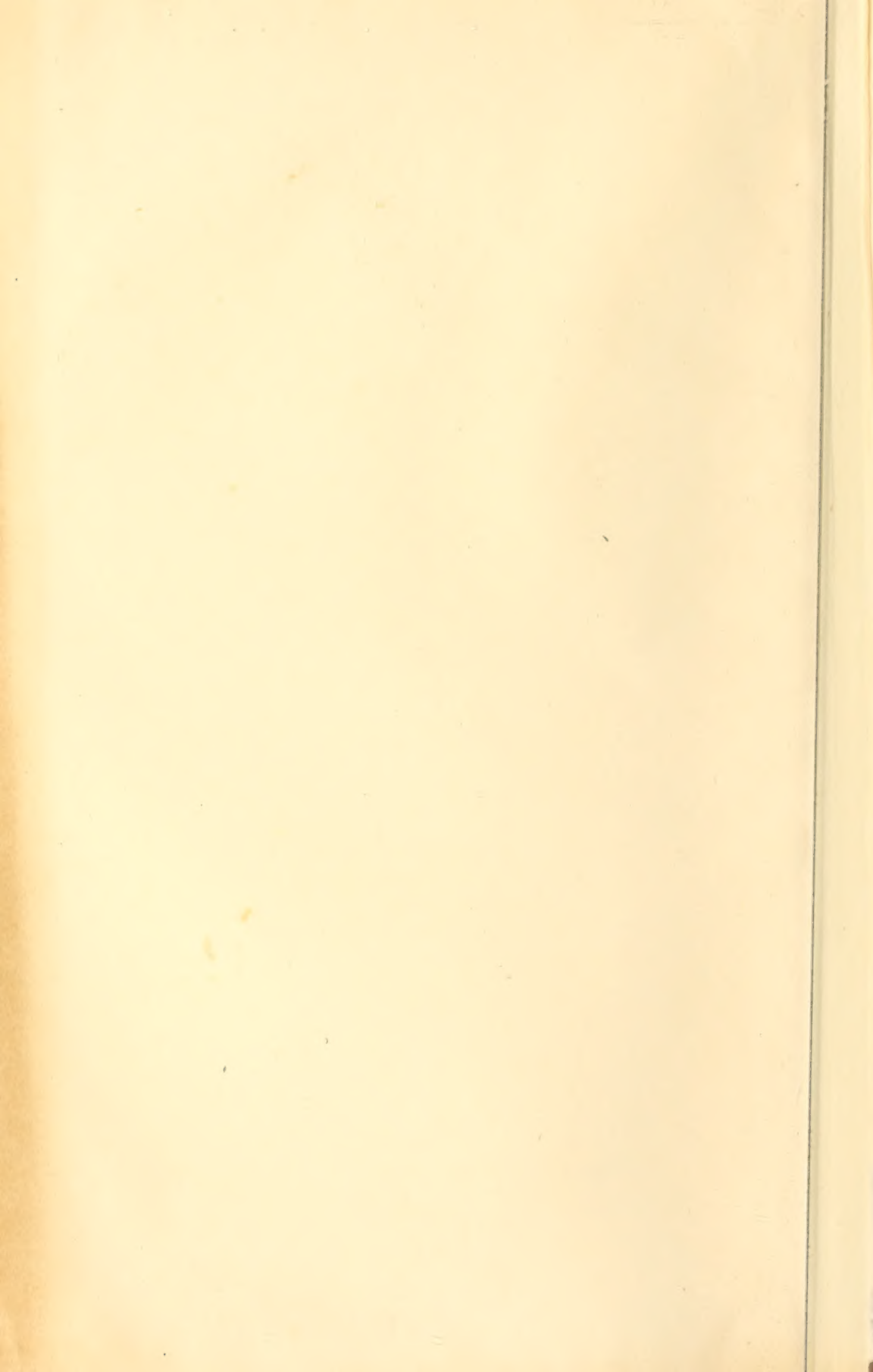




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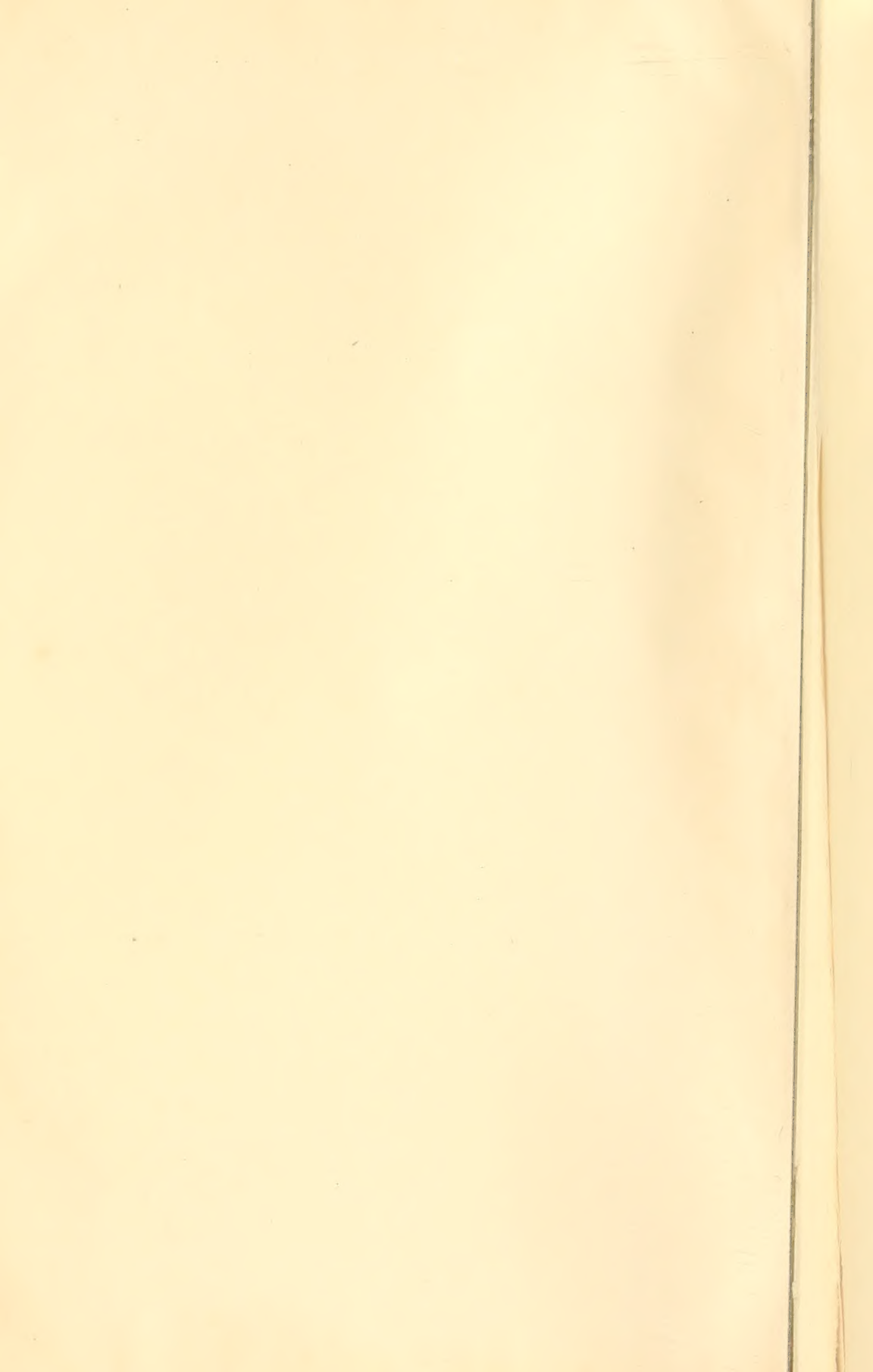
















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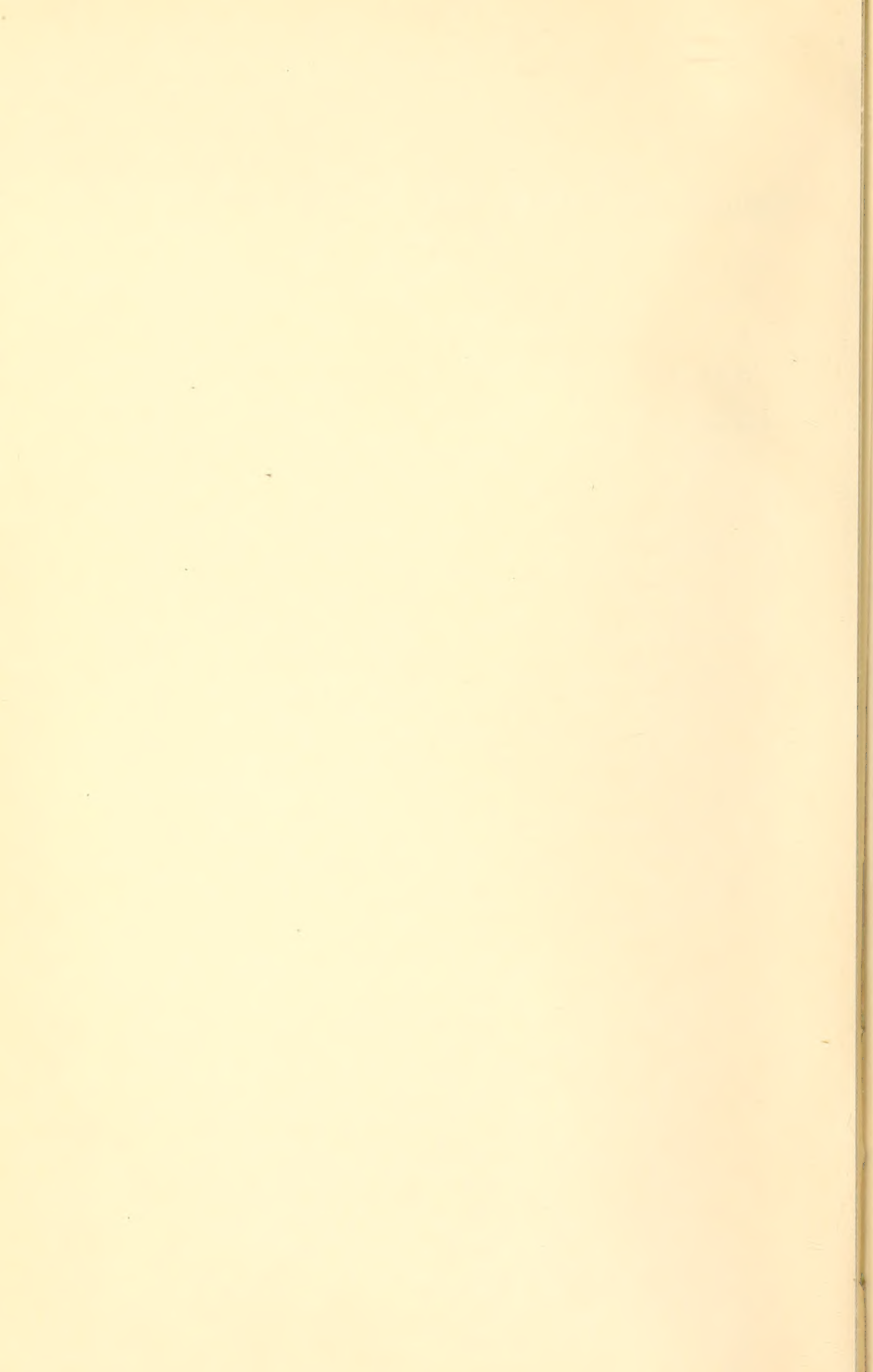
# TABLES OF TITLES AND WORDS AND PHRASES.

## I. TITLES.

*Italics indicate cross-references.*

- INTERPRETATION AND CONSTRUCTION, *Joinder*, 615.  
I.  
INTERPRETERS, 27.  
INTERSTATE COMMERCE, 34.  
*Intervening Cause*, 179.  
INTERVENTION, 180.  
*Intestate Laws*, 186.  
*Intimidation of Voters*, 187.  
INTOXICATING LIQUORS, 189.  
INTOXICATION, 398.  
*In Transitu*, 416.  
*In Ventre Sa Mere*, 420.  
INVESTMENTS, 423.  
*Involuntary Manslaughter*, 479.  
*Irreparable Injury*, 483.  
*Irresistible*, 484.  
*Irresistible Impulse*, 484.  
IRRIGATION, 485.  
ISLANDS, 530.  
ISSUE (DESCENDANTS), 542.  
*Jail Liberties*, 579.  
JEOPARDY, 580.  
JETTISON, 610.  
*Joint Adventures*, 615.  
*Joint and Several*, 615.  
*Joint Creditors and Debtors*, 615.  
*Joint Debtors' Acts*, 615.  
JOINT EXECUTORS AND ADMINISTRATORS, 616.  
*Joint Judgment*, 635.  
*Joint Negligence*, 635.  
*Joint Parties*, 635.  
*Joint Resolutions*, 635.  
JOINT-STOCK COMPANIES, 636.  
JOINT TENANTS AND TENANTS IN COMMON, 646.  
*Joint Tortfeasors*, 712.  
*Joint Trespass*, 712.  
JUDGE, 714.  
JUDGMENT NOTES, 752.  
JUDGMENTS AND DECREES, 756.  
JUDICIAL NOTICE, 892.  
JUDICIAL SALES, 948.  
JURISDICTION, 1039.  
JURY AND JURY TRIAL, 1086.







## II. WORDS AND PHRASES.

By THOMAS JOHNSON MICHIE.

- INTERRUPT — INTERRUPTION, 32.  
INTERSECT, 32.  
INTERVAL, 179.  
INTERVALE, 179.  
INTERVENE, 179.  
INTERVENING, 179.  
INTERVENING DAMAGES, 179.  
INTER VIVOS, 186.  
INTESTATE, 186.  
INTIMATE, 186.  
INTIMIDATION, 187.  
INTO, 187.  
INTOXICATE — INTOXICATED — INTOX-  
ICANTS, 187.  
IN TRANSIT, 416.  
INTRINSIC, 416.  
INTRODUCE, 416.  
INTROMISSION, 416.  
INTRUDE, 416.  
INTRUDER, 417.  
INTRUSION, 417.  
INTRUSTED, 417.  
INURE, 417.  
INVALID, 417.  
INVALIDATED, 418.  
INVASION, 418.  
INVEIGLE, 418.  
INVENTED WORD, 419.  
INVENTION, 419.  
INVENTORY, 419.  
INVEST — INVESTMENT, 420.  
INVESTIGATE — INVESTIGATION, 421.  
INVESTITURE, 422.  
INVIOULATE, 478.  
INVITATION — INVITE, 478.  
INVOICE, 478.  
INVOLUNTARY, 479.  
INVOLUNTARY PAYMENT, 479.  
INVOLUNTARY SERVITUDE, 479.  
INVOLVE — INVOLVED, 480.  
I. O. U., 480.  
IPSO FACTO, 481.  
IRON, 481.  
IRREGULAR — IRREGULARITY, 481.  
IRREGULAR HEIR, 482.  
IRRELEVANT, 483.  
IRREPARABLE, 483.  
IRRESISTIBLE SUPERHUMAN CAUSE, 484.  
IRRESISTIBLE VIOLENCE, 484.  
IRRESPECTIVE OF BENEFITS, 484.  
IRREVOCABLE, 484.  
IS, 528.  
ISSUABLE, 537.  
ISSUE, 537.  
IT, 577.  
ITEM, 577.  
ITEMIZED ACCOUNT, 578.  
ITINERANT, 578.  
JACK, 578.  
JACITATION OF MARRIAGE, 578.  
JAIL, 578.  
JANITOR, 579.  
JAPANESE, 579.  
JAS., 579.  
JEALOUS EYE, 579.  
JEOPAILS, 579.  
JET, 609.  
JETSAM, 609.  
JEWEL — JEWELRY, 613.  
JOB, 614.  
JOBBER, 614.  
JOCKEY, 614.  
JOIN, 614.  
JOINT — JOINTLY, 615.  
JOINTURE, 712.  
JOURNAL, 713.  
JOURNEY, 713.  
JOURNEYS ACCOUNT, 713.  
J. P., 713.  
J.R., 713.  
JUBILEE, 713.  
JUDEX, 713.



*TABLE OF WORDS AND PHRASES.*

JUDG., 713.  
JUDICATORY, 886.  
JUDICIAL, 886.  
JUDICIALLY, 891.  
JUDICIAL RECORD, 947.  
JUDICIOUSLY, 1036.  
JUDICIUM, 1036.

JUGGLER, 1036.  
JUN., 1036.  
JUNCTION, 1036.  
JUNIOR, 1036.  
JUNK SHOP, 1038.  
JURAT, 1038.



# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

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## INTERPRETATION AND CONSTRUCTION.

BY H. T. TIFFANY.

- I. SCOPE OF TITLE, 2.
- II. DEFINITION, 2.
- III. OBJECT AND SCOPE OF INTERPRETATION, 2.
- IV. CONSIDERATION OF DIFFERENT PARTS OF INSTRUMENT, 4.
  - 1. *Instrument to Be Considered as a Whole*, 4.
  - 2. *Every Part to Be Given Effect*, 7.
  - 3. *Repugnant Clauses in Deed*, 8.
  - 4. *Transaction Incorporated in Several Writings*, 9.
- V. MEANING OF WORDS AND PHRASES, 11.
  - 1. *Ordinary Meaning Generally to Be Given*, 11.
  - 2. *Arbitrary Meaning Given by Parties*, 12.
  - 3. *Peculiar Meaning Given by Usage*, 12.
  - 4. *Technical Terms and Expressions*, 13.
- VI. LANGUAGE CONSTRUED MOST STRONGLY AGAINST USER THEREOF, 14.
- VII. CONSTRUCTION IN FAVOR OF INSTRUMENT, 17.
  - 1. *Validity of Instrument*, 17.
  - 2. *Legality of Instrument*, 18.
  - 3. *Effectiveness of Instrument*, 18.
  - 4. *Avoidance of Forfeiture*, 18.
- VIII. REASONABLE AND EQUITABLE CONSTRUCTION PREFERRED, 18.
- IX. VERBAL AND CLERICAL MISTAKES, 19.
  - 1. *In General*, 19.
  - 2. *Words Omitted May Be Supplied*, 19.
  - 3. *Repugnant Words May Be Rejected*, 19.
  - 4. *Substitution of Words*, 20.
  - 5. *False Grammar*, 20.
  - 6. *Incorrect Spelling*, 20.
- X. PUNCTUATION, 20.
- XI. WRITTEN MATTER CONTROLS PRINTED, 21.
- XII. SURROUNDING CIRCUMSTANCES, 21.
- XIII. CONSTRUCTION BY PARTIES, 23.
- XIV. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS, 25.
- XV. IMPLIED TERMS, 26.

### CROSS-REFERENCES.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles AMBIGUITY, vol. 2, p. 287; CONTRACTS, vol. 7, p. 88, and the*



*references there given; COVENANTS, vol. 8, p. 43; DEEDS, vol. 9, p. 87; GUARANTY, vol. 14, p. 1127; INSURANCE, vol. 16, p. 830, and the references there given; PAROL EVIDENCE; STATUTES; WILLS. And see the Words and Phrases throughout this work.*

**I. SCOPE OF TITLE.** — This article will treat of those rules which govern in the interpretation and construction of written instruments generally, and especially of instruments *inter partes*, such as deeds and contracts. Rules of construction peculiar to wills are to be found under another title,<sup>1</sup> and the admissibility of parol and extrinsic evidence to aid in the construction of instruments, though necessarily involved to some extent in the matters treated herein, will be more particularly considered elsewhere.<sup>2</sup>

**II. DEFINITION.** — The terms "interpretation" and "construction," as generally used by courts and legal writers, signify the ascertainment of the thought or meaning of the author of, or of the parties to, a legal document, as expressed therein, according to the rules of language and subject to the rules of law.<sup>3</sup>

A distinction has been stated to exist between the terms "interpretation" and "construction," but this, however logically accurate, is productive of little practical benefit,<sup>4</sup> and the terms are used interchangeably by the courts and by the majority of text-book writers.<sup>5</sup>

**III. OBJECT AND SCOPE OF INTERPRETATION.** — As is implied in the definition given above, the main object of the interpretation of an instrument is the determination of the meaning of the party or parties whose language is incorporated therein, or, as generally expressed, the determination of the intention of the parties.<sup>6</sup> This intention which is to be sought is, however, the inten-

1. Construction of Wills.—See the title WILLS.

2. See the title PAROL EVIDENCE.

3. Definition. — Adapted from Leake's Digest of the Law of Contracts.

In *Di Sora v. Philipps*, 10 H. L. Cas. 638, Lord Chelmsford said: "The construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used. If the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound to that meaning; but if there is no such established sense, the intention must be collected in the ordinary manner from the language employed."

4. Distinction Between Interpretation and Construction. — Dr. Lieber, in his *Legal and Political Hermeneutics* (3d ed., 1880, by Hammond), thus expresses the distinction: "Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey" (p. 11). "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit though not within the letter of the text" (p. 44).

The distinction has been adopted in the treatment of the subject in *Wharton on Contracts* (vol. 2, c. 19), apparently without much advantage in clearness of treatment. See also 2 *Parsons on Contracts* (7th ed.) 491, note.

5. Terms Ordinarily Used as Interchangeable. — See *Jones on Commercial and Trade Contracts*, § 2; *Bouv. L. Dict.*; *Leake's Dig. Law of Contracts* 217.

"It appears that neither common usage nor practical convenience in legal discussions supports the distinction." *Thayer on Evidence* 411, note 2.

6. Intention. — In *Shore v. Wilson*, 9 Cl. & F. 525, Coleridge, J., said: "It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention." See also the remarks of Mr. Justice Strong in *Heryford v. Davis*, 102 U. S. 235.

**Intention of Parties to Contracts Generally—England.** — *Ford v. Beech*, 11 Q. B. 852, 63 E. C. L. 852; *Wells v. Tregusan*, 2 Salk. 463; *Dallman v. King*, 4 Bing. N. Cas. 105, 33 E. C. L. 293.

**United States.** — *Hollingsworth v. Fry*, 4 Dall. (U. S.) 345; *Chesapeake, etc., Canal Co. v. Hill*, 15 Wall. (U. S.) 94; *The Ada, Davies* (U. S.) 407; *Lemmons v. Flanakin, Hempst.* (U. S.) 32; *Mississippi River Logging Co. v. Robson*, 32 U. S. App. 520, 60 Fed. Rep. 773; *Metropolitan Nat. Bank v. Benedict Co.*, 74 Fed. Rep. 182; *Rockefeller v. Merritt*, 76 Fed. Rep. 909.

**Alabama.** — *Watt v. Sheppard*, 2 Ala. 425; *Whitehurst v. Boyd*, 8 Ala. 375; *Bryant v. Stephens*, 58 Ala. 636.

**California.** — *Steele v. Branch*, 40 Cal. 3.

**Colorado.** — *Daniels v. Knight Carpet Co.*, 15 Colo. 56.

**Connecticut.** — *Brown v. Slater*, 16 Conn. 192, 41 Am. Dec. 136.

**Florida.** — *Pensacola Gas Co. v. Lotze*, 23 Fla. 368.

**Illinois.** — *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474; *Hibbard v. McKindley*, 28 Ill. 240; *Robinson v. Stow*, 39 Ill. 568; *Walker*



tion expressed in the instrument, and any intention which may have existed, unexpressed, cannot be considered;<sup>1</sup> or, as it is stated in a number of cases, the question is not what the parties may have meant or intended, but what is

*v. Douglas*, 70 Ill. 445; *Walker v. Tucker*, 70 Ill. 527; *Traders Ins. Co. v. Northern Pac. Express Co.*, 70 Ill. App. 143; *Field v. Leiter*, 118 Ill. 17.

*Indiana*. — *Landwerlen v. Wheeler*, 106 Ind. 523.

*Iowa*. — *Rand v. Wiley*, 70 Iowa 110.

*Kentucky*. — *Hunter v. Miller*, 6 B. Mon. (Ky.) 612; *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) 192.

*Louisiana*. — *Benjamin's Succession*, 39 La. Ann. 614; *Tete v. Lanoux*, 45 La. Ann. 1343.

*Maine*. — *Hawes v. Smith*, 12 Me. 429; *Higgins v. Wasgatt*, 34 Me. 305; *Ricker v. Fairbanks*, 40 Me. 43.

*Maryland*. — *Hall v. Farmers' Nat. Bank*, 53 Md. 120; *Baltimore, etc., R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318; *Baltimore First Nat. Bank v. Gerke*, 68 Md. 449.

*Massachusetts*. — *Gage v. Tirrell*, 9 Allen (Mass.) 299.

*Michigan*. — *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404.

*Minnesota*. — *Lindley v. Groff*, 37 Minn. 338.

*Missouri*. — *Johnson County v. Wood*, 84 Mo. 509; *Belch v. Miller*, 32 Mo. App. 387.

*Nebraska*. — *People v. Gosper*, 3 Neb. 285; *Paxton v. Smith*, 41 Neb. 56.

*New Hampshire*. — *Morrison v. Insurance Co. of North America*, 64 N. H. 137; *Crocker v. Hill*, 61 N. H. 345, 60 Am. Rep. 322.

*New Jersey*. — *Den v. Camp*, 19 N. J. L. 148.

*New York*. — *Platt v. Lott*, 17 N. Y. 478; *Buck v. Burk*, 18 N. Y. 337; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Hoffman v. Etna F. Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *People v. Lee*, 104 N. Y. 441; *Ringle v. O'Matthiessen*, (Supm. Ct. Tr. T.) 39 N. Y. Supp. 92; *Tucker v. Meeks*, 2 Sweeny (N. Y.) 736.

*North Carolina*. — *Iredell v. Barbee*, 9 Ired. L. (31 N. Car.) 250.

*Ohio*. — *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio 385.

*Oregon*. — *Powell v. Dayton, etc., R. Co.*, 14 Oregon 356.

*Vermont*. — *Noyes v. Nichols*, 28 Vt. 159; *Collins v. Lavelle*, 44 Vt. 230.

*Intention of Parties to Deeds* — *England*. — *Parkhurst v. Smith*, Willes 327; *Cholmondeley v. Clinton*, 2 Jac. & W. 91; *Evans v. Vaughan*, 4 B. & C. 266, 10 E. C. L. 327; *Hilbers v. Parkinson*, 25 Ch. D. 203; *Clayton v. Glengall*, 1 Dr. & War. 1.

*Canada*. — *Barthel v. Scotten*, 24 Can. Sup. Ct. 367.

*United States*. — *Prentice v. Duluth Storage, etc., Co.*, 58 Fed. Rep. 437, 19 U. S. App. 100; *Thomas v. Hatch*, 3 Sumn. (U. S.) 170; *Yore v. Yore*, 63 Fed. Rep. 645.

*Alabama*. — *Hamner v. Smith*, 22 Ala. 433.

*California*. — *Brannan v. Mesick*, 10 Cal. 95; *Racouillat v. Sansevain*, 32 Cal. 376.

*Connecticut*. — *Bryan v. Bradley*, 16 Conn. 474; *Goodyear v. Shanahan*, 43 Conn. 204.

*Illinois*. — *Farnam v. Thompson*, 171 Ill. 519.

*Kentucky*. — *Heingley v. Harris*, 1 Ky. L.

Rep. 55; *Davis v. Hardin*, 80 Ky. 672; *Ferrill v. Cleveland*, 6 Ky. L. Rep. 512.

*Maine*. — *Deering v. Long Wharf*, 25 Me. 51; *Lincoln v. Wilder*, 29 Me. 169; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751.

*Maryland*. — *Handy v. McKim*, 64 Md. 560.

*Massachusetts*. — *Wallis v. Wallis*, 4 Mass. 135, 3 Am. Dec. 210; *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76; *Bent v. Rogers*, 137 Mass. 192; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Frost v. Spaulding*, 19 Pick. (Mass.) 445, 31 Am. Dec. 150.

*Minnesota*. — *Cannon v. Emmans*, 44 Minn. 294.

*Mississippi*. — *Goosey v. Goosey*, 48 Miss. 210; *Williams v. Claiborne, Smed. & M. Ch.* (Miss.) 355.

*Missouri*. — *Jennings v. Brizeadine*, 44 Mo. 332; *Long v. Wagoner*, 47 Mo. 178; *Bruensmann v. Carroll*, 52 Mo. 313.

*Nebraska*. — *Eiseley v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128.

*New Hampshire*. — *Johnson v. Conant*, 64 N. H. 132.

*New Jersey*. — *Morris Canal, etc., Co. v. Matthiesen*, 17 N. J. Eq. 385; *Melick v. Pidcock*, 44 N. J. Eq. 525, 6 Am. St. Rep. 901.

*New York*. — *Case v. Dexter*, 106 N. Y. 553; *People v. Jones*, 112 N. Y. 597; *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809; *Jackson v. Myers*, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; *Jackson v. Blodget*, 16 Johns. (N. Y.) 172; *Richards v. North West Protestant Dutch Church*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 317.

*North Carolina*. — *Lowdermilk v. Bostick*, 98 N. Car. 299; *Barnes v. Haybarger*, 8 Jones L. (53 N. Car.) 76.

*Ohio*. — *Wolfe v. Scarborough*, 2 Ohio St. 361; *White v. Sayre*, 2 Ohio 113; *Bobo v. Wolf*, 18 Ohio St. 465; *Brown v. Hamilton First Nat. Bank*, 44 Ohio St. 269.

*Oregon*. — *Hahn v. Baker Lodge No. 47*, 21 Oregon 30, 28 Am. St. Rep. 723.

*Pennsylvania*. — *Berridge v. Glassey*, 112 Pa. St. 442, 56 Am. Rep. 324.

*Rhode Island*. — *Waterman v. Andrews*, 14 R. I. 589.

*Texas*. — *Smith v. Brown*, 66 Tex. 543.

*Vermont*. — *Mills v. Catlin*, 22 Vt. 98; *Collins v. Lavelle*, 44 Vt. 230.

*Virginia*. — *Bradley v. Zehmer*, 82 Va. 685.

**In the Construction of Wills** the same rule prevails. See the title **WILLS**.

**1. Intention Sought Is That Expressed** — *England*. — *Shore v. Wilson*, 9 Cl. & F. 355.

*United States*. — *Maryland v. Baltimore, etc., R. Co.*, 22 Wall. (U. S.) 105; *William Cramp, etc., Ship, etc., Bldg. Co. v. Sloan*, 21 Fed. Rep. 561; *Crimp v. McCormick Constr. Co.*, 34 U. S. App. 598.

*Alabama*. — *Kyle v. Bellenger*, 79 Ala. 516.

*Connecticut*. — *West Haven Water Co. v. Redfield*, 58 Conn. 39.

*Florida*. — *Meinhardt v. Mode*, 22 Fla. 279.

*Georgia*. — *Rogers v. Atkinson*, 1 Ga. 12.

*Illinois*. — *Walker v. Tucker*, 70 Ill. 527; *Bearrs v. Ford*, 108 Ill. 16.



the meaning of the words which they have used,<sup>1</sup> this being stated to be a most important distinction, a disregard of which often leads to erroneous conclusions.<sup>2</sup>

**Interpretation Only When Ambiguity Exists.** — It would seem to follow, from the statement just made as to the object of interpretation, that if the language of the instrument is plain and unambiguous in itself, there is no room for interpretation or construction, and it is quite frequently so stated.<sup>3</sup> But in determining whether there is such an ambiguity as calls for interpretation the whole instrument is to be considered, and not an isolated part thereof, this being merely an application of the rule considered below, that the instrument is to be considered as a whole.<sup>4</sup>

**IV. CONSIDERATION OF DIFFERENT PARTS OF INSTRUMENT — 1. Instrument to Be Considered as a Whole.** — One of the rules of interpretation most frequently referred to is to the effect that the intention must be determined by a consideration of the whole instrument rather than of any particular clause, the theory being that the parties presumably had the same general purpose and object in view in all parts of the instrument, and consequently, if some of the stipulations are more obscure than others, or one part is seemingly inconsistent with another, the main purpose and object, as collected from the whole instru-

*Iowa.* — *Greene v. Day*, 34 Iowa 328; *Locke v. Sioux City, etc., R. Co.*, 46 Iowa 109; *Heiple v. Reinhart*, 100 Iowa 530.

*Kansas.* — *Bobbs v. Bancroft*, 13 Kan. 123.

*Kentucky.* — *Louisville, etc., R. Co. v. Louisville Southern R. Co.*, 100 Ky. 690, 8 Am. & Eng. R. Cas. N. S. 161.

*Maine.* — *McLellan v. Cumberland Bank*, 24 Me. 566; *Jeffrey v. Grant*, 37 Me. 236.

*Michigan.* — *Holmes v. Hall*, 8 Mich. 66, 77 Am. Dec. 444; *White v. Smith*, 37 Mich. 291.

*Minnesota.* — *Merriam v. Pine City Lumber Co.*, 23 Minn. 314.

*Missouri.* — *Rubey v. Missouri Coal, etc., Co.*, 21 Mo. App. 159.

*New Hampshire.* — *Furbush v. Goodwin*, 25 N. H. 425.

*New York.* — *Schoonmaker v. Hoyt*, 148 N. Y. 425; *Hayward Homestead Tract Assoc. v. Miller*, (Supm. Ct. Eq. T.) 6 Misc. (N. Y.) 254; *Mumford v. M'Pherson*, 1 Johns. (N. Y.) 414, 3 Am. Dec. 339.

*North Carolina.* — *Brunhild v. Freeman*, 77 N. Car. 128.

*Pennsylvania.* — *Strohecker v. Farmers' Bank*, 6 Pa. St. 41.

*Vermont.* — *Clark v. Lillie*, 39 Vt. 405.

In *Gibson v. Minet*, 1 H. Bl. 615, Chief Baron Eyre said: "I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, that the words may bear the sense which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them."

**1. Meaning of Words Used.** — *Rickman v. Carstairs*, 5 B. & Ad. 651, 27 E. C. L. 147; *Ex p. Chick*, 11 Ch. D. 739; *Smith v. Lucas*, 18 Ch. D. 542; *Abbott v. Middleton*, 7 H. L. Cas. 114; *Bates v. Woodruff*, 123 Ill. 205; *Eckford v. Eckford*, (Iowa 1892) 53 N. W. Rep. 345; *Montgomery v. Montgomery*, 11 Ky. L. Rep. 87, 11 S. W. Rep. 596; *Barry's Appeal*, (Pa. 1887) 8 Cent. Rep. 132, 10 Atl. Rep. 126; *Stokes v. Van Wyck*, 83 Va. 724; *Sutherland v. Sydnor*, 84

Va. 880; *Couch v. Eastham*, 29 W. Va. 784; *Watrous v. McKie*, 54 Tex. 65.

**2.** *Lord Wensleydale* in *Monypenny v. Monypenny*, 9 H. L. Cas. 146.

**3. No Room for Construction in Absence of Ambiguity.** — *Co Litt.* 147a.

*England.* — *Lanyon v. Carne*, 2 Saund. 167.

*United States.* — *Prentice v. Duluth Storage, etc., Co.*, 53 Fed. Rep. 443.

*Arizona.* — *U. S. v. Cameron*, (Ariz. 1889) 21 Pac. Rep. 177.

*Colorado.* — *McDermith v. Voorhees*, 16 Colo. 403.

*Connecticut.* — *Hoyt v. Ketcham*, 54 Conn. 60.

*Illinois.* — *Nichols v. Mercer*, 44 Ill. 250; *Canterberry v. Miller*, 76 Ill. 355.

*Indiana.* — *German Mut. Ins. Co. v. Grim*, 32 Ind. 249, 2 Am. Rep. 347; *Newpoint Lodge No. 255 v. Newpoint*, 138 Ind. 141.

*Kentucky.* — *Henderson v. Mack*, 82 Ky. 379.

*Maryland.* — *Moody v. Hall*, 61 Md. 517.

*Minnesota.* — *Witt v. St. Paul, etc., R. Co.*, 38 Minn. 122.

*Missouri.* — *Carr v. Lackland*, 112 Mo. 460; *Patterson v. Missouri Glass Co.*, 63 Mo. App. 173.

*New York.* — *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729.

*Vermont.* — *Noyes v. Nichols*, 28 Vt. 159.

**Illustration.** — In *Veazie v. Forsaith*, 76 Me. 172, a deed of trust to the grantor's children of all his property provided for the payment of a certain sum yearly to the grantor "from the income." It was held that such yearly payment was limited to the amount of the income, and that the fact that the deed included all his property and left him without other means of support could not affect the interpretation thereof, the court saying that, "when the language is free from doubt, and leaves no uncertainty as to the meaning of the parties, it must govern and cannot be controlled by any outside circumstances, whatever may be the equities growing out of them."

**4. Ambiguous Character Determined by Whole Instrument.** — *O'Brien v. Miller*, 168 U. S. 287.



ment, may be so clear and distinct as to throw light upon such obscure or inconsistent parts.<sup>1</sup>

**Applications of Rule.** — Among the more important applications of this rule may be mentioned the case of general covenants in a deed, which are frequently treated as limited by other covenants therein of a more particular character.<sup>2</sup> So, though a deed may in one part use formal words of conveyance, yet if it appears from the whole instrument that an agreement for a conveyance only is intended, this intent will prevail.<sup>3</sup> The rule likewise applies to the descrip-

**1. Instrument to Be Considered as a Whole.** — Sheppard's Touchstone 87.

*England.* — Mallan v. May, 13 M. & W. 511; Monypenny v. Monypenny, 3 De G. & J. 572; Throckmerton v. Tracy, Plowd. 161; Hill v. Grange, Plowd. 170; Hume v. Rundell, 2 Sim. & St. 177.

*United States.* — Boardman v. Reed, 6 Pet. (U. S.) 328; Stewart v. U. S., 24 Ct. Cl. 504; Central Trust Co. v. Wabash, etc., R. Co., 29 Fed. Rep. 546; Donahoe v. Kettell, 1 Cliff. (U. S.) 135; Goodyear v. Cary, 4 Blatchf. (U. S.) 271.

*Alabama.* — Brush Electric Light, etc., Co. v. Montgomery, 114 Ala. 433.

*Florida.* — Stewart v. Preston, 1 Fla. 10, 44 Am. Dec. 621; Adams v. Higgins, 23 Fla. 13; Pensacola Gas Co. v. Lotze, 23 Fla. 368.

*Illinois.* — Field v. Leiter, 118 Ill. 17; Phayer v. Kennedy, 169 Ill. 360.

*Kentucky.* — Morriso v. Coghill, Sneed (Ky.) 322.

*Louisiana.* — Henderson v. Rost, 5 La. Ann. 441; Allen's Succession, 48 La. Ann. 1036.

*Maine.* — Sawyer v. Hammatt, 15 Me. 40; Chase v. Bradley, 26 Me. 531; Merrill v. Gore, 29 Me. 346; Chapman v. Seccomb, 36 Me. 102; Nobleborough v. Clark, 68 Me. 87, 28 Am. Rep. 22.

*Maryland.* — Varnum v. Thruston, 17 Md. 470.

*Massachusetts.* — Allen v. Holton, 20 Pick. (Mass.) 458.

*Michigan.* — Norris v. Showerman, 2 Dougl. (Mich.) 16; Dudgeon v. Haggart, 17 Mich. 273.

*Minnesota.* — Rose v. Roberts, 9 Minn. 119; Grueber v. Lindenmeier, 42 Minn. 99.

*Mississippi.* — Goosey v. Goosey, 48 Miss. 217.

*Missouri.* — Gregg v. Macey, 10 Mo. 385; Belch v. Miller, 32 Mo. App. 387; Orr v. Rode, 101 Mo. 387.

*Nebraska.* — People v. Gosper, 3 Neb. 285.

*New Hampshire.* — Bell v. Sawyer, 32 N. H. 72; Lane v. Thompson, 43 N. H. 320; Salmon Falls Mfg. Co. v. Portsmouth Co., 46 N. H. 249; Driscoll v. Green, 59 N. H. 101.

*New York.* — Ward v. Whitney, 8 N. Y. 442; Hamilton v. Taylor, 18 N. Y. 358; Case v. Dexter, 106 N. Y. 548; Sims v. U. S. Trust Co., 103 N. Y. 472.

*North Carolina.* — Lowdermilk v. Bostick, 98 N. Car. 299.

*Ohio.* — Kelly v. Mills, 8 Ohio 325; German F. Ins. Co. v. Roost, 55 Ohio St. 581, 60 Am. St. Rep. 711.

*Oregon.* — Jasper v. Jasper, 17 Oregon 590.

*Pennsylvania.* — Stewart v. Lang, 37 Pa. St. 201, 78 Am. Dec. 414; Delaware, etc., R. Co. v. Sanderson, (Pa. 1885) 1 Cent. Rep. 102; Berridge v. Glassey, 112 Pa. St. 442, 56 Am. Rep. 322.

*South Carolina.* — Anderson v. Holmes, 14 S. Car. 162.

*Tennessee.* — Arbuckle v. Kirkpatrick, 98 Tenn. 221, 60 Am. St. Rep. 854.

*Texas.* — Johnston v. McDonnell, 37 Tex. 595; Wallace v. Crow, (Tex. 1886) 1 S. W. Rep. 372.

*Vermont.* — Hibbard v. Hurlburt, 10 Vt. 178; Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363.

*Virginia.* — Bradley v. Zehmer, 82 Va. 685.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*. Every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." *Per* Lord Ellenborough, C. J., in *Barton v. Fitzgerald*, 15 East 530.

**Apparent Inconsistency in Instrument.** — "The first part of this paper is plain and intelligible, and can mean nothing else than that the defendant should retain, from the proceeds of the demands assigned to him by the order, enough to pay his specified demands and pay over the balance to the owner; but the other part is apparently inconsistent with this, and is certainly liable to some doubt as to its true construction. Now the whole of this contract must be taken together in order to get at the true intention of the parties; and if the latter part is irreconcilable with the former upon any reasonable construction, it ought to aid in the construction of the whole, though apparently inconsistent." *Parker, C. J.*, in *Knower v. Emerson*, 9 Pick. (Mass.) 422.

**2. Covenants in Deed.** — Stannard v. Forbes, 6 Ad. & El. 572, 33 E. C. L. 149; Foord v. Wilson, 8 Taunt. 543, 4 E. C. L. 205; Davis v. Lyman, 6 Conn. 232; Street v. Chicago Wharfing, etc., Co., 157 Ill. 613; Second Universalist Soc. v. Dugan, 65 Md. 460; Whallon v. Kauffman, 19 Johns. (N. Y.) 98; Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652.

In *Browning v. Wright*, 2 B. & P. 13, a deed in fee simple contained a warranty by the grantor against the acts of himself and his heirs, and a subsequent covenant, expressed in general terms, that he was seized lawfully in fee simple and that he had good right and power to convey. It was held that the latter covenant was to be construed in connection with the previous covenant, and should be limited to the acts of the grantor. See also the title COVENANTS, vol. 8, p. 43.

**3. Deed as Contract.** — Goodtitle v. Way, 1 T. R. 735; Doe v. Clare, 2 T. R. 739; Doe v. Smith, 6 East 530; Foster v. Foster, 1 Lev. 55; Sturghion v. Dorothy, Noy 128; Lindley v. Groff, 37 Minn. 338; Jackson v. Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504.



tive words in a deed, all of which are to be considered in case of any obscurity or uncertainty,<sup>1</sup> and the recitals likewise in an instrument may be looked to for the purpose of determining the meaning to be given to its operative parts,<sup>2</sup> provided the meaning of the latter is doubtful.<sup>3</sup>

**Rule of Eiusdem Generis.** — This principle receives an important application in the rule of *eiusdem generis*, according to which general words following words of a more particular character are regarded as limited in their meaning by the former.<sup>4</sup> This rule is, however, as are practically all the rules of construction, subordinate to the requirement that the intent of the parties is chiefly to be sought, and will, of course, not apply if the intent appears to be otherwise.<sup>5</sup> In a late English decision it is declared to apply only if the intent to limit the general words is apparent, the latter being presumably used in their ordinary and general sense.<sup>6</sup>

**General Words Preceding Particular Words** are likewise, on the same principle,

**1. Description in Deed** — *United States*. — Boardman v. Reed, 6 Pet. (U. S.) 328.

*Kentucky*. — Allen v. Rinehardt, 90 Ky. 466.

*Louisiana*. — Bryan v. Wisner, 44 La. Ann. 832; Brown v. Broussard, 43 La. Ann. 962.

*Minnesota*. — Cannon v. Emmans, 44 Minn. 294.

*Missouri*. — Baker v. Clay, 101 Mo. 553.

*New Hampshire*. — Driscoll v. Green, 59 N. H. 101.

*New York*. — Case v. Dexter, 106 N. Y. 553.

*Texas*. — Cullers v. Platt, 81 Tex. 258.

See also the title **BOUNDARIES**, vol. 4, p. 756.

**2. Recitals in Instrument** — *England*. — Bailey v. Lloyd, 5 Russ. 344; Moore v. Magrath, 1 Cowp. 9; *In re Daniel*, 1 Ch. D. 375; *In re Michell*, 9 Ch. D. 9; Danby v. Coutis, 29 Ch. D. 500; Howard v. Shrewsbury, L. R. 17 Eq. 391; Walsh v. Trevanion, 15 Q. B. 733, 69 E. C. L. 733; London, etc., R. Co. v. Blackmore, L. R. 4 H. L. 623.

*United States*. — Lamb v. Davenport, 1 Sawy. (U. S.) 609; Cornell v. Green, 88 Fed. Rep. 821.

*Illinois*. — Walker v. Tucker, 70 Ill. 527.

*Massachusetts*. — Rich v. Lord, 18 Pick. (Mass.) 325.

*Montana*. — Ming v. Woolfolk, 3 Mont. 580.

*New Jersey*. — Woodruff v. Morristown Sav. Inst., 34 N. J. Eq. 174.

*New York*. — National Mechanics' Banking Assoc. v. Conkling, 90 N. Y. 116, 43 Am. Rep. 146; Jackson v. Stackhouse, 1 Cow. (N. Y.) 126, 13 Am. Dec. 514.

**Recitals Not Alone to Be Considered.** — "This does not mean that we shall look at the language of the recitals alone. It simply means that we shall look at the entire language—that included in the recitals as well as that included in the operative part of the instrument—and from the whole ascertain the intention of the parties." Burgess v. Badger, 124 Ill. 293.

**3. Operative Parts Must Be Doubtful.** — Walsh v. Trevanion, 15 Q. B. 751, 69 E. C. L. 751; Bailey v. Lloyd, 5 Russ. 344; Young v. Smith, L. R. 1 Eq. 183; Howard v. Shrewsbury, L. R. 17 Eq. 394; Leggott v. Barrett, 15 Ch. D. 311; Bell v. Bruen, 1 How. (U. S.) 169.

In *Ingleby v. Swift*, 10 Bing. 84, 25 E. C. L. 36, it was held that the penalty in a bond for a certain amount could not be cut down to

a less amount by a recital that the parties had agreed to execute a bond for the less amount.

**4. Rule of Eiusdem Generis** — *England*. — Crompton v. Jarratt, 30 Ch. D. 298; Clifford v. Arundell, 27 Beav. 209; Lozano v. Janson, 28 L. J. Q. B. 337; Naylor v. Palmer, 8 Exch. 739; Nesbitt v. Lushington, 4 T. R. 783; Cullen v. Butler, 5 M. & S. 461; Lyndon v. Standbridge, 2 H. & N. 51; Doe v. Meyrick, 2 Cromp. & J. 223; Hare v. Horton, 5 B. & Ad. 715, 27 E. C. L. 160; Moore v. Magrath, 1 Cowp. 12.

*United States*. — Given v. Hilton, 95 U. S. 591; Boon v. Aetna Ins. Co., 12 Blatchf. (U. S.) 34; Kendall v. Almy, 2 Sumn. (U. S.) 278.

*Louisiana*. — Marcy v. Sun Ins. Co., 11 La. Ann. 748.

*Maine*. — Andrews v. Schoppe, 84 Me. 170.

*Massachusetts*. — Johnson v. Goss, 128 Mass. 433; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14.

*Michigan*. — American Transp. Co. v. Moore, 5 Mich. 368; Hawkins v. Great Western R. Co., 17 Mich. 57, 97 Am. Dec. 179.

*New Hampshire*. — Benton v. Benton, 63 N. H. 289, 56 Am. Rep. 512; Bills v. Putnam, 64 N. H. 554.

*Ohio*. — Perrin v. Protection Ins. Co., 11 Ohio 147, 38 Am. Dec. 728.

**Illustrations.** — In *Vaughan v. Porter*, 16 Vt. 266, where a contract for the sale of a patent provided that the contract should be void if defects were found to exist in the patent whereby all its privileges could not be enforced, or if there should be "any other defect whatever," the latter clause was held to be controlled by the previous clause, and consequently to refer only to defects in the patent, and not to defects in machines constructed under the patent.

Where in a policy of insurance, words specifying particular causes of loss are followed by general words, such as, "all other perils, losses, and misfortunes," these latter cover only losses of a character similar to those particularly specified. Cullen v. Butler, 5 M. & S. 461.

**5. Not Applicable if Contrary to Intent.** — Ringeer v. Cann, 3 M. & W. 343; Fenwick v. Schmalz, L. R. 3 C. P. 315; Ivison v. Gassiot, 3 De G. M. & G. 958; Brunswick Sav. Inst. v. Crossman, 76 Me. 577.

**6. Anderson v. Anderson**, (1895) 1 Q. B. 749.



limited by the particular words,<sup>1</sup> unless the intention appears to be otherwise.<sup>2</sup>

**2. Every Part to Be Given Effect.** — What may be considered another aspect of the rule that the instrument shall be considered as a whole is the requirement that every clause and even every word shall be given effect, if this is in any way possible, and no part will be rejected unless absolutely repugnant to the general intent. Consequently, such a general construction must, if possible, be adopted that every part will be in harmony therewith.<sup>3</sup>

**1. General Words Preceding Particular Words** — *England*. — Dyne *v.* Nutley, 14 C. B. 122, 78 E. C. L. 122; Wood *v.* Rowcliffe, 6 Exch. 407; Griffiths *v.* Penson, 9 Jur. N. S. 385; Altham's Case, 8 Reports 154b.

*United States*. — Bock *v.* Perkins, 139 U. S. 628.

*Alabama*. — Carter *v.* Chevalier, 108 Ala. 563.

*Maine*. — Moore *v.* Griffin, 22 Me. 350; Parker *v.* Murch, 64 Me. 54.

*Maryland*. — Mims *v.* Armstrong, 31 Md. 87, 1 Am. Rep. 22.

*Massachusetts*. — Driscoll *v.* Fiske, 21 Pick. (Mass.) 503.

*Missouri*. — Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424.

*New York*. — Emigrant Industrial Sav. Bank *v.* Roche, 93 N. Y. 374; Munro *v.* Alaire, 2 Cai. (N. Y.) 320.

**Schedule Following General Words.** — This principle has been applied in the case of words of description of a general nature followed by a schedule of particular articles intended to be included. Wood *v.* Rowcliffe, 6 Exch. 407; Bock *v.* Perkins, 139 U. S. 638; Mims *v.* Armstrong, 31 Md. 87, 1 Am. Rep. 22; Driscoll *v.* Fiske, 21 Pick. (Mass.) 503.

**2. Intention Controlling.** — Corwin *v.* Hood, 58 N. H. 401, where it was said: "The enumeration of particular things in a written instrument may exclude others of the same class, but there is no absolute rule of construction that such enumeration excludes things of a different class, when the general terms used are broad enough to include them." See also Field *v.* Huston, 21 Me. 69.

**3. Every Clause or Word to Be Given Effect if Possible** — *England*. — Bush *v.* Watkins, 14 Beav. 425; Stratford *v.* Bosworth, 2 Ves. & B. 341.

*Alabama*. — Mason *v.* Alabama Iron Co., 73 Ala. 270; Evans *v.* Sanders, 8 Port. (Ala.) 497, 33 Am. Dec. 297.

*Florida*. — Florida First Nat. Bank *v.* Savannah, etc., R. Co., 36 Fla. 183.

*Illinois*. — Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Riggis *v.* Love, 72 Ill. 556; Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603; Mittel *v.* Karl, 133 Ill. 65; Hennessy *v.* Gore, 35 Ill. App. 594.

*Iowa*. — Decorah *v.* Kesselmeier, 45 Iowa 166.

*Kentucky*. — Churchill *v.* Reamer, 8 Bush (Ky.) 256.

*Louisiana*. — Baron *v.* Placide, 7 La. Ann. 229.

*Maine*. — Child *v.* Ficket, 4 Me. 471; Heywood *v.* Heywood, 42 Me. 229, 66 Am. Dec. 277.

*Massachusetts*. — Corbin *v.* Healy, 20 Pick. (Mass.) 514.

*Michigan*. — Vary *v.* Shea, 36 Mich. 388;

Plano Mfg. Co. *v.* Ellis, 68 Mich. 101; Jones *v.* Pashby, 62 Mich. 614.

*New Hampshire*. — Richardson *v.* Palmer, 38 N. H. 212; Bell *v.* Woodward, 46 N. H. 337; Emerson *v.* White, 29 N. H. 482.

*New York*. — Harty *v.* Doyle, 49 Hun (N. Y.) 410; Barhydt *v.* Ellis, 45 N. Y. 107; Miller *v.* Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179.

*North Carolina*. — Fowle *v.* Kerchner, 87 N. Car. 49.

*Ohio*. — German F. Ins. Co. *v.* Roost, 55 Ohio St. 581, 60 Am. St. Rep. 711.

*Oregon*. — Chrisman *v.* State Ins. Co., 16 Oregon 283.

*Pennsylvania*. — Wager *v.* Wager, 1 S. & R. (Pa.) 374; Smith *v.* National L. Ins. Co., 103 Pa. St. 177, 49 Am. Rep. 121; Philadelphia *v.* River Front R. Co., 133 Pa. St. 134, 43 Am. & Eng. R. Cas. 167.

*South Carolina*. — Alexander *v.* Burnet, 5 Rich. L. (S. Car.) 189; Smith *v.* Smith, 33 S. Car. 210.

*Vermont*. — Collins *v.* Lavelle, 44 Vt. 230; Hydeville Co. *v.* Eagle R., etc., Co., 44 Vt. 395; Shepard *v.* Shepard, 60 Vt. 109.

**Illustrations.** — In Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518, where at the bottom of a promissory note, in terms payable on demand, was written the memorandum, "one-half payable in twelve months, the balance in twenty-four months," it was held that since every clause should be given an effect if possible, the memorandum should be taken as intended to limit and control the generality of the words "on demand," and that the agreement was to pay one-half on demand after twelve months and the other half on demand after twenty-four months.

In Philadelphia *v.* River Front R. Co., 133 Pa. St. 134, there was a question as to the construction of an agreement between a city and a railroad company providing that the latter should build on a street "a single track only, without sidings for standing or passing trains," and should at no time "construct any such switches or turnouts." It was held that the word "such" could not be treated as surplusage, but that it restricted the meaning of the phrase "switches or turnouts" to those made for standing or passing trains, and hence the construction of a turnout to connect with a warehouse was allowable; the court, by Mitchell, J., saying: "A word not plainly inserted by accident or mistake is never to be thrown out entirely while there is a plain and natural construction which can be given to it not manifestly destructive of the general intent of the sentence."

**Habendum in Deed.** — While, as a general rule, the *habendum* clause in a deed must give way to the granting words when clearly contradictory, it should be resorted to equally



**3. Repugnant Clauses in Deed.** — It is stated, especially by the older authorities, that in the case of a deed the first of two repugnant clauses prevails, this being contrasted with the case of a will, in which the later clause prevails.<sup>1</sup> The rule thus stated is not, however, frequently adopted by the most modern authorities,<sup>2</sup> and is regarded as a rule of last resort,<sup>3</sup> as is the converse rule in regard to wills,<sup>4</sup> a construction being by preference adopted which will avoid giving a repugnant meaning to different clauses.<sup>5</sup>

The Same Principle, it seems, underlies the well-recognized rule that after having once granted an estate in a deed, the grantor cannot restrict or nullify it by a subsequent clause,<sup>6</sup> an important application of which is seen in the requirement that in case of a clear repugnancy between the premises and the *habendum* in a deed, the former will prevail.<sup>7</sup>

with the balance of the instrument to ascertain the intention of the maker. *Henderson v. Mack*, 82 Ky. 379; *Rines v. Mansfield*, 96 Mo. 394; *Hodges v. Fleetwood*, 102 N. Car. 122; *Whitby v. Duffy*, 135 Pa. St. 620; *Congregational Soc. v. Stark*, 34 Vt. 243. See the title *DEEDS*, vol. 9, p. 87.

**Parts of a Description in a Deed** should likewise all be given a meaning and effect if possible. *St. Louis v. Rutz*, 138 U. S. 226; *Peoria, etc., Union R. Co. v. Tamplin*, 156 Ill. 285.

**1. Rule that Prior Clause Prevails.** — *Sheppard's Touchstone* 88; *Cruise's Dig.*, tit. Deed, c. 20, § 8; 2 Black. Com. 381.

*England.* — *Cope v. Cope*, 15 Sim. 126; *In re Webber*, 17 Sim. 222; *Doe v. Biggs*, 2 Taunt. 113.

*Alabama.* — *Gould v. Womack*, 2 Ala. 83; *Petty v. Boothe*, 19 Ala. 633; *Webb v. Webb*, 29 Ala. 588.

*Arkansas.* — *Doe v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Tubbs v. Gatewood*, 26 Ark. 128.

*California.* — *Havens v. Dale*, 18 Cal. 359.

*Georgia.* — *Daniel v. Veal*, 32 Ga. 589.

*Pennsylvania.* — *Straus v. Wanamaker*, 175 Pa. St. 213.

**But the Granting Clause** prevails over introductory recitals. *Webb v. Webb*, 29 Ala. 588; *Miller v. Tunica County*, 67 Miss. 651; *Kershaw v. Boykin*, 1 Brev. (S. Car.) 301.

**2. Rule Not Now Favored.** — In *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751, Rice, J., after quoting from the early authorities to the effect that the first of two clauses in a deed should control, and the latter of two clauses in a will, said: "These, however, are technical rules of construction, which were adopted, as declared by Lord Mansfield, 'for want of a better reason,' and are not entitled to much consideration, and should never be resorted to for purposes of construction unless difficulties are presented which cannot be resolved by more satisfactory rules. In modern times they have given way to the more sensible rule of construction, which is, in all cases to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed, as well as the situation of the parties to it." See also *McWilliams v. Ramsay*, 23 Ala. 813; *Henderson v. Sawyer*, 99 Ga. 234; *Henderson v. Mack*, 82 Ky. 379; *Spurrier v. Parker*, 16 B. Mon. (Ky.) 274; *Waterman v. Andrews*, 14 R. I. 589.

**3. Rule One of Last Resort.** — *Bush v. Watkins*, 14 Beav. 425; *Petty v. Boothe*, 19 Ala. 633.

**4. Rule as to Wills.** — *Theological Seminary v. Kellogg*, 16 N. Y. 83; *Van Vechten v. Keator*, 63 N. Y. 52; *Van Horne v. Campbell*, 100 N. Y. 317, 53 Am. Rep. 166; *Newbold v. Boone*, 52 Pa. St. 167.

The rule is stated by Jessel, M. R., to be a mere "rule of thumb." *In re Bywater*, 18 Ch. D. 17. See also the title *WILLS*.

**5. Repugnancy Avoided if Possible** — *Iowa.* — *Decorah v. Kesselmeier*, 45 Iowa 166.

*Kentucky.* — *Spurrier v. Parker*, 16 B. Mon. (Ky.) 274.

*Maine.* — *Chase v. Bradley*, 26 Me. 531.

*Massachusetts.* — *Corbin v. Healy*, 20 Pick. (Mass.) 514.

*North Carolina.* — *Proctor v. Pool*, 4 Dev. L. (15 N. Car.) 370.

*Pennsylvania.* — *Hazleton Coal Co. v. Buck Mountain Coal Co.*, 57 Pa. St. 301.

*Texas.* — *Swisher v. Grumbles*, 18 Tex. 164.

See *supra*, this section, *Instrument to Be Considered as a Whole*.

**6. Grant Cannot Be Restricted or Diminished by Subsequent Clause** — *California.* — *Wilcoxson v. Sprague*, 51 Cal. 640; *McLennan v. McDonnell*, 78 Cal. 273.

*Maine.* — *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Maker v. Lazell*, 83 Me. 562, 23 Am. St. Rep. 795.

*Maryland.* — *Budd v. Brooke*, 3 Gill (Md.) 198, 43 Am. Dec. 321; *Winter v. Gorsuch*, 51 Md. 180.

*Massachusetts.* — *Cutler v. Tufts*, 3 Pick. (Mass.) 272; *Pynchon v. Stearns*, 11 Met. (Mass.) 312, 45 Am. Dec. 210.

*New Jersey.* — *Ackerman v. Vreeland*, 14 N. J. Eq. 23.

*New York.* — *Tucker v. Meeks*, 2 Sweeny (N. Y.) 736.

*Wisconsin.* — *Green Bay, etc., Canal Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701.

**Illustrations.** — In *Maker v. Lazell*, 83 Me. 562, 23 Am. St. Rep. 795, it was held that the effect of a conveyance of land cannot be destroyed by a subsequent clause stating that it was intended to convey the title which the grantor received by a specified deed, when by the latter no title was conveyed to the grantor.

And where a deed conveyed the absolute title to four persons, a subsequent clause authorizing one of them to dispose of the land at will was held to be invalid. *Blair v. Muse*, 83 Va. 238.

**7. Repugnant Habendum.** — See the title *DEEDS*, vol. 9, p. 140.



4. **Transaction Incorporated in Several Writings.** — The principle that the instrument shall be considered as a whole applies when a transaction is incorporated in or evidenced by more than one writing, in which case all the writings are treated as if they were parts of one instrument and are considered together for the purpose of determining the meaning of the parties.<sup>4</sup> The

1. **Transaction Incorporated in Several Writings** — *England.* — *In re Phoenix Bessemer Steel Co.*, 44 L. J. Ch. 683; *In re Wedgwood Coal, etc., Co.*, 7 Ch. D. 75; *Smith v. Chadwick*, 20 Ch. D. 62; *In re Capital F. Ins. Assoc.*, 21 Ch. D. 209; *Tyrell v. Hope*, 2 Atk. 558; *Manlove v. Bale*, 2 Vern. 84; *Hopgood v. Ernest*, 3 De G. J. & S. 116; *Stucley v. Baily*, 1 H. & C. 405; *Coles v. Hulme*, 8 B. & C. 568, 15 E. C. L. 299; *Thurman v. Cooper*, 2 Rolle 23.

*United States.* — *Joy v. St. Louis*, 138 U. S. 1, 45 Am. & Eng. R. Cas. 655; *Livingston v. Story*, 11 Pet. (U. S.) 386; *Wildman v. Taylor*, 4 Ben. (U. S.) 42; *Rutland, etc., R. Co. v. Crocker*, 21 Law Rep. 201; *Atlantic Ins. Co. v. Conard*, 4 Wash. (U. S.) 672.

*Alabama.* — *Whitehurst v. Boyd*, 8 Ala. 375; *Sewall v. Henry*, 9 Ala. 24; *Casey v. Holmes*, 10 Ala. 776; *Byrne v. Marshall*, 44 Ala. 355; *Alabama State Bank v. Barnes*, 82 Ala. 607; *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422; *Chambers v. Marks*, 93 Ala. 412.

*Arkansas.* — *St. Louis, etc., R. Co. v. Beidler*, 45 Ark. 17.

*California.* — *Gerdes v. Moody*, 41 Cal. 335; *Patterson v. Donner*, 48 Cal. 369; *Pulliam v. Bennett*, 55 Cal. 368.

*Colorado.* — *O'Reilly v. Burns*, 14 Colo. 7; *Weston v. Estey*, 22 Colo. 334.

*Connecticut.* — *Isham v. Morgan*, 9 Conn. 374, 23 Am. Dec. 361.

*Florida.* — *Meinhardt v. Mode*, 22 Fla. 279.

*Illinois.* — *Duncan v. Charles*, 5 Ill. 561; *Welch v. Dutton*, 79 Ill. 465; *Galena, etc., R. Co. v. Barrett*, 95 Ill. 467; *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434; *Denby v. Graff*, 10 Ill. App. 195.

*Indiana.* — *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642; *Allen v. Nofsinger*, 13 Ind. 494; *Burns v. Singer Mfg. Co.*, 87 Ind. 547; *Richter v. Richter*, 111 Ind. 456; *Schmueckle v. Waters*, 125 Ind. 265; *Leach v. Rains*, 149 Ind. 152.

*Kansas.* — *Harrison v. Andrews*, 18 Kan. 535; *Phelps, etc., Windmill Co. v. Piercy*, 41 Kan. 763.

*Kentucky.* — *Parks v. Cooke*, 3 Bush (Ky.) 168; *Smith v. Theobald*, 86 Ky. 141; *Honore v. Hutchings*, 8 Bush (Ky.) 687.

*Louisiana.* — *Akin v. Drummond*, 2 La. Ann. 92; *Phillips v. Feliciana Cotton Oil Co.*, 48 La. Ann. 404.

*Maine.* — *Mitchell v. Smith*, 67 Me. 338; *Moore v. Fletcher*, 16 Me. 63, 33 Am. Dec. 633; *Knight v. Dyer*, 57 Me. 174, 99 Am. Dec. 765; *Gammon v. Freeman*, 31 Me. 243.

*Maryland.* — *Owings v. Emery*, 7 Gill (Md.) 405.

*Massachusetts.* — *Newall v. Wright*, 3 Mass. 138, 3 Am. Dec. 98; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *King v. King*, 7 Mass. 496; *Taunton, etc., Turnpike Corp. v. Whiting*, 10 Mass. 327, 6 Am. Dec. 124; *Barnard v. Cushing*, 4 Met. (Mass.) 230, 38 Am. Dec. 362; *Collins v. Delaporte*, 115 Mass. 159;

*Avery v. Bushnell*, 123 Mass. 349; *Gaffney v. Hicks*, 131 Mass. 124; *Washburn, etc., Mfg. Co. v. Salisbury*, 152 Mass. 346; *Cloyes v. Sweetser*, 4 Cush. (Mass.) 403; *Hunt v. Livermore*, 5 Pick. (Mass.) 395; *Sibley v. Holden*, 10 Pick. (Mass.) 250; *Makepeace v. Harvard College*, 10 Pick. (Mass.) 298.

*Michigan.* — *Stuart v. Worden*, 42 Mich. 154; *Smith v. Van Blarcom*, 45 Mich. 371; *Chapman v. Colby*, 47 Mich. 46; *Sutton v. Beckwith*, 68 Mich. 303, 13 Am. St. Rep. 344; *Timmerman v. Dever*, 52 Mich. 34, 50 Am. Rep. 240.

*Minnesota.* — *Chute v. Washburn*, 44 Minn. 312; *St. Paul, etc., R. Co. v. St. Paul Union Depot Co.*, 44 Minn. 325.

*Missouri.* — *MacDonald v. Wolff*, 40 Mo. App. 302; *Reeves v. McGlochlin*, 65 Mo. App. 537; *Houck v. Frisbee*, 66 Mo. App. 16; *Gwin v. Waggoner*, 98 Mo. 315.

*Nebraska.* — *Edling v. Bradford*, 30 Neb. 593.

*New Hampshire.* — *Odiorne v. Sargent*, 6 N. H. 401; *Hill v. Huntress*, 43 N. H. 480.

*New York.* — *Wright v. Douglass*, 7 N. Y. 564; *Huttemeier v. Albro*, 18 N. Y. 48; *Hamilton v. Taylor*, 18 N. Y. 358; *Draper v. Snow*, 20 N. Y. 331, 75 Am. Dec. 408; *Church v. Brown*, 21 N. Y. 315; *Rogers v. Smith*, 47 N. Y. 324; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, 8 Am. Rep. 549; *Marsh v. Dodge*, 66 N. Y. 533; *Wilson v. Randall*, 67 N. Y. 338; *Taddiken v. Cantrell*, 69 N. Y. 507, 25 Am. Rep. 253; *Treadwell v. Archer*, 76 N. Y. 196; *Putnam v. Stewart*, 97 N. Y. 411; *Coe v. Tough*, 116 N. Y. 273; *Kinyon v. Kinyon*, (Supm. Ct. Eq. T.) 6 Misc. (N. Y.) 584; *Equitable General Providing Co. v. Potter*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 124; *Thomas v. Austin*, 4 Barb. (N. Y.) 265; *Hanford v. Rogers*, 11 Barb. (N. Y.) 18; *Pepper v. Haight*, 20 Barb. (N. Y.) 429; *Van Hagen v. Van Rensselaer*, 18 Johns. (N. Y.) 420; *Jackson v. Dunsbath*, 1 Johns. Cas. (N. Y.) 91; *Jackson v. McKenny*, 3 Wend. (N. Y.) 233, 20 Am. Dec. 690; *Rubber Tip Pencil Co. v. Hovey*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 74; *Cornell v. Todd*, 2 Den. (N. Y.) 130; *Hills v. Miller*, 3 Paige (N. Y.) 254, 24 Am. Dec. 218; *Hull v. Adams*, 1 Hill (N. Y.) 601.

*North Carolina.* — *Howell v. Howell*, 7 Ired. L. (29 N. Car.) 491, 47 Am. Dec. 335.

*Ohio.* — *White v. Brocaw*, 14 Ohio St. 339.

*Oregon.* — *Dean v. Lawham*, 7 Oregon 422; *Kruse v. Prindle*, 8 Oregon 158; *Looney v. Rankin*, 15 Oregon 617.

*Pennsylvania.* — *Cummings v. Antes*, 19 Pa. St. 287.

*Rhode Island.* — *Kenyon v. Nichols*, 1 R. I. 411.

*Texas.* — *Wallis v. Beauchamp*, 15 Tex. 303; *Dallas Nat. Bank v. Davis*, 78 Tex. 362.

*Vermont.* — *Strong v. Barnes*, 11 Vt. 221, 34 Am. Dec. 684; *Reed v. Field*, 15 Vt. 672.

*Virginia.* — *Anderson v. Harvey*, 10 Gratt. (Va.) 386.



writings to be thus construed together need not bear the same date,<sup>1</sup> nor, it seems, be absolutely contemporaneous in execution;<sup>2</sup> but they must be between the same parties<sup>3</sup> and must relate to the same subject-matter.<sup>4</sup> Among the more common applications of this rule may be mentioned the case of a deed and defeasance incorporated in separate instruments, in which the two are construed together as constituting one instrument, in effect a mortgage.<sup>5</sup> And in the same way a deed of land and the purchase-money mortgage given by the grantee will be construed as parts of one transaction,<sup>6</sup> and so a negotiable instrument will be construed in connection with a contemporaneous agreement between the parties thereto.<sup>7</sup>

**Separate Writing Expressly Referred to.** — Instruments are likewise to be construed together if one refers to the other so as expressly or impliedly to make the latter a part thereof,<sup>8</sup> but if the reference to the other writing is made merely

*Wisconsin.* — *Norton v. Kearney*, 10 Wis. 443; *Hagerty v. White*, 69 Wis. 317; *Hannig v. Mueller*, 82 Wis. 235.

**Question for Jury.** — In *Dechert v. Municipal Electric Light Co.*, 9 N. Y. App. Div. 573, it was decided to be a question for the jury whether a contract for the equipment of certain premises with electric wires, and another contract between the same parties, made the same day, for the furnishing of electricity to the building, were parts of one transaction so as to render applicable to the contract for the wiring a stipulation in the contract for the electricity that a contractor should not be liable for injuries resulting from the use of electricity, the evidence on the subject being contradictory and neither contract expressly referring to the other.

**1. Need Not Bear Same Date.** — *Ireland v. Montgomery*, 34 Ind. 174; *Brandreth v. Sandford*, 1 Duer (N. Y.) 390; *Thompson v. McClenachan*, 17 S. & R. (Pa.) 110.

In *Knowles v. Toone*, 96 N. Y. 534, the note of a married woman having been offered for sale to the plaintiff, the latter refused to purchase it at the time, but three days thereafter, upon obtaining from the woman written answers to certain questions as to her liability and pecuniary responsibility, the plaintiff purchased the note. It was held that the two instruments should be considered in connection with each other, *Miller, J.*, saying: "The fact that one is dated after the other can make no difference if the contract is not carried into effect until the date of the latter."

**2. Need Not Be Absolutely Contemporaneous.** — *Jones v. Morley*, 1 Ld. Raym. 287; *Smith v. Chadwick*, 20 Ch. D. 27; *Cromwel's Case*, 2 Reports 696; *Stacey v. Randall*, 17 Ill. 467; *Neill v. Chesson*, 15 Ill. App. 266; *Reed v. Ellis*, 63 Ill. 206; *McMaster v. State*, 108 N. Y. 542. And see *Sawyer v. Hammatt*, 15 Me. 40; *Adams v. Hill*, 16 Me. 215.

As to the necessity that defeasance be contemporaneous with mortgage, see the title MORTGAGES.

In *Jeffery v. Hursh*, 58 Mich. 246, it was said that an interval of five minutes or half an hour is not of itself sufficient to make the documents independent transactions, they bearing the same date and being intended as parts of one transaction.

**3. Writing Must Be Between Same Parties.** — *Webb v. Spicer*, 13 Q. B. 894, 66 E. C. L. 894; *Salmon v. Webb*, 3 H. L. Cas. 510; *Craig v.*

*Wells*, 11 N. Y. 315; *Rexford v. Marquis*, 7 Lans. (N. Y.) 249; *Nye v. Lovitt*, 92 Va. 710.

In *Bradley v. Marshall*, 54 Ill. 173, the agreement was construed with the note, though the note was made to the order of a firm, while the agreement was made with only one member thereof, the consideration having moved from such member alone, and he being the owner of the note. And see *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194.

**4. Must Relate to Same Subject-matter.** — *Allen v. Parker*, 27 Me. 531; *Jeffery v. Hursh*, 58 Mich. 246; *Mann v. Witbeck*, 17 Barb. (N. Y.) 388; *Craig v. Wells*, 11 N. Y. 315; *Cornell v. Todd*, 2 Den. (N. Y.) 130; *McMaster v. State*, 108 N. Y. 542; *Nye v. Lovitt*, 92 Va. 710.

**5. Absolute Deed and Defeasance.** — *Teal v. Walker*, 111 U. S. 242; *Bearss v. Ford*, 108 Ill. 16; *Stowe v. Merrill*, 77 Me. 550; *Houser v. Lamont*, 55 Pa. St. 311, 93 Am. Dec. 755; *Brinkman v. Jones*, 44 Wis. 498. And see the title MORTGAGES.

**6. Deed and Purchase-money Mortgage.** — *Holbrook v. Finney*, 4 Mass. 569, 3 Am. Dec. 243; *Stow v. Tift*, 15 Johns. (N. Y.) 463, 8 Am. Dec. 266; *George v. Cooper*, 15 W. Va. 666. See generally the title VENDOR AND PURCHASER.

**7. Negotiable Instrument** — *Arkansas*. — *Richardson v. Thomas*, 28 Ark. 387.

*California*. — *Goodwin v. Nickerson*, 51 Cal. 166.

*Colorado*. — *Munro v. King*, 3 Colo. 238.

*Connecticut*. — *Beach's Appeal*, 58 Conn. 464.

*Illinois*. — *Bradley v. Marshall*, 54 Ill. 173.

*Indiana*. — *Titlow v. Hubbard*, 63 Ind. 6.

*Kansas*. — *Muzzy v. Knight*, 8 Kan. 456; *Weeks v. Medler*, 20 Kan. 57.

*Kentucky*. — *Parks v. Cooke*, 3 Bush (Ky.) 168.

*Michigan*. — *Singer Mfg. Co. v. Haines*, 36 Mich. 385; *Lawrence v. Griswold*, 30 Mich. 410.

*Minnesota*. — *Syracuse Third Nat. Bank v. Armstrong*, 25 Minn. 531.

*Missouri*. — *Noell v. Gaines*, 68 Mo. 649.

*New Hampshire*. — *Hill v. Huntress*, 43 N. H. 480.

*New York*. — *Sherwood v. Archer*, 10 Hun (N. Y.) 73.

See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 144.

**8. Writings Expressly Referred to** — *England*. — *Wood v. Rowcliffe*, 6 Exch. 407.

*Alabama*. — *Casey v. Holmes*, 10 Ala. 776.



for a particular purpose, it becomes a part of the writing containing the reference only for that purpose.<sup>1</sup>

**V. MEANING OF WORDS AND PHRASES — 1. Ordinary Meaning Generally to Be Given.** — Words in an instrument are to be given their plain, ordinary, and popular meaning, unless they have acquired a peculiar sense in respect to the particular subject-matter, as by the known usage of trade, or the like, or unless the context shows that the parties used them in some other and peculiar sense.<sup>2</sup>

*Arkansas.* — *Vaughn v. Taylor*, 18 Ark. 65; *Pillow v. Brown*, 26 Ark. 240.

*California.* — *Goodwin v. Nickerson*, 51 Cal. 166.

*Florida.* — *Howard v. Pensacola, etc.*, R. Co., 24 Fla. 560.

*Illinois.* — *Bradley v. Marshall*, 54 Ill. 173; *Edwards v. Farmers' Ins. Co.*, 74 Ill. 84; *Lake View v. MacRitchie*, 134 Ill. 203.

*Indiana.* — *Amos v. Amos*, 117 Ind. 19.

*Kansas.* — *Miller v. Edgerton*, 38 Kan. 36; *Wichita University v. Schweiter*, 50 Kan. 672.

*Kentucky.* — *Parks v. Cooke*, 3 Bush (Ky.) 168; *Dillingham v. Estill*, 3 Dana (Ky.) 21.

*Louisiana.* — *Delogny v. Mercer*, 43 La. Ann. 205.

*Maine.* — *Sawyer v. Hammatt*, 15 Me. 40; *Adams v. Hill*, 16 Me. 215.

*Massachusetts.* — *Bergin v. Williams*, 138 Mass. 544.

*Michigan.* — *Rorabacher v. Lee*, 16 Mich. 169; *Grieb v. Cole*, 60 Mich. 397, 1 Am. St. Rep. 533.

*Minnesota.* — *Short v. Van Dyke*, 50 Minn. 286.

*Montana.* — *Dawes v. Powers*, 5 Mont. 59; *Watson v. O'Neill*, 14 Mont. 197.

*New Jersey.* — *McGeragle v. Broemel*, 53 N. J. L. 59.

*New York.* — *Wilson v. Randall*, 67 N. Y. 338; *Rogers v. Kneeland*, 13 Wend. (N. Y.) 114.

*North Carolina.* — *Bobbitt v. Liverpool, etc.*, Ins. Co., 66 N. Car. 71.

*Ohio.* — *Smith v. Turpin*, 20 Ohio St. 478.

*Pennsylvania.* — *Spangler v. Springer*, 22 Pa. St. 454; *Philips v. Scott*, 2 Watts (Pa.) 318.

**Insurance Policy.** — So where an insurance policy refers to the application for a "more particular description" of the property insured, and by apt words makes it "a part of this contract" of insurance, the two instruments must be construed together. *Edwards v. Farmers' Ins. Co.*, 74 Ill. 84. See also the title *INSURANCE*, vol. 16, p. 830.

**A Note and a Mortgage** securing it will be construed as one instrument.

*Illinois.* — *Hennessy v. Gore*, 35 Ill. App. 594.

*Iowa.* — *Dobbins v. Parker*, 46 Iowa 357.

*Kansas.* — *Meyer v. Graeber*, 19 Kan. 165; *Cabbell v. Knot*, 2 Kan. App. 68.

*Missouri.* — *Brownlee v. Arnold*, 60 Mo. 79.

*Nebraska.* — *Seieroe v. Kearney First Nat. Bank*, 50 Neb. 612.

In *Prichard v. Miller*, 85 Ala. 500, where the figures in the margin of a note included both principal and interest, but in the body of the note no interest was mentioned, it was held that this incongruity was corrected by reference to the mortgage securing the note, which recited that it was given to secure the debt wit-

nessed by the note "with interest from date to maturity." See also the titles *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *MORTGAGES*.

**1. Reference for Certain Purposes Only.** — *Baltimore, etc.*, R. Co. v. *Stewart*, 79 Md. 487; *Short v. Van Dyke*, 50 Minn. 286; *Riley v. Brooklyn*, 46 N. Y. 444. So in *Hopkins v. Rogers*, 3 Verg. (Tenn.) 457, it was decided that the fact that a contract for the delivery of an article provided that the price should be governed by the terms of a prior contract of sale did not incorporate into the subsequent contract a provision in the prior one as to the time and place of delivery.

**2. Ordinary Meaning** — *England.* — *Robertson v. French*, 4 East 135; *Holt v. Collyer*, 16 Ch. D. 720; *Bland v. Crowley*, 6 Exch. 529; *Shore v. Wilson*, 9 Cl. & F. 525; *Stanley v. Western Ins. Co.*, L. R. 3 Exch. 71; *Thellusson v. Rendlesham*, 7 H. L. Cas. 429; *Bowes v. Shand*, 2 App. Cas. 455; *Griffith v. Harrison*, 4 T. R. 737.

*United States.* — *Moran v. Prather*, 23 Wall. (U. S.) 402; *Railroad Companies v. Schutte*, 103 U. S. 118; *Knowlton v. Oliver*, 28 Fed. Rep. 516; *Potter v. Phenix Ins. Co.*, 63 Fed. Rep. 382.

*Alabama.* — *Brush Electric Light, etc., Co. v. Montgomery*, 114 Ala. 433.

*Illinois.* — *Stearns v. Sweet*, 78 Ill. 446; *Stettauer v. Hamlin*, 97 Ill. 312; *Supreme Council, etc. v. Curd*, 111 Ill. 284; *Schneider v. Turner*, 130 Ill. 28; *American Merchants Mfg. Co. v. Kantrowitz*, 77 Ill. App. 155.

*Iowa.* — *Willmering v. McGaughey*, 30 Iowa 205, 6 Am. Rep. 673.

*Maine.* — *Hawes v. Smith*, 12 Me. 429.

*Massachusetts.* — *Boston v. Richardson*, 13 Allen (Mass.) 146.

*Michigan.* — *Trowbridge v. Dean*, 40 Mich. 687.

*Mississippi.* — *Goosey v. Goosey*, 48 Miss. 210.

*Missouri.* — *Rubey v. Missouri Coal, etc., Co.*, 21 Mo. App. 159; *Fruin v. Crystal R. Co.*, 89 Mo. 397; *Bradshaw v. Bradbury*, 64 Mo. 334.

*Nevada.* — *Rankin v. New England, etc., Silver Min. Co.*, 4 Nev. 78.

*New Hampshire.* — *Pillsbury v. Locke*, 33 N. H. 96, 66 Am. Dec. 711.

*New York.* — *Griswold v. Sawyer*, 56 Hun (N. Y.) 12; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729; *Pohalski v. Mutual L. Ins. Co.*, 36 N. Y. Super. Ct. 234; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 488.

*Ohio.* — *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio 385.

*Pennsylvania.* — *McWilliams v. Martin*, 12 S. & R. (Pa.) 269, 14 Am. Dec. 688.



**2. Arbitrary Meaning Given by Parties.** — The parties may, however, attach an unusual or arbitrary meaning to words, and if they do so, and this appears from the balance of the instrument, the court must give the words such meaning, even though it be absolutely contrary to the ordinary meaning.<sup>1</sup> This rule is in effect the same as that referred to below, viz., that one word may, in construing an instrument, be substituted for another, as more in harmony with the intent of the parties, it being immaterial whether the parties be considered to have used the word by consent in a sense more properly indicated by another word, or to have used it by mistake in place of such other word.<sup>2</sup>

**3. Peculiar Meaning Given by Usage.** — If words have by usage acquired a meaning different from their ordinary and popular meaning, when used with reference to the subject-matter of the particular instrument or the trade or calling to which it has reference, the parties will be assumed to have used them in this peculiar sense,<sup>3</sup> and the rule is the same when the usage of the locality in which the instrument is executed has given certain words therein a peculiar signification.<sup>4</sup> In order that the words used shall be given such peculiar mean-

*Vermont.* — Gove v. Downer, 59 Vt. 139.

"The Golden Rule of Construction is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favor of a different interpretation." *Fowell v. Tranter*, 3 H. & C. 458.

**1. Arbitrary Meaning May Be Given to Words** — *United States.* — *Thorington v. Smith*, 8 Wall. (U. S.) 1.

*California.* — *Central Pac. R. Co. v. Beal*, 47 Cal. 151.

*Connecticut.* — *Excelsior Needle Co. v. Smith*, 61 Conn. 56; *In re Curtis*, 64 Conn. 501, 42 Am. St. Rep. 200.

*Maryland.* — *McCoy v. Erie, etc.*, Transp. Co., 42 Md. 498.

*Missouri.* — *Carter v. Alexander*, 71 Mo. 585.

*Oregon.* — *Pendleton v. Saunders*, 19 Oregon 9.

In *Morrison v. Wilson*, 30 Cal. 344, *Shafter, J.*, said: "The meaning of language depends upon usage, and varies with it. If parties should insert a clause in their contract to the effect that the language used by them should be taken in a certain sense which had become provincial, or in the meaning borne by it in a particular trade, and particularly if they should proceed to state the agreed definition in detail and the definition turned out to be clear and unambiguous, the general meaning would have to give way; and it follows that it must be considered that parties have the power to innovate upon the general meaning of words at large, free from all legal restrictions. If they see fit to agree that mile shall stand for league, or grant, bargain, and sell for quitclaim, or even black for white, however we might marvel at the caprice, we could not question the power."

**2.** See *infra*, this title, *Verbal and Clerical Mistakes*.

**3. Trade Usage as to Meaning of Terms** — *England.* — *Taylor v. Briggs*, 2 C. & P. 525, 12 E. C. L. 245; *Myers v. Sarl*, 30 L. J. Q. B. 9, 7 Jur. N. S. 97.

*United States.* — *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254; *Dodge v. Hedden*, 42 Fed. Rep. 446.

*Georgia.* — *Featherston v. Rounsaville*, 73 Ga. 617.

*Illinois.* — *Myers v. Walker*, 24 Ill. 133; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349.

*Indiana.* — *Scott v. Hartley*, 126 Ind. 239.

*Iowa.* — *Louis Cook Mfg. Co. v. Randall*, 62 Iowa 244.

*Maryland.* — *Appleman v. Fisher*, 34 Md. 540.

*Massachusetts.* — *Lowry v. Russell*, 8 Pick. (Mass.) 360; *Whitney v. Boardman*, 118 Mass. 242; *Page v. Cole*, 120 Mass. 37; *Houghton v. Watertown F. Ins. Co.*, 131 Mass. 300.

*Missouri.* — *Long v. J. K. Armsby Co.*, 43 Mo. App. 253.

*New Jersey.* — *Smith v. Clayton*, 29 N. J. L. 357; *Barton v. McKelway*, 22 N. J. L. 165.

*New York.* — *Dalton v. Daniels*, 2 Hilt. (N. Y.) 472; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Smith v. Clews*, 114 N. Y. 190, 11 Am. St. Rep. 627.

*Ohio.* — *Wayne v. Steamboat General Pike*, 16 Ohio 422.

*Oregon.* — *McCulsky v. Klosterman*, 20 Oregon 108.

*Pennsylvania.* — *McDonough v. Jolly*, 165 Pa. St. 542.

*Texas.* — *Dwyer v. Brenham*, 70 Tex. 30; *Parks v. O'Connor*, 70 Tex. 377.

**Words of Quantity or Number.** — Such usage has been frequently decided to be controlling even as to the meaning of words indicating the quantity, number, length, or space, usually the most definite in language. *Bullock v. Finley*, 28 Fed. Rep. 514; *Heald v. Cooper*, 8 Me. 32; *Ford v. Tirrell*, 9 Gray (Mass.) 401, 69 Am. Dec. 297; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Lowe v. Lehman*, 15 Ohio St. 179.

So in *Soutier v. Kellerman*, 18 Mo. 509, and *Bragg v. Bletzt*, 7 D. C. 105, it was decided that a custom of the trade that one thousand shingles should consist of a certain number of packages of a certain size, without reference to the actual number, was controlling as to the interpretation of the word "thousand."

**4. Local Usage.** — *Study v. Sanders*, 5 B. & C. 628; *Rindskoff v. Barrett*, 14 Iowa 101; *Thompson v. Sloan*, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546; *Saltsburg Gas Co. v. Saltsburg*,



ing, it is not necessary, according to the weight of authority, that there be any ambiguity apparent on the face of the phrase.<sup>1</sup>

**4. Technical Terms and Expressions.** — Words and phrases which have meaning only in connection with an art or calling, and no meaning otherwise, are to be given their technical meaning unless they were evidently used in a different sense,<sup>2</sup> in which case the intention controls.<sup>3</sup>

**Legal Terms.** — This rule in favor of imputing to technical terms a technical meaning applies in the case of legal terms, which are to be given their legal meaning<sup>4</sup> unless obviously used in a different sense, in which case also the intention controls.<sup>5</sup>

138 Pa. St. 250; *Phoenix Iron Co. v. Samuel*, 13 W. N. C. (Pa.) 50; *Roberts v. Short*, 1 Tex. 373.

In *Smith v. Wilson*, 3 B. & Ad. 728, 23 E. C. L. 169, a leading case, the facts were that in a lease of a rabbit-warren the lessee covenanted that at the expiration of the term he would leave on the warren ten thousand rabbits, the lessor paying for them sixty pounds per thousand. In an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, it was held that parol evidence was admissible to show that by the custom of the country where the lease was made the word "thousand," as applied to rabbits, denoted one hundred dozen.

So in *Callahan v. Stanley*, 57 Cal. 476, it was held that the term "stubble" in a lease was to be interpreted in accordance with the custom prevailing in that locality.

**1. Words Need Not Be Ambiguous.** — *Myers v. Sarl*, 3 El. & El. 306, 107 E. C. L. 306; *Smith v. Wilson*, 3 B. & Ad. 728, 23 E. C. L. 169; *Brown v. Byrne*, 3 El. & Bl. 703, 77 E. C. L. 703; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407. See also the cases cited *supra*, in this section. But see *contra*, *Yates v. Pym*, 6 Taunt. 446, 1 E. C. L. 446; *Blackett v. Royal Exch. Assur. Co.*, 2 Crompt. & J. 244; *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, 81 Am. Dec. 284; *Willmering v. McGaughey*, 30 Iowa 205, 6 Am. Rep. 673.

**2. Technical Terms and Expressions — England.** — *Shore v. Wilson*, 9 Cl. & F. 355; *Holt v. Collyer*, 16 Ch. D. 720.

*Connecticut.* — *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154.

*Illinois.* — *Pixley v. Boynton*, 79 Ill. 351.

*Iowa.* — *Willmering v. McGaughey*, 30 Iowa 205, 6 Am. Rep. 673.

*Michigan.* — *Busch v. Pollock*, 41 Mich. 64.

*Missouri.* — *Bradshaw v. Bradbury*, 64 Mo. 334.

*New Jersey.* — *Smith v. Clayton*, 29 N. J. L. 357.

*New York.* — *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453.

*South Carolina.* — *Bonham v. Charlotte, etc.*, R. Co., 13 S. Car. 267.

**Illustrations.** — In *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. Rep. 198, the question was as to a contract for services of a professional base-ball player which gave to the employer the "right to reserve" such player for the next season. It was held to be permissible to determine the meaning of this phrase by reference to the established meaning which it

had acquired among those engaged in that business.

In *Long v. Davidson*, 101 N. Car. 170, where a contract for the building of a house provided that the contractor should be paid a certain sum per thousand for laying bricks, to be estimated by "wall count, solid measure," it was held that such phrase was to be given the meaning universally understood among brick masons and contractors, although this usage was not known to the person for whom the work was done, since this was the only meaning conveyed by the expression, and he should have informed himself of the fact that it had at least one meaning.

**3. Technical Meaning Gives Way to Manifest Intention — United States.** — *Speed v. St. Louis Merchants' Bridge Terminal R. Co.*, 86 Fed. Rep. 235, 57 U. S. App. 526.

*California.* — *Central Pac. R. Co. v. Beal*, 47 Cal. 151.

*Indiana.* — *Carson v. McCaslin*, 60 Ind. 337; *Kennedy v. Kennedy*, 150 Ind. 636, citing 14 AM. AND ENG. ENCYC. OF LAW (1st ed.) 550.

*Mississippi.* — *Atkinson v. Sinnott*, 67 Miss. 502.

*Pennsylvania.* — *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Funk v. Haldeman*, 53 Pa. St. 229; *Criswell v. Grumbling*, 107 Pa. St. 408.

*Vermont.* — *Citing Collins v. Lavelle*, 44 Vt. 233.

**4. Legal Terms — England.** — *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Leach v. Jay*, 9 Ch. D. 45; *Smith v. Butcher*, 10 Ch. D. 114.

*United States.* — *Hagen v. Kean*, 3 Dill. (U. S.) 124.

*Iowa.* — *Knott v. Burleson*, 2 Greene (Iowa) 600.

*Maryland.* — *Maryland Coal Co. v. Cumberland, etc.*, R. Co., 41 Md. 343.

*New York.* — *Bowen v. Kaughan*, (N. Y. Super. Ct. Spec. T.) 1 N. Y. St. Rep. 121.

*Pennsylvania.* — *Hunt's Estate*, 133 Pa. St. 260, 19 Am. St. Rep. 640.

*Virginia.* — *Findley v. Findley*, 11 Gratt. (Va.) 434; *Nye v. Lovitt*, 92 Va. 715.

So the word "heirs" is always given its technical signification, unless the circumstances show that it was used in another sense. See the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318.

**5. Legal Terms Yield to Intent — United States.** — *Prentice v. Duluth Storage, etc., Co.*, 58 Fed. Rep. 437.

*Connecticut.* — *Davies v. Davies*, 55 Conn. 319.

*Missouri.* — *Waddell v. Waddell*, 99 Mo. 338, 17 Am. St. Rep. 575.



**VI. LANGUAGE CONSTRUED MOST STRONGLY AGAINST USER THEREOF.** — The words of a document will, in cases of doubt, be construed most strongly against the party using them, or, as it is sometimes expressed, *fortius contra proferentem*. This principle has frequently been applied in the case of deeds,<sup>1</sup> including those by way of lease<sup>2</sup> or by way of mortgage.<sup>3</sup> In some of the older authorities a distinction is drawn in this respect between an indenture and a deed poll, to the effect that an indenture is executed by both parties and the words are to be considered those of both,<sup>4</sup> and in a few modern cases, in stating the rule as to construction against the grantor, it is in terms restricted to cases of deed poll.<sup>5</sup> In the case of public grants, however, the

*New York.* — *Jackson v. Myers*, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809; *Heath v. Hewitt*, 127 N. Y. 166, 24 Am. St. Rep. 438.

*North Carolina.* — *Vickers v. Leigh*, 104 N. Car. 248.

*Pennsylvania.* — *Lehigh, etc., Coal Co. v. Wright*, 177 Pa. St. 387.

So in *Metcalf v. Taylor*, 36 Me. 28, it was decided that where a contract for the construction and sale of a vessel as a whole showed that it was not intended that the title thereto should pass at the time, but merely provided for future purchase and sale, the fact that the words used were "have granted, bargained, and sold," could not give it any other meaning.

**1. Construction Fortius Contra Proferentem** — **In Case of Deeds** — *England.* — *Taylor v. Liverpool, etc., Steam Co.*, L. R. 9 Q. B. 546; *Ashworth v. Mounsey*, 9 Exch. 186; *Matter of Stroud*, 8 C. B. 529, 65 E. C. L. 529; *Leech v. Schweder*, L. R. 9 Ch. 463; *Swann v. Tonnereau*, 3 Ves. Jr. 48; *Doe v. Williams*, 1 H. Bl. 26; *Dann v. Spurrier*, 3 B. & P. 399; *Barrett v. Bedford*, 8 T. R. 605; *Bullen v. Denning*, 5 B. & C. 842; *Doe v. Dixon*, 9 East 15; *Stephens v. Frost*, 2 Y. & C. Ch. 302; *Neill v. Devonshire*, 8 App. Cas. 135.

*United States.* — *Douglass v. Lewis*, 131 U. S. 75; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 589; *Thomas v. Hatch*, 3 Sumn. (U. S.) 170; *Smith v. Selden*, 1 Blatchf. (U. S.) 475.

*Alabama.* — *Homer v. Schonfeld*, 84 Ala. 313.

*California.* — *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61; *Vance v. Fore*, 24 Cal. 435; *Piper v. True*, 36 Cal. 606; *Salmon v. Wilson*, 41 Cal. 595; *Hager v. Spect*, 52 Cal. 579.

*Colorado.* — *Brown v. State*, 5 Colo. 496.

*Connecticut.* — *Marshall v. Niles*, 8 Conn. 369; *Bryan v. Bradley*, 16 Conn. 474; *Bushnell v. Ore Bed*, 31 Conn. 150; *Hoyt v. Ketcham*, 54 Conn. 60.

*Illinois.* — *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Sharp v. Thompson*, 100 Ill. 447, 33 Am. Rep. 61; *Peoria, etc., Union R. Co. v. Tamplin*, 156 Ill. 285; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112.

*Iowa.* — *Marshall v. McLean*, 3 Greene (Iowa) 363.

*Kentucky.* — *Gross v. Houchin*, 6 Ky. L. Rep. 442.

*Maine.* — *Lincoln v. Wilder*, 29 Me. 169; *Winslow v. Patten*, 34 Me. 25; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Esty v. Baker*, 50 Me. 331; *Moore v. Griffin*, 22 Me. 350.

*Maryland.* — *Carroll v. Norwood*, 5 Har. & J. (Md.) 155; *Second Universalist Soc. v. Dugan*, 65 Md. 460; *Budd v. Brooke*, 3 Gill (Md.) 198, 43 Am. Dec. 321.

*Massachusetts.* — *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Worthington v. Hylyer*, 4 Mass. 196; *Watson v. Boylston*, 5 Mass. 411; *Ashley v. Pease*, 18 Pick. (Mass.) 268; *Palmer v. Evangelical Baptist Benev., etc., Soc.*, 166 Mass. 143.

*New Hampshire.* — *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305; *Clough v. Bowman*, 15 N. H. 504; *Emerson v. White*, 29 N. H. 492; *Richardson v. Palmer*, 38 N. H. 218; *Sanborn v. Clough*, 40 N. H. 330.

*New Jersey.* — *Dunn v. English*, 23 N. J. L. 126.

*New York.* — *Jackson v. Hudson*, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500; *Jackson v. Gardner*, 8 Johns. (N. Y.) 394; *Jackson v. Blodgett*, 16 Johns. (N. Y.) 172.

*Ohio.* — *White v. Sayre*, 2 Ohio 113.

*Pennsylvania.* — *Beeson v. Patterson*, 36 Pa. St. 24; *Rung v. Shoneberger*, 2 Watts (Pa.) 23, 26 Am. Dec. 95; *Means v. Presbyterian Church*, 3 W. & S. (Pa.) 303. *Compare Hogg's Appeal*, 22 Pa. St. 479.

*Rhode Island.* — *Waterman v. Andrews*, 14 R. I. 589.

*South Carolina.* — *Peay v. Briggs*, 2 Mill (S. Car.) 98, 12 Am. Dec. 656; *Foy v. Neal*, 2 Strobb. L. (S. Car.) 156; *Johnson v. McMillan*, 1 Strobb. L. (S. Car.) 143.

*Vermont.* — *Mills v. Catlin*, 22 Vt. 98.

*Virginia.* — *Carrington v. Goddin*, 13 Gratt. (Va.) 587.

**2. In Leases.** — *Bullen v. Denning*, 5 B. & C. 847; *Windham's Case*, 5 Reports 76; *Manchester College v. Trafford*, 2 Show. 31; *Doe v. Dixon*, 9 East 15; *Johnson v. Edgware, etc.*, L. Co., 35 Beav. 484. See generally the title LEASES.

So where a tenant in fee simple makes a lease of land to have and to hold to the lessee for the term of life, without mentioning whose life, it is to be construed as granting a term for life at the option of the lessee, as an estate for a man's own life is higher than for the life of another. Co. Litt. 42a.

In *Dann v. Spurrier*, 3 B. & P. 399, where an agreement was for a lease "for seven, fourteen, or twenty-one years," it was held that the length of the lease was at the option of the lessee.

**3. In Mortgages.** — *Jerome v. Hopkins*, 2 Mich. 97; *Stuart v. Worden*, 42 Mich. 154. See generally the title MORTGAGES.

**4. Indentures and Deeds Poll.** — *Sheppard's Touchstone* 86; 2 Black. Com. 380.

**5.** See *Richardson v. Palmer*, 38 N. H. 218; *Palmer v. Evangelical Baptist Benev., etc., Soc.*, 166 Mass. 143.

In *Beckwith v. Howard*, 6 R. I. 1, a deed of lease executed by both parties provided



contrary rule prevails, and the construction is in favor of the state<sup>1</sup> unless the grant is based on a consideration moving from the grantee, in which case the grant is, it appears, construed, as is a private grant, in favor of the grantee.<sup>2</sup> The rule of construction against the party using the words has also been frequently applied in the case of contracts,<sup>3</sup> as in the case of policies of insurance, the language of which is considered to be that of the insurer, and

that a gangway found in the lot leased should be kept open for the benefit of that lot and also of the lots adjoining. This clause was held to be obligatory upon both parties, and, consequently, to be construed as the language of both, the court quoting Sheppard's Touchstone to the effect that the words in an indenture may be applied to either party to whom they most properly belong, and that they shall not be taken most strongly against one or beneficially to the other, as would be the words of a deed poll.

**1. Public Grants — England.** — Feather *v.* Reg., 6 B. & S. 203, 118 E. C. L. 203; Leeds, etc., Canal Co. *v.* Hustler, 1 B. & C. 424, 8 E. C. L. 181; Stourbridge Canal Co. *v.* Wheeley, 2 B. & Ad. 792, 22 E. C. L. 185; Barrett *v.* Stockton, etc., R. Co., 2 M. & G. 134, 40 E. C. L. 298; Parker *v.* Great Western R. Co., 7 M. & G. 253, 49 E. C. L. 253; Blakemore *v.* Glamorganshire Canal Nav. Co., 1 Myl. & K. 154; Willion *v.* Berkeley, Plowd. 243; Gildart *v.* Gladstone, 11 East 675.

*United States.* — Rice *v.* Minnesota, etc., R. Co., 1 Black. (U. S.) 358; Minturn *v.* Larue, 23 How. (U. S.) 436.

*Alabama.* — Marion Sav. Bank *v.* Dunkin, 54 Ala. 471.

*California.* — Hostetter *v.* Los Angeles Terminal R. Co., 108 Cal. 38.

*Connecticut.* — Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 222.

*Florida.* — Florida, etc., R. Co. *v.* Pensacola R. Co., 10 Fla. 145.

*Illinois.* — Northwestern Fertilizing Co. *v.* Hyde Park, 70 Ill. 634.

*Kentucky.* — Bowling Green, etc., R. Co. *v.* Warren County Ct., 10 Bush (Ky.) 711.

*New Jersey.* — Passaic, etc., Bridges *v.* Hoboken Land, etc., Co., 13 N. J. Eq. 81.

*New York.* — Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554; Jackson *v.* Reeves, 3 Cai. (N. Y.) 293; People *v.* New York, etc., Ferry Co., 68 N. Y. 71; People *v.* Deehan, 153 N. Y. 528.

*North Carolina.* — Raleigh, etc., R. Co. *v.* Reid, 64 N. Car. 155.

*Ohio.* — State *v.* Boyce, 43 Ohio St. 46.

*Pennsylvania.* — Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355; Dugan *v.* Bridge Co., 27 Pa. St. 303, 67 Am. Dec. 464.

**Illustration.** — In New York *v.* Broadway, etc., R. Co., 97 N. Y. 275, where the charter of a street-railway company authorized it to construct a railroad subject to the payment of the same license fee annually for each car as was paid by other street railroads in the city, it was held that the city was entitled to a fee equal to the highest paid by any company in the city.

**2. Grants Based on Consideration.** — Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 344, 11 Pet. (U. S.) 591; Langdon *v.* New York, 93 N. Y. 129.

**Grants Between Governments.** — In *Indiana v. Milk*, 11 Biss. (U. S.) 197, it was said that a more liberal rule of construction is allowable in interpreting the grant of one state or political community to another than is permitted in interpreting a mere private grant, and this rule was there applied in the case of a grant from the United States to a state government.

**3. In Contracts — England.** — Fitton *v.* Accidental Death Ins. Co., 17 C. B. N. S. 134, 112 E. C. L. 134; Braunstein *v.* Accidental Death Ins. Co., 1 B. & S. 799, 101 E. C. L. 799; Anderson *v.* Fitzgerald, 4 H. L. Cas. 484; Fowkes *v.* Manchester, etc., Assur. Assoc., 32 L. J. Q. B. 153; Stephens *v.* Pell, 2 C. & M. 710; Mayer *v.* Isaac, 6 M. & W. 612; Birrell *v.* Dryer, 51 L. T. N. S. 130; Webb *v.* Plummer, 2 B. & Ald. 752; Hargreave *v.* Smee, 6 Bing. 244, 19 E. C. L. 69; Barton *v.* Fitzgerald, 15 East 530.

*United States.* — Orient Mut., etc., Ins. Co. *v.* Wright, 1 Wall. (U. S.) 486; Garrison *v.* U. S., 7 Wall. (U. S.) 688; Palmer *v.* Warren Ins. Co., 1 Story (U. S.) 369; Noonan *v.* Bradley, 9 Wall. (U. S.) 394; Phoenix Ins. Co. *v.* Slaughter, 12 Wall. (U. S.) 404; Chambers *v.* U. S., 24 Ct. Cl. 387; Simpson *v.* U. S., 31 Ct. Cl. 217; Supreme Council, etc., *v.* Fidelity, etc., Co., 63 Fed. Rep. 48, 22 U. S. App. 439; Davis, etc., Bldg., etc., Co. *v.* Jones, 66 Fed. Rep. 124.

*Alabama.* — Livingston *v.* Arrington, 28 Ala. 424; Seay *v.* McCormick, 68 Ala. 549.

*Illinois.* — Walker *v.* Kimball, 22 Ill. 537; McCarty *v.* Howell, 24 Ill. 343; Aurora F. Ins. Co. *v.* Eddy, 49 Ill. 106; North American F. Ins. Co. *v.* Zaenger, 63 Ill. 464; Commercial Ins. Co. *v.* Robinson, 64 Ill. 265, 16 Am. Rep. 557; Massie *v.* Belford, 68 Ill. 290; Richardson *v.* People, 85 Ill. 495.

*Kansas.* — Graff *v.* Osborne, 56 Kan. 162.

*Louisiana.* — Arnauld *v.* Delachaise, 4 La. Ann. 120; Delogny *v.* Mercer, 43 La. Ann. 205.

*Maine.* — Bartlett *v.* Union Mut. F. Ins. Co., 46 Me. 500.

*Massachusetts.* — Barney *v.* Newcomb, 9 Cush. (Mass.) 46.

*Michigan.* — Wetmore *v.* Pattison, 45 Mich. 439.

*New York.* — Wright *v.* Williams, 20 Hun (N. Y.) 320; Marvin *v.* Stone, 2 Cow. (N. Y.) 806; Hoffman *v.* Aetna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; Rann *v.* Home Ins. Co., 59 N. Y. 389; White *v.* Hoyt, 73 N. Y. 505; Allen *v.* St. Louis Ins. Co., 85 N. Y. 473; Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 8 Am. St. Rep. 758.

*Ohio.* — Webster *v.* Dwelling House Ins. Co., 53 Ohio St. 558, 53 Am. St. Rep. 658.

*Pennsylvania.* — Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Franklin F. Ins. Co. *v.* Brock, 57 Pa. St. 74.

*Rhode Island.* — Wilson *v.* Conway F. Ins. Co., 4 R. I. 156; Deblois *v.* Earle, 7 R. I. 26.

*South Dakota.* — Osborne *v.* Stringham, 4 S. Dak. 593.



hence is construed most strongly in favor of the insured.<sup>1</sup> It is on the same principle that the holder of an instrument which is so ambiguous that it does not clearly appear whether it is a bill of exchange or a promissory note may treat it as either at his election.<sup>2</sup> The rule also applies in the case of contracts of guaranty.<sup>3</sup> On this principle an exception or reservation in a deed or other instrument, being treated as the language of the person in whose favor the exception is made, is construed most strongly against his interest,<sup>4</sup> and so the conditions in a bond are treated as the language of the obligee and construed in favor of the obligor.<sup>5</sup> This rule, however, though frequently applied, has been the subject of unfavorable remark, as one to be applied only in the last resort,<sup>6</sup> and even its existence has been denied by

**Illustrations.**—In *MacAndrews v. Mignano*, 14 U. S. App. 10, a provision in a charter party prepared by the charterers, which was for their benefit, should be, it was held, construed against them in case of ambiguity.

In a **Contract of Sale** a provision that the contract is to be void in case the vendor cannot produce good title is to be construed against the vendor, the writing being considered that of the vendor. *Greaves v. Wilson*, 25 Beav. 290; *Bolton v. Johnston*, 57 Ill. App. 178.

**1. Insurance Contract**—*England*.—*Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Notman v. Anchor Assur. Co.*, 4 C. B. N. S. 481, 93 E. C. L. 481; *Fowkes v. Manchester, etc., L. Assur., etc., Assoc.*, 3 B. & S. 929, 113 E. C. L. 929.

*United States*.—*Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Moulou v. American L. Ins. Co.*, 111 U. S. 335; *American Surety Co. v. Pauly*, 170 U. S. 144.

*Alabama*.—*Alabama Gold L. Ins. Co. v. Johnston*, 8 Ala. 467, 60 Am. Rep. 112.

*California*.—*Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 23 Am. St. Rep. 460.

*Connecticut*.—*Boon v. Ætna Ins. Co.*, 40 Conn. 575.

*Georgia*.—*Northwestern Mut. L. Ins. Co. v. Ross*, 63 Ga. 199.

*Illinois*.—*Healey v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637.

*Indiana*.—*Continental Ins. Co. v. Vanlue*, 126 Ind. 410.

*Kentucky*.—*Phoenix Ins. Co. v. Spiers*, 87 Ky. 285.

*Missouri*.—*Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221.

*New Jersey*.—*Anders v. Supreme Lodge, etc.*, 51 N. J. L. 175.

*New York*.—*Reynolds v. Commerce F. Ins. Co.*, 47 N. Y. 597; *Halpin v. Insurance Co. of North America*, 120 N. Y. 73.

*Pennsylvania*.—*Western Ins. Co. v. Cropper*, 32 Pa. St. 351, 75 Am. Dec. 561; *Humphreys v. National Ben. Assoc.*, 139 Pa. St. 264.

*Tennessee*.—*Hoffman v. Germania Ins. Co.*, 88 Tenn. 735.

*Vermont*.—*Brink v. Merchants, etc., Ins. Co.*, 49 Vt. 442.

*Wisconsin*.—*Shafer v. Phoenix Ins. Co.*, 53 Wis. 361.

See generally the title **INSURANCE**, vol. 16, p. 830.

**2. Bill or Note.**—*Edis v. Bury*, 6 B. & C. 433, 13 E. C. L. 227; *Lloyd v. Oliver*, 18 Q. B. 471, 83 E. C. L. 471; *Forbes v. Marshall*, 11 Exch. 166; *Heise v. Bumpas*, 40 Ark. 547; *Com. v. Butterick*, 100 Mass. 12. See also the

title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 65.

**3. Contracts of Guaranty.**—*Hargreave v. Smee*, 6 Bing. 244, 19 E. C. L. 69; *Mason v. Pritchard*, 12 East 227; *Wood v. Priestner*, L. R. 2 Exch. 70; *Drummond v. Prestman*, 12 Wheat. (U. S.) 515; *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204; *Belloni v. Freeborn*, 63 N. Y. 383. See the title **GUARANTY**, vol. 14, p. 1127.

**4. Exception in Instrument**—*England*.—*Cardigan v. Armitage*, 2 B. & C. 197, 9 E. C. L. 60; *Blackett v. Royal Exch. Assur. Co.*, 2 Crompt. & J. 244; *Bullen v. Denning*, 5 B. & C. 850; *Smith v. Newsam*, Yelv. 189; *Wyndham v. Way*, 4 Taunt. 316; *Lofield's Case*, 10 Coke 107; *Lanyon v. Carne*, 2 Saund. 166.

*United States*.—*Donnell v. Columbian Ins. Co.*, 2 Sumn. (U. S.) 366.

*Iowa*.—*Wiley v. Sirdorus*, 41 Iowa 224.

*New Hampshire*.—*Coheco Mfg. Co. v. Whittier*, 10 N. H. 305.

*New York*.—*Jackson v. Gardner*, 8 Johns. (N. Y.) 406; *Jackson v. Lawrence*, 11 Johns. (N. Y.) 191; *Duryea v. New York*, 62 N. Y. 592; *Ives v. Van Auken*, 34 Barb. (N. Y.) 566.

*Pennsylvania*.—*Klaer v. Ridgway*, 86 Pa. St. 529.

*Vermont*.—*Putnam v. Smith*, 4 Vt. 622.

**Exceptions in Carrier's Contract.**—*Wilson v. Xantho*, 12 App. Cas. 503; *Hudson v. Ede*, L. R. 2 Q. B. 566; *Burton v. English*, 12 Q. B. D. 218; *Edsall v. Camden, etc., R., etc., Co.*, 50 N. Y. 661; *Babcock v. Lake Shore, etc., R. Co.*, 49 N. Y. 491; *Duryea v. New York*, 62 N. Y. 592.

**5. Conditions in Bond Construed Favorably to Obligors.**—*Butler v. Wigge*, 1 Saund. 65; *Chicago, etc., R. Co. v. Aurora*, 99 Ill. 205; *Ben-nehau v. Webb*, 6 Ired. L. (28 N. Car.) 57.

**6. Rule One of Last Resort.**—*Patterson v. Gage*, 11 Colo. 50; *Swan v. Morehouse*, 6 D. C. 225; *Falley v. Giles*, 29 Ind. 114; *Carroll v. Granite Mfg. Co.*, 11 Md. 411; *Varnum v. Thruston*, 17 Md. 496; *Biddle v. Vandever*, 26 Mo. 500; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; *Adams v. Warner*, 23 Vt. 395.

Chancellor Kent says: "The rule that the language of a deed or contract is to be taken most strongly against the party using it \* \* \* applies only to cases of ambiguity in the words, or where the exposition is requisite to give them lawful effect. It is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail. The modern and more reasonable practice is to give to the language its just sense, and to search for the precise meaning, and one requisite to



a leading English judge.<sup>1</sup>

**Promisee's Understanding of Contract.** — A principle of construction apparently analogous to that above referred to is stated in some cases, to the effect that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee.<sup>2</sup> The principle is, however, properly applicable only, it seems, when the promisor used words which can be rationally construed as expressing the sense which the promisee attached to them.<sup>3</sup>

**VII. CONSTRUCTION IN FAVOR OF INSTRUMENT** — 1. **Validity of Instrument.** — Where the language of an instrument is susceptible of two constructions, one of which will render it valid and the other invalid, the former will be adopted.<sup>4</sup>

give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction." 2 Kent's Com. 556.

1. **Existence of Rule Denied.** — In *Taylor v. St. Helens*, 6 Ch. D. 264, Jessel, M. R., said: "I do not see how, according to the now established rules of construction, as settled by the House of Lords in the well-known case of *Grey v. Pearson*, 6 H. L. Cas. 61, followed by *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, and *Abbott v. Middleton*, 7 H. L. Cas. 68, that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favor of the grantor, for the grant is annulled."

But in a Later Case, in the court of appeal, the rule was discussed as being in full force in the case of a contract. See *Birrell v. Dryer*, 9 App. Cas. 345, 51 L. T. N. S. 130.

2. **Promisor's Knowledge of Promisee's Understanding of Contract** — *England*. — *Mowatt v. Londesborough*, 3 El. & Bl. 307, 77 E. C. L. 307.

*Illinois*. — *Wells v. Carpenter*, 65 Ill. 447; *Street v. Chicago Wharfing, etc., Co.*, 157 Ill. 605.

*Michigan*. — *Thoubboron v. Lewis*, 43 Mich. 639, 38 Am. Rep. 218.

*Missouri*. — *Farley v. Pettes*, 5 Mo. App. 262.

*Nebraska*. — *Schroeder v. Nielson*, 39 Neb. 335.

*New York*. — *Potter v. Ontario, etc., Mut. Ins. Co.*, 5 Hill. (N. Y.) 149; *White v. Hoyt*, 73 N. Y. 511; *Barlow v. Scott*, 24 N. Y. 40; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Sherwood v. Crane*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 83.

*Ohio*. — *Chamberlain v. Painesville, etc., R. Co.*, 15 Ohio St. 225.

*Pennsylvania*. — *Williamson v. McClure*, 37 Pa. St. 402.

*Vermont*. — *Gunnison v. Bancroft*, 11 Vt. 490.

For discussion of the origin of the rule as derived from works on moral philosophy, see *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87.

**Statutory Provisions.** — In some jurisdictions the rule stated in the text has been declared by statute. Code Ga. (1895), § 3674; *Hill v. John P. King Mfg. Co.*, 79 Ga. 105; Code Iowa

(1897), § 4617; *Patton v. Arney*, 95 Iowa 664; *Hopwood v. Corbin*, 63 Iowa 218; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67; *Chicago Lumber Co. v. Tibbles Mfg. Co.*, 80 Iowa 369; *Evans v. McConnell*, 99 Iowa 326; *Rouss v. Creglow*, 103 Iowa 60. See also the various local statutes.

3. **Limitation of Rule.** — *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87. So in *Johnson v. Sellers*, 33 Ala. 265, it was decided that one elected as principal of a school was not bound to bring his wife with him merely because he accepted the office with the knowledge that the trustees expected him to bring her.

4. **Construed So as to Avoid Invalidity** — *England*. — *Pugh v. Leeds*, 2 Cowp. 714.

*Illinois*. — *Easton v. Mitchell*, 21 Ill. App. 189.

*Michigan*. — *Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699.

*Mississippi*. — *Merrill v. Melchior*, 30 Miss. 516.

*New Jersey*. — *Pitney v. Bolton*, 45 N. J. Eq. 639.

*New York*. — *Post v. Hover*, 33 N. Y. 593; *Coyne v. Weaver*, 84 N. Y. 386.

*South Carolina*. — *Carter v. King*, 11 Rich. L. (S. Car.) 125.

Thus in *Haigh v. Brooks*, 10 Ad. & El. 309, 37 E. C. L. 108, where a document stated that it was given "in consideration of your being in advance," it was held that these words should be construed not as indicating a past consideration, but as being equivalent to "in consideration of your becoming in advance" or "on condition of your being in advance."

And in *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682, an assignment was of a note against certain persons named "for one hundred and fifty dollars, payable in one year from date with use for value received." It was held that the words "for value received" were to be construed as not merely descriptive of the note, though they occurred therein, but that they were to be considered part of the assignment, importing a sufficient legal consideration therefor.

**Statute of Frauds.** — And where one construction would render the contract invalid under the statute of frauds, another construction will be preferred. *Adams v. Adams*, 26 Ala. 272; *Phipps v. McFarlane*, 3 Minn. 109, 74 Am. Dec. 743.

**Description in Deed.** — So where a description in a deed can possibly be construed so as to render the deed effective, it will be done. See the title **BOUNDARIES**, vol. 4, p. 756.



2. **Legality of Instrument.** — Likewise an instrument will be construed, if possible, as being made for a legal rather than for an illegal purpose.<sup>1</sup>

3. **Effectiveness of Instrument.** — A construction will be avoided, if possible, which will render the instrument frivolous and ineffectual, it being presumed that the parties intended the instrument to have some operation.<sup>2</sup>

4. **Avoidance of Forfeiture.** — An analogous rule is that a writing will be construed so as to avoid a forfeiture of rights thereunder, since forfeitures are not favored in the law.<sup>3</sup>

**VIII. REASONABLE AND EQUITABLE CONSTRUCTION PREFERRED.** — A construction is to be placed on a document such as will render it reasonable rather than unreasonable, and just to both the parties rather than unjust.<sup>4</sup>

1. **Instrument to Be Construed So as to Avoid Illegality** — *England*. — *Shore v. Wilson*, 9 Cl. & F. 355.

*United States*. — *Hobbs v. McLean*, 117 U. S. 569; *U. S. v. Central Pac. R. Co.*, 118 U. S. 235; *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

*Connecticut*. — *Hamden v. Merwin*, 54 Conn. 418.

*Illinois*. — *Crittenden v. French*, 21 Ill. 598.

*Indiana*. — *Hunt v. Elliott*, 80 Ind. 249, 41 Am. Rep. 794.

*Iowa*. — *Alfree v. Gates*, 82 Iowa 19.

*Louisiana*. — *Steinspring v. Bennett*, 16 La. Ann. 201.

*Massachusetts*. — *Guernsey v. Cook*, 120 Mass. 501.

*New Jersey*. — *Pitney v. Bolton*, 45 N. J. Eq. 639.

*New York*. — *Archibald v. Thomas*, 3 Cow. (N. Y.) 284; *Curtis v. Gokey*, 68 N. Y. 304; *Lorillard v. Clyde*, 86 N. Y. 384; *Powers v. Clarke*, 127 N. Y. 417.

*Tennessee*. — *Atlanta Guano Co. v. Phipps*, (Tenn. Ch. 1897) 41 S. W. Rep. 1087.

*Wisconsin*. — *Watters v. McGuigan*, 72 Wis. 155.

See also the title **ILLEGAL CONTRACTS**, vol. 15, p. 927.

2. **Construction in Favor of Effectiveness** — *England*. — *Collis v. Emett*, 1 H. Bl. 313; *Russell v. Phillips*, 14 Q. B. 891, 68 E. C. L. 891.

*United States*. — *Watts v. Camors*, 10 Fed. Rep. 145; *In re Dunkerson*, 4 Biss. (U. S.) 227.

*California*. — *Saunders v. Clark*, 29 Cal. 299.

*Connecticut*. — *Brown v. Slater*, 16 Conn. 192,

41 Am. Dec. 136.

*Illinois*. — *Peckham v. Haddock*, 36 Ill. 38;

*Field v. Leiter*, 118 Ill. 17; *Shreffler v. Nadel-*

*hoffer*, 133 Ill. 537, 23 Am. St. Rep. 626.

*Indiana*. — *Cravens v. Eagle Cotton Mills*

*Co.*, 120 Ind. 6, 16 Am. St. Rep. 298.

*North Carolina*. — *Hunter v. Anthony*, 8

*Jones L.* (53 N. Car.) 385, 80 Am. Dec. 333.

*Pennsylvania*. — *Coder v. Huling*, 27 Pa.

*St.* 84.

*Texas*. — *Cleveland v. Sims*, 69 Tex. 153.

*Virginia*. — *Cobbs v. Fountaine*, 3 Rand.

(Va.) 487.

*Wisconsin*. — *Redman v. Hartford F. Ins.*

*Co.*, 47 Wis. 89, 32 Am. Rep. 751.

3. **Construction So as to Avoid Forfeiture** —

*England*. — *Francis v. Minton*, L. R. 2 C. P. 543.

*United States*. — *Adams v. Valentine*, 33 Fed.

*Rep.* 1.

*Illinois*. — *Board of Education v. Normal*

*First Baptist Church*, 63 Ill. 204.

*Maine*. — *Osgood v. Abbott*, 58 Me. 74.

*Massachusetts*. — *Merrifield v. Cobleigh*, 4

*Cush.* (Mass.) 178; *Hadley v. Hadley Mfg.*

*Co.*, 4 Gray (Mass.) 140.

*New York*. — *Pirsson v. Arkenburgh*, 57 N.

*Y. Super. Ct.* 474; *Lyon v. Hersey*, 103 N. Y.

264; *Jackson v. Silvernail*, 15 Johns. (N. Y.)

278.

*Ohio*. — *State v. Boyce*, 43 Ohio St. 46.

*Pennsylvania*. — *Paschall v. Passmore*, 15

*Pa. St.* 295; *Helme v. Philadelphia L. Ins.*

*Co.*, 61 Pa. St. 107, 100 Am. Dec. 621.

*Wisconsin*. — *Jacobs v. Spalding*, 71 Wis.

177.

See also the title **CONDITIONS**, vol. 6, p. 499.

**Insurance Contracts.** — This rule is applied in

the case of insurance contracts.

*Indiana*. — *Northwestern Mut. L. Ins. Co.*

*v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192;

*Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7.

*New Jersey*. — *Carson v. Jersey City Ins.*

*Co.*, 43 N. J. L. 300, 39 Am. Rep. 584.

*New York*. — *Clinton v. Hope Ins. Co.*, 45

N. Y. 454.

*Ohio*. — *West v. Citizens' Ins. Co.*, 27 Ohio



**IX. VERBAL AND CLERICAL MISTAKES — 1. In General.** — It is now generally agreed that courts of law or of equity may correct, merely as a matter of construction, obvious mistakes of a verbal or clerical character, so as to bring all parts of the instrument into harmony with the manifest intent of the parties as gathered from the instrument itself, since greater regard is to be paid to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.<sup>1</sup>

**2. Words Omitted May Be Supplied.** — Accordingly, in order to effectuate the intention of the parties, words omitted from an instrument may be supplied if the context clearly shows what was intended.<sup>2</sup>

**3. Repugnant Words May Be Rejected.** — Likewise, words which are repugnant to the expressed intent of the parties may be rejected if it is impossible to reconcile them with the context.<sup>3</sup>

*Steamboat Co.*, 51 Mich. 558, it was held that a contract for the transportation of goods by steamboat, the rates for which were higher than by sail, would not authorize a carrier, at his option, and without good cause arising from unforeseen contingencies, to forward the shipment by sail, merely because the contract contained a stipulation that it might be carried or forwarded by different means or routes of transportation, since it would be unreasonable to presume that the shipper would contract to pay a higher rate for the more desirable mode of transportation and leave it to the carrier to furnish a less desirable mode.

**Contract for Services.** — In *Coghlan v. Stetson*, 19 Fed. Rep. 727, a contract for the services of an actor which provided that he should be paid a certain amount for each performance in which he should appear was held to bind the employer to furnish him opportunity to appear at his regular performances, since it would be unreasonable to hold the employee bound and not the employer.

**Promise to Pay Debt.** — In *Tebo v. Robinson*, 100 N. Y. 27, it was held that a promise of one to pay a debt "the moment I am able to pay it" was to be reasonably interpreted, and that it did not require him to pay, although in possession of property sufficient for the purpose, if he was plainly insolvent or if payment would strip him of his means of support.

**1. Verbal and Clerical Mistakes.** — *Ford v. Beech*, 11 Q. B. 866, 63 E. C. L. 866; *Wilson v. Wilson*, 5 H. L. Cas. 66; *Field v. Leiter*, 118 Ill. 17; *Street v. Chicago Wharfing, etc., Co.*, 157 Ill. 613; *Weed v. Abbott*, 51 Vt. 609.

**2. Words Supplied to Effectuate Intention** — *England.* — *In re Bird*, 3 Ch. D. 214; *Bustard v. Coulter*, Cro. Eliz. 902; *In re Daniel*, 1 Ch. D. 375; *Waugh v. Bussell*, 5 Taunt. 707, 1 E. C. L. 241; *Hanbury v. Tyrell*, 21 Beav. 322; *In re Redfern*, 6 Ch. D. 133; *Smith v. Oakes*, 14 Sim. 122; *Phipps v. Tanner*, 5 C. & P. 488, 24 E. C. L. 421.

*Georgia.* — *Atlanta, etc., R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305.

*Maine.* — *Scamman v. Sawyer*, 4 Me. 429

*Minnesota.* — *Butler v. Bohn*, 31 Minn. 325; *Gran v. Spangenberg*, 53 Minn. 42.

*Virginia.* — *Harman v. Howe*, 27 Gratt. (Va.) 676.

*West Virginia.* — *Liston v. Jenkins*, 2 W. Va. 62.

**Illustrations.** — In *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am. St.

Rep. 626, where a contract for the erection of a grand stand at a race course provided for the payment by the contractor of one hundred dollars for every day that he should be in default in case he "shall to fully and entirely" complete the work, it was held that the word "fail" should be supplied before "to."

In *Dodd v. Mitchell*, 77 Ind. 388, a lease in which the parties of the second part agreed "to pay \$4.50 per acre, and the first payment to be due the 25th day of December, 1875, and the balance to be paid yearly thereafter," was read so as to require the "yearly" payment of the sum named.

**The Name of the Grantor** has accordingly been supplied in the operative part of a deed. *Say's Case*, 10 Mod. 40; *Trethewy v. Ellesdon*, 2 Vent. 141; *Mardes v. Meyers*, 8 Tex. Civ. App. 542. And see *Mill v. Hill*, 3 H. L. Cas. 828.

**Description in Deed.** — A word may be supplied in the description in a deed to conform to the evident intent. *Burnett v. McCluey*, 78 Mo. 676; *Hoffman v. Riehl*, 27 Mo. 554; *Montgomery v. Carlton*, 56 Tex. 431. In *Deal v. Cooper*, 94 Mo. 62, the call "east with" was read as "east parallel with."

**3. Repugnant Words Rejected** — *England.* — *Gwyn v. Neath Canal Nav. Co.*, L. R. 3 Exch. 215; *Strickland v. Maxwell*, 2 C. & M. 539; *Wilson v. Wilson*, 15 Sim. 487; *Belcher v. Sikes*, 8 B & C. 185, 15 E. C. L. 186.

*Illinois.* — *Chicago, etc., R. Co. v. Bartlett*, 120 Ill. 603.

*Kentucky.* — *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) 192.

*Maryland.* — *Dulany v. Middleton*, 72 Md. 67.

*Massachusetts.* — *Wade v. Howard*, 6 Pick. (Mass.) 492; *Fowle v. Bigelow*, 10 Mass. 379; *Manufacturers' F. & M. Ins. Co. v. Western Assur. Co.*, 145 Mass. 419.

*Missouri.* — *State v. McElhaney*, 20 Mo. App. 584.

*New Hampshire.* — *Holbrook v. Bowman*, 62 N. H. 313.

*New York.* — *Jackson v. Loomis*, 18 Johns. (N. Y.) 81.

*Ohio.* — *Mintier v. Mintier*, 28 Ohio St. 307.

*Vermont.* — *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363.

**Description in Deed.** — False particulars in the description in a deed are to be rejected. *Doe v. Galloway*, 5 B. & Ad. 43, 27 E. C. L. 28; *Cleaveland v. Smith*, 2 Story (U. S.) 278; *Emerson v. White*, 29 N. H. 482; *Brookman v. Kurzman*, 94 N. Y. 272; *Loomis v. Jackson*,



4. **Substitution of Words.** — On the same principle one word will be substituted for another which is plainly erroneous, this being in effect merely the giving to a word the meaning called for by the context.<sup>1</sup>

5. **False Grammar.** — Grammatical inaccuracies are immaterial, provided the intention appears.<sup>2</sup> Accordingly, though a relative word is generally considered to refer to its nearest antecedent,<sup>3</sup> this rule does not apply if the intention appears to be otherwise.<sup>4</sup>

6. **Incorrect Spelling.** — Incorrect spelling is likewise disregarded.<sup>5</sup>

**X. PUNCTUATION.** — The punctuation of an instrument may be considered when the meaning is doubtful,<sup>6</sup> but it cannot control if the meaning otherwise plainly appears.<sup>7</sup> In order to arrive at the meaning of the parties, proper

19 Johns. (N. Y.) 452. See also the title *BOUNDARIES*, vol. 4, p. 756.

1. **Substitution of Words** — *England*. — Wilson v. Wilson, 5 H. L. Cas. 40.

*California*. — Sprague v. Edwards, 48 Cal. 239. *Illinois*. — Hurt v. McCartney, 18 Ill. 129; Stow v. Steel, 45 Ill. 328; Calumet, etc., Canal, etc., Co. v. Russell, 68 Ill. 426.

*Massachusetts*. — Huntington v. Lyman, 138 Mass. 205.

*Missouri*. — State v. McElhaney, 20 Mo. App. 584.

See also *supra*, this title, *Meaning of Words and Phrases* — *Arbitrary Meaning Given by Parties*.

**Illustrations.** — In Fowler v. Woodward, 26 Minn. 347, where a mortgage provided for the payment of annual interest, and contained a power to sell in case of default in the payment of any of the instalments of interest due "quarterly," it was held that the word "quarterly" should be read as meaning "annually."

"And" and "Or" have been so construed as to give to one the meaning of the other. Maynard v. Wright, 26 Beav. 285; Wright v. Kemp, 3 T. R. 470; Brittin v. Mitchell, 4 Ark. 92; Tennell v. Ford, 30 Ga. 707; Litchfield v. Cudworth, 15 Pick. (Mass.) 23; White v. Crawford, 10 Mass. 183; Jackson v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; Loyd v. Lynchburg Nat. Bank, 86 Va. 690.

**Substitution of Names.** — So one name has been substituted for another where it was obvious from the context that a mistake had been made. Wilson v. Wilson, 5 H. L. Cas. 66.

In Richmond v. Woodard, 32 Vt. 833, a bond executed by one W. as principal, and others as sureties, contained a condition which, after reciting that the said W. had been appointed deputy sheriff, proceeded, "Now if the said M. shall" save the said sheriff harmless, etc. It was held that the bond should be construed as if the name of W. had been written therein in place of M., the name M. not occurring elsewhere in the bond, and being evidently a mere clerical error.

**Description of Parties.** — In Sisson v. Donnelly, 36 N. J. L. 432, where a tripartite deed in terms conveyed the land to the "party of the second part," and the intention was clearly to convey it to the "party of the third part," the deed was construed in accordance with such intention.

And so "party of the first part" has been read as "party of the second part." Russell v. Merrifield, 131 Ind. 148; Huyler v. Atwood, 26 N. J. Eq. 504; Fairchild v. Lynch, 42 N. Y. Super. Ct. 265.

**Calls in Description.** — So "north" in a description has been read "south." Barnard v. Russell, 19 Vt. 334; Cornell v. Green, 88 Fed. Rep. 821.

2. **Grammatical Inaccuracy Immaterial** — *England*. — Cromwell v. Grumsden, 1 Ld. Raym. 335; Fountain v. Guavars, 2 Show. 333; Langdon v. Goole, 3 Lev. 21.

*California*. — Hancock v. Watson, 18 Cal. 137; Sprague v. Edwards, 48 Cal. 239.

*Illinois*. — Northrup v. Smothers, 39 Ill. App. 588.

*Michigan*. — Newton v. McKay, 29 Mich. 1. *New Hampshire*. — Nettleton v. Billings, 13 N. H. 446.

*New York*. — Jackson v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515.

*North Carolina*. — Kea v. Robeson, 5 Ired. Eq. (40 N. Car.) 373; Hicks v. Bullock, 96 N. Car. 164.

*Pennsylvania*. — Knisely v. Shenberger, 7 Watts (Pa.) 193.

*Vermont*. — Gray v. Clark, 11 Vt. 583.

*West Virginia*. — Ketchum v. Spurlock, 34 W. Va. 597.

3. **Relative Words Refer to Nearest Antecedent.** — Bold v. Molineux, 1 Dyer 146; Rex v. St. Mary's, 1 B. & Ald. 327; Baring v. Christie, 5 East 398.

4. **Intention Governs.** — Guier's Case, 1 Dyer 466; Carbonel v. Davies, 1 Stra. 394; Staniland v. Hopkins, 9 M. & W. 178; Doe v. Dodd, 5 B. & Ad. 689, 27 E. C. L. 157; Nettleton v. Billings, 13 N. H. 446.

So where a contract for the sale of a timepiece contained a clause, "which I warrant to keep good time, if well used, ninety days; if not, to furnish one that will, of the same kind," it was held that the qualification "if well used," though grammatically applicable only to the first timepiece, should be construed as applying also to one subsequently furnished in place of it. Morey v. Homan, 10 Vt. 565.

5. **Incorrect Spelling Immaterial.** — Hogans v. Carruth, 19 Fla. 90; Huntington v. Lyman, 138 Mass. 205; Watters v. Bredin, 70 Pa. St. 237. And see the title *SPELLING*.

6. **Punctuation.** — Ewing v. Burnet, 11 Pet. (U. S.) 41; Joy v. St. Louis, 138 U. S. 1, 45 Am. & Eng. R. Cas. 655, 29 Fed. Rep. 546; Olivet v. Whitworth, 82 Md. 258; Rhein's Appeal, (Pa. 1887) 8 Atl. Rep. 862. See also the title *STATUTES*.

7. **Ineffective as Against Plain Meaning of Instrument.** — Ewing v. Burnet, 11 Pet. (U. S.) 41; Osborn v. Farwell, 87 Ill. 89, 29 Am. Rep. 47; Hawes v. Sternheim, 57 Ill. App. 126; Lyles v. Lescher, 108 Ind. 382; Allen's Succes-



punctuation marks may be inserted by the court in construing the instrument.<sup>1</sup>

**XI. WRITTEN MATTER CONTROLS PRINTED.** — Where an instrument consists partly of printed words, constituting a regular form, and partly of written words inserted therein, the latter will, in case of repugnancy, be given greater weight in the construction of the contract, on the theory that language selected by the parties themselves is more in harmony with their intention than printed words, which are frequently not even read by them.<sup>2</sup> But if the written and printed matter can possibly be reconciled this will be done, it being presumed that the instrument contains no clauses not intended by the parties.<sup>3</sup>

**XII. SURROUNDING CIRCUMSTANCES.** — In interpreting a writing, the court, in order to determine its meaning, will consider all the facts and circumstances attending its execution.<sup>4</sup> Among the circumstances so considered are the

sion, 48 La. Ann. 1036; *Weatherly v. Mister*, 39 Md. 620; *Arcularius v. Sweet*, 25 Barb. (N. Y.) 406; *Kinkele v. Wilson*, 151 N. Y. 269; *Bunn v. Wells*, 94 N. Car. 67; *White v. Smith*, 33 Pa. St. 186, 75 Am. Dec. 589; *Ketchum v. Spurlock*, 34 W. Va. 597.

**1. Punctuation Marks May Be Inserted.** — *English v. McNair*, 34 Ala. 40; *Seay v. McCormick*, 68 Ala. 549; *Doe v. Martin*, 4 T. R. 65; *Burgess v. Badger*, 124 Ill. 288.

**2. Written Matter Controls Printed** — *England*. — *Joyce v. Realm Marine Ins. Co.*, L. R. 7 Q. B. 580; *Moore v. Harris*, 45 L. J. P. C. 55; *Alsager v. St. Katherine's Dock Co.*, 14 M. & W. 796.

*United States*. — *Sturm v. Boker*, 150 U. S. 312; *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatchf. (U. S.) 317.

*Alabama*. — *Thornton v. Sheffield*, etc., R. Co., 84 Ala. 109, 5 Am. St. Rep. 337.

*Illinois*. — *American Express Co. v. Pinckney*, 29 Ill. 392; *People v. Dulaney*, 96 Ill. 503; *Loveless v. Thomas*, 152 Ill. 479; *Chicago v. Weir*, 165 Ill. 582; *Holmes v. Parker*, 25 Ill. App. 225, affirmed 125 Ill. 478.

*Iowa*. — *McNear v. McComber*, 18 Iowa 17; *Rush v. Carpenter*, 54 Iowa 132.

*Maine*. — *Cushman v. Northwestern Ins. Co.*, 34 Me. 487.

*Michigan*. — *Russell v. Bondie*, 51 Mich. 76; *Mansfield Mach. Works v. Lowell*, 62 Mich. 546.

*Minnesota*. — *Ortt v. Minneapolis*, etc., R. Co., 36 Minn. 396; *Murray v. Pillsbury*, 59 Minn. 85.

*Nebraska*. — *Union Pac. R. Co. v. Graddy*, 25 Neb. 849.

*New York*. — *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Harper v. New York City Ins. Co.*, 22 N. Y. 447; *Benedict v. Ocean Ins. Co.*, 31 N. Y. 397; *Reynolds v. Commerce F. Ins. Co.*, 47 N. Y. 597; *Hill v. Miller*, 76 N. Y. 32; *Clark v. Woodruff*, 83 N. Y. 518; *Chadsey v. Guion*, 97 N. Y. 333; *Hutt v. Zimmer*, 78 Hun (N. Y.) 23; *Weisser v. Maitland*, 3 Sandf. (N. Y.) 322; *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385.

*North Carolina*. — *Millhiser v. Erdmann*, 103 N. Car. 27.

*Ohio*. — *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33.

*Pennsylvania*. — *Duffield v. Hue*, 129 Pa. St. 94; *Dick v. Ireland*, 130 Pa. St. 299; *Heller's Estate*, 6 Pa. Super. Ct. 246.

*Vermont*. — *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687; *Cummings v. Dearborn*, 56 Vt. 447.

**Reason of Rule.** — In *Joyce v. Realm Marine Ins. Co.*, L. R. 7 Q. B. 580, Blackburn, J., said: "The ordinary and general rule in the case of a policy of insurance, of course, is that we must construe the policy as we find it; it is in a printed form, with written parts introduced into it, and we are to take the whole together, both the written and the printed parts. Although it has sometimes been endeavored to be argued that we ought to bestow no more attention on the written parts than on the printed parts, which are uniform in most policies of insurance, there is no doubt that we do, and ought to, make a difference between them. The part that is specially put into a particular instrument is naturally more in harmony with what the parties are intending than the other, although it must not be used to reject the other or to make it have no effect."

**3. Written and Printed Matter Reconciled if Possible** — *England*. — *Horsley v. Price*, 11 Q. B. D. 244; *Jessel v. Bath*, L. R. 2 Exch. 267; *Cross v. Pagliano*, L. R. 6 Exch. 9; *Alsager v. St. Katherine's Dock Co.*, 14 M. & W. 794.

*Alabama*. — *Bolman v. Lohman*, 79 Ala. 63; *Piedmont Land, etc. Co. v. Thomson-Houston Motor Co.*, (Ala. 1892) 12 So. Rep. 769.

*Illinois*. — *Wallwork v. Derby*, 40 Ill. 527.

*Louisiana*. — *Hunter v. General Ins. Co.*, 11 La. Ann. 139.

*New York*. — *Hill v. Miller*, 76 N. Y. 32; *Hutt v. Zimmer*, 78 Hun (N. Y.) 23; *Miller v. Hannibal*, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179.

*Pennsylvania*. — *Wheeling*, etc., R. Co. v. *Gourley*, 99 Pa. St. 171.

**4. Surrounding Circumstances** — *United States*. — *U. S. v. Peck*, 102 U. S. 65; *Merriam v. U. S.*, 107 U. S. 437; *U. S. v. Gibbons*, 109 U. S. 200; *Chicago*, etc., R. Co. v. *Denver*, etc., R. Co., 143 U. S. 596; *Nash v. Towne*, 5 Wall. (U. S.) 689; *Cavazos v. Trevino*, 6 Wall. (U. S.) 773; *Van Epps v. Walsh*, 1 Woods (U. S.) 598; *Hamm v. San Francisco*, 17 Fed. Rep. 119; *Waring v. Louisville*, etc., R. Co., 19 Fed. Rep. 863.

*Alabama*. — *Crass v. Scruggs*, 115 Ala. 258.

*California*. — *Stanley v. Green*, 12 Cal. 148; *Mulford v. Le Franc*, 26 Cal. 88; *Saunders v. Clark*, 29 Cal. 299; *Piper v. True*, 36 Cal. 606; *Pio Pico v. Coleman*, 47 Cal. 65; *Sprague v. Edwards*, 48 Cal. 239; *Wade v. Deray*, 50 Cal. 376; *Truett v. Adams*, 66 Cal. 218; *Grennan v. McGregor*, 78 Cal. 258.

*Colorado*. — *Union Pac. R. Co. v. Anderson*, 11 Colo. 293.

*Connecticut*. — *Brown v. Slater*, 16 Conn. 192,



relations of the parties,<sup>1</sup> the nature and situation of the subject-matter,<sup>2</sup> and the apparent purpose of making the instrument or contract in question.<sup>3</sup>

41 Am. Dec. 136; *Strong v. Benedict*, 5 Conn. 210; *Goodyear v. Shanahan*, 43 Conn. 204.

*Illinois*. — *Hadden v. Shoutz*, 15 Ill. 581; *Torrence v. Shedd*, 156 Ill. 194; *Ferry v. Miltimore*, 64 Ill. App. 557; *Field v. Leiter*, 118 Ill. 17; *Louisville, etc., R. Co. v. Koelle*, 104 Ill. 455.

*Indiana*. — *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 16 Am. St. Rep. 298; *H. G. Olds Wagon Works v. Coombs*, 124 Ind. 62.

*Iowa*. — *Des Moines County v. Hinkley*, 62 Iowa 337.

*Kansas*. — *Simpson v. Kimberlin*, 12 Kan. 579; *Bell v. Rankin*, 1 Kan. App. 209.

*Maine*. — *Treat v. Strickland*, 23 Me. 234; *Bradford v. Cressey*, 45 Me. 9; *Abbott v. Abbott*, 53 Me. 356.

*Maryland*. — *Zimmer v. Miller*, 64 Md. 296; *Baltimore, etc., R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318.

*Massachusetts*. — *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Stoops v. Smith*, 100 Mass. 63, 1 Am. Rep. 85; *Coogan v. Burling Mills*, 124 Mass. 390; *Miller v. Stevens*, 100 Mass. 518, 1 Am. Rep. 139; *Farnsworth v. Boardman*, 131 Mass. 115; *Butterworth v. Western Assur. Co.*, 132 Mass. 489; *Norway Plains Sav. Bank v. Moors*, 134 Mass. 129; *Aldrich v. Aldrich*, 135 Mass. 153; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226.

*Michigan*. — *Spaulding v. Coon*, 50 Mich. 622; *Ferris v. Wilcox*, 51 Mich. 105, 47 Am. Rep. 551; *Newaygo Mfg. Co. v. Chicago, etc., R. Co.*, 64 Mich. 114.

*Minnesota*. — *Grueber v. Lindenmeier*, 42 Minn. 99.

*Mississippi*. — *Pratt v. Canton Cotton Co.*, 51 Miss. 470.

*Missouri*. — *Patterson v. Camden*, 25 Mo. 13; *Belch v. Miller*, 32 Mo. App. 387; *Crawford v. Elliott*, 78 Mo. 497.

*New Hampshire*. — *Lane v. Thompson*, 43 N. H. 320; *Winnipisseege Lake Cotton, etc., Mfg. Co. v. Perley*, 46 N. H. 83.

*New Jersey*. — *Morris Canal, etc., Co. v. Matthiesen*, 17 N. J. Eq. 385; *Dunn v. English*, 23 N. J. L. 126.

*New York*. — *French v. Carhart*, 1 N. Y. 96; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Knapp v. Warner*, 57 N. Y. 668; *White's Bank v. Myles*, 73 N. Y. 335, 29 Am. Rep. 157; *Union Trust Co. v. Whiton*, 97 N. Y. 172; *Kingsland v. New York*, 45 Hun (N. Y.) 198; *Bickett v. Taylor*, (Supm. Ct. Gen. T.) 55 How. Pr. (N. Y.) 126; *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335; *Stapenhorst v. Wolff*, 35 N. Y. Super. Ct. 25; *Lyon v. Hersey*, 103 N. Y. 264.

*Ohio*. — *Oldham v. Broom*, 28 Ohio St. 41; *Dayton v. Hooglund*, 39 Ohio St. 671.

*Oregon*. — *Weiler v. Henarie*, 15 Oregon 28.

*Pennsylvania*. — *Lacy v. Green*, 84 Pa. St. 518; *Thayer's Appeal*, (Pa. 1887) 8 Cent. Rep. 479, 9 Atl. Rep. 498; *Erwin v. Hoch*, (Pa. 1887) 9 Cent. Rep. 678, 12 Atl. Rep. 149, 20 W. N. C. (Pa.) 278.

*South Carolina*. — *Foy v. Neal*, 2 Strobb. L. (S. Car.) 156.

*Texas*. — *Watrous v. McKie*, 54 Tex. 65.

*Vermont*. — *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864.

*West Virginia*. — *Heatherley v. Farmers' Bank*, 31 W. Va. 70; *Scraggs v. Hill*, 37 W. Va. 706; *Shrewsbury v. Tufts*, 41 W. Va. 212.

*Illustrations*. — While the first legal tender case was pending in the United States Supreme Court, a contract was made containing a stipulation that the parties should be bound by any decision thereafter rendered in regard to legal tender notes by that court; and it was decided that the pendency of such case was a circumstance with reference to which the contract was made, and that therefore the parties were bound by the decision rendered in that case and not by the subsequent decision by which it was overruled. *Woodruff v. Woodruff*, 52 N. Y. 53.

*Penalty or Liquidated Damages*. — So it has been decided that whether damages fixed by a contract for failure to perform it are to be regarded as in the nature of a penalty or as liquidated damages is to be determined from the language of the contract construed in the light of the nature and circumstances of the case. *Colwell v. Lawrence*, 38 N. Y. 71; *Little v. Banks*, 85 N. Y. 258; *Noyes v. Phillips*, 60 N. Y. 408.

*1. Relation of Parties*. — *England*. — *Humfrey v. Dale*, 7 El. & Bl. 266, 90 E. C. L. 266.

*Alabama*. — *Crass v. Scruggs*, 115 Ala. 258.

*Illinois*. — *Hall v. Emporia First Nat. Bank*, 133 Ill. 234.

*Massachusetts*. — *Farnsworth v. Boardman*, 131 Mass. 115; *Dwellely v. Dwellely*, 143 Mass. 509.

*New Hampshire*. — *Wheeler v. Traders' Ins. Co.*, (N. H. 1885) 1 N. Eng. Rep. 321.

*New York*. — *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75.

*2. Nature and Situation of Subject-matter*. — *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596; *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550; *Gray v. Saco Water Power Co.*, 85 Me. 526; *Clark v. Houghton*, 12 Gray (Mass.) 38; *Dwellely v. Dwellely*, 143 Mass. 509; *Smith v. Brown*, 66 Tex. 543.

So in order to resolve a doubt or uncertainty in respect to the description in a deed, reference may be made to the condition of the property, the state of the title, and the boundaries. *Cannon v. Emmans*, 44 Minn. 294.

*3. Purpose of Instrument or Contract*. — *United States*. — *Brick v. Brick*, 98 U. S. 514; *Henryford v. Davis*, 102 U. S. 235; *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596.

*Alabama*. — *Brantley v. Southern L. Ins. Co.*, 53 Ala. 554; *Mason v. Alabama Iron Co.*, 73 Ala. 270.

*Georgia*. — *Illges v. Dexter*, 77 Ga. 36.

*Illinois*. — *Torrence v. Shedd*, 156 Ill. 194; *Illinois Terra Cotta Lumber Co. v. Owen*, 167 Ill. 360.

*Indiana*. — *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60.

*Massachusetts*. — *Norway Plains Sav. Bank v. Moors*, 134 Mass. 129.

*Michigan*. — *Darrah v. Gow*, 77 Mich. 16; *Williams v. Flood*, 63 Mich. 487.



These surrounding circumstances, however, cannot be considered when the instrument is in itself plain and unambiguous without reference to them, since their only possible effect in such a case would be to give the instrument a meaning inconsistent with the language used therein.<sup>1</sup> It is but another statement of the same rule to say, as is frequently done, that the court will, if necessary, put itself in the place of the parties and read the instrument in the light of the circumstances surrounding them at the time it was made and of the objects which they evidently had in view.<sup>2</sup>

**Preliminary Negotiations.** — On the same principle preliminary negotiations leading up to a contract may be considered for the purpose of determining the meaning of words and expressions used in the contract, this not involving a variance of the terms of the contract, but merely enabling the court to carry out the intentions of the parties.<sup>3</sup>

**XIII. CONSTRUCTION BY PARTIES.** — The construction which the parties have, by their acts, placed on an ambiguous instrument is entitled to great,

*Missouri.* — *Lakenan v. Hannibal, etc., R. Co.*, 36 Mo. App. 363.

*New Hampshire.* — *Wheeler v. Traders' Ins. Co.*, (N. H. 1885) 1 N. Eng. Rep. 321.

*New York.* — *Marsh v. McNair*, 99 N. Y. 174.

**1. Circumstances Considered Only in Case of Ambiguity.** — *Adams, etc., Mfg. Co. v. Cook*, 16 Ill. App. 161; *Plano Mfg. Co. v. Ellis*, 68 Mich. 101; *Reynolds v. Commerce F. Ins. Co.*, 47 N. Y. 597; *Muldoon v. Deline*, 135 N. Y. 150.

In *Springsteen v. Samson*, 32 N. Y. 703, Potter, J., said: "It is conceded to be a sound rule in the construction of contracts that where the language is clear, unequivocal, and unambiguous, the contract is to be interpreted by its own language, and courts are not at liberty to look at extrinsic circumstances surrounding the transaction, or elsewhere, for reasons to ascertain its intent; the understanding of the parties must be deemed to be that which their own written agreement declares."

**2. Court Stands in Place of Parties** — *United States.* — *Merriam v. U. S.*, 107 U. S. 441; *Mississippi River Logging Co. v. Robson*, 32 U. S. App. 520; *Prentice v. Duluth Storage, etc., Co.*, 58 Fed. Rep. 437; *Rockefeller v. Merritt*, 76 Fed. Rep. 909, 40 U. S. App. 666; *Speed v. St. Louis Merchants' Bridge Terminal Co.*, 86 Fed. Rep. 235, 57 U. S. App. 526.

*California.* — *Hibernia Sav., etc., Soc. v. Wackenreuder*, 99 Cal. 503; *Walsh v. Hill*, 38 Cal. 481; *Remy v. Olds*, (Cal. 1893) 34 Pac. Rep. 216.

*Illinois.* — *Hall v. Emporia First Nat. Bank*, 133 Ill. 234; *Wilson v. Roots*, 119 Ill. 379; *Street v. Chicago Wharfing, etc., Co.*, 157 Ill. 605.

*Maryland.* — *Baltimore, etc., R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318.

*Massachusetts.* — *Crafts v. Hibbard*, 4 Met. (Mass.) 438.

*Minnesota.* — *Witt v. St. Paul, etc., R. Co.*, 38 Minn. 122; *Austrian v. Davidson*, 21 Minn. 117; *Everett v. Continental Ins. Co.*, 21 Minn. 76.

*New Hampshire.* — *Driscoll v. Green*, 59 N. H. 101.

*New York.* — *Jackson v. Marsh*, 6 Cow. (N. Y.) 281.

"All the facts and circumstances may be

taken into consideration, if the language be doubtful, to enable the court to arrive at the real intention of the parties, and to make a correct application of the words of the contract to the subject-matter and the objects professed to be described, for the law concedes to the court the same light and information that the parties enjoyed, so far as the same can be collected from the language employed, the subject matter, and the surrounding facts and circumstances." *Moran v. Prather*, 23 Wall. (U. S.) 501.

**Code Civ. Pro. Mont.** (1895), § 3136, provides that the court is entitled to receive evidence of the circumstances under which the instrument was made, including the situation of the subject of the instrument and of the parties to it, "so that the judge be placed in the position of those whose language he is to interpret." See *Watson v. O'Neill*, 14 Mont. 197.

**3. Preliminary Negotiations** — *England.* — *Birch v. Depeyster*, 1 Stark. 210, 2 E. C. L. 86; *Macdonald v. Longbottom*, 1 El. & El. 977, 102 E. C. L. 977.

*Indiana.* — *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

*Kansas.* — *Mason v. Ryus*, 26 Kan. 464.

*Maryland.* — *Stockham v. Stockham*, 32 Md. 196.

*Massachusetts.* — *Stoops v. Smith*, 100 Mass. 63, 1 Am. Rep. 85; *Swett v. Shumway* 102 Mass. 365, 3 Am. Rep. 471.

*New Jersey.* — *Freeman v. Bartlett*, 47 N. J. L. 33.

*New York.* — *Cole v. Wendel*, 8 Johns. (N. Y.) 116; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Greenfield v. Gilman*, 140 N. Y. 168.

*Pennsylvania.* — *Stover v. Metzgar*, 1 W. & S. (Pa.) 269.

*Vermont.* — *Hart v. Hammett*, 18 Vt. 127.

See, however, remarks of Blackburn, L. J., in *Inglis v. Buttery*, 3 App. Cas. 576 *et seq.*

**Illustrations.** — In *Gray v. Harper*, 1 Story (U. S.) 574, the question being as to the meaning of the word "cost" in a contract, Story, J., said, in charging the jury, that conversations at the time of making the contract "may be deemed a part of the *res gestæ*, and thus may be referred to as explanatory of the real intentions of the parties in the use of the word."



if not controlling, weight in determining its proper construction.<sup>1</sup> Such practical construction will, however, be given weight only when the contract or instrument is ambiguous, since a construction contrary to the plain terms

**1. Construction by Parties — England.** — *Chapman v. Bluck*, 5 Scott 513.

*United States.* — *Edward Hines Lumber Co. v. Alley*, 43 U. S. App. 169; *Topliff v. Topliff*, 122 U. S. 121; *District of Columbia v. Gallaher*, 124 U. S. 505; *Central Trust Co. v. Wabash, etc., R. Co.*, 34 Fed. Rep. 254; *Interstate Land Co. v. Maxwell Land Grant Co.*, 41 Fed. Rep. 275; *Davis v. Shafer*, 50 Fed. Rep. 764; *Leavitt v. Windsor Land, etc., Co.*, 54 Fed. Rep. 439; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50; *Philadelphia, etc., R. Co. v. Trimble*, 10 Wall. (U. S.) 367; *Carr v. U. S.*, 22 Ct. Cl. 152; *Irwin v. U. S.*, 16 How. (U. S.) 513.

*Arkansas.* — *Robbins v. Kimball*, 55 Ark. 414, 29 Am. St. Rep. 45.

*California.* — *Katz v. Bedford*, 77 Cal. 319; *Mulford v. Le Shafer*, 50 Fed. Rep. 88.

*Colorado.* — *Union Pac. R. Co. v. Anderson*, 11 Colo. 293.

*Connecticut.* — *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Brigham v. Ross*, 55 Conn. 373.

*Florida.* — *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217; *Shouse v. Doane*, 39 Fla. 95.

*Illinois.* — *Leavers v. Cleary*, 75 Ill. 349; *Garrison v. Nute*, 87 Ill. 215; *People v. Murphy*, 119 Ill. 159; *Hall v. Emporia First Nat. Bank*, 133 Ill. 234, 35 Ill. App. 116; *Street v. Chicago Wharfing, etc., Co.*, 157 Ill. 605; *Work v. Welsh*, 160 Ill. 468; *Home Nat. Bank v. Waterman*, 30 Ill. App. 535; *Hammerquist v. Swenson*, 44 Ill. App. 627; *Mohr v. McKenzie*, 60 Ill. App. 575; *Siegel v. Colby*, 61 Ill. App. 315; *Burgess v. Badger*, 124 Ill. 288.

*Indiana.* — *Reissner v. Oxley*, 80 Ind. 580; *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300; *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91; *Vinton v. Baldwin*, 95 Ind. 433; *Dwenger v. Geary*, 113 Ind. 106; *Pate v. French*, 122 Ind. 10; *Ingle v. Norington*, 126 Ind. 174; *Lyles v. Lescher*, 108 Ind. 382; *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114; *Smith v. Miami County*, 6 Ind. App. 153.

*Iowa.* — *Pratt v. Prouty*, 104 Iowa 419.

*Louisiana.* — *Wilcoxon v. Bowles*, 1 La. Ann. 230; *Parrott v. Wikoff*, 1 La. Ann. 232; *Williams v. McHatton*, 16 La. Ann. 196; *Frigerio v. Stillman*, 17 La. Ann. 23; *Commercial Bank v. New Orleans*, 17 La. Ann. 190.

*Maryland.* — *Citizens' F. Ins., etc., Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; *Mitchell v. Wedderburn*, 68 Md. 139. *Compare Hutchins v. Dixon*, 11 Md. 29.

*Massachusetts.* — *Stone v. Clark*, 1 Met. (Mass.) 378, 35 Am. Dec. 370; *Fogg v. Middlesex Mut. F. Ins. Co.*, 10 Cush. (Mass.) 337; *Jennings v. Whitehead, etc., Mach. Co.*, 138 Mass. 594.

*Michigan.* — *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488; *Hoag v. Place*, 93 Mich. 450; *McVicar v. Denison*, 81 Mich. 348; *Monfort v. Stevens*, 68 Mich. 61.

*Minnesota.* — *Luverne First Nat. Bank v. Jagger*, 41 Minn. 308; *Staples v. Edwards, etc., Lumber Co.*, 56 Minn. 16; *Hill v. Duluth City*, 57 Minn. 231.

*Missouri.* — *Price v. Evans*, 26 Mo. 30; *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Jones v. De Lassus*, 84 Mo. 541; *Mathews v. Danahy*, 26 Mo. App. 660; *Belch v. Miller*, 32 Mo. App. 387; *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 49; *Deutmann v. Kilpatrick*, 46 Mo. App. 624; *Rose v. Eclipse Carbonating Co.*, 60 Mo. App. 28; *Curtin v. Grand Lodge, etc.*, 65 Mo. App. 294, 2 Mo. App. Rep. 1206.

*Nebraska.* — *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 4 Am. & Eng. Corp. Cas. N. S. 191; *Hale v. Sheehan*, 52 Neb. 184; *Rathbun v. McConnell*, 27 Neb. 239; *Paxton v. Smith*, 41 Neb. 56.

*New Jersey.* — *Helme v. Strater*, 52 N. J. Eq. 591; *Dwyer v. Bonitz*, (N. J. 1895) 31 Atl. Rep. 172; *Schmitz v. Scheifele*, (N. J. 1887) 5 Cent. Rep. 833.

*New York.* — *French v. Carhart*, 1 N. Y. 96; *Syms v. New York*, 105 N. Y. 153; *Nearpass v. Newman*, 106 N. Y. 47; *Parks v. Jacob Dold Packing Co.*, (Buffalo Super. Ct. Gen. T.) 6 Misc. (N. Y.) 570; *Tilden v. Tilden*, 8 N. Y. App. Div. 99; *Stapenhorst v. Wolff*, 35 N. Y. Super. Ct. 25; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 15, 8 Am. Dec. 287.

*Ohio.* — *Butler v. Moses*, 43 Ohio St. 166.

*Pennsylvania.* — *Coleman v. Grubb*, 23 Pa. St. 393; *Ringrose v. Ringrose*, 170 Pa. St. 593; *People's Natural Gas Co. v. Braddock Wire Co.*, 155 Pa. St. 22; *Matchette v. Colburn*, 166 Pa. St. 265.

*South Carolina.* — *Murray v. Aiken Min., etc., Mfg. Co.*, 37 S. Car. 468.

*South Dakota.* — *Blood v. Fargo, etc., Elevator Co.*, 1 S. Dak. 71.

*Texas.* — *Heidenheimer v. Cleveland*, (Tex. 1891) 17 S. W. Rep. 524.

*Vermont.* — *Wheelock v. Moulton*, 15 Vt. 519; *Thompson v. Prouty*, 27 Vt. 14; *White v. Amsden*, 67 Vt. 1; *Tullar v. Baxter*, 59 Vt. 467.

*Virginia.* — *Clark v. Nunn*, 25 Gratt. (Va.) 287; *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272.

*West Virginia.* — *Heatherly v. Farmers' Bank*, 31 W. Va. 70.

*Wisconsin.* — *Hosmer v. McDonald*, 80 Wis. 54; *Janesville Cotton Mills v. Ford*, 82 Wis. 416.

**Illustrations.** — In *Robinson v. U. S.*, 13 Wall. (U. S.) 363, where one contracted to deliver a certain quantity of barley without any specification as to whether the delivery should be made in bulk or in sacks, the court treated the fact that for a period of six months the barley was delivered in sacks as a proper reason for construing the contract as requiring a delivery in sacks rather than in bulk.

So where a building contract was ambiguous as to which of the parties was to furnish stone for certain parts of the building, the fact that while the work was in progress one of them did furnish it was held to show that he was required by the contract so to do. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206.

**Description in Deed.** — When the description in a deed of the land conveyed is ambiguous,



of the instrument is necessarily erroneous, and the parties are not bound by their erroneous construction of the contract.<sup>1</sup> And it is said that the ambiguity must be evident, and that "not every captious doubt" will justify the court in disregarding the words of the instrument and seeking the intention of the parties as indicated by an attempted performance.<sup>2</sup> To have any value as a practical construction the course of dealing should, it is said, be uniform, unquestioned, and fully concurred in by both parties.<sup>3</sup>

**Previous Contracts.**—On an analogous principle the manner in which the parties have acted under other like contracts is entitled to consideration.<sup>4</sup>

**XIV. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.**—The principle that the express mention of one thing implies the exclusion of another thing is occasionally utilized in construing a contract,<sup>5</sup> but, like other rules of construction, it is useful only for the purpose of arriving at the intent of the parties, and it will not be applied if not in harmony with such intent.<sup>6</sup>

the construction placed upon it by the parties in interest by the practical location of the boundary lines and acquiescence therein for a considerable time is always most significant and often controlling. *Reed v. Merrimac River Locks*, etc., 8 How. (U. S.) 274; *Raymond v. Nash*, 57 Conn. 447; *Watt v. Ganahl*, 34 Ga. 290; *Owen v. Bartholomew*, 9 Pick. (Mass.) 520; *Reed v. Farr*, 35 N. Y. 113; *Kingsland v. New York*, 45 Hun (N. Y.) 198; *Norcom v. Leary*, 3 Ired. L. (25 N. Car.) 49; *Messer v. Oestreich*, 52 Wis. 684.

**Construction by Supplementary Contract.**—In *Smith v. Miami County*, 6 Ind. App. 153, it was held that a supplementary agreement between a county and one who had contracted to build a pier for a bridge, which recited that it was made because a bed of quicksand made it impossible to obtain a solid foundation without driving piling, "which fact was not taken into consideration when" the original contract was made, was a practical construction of the first contract, showing that the piling was not included therein.

**1. Construction by Parties Ineffective in Absence of Ambiguity.**—*United States*.—Philadelphia, etc., *R. Co. v. Trimble*, 10 Wall. (U. S.) 367; *Davis v. Shafer*, 50 Fed. Rep. 764.

*Arkansas*.—*Hershey v. Luce*, 56 Ark. 320.

*Illinois*.—*Davis v. Sexton*, 35 Ill. App. 407.

*Indiana*.—*Morris v. Thomas*, 57 Ind. 316; *Newpoint Lodge No. 255 v. Newpoint*, 138 Ind. 141.

*Iowa*.—*Spencer v. Millisack*, 52 Iowa 31.

*Maine*.—*Agricultural Bank v. Burr*, 24 Me. 256; *Bishop v. White*, 68 Me. 104.

*Maryland*.—*Citizens' F. Ins., etc., Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360.

*Minnesota*.—*St. Paul, etc., R. Co. v. Blackmar*, 44 Minn. 514.

*Missouri*.—*C. D. Smith Drug Co. v. Saunders*, 70 Mo. App. 221.

*New Jersey*.—*Rogers v. Colt*, 21 N. J. L. 704; *Stewart v. Lehigh Valley R. Co.*, 37 N. J. L. 53.

*New York*.—*Baring v. Waterbury*, 10 N. Y. App. Div. 1; *Hill v. Priestly*, 52 N. Y. 635.

*Pennsylvania*.—*Alexander's Appeal*, (Pa. 1887) 11 Atl. Rep. 83.

*Vermont*.—*Arnold v. Farr*, 61 Vt. 444.

*Virginia*.—*Holston Salt, etc., Co. v. Campbell*, 89 Va. 396.

So it was decided that the fact that a party to a contract paid interest for three years,

which, on a proper and obvious construction of the contract, he did not owe, should have no weight on the question of the construction of the contract. *Garard v. Monongahela College*, 114 Pa. St. 337.

*2. Cincinnati v. Gas Light, etc., Co.*, 53 Ohio St. 278.

*3. Cincinnati v. Gas Light, etc., Co.*, 53 Ohio St. 278.

**4. Previous Contracts.**—*Off v. J. B. Inderrieden Co.*, 74 Ill. App. 105; *Jamison v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302; *Robinson v. Crawford*, 31 N. Y. App. Div. 228.

**5. Expressio Unius Est Exclusio Alterius.**—*Roddy v. Fitzgerald*, 6 H. L. Cas. 856; *Emmens v. Elderton*, 4 H. L. Cas. 624; *Hare v. Horton*, 5 B. & Ad. 715, 27 E. C. L. 160; *Mather v. Frazer*, 2 Kay & J. 536; *Hardwicke v. Sandys*, 12 M. & W. 761; *Aspdin v. Austin*, 5 Q. B. 684, 48 E. C. L. 684; *Higgins v. Eagleton*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 223; *O'Neil v. Van Tassel*, 137 N. Y. 297.

It was stated by Willes, J., in *North Stafford Steel, etc., Co. v. Ward*, L. R. 3 Exch. 177, that it is an ordinary rule that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined. And in *Cree v. Bristol*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 1, it was decided that an express provision in a contract for forfeiture of rights under a contract for certain causes precluded an implication of forfeiture for other causes.

**6. Rule Subordinate to Intention.**—It was stated by Lord Campbell, in *Saunders v. Evans*, 8 H. L. Cas. 721, that the maxim is not of universal application, but that "it depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction," and it was held in that case that the fact that there was a reservation of the express power to appoint by deed did not exclude an appointment by will. See also *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337; *Corwin v. Hood*, 58 N. H. 401.

**The Maxim "Expressum Facit Cessare Tacitum"** seems to be but another expression of the same idea. See *Broom's Legal Maxims* (8th Am. ed.) 651; *Co. Litt.* 183b, 210a. See also *Dickson v. Zizinia*, 10 C. B. 6c2, 70 E. C. L. 602; *Kansas City Planing Mill Co. v. Brundage*, 25



**XV. IMPLIED TERMS.** — Besides the terms expressed in a contract or conveyance the law will imply certain terms as being inherent in the nature of the transaction, and as having, therefore, necessarily been intended by the parties, unless the language is such as to exclude any such implication.<sup>1</sup>

**Existing Law Part of Contract.** — On an analogous principle the parties are presumed, unless the terms exclude the presumption, to contract with reference to the existing law, and consequently the obligations imposed by such law, whether written or unwritten, are regarded as a part of the contract.<sup>2</sup>

**Words of Measure.** — This rule has occasionally been applied in regard to words denoting measure, which are construed to mean the quantity which by statute such measure is required to contain.<sup>3</sup>

Mo. App. 272; Greer v. Van Meter, 54 N. J. Eq. 270.

**1. Implied Terms in Contract — England.** — Randall v. Lynch, 12 East 182; Gerard v. Lewis, L. R. 2 C. P. 305; Stirling v. Maitland, 5 B. & S. 840, 117 E. C. L. 840; Johnson v. Raylton, 7 Q. B. D. 438; Whincup v. Hughes, L. R. 6 C. P. 78.

*United States.* — U. S. v. Babbit, 1 Black. (U. S.) 61; Donahoe v. Kettell, 1 Cliff. (U. S.) 144; Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. (U. S.) 276.

*Illinois.* — Ames v. Moir, 27 Ill. App. 88; Grimley v. Davidson, 133 Ill. 116.

*Maine.* — Rogers v. Sheerer, 77 Me. 323.

*New Hampshire.* — Currier v. Boston, etc., R. Co., 34 N. H. 498.

*New York.* — Booth v. Cleveland Rolling Mill Co., 74 N. Y. 15; Scrantom v. Booth, 29 Barb. (N. Y.) 174; Nicoll v. Sands, 131 N. Y. 19; Genet v. Delaware, etc., Canal Co., 136 N. Y. 593.

In Genet v. Delaware, etc., Canal Co., 136 N. Y. 593, Finch, J., after saying that implied promises are to be cautiously and not hastily raised, proceeded: "They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it;" and cited Dermott v. State, 99 N. Y. 101, to the effect that a promise can be implied only where it may rightly be assumed that it would have been made if attention had been drawn to it, and King v. Leighton, 100 N. Y. 386, to the effect that the implication can be raised only to enforce a manifest equity or to reach a result which the unequivocal acts of the parties indicated that they intended to effect.

**Implied Terms in Grant — England.** — Evans v. Rees, 12 Ad. & El. 57, 40 E. C. L. 23; Howton v. Frearson, 8 T. R. 56; Rowbotham v. Wilson, 8 H. L. Cas. 360; Pomfret v. Ricroft, 1 Saund. 323; Dand v. Kingscote, 6 M. & W. 174; Cardigan v. Armitage, 2 B. & C. 197, 9 E. C. L. 60; Clarence R. Co. v. Great North of England, etc., R. Co., 13 M. & W. 706.

*United States.* — Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 630.

*Maine.* — Dority v. Dunning, 78 Me. 381.

*New York.* — Dermott v. State, 99 N. Y. 101.

*Pennsylvania.* — McCracken v. Gumbert, 131 Pa. St. 36.

In Stanwood v. Kimball, 13 Met. (Mass.) 526, it was held that the grant of a right to lay an aqueduct from a spring of water to certain buildings carried with it a right to the use of the water to be conveyed; the court, by Shaw, C. J., saying: "Every grant of a right or privilege carries with it, by necessary implication, everything necessary to its enjoyment which the grantor has in his power to grant."

**Implied Covenants in Deeds** form an important application of this rule, whereby, from the use of certain words to create an estate, an agreement is implied to protect the estate so created. See the title COVENANTS, vol. 8, p. 43.

**2. Law Becomes Part of Contract — United States.** — Green v. Biddle, 8 Wheat. (U. S.) 92; Bronson v. Kinzie, 1 How. (U. S.) 319; McCracken v. Hayward, 2 How. (U. S.) 612; Van Hoffman v. Quincy, 4 Wall. (U. S.) 550.

*Arkansas.* — State v. Allis, 18 Ark. 269.

*California.* — People v. Bond, 10 Cal. 570; Ede v. Knight, 93 Cal. 159.

*Illinois.* — Barrett v. Boddie, 158 Ill. 479, 49 Am. St. Rep. 172; Andrews, etc., Co. v. Atwood, 167 Ill. 249.

*Indiana.* — Haskett v. Maxey, 134 Ind. 182; Snow v. Indiana, etc., R. Co., 109 Ind. 422.

*Minnesota.* — Stahl v. Mitchell, 41 Minn. 325.

*Missouri.* — Parks v. Connecticut F. Ins. Co. 26 Mo. App. 511.

*Texas.* — Smith v. Elliott, 39 Tex. 201.

*Wisconsin.* — Manistee Iron Works Co. v. Shores Lumber Co., 92 Wis. 21.

The right to seize and sell property in satisfaction of a judgment according to the law existing at the time of the making of a contract on which a judgment was based has been held to be an implied term of the contract. Lessley v. Phipps, 49 Miss. 790.

**3. Words of Measure.** — St. Cross's Hospital v. De Walden, 6 T. R. 338; Clark v. Pinney, 7 Cow. (N. Y.) 681.

Where a statute provided that a ton should contain two thousand pounds, it was held that the word should receive that construction when used in a contract. Green v. Moffett, 22 Mo. 529; Evans v. Myers, 25 Pa. St. 114.



# INTERPRETERS.

BY LOMAX PITTMAN.

## I. DEFINITIONS, 27.

1. *In General*, 27.
2. *Court Interpreter*, 27.

## II. IN JUDICIAL PROCEEDINGS, 27.

1. *Right and Duty of Court to Appoint*, 27.
  - a. *In General*, 27.
    - (1) *At Common Law*, 27.
    - (2) *Under Statutes*, 28.
  - b. *What Witnesses May Testify through Interpreter*, 28.
    - (1) *Foreigners*, 28.
    - (2) *Mutes*, 29.
    - (3) *Persons with Defective Power of Speech*, 29.
  - c. *Necessity of Appointment Question for Court*, 29.
2. *Interpreter Must Be Sworn as Witness*, 30.
3. *Competency*, 30.
  - a. *As Relating to Bias of Person Appointed*, 30.
    - (1) *Discretion of Trial Court*, 30.
    - (2) *Witness as Interpreter*, 30.
    - (3) *Relation of Interpreter to Party*, 31.
  - b. *As Relating to Ability of Person to Interpret*, 31.
  - c. *As Relating to Receipt of Evidence from Witness*, 31.
  - d. *Parties Acquiescing in Interpretation of Unbiased Commissioner*, 31.
4. *Impeachment of Interpreter's Testimony*, 31.
5. *Compensation of Interpreter*, 31.

## III. INTERPRETER BETWEEN ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATION, 32.

## IV. CONTRACTS, ADMISSIONS, AND OTHER COMMUNICATION THROUGH INTERPRETER, 32.

### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, titles *EXAMINATION OF WITNESSES*, vol. 8, p. 95; *DEPOSITIONS*, vol. 6, p. 528.

For other matters of *SUBSTANTIVE LAW* related to this subject, see the title *EVIDENCE*, vol. 11, p. 484, and the references there given.

**I. DEFINITIONS — 1. In General.** — An interpreter is one who is employed to translate the words or signs of a person who can speak only a language foreign to that of the person or persons to whom the communication is made, or who is dumb.<sup>1</sup>

**2. Court Interpreter.** — A court interpreter is one who, on a trial, translates, for the benefit of the court and jury, the language of a witness speaking a foreign tongue or of a dumb witness making signs.<sup>2</sup>

**II. IN JUDICIAL PROCEEDINGS — 1. Right and Duty of Court to Appoint — a. IN GENERAL — (1) At Common Law.** — In order to get before the court oral evidence bearing upon matters under inquiry, that justice may be done between the parties, it frequently becomes necessary to appoint an interpreter,

**1. Interpreter Defined.** — See *Bouv. L. Dict.*; **2. Court Interpreter Defined.** — *Black's L. Dict.*



and where the necessity exists, the court not only has the right to make such an appointment, but it is its duty to do so.<sup>1</sup> Such testimony is not hearsay.<sup>2</sup> The question of the necessity of an interpreter in particular cases is treated elsewhere in this article.<sup>3</sup>

(2) *Under Statutes.* — And where a court of justice is specially authorized by statute to exercise this power where necessary, such statute is merely declaratory of the existence of a power which the court would have had in the absence of legislation on the subject,<sup>4</sup> and the exercise of such power of appointment under a statute frequently becomes merely a matter of determining what, if any, statute is in force regulating the exercise of such power.<sup>5</sup> By statutes in some states the judges of courts are vested with authority to appoint official interpreters for their respective courts.<sup>6</sup>

**Common Law Not Changed by Statute.** — An examination of these statutes will disclose the fact that few, if any, fundamental changes are made in the common-law rules. Thus a statute providing for the appointment of an interpreter for a witness who does not speak English will not be construed as requiring the appointment of an interpreter for a defendant who cannot understand English.<sup>7</sup>

**b. WHAT WITNESSES MAY TESTIFY THROUGH INTERPRETER** — (1) *Foreigners.* — It is proper for the court to appoint an interpreter in any case where such appointment is necessary to get before the court and jury the facts to which a witness testifies, as where he can speak only in a language not understood by the court or jury.<sup>8</sup>

**1. Right and Duty of Court to Appoint Interpreter** — *England.* — Reg. v. Entrehman, C. & M. 248, 41 E. C. L. 139.

*California.* — People v. Ah Wee, 48 Cal. 236.

*Illinois.* — Chicago, etc., R. Co. v. Shenk, 131 Ill. 283.

*Indiana.* — Skaggs v. State, 108 Ind. 53.

*Louisiana.* — Davis v. Police Jury, 19 La. 541.

*Massachusetts.* — Amory v. Fellowes, 5 Mass. 219; Norberg's Case, 4 Mass. 81; Com. v. Vose, 157 Mass. 393.

*New York.* — People v. McGee, 1 Den. (N. Y.) 19; Wright v. Masevas, 56 Barb. (N. Y.) 521.

*Ohio.* — Hout v. Hout, Wright (Ohio) 156.

**Number of Interpreters.** — Since the object of the examination of a witness is to get the facts within the knowledge of the witness before the court and jury, the court has the power to appoint as many interpreters as it considers necessary for the accomplishment of that object. Skaggs v. State, 108 Ind. 53.

In a criminal prosecution of a mute, two witnesses were properly sworn as interpreters where one was the prosecutor and the other a disinterested third person. State v. Weldon, 39 S. Car. 318.

**Duty of Commissioner Taking Deposition to Employ Interpreter.** — Where a witness about to be examined under a *dedimus potestatem* does not understand the language of the commissioners, nor they his, they must swear an interpreter. Amory v. Fellowes, 5 Mass. 219.

**The Manner in Which Examinations through an Interpreter should be conducted** is a matter to be regulated by the court in its discretion. Skaggs v. State, 108 Ind. 53.

**2. Interpretation Not Hearsay.** — See 1 Wharton on Evidence (3d ed.), § 174.

**3.** See *infra*, this section, *Necessity of Appointment Question for Court.*

**4. Statutory Authority to Appoint Interpreters.** — See the various local codes and statutes.

**Statute Authorizing Appointment Merely Declaratory of Common Law.** — Where there is a statute authorizing the court to appoint an interpreter (see 2 Code Ga. 1895, § 5275) to interpret the testimony of a foreigner or of a deaf mute, such statute is merely declaratory of the common law lodging with the court the power to make such appointment. Schall v. Eisner, 58 Ga. 190.

**5.** See, for instance, Com. v. Sanson, 67 Pa. St. 322, in which it was held that the Act of Feb. 18, 1869 (Pamph. L. 198), relating to interpreters in the city of Philadelphia, did not repeal the Act of March 27, 1865 (Pamph. L. 795), on the same subject, and that therefore the third section of the act first mentioned did not apply to the official interpreter appointed by the court when he came to the stand to interpret in the ordinary course of his duty.

**6.** The right to appoint an interpreter to the general sessions of the peace in the city of New York was vested by Laws N. Y. 1882, c. 410 (Consolidation Act, §§ 1529, 1531), in the recorder, city judge, and judge in the court of general sessions. These appointments are not governed by the civil service laws in force in that state. Cutugno v. New York, 58 N. Y. Super. Ct. 567, 9 N. Y. Supp. 729.

And see the statutes in other jurisdictions.

**7. Appointment of Interpreter Not Required So that Defendant May Understand Witness.** — Livar v. State, 26 Tex. App. 115.

**8. Witness Speaking Language Not Understood by Court or Jury** — *England.* — Reg. v. Entrehman, C. & M. 248, 41 E. C. L. 139.

*Alabama.* — Horn v. State, 98 Ala. 23; Central of Georgia R. Co. v. Joseph, (Ala. 1900) 28 So. Rep. 35.

*California.* — People v. Wong Ah Bang, 65 Cal. 305.

*Georgia.* — Schall v. Eisner, 58 Ga. 190.

*Illinois.* — Chicago, etc., R. Co. v. Shenk, 131 Ill. 283.



(2) *Mutes*. — An interpreter is also necessary where a witness can communicate with others only by means of signs, being wholly without the power of speech,<sup>1</sup> even though he is able to write;<sup>2</sup> but it has been said that in the latter case it would always be the better practice to have the mute write his answers to the questions propounded to him.<sup>3</sup> While mutes generally adopt one of the several recognized codes of sign language for the purpose of conveying intelligence, it sometimes happens that a mute's means of communication are limited to signs peculiar to him and understood only by certain persons between whom and the mute such code has been established. It has been held that such fact will not, of course, debar the mute from testifying, and that the interpreter appointed should be the person familiar with his signals.<sup>4</sup>

(3) *Persons with Defective Power of Speech*. — And where a witness has some infirmity of speech, so that the court or jury cannot hear or understand his words, an interpreter may be appointed to communicate his testimony intelligibly.<sup>5</sup>

c. NECESSITY OF APPOINTMENT QUESTION FOR COURT. — Generally, the question of the necessity of the appointment of an interpreter for a witness or for the translation of a document into English from a foreign language, whether the cause is tried before a judge or before a judge and jury, is a matter for the trial judge. His opportunity of judging of the necessity of an interpreter in the particular case, whether it relates to the distinctness with which the witness for whom an interpreter is sought may speak the English language, or to the ability of the court to understand documentary evidence written in a foreign language, must of necessity be better than that of the appellate court.<sup>6</sup> This discretion is, however, not always final, and cannot be

*Louisiana*. — *Davis v. Police Jury*, 19 La. 541.

*Massachusetts*. — *Norberg's Case*, 4 Mass. 81; *Amory v. Fellowes*, 5 Mass. 219.

*New York*. — *Leetch v. Atlantic Mut. Ins. Co.*, 4 Daly (N. Y.) 518.

*Ohio*. — *Haupt v. Haupt*, Wright (Ohio) 156; *Schutter v. Williams*, 1 West. L. J. 319, 1 Ohio Dec. (Reprint) 47.

*South Carolina*. — *Kuhtman v. Brown*, 4 Rich. L. (S. Car.) 479.

1. *Mutes*. — *Ruston's Case*, 1 Leach C. C. 408; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Snyder v. Nations*, 5 Blackf. (Ind.) 295; *Skaggs v. State*, 108 Ind. 53; *State v. Burns*, (Iowa 1899) 78 N. W. Rep. 681; *State v. Weldon*, 39 S. Car. 318.

*Witness Mute from Imbecility*. — In a prosecution for rape, where the injured female was of sufficient age to testify, but being of weak understanding was unable to talk and could communicate and receive ideas only by signs, it was held proper to appoint an interpreter familiar with her signs. *People v. McGee*, 1 Den. (N. Y.) 19.

2. *Ability of Mute to Write*. — *State v. De Wolf*, 8 Conn. 9, 20 Am. Dec. 90.

3. *Morrison v. Lennard*, 3 C. & P. 127, 14 E. C. L. 238.

4. *Use of Signs Peculiar to Individual Mute*. — *People v. McGee*, 1 Den. (N. Y.) 19.

Thus, in a criminal prosecution a deaf mute was offered as a witness, and his sister being examined, it appeared that she and he had for a number of years been able to understand each other by means of certain arbitrary signs and motions which necessity had invented between them, but that such signs were not sig-

nificant of letters, syllables, words, or sentences, but were expressive of general propositions and of entire mental conceptions. From her examination it further appeared that she could communicate to him true notions of the moral and religious nature of an oath and of the temporal dangers of perjury. An interpreter was proper in such case, and the sister was the proper person to be appointed. *Ruston's Case*, 1 Leach C. C. 408.

5. *Persons with Defective Power of Speech*. — In *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184, a witness was unable, from his physical condition, to speak loud enough to be heard by the court and jury, and the court permitted his answers to be communicated by a third person, in the presence and hearing of the witness.

6. *Question of Necessity Generally for Judgment of Trial Court* — *Alabama*. — *Horn v. State*, 98 Ala. 23.

*California*. — *People v. Young*, 108 Cal. 8.

*Georgia*. — *Schall v. Eisner*, 58 Ga. 190; *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184.

*Iowa*. — *State v. Severson*, 78 Iowa 653.

*Louisiana*. — *Farar v. Warfield*, 8 Mart. N. S. (La.) 696.

*New York*. — *People v. McGee*, 1 Den. (N. Y.) 19.

Where a Witness Speaks Broken English the court may, in its discretion, and from its observation of the language of the witness, allow him to testify through an interpreter. *Horn v. State*, 98 Ala. 23; *Schall v. Eisner*, 58 Ga. 190; *State v. Severson*, 78 Iowa 653.

This common-law rule is expressed in the form of a statute. *People v. Young*, 108 Cal. 8.



arbitrarily exercised without review to the injury of litigants.<sup>1</sup>

**2. Interpreter Must Be Sworn as Witness.** — An interpreter, whether in the trial of a case in court or as the interpreter of a witness giving his deposition, must give his translation under oath.<sup>2</sup> In either case he is a witness, and there is every reason for saying that the general rules which govern the testimony of other witnesses apply to him.<sup>3</sup> The court which appoints him cannot confer upon him the authority to exercise judicial power or powers fundamentally differing from those which all witnesses may exercise.<sup>4</sup>

**3. Competency — a. AS RELATING TO BIAS OF PERSON APPOINTED —**

(1) *Discretion of Trial Court.* — It would evidently be improper for a court to appoint as interpreter one who would reasonably be expected to be unfair and biased in his translation of the testimony;<sup>5</sup> a degree of discretion must, however, necessarily be vested in the trial court as to the person who shall be employed as an interpreter, and the exercise of such discretion will be reviewed only when it is shown that it has been the subject of abuse on the part of the trial court, to the injury of one of the parties.<sup>6</sup>

**Discretion Must Not Be Exercised So as to Deprive Party of Evidence.** — Though it is generally within the court's discretion to choose an interpreter, it is reversible error to exercise such discretion so as to deprive a party altogether of his witness when the interpreter offered is not legally incompetent.<sup>7</sup>

(2) *Witness as Interpreter.* — A person is not incompetent to act as an interpreter merely because he is a witness in the cause. There is no legal presumption because the person has testified or is about to testify in behalf of one of the parties to the suit, that he is so far biased and prejudiced in favor of that party as not to be trusted to interpret honestly and impartially.<sup>8</sup>

**Commissioner Taking Depositions.** — The rule applicable to the court is also true with reference to a commissioner taking depositions. The statute authorizing such an officer to employ an interpreter where the witness does not speak English does not require him to have an interpreter where he can himself translate the language. *Munk v. Weidner*, 9 Tex. Civ. App. 491.

**Where Witness Understands and Speaks Both Languages.** — A witness may relate in English, without being sworn as an interpreter or without the intervention of any interpreter, admissions made to him in a foreign language, giving the foreign words used and stating their meaning in English. *Com. v. Kepper*, 114 Mass. 278; *Thon v. Rochester R. Co.*, (Supm. Ct. Spec. T.) 29 N. Y. Supp. 675.

1. See *Chicago, etc., R. Co. v. Shenk*, 131 Ill. 283.

2. **Interpreter Must Be Sworn as Witness — Georgia.** — *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184.

*Massachusetts.* — *Norberg's Case*, 4 Mass. 81; *Amory v. Fellowes*, 5 Mass. 219.

*Michigan.* — *People v. Dowdigan*, 67 Mich. 95.

*New York.* — *Vandervoort v. Smith*, 2 Cal. (N. Y.) 155.

*South Carolina.* — *State v. Weldon*, 39 S. Car. 318.

3. **The Interpreter Is a Witness** distinct from the person whose testimony he interprets. Thus it was held that where, by a statute, the reporter's notes taken before a committing magistrate upon a preliminary examination were made *prima facie* evidence of the testimony given, such notes were inadmissible when taken through an interpreter. *People v. Lee Fat*, 54 Cal. 527; *People v. Ah Yute*, 56 Cal. 119. And in *Scheerer v. Harber*, 36 Ind.

536, the court held that the evidence of what an interpreter testified to as received by him in a foreign language from a witness on a former trial could not be given by one who heard the evidence, unless the interpreter was dead or insane, or out of the jurisdiction of the court, or from some other legal reason unable to testify.

See also the title WITNESSES.

**Departure from General Rule Authorized.** — In *U. S. v. Gibert*, 2 Sumn. (U. S.) 19, it was held not error to allow a witness acting as interpreter to take advantage of the suggestions of others who were not sworn, with regard to the proper interpretation of the testimony, stating the result to the court as his own interpretation.

4. *People v. Wong Ah Bang*, 65 Cal. 305.

5. **Bias of Interpreter.** — *State v. Thompson*, 14 Wash. 285.

6. **Discretion of Court Reviewed Only When Abused — United States.** — *Barber Asphalt Paving Co. v. Odasz*, 57 U. S. App. 129, 85 Fed. Rep. 754.

*California.* — *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

*Illinois.* — *Chicago, etc., R. Co. v. Shenk*, 131 Ill. 283.

*Iowa.* — *State v. Burns*, (Iowa 1899) 78 N. W. Rep. 681.

*Michigan.* — *Swift v. Applebone*, 23 Mich. 252.

*Washington.* — *State v. Thompson*, 14 Wash. 285.

7. The court should not exercise its discretion so as to deprive the party of evidence. *Chicago, etc., R. Co. v. Shenk*, 131 Ill. 283.

8. **Witness as Interpreter.** — *Barber Asphalt Paving Co. v. Odasz*, 57 U. S. App. 129, 85 Fed. Rep. 754; *People v. Ramirez*, 56 Cal. 533, 38



(3) *Relation of Interpreter to Party.* — There is no presumption of impropriety in an appointment merely because of the fact that the person selected to interpret the testimony of a party to, or person interested in, the proceeding is a friend of such party or person,<sup>1</sup> or that he is the next friend of an infant plaintiff;<sup>2</sup> though it has been held that unless the necessity is great a near relative of a party should not be appointed to interpret the testimony of such party.<sup>3</sup>

b. AS RELATING TO ABILITY OF PERSON TO INTERPRET. — The interpreter's competency as relating to his ability to perform the duties for which he is offered and sworn, like his competency in other respects, is largely a matter for the judgment of the trial court.<sup>4</sup>

c. AS RELATING TO RECEIPT OF EVIDENCE FROM WITNESS. — In the trial of a case in which an interpreter is used, he, as well as the person whose testimony he interprets, is a witness, and the evidence must, of course, be both received and given in court before the jury.<sup>5</sup> The receipt by the interpreter of testimony out of the hearing of the jury has been held proper under peculiar circumstances.<sup>6</sup>

d. PARTIES ACQUIESCING IN INTERPRETATION OF UNBIASED COMMISSIONER. — Where an unbiased commissioner taking the deposition of a foreigner acted as interpreter with the acquiescence of both parties, in a state where there was no statutory provision as to the manner of the appointment of an interpreter in such a case, the interpretation of the commissioner was held to be competent.<sup>7</sup>

4. *Impeachment of Interpreter's Testimony.* — The testimony of an interpreter, like the testimony of any other witness, may be impeached; his testimony goes to the jury under those rules of law by which the testimony of all witnesses is weighed.<sup>8</sup>

5. *Compensation of Interpreter.* — Inasmuch as an interpreter is regarded as

Am. Rep. 73; Chicago, etc., R. Co. v. Shenk, 131 Ill. 283.

1. *Friendship Between Interpreter and Party.* — State v. Burns, (Iowa 1899) 78 N. W. Rep. 681.  
2. *Next Friend of Infant Plaintiff Appointed Interpreter.* — Swift v. Applebone, 23 Mich. 252.

3. *Husband Not Proper Interpreter for Wife.* — In a criminal case it was found necessary to have an interpreter for the principal witness for the state, and against the defendant's protest the husband of the witness, who was also a witness, was permitted to act as such interpreter. The case was reversed for other reasons, but the court condemned the action of the trial court in such appointment, and intimated that the error in this regard would have been sufficient of itself to justify a reversal of the case. State v. Thompson, 14 Wash. 285.

*Brother or Sister of Party.* — In Barber Asphalt Paving Co. v. Odasz, 57 U. S. App. 129, 85 Fed. Rep. 754, it was said to be erroneous to appoint a brother or sister as interpreter of the testimony of a party to the cause, though in this particular case the facts were such that the error did not authorize a reversal.

4. *Ability of Interpreter a Question for Court.* — Central of Georgia R. Co. v. Joseph, (Ala. 1900) 28 So. Rep. 35; Skaggs v. State, 108 Ind. 53; State v. Weldon, 39 S. Car. 319.

*For Deaf and Dumb Witnesses.* — Where a deaf mute says he can understand and make himself understood through an interpreter offered, such interpreter may be appointed a witness though he is not an adept in the sign language. Skaggs v. State, 108 Ind. 53; State v. Weldon, 39 S. Car. 318.

5. See *supra*, this section, *Interpreter Must Be Sworn as Witness.*

6. *Interpreter Obtaining Answer of Witness in Private.* — The general rule seems to have been relaxed in the case of Skaggs v. State, 108 Ind. 53. In that case a question propounded to the prosecuting witness so shocked her modesty that she ran from the court room to an adjoining room, to which room the interpreter followed her, and in seclusion obtained her answer to the question. Both returned immediately to the court room, where the answer was given to the jury without a repetition of the question to the witness, and the court held that under all the circumstances the evidence of the interpreter was not incompetent.

7. *Unbiased Commissioner to Take Depositions Acting as Interpreter Without Objection.* — Leitch v. Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

8. *Weight to Be Given to Interpreter's Testimony for Jury.* — Schnier v. People, 23 Ill. 17; Skaggs v. State, 108 Ind. 53; Ulrich v. People, 39 Mich. 245. See U. S. v. Gibert, 2 Sumn. (U. S.) 19.

*The Correctness of the Interpretation*, like the testimony of all other witnesses, is a question of fact for the jury's decision; and this whether the verity of his translation depends upon his truthfulness as a witness or upon his ability to translate the exact ideas which the witness endeavors to transmit. In the latter case, where there was a dispute as to the meaning of a word in a foreign language, it was held proper to require the interpreter to give the primary meaning of all words used in connection.



a witness and required to be sworn as such, it would seem that the ordinary rules in regard to the compensation of witnesses would apply,<sup>1</sup> but in some states interpreters are appointed by the court and compensated by a salary, or otherwise, as the statute may provide.<sup>2</sup>

**III. INTERPRETER BETWEEN ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATION.** — The confidential communications made through an interpreter between an attorney and his client are privileged, and the interpreter cannot be made to disclose them.<sup>3</sup>

**IV. CONTRACTS, ADMISSIONS, AND OTHER COMMUNICATION THROUGH INTERPRETER.** — If persons speaking a different language communicate by an interpreter, the latter's version of their words may of course be proved as their own declarations.<sup>4</sup> But an interpreter through whom a contract is made is not necessarily an agent so as to bind his principal by a false translation.<sup>5</sup>

**INTERRUPT — INTERRUPTION,** — See note 6.

**INTERSECT.** — To intersect means to cross.<sup>7</sup>

tion with the word in dispute, so that the jury might be enabled to determine its meaning in case of a disagreement among the interpreters. *Schnier v. People*, 23 Ill. 17.

1. See *supra*, this section, *Interpreter Must Be Sworn as Witness*. See also *Bastard v. Smith*, 10 Ad. & El. 213, 37 E. C. L. 96.

2. **Official Interpreter Appointed by Court.** — *Cutugno v. New York*, 58 N. Y. Super. Ct. 567, 9 N. Y. Supp. 729; *Crawford County v. Le Clerc*, 4 Chand. (Wis.) 56, 3 Pin. (Wis.) 326.

See also the various local statutes.

3. **Communication through Interpreter Between Attorney and Client Privileged.** — *Wilson v. Rastall*, 4 T. R. 756, 2 Rev. Rep. 515; *Du Barre v. Livette*, Peake N. P. (ed. 1795) 108, note a, 3 Rev. Rep. 655; *Jackson v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; *Parker v. Carter*, 4 Munf. (Va.) 273. See also the title **PRIVILEGED COMMUNICATIONS**.

4. **Contracts, Admissions, and Other Communication through Interpreter.** — *McCormicks v. Fuller*, 56 Iowa 43; *Com. v. Vose*, 157 Mass. 393; *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539; *Miller v. Lathrop*, 50 Minn. 91; *Wright v. Maseras*, 56 Barb. (N. Y.) 531; *Schutter v. Williams*, 1 West. L. J. 319, 1 Ohio Dec. (Report) 47.

5. **Interpreter Making Contract Not Necessarily Agent so as to Bind Principal by False Translation.** — A party may make an interpreter his agent, but the mere fact of contracting through an interpreter with another party whose language he does not understand does not constitute such interpreter an agent so as to bind him by a false translation. *Diener v. Schley*, 5 Wis. 483.

6. **Interrupt — Religious Meeting.** (See also the title **DISTURBING MEETINGS**, vol. 9, p. 664.) — In a prosecution under statute for disturbing religious worship, the court charged that "the word *interrupt*, as used in the statute, \* \* \* means anything done by the defendants or any other person which takes the attention of the hearers from the services or discourse of the minister." This was held to be erroneous, as withdrawing the attention of the jury from the essence of the offense, the intention, it being necessary that the *interruption* should be wilful. *Brown v. State*, 46 Ala. 175.

**Prescription.** (See also the titles **EASEMENTS**, vol. 10, p. 427; **PRESCRIPTION**.) — In *Innerarity v. Mims*, 1 Ala. 674, it was said: "A prescription, to be available, must have been uninterrupted. '*Interruptions*' are of two kinds, natural and civil. The first consisted in entering into and upon immovable things, in taking away such as were movable; civil *interruption* was the interposition of a legal claim in a court of justice." 1 *Brown's Civil Law* 248."

"*Interruption* means an obstruction, not a cesser or intermission, or anything denoting a mere breach in time. There must be an overt act indicating that the right is disputed." *Carr v. Foster*, 3 Q. B. 581, 43 E. C. L. 876. See also *Cooper v. Straker*, 40 Ch. D. 21.

In *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 621, it was said: "By a long course of decision the word *interrupted*, when applied to acts done by the servient owner, has received a fixed meaning as indicating an obstruction to the use of the easement, some act of interference with its enjoyment, which, if unjustifiable, would be an actionable wrong. This meaning has been given to the word as used in the statute 2 and 3 William IV. (Parke, B., in *Onley v. Gardiner*, 4 M. & W. 496), and is its usual signification."

**Covenant.** — In a covenant for quiet enjoyment, *interruption* usually means a lawful *interruption*, but the term may be extended by the court to tortious acts. *Elphinstone on Deeds* 483; *Chapham v. Southgate*, 10 Mod. 384; *Hunt v. Allen*, Winch 25.

7. **Intersect.** — A statute provided that it should be lawful for a railroad to *intersect* any stream or watercourse, or any road or highway, whenever necessary for the construction of its roadbed. In construing this provision the court said: "The railroad does not cross this highway. The word *intersect* ordinarily means the same as to cross; literally, to cut into or between. The two words seem to be used in the same sense, as is apparent from the fact that the word *intersected* only is used in the latter part of the quotation; whereas, if they were used in different senses, we should expect to find the words 'or crossed' also used. But if it is to be conceded that the word *intersect* is to be understood in the sense of



touching, or coming in contact with, we think it cannot be extended so as to embrace a case like this, where the lay-out of the railroad covers a portion of the lay-out of the highway without disturbing or interfering with the traveled part of the highway." *State v. New Haven, etc., R. Co.*, 45 Conn. 344. And see generally the title RAILROADS.

**Intersect — Mining Laws.** — A mining act provided that where two or more veins *intersected* or crossed each other, priority of title should govern, and the prior location should be entitled to all ore or minerals contained within the *intersection*. In *Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, (Colo. 1899) 59 Pac. Rep. 607, it is said: "In *Branagan v. Dulaney*, 8 Colo. 408, it was assumed that the 'space of *intersection*' meant the *intersection* of the veins of conflicting cross locations, and, as the mineral in this space was given to the prior location, and none other, that therefore the junior locator of a cross lead had all the ore of his vein within the space of *intersection* of the conflicting locations, save at the space where the veins *intersected*. Section 2336 does not purport to provide for the location of cross veins over territory included within a prior valid and subsisting location. Its purpose appears to be to fix the rights of the claimants of such veins, to settle what might otherwise be conflicting rights between claimants of veins crossing or *intersecting* each other, and provide easements for the benefit of the claimants of such veins (*Wilhelm v. Silvester*, 101 Cal. 358); and unless in making such provisions it impliedly gives the junior cross claimant the ore of his vein, except at the point where it *intersects* the vein of a senior location, the doctrine announced in *Branagan v. Dulaney* cannot be upheld; so that in order to determine what rights are conferred upon a junior cross claimant under this section, the real question is, what is meant by the 'space of *intersection*': The words employed in a

statute are to be construed with reference to its subject-matter and the objects sought to be attained (23 AM. AND ENG. ENCYC. OF LAW 322; *Brewer v. Blougher*, 14 Pet. (U. S.) 178, 10 L. ed. 408; *Sedg. St. and Const. Law* 359), as well as the legislative purpose in enacting it; and its language should receive that construction which will render it harmonious with that purpose, rather than that which will defeat it (*id.* 319; *Taylor v. Washington County*, 67 Ind. 383; *People v. Lacombe*, 99 N. Y. 43). When ambiguous, its general intent, as gathered from the statute, furnishes a key by which its ambiguities may be solved, and thus its words given that meaning which will harmonize with that intent. *Suth. St. Const.*, §§ 218, 219. Conditions with reference to the subject-matter of the act, which it is apparent from its context it was necessary to provide for, may also be considered in ascertaining what is meant by that which is apparently ambiguous. *People v. Lacombe*, *supra*. It is evident from the provisions of section 2322 that the intent of Congress was to give to the locator of a claim to which no adverse rights had attached every vein apexing within the surface boundaries of his location, unless its intent is negatived by section 2336. The words *intersect* and 'cross,' as used in this section, are not strictly synonymous, and in using both, it must be presumed, intended to provide for different conditions. Veins might *intersect*, either on their strike or dip, and not cross. In that event it was necessary to provide which location should have the ore at the space of *intersection*, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior locator should have the right of way through the space of *intersection* for the convenient working of his mine." See also the title MINES AND MINING CLAIMS.



# INTERSTATE COMMERCE.

BY WILLIAM B. HALE.

## I. INTRODUCTORY — STATE OF DECISIONS, 41.

## II. REGULATION OF INTERSTATE COMMERCE, 41.

1. *Power of Congress*, 41.
  - a. *In General*, 41.
  - b. *Exclusiveness of Power*, 42.
    - (1) *Statement of Rule*, 42.
    - (2) *National Subjects Requiring Uniformity of Regulation*, 44.
  - c. *Extent of Power*, 46.
    - (1) *In General*, 46.
    - (2) *Subjects of Regulation*, 47.
      - (a) *Summary Statement*, 47.
      - (b) *Highways*, 48.
      - (c) *Railroads*, 48.
      - (d) *Telegraph Companies*, 48.
      - (e) *Wharves, Piers, Bridges, etc.*, 49.
      - (f) *Shipping and Navigation*, 50.
      - (g) *Persons*, 52.
      - (h) *Trusts and Monopolies*, 52.
      - (i) *Trademarks*, 53.
      - (j) *Counterfeiting*, 53.
      - (k) *Embargo*, 53.
      - (l) *Manufacture*, 53.
    - (3) *Preferences to Ports of One State*, 54.
  - d. *Delegation of Power*, 54.
  - e. *Means Employed*, 54.
2. *Power of States*, 55.
  - a. *Local Police Regulations*, 55.
    - (1) *Validity in General*, 55.
    - (2) *When Invalid*, 56.
  - b. *Effect of Non-action by Congress*, 57.
  - c. *Effect of Action by Congress*, 58.
  - d. *Tonnage Duties*, 60.
  - e. *Import or Export Duties*, 60.
3. *What Constitutes Regulation*, 60.

## III. WHAT CONSTITUTES INTERSTATE COMMERCE, 61.

1. *Definition and Nature*, 61.
2. *Particular Transactions Constituting Interstate Commerce*, 63.
  - a. *Carriage of Freight and Passengers*, 63.
  - b. *Telegraphs and Telephones*, 64.
  - c. *Insurance*, 64.
  - d. *Grain Elevators*, 65.
  - e. *Stock Yards*, 65.
  - f. *Production and Manufacture*, 65.
  - g. *Stock Exchanges*, 65.
  - h. *Foreign Corporations*, 65.
  - i. *Sale of Goods*, 65.
    - (1) *In General*, 65.
    - (2) *By Agents*, 66.
3. *Subjects of Interstate Commerce*, 67.
  - a. *Lawful Subjects of Barter and Sale*, 67.



## INTERSTATE COMMERCE.

- b. Particular Articles, 68.*
- c. Power to Determine, 69.*
- 4. *When Protection of Commerce Clause Attaches, 70.*
- 5. *When Protection of Commerce Clause Ceases, 70.*
  - a. Incorporation with Mass of Property of State, 70.*
  - b. When Incorporation Takes Place, 71.*
    - (1) *In General, 71.*
    - (2) *Original Packages, 71.*
      - (a) *Statement of Rule, 71.*
      - (b) *What Constitutes Original Package, 73.*
      - (c) *What Constitutes Breaking, 74.*
      - (d) *Wilson Law, 74.*

### IV. STATE STATUTES AFFECTING INTERSTATE COMMERCE, 74.

- 1. *In General, 74.*
- 2. *Construction of Statutes, 75.*
  - a. Construction to Sustain Statute, 75.*
    - (1) *General Rule, 75.*
    - (2) *Partial Invalidity, 76.*
  - b. Following Construction of State Court, 76.*
- 3. *Discrimination Against Products and Citizens of Other States, 77.*
- 4. *Inspection Laws, 78.*
  - a. Validity, 78.*
    - (1) *In General, 78.*
    - (2) *Discriminations, 79.*
  - b. What Are Inspection Laws, 79.*
    - (1) *General Principles, 79.*
    - (2) *Particular Statutes, 81.*
  - c. Inspection Charges, 81.*
- 5. *Quarantine and Sanitary Laws, 82.*
  - a. Validity in General, 82.*
  - b. Quarantine Charges, 83.*
  - c. Making Importer Liable for Damages, 83.*
- 6. *Exclusion of Imports, 84.*
  - a. Lawful Subjects of Commerce, 84.*
  - b. Adulterated, Unsound, or Infectious Articles, 84.*
- 7. *Preventing Exports, 85.*
- 8. *Sale of Goods, 85.*
- 9. *Exclusion of Paupers, Criminals, and the Like, 86.*
- 10. *Contracts, 86.*
- 11. *Game Laws, 87.*
- 12. *Fish Laws, 87.*
- 13. *Insurance, 87.*
- 14. *Intoxicating Liquors, 87.*
- 15. *Cigarettes, 87.*
- 16. *Oleomargarine, 87.*
- 17. *Warehouses and Elevators, 88.*
- 18. *Wharves, Piers, and Docks, 88.*
- 19. *Dams, 88.*
- 20. *Bridges, 88.*
- 21. *Public Highways, 88.*
- 22. *Telegraphs and Telephones, 89.*
  - a. In General, 89.*
  - b. Police Powers, 89.*
  - c. Regulation of Buildings, Poles, and Wires, 89.*
  - d. Taxation, 90.*
  - e. Charge for Poles in Street, 90.*
  - f. Transmission and Delivery of Messages, 90.*
  - g. Regulation of Rates, 91.*
  - h. Contracts Limiting or Qualifying Liability, 91.*



## INTERSTATE COMMERCE.

- i. Granting One Company a Monopoly, 91.*
  - j. Effect of Congressional Legislation, 91.*
- 23. *Stock Yards, 92.*
- 24. *Navigation and Navigable Waters, 92.*
- 25. *Liens, 92.*
- 26. *Ships and Shipping, 92.*
- 27. *Pilots, 92.*
- 28. *Ferries, 92.*
- 29. *Seeds, 92.*
- 30. *Coal Oil or Petroleum, 93.*
- 31. *Natural Gas, 93.*
- 32. *Logs and Logging, 93.*
- 33. *Service of Process on Traveller, 93.*
- 34. *County Printing, 93.*
- 35. *Suppression of Gambling, 94.*
- 36. *Satisfaction of Mortgages, 94.*
- 37. *Death by Wrongful Act, 94.*
- 38. *Disinterment of Dead Bodies, 94.*
- 39. *Chinese Immigration, 94.*
- 40. *Manufacture, 94.*
- 41. *License, Occupation and Privilege Tax, 94.*
- 42. *Railroads and Other Carriers, 94.*
  - a. In General, 94.*
  - b. Consolidation, 96.*
  - c. Discrimination, 96.*
  - d. Sunday Laws, 97.*
  - e. Contracts of Carriage, 97.*
  - f. Examining and Licensing Employees, 98.*
  - g. Running of Trains, 98.*
  - h. Heating Passenger Cars, 100.*
  - i. Equal and Separate Accommodations, 100.*
  - j. Tickets and Mileage Books, 100.*
  - k. Rates of Carriage, 101.*
  - l. Free Carriage of Shippers, 103.*
  - m. Delaying Shipments, 103.*
  - n. Delivery to Consignees, 103.*
  - o. Transportation of Live Stock, 103.*
  - p. Liability for Injuries Happening within State, 104.*
  - q. Depot and Terminal Facilities, 104.*
  - r. Connecting Carriers, 104.*
  - s. Switching, 104.*
  - t. Leases, 104.*
  - u. Garnishment, 104.*
  - v. Paupers, 105.*
  - w. Effect of Interstate Commerce Act, 105.*
- 43. *Foreign Corporations, 105.*
  - a. Power of State in General, 105.*
  - b. What Constitutes "Doing Business in State," 106.*
  - c. Known Place of Business and Authorized Agent, 106.*
  - d. Taxation and License, 106.*
  - e. Right to Buy and Sell, 107.*
  - f. Right to Contract, 107.*
  - g. Right to Sue, 107.*
  - h. Consolidation with Domestic Corporation, 108.*
  - i. Insurance, 108.*
- 44. *State Taxation, 108.*
  - a. Validity in General, 108.*
    - (1) *Statement of Rule, 108.*
    - (2) *What Constitutes Tax on Commerce, 109.*
    - (3) *Separation of Interstate from Intrastate Commerce, 110.*



## INTERSTATE COMMERCE.

- (4) *Discrimination*, 111.
- b. *Property Tax*, 111.
  - (1) *Instrumentalities of Commerce*, 111.
  - (2) *Vessels*, 112.
  - (3) *Bridges*, 113.
  - (4) *Imports Interstate and Foreign*, 113.
  - (5) *Exports*, 114.
  - (6) *Goods in Transit*, 115.
  - (7) *Bonds, Credits, and Choses in Action*, 115.
- c. *Travelers and Immigrants*, 116.
- d. *Carriers*, 116.
  - (1) *Freight*, 116.
  - (2) *Passengers*, 116.
  - (3) *Rolling Stock*, 117.
  - (4) *Gross Receipts*, 118.
    - (a) *Receipts from Interstate and Foreign Transportation*, 118.
    - (b) *Receipts from Internal Transportation*, 119.
    - (c) *Receipts Mingled with Mass of Property of State*, 119.
    - (d) *Foreign Building and Loan Associations*, 120.
  - (5) *Taxation by Unit Rule*, 120.
  - (6) *Office Tax*, 120.
- e. *Franchise Tax on Corporations*, 120.
- f. *Incorporation Charges*, 121.
- g. *Sales Within State*, 121.
- h. *Stamp Tax*, 122.
- i. *Insurance Premiums*, 122.
- j. *Inheritance or Succession Tax*, 122.
- k. *Live Stock Grazed in State*, 122.

## V. INTERSTATE COMMERCE ACT, 122.

- 1. *Nature, Purpose, and Constitutionality*, 122.
- 2. *Rules of Construction*, 123.
  - a. *In General*, 123.
  - b. *Strict or Liberal Construction*, 123.
  - c. *Interests to Be Considered*, 124.
  - d. *Application to Existing Contracts*, 124.
  - e. *Terms "Railroad" and "Transportation,"* 124.
  - f. *Construction of English Traffic Acts Adopted*, 124.
- 3. *Organization, Powers, and Duties of Commission*, 124.
  - a. *In General*, 124.
  - b. *Administrative, Judicial, and Legislative Powers*, 125.
  - c. *Establishment of General Rules of Conduct*, 125.
  - d. *Establishment of Rates of Carriage*, 126.
  - e. *Enforcement of Contracts*, 127.
  - f. *Establishment of Through Routes*, 127.
  - g. *Regulations Limited to Existing Facilities*, 127.
- 4. *Carriers Subject to Act*, 128.
  - a. *In General*, 128.
  - b. *Transportation Wholly Within One State*, 128.
  - c. *Carriers under "Common Control, Management, or Arrangement"*, 129.
  - d. *Carriers by Water*, 130.
  - e. *Northern Pacific Railway Company*, 130.
  - f. *Transfer and Switching Companies*, 130.
  - g. *Express Companies*, 130.
  - h. *Bridges and Ferries*, 131.
  - i. *Stock Yards Companies*, 131.
- 5. *Just and Reasonable Charges*, 131.
  - a. *In General*, 131.



## INTERSTATE COMMERCE.

- b. What Constitutes, 131.*
    - (1) *A Question of Fact, 131.*
    - (2) *Circumstances to Be Considered, 132.*
    - (3) *Comparison of Rates, 133.*
- 6. *Unjust Discrimination, 134.*
  - a. In General, 134.*
  - b. What Constitutes, 135.*
    - (1) *In General, 135.*
    - (2) *Similarity of Circumstances and Conditions, 136.*
    - (3) *Classification of Freights, 138.*
  - c. Particular Instances, 139.*
- 7. *Undue Preference or Advantage, 142.*
  - a. In General, 142.*
  - b. What Constitutes, 143.*
    - (1) *In General, 143.*
    - (2) *Circumstances to Be Considered, 144.*
  - c. Particular Instances, 146.*
- 8. *Facilities for Interchange of Traffic, 149.*
  - a. Duty to Afford Equal Facilities, 149.*
  - b. Duty to Arrange for Joint Through Transportation, 151.*
  - c. Duty to Advance Charges or Give Credit, 152.*
  - d. Duty to Draw Cars of Other Lines, 152.*
- 9. *Long and Short Hauls, 153.*
  - a. In General, 153.*
  - b. Equal Charge for Longer and Shorter Hauls, 153.*
  - c. Dissimilarity of Circumstances and Conditions, 154.*
    - (1) *As Justifying Greater Rate for Shorter Haul, 154.*
    - (2) *What Constitutes, 155.*
      - aa. In General, 155.*
      - bb. Competition Between Rival Lines, 156.*
      - cc. Local and Through Rates, 158.*
    - (3) *How Determined, 158.*
      - aa. Application to Commission for Relief, 158.*
      - bb. By Carrier in First Instance, 159.*
- 10. *Filing and Publishing Schedules, 160.*
  - a. Duty to Establish and Publish, 160.*
  - b. Duty to File Schedule, 161.*
  - c. Contents of Schedule, 161.*
  - d. Contracts Presumed to Be with Reference to Schedule, 161.*
  - e. Effect of Variance from Scheduled Rates, 162.*
  - f. Change of Schedules, 162.*
- 11. *Continuous Carriage, 163.*
- 12. *Pooling Contracts, 163.*
- 13. *Mileage, Excursion, Commutation Tickets, etc., 163.*
- 14. *Enforcement of Act, 164.*
  - a. Election of Tribunal, 164.*
    - (1) *In General, 164.*
    - (2) *Jurisdiction of State Courts, 164.*
  - b. Proceedings Before Commission, 164.*
    - (1) *Jurisdiction, 164.*
      - (a) *How Acquired — Complaint Unnecessary, 164.*
      - (b) *Extent of Jurisdiction, 165.*
        - aa. Jurisdiction Strictly Statutory, 165.*
        - bb. Jurisdiction in Penal Actions and Prosecutions, 165.*
        - cc. Jurisdiction over Foreign Carriers, 165.*
        - dd. Jurisdiction as to Receivers, 165.*
    - (2) *Function of Commission, 165.*
      - (a) *In General, 165.*



## INTERSTATE COMMERCE.

- (b) *Duty as to Abstract, Collateral, and Ex Parte Questions*, 165.
  - (3) *Nature of Proceeding*, 166.
    - (a) *Mode of Procedure*, 166.
    - (b) *Doctrine of Estoppel Inapplicable*, 166.
  - (4) *Parties*, 166.
  - (5) *Evidence*, 166.
    - (a) *Necessity for in Support of Complaint*, 166.
    - (b) *Burden of Proof on Complainant*, 166.
    - (c) *Right to Take Proofs Where Defendant Fails to Answer*, 167.
  - (6) *Right to Require Attendance of Witnesses, Production of Books, Papers, etc.*, 167.
    - (a) *In General*, 167.
    - (b) *Enforcement of Order*, 167.
      - aa. *Commission Cannot Punish Disobedience as a Contempt*, 167.
      - bb. *Right to Invoke Aid of United States Court*, 167.
        - (aa) *Statutory Provision*, 167.
        - (bb) *Nature and Object of Proceeding under Provision*, 168.
        - (cc) *Grounds of Defense in Such Proceedings*, 168.
        - (dd) *Failure to Obey Order Punishable as Contempt*, 168.
  - (7) *Findings of Fact*, 168.
    - (a) *In General*, 168.
    - (b) *Duty to Dispose of Issues of Fact*, 169.
    - (c) *Duty to Receive and Take into Account Evidence of Facts*, 169.
  - (8) *Report*, 169.
    - (a) *Duty of Commission to Make Report*, 169.
    - (b) *Requisites of Report*, 169.
      - aa. *In General*, 169.
      - bb. *Recommendation as to Reparation*, 169.
  - (9) *Order of Commission*, 169.
    - (a) *Right to Make Order Pendente Lite*, 169.
    - (b) *When Order Unnecessary*, 169.
      - aa. *In General*, 169.
      - bb. *No Order Made Where Tariff Abandoned Before Complaint Made*, 169.
      - cc. *Effect of Answer Promising Compliance with the Law*, 170.
    - (c) *Requisites of Order*, 170.
    - (d) *Nature and Effect of Order*, 170.
      - aa. *In General*, 170.
      - bb. *Order Binding on Successor of Railroad Company*, 170.
      - cc. *Effect of Decision as a Precedent*, 170.
    - (e) *Manner of Enforcing Orders of Commission*, 170.
  - (10) *Rehearing*, 171.
  - (11) *Reparation*, 171.
    - (a) *Right of Commission to Award*, 171.
    - (b) *Burden of Proof on Complainant Where Reparation Claimed*, 171.
    - (c) *Measure of Damages*, 171.
    - (d) *Determination Whether Property Held by Receiver Is Subject to Order of Reparation*, 171.
  - (12) *Refunding of Excessive Rates*, 171.
- c. *Proceedings in Federal Courts*, 171.



## INTERSTATE COMMERCE.

- (1) *Without Prior Application to Commission, 171.*
  - (a) *Application by Commission to Enforce Provisions and Punish Violations, 171.*
    - aa. *In General, 171.*
    - bb. *Manner of Enforcement, 172.*
      - (aa) *Mandamus, 172.*
      - (bb) *Injunction, 172.*
  - (b) *Application by Persons Injured by Violation of Act, 172.*
    - aa. *Actions for Damages, 172.*
    - bb. *Suits for Relief from Illegal Discrimination, 172.*
- (2) *Proceedings to Enforce Orders of Commission, 172.*
  - (a) *Jurisdiction of Federal Courts, 172.*
    - aa. *In General, 172.*
    - bb. *Jurisdiction Independent of Citizenship of Parties, 173.*
    - cc. *No Objection that Complainant Before Commission Had No Real Grievance, 173.*
  - (b) *Parties, 173.*
    - aa. *Who May Apply, 173.*
      - (aa) *Generally, 173.*
      - (bb) *Capacity of Commission to Sue as Body Corporate, 173.*
    - bb. *Parties Defendant, 173.*
      - (aa) *Carrier Jointly Concerned with Defendant, Proper but Not Necessary Party, 173.*
      - (bb) *Enforcement Against One Company Within Court's Jurisdiction, 174.*
  - (c) *Nature of Proceeding, 174.*
    - aa. *Whether Equitable or Legal, 174.*
    - bb. *Such Proceedings Original in Their Nature, 174.*
  - (d) *Evidence, 174.*
    - aa. *Findings of Fact — Effect as Evidence, 174.*
      - (aa) *Statutory Provisions, 174.*
      - (bb) *Construction of Findings, 175.*
    - bb. *Right to Consider Testimony Used Before Commission and Hear Additional Proof, 175.*
  - (e) *Decision upon Application, 176.*
    - aa. *General Principles Controlling, 176.*
      - (aa) *Orders Which Should Be Enforced, 176.*
      - (bb) *When Enforcement Properly Refused, 176.*
      - (cc) *Duty to Remand Case to Commission, 176.*
    - bb. *Limitation of Power of Court in Disposing of Order, 177.*
  - (f) *Enforcement of Order, 177.*
    - aa. *In General, 177.*
    - bb. *Punishment for Disobedience to Process of Circuit Court, 177.*
  - (g) *Appeal, 177.*
    - aa. *To What Court Taken, 177.*
    - bb. *Reversal and Remand in Circuit Court of Appeals, 177.*
    - cc. *Review in Supreme Court of Question as to Reasonableness of Discrimination, 178.*
    - dd. *Effect of Appeal as Supersedeas, 178.*
- (3) *Criminal Proceedings, 178.*



## CROSS-REFERENCES.

For matters of *PROCEDURE* see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 11, p. 482.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the titles *CONSTITUTIONAL LAW*, vol. 6, p. 882; *INTOXICATING LIQUORS*, *post*; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*; *POLICE POWER*; *TAXATION*; and the specific titles throughout this article.

**I. INTRODUCTORY — STATE OF DECISIONS.** — The Supreme Court of the United States is the one ultimate judicial authority on all questions of interstate commerce.<sup>1</sup> But as has been often pointed out, and even admitted by the court itself, the decisions of that high tribunal have been far from uniform, and any attempt to reconcile all that has been said and decided by it must end in confusion.<sup>2</sup> The difficulty, if not impossibility, of reconciling all the decisions upon the subject is shown by the extraordinary number of dissenting opinions in the cases. Most of the important decisions were rendered by a divided court. Still it can safely be said that the differences of opinion thus manifested have not been so much upon fundamental principles as upon the application of those principles to particular facts and the construction of the various state statutes which have been under consideration. The principles themselves are fairly well settled.<sup>3</sup> In view of these facts the Supreme Court has said that it would be a useless task to undertake to fix an arbitrary rule by which the line separating the powers of the state from the exclusive power of Congress in this regard must in all cases be located, and that it is better to settle each case as it arises upon a view of the particular rights involved.<sup>4</sup>

It will be seen throughout this title that an extraordinary number of state and lower federal court decisions have been reversed by the Supreme Court at Washington. The treatment of these and similar cases has involved some difficulty, and where, from the peculiarity of the facts involved, the overruling was not absolutely certain, they have been cited, but only to indicate the views of such courts, and not as controlling authority.

**II. REGULATION OF INTERSTATE COMMERCE — 1. Power of Congress — a. IN GENERAL.** — The commerce clause of the Constitution provides that Congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."<sup>5</sup> Among the reasons, if not the strongest reason, for vesting in Congress the power to regulate interstate com-

1. **Decisions of Supreme Court Ultimate Authority.** — *Monongahela Nav. Co. v. U. S.*, 148 U. S. 329.

2. **Confusion and Conflict in Authorities Admitted.** — *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Fargo v. Michigan*, 121 U. S. 230; *Leloup v. Mobile*, 127 U. S. 640; *In re Rahrer*, 140 U. S. 545; *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575; *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155.

It was admitted in *Fargo v. Michigan*, 121 U. S. 230, that the court had not always employed the same language, and that all of the judges of the court who had written opinions for it might not have meant precisely the same thing.

3. **Principles Well Settled.** — *Scott v. Donald*, 165 U. S. 90; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204.

**Leading Case Followed.** — The cases have

almost uniformly adhered to the fundamental principles which Chief Justice Marshall laid down in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, as to the nature and extent of the grant of power to Congress to regulate interstate and foreign commerce, and also of the limitations, express and implied, which it imposes upon state legislation with regard to taxation, to the control of domestic commerce, and to all persons and things within its limits which are purely of internal concern. *Kidd v. Pearson*, 128 U. S. 16.

4. **Line Between Power of Congress and of States Drawn as Each Case Arises.** — *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, *quoting* with approval *Hall v. De Cuir*, 95 U. S. 485; *Railroad Commission Cases*, 116 U. S. 307. See also *Kidd v. Pearson*, 128 U. S. 16; *Welton v. Missouri*, 91 U. S. 281.

5. Const. U. S., art. 1, § 8, cl. 3.



merce was the desirability of insuring uniformity of regulation against conflicting and discriminating state legislation.<sup>1</sup> Indeed, the need of some equitable and just regulation of commerce was one of the most influential causes which led to the adoption of the Constitution.<sup>2</sup>

*b. EXCLUSIVENESS OF POWER*—(1) *Statement of Rule.*—The power to regulate implies full power over the thing to be regulated, and excludes the action of all others that would perform the same action on the same thing.<sup>3</sup> Accordingly, though there is much confusion in the language of the decisions, especially the earlier ones, it is well settled that the power of Congress to regulate interstate commerce is exclusive.<sup>4</sup> The differences of opinion which have existed in the cases upon this subject have arisen not from a denial of the power of Congress when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to any action by the states, or, in other words, whether the power of Congress to regulate commerce is exclusive or only paramount.<sup>5</sup> It has

1. *Uniformity of Regulation Object of Commerce Clause.*—*Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *State Freight Tax Case*, 15 Wall. (U. S.) 275; *Dubuque, etc., R. Co. v. Richmond*, 19 Wall. (U. S.) 589; *Welton v. Missouri*, 91 U. S. 280; *Mobile County v. Kimball*, 102 U. S. 691; *Kidd v. Pearson*, 128 U. S. 21, 2 Int. Com. Rep. 232; *Veazie v. Moor*, 14 How. (U. S.) 568; *Dubuque, etc., R. Co. v. Richmond*, 19 Wall. (U. S.) 584; *Tiernan v. Rinker*, 102 U. S. 123; *Webber v. Virginia*, 103 U. S. 344; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Leisy v. Hardin*, 135 U. S. 100; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192.

2. *Necessity of Just Regulation Prompted Adoption of Constitution.*—*Cook v. Pennsylvania*, 97 U. S. 574; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 494; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Welton v. Missouri*, 91 U. S. 281. 3. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 209.

4. *Power of Congress Is Exclusive—United States.*—*Passenger Cases*, 7 How. (U. S.) 283; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Henderson v. New York*, 92 U. S. 259; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Hall v. De Cuir*, 95 U. S. 485; *Mobile County v. Kimball*, 102 U. S. 691; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Smith v. Alabama*, 124 U. S. 465; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Kidd v. Pearson*, 128 U. S. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 161; *Minnesota v. Barber*, 136 U. S. 313; *In re Rahrer*, 140 U. S. 545; *Crutcher v. Kentucky*, 141 U. S. 47; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 48 Am. & Eng. R. Cas. 608; *U. S. v. E. C. Knight Co.*, 156 U. S. 1; *In re Debs*, 158 U. S. 564; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Hennington v. Georgia*, 163 U. S. 299; *Scott v. Donald*, 165 U. S. 58; *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613;

*Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs*, 18 Fed. Rep. 10; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *The Katie*, 40 Fed. Rep. 480; *Rhea v. Newport, etc., R. Co.*, 50 Fed. Rep. 16; *Ex p. Scott*, 66 Fed. Rep. 45; *Kaeiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151, 16 Am. & Eng. R. Cas. 40; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679, 16 Am. & Eng. R. Cas. 1; *Michigan Tel. Co. v. Charlotte*, 93 Fed. Rep. 11; *Gulf, etc., R. Co. v. Miami Steamship Co.*, 86 Fed. Rep. 407; *Halderman v. Beckwith*, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907; *U. S. v. Duluth*, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001; *Rhodes v. Iowa*, 170 U. S. 412, *reversing* 90 Iowa 496; *Leonard v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 599, 3 Int. Com. C. Rep. 241; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

*Alabama.*—*Cook v. Rome Brick Co.*, 98 Ala. 409.

*California.*—*People v. Downer*, 7 Cal. 169; *Mitchell v. Steelman*, 8 Cal. 363; *Carson River Lumbering Co. v. Patterson*, 33 Cal. 334.

*Indiana.*—*State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155; *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575.

*Iowa.*—*Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672, 6 Am. & Eng. R. Cas. 305; *Gatton v. Chicago, etc., R. Co.*, 95 Iowa 112.

*Kansas.*—*State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98; *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

*Maine.*—*Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774.

*Maryland.*—*Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

*Minnesota.*—*Foster v. Blue Earth County*, 7 Minn. 140.

*Pennsylvania.*—*Wigton v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 184, 47 Leg. Int. (Pa.) 154; *Com. v. Vandyke*, 9 Pa. Dist. 41.

*Texas.*—*Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 Tex. 1, 59 Am. St. Rep. 17.

5. *Point of Differences of Opinion.*—*In re Rahrer*, 140 U. S. 545.

"There can be no doubt but that exclusive



frequently been said that the power of the states to regulate commerce is concurrent with that of Congress, and that in the absence of congressional legislation the states may regulate interstate commerce within their own limits, with the understanding always that all such regulations inconsistent with those of the federal government must give way.<sup>1</sup> But these statements are clearly not correct in the broad sense of the terms used.<sup>2</sup> The doctrine has always been controverted in the Supreme Court, and has seldom, if ever, been stated without dissent.<sup>3</sup> Certainly it has never been decided by that court that the power to regulate interstate as well as foreign commerce is not exclusively vested in Congress.<sup>4</sup> It must be conceded that a state has power to enact many laws which affect interstate or foreign commerce,<sup>5</sup> but statutes of this class are sustained, not because the state has any power to regulate interstate or foreign commerce, but because such statutes are not deemed regulations of such commerce, but on the contrary are mere local police regu-

power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution.'" *Hall v. De Cuir*, 95 U. S. 487, citing *Sherlock v. Alling*, 93 U. S. 103; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284.

1. **Power of State Concurrent but Subordinate — United States.** — *License Cases*, 5 How. (U. S.) 504 [*overruled* in *Leisy v. Hardin*, 135 U. S. 100]; *Osborne v. Mobile*, 16 Wall. (U. S.) 482; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *The Lottawanna*, 21 Wall. (U. S.) 558; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164; *Munn v. Illinois*, 94 U. S. 138; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Pound v. Turck*, 95 U. S. 462; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Walling v. Michigan*, 116 U. S. 446; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Crandall v. Nevada*, 6 Wall. (U. S.) 35. See also *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164. And see comments on these cases limiting the general language used in them in *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557.

*California*. — *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581.

*Minnesota*. — *Jacobson v. Wisconsin, etc., R. Co.*, 71 Minn. 519.

*Missouri*. — *State v. Addington*, 77 Mo. 110.

*Ohio*. — *Thoms v. Greenwood*, 7 Am. L. Rec. 320, 6 Ohio Dec. (Reprint) 639.

*South Carolina*. — *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

**Illustrative Statements of Rule.** — The power granted to Congress to regulate commerce among the several states is not exclusive, as a state may at all times regulate commerce carried on wholly within its borders. *Thoms v. Greenwood*, 7 Am. L. Rec. 320, 6 Ohio Dec. (Reprint) 639.

So long as Congress forbears to exercise the power to regulate commerce, each state may, for itself, within its own limits, regulate such

commerce. *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

The power of Congress to regulate commerce does not take away the right to legislate on matters where Congress has not acted. *Newport v. Taylor*, 16 B. Mon. (Ky.) 699.

2. **State Power Not Concurrent.** — *Leisy v. Hardin*, 135 U. S. 100 [*overruling* *License Cases*, 5 How. (U. S.) 504]; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Halderman v. Beckwith*, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907; *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672; *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

A state has no power to regulate commerce which extends beyond its own jurisdiction. *Halderman v. Beckwith*, 4 McLean (U. S.) 286, 11 Fed. Cas. No. 5,907.

**Result of Decisions.** — In *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 342, 17 Fed. Cas. No. 9,645, the result of the decisions was held to be that states had no power to regulate any but internal commerce. See also *Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

"Whatever doubt the earlier decisions may have created — and certainly there was, for a time, much confusion and conflict — it is completely removed by the recent decisions, and the law now is that all legislation in regulation of commerce between the states must be enacted by the national legislature." *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575.

3. **Doctrine Always Controverted.** — *Henderson v. New York*, 93 U. S. 272.

4. *State Freight Tax Case*, 15 Wall. (U. S.) 232.

**Comparison with Power Over Foreign Commerce.**

— It may be laid down as the settled doctrine of the Supreme Court that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations. *Brown v. Houston*, 114 U. S. 622; *Crutcher v. Kentucky*, 141 U. S. 57; *State Freight Tax Case*, 15 Wall. (U. S.) 232. In both cases the power of Congress is necessarily exclusive. *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 469.

5. **Power of State to Enact Laws Affecting Interstate and Foreign Commerce.** — See *infra*, this section, *Power of States*. See also *infra*, this title, *State Statutes Affecting Interstate Commerce*.



lations having their source in the powers which the states reserved and never surrendered to Congress, and their character in this respect is not changed by the fact that for a limited time or to a limited extent they incidentally affect interstate commerce,<sup>1</sup> or by the fact that Congress in the exercise of its commercial powers might enact similar regulations.<sup>2</sup> Legislation may affect commerce in a great variety of ways without constituting a regulation of it within the meaning of the Constitution.<sup>3</sup> It cannot be doubted, however, that a state law dealing directly and only with interstate commerce is void.<sup>4</sup>

(2) *National Subjects Requiring Uniformity of Regulation.*—When the subject upon which Congress can act under the power to regulate commerce is national in its character, and admits and requires uniformity of regulation affecting alike all the states, then the power is in its nature exclusive, and the states have no power to act.<sup>5</sup>

The Failure of Congress to Act as to matters of such a national character is equivalent to a declaration that the matter shall be free from regulation or restriction by any statutory enactments,<sup>6</sup> and any regulation of the subject by

**1. Local Police Laws Not Deemed Regulations of Commerce.**—*Hennington v. Georgia*, 163 U. S. 317; *Leisy v. Hardin*, 135 U. S. 100; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465; *Hall v. De Cuir*, 95 U. S. 487; *Missouri*, etc., R. Co. v. *Haber*, 169 U. S. 635; *New York*, etc., R. Co. v. *New York*, 165 U. S. 628; *Nashville*, etc., R. Co. v. *Alabama*, 128 U. S. 101; *Hannibal*, etc., R. Co. v. *Husen*, 95 U. S. 472; *Western Union Tel. Co. v. James*, 162 U. S. 656; *Sherlock v. Alling*, 93 U. S. 99; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Mobile County v. Kimball*, 102 U. S. 691; *Smith v. Alabama*, 124 U. S. 465; *Chicago*, etc., R. Co. v. *Fuller*, 17 Wall. (U. S.) 560; *Kidd v. Pearson*, 128 U. S. 1; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

**Police Powers Not Surrendered.**—"The grant to Congress of authority to regulate foreign and interstate commerce did not involve a surrender by the states of their police powers." *Plumley v. Massachusetts*, 155 U. S. 471. See also to the same effect *Sherlock v. Alling*, 93 U. S. 99.

**Limit Between State and Federal Power.**—That which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the exclusive jurisdiction of the United States. *In re Rahrer*, 140 U. S. 545.

2. See *State v. Harbourn*, 70 Conn. 484. See also *infra*, this section, *Power of States—Local Police Regulations*.

**3. Affecting Without Regulating Commerce.**—*Sherlock v. Alling*, 93 U. S. 99; *Hall v. De Cuir*, 95 U. S. 487; *Mobile County v. Kimball*, 102 U. S. 691; *Smith v. Alabama*, 124 U. S. 465; *Western Union Tel. Co. v. James*, 162 U. S. 656; *Osborne v. Mobile*, 16 Wall. (U. S.) 482; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284.

**Subjects Auxiliary to Commerce.**—Language affirming the exclusiveness of the grant of power over commerce to Congress, commerce being defined as intercourse and traffic, may not be inaccurate when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce. *Mobile County v. Kimball*, 102 U. S. 691.

**4. State Laws Dealing Directly with Interstate Commerce.**—*State v. Harbourn*, 70 Conn. 484. See also *infra*, this section, *Power of States*;

and *infra*, this title, *State Statutes Affecting Interstate Commerce*.

In the absence of legislation by Congress a state enactment may so directly and materially burden interstate commerce as to be in itself a regulation of such commerce, and therefore void. *Lake Shore*, etc., R. Co. v. *Ohio*, 173 U. S. 285; *Hall v. De Cuir*, 95 U. S. 485.

**5. Exclusive Power of Congress in Matters National in Character and Requiring Uniformity of Regulation—United States.**—*Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Ex p. McNeil*, 13 Wall. (U. S.) 236; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Chicago*, etc., R. Co. v. *Fuller*, 17 Wall. (U. S.) 560; *The Lottawanna*, 21 Wall. (U. S.) 558; *Welton v. Missouri*, 91 U. S. 275; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Tiernan v. Rinker*, 102 U. S. 123; *Lord v. Goodall*, etc., *Steamship Co.*, 102 U. S. 541; *Mobile County v. Kimball*, 102 U. S. 691; *Kaiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Webber v. Virginia*, 103 U. S. 344; *Parkersburg*, etc., *Transp. Co. v. Parkersburg*, 107 U. S. 691; *Escanaba*, etc., *Transp. Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622; *Railroad Commission Cases*, 116 U. S. 307; *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Philadelphia*, etc., *Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465; *In re Rahrer*, 140 U. S. 545; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Leisy v. Hardin*, 135 U. S. 100; *Covington*, etc., *Bridge Co. v. Kentucky*, 154 U. S. 204; *Ouachita*, etc., *Packet Co. v. Aiken*, 16 Fed. Rep. 890; *Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs*, 18 Fed. Rep. 10.

*California.*—*State v. The Steamship Constitution*, 42 Cal. 578, 10 Am. Rep. 303.

*Indiana.*—*State v. Indiana*, etc., *Oil*, etc., Co., 120 Ind. 575.

*Iowa.*—*Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672.

**6. Failure of Congress to Act Equivalent to Declaration that Commerce Shall Be Free—United States.**—*Welton v. Missouri*, 91 U. S. 275;



the states, except in matters of local concern only, is repugnant to such freedom.<sup>1</sup>

Interstate or Foreign Commerce Is National in Its Character, and admits and requires one uniform system of regulation, at least as to all that portion of it which consists in the carriage of persons and the transportation, purchase, sale, and exchange of commodities. Accordingly, so long as Congress does not pass any law regulating these matters specifically, or subjecting them to the operation of state laws,<sup>2</sup> a state has no power to interfere.<sup>3</sup> "In the matter of

Hall *v.* De Cuir, 95 U. S. 485; Mobile County *v.* Kimball, 102 U. S. 691; Tiernan *v.* Rinker, 102 U. S. 123; Brown *v.* Houston, 114 U. S. 622; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489; Webber *v.* Virginia, 103 U. S. 344; Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678; Parkersburg, etc., Transp. Co. *v.* Parkersburg, 107 U. S. 691; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Walling *v.* Michigan, 116 U. S. 446; Philadelphia, etc., Steamship Co. *v.* Pennsylvania, 122 U. S. 326; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347; Smith *v.* Alabama, 124 U. S. 465; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465; Stoutenburgh *v.* Hennick, 129 U. S. 141; Leisy *v.* Hardin, 135 U. S. 100; *In re* Rahrer, 140 U. S. 545; Crutcher *v.* Kentucky, 141 U. S. 47; Brennan *v.* Titusville, 153 U. S. 289; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 204; U. S. *v.* E. C. Knight Co., 156 U. S. 1; Western Union Tel. Co. *v.* James, 162 U. S. 650; Hennington *v.* Georgia, 163 U. S. 299; Pacific Coast Steam-Ship Co. *v.* Board of Railroad Com'rs, 18 Fed. Rep. 10; *Ex p.* Scott, 66 Fed. Rep. 45.

*Indiana.*—State *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 575.

*Kansas.*—Hardy *v.* Atchison, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

Whether Congress Has Failed to Act. — It seems that Act Cong. 1866 (14 U. S. Stat. at L. 66; Rev. Stat. U. S., § 5258), authorizing all railroad companies to transport passengers and freight from state to state and empowering them to receive and accept compensation therefor, is such a regulation of interstate commerce as to preclude all further legislation upon the same subject by the states, under the principle that where Congress has regulated a particular subject of interstate commerce it in effect declares that no additional or other regulations upon the same subject shall be passed or exist. Hardy *v.* Atchison, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

Freedom of Commerce — What Constitutes. — Freedom of transportation between the states or between the United States and foreign countries implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196. See also Kauffman Milling Co. *v.* Missouri Pac. R. Co., 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417.

1. Walling *v.* Michigan, 116 U. S. 455 [citing Welton *v.* Missouri, 91 U. S. 275; Mobile County *v.* Kimball, 102 U. S. 691; Brown *v.* Houston, 114 U. S. 622].

But Mere Police Regulations, such as Sunday

laws, etc., are not such regulations of interstate commerce as are void in the absence of affirmative legislation by Congress. Hennington *v.* Georgia, 163 U. S. 299. See also *supra*, this section, *Statement of Rule*; and *infra*, this section, *Power of States — Local Police Regulations*.

2. Operation of State Laws Extended by Act of Congress. — The Wilson law is an illustration of an Act of Congress subjecting articles of interstate commerce to the operation of state laws. See *infra*, this title, *What Constitutes Interstate Commerce — When Protection of Commerce Clauses Ceases — Wilson Law*. See also the title INTOXICATING LIQUORS, *post*.

Nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, even under the guise of a police regulation. Brennan *v.* Titusville, 153 U. S. 289.

3. Interstate Commerce National in Character — Inaction of Congress Does Not Authorize State Action. — *United States.* — Welton *v.* Missouri, 91 U. S. 280; Mobile County *v.* Kimball, 102 U. S. 691; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Walling *v.* Michigan, 116 U. S. 446; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 486; Stoutenburgh *v.* Hennick, 129 U. S. 141; Leisy *v.* Hardin, 135 U. S. 100; Hinson *v.* Lott, 8 Wall. (U. S.) 148; Hall *v.* De Cuir, 95 U. S. 485; Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678; U. S. *v.* E. C. Knight Co., 156 U. S. 1; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285; *In re* Rahrer, 140 U. S. 545; Pacific Coast Steam-Ship Co. *v.* Board of Railroad Com'rs, 18 Fed. Rep. 10; State Freight Tax Case, 15 Wall. (U. S.) 239.

*Indiana.* — State *v.* Indiana, etc., Oil, etc., Co., 120 Ind. 575.

*Iowa.* — Carton *v.* Illinois Cent. R. Co., 59 Iowa 148, 44 Am. Rep. 672.

*Kansas.* — Hardy *v.* Atchison, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432; State *v.* Saunders, 19 Kan. 127, 27 Am. Rep. 98.

"Even if Congress has not seen fit to prescribe any specific rules to govern interstate commerce, that does not affect the question. 'Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled.'" Hardy *v.* Atchison, etc., R. Co., 32 Kan. 715, commenting upon Peik *v.* Chicago, etc., R. Co., 94 U. S. 164; Munn *v.* Illinois, 94 U. S. 138; and Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155; which cases seem to decide that until Congress acts in reference to interstate commerce the legislature of a state may regulate the transportation of freight and passengers among the states. These cases



interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." <sup>1</sup> Indeed, as has been seen, the very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. <sup>2</sup>

**Navigation on the High Seas is necessarily national in its character.** <sup>3</sup>

**c. EXTENT OF POWER — (1) In General — Constitutional Limitations.** — The power to regulate interstate and foreign commerce is full, complete, and absolute in Congress, subject to no limitations other than are prescribed by the Constitution. <sup>4</sup> "The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution, or in any of the amendments to that instrument," but on the contrary it must be exercised in subordination thereto. <sup>5</sup>

**Legitimate Objects of Exercise.** — The constitutional power of Congress to regulate interstate and foreign commerce may be used not only for the advancement of commerce, but for the promotion of other objects of national concern. <sup>6</sup>

**Not Limited by State Lines.** — The power of Congress to regulate commerce between the states is supreme over the whole subject, unimpeded and unembarrassed by state lines and state laws. <sup>7</sup>

**Commerce Wholly Within State.** — Congress has no power to regulate the purely internal commerce of a state, and the jurisdiction of the state over such com-

seem to be inconsistent with the principles which have been settled by both the prior and the subsequent decisions of the United States Supreme Court upon this question. See also *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672, wherein these three cases were commented upon in the same manner.

**Not Only National but Also International.** — The matters of interstate and foreign commerce and the proper regulation thereof are not only national but international in their character, and the great importance of having but one source for the law which regulates such commerce throughout the length and breadth of the land cannot be overestimated. *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

**The Business of Selling Goods by Sample on Commission** applies to that class of subjects which calls for uniform rules and national legislation, and is excluded from that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and consequently the state cannot regulate it. *Stoutenburgh v. Hennick*, 129 U. S. 141.

1. *Per Bradley, J.*, in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, *quoted* with approval in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. See also *Stoutenburgh v. Hennick*, 129 U. S. 141; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411.

2. *Welton v. Missouri*, 91 U. S. 275; See also *supra*, this section, *In General*.

3. *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 547.

**Interstate Commerce Carried On by Ships on the sea** is national in its character and properly admits of only one uniform system. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

4. **Limited Only by Constitution.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 196; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Welton v. Missouri*, 91 U. S. 275; *Tieman v. Rinker*, 102 U.

*S.* 123; *Mobile County v. Kimball*, 102 U. S. 691; *Kidd v. Pearson*, 128 U. S. 1; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96; *Leisy v. Hardin*, 135 U. S. 100; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 329; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *State v. Kennedy*, 19 La. Ann. 397.

5. *U. S. v. Joint Traffic Assoc.*, 171 U. S. 570, *citing Monongahela Nav. Co. v. U. S.*, 148 U. S. 312; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

**Liberty of Contract under Constitution.** — "The provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and \* \* \* the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states." *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

6. **Incidental Promotion of Other Objects.** — *U. S. v. The William*, 2 Am. L. J. (Hall's) 255, 28 Fed. Cas. No. 16,700; *U. S. v. E. C. Knight Co.*, 156 U. S. 12.

7. **State Lines Ignored.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Guy v. Baltimore*, 100 U. S. 434; *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678; *Kidd v. Pearson*, 128 U. S. 1; *Leisy v. Hardin*, 135 U. S. 111; *The Daniel Ball*, Brown Adm. 197, 6 Fed. Cas. No. 3,564; *U. S. v. Duluth*, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *Pilotage Com'rs v. Steamboat Cuba*, 28 Ala. 185; *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655. See also *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *U. S. v. Martin*, 14 Fed. Rep. 817.



merce is exclusive.<sup>1</sup>

**Police Powers.** — Congress can exercise no police powers within a state; the police power of the states is essentially exclusive.<sup>2</sup>

**Commerce with Indian Tribes.** — The power of Congress to regulate commerce with the Indians is absolute under the Constitution, and it is immaterial that the tribe resides wholly within the limits of a state.<sup>3</sup>

(2) *Subjects of Regulation* — (a) **Summary Statement.** — The power of Congress to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations and among the states.<sup>4</sup> It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on.<sup>5</sup> It includes the means of communication by land as well as by water.<sup>6</sup>

**1. Purely Internal Commerce of State** — *United States*. — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *U. S. v. Coombs*, 12 Pet. (U. S.) 72; *Passenger Cases*, 7 How. (U. S.) 283; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *U. S. v. Dewitt*, 9 Wall. (U. S.) 41; *The Daniel Ball*, 10 Wall. (U. S.) 557; *Hall v. De Cuir*, 95 U. S. 485; *Plessy v. Ferguson*, 163 U. S. 537; *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587, *affirming* 66 Miss. 662; *Trade-Mark Cases*, 100 U. S. 82; *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 541; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Fargo v. Michigan*, 121 U. S. 230; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Kidd v. Pearson*, 128 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; *In re Rahrer*, 140 U. S. 545; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *U. S. v. E. C. Knight Co.*, 156 U. S. 1; *Geer v. Connecticut*, 161 U. S. 519; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Gladson v. Minnesota*, 166 U. S. 427; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *The Gretna Green*, 20 Fed. Rep. 901; *The Katie*, 40 Fed. Rep. 480; *U. S. v. Boyer*, 85 Fed. Rep. 425; *Nicol v. Ames*, 173 U. S. 509, *affirming* 89 Fed. Rep. 144; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *The "Bright Star"*, Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880; *King v. American Transp. Co.*, 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787; *The Steam Propeller Thomas Swan*, 6 Ben. (U. S.) 42, 23 Fed. Cas. No. 13,931; *U. S. v. The Steamboat James Morrison*, Newb. Adm. 241, 26 Fed. Cas. No. 15,465; *Sears v. Warren County*, 36 Ind. 267, 10 Am. Rep. 62.

*Louisiana*. — *New Orleans v. Ship Martha J. Ward*, 14 La. Ann. 289.

*New York*. — *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *People v. Huntingdon*, 4 N. Y. Leg. Obs. 187.

*Ohio*. — *Thoms v. Greenwood*, 7 Am. L. Rec. 320, 6 Ohio Dec. (Reprint) 639.

*Texas*. — *Houston, etc., Nav. Co. v. Dwyer*, 2 Tex. 376.

**Inland Navigation.** — The Act of Congress limiting the liability of the owners of vessels for the loss of property shipped on the vessels does not apply to vessels engaged in inland navigation, and is not unconstitutional as an attempt of the federal government to control commerce within the several states. *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 541.

The power of Congress comprehends navigation within the limits of every state, so far as it is connected with commerce with foreign nations or among the states or with Indian tribes. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 197.

The power of Congress to regulate commerce extends to the control of navigable rivers situated wholly within the state. *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678.

**Internal Commerce Connected with Interstate Commerce.** — In *The City of Salem*, 37 Fed. Rep. 846, it was held that the interests of interstate commerce on the navigable waters of the United States require that all steamboats plying therein, even those engaged in intrastate commerce only, should be subject to certain regulations of Congress in regard to the number of passengers carried, etc., in like manner with steamboats carrying on interstate commerce.

**The Internal Revenue Act of 1898**, taxing sales at exchanges, boards of trade, etc., and requiring the execution and stamping of a written note or memorandum of the contract, does not interfere with internal state commerce. *Nicol v. Ames*, 173 U. S. 509, *affirming* 89 Fed. Rep. 144.

**2. Police Power of States Exclusive.** — *U. S. v. E. C. Knight Co.*, 156 U. S. 13; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *U. S. v. Popper*, 98 Fed. Rep. 423; *In re Rahrer*, 140 U. S. 545. See the title POLICE POWER.

**3. Commerce with Indians.** — *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *U. S. v. Kagama*, 118 U. S. 375. But see *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655. See generally article INDIANS, vol. 16, p. 212.

**4.** *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (the leading case), *reversing* 17 Johns. (N. Y.) 488. See also *Lin Sing v. Washburn*, 20 Cal. 534.

**5.** *Sherlock v. Alling*, 93 U. S. 103; *Welton v. Missouri*, 91 U. S. 275; *Lin Sing v. Washburn*, 20 Cal. 534.

**"Contracts to Buy, Sell, or Exchange Goods to Be Transported** among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce." *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 239. To the same effect are *Kidd v. Pearson*, 128 U. S. 1; *U. S. v. E. C. Knight Co.*, 156 U. S. 14.

**6. Means of Communication by Land or Water.** — *California v. Central Pac. R. Co.*, 127 U. S.



And it is not confined to subjects of legislation which are necessarily of a national character, and therefore exclusively within the control of Congress, but it also includes matters of a character merely local in their operation, and upon which the states may legislate in the absence of any legislation by Congress.<sup>1</sup>

(b) Highways. — Congress has power to authorize or construct roads and highways as a means of communication between the states without the concurrence or consent of the states within which the structures are made,<sup>2</sup> and may remove everything put upon highways, natural or artificial, which obstructs the passage of interstate commerce or the carrying of the mails.<sup>3</sup>

(c) Railroads — Construction. — Congress has authority, in the exercise of its power to regulate interstate commerce among the several states, to construct, or authorize individuals or corporations to construct, railroads across the states and territories of the United States.<sup>4</sup>

Operation of Trains. — So Congress may legislate as to qualifications, duties, and liabilities of employees and others on railway trains engaged in interstate or foreign commerce,<sup>5</sup> and may regulate the necessary switching of cars and their delivery at terminal points,<sup>6</sup> though in the absence of congressional legislation the states may regulate these subjects.<sup>7</sup>

Freight Rates on interstate commerce may be regulated under federal authority with reference to trade conditions and the circumstances of localities without infringing any rights or immunities under the Constitution.<sup>8</sup>

(d) Telegraph Companies. — Telegraph companies, so far as their foreign and interstate business is concerned, are engaged in interstate commerce and are subject to the regulating power of Congress.<sup>9</sup> Congress may authorize and

1; *In re Debs*, 158 U. S. 564; *U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331; *Stockton v. Baltimore, etc.*, R. Co., 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *The City of Salem*, 37 Fed. Rep. 846; *King v. American Transp. Co.*, 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787.

New Instrumentalities of Commerce. — The power of Congress to regulate commerce with foreign nations and among the states is not confined to the instrumentalities of commerce known or in use when the Constitution was adopted, but keeps pace with the progress of the country and adapts itself to the new developments of time and circumstances. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

1. Local Regulations. — *Crandall v. Nevada*, 6 Wall. (U. S.) 35. See also *infra*, this section, *Power of States*.

2. Power to Construct or Authorize Highways. — *Stockton v. Baltimore, etc.*, R. Co., 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *Luxton v. North River Bridge Co.*, 153 U. S. 525. See generally article HIGHWAYS, vol. 15, p. 343.

3. Removal of Obstructions on Highways. — *In re Debs*, 158 U. S. 564.

4. Construction Across States and Territories. — *California v. Central Pac. R. Co.*, 127 U. S. 1, 33 Am. & Eng. R. Cas. 451; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 44 Am. & Eng. R. Cas. 26; *Luxton v. North River Bridge Co.*, 153 U. S. 525.

5. Qualifications and Duties of Employees. — *Smith v. Alabama*, 124 U. S. 465; *Nashville, etc.*, R. Co. v. Alabama, 128 U. S. 96; *Ex p. Pool*, 2 Va. Cas. 276.

6. Switching and Delivery of Cars. — *Fielder v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 362.

7. Regulation by States. — See *infra*, this title, *State Statutes Affecting Interstate Commerce*, subdiv. 42. *Railroads and Other Carriers*.

8. Freight Rates May Be Regulated. — *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417.

Prohibiting Joint Traffic Agreements. — Congress, in the exercise of its right to regulate commerce among the several states, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations, entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505.

9. May Regulate Telegraph Companies. — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Atlantic, etc.*, State Tel. Co., 5 Nev. 102. See also *infra*, this title, *What Constitutes Interstate Commerce*. And see the title TELEGRAPHS AND TELEPHONES.

State Laws Superseded. — An Act of Congress giving to telegraph companies the right to construct and operate telegraph lines on the public lands of the United States, etc., upon evidence of acceptance of its terms under specified restrictions, is a regulation of commerce within the meaning of the Constitution, and supersedes state legislation upon the subject. *Western Union Tel. Co. v. Atlantic, etc.*, State Tel. Co., 5 Nev. 102.



aid in the construction of telegraph lines across states and territories, as this is a legitimate regulation of commercial intercourse among the states, and is appropriate legislation to execute the powers of Congress over the postal service.<sup>1</sup>

(e) **Wharves, Piers, Bridges, etc. — In General.** — Congress has power to authorize and regulate the erection of wharves, piers, bridges, and all other instrumentalities of interstate and foreign commerce which in the judgment of Congress may be necessary or expedient.<sup>2</sup>

**Subordinate Concurrent Power of State.** — In the absence of congressional action the states may regulate these matters under their reserved police powers,<sup>3</sup> but the power of Congress is paramount.<sup>4</sup>

**Consent of State.** — The consent or concurrence of the states between which the establishment of a bridge is authorized by Congress is not necessary.<sup>5</sup>

**Instrumentalities Employed.** — Congress has power to construct a bridge across a navigable stream for the furtherance of commerce among the states, or it may authorize the construction of the bridge by agents, whether individuals or a corporation created by itself or a state corporation already existing and concerned in the enterprise.<sup>6</sup>

**Legalizing or Declaring Bridge to Be Nuisance.** — Congress has power to declare

1. **Authorizing and Aiding Construction of Telegraph Lines.** — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

2. **Wharves, Piers, Bridges, etc. — United States.** — *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Clinton Bridge*, 10 Wall. (U. S.) 454; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 18 How. (U. S.) 421; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Newport, etc.*, *Bridge Co. v. U. S.*, 105 U. S. 470; *Parkersburg, etc.*, *Transp. Co. v. Parkersburg*, 107 U. S. 691; *California v. Central Pac. R. Co.*, 127 U. S. 1, 33 Am. & Eng. R. Cas. 451; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *Canada Southern R. Co. v. International Bridge Co.*, 8 Fed. Rep. 190; *Miller v. New York*, 10 Fed. Rep. 513; *Decker v. Baltimore, etc.*, R. Co., 30 Fed. Rep. 723; *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., 37 Fed. Rep. 129; *Stockton v. Baltimore, etc.*, R. Co., 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *Scranton v. Wheeler*, 16 U. S. App. 152, 57 Fed. Rep. 803; *Clinton Bridge, Woolw. (U. S.)* 150, 5 Fed. Cas. No. 2,900, *affirmed* 10 Wall. (U. S.) 454; *Miller v. New York*, 13 Blatchf. (U. S.) 469, 17 Fed. Cas. No. 9,585; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74, 22 Fed. Cas. No. 12,851.

*New York.* — *People v. Kelly*, 76 N. Y. 475. *Ohio.* — *Winifrede Coal Co. v. Central R., etc.*, Co., 24 Cinc. L. Bul. 173, 11 Ohio Dec. (Reprint) 35; *Muskingum County v. Board of Public Works*, 39 Ohio St. 628.

See also the titles BRIDGES, vol. 4, p. 918; WHARVES AND WHARFAGE.

**Authorizing Obstruction of Navigation.** — Congress may authorize the erection of a bridge over a navigable river which will interfere with the navigation thereof. *People v. Kelly*, 76 N. Y. 475. See also the title BRIDGES, vol. 4, p. 922.

3. **Power of States.** — See *infra*, this title, *State Statutes Affecting Interstate Commerce*, subdiv. 18. *Wharves, Piers, and Docks*; subdiv. 20. *Bridges*.

4. **Power of Congress Paramount.** — *Newport,*

*etc.*, *Bridge Co. v. U. S.*, 105 U. S. 475; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 18 How. (U. S.) 421; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Clinton Bridge*, 10 Wall. (U. S.) 454; *Chicago, etc.*, R. Co. *v. Fuller*, 17 Wall. (U. S.) 560; *Pound v. Turck*, 95 U. S. 459; *Wisconsin v. Duluth*, 96 U. S. 379.

**Congress May Restrain State Action** authorizing constructions upon navigable rivers. *Dover v. Portsmouth Bridge*, 17 N. H. 200.

**Bridges Wholly Within Limits of State.** — The state has sole power to bridge the waters within its limits, but this power is subject to the power of Congress to prevent obstructions to navigation in such waters within the state and accessible from without it. *Hatch v. Wallamet Iron Bridge Co.*, 6 Fed. Rep. 326.

5. **Consent of State Unnecessary.** — *Decker v. Baltimore, etc.*, R. Co., 30 Fed. Rep. 723; *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., 37 Fed. Rep. 129.

6. *Stockton v. Baltimore, etc.*, R. Co., 32 Fed. Rep. 9, 1 Int. Com. Rep. 411.

**Congress Has Power Directly or Through a Corporation** created for that purpose to construct bridges over navigable rivers between states for the accommodation of interstate commerce by land, and to take private lands for that purpose, making just compensation therefor. *Luxton v. North River Bridge Co.*, 153 U. S. 525, wherein the Act of July 11, 1890, c. 669, incorporating the North River Bridge Company and authorizing the construction of a bridge across the Hudson river between the states of New York and New Jersey, was held constitutional.

Congress may authorize a private corporation to occupy the navigable waters within the state and appropriate the soil under them in order to construct a bridge over such waters for the purpose of interstate commerce, notwithstanding the protest of the state. *Decker v. Baltimore, etc.*, R. Co., 30 Fed. Rep. 723; *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., 37 Fed. Rep. 129.



existing bridges over navigable streams to be lawful structures,<sup>1</sup> but it has been held that Congress cannot declare bridges erected by state authority in the absence of conflicting legislation by Congress to be nuisances.<sup>2</sup>

**Bridge Tolls.** — Congress has power to regulate the bridge tolls upon a bridge over navigable waters of the United States between Canada and New York.<sup>3</sup>

(f) **Shipping and Navigation — In General.** — The power of Congress to regulate commerce is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce.<sup>4</sup> It also includes the control, for the purposes of navigation, of the navigable waters of the country and the lands under them.<sup>5</sup>

**1. Legalizing Existing Bridges.** — *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 421; *Clinton Bridge, re Wall*. (U. S.) 454.

**Effect on Decree Directing Abatement as a Nuisance.** — In *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 421, an Act of Congress declaring a bridge to be a lawful structure after a decree of the Supreme Court of the United States had directed its abatement as a nuisance was held to be within the power of Congress, and not void as annulling the decree of the court, because the decree directing the abatement proceeded upon the ground that the bridge was in conflict with the then existing regulations of commerce by Congress, and was executory, depending upon the continuance of the bridge as an unlawful obstruction to the right of navigation.

**2. Declaring Bridge Authorized by State to Be Nuisance.** — *Dover v. Portsmouth Bridge*, 17 N. H. 200.

**3. Regulating Tolls on Bridges.** — *Canada Southern R. Co. v. International Bridge Co.*, 8 Fed. Rep. 190.

**4. Power to Regulate Commerce Includes Navigation and Its Incidents.** — *United States*. — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *U. S. v. Coombs*, 12 Pet. (U. S.) 72; *Henderson v. New York*, 92 U. S. 270; *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 544; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *The Gretna Green*, 20 Fed. Rep. 901; *U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331; *The City of Salem*, 37 Fed. Rep. 846; *The Katie*, 40 Fed. Rep. 480; *Scranton v. Wheeler*, 16 U. S. App. 152, 57 Fed. Rep. 803; *The Barque Chusan*, 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717; *King v. American Transp. Co.*, 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787; *The Lewellen*, 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307; *The Brig Wilson v. U. S.*, 1 Brock. (U. S.) 423, 30 Fed. Cas. No. 17,846.

*Alabama.* — *Pilotage Com'rs v. Steamship Cuba*, 28 Ala. 185.

*Maine.* — *Moor v. Veazie*, 31 Me. 362, 32 Me. 343, 52 Am. Dec. 655.

*New York.* — *Rumsey v. New York, etc., R. Co.*, 63 Hun (N. Y.) 200.

See generally the titles NAVIGATION; SHIPS AND SHIPPING.

**Commerce Includes Navigation**, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce" in the Constitution. *In re Debs*, 158 U. S. 590, quoting *Gibbons v. Ogden*, 9 Wheat. (U. S.) 197.

The Whole Commercial Marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, are therefore but the exercise of an undisputed power. *Sinnot v. Davenport*, 22 How. (U. S.) 243.

**5. Power Includes Control of Navigable Waters** — *United States*. — The Steam Propeller *Thomas Swan*, 6 Ben. (U. S.) 45, 23 Fed. Cas. No. 13,931; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518; *Foster v. Davenport*, 22 How. (U. S.) 244; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *The Daniel Ball*, 10 Wall. (U. S.) 557; *Griffing v. Gibb*, 2 Black (U. S.) 519, reversing *McAll*. (U. S.) 212, 11 Fed. Cas. No. 5,819; *South Carolina v. Georgia*, 93 U. S. 4; *McCready v. Virginia*, 94 U. S. 391; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 421; *Mobile County v. Kimball*, 102 U. S. 691; *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312; *In re Debs*, 158 U. S. 564; *U. S. v. Mississippi, etc., Boom Co.*, 3 Fed. Rep. 548; *Huse v. Glover*, 15 Fed. Rep. 292; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753; *Wallamet Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347; *Decker v. Baltimore, etc., R. Co.*, 30 Fed. Rep. 723; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *The City of Salem*, 37 Fed. Rep. 846; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. Rep. 129; *Texas, etc., R. Co. v. New Orleans*, 40 Fed. Rep. 111; *The Katie*, 40 Fed. Rep. 480; *Scranton v. Wheeler*, 16 U. S. App. 152, 57 Fed. Rep. 803; *Gulf, etc., R. Co. v. Miami Steamship Co.*, 86 Fed. Rep. 407; *U. S. v. Beef Slough Mfg., etc., Co.*, 8 Biss. (U. S.) 421, 24 Fed. Cas. No. 14,559; *U. S. v. Duluth*, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,007; *Works v. Junction R. Co.*, 5 McLean (U. S.) 425, 30 Fed. Cas. No. 18,046.

*California.* — *People v. Potrero, etc., R. Co.*, 67 Cal. 166.

*Illinois.* — *Chicago v. Law*, 144 Ill. 569.

*Indiana.* — *Depew v. Wabash, etc., Canal*, 5 Ind. 8.

*Maine.* — *Moor v. Veazie*, 31 Me. 362, 32 Me. 343, 52 Am. Dec. 655.

*New York.* — *Coxe v. State*, 144 N. Y. 396.

*Pennsylvania.* — *Flanagan v. Philadelphia*, 42 Pa. St. 219.

*Texas.* — *Galveston v. Menard*, 23 Tex. 349.



**Pilots and Engineers.** — Under its power to regulate commerce, Congress may prescribe the qualifications for pilots and engineers of vessels engaged in foreign and interstate commerce.<sup>1</sup>

**The Establishment of Buoys and Beacons** by Congress is undoubtedly within its commercial power.<sup>2</sup>

**Building and Equipment of Ships.** — Congress has power to regulate the building and equipment of vessels within the United States, whether they are or are not engaged in commerce with foreign nations or among the several states.<sup>3</sup>

**Registration, Enrolment, and License.** — Under its power to regulate interstate and foreign commerce Congress may require the enrolment and licensing of vessels engaged in such commerce<sup>4</sup> and may provide for the recording of the evidence of title to registered and enrolled vessels.<sup>5</sup>

**Sale or Mortgage of Ships.** — And Congress may regulate the sale or mortgage of United States vessels engaged in interstate trade.<sup>6</sup>

**Taxation.** — The power to regulate commerce as conferred upon Congress does not give to Congress the power to tax ships engaged in commerce.<sup>7</sup>

**Duty on Passengers.** — Under its power to regulate commerce between the states and with foreign nations, Congress may impose a duty upon the owners of vessels for every passenger brought from a foreign port into a port of the United States who is not a citizen of the latter country.<sup>8</sup>

**Liens.** — Congress has authority to establish a lien on vessels of the United States, uniform throughout the whole country, in favor of materialmen.<sup>9</sup>

**Regulations for Safety of Passengers.** — Under its power to regulate commerce, Congress may enact laws providing for the better security of the lives of passengers on vessels propelled by steam,<sup>10</sup> and may impose penalties for failure

*Virginia.* — *McCready v. Com.*, 27 Gratt. (Va.) 985.

For a Full Discussion of Navigable Waters, see generally the title NAVIGABLE WATERS.

**Power Not Only Paramount but Exclusive.** — The power of Congress to make improvements on the navigable waters of the United States which lie within the limits of a state is not only paramount but exclusive, and cannot be lawfully interfered with to any extent. *U. S. v. Duluth*, 1 Dill. (U. S.) 469, 25 Fed. Cas. No. 15,001.

The power of Congress over such natural highways as navigable streams is confessedly supreme. See among the various cases in which this supremacy has been affirmed, *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Mobile County v. Kimball*, 102 U. S. 691; *Newport, etc., Bridge Co. v. U. S.*, 105 U. S. 470; *Miller v. New York*, 109 U. S. 385; *Wisconsin v. Duluth*, 96 U. S. 379; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 329.

**1. Qualifications of Pilots and Engineers.** — *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Smith v. Alabama*, 124 U. S. 465; *Cisco v. Roberts*, 6 Bosw. (N. Y.) 494.

**2. Buoys and Beacons.** — *Mobile County v. Kimball*, 102 U. S. 691.

**3. U. S. v. Jackson**, 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458.

**4. Enrolment and License of Ships.** — *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

**License for Interior Waters of State Void.** — A federal coasting license granted to a vessel plying upon the interior waters of a state from which it could not reach another state or a foreign nation is void as not within the power

of Congress to regulate interstate and foreign commerce. *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655.

**5. Recording Evidence of Title.** — *White's Bank v. Smith*, 7 Wall. (U. S.) 646; *Foster v. Chamberlain*, 41 Ala. 158; *Wood v. Stockwell*, 55 Me. 76.

Congress Has the Exclusive Power to provide where the evidence of title to registered and enrolled vessels shall be recorded. *Mitchell v. Steelman*, 8 Cal. 363; *Wood v. Stockwell*, 55 Me. 76.

**6. Sale or Mortgage.** — *Shaw v. McCandless*, 36 Miss. 296.

**State Statute of Frauds.** — The Act of Congress of July 29, 1850, regulating the recording of mortgages on vessels, controls the state statutes of frauds. *Mitchell v. Steelman*, 8 Cal. 363.

**7. Taxation of Ships.** — *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273, citing *Passenger Cases*, 7 How. (U. S.) 283.

"The authority of Congress to tax ships is derived from the express grant of power in the eighth section of the first article [of the United States Constitution], to lay and collect taxes, duties, imposts, and excises; and \* \* \* the inability of the states to tax ships as instruments of commerce arises from the express prohibition contained in the tenth section of the same article." *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 280, citing *Passenger Cases*, 7 How. (U. S.) 283. See also *Gibbons v. Ogden*, 9 Wheat. (U. S.) 201.

**8. Duty on Passengers.** — *Head Money Cases*, 112 U. S. 580.

**9. Lien of Materialmen.** — *The Lottawanna*, 21 Wall. (U. S.) 558. See generally the title LIENS.

**10. Securing Lives of Passengers.** — *U. S. v. The Steamboat James Morrison*, Newb. Adm. 241,



to provide life preservers upon ships engaged in interstate or foreign commerce, or for failure to have their boilers inspected.<sup>1</sup>

**Punishment of Crime.** — Under its power to regulate interstate and foreign commerce, Congress may punish offenses committed on the high seas, below the grade of piracy and felony, which are expressly provided for in the Constitution,<sup>2</sup> and may make it a felony to steal from stranded vessels.<sup>3</sup>

(g) **Persons — Acts of Individuals.** — The power of Congress to regulate interstate commerce is not limited to the protection of such commerce from acts of interference by state legislation or by means of regulations made under the authority of the state by some political subdivision thereof, but it extends to acts and contracts of individuals so far as they affect or interfere with interstate or foreign commerce.<sup>4</sup> Any offense which thus interferes with, obstructs, or prevents such commerce or navigation, though committed on land within the limits of a state, may be punished by Congress.<sup>5</sup>

**Private Contracts.** — The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce.<sup>6</sup> Contracts for the sale and transportation to other states of specific articles are proper subjects for regulation by Congress, because they form part of interstate commerce.<sup>7</sup> The constitutional guaranty of liberty to the individual to enter into private contracts does not limit the power of Congress and prevent it from legislating upon the subject of contracts in respect to interstate and foreign commerce.<sup>8</sup> Where parties contract to engage in interstate commerce they do so subject to the right of Congress subsequently to pass laws regulating such commerce.<sup>9</sup>

**Status of Persons.** — Under the power to regulate commerce, Congress has no power to declare the status which any person shall sustain while in a state.<sup>10</sup>

(h) **Trusts and Monopolies.** — Congress has power to enact anti-trust laws regulating or prohibiting contracts and combinations in restraint of interstate or foreign commerce.<sup>11</sup> It is only to those contracts whose direct and immediate

26 Fed. Cas. No. 15,465; *Bradley v. Northern Transp. Co.*, 15 Ohio St. 553.

1. **Life Preservers and Boiler Inspection.** — *The Steam Propeller Thomas Swan*, 6 Ben. (U. S.) 42, 23 Fed. Cas. No. 13,931.

2. **Crimes Below Grade of Piracy and Felony.** — *The Ship Ulysses*, Brun. Col. Cas. (U. S.) 529, 24 Fed. Cas. No. 14,330; *U. S. v. Anderson*, 10 Blatchf. (U. S.) 226, 24 Fed. Cas. No. 14,447; *Charge to Grand Jury*, 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256, 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277.

Under the commerce clause Congress has power to declare that certain acts committed upon the high seas shall constitute piracy and shall be punishable as such, even if those acts do not strictly constitute the crime of piracy as known to international law. *Charge to Grand Jury*, 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277.

3. **Stealing from Stranded Vessel.** — *U. S. v. Coombs*, 12 Pet. (U. S.) 72.

4. **Acts of Individuals.** — *In re Debs*, 158 U. S. 564; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Sherlock v. Alling*, 93 U. S. 103; *Lin Sing v. Washburn*, 20 Cal. 534.

5. **Congress May Punish Obstruction of Interstate Commerce.** — *U. S. v. Coombs*, 12 Pet. (U. S.) 72.

6. **Contracts Relating to Interstate Commerce.** — *U. S. v. E. C. Knight Co.*, 156 U. S. 13; *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211,

*modifying and affirming* 54 U. S. App. 723, 85 Fed. Rep. 271.

In *Dubuque, etc., R. Co. v. Richmond*, 19 Wall. (U. S.) 589, it was said that the power of Congress to regulate interstate and foreign commerce was never intended to be exercised so as to interfere with private contracts not designed at the time when they were made to create impediments to such commerce.

7. **Contracts for Sale and Transportation.** — *The Panama, Deady (U. S.)* 27, 18 Fed. Cas. No. 10,702; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

8. **Liberty of Contract.** — *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505.

9. **Contracts Subject to Subsequent Regulations of Commerce.** — *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169.

10. **Status of Persons in State.** — *Lemmon v. People*, 26 Barb. (N. Y.) 270, *affirmed* 20 N. Y. 562, holding that the power to regulate commerce may be exercised over individuals as passengers only while on the ocean and until they come under such jurisdiction, but that it ceases when the voyage ends, and that then the state law controls.

11. **Anti-trust Laws.** — *U. S. v. E. C. Knight Co.*, 156 U. S. 1; *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *U. S. v. Agler*, 62 Fed. Rep. 824. See generally, for a full discussion of this subject, the title **MONOPOLIES**.

Act Cong. July 2, 1890, § 4, giving to federal



effect is a restraint upon interstate commerce, and not to such as are made to promote legitimate business, though they may incidentally affect such commerce, that the federal anti-trust law enacted under the power of Congress to regulate interstate commerce applies.<sup>1</sup> A contract or combination which relates directly to manufacture only is not brought within the purview of the federal anti-trust act, although as an indirect and incidental result of such combination commerce among the states may be thereafter somewhat affected.<sup>2</sup>

(i) **Trademarks.** — If Congress, under its power to regulate commerce, can in any case regulate the use of trademarks, the regulation must be limited to their use in "commerce with foreign nations, and among the several states, and with the Indian tribes," and cannot be made applicable to commerce between citizens of the same state.<sup>3</sup>

(j) **Counterfeiting.** — Under its power to regulate commerce between the states and foreign nations, Congress may provide for punishing as a crime the counterfeiting within the United States of the notes of foreign banks or corporations, although such notes are not the issue of a foreign government.<sup>4</sup>

(k) **Embargo.** — Congress may lay an embargo on commerce with a foreign nation under its power to regulate commerce.<sup>5</sup>

(l) **Manufacture.** — Under the power to regulate commerce, Congress has no power to regulate the manufacture of articles which may ultimately become the objects of interstate commerce,<sup>6</sup> because such manufacture does not constitute interstate commerce.<sup>7</sup> But if an agreement or combination directly restrains not alone the manufacture but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the operation of the federal anti-trust statute, because it interferes with interstate commerce.<sup>8</sup>

Circuit Courts jurisdiction to restrain conspiracies to obstruct interstate commerce before such objects are accomplished, is not unconstitutional. *U. S. v. Elliott*, 64 Fed. Rep. 27. But compare *U. S. v. Agler*, 62 Fed. Rep. 824.

**Combinations in Restraint of Internal State Commerce.** — Over that part of a combination or agreement which relates to commerce within the state, Congress has no jurisdiction by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

**Power to Suppress Monopoly Merely Incidental.** — "The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce." *U. S. v. E. C. Knight Co.*, 156 U. S. 12.

1. *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505.

**As to What Agreements Are in Restraint of Interstate Commerce** within the meaning of the federal anti-trust law, see the title **MONOPOLIES**.

2. **Combinations Relating to Manufacture Only.** — *U. S. v. E. C. Knight Co.*, 156 U. S. 1, distinguished in *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211. See also *infra*, this subsection, **Manufacture**.

3. **Regulation of Trademarks.** — *Trade Mark Cases*, 100 U. S. 82. See generally the title **TRADEMARKS**.

4. **Counterfeiting Foreign Bank Notes.** — *U. S. v. Arjona*, 120 U. S. 479.

5. **Embargo.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 191; *U. S. v. The William*, 2 Am. L. J. (Hall's) 255, 28 Fed. Cas. No. 16,700.

6. **No Power to Regulate Manufacture.** — *Veazie v. Moor*, 14 How. (U. S.) 568; *Mugler v. Kansas*, 123 U. S. 623; *Crutcher v. Kentucky*, 141 U. S. 47; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211, distinguishing *U. S. v. E. C. Knight Co.*, 156 U. S. 1; *U. S. v. Boyer*, 85 Fed. Rep. 425; *Arkansas v. Kansas, etc., Coal Co.*, 96 Fed. Rep. 353.

**Intention of Manufacturer to Sell in Other States Immaterial.** — In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, the direct purpose of the combination was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar thereafter to dispose of it by selling it in another state was held to be immaterial, and not to alter the character of the combination so as to bring it within the power of Congress to regulate commerce. See also *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211; *Kidd v. Pearson*, 128 U. S. 1.

7. **Manufacture Not Interstate Commerce.** — See *infra*, this title, **What Constitutes Interstate Commerce** — **Particular Transactions Constituting Interstate Commerce** — **Production and Manufacture**.

8. **Combinations Affecting Both Manufacture and Sale.** — *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.



(3) *Preferences to Ports of One State.* — Congress is prohibited by the Federal Constitution from giving preference by any regulation of commerce or revenue to ports of one state over those of another, and cannot require vessels bound to or from one state to enter, clear, or pay duties in another.<sup>1</sup>

*d. DELEGATION OF POWER.* — Congress cannot delegate to a state or municipal corporation the power to regulate interstate or foreign commerce,<sup>2</sup> though it seems that the right to regulate certain incidents of such commerce may be delegated to the states.<sup>3</sup>

*Adoption of State Law.* — An Act of Congress declaring that certain subjects of interstate or foreign commerce shall be regulated by such laws as the states may respectively enact for that purpose is not an unlawful delegation of power to the states, where the subject is one not demanding uniformity of regulation, and which, therefore, the states have a right to regulate in the absence of legislation on the subject by Congress.<sup>4</sup>

*Wilson Law.* — The Act of Congress known as the Wilson Law, which subjects intoxicating liquors shipped into a state to the operation of the police laws of the state immediately upon "arrival," is held to be not a delegation to the states of the power to regulate commerce, nor an adoption of state laws as a regulation of such commerce.<sup>5</sup> On the contrary, it is said that in enacting that law Congress has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws dealing with such property.<sup>6</sup>

*e. MEANS EMPLOYED — Corporations.* — In the execution of its constitutional power to regulate commerce, Congress may employ as a fit instrumentality a railway corporation created by one of the states,<sup>7</sup> or it may itself create a corporation for purposes connected with interstate commerce.<sup>8</sup>

**1. Preferences Forbidden by Constitution.** — Const. U. S., art. I, § 9; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 421; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455.

**Limitation on Federal Government, Not on States.** — This provision is a restraint upon the powers of the general government, and not upon the powers of the states. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455.

**What Amounts to Preference.** — An Act of Congress providing for the erection and maintenance of a bridge over a navigable river, though it may incidentally increase the trade of one city and diminish that of another, is not in conflict with the Constitution of the United States, art. I, § 9, providing that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 421.

**2. Congress Cannot Delegate Power to Regulate Commerce.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Stoutenburgh v. Hennick*, 129 U. S. 141; *In re Spickler*, 43 Fed. Rep. 653.

**Delegating Ministerial Duties.** — Congress may authorize the construction of a bridge over a navigable river and devolve the duty of approving the plan of construction upon the secretary of war. *Miller v. New York*, 10 Fed. Rep. 513; *People v. Kelly*, 76 N. Y. 475.

**3. Power to Regulate Right of Sale May Be Delegated.** — *In Rhodes v. Iowa*, 170 U. S. 412,

it was held that the right to sell articles of interstate commerce after they have arrived within the state of destination is merely an incident of interstate commerce and may be delegated by Congress to the state; but as to the right of Congress to subject to state laws interstate commerce in its fundamental aspect, involving the transportation of merchandise into one state or across another, the court expressed no opinion.

**4. Adoption of Laws Which State Has Right to Enact.** — *Cooley v. Board of Wardens*, 12 How. (U. S.) 299.

**Cannot Adopt Police Laws.** — Congress cannot transfer legislative powers to a state, nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, the law must be one that it would be competent for Congress itself to enact, and not a law passed in the exercise of the police power. *In re Rahrer*, 140 U. S. 545.

**5. Wilson Law Not Delegation of Power nor Adoption of State Laws.** — *In re Rahrer*, 140 U. S. 545; *In re Spickler*, 43 Fed. Rep. 653; *State v. Fraser*, 1 N. Dak. 425.

**6. In re Rahrer**, 140 U. S. 545; *State v. Fraser*, 1 N. Dak. 425.

**7. Employment of State Corporation.** — *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *Decker v. Baltimore, etc., R. Co.*, 30 Fed. Rep. 723; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. Rep. 129; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411.

**8. Congress May Create Corporation under Power to Regulate Commerce.** — *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641.



**Injunction.** — The United States may resort to the process of injunction to prevent interference with interstate and foreign commerce.<sup>1</sup>

**Forcible Intervention.** — The relation of the general government to interstate commerce and the transportation of the mails is such as to authorize a direct and forcible interference to prevent an obstruction thereof.<sup>2</sup>

**2. Power of States** — *a. LOCAL POLICE REGULATIONS* — (1) *Validity in General.* — A state may legislate with reference to local needs, although interstate commerce is affected, where the matter regulated is not of a national character and does not admit of nor require a uniform system of regulation,<sup>3</sup> provided, however, there has been no congressional legislation in respect thereto.<sup>4</sup>

**Legislation Which Is a Mere Aid to Commerce** may be enacted by a state, although at the same time it may incidentally affect commerce itself.<sup>5</sup>

**1. Injunction.** — *In re Debs*, 158 U. S. 564. See generally the title INJUNCTIONS, vol. 16, p. 337.

**2. Force.** — *In re Debs*, 158 U. S. 564.

**3. State May Legislate on Local Subjects** — *United States.* — *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Veazie v. Moor*, 14 How. (U. S.) 568; *Cushing v. The Ship John Fraser*, 21 How. (U. S.) 184; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Exp. McNiel*, 13 Wall. (U. S.) 236; *Chicago, etc., R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *The Lottawanna*, 21 Wall. (U. S.) 558; *Welton v. Missouri*, 91 U. S. 275; *Sherlock v. Alling*, 93 U. S. 99; *Mobile County v. Kimball*, 102 U. S. 691; *Webber v. Virginia*, 103 U. S. 344; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622; *Railroad Commission Cases*, 116 U. S. 307; *Huse v. Glover*, 119 U. S. 543, *affirming* 11 Biss. (U. S.) 550; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Leloup v. Mobile*, 127 U. S. 640; *Kidd v. Pearson*, 128 U. S. 1; *Leisy v. Hardin*, 135 U. S. 100; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285; *Hatch v. Wallamet Iron Bridge Co.*, 6 Fed. Rep. 326; *Ouachita, etc., Packet Co. v. Aiken*, 16 Fed. Rep. 890; *Pacific Coast Steamship Co. v. Board of Railroad Com'rs*, 18 Fed. Rep. 10; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Rhea v. Newport, etc., R. Co.*, 50 Fed. Rep. 16; *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. Rep. 839; *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

*California.* — *State v. The Steamship Constitution*, 42 Cal. 578, 10 Am. Rep. 303.

*Connecticut.* — *State v. Harbournne*, 70 Conn. 484.

*Minnesota.* — *Jacobson v. Wisconsin, etc., R. Co.*, 71 Minn. 519.

*New York.* — *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492.

**Distinction Between Local and National Subjects.** — "The distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole

country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations," has been settled by repeated decisions of the Supreme Court and cannot longer be regarded as open to examination. "After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the states and the exercise of power over purely local commerce and local concerns." *Leisy v. Hardin*, 135 U. S. 118.

**Local State Regulations Contemplated by Constitution.** — "The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated." *Mobile County v. Kimball*, 102 U. S. 691.

**Instruments of Commerce.** — "By such statutes the states regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control except when employed in foreign or interstate commerce. As they can only be used in the state, their regulation for all purposes may properly be assumed by the state until Congress acts in reference to their foreign or interstate relations." *Hall v. De Cuir*, 95 U. S. 488.

**4. State May Act Only in Absence of Regulation by Congress** — *United States.* — *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Hall v. De Cuir*, 95 U. S. 485; *Smith v. Alabama*, 124 U. S. 465; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Plumley v. Massachusetts*, 155 U. S. 461; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98.

*California.* — *State v. The Steamship Constitution*, 42 Cal. 578, 10 Am. Rep. 303.

*Connecticut.* — *State v. Harbournne*, 70 Conn. 484.

*Louisiana.* — *New Orleans v. Ship Martha J. Ward*, 14 La. Ann. 289.

See also *infra*, this subsection, *Effect of Non-action by Congress; Effect of Action by Congress.*

**5. Legislation in Aid of Commerce.** — *Western Union Tel. Co. v. James*, 162 U. S. 650; *Mobile County v. Kimball*, 102 U. S. 691; *New York, etc., R. Co. v. New York*, 165 U. S. 628.



**Nature and Source of Power.** — Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce.<sup>1</sup> All state legislation regulating or affecting interstate commerce must, in order to be valid, be enacted in pursuance of the police powers of the state.<sup>2</sup> The states may, so long as they do no more than legitimately exercise their reserved police power, enact laws which will be valid although they may incidentally affect interstate commerce.<sup>3</sup>

(2) *When Invalid.* — It is a well-settled rule that if a state statute purporting to have been enacted in pursuance of the police power to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge and thereby to

1. **Source of Power.** — *Hennington v. Georgia*, 163 U. S. 299; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285; *New York, etc., R. Co. v. New York*, 165 U. S. 628; *Missouri, etc., R. Co. v. Hater*, 169 U. S. 635; *Leisy v. Hardin*, 135 U. S. 108. And see *State v. Harbourn*, 70 Conn. 484. See also *supra*, this section, *Power of Congress — Exclusiveness of Power*.

2. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489.

3. **Police Laws Incidentally Affecting Interstate Commerce Are Valid** — *United States*. — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Sherlock v. Alling*, 93 U. S. 99; *Mobile County v. Kimball*, 102 U. S. 691; *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Huse v. Glover*, 119 U. S. 543; *Smith v. Alabama*, 124 U. S. 465; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Hennington v. Georgia*, 163 U. S. 299; *New York v. Miln*, 11 Pet. (U. S.) 102; *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Chicago, etc., R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *Michigan Tel. Co. v. Charlotte*, 93 Fed. Rep. 11; *Hall v. De Cuir*, 95 U. S. 485; *Railroad Commission Cases*, 116 U. S. 307; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Leloup v. Mobile*, 127 U. S. 640; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Plumley v. Massachusetts*, 155 U. S. 461; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98; *Geer v. Connecticut*, 161 U. S. 519; *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142; *New York, etc., R. Co. v. New York*, 165 U. S. 628; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133; *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438; *King v. American Transp. Co.*, 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787.

*Connecticut*. — *State v. Harbourn*, 70 Conn. 484.

*Indiana*. — *Brechbill v. Randall*, 102 Ind.

528, 52 Am. Rep. 695; *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575.

*Kansas*. — *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

*Louisiana*. — *New Orleans v. Ship Martha J. Ward*, 14 La. Ann. 289.

*Massachusetts*. — *Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

*Missouri*. — *State v. Addington*, 77 Mo. 110.

*New Jersey*. — *Waterbury v. Newton*, 50 N. J. L. 534.

*New York*. — *Cisco v. Roberts*, 36 N. Y. 292; *Fitch v. Livingston*, 4 Sandf. (N. Y.) 492.

*Pennsylvania*. — *Craig v. Kline*, 65 Pa. St. 399, 3 Am. Rep. 636.

*Virginia*. — *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 57 Am. St. Rep. 827.

**What Is Valid Exercise of Police Power.** — For numerous illustrations of statutes sustained as being a valid exercise of the state police power, see *infra*, this title, *State Statutes Affecting Interstate Commerce*.

Matters of internal police, which the states have full power to regulate within their limits, include whatever will promote the peace, comfort, convenience, and prosperity of their people. "This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by a state than by a distant authority." *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678.

Generally as to the meaning of the term "convenience," as related to police power, see *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 692.

**Reasonableness of Regulation.** — "The reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority or is to be deemed a legitimate exertion of the [police] power of the state to protect the public interests or promote the public convenience." *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, *citing Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465.

A state statute which unnecessarily interferes with the speedy and uninterrupted carriage of the United States mails cannot be considered a reasonable police regulation. *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142,



give effect to the Federal Constitution.<sup>1</sup> A mere evasion of the right of Congress to regulate commerce will not be tolerated.<sup>2</sup> A state may not, under cover of exerting its police powers, substantially prohibit or burden any foreign or interstate commerce.<sup>3</sup> A police regulation going beyond the necessities of the case and interfering with interstate commerce is void.<sup>4</sup> It is no answer to the objection that a state statute is a regulation of commerce by a state and forbidden by the Constitution, to say that it falls within the police power of the states; for, to whatever class of legislative powers it may belong, it is prohibited to the states if granted exclusively to Congress by the Constitution.<sup>5</sup> Subjects of interstate commerce are not within the jurisdiction of the police power of a state unless placed there by congressional action.<sup>6</sup>

**b. EFFECT OF NON-ACTION BY CONGRESS.**—The failure of Congress to

*distinguished in Lake Shore, etc., R. Co. v. Ohio, 173 U. S. 285.*

**1. Police Regulation Must Be Such in Fact.**—*Henderson v. New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; Hannibal, etc., R. Co. v. Husen, 95 U. S. 465; Mugler v. Kansas, 123 U. S. 623; Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78; Lawton v. Steele, 152 U. S. 133; Brennan v. Titusville, 153 U. S. 289; Hennington v. Georgia, 163 U. S. 299; Plessy v. Ferguson, 163 U. S. 537; Scott v. Donald, 165 U. S. 58; New York, etc., R. Co. v. New York, 165 U. S. 628; Missouri, etc., R. Co. v. Haber, 169 U. S. 613; Schollenberger v. Pennsylvania, 171 U. S. 1; Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345.*

**2. Evasion of Power of Congress Not Tolerated.**—*Lake Shore, etc., R. Co. v. Ohio, 173 U. S. 285.*

A state law purporting to deal only with domestic matters, but being in its effect and essence merely a regulation of interstate commerce, is void. *Hall v. De Cuir, 95 U. S. 485; State v. Harbourn, 70 Conn. 484.*

**3. Hannibal, etc., R. Co. v. Husen, 95 U. S. 465.**

**Good Faith of State Immaterial.**—*Scott v. Donald, 165 U. S. 91*, wherein it was conceded that the *South Carolina* dispensary law of 1895 was passed in the *bona fide* exercise of its police power, but the law was nevertheless declared void as an interference with interstate commerce. *Citing Mugler v. Kansas, 123 U. S. 623.*

**An Express Declaration that a Statute Is Passed in Pursuance of the Police Power** and as a police regulation is not binding upon the federal courts, and will not sustain the statute if the act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government. *Brennan v. Titusville, 153 U. S. 289 [citing New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Henderson v. New York, 92 U. S. 259].*

**Discriminating Legislation.**—A state statute which would be valid as an exercise of the police power is nevertheless void if it discriminates against the citizens and products of other states in a matter of commerce between the states. *Scott v. Donald, 165 U. S. 94.* See also *infra*, this title, *State Statutes Affecting Interstate Commerce*, subdiv. 3. *Discrimination Against Products and Citizens of Other States.*

**4. Unnecessary Regulation.**—*Missouri, etc., R.*

*Co. v. Haber, 169 U. S. 613; Hannibal, etc., R. Co. v. Husen, 95 U. S. 473; Illinois Cent. R. Co. v. Illinois, 163 U. S. 142; Lake Shore, etc., R. Co. v. Ohio, 173 U. S. 285.*

Since the range of a state's police power comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion. *Hannibal, etc., R. Co. v. Husen, 95 U. S. 465.*

**5. Police Power Does Not Extend to Regulation of Interstate Commerce.**—*Henderson v. New York, 92 U. S. 259; Bowman v. Chicago, etc., R. Co., 125 U. S. 492; Walling v. Michigan, 116 U. S. 446.*

"The police power cannot be set up to control the inhibitions of the Federal Constitution or the powers of the United States government created thereby." *Walling v. Michigan, 116 U. S. 460, quoted in Scott v. Donald, 165 U. S. 94.*

**6. Subjects of Interstate Commerce Not Within Police Power.**—*Leisy v. Hardin, 135 U. S. 100; Henderson v. New York, 92 U. S. 259; Hannibal, etc., R. Co. v. Husen, 95 U. S. 465; Walling v. Michigan, 116 U. S. 446; Robbins v. Shelby County Taxing Dist., 120 U. S. 489; Bowman v. Chicago, etc., R. Co., 125 U. S. 465; Ex p. Loeb, 72 Fed. Rep. 657; Bennett v. American Express Co., 83 Me. 236, 23 Am. St. Rep. 774.*

**Under the Wilson Law** (Act Cong. Aug. 8, 1890, 26 U. S. Stat. at L. 313, c. 728), the state may enact police laws affecting the sale of intoxicating liquors even in original packages. *Vance v. W. A. Vandercook Co., 170 U. S. 438.* See also *infra*, this title, *What Constitutes Interstate Commerce*, subdiv. 5. b. (2) (d) *Wilson Law*. And see the title *INTOXICATING LIQUORS, post*.

**Preventing Fraud and Deception in Articles of Commerce.**—In the execution of its police powers, a state may enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. *Schollenberger v. Pennsylvania, 171 U. S. 1.* This decision proceeds upon the principle that fraudulent or adulterated articles are not legitimate subjects of commerce. See *infra*, this title, *What Constitutes Interstate Commerce*—*Subjects of Interstate Commerce.*



take any action as to matters of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, does not amount to a declaration that nothing shall be done as to such matters by the state,<sup>1</sup> but on the contrary it is rather to be deemed a declaration that for the time being, and until Congress sees fit to act, they may be regulated by state authority.<sup>2</sup> The mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people.<sup>3</sup>

c. EFFECT OF ACTION BY CONGRESS — In General. — Where Congress has regulated a particular subject of interstate commerce, it thereby in effect declares that no additional or other regulations on the same subject shall be passed by the state, and all state laws upon such subject must fail.<sup>4</sup>

**1. Inaction by Congress Not Inhibition of State Action.** — *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98.

"So long as Congress has not legislated upon the particular subject, they [local laws] are \* \* \* to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits." *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133.

**Effect of Nonaction by Congress Determined on Circumstances of Each Case.** — The question whether the failure of Congress to provide a regulation by law as to any particular subject of commerce among the states is conclusive of its intention that such subject shall be free from positive regulation, or that, until Congress intervenes, it shall be left to be dealt with by the states, is one to be determined from the circumstances of each case as it arises. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465.

**2. Non-action by Congress Adopts State Laws.** — *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Mobile County v. Kimball*, 102 U. S. 691; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Smith v. Alabama*, 124 U. S. 465; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465. See minority opinion in *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204.

**Interference by Courts in Advance of Congressional Legislation.** — If there is any case involving local or police regulations in which the courts of the United States can interfere in advance of congressional regulation, it is where there is a manifest purpose by round-about means to invade the domain of federal authority. *Ouachita Packet Co. v. Aiken*, 121 U. S. 444.

The judicial power cannot act until Congress has prescribed the rule in regard to commerce. *U. S. v. Railroad Bridge Co.*, 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114.

**3. Mere Grant of Commercial Power Not Prohibition of State Action** — *United States*. — *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Mobile County v. Kimball*, 102 U.

S. 691; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Smith v. Alabama*, 124 U. S. 465; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *License Cases*, 5 How. (U. S.) 504; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Hennington v. Georgia*, 163 U. S. 299; *New York, etc., R. Co. v. New York*, 165 U. S. 628; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 395, 22 Fed. Cas. No. 12,852.

*Alabama*. — *Pilotage Com'rs v. Steamboat Cuba*, 28 Ala. 185.

*Missouri*. — *State v. Addington*, 77 Mo. 110.

*New York*. — *Stilwell v. Raynor*, 1 Daly (N. Y.) 47.

**Contrary Dicta Disapproved.** — "There have been, it is true, expressions by individual judges of this court going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all state authority; but there has been no adjudication of the court to that effect." *Mobile County v. Kimball*, 102 U. S. 691, *distinguishing* *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

**4. Regulation by Congress Precludes State Regulation** — *United States*. — *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *New York v. Miln*, 11 Pet. (U. S.) 102; *Prigg v. Com.*, 16 Pet. (U. S.) 539; *Withers v. Buckley*, 20 How. (U. S.) 84; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Foster v. Davenport*, 22 How. (U. S.) 244; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Ex p. McNiel*, 13 Wall. (U. S.) 236; *Chicago, etc., R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *Sherlock v. Alling*, 93 U. S. 99; *Hall v. De Cuir*, 95 U. S. 485; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Mobile County v. Kimball*, 102 U. S. 691; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Escanaba, etc., Transp. Co. v. Chicago*, 107 U. S. 678; *New Orleans, etc., R. Co. v. Mississippi*, 112 U. S. 12; *Moran v. New Orleans*, 112 U. S. 69; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Huse v. Glover*, 119 U. S. 543, *affirming* 11 Biss. (U. S.) 550; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Leisy v. Hardin*,



**Conflicting State and Federal Regulations.** — State police laws must give way when in conflict with an Act of Congress regulating interstate commerce.<sup>1</sup> This follows from the provision of the United States Constitution declaring that the Constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land.<sup>2</sup> A state statute may stand unless the repugnancy and conflict between it and the Act of Congress are so direct and positive that the two acts cannot be reconciled or stand together.<sup>3</sup>

**Partial Regulation by Congress.** — A state statute will stand unless Congress, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer.<sup>4</sup>

**State Law Suspended but Not Repealed.** — When Congress acts upon a subject which had previously been regulated by state laws, such act does not repeal, but merely suspends, the state laws upon the subject, and when the Act of Congress is repealed or so modified as to permit the operation of the state law it becomes again valid and in force.<sup>5</sup>

**The State Laws Are Superseded Only to the Extent that they affect commerce outside**

135 U. S. 100; *Minnesota v. Barber*, 136 U. S. 313; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98; *Quachita, etc., Packet Co. v. Aiken*, 16 Fed. Rep. 890; *Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs*, 18 Fed. Rep. 10; *Woodruff v. North Bloomfield Gravel Min. Co.*, 18 Fed. Rep. 753; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *Rhea v. Newport, etc., R. Co.*, 50 Fed. Rep. 16; *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. Rep. 839; *Palmer v. Cuyahoga County*, 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688; *U. S. v. Beef Slough Mfg., etc., Co.*, 8 Biss. (U. S.) 421, 24 Fed. Cas. No. 14,559; *Heerman v. Beef Slough Mfg., etc., Co.*, 1 Fed. Rep. 145; *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S. 401, 27 Fed. Cas. No. 15,867; *Charge to Grand Jury*, 2 *Sprague* (U. S.) 279, 30 Fed. Cas. No. 18,256. But see *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613.

*California.* — *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581.

*Missouri.* — *State v. Addington*, 77 Mo. 110.

*Nevada.* — *Western Union Tel. Co. v. Atlantic, etc., State Tel. Co.*, 5 Nev. 102.

*New York.* — *Henderson v. Spofford*, 59 N. Y. 131.

*Pennsylvania.* — *Flanagan v. Philadelphia*, 42 Pa. St. 219; *Craig v. Kline*, 65 Pa. St. 399, 3 Am. Rep. 636.

*Texas.* — *Missouri, etc., R. Co. v. Fookes*, (Tex. Civ. App. 1897) 40 S. W. Rep. 858.

**Foreign Commerce Has Been Fully Regulated by Congress**, and any regulations imposed by the states upon that branch of commerce constitute a palpable interference and are void. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

**As to Whether Any Particular Subject Has Been So Regulated by Congress** as to preclude state action on the same subject, see *infra*, this title, *State Statutes Affecting Interstate Commerce*.

**1. State Police Laws Yield to Conflicting Acts of Congress.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Mobile County v. Kimball*, 102 U. S. 691; *Moran v. New Orleans*, 112 U. S.

69; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 106; *Brown v. Houston*, 114 U. S. 622; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Smith v. Alabama*, 124 U. S. 465; *Kidd v. Pearson*, 128 U. S. 1; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96; *Minnesota v. Barber*, 136 U. S. 313; *In re Rahrer*, 140 U. S. 545; *Crutcher v. Kentucky*, 141 U. S. 47; *Brennan v. Titusville*, 153 U. S. 289; *U. S. v. E. C. Knight Co.*, 156 U. S. 1; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Hennington v. Georgia*, 163 U. S. 299; *New York, etc., R. Co. v. New York*, 165 U. S. 628; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285; *Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs*, 18 Fed. Rep. 10; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411.

**2. Acts of Congress Supreme Law of Land.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 210; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Brown v. Maryland*, 12 Wheat. (U. S.) 448; *Hennington v. Georgia*, 163 U. S. 309.

**3. Conflict Must Be Irreconcilable.** — *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613; *Sinnot v. Davenport*, 22 How. (U. S.) 227.

**4. Supplementary State Laws.** — In *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, it was held that though Congress had acted upon a certain subject of interstate commerce, if it did not cover the whole subject the state had power to enact valid police laws not in conflict with the Act of Congress. Justice Brewer dissented, holding that the facts that Congress had legislated only partially and that its legislation did not go so far as in the judgment of the state legislature was required were not sufficient to warrant the state in supplementing such legislation. And see *Prigg v. Com.*, 16 Pet. (U. S.) 539, wherein it was held that where Congress has exclusive power over a subject it is not competent for state legislation to add to the provisions of Congress on that subject.

**5. State Law Not Repealed.** — *Henderson v. Spofford*, 59 N. Y. 131, *affirming* (C. Pl. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 140, 3 Daly (N. Y.) 361. See also *Sturgis v. Spofford*, 45 N. Y. 446.



the state as it comes within the state.<sup>1</sup>

The Imposition of a License Tax by Congress is not such a regulation of commerce as relieves one who has paid it from the local police regulations of the state, but it is the mere exercise of the taxing power.<sup>2</sup>

d. **TONNAGE DUTIES.** — The states are specifically forbidden by the Constitution to lay any tonnage duties without the consent of Congress.<sup>3</sup>

e. **IMPORT OR EXPORT DUTIES.** — The states are prohibited from laying any imposts or duties on imports or exports without the consent of Congress, except what may be absolutely necessary for executing the state inspection laws.<sup>4</sup>

**3. What Constitutes Regulation.** — The power to regulate commerce is the power to prescribe rules by which it shall be governed — that is to say, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.<sup>5</sup> Any regulation of the transportation of

**1. How Far State Laws Are Superseded.** — Hall v. De Cuir, 95 U. S. 488.

**2. Federal License Tax Not a Regulation Precluding State Action.** — License Tax Cases, 5 Wall. (U. S.) 462; *Pervear v. Com.*, 5 Wall. (U. S.) 475; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Plumley v. Massachusetts*, 155 U. S. 461; *Pilotage Com'rs v. Steamboat Cuba*, 28 Ala. 185. See also *Veazie v. Moor*, 14 How. (U. S.) 568; *Home Ins. Co. v. Augusta*, 93 U. S. 116; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692.

Generally as to the effect of a license as authority on the business licensed, see *Sinnot v. Davenport*, 22 How. (U. S.) 240, and *Gibbons v. Ogden*, 9 Wheat. (U. S.) 210.

**This Rule Is Now Expressly Declared by Statute.** — Rev. Stat. U. S., § 3243. See *Plumley v. Massachusetts*, 155 U. S. 461.

**3. Tonnage Duties Prohibited.** — Const. U. S., art. 1, § 10, cl. 2; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577; *Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Guy v. Baltimore*, 100 U. S. 434; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *State Tonnage Tax Cases*, 12 Wall. (U. S.) 204; *Peete v. Morgan*, 19 Wall. (U. S.) 581; *Inman Steamship Co. v. Tinker*, 94 U. S. 238; *Southern Steamship Co. v. Portwaddens*, 6 Wall. (U. S.) 31; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Huse v. Glover*, 119 U. S. 543; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *In re Rahrer*, 140 U. S. 545; *Thames Bank v. Lovell*, 18 Conn. 500. See generally the title **TAXATION**.

"Charges for Wharfage may be graduated by the tonnage of vessels using a wharf, and \* \* \* this is not a duty of tonnage within the meaning of the Constitution." *Ouachita Packet Co. v. Aiken*, 121 U. S. 444 [citing *Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691]. See generally the title **WHARVES AND WHARFAGE**.

**4. Import and Export Duties Prohibited.** — *United States*. — Const. U. S., art. 1, § 10, cl. 2; *Cooley v. Board of Wardens*, 12 How. (U.

S.) 299; *Almy v. California*, 24 How. (U. S.) 169; *New York v. Miln*, 11 Pet. (U. S.) 102; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Neilson v. Garza*, 2 Woods (U. S.) 287; *Cook v. Pennsylvania*, 97 U. S. 566; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Turner v. Maryland*, 107 U. S. 38; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517; *Leisy v. Hardin*, 135 U. S. 100; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Preston v. Finley*, 72 Fed. Rep. 850.

*Maryland*. — *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

*New York*. — *People v. Roberts*, 158 N. Y. 162.

*North Carolina*. — *State v. Norris*, 78 N. Car. 443.

See generally the title **TAXATION**.

**Application to Imports from Sister State.** — Article 1, section 10, clause 2, of the Constitution, prohibiting the states, without the consent of Congress, from levying duties on imports or exports, has reference to goods brought from or carried to foreign countries alone, and not to goods transported from one state to another. *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Brown v. Houston*, 114 U. S. 622. But these decisions must not be understood as holding that a state may levy import or export duties on goods imported from or exported to another state; they merely hold that this particular clause does not prohibit it. As a matter of fact, such duties are prohibited by the clause of the Constitution conferring exclusive jurisdiction on Congress to regulate commerce between the states. *Brown v. Houston*, 114 U. S. 622. And see generally the title **TAXATION**, for a full discussion of the subject.

The Words "Inspection Laws," "Imports," and "Exports" as used in the Federal Constitution, § 10, art. 1, cl. 2, have exclusive reference to property. *People v. Compagnie Générale Transatlantique*, 107 U. S. 59.

**5. Cooley v. Board of Wardens**, 12 How. (U. S.) 299; *Welton v. Missouri*, 91 U. S. 279; *Tieman v. Rinker*, 102 U. S. 123; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *In-*



interstate commerce, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication affecting commerce, operates as a regulation of commerce itself.<sup>1</sup>

### III. WHAT CONSTITUTES INTERSTATE COMMERCE — 1. Definition and Nature.

— "Commerce," in a General Sense, means an interchange or mutual change of goods, wares, products, or property of any kind, between nations or individuals, either by barter or by purchase and sale.<sup>2</sup>

Interstate Commerce, or commerce among the several states of the Union, is commerce which concerns more states than one.<sup>3</sup> Strictly considered, it consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.<sup>4</sup> Commerce contemplated by the Fed-

terstate Commerce Commission *v.* Brimson, 154 U. S. 447; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

1. Regulation of Transportation. — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Passenger Cases*, 7 How. (U. S.) 283; *Pennsylvania v. Wheeling, etc.*, Bridge Co., 18 How. (U. S.) 421; *Almy v. California*, 24 How. (U. S.) 169; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672; *Council Bluffs v. Kansas City, etc.*, R. Co., 45 Iowa 338, 24 Am. Rep. 773.

Illustrations. — For numerous illustrations of what constitutes a regulation of commerce, see *supra*, this title, *Regulation of Interstate Commerce — Power of Congress — Subjects of Regulation*; and *infra*, this title, *State Statutes Affecting Interstate Commerce*.

Enforcement of Burdensome Contract Not Interference with Interstate Commerce. — Where an elevator company contracted with a carrier for the exclusive handling of grain across a river at a certain point, and afterwards Congress established a bridge at that point to facilitate interstate commerce, whereby it became unnecessary and a useless expense to have the grain handled at that point, the enforcement of the contract after the construction of the bridge was held not to be an interference with the power of Congress to regulate commerce between the states. *Dubuque, etc., R. Co. v. Richmond*, 19 Wall. (U. S.) 584.

Extending Admiralty Jurisdiction Not Exercise of Commerce Power. — Act Cong. Feb. 26, 1845 (5 U. S. Stat. at L. 726, c. 20), extending the admiralty jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting them, is not an exercise of the power to regulate commerce, but rests upon the ground that such waters are within the scope of admiralty and maritime jurisdiction granted to the federal government by the Constitution. *The Propeller Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Fretz v. Bull*, 12 How. (U. S.) 466.

2. Commerce Defined. — *In re Nickodemus*, 3 Nat. Bankr. Reg. 230, 18 Fed. Cas. No. 10,254; *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338, 24 Am. Rep. 773; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 187, holding that in its constitutional sense it also means intercourse and navigation.

3. Interstate Commerce Defined. — *Kaeiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151; *Sears v. Warren County*, 36 Ind. 267, 10 Am. Rep. 62.

"Among the Several States." — "The word 'among' means 'intermingled with.' A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. \* \* \* Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." *Gibbons v. Ogden*, 9 Wheat. (U. S.) 194.

No Reference to Public Transactions of States. — "Commerce among the several states means commerce between citizens of the several states, and has no reference to transactions by a state as such with another state in their corporate or public capacities." *Miller, J.*, dissenting, in *Stoutenburgh v. Hennick*, 129 U. S. 141, citing *Gibbons v. Ogden*, 6 Wheat. (U. S.) 448.

4. Commerce in Its Constitutional Sense — *United States*. — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 215; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *U. S. v. Holliday*, 3 Wall. (U. S.) 417; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Welton v. Missouri*, 91 U. S. 280; *Henderson v. New York*, 92 U. S. 259; *Mobile County v. Kimball*, 102 U. S. 691; *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 541; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Kidd v. Pearson*, 128 U. S. 1, 2 Int. Com. Rep. 232; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Hooper v. California*, 155 U. S. 648; *U. S. v. E. C. Knight Co.*, 156 U. S. 1; *Arkansas v. Kansas, etc., Coal Co.*, 96 Fed. Rep. 353; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *In re Greene*, 52 Fed. Rep. 104; *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

*California*. — *People v. Raymond*, 34 Cal. 492.

*Iowa*. — *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 187; *Campbell v. Chicago, etc., R. Co.*, 86 Iowa 587.

*Missouri*. — *Crow v. State*, 14 Mo. 237.

Vehicles of Commerce Included. — Commerce, in its broadest acceptation, embraces not merely traffic, but the vehicles by which it is prosecuted. *Veazie v. Moor*, 14 How. (U. S.) 568.



eral Constitution is not limited to mere traffic — to buying and selling or the interchange of commodities.<sup>1</sup>

Transportation is the means by which commerce is carried on,<sup>2</sup> and is a constituent part of commerce itself.<sup>3</sup>

**Transportation Across State Line.** — The transportation of freight and passengers from one state to another, or through more than one state, either by land or by water, is interstate commerce,<sup>4</sup> regardless of the distance from which it comes or to which it is bound before or after crossing such state line.<sup>5</sup> The means of transportation and the time of transit are immaterial.<sup>6</sup>

**Continuous Voyage.** — The transportation of freight and passengers from the interior of one state to a point in another state is commerce among the states, even as to that part of the voyage which lies wholly within either state, provided the transportation is under an entire contract for a continuous voyage.<sup>7</sup>

**1. Not Limited to Trade and Traffic.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 4 Int. Com. Rep. 87; *People v. Raymond*, 34 Cal. 492; *Campbell v. Chicago, etc.*, R. Co., 86 Iowa 587; *State v. Foreman*, 8 Yerg. (Tenn.) 256. But see *Caldwell v. State*, 1 Stew. & P. (Ala.) 327, wherein it was said that commerce relates to trade and that intercourse may be carried on without trade, and that, therefore, commerce includes no intercourse but that which consists in trade and traffic.

Chief Justice Marshall, in the first and greatest case construing the commerce clause of the Constitution, defined commerce as follows: "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189.

"Commerce" and "Trade," — "Commerce" relates to dealings with foreign nations. "Trade" means mutual traffic among the citizens of a state or nation, or the buying, selling, or exchange of articles between members of the same community. *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

**2. Council Bluffs v. Kansas City, etc., R. Co.**, 45 Iowa 338, 24 Am. Rep. 773.

**3. Transportation Is Part of Interstate Commerce.** — *Hopkins v. U. S.*, 171 U. S. 578; *Kaeiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Chicago, etc., R. Co. v. Fuller*, 17 Wall. (U. S.) 560; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 479.

**4. Transportation Across State Line Constitutes Interstate Commerce — United States.** — *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Kaeiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151; *Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs*, 18 Fed. Rep. 10; *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276; *Mobile, etc., R. Co. v. Sessions*, 28 Fed. Rep. 592; *Ex p. Koehler*, 30 Fed. Rep. 867; *Baird v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 592; *Donald v. Scott*, 74 Fed. Rep. 859; *Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. Rep. 679; *Sweatt v. Boston, etc., R. Co.*, 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684;

*Rhodes v. Iowa*, 170 U. S. 412; *U. S. v. Joint-Traffic Assoc.*, 171 U. S. 505; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

*California.* — *People v. Raymond*, 34 Cal. 492.

*Indiana.* — *Fry v. State*, 63 Ind. 562, 30 Am. Rep. 238.

*Maine.* — *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774; *State v. Intoxicating Liquors*, 83 Me. 158.

*New Jersey.* — *State v. Carrigan*, 39 N. J. L. 35.

*New York.* — *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

*Texas.* — *Southern Pac. R. Co. v. Haas*, (Tex. 1891) 17 S. W. Rep. 600; *American Starch Co. v. Bateman*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771; *Texas, etc., R. Co. v. Avery*, (Tex. Civ. App. 1895) 33 S. W. Rep. 704; *Fuqua v. Pabst Brewing Co.* 90 Tex. 298; *State v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 542.

**5. Distance Immaterial.** — *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, holding that traffic across a bridge spanning a river between two states is interstate commerce.

**Ferries.** — The transportation of passengers and freight for hire by a steam ferry across the Delaware river from New Jersey to Philadelphia by a corporation of New Jersey is interstate commerce, and is not subject to exactions by the state of Pennsylvania. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

**Passage Entirely Through State Not Essential.** — *Fargo v. Michigan*, 121 U. S. 230 [citing *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Crandall v. Nevada*, 6 Wall. (U. S.) 35].

In *Bondholders v. Railroad Com'rs*, 3 Fed. Cas. No. 1,625, it was questioned whether the carriage of freight into one state from another, or out of the state into another, not being a mere transit through the state, is interstate commerce so that the carriage within the state is beyond its power of regulation.

**6. Time and Means of Transportation Immaterial.** — *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

**7. Continuous Voyage — United States.** — *Lord v. Goodall, etc., Steamship Co.*, 4 Sawy. (U. S.) 292, affirmed 102 U. S. 541; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Ex p. Koehler*, 30 Fed. Rep. 867. *Contra*, *The Bright Star*,



**Temporary Interruption of Voyage.** — Where goods destined for a point outside the state are temporarily detained at a point within the state, such detention does not so interrupt the transit as to make the transportation of such goods local and not interstate commerce.<sup>1</sup>

**Commerce Wholly Confined to One State** is not, of course, interstate commerce,<sup>2</sup> though it may happen that commerce which is internal and confined to one state is so closely connected with interstate commerce as to require its being to some extent subject to the same control.<sup>3</sup> A continuous carriage between points in the same state, but by a route lying partly in another state, is not interstate commerce,<sup>4</sup> though a different view has been taken by some courts.<sup>5</sup>

**Jurisdiction.** — Commerce does not include jurisdiction.<sup>6</sup>

**2. Particular Transactions Constituting Interstate Commerce** — *a. CARRIAGE OF FREIGHT AND PASSENGERS.* — It has already been seen that the transportation of freight or passengers from one state to another constitutes interstate commerce.<sup>7</sup>

**Receiving and Landing Passengers and Freight.** — The business of receiving and landing passengers and freight is incident to their transportation and constitutes a part of interstate commerce.<sup>8</sup>

*Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880. Indiana.* — *Depew v. Wabash, etc., Canal, 5 Ind. 8.*

*Pennsylvania.* — *Delaware, etc., Canal Co. v. Com., (Pa. 1888) 17 Atl. Rep. 175, 37 Am. & Eng. R. Cas. 359. Compare Norfolk, etc., R. Co. v. Com., 114 Pa. St. 256.*

*Texas.* — *Galveston, etc., R. Co. v. Armstrong, (Tex. Civ. App. 1897) 43 S. W. Rep. 614; State v. Gulf, etc., R. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 542; Houston Direct Nav. Co. v. Insurance Co. of North America, 89 Tex. 1, 59 Am. St. Rep. 17.*

A steamer employed in the transportation, on a river wholly within a state, of goods destined for other states and of goods brought from without the limits of the state and destined to places within the state, is engaged in interstate commerce; and however limited that commerce is, so far as it goes it is subject to regulation by Congress. *The Daniel Ball, 10 Wall. (U. S.) 557. Compare The Bright Star, Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880.*

**1. Temporary Interruption of Voyage.** — *The Daniel Ball, 10 Wall. (U. S.) 557; Cutting v. Florida R., etc., Co., 46 Fed. Rep. 641; Delaware, etc., Canal Co. v. Com., (Pa. 1888) 17 Atl. Rep. 175, 37 Am. & Eng. R. Cas. 359; Coe v. Errol, 116 U. S. 517.*

The fact that the goods stop at either end of the route until taken up by an independent carrier does not destroy the interstate character of the commerce. *The Daniel Ball, 10 Wall. (U. S.) 557.*

**2. Commerce Confined to One State.** — *Hall v. De Cuir, 95 U. S. 485; Western Union Tel. Co. v. Texas, 105 U. S. 460; Wabash, etc., R. Co. v. Illinois, 118 U. S. 557; The Daniel Ball, 10 Wall. (U. S.) 557; Geer v. Connecticut, 161 U. S. 519; The Gretna Green, 20 Fed. Rep. 901; The City of Salem, 37 Fed. Rep. 846; The Bright Star, Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880; The Steam Propeller Thomas Swan, 6 Ben. (U. S.) 42, 23 Fed. Cas. No. 13,931; Sears v. Warren County, 36 Ind. 267, 10 Am. Rep. 62; Scammon v. Kansas City, etc., R. Co., 41 Mo. App. 194.*

**3. Internal Commerce Connected with Interstate Commerce.** — A party using for the transportation of his goods between points in the same state an instrument of commerce which is subject to the regulating power of Congress, such as a vessel navigating the high seas, must use it subject to all the limitations imposed upon its use by Congress. *Lord v. Goodall, etc., Steamship Co., 4 Sawy. (U. S.) 292.*

**4. Route Partly in Another State.** — *Com. v. Lehigh Valley R. Co., (Pa. 1888) 17 Atl. Rep. 179; Com. v. Lehigh Valley R. Co., 129 Pa. St. 308; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 [affirming 129 Pa. St. 308; explaining Coe v. Errol, 116 U. S. 517, and Lord v. Goodall, etc., Steamship Co., 102 U. S. 541]; Campbell v. Chicago, etc., R. Co., 86 Iowa 587. But see Burlington, etc., R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391.*

**Stock Yards on State Line.** — Where the shipment of live stock is between two points in the same state, the facts that the yards where the cattle are unloaded extend into another state and that the office of the consignee where the cattle are unloading is in the other state do not convert the transaction into interstate commerce. *Scammon v. Kansas City, etc., R. Co., 41 Mo. App. 194.*

**5. New Orleans Cotton Exch. v. Cincinnati, etc., R. Co., 2 Int. Com. C. Rep. 375; State v. Chicago, etc., R. Co., 40 Minn. 267, 12 Am. St. Rep. 730; Sternberger v. Cape Fear, etc., R. Co., 29 S. Car. 510, 2 Int. Com. Rep. 426.**

**Carriage over High Seas.** — Carriage between ports in the same state, but over the high seas a marine league from shore, is foreign commerce. *Lord v. Goodall, etc., Steamship Co., 102 U. S. 541; Pacific Coast Steam Ship Co. v. Board of Railroad Com'rs, 18 Fed. Rep. 10.*

**6. Jurisdiction Not Included.** — *Caldwell v. State, 1 Stew. & P. (Ala.) 327.*

**7. Transportation of Freight and Passengers.** — See *supra*, this section, *Definition and Nature.*

**8. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.**



Moving Goods in the Station from the Platform on which they are put on arrival, to the freight warehouse, is a part of interstate commerce.<sup>1</sup>

Fares and Freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.<sup>2</sup>

**Sleeping Cars.** — The cars used by a sleeping-car company for the carriage of passengers are vehicles of transportation, and their use in receiving and delivering travelers at points widely separated is commerce.<sup>3</sup>

The Business of Ferrying across a navigable stream between two states is interstate commerce.<sup>4</sup>

**Soliciting Business for Carriers.** — An agent whose business consists in soliciting passengers to travel over the railroad which he represents, from one state into and through other states, is engaged in interstate commerce.<sup>5</sup>

A Railroad Which Is a Link in a Through Line of road by which passengers and freight are carried into a state from other states and from that state to other states is engaged in interstate commerce.<sup>6</sup> The fact that transportation from one state to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the state line does not affect the character of the transportation in this respect.<sup>7</sup>

**Preparing Train of Empty Cars.** — A train consisting of empty freight cars being prepared and taken to a point without the state for the purpose of transporting coal within the state is not engaged in interstate commerce.<sup>8</sup>

**b. TELEGRAPHS AND TELEPHONES.** — Communication or intercourse by telegraph or telephone, with the business of conducting such communication between persons in different states, is interstate commerce.<sup>9</sup>

**c. INSURANCE.** — The business of insurance, as conducted by insurance companies organized under the laws of other states, is not interstate commerce, and there is no difference in this respect between fire, life, and marine insurance.<sup>10</sup>

1. *Rhodes v. Iowa*, 170 U. S. 412.

2. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

3. *Sleeping Cars.* — *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276.

4. *Ferries.* — *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Fargo v. Michigan*, 121 U. S. 230.

5. *Soliciting Agent for Carrier.* — *McCall v. California*, 136 U. S. 104.

6. *Connecting Carriers.* — *The Daniel Ball*, 10 Wall. (U. S.) 557; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 45 Am. & Eng. R. Cas. 9; *Ex p. Koehler*, 30 Fed. Rep. 867; *Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 Tex. 1, 59 Am. St. Rep. 17, *reversing* (Tex. Civ. App. 1895) 31 S. W. Rep. 560; *Galveston, etc., R. Co. v. Armstrong*, (Tex. Civ. App. 1897) 43 S. W. Rep. 614. *Compare* *Norfolk, etc., R. Co. v. Com.*, 114 Pa. St. 256.

7. *Crossing State Line Not Necessary.* — *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114.

A common carrier is engaged in interstate commerce where it transports articles from one point to another point in the same state, if they are delivered at the latter point to a connecting carrier for transportation out of the state. *State v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 542; *Galveston, etc., R. Co. v. Armstrong*, (Tex. Civ. App. 1897) 43 S. W. Rep. 614.

8. *Empty Cars.* — *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 57 Am. St. Rep. 827. This conclusion was reached by analogy to the rule

that the article does not become a subject of interstate commerce until it begins to move on its final journey from one state to another, and that a previous intention to transport an article out of the state is immaterial. See also *infra*, this section, *When Protection of Commerce Clause Attaches*.

9. *Telegraph and Telephone Companies Are Engaged in Interstate Commerce.* — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, *reviewed in* *Bagg v. Wilmington*, etc., R. Co., 109 N. Car. 279, 26 Am. St. Rep. 569; *Leloup v. Mobile*, 127 U. S. 640; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692; *Western Union Tel. Co. v. James*, 162 U. S. 650; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *Reed v. Western Union Tel. Co.*, 56 Mo. App. 168; *Western Union Tel. Co. v. Atlantic, etc., State Tel. Co.*, 5 Nev. 102; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795.

10. *Insurance Is Not Commerce.* — *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Crutcher v. Kentucky*, 141 U. S. 59; *Hooper v. California*, 155 U. S. 648; *New York L. Ins. Co. v. Cravens*, 178 U. S. 401; *Berry v. Mobile L. Ins. Co.*, 1 Tex. L. J. 157, 3 Fed. Cas. No. 1,358; *State v. Phipps*, 50 Kan. 609, 34 Am. St. Rep. 152; *State v. Allgeyer*, 48 La. Ann. 104.



*d.* GRAIN ELEVATORS. — Grain elevators which are situated and carry on business entirely within a state may be termed instruments of interstate commerce, but they are not engaged in such commerce themselves merely because they transfer grain from one road to another which may run into other states.<sup>1</sup>

*e.* STOCK YARDS. — The fact that the yards of a stock-yard company are located on both sides of the division line between two states, so that the stock may pass to and fro over the state line in the yards in feeding, handling, etc., does not of itself impress the business with the character of interstate commerce.<sup>2</sup>

*f.* PRODUCTION AND MANUFACTURE. — Neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where they are produced or manufactured, prior to the commencement of the actual transfer or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress.<sup>3</sup> Not every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress.<sup>4</sup> Where a contract is for the sale of an article and for its delivery in another state, the transaction is one of interstate commerce, although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale.<sup>5</sup>

Packing Houses engaged in slaughtering cattle, sheep, and hogs intended for interstate and foreign commerce, are not engaged in interstate commerce.<sup>6</sup>

Mining. — The business of coal mining is not interstate commerce.<sup>7</sup>

*g.* STOCK EXCHANGES. — The business transacted on a stock exchange is not interstate commerce.<sup>8</sup>

*h.* FOREIGN CORPORATIONS. — A contract between citizens of one state and a corporation of another state for the doing of one single thing is a transaction of interstate commerce, and not a doing of business in the state.<sup>9</sup>

*i.* SALE OF GOODS — (1) *In General.* — The negotiation in one state of sales of goods which are in another state, for the purpose of their introduction into the former state, constitutes interstate commerce.<sup>10</sup> Where parties in one state order goods from persons or corporations in another state, and the

1. Grain Elevators Not Engaged in Interstate Commerce. — *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517.

2. Stock Yards on State Line. — *Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. Rep. 679, 82 Fed. Rep. 850; *Scammon v. Kansas City, etc.*, R. Co., 41 Mo. App. 194.

The facts that a state line runs through stock yards, and that a lot of stock there sold may be at the time partly in each of the two states, are immaterial so far as concerns any question of interstate commerce. *Hopkins v. U. S.*, 171 U. S. 578.

3. Production or Manufacture Is Not Commerce. — *In re Greene*, 52 Fed. Rep. 113; *U. S. v. Boyer*, 85 Fed. Rep. 425; *Arkansas v. Kansas, etc.*, Coal Co., 96 Fed. Rep. 359; *Kidd v. Pearson*, 128 U. S. 1. See also *U. S. v. E. C. Knight Co.*, 156 U. S. 14, wherein it was said that commerce succeeds to manufacture and is not a part of it.

4. Enterprises Carried On by Interstate Shipments. — *Addyston Pipe, etc.*, Co. v. U. S., 175 U. S. 211.

The acquisition of sugar refineries in one state by a corporation created in another state, and the business of refining sugar in the former state, bear no direct relation to commerce be-

tween the states or with foreign nations. *U. S. v. E. C. Knight Co.*, 156 U. S. 1.

5. Contract to Manufacture and Sell. — *Addyston Pipe, etc.*, Co. v. U. S., 175 U. S. 211.

6. Packing Houses. — *U. S. v. Boyer*, 85 Fed. Rep. 425.

7. Mining Is Not Interstate Commerce. — *Arkansas v. Kansas, etc.*, Coal Co., 96 Fed. Rep. 353, citing *U. S. v. Boyer*, 85 Fed. Rep. 425.

8. In *Hopkins v. U. S.*, 171 U. S. 578, it was held that the business of the members of the Kansas City Live Stock Exchange was not interstate commerce, and hence the federal anti-trust act did not affect them. This case is distinguished in *Addyston Pipe, etc.*, Co. v. U. S., 175 U. S. 211.

9. What Constitutes Doing Business in State. — *Davis, etc.*, Bldg., etc., Co. v. *Caigle*, (Tenn. Ch. 1899) 53 S. W. Rep. 240. For a full discussion of what constitutes doing business in a state by a foreign corporation, see the title FOREIGN CORPORATIONS, vol. 13, p. 869 *et seq.*

10. Contracts for Sale and Transportation to Another State — *United States*. — *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *O'Neil v. Vermont*, 144 U. S. 323; *Ex p. Loeb*,



goods are shipped into the state, although with a draft attached to the bill of lading, the transaction is one of interstate commerce.<sup>1</sup>

The Right to Sell Any Article Imported is an inseparable incident to the right to import it,<sup>2</sup> and there is no distinction in this regard between a sale at wholesale to individuals engaged in the jobbing or retail trade and a sale at retail to the consumer,<sup>3</sup> provided the goods are sold in the original packages in which they were imported.<sup>4</sup> The right of sale does not extend beyond the first sale by the importer after the arrival of the goods within the state.<sup>5</sup>

An Action for the Price of Goods Sold to the buyer in one state by the manufacturer in another state relates to interstate commerce, so that the right to sue in the former state cannot be denied by such state for failure of the plaintiff to comply with local laws.<sup>6</sup>

(2) *By Agents.* — The right to sell goods imported from other states in the original package includes the right to sell by an agent.<sup>7</sup> A business carried on by a nonresident of the state through agents who solicit from citizens of the state orders for goods and forward such orders to their principal, who thereupon forwards the goods, is interstate commerce.<sup>8</sup> It has been held that if the goods are never in fact ordered or purchased from the agents until after they are actually within the limits of the state, the transaction is not one of interstate commerce.<sup>9</sup> But this is clearly not correct so far as the principal

72 Fed. Rep. 657; Addyston Pipe, etc., Co. v. U. S., 175 U. S. 211.

Alabama. — Cook v. Rome Brick Co., 98 Ala. 409; Culberson v. American Trust, etc., Co., 107 Ala. 457.

Iowa. — Wind v. Iler, 93 Iowa 316.

Louisiana. — Pegues v. Ray, 50 La. Ann. 574.

Ohio. — Haldy v. Tomoor-Haldy Co., 4 Ohio Dec. 118.

Texas. — Bateman v. Western Star Milling Co., 1 Tex. Civ. App. 90; Lyons-Thomas Hardware Co. v. Reading Hardware Co., (Tex. Civ. App. 1893) 21 S. W. Rep. 300; H. Zuberbieber Co. v. Harris, (Tex. Civ. App. 1896) 35 S. W. Rep. 403; C. B. Cones, etc., Mfg. Co. v. Rosenbaum, (Tex. Civ. App. 1898) 45 S. W. Rep. 333.

Sales "C. O. D." — Where a dealer in one state receives from persons in another state by telegraph and mail orders for goods which he fills by selecting the goods and delivering them to an express company for delivery in the other state C. O. D., the transaction is one of interstate commerce. O'Neil v. Vermont, 144 U. S. 323.

1. Draft Attached to Bill of Lading. — Gale Mfg. Co. v. Finkelstein, (Tex. Civ. App. 1899) 54 S. W. Rep. 619.

Foreign Corporation Doing Business Within State. — For a full discussion of what constitutes doing business within a state, see the title FOREIGN CORPORATIONS, vol. 13, p. 869 et seq.

2. Right to Sell Imported Articles. — Brown v. Maryland, 12 Wheat. (U. S.) 419; Leisy v. Hardin, 135 U. S. 100; Coe v. Errol, 116 U. S. 517; Collins v. New Hampshire, 171 U. S. 30; Rhodes v. Iowa, 170 U. S. 412. See also *infra*, this section, *When Protection of Commerce Clause Cases — Original Packages*.

3. No Distinction Between Sale at Wholesale and Retail. — Schollenberger v. Pennsylvania, 171 U. S. 1.

4. Sale in Original Package. — For a full discussion of the "original package" cases, see

*infra*, this section, *When Protection of Commerce Clause Cases — Original Packages*.

5. Right Limited to First Sale. — Schollenberger v. Pennsylvania, 171 U. S. 1, citing Waring v. Mobile, 8 Wall. (U. S.) 110.

6. Action for Price. — Woessner v. Cottam, 19 Tex. Civ. App. 611. See also *supra*, this section, *Foreign Corporations*.

7. Right to Sell by Agent. — Lyng v. Michigan, 135 U. S. 161; Schollenberger v. Pennsylvania, 171 U. S. 1; *In re Minor*, 69 Fed. Rep. 233; Bradford v. Stevens, 10 Gray (Mass.) 379; Carstairs v. O'Donnell, 154 Mass. 357; Com. v. Paul, 170 Pa. St. 284, 37 W. N. C. (Pa.) 137. See also State v. Montgomery, 92 Me. 433.

8. Nonresident Selling by Agent Is Engaged in Interstate Commerce. — Chrystal v. Macon, 108 Ga. 27; Haldy v. Tomoor-Haldy Co., 4 Ohio Dec. 118; Wolff Dryer Co. v. Bigler, 192 Pa. St. 466; Mearshon v. Pottsville Lumber Co., 187 Pa. St. 12, 42 W. N. C. (Pa.) 399; Bateman v. Western Star Milling Co., 1 Tex. Civ. App. 90; Lyons-Thomas Hardware Co. v. Reading Hardware Co., (Tex. Civ. App. 1893) 21 S. W. Rep. 300; Miller v. Goodman, 91 Tex. 41; Shaw Piano Co. v. Ford, (Tex. Civ. App. 1897) 41 S. W. Rep. 198.

9. Sale After Arrival in State. — Chrystal v. Macon, 108 Ga. 27, holding that this doctrine is applicable to a business in the course of which each customer, though he actually orders a portrait from a dealer in another state, has the right or privilege of selecting and purchasing from the latter's agent in his own state a suitable frame for every portrait from a stock of frames shipped into the state for that purpose by the dealer; no customer, however, being, in any instance, bound to purchase a frame unless he chooses to do so. So far as respects the sale of the frame this is internal state business pure and simple, and has no interstate feature.

Sale from Warehouse. — Where goods were manufactured in another state and shipped to a warehouse within the state, and at that point



or importer is concerned. The selling in one state of goods manufactured in another state and shipped into the former state is interstate commerce, so far as the importer is concerned, whether the goods are sold before or after they are shipped into the state.<sup>1</sup> A distinction has been drawn, however, between the position of the principal and that of the agent. It is said that while the sale at its destination of an article which has been sent from another state may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make the business of the person so employed a portion of interstate commerce.<sup>2</sup> It is difficult to reconcile this distinction, however, with the decisions holding that the right to sell includes the right to sell by an agent.<sup>3</sup> The business of a commission merchant who buys and sells goods on commission at a given point does not constitute interstate commerce although goods are consigned to him for sale from other states and by him sold for shipment to other states.<sup>4</sup>

**3. Subjects of Interstate Commerce — a. LAWFUL SUBJECTS OF BARTER AND SALE.** — Only such commodities as may lawfully become the subjects of purchase, sale, or exchange are articles of interstate commerce, within the protection of the commerce clause of the Constitution.<sup>5</sup> Articles which on account of their existing condition would bring and spread disease or pestilence, such as substances infected with disease germs, and meat or other provisions unfit

were distributed among customers who, after such shipment, had purchased different articles of the goods from a person going from house to house exhibiting samples and taking orders, the sales so made were held not to constitute interstate commerce. *L. B. Price Co. v. Atlanta*, 105 Ga. 358; *Duncan v. State*, 105 Ga. 457.

**1. Situation of Goods Immaterial as to Vendor.** — *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Miller v. Goodman*, 91 Tex. 41; *Shaw Piano Co. v. Ford*, (Tex. Civ. App. 1897) 41 S. W. Rep. 198; *Lasater v. Purcell Mill, etc., Co.*, (Tex. Civ. App. 1899) 54 S. W. Rep. 425, holding that a foreign corporation doing such business is not engaged in "transacting" or "soliciting" business in the state, within the meaning of a state statute relative to permits. See also *infra*, this section, *When Protection of Commerce Clause Ceases — Original Packages*.

**Shipment by Carload — Sale by Package.** — A transaction is none the less interstate commerce because the goods, though put up in smaller packages, are shipped into the state by the carload while they are sold by the package by the commission men. *Lasater v. Purcell Mill, etc., Co.*, (Tex. Civ. App. 1899) 54 S. W. Rep. 425.

**2. Distinction Between Business of Principal and Business of Agent.** — *Hopkins v. U. S.*, 171 U. S. 578; *American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750.

**Agent Held Not Engaged in Interstate Commerce.** — *Emert v. Missouri*, 156 U. S. 296; *American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750; *Duncan v. State*, 105 Ga. 457; *L. B. Price Co. v. Atlanta*, 105 Ga. 358; *Chrystal v. Macon*, 108 Ga. 27.

**3.** For example, it was held in *Com. v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32, that a nonresident manufacturer of oleomargarine who sells his product in Pennsylvania at a store managed by an agent with an internal revenue license is not engaged in interstate commerce, and his agent is amenable

to the penalties of the oleomargarine Act of May 21, 1885, P. L. 22. But the conviction of the agent in this case was reversed in *Schollenberger v. Pennsylvania*, 171 U. S. 1, upon the ground that the sale was in original packages and constituted a part of interstate commerce.

**4. Commission Merchants Selling Consignments.** — *Hopkins v. U. S.*, 171 U. S. 578; *Walton v. Augusta*, 104 Ga. 757.

The nature of such merchant's business is not affected in this regard by the fact that he pays drafts drawn against consignments to him for sale, nor because he may have previously loaned money to aid in the preparation of the goods for market, and taken a mortgage thereon, the amount of which he deducts from the proceeds of the sale. *Hopkins v. U. S.*, 171 U. S. 578.

**Persons Engaged on Their Own Account** in a "commercial street brokerage business," in the course of which they take orders for goods to be filled by nonresident dealers, the brokers, unless otherwise directed, placing these orders at their own option with any of their correspondents and reselling any goods rejected after their arrival in the state, are not engaged in interstate commerce. *Walton v. Augusta*, 104 Ga. 757.

**5. Lawful Subjects of Sale or Exchange.** — *Leisy v. Hardin*, 135 U. S. 100; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *In re Ware*, 53 Fed. Rep. 783; *Donald v. Scott*, 74 Fed. Rep. 859; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *In re Scheitlin*, 99 Fed. Rep. 272; *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 56; *Ballock v. State*, 73 Md. 1, 25 Am. St. Rep. 559; *Austin v. State*, 101 Tenn. 563.

**"Only Those Things Which Are in Fact Commodities** in some true sense, and as such are proper things for importation and use, can be legitimate articles of commerce" within the scope of the Constitution. *Austin v. State*, 101 Tenn. 563.



for human use, are not legitimate subjects of trade and commerce and are not within the protection of the commerce clause of the Constitution, but fall within the police power of the state.<sup>1</sup> Where articles are harmful or deleterious, and therefore are not legitimate subjects of commerce, the fact that they are in original packages will not protect them from state regulation.<sup>2</sup> It is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress.<sup>3</sup>

**b. PARTICULAR ARTICLES.** — Merchandise only is the subject of interstate commerce.<sup>4</sup> The clause does not apply to persons.<sup>5</sup>

**Adulterated Articles of Food** are not legitimate subjects of commerce.<sup>6</sup>

**Baking Powder.** — Baking powder is a well-known article of commerce among the states, and the fact that it contains alum does not deprive it of its character as a legitimate article of interstate commerce, in the absence of proof that the presence of alum in baking powder is deleterious to health.<sup>7</sup>

**Cigarettes.** — Cigarettes have been held not to be legitimate articles of commerce, being harmful and deleterious to health.<sup>8</sup> But a contrary conclusion was reached by other cases.<sup>9</sup>

**Intoxicating Liquors** are recognized as legitimate subjects of interstate commerce.<sup>10</sup>

**Lottery Tickets**, or bonds the conditions of which render them substantially of a similar nature, are not legitimate articles of commerce.<sup>11</sup>

**Oleomargarine** is a recognized and legitimate subject of interstate commerce.<sup>12</sup>

**1. Unsound or Infectious Articles.** — *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 489; *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Crutcher v. Kentucky*, 141 U. S. 60; *Brennan v. Titusville*, 153 U. S. 289; *License Cases*, 5 How. (U. S.) 576; *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

**Animals Having Contagious or Infectious Diseases** are not lawful subjects of commerce and may be excluded by the state under the exercise of its police power. *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613; *Kimmish v. Ball*, 129 U. S. 217; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465.

**2. Original Package No Protection.** — *Com. v. Huntley*, 156 Mass. 236; *Austin v. State*, 101 Tenn. 563.

**3. Crutcher v. Kentucky**, 141 U. S. 61.

**4. Merchandise Subject of Commerce.** — *State Freight Tax Cases*, 15 Wall. (U. S.) 281.

**5. Persons.** — *New York v. Miln*, 11 Pet. (U. S.) 102.

**6. Adulterated Articles of Food.** — *Plumley v. Massachusetts*, 155 U. S. 467; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Com. v. Huntley*, 156 Mass. 236; *Austin v. State*, 101 Tenn. 563.

**Fraudulent and Deceptive Articles.** — The commerce clause of the Constitution does not secure to any one "the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which in fact is wholly different from that which is offered for sale." *Plumley v. Massachusetts*, 155 U. S. 467.

**7. Baking Powder Containing Alum.** — *In re Ware*, 53 Fed. Rep. 783.

**8. Cigarettes Held Not Legitimate Articles of Commerce.** — *Austin v. State*, 101 Tenn. 563; *Blaufeld v. State*, (Tenn. 1899) 53 S. W. Rep. 1090.

**9. Contrary View.** — *Iowa v. McGregor*, 76 Fed. Rep. 956; *Sawrie v. Tennessee*, 82 Fed.

Rep. 615; *In re Minor*, 69 Fed. Rep. 233; *State v. Goetze*, 43 W. Va. 495.

**10. Intoxicating Liquors** — *United States*. — *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *O'Neil v. Vermont*, 144 U. S. 323; *Scott v. Donald*, 165 U. S. 58; *In re Beine*, 42 Fed. Rep. 545; *Tuchman v. Welch*, 42 Fed. Rep. 548; *M. Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561; *Ex p. Edgerton*, 59 Fed. Rep. 115; *Ex p. Jervey*, 66 Fed. Rep. 957; *Jervey v. The Carolina*, 66 Fed. Rep. 1013; *Ex p. Loeb*, 72 Fed. Rep. 657; *Donald v. Scott*, 74 Fed. Rep. 859; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438.

*Delaware*. — *State v. Allmond*, 2 Houst. (Del.) 612.

*Indiana*. — *Indianapolis v. Bieler*, 138 Ind. 30.

*Iowa*. — *State v. Pfeleajor*, 81 Iowa 759; *State v. Corrick*, 82 Iowa 451; *State v. Rhodes*, 90 Iowa 496; *Wind v. Iler*, 93 Iowa 316.

*Maine*. — *State v. Intoxicating Liquors*, 82 Me. 558.

*Maryland*. — *Bode v. State*, 7 Gill (Md.) 326.

*Rhode Island*. — *State v. Amery*, 12 R. I. 64.

*Vermont*. — *Jones v. Hard*, 32 Vt. 481.

"So long \* \* \* as state legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles." *Scott v. Donald*, 165 U. S. 91.

**11. Lottery Tickets.** — *Ballock v. State*, 73 Md. 1, 25 Am. St. Rep. 559.

**12. Oleomargarine Recognized Article of Commerce** — *United States*. — *Schollenberger v. Pennsylvania*, 171 U. S. 1; *In re Gooch*, 44 Fed. Rep. 276; *In re McAllister*, 51 Fed. Rep. 282; *In re Worthen*, 58 Fed. Rep. 467; *Ex p. Scott*, 66 Fed. Rep. 45; *In re Brundage*, 96 Fed. Rep. 963; *In re Scheitlin*, 99 Fed. Rep. 272.



But oleomargarine put up and colored in imitation of genuine butter is not a lawful subject of commerce, and is subject to the police power of the state.<sup>1</sup>

**Natural Gas.** — Natural gas, when brought to the surface and placed in pipes for transportation, is an article of commerce.<sup>2</sup>

**Petroleum or Coal Oil** is a legitimate subject of commerce.<sup>3</sup>

**Newspapers.** — Newspapers are legitimate subjects of commerce within the meaning of the commerce clause of the Constitution.<sup>4</sup>

**Game** delivered to a common carrier to be transported to a point outside of the state is an article of interstate commerce not subject to the police power of the state.<sup>5</sup>

**c. POWER TO DETERMINE — Power of Congress.** — The power to regulate commerce includes the power to declare what property or things may be the subject of commerce, and therefore Congress has power to prescribe what articles of merchandise shall not be the subject of interstate or foreign commerce.<sup>6</sup>

**This Power Is Exclusive.** — The failure of Congress to make any express declarations on the subject has not submitted to the several states the decision of the question in each locality, what shall and what shall not be articles of traffic in the interstate commerce of the country.<sup>7</sup> It has been held, however, that the power of Congress in this respect is merely paramount and not exclusive, and that in the absence of congressional legislation upon the subject the states may determine the question for themselves.<sup>8</sup>

**Articles Inherently Unfit for Commerce.** — The states have an undoubted right, in the absence of any action by Congress upon the subject, to prohibit the importation and sale of articles inherently unworthy of commerce and unfit for the use of the people.<sup>9</sup> The question whether an article is or is not a sub-

*Maryland.* — *Fox v. State*, 89 Md. 381.

*Massachusetts.* — *Com. v. Huntley*, 156 Mass. 236.

*New York.* — *Waterbury v. Egan*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 355.

*Pennsylvania.* — *Com. v. Paul*, 9 Pa. Co. Ct. 196; *Com. v. Paul*, 170 Pa. St. 284, 37 W. N. C. (Pa.) 137; *Com. v. Schollenberger*, 156 Pa. St. 201, 12 Pa. Co. Ct. 442, 535, 2 Pa. Dist. 244.

**The Act of Congress of Aug. 2, 1886**, declared oleomargarine to be a salable article and regulated its sale. *Com. v. Paul*, 9 Pa. Co. Ct. 196, 10 Pa. Co. Ct. 332.

**1. Oleomargarine Colored to Imitate Butter.** — *Plumley v. Massachusetts*, 155 U. S. 461; *In re Scheitlin*, 99 Fed. Rep. 272; *Com. v. Huntley*, 156 Mass. 236. *Contra, In re Brundage*, 96 Fed. Rep. 993.

**2. Natural Gas.** — *State v. Indiana*, etc., Oil, etc., Co., 120 Ind. 575; *Avery v. Indiana*, etc., Oil, etc., Co., 120 Ind. 600.

**3. Petroleum.** — *In re Wilson*, (N. Mex. 1900) 60 Pac. Rep. 73.

**4. Newspapers.** — *Preston v. Finley*, 72 Fed. Rep. 850.

**5. Game.** — *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 77. But see *contra* cases and a full discussion of the subject in vol. 14, p. 654, title GAME AND GAME LAWS.

**6. Leisy v. Hardin**, 135 U. S. 100; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465; *License Cases*, 5 How. (U. S.) 504; *Ex p. Loeb*, 72 Fed. Rep. 657; *U. S. v. Popper*, 98 Fed. Rep. 423; *License Cases*, 5 How. (U. S.) 577; *U. S. v. Gould*, 8 Am. L. Reg. 525, 25 Fed. Cas. No. 15,239; *Charge to Grand Jury*, 3 Phila. (Pa.) 527, 30 Fed. Cas. No. 18,269a.

**Declaring Commerce in Certain Articles Unlawful.** — Congress may prohibit citizens and resi-

dents of the United States from engaging in the slave trade with foreign countries, under its power to regulate commerce. *Charge to Grand Jury*, 3 Phila. (Pa.) 527, 30 Fed. Cas. No. 18,269a.

**7. Power Exclusively in Congress.** — *Bowman v. Chicago*, etc., R. Co., 125 U. S. 493; *In re Rahrer*, 140 U. S. 545.

"If the state may not regulate commerce among the states in a commercial article at all, it may not oust the national jurisdiction by merely declaring a commercial commodity not to be a commercial commodity merely because the local policy of the state would be subverted thereby." *Sawrie v. Tennessee*, 82 Fed. Rep. 615.

**8. Com. v. Paul**, 9 Pa. Co. Ct. 196.

**9. Right to Exclude Noncommercial Articles.** — *Austin v. State*, 101 Tenn. 563. And see generally *infra*, this title, *State Statutes Affecting Interstate Commerce*.

Upon this ground a state may prohibit the importation and sale of cigarettes. *Austin v. State*, 101 Tenn. 563.

**Effect of Nonaction by Congress.** — While the silence of Congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the state shall be free and unrestricted (see *supra*, this title, *Regulation of Interstate Commerce — Power of States — Effect of Non-action by Congress*), congressional nonaction upon the antecedent question as to whether other articles are suited for commerce is not tantamount to an affirmation by that body that they are so suited. "Articles of the former class are already within the domain of congressional regulation, while those of the latter class are as yet beyond that domain and within control of the states, and



ject of lawful interstate commerce must depend upon the intrinsic state or condition of the article, and not upon a mere declaration by the state legislature.<sup>1</sup>

An Article Which Congress Taxes and Recognizes as a proper subject of foreign and interstate commerce cannot be totally excluded from a state.<sup>2</sup>

4. **When Protection of Commerce Clause Attaches.** — Whenever property has lawfully begun to move upon its final journey as an article of commerce from one state to another, that moment it becomes the subject of interstate commerce and as such is subject only to national regulation.<sup>3</sup> But this movement does not begin until the articles have been shipped or started for transportation from one state to another.<sup>4</sup> Mere preparation of the article for transportation is insufficient.<sup>5</sup> It must be actually delivered to the carrier for transportation.<sup>6</sup> A mere intent on the part of the purchaser or manufacturer of articles to export them to another state will not render such articles subjects of interstate commerce prior to the time when the shipment actually begins.<sup>7</sup> The products of domestic enterprise in agriculture or manufactures or in the arts are not within the protection of the commerce clause merely because they may ultimately become the subjects of foreign or interstate commerce.<sup>8</sup>

5. **When Protection of Commerce Clause Ceases** — *a.* **INCORPORATION WITH MASS OF PROPERTY OF STATE** — **Statement of Rule.** — The point of time when an article of interstate commerce ceases to be such and the power of the state over it begins is not the instant when the article enters the state, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the state or country,<sup>9</sup> and even after that time

from the nature of the case must remain so, unless and until affirmatively determined by higher authority to be worthy of commerce, and thereby transferred to the other class." *Austin v. State*, 101 Tenn. 563.

1. **Intrinsic Condition of Article Controlling.** — *In re Rahrer*, 140 U. S. 545.

2. *Schollenberger v. Pennsylvania*, 171 U. S. 1. See also *Com. v. Schollenberger*, 12 Pa. Co. Ct. 442, 535, 2 Pa. Dist. 244.

**Tax for Revenue Only.** — An Act of Congress laying a tax upon certain articles for the purposes of revenue only is not, without more, such a recognition of them as legitimate articles of commerce as will prevent a state from declaring them not legitimate articles of commerce. *Plumley v. Massachusetts*, 155 U. S. 461.

3. *United States*. — *Gilman v. Philadelphia*, 3 Wall. (U. S.) 724; *The Daniel Ball*, 10 Wall. (U. S.) 557; *Coe v. Errol*, 116 U. S. 517; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192; *U. S. v. E. C. Knight Co.*, 156 U. S. 13; *Ex p. Koehler*, 30 Fed. Rep. 867.

*Kansas*. — *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

*Maine*. — *Bennett v. American Express Co.*, 83 Me. 236, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 56.

*Maryland*. — *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

*Virginia*. — *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 57 Am. St. Rep. 827.

4. **When Final Movement Begins.** — *Coe v. Errol*, 116 U. S. 517.

5. **Preparation for Shipment Not Sufficient.** — *U. S. v. Boyer*, 85 Fed. Rep. 425. *Contra*, *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575.

**Gathering at Depot for Shipment.** — "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there." *Coe v. Errol*, 116 U. S. 517.

6. **Actual Delivery to Carrier Necessary.** — *U. S. v. Boyer*, 85 Fed. Rep. 425.

7. **Intent to Export Insufficient.** — *Coe v. Errol*, 116 U. S. 517; *U. S. v. Boyer*, 85 Fed. Rep. 425; *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349; *Carrier v. Gordon*, 21 Ohio St. 608. See also *Brown v. Houston*, 114 U. S. 622.

**The Fact that an Article Is Manufactured for Export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.** *Coe v. Errol*, 116 U. S. 517; *Kidd v. Pearson*, 128 U. S. 24; *U. S. v. E. C. Knight Co.*, 156 U. S. 13; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

8. *Veazie v. Moor*, 14 How. (U. S.) 568; *Addyston Pipe, etc., Co. v. U. S.*, 175 U. S. 211.

9. **Property a Subject of Interstate Commerce until Mingled with Property of State.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Mary-*



it so far remains an article of interstate commerce that it is protected by the Constitution from any burdens imposed upon it by reason of its foreign origin.<sup>1</sup>

**Reason for Rule.** — If at any time before it has thus become incorporated into the mass of property of the state or nation it could be subjected to any restrictions by state legislation, the object of investing the control in Congress might be entirely defeated.<sup>2</sup>

**b. WHEN INCORPORATION TAKES PLACE** — (1) *In General* — **Delivery to Consignee.** — Articles of interstate commerce continue such until delivery to the consignee.<sup>3</sup> The state has no power to stop interstate shipments at the state line by breaking their continuity and intercepting their course from the point of origin to the point of consummation.<sup>4</sup>

**After Articles Have Left the Hands of the Importer** they are no longer subjects of foreign or interstate commerce.<sup>5</sup>

**The First Sale** in the state of the imported article destroys its character as an import and incorporates it with the mass of property of the state.<sup>6</sup>

**Necessity of Sale.** — It has been said that it is only by the sale of the imported article that it becomes mingled with the other property within the state.<sup>7</sup> But it is believed that this decision cannot be maintained. The better rule seems to be that when the goods have come to rest at their final destination, and are exposed for sale or use, they become a part of the mass of the property of the state even though they remain in the original package.<sup>8</sup>

(2) *Original Packages* — (a) **Statement of Rule.** — Property becomes mixed with the general mass of property within the state when the original package in

and, 12 Wheat. (U. S.) 419; *Welton v. Missouri*, 91 U. S. 275; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Tiernan v. Rinker*, 102 U. S. 123; *Brown v. Houston*, 114 U. S. 622; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Leisy v. Hardin*, 135 U. S. 100; *Emert v. Missouri*, 156 U. S. 296; *State v. Intoxicating Liquors*, 65 Me. 556.

**Goods Remaining in Warehouse of Importer.** — So long as the goods remain the property of the importer in his warehouse in the original form and package in which they were imported, they remain articles of interstate commerce within the protection of the Constitution. *Welton v. Missouri*, 91 U. S. 282.

**1. Protection Against Discriminating State Legislation.** — *Welton v. Missouri*, 91 U. S. 282; *Howe Mach. Co. v. Gage*, 100 U. S. 676. And generally, as to discriminating state legislation, see *infra*, this title, *State Statutes Affecting Interstate Commerce*.

**2. Reason for Rule.** — *Welton v. Missouri*, 91 U. S. 281.

**3. Delivery to Consignee** — *United States v. Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Rhodes v. Iowa*, 170 U. S. 412; *Leisy v. Hardin*, 135 U. S. 100; *Vance v. W. A. Vandercreek Co.*, 170 U. S. 438.

*Iowa*. — *State v. Corrick*, 82 Iowa 451.

*Kansas*. — *H. rdy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

*Maine*. — *State v. Intoxicating Liquors*, 83 Me. 158.

**4. Stopping Goods at State Line.** — *Rhodes v. Iowa*, 170 U. S. 412, *reversing* 90 Iowa 496.

**5. After Leaving Hands of Importer.** — *Kidd v. Pearson*, 128 U. S. 23, holding that a state may forbid the sale at retail of articles after they have left the hands of the importer, without interfering with interstate commerce.

**Imports for Personal Use.** — Liquor imported

from another state or from a foreign country, for the personal use of the importer, is protected by the interstate commerce law, and this protection continues so long as such use continues, but ceases when such use ceases. *Donald v. Scott*, 76 Fed. Rep. 554, 559.

**6. Sale Destroys Character as Import.** — *Welton v. Missouri*, 91 U. S. 275; *Leisy v. Hardin*, 135 U. S. 100; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *U. S. v. Hopkins*, 82 Fed. Rep. 529; *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. Rep. 839; *U. S. v. Gould*, 8 Am. L. Reg. 525, 25 Fed. Cas. No. 15,239; *McGregor v. Cone*, 104 Iowa 465; *Wind v. Iler*, 93 Iowa 316; *People v. Huntingdon*, 4 N. Y. Leg. Obs. 187.

**7. Sale Necessary to Destroy Character as Import.** — *In re Minor*, 69 Fed. Rep. 233.

In the absence of any different provision by Congress the state law does not attach to property brought into the state before sale. *Rhodes v. Iowa*, 170 U. S. 412. It was in pursuance of this suggestion that Congress might make a different provision that an exception to the rule was created by the Wilson Law in the case of intoxicating liquors. See *infra*, this subsection, *Wilson Law*.

**8. Arrival at Final Destination and Exposure for Sale or Use.** — *In re May*, 82 Fed. Rep. 422. See also *McGregor v. Cone*, 104 Iowa 465.

In *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 497, the Supreme Court said: "When goods are sent from one state to another state for sale, or in consequence of a sale, they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another state." See also *Brown v. Houston*, 114 U. S. 632; *L. B. Price Co. v. Atlanta*, 105 Ga. 365 [*citing Singer Mfg. Co. v. Wright*, 97 Ga. 114]; *American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750.



which it was imported is no longer such in the hands of the importer, but until that time the article remains a subject of interstate commerce and is protected by the commerce clause from state interference.<sup>1</sup>

**Right to Sell.** — The right to conduct interstate commerce free from interference or regulation by the states includes the right to sell imported articles in the original package regardless of the laws of the state,<sup>2</sup> for the very pur-

**1. Original Package in Hands of Importer Protected from State Interference** — *United States*. — *New York v. Miln*, 11 Pet. (U. S.) 102; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517; *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Emert v. Missouri*, 156 U. S. 321; *In re Van Vliet*, 43 Fed. Rep. 761; *In re McAllister*, 51 Fed. Rep. 282; *W. A. Vandercook Co. v. Vance*, 80 Fed. Rep. 786; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *Pabst Brewing Co. v. Terre Haute*, 98 Fed. Rep. 330.

*Arkansas*. — *Smith v. State*, 54 Ark. 248.

*Delaware*. — *State v. Allmond*, 2 *Houst. (Del.)* 612.

*Iowa*. — *McGregor v. Cone*, 104 Iowa 465; *Hopkins v. Lewis*, 84 Iowa 690.

*Louisiana*. — *State v. Davidson*, 50 La. Ann. 1297.

*Maine*. — *State v. Intoxicating Liquors*, 65 Me. 556; *Wasserboehr v. Boulrier*, 84 Me. 165, 30 Am. St. Rep. 344; *State v. Montgomery*, 92 Me. 433.

*Pennsylvania*. — *Com. v. Paul*, 148 Pa. St. 559.

**Overruled Cases.** — The License Cases, 5 How. (U. S.) 504, wherein it was held that a state statute regulating the sale of intoxicating liquors, although imported from another state and sold in the original package, was not an interference with interstate commerce, have been overruled by the above cases.

**Intent to Break Original Package — Seizure and Forfeiture.** — Imported foreign liquors are liable to seizure and forfeiture under a state statute while the importer retains possession in the original package, but for the purpose and with the intent to break the package and sell the liquors in the state in quantities less than the package. *State v. Intoxicating Liquors*, 65 Me. 556.

**2. Right to Sell in Original Package** — *United States*. — *New York v. Miln*, 11 Pet. (U. S.) 102; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Cook v. Pennsylvania*, 97 U. S. 566; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465; *Lyng v. Michigan*, 135 U. S. 161; *Leisy v. Hardin*, 135 U. S. 100 [overruling License Cases, 5 How. (U. S.) 504]; *In re Rahrer*, 140 U. S. 545; *Rhodes v. Iowa*, 170 U. S. 412; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *In re Beine*, 42 Fed. Rep. 545; *U. S. v. Fiscus*, 42 Fed. Rep. 395; *Tuchman v. Welch*, 42 Fed. Rep. 548; *M. Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561; *In re Spickler*, 43 Fed. Rep. 653; *In re Gooch*, 44 Fed. Rep. 276; *In re McAllister*, 51 Fed. Rep. 282; *In re Sanders*, 52 Fed. Rep. 802; *In re Ware*, 53 Fed. Rep. 783; *In re Worthen*, 58 Fed. Rep. 467; *In re Minor*, 69 Fed. Rep. 233; *Iowa v. McGregor*, 76 Fed. Rep. 956; *Moore v. Bahr*, 82 Fed. Rep. 19; *In re May*, 82 Fed. Rep. 422; *Sawrie v.*

*Tennessee*, 82 Fed. Rep. 615; *In re Brundage*, 96 Fed. Rep. 963; *Rhodes v. Iowa*, 170 U. S. 412; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438. See also *O'Neil v. Vermont* 144 U. S. 335.

*Arkansas*. — *Smith v. State*, 54 Ark. 248.

*Florida*. — *Hall v. State*, 39 Fla. 637.

*Indiana*. — *Indianapolis v. Bieler*, 138 Ind. 30.

*Iowa*. — *State v. Pfeleajor*, 81 Iowa 759; *State v. Coonan*, 82 Iowa 400; *State v. Miller*, 86 Iowa 638; *McGregor v. Cone*, 104 Iowa 465.

*Kansas*. — *State v. Winters*, 44 Kan. 723.

*Louisiana*. — *State v. Davidson*, 50 La. Ann. 1297.

*Maine*. — *State v. Robinson*, 49 Me. 285; *State v. Intoxicating Liquors*, 65 Me. 556; *State v. Intoxicating Liquors*, 82 Me. 558; *Wasserboehr v. Boulrier*, 84 Me. 165, 30 Am. St. Rep. 344.

*Maryland*. — *Bode v. State*, 7 Gill (Md.) 326; *Fox v. State*, 89 Md. 381.

*Massachusetts*. — *Bradford v. Stevens*, 10 Gray (Mass.) 379; *Carstairs v. O'Donnell*, 154 Mass. 357.

*New Mexico*. — *In re Wilson*, (N. Mex. 1900) 60 Pac. Rep. 73.

*New York*. — *Waterbury v. Egan*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 355.

*Ohio*. — *State v. Stevens*, 5 Ohio N. P. 354, 8 Ohio Dec. 6.

*Pennsylvania*. — *Com. v. Paul*, 148 Pa. St. 559, 170 Pa. St. 284, 37 W. N. C. (Pa.) 137, 9 Pa. Co. Ct. 196; *Com. v. Silverman*, 138 Pa. St. 642; *Com. v. Zelt*, 138 Pa. St. 615; *Com. v. Schollenberger*, 156 Pa. St. 201, 12 Pa. Co. Ct. 442, 535, 2 Pa. Dist. 244.

*Rhode Island*. — *State v. Amery*, 12 R. I. 64.

*Vermont*. — *Jones v. Hard*, 32 Vt. 481; *Yearreau v. Bacon*, 65 Vt. 516, applying *Leisy v. Hardin*, 135 U. S. 100.

*West Virginia*. — *State v. Goetze*, 43 W. Va. 495.

**Storage for Sale.** — A citizen of another state has a right to store liquors in original packages within the state of *South Carolina* for the purpose of sale in such packages. *Moore v. Bahr*, 82 Fed. Rep. 19.

**Wholesale or Retail Sales.** — The importer has a right to sell either to consumers or to retail dealers. *Schollenberger v. Pennsylvania*, 171 U. S. 1, reversing *Com. v. Schollenberger*, 156 Pa. St. 201.

**Sale of Original Package and Sale of Contents Distinguished.** — In *Hopkins v. Lewis*, 84 Iowa 690, a distinction was drawn between a sale of the original packages themselves and a sale of the contents of original packages. But compare *State v. Miller*, 86 Iowa 638, wherein, on a very similar state of facts, an opposite conclusion as to what constituted a sale in original packages was reached.

**Fraudulent Articles.** — Oleomargarine artificially colored to look like butter cannot be sold even in original packages in violation of



pose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale or exchange of the commodities transported.<sup>1</sup> Prior to the decision of the original-package cases in the Supreme Court of the United States, the state courts had several times held that a state could, in the proper exercise of its police power, prohibit or regulate the sale of goods even though they were imported from another state and sold in the original package. These cases are, of course, overruled by the later decisions of the Supreme Court.<sup>2</sup>

(b) **What Constitutes Original Package — Original Package Defined.** — An original package, as applied to interstate and international commerce, is a package, bundle, or aggregation of goods put up in whatever form, covering, or receptacle for transportation, and as a unit transported from one state or nation to another.<sup>3</sup> An original package, within the constitutional provision respecting the regulation of commerce, is the identical package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped.<sup>4</sup>

**A Package Need Not Be Covered** or closed in order to constitute an original package.<sup>5</sup>

**Small Packages Inclosed in Larger Ones.** — Where bottles or packages are fastened together and marked, or are placed in a larger box, barrel, crate, or other receptacle, and shipped therein, the outside box, bundle, or receptacle, and not any bottle or package contained therein, constitutes the original package.<sup>6</sup> And this is true although each bottle or package is separately wrapped in paper labeled "original package" and marked with the name of the importer.<sup>7</sup>

a state statute. *Plumley v. Massachusetts*, 155 U. S. 461, *limiting and distinguishing Leisy v. Hardin*, 135 U. S. 100.

1. **Sale Purpose of Transportation.** — *Rhodes v. Iowa*, 170 U. S. 412; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465.

2. **Overruled State Decisions.** — *Grouse v. Howat*, 77 Iowa 187; *Leisy v. Hardin*, 78 Iowa 286; *State v. Bowman*, 78 Iowa 519; *State v. Zimmerman*, 78 Iowa 614; *Collins v. Hills*, 77 Iowa 181, in both of which latter cases the articles in question were intoxicating liquors; *State v. Fulker*, 43 Kan. 237; *McGuinness v. Bligh*, 11 R. I. 94.

In *State v. Zimmerman*, 78 Iowa 614, the court distinguished *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465, saying that it went no further than to hold that the states have no authority to interfere with or regulate commerce between the states by prohibiting the common carriers from transporting into a state intoxicating liquors to be delivered to a consignee not authorized to sell them by the laws of such state.

3. **Original Package Defined.** — *Keith v. State*, 91 Ala. 2; *Austin v. State*, 101 Tenn. 563. See also *Collins v. Hills*, 77 Iowa 181; *McGregor v. Cone*, 104 Iowa 465.

An "original package" is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. *Com. v. Schollenberger*, 156 Pa. St. 201.

4. **Identical Package Delivered to Carrier at Point of Shipment.** — *Guckenheimer v. Sellers*, 81 Fed. Rep. 997; *McGregor v. Cone*, 104 Iowa 465; *Austin v. State*, 101 Tenn. 563.

5. **Covering Unnecessary.** — *In re Harmon*, 43

Fed. Rep. 372; *Keith v. State*, 91 Ala. 2; *State v. Chapman*, 1 S. Dak. 414; *Austin v. State*, 101 Tenn. 563.

6. **Outside Receptacle Constitutes Original Package.** — *Guckenheimer v. Sellers*, 81 Fed. Rep. 997; *Keith v. State*, 91 Ala. 2; *Harrison v. State*, 91 Ala. 62; *Smith v. State*, 54 Ark. 248; *McGregor v. Cone*, 104 Iowa 465; *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 718; *State v. Chapman*, 1 S. Dak. 414; *Austin v. State*, 101 Tenn. 563; *In re Harmon*, 43 Fed. Rep. 372, in which case the box was marked "to be returned."

**Cigarettes.** — A pine box, in which are packed for commercial shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal revenue stamp, without any other packing or inclosure around or about them, except the box itself, is the original package of commerce. *McGregor v. Cone*, 104 Iowa 465.

7. **Separate Wrapping and Labeling of Small Packages.** — *Keith v. State*, 91 Ala. 2. But see *In re May*, 82 Fed. Rep. 422.

Where bottles are inclosed in separate paper boxes, which are sealed, and the paper boxes are packed and shipped in a wooden box, the wooden box constitutes the original package. *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 719.

**Contra.** — In *State v. Coonan*, 82 Iowa 400, intoxicating liquors were put up in sealed bottles, and for convenience of shipment the bottles were packed in boxes and barrels and consigned to an agent in another state, who removed the bottles from the boxes and barrels, and sold them sealed to persons who were not allowed to drink the contents on the premises. This was held to constitute a sale in original packages within the decision of *Leisy v. Hardin*, 135 U. S. 100.



But if the carrier, without the knowledge of the consignor, places bottles or packages separately wrapped and labeled, in boxes, and thus transports them, the bottles or packages, and not the boxes, are original packages.<sup>1</sup>

**Small Pasteboard Slide Boxes Containing Ten Cigarettes**, shipped without case, covering, or inclosure of any kind around or about any of such packages, but each package loose and separate from every other, are original packages.<sup>2</sup>

**Bottles.** — In the case of liquor in bottles, if the bottles are shipped singly, each is an original package.<sup>3</sup>

**Packages Suited to Retail Trade.** — Packages of a form and size fitted and intended for sale at retail to the consumer and in fact so sold have been held not to be "original packages."<sup>4</sup> But this decision was overruled on appeal, and it was held that the right to sell in the original package does not depend on the question whether the package is or is not suitable for retail trade. The right to sell it is the same whether to consumers or to retail dealers.<sup>5</sup>

**Packages Adapted for Unlawful Trade.** — Where a mode of putting up a package is not adapted to meet the requirements of actual interstate commerce, but is calculated for the requirements of an unlawful intra-state retail trade, the dealer will not be protected on the ground that he is selling an original package.<sup>6</sup>

**Original Package for Purpose of Taxation.** — The determination of the internal revenue department that a package is a proper and original package for purposes of taxation does not show that it is an original package within the meaning of the term as used with reference to interstate commerce.<sup>7</sup>

(c) **What Constitutes Breaking.** — Merely Removing the Lid of an original package so that a prospective buyer may examine its contents is not such a breaking of a package as will destroy its original character.<sup>8</sup>

**Drawing the Bung of Barrels** in which liquors are imported, for the sole purpose of testing the liquors, does not make such liquors a part of the general mass of property of the state.<sup>9</sup>

(d) **Wilson Law.** — So far as intoxicating liquors are concerned, the effect of the original-package cases has been obviated by the Act of Congress known as the Wilson Law, which has been sustained as a constitutional exercise by Congress of its power to regulate interstate commerce.<sup>10</sup>

#### IV. STATE STATUTES AFFECTING INTERSTATE COMMERCE — 1. In General —

**Scope of Section.** — The power of Congress and of the several states to regulate interstate and foreign commerce has been considered in the preceding sections

**1. Placing in Larger Receptacle by Carrier.** — *Tinker v. State*, 96 Ala. 115. But compare *Austin v. State*, 101 Tenn. 563, where an opposite conclusion was reached upon an almost identical state of facts in the case of a sale of cigarettes.

If the bottles or bundles are packed in a larger box before delivery to the carrier, such larger box constitutes the original package. *McGregor v. Cone*, 104 Iowa 465.

**2. Packages of Ten Cigarettes.** — *Iowa v. McGregor*, 76 Fed. Rep. 956; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *McGregor v. Cone*, 104 Iowa 465. Compare *Austin v. State*, 101 Tenn. 563.

**3. Bottles Shipped Singly.** — *Guckenheimer v. Sellers*, 81 Fed. Rep. 997.

**4. Com. v. Paul**, 170 Pa. St. 284, 37 W. N. C. (Pa.) 137.

**5. Package May Be Suited for Retail Trade.** — *Schollenberger v. Pennsylvania*, 171 U. S. 1.

In this case the court refused to determine how small an original package might be, but held that a sale of a ten-pound package of oleomargarine, manufactured, packed, marked, imported, and sold in such package, was a

valid sale, although to a person who was himself a consumer.

**6. Com. v. Schollenberger**, 156 Pa. St. 201.

**7. Determination of Internal Revenue Department Not Conclusive.** — *Plumley v. Massachusetts*, 155 U. S. 461; *McGregor v. Cone*, 104 Iowa 465; *Austin v. State*, 101 Tenn. 563.

**Package of Ten Cigarettes.** — The fact that the internal revenue department has recognized a package containing ten cigarettes as an original package for the purposes of taxation is not conclusive that it is an original package for commercial purposes, as the repacking of such packages in additional coverings is optional with the manufacturer, and such repacking would destroy the character of the smaller bundles as original packages. *McGregor v. Cone*, 104 Iowa 465.

**8. Removing Lid for Inspection.** — *In re McAllister*, 51 Fed. Rep. 282.

**9. Wind v. Iler**, 93 Iowa 316. Compare *Wasserboehr v. Boulter*, 84 Me. 165, 30 Am. St. Rep. 344.

**10. Wilson Law.** — See the title INTOXICATING LIQUORS, *post*.



of this title. It was there seen that the power to regulate such commerce is in all cases vested exclusively in Congress, and cannot be exercised in any case by the states. It was seen, however, that under their reserved police power, the states may enact valid local police laws incidentally affecting interstate or foreign commerce so long as they do not conflict with any Act of Congress on the subject, such laws not being deemed regulations of commerce. It is impossible to frame a rule drawing a hard-and-fast line between the commercial power of Congress and the reserved police powers of the states, and the courts have not attempted it, preferring to decide as each case arises upon which side of the line it falls. It is the purpose of this section to examine and enumerate the various classes of state statutes wherein this question has been determined.

**General Rule.** — It may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.<sup>1</sup> A state statute which only assumes to regulate those engaged in interstate commerce while passing through the particular state is nevertheless void because it in effect and necessarily regulates and controls the conduct of such persons throughout the entire voyage which stretches through several states.<sup>2</sup>

**Direct Burdens on Commerce.** — It may safely be said that state legislation which seeks to impose a direct burden upon interstate or foreign commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.<sup>3</sup> Every obstacle laid upon the transportation of passengers or merchandise from state to state is a regulation of interstate commerce.<sup>4</sup>

**Purpose of Law Immaterial.** — The mere fact that a state statute is enacted in good faith as an exercise of the police power will not render it valid if it in fact amounts to a regulation of interstate commerce.<sup>5</sup> It is not the purpose of the law, but its effect, which is to be considered.<sup>6</sup>

**The Presumption that It Was Enacted in Good Faith** cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States.<sup>7</sup>

**Judicial Question.** — It is for the courts to determine what state action is or is not a regulation of interstate commerce.<sup>8</sup>

## 2. Construction of Statutes — a. CONSTRUCTION TO SUSTAIN STATUTE —

(1) **General Rule.** — A statute should be construed, if possible, so as not to

1. **General Rule as to Validity of State Statutes.** — *Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 405.

2. **Regulation Limited to Particular State.** — *Western Union Tel. Co. v. James*, 162 U. S. 656, citing as an illustration *Hall v. De Cuir*, 95 U. S. 485.

3. **Statutes Imposing Direct Burdens on Commerce Void.** — *Hall v. De Cuir*, 95 U. S. 485; *Leonard v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 599, 3 Int. Com. C. Rep. 241; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, *Railroad Commission Cases*, 116 U. S. 307; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 470; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Welton v. Missouri*, 91 U. S. 275; *Henderson v. New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Sherlock v. Alling*, 93 U. S. 99; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 486; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Smith v. Alabama*, 124

U. S. 465; *Lyng v. Michigan*, 135 U. S. 161; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557 [*distinguishing* *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164].

4. **Obstacle on Transportation.** — *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *State Freight Tax Case*, 15 Wall. (U. S.) 232.

5. **Bona Fide Purpose Immaterial.** — *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Moran v. New Orleans*, 112 U. S. 69; *State Freight Tax Case*, 15 Wall. (U. S.) 232.

6. **Effect Alone Considered.** — *Moran v. New Orleans*, 112 U. S. 69; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Henderson v. New York*, 92 U. S. 259; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Brimmer v. Rebman*, 138 U. S. 78; *Chy Lung v. Freeman*, 92 U. S. 275; *Cannon v. New Orleans*, 20 Wall. (U. S.) 577.

7. *Minnesota v. Barber*, 136 U. S. 313.

8. **What Constitutes Regulation of Commerce a Judicial Question.** — *Leisy v. Hardin*, 135 U. S. 100.



make it an interference with the exclusive power of Congress to regulate interstate commerce.<sup>1</sup> Thus a state statute will be construed, if possible, as affecting merely traffic wholly within the state where it would be in violation of the commerce clause of the Constitution if it were intended to affect interstate traffic.<sup>2</sup> The cases are very numerous wherein state statutes whose terms were broad enough to include both internal and interstate commerce have been held applicable only to internal commerce, and as such sustained, because to hold otherwise would render the statute unconstitutional.<sup>3</sup>

(2) *Partial Invalidity*. — A state statute may be void so far as it affects interstate commerce, but valid as to all business to be exclusively performed within the state.<sup>4</sup> Statutes which are constitutional in part only will be upheld and enforced so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable.<sup>5</sup> Where the constitutional and unconstitutional provisions of a state statute affecting interstate commerce are so bound up together that separation cannot be made without completely destroying the statute and substituting another for it by judicial construction, the whole act is unconstitutional and void.<sup>6</sup>

6. FOLLOWING CONSTRUCTION OF STATE COURT. — In determining whether a state statute is in violation of the commerce clause of the Constitution, the United States Supreme Court will adopt the construction of the

1. *Construction Sustaining Statute Adopted*. — *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

2. *Limiting Statute to Internal Traffic*. — *Hardy v. Atchison*, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432; *McGwigan v. Wilmington*, etc., R. Co., 95 N. Car. 428, 59 Am. Rep. 247.

A State Statute Fixing Railroad Rates will be construed to apply only to rates for transportation wholly within the state, because otherwise it would be void as an interference with interstate commerce. *Merrill v. Boston*, etc., R. Co., 63 N. H. 259, 21 Am. & Eng. R. Cas. 48. *Contra*, *Louisville*, etc., R. Co. v. Railroad Commission, 19 Fed. Rep. 679, 16 Am. & Eng. R. Cas. 1, holding that the statute should be declared wholly void.

3. *Statutes Held Applicable Only to Internal Commerce* — *United States*. — *Peik v. Chicago*, etc., R. Co., 94 U. S. 164, 16 Am. R. Rep. 413; *Chicago*, etc., R. Co. v. *Ackley*, 94 U. S. 179; *Louisville*, etc., R. Co. v. *Mississippi*, 133 U. S. 587.

*District of Columbia*. — *Georgetown v. Davidson*, 6 D. C. 278.

*Iowa*. — *Burlington*, etc., R. Co. v. *Dey*, 82 Iowa 312, 31 Am. St. Rep. 477; *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672.

*Kansas*. — *Hardy v. Atchison*, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

*Maine*. — *Lafarier v. Grand Trunk R. Co.*, 84 Me. 286.

*Michigan*. — *Osborn v. Wabash R. Co.*, (Mich. 1900) 82 N. W. Rep. 526; *Smith v. Lake Shore*, etc., R. Co., 114 Mich. 460.

*Mississippi*. — *Louisville*, etc., R. Co. v. *State*, 66 Miss. 662, 14 Am. St. Rep. 599.

*New York*. — *Dillon v. Erie R. Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 119; *Beardsley v. New York*, etc., R. Co., 15 N. Y. App. Div. 251.

*North Carolina*. — *McGwigan v. Wilmington*, etc., R. Co., 95 N. Car. 428, 59 Am. Rep. 247.

*Texas*. — *Missouri*, etc., R. Co. v. *Fookes*, (Tex. Civ. App. 1897) 40 S. W. Rep. 858; *Missouri Pac. R. Co. v. Harris*, 1 Tex. App. Civ. Cas., § 1257; *Southern Pac. R. Co. v. Haas*, (Tex. 1891) 17 S. W. Rep. 600.

See also cases cited *infra*, this section, to the effect that a statute may be void so far as it affects interstate commerce, but valid as to purely internal or domestic commerce.

A State Statute Fixing a Maximum Freight Rate will be construed, if possible, as applying merely to internal traffic and not to interstate commerce, because if it were intended to apply to such interstate commerce it would be in violation of the commerce clause of the Constitution and therefore void. *Hardy v. Atchison*, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

4. *Statute Void in Part and Valid in Part*. — *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *Batterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39.

5. *Enforced Where Void Part Is Severable*. — *Packet Co. v. Keokuk*, 95 U. S. 80; *Railroad Commission Cases*, 116 U. S. 307; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411. See also the title STATUTES.

*Remedy by Injunction*. — If a tax can be separated, the court will enjoin that portion only which is on interstate traffic. *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, reviewed in *Ratterman v. American Express Co.*, 49 Ohio St. 608.

6. *Whole Act Void Where Void Part Not Separable*. — *State v. Indiana*, etc., Oil, etc., Co., 120 Ind. 575. See the title STATUTES.

Where a state statute fixing freight rates for carriage within the state is so framed as to apply to cases of interstate transportation, it seems that the statute must be held wholly unconstitutional, and cannot be supported as to transportation wholly within the state. *Louisville*, etc., R. Co. v. *Railroad Commission*, 19 Fed. Rep. 679, 16 Am. & Eng. R. Cas. 1.



statute put upon it by the state court of last resort,<sup>1</sup> in the absence of exceptional conditions which sometimes impel the Supreme Court to disregard inadmissible constructions given by state courts to their own statutes and state constitutions.<sup>2</sup>

**3. Discrimination Against Products and Citizens of Other States.** — A state statute affecting interstate commerce is not to be sustained merely because it does not discriminate between the people of such state and the people of other states. The statute may, upon its face, equally apply to people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states including the people of the state enacting such statute.<sup>3</sup> But the mere fact that the state law does discriminate against the citizens and products of other states is sufficient to condemn it as an interference with interstate commerce.<sup>4</sup> It is for this reason that in sustaining statutes when attacked as

**1. Construction by State Court of Last Resort Followed.** — *Geer v. Connecticut*, 161 U. S. 519; *Sanford v. Poe*, 37 U. S. App. 378; *In re Rahrer*, 140 U. S. 545; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418; *State Railroad Tax Cases*, 92 U. S. 575; *Hall v. De Cuir*, 95 U. S. 485; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Henderson Bridge Co. v. Henderson*, 141 U. S. 679; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688; *New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 431; *Howe Mach. Co. v. Gage*, 100 U. S. 676, *citing* *Leffingwell v. Warren*, 2 Black (U. S.) 599.

**2. Inadmissible Constructions Disregarded.** — *Kidd v. Pearson*, 128 U. S. 15.

**3. Failure to Discriminate Not Conclusive of Validity.** — *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Brennan v. Titusville*, 153 U. S. 289; *Scott v. Donald*, 165 U. S. 98; *Buffalo v. Reavey*, 37 N. Y. App. Div. 228.

**Sale by Citizens Also Prohibited.** — The fact that a state has prohibited the sale of a certain article of commerce by its own citizens does not give it the right to prohibit the importation of it into the state. *Ex p. Loeb*, 72 Fed. Rep. 657; *Buffalo v. Reavey*, 37 N. Y. App. Div. 228. *Contra*, *Austin v. State*, 101 Tenn. 563.

**4. Discriminating Statute Void — United States.** — *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Ward v. Maryland*, 12 Wall. (U. S.) 163; *Dubuque, etc., R. Co. v. Richmond*, 19 Wall. (U. S.) 584; *Welton v. Missouri*, 91 U. S. 275; *Cook v. Pennsylvania*, 97 U. S. 566; *Guy v. Baltimore*, 100 U. S. 434; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Tiernan v. Rinker*, 102 U. S. 123; *Webber v. Virginia*, 103 U. S. 344; *Turner v. Maryland*, 107 U. S. 38; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 446; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Manchester v. Massachusetts*, 139 U. S. 240; *Voight v. Wright*, 141 U. S. 62; *Plumley v. Massachusetts*, 155 U. S. 461; *In re May*, 82 Fed. Rep. 422; *Swift v. Sutphin*, 39

Fed. Rep. 630; *In re Barber*, 39 Fed. Rep. 641; *In re Christian*, 39 Fed. Rep. 636, note; *Harvey v. Huffman*, 39 Fed. Rep. 646, note; *Ex p. Kieffer*, 40 Fed. Rep. 399; *Donald v. Scott*, 74 Fed. Rep. 859; *Spellman v. New Orleans*, 45 Fed. Rep. 3. See also *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

*Colorado.* — *Schmidt v. People*, 18 Colo. 78.  
*Idaho.* — *State v. Duckworth*, (Idaho 1897) 51 Pac. Rep. 456, 39 L. R. A. 365.

*Indiana.* — *State v. Klein*, 126 Ind. 68; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695.

*Maine.* — *State v. Furbush*, 72 Me. 493.

*Massachusetts.* — *Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

*Michigan.* — *Jackson Min. Co. v. Auditor-General*, 32 Mich. 488.

*Missouri.* — *State v. North*, 27 Mo. 464.

*New Jersey.* — *Waterbury v. Newton*, 50 N. J. L. 534.

*New York.* — *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 665.

*South Carolina.* — *State v. Holleyman*, 55 S. Car. 207.

*Virginia.* — *Ex p. Rollins*, 80 Va. 314; *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 57 Am. St. Rep. 827.

See also the titles HAWKERS AND PEDDLERS, vol. 15, p. 290; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.

**Equality in Markets of State.** — Any local regulation which in terms or by its necessary operation denies equality in the markets of a state is, when applied to the people and products or industries of other states, a direct burden upon interstate commerce, and is therefore void. *Voight v. Wright*, 141 U. S. 67; *Brimmer v. Rebman*, 138 U. S. 78; *Welton v. Missouri*, 91 U. S. 275; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Minnesota v. Barber*, 136 U. S. 313; *Donald v. Scott*, 74 Fed. Rep. 863.

**Discrimination After Incorporation with Mass of Property of State.** — A state cannot discriminate against the products of other states, even after they have become a part of the mass of property in the state. *Brown v. Houston*, 114 U. S. 622.

Commerce among the states is not free whenever a commodity is, by reason of its foreign growth or manufacture, subjected by a state legislation to discriminating regula-



being an interference with interstate commerce the court has so often adverted to the fact that the statute made no discrimination.<sup>1</sup> It must not be concluded from the incautious language used that only discriminating statutes are void as an interference with interstate commerce.<sup>2</sup>

**4. Inspection Laws—*a. VALIDITY*—(1) *In General.***—Inspection laws do not constitute regulations of commerce within the meaning of the Constitution, and therefore the several states, in the proper exercise of their reserved police powers, and in the absence of legislation by Congress, may enact valid inspection laws which will apply to subjects of interstate and foreign commerce.<sup>3</sup>

**Power Recognized in Constitution.**—The right of the states to pass inspection laws is expressly recognized, so far as foreign commerce is concerned, in article I, section 10, of the Constitution, in the clause declaring that “no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; \* \* \* and all such laws shall be subject to the revision and control of the Congress.” The same principle applies to interstate commerce.<sup>4</sup>

**Paramount Power of Congress.**—Any state inspection law is subject to the para-

tions or burdens. *Webber v. Virginia*, 103 U. S. 344; *Welton v. Missouri*, 91 U. S. 275.

**Foreign Corporations.**—A state may discriminate between domestic and foreign corporations. *Philadelphia F. Assoc. v. New York*, 119 U. S. 110, *citing Ducat v. Chicago*, 10 Wall. (U. S.) 410. And see generally the title FOREIGN CORPORATIONS, vol. 13, p. 834.

**Discrimination under Wilson Law.**—The Wilson Law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. *Scott v. Donald*, 165 U. S. 100. See generally the title INTOXICATING LIQUORS, *post*.

**1. Effect of Discrimination in General.**—See for illustrations *Osborne v. Mobile*, 16 Wall. (U. S.) 482; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Howe Mach. Co. v. Gage*, 180 U. S. 676; *Emert v. Missouri*, 156 U. S. 296; *In re May*, 82 Fed. Rep. 422.

**2. View that Only Discriminating Statutes Are Void.**—It was held in *In re May*, 82 Fed. Rep. 422, that in order to render a state statute void upon the ground that it constitutes an unlawful interference with interstate commerce, it must involve some discrimination against persons or goods of other states. The court reviewed the decisions of the Supreme Court. This statement of the rule is clearly not correct and is not a fair deduction from the decisions cited.

In *Walling v. Michigan*, 116 U. S. 446, a state statute was condemned mainly on the ground that it discriminated against the citizens and products of other states in a matter of commerce between the states, and thus usurped one of the prerogatives of Congress. But in *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 496, the court said: “It would be error to lay any stress on the fact that the statute passed upon in that case made a discrimination between citizens and products of other states in favor of those of the state of Michigan, [because] interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce.”

*Citing Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489.

In *Woodruff v. Parham*, 8 Wall. (U. S.) 123, a state taxation law was sustained solely upon the ground that it made no discrimination.

**3. Bona Fide Inspection Laws Valid—*United States.***—*Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *State Tonnage Tax Cases*, 12 Wall. (U. S.) 204; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 29; *Foster v. New Orleans*, 94 U. S. 246; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590; *Hennington v. Georgia*, 163 U. S. 299; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Voight v. Wright*, 141 U. S. 62; *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348; *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690; *King v. American Transp. Co.*, 1 Flipp. (U. S.), 14 Fed. Cas. No. 7,787; *Neilson v. Garza*, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

*Alabama.*—*Sheffield v. Parsons*, 3 Stew. & P. (Ala.) 302.

*California.*—*Addison v. Saulnier*, 19 Cal. 82. *Georgia.*—*Green v. Savannah*, R. M. Charlt. (Ga.) 368.

*Kentucky.*—*Vanmeter v. Spurrier*, 94 Ky. 22. *Louisiana.*—*State v. Fosdick*, 21 La. Ann. 256.

*Massachusetts.*—*Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

*Mississippi.*—*Gaines v. Coates*, 51 Miss. 335.

*South Carolina.*—*Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751.

**Quarantine and Sanitary Laws.**—See generally *infra*, this title, *State Statutes Affecting Interstate Commerce*, subdiv. 5, *Quarantine and Sanitary Laws*.

**4. Constitution Recognizes Power.**—*Bowman v. Chicago, etc., R. Co.*, 125 U. S. 488; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Voight v. Wright*, 141 U. S. 62; *Scott v. Donald*, 165 U. S. 58; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59.



mount right of Congress to regulate commerce with foreign nations and among the several states.<sup>1</sup>

**Inspection in Transit.** — A statute or ordinance requiring the inspection of commodities in transit through the state or municipality and bound for points in other states is void.<sup>2</sup>

(2) **Discriminations.** — An inspection law must be fair, equal, and in no way discriminate in favor either of persons or of property.<sup>3</sup> A statute in effect requiring the inspection of goods brought into the state from other states, but not requiring the inspection of similar goods produced within the state, is unconstitutional and void as being in restraint of interstate commerce.<sup>4</sup>

**b. WHAT ARE INSPECTION LAWS** — (1) *General Principles* — **Must Be Such in Fact.** — Inspection laws, to be valid, must be such in fact, and have some natural tendency to secure the ends for which inspection laws are enacted.<sup>5</sup> A statute to be sustained as an inspection law must, at least, provide for some inspection of the article in question.<sup>6</sup>

**The Object of Inspection Laws** is to certify to the quantity, quality, and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers.<sup>7</sup>

**1. Power of State Subordinate to Power of Congress.** — *Turner v. Maryland*, 107 U. S. 57; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Neilson v. Garza*, 2 Woods (U. S.) 287. See generally *supra*, this title, II. 2. c. *Effect of Action by Congress*.

**2. Inspection of Goods in Transit.** — *Georgetown v. Davidson*, 6 D. C. 278.

**3. Discriminating Statute Void** — *United States*. — *Turner v. Maryland*, 107 U. S. 38; *Minnesota v. Barber*, 136 U. S. 313, *affirming* 39 Fed. Rep. 641; *Brimmer v. Rebman*, 138 U. S. 78; *Voight v. Wright*, 141 U. S. 62; *Swift v. Sutherland*, 39 Fed. Rep. 630; *In re Barber*, 39 Fed. Rep. 641; *In re Christian*, 39 Fed. Rep. 636, note; *Harvey v. Huffman*, 39 Fed. Rep. 646, note; *Ex p. Kieffer*, 40 Fed. Rep. 399; *In re Rebman*, 41 Fed. Rep. 867; *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348; *Donald v. Scott*, 74 Fed. Rep. 863.

*Colorado*. — *Schmidt v. People*, 18 Colo. 78.

*Indiana*. — *State v. Klein*, 126 Ind. 68.

*Massachusetts*. — *Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

*Oklahoma*. — *Farris v. Henderson*, 1 Okla. 384.

A state statute requiring tobacco packed for export to be inspected and branded, but excepting from the provisions thereof any grower of tobacco who may pack the same at the place where grown, is a valid inspection law and not a regulation of commerce. *Turner v. Maryland*, 107 U. S. 38.

**Inspection Limited to Commodities from Certain States.** — A state which in terms requires an inspection of all lime imported or sold in a state, but prescribes no standard either of quality or mode of packing or size of casks except as to lime manufactured in Massachusetts or imported from Maine, is void. *Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

**4. Inspection Limited to Articles from Other States.** — *Brimmer v. Rebman*, 138 U. S. 78; *Voight v. Wright*, 141 U. S. 62; *In re Rebman*, 41 Fed. Rep. 867; *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348.

As to whether a statute requiring inspection only of commodities imported or coming into

the state "for sale" makes an unlawful discrimination against the citizens of other states, see *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348.

**5. Adaptation of Means to Ends.** — *Foster v. New Orleans*, 94 U. S. 246; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; *Donald v. Scott*, 74 Fed. Rep. 859; *People v. Edye*, 11 Daly (N. Y.) 132; *Farris v. Henderson*, 1 Okla. 384; *State v. McGee*, 55 S. Car. 247.

**Requiring Tobacco to Be Brought to State Warehouse.** — It is not foreign to the character of an inspection law to require every hogshead of tobacco to be brought to a state tobacco warehouse. *Turner v. Maryland*, 107 U. S. 38.

**Preventing Importation and Promoting Monopoly.** — An inspection law cannot be used as a preventive to the importation of articles of the same class with those which it either permits or assists, nor to promote a monopoly. *Donald v. Scott*, 74 Fed. Rep. 863, *citing* *Foster v. New Orleans*, 94 U. S. 248. See also *infra*, this section, 6. *Exclusion of Imports*.

**6. Actual Inspection Necessary.** — *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, wherein the *South Carolina* dispensary law was condemned upon the ground that it did not provide for the actual inspection of the liquors to be imported. See also *State v. McGee*, 55 S. Car. 247.

**Opening Package Not Required.** — A law which would otherwise be an inspection law does not cease to be such because no provision is made for opening the package which contains the article and examining the quality of its contents. *Turner v. Maryland*, 107 U. S. 49.

**7. Object of Inspection Laws.** — *Foster v. New Orleans*, 94 U. S. 246; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 203; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Clintman v. Northrop*, 8 Cow. (N. Y.) 46; *Brimmer v. Rebman*, 138 U. S. 78, *affirming* 41 Fed. Rep. 867; *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751. See also *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348.

"Recognized Elements of Inspection Laws have always been quality of the article, form,



**Application to Exports and Imports.** — It has been doubted whether inspection laws can be intended for any other purpose than the inspection of articles to be exported from a state.<sup>1</sup> But the better opinion is that the scope of inspection laws which the states have power to pass under the Constitution is not confined to articles of domestic produce or manufacture, but applies to articles imported and to those intended for domestic use.<sup>2</sup> A law may be none the less an inspection law because it may have a remote and considerable influence on commerce.<sup>3</sup>

**No Application to Persons.** — Inspection laws have reference only to personal property, and not to persons.<sup>4</sup> A statute providing for the inspection of persons and effects of immigrants and others coming into the state is not a valid inspection law within the meaning of the Constitution.<sup>5</sup>

**Prohibitory Statutes Invalid.** — It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.<sup>6</sup> Reasonable and appropriate laws for the inspection of articles, including food products, are valid; but absolute prohibition of an unadulterated and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unwholesome or impure.<sup>7</sup> Inspection laws

capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters." *Turner v. Maryland*, 107 U. S. 55.

What laws may properly be classed as inspection laws authorized by the Constitution must be determined largely by the nature of the inspection laws of the states at the time the Constitution was framed. *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, citing *Turner v. Maryland*, 107 U. S. 38, wherein there is an elaborate examination of those statutes, many of which are cited in a footnote. Similar citations are also found in a footnote to the report of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

A state may pass inspection laws designed to fit its products for becoming articles of foreign commerce or commerce among the states. *Turner v. Maryland*, 107 U. S. 50; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

**1. Limitation to Exports.** — See *Voight v. Wright*, 141 U. S. 64; *Donald v. Scott*, 74 Fed. Rep. 862.

**2. Inspection Laws May Apply to Both Exports and Imports.** — *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Neilson v. Garza*, 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091; *Green v. Savannah*, R. M. Charlt. (Ga.) 368; *Vanmeter v. Spurrier*, 94 Ky. 22; *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751.

**3. Influence on Commerce Immaterial.** — *Turner v. Maryland*, 107 U. S. 54, citing *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

**4. Inspection Applies to Property, Not Persons.** — *Voight v. Wright*, 141 U. S. 62; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59.

**5. Inspection of Passengers, Immigrants, etc.** — *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; *People v. Pacific Mail Steam Ship Co.*, 16 Fed. Rep. 344; *American Steamship Co. v. Philadelphia Board of Health*, 26 Int. Rev. Rec. 69; *People v. Edye*, 11 Daly (N. Y.) 132.

**Charges Imposed on Vessels for the Inspection of Passengers** and others are exactions in compensation for services rendered, and are not within the prohibition of the United States Constitution, art. 1, § 10. *Morgan's Louisiana, etc., R., etc., Co. v. Board of Health*, 36 La. Ann. 666. *Contra*, *American Steamship Co. v. Philadelphia Board of Health*, 26 Int. Rev. Rec. 69.

A statute requiring the payment of a fee for each passenger inspected, to ascertain if he is afflicted with leprosy, and imposing a fine for nonpayment upon the owners and consignees of the vessels bringing the passengers, is void as an interference with interstate commerce. *People v. Pacific Mail Steam-Ship Co.*, 16 Fed. Rep. 344.

**6. Inspection Does Not Include Prohibition.** — *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 488. See also *Vance v. W. A. Vandercook Co.*, 170 U. S. 438.

**7. Legitimate Subjects of Commerce Cannot Be Excluded.** — *United States*. — *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Minnesota v. Barber*, 136 U. S. 313, affirming 39 Fed. Rep. 641; *Brimmer v. Rebman*, 138 U. S. 78, affirming 41 Fed. Rep. 867; *Scott v. Donald*, 165 U. S. 58; *In re Rebman*, 41 Fed. Rep. 867; *Swift v. Sutphin*, 39 Fed. Rep. 630; *In re Barber*, 39 Fed. Rep. 641; *In re Christian*, 39 Fed. Rep. 636, note; *Harvey v. Huffman*, 39 Fed. Rep. 646, note; *Ex p. Kieffer*, 40 Fed. Rep. 399; *Donald v. Scott*, 74 Fed. Rep. 859.

*Colorado*. — *Schmidt v. People*, 18 Colo. 78. *Indiana*. — *State v. Klein*, 126 Ind. 68.



which, though they purport to be for the protection of the public health, in effect prohibit the importation of commodities from other states whose citizens cannot reasonably conform to the mode of inspection prescribed, are void as an interference with interstate commerce.<sup>1</sup>

(2) *Particular Statutes* — *Intoxicating Liquors*. — A statute forbidding common carriers to bring intoxicating liquor into the state without being first furnished with a certificate from a designated county officer, that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county, is not an inspection law.<sup>2</sup> The *South Carolina* dispensary act of 1895, regulating the manufacture, importation, and sale of intoxicating liquors, cannot be sustained as an inspection act.<sup>3</sup>

*Tobacco*. — A state statute prohibiting the shipping of tobacco out of the state, unless it had been previously inspected and marked, is a valid exercise of the police power and is not a regulation of commerce or unconstitutional.<sup>4</sup>

*Hides*. — A statute providing for the inspection, marking, and branding of hides imported or exported is a valid inspection law.<sup>5</sup>

*Coal and Coke*. — A statute providing for the inspection and gauging of all coal and coke barges in the state to ascertain the number of bushels in each load, and prohibiting the sale thereof until so gauged, is a valid inspection law as to boatloads of coal brought from other states on the navigable waters of the United States.<sup>6</sup>

*Survey of Damaged Goods on Vessels*. — A state statute authorizing a state officer at a port to make a survey of the hatches of every vessel arriving at the port and of the damaged goods coming on board of such vessels, and prohibiting any other person to do so under a penalty, the object of the statute being to furnish official evidence for the parties immediately concerned, and where the goods are damaged to provide for and regulate their sale, and not that of certifying the quantity and value of the things inspected for the protection of consumers, is not an inspection law, but a regulation of commerce, and as such is void.<sup>7</sup>

c. *INSPECTION CHARGES* — *Reasonable and Excessive Charges*. — As an incident to its power to enact valid inspection laws, a state may impose a reasonable tax or charge for the purpose of defraying the expenses of inspection.<sup>8</sup> Where the inspection charge imposed is unreasonable or excessive, it is void as an inter-

1. *Prohibiting Importation* — *Inability of Non-residents to Conform to Statute*. — *Minnesota v. Barber*, 136 U. S. 313, *affirming* 39 Fed. Rep. 641; *Brimmer v. Rebman*, 138 U. S. 78; *In re Rebman*, 41 Fed. Rep. 867; *Swift v. Sutphin*, 39 Fed. Rep. 630.

An Act Requiring Inspection of Animals Before Slaughter Is Void. — *Swift v. Sutphin*, 39 Fed. Rep. 630; *In re Barber*, 39 Fed. Rep. 641, *affirmed* 136 U. S. 313; *In re Christian*, 39 Fed. Rep. 636, note; *Harvey v. Huffman*, 39 Fed. Rep. 646, note; *Ex p. Kieffer*, 40 Fed. Rep. 399; *Schmidt v. People*, 18 Colo. 78; *State v. Klein*, 126 Ind. 68.

2. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465.

3. *South Carolina Dispensary Act*. — *Scott v. Donald*, 165 U. S. 58.

4. *Tobacco*. — *Turner v. Maryland*, 107 U. S. 38.

5. *Hides*. — *Neilson v. Garza*, 2 Woods (U. S.) 287.

6. *Inspection and Gauging of Coal and Coke*. — *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590; *State v. Pittsburgh, etc., Coal Co.*, 41 La. Ann. 465.

A city ordinance requiring coal sold within the city to be measured by an inspector and

allowing him a fee therefor is valid even as applied to imported coal. *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751.

7. *Foster v. New Orleans*, 194 U. S. 246, *reversing* 26 La. Ann. 105.

8. *Reasonable Inspection Charge Valid* — *United States*. — Const. U. S., art. 1, § 10, cl. 2; *Turner v. Maryland*, 107 U. S. 38; *Brimmer v. Rebman*, 138 U. S. 78, *affirming* 41 Fed. Rep. 867; *Scott v. Donald*, 165 U. S. 58; *Patterson Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Glover v. Board of Flour Inspectors*, 48 Fed. Rep. 348.

*California*. — *Addison v. Saulnier*, 19 Cal. 82.

*Kentucky*. — *Vanmeter v. Spurrier*, 94 Ky. 22.

*Louisiana*. — *Board of Hay Inspectors v. Pleasants*, 23 La. Ann. 349.

*Maryland*. — *Turner v. State*, 55 Md. 240.

*North Carolina*. — *Goodwin v. Caraleigh Phosphate, etc., Works*, 119 N. Car. 120.

*South Carolina*. — *Charleston v. Rogers*, 2 McCord L. (S. Car.) 495, 13 Am. Dec. 751.

*Power Merely Incidental*. — A charge imposed for the express purpose of executing an inspection law is void if the statute is not in fact a valid inspection law. *People v. Edye*, 11 Daly (N. Y.) 132.



ference with interstate commerce.<sup>1</sup> The excess must manifest a purpose to evade constitutional limitations or it will not render the statute void.<sup>2</sup> A state inspection law imposing a charge declared to be for the purpose of defraying the expenses of the inspection is not void as constituting a tax on interstate commerce merely because some of the revenue derived from such inspection charges has in fact been applied to other purposes.<sup>3</sup>

**Power to Determine Reasonableness.** — Congress may determine whether state inspection charges are excessive or not where the inspection laws operate on interstate as well as foreign commerce.<sup>4</sup> A federal court will not go into the examination of the question of excess, except so far as to decide whether or not the tax is only colorably an inspection charge or a charge of a similar nature.<sup>5</sup>

**Discrimination.** — A state statute imposing a charge for inspecting goods brought into the state, but not upon goods manufactured in the state, does constitute an attempt by the state to regulate interstate commerce, and is therefore unconstitutional and void.<sup>6</sup>

**5. Quarantine and Sanitary Laws — a. VALIDITY IN GENERAL — Power of State.** — A state in the exercise of the police power reserved to it, and in the absence of conflicting regulations by Congress, may pass reasonable sanitary and quarantine laws which will be valid although to a certain extent they necessarily affect interstate and foreign commerce.<sup>7</sup> Such laws relate to subjects not requiring a uniform system of regulation, and in fact requiring different rules in different localities.<sup>8</sup> Under such circumstances, as has been seen, the states have power to act so long as Congress has not covered the same field.<sup>9</sup> The states may, in the exercise of their police power, cause the removal or destruction of infectious or unsound articles.<sup>10</sup>

**1. Unreasonable Charge Is Void.** — *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Brimmer v. Rebman*, 138 U. S. 78, 41 Fed. Rep. 867; *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690; *Goodwin v. Caraleigh Phosphate, etc., Works*, 119 N. Car. 120.

An inspection tax of twenty-five cents per ton on fertilizers is not so excessive as to constitute a mere tax on interstate commerce and is not therefore void. *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Goodwin v. Caraleigh Phosphate, etc., Works*, 119 N. Car. 120.

**2. Excess Showing Purpose to Evade Constitutional Limitations.** — *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690.

**3. Diversion of Revenue to Other Purposes.** — *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345. But see *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609, wherein it is said that a charge cannot be sustained when evidently in excess of what is required for inspection purposes, and when the proceeds are applied to other uses. In this case the court took judicial notice that a tax of five hundred dollars for each separate brand of fertilizer sold in the state was a much larger sum than was necessary for its inspection.

**4. Power of Congress.** — *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345; *Neilson v. Garza, 2 Woods* (U. S.) 287; *Turner v. Maryland*, 107 U. S. 38.

**5. Power of Federal Court.** — *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690.

In *Neilson v. Garza, 2 Woods* (U. S.) 287, Mr. Justice Bradley says that it may be doubtful whether it is not exclusively the province of Congress and not at all that of a court to decide whether a charge or duty under an inspection law is or is not excessive. See also *Turner v. Maryland*, 107 U. S. 51.

**6. Discriminating Charge Void.** — *Voight v. Wright*, 141 U. S. 62.

**7. Quarantine and Sanitary Laws Valid — United States.** — *In re Ware*, 53 Fed. Rep. 783; *In re Wong Yung Quy*, 2 Fed. Rep. 624; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 104; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Hennington v. Georgia*, 163 U. S. 299; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 377; *King v. American Transp. Co.*, 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Foster v. New Orleans*, 94 U. S. 246; *Louisiana v. Texas*, 176 U. S. 1. *Idaho.* — *State v. Rasmussen*, (Idaho 1900) 59 Pac. Rep. 933.

*Louisiana.* — *Compagnie Française, etc., v. State Board of Health*, 51 La. 645.

*Massachusetts.* — *Higgins v. Three Hundred Casks Lime*, 130 Mass. 1.

**8. Uniformity of Regulation Not Required.** — *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455.

**9. See supra**, II. 2. a. *Local Police Regulations.*

**10. Destruction of Infectious Articles.** — *Brown v. Maryland*, 12 Wheat. (U. S.) 419.



**Limit of Power.** — While a state may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the state, it cannot beyond what is absolutely necessary for self-protection interfere with transportation into or through its territory.<sup>1</sup> The total exclusion of sound articles of commerce cannot be justified as being a quarantine or health regulation, but unsound or infectious articles may be excluded.<sup>2</sup> Of course quarantine and health laws must have some real relation to the objects named in them in order to be sustained as valid exercises of the police power.<sup>3</sup>

**Effect of Congressional Regulation.** — Congress has power to establish quarantine and sanitary regulations so far as they relate to or affect interstate and foreign commerce. If Congress should exercise this power all state laws inconsistent with the regulation established by Congress would be abrogated.<sup>4</sup>

**b. QUARANTINE CHARGES.** — The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute, for examination as to her sanitary condition, is not a tax upon interstate commerce within the meaning of the Constitution, and does not render the law unconstitutional.<sup>5</sup>

**c. MAKING IMPORTER LIABLE FOR DAMAGES.** — A state statute providing that any person bringing into the state cattle liable to communicate or capable of communicating Texas or Spanish fever to any domestic cattle of the state shall be liable for the damages caused thereby, is not, within the meaning of the Constitution or in any just sense, a regulation of commerce among the states.<sup>6</sup>

**1. Necessity the Limit of Power.** — *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *State v. Duckworth*, (Idaho 1897) 51 Pac. Rep. 456, 39 L. R. A. 365; *Salzenstein v. Mavis*, 91 Ill. 391; *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653.

In *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, it was held that a state could prohibit the importation of Texas cattle into the state, because all Texas cattle are afflicted with or capable of imparting Texas fever, but that a state could not prohibit the shipment by rail through the state of such cattle, because in such case there is no danger of communicating Texas fever to native cattle. This was approved in *Selvege v. St. Louis, etc., R. Co.*, 135 Mo. 163.

**Requiring Sheep to Be Dipped.** — A state statute requiring all sheep brought into the state to be inspected and dipped, whether sound and healthy or not, is void as an interference with interstate commerce. *State v. Duckworth*, (Idaho 1897) 51 Pac. Rep. 456, 39 L. R. A. 365, distinguished in *State v. Rasmussen*, (Idaho 1900) 59 Pac. Rep. 933.

**Requiring Certificate as Condition of Importation.** — A state statute forbidding common carriers to bring intoxicating liquors into the state without first receiving a certificate that the consignee or person to whom they are to be transported or delivered is authorized to sell intoxicating liquors in the county, cannot be supported as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 489.

**2. See *infra*, this section, 6. Exclusion of Imports.**

**3. *Hennington v. Georgia*, 163 U. S. 299; *State v. Duckworth*, (Idaho 1897) 51 Pac. Rep. 456, 39 L. R. A. 365.**

**4. Power of Congress Is Paramount.** — In *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, the court said: "It may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent." *Quoted with approval in Gulf, etc., R. Co. v. Hefley*, 158 U. S. 104. See also *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613.

This is implied by the form in which the rule is stated in the decisions, which merely assert the power to exist in the states in the absence of any regulation by Congress. See generally *supra*, this title, II. 2. c. *Effect of Action by Congress*.

**5. Quarantine Charges Valid.** — *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455.

**6. Texas or Spanish Fever Communicated by Cattle.** — *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, affirming 56 Kan. 694; *Rouse v. Youard*, 1 Kan. App. 270. But see *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653; *Selvege v. St. Louis, etc., R. Co.*, 135 Mo. 163. *Contra, Jarvis v. Riffin*, 94 Ill. 164.

**Allowing Texas Cattle to Run at Large.** — A state statute which provides that a person having in his possession Texas cattle shall be liable for any damages which may accrue from allowing them to run at large and thereby spread the disease known as Texas fever, is not in conflict with the commerce clause of the Constitution of the United States. *Kim-mish v. Ball*, 129 U. S. 217, distinguishing *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465.



6. **Exclusion of Imports** — *a.* **LAWFUL SUBJECTS OF COMMERCE.** — A state cannot prevent the importation of lawful subjects of commerce.<sup>1</sup> The power to regulate or forbid the sale of a commodity after it has been brought into the state does not carry with it the right and power to prevent its introduction by transportation from another state.<sup>2</sup>

*b.* **ADULTERATED, UNSOUND, OR INFECTIOUS ARTICLES.** — The states have power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease and death, such as rags or other substances infected with contagious germs, or articles of food unfit for human use or consumption.<sup>3</sup>

**Live Stock.** — Thus a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering it,<sup>4</sup> and, it has been held, may establish quarantine regulations absolutely prohibiting the importation of live stock from states wherein an infectious disease has broken out among such live stock;<sup>5</sup> but it is apprehended that if such prohibition is unnecessary to guard properly against the danger feared it will be void as an interference with interstate commerce.<sup>6</sup>

**Food Products.** — So a state may prohibit the importation or the sale therein of putrid or diseased or dangerous articles of food. The reason of this rule is

1. **State Cannot Prevent Importation of Legitimate Articles of Commerce.** — *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 161; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Ex p. Kieffer*, 40 Fed. Rep. 399.

**What Are Lawful Subjects of Commerce.** — See *supra*, this title, III. 3. *Subjects of Interstate Commerce.*

2. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 500.

3. **State May Prohibit Importation of Infectious Articles.** — *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 489; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 471; *In re Ware*, 53 Fed. Rep. 783; *Sawrie v. Tennessee*, 82 Fed. Rep. 622; *Patterson v. Kentucky*, 97 U. S. 501, *approved in Missouri, etc., R. Co. v. Haber*, 169 U. S. 613.

**Articles Unfit for Use.** — Until Congress has acted upon the subject, the states have the right under their reserved police power to prohibit importation and sale of articles inherently unworthy of commerce and unfit for the use of their people. *Austin v. State*, 101 Tenn. 563.

4. **Infected Animals May Be Excluded.** — *Kimish v. Ball*, 129 U. S. 217; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613; *State v. Rasmussen*, (Idaho 1900) 59 Pac. Rep. 933; *Salzenstein v. Mavis*, 91 Ill. 391; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550; *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653.

5. *State v. Rasmussen*, (Idaho 1900) 59 Pac. Rep. 933; *St. Louis Southwestern R. Co. v. Smith*, 20 Tex. Civ. App. 451.

**Exclusion of Texas Cattle at Certain Seasons.** — The statute of Missouri which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the state between the first day of March and the first day of November in each year, is in conflict with the clause of the Constitution which ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Such a statute is

more than a quarantine regulation, and not a legitimate exercise of the police power of the state. *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Gilmore v. Hannibal, etc., R. Co.*, 67 Mo. 323. *Overruling Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 184; *Dimond v. Kansas City, etc., R. Co.*, 60 Mo. 393; *Mercer v. Kansas City, etc., R. Co.*, 60 Mo. 397; *Kenney v. Hannibal, etc., R. Co.*, 62 Mo. 476. See also *Urton v. Sherlock*, 75 Mo. 247.

In *Illinois*, a statute substantially similar to the *Missouri* statute above condemned was sustained in several cases. *Yeazel v. Alexander*, 58 Ill. 254; *Stevens v. Brown*, 58 Ill. 289; *Chicago, etc., R. Co. v. Gasaway*, 71 Ill. 570. But in deference to the above decision of the Supreme Court in the *Missouri* case, these cases have been *overruled in Illinois*. *Salzenstein v. Mavis*, 91 Ill. 391; *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70; *Jarvis v. Riffin*, 94 Ill. 164.

A state statute prohibiting the bringing into the state, at certain seasons, of cattle capable of communicating, or liable to impart, the Texas, splenic, or Spanish fever, and making the fact that cattle come from south of the thirty-seventh parallel of north latitude *prima facie* evidence that they are capable of communicating that disease, does not interfere with interstate commerce. *Rouse v. Youard*, 1 Kan. App. 270, *following Patee v. Adams*, 37 Kan. 136; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 554, and *distinguishing Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465.

6. **Unnecessary Prohibition Void.** — *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653; *Selwege v. St. Louis, etc., R. Co.*, 135 Mo. 163.

It is a Judicial Question for the courts to determine, and not for the legislature, whether or not a prohibition of imports extends beyond the danger to be apprehended. *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 473, *disapproving Yeazel v. Alexander*, 58 Ill. 254, which was subsequently *overruled in Salzenstein v. Mavis* 91 Ill. 391.



that putrid, diseased, and dangerous articles of food do not belong to commerce. They are not commercial articles, and hence the power to regulate them was not granted to Congress.<sup>1</sup> But any act of a state which interferes with interstate commerce in a well-known and sound article of commerce is unconstitutional and void.<sup>2</sup>

**Regulations to Secure Purity.** — A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.<sup>3</sup>

**Fraudulent Articles.** — Articles or commodities so disguised as to be a cheat, calculated to lead a purchaser into buying something he did not intend to buy, may be excluded by the state.<sup>4</sup>

**7. Preventing Exports.** — A state law prohibiting or impeding the transportation out of the state of an article of commerce is an interference with interstate commerce, and void.<sup>5</sup>

**8. Sale of Goods.** — A state cannot prevent the sale of an article of interstate commerce,<sup>6</sup> or impose any burdens or conditions upon the right to sell in the original packages articles shipped into the state from other states.<sup>7</sup> Of course, if a statute in relation to the sale of goods applies solely to the internal commerce of the state, it cannot be repugnant to the commerce clause of the Constitution.<sup>8</sup>

**Delivery of Goods.** — A state may not prohibit the delivery in the state to the purchaser of goods purchased in another state.<sup>9</sup>

**Taxing Sales.** — A state cannot tax in any manner the sale of subjects of interstate commerce.<sup>10</sup>

**Fraudulent Goods.** — The commerce clause of the Constitution does not prevent a state from making regulations to prevent deception and fraud in the sale within their respective limits of articles in whatever state manufactured. That clause does not secure to any one the privilege of committing a wrong against society.<sup>11</sup>

1. *In re Ware*, 53 Fed. Rep. 783.

2. *In re Ware*, 53 Fed. Rep. 783 (*citing* Han-nibal, etc., R. Co. v. Husen, 95 U. S. 465; Bowman v. Chicago, etc., R. Co., 125 U. S. 474; Henderson v. New York, 92 U. S. 271; Foster v. Blue Earth County, 7 Minn. 140; Hall v. De Cuir, 95 U. S. 485); Austin v. State, 101 Tenn. 563, *citing* Schollenberger v. Pennsylvania, 171 U. S. 1.

A Pure and Healthy Food Product cannot be totally excluded by a state because the inspection or analysis of the article to be imported is somewhat difficult and burdensome. Schollenberger v. Pennsylvania, 171 U. S. 1, wherein the court said that the License Cases, 5 How. (U. S.) 504, had been *overruled* in Leisy v. Hardin, 135 U. S. 100.

The fact that an article of commerce is subject to adulteration with injurious substances, in the course of its manufacture, does not authorize a state to forbid the introduction of the unadulterated article into the state. Schollenberger v. Pennsylvania, 171 U. S. 1.

3. Total Exclusion Not Permitted. — Schollenberger v. Pennsylvania, 171 U. S. 1; Minnesota v. Barber, 136 U. S. 313.

4. Fraudulent Articles May Be Excluded. — Plumley v. Massachusetts, 155 U. S. 461; Sawrie v. Tennessee, 82 Fed. Rep. 622. See also, this section, *supra*, 8. Sale of Goods; *infra*, 16. Oleomargarine.

5. State Cannot Prevent or Impede Exportation. — Kidd v. Pearson, 128 U. S. 1; State v. In-

diana, etc., Oil, etc., Co., 120 Ind. 575, *citing* Coe v. Errol, 116 U. S. 517.

6. Sale of Legitimate Articles of Commerce Cannot Be Prohibited. — Collins v. New Hampshire, 171 U. S. 30; Leisy v. Hardin, 135 U. S. 100; Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275. See also *supra*, this title, III. 2. i. Sale of Goods.

7. Burdens on Sale in Original Package. — *In re* Schechter, 63 Fed. Rep. 695; Allen v. Tyson-Jones Buggy Co., 91 Tex. 22.

A State May Prohibit "Peddling" of goods, although by an agent for a principal resident in another state, there being no discrimination. Com. v. Gardner, 133 Pa. St. 284, 25 W. N. C. (Pa.) 462, 19 Am. St. Rep. 645. See the title HAWKERS AND PEDDLERS, vol. 15, p. 290.

8. Dabbs v. State, 39 Ark. 353, 43 Am. Rep. 275.

9. Delivery in State Cannot Be Prohibited. — Sternweis v. Stilsing, 52 N. J. L. 517.

10. Taxation of Sales. — See *infra*, this section, 44. g. Sales Within State.

11. Sale of Fraudulent Articles May Be Prohibited. — Schollenberger v. Pennsylvania, 171 U. S. 1 (*citing* Plumley v. Massachusetts, 155 U. S. 462); Patapsco Guano Co. v. North Carolina Board of Agriculture, 171 U. S. 345.

Baking Powder Containing Alum. — Baking powder containing alum may be sold without complying with a state statute declaring it a misdemeanor to sell such baking powder unless the package has a label on it stating that the baking powder contains alum, in the ab-



**Foreign Grown Nursery Stock.** — A state statute requiring all persons selling nursery stock grown in other states to file an affidavit and bond with the secretary of state and to procure a license is void.<sup>1</sup>

**Goods Made by Convict Labor.** — A state statute requiring goods made by convict labor to be so labeled as a condition of the right to sell such goods within the state is void as to goods made in other states.<sup>2</sup>

**Bankrupt, Closing-out, and Fire Sales.** — A state statute designed to prevent fraud, and providing that an itinerant vendor shall not advertise or represent any sale as a bankrupt, insolvent, or closing-out sale, or as a sale of goods damaged by smoke, fire, water, or otherwise, until he has made oath to the facts, procured a license, and made a deposit with a state officer, is not void as an interference with interstate commerce.<sup>3</sup>

**Sale of Perishable Food at Railway Depots, etc.** — A city ordinance prohibiting railroad companies from permitting the selling of fruit, vegetables, or perishable freight from their cars, platforms, or in depot buildings or grounds, is unconstitutional and void, if it is intended to hinder competition with resident dealers, so far as relates to interstate traffic that the roads may have brought in; but it is valid if it is intended as a mere police regulation, such as the preservation of the public health, or to prevent crowds from gathering at public places.<sup>4</sup>

**Solicitation of Orders for Goods.** — A statute prohibiting the solicitation within the state of orders for goods which are in another state, although the sale of such goods within the state is prohibited by an exercise of the police power, is void.<sup>5</sup>

**9. Exclusion of Paupers, Criminals, and the Like.** — In the exercise of its police power a state may exclude from its limits convicts, paupers, idiots and lunatics, persons liable to become a public charge, and persons affected by infectious and contagious diseases.<sup>6</sup> A state may demand from a vessel a list of passengers, with their ages, places of birth, occupations, last place of legal settlement, etc. Such a requirement is a police regulation.<sup>7</sup> But a state statute imposing burdensome and almost impossible conditions upon a shipmaster as a prerequisite to the landing of his passengers, and providing for the alternative payment of a sum of money, is void, although ostensibly limited to passengers who are paupers, criminals, lewd and debauched women, or the like, the plain purpose of the statute being to extort money from the passengers or shipmaster or to prevent immigration into the state altogether.<sup>8</sup>

**10. Contracts.** — The states may prescribe the form of all commercial contracts.<sup>9</sup> The lawful exercise by a state of this power to determine the form

sence of evidence that alum in baking powder is deleterious to health. *In re Ware*, 53 Fed. Rep. 783.

1. *In re Schechter*, 63 Fed. Rep. 695.

2. **Requiring Label on Goods Made by Convict Labor.** — *People v. Hawkins*, 157 N. Y. 1, affirming 20 N. Y. App. Div. 494. See also *People v. Hawkins*, 85 Hun (N. Y.) 43, affirming (Oyer and T. Ct.) 10 Misc. (N. Y.) 65.

3. **Bankrupt and Fire Sales.** — *In re Mosler*, 8 Ohio Cir. Ct. 324, 4 Ohio Cir. Dec. 82. Compare *In re Schechter*, 63 Fed. Rep. 695, wherein a state statute making very similar provision as to the sale of nursery stock was held void.

4. *Spellman v. New Orleans*, 45 Fed. Rep. 3; *State v. Davidson*, 50 La. Ann. 1297, wherein the court excepted from the operation of the statute sales in the original package.

5. **State Cannot Prevent Solicitation of Orders for Goods.** — *Ex p. Loeb*, 72 Fed. Rep. 657.

6. **State May Exclude Paupers, Idiots, Criminals, etc.** — *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613; *New York v. Miln*, 11 Pet. (U. S.) 102; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 471.

**Armed Men of Low and Lawless Type of Humanity.** — In *Arkansas v. Kansas, etc., Coal Co.*, 96 Fed. Rep. 361, the court said that no statute of the state of Arkansas prohibited persons described as "armed men of the low and lawless type of humanity," from coming into the state, and that it would be time enough to decide whether the state had the power to exclude them when such a case arose, but that in the absence of such a statute, under the Fourteenth Amendment, and under the interstate commerce clause of the Constitution, they now have that right.

7. **Requiring List of Passengers, etc.** — *Howe Mach. Co. v. Gage*, 100 U. S. 676, citing *New York v. Miln*, 11 Pet. (U. S.) 102.

8. **Extorting Money or Prohibiting Immigration.** — *Chy Lung v. Freeman*, 92 U. S. 275; *Henderson v. New York*, 92 U. S. 259, reviewing *New York v. Miln*, 11 Pet. (U. S.) 103, and *Passenger Cases*, 7 How. (U. S.) 283.

9. **State May Prescribe Form of Commercial Contracts.** — *Trade-Mark Cases*, 100 U. S. 82, cited in *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204.



in which contracts may be proved does not amount to a regulation of interstate commerce.<sup>1</sup>

**11. Game Laws.** — The constitutionality of game laws with respect to the commerce clause of the Constitution has been considered in a former article.<sup>2</sup>

**12. Fish Laws.** — This subject has been fully treated elsewhere in this work.<sup>3</sup>

**13. Insurance.** — The state may regulate the business of insurance, even going so far as to designate the competency of the parties to engage in the business, to prohibit agencies therefor, and to impose a payment of a tax as a condition to the establishment of such agencies.<sup>4</sup> Insurance is not commerce within the protection of the commerce clause of the Constitution.<sup>5</sup>

**14. Intoxicating Liquors.** — State regulation of intoxicating liquors with reference to the commerce clause of the Constitution has been fully considered under another title in this work.<sup>6</sup>

**15. Cigarettes.** — A state statute prohibiting, taxing, or burdening in any way the sale of cigarettes is void as applied to cigarettes shipped into the state from other states and sold in the original package.<sup>7</sup> A contrary view has been taken upon the ground that cigarettes, being harmful and deleterious to health, are not legitimate articles of commerce, and hence a state may prohibit their sale or importation, even in original packages.<sup>8</sup>

**16. Oleomargarine — Prohibiting Importation and Sale.** — Oleomargarine being a lawful article of commerce, a state statute wholly excluding it from importation into a state from another state, and prohibiting its sale in the original package in which it was imported, is void as an interference with interstate commerce.<sup>9</sup> A state statute prohibiting the sale of oleomargarine unless it is colored pink is void as being, in necessary effect, prohibitory.<sup>10</sup>

The Act of Congress relating to oleomargarine was not intended as a regulation of commerce among the states, and therefore it does not prevent a state from legislating in the same matter.<sup>11</sup>

**Contracts of Carriage.** — As to state regulation of contracts of carriage, see *infra*, this section, 42. *e. Contracts of Carriage.*

**1. Not a Regulation of Commerce.** — *Missouri, etc., R. Co. v. McCann*, 174 U. S. 580; *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311.

**2. Constitutionality of Game Laws.** — See the title GAME AND GAME LAWS, vol. 14, p. 654.

**3. Fish and Fisheries.** — See generally the title FISH AND FISHERIES, vol. 13, p. 554.

**4. State May Regulate Insurance.** — *Fire Department v. Noble*, 3 E. D. Smith (N. Y.) 440; *Fire Department v. Wright*, 3 E. D. Smith (N. Y.) 453. See also generally the titles FIRE INSURANCE, vol. 13, p. 86; INSURANCE, vol. 16, p. 830; LIFE INSURANCE; MARINE INSURANCE.

**5. Insurance Not Commerce.** — See *supra*, this title, *What Constitutes Interstate Commerce*, subdiv. 2. *c. Insurance.*

**6. Regulation of Intoxicating Liquors.** — See the title INTOXICATING LIQUORS, *post*.

**7. State Cannot Prohibit, Tax, or Burden Sale of Cigarettes in Original Package.** — *In re Minor*, 69 Fed. Rep. 233; *Sawrie v. Tennessee*, 82 Fed. Rep. 615; *State v. McGregor*, 76 Fed. Rep. 956; *McGregor v. Cone*, 104 Iowa 465; *State v. Goetze*, 43 W. Va. 495.

**As to What Constitutes an Original Package of Cigarettes,** see *supra*, this title, *What Constitutes Interstate Commerce*, subdiv. 5. *b. (2) (b) What Constitutes Original Package.*

**8. Contrary View.** — *Austin v. State*, 101 Tenn. 563; *Blaufield v. State*, 103 Tenn. 593.

**9. Oleomargarine Cannot Be Excluded by State** — *United States*. — *Schollenberger v. Pennsylvania*, 171 U. S. 1, *reversing* 170 Pa. St. 296; *Collins v. New Hampshire*, 171 U. S. 30; *In re Gooch*, 44 Fed. Rep. 276; *In re McAllister*, 51 Fed. Rep. 282; *In re Worthen*, 58 Fed. Rep. 467; *Ex p. Scott*, 66 Fed. Rep. 45; *In re Scheitlin*, 99 Fed. Rep. 272; *In re Brundage*, 96 Fed. Rep. 963.

*Maryland.* — *Fox v. State*, 89 Md. 381.

*Massachusetts.* — *Com. v. Huntley*, 156 Mass. 236.

*Pennsylvania.* — *Com. v. Schollenberger*, 12 Pa. Co. Ct. 442, 535, 2 Pa. Dist. 244; *Com. v. Paul*, 10 Pa. Co. Ct. 332, 9 Pa. Co. Ct. 196.

*New York.* — *Waterbury v. Egan*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 355.

**Contra.** — *State v. Addington*, 77 Mo. 110; *In re Brosnahan*, 18 Fed. Rep. 62.

**10. Coloring Oleomargarine Pink.** — *Collins v. New Hampshire*, 171 U. S. 30, *citing* *Schollenberger v. Pennsylvania*, 171 U. S. 1, and *cited* with approval in *Com. v. Vandyke*, 9 Pa. Dist. 41, wherein it is said that a state cannot compel a dealer to color his oleomargarine pink, but that it can punish him for coloring it yellow.

**11. Congress Has Not So Legislated as to Exclude State Legislation.** — *Plumley v. Massachusetts*, 155 U. S. 461, construing Act of Cong. Aug. 2, 1886, 24 U. S. Stat. at L. 209. But see *In re Brundage*, 96 Fed. Rep. 963; *Com. v. Schollenberger*, 12 Pa. Co. Ct. 442, 535, 2 Pa. Dist. 244; *Com. v. Paul*, 10 Pa. Co. Ct. 332, 9 Pa. Co. Ct. 196; *Waterbury v. Egan*, (N. Y. City Ct.



**Legislation to Secure Purity.** — A state may so regulate the introduction of oleomargarine as to insure its purity, although it has no power to exclude it totally.<sup>1</sup>

**Preventing Deception in Sale.** — A state statute prohibiting the sale of oleomargarine prepared in imitation of yellow butter, but not prohibiting the manufacture or sale of oleomargarine in a separate or distinct form so as to advise the consumer of its real character, is not void as an interference with interstate commerce, even as applied to oleomargarine sold in the original package.<sup>2</sup> Deceptive coloration or adulteration of imported oleomargarine removes it from the domain of congressional regulation and subjects it to constitutional exclusion by state law.<sup>3</sup> It is immaterial that the prohibited commodity is a wholesome food, since it would be equally wholesome if prepared without the deceptive ingredients.<sup>4</sup>

After Oleomargarine Has Become Part of the Mass of Property Within the State, as by breaking of the original package, sale, or otherwise, it is subject to the police laws of the state, because, as has been seen, it is not then an article of interstate commerce within the protection of the commerce clause of the Constitution.<sup>5</sup>

**17. Warehouses and Elevators.** — The relation of warehouses and elevators to interstate commerce will be considered in a separate article.<sup>6</sup>

**18. Wharves, Piers, and Docks.** — Although wharves are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belong to the states in which they are situated.<sup>7</sup>

**19. Dams.** — A state statute authorizing the erection of a dam across a navigable stream is not, in the absence of legislation by Congress upon the subject, void as an interference with interstate commerce.<sup>8</sup>

**20. Bridges.** — In the absence of legislation by Congress the states have power to authorize and regulate the construction and operation of bridges over navigable streams.<sup>9</sup>

**21. Public Highways.** — The police powers of a state embrace the establishment, maintenance, and control of public highways, and under such powers reasonable regulations incident to the right to establish and maintain such

Gen. T.) 3 Misc. (N. Y.) 355. In all these cases great effect was given to the Act of Congress taxing oleomargarine.

**1. Regulations to Insure Purity Valid.** — *Schollenberger v. Pennsylvania*, 171 U. S. 1.

**2. State May Prevent Fraudulent Imitation of Butter.** — *Plumley v. Massachusetts*, 155 U. S. 462, affirming 156 Mass. 236; *In re Scheitlin*, 99 Fed. Rep. 272; *McAllister v. State*, 72 Md. 390; *Com. v. Huntley*, 156 Mass. 236; *State v. Addington*, 77 Mo. 110; *Waterbury v. Newton*, 50 N. J. L. 534; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483; *Com. v. Vandyke*, 9 Pa. Dist. 41.

**Contra.** — *In re Worthen*, 58 Fed. Rep. 467; *In re Brundage*, 96 Fed. Rep. 903. In both these cases the oleomargarine was artificially colored so as to resemble butter, but it was nevertheless held that the state could not forbid a sale in the original package.

**3. Coloring in Imitation of Butter.** — *Austin v. State*, 101 Tenn. 563, citing *Plumley v. Massachusetts*, 155 U. S. 467, and *Collins v. New Hampshire*, 171 U. S. 30. See also cases cited in preceding note.

**4. Wholesomeness Immaterial.** — *Waterbury v. Newton*, 50 N. J. L. 534.

**5. In re McAllister**, 51 Fed. Rep. 282; *Armour Packing Co. v. Snyder*, 84 Fed. Rep. 136; *Com. v. Paul*, 148 Pa. St. 559, 37 W. N. C. (Pa.) 137, 170 Pa. St. 284, 50 Am. St. Rep.

776; *Com. v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32, reversed in 171 U. S. 1, on the ground that the sale was in the original package.

**Incorporation with Mass of Property of State.** — As to when an article of interstate commerce becomes incorporated with the mass of property of the state and ceases to be within the protection of the commerce clause, see *supra*, this title, *What Constitutes Interstate Commerce* — *When Protection of Commerce Clause Ceases*.

**6. Warehouses and Elevators.** — See the title WAREHOUSES.

**7. Wharves, etc., Subject to Local Regulation.** — *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691. See generally, for a full discussion, the title WHARVES.

**8. Dams in Navigable Streams.** — *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245, cited in *Hennington v. Georgia*, 163 U. S. 312, wherein the court said that notwithstanding the case had sometimes been criticised, its authority had never been questioned in the Supreme Court. But on the contrary it was declared in *Pound v. Turck*, 95 U. S. 459, that it had never been overruled, but had always been sustained. See also generally the title DAMS, vol. 8, p. 699.

**9. See the title BRIDGES**, vol. 4, p. 918. See also generally *supra*, this title, *Regulation of Interstate Commerce* — *Power of States*.



highways may be established by the state.<sup>1</sup> How the highways of a state, whether on land or by water, shall be improved for the public good, is a matter for state determination, subject always to the right of Congress to interpose when in its judgment the action of the state is deemed to encroach upon the highway as a means of interstate and foreign commerce.<sup>2</sup>

**22. Telegraphs and Telephones**—*a.* IN GENERAL.—A telegraph company, so far as its foreign and interstate business is concerned, is an instrument of interstate and foreign commerce, and, as such, subject to the regulating power of Congress, and not to regulation by the states.<sup>3</sup> A statute of a state, intended to regulate or tax or to impose any other restriction upon the transmission of telegraphic messages from one state to another, is not within that class of legislation which the states may enact in the absence of legislation by Congress; and such statutes are void even as to that part of such transmission which may be within the state.<sup>4</sup> Regulations limited in their operation to business done wholly within the limits of the state cannot, of course, in any event, be regarded as regulations of interstate commerce, and state statutes will be so construed if possible where a different construction would render them unconstitutional.<sup>5</sup>

*b.* POLICE POWERS.—In the exercise of its police powers, a state may impose regulations on telephones and telegraph lines designed for the safety and convenience of the local public.<sup>6</sup>

*c.* REGULATION OF BUILDINGS, POLES, AND WIRES.—A state may, provided it does not encroach upon the free exercise of the powers vested in Congress, make all necessary provisions in respect to the buildings, poles, and wires of telegraph companies within its jurisdiction, which the comfort and convenience of the community may require.<sup>7</sup> Thus it is competent for the state to require all electric wires in cities of the state to be placed under the surface of the street.<sup>8</sup>

**1. Establishment and Maintenance of Highways under Police Power.**—*Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285; *Jones v. Brim*, 165 U. S. 180; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Hall v. De Cuir*, 95 U. S. 485; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 377.

**2. Power of Congress Paramount.**—*Huse v. Glover*, 119 U. S. 543, *affirming* 11 Biss. (U. S.) 550, and *citing* *Spooner v. McConnell*, 1 McLean (U. S.) 337; *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500, 46 Am. Dec. 332, and *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447; *followed in* *Rhea v. Newport News, etc., R. Co.*, 50 Fed. Rep. 16, 52 Am. & Eng. R. Cas. 657, and *reviewed in* *Stockton v. Powell*, 29 Fla. 1.

**3. Interstate Business Not Subject to State Regulation.**—*Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Leloup v. Mobile*, 127 U. S. 640.

A state statute restricting the ordinary business of telegraphing among the states is void. *State v. Harbourn*, 70 Conn. 484.

**Business Constitutes Interstate Commerce.**—That communication by telegraph and telephone between persons in different states, and the business of conducting such communication, are interstate commerce, see *supra*, this title, *What Constitutes Interstate Commerce*.

**4. Absence of Congressional Legislation Immaterial.**—*Wabash, etc., R. Co. v. Illinois*, 118

U. S. 557, wherein the court said that it had never "consciously" held otherwise, and *distinguished* the cases of *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, and *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164.

**Regulation While Passing Through State.**—A state statute which only assumes to regulate those engaged in interstate commerce while passing through the particular state is void because it in effect necessarily regulates and controls the conduct of such persons throughout the entire voyage extending through several states. *Western Union Tel. Co. v. James*, 162 U. S. 656, *citing* *Hall v. De Cuir*, 95 U. S. 485.

**5. Statutes Limited to Business Within State Valid.**—*Central Union Telephone Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114; *Western Union Tel. Co. v. Mellon*, 100 Tenn. 429; *Western Union Tel. Co. v. Bright*, 90 Va. 778; *Western Union Tel. Co. v. Powell*, 94 Va. 268.

**Construction to Sustain Statute.**—See generally *supra*, this section, 2, *a. Construction to Sustain Statute*.

**6. Police Regulations Valid.**—*Michigan Telephone Co. v. Charlotte*, 93 Fed. Rep. 11; *Connell v. Western Union Tel. Co.*, 108 Mo. 459.

**7. Regulations of Buildings, Poles, and Wires in Jurisdiction Valid.**—*Western Union Tel. Co. v. Pendleton*, 122 U. S. 347.

**8. Requiring Wires to Be Put under Ground.**—*Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552.



*d. TAXATION.* — Telegraph companies cannot be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without, or from points without to points within, but such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states, and not subject to legislative control of the states, while messages of the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power.<sup>1</sup> The property of a telegraph company situated in the state may be taxed in the same manner that other property of the state is taxed.<sup>2</sup> A state statute taxing telegraph companies upon that proportion of the value of their entire property which the length of their lines within the state bears to the total length of their lines both within and without the state does not amount to a regulation or interference with interstate commerce, but is in fact a property tax.<sup>3</sup>

*e. CHARGE FOR POLES IN STREET.* — A municipal charge for the use of the streets of the municipality by a telegraph company for the erection of its poles, of a fixed sum for each pole erected, is not a property or license tax, and is not void as an interference with interstate commerce.<sup>4</sup>

*f. TRANSMISSION AND DELIVERY OF MESSAGES* — *Providing Facilities.* — Statutes requiring telephone and telegraph companies to provide proper facilities and to receive and transmit messages without discrimination have been sustained so far as they relate to acts done within the state.<sup>5</sup>

*Order of Transmission.* — A state statute prescribing the order in which telegraphic messages shall be sent is void so far as it applies to messages to be delivered in another state.<sup>6</sup>

*Penalty for Nondelivery or Delay.* — A state statute imposing a penalty for failure to deliver messages with due diligence is void as an attempted regulation of

**1. Internal but Not Interstate Business May Be Taxed.** — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Mobile*, 127 U. S. 640; *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, cited in *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 473; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *In re Pennsylvania Tel. Co.*, 48 N. J. Eq. 91; *Western Union Tel. Co. v. State*, 62 Tex. 630.

*Contra.* — *Western Union Tel. Co. v. State*, 55 Tex. 314.

As to taxes upon telegraph companies or other business, see *infra*, this section, 44. *State Taxation.*

**Overruled State Decisions.** — The following state decisions, holding that a state may impose a tax upon the interstate messages on telegraph companies, have been either reversed or disapproved by decisions of the United States Supreme Court: *Western Union Tel. Co. v. Richmond*, 26 Gratt. (Va.) 1; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Mobile v. Leloup*, 76 Ala. 401.

**License Privilege or Occupation Tax.** — Generally as to the right of a state or municipal corporation to exact a license or occupation tax from telegraph companies having an

agency located and doing business in the state or municipal corporation, see the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*.

**2. Property Tax Valid.** — *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Leloupe v. Mobile*, 127 U. S. 640.

**3. Taxation by Unit Rule Valid.** — *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, affirming 71 Miss. 555. See also *infra*, this section, 44. *State Taxation.*

**4. Municipality May Charge for Each Pole in Street.** — *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, reversing 39 Fed. Rep. 59. See also *Philadelphia v. American Union Tel. Co.*, 167 Pa. St. 406.

**5. Facilities Afforded Residents of State.** — *Central Union Telephone Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114; *Connell v. Western Union Tel. Co.*, 108 Mo. 459, distinguishing *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347. See also *infra*, this subdivision, paragraph *Penalty for Nondelivery or Delay*.

**6. Order of Transmitting Interstate Messages.** — *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, quoted upon this point in *Western Union Tel. Co. v. James*, 162 U. S. 650; *Connell v. Western Union Tel. Co.*, 108 Mo. 459.

*Contra.* — A state statute regulating the order of receipt and transmission of messages and prescribing a penalty for its violation, but not attempting to regulate the delivery of messages in other states or of messages sent from other states, is not void as a regulation of interstate commerce. *Butner v. Western Union Tel. Co.*, 2 Okla. 234.



interstate commerce so far as applied to messages received within the state for transmission and delivery to persons in other states,<sup>1</sup> but a statute imposing a penalty for failure to deliver with due diligence messages received for transmission in other states to be delivered within the state is a valid exercise of the police power, in the absence of any action by Congress upon the subject, as no attempt is made to enforce the provisions of the statute beyond the limits of the state.<sup>2</sup> A grossly excessive penalty might be deemed an interference with interstate commerce.<sup>3</sup>

**Delivery by Messenger.** — A state statute requiring telegraph companies to deliver despatches by messenger to the persons to whom the same are addressed, or to their agents, provided either reside within one mile of the telegraphic station, or within the city or town in which such station is situated, is in conflict with the commerce clause of the Constitution in so far as it attempts to regulate the delivery of despatches at places situated in other states.<sup>4</sup>

**g. REGULATION OF RATES.** — A state statute regulating telegraph and telephone rates between points in the state is not an interference with interstate commerce,<sup>5</sup> even though the line passes out of the state and through another state for a part of the distance.<sup>6</sup>

**h. CONTRACTS LIMITING OR QUALIFYING LIABILITY.** — A state statute declaring void all contracts with a telegraph company by which it is agreed that the company shall not be liable for a failure to deliver a message unless notified of the claim for damages within sixty days is void with respect to messages sent from another state.<sup>7</sup>

**i. GRANTING ONE COMPANY A MONOPOLY.** — A state statute granting a telegraph company a monopoly over certain portions of its territory is void as an interference with interstate commerce.<sup>8</sup>

**j. EFFECT OF CONGRESSIONAL LEGISLATION.** — The Act of Congress of July 24, 1866,<sup>9</sup> giving to any telegraph company the right to construct, etc.,

**1. Delivery in Other States.** — *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, *reversing* 95 Ind. 12, 48 Am. Rep. 692, and *overruling* *Western Union Tel. Co. v. Ferris*, 103 Ind. 91; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692, and *Western Union Tel. Co. v. Meredith*, 95 Ind. 93.

**2. Delivery in State.** — *Western Union Tel. Co. v. James*, 162 U. S. 650 [*affirming* 90 Ga. 254, and *distinguishing* *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347]; *Western Union Tel. Co. v. Howell*, 95 Ga. 194, 51 Am. St. Rep. 68; *Connell v. Western Union Tel. Co.*, 108 Mo. 459; *Western Union Tel. Co. v. Mellon*, 100 Tenn. 429; *Western Union Tel. Co. v. Lark*, 95 Ga. 806; *Western Union Tel. Co. v. Bright*, 90 Va. 778; *Western Union Tel. Co. v. Tyler*, 90 Va. 297, 44 Am. St. Rep. 910; *Western Union Tel. Co. v. Powell*, 94 Va. 263.

**Legislation in Aid of Commerce.** — A statute imposing a penalty upon a telegraph company for failure to deliver messages is in aid of commerce and not an interference with it. *Western Union Tel. Co. v. James*, 162 U. S. 650.

**3. Excessive Penalty.** — In *Western Union Tel. Co. v. James*, 162 U. S. 650, the court sustained a state statute imposing a penalty for failure to deliver messages with due diligence in the state, but said: "We do not mean to be understood as holding that any state law on this subject would be valid, even in the absence of Congressional legislation, if the penalty provided were so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce."

**4. Delivery by Messenger in Another State.** — *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347.

**5. Rates Between Points in Same State.** — *Central Union Telephone Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, wherein it was held that a state statute limiting the rent for a telephone service was designed only to apply to telephone service within the state, and as so construed the statute was held valid.

**6. Line Partly in Another State.** — *Railroad Com'rs v. Western Union Tel. Co.*, 113 N. Car. 213; *Leavell v. Western Union Tel. Co.*, 116 N. Car. 211, 47 Am. St. Rep. 798. See also *supra*, this title, *What Constitutes Interstate Commerce*, subdiv. 2. a. *Carriage of Freight and Passengers*, wherein the same question is considered with reference to railroad companies.

**7. Statute Prohibiting Limitation of Liability Void as to Interstate Messages.** — *Western Union Tel. Co. v. Burgess*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1033.

**8. Grant of Monopoly Void.** — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, wherein the court said that it was unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted by enacting the statute of July 24, 1866, entitled an act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes.

**9. 14 Stat. at Large 221; Rev. Stat. U. S., §§ 5263-5669.**



telegraph lines on the public lands of the United States, etc., upon evidence of acceptance of its terms under specified restrictions, etc., is a regulation of commerce, within the meaning of that clause of the United States Constitution which declares that Congress has power to "regulate commerce, etc., among the several states," and supersedes state legislation upon the subject.<sup>1</sup> Thus a state statute conferring upon a corporation the sole right to contract and maintain lines of telegraph in certain counties of the state is in conflict with such Act of Congress and is void.<sup>2</sup> This Act of Congress, however, confers no exemption from the ordinary burdens of taxation in a state within which a company owns or operates lines of telegraph,<sup>3</sup> and as it does not touch the subject-matter of the delivery of messages, it does not prevent a state from legislating upon that subject.<sup>4</sup> So also such Act of Congress does not free the purely domestic business of a telegraph company from state control.<sup>5</sup>

**23. Stock Yards.** — The business of a stock-yards company in receiving, yarding, and feeding live stock, and making sales thereof for the owners, though these services are performed for a mixed interstate and local traffic, is such an incident to commerce as may be subject to regulation by state legislation.<sup>6</sup>

**Effect of Congressional Legislation.** — Congress has not assumed the exclusive regulation of interstate commerce in live stock to such an extent as will prevent a state legislature from prescribing reasonable maximum charges and other regulations in respect to the yarding, feeding, and sale of stock by a stock-yards company situated within the state, although it has passed acts concerning the loading, feeding, watering, and resting of live stock, and the exportation of diseased cattle, and the inspection of cattle, sheep, and hogs.<sup>7</sup>

**24. Navigation and Navigable Waters.** — The respective powers of Congress and the states in respect to navigation and navigable waters will be treated in special articles devoted to those subjects.<sup>8</sup>

**25. Liens.** — A state may establish maritime liens without coming into conflict with the commerce clause of the Constitution.<sup>9</sup> A lien given by state statute on logs cut in another state for surveying and scaling them by the surveyor-general while in a log boom does not constitute a burden on interstate commerce, but is a lawful charge imposed by the state for furnishing additional facilities for navigation of a waterway.<sup>10</sup>

**26. Ships and Shipping.** — This topic will be discussed under another title.<sup>11</sup>

**27. Pilots.** — The power of the states to regulate pilots and pilotage will be fully treated in an article upon that subject.<sup>12</sup>

**28. Ferries.** — The power of the states in respect to ferries has been considered in the special article devoted to that subject.<sup>13</sup>

**29. Seeds.** — A state statute providing that persons selling seed in packages unmarked by the date when such seed were grown, except farmers selling seed in open bulk to other farmers or gardeners, shall be guilty of a misdemeanor,

1. **State Legislation Superseded.** — *Western Union Tel. Co. v. Atlantic, etc.*, State Tel. Co., 5 Nev. 102.

2. **Grant of Monopoly Void.** — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, affirming 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960.

3. **Exemption from Taxation Not Conferred.** — *Western Union Telegraph Co. v. Atty.-Gen.*, 125 U. S. 530.

4. **Delivery of Messages May Be Regulated by State.** — *Western Union Tel. Co. v. James*, 162 U. S. 650.

5. **Domestic Business May Be Controlled by State.** — *Western Union Tel. Co. v. Mississippi R. Commission*, 74 Miss. 80.

6. **State May Regulate Business of Stock Yards.**

— *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. Rep. 839.

7. **Maximum Charges May Be Fixed by State.** — *Cotting v. Kansas City Stock-Yards Co.*, 82 Fed. Rep. 839.

8. See the titles **NAVIGATION**; **NAVIGABLE WATERS**.

9. **Maritime Liens.** — *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388; *Hursey v. Hassam*, 45 Miss. 133. See also generally the titles **MARITIME LIENS**; **SHIPS AND SHIPPING**.

10. **Lien on Logs in Boom.** — *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126.

11. See the title **SHIPS AND SHIPPING**.

12. **Pilots and Pilotage.** — See the title **PILOTS**.

13. See the title **FERRIES**, vol. 12, p. 1086.



is unconstitutional and void in so far as it applies to the selling of seed in original packages imported from another state.<sup>1</sup>

**30. Coal Oil or Petroleum.** — A state statute providing that no corporation, either foreign or domestic, shall have the right to sell petroleum or coal oil, or the products thereof, for illuminating purposes within the territory, without first obtaining a license, in so far as it applies to sales of coal oil within the territory by the importer in original packages, is void and unconstitutional as in restraint of interstate commerce.<sup>2</sup>

**31. Natural Gas.** — A state statute prohibiting the transportation or piping of natural gas from the state, and imposing penalties for so doing, is void as an interference with interstate commerce.<sup>3</sup> So a state statute prohibiting the transportation of natural gas through pipes at a pressure exceeding three hundred pounds to the square inch or otherwise than by natural pressure of the gas flowing from the well, is void as an interference with interstate commerce, since its necessary effect is to prevent gas from being transported from the gas fields in the state into other states.<sup>4</sup>

**32. Logs and Logging.** — A state statute forbidding the floating of logs and timber upon the rivers of the state unless made up into rafts and in charge of competent crews to manage such rafts and prevent their doing damage, is a lawful exercise of the police power of the state, even as applied to logs and timber coming from and bound to other states.<sup>5</sup>

**Tolls.** — A toll imposed by a state on logs and lumber floated down from that state into an adjoining one is unconstitutional, as an attempted regulation of interstate commerce.<sup>6</sup>

**Scaling Logs.** — A state statute requiring all logs run through certain waters of the state to be scaled by a state officer is valid as an inspection law.<sup>7</sup>

**Charges for Logs Washed Ashore.** — A state statute prohibiting the removal of logs washed ashore without paying a charge for each log to the owner of the shore, and providing a method of collecting such charge, is a valid police law and not an interference with interstate commerce even as to logs washed upon the shore from other states.<sup>8</sup>

**33. Service of Process on Traveler.** — The service of process from a state court upon a citizen of another state who is at the time of service traveling through the former state in order to attend court in a third state as a witness for and at the request of a citizen of the state wherein the service is made, does not constitute an unlawful interference with interstate commerce.<sup>9</sup>

**34. County Printing.** — A state statute requiring all county printing to be done within the state, and, if possible, in the county ordering such printing,

1. **Requiring Seed Packages to Be Dated.** — *In re Sanders*, 52 Fed. Rep. 802.

2. **Requiring License to Sell Coal Oil.** — *In re Wilson* (N. Mex. 1900) 60 Pac. Rep. 73. See also the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**.

3. **Preventing Piping of Natural Gas into Other States.** — *State v. Indiana*, etc., Oil, etc., Co., 120 Ind. 576; *Avery v. Indiana*, etc., Oil, etc., Co., 120 Ind. 600. See also *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, wherein Act of *Indiana*, February 20, 1889, was held not to prohibit the piping of petroleum and natural gas out of the state, and that therefore it was not in conflict with the commerce clause of the Constitution.

4. **Prohibiting Piping Except under Natural Pressure.** — *Benedict v. Columbus Constr. Co.*, 49 N. J. Eq. 23, construing Act of *Indiana*, March 4, 1891. But the *Indiana* court took a contrary view of this same statute upon the ground that it applied to all persons without

discrimination, and was intended solely for the purpose of regulating the use of a characteristically local and intrinsically dangerous product. *Jamieson v. Indiana Natural Gas, etc., Co.*, 128 Ind. 555, *distinguishing State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575, and *Leisy v. Hardin*, 135 U. S. 100.

5. **Requiring Logs to Be Rafted.** — *Harrigan v. Connecticut River Lumber Co.*, 129 Mass. 580, 37 Am. Rep. 387; *Scott v. Willson*, 3 N. H. 321; *Craig v. Kline*, 65 Pa. St. 399, 3 Am. Rep. 636, 2 Leg. Gaz. (Pa.) 81.

6. **Toll on Floated Logs Void.** — *Carson River Lumbering Co. v. Patterson*, 33 Cal. 334.

7. **Scaling Logs.** — *Hospes v. O'Brien*, 24 Fed. Rep. 145.

8. **Charge for Logs Washed Ashore.** — *Henry v. Roberts*, 50 Fed. Rep. 902.

9. **Service of Process on Traveler Not an Interference with Interstate Commerce.** — *Holyoke, etc., Ice Co. v. Ambden*, 55 Fed. Rep. 593.



is not void as a regulation of interstate commerce.<sup>1</sup>

35. **Suppression of Gambling.**—A state statute prohibiting the selling of pools on horse races or other contests not taking place within the state,<sup>2</sup> or prohibiting the business of transmitting money to race tracks without the state, there to be placed or bet on horse races,<sup>3</sup> is a valid exercise of the police power of the state, and not a violation of the commerce clause of the Constitution. When the conditions of a bond of a foreign government fall within the condemnation of the police regulations of a state, changing its character to a species of lottery, to prohibit its sale does not violate treaty stipulations, or constitutional provisions as to commerce.<sup>4</sup>

36. **Satisfaction of Mortgages.**—A state statute imposing a penalty on a mortgagee whose mortgage has been satisfied, for failure to enter satisfaction of record after being requested to do so, is not void as an interference with interstate commerce, even as applied to mortgages held by nonresident mortgagees.<sup>5</sup>

37. **Death by Wrongful Act.**—Until Congress makes some regulation touching the liability of parties for marine torts resulting in death of the persons injured, a state statute giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the state; and, as thus applied, it constitutes no encroachment upon the commercial power of Congress.<sup>6</sup>

38. **Disinterment of Dead Bodies.**—A state statute making it unlawful to disinter or remove from the place of burial the remains of any deceased person without a permit for which a fee must be paid, is not in violation of the commerce clause of the Constitution.<sup>7</sup>

39. **Chinese Immigration.**—A state statute to protect free white people against competition with Chinese, and to discourage immigration of Chinese into the state, is not valid as a part of the police regulations of the state, as this power has been given to Congress as part of the power to regulate commerce.<sup>8</sup>

40. **Manufacture.**—A state statute regulating or prohibiting the manufacture of commodities within the state is not an interference with interstate commerce.<sup>9</sup> The reason for this is that manufacture does not constitute commerce.<sup>10</sup>

41. **License, Occupation, and Privilege Tax.**—This subject is fully treated in a separate article of this work.<sup>11</sup>

42. **Railroads and Other Carriers**—*a.* **IN GENERAL.**—It has been seen that

1. **Requiring County Printing to Be Done Within State.**—*Tribune Printing, etc., Co. v. Barnes*, 7 N. Dak. 591, *construing* Rev. Code N. Dak., § 1807.

2. **Pools on Foreign Horse Races.**—*Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795; *State v. Stripling*, 113 Ala. 120.

3. **Transmitting Money to Bet Without the State.**—*State v. Harbourn*, 70 Conn. 484.

A statute prohibiting any person in the state to act as agent in placing bets outside of the state is not an interference with interstate commerce. *State v. Stripling*, 113 Ala. 120.

4. **Lotteries.**—*Ballock v. State*, 73 Md. 1, 25 Am. St. Rep. 559.

5. **Statute Requiring Satisfaction of Record on Request.**—*George F. Dittman Boot, etc., Co. v. Mixon*, 120 Ala. 206, *construing* Code of Alabama 1896, § 1066.

6. **Statute Imposing Liability for Death by Wrongful Act Not an Interference with Interstate Commerce.**—*Sherlock v. Alling*, 93 U. S. 99,

*cited* with approval in *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613.

7. **State May Regulate Disinterment of Dead Bodies.**—*In re Wong Yung Quy*, 2 Fed. Rep. 624, holding that such a statute is a sanitary law and as such within the police powers of the state and valid. It may also be sustained upon the ground that dead bodies are not subjects of commerce.

8. **State Cannot Regulate Immigration.**—*Lin Sing v. Washburn*, 20 Cal. 534. See also *infra*, this section, 44. **State Taxation**—*Travelers and Immigrants*.

9. **Manufacture May Be Regulated or Prohibited by State.**—*Powell v. Pennsylvania*, 127 U. S. 678, *distinguished* in *Schollenberger v. Pennsylvania*, 171 U. S. 1. See also *Mugler v. Kansas*, 123 U. S. 623.

10. **Manufacture Is Not Commerce.**—See *supra*, *What Constitutes Interstate Commerce*, subdiv. 2. *f. Production and Manufacture*.

11. See the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**.



transportation of goods and passengers is an important part of commerce. Accordingly any regulation of transportation from state to state, whether upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication, operates as a regulation of interstate commerce, and if imposed by a state is void.<sup>1</sup> Celerity in the transportation of freight and passengers is imperatively demanded by the commerce of the country, and every impediment thereto, every regulation of a state whereby the most speedy transit is prevented, is a burden upon interstate commerce, and therefore void.<sup>2</sup>

**Police Regulations.** — A state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders, but the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.<sup>3</sup> The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, within themselves, regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce.<sup>4</sup>

**Effect of Congressional Legislation.** — It has been held that in the absence of legislation by Congress the states have power to regulate interstate carriers in matters of domestic concern although interstate commerce may be thereby affected;<sup>5</sup> but these cases have been very much limited, if not expressly overruled, in later cases.<sup>6</sup> By the interstate commerce act, Congress assumed control of the subject of interstate railway traffic, and it must be presumed that it prescribed all the regulations, terms, conditions, and penalties which it deemed proper or desirable, and it is not competent for the states to prescribe other

1. **State Regulation of Interstate Transportation Void.** — Louisville, etc., R. Co. v. Railroad Commission, 19 Fed. Rep. 679; Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs, 18 Fed. Rep. 10; Council Bluffs v. Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773; Cartou v. Illinois Cent. R. Co., 59 Iowa 148, 44 Am. Rep. 672; State v. Saunders, 19 Kan. 127, 27 Am. Rep. 98; Houston Direct Nav. Co. v. Insurance Co. of North America, 89 Tex. 1, 59 Am. St. Rep. 17, reversing (Tex. Civ. App. 1895) 31 S. W. Rep. 560; State v. Gulf, etc., R. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 542; McCann v. Eddy, (Mo. 1894) 27 S. W. Rep. 541, citing State Freight Tax Case, 15 Wall. (U. S.) 232.

See also generally the succeeding subsections of this section for numerous applications of this rule to special cases.

**A Provision in the Charter of a Corporation** that it shall be subject to the laws governing common carriers does not authorize the state to regulate the interstate commerce carried on by such corporation. Houston Direct Nav. Co. v. Insurance Co. of North America, 89 Tex. 1, 59 Am. St. Rep. 17, reversing (Tex. Civ. App. 1895) 31 S. W. Rep. 560.

2. **Delaying Transportation.** — Council Bluffs v. Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773.

**Requiring Trains to Stop at Stations.** — See *infra*, this section, 42. *g. Running of Trains.*

3. **Burdens on Transportation Void.** — Illinois Cent. R. Co. v. Illinois, 163 U. S. 154; Dubuque, etc., R. Co. v. Richmond, 19 Wall. (U. S.) 584; Railroad Commission Cases, 116

U. S. 307; Smith v. Alabama, 124 U. S. 465; Council Bluffs v. Kansas City, etc., R. Co., 45 Iowa 338, 24 Am. Rep. 773.

**Requiring Carrier to Obtain Certificate.** — A state statute requiring a carrier to obtain a certificate from state officers as a condition of being allowed to bring certain articles of interstate commerce into the state is void. Bowman v. Chicago, etc., R. Co., 125 U. S. 465.

**An Act Prohibiting Colored Seamen** employed on vessels of the United States from being brought into the ports of the state on such vessels is void as an interference with interstate commerce. The Cynosure, 1 Sprague (U. S.) 88, 6 Fed. Cas. No. 3,529; The Ship William Jarvis, 1 Sprague (U. S.) 485, 29 Fed. Cas. No. 17,697.

4. **Police Laws Not Regulations of Commerce.** — Chicago, etc., R. Co. v. Solan, 169 U. S. 133. See also *supra*, this title, *Regulation of Interstate Commerce*, subdiv. 2. *a. Local Police Regulations.*

5. **Power in Absence of Legislation by Congress.** — Munn v. Illinois, 94 U. S. 113; Chicago, etc., R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago, etc., R. Co., 94 U. S. 164; Winona, etc., R. Co. v. Blake, 94 U. S. 180; Chicago, etc., R. Co. v. Fuller, 17 Wall. (U. S.) 560; People v. Wabash, etc., R. Co., 104 Ill. 476.

A corporation operating a railroad across the state of Illinois is, for all purposes of local government, a domestic corporation, subject to the police control of the legislature. Cleveland, etc., R. Co. v. People, 175 Ill. 359.

6. **Former Cases Limited or Overruled.** — Wabash, etc., R. Co. v. Illinois, 118 U. S. 557; Covington, etc., Bridge Co. v. Kentucky, 154



and additional regulations.<sup>1</sup> The same effect has been given in some cases to the Act of Congress of June 15, 1866, enacted to facilitate commercial postal and military communication among the United States,<sup>2</sup> but in other cases this statute has been denied that effect.<sup>3</sup>

*b. CONSOLIDATION.* — A state statute or constitution prohibiting the consolidation of a railroad corporation with a parallel or competing road is not an interference with the power of Congress over interstate commerce.<sup>4</sup> So a state may prevent the owner or lessee of a railroad from acquiring the control of a parallel or competing line.<sup>5</sup> Statutes of several adjoining states authorizing the consolidation of corporations which had previously operated a continuous line of road through those states are not void as a regulation of interstate commerce.<sup>6</sup>

*c. DISCRIMINATION — In Rates or Facilities Furnished.* — A state statute prohibiting discrimination in rates of carriage for passengers or freight, or in facilities furnished, is void so far as it applies to the interstate transportation of freight or passengers.<sup>7</sup> But where the statute is limited in its operation to traffic wholly within the state, it is not void as an interference with interstate commerce.<sup>8</sup>

*Between Passengers on Account of Color.* — A state statute forbidding common carriers of passengers from discriminating against passengers on account of race or color is not void as an attempted regulation of interstate commerce.<sup>9</sup>

*In Terminal Facilities.* — A state statute imposing penalties for discrimination

U. S. 204; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

**1. Interstate Commerce Act Precludes State Legislation.** — *Missouri, etc., R. Co. v. Fookes*, (Tex. Civ. App. 1897) 40 S. W. Rep. 858.

Any requirement of a state statute in conflict with the requirements of the Interstate Commerce Act is void. *Baird v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 592.

**2. Effect of Act Cong. June 15, 1866.** — So far as the will of Congress respecting commerce among the states by means of railroads can be determined from its enactment of the provisions of law found in Rev. Stat., § 5258, and Rev. Stat., c. 6, title 48, §§ 4252-4289, they are indications of an intention that such transportation of commodities between the states shall be free except when restricted by Congress, or by a state with the express permission of Congress. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465.

Sections 1310-1316, inclusive, of the Iowa Code, requiring railway companies connecting with the Union Pacific railway to transfer their freight, passengers, and express matter at Council Bluffs, is in conflict with the Acts of Congress approved respectively July 1, 1862, and June 15, 1866, and cannot therefore be enforced. *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338, 24 Am. Rep. 775.

**3. Chicago, etc., R. Co. v. Fuller**, 17 Wall. (U. S.) 560.

**Police Laws Not Prohibited.** — United States Revised Statutes, § 5258, relating to transportation of persons and property from one state to another, does not so far cover the whole subject of interstate transportation as to prevent a state from passing proper police laws incidentally affecting interstate commerce. *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613, *citing with approval* *New York, etc., R. Co. v. New York*, 165 U. S. 628. See also to the

same effect, *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285; *Missouri, etc., R. Co. v. Haber*, 169 U. S. 613.

**4. Consolidation of Parallel or Competing Roads.** — *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, *affirming* 97 Ky. 675. See the title *CONSOLIDATION OF CORPORATIONS*, vol. 6, p. 829. See also *Von Steuben v. Central R. Co.*, 4 Pa. Dist. 153.

**5. Control of Competing Lines.** — *Von Steuben v. Central R. Co.*, 4 Pa. Dist. 153; *Gulf, etc., R. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815, 36 Am. and Eng. R. Cas. 481, 2 Int. Com. Rep. 335.

**6. Consolidation of Connecting Carriers.** — *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157. But in this case the decision seems to have been rested upon the proposition that, in the absence of Congressional legislation, the states may *eo nomine* regulate interstate commerce. This, as has been seen, is not the law. See *supra*, this title, *Regulation of Interstate Commerce — Power of States*.

**7. State Statute Forbidding Discrimination Void.** — *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, *reversing* 104 Ill. 476, 105 Ill. 236; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Mobile, etc., R. Co. v. Dismukes*, 94 Ala. 131, 49 Am. and Eng. R. Cas. 42; *Gatton v. Chicago, etc., R. Co.*, 95 Iowa 112; *McGwigan v. Wilmington, etc., R. Co.*, 95 N. Car. 428, 59 Am. Rep. 247; *Wigton v. Pennsylvania R. Co.*, 8 Pa. Co. Ct. 191; *Providence Coal Co. v. Providence, etc., R. Co.*, 15 R. I. 303; *Southern Pac. R. Co. v. Haas*, (Tex. 1891) 17 S. W. Rep. 600; *Atchinson, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, *reversing* 15 Fed. Rep. 650. See also *C. B. & Q. R. Co. v. Jones*, 149 Ill. 384.

**8. Statute Limited to Internal Traffic.** — *Railroad Commission Cases*, 116 U. S. 307, 347, 352.

**9. Discrimination Against Colored Passengers.** — *Decuir v. Benson*, 27 La. Ann. 1.



in regard to terminal facilities cannot be enforced, as that matter is covered by Act of Congress.<sup>1</sup>

**d. SUNDAY LAWS — Running of Trains.** — A state statute prohibiting the running of trains within the state on Sunday is not void as an interference with interstate commerce, though in effect it prevents trains from passing through the state on Sunday from and to adjacent states, but it is a valid exercise of the police power.<sup>2</sup>

**Express Business.** — State statutes, so far as they attempt to interfere with the right of an express company to transact its interstate business on Sunday, are void.<sup>3</sup> It is otherwise, however, as to business in connection with merchandise as to which the state is the initial or terminal point.<sup>4</sup> The delivery of non-perishable articles on Sunday may be prohibited.<sup>5</sup>

**e. CONTRACTS OF CARRIAGE — Form of Contract.** — A state may regulate the form of contracts for the interstate carriage of goods and passengers.<sup>6</sup>

**Exemption from Liability of Common Carrier.** — A statute of a state, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the state under a contract for interstate transportation, contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.<sup>7</sup>

**Limiting Liability to Its Own Lines.** — It would seem that a state statute prohibiting carriers from contracting to limit their liability for loss or damage to that occurring on their own lines is void as an interference with interstate commerce.<sup>8</sup> But a statute regulating the form of contract by which a carrier

1. **Terminal Facilities Regulated by Congress.** — *Fielder v. Missouri*, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 362.

2. **Statute Prohibiting Running of Trains on Sunday Valid.** — *Hennington v. Georgia*, 163 U. S. 299, *affirming* 90 Ga. 396, 57 Am. & Eng. R. Cas. 42; *State v. Southern R. Co.*, 119 N. Car. 814, 56 Am. St. Rep. 689; *Norfolk*, etc., R. Co. v. Com., 93 Va. 749, 57 Am. St. Rep. 827, *overruling* 88 Va. 95, 29 Am. St. Rep. 705; *State v. Baltimore*, etc., R. Co., 24 W. Va. 783, 49 Am. Rep. 290, 18 Am. & Eng. R. Cas. 466.

3. **Interstate Express Business.** — *Dinsmore v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 436; *Adams Express Co. v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 65 How. Pr. (N. Y.) 72.

A court of equity has power to grant an injunction against the officers charged with the enforcement of such a law. *Dinsmore v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 436.

4. **Where State Is Initial or Terminal Point.** — *Dinsmore v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 436; *Adams Express Co. v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 65 How. Pr. (N. Y.) 72.

5. **Distinction Between Receiving or Delivering and Transportation.** — An express company is not justified in transacting its ordinary business on Sunday, or in receiving and delivering merchandise on that day in disregard of a state statute, but it has a right to move its interstate business or perishable articles on that day and may enjoin the police of a city from interference with such business. *Adams Express Co. v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 65 How. Pr. (N. Y.) 72.

6. **Non-perishable Articles.** — *Dinsmore v.*

*Board of Police*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 436; *Adams Express Co. v. Board of Police*, (N. Y. Super. Ct. Spec. T.) 65 How. Pr. (N. Y.) 72.

6. **Form of Contract May Be Regulated by State.** — *Missouri*, etc., R. Co. v. *McCann*, 174 U. S. 580; *Richmond*, etc., R. Co. v. *R. A. Patterson Tobacco Co.*, 169 U. S. 311, *affirming* 92 Va. 670; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238.

7. **Prohibiting Contracts for Exemption from Liability as Common Carrier.** — *Chicago*, etc., R. Co. v. *Solan*, 169 U. S. 133, *affirming* 95 Iowa 260; *Hart v. Chicago*, etc., R. Co., 69 Iowa 485; *Ohio*, etc., R. Co. v. *Tabor*, 98 Ky. 503; *McCann v. Eddy*, 133 Mo. 59; *Bagg v. Wilmington*, etc., R. Co., 109 N. Car. 279, 26 Am. St. Rep. 569.

8. **Contract Limiting Liability to Fixed Amount.** — Under such a statute a contract of interstate transportation whereby the carrier attempts to limit its liability for personal injuries resulting from negligence of its servants to the sum of five hundred dollars, is void. *Chicago*, etc., R. Co. v. *Solan*, 169 U. S. 133, *affirming* 95 Iowa 260.

8. **State Cannot Prevent Carrier Limiting Liability to Its Own Lines.** — See *Richmond*, etc., R. Co. v. *R. A. Patterson Tobacco Co.*, 169 U. S. 313.

In *Missouri*, Rev. Stat. 1889, § 944, providing in effect, as construed by the Supreme Court (*Dimmitt v. Kansas City*, etc., R. Co., 103 Mo. 433), that a carrier contracting to transport property beyond the terminus of its own line cannot exempt itself from liability for the negligence of the carrier completing the transportation, is not void as a regulation of interstate commerce, since the carrier is left at liberty to limit its duty and obligation to transportation



may limit its liability to its own lines is not a regulation of commerce, and is therefore valid.<sup>1</sup>

**Limiting Time for Bringing Action.** — A state statute providing that a stipulation in a contract of carriage for a shorter limitation in which to sue than that provided by the state statute of limitations shall be void, is valid even as applied to contracts for interstate transportation.<sup>2</sup>

**Requiring Notice as Condition Precedent to Right to Sue.** — A state statute prohibiting stipulations in contracts of carriage requiring notice of a claim for damages to be given within less than ninety days as a condition of the right to sue is valid even as applied to a contract for interstate transportation.<sup>3</sup>

**Statutes Entering into Contract.** — State statutes assuming to regulate interstate commerce are void, and therefore do not enter into and become a part of contracts made within the state for an interstate shipment.<sup>4</sup>

**f. EXAMINING AND LICENSING EMPLOYEES.** — A state may require the engineers and other persons engaged in the driving and management of all railroad trains passing through the state to submit to an examination by a local board as to their fitness for their positions.<sup>5</sup> A state statute requiring locomotive engineers to be examined and licensed by a state board or officers and prescribing penalties for its violation is not void as a regulation of interstate commerce, even as applied to an engineer who operates the locomotive drawing a train running between points in different states.<sup>6</sup> So a state may require engineers and other railroad employees to be examined by a medical board, to determine whether or not they are color-blind, and may make their employment penal unless they have certificates of fitness.<sup>7</sup>

**g. RUNNING OF TRAINS — Requiring Trains to Stop at Stations.** — A state statute requiring all railroad companies operating lines within the state to cause three, each way, of their regular passenger trains, if so many are run daily, to stop at a station, city, or village containing over three thousand inhabitants, to receive and discharge passengers, is a valid exercise of the police power as such, and applies to an interstate railroad incorporated by and running through such state, the federal government not having taken any affirmative action on the

over its own route. It merely prohibits a carrier from making a contract for a through shipment to a point beyond its line, and at the same time exempting itself from liability for the negligence of the connecting carrier employed by it to complete the transportation. *McCann v. Eddy*, 133 Mo. 59, *affirmed* 174 U. S. 580. But *compare* *McCann v. Eddy*, (Mo. 1894) 27 S. W. Rep. 541.

**1. Form of Contract Limiting Liability May Be Regulated.** — *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*, 92 Va. 670, *affirmed* 169 U. S. 311. Generally as to the power of a state to regulate the form of contracts, see *supra*, this section, 10, *Contracts*.

A state statute requiring a contract of carriage to state in unambiguous terms, in the portion of the contract acknowledging the receipt of the goods and expressing the obligation to transport, the limitation of the carrier's obligation to his own line, is valid. *Missouri, etc., R. Co. v. McCann*, 174 U. S. 580.

**2. Shorter Limitation than Prescribed by Statute May Be Prohibited.** — *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116; *Reeves v. Texas, etc., R. Co.*, 11 Tex. Civ. App. 514; *Galveston, etc., R. Co. v. Herring*, (Tex. Civ. App. 1896) 36 S. W. Rep. 129; *Galveston, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 428; *Armstrong v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1117; *Armstrong v. Galveston, etc., R. Co.*, 92 Tex.

117, *reversing* (Tex. Civ. App. 1897) 43 S. W. Rep. 614.

**3. Stipulation for Notice of Claim in Limited Time May Be Prohibited.** — *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116; *Armstrong v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1117; *Armstrong v. Galveston, etc., R. Co.*, 92 Tex. 117, *reversing* (Tex. Civ. App. 1897) 43 S. W. Rep. 614.

**4. State Statutes Regulating Interstate Commerce Form No Part of Contract.** — *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672.

**5. Examination of Employees as to Fitness for Position.** — *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133.

**6. Examination and License of Locomotive Engineers.** — *Smith v. Alabama*, 124 U. S. 465; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96. Both of these cases were *cited with approval* in *Missouri, etc., R. Co. v. Haber*, 169 U. S. 633.

A State Statute Imposing a License Tax upon an engineer of trains running through the state is not an attempt to regulate interstate commerce, but is a legitimate exercise of the police power. *Smith v. Alabama*, 124 U. S. 465, *distinguished* in *McCall v. California*, 136 U. S. 104.

**7. Examination for Color-Blindness.** — *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96.



subject under its powers to regulate interstate commerce.<sup>1</sup> So a state statute requiring all regular passenger trains to stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety is a valid police law, even as applied to a train employed in interstate commerce, and is not an unlawful interference with such commerce.<sup>2</sup> But so far as such statute requires an interstate fast mail train to turn aside from its course to stop at a county seat, as to which other and ample accommodation is furnished, it is void as an interference with interstate commerce and the passage of the United States mails;<sup>3</sup> and it has been held in a very recent case that so far as such a statute requires every passenger train, "regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question," it is unreasonable and void because constituting a direct burden upon interstate commerce.<sup>4</sup> It is but a step to hold that any statute, reasonable or unreasonable, wise or foolish, requiring trains engaged in interstate commerce to stop at designated stations, is void as being a regulation or interference with interstate commerce, and from the dissenting and concurring opinions in the class of cases under discussion, it is believed that the Supreme Court will take that step when the occasion arises.

**Speed of Trains.** — A state may regulate the speed of trains in or near cities and towns, or at crossings.<sup>5</sup>

**Notice of Arrival of Trains.** — A statute requiring notice of the arrival of trains is not a regulation of interstate commerce, although it necessitates the transmission of information from state to state.<sup>6</sup> A state statute requiring railroads to post notices as to whether trains are on time or not is not void as being a regulation of interstate commerce.<sup>7</sup>

**Lighting Road in City Limits.** — A municipal corporation may require railroad companies to light their roads within the limits of the municipality by electricity, such requirement being a legitimate exercise of the police power and

1. **Requiring Limited Number of Trains to Stop at Stations.** — *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, *distinguishing* *Hall v. De Cuir*, 95 U. S. 485; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 143, and in turn *distinguished* in *Lake Shore, etc., R. Co. v. Smith*, 173 U. S. 697, and in *Cleveland, etc., R. Co. v. Illinois*, 177 U. S. 514, *reversing* 175 Ill. 359. See also *Lake Shore, etc., R. Co. v. State*, 8 Ohio Cir. Ct. 220, 4 Ohio Cir. Dec. 406; *Davidson v. State*, 4 Tex. App. 545, 30 Am. Rep. 166.

2. **Requiring All Trains to Stop at County Seats.** — *Gladson v. Minnesota*, 166 U. S. 427, *affirming* 57 Minn. 385; *Chicago, etc., R. Co. v. People*, 105 Ill. 657; *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Cleveland, etc., R. Co. v. People*, 175 Ill. 359; *State v. Gladson*, 57 Minn. 385.

**Requiring All Trains to Stop at Way Stations.** — A state statute requiring every passenger train to stop for five minutes at each way station and imposing a penalty upon the conductors thereof for failure to comply with the statute is a constitutional exercise of the police power of the state. *Davidson v. State*, 4 Tex. App. 545, 30 Am. Rep. 166.

**Application to Through Train Between Points Without the State.** — A passenger train run-

ning on a regular schedule, but which does not carry passengers from one point in Illinois to another, being designed solely for through passage to points without the state, is not excepted from the act requiring regular passenger trains to stop at county seats, even though there are other regular trains sufficient to accommodate local business. *Cleveland, etc., R. Co. v. People*, 175 Ill. 359, *reversed* in 177 U. S. 514.

3. *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, *distinguished* in *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, and in *Gladson v. Minnesota*, 166 U. S. 427, *affirming* 57 Minn. 390.

4. *Cleveland, etc., R. Co. v. Illinois*, 177 U. S. 514 (Oct. Term 1899) *reversing* 175 Ill. 359. The court reviewed its prior decisions upon the right of the state to regulate carriers, and *distinguished* *Gladson v. Minnesota*, 166 U. S. 427, and *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285.

5. **Speed in Neighborhood of Towns, Crossings, Curves, etc.** — *Crutcher v. Kentucky*, 141 U. S. 61; *Clark v. Boston, etc., R. Co.*, 64 N. H. 323.

6. **Notice of Arrival.** — *State v. Indiana, etc., R. Co.*, 133 Ind. 69.

7. **Posting Notice as to Whether Trains Are on Time.** — *State v. Indiana, etc., R. Co.*, 133 Ind. 69; *State v. Pennsylvania Co.*, 133 Ind. 700.



not an interference with interstate commerce.<sup>1</sup>

*h. HEATING PASSENGER CARS.* — It is clearly competent for a state, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce.<sup>2</sup>

*i. EQUAL AND SEPARATE ACCOMMODATIONS.* — A state statute which requires those engaged in the transportation of passengers among the states to give all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and which subjects to an action for damages the owner of such a vessel who excludes colored passengers, on account of their color, from the cabin set apart by him for the use of whites during the passage, is a regulation of interstate commerce, and is therefore unconstitutional and void.<sup>3</sup> And a statute requiring carriers to furnish equal but separate accommodations for colored passengers is also void as to interstate transportation.<sup>4</sup> But some courts have taken a contrary view and sustained such statutes.<sup>5</sup> Where such a statute is limited in its operation to the carriage of passengers from one point to another within the state it is not void as an interference with interstate commerce.<sup>6</sup>

*j. TICKETS AND MILEAGE BOOKS* — *Sale by Authorized Agents.* — A state statute prohibiting the sale of tickets for passage on railroads or vessels by persons not authorized agents of the carriers is not void as an attempted regulation of interstate commerce.<sup>7</sup>

*Keeping Open Ticket Office.* — A regulation as to the hours for opening a ticket office is not void as being a regulation of interstate commerce.<sup>8</sup>

*Mileage Books.* — A state statute requiring railroads operating in the state to sell mileage books at a certain rate, is not void as an attempted interference with interstate commerce, as applied to the carriage of passengers between points in the same state.<sup>9</sup>

*Stop-over Privileges.* — A state statute providing that tickets for passage on

1. *Lighting Road with Electricity.* — *St. Bernard v. Cleveland, etc., R. Co.*, 4 Ohio Dec. 371.

2. *Mode of Heating Cars Subject to State Legislation.* — *New York, etc., R. Co. v. New York*, 165 U. S. 628; *Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133; *People v. New York, etc., R. Co.*, 55 Hun (N. Y.) 409, *affirmed* 123 N. Y. 635.

3. *Equal Privileges in All Parts of Vessel.* — *Hall v. De Cuir*, 95 U. S. 485. *Distinguished* in *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 589; *Plessy v. Ferguson*, 163 U. S. 546. *Contra*, *Decuir v. Benson*, 27 La. Ann. 1.

4. *Statute Requiring Equal but Separate Accommodations for Colored Passengers Void.* — *Anderson v. Louisville, etc., R. Co.*, 62 Fed. Rep. 46; *State v. Hicks*, 44 La. Ann. 770; *Louisville, etc., R. Co. v. State*, 66 Miss. 662, 14 Am. St. Rep. 599; *Carrey v. Spencer*, (Supm. Ct. Spec. T.) 36 N. Y. Supp. 886. See also *Plessy v. Ferguson*, 163 U. S. 537.

5. *Contrary View.* — *Smith v. State*, 100 Tenn. 494. See also *Decuir v. Benson*, 27 La. Ann. 1.

6. *Statute Limited to Internal Transportation.* — *Plessy v. Ferguson*, 163 U. S. 546; *Hall v. De Cuir*, 95 U. S. 485; *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587; *State v. Hicks*, 44 La. Ann. 770; *Louisville, etc., R. Co. v. State*, 66 Miss. 662, 14 Am. St. Rep. 599.

7. *Sale by "Scalpers" May Be Prohibited.* —

*Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 58 Am. & Eng. R. Cas. 28; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Stedman v. State*, 64 Ind. 597; *Johns v. State*, 78 Ind. 335; *State v. Corbett*, 57 Minn. 345, 58 Am. & Eng. R. Cas. 35; *People v. Warden of City Prison*, 26 N. Y. App. Div. 228; *Com. v. Wilson*, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484.

*Certificate of Authority Required.* — A state statute may require persons selling railroad or steamship tickets to have a certificate of authority from the carrier. *Burdick v. People*, 149 Ill. 600, 611, note, 41 Am. St. Rep. 329; *State v. Corbett*, 57 Minn. 345; *Com. v. Wilson*, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484.

8. *Hours for Opening Ticket Office.* — *Hall v. South Carolina R. Co.*, 25 S. Car. 564.

9. *Requiring Sale of Mileage Books.* — *Dillon v. Erie R. Co.*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 116; *Beardsley v. New York, etc., R. Co.*, 15 N. Y. App. Div. 251. See also *Smith v. Lake Shore, etc., R. Co.*, 114 Mich. 460.

*Thousand Mile Tickets.* — A state statute requiring all railroad companies in the state to keep for sale thousand mile tickets at certain specified rates good for the passage of the purchaser, his wife and children, and valid for two years, applies only to the transportation of passengers between two points in the state, and is therefore not void as an attempted regulation of interstate commerce. *Smith v. Lake Shore, etc., R. Co.*, 114 Mich. 460.



any railroad shall be binding on the company for six years from date, and giving the holder the right to stop off at usual stopping places as often as he pleases during that period, is void so far as interstate or foreign transportation is concerned as being a regulation of such commerce.<sup>1</sup>

**Redemption of Unused Tickets.** — A state statute requiring railroad companies to redeem unused tickets on presentation within a reasonable time applies only to tickets for passage from and to points which are both within the state, and not to tickets for interstate transportation, and as thus construed such statutes are not void as an attempted interference with interstate commerce.<sup>2</sup>

**k. RATES OF CARRIAGE** — **State Cannot Regulate.** — A state statute regulating rates of carriage as applied to goods and passengers brought from or carried to other states is void as a regulation of interstate commerce.<sup>3</sup> And of course railroad commissioners appointed under the authority of a state statute have no such power.<sup>4</sup> Where a domestic corporation is engaged in interstate com-

**1. Stop-over Privileges.** — *Lafarier v. Grand Trunk R. Co.*, 84 Me. 286, wherein the statute was construed as not applicable to interstate and foreign tickets, as such a construction would make the law unconstitutional.

**2. Redemption of Tickets.** — *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 58 Am. & Eng. R. Cas. 35; *Missouri, etc., R. Co. v. Fookes*, (Tex. Civ. App. (1897) 40 S. W. Rep. 858.

**3. State Regulation of Rates for Interstate Transportation Void** — *United States*. — *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Kaiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151, 16 Am. & Eng. R. Cas. 40, 5 McCrary (U. S.) 496; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Farmers' L. & T. Co. v. Stone*, 20 Fed. Rep. 270; *Illinois Cent. R. Co. v. Stone*, 20 Fed. Rep. 468, 18 Am. & Eng. R. Cas. 416, *distinguishing Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164. See also *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285.

*Iowa*. — *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148, 44 Am. Rep. 672; *State v. Chicago, etc., R. Co.*, 70 Iowa 162; *Gatton v. Chicago, etc., R. Co.*, 95 Iowa 112.

*Kansas*. — *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432. See also *Atchison, etc., R. Co. v. Campbell*, 8 Kan. App. 661.

*Massachusetts*. — *Com. v. Housatonic R. Co.*, 143 Mass. 264.

*Michigan*. — *Osborn v. Wabash R. Co.*, (Mich. 1900) 82 N. W. Rep. 526.

*Minnesota*. — *State v. Chicago, etc., R. Co.*, 40 Minn. 267, 12 Am. St. Rep. 730.

*New Hampshire*. — *Merrill v. Boston, etc., R. Co.*, 63 N. H. 259, 21 Am. & Eng. R. Cas. 48.

*North Carolina*. — *McGwigan v. Wilmington, etc., R. Co.*, 95 N. Car. 428, 59 Am. Rep. 247.

*Pennsylvania*. — *Wigton v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 184, 47 Leg. Int. (Pa.) 154.

*South Carolina*. — *Railroad Com'rs v. Charlotte, etc., R. Co.*, 22 S. Car. 220, 26 Am. & Eng. R. Cas. 29; *Hall v. South Carolina R. Co.*, 25 S. Car. 564; *Sternberger v. Cape Fear, etc., R. Co.*, 29 S. Car. 510, 35 Am. & Eng. R. Cas. 693, 2 Int. Com. Rep. 426.

*Texas*. — *Missouri, etc., R. Co. v. Fookes*, (Tex. Civ. App. 1897) 40 S. W. Rep. 858.

**Statute Fixing Maximum Charges.** — A state statute fixing a tariff of maximum charges for the transportation of freight and passengers is void as being a regulation of interstate commerce in so far as it applies to through shipments over interstate lines. *Kaiser v. Illinois Cent. R. Co.*, 18 Fed. Rep. 151.

**A Recovery for Overcharges** for freight on an interstate shipment involving an unjust discrimination cannot be authorized by a state statute, because it would be a regulation of interstate commerce. *Gatton v. Chicago, etc., R. Co.*, 95 Iowa 112.

**Effect of Contract Not to Discriminate in Rates.** — Where an interstate carrier is under contract with a city not to discriminate in rates against it or its inhabitants, a resolution of the city council declaring certain rates between the city and points in other states to be a discrimination against it and requiring their reduction under penalty of a forfeiture of the contract is merely an attempt to enforce a lawful contract and is not void as an attempted regulation of interstate commerce. *Iron Mountain R. Co. v. Memphis*, 96 Fed. Rep. 113.

**Transportation Between Points in Same State but Through Neighboring State.** — In *State v. Chicago, etc., R. Co.*, 40 Minn. 267, 12 Am. St. Rep. 730, 37 Am. & Eng. R. Cas. 602, 2 Int. Com. Rep. 519, it was held that state railroad commissioners had no authority to regulate the rates for transportation between two points in the same state but over a route partly in another state, upon the ground that such transportation constitutes interstate commerce, and as such is to be regulated exclusively by Congress. The court cited in support of this, *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 541; *Pacific Coast Steamship Co. v. Board of Railroad Com'rs*, 9 Sawy. (U. S.) 253; *Sternberger v. Cape Fear, etc., R. Co.*, 29 S. Car. 510, 35 Am. & Eng. R. Cas. 693, 2 Int. Com. Rep. 426; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 289, and *disapproved* the contrary holding of *Lehigh Valley R. Co. v. Com.*, 2 Int. Com. Rep. 226. It seems, however, that the *Minnesota* court was in error in holding such transportation to constitute interstate commerce. See *supra*, this title, *What Constitutes Interstate Commerce*.

**4. Power of State Railroad Commissioners.** — *State v. Chicago, etc., R. Co.*, 70 Iowa 162;



merce, a state cannot regulate its rates of carriage for interstate shipments.<sup>1</sup>

The Failure of Congress to Make Regulations as to the rates of carriage for interstate commerce does not authorize a state to make such regulations.<sup>2</sup> A contrary view has been taken in some cases,<sup>3</sup> but these decisions must be regarded as overruled by later decisions of the Supreme Court.<sup>4</sup>

By the Interstate Commerce Act, Congress has undertaken to regulate the rates of carriage with respect to interstate commerce, and therefore any state regulation upon the subject is void.<sup>5</sup>

Regulation Limited to Internal Transportation. — A state statute regulating rates of carriage, but confined in its operation to transportation wholly within the state, is not void as an interference with interstate commerce.<sup>6</sup> The power of a state to regulate railroad rates within the state does not include so much of a transportation on a continuous shipment between points in one state to points in another state as will cover the distance traveled within the limits of the state prescribing the regulation.<sup>7</sup>

Posting Schedules of Rates. — A state statute requiring railroad companies to fix rates annually for transportation and to post a printed copy of such rates in all stations and depots, and providing a penalty for charging a higher rate than the rate posted, is valid as a police regulation, and not void as an attempt to regulate commerce among the states.<sup>8</sup>

Increasing Rates After Acceptance for Transportation. — A state statute prohibiting railroad companies doing business within the state from increasing or advancing

Com. v. Housatonic R. Co., 143 Mass. 264; State v. Chicago, etc., R. Co., 40 Minn. 267, 12 Am. St. Rep. 730, 37 Am. & Eng. R. Cas. 602, 2 Int. Com. Rep. 519; Railroad Com'rs v. Charlotte, etc., R. Co., 22 S. Car. 220, 26 Am. & Eng. R. Cas. 29.

1. Domestic Corporation Engaged in Interstate Commerce. — Louisville, etc., R. Co. v. Railroad Commission, 19 Fed. Rep. 679.

Regulation of Rates in Charter of Corporation. — A regulation of interstate commerce as such is as invalid in a charter as in any other state statute, but perhaps a state may bind domestic corporations by contract to certain schedules of rates. Louisville, etc., R. Co. v. Railroad Commission, 19 Fed. Rep. 679. As to contract, see Iron Mountain R. Co. v. Memphis, 96 Fed. Rep. 113.

2. Absence of Congressional Regulation Does Not Authorize State Regulation. — Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204; Kaeiser v. Illinois Cent. R. Co., 18 Fed. Rep. 151, 5 McCrary (U. S.) 496, 16 Am. & Eng. R. Cas. 40; Carton v. Illinois Cent. R. Co., 59 Iowa 148, 44 Am. Rep. 672, 6 Am. & Eng. R. Cas. 305; Hardy v. Atchison, etc., R. Co., 32 Kan. 698, 18 Am. & Eng. R. Cas. 432; Com. v. Shith, 92 Ky. 38, 36 Am. St. Rep. 578; McGwigan v. Wilmington, etc., R. Co., 95 N. Car. 428, 59 Am. Rep. 247; Baltimore, etc., R. Co. v. Pittsburgh, 3 Pittsb. (Pa.) 20.

3. Contrary View. — Chicago, etc., R. Co. v. Iowa, 94 U. S. 155, 16 Am. R. Rep. 169; Peik v. Chicago, etc., R. Co., 94 U. S. 164; Winona, etc., R. Co. v. Blake, 94 U. S. 180, following Munn v. Illinois, 94 U. S. 113; People v. Wabash, etc., R. Co., 104 Ill. 476; Fuller v. Chicago, etc., R. Co., 31 Iowa 187; Chosen Freeholders v. State, 24 N. J. L. 718, affirming 23 N. J. L. 206. See also Chicago, etc., R. Co. v. Fuller, 17 Wall. (U. S.) 560.

4. Overruled Cases. — So far as any decisions in the United States Supreme Court may be con-

sidered as laying down the principle that the states may regulate the charges for interstate traffic, they must be considered as overruled. Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, citing Wabash, etc., R. Co. v. Illinois, 118 U. S. 557, and Bowman v. Chicago, etc., R. Co., 125 U. S. 465.

5. Effect of Interstate Commerce Act. — Gulf, etc., R. Co. v. Hefley, 158 U. S. 98; Mobile, etc., R. Co. v. Dismukes, 94 Ala. 131, 49 Am. & Eng. R. Cas. 42; Houston, etc., R. Co. v. Peters, 15 Tex. Civ. App. 515; Missouri, etc., R. Co. v. Fookes, (Tex. Civ. App. 1897) 40 S. W. Rep. 858. See also People v. Wabash, etc., R. Co., 104 Ill. 476. And see *infra*, this subdivision, *Delivery to Consignee*.

6. Transportation Wholly Within State. — Railroad Commission Cases, 116 U. S. 307, 347, 352; Heiserman v. Burlington, etc., R. Co., 63 Iowa 732.

7. Regulation of Part of Through Transportation Within State. — Louisville, etc., R. Co. v. Railroad Commission, 19 Fed. Rep. 679; Illinois Cent. R. Co. v. Stone, 20 Fed. Rep. 468.

*Contra*. — Wabash, etc., R. Co. v. People, 105 Ill. 236; People v. Wabash, etc., R. Co., 104 Ill. 476. But these cases are overruled by the Supreme Court. See *supra*, this page note 4.

8. Statute Requiring Schedules of Rates to Be Posted Valid. — Chicago, etc., R. Co. v. Fuller, 17 Wall. (U. S.) 560; Little Rock, etc., R. Co. v. Hanniford, 49 Ark. 291; Fuller v. Chicago, etc., R. Co., 31 Iowa 187.

Effect of Interstate Commerce Act. — Since the enactment of the Interstate Commerce Act the rule would be otherwise, for that act covers these subjects. See above, this page, note 2, etc.; also *supra*, this title, *Regulation of Interstate Commerce*, subdiv. 2. c. *Effect of Action by Congress*. And see Missouri, etc., R. Co. v. Fookes, (Tex. Civ. App. 1897) 40 S. W. Rep. 858; People v. Wabash, etc., R. Co., 104 Ill. 476.



their rates of freight, or charging for the transportation thereof from one point to another a sum greater than the rate of freight or charge for transportation asked or charged at the time such freight is offered or tendered for transportation, is not void as an attempted regulation of interstate commerce.<sup>1</sup>

*l.* FREE CARRIAGE OF SHIPPERS. — A state statute requiring railway companies to carry without extra charge the shipper of a car load or loads of goods is not void as an attempted regulation of interstate commerce, where no attempt is made to fix the shipping rate per car.<sup>2</sup>

*m.* DELAYING SHIPMENTS. — A state statute imposing a penalty on railroad companies for the detention of freight more than a limited time after it is received for shipment, without the consent of the shipper, is not void as a regulation of interstate commerce even as applied to freight to be shipped to another state, since the enforcement of such statute would expedite and not obstruct interstate traffic.<sup>3</sup>

*n.* DELIVERY TO CONSIGNEES — On Payment of Charges Specified in Bill of Lading. — A state statute imposing a penalty upon railroad companies for refusing to deliver freight upon payment or tender of the charges specified in the bill of lading is not, even when applied to an interstate shipment, a regulation of interstate commerce, but is a proper exercise of the police power of the state, and is valid in the absence of any regulation by Congress upon the subject.<sup>4</sup> But Congress has regulated the subject by the Interstate Commerce Act, and accordingly, since that act became a law, such state statutes cannot be enforced.<sup>5</sup>

The South Carolina Dispensary Act, so far as it prohibits railroad employees from unloading liquors at any point where there is no state dispensary, is void as an interference with interstate commerce.<sup>6</sup>

*o.* TRANSPORTATION OF LIVE STOCK — Overloading Cars. — A state statute providing that no railroad company in the carrying or transportation of animals shall overload its cars is not void as a regulation of interstate commerce, even as applied to a shipment of live stock from one state to another.<sup>7</sup>

Double-deck Cars. — A state statute requiring railroad companies to furnish double-deck cars for the shipment of sheep, and providing a penalty for failure to do so, so far as applied to interstate shipments is a regulation of interstate commerce and as such is void.<sup>8</sup>

Feeding and Watering Stock. — A state statute requiring common carriers of live

1. Forbidding Increase of Rates Pending Transportation. — Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 50 Am. St. Rep. 320. See also *infra*, this subdivision, *Delivery to Consignee*.

2. Free Carriage of Shipper of Car Loads. — Atchison, etc., R. Co. v. Campbell, 8 Kan. App. 661.

3. Bagge v. Wilmington, etc., R. Co., 109 N. Car. 279, 26 Am. St. Rep. 569, *distinguishing* McGwigan v. Wilmington, etc., R. Co., 95 N. Car. 432, 59 Am. Rep. 247.

The reason assigned in the above case seems to be irrelevant, as the states are prohibited from making any regulation of interstate commerce and are not simply prohibited from obstructing such commerce.

4. Requiring Delivery to Consignee on Payment of Charges Specified in Bill of Lading. — Little Rock, etc., R. Co. v. Hanniford, 49 Ark. 291; Gulf, etc., R. Co. v. McCown, (Tex. Civ. App. 1894) 25 S. W. Rep. 435; Gulf, etc., R. Co. v. Dwyer, 75 Tex. 572, 16 Am. St. Rep. 926, 42 Am. & Eng. R. Cas. 503; Ft. Worth, etc., R. Co. v. Lillard, 4 Tex. App. Civ. Cas., § 83. But see *supra*, this subdivision, *Rates of Carriage*.

5. State Statute Superseded by Interstate Commerce Act. — Gulf, etc., R. Co. v. Hefley, 158 U. S. 98; St. Louis Southwestern R. Co. v. Carden, (Tex. Civ. App. 1896) 34 S. W. Rep. 145; Houston, etc., R. Co. v. Peters, 15 Tex. Civ. App. 515.

*Contra*. — Such a statute is not superseded by the Interstate Commerce Act. Gulf, etc., R. Co. v. McCown, (Tex. Civ. App. 1894) 25 S. W. Rep. 435; Dillingham v. Fischl, 1 Tex. Civ. App. 546; Gulf, etc., R. Co. v. Nelson, 4 Tex. Civ. App. 345; Ft. Worth, etc., R. Co. v. Lillard, (Tex. App. 1890) 16 S. W. Rep. 654. But these cases must be regarded as *overruled* by the above decision of the Supreme Court and the later Texas cases. See also *supra*, this subdivision, *Rates of Carriage*.

6. South Carolina Dispensary Act Void. — *In re* Langford, 57 Fed. Rep. 570.

7. State May Prohibit Overloading of Cars. — Crawford v. Southern R. Co., 56 S. Car. 136.

8. Penalty for Failure to Supply Double-deck Cars. — Stanley v. Wabash, etc., R. Co., 100 Mo. 435, 42 Am. & Eng. R. Cas. 328, 3 Int. Com. Rep. 176.



stock to feed and water such stock sufficiently during the carriage is a valid police law, and not void as an attempted regulation of interstate commerce.<sup>1</sup> Nor is such a statute in conflict with the Act of Congress forbidding an interstate railroad to confine stock in cars longer than twenty-eight hours without unloading for rest, water, and feeding.<sup>2</sup>

*6. LIABILITY FOR INJURIES HAPPENING WITHIN STATE — In General.* — A state statute affecting the liability of carriers for injuries within the state is not a regulation of commerce.<sup>3</sup> Carriers, although engaged in interstate commerce, are liable according to the law of the state for acts of misfeasance or nonfeasance done within the state.<sup>4</sup>

*Damage by Sparks.* — A state statute making railroad companies liable for damage done by sparks from their locomotives is valid even as applied to railroad companies engaged in interstate commerce.<sup>5</sup>

*Exclusion of Passenger from Cars.* — A state statute abrogating all common-law remedies for the wrongful exclusion of a passenger from the cars of a railroad company is unconstitutional as applied to railroads running between two or more states, it being a regulation of interstate commerce.<sup>6</sup>

*7. DEPOT AND TERMINAL FACILITIES.* — A state statute regulating a terminal station wholly within the state operated by a domestic corporation is not void as an interference with interstate commerce.<sup>7</sup> A state may fix just and reasonable rates for the use of terminal facilities and depots situated wholly within the state.<sup>8</sup>

*7. CONNECTING CARRIERS.* — A state statute requiring railroads to draw the cars of other corporations as well as their own, at reasonable times and for a reasonable compensation to be agreed upon by the parties or fixed by the railroad commissioners, is not void as a regulation of interstate commerce.<sup>9</sup>

*8. SWITCHING.* — A state may regulate the price to be charged for switching cars within the state, although the switching of cars used in interstate traffic is an act of interstate commerce.<sup>10</sup> Where the putting in of a connecting switch at the crossing of two railroads to facilitate the transfer of cars from one road to the other will benefit both state and interstate traffic, there is concurrent jurisdiction in the state and federal authorities to order the putting in of such switch.<sup>11</sup>

*7. LEASES.* — A state statute requiring every person or corporation operating a railroad in a state under a lease to have such lease recorded is not void as an interference with interstate commerce.<sup>12</sup>

*11. GARNISHMENT.* — A state statute authorizing the garnishment of common carriers is not an attempt to regulate interstate commerce.<sup>13</sup>

1. Feeding and Watering Stock in Transit. — *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. 1894) 24 S. W. Rep. 837.

2. Effect of Act of Congress. — *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. 1894) 24 S. W. Rep. 837.

3. Statute Regulating Liability Not a Regulation of Commerce. — *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133.

4. Liability for Malfeasance or Nonfeasance Determined by State Law. — *Smith v. Alabama*, 124 U. S. 465; *Smith v. Boston, etc., R. Co.*, 63 N. H. 25.

5. Liability for Damage by Sparks from Locomotives. — *Smith v. Boston, etc., R. Co.*, 63 N. H. 25; *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103.

6. Abrogation of Common-law Remedies for Wrongful Exclusion of Passenger. — *Brown v. Memphis, etc., R. Co.*, 5 Fed. Rep. 499.

7. Terminal Station Subject to State Regulation. — Thus a domestic terminal company operating a common passenger terminal station

wholly within the state may be required to admit an interstate railway company to the use of such terminal station. *State v. Jacksonville Terminal Co.*, (Fla. 1900) 27 So. Rep. 225.

8. Rates for Use of Terminal Facilities. — *State v. Jacksonville Terminal Co.*, (Fla. 1900) 27 So. Rep. 225.

9. Requiring Railroads to Draw Cars of Other Roads. — *Rae v. Grand Trunk R. Co.*, 14 Fed. Rep. 401; *Iowa v. Chicago, etc., R. Co.*, 33 Fed. Rep. 391.

10. Switching Charges. — *Iowa v. Chicago, etc., R. Co.*, 33 Fed. Rep. 391; *Chicago, etc., R. Co. v. Becker*, 32 Fed. Rep. 849. But see *Fielder v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 362.

11. Concurrent Jurisdiction to Order Putting In of Switch. — *Jacobson v. Wisconsin, etc., R. Co.*, 71 Minn. 519.

12. Recording Railroad Leases. — *Com. v. Chesapeake, etc., R. Co.*, 101 Ky. 159.

13. Garnishment of Common Carriers. — *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459.



*v.* PAUPERS. — A state statute requiring common carriers who bring into the state persons not having a settlement therein, to remove them beyond the state if they fall into distress within a year, is void as an attempted regulation of foreign and interstate commerce.<sup>1</sup>

*w.* EFFECT OF INTERSTATE COMMERCE ACT. — By the Interstate Commerce Act Congress assumed control of the subject of interstate traffic by enacting laws regulating the same, and it must be presumed that it prescribed all the regulations, terms, conditions, and penalties which it deemed proper or desirable, and it is not competent for the states to prescribe other and additional regulations.<sup>2</sup>

**43. Foreign Corporations** — *a.* POWER OF STATE IN GENERAL. — A state may discriminate between her own domestic corporations and those of other states.<sup>3</sup> A state may totally exclude foreign corporations, or may impose any restrictions it deems proper as a condition upon which such corporations may do business in the state.<sup>4</sup> The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign.<sup>5</sup> While a state may exclude from its jurisdiction foreign corporations not engaged in interstate commerce, it cannot exclude a foreign corporation engaged in such commerce any more than it can exclude an individual so engaged.<sup>6</sup> There is a distinction between foreign corporations seeking to do business which does not belong to the regulating power of Congress, and corporations seeking to do the business of interstate commerce.<sup>7</sup> In carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments.<sup>8</sup>

**1. Requiring Carriers to Remove Paupers.** — *Bangor v. Smith*, 83 Me. 422.

**2. Missouri, etc., R. Co. v. Fookes**, (Tex. Civ. App. 1897) 40 S. W. Rep. 858. See also *supra*, this subdivision, *Rates of Carriage*; and generally *supra*, this title, *Regulation of Interstate Commerce*, subdiv. 2. *c.* *Effect of Action by Congress*.

**3. Discrimination Between Foreign and Domestic Corporations.** — *Augusta Bank v. Earle*, 13 Pet. (U. S.) 519; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 189; *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T.) 25 Misc. (N.Y.) 665.

**4. Right of Foreign Corporations to Do Business in the State.** — For a full discussion of this subject see the article FOREIGN CORPORATIONS, vol. 13, p. 860.

**5. Limitation on Power of State.** — *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181. See also *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155.

**Mercantile or Commercial Agencies.** — The business transacted by mercantile or commercial agencies does not constitute interstate commerce such as is under the exclusive control of Congress, and a state may regulate their business within its limits in any manner it sees fit without interfering with interstate commerce. *State v. Morgan*, 2 S. Dak. 32, wherein the conviction of an agent of R. G. Dun & Co., for violation of a state statute, was sustained.

**6. Cannot Exclude Foreign Corporation Engaged in Interstate Commerce.** — *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Fritts v. Palmer*, 132 U. S. 282; *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542; *Horn Silver Min. Co. v. New York*, 143 U. S. 305; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688; *Ex p. Stockton*, 33 Fed. Rep. 95; *Indiana v. Pullman Palace Car Co.*, 11 Biss. (U. S.) 561, 16 Fed. Rep. 193, 13 Am. & Eng. R. Cas. 307; *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90; *Huffman v. Western Mortg., etc., Co.*, 13 Tex. Civ. App. 169.

**7. Crutcher v. Kentucky**, 141 U. S. 59.

**A Local Corporation** which contributes only its own local right of traffic to a system of through traffic by means of contract arrangements with other local companies cannot for that reason be permitted to exercise corporate franchise within a foreign jurisdiction free of such burdens as may be imposed by such foreign jurisdiction upon the theory that it is engaged in interstate commerce. *Norfolk, etc., R. Co. v. Com.*, 114 Pa. St. 256.

**8. Corporations Equally with Individuals Protected by Commerce Clause Against State Burdens** — *United States*. — *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Welton v. Missouri*, 91 U. S. 275; *Mobile County v. Kimball*, 102 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. Rep. 9, 1 Int. Com. Rep. 411; *Gloucester Ferry*



*b. WHAT CONSTITUTES "DOING BUSINESS IN STATE."* — The transaction of the business of interstate commerce is not considered as "doing business in the state," within the meaning of state statutes regulating foreign corporations "doing business within the state."<sup>1</sup>

*c. KNOWN PLACE OF BUSINESS AND AUTHORIZED AGENT.* — A state statute or constitution providing that no foreign corporation shall do any business in the state without having one or more known places of business, and an authorized agent or agents in the state upon whom process can be served, is void so far as corporations engaged in interstate commerce are concerned.<sup>2</sup> A contrary view has been taken in some cases.<sup>3</sup>

*d. TAXATION AND LICENSE.* — Property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business.<sup>4</sup> A state law taxing corporations foreign and domestic, according to their whole capital stock or the amount of their business, is not void as an interference with interstate commerce, even as applied to foreign corporations.<sup>5</sup>

Foreign corporations may be taxed for the privilege of conducting their corporate business within the state, provided such business does not constitute interstate commerce.<sup>6</sup> Thus a state may require a foreign corporation to obtain a license and pay a tax, provided the business transacted by it does not constitute interstate commerce.<sup>7</sup> It is well settled that a state cannot, under guise of a license tax, exclude from its jurisdiction a foreign corporation

*Co. v. Pennsylvania*, 114 U. S. 204; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 189; *Williams v. Hintermeister*, 26 Fed. Rep. 889; *New Orleans, etc., Packet Co. v. James*, 32 Fed. Rep. 21.

*Indiana.* — *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575.

*Montana.* — *McNaughton Co. v. McGirl*, 20 Mont. 124.

*Texas.* — *C. B. Cones, etc., Mfg. Co. v. Rosenbaum*, (Tex. Civ. App. 1898) 45 S. W. Rep. 333; *Gale Mfg. Co. v. Finkelstein*, 22 Tex. Civ. App. 241.

1. Interstate Commerce Does Not Constitute "Doing Business Within" State. — *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Cook v. Rome Brick Co.*, 98 Ala. 409; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 42 W. N. C. (Pa.) 399; *Milan Milling, etc., Co. v. Gorten*, 93 Tenn. 590; *Davis, etc., Bldg., etc., Co. v. Caigle*, (Tenn. Ch. 1899) 53 S. W. Rep. 240; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.*, (Tex. Civ. App. 1893) 21 S. W. Rep. 300; *H. Zuberbieb Co. v. Harris*, (Tex. Civ. App. 1896) 35 S. W. Rep. 403.

What Constitutes "Doing Business in State" by Foreign Corporation. — See generally the title FOREIGN CORPORATIONS, vol. 13, p. 869.

2. Known Place of Business and Authorized Agent. — *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *New Orleans, etc., Packet Co. v. James*, 32 Fed. Rep. 21; *Cook v. Rome Brick Co.*, 98 Ala. 409; *McNaughton Co. v. McGirl*, 20 Mont. 124; *Kent, etc., Co. v. Tuttle*, 20 Mont. 203; *Murphy Varnish Co. v. Connell*, (Supm. Ct.) 10 Misc. (N. Y.) 553; *Milan Milling, etc., Co. v. Gorten*, 93 Tenn. 590.

As to the power of the state to make such requirements where the foreign corporation is not engaged in interstate commerce, see the title FOREIGN CORPORATIONS, vol. 13, p. 834.

3. Contrary View. — *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145; *Utley v. Clark-Gardner*

*Lode Min. Co.*, 4 Colo. 369; *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90. But in this case the court proceeded upon the now repudiated theory that the dormant power of Congress to regulate commerce does not interfere with the right of the state to act, and that the state has concurrent power to regulate commerce and may exercise it, except so far as Congress has actually exercised the power. See *supra*, this title, *Regulation of Interstate Commerce—Power of States*.

4. Property in State May Be Taxed. — *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530. See also generally *infra*, this section, *Taxation*.

5. Tax on Capital Stock or Amount of Business. — *Horn Silver Min. Co. v. New York*, 143 U. S. 530.

6. Taxation for Privilege of Doing Business. — *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Southern Bldg., etc., Assoc. v. Norman*, 98 Ky. 294; *People v. Wemple*, 61 Hun (N. Y.) 83, *affirmed* 131 N. Y. 64, 54 Am. & Eng. R. Cas. 1.

The power to refuse a recognition of the corporate existence of a foreign corporation does not involve the right to tax such corporations at the arbitrary discretion of the state. *Erie R. Co. v. State*, 31 N. J. L. 531.

A foreign corporation cannot be taxed for the privilege of transporting goods and passengers from state to state. *Erie R. Co. v. State*, 31 N. J. L. 531, *reversing* 30 N. J. L. 473.

See generally, as to the right of a state to impose conditions upon a foreign corporation seeking to do business within the state, the title FOREIGN CORPORATIONS, vol. 13, p. 834.

7. License Tax Valid Except as Applied to Business of Interstate Commerce. — *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90.



engaged in interstate commerce.<sup>1</sup> A state may impose a tax against a foreign corporation for office license, except only where its business is strictly interstate or foreign commerce.<sup>2</sup>

*e.* **RIGHT TO BUY AND SELL.** — A Foreign Corporation Has the Right to Sell articles of commerce anywhere in the state and ship them to the purchasers, and any attempt on the part of the state to interfere with such business is an interference with interstate commerce, and void.<sup>3</sup> The sale may be negotiated either by commercial agents or drummers or by correspondence, and in either case it constitutes interstate commerce.<sup>4</sup> Compliance with state requirements as to taking out licenses, filing certificates and charters, or establishing resident agencies, is not necessary.<sup>5</sup>

A Foreign Corporation Buying Goods in the State through an agent, or soliciting the consignment of goods to its warehouses in other states, is engaged in interstate commerce, and is not subject to state laws regulating foreign corporations.<sup>6</sup>

*f.* **RIGHT TO CONTRACT.** — A state cannot impose conditions or limitations upon the right of a foreign corporation to make contracts in the state for carrying on commerce between the states.<sup>7</sup>

*g.* **RIGHT TO SUE.** — A state statute providing that no foreign corporation doing business in the state can maintain any action with reference to such business, unless it has filed a copy of its charter, paid the required fees, and received a certificate, is void as an interference with interstate commerce, so

**1. Exclusion under Guise of License Tax.** — *Crutcher v. Kentucky*, 141 U. S. 58; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114.

**Agents of Foreign Express Company.** — A state cannot require the agents of a foreign express company to take out a license as a condition of transacting any business within the state. *Crutcher v. Kentucky*, 141 U. S. 47.

**2. Office License.** — *McCall v. California*, 136 U. S. 104 (*distinguishing* *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181); *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114.

**3. Foreign Corporation Has Right to Sell in State** — *United States*. — *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104; *Crutcher v. Kentucky*, 141 U. S. 47; *Brennan v. Titusville*, 153 U. S. 289. *Compare* *American Harrow Co. v. Shaffer*, 68 Fed. Rep. 750.

*Alabama.* — *Nelms v. Edinburg American Land Mortg. Co.*, 92 Ala. 157; *Cook v. Rome Brick Co.*, 98 Ala. 409; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145.

*Arkansas.* — *Gunn v. White Sewing Mach. Co.*, 57 Ark. 24, 38 Am. St. Rep. 223.

*Colorado.* — *Kindel v. Beck, etc., Lith. Co.*, 19 Colo. 310; *Fairbanks v. Macleod*, 8 Colo. App. 190.

*Michigan.* — *Coit v. Sutton*, 102 Mich. 324.

*Montana.* — *Kent, etc., Co. v. Tuttle*, 20 Mont. 203.

*New Mexico.* — *Singer Mfg. Co. v. Hardee*, 4 N. Mex. 175.

*New York.* — *Murphy Varnish Co. v. Connell*, (Supm. Ct.) 10 Misc. (N. Y.) 553; *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 665.

*Ohio.* — *Haldy v. Tomoor-Haldy Co.*, 4 Ohio Dec. 118, *citing* *Aultman v. Holder*, 34 Cinc. L. Bul. 93.

*Tennessee.* — *Milan Milling, etc., Co. v. Gorten*, 93 Tenn. 590.

*Texas.* — *Reed v. Walker*, 2 Tex. Civ. App. 92; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.*, (Tex. Civ. App. 1893) 21 S. W. Rep. 300; *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90; *H. Zuberbieb Co. v. Harris*, (Tex. Civ. App. 1896) 35 S. W. Rep. 403; *American Starch Co. v. Bateman*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771; *Miller v. Goodman*, 91 Tex. 41; *Shaw Piano Co. v. Ford*, (Tex. Civ. App. 1897) 41 S. W. Rep. 198; *C. B. Cones, etc., Mfg. Co. v. Rosenbaum*, (Tex. Civ. App. 1898) 45 S. W. Rep. 333; *Lewis v. W. R. Irby Cigar, etc., Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 476; *Gale Mfg. Co. v. Finkelstein*, 22 Tex. Civ. App. 241.

**4. Sales by Agents and Correspondence.** — *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Murphy Varnish Co. v. Connell*, (Supm. Ct.) 10 Misc. (N. Y.) 553; *Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 42 W. N. C. (Pa.) 399; *Haldy v. Tomoor-Haldy Co.*, 4 Ohio Dec. 118; *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90.

**5. Compliance with State Regulations Not Necessary.** — *Murphy Varnish Co. v. Connell*, (Supm. Ct.) 10 Misc. (N. Y.) 553; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 42 W. N. C. (Pa.) 399; *Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466.

**Contra.** — *Western Paper Bag Co. v. Johnson*, (Tex. Civ. App. 1896) 38 S. W. Rep. 364.

**6. Buying or Soliciting Consignments through Agents.** — *McNaughton Co. v. McGirl*, 20 Mont. 124.

**7. Restrictions on Right to Contract.** — *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Gunn v. White Sewing Mach. Co.*, 57 Ark. 24, 38 Am. St. Rep. 223; *McNaughton Co. v. McGirl*, 20 Mont. 124; *Mearshon v. Pottsville Lumber Co.*, 187 Pa. St. 12, 42 W. N. C. (Pa.) 399; *Milan Milling, etc., Co. v. Gorten*, 93 Tenn. 590.



far as the business of the foreign corporation constitutes interstate commerce.<sup>1</sup>

*h. CONSOLIDATION WITH DOMESTIC CORPORATION.* — A statute exacting certain fees upon the consolidation of domestic with foreign corporations, proportioned to the capital stock of the new corporation, is not void as a tax on interstate commerce.<sup>2</sup>

*i. INSURANCE.* — A state statute imposing a fine for effecting insurance in the state in any foreign insurance company which has not complied with the state law is unconstitutional.<sup>3</sup>

**44. State Taxation** — *a. VALIDITY IN GENERAL* — (1) *Statement of Rule.* — It is well settled that a state cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress.<sup>4</sup> Indeed, taxation has been said to be one of the principal forms

**1. Right to Sue Without Compliance with State Requirements** — *Colorado.* — Fairbanks *v. Macleod*, 8 Colo. App. 190; Kindel *v. Beck*, etc., Lith. Co., 19 Colo. 310.

*New York.* — Hargraves Mills *v. Harden*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 665.

*Ohio.* — Haldy *v. Tomoor-Haldy Co.*, 4 Ohio Dec. 118.

*Pennsylvania.* — Wolff Dryer Co. *v. Bigler*, 192 Pa. St. 466.

*Texas.* — Gale Mfg. Co. *v. Finkelstein*, 22 Tex. Civ. App. 241; Lewis *v. W. R. Irby Cigar, etc., Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 476; C. B. Cones, etc., Mfg. Co. *v. Rosenbaum*, (Tex. Civ. App. 1898) 45 S. W. Rep. 333; Shaw Piano Co. *v. Ford*, (Tex. Civ. App. 1897) 41 S. W. Rep. 198; Reed *v. Walker*, 2 Tex. Civ. App. 92; American Starch Co. *v. Bateman*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771; Bateman *v. Western Star Milling Co.*, 1 Tex. Civ. App. 90; Lyons-Thomas Hardware Co. *v. Reading Hardware Co.*, (Tex. Civ. App. 1893) 21 S. W. Rep. 300; H. Zuberbier Co. *v. Harris*, (Tex. Civ. App. 1896) 35 S. W. Rep. 403; Miller *v. Goodman*, 91 Tex. 41. See also Milan Milling, etc., Co. *v. Gorten*, 93 Tenn. 590. *Contra*, Western Paper Bag Co. *v. Johnson*, (Tex. Civ. App. 1896) 38 S. W. Rep. 364.

**2. Fees upon Consolidation with Domestic Corporation.** — Ashley *v. Ryan*, 153 U. S. 436, affirming 49 Ohio St. 504.

**3. Insurance in Foreign Companies.** — State *v. Allgeyer*, 48 La. Ann. 104.

**4. Interstate Commerce Cannot Be Taxed by State** — *United States.* — Crandall *v. Nevada*, 6 Wall. (U. S.) 35; State Freight Tax Case, 15 Wall. (U. S.) 232; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284; Baltimore, etc., R. Co. *v. Maryland*, 21 Wall. (U. S.) 456, 6 Am. R. Rep. 483; Almy *v. California*, 24 How. (U. S.) 169; Welton *v. Missouri*, 91 U. S. 275; Henderson *v. New York*, 92 U. S. 259; Sherlock *v. Alling*, 93 U. S. 99; Pensacola Tel. Co. *v. Western Union Tel. Co.*, 96 U. S. 1; Cook *v. Pennsylvania*, 97 U. S. 566; Howe Mach. Co. *v. Gage*, 100 U. S. 676; Mobile County *v. Kimball*, 102 U. S. 691; Webber *v. Virginia*, 103 U. S. 344; Western Union Tel. Co. *v. Texas*, 105 U. S. 460; Turner *v. Maryland*, 107 U. S. 38; Moran *v. New Orleans*, 112 U. S. 69;

Western Union Tel. Co. *v. Pendleton*, 122 U. S. 347; Gloucester Ferry Co. *v. Pennsylvania*, 114 U. S. 196; Brown *v. Houston*, 114 U. S. 622; Walling *v. Michigan*, 116 U. S. 446; Pickard *v. Pullman Southern Car Co.*, 117 U. S. 34; Wabash, etc., R. Co. *v. Illinois*, 118 U. S. 557; Robbins *v. Shelby County Taxing Dist.*, 120 U. S. 489; Fargo *v. Michigan*, 121 U. S. 230, 31 Am. & Eng. R. Cas. 452; Philadelphia, etc., Steamship Co. *v. Pennsylvania*, 122 U. S. 326; Smith *v. Alabama*, 124 U. S. 465; Bowman *v. Chicago, etc., R. Co.*, 125 U. S. 496; Western Union Tel. Co. *v. Atty.-Gen.*, 125 U. S. 530; Leloup *v. Mobile*, 127 U. S. 640; Ratterman *v. Western Union Tel. Co.*, 127 U. S. 411; Lyng *v. Michigan*, 135 U. S. 161; Western Union Tel. Co. *v. Alabama State Board*, 132 U. S. 472; McCall *v. California*, 136 U. S. 108, 45 Am. & Eng. R. Cas. 1; Asher *v. Texas*, 128 U. S. 129; Norfolk, etc., R. Co. *v. Pennsylvania*, 136 U. S. 114; Pullman's Palace Car Co. *v. Pennsylvania*, 141 U. S. 18; Crutcher *v. Kentucky*, 141 U. S. 58; Maine *v. Grand Trunk R. Co.*, 142 U. S. 217, 48 Am. & Eng. R. Cas. 602; Pacific Express Co. *v. Seibert*, 142 U. S. 339, 48 Am. & Eng. R. Cas. 610; Horn Silver Min. Co. *v. New York*, 143 U. S. 305; Ficklen *v. Shelby County Taxing Dist.*, 145 U. S. 1; Lehigh Valley R. Co. *v. Pennsylvania*, 145 U. S. 192; St. Louis *v. Western Union Tel. Co.*, 148 U. S. 92; Covington, etc., Bridge Co. *v. Kentucky*, 154 U. S. 204; Cleveland, etc., R. Co. *v. Backus*, 154 U. S. 439; Postal Tel. Cable Co. *v. Adams*, 155 U. S. 688; New York, etc., R. Co. *v. Pennsylvania*, 158 U. S. 431; Western Union Tel. Co. *v. James*, 162 U. S. 650; Adams Express Co. *v. Ohio State Auditor*, 166 U. S. 185; Indiana *v. Pullman Palace Car Co.*, 16 Fed. Rep. 193, 11 Biss. (U. S.) 561, 13 Am. & Eng. R. Cas. 307; Pullman Southern Car Co. *v. Nolan*, 22 Fed. Rep. 276; St. Louis *v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *In re Flinn*, 57 Fed. Rep. 496; Webster *v. Bell*, 68 Fed. Rep. 183; Southern R. Co. *v. Asheville*, 69 Fed. Rep. 359; *In re Minor*, 69 Fed. Rep. 233; *In re May*, 82 Fed. Rep. 422; *In re Tinsman*, 95 Fed. Rep. 648; Pabst Brewing Co. *v. Terre Haute*, 98 Fed. Rep. 330.

*California.* — Lin Sing *v. Washburn*, 20 Cal. 534.

*Florida.* — Hall *v. State*, 39 Fla. 637.

*Indiana.* — State *v. Woodruff Sleeping, etc.*,



of regulation attempted by the states.<sup>1</sup> What constitutes interstate commerce within the meaning of this rule has been considered in previous sections of this article, and need not be repeated in this connection.<sup>2</sup>

(2) *What Constitutes Tax on Commerce.* — The line between the limits of state sovereignty in imposing taxation, and the power and duty of the federal government to protect and regulate interstate commerce, is always difficult to be traced.<sup>3</sup> The controversy in the cases has been not so much as to the power of the states to tax interstate commerce, as it has been as to what in fact constitutes a tax on such commerce. The validity under the commerce clause, of numerous classes of state taxing laws, is considered in the succeeding subsections of this article.<sup>4</sup>

**Purpose of Tax Immaterial.** — The purpose of state taxation is immaterial, for if such taxation is in fact a regulation of, or burden on, interstate or foreign commerce, it is void.<sup>5</sup> Thus, it is immaterial that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation.<sup>6</sup>

**Mode of Collection Immaterial.** — The constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject on which the burden is laid. The test is, what is the subject of the tax, upon what does the burden really rest, not from whom does the state exact payment into its treasury.<sup>7</sup>

**Compensation for Facilities Furnished.** — There is a recognized distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a local charge for a local facility provided for the transaction of such commerce. A tax which may fairly be considered as merely a compensation for additional facilities furnished by a state or municipality is not void as a tax on interstate commerce.<sup>8</sup>

*Coach Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798.

*Kentucky.* — *Com. v. Smith*, 92 Ky. 38, 36 Am. St. Rep. 578.

*Maine.* — *State v. Montgomery*, 92 Me. 433.

*New Jersey.* — *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226, reversing 30 N. J. L. 473; *State v. Carrigan*, 39 N. J. L. 35; *Matter of Pennsylvania Telephone Co.*, 48 N. J. Eq. 91, 27 Am. St. Rep. 462; *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L. 278.

*New York.* — *People v. Roberts*, 27 N. Y. App. Div. 455; *People v. Wemple*, 138 N. Y. 1, 54 Am. & Eng. R. Cas. 1.

*North Carolina.* — *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404; *Bain v. Richmond, etc.*, R. Co., 105 N. Car. 363, 18 Am. St. Rep. 912; *Goodwin v. Caraleigh Phosphate, etc., Works*, 119 N. Car. 120.

*West Virginia.* — *State v. Goetze*, 43 W. Va. 495.

1. *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

2. **As to What Constitutes Interstate Commerce** which cannot be taxed within the rule stated in the text, see *supra*, this title, *What Constitutes Interstate Commerce*.

**License Tax for Privilege of Doing the Business of Interstate Commerce.** — For a full discussion of this subject, see the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*.

3. **Line Between Commercial and Taxing Power.** — *State Freight Tax Case*, 15 Wall. (U. S.) 232.

4. **What Constitutes Tax upon Commerce.** — A tax the effect of which is to diminish personal

intercourse is a tax upon commerce within the meaning of the Constitution. *Lin Sing v. Washburn*, 20 Cal. 534.

A state tax seriously affecting the interchange of commodities between the states is a regulation of commerce. *Hinson v. Lott*, 8 Wall. (U. S.) 148.

5. **Purpose of Taxation Immaterial.** — *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Moran v. New Orleans*, 112 U. S. 69; *Western Union Tel. Co. v. Texas*, 105 U. S. 460. See *Galveston County v. Gorham*, 49 Tex. 279.

6. **Taxation for Support of State Government.** — *Moran v. New Orleans*, 112 U. S. 69; *State Freight Tax Case*, 15 Wall. (U. S.) 232.

7. **Test of Constitutionality.** — *State Freight Tax Case*, 15 Wall. (U. S.) 232.

8. **Charge for Facilities Furnished Valid.** — *Hopkins v. U. S.*, 171 U. S. 578; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, 100 U. S. 430; *Cincinnati, etc., Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg, etc., Transp. Co. v. Parkersburg*, 107 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

**Tolls upon Vessels for Improvement of Navigation Valid.** — *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500, 46 Am. Dec. 332; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447, cited in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

**Fees for Examining and Licensing Engineers.** — Fees exacted for service rendered in examining and licensing engineers are not a tax or burden on interstate commerce. *Smith v. Alabama*, 124 U. S. 465. See also *supra*, this



**Tax on Incidents of Commerce.** — Whenever the taxation of a commodity would amount to a regulation of commerce within the prohibition of the Constitution, so will the taxation of an inseparable incident or necessary concomitant of such commodity.<sup>1</sup> The business of receiving and landing passengers and freight is incident to their transportation, and a tax upon such receiving and landing is a tax upon transportation and upon commerce, interstate or foreign, involved in such transportation.<sup>2</sup>

**Taxation of Business Transacted in State.** — While as a general proposition a state may tax business transacted within its limits, where such business constitutes interstate or foreign commerce a state tax thereon is void.<sup>3</sup> A state may tax a limited partnership engaged in mining and shipping coal to points outside the state, as the tax is upon the privilege of the association exercised wholly within the state and not upon interstate commerce.<sup>4</sup> A statute imposing an *ad valorem* tax upon the average amount of capital invested in their business by merchants is not a tax upon the goods, and is not an interference with interstate commerce.<sup>5</sup>

**Corporation Not Engaged in Interstate Commerce.** — A state tax upon a corporation having power to engage in foreign or interstate commerce is not void as an interference with such commerce, unless the corporation is actually engaged in such commerce.<sup>6</sup>

(3) *Separation of Interstate from Intrastate Commerce.* — Where a carrier is engaged in both interstate and intrastate business, in the imposition of a tax upon such carrier the interstate business must be discriminated from the intrastate business, or it must be made capable of such discrimination so that it may clearly appear that the intrastate business alone is taxed.<sup>7</sup> Whenever

section 42. *f. Examining and Licensing Employees.*

**Toll for Use of Railways Considered as Highways.** — A state statute taxing carriers according to the weight of freight carried cannot be sustained upon the ground that it is not intended as a regulation of commerce, but as a compensation for the use of works of internal improvement constructed under franchises granted by the state, or, in other words, that it is a toll for the use of railways considered as highways. The error of such proposition is in the fact that the tax is not upon the franchises of the corporations, but upon their freight. *State Freight Tax Cases*, 15 Wall. (U. S.) 232.

**Inspection Charges.** — See *supra*, this section, 4. *c. Inspection Charges.*

**1. Taxation of Inseparable Incidents of Commerce Void.** — *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226, wherein it was held that a tax on the business of a foreign railroad company passing through the state, though in form a tax on the business of the company, is in substance a tax on the commodities the transportation of which constitutes such business, and is therefore void.

**2. Business of Receiving and Landing Passengers and Freight Cannot Be Taxed.** — *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *People v. Wemple*, 65 Hun (N. Y.) 256, 29 Abb. N. Cas. (N. Y.) 85, *affirmed* 138 N. Y. 1.

The business transacted in New York by the Pennsylvania Railroad Company in connection with its ferry and terminal facilities, and in collecting in that city money for transportation of passengers and freight, etc., constitutes interstate commerce, and cannot be taxed by the

state of New York. *People v. Wemple*, 138 N. Y. 1, 54 Am. & Eng. R. Cas. 1, *affirming* 65 Hun (N. Y.) 252, 29 Abb. N. Cas. (N. Y.) 85, and *distinguishing* *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, and *Maine v. Grand Trunk R. Co.*, 142 U. S. 217. See also *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

**3. Tax on Business Within State.** — *Fargo v. Michigan*, 121 U. S. 230.

**Foreign Corporations.** — See *supra*, this section, 43. *Foreign Corporations.*

**4. Limited Partnership Engaged in Mining.** — *Com. v. Sandy Lick Gas, etc., Co.*, 1 Dauphin Co. Rep. (Pa.) 314.

Mining does not constitute commerce. See *supra*, this title, *What Constitutes Interstate Commerce*, subdiv. 2. *f. Production and Manufacture.*

**5. Tax on Capital Invested.** — *Oliver Finney Grocery Co. v. Speed*, 87 Fed. Rep. 408.

**6. Corporation Authorized to Engage in Interstate Commerce, but Not So Engaged.** — *Honduras Commercial Co. v. State Board of Assessors*, 54 N. J. L. 278.

**7. Taxation of Carriers Engaged in Both Interstate and Intrastate Business.** — *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, *reviewed* in *Ratterman v. American Express Co.*, 49 Ohio St. 608; *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39; *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *Webster v. Bell*, 68 Fed. Rep. 183; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Pacific Express Co. v. Seibert*, 142 U. S. 339. See also *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404.



the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect the tax arising upon commerce solely within its own territory.<sup>1</sup>

(4) *Discrimination*. — A state statute imposing a tax discriminating against the citizens or products of other states in favor of the citizens or residents of the state is void.<sup>2</sup> The fact that a tax does not discriminate against citizens or products of other states is often assigned as a reason for holding the tax valid as not being a regulation of or interference with interstate commerce.<sup>3</sup> But a state tax upon interstate commerce is not made valid by the fact that it is laid without discrimination upon both state and interstate commerce. The state has a right to tax its own domestic commerce and property as it pleases, but it cannot in any way tax interstate commerce.<sup>4</sup>

**Tax on Aliens.** — A state statute imposing a tax on resident aliens is unconstitutional, being an interference with foreign commerce.<sup>5</sup>

*b. PROPERTY TAX*—(1) *Instrumentalities of Commerce*. — A state may tax all the property having a *situs* therein, notwithstanding it may belong to persons engaged in the business of transacting interstate commerce and be used therein, and it is immaterial what particular form the exaction takes provided it is essentially only property taxation.<sup>6</sup> The instrumentalities of interstate

**1. Partial Invalidity.** — *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 200, *citing* *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411.

The statute will be held invalid so far as it affects interstate business, but will be sustained so far as it affects business wholly within the state, if a separation can be made. See generally *supra*, this section, *Construction of Statutes—Construction to Sustain Statute*.

**Injunction.** — The levy of a tax on a company doing both local and interstate business will be enjoined until a separation between the two kinds of business can be made. *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60.

If the tax can be separated, the court will enjoin that portion only which is laid on interstate traffic. *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411. See also *Ratterman v. American Express Co.*, 49 Ohio St. 608.

**2. Discriminating Tax Void** — *United States*. — *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Cook v. Pennsylvania*, 97 U. S. 566; *Guy v. Baltimore*, 100 U. S. 434; *Walling v. Michigan*, 116 U. S. 446, *reversing* 53 Mich. 264; *Lyng v. Michigan*, 135 U. S. 161; *Brimmer v. Rebnan*, 138 U. S. 78; *Ex p. Thornton*, 12 Fed. Rep. 538; *Ex p. Hanson*, 28 Fed. Rep. 127.

*Alabama*. — *Vines v. State*, 67 Ala. 73; *Powell v. State*, 69 Ala. 10.

*Michigan*. — *Jackson Min. Co. v. Auditor General*, 32 Mich. 488; *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226, *reversing* 30 N. J. L. 473.

*New Jersey*. — *Kolb v. Boonton*, (N. J. 1899) 44 Atl. Rep. 873.

*New York*. — *People v. Wemple*, 138 N. Y. 1, 54 Am. & Eng. R. Cas. 1.

**Contra.** — *Davis v. Dashiell*, Phil. L. (61 N. Car) 114; *Huddleston v. Hagerty*, 2 Ohio N. P. 291, 1 Ohio Dec. 331.

**Foreign Peddlers.** — See the title HAWKERS AND PEDDLERS, vol. 15, p. 290.

**3. Effect of Failure to Discriminate.** — See *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *People v. Roberts*, 158 N. Y. 168. See also *Galveston County v. Gorham*, 49 Tex. 279. And see generally *supra*, this section, 3. *Discrimination Against Products and Citizens of Other States*.

A tax imposed upon business carried on within a state, but without discrimination between its citizens and the citizens of other states, is in no sense a regulation of interstate commerce, although it incidentally affects it, and it is therefore valid. *Applegarth v. State*, 89 Md. 140; *Kolb v. Boonton*, (N. J. 1899) 44 Atl. Rep. 873.

**4. Tax on Interstate Commerce Void Although Not Discriminating.** — *State v. Cumberland, etc., R. Co.*, 40 Md. 22; *State Freight Tax Case*, 15 Wall. (U. S.) 232.

**5. Tax on Resident Aliens Void.** — *Lin Sing v. Washburn*, 20 Cal. 534.

**6. Instrumentalities of Commerce Having Situs in State May Be Taxed** — *United States*. — *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Passenger Cases*, 7 How. (U. S.) 283; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; 7 Am. R. Rep. 312, *affirming* 7 Phila. (Pa.) 555; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117; *Leloup v. Mobile*, 127 U. S. 640; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, *affirming* *Montclair v. Ramsdell*, 107 U. S. 156; *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 9; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *Postal Tel. Cable Co.*



commerce having no *situs* within the state cannot be taxed by the state.<sup>1</sup> A state tax imposed on property because it is used in interstate or foreign commerce is void.<sup>2</sup>

(2) *Vessels*. — A municipal tax assessed on vessels having that city as their home port, and based on their valuation, is not void as an interference with interstate or foreign commerce.<sup>3</sup> It is not a regulation of commerce for a state to tax the interests of citizens of the state in vessels engaged in interstate and foreign commerce registered at the proper federal office in the state.<sup>4</sup> But such tax must not be a tonnage duty,<sup>5</sup> and must be levied only at the

*v. Adams*, 155 U. S. 688, *affirming* 71 Miss. 555, 42 Am. St. Rep. 476; *New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 431; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1; *Sanford v. Poe*, 165 U. S. 194, note 1; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150; *Weir v. Norman*, 166 U. S. 171, note 1; *Atty.-Gen. v. Western Union Tel. Co.*, 33 Fed. Rep. 129; *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *Sanford v. Poe*, 69 Fed. Rep. 546, 37 U. S. App. 378, *affirming* *Western Union Tel. Co. v. Poe*, 64 Fed. Rep. 9; *Reinhart v. McDonald*, 76 Fed. Rep. 403; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, *affirming* 24 Colo. 291.

*Indiana*. — *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513; *Indianapolis, etc., R. Co. v. Backus*, 133 Ind. 609; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625, 54 Am. & Eng. R. Cas. 227; *Western Union Tel. Co. v. Taggart*, 141 Ind. 281.

*Kentucky*. — *Com. v. Smith*, 92 Ky. 38, 36 Am. St. Rep. 578.

*Mississippi*. — *Postal Tel.-Cable Co. v. Adams*, 71 Miss. 555, 42 Am. St. Rep. 476.

*New Jersey*. — *Tide Water Pipe Co. v. State Board of Assessors*, 57 N. J. L. 516.

*New York*. — *People v. Tax, etc., Com'rs*, 48 Barb. (N. Y.) 157; *People v. Tierney*, 57 Hun (N. Y.) 357; *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542, *affirming* 61 Hun (N. Y.) 83; *People v. Roberts*, 36 N. Y. App. Div. 597.

*Pennsylvania*. — *Philadelphia v. American Union Tel. Co.*, 167 Pa. St. 406.

*South Dakota*. — *State v. State Board of Assessment*, 3 S. Dak. 338.

**Tax Not Based on Valuation of Property.** — While a state may impose a tax upon property within its borders, owned by a person or company engaged in carrying on interstate commerce, yet when it is apparent that the tax imposed is a mere arbitrary sum fixed by the state without regard to the value of the property, it will be regarded as a tax upon the business of the owner, and therefore such a regulation of interstate commerce as is forbidden by the Constitution. *Com. v. Smith*, 92 Ky. 38, 36 Am. St. Rep. 578.

**Privilege Tax in Lieu of All Other Taxes.** — A state tax on telegraph companies of a certain amount per mile of wires operated within the state, in lieu of all other state, county, and municipal taxes, and amounting to less than the usual *ad valorem* tax, is in substance a simple tax on property within the state, and as such is not void as to a foreign corporation engaged in interstate commerce. *Postal Tel.*

*Cable Co. v. Adams*, 155 U. S. 688, *affirming* 71 Miss. 555, 42 Am. St. Rep. 476.

**Privilege Tax in Addition to Property Tax.** — No state may add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce. *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688.

**Visible Property of Interstate Railway.** — A state may levy a tax upon the visible property of an interstate railway company situated in the state. *California v. Central Pac. R. Co.*, 127 U. S. 1, 33 Am. & Eng. R. Cas. 451.

**The Intangible Property of an Express Company** within the state, ascertained by the unit rule (see *infra*, this section, 44. d. (5), *Taxation by Unit Rule*), may be taxed without interfering with interstate commerce. *Weir v. Norman*, 166 U. S. 117, note 1.

**1. Property Not Having Situs in State.** — *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276.

**2. Tax on Property Because Used in Interstate or Foreign Commerce Void.** — *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 9; *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542, *affirming* 61 Hun (N. Y.) 83; *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 24 Am. & Eng. R. Cas. 511, *disapproving* *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587.

**3. Municipal Taxation at Home Port.** — *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Battle v. Mobile*, 9 Ala. 234, 44 Am. Dec. 438; *Wheeling, etc., Transp. Co. v. Wheeling*, 9 W. Va. 170, 27 Am. Rep. 552.

**4. Interest of Citizens in Vessels May Be Taxed.** — *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 373; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Passenger Cases*, 7 How. (U. S.) 283; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Howell v. State*, 3 Gill. (Md.) 14; *Gunther v. Baltimore*, 55 Md. 457; *People v. Tax, etc., Com'rs*, 48 Barb. (N. Y.) 157; *Perry v. Torrence*, 8 Ohio 521, 32 Am. Dec. 725; *Wheeling, etc., Transp. Co. v. Wheeling*, 9 W. Va. 170, 27 Am. Rep. 552.

**5. Tonnage Duties Prohibited.** — *Moran v. New Orleans*, 112 U. S. 69. See also *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 283. And see *supra*, this title, *Regulation of Interstate Commerce*, subdiv. 2. d. *Tonnage Duties*; and the title *TAXATION*.



port of registry upon a valuation made as other property in the state is valued, without unfavorable discrimination on account of its employment.<sup>1</sup>

The Expense of Quarantine Regulations cannot be raised by a tax on foreign owned ships engaged in interstate or international commerce.<sup>2</sup>

**Charge for Each of the Officers and Crew.** — A state statute requiring the payment of a sum of money for hospital purposes from masters of vessels engaged in the foreign coast trade, for each of the officers and crew of such vessel, is in conflict with the commerce clause of the Constitution, and is therefore void.<sup>3</sup>

(3) *Bridges.* — A state may levy a tax upon the property of a bridge company situated exclusively within the state, and upon the value of its franchise granted by the state, although the bridge connects two states and is used entirely for interstate business.<sup>4</sup> Where a bridge connects two states, the boundary line of which is a navigable river, each state may levy a tax upon the capital stock in proportion to the length of the bridge in each state.<sup>5</sup>

(4) *Imports Interstate and Foreign.* — A tax on goods and commodities transported into a state or out of it, or a tax upon the owner of such goods for the right so to transport them, is a regulation of interstate commerce such as is exclusively within the province of Congress.<sup>6</sup> But after the goods have arrived in the state and become mingled with and part of the general mass of property in the state, they may be taxed in the same manner that other similar property in the state is taxed, although they have been imported from other

1. *Moran v. New Orleans*, 112 U. S. 69, *citing* *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596, and *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

**State of Home Port Has Exclusive Taxing Jurisdiction.** — No state but that in which a vessel has her home port has dominion over her for the purpose of taxation. *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Moran v. New Orleans*, 112 U. S. 69.

2. **Tax on Foreign Owned Ships for Quarantine Purposes.** — *Peete v. Morgan*, 19 Wall. (U. S.) 581.

3. **Charge Exacted for Each Officer and Member of Crew Void.** — *People v. Brooks*, 4 Den. (N. Y.) 469. In this case, however, it was said that such a tax on the account of passengers would be valid; the court *citing* in support of this position, *New York v. Miln*, 11 Pet. (U. S.) 136.

A state tax providing a fund for a charitable hospital, being imposed exclusively on the passengers and not on the officers and crew of a vessel, is not a regulation of commerce, and is therefore valid. *State v. Fullerton*, 7 Rob. (La.) 210.

4. **Tax on Property of Bridge Company Within State.** — *Henderson Bridge Co. v. Henderson*, 141 U. S. 679, *affirming* 99 Ky. 623, and *distinguished* in *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279.

**Bridge Company Not Engaged in Transportation.** — Where the business of transportation is not carried on by a bridge company, but by persons and corporations that pay tolls to the bridge company, a state tax on the intangible property within the state of the bridge company is not void as a tax on interstate commerce, and its effect thereon is only remote and incidental. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, *affirming* 99 Ky. 623.

**Tax on Capital Stock.** — A tax on the capital

stock of a bridge company which owns a bridge spanning a river between two states, but which does not transact any interstate business over the bridge, such business being carried by persons and corporations that pay the bridge company tolls for the privilege of using the bridge, is not a tax upon interstate commerce. *Keokuk, etc., Bridge Co. v. Illinois*, 175 U. S. 626, *affirming* 176 Ill. 267; and *citing* *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, and *Henderson Bridge Co. v. Henderson*, 173 U. S. 592.

5. **Tax in Proportion to Length of Bridge in State.** — *Keokuk, etc., Bridge Co. v. Illinois*, 175 U. S. 627, *affirming* 176 Ill. 267.

6. **Tax on Goods Transported — United States.** — *State Freight Tax Case*, 15 Wall. (U. S.) 232, 282, *reversing* 62 Pa. St. 286, 1 Am. Rep. 399; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Baltimore, etc., R. Co. v. Maryland*, 21 Wall. (U. S.) 456, 6 Am. R. Rep. 483; *Neil v. Ohio*, 3 How. (U. S.) 720, *reversing* 7 Ohio (pt. i.) 132, 28 Am. Dec. 623; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193, 11 Biss. (U. S.) 561, 13 Am. & Eng. R. Cas. 307; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Hewe Mach. Co. v. Gage*, 100 U. S. 676; *Indiana v. American Express Co.*, 7 Biss. (U. S.) 227, 13 Fed. Cas. No. 7,021; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

*Kansas.* — *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. & Eng. R. Cas. 432.

*Maryland.* — *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *State v. Cumberland, etc., R. Co.*, 40 Md. 22.

*Michigan.* — *Jackson Min. Co. v. Auditor-General*, 32 Mich. 488.

*New Jersey.* — *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226, *reversing* 30 N. J. L. 473; *State v. Carrigan*, 39 N. J. L. 35.

*New York.* — *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542, *affirming* 61 Hun (N. Y.) 83.

*Compare* *Pennsylvania R. Co. v. Com.*, 3 Grant Cas. (Pa.) 128.



states or from foreign countries.<sup>1</sup> So long as goods remain the property of the importer, in the original form or package in which imported, a tax upon them by a state is a duty upon imports, and therefore unconstitutional,<sup>2</sup> but after merchandise in the original package has once been sold by the importer it becomes incorporated with the mass of property of the state and is taxable as other property of the state.<sup>3</sup>

**Discrimination.** — A state cannot levy a discriminating tax on foreign or domestic imports even after they have become mingled with the common mass of property of the state,<sup>4</sup> and it matters not whether the tax is laid directly upon the article sold, or in the form of licenses for their sale.<sup>5</sup> The taxing of goods coming from other states, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed.<sup>6</sup> But the mere fact that the mode of collecting the tax on the article made in the state is different from that of collecting the tax on articles brought from another state will not render the tax on the latter articles void as a discriminating tax, where the rate of taxation is the same for both classes of articles.<sup>7</sup>

(5) *Exports.* — Goods cannot be taxed by a state by reason of their being intended for exportation, even though they still remain a part of the general mass of property of the state.<sup>8</sup> But the mere intention of the owner of goods to export them does not exempt such goods from state taxation, provided they

**1. Imports May Be Taxed After Mingling with Mass of Property of State.** — *United States.* — *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Brown v. Houston*, 114 U. S. 622; *Welton v. Missouri*, 91 U. S. 282; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Coe v. Errol*, 116 U. S. 517; *Pittsburg, etc., Coal Co. v. Bates*, 156 U. S. 577; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Turpin v. Burgess*, 117 U. S. 504; *Exp. Hanson*, 28 Fed. Rep. 127.

*Alabama.* — *Mobile v. Waring*, 41 Ala. 139.

*District of Columbia.* — *In re Wilson*, 19 D. C. 341.

*Georgia.* — *Padelford v. Savannah*, 14 Ga. 438.

*Indiana.* — *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156.

*Louisiana.* — *Brown v. Houston*, 33 La. Ann. 843, 39 Am. Rep. 284; *Pittsburg, etc., Coal Co. v. Bates*, 40 La. Ann. 226, 8 Am. St. Rep. 519; *Gelpi v. Schenck*, 48 La. Ann. 1535.

*Maryland.* — *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

*Mississippi.* — *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581, 41 Am. Dec. 633.

*New York.* — *People v. Roberts*, 158 N. Y. 162, affirming 27 N. Y. App. Div. 632.

See also *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

**When Goods Become Mingled with Mass of Property of State.** — For a full discussion of this subject, see *supra*, this title, *What Constitutes Interstate Commerce* — *Subjects of Interstate Commerce*. See also cases cited *supra*, this note.

**2. Goods in Original Packages Cannot Be Taxed.** — *Brown v. Maryland*, 12 Wheat. (U. S.) 419. This is the first of all the "original package" cases. See also *New York v. Miln*, 11 Pet. (U. S.) 102; *Welton v. Missouri*, 91 U. S. 282; *State v. Allmond*, 2 Houst. (Del.) 612.

**Storage of Beer in Original Packages.** — *Wilson Law.* — A city ordinance imposing a license tax

upon each brewery, depot, or agency of a brewery maintained in the city, no provision being made for the supervision, control, or regulation of such breweries, depots, or agencies, is not an exercise of the police power of the state within the meaning of the Wilson Act, but is purely a revenue measure, and therefore does not apply to a brewery depot maintained for the purpose of storing beer in the original packages. *Pabst Brewing Co. v. Terre Haute*, 98 Fed. Rep. 330.

**3. Merchandise in Original Package Once Sold.** — *Pervear v. Com.*, 5 Wall. (U. S.) 475.

**Purchase Before Delivery to Port of Entry.** — Goods purchased from an importer after they have been brought within the jurisdiction of the United States, but before they have been delivered to the port of entry to which they were consigned, are subject to taxation by state authority. *Mobile v. Waring*, 41 Ala. 139.

**4. Discriminating Tax Void.** — *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Tiernan v. Rinker*, 102 U. S. 123; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Brown v. Houston*, 114 U. S. 622; *Webber v. Virginia*, 103 U. S. 344; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Coe v. Errol*, 116 U. S. 517; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326 [*criticizing State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284]; *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

**5. Mode of Taxation Immaterial.** — *Webber v. Virginia*, 103 U. S. 344.

**6. Tax Because of Foreign Origin Void as a Tax on Commerce.** — *Brown v. Houston*, 114 U. S. 622.

**7. Difference in Mode of Collection Immaterial.** — *Hinson v. Lott*, 8 Wall. (U. S.) 148.

**8. Goods Intended for Export.** — *Coe v. Errol*, 116 U. S. 517; *Carrier v. Gordon*, 21 Ohio St. 608; *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.



are taxed in the usual manner, and not because of their anticipated departure.<sup>1</sup> Until the goods are actually started in course of transportation to the state of their destination, or delivered to the carrier for that purpose, they are subject to state taxation.<sup>2</sup> Goods purchased by a citizen of another state, but remaining in the state to undergo a further process of manufacture, may be taxed by the state without violating the commerce clause of the Constitution, because such goods have a *situs* in the state.<sup>3</sup> Grain bought by an agent on commission for a nonresident principal, and stored in the agent's warehouse, is subject to taxation.<sup>4</sup> Coal mined in one state by a foreign corporation whose business office is in another state is not taxable by the former state while awaiting shipment to purchasers in other states.<sup>5</sup>

(6) *Goods in Transit.* — A state tax upon freight in the course of transportation is void, and it is immaterial whether the tax is laid by the state of origin or the state of destination. In the one case the protection of the commerce clause has attached, and in the other such protection has not ceased.<sup>6</sup> So long as the tax is really upon the freight carried it is in conflict with the commerce clause of the Constitution, although the tax itself is collected from the carrier.<sup>7</sup> There is an obvious distinction between a tax which intercepts the import, as an import, on its way to become incorporated with the general mass of property in the state, and a tax which finds the article already incorporated with that mass by the act of the importer.<sup>8</sup>

*Temporary Interruption of Transit in State.* — A tax on property belonging to the citizens of another state in its transit through a state, which is delayed therein merely for the purpose of separation and assortment, is a tax on commerce.<sup>9</sup> So property which is delayed within the state merely for reshipment has no *situs* within the state for the purpose of taxation.<sup>10</sup>

(7) *Bonds, Credits, and Choses in Action* — *Bonds.* — A state statute taxing personal property and declaring that personal property shall include moneys, credits, bonds, etc., wherever situated, does not constitute an attempt by the

1. *Intention to Export No Exemption from Taxation.* — *Coe v. Errol*, 116 U. S. 517; *Turpin v. Burgess*, 117 U. S. 504; *State v. Cumberland, etc.*, R. Co., 40 Md. 22. *Contra*, *Rothermel v. Meyerle*, 136 Pa. St. 250, 26 W. N. C. (Pa.) 422.

*Accident of Subsequent Exportation.* — Where a general tax is laid on all property of the state alike, it cannot be construed as a duty upon exports when falling upon goods not then intended for exportation, if they should happen to be exported afterwards. *Brown v. Houston*, 114 U. S. 622.

2. *Actual Commencement of Transportation.* — See *supra*, this title, *What Constitutes Interstate Commerce* — *When Protection of Commerce Clause Attaches.*

3. *Goods Remaining in State for Further Manufacture.* — *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156; *Rieman v. Shepard*, 27 Ind. 288; *Powell v. Madison*, 21 Ind. 335.

4. *Grain Purchased and Stored for Nonresident Principal.* — *Walton v. Westwood*, 73 Ill. 125.

5. *Goods Awaiting Shipment to Nonresident Purchaser.* — *State v. Carrigan*, 39 N. J. L. 35.

6. *Tax on Goods in Transit Is Void* — *United States.* — *State Freight Tax Case*, 15 Wall. (U. S.) 232, reversing 62 Pa. St. 286, 1 Am. Rep. 399; *Cooley v. Board of Wardens*, 12 How. (U. S.) 299; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Coe v. Errol*, 116 U. S. 517, reversing 62 N. H. 303; *Walling v. Michigan*, 116 U. S. 446; *Turpin v. Burgess*, 117 U. S. 504; *Robbins v. Shelby County Taxing Dist.*,

120 U. S. 489. See also *People v. Commissioners*, 104 U. S. 466.

*Indiana.* — *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156.

*Maryland.* — *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

*New Jersey.* — *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226; *State v. Engle*, 34 N. J. L. 425; *State v. Carrigan*, 39 N. J. L. 35.

*When Property Is in Transit.* — Property ready for transportation should be regarded as *in transitu*, and exempt from taxation, provided there is a purpose to ship immediately, or at least as soon as transportation can be conveniently obtained, followed by actual shipment in a reasonable time. *Standard Oil Co. v. Combs*, 96 Ind. 181, 49 Am. Rep. 156; *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *Ogilvie v. Crawford County*, 7 Fed. Rep. 745. See also *State v. Carrigan*, 39 N. J. L. 35.

See generally *Walton v. Westwood*, 73 Ill. 125; *Rieman v. Shepard*, 27 Ind. 288; *Powell v. Madison*, 21 Ind. 335; *Standard Oil Co. v. Combs*, 96 Ind. 181, 49 Am. Rep. 156. See also *supra*, this title, *What Constitutes Interstate Commerce* — *When Protection of Commerce Clause Attaches.*

7. *Collection of Tax from Carrier Immaterial.* — *State Freight Tax Case*, 15 Wall. (U. S.) 232.

8. *Tax Intercepting Imports.* — *Leisy v. Hardin*, 135 U. S. 100.

9. *Temporary Interruption for Separation and Assortment.* — *State v. Engle*, 34 N. J. L. 425.

10. *Delay for Reshipment.* — *State v. Carrigan*,



state to regulate commerce among the several states, although it results in the taxation of bonds executed in other states and expressly subject to their laws.<sup>1</sup> A state statute making private corporations, domestic and foreign, responsible for the assessment and collection of taxes on bonds issued by them and held by residents of the state, requiring a deduction of a state tax by the corporate officers in paying interests owned by residents of the state, is not void as being a regulation of commerce.<sup>2</sup>

A Tax on a Chose in Action owned by a resident of the state is not void as being a regulation of interstate commerce, although the debtor is a nonresident.<sup>3</sup>

*c. TRAVELERS AND IMMIGRANTS.* — It is a settled matter that to tax the transit of passengers from foreign countries or between the states is to regulate commerce, and therefore such a tax is void.<sup>4</sup> A state tax on immigrants is void.<sup>5</sup>

*d. CARRIERS* — (1) *Freight.* — A state statute requiring all carriers doing business in the state to pay a tax upon all merchandise carried, based upon the weight of the merchandise, is in conflict with the commerce clause of the Constitution so far as it relates to interstate traffic.<sup>6</sup>

(2) *Passengers* — In General. — A state statute imposing a tax upon carriers for each passenger transported across any portion of the state is void as an interference with interstate commerce in so far as it operates upon persons entering into, departing from, or passing through the state.<sup>7</sup> The tax on the

39 N. J. L. 35, citing *State v. Engle*, 34 N. J. L. 425.

1. *Taxation of Bonds Subject to Laws of Other States.* — *Kirtland v. Hotchkiss*, 100 U. S. 491.

2. *Statute Making Corporations Liable for Taxes on Their Bonds.* — *Com. v. New York, etc., R. Co.*, 150 Pa. St. 234; *Com. v. Delaware, etc., Canal Co.*, 150 Pa. St. 245.

3. *Tax on Debt of Nonresident to Resident.* — *Atlanta Nat. Bldg., etc., Assoc. v. Stewart*, 109 Ga. 80.

4. *Tax on Transit Passengers Void.* — *Henderson v. New York*, 92 U. S. 259; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

As to taxes on carriers on account of passengers carried, see *infra*, this subdivision, *d. (2) Passengers.*

In *Crandall v. Nevada*, 6 Wall. (U. S.) 35, a statute of Nevada, which in effect laid a tax upon every traveler passing through or beyond its territorial limits, was adjudged to be invalid, but not on the ground that it was a regulation of interstate commerce. Chief Justice Chase and Mr. Justice Clifford dissented from this conclusion, and pronounced the act to be a regulation of interstate commerce exclusively within the jurisdiction of Congress. See also *Hardy v. Atchison, etc., R. Co.*, 32 Kan. 698, 18 Am. and Eng. R. Cas. 432.

*Persons Temporarily in State.* — A state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489.

5. *Tax on Immigrants.* — *People v. Downer*, 7 Cal. 169; *Mitchell v. Steelman*, 8 Cal. 363.

6. *Tax Based on Weight of Merchandise Carried.* — *Baltimore, etc., R. Co. v. Maryland*, 21 Wall. (U. S.) 456; *Pickard v. Pullman Southern*

*Car Co.*, 117 U. S. 34; *Fargo v. Michigan*, 121 U. S. 230; *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60; *State Freight Tax Case*, 15 Wall. (U. S.) 232, reversing 62 Pa. St. 286, 1 Am. Rep. 399, and followed in *State Freight Tax Case*, 15 Wall. (U. S.) 282, and *State v. Cumberland, etc., R. Co.*, 40 Md. 22; *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226, reversing 30 N. J. L. 473.

A Tax upon Freight Taken Up Without the State and Brought Within It is equally repugnant to the constitutional provision with a tax on freight carried across the state. *State v. Carigan*, 39 N. J. L. 35, citing *State Freight Tax Case*, 15 Wall. (U. S.) 232.

*Charter of Carrier Providing for Taxation.* — A clause in the charter of a railroad company, providing that all tonnage, of whatever kind or description, except the ordinary baggage of passengers, carried or conveyed on said railroad in each and every year, shall be subject to a toll or duty for the use of the commonwealth of three mills per ton per mile, is simply a mode of taxing the company according to the magnitude of its business, and is not intended as a tax on commerce, and is valid. The acceptance by the company of a charter with such a provision is equivalent to an express contract to pay the tax. Treated as a contract, therefore, between the state and the corporation, it is not to be tested by the Constitution as a law of the state; regarded as a law, the company cannot complain of it, for they freely subjected themselves to it, for the sake of the benefits offered with it. *Pennsylvania R. Co. v. Com.*, 3 Grant Cas. (Pa.) 128.

7. *Transportation of Passengers Cannot Be Taxed* — *United States.* — *Baltimore, etc., R. Co. v. Maryland*, 21 Wall. (U. S.) 456; *Henderson v. New York*, 92 U. S. 259, reviewing *Passenger Cases*, 7 How. (U. S.) 283; *Hannibal, etc., R. Co. v. Husen*, 95 U. S. 465; *Howe Mach. Co. v. Gage*, 100 U. S. 676, citing *Passenger Cases*, 7 How. (U. S.) 283; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Fargo v. Michi-*



carrier is regarded as substantially a tax on the passenger, since the carrier will make him pay it in advance as part of his fare.<sup>1</sup>

**Passengers in Sleeping Cars.** — A state cannot tax the transportation of passengers from one state to another in sleeping cars.<sup>2</sup>

**Alien Passengers.** — State statutes imposing taxes upon carriers for alien passengers brought into the state are void.<sup>3</sup>

**Contract in Charter.** — Where a railway accepts a charter requiring it to pay over to the state a certain percentage of all moneys received for the transportation of passengers, such provision operates merely as a tax upon the company with its consent, and is not a capitation tax or a tax upon a passenger's right of transit through the state, and is therefore not unconstitutional.<sup>4</sup>

(3) **Rolling Stock — General Rule.** — A tax upon the ordinary and lawful means of transportation is really a tax upon the thing carried, and therefore a state statute taxing locomotives, passenger and freight cars, etc., for the purpose of revenue, involves a tax upon interstate commerce and is unconstitutional and void where the owner of such locomotives and cars has no domicile within the state, and the property has otherwise no *situs* in the state, and is used in interstate transportation.<sup>5</sup> A state cannot tax the rolling stock of a foreign railroad company which is used in interstate commerce.<sup>6</sup> But the mere fact that cars are employed as vehicles of transportation in the interchange of interstate commerce will not render their taxation by a state invalid,<sup>7</sup> because, as has been seen, the instrumentalities of interstate or foreign commerce may be taxed as property.<sup>8</sup>

**Cars Habitually Used Within State.** — A state may tax the rolling stock of a foreign

gan, 121 U. S. 230; Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326; People v. Pacific Mail Steam-Ship Co., 16 Fed. Rep. 344; Pullman's Palace Car Co. v. Twombly, 29 Fed. Rep. 658; People v. Compagnie Générale Transatlantique, 107 U. S. 59, holding that the tax is not relieved from this constitutional objection by calling it an inspection law, and *affirming* 10 Fed. Rep. 357, 20 Blatchf. (U. S.) 296. See also "Head-Money Cases," 18 Fed. Rep. 135.

*Delaware.* — Clarke v. Philadelphia, etc., R. Co., 4 Houst. (Del.) 158, 6 Am. R. Rep. 7.

*New Jersey.* — Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226.

*Compare* People v. Brooks, 4 Den. (N. Y.) 469; New York v. Miln, 11 Pet. (U. S.) 136.

*Contra.* — State v. Delaware, etc., R. Co., 30 N. J. L. 473; Crandall v. Nevada, 6 Wall. (U. S.) 35, *reversing* 1 Nev. 294.

1. **Tax on Carrier Is Tax on Passenger.** — Henderson v. New York, 92 U. S. 259.

2. **Transportation in Sleeping Cars Cannot Be Taxed.** — State v. Woodruff Sleeping, etc., Coach Co., 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798; Indiana v. Pullman Palace Car Co., 11 Biss. (U. S.) 561, 16 Fed. Rep. 193, 13 Am. & Eng. R. Cas. 307; Pickard v. Pullman Southern Car Co., 117 U. S. 34.

3. **Tax on Carriers for Alien Passengers Void.** — Passenger Cases, 7 How. (U. S.) 283; People v. Compagnie Générale Transatlantique, 107 U. S. 59, *citing with approval* Henderson v. New York, 92 U. S. 259, and Chy Lung v. Freeman, 92 U. S. 275; People v. Edye, 11 Daly (N. Y.) 132. *Compare* People v. Brooks, 4 Den. (N. Y.) 469.

4. **Tax Authorized by Contract in Charter of Carrier.** — State v. Baltimore, etc., R. Co., 34 Md. 344, *affirmed* 21 Wall. (U. S.) 456. *Compare* State v. Fullerton, 7 Rob. (La.) 210. See

also Pennsylvania R. Co. v. Com., 3 Grant Cas. (Pa.) 128.

5. **Means of Interstate Transportation Cannot Be Taxed.** — Delaware Railroad Tax, 18 Wall. (U. S.) 206, *affirming* 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645; Pickard v. Pullman Southern Car Co., 117 U. S. 34; Marye v. Baltimore, etc., R. Co., 127 U. S. 124; Central R. Co. v. State Board of Assessors, 49 N. J. L. 1, *reviewing* Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226, and Hays v. Pacific Mail Steamship Co., 17 How. (U. S.) 596.

As to taxation of rolling stock generally, and particularly the *situs* for taxation, see Comstock v. Grand Rapids, 54 Mich. 641, 17 Am. & Eng. R. Cas. 457.

6. **Rolling Stock of Foreign Railroad Company Cannot Be Taxed.** — Minot v. Philadelphia, etc., R. Co., 2 Abb. (U. S.) 323, *affirmed* 18 Wall. (U. S.) 206; Indiana v. Pullman Palace Car Co., 11 Biss. (U. S.) 561, 13 Am. & Eng. R. Cas. 307; Pullman Southern Car Co. v. Nolan, 22 Fed. Rep. 276, 17 Am. & Eng. R. Cas. 398; Pickard v. Pullman Southern Car Co., 117 U. S. 34, 24 Am. & Eng. R. Cas. 511; Tennessee v. Pullman Southern Car Co., 117 U. S. 51; Central R. Co. v. State Board of Assessors, 49 N. J. L. 1; Bain v. Richmond, etc., R. Co., 105 N. Car. 363, 18 Am. St. Rep. 912.

*Contra.* — Pullman Southern Car Co. v. Gaines, 3 Tenn. Ch. 587; *disapproved* in Pickard v. Pullman Southern Car Co., 117 U. S. 34, 24 Am. & Eng. R. Cas. 511, which latter case was *followed* in Tennessee v. Pullman Southern Car Co., 117 U. S. 51.

7. **Mere Employment in Interstate Transportation No Exemption from Taxation.** — Marye v. Baltimore, etc., R. Co., 127 U. S. 124.

8. **Taxing Instrumentalities of Commerce.** — See *supra*, this subdivision, b. (1) *Instrumentalities of Commerce*.



railroad corporation habitually used within the state, although such rolling stock is used as a vehicle of interstate commerce,<sup>1</sup> because personal property may have an actual *situs* for purposes of taxation different from the domicile of the owner.<sup>2</sup> Such a tax may be properly assessed and collected even where the specific and individual items of property so used and employed are not continuously the same, but are constantly changing. In such cases the tax may be fixed by an appraisal and valuation of the average amount of the property thus habitually used and collected by distraint upon any portion that may at any time be found.<sup>3</sup>

(4) *Gross Receipts* — (a) *Receipts from Interstate and Foreign Transportation.* — A state statute imposing a tax upon the gross receipts of railway, express, or telegraph companies for tolls and transportation is void as an interference with interstate commerce in so far as such receipts are derived from transportation between different states or between a state and foreign countries.<sup>4</sup> A different view has been taken by many state courts, but these decisions must be considered as overruled by the later decisions of the Supreme Court.<sup>5</sup> Clearly a

1. *Cars Habitually Used Within State.* — *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117; *Reinhardt v. McDonald*, 76 Fed. Rep. 403; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, *affirming* 24 Colo. 291; *Denver, etc., R. Co. v. Church*, 17 Colo. 1, 31 Am. St. Rep. 252. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

*Cars Loaned for Use Within State.* — A statute authorizing the assessment of all property used by one corporation and belonging to another, to either the corporation using it or the one owning it, is not void as an interference with interstate commerce, even as applied to the case of a transportation company loaning cars to a railroad company for special purposes. *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, *affirmed* 174 U. S. 70.

2. *Situs for Purposes of Taxation.* — Although in such case it is true that as the *situs* of such foreign railroad corporation is in another state, so also, upon general principles, the *situs* of all its personal property is in such state; yet for the purposes of taxation, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117.

3. *Tax Based on Average Number of Cars Used Within State.* — *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, *affirming* 24 Colo. 291. *Compare* *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

4. *Tax on Receipts from Interstate and Foreign Transportation* — *United States.* — *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460, *reversing* 55 Tex. 314; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Fargo v. Michigan*, 121 U. S. 230, 31 Am. & Eng. R. Cas. 452; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, *distinguishing* *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Mobile*, 127 U. S. 640, *reversing* 76 Ala. 401; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472, *reversing* 80 Ala. 273,

60 Am. Rep. 99; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 431; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193, 11 Biss. (U. S.) 561, 13 Am. & Eng. R. Cas. 307; *Southern R. Co. v. Asheville*, 69 Fed. Rep. 359. *Compare* *State Freight Tax Case*, 15 Wall. (U. S.) 283. But see *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284.

*Dakota.* — *Northern Pac. R. Co. v. Raymond*, 5 Dak. 356, 37 Am. & Eng. R. Cas. 379, 2 Int. Com. Rep. 321.

*Indiana.* — *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798.

*New York.* — *People v. Wemple*, 138 N. Y. 1.

*North Dakota.* — *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310; *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 395; *Northern Pac. R. Co. v. Brewer*, 2 N. Dak. 396; *Northern Pac. R. Co. v. Tressler*, 2 N. Dak. 397.

*Pennsylvania.* — *Com. v. Lehigh Valley R. Co.*, (Pa. 1888) 17 Atl. Rep. 179; *Delaware, etc., Canal Co. v. Com.*, (Pa. 1888) 17 Atl. Rep. 175, 31 Am. & Eng. R. Cas. 359.

*Vermont.* — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1.

*Municipal Taxation under Authority of Void Statute.* — A state statute authorizing a municipal corporation to levy a tax upon the gross receipts of persons engaged in interstate commerce and doing business within the municipal corporation is void, and therefore any tax levied by the municipal corporation under the authority of such statute is likewise void, though, as a matter of fact, it is limited to business done merely within the state and does not touch any interstate business. *Southern R. Co. v. Asheville*, 69 Fed. Rep. 359.

5. *Overruled State Decisions.* — *Western Union Tel. Co. v. Alabama State Board of Assessment*, 80 Ala. 273, 60 Am. Rep. 99, *reversed* in 132 U. S. 472; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *People v. Campbell*, 74 Hun (N. Y.) 210; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Philadelphia, etc., Steamship Co. v. Com.*, 104 Pa. St. 109; *Western Union Tel. Co. v. Com.*, 110 Pa. St. 405; *Southern Express Co. v. Hood*, 15 Rich. L. (S. Car.) 66, 94 Am. Dec. 141; *Pullman's Palace Car Co. v. Com.*, 107 Pa. St. 148.



state has no power to impose a tax upon the receipts of a foreign corporation for the transportation of merchandise received out of the state and simply carried through the state, as such a tax is an interference with interstate commerce.<sup>1</sup>

**Franchise and Property Tax.** — In virtue of its right to tax the property of corporations the state may lay a tax upon the gross receipts of a carrying company, estimating it after those receipts have been collected and have become the property of the company, and in virtue of the right to tax the franchises of corporations the state may resort to the gross receipts as a measure of probable value.<sup>2</sup>

**Income Tax.** — A tax on the gross receipts of a transportation company cannot be sustained as an income tax.<sup>3</sup>

(b) **Receipts from Internal Transportation.** — A state may levy a tax upon the gross earnings within the state of persons or corporations engaged in interstate commerce. A tax upon the receipts of carriers for business done wholly within the state is not an interference with interstate commerce.<sup>4</sup> A state statute taxing the gross earnings of a carrier will be construed, if possible, to apply only to local or domestic traffic so as to sustain the statute.<sup>5</sup> A state may impose a tax on the gross receipts for the transportation of goods and passengers by continuous carriage from one point in the state to another point in the same state, although part of the route is over the soil of another state, inasmuch as such transportation does not constitute interstate commerce.<sup>6</sup>

(c) **Receipts Mingled with Mass of Property of State.** — A state may tax money actually within the state, after it has passed beyond the stage of compensation for carrying persons or property between the states, as it may tax other money or property within its limits.<sup>7</sup>

**Carrier with Lines Limited to State.** — A tax levied by state authority upon the gross receipts of an express company whose business consists in receiving goods to be delivered outside of the state, where the company's line does not extend, is not a violation of the commerce clause of the Constitution. *American Union Express Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382, citing *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284. But compare *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798.

**1. Property Carried Through State by Foreign Corporation.** — *U. S. Express Co. v. Hemmingway*, 39 Fed. Rep. 60. See also *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798.

**Tax Proportioned to Distance Traveled Within State.** — Where a tax is levied upon the gross earnings of a sleeping car company, the fact that the amount of tax is restricted to the distance passengers are carried through the state does not render it valid, for the tax assumed to be levied is upon the interstate commerce and not upon the internal commerce of the state. *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798. Compare *American Union Express Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382.

**2. Franchise and Property Tax — Valuation Based on Gross Receipts.** — *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284. See also *People v. Campbell*, 74 Hun (N. Y.) 210; *State v. State Board of Assessment*, 3 S. Dak. 338.

**3. Not Sustained as Income Tax.** — *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326.

**4. Gross Earnings Within State May Be Taxed** — *United States*. — *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 431; *Crutcher v. Kentucky*, 141 U. S. 59; *U. S. Express Co. v. Hemingway*, 39 Fed. Rep. 60; *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310, holding that Act of *Missouri*, May 16, 1889, which imposes on express companies a tax on "receipts for business done within this state," is not an interference with interstate commerce; affirmed 142 U. S. 339.

*Indiana*. — *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155, 33 Am. & Eng. R. Cas. 476, 1 Int. Com. Rep. 798.

*Michigan*. — *Walcott v. People*, 17 Mich. 68. *New York*. — *People v. Wemple*, 52 Hun (N. Y.) 434.

*North Dakota*. — *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310, 395; *Northern Pac. R. Co. v. Brewer*, 2 N. Dak. 396; *Northern Pac. R. Co. v. Tressler*, 2 N. Dak. 397.

**5. Construction to Sustain Statute.** — *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310, 53 Am. & Eng. R. Cas. 616. See generally *supra*, this section, 2. a. *Construction to Sustain Statute*.

**6. Carriage Between Points in Same State but through Another State.** — *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, affirming 129 Pa. St. 308. See also *supra*, this title, *What Constitutes Interstate Commerce*, subd. 2. a. *Carriage of Freight and Passengers*.

**7. Receipts Mingled with Mass of Property of State May Be Taxed.** — *State Tax on Railway*



(d) **Foreign Building and Loan Associations.** — A statute requiring foreign building and loan associations doing business in a state to pay a tax upon their gross receipts is not unconstitutional as an interference with interstate commerce.<sup>1</sup>

(5) **Taxation by Unit Rule.** — The property of corporations engaged in interstate commerce, situated in the several states through which their lines of business extend, may be valued as a unit for the purposes of taxation, taking into consideration the uses to which it is put and all the elements making up its aggregate value; and a proportion of the whole fairly ascertained may be taxed by the particular state without violating any federal restriction.<sup>2</sup> This rule has been applied to railroad, express, telegraph, sleeping car, and other similar companies, foreign or domestic, operating through several states, and taxes upon their intangible property, capital stock, gross receipts, or incomes have been sustained where levied upon that proportion of the whole which the miles operated within the state bear to the entire mileage operated both within and without the state.<sup>3</sup> Such a tax is essentially a property tax upon property owned and used within the state.<sup>4</sup> Taxation by the unit rule has been several times declared void as an unconstitutional interference with interstate commerce, or as an attempt to tax property situated in other states, but these decisions must be considered as overruled by the later decisions of the Supreme Court.<sup>5</sup>

(6) **Office Tax.** — A state statute imposing a tax upon a railroad company which is a link in a through line of road engaged in interstate commerce, as a condition precedent to allowing it to keep an office in such state for the use of its officers, agents, and employees, is a tax upon interstate commerce, and as such is void.<sup>6</sup>

c. **FRANCHISE TAX ON CORPORATIONS.** — A state statute imposing on

Gross Receipts, 15 Wall. (U. S.) 294 [*distinguishing* State Freight Tax Case, 15 Wall. (U. S.) 232]; *Fargo v. Michigan*, 121 U. S. 230, 31 Am. & Eng. R. Cas. 452.

There is a distinction between a tax on transportation and a tax upon its fruits, realized and reduced to possession, so as to have become part of the general capital and property of the taxpayer. *Moran v. New Orleans*, 112 U. S. 69, *citing* State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284.

1. **Gross Receipts of Foreign Building and Loan Association May Be Taxed.** — *Southern Bldg., etc., Assoc. v. Norman*, 98 Ky. 294, 56 Am. St. Rep. 367.

2. **Taxation by Unit Rule Valid** — *United States*. — *Delaware Railroad Tax*, 18 Wall. (U. S.) 206, 7 Am. R. Rep. 312, *affirming* 7 Phila. (Pa.) 555; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *State Railroad Tax Cases*, 92 U. S. 575; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 46 Am. & Eng. R. Cas. 236, *affirming* 107 Pa. St. 156; *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, *affirming* 107 Pa. St. 156; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 48 Am. & Eng. R. Cas. 602; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, *distinguishing* *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, *affirming* 71 Miss. 555, 42 Am. St. Rep. 476; *New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 431; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1; *Adams Express Co. v.*

*Kentucky*, 166 U. S. 171; *Weir v. Norman*, 166 U. S. 171, note 1; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193; *Atty.-Gen. v. Western Union Tel. Co.*, 33 Fed. Rep. 129; *Pullman's Palace-Car Co. v. Board of Assessors*, 55 Fed. Rep. 206; *Sanford v. Poe*, 165 U. S. 194, note 1, 69 Fed. Rep. 546, 37 U. S. App. 378, *affirming* *Western Union Tel. Co. v. Poe*, 64 Fed. Rep. 9. See also *Keokuk, etc., Bridge Co. v. Illinois*, 175 U. S. 627.

*Connecticut*. — *State v. New York, etc., R. Co.*, 60 Conn. 326.

*Indiana*. — *Western Union Tel. Co. v. Taggart*, 141 Ind. 281.

*New Jersey*. — *Tide Water Pipe Co. v. State Board of Assessors*, 57 N. J. L. 516.

See also *State v. State Board of Assessment*, 3 S. Dak. 338. But *compare* *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1.

3. See cases in preceding note.

4. **Tax on Property Within State.** — *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193, 11 Biss. (U. S.) 561, 13 Am. & Eng. R. Cas. 307.

5. **Overruled Cases.** — *Indiana v. Pullman Palace Car Co.*, 16 Fed. Rep. 193, 11 Biss. (U. S.) 561, 13 Am. & Eng. R. Cas. 307; *State v. Woodruff Sleeping, etc., Coach Co.*, 114 Ind. 155; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1.

6. **Office Tax Void.** — *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, *reversing* 114 Pa. St. 526.



all corporations doing business within the state a tax proportioned to the total amount of their capital stock, without regard to what part thereof is employed within the state, or to the amount or kind of business done there, imposes purely a franchise tax, and even as applied to a corporation engaged in interstate commerce cannot be considered as a tax upon interstate commerce.<sup>1</sup> A state may impose upon domestic corporations engaged in state and interstate commerce a franchise tax measured by the whole capital or business or dividends, or in any other way in the discretion of the legislature, without regard to that part of the business arising from interstate commerce, provided no hostile discrimination is made against such part.<sup>2</sup> A state statute imposing a tax on foreign corporations doing business in the state, based on the amount of capital used by the corporation in the state, is not a regulation of interstate commerce.<sup>3</sup>

**Franchise Granted by United States.** — An assessment for taxation by a state of a franchise granted by Congress to operate an interstate railroad is void, as it is inconsistent with the power of Congress to regulate commerce among the several states.<sup>4</sup>

**f. INCORPORATION CHARGES.** — The imposition of a fee on corporations for filing articles of incorporation is not a tax on interstate commerce, although the corporation is engaged in such business.<sup>5</sup>

**g. SALES WITHIN STATE — General Rule.** — A state may impose a uniform tax on all sales made in it, whether such sales be made by one of its own citizens or the citizens of another state, and whether the goods sold are the produce of the state imposing the tax, or of some other state.<sup>6</sup>

**Discrimination.** — A state statute taxing the sale of certain goods but exempting similar goods manufactured in the state, or taxing sales by nonresidents and not taxing sales by residents, is void so far as it discriminates, being an interference with interstate commerce.<sup>7</sup>

**Sale of Goods in Other States.** — The sale by sample of goods not then within the state is interstate commerce and cannot be taxed by the state.<sup>8</sup>

**1. Franchise Taxes Valid.** — *People v. Campbell*, 74 Hun (N. Y.) 210; *People v. Wemple*, 117 N. Y. 136; *Horn Silver Min. Co. v. New York*, 143 U. S. 305. See also *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. But compare *Fargo v. Michigan*, 121 U. S. 230.

**2. Franchise Tax on Domestic Corporations.** — *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *People v. Wemple*, 52 Hun (N. Y.) 434, 117 N. Y. 136; *People v. Wemple*, 138 N. Y. 1, 54 Am. & Eng. R. Cas. 1, affirming 65 Hun (N. Y.) 252, 29 Abb. N. Cas. (N. Y.) 85; *People v. Roberts*, 158 N. Y. 162, affirming 27 N. Y. App. Div. 632.

**3. Capital of Foreign Corporations Employed in State.** — *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36; *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542, affirming 61 Hun (N. Y.) 83; *People v. Roberts*, 158 N. Y. 168. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 46 Am. & Eng. R. Cas. 236, affirming 107 Pa. St. 156.

**4. Federal Franchise Cannot Be Taxed.** — *California v. Central Pac. R. Co.*, 127 U. S. 1, 33 Am. & Eng. R. Cas. 451; *Keokuk, etc., Bridge Co. v. Illinois*, 175 U. S. 627.

But see *Atlantic, etc., R. Co. v. Lesueur*, (Ariz. 1888) 19 Pac. Rep. 157, 37 Am. & Eng. R. Cas. 368, wherein it is held that the taxation by a territory of the franchises of a railway

granted by act of Congress is not in conflict with the constitutional grant to Congress of the power to regulate commerce among the states.

**5. Incorporation Charges Valid.** — *Chicago, etc., R. Co. v. State*, (Ind. 1898) 51 N. E. Rep. 924.

**6. Uniform Tax on All Sales Valid.** — *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581, 41 Am. Dec. 633; *Raguet v. Wade*, 4 Ohio 107.

**Regulation of Sales Within State.** — As to power of state in general, see *supra*, this section, 8. *Sale of Goods*.

**7. Discriminating Tax Void.** — *Tiernan v. Rinker*, 102 U. S. 123; *Walling v. Michigan*, 116 U. S. 446, reversing 53 Mich. 264; *Lyng v. Michigan*, 135 U. S. 161; *Ex p. Thornton*, 12 Fed. Rep. 538; *Ex p. Hanson*, 28 Fed. Rep. 127.

*Contra.* — *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Davis v. Dashiell*, Phil. L. (61 N. Car.) 114; *Huddleston v. Hagerty*, 2 Ohio N. P. 291, 1 Ohio Dec. 331; *Galveston County v. Gorham*, 49 Tex. 279.

**8. Sale by Sample of Goods in Other States.** — *In re Flinn*, 57 Fed. Rep. 496; *Brennan v. Titusville*, 153 U. S. 289; *People v. Roberts*, 27 N. Y. App. Div. 455; *People v. Roberts*, 29 N. Y. App. Div. 585.

It is not competent for a state to levy taxes or to impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in said state be-



**Sale in Original Package.** — A state tax on sales is void as applied to imported goods sold in the original package.<sup>1</sup> Credits and bills receivable for the price of imports sold by the importer in unbroken original packages are not subject to state or municipal taxation.<sup>2</sup>

**Dealing in "Futures."** — A state statute taxing the business of buying and selling "futures" is not a violation of the interstate commerce clause of the Constitution.<sup>3</sup>

**h. STAMP TAX — On Bills of Lading.** — A state statute imposing a stamp tax on bills of lading for the transportation of articles of interstate commerce is void.<sup>4</sup>

**On Bills of Exchange.** — A state statute imposing a stamp tax upon foreign and interstate bills of exchange is void as being an attempted regulation of commerce.<sup>5</sup>

**i. INSURANCE PREMIUMS.** — A state statute imposing a tax on the entire amount of premiums to be received by insurance companies by which it was intended to tax all the business of such companies as evidenced by the entire premiums received by them from all sources, whether within or without the state, is not repugnant to the commerce clause of the Constitution prohibiting any interference by the states with interstate commerce.<sup>6</sup> A tax imposed upon premiums received for insuring imports is valid, not being a regulation of interstate commerce.<sup>7</sup>

**j. INHERITANCE OR SUCCESSION TAX.** — A state inheritance or succession tax levied only on residents of foreign countries is not void as an attempted regulation of foreign commerce.<sup>8</sup>

**k. LIVE STOCK GRAZED IN STATE.** — A tax imposed on all live stock brought into a state for the purpose of being grazed therein is not void as an interference with interstate commerce.<sup>9</sup>

**V. INTERSTATE COMMERCE ACT — 1. Nature, Purpose, and Constitutionality.** — By the Act of Congress of February 4, 1887, commonly known as the Interstate Commerce Act,<sup>10</sup> Congress, in pursuance of its constitutional power to regulate commerce among the states, assumed control of the interstate railway traffic of the country. Before this statute there had been but little affirm-

fore they are introduced therein. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, distinguished in *Ficklen v. Shelby County Taxing Dist.*, 145 U. S. 1.

**1. Sale in Original Package Cannot Be Taxed.** — *In re Minor*, 69 Fed. Rep. 233; *Cook v. Pennsylvania*, 97 U. S. 566; *People v. Lyng*, 74 Mich. 579; *Gelpi v. Schenck*, 48 La. Ann. 1535. See *Brown v. Houston*, 114 U. S. 622. But see *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581.

**Contra.** — Goods brought from other states and sold by the importer in original packages are subject to taxation under a statute imposing a tax on "the amount of sales of goods, wares, and merchandise." *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

**Auction Sales.** — A state requiring an auctioneer to collect and pay into the state treasury a tax on his sales imposes a tax on the goods sold, and as applied to imported goods in original packages is void. *Cook v. Pennsylvania*, 97 U. S. 566, cited with approval in *Howe Mach. Co. v. Gage*, 100 U. S. 676.

**A Tax on the Proceeds of Commission Sales of goods within the state is not a tax on the property sold, and does not attach until by sale the property has become mingled with the general mass of property of the state, and therefore it is not void as an interference with interstate commerce.** *Padelford v. Savannah*, 14 Ga. 438.

**2. Credits and Bills Receivable for Price.** — *Gelpi v. Schenck*, 48 La. Ann. 1535.

**3. Business of Buying and Selling "Futures."** — *Alexander v. State*, 86 Ga. 246.

**4. Stamp Tax on Bills of Lading Void.** — *Woodruff v. Parham*, 8 Wall. (U. S.) 123 [explaining] *Almy v. California*, 24 How. (U. S.) 169; *Garrison v. Tillingham*, 18 Cal. 404; *People v. Raymond*, 34 Cal. 492.

**5. Stamp Tax on Bills of Exchange Void.** — *People v. Raymond*, 34 Cal. 492. *Contra, Ex p. Martin*, 7 Nev. 140, 8 Am. Rep. 707.

**6. Tax on Premiums Valid.** — *Insurance Co. of North America v. Com.*, 87 Pa. St. 173, 30 Am. Rep. 352.

**7. Premiums for Insuring Imports.** — *People v. National F. Ins. Co.*, 27 Hun (N. Y.) 188.

**8. Inheritance Tax on Foreign Residents Valid.** — *Mager v. Grima*, 8 How. (U. S.) 490.

**9. Tax on Live Stock Grazed in State Valid.** — *People v. Niles*, 35 Cal. 282; *Kelley v. Rhoads*, 7 Wyo. 237. See also *Hardesty v. Fleming*, 57 Tex. 395.

**10. Interstate Commerce Act.** — 24 Stat. at L. 379, Rev. Stat. U. S., Supp. (1874-91) 529, amended by Acts of March 2, 1889, 25 Stat. at L. 855, Rev. Stat. U. S., Supp. (1874-91) 684; Feb. 10, 1891, 26 Stat. at L. 743, Rev. Stat. U. S., Supp. (1874-91) 891; Feb. 11, 1893, 27 Stat. at L. 443.



active legislation by Congress under its commercial power, and the courts were principally occupied in this regard with questions involving an invasion by the states of the exclusive but unexercised power of Congress to regulate interstate and foreign commerce.<sup>1</sup>

"The Principal Objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."<sup>2</sup> The act discloses no purpose on the part of Congress to reinforce the provisions of the tariff laws, or to co-operate with the assumed policy thereof. Tariff laws differ wholly in their objects from laws to regulate commerce.<sup>3</sup> The method adopted by Congress to secure these ends consisted in the establishment of certain regulations applicable to railway carriers engaged in interstate transportation, and the creation of a commission charged with the administration and enforcement of the act. These subjects are treated in detail in the succeeding sections.

**Constitutionality.** — The Interstate Commerce Act has been sustained as a proper and constitutional exercise by Congress of its power to regulate interstate and foreign commerce.<sup>4</sup>

**2. Rules of Construction** — *a.* IN GENERAL. — In construing the Interstate Commerce Act the courts will take notice of the history of the legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions, and which, therefore, is most likely the construction intended by Congress.<sup>5</sup> Commerce being, in its largest sense, one of the most important subjects of legislation, an intention to promote and facilitate it, and not to hamper or destroy it, must be attributed to Congress in the enactment of the Interstate Commerce Act.<sup>6</sup> The act was intended to apply only to matters involved in the regulation of commerce.<sup>7</sup>

*b.* STRICT OR LIBERAL CONSTRUCTION. — The Interstate Commerce Act is drawn upon broad lines and should be construed in the same manner.<sup>8</sup> The law should be as liberally construed in favor of commerce among the states as its language will permit; but when complaint is made or relief is sought solely or mainly in the interests of the common carriers engaged in the transportation of such commerce, the act complained of or the right asserted should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred.<sup>9</sup> The Interstate Commerce Act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts, and adopt proper business methods, further than its terms and recognized purposes require.<sup>10</sup>

1. See generally the preceding sections of this article, wherein this class of questions was considered.

2. Principal Object and Purpose of Act. — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 510; U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 905.

3. Reinforcement of Tariff Laws. — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 221.

4. Act Is Constitutional. — Interstate Commerce Commission *v.* Brimson, 154 U. S. 448; Bullard *v.* Northern Pac. R. Co., 10 Mont. 168, 45 Am. & Eng. R. Cas. 234.

5. In Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, a general

discussion of the causes and reasons which led to the enactment of the Interstate Commerce Act is given at great length.

6. Construction to Facilitate Commerce. — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

7. Act Limited to Regulation of Commerce. — Interstate Commerce Commission *v.* Brimson, 154 U. S. 448.

8. Broad Construction. — Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. Rep. 107.

9. Construction Against Carrier. — Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 63 Fed. Rep. 775; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567.

10. Construction to Abridge Common-law Rights of Carrier. — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409,



*c.* INTERESTS TO BE CONSIDERED. — In determining questions arising under the Interstate Commerce Act, the interests of three parties must be taken into consideration; namely, the interests of the seller at the point of departure, the rights of the carrier, and the rights or interests of the trader or consumer at the point of delivery.<sup>1</sup> It was at one time thought doubtful whether the interests of the railway companies could be taken into account at all, but it is now established that they can be.<sup>2</sup> Nevertheless the act was intended primarily for the benefit of the interstate traffic rather than for the advantage of the designated common carriers engaged in its transportation.<sup>3</sup>

*d.* APPLICATION TO EXISTING CONTRACTS. — The Interstate Commerce Act, although applicable to, does not impair, the obligation of contracts entered into before it took effect.<sup>4</sup>

*e.* TERMS "RAILROAD" AND "TRANSPORTATION." — The term "railroad" as used in the act includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease.<sup>5</sup> The term "transportation" as used in the Interstate Commerce Act includes all instrumentalities of shipment or carriage.<sup>6</sup>

*f.* CONSTRUCTION OF ENGLISH TRAFFIC ACTS ADOPTED. — The Interstate Commerce Act having adopted substantially some of the provisions of the English railway traffic acts, the construction given to such provisions by the English courts must be received as incorporated into the act.<sup>7</sup> But in applying English precedents care must be taken not to overlook dissimilarity of legislation, and methods of trade and transportation prevailing in England.<sup>8</sup>

**3. Organization, Powers, and Duties of Commission** — *a.* IN GENERAL. — The powers and duties of the interstate commerce commission are not very clearly defined in the act, nor is its method of procedure very distinctly outlined.<sup>9</sup> Section 11 creates the commission, and section 12 authorizes the commission to inquire into the management of the business of all common carriers subject to the provisions of the act, and to demand from such carriers full and complete information necessary to enable the commission to perform its duties, and authorizes the commission to execute and enforce the provisions of the act.<sup>10</sup> Subsequent sections provide for complaints, investigations, reports, and

*citing* Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 51. See also Chicago, etc., R. Co. *v.* Osborne, 52 Fed. Rep. 914.

**1. Interests of Seller, Consumer, and Carrier to Be Considered.** — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

**2. Interests of Carrier.** — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409 [*citing* Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 52; Ames *v.* Union Pac. R. Co., 64 Fed. Rep. 176; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 412]. See also Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 165.

**3. Act Intended Primarily for Benefit of Interstate Traffic, Not of Carrier.** — Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567.

**4. Act Applies to Contracts Made Before Its Passage.** — Bullard *v.* Northern Pac. R. Co., 10 Mont. 168, 45 Am. & Eng. R. Cas. 234.

**5. Railroad.** — Interstate Commerce Act, § 1; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

**6. Transportation.** — Interstate Commerce Act, § 1; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

**7. Construction of English Statutes Followed.** — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 37, *affirmed* 145 U. S. 263; McDonald *v.* Hovey, 110 U. S. 619; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144; Gulf, etc., R. Co. *v.* Miami Steamship Co., 86 Fed. Rep. 407; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; U. S. *v.* Delaware, etc., R. Co., 40 Fed. Rep. 101; Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. Rep. 803, 43 U. S. App. 308.

**8. Effect of Dissimilarity of English Methods and Legislation.** — Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. Rep. 832, *citing* Trammell *v.* Clyde Steamship Co., 5 Int. Com. C. Rep. 327.

**9. Powers and Duties Not Clearly Defined by Act.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

**10. General Powers of Commission.** — Interstate Commerce Act, § 12, as amended March 2, 1889 (25 Stat. at Large 858); Interstate Com-



orders as to alleged violations of the act. These subjects will be treated in detail in a subsequent section of this article.<sup>1</sup> It is sufficient to say here that in the enforcement of the civil features of the act the commission bears much the same relation to the court that the grand jury does in criminal matters. It is to investigate abuses and call upon the courts to suppress them whenever necessary.<sup>2</sup> It has also been said that the commission may be regarded as the general referee of each and every circuit court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act.<sup>3</sup>

**No Power to Manage the Business of Carriers** has been conferred upon the commission, but only a limited power expressly defined in the act to interfere for the purpose of preventing violations of the act in specified cases.<sup>4</sup>

**No Dispensing Power to Relieve Hardships** has been given to the commission. Its power in that respect is limited to cases specified in the fourth section.<sup>5</sup>

**Commission a Corporation.** — The commission is a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts.<sup>6</sup>

**b. ADMINISTRATIVE, JUDICIAL, AND LEGISLATIVE POWERS.** — The interstate commerce commission is an administrative board exercising administrative powers.<sup>7</sup> It is not a court, and has no judicial power,<sup>8</sup> although it has and exercises a *quasi-judicial* power.<sup>9</sup> The commission has no legislative powers.<sup>10</sup>

**c. ESTABLISHMENT OF GENERAL RULES OF CONDUCT.** — The commission should confine itself to redressing, on complaint made by a particular person, firm, corporation, or locality, some specific disregard by common carriers of the provisions of the act, and should not promulgate general orders which become rules of action to the carrier companies.<sup>11</sup> If the commission has power, of its own motion, to promulgate general decrees or orders, which thereby become rules of action to common carriers, such exertion of power

merce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 909.

**Compelling Witness to Produce Books and Papers.** — See *infra*, this section, *Enforcement of Act*.

**Creation of Commission Constitutional.** — Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567.

1. See *infra*, this section, *Enforcement of Act*.

2. **Commission Likened to Grand Jury.** — U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 909.

3. **Commission Regarded as General Referee.** — Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567.

4. **Traders, etc., Union v. Philadelphia, etc., R. Co.,** 1 Int. Com. Rep. 371.

5. *Re Iowa Barb Steel Wire Co.,* 1 Int. Com. Rep. 605, 1 Int. Com. C. Rep. 17.

6. **Commission a Body Corporate.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197. See also *infra*, this section, *Enforcement of Act*.

7. **Commission an Administrative Board.** — Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 76 Fed. Rep. 183; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Interstate Commerce Commission *v.* Cincinnati, etc., R.

Co., 64 Fed. Rep. 981; U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 907.

8. **Commission Not a Court.** — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. Rep. 981; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567; U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 907.

9. **Quasi-Judicial Powers.** — Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 76 Fed. Rep. 183; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. Rep. 981; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409.

**Functions Those of Referees or Special Commissioners.** — Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567.

10. **No Legislative Powers.** — Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 76 Fed. Rep. 183; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

11. **Should Not Promulgate General Orders.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

**Actual Violation of Act Necessary to Justify Action.** — *Re Order of Railway Conductors,* 1 Int. Com. Rep. 18; Holbrook *v.* St. Paul, etc., R. Co., 1 Int. Com. Rep. 323.



must be confined to the obvious purposes and directions of the statute, since Congress has not granted it legislative powers.<sup>1</sup>

*d. ESTABLISHMENT OF RATES OF CARRIAGE.* — It is now well settled that the commission has no power to fix or establish rates, either maximum or minimum, absolute or relative, which shall be binding upon the carriers for the future.<sup>2</sup> Nor can the commission secure the same result indirectly by first determining what in reference to the past were reasonable and just rates, and then obtaining from the courts a peremptory order that in the future the carriers should follow the rates thus determined to have been reasonable and just in the past.<sup>3</sup> The courts have no more power than the commission to fix rates.<sup>4</sup> The reason for this is that the power to fix rates for the future is a legislative power, and neither the courts nor the commission can exercise legislative powers.<sup>5</sup> It is one thing to inquire whether the rates which have been charged and collected are reasonable — that is a judicial act; but it is an entirely different thing to prescribe rates which shall be charged in the future — that is a legislative act.<sup>6</sup> Subject to the two leading prohibitions that

**1. Limitation of Power.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**Effect of State Regulations.** — The commission in fixing regulations for interstate commerce is not bound by state regulations as to local commerce. *Leonard v. Chicago, etc., R. Co.*, 2 Int. Com. C. Rep. 599, 3 Int. Com. Rep. 241.

**2. No Power to Fix Rates.** — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. Rep. 249; *Interstate Commerce Commission v. Northeastern R. Co.*, 83 Fed. Rep. 611, *affirming* 74 Fed. Rep. 70, *following* *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 76 Fed. Rep. 183; *Shinkle, etc., Co. v. Louisville, etc., R. Co.*, 76 Fed. Rep. 1007; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, *affirmed* *Interstate Commerce Commission v. Northeastern R. Co.*, 83 Fed. Rep. 611, 42 U. S. App. 603; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 69 Fed. Rep. 227, 74 Fed. Rep. 715; *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 74 Fed. Rep. 784; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 94 Fed. Rep. 272; *Thatcher v. Delaware, etc., Canal Co.*, 1 Int. Com. C. Rep. 152; *Interstate Commerce Commission v. Western, etc., R. Co.*, 93 Fed. Rep. 83; *Thatcher v. Fitchburg R. Co.*, 1 Int. Com. Rep. 356.

The interstate commerce commission has held that it is authorized to establish and declare maximum reasonable rates. *Matter of Chicago, etc., R. Co.*, 2 Int. Com. C. Rep. 231; *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97. But these cases are *overruled* by the cases cited above.

In *State v. Fremont, etc., R. Co.*, 22 Neb. 313, it was held that a state board acting under a statute somewhat similar in its provisions to the Interstate Commerce Act had power to fix rates for the future which would be reasonable and just. This case was *distinguished* in

*Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479.

**Equal Mileage Rates.** — The commission has no power to require the adoption of rates on an equal and uniform mileage basis. *La Crosse Manufactures, etc., Union v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 9, 1 Int. Com. C. Rep. 629.

**Through Rates.** — The commission is not authorized to establish through routes or fix through rates between connecting lines. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

**Authority to Raise Rates.** — The commission has no authority to raise rates. *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925; *Matter of Chicago, etc., R. Co.*, 2 Int. Com. C. Rep. 231, 2 Int. Com. Rep. 137; *Poughkeepsie Iron Co. v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195.

**3. Mandamus or Injunction to Enforce Rate Fixed by Commission.** — *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. Rep. 249.

A petition by the commission for an order of a federal court enjoining a carrier from making certain charges which the commission has declared to be unreasonable and unjust is not subject to the objection that it is an attempt by indirection to fix a maximum rate of transportation, and is authorized by the Interstate Commerce Act, which prohibits unreasonable and unjust rates and empowers the commission to execute and enforce the act. *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 94 Fed. Rep. 272.

**4. Courts Have No Power to Fix Rates.** — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

**5. Power to Fix Rates Legislative and Not Administrative or Judicial.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479.

See *supra*, this section, subdiv. *Administrative, Judicial, and Legislative Powers.*

**6. Farmers' L. & T. Co. v. Northern Pac. R.**



their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.<sup>1</sup> The power of the commission and the courts is limited to determining whether the rates fixed by the carriers are for any reason in conflict with the statute.<sup>2</sup>

*e.* ENFORCEMENT OF CONTRACTS. — The commission has no power to enforce contracts made with a carrier. The contract must be enforced by the ordinary remedies in the courts.<sup>3</sup>

*f.* ESTABLISHMENT OF THROUGH ROUTES. — The commission has no power to establish through lines or routes by requiring connecting carriers to enter into arrangement for a joint tariff and through routing and billing. This is a matter to be settled by the companies themselves by contract between them.<sup>4</sup>

*g.* REGULATIONS LIMITED TO EXISTING FACILITIES. — Whenever the proposed regulation departs from the business of regulating the facilities and operations of carriers as they actually exist, and enters into the domain of deprivation, construction, and reconstruction of properties, to carry out the proposed regulation, it is beyond the power of the commission.<sup>5</sup> The act does not give the commission jurisdiction to order the carrier to furnish any particular equipment of cars, or in fact any cars at all.<sup>6</sup>

Co., 83 Fed. Rep. 249; *Interstate Commerce Commission v. Chicago, etc.*, R. Co., 94 Fed. Rep. 272; *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 167 U. S. 499 [citing *Chicago, etc.*, R. Co. *v.* *Minnesota*, 134 U. S. 418; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *St. Louis, etc.*, R. Co. *v.* *Gill*, 156 U. S. 649; *Cincinnati, etc.*, R. Co. *v.* *Interstate Commerce Commission*, 162 U. S. 184; *Texas, etc.*, R. Co. *v.* *Interstate Commerce Commission*, 162 U. S. 197; *Munn v. Illinois*, 94 U. S. 113; *Peik v. Chicago, etc.*, R. Co., 94 U. S. 164; *Express Cases*, 117 U. S. 1].

1. Carriers May Fix Rates in First Instance. — *Cincinnati, etc.*, R. Co. *v.* *Interstate Commerce Commission*, 162 U. S. 184, following *Interstate Commerce Commission v. Baltimore, etc.*, R. Co., 43 Fed. Rep. 37, which case was affirmed in 145 U. S. 263, and quoted with approval in *Texas, etc.*, R. Co. *v.* *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 167 U. S. 479; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 74 Fed. Rep. 715; *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 76 Fed. Rep. 183.

2. *Thatcher v. Delaware, etc.*, Canal Co., 1 Int. Com. C. Rep. 152, cited with approval in *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 167 U. S. 479; *Cincinnati, etc.*, R. Co. *v.* *Interstate Commerce Commission*, 162 U. S. 184; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

3. Cannot Enforce Contracts. — *Traders, etc.*, Union *v.* *Philadelphia, etc.*, R. Co., 1 Int. Com. Rep. 371, 1 Int. Com. C. Rep. 122.

4. Commission Has No Power to Establish Through Routes. — *Interstate Commerce Com-*

*mission v. Western, etc.*, R. Co., 93 Fed. Rep. 83; *Gulf, etc.*, R. Co. *v.* *Miami Steamship Co.*, 52 U. S. App. 732, 86 Fed. Rep. 407; *New York, etc.*, R. Co. *v.* *Platt*, 7 Int. Com. Rep. 323; *Little Rock, etc.*, R. Co. *v.* *St. Louis, etc.*, R. Co., 63 Fed. Rep. 775; *Kentucky, etc.*, Bridge Co. *v.* *Louisville, etc.*, R. Co., 37 Fed. Rep. 567, 2 Int. Com. Rep. 351; *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925; *Chicago, etc.*, R. Co. *v.* *Osborne*, 52 Fed. Rep. 912, 10 U. S. App. 430; *Interstate Commerce Commission v. Louisville, etc.*, R. Co., 73 Fed. Rep. 409; *Re Joint Water, etc.*, Lines, 2 Int. Com. Rep. 486, 2 Int. Com. C. Rep. 645; *Worcester Excursion Car Co. v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 792; *Capehart v. Louisville, etc.*, R. Co., 3 Int. Com. Rep. 278, 4 Int. Com. C. Rep. 265; *Chicago, etc.*, R. Co. *v.* *Pennsylvania R. Co.*, 1 Int. Com. Rep. 294; *Union Pac. R. Co. v. U. S.*, 117 U. S. 355; *Little Rock, etc.*, R. Co. *v.* *East Tennessee, etc.*, R. Co., 2 Int. Com. Rep. 454, 3 Int. Com. C. Rep. 1; *Little Rock, etc.*, R. Co. *v.* *St. Louis, etc.*, R. Co., 41 Fed. Rep. 559, 42 Am. & Eng. R. Cas. 490; *Little Rock, etc.*, R. Co. *v.* *East Tennessee, etc.*, R. Co., 47 Fed. Rep. 771; *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; *Express Cases*, 117 U. S. 1.

Facilities for Interchange of Traffic. — See *infra*, this section, *Facilities for Interchange of Traffic*.

5. No Power to Order Construction or Reconstruction of Properties. — *Detroit, etc.*, R. Co. *v.* *Interstate Commerce Commission*, 74 Fed. Rep. 803.

6. Power to Compel Use of Cars of Particular Kind. — *Scofield v. Lake Shore, etc.*, R. Co., 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90;



**4. Carriers Subject to Act — a. IN GENERAL.** — The carriers subject to the Interstate Commerce Act are those engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.<sup>1</sup> The Interstate Commerce Act by its terms applies to the carriage from any place in the United States through a foreign country to any other place in the United States.<sup>2</sup> The act is intended to regulate all the commerce subject to the exclusive jurisdiction of Congress, including the agents and instrumentalities employed and the commodities carried, with only the limitations found in the act itself.<sup>3</sup> In framing the act Congress had in view only those common carriers ordinarily termed railway companies that are engaged in the transportation business of the lines of road owned or operated by them.<sup>4</sup>

**b. TRANSPORTATION WHOLLY WITHIN ONE STATE.** — The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property, wholly within one state and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory.<sup>5</sup> Where the lines of the initial carrier do not extend beyond the state, and such carrier has nothing to do in transporting goods beyond the state, the fact that they are intended for an ultimate destination beyond the state does not make the shipment an interstate shipment so as to subject the initial carrier to regulation.<sup>6</sup> On the other hand, the mere fact that the goods began their journey at a point outside the state, and that the initial carrier undertook to ship them

*Rice v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 841, 3 Int. Com. C. Rep. 193. See also *Worcester Excursion Car. Co. v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 792.

**1. What Carriers Are Subject to Act.** — Interstate Commerce Act, § 1; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Brimson*, 154 U. S. 457.

**Transportation Between Foreign Ports and Ports of Entry.** — The Interstate Commerce Act has undertaken no regulation of traffic from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of tariffs of rates and charges, but has left it to the unrestrained competition of ocean carriers and all the circumstances and conditions surrounding it. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**2. Carriage Through Foreign Country.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**3. Intention of Act.** — *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592.

**Act Does Not Extend to Immigrants Arriving at Port of New York for Interior Points.** — *Savery*

*v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 210, 2 Int. Com. C. Rep. 338.

**4. Only Railway Carriers Included.** — *U. S. v. Morsman*, 42 Fed. Rep. 448.

**5. Operations Wholly Within One State.** — Interstate Commerce Act, § 1; *Interstate Commerce Commission v. Brimson*, 154 U. S. 457; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.

**6. Traffic Beginning and Ending in the State.** — *Ex p. Koehler*, 30 Fed. Rep. 869; *Missouri, etc., Railroad Tie, etc., Co. v. Cape Girardeau, etc., R. Co.*, 1 Int. Com. Rep. 607, 1 Int. Com. C. Rep. 30; *New Jersey Fruit Exch. v. Central R. Co.*, 2 Int. Com. Rep. 84, 2 Int. Com. C. Rep. 142; *Mattingly v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; *Ft. Worth, etc., R. Co. v. Whitehead*, 6 Tex. Civ. App. 595.

**Delivery in State Where Traffic Originated.** — Traffic destined to another state is not interstate if the delivery by the carrier is made in the same state where the rates were made and the traffic originated. It was so held in a case where goods were shipped in New Jersey for New York city, but were delivered by the carrier in New Jersey opposite New York city. *New Jersey Fruit Exch. v. Central R. Co.*, 2 Int. Com. Rep. 84, 2 Int. Com. C. Rep. 142.



to their ultimate destination, does not render their carriage by the domestic company an act of interstate commerce, subjecting the domestic company to the Interstate Commerce Act.<sup>1</sup>

c. CARRIERS UNDER "COMMON CONTROL, MANAGEMENT, OR ARRANGEMENT." — Only carriers engaged in transportation "under a common control, management, or arrangement, for a continuous carriage or shipment," are subject to the operation of the Interstate Commerce Act.<sup>2</sup> To come within the meaning of the words, "common control, management, or arrangement, for a continuous carriage or shipment," as used in section one of the act, there need not be a control of the through line centred in a single source of authority; but if the different carriers have invited interstate traffic over their roads, which is intended to be continuous, and have arranged their business so that the continuity of the shipment shall be preserved, and have combined their several lines, and by preparatory measures have provided for the reception, carriage, and delivery of the traffic, it comes within the meaning of the statute.<sup>3</sup> Where a railroad company whose road lies wholly within a state receives goods brought from beyond the state under through bills of lading and participates in through rates and charges according to a proportion previously agreed on, it thereby becomes part of a continuous line, "under a common control, management, or arrangement, for a continuous carriage or shipment," within the meaning of the first section, and it is immaterial that it receives as its share the regular rate charged by it for local traffic.<sup>4</sup> But where a railroad company operating between only two points in the same state carries goods from one of its termini to the other without any understanding or arrangement that it would become a link in a through line of transportation from points in other states, the mere fact that the goods began their journey at a point in another state, and that the initial carrier undertook to ship them to their ultimate destination, does not render their carriage by the domestic company an act of interstate commerce.<sup>5</sup> The phrase "common control, management, or arrangement, for a continuous carriage or shipment," is intended to cover all interstate traffic carried either over a railway or over part water and part railway lines.<sup>6</sup> Where a state railroad elects to enter into the carriage of interstate freights by entering into arrangements with con-

1. Ft. Worth, etc., R. Co. v. Whitehead, 6 Tex. Civ. App. 595.

See *infra*, this section, subdiv. *Carriers under "Common Control, Management, or Arrangement."*

2. Necessity of Common Control or Arrangement. — Int. Com. Act, § 1; Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184; *Ex p. Koehler*, 30 Fed. Rep. 867, 12 Sawy. (U. S.) 341, 30 Am. & Eng. R. Cas. 71; Interstate Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925; Ft. Worth, etc., R. Co. v. Whitehead, 6 Tex. Civ. App. 595.

3. What Constitutes Common Control, Management, or Arrangement. — Boston Fruit, etc., Exch. v. New York, etc., R. Co., 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 324.

4. Participation in Through Rates and Through Bills of Lading. — Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184, *affirming* 56 Fed. Rep. 925, and *distinguishing* Chicago, etc., R. Co. v. Osborne, 52 Fed. Rep. 912, 10 U. S. App. 430.

A railroad company whose line is entirely within one state becomes subject to the act

where it issues through bills of lading for connecting lines to points in other states and makes through rates. *Re Annapolis, etc.*, R. Co., 1 Int. Com. Rep. 315.

5. Through Carriage Without Prior Arrangement. — Ft. Worth, etc., R. Co. v. Whitehead, 6 Tex. Civ. App. 595.

Where there is no agreement on the part of the last connecting carrier for any such joint tariff as implies a reduced rate to its local stations, but, on the contrary, such company collects and retains its entire local rates on all freight shipped to its local stations, over its own lines of connecting carriers, there is no such arrangement for a continuous carriage or shipment existing between such company and its connections as to bring the rates which are charged to said local stations within the first section of the act to regulate commerce. Interstate Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925, *citing* Chicago, etc., R. Co. v. Osborne, 52 Fed. Rep. 912, 10 U. S. App. 430.

6. Lines Used for Interstate Traffic. — Trammell v. Clyde Steamship Co., 5 Int. Com. C. Rep. 324.

Goods shipped from one state to another are interstate traffic, and all the roads forming a part of the line over which they are carried are



necting carriers, it subjects itself to the control of the commission, and it is not competent for the company to limit that control in respect to certain points on its road and exclude other points by requesting the connecting carriers not to name or fix any rates for that part of the transportation within the state to certain points.<sup>1</sup> Railroad companies, incorporated by and doing business wholly within one state, cannot be compelled to agree to a "common control, management, or arrangement" with connecting companies, and thus be deprived of their rights and powers as to rates on their own roads.<sup>2</sup> The mere fact that a railway wholly within a state, and a vessel running between that state and another state, meet at a point within the state wherein the railway runs and thus form a continuous line of transportation between the two states by the one taking up the goods delivered by the other at its terminus and carrying them thence to their destination, does not bring the carriers who use the railway and steamer within the act so long as the railway and steamer are each operated under a separate and distinct control, each making its own rates and each liable only for the carriage and safe delivery of the goods at the end of its own route.<sup>3</sup>

*d. CARRIERS BY WATER.* — The Interstate Commerce Act does not apply to any water craft unless it is used in connection with a railway "under a common control, management, or arrangement, for a continuous carriage or shipment" from one state or territory of the United States to another, or to or from such state or territory from or to a foreign country.<sup>4</sup>

*e. NORTHERN PACIFIC RAILWAY COMPANY.* — The provision of the charter of the Northern Pacific Railway Company, that its directors "shall from time to time fix, determine, and regulate fares, tolls, and charges," except that they shall be "subject to such regulations as Congress may impose restricting the charges for such government transportation," does not give the directors exclusive control over all rates and fares except for government transportation so as to prevent regulation by the Interstate Commerce Commission.<sup>5</sup>

*f. TRANSFER AND SWITCHING COMPANIES.* — A corporation which is engaged in switching cars, loaded and empty, from the tracks between two or more railways, for which service it collects certain switching charges, but which charges no traffic rates on the freight transported in such cars, is a mere switchman or transfer company, and not a common carrier of interstate commerce or traffic within the meaning of the Interstate Commerce Act.<sup>6</sup>

*g. EXPRESS COMPANIES.* — The Interstate Commerce Act does not apply to express companies carrying on an express or parcel business in the usual manner, but not operating railway lines.<sup>7</sup> But where a railroad company itself

subject to the act. *James, etc., Buggy Co. v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 682, 4 Int. Com. C. Rep. 744.

A short road entirely within one state, but used as a means of taking interstate traffic by connecting interstate roads, is subject to the act. *Heck v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 775, 1 Int. Com. C. Rep. 495.

1. *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 56 Fed. Rep. 925; *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648.

2. *Compelling Railroad to Enter into Common Arrangement for Through Carriage.* — *Chicago, etc., R. Co. v. Osborne*, 10 U. S. App. 430, distinguished in *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184. See also *infra*, this section, *Facilities for Interchange of Traffic*.

3. *Common Arrangement Between Railway and Water Lines.* — *Ex p. Koehler*, 30 Fed. Rep. 869, wherein it is held that to make such car-

rier subject to the act, the railway and vessel must as therein provided be operated and used under a common control, a control to which each is alike subject and by which rates are prescribed and bills of lading given for the carriage of goods over both roads as one. See also *Ft. Worth, etc., R. Co. v. Whitehead*, 6 Tex. Civ. App. 595.

4. *Act Not Applicable to Independent Carriers by Water.* — *Ex p. Koehler*, 30 Fed. Rep. 869; *Re Joint Water, etc., Lines*, 2 Int. Com. Rep. 486, 2 Int. Com. C. Rep. 645.

5. *Power of Commission to Regulate Rates on Northern Pacific R. Co.* — *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234.

6. *Transfer and Switching Companies Not Subject to Act.* — *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

7. *Express Companies Not Subject to Act.* — *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. Rep. 659, affirmed 92 Fed.



conducts an express business, it is as to such business subject to the provisions of the Interstate Commerce Act.<sup>1</sup>

*h. BRIDGES AND FERRIES.* — A bridge company that owns no cars, but solicits freight for the railway companies which will furnish the cars and over whose line the freight is to go, and merely transfers such cars over its bridge, delivering them to the railway companies furnishing the same and charging for its services its regular bridge toll, but making no charge for transporting the freight contained or carried in the car, is not a common carrier of interstate freight and is not subject to the Interstate Commerce Act.<sup>2</sup> The term "railroads" as used in the act includes all bridges and ferries used or operated in connection with any railroad.<sup>3</sup> Where a railway company by contract with a bridge company acquires the right to use a bridge with its approaches for the engines, cars, and trains of the railway company, the first section of the Interstate Commerce Act requires the railway company to be considered as the owner or operator of the bridge and approaches for the time being as to all freight transported by the railway company over the bridge, and as to all such traffic the railway company and not the bridge company must be regarded as the common carrier subject to the provisions and entitled to the benefits of the Interstate Commerce Act.<sup>4</sup>

*i. STOCK YARDS COMPANIES.* — The Interstate Commerce Act applies only to common carriers, and its provisions as to reasonable and just charges are not applicable to the business of a stock yards company, which neither operates nor uses any railway, motive power, or rolling stock, nor otherwise engages in any transportation.<sup>5</sup>

**5. Just and Reasonable Charges** — *a. IN GENERAL.* — The first section of the Interstate Commerce Act provides that all charges made for any services rendered or to be rendered in the transportation of passengers or of property or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such services is prohibited and declared to be unlawful.<sup>6</sup>

*b. WHAT CONSTITUTES* — (1) *A Question of Fact.* — The question whether certain charges were reasonable or unreasonable is a question of fact.<sup>7</sup>

Rep. 1022, following *U. S. v. Morsman*, 42 Fed. Rep. 448, and *Re Express Cos.*, 1 Int. Com. Rep. 677. *Contra, Re Express Cos.*, 1 Int. Com. Rep. 22.

1. **Railroad Conducting Express Business.** — *Re Express Cos.*, 1 Int. Com. Rep. 677, 1 Int. Com. C. Rep. 349; *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310; *U. S. v. Morsman*, 42 Fed. Rep. 448.

2. **Bridges Not Subject to Act.** — *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, 2 Int. Com. Rep. 351.

Neither does a franchise to such company giving it the power to build, maintain, and operate a bridge with approaches, on which tracks are laid and freight charges collected, constitute such company a common carrier, as such franchise does not give it the right to charge compensation for transporting freight or passengers. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, 2 Int. Com. Rep. 351.

"Between such a bridge company and the railway carriers of the country the act establishes no such reciprocal relations, duties, and obligations as require the latter to form business connections with the former." *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, 2 Int. Com. Rep. 351.

3. **Term "Railroad" Includes Bridges and Fer-**

**ries.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 457; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

4. **Railway Using Bridge Subject to Act.** — *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, 2 Int. Com. Rep. 351.

5. **Stock Yards Companies Not Subject to Act.** — *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. Rep. 839.

6. **Charges Must Be Just and Reasonable.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 165; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Cutting v. Florida R. etc., Co.*, 30 Fed. Rep. 663; *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97; *Evans v. Oregon R., etc., Co.*, 1 Int. Com. Rep. 641, 1 Int. Com. C. Rep. 325; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375.

7. **Reasonableness a Question of Fact.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.



(2) *Circumstances to Be Considered — In General.* — All circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect the provisions of the act.<sup>1</sup> The rate may be unreasonable because it is too low as well as because it is too high. In the former case it is unreasonable and unjust to the stockholder, and in the latter to the shipper.<sup>2</sup> In determining the reasonableness of rates, the commercial value of the traffic should be considered and the rates so adjusted that producers of traffic as well as carriers may carry on their pursuit successfully if practicable for both and without injustice to the carrier. The interests of both and of the public at large should be considered.<sup>3</sup>

**Review of Finding Commission.** — Where the finding of the commission as to the reasonableness of rates has been approved by the Circuit Court and the Circuit Court of Appeals, the Supreme Court is not disposed to review such finding. *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.

**1. Considerations Affecting Reasonableness of Rates — In General.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 74 Fed. Rep. 715; *Evans v. Oregon R., etc., Co.*, 1 Int. Com. Rep. 641, 1 Int. Com. C. Rep. 325; *Howell v. New York, etc., R. Co.*, 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375; *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529; *Potter Mfg. Co. v. Chicago, etc., R. Co.*, 5 Int. Com. C. Rep. 514; *Squire v. Michigan Cent. R. Co.*, 3 Int. Com. Rep. 515, 4 Int. Com. C. Rep. 611; *Pankey v. Richmond, etc., R. Co.*, 3 Int. Com. Rep. 33, 3 Int. Com. C. Rep. 658; *Lehmann v. Texas, etc., R. Co.*, 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44; *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. C. Rep. 584, 2 Int. Com. Rep. 414; *Brady v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 78, 2 Int. Com. C. Rep. 131; *Delaware State Grange v. New York, etc., R. Co.*, 3 Int. Com. Rep. 554, 4 Int. Com. C. Rep. 588, rehearing denied in 5 Int. Com. C. Rep. 161; *Matter of Alleged Excessive Freight Rates, etc.*, 3 Int. Com. Rep. 93, 4 Int. Com. C. Rep. 48; *Re Chicago, etc., R. Co.*, 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep. 231; *James v. Canadian Pac. R. Co.*, 4 Int. Com. Rep. 274, 5 Int. Com. C. Rep. 612; *La Crosse Manufacturers, etc., Union v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 9, 1 Int. Com. C. Rep. 629; *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52; *Manufacturers', etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *Lincoln Board of Trade v. Burlington, etc., R. Co.*, 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147; *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417; *Thurber v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473; *Rice v. Western New York, etc., R. Co.*, 2 Int. Com. Rep. 298, 2 Int. Com. C. Rep. 389; *Hurlburt v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 81, 2 Int. Com. C. Rep. 122; *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 324; *Re Tariffs of the Transcontinental Lines*, 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324;

*Buchanan v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 655, 5 Int. Com. C. Rep. 7; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. C. Rep. 1, 2 Int. Com. Rep. 1; *Proctor v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 131, 4 Int. Com. C. Rep. 87.

**Classification of Freights.** — See *Thurber v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473; *Myers v. Pennsylvania Co.*, 2 Int. Com. Rep. 403, 2 Int. Com. C. Rep. 573; *Harvard Co. v. Pennsylvania Co.*, 3 Int. Com. Rep. 257, 4 Int. Com. C. Rep. 212; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. C. Rep. 534. See also *infra*, this section, *Unjust Discrimination*.

**Local and Through Rates.** — *Re Passenger Tariffs*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649; *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97; *Brady v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 78, 2 Int. Com. C. Rep. 131.

**Length of Carriage as Affecting Reasonableness of Rates.** — See *Crews v. Richmond, etc., R. Co.*, 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52; *Farrar v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 764, 1 Int. Com. C. Rep. 487; *Manufacturers', etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *Lincoln Board of Trade v. Burlington, etc., R. Co.*, 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147.

**2. Rates Unreasonably Low.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 511.

The carrier may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the services rendered, without violating the act; and such reduction compels no change by its competitor or any other company. *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 914.

**3. Interests of Carrier, Shipper, and Public to Be Considered.** — *Delaware State Grange, etc., v. New York, etc., R. Co.*, 3 Int. Com. Rep. 561, 4 Int. Com. C. Rep. 605; *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 511; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**Failure of Shipper to Secure Profit.** — The fact that an article cannot be shipped at a named rate is not conclusive evidence that the rate is unreasonable. Distance, proximity of other



The Volume of Traffic is an element usually and properly taken into account in determining whether the rate is reasonable.<sup>1</sup>

The Value of the Article Shipped should be taken into account in fixing a rate, as the liability of the carrier is greater or less according to the value of the articles shipped.<sup>2</sup>

Competition Between Carriers is an element to be considered in determining whether or not rates are reasonable in themselves.<sup>3</sup> The possible influence of water competition upon rates for the transportation of certain classes of freight, and the nonexistence of such competition in the case of perishable freights, do not authorize the carrier to take advantage of the situation and charge unreasonable rates on perishable freights.<sup>4</sup>

(3) *Comparison of Rates — In General.* — The question of the justness and reasonableness of rates under the first section is colored by the other provisions of the law, and by the general policy of the whole enactment, which is to effect equality of rates.<sup>5</sup> In determining whether rates are just and reasonable in themselves, a comparison may be made of the particular rates with those accepted elsewhere for similar services.<sup>6</sup> But the rates to other places or points of shipment are unimportant except as a circumstance or fact in the proof, and have no other than an evidentiary bearing.<sup>7</sup>

Where an Advance Is Made in rates which have long been maintained, and the evidence shows that the traffic affected is large, important, and constantly increasing, the advance will be held unjust, unless it is satisfactorily explained.<sup>8</sup>

A Reduction in Rates is not in itself an acknowledgment that the former rates were unreasonable, as such reduction may be accounted for because of a decrease in cost of transportation, and an increase in the volume of traffic.<sup>9</sup>

Where a Special Service Is Required of the carrier, such as rapid transit and speedy delivery in cases of perishable freight, a higher rate than for the carriage of ordinary freights is warranted.<sup>10</sup> But the higher rate for a special service should bear a just relation to the value of the service to the traffic, and is not wholly in the discretion of the carrier.<sup>11</sup>

Party Rate and Single Trip Ticket. — The issue by a railway company engaged in

producers of the same article, necessary expenses of transportation, competing water routes, and other causes may make a reasonable rate too high to make the shipment of a certain article profitable. *Riddle v. New York, etc., R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594.

Failure of Carrier to Secure Profit. — The failure to produce some profit to those who have invested their money in the building of a road is not conclusive that the tariff of rates is unjust and unreasonable. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362.

1. Volume of Traffic to Be Considered. — *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97; *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529.

2. Value of Article Shipped to Be Considered. — *Howell v. New York, etc., R. Co.*, 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272.

3. Competition as Affecting Reasonableness of Rates. — *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41, 2 Int. Com. C. Rep. 52; *La Crosse Manufacturers', etc., Union v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 9; *Squire v. Michigan Cent. R. Co.*, 3 Int. Com. Rep. 515, 4 Int. Com. C. Rep. 611. See also *Interstate Commerce Commission v. Western, etc., R. Co.*, 93 Fed. Rep. 84, *affirming* 88 Fed. Rep. 186.

4. Perishable Freight. — *Perry v. Florida*

*Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

5. Equality of Rates the Object Sought. — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

6. Comparison Permitted. — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

7. Other Rates Mere Evidence. — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.

8. Effect of Advance in Rates. — *Railroad Commission v. Savannah, etc., R. Co.*, 3 Int. Com. Rep. 414, 5 Int. Com. C. Rep. 13. See also *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

9. Effect of Reduction in Rates. — *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529.

10. Higher Rate for Special Service Justified. — *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529; *Boston Fruit, etc., Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; *Delaware State Grange, etc., v. New York, etc., R. Co.*, 3 Int. Com. Rep. 554, 4 Int. Com. C. Rep. 588, 5 Int. Com. C. Rep. 161.

11. Rate Proportionate to Service. — *Delaware State Grange, etc., Co. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 561, 4 Int. Com. C. Rep. 605.



interstate commerce of a "party-rate ticket," for the transportation of ten or more persons from a place situated in one state or territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make an "unjust or unreasonable charge" against such individual within the meaning of the first section of the act to regulate commerce.<sup>1</sup>

**Summer and Winter Rates.** — A railroad company may lawfully charge lower rates for coal in summer months in order to keep its coal cars and coal crew employed during that season of the year, provided such rates are offered in good faith to all persons upon equal terms.<sup>2</sup>

**Average Cost of Carriage on Entire System.** — The fact that the cost of carriage of all coal upon an entire railroad system, from all points of shipment to all destinations, is a certain per cent. of the gross receipts from all coal, is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts of that particular line or part, and that therefore a different charge is unreasonable or unjust.<sup>3</sup>

**Long and Short Hauls.** — The charges accepted for a longer haul may be referred to for the purpose of considering the reasonableness of the charge made for the shorter haul.<sup>4</sup> But the fact that the rates for a longer haul are reasonable does not necessarily make a higher rate for a shorter haul unjust and unreasonable within the meaning of the first section.<sup>5</sup>

**6. Unjust Discrimination — a. IN GENERAL — The Statutory Provision.** — Section 2 of the Interstate Commerce Act provides in substance that if any common carrier subject to its provisions shall directly or indirectly, by any special rate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is thereby prohibited and declared to be unlawful.<sup>6</sup> This section of the act was modeled upon section 90 of the English railway clauses consolidation act of 1845, known as the "Equality Clause."<sup>7</sup>

**Limited to Discrimination in Rates.** — The principal purpose of the second section of the act is to prevent unjust discrimination in rates between shippers.<sup>8</sup> It

**1. Party-Rate Tickets.** — Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 165, citing Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, which affirmed 43 Fed. Rep. 37.

**2. Lower Summer Rates Not Unlawful.** — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409.

**3. Comparison with Average of Entire System.** — Interstate Commerce Commission *v.* Lehigh Valley R. Co., 74 Fed. Rep. 784.

**4. Charge for Longer Haul May Be Considered.** — Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. Rep. 107.

**5. Higher Short Haul Rate Not Necessarily Unreasonable.** — Interstate Commerce Commission *v.* Western, etc., R. Co., 88 Fed. Rep. 186.

**6. Discrimination in Rates Between Shippers Forbidden.** — Wight *v.* U. S., 167 U. S. 513; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Cutting *v.* Florida R., etc., Co., 30 Fed. Rep. 663; U. S. *v.* Egan, 47 Fed. Rep. 112; Interstate Commerce Commission *v.* Texas, etc., R. Co., 52

Fed. Rep. 187; Heck *v.* East Tennessee, etc., R. Co., 1 Int. Com. Rep. 775, 1 Int. Com. C. Rep. 495; Mattingly *v.* Pennsylvania Co., 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; *Re* Underbiling, 1 Int. Com. Rep. 813, 1 Int. Com. C. Rep. 633.

Where a miner and shipper of coal complains of a railroad company that is also a miner and shipper of coal, the commission cannot compel the company to keep separate accounts of what it costs for the transportation of its coal, so as to prevent unjust discrimination against the individual. Haddock *v.* Delaware, etc., R. Co., 3 Int. Com. Rep. 302, 4 Int. Com. C. Rep. 296.

**7. Section Modeled on English Act.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

**8. Purpose Is to Prevent Discrimination Between Shippers.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Western, etc., R. Co., 88 Fed. Rep. 186.

The purpose of the second section of the act is to enforce equality between shippers over



does not relate to preferences as between localities,<sup>1</sup> or to preferences in facilities furnished, except so far as the facilities furnished or denied make the rate a discriminating one. Discrimination in this sense is regulated by section 3.<sup>2</sup> The rate charged in a particular case, however, may violate each of the first four sections of the statute.<sup>3</sup>

**Common Law and Statute Contrasted.** — At common law, so long as the carriers carried for all persons who applied, in the order in which the goods were delivered, and the charges for transportation were reasonable, the carriers were not bound to make the same charge to all persons alike for the same services.<sup>4</sup> The Interstate Commerce Act has changed this rule where the transportation is under substantially similar circumstances and conditions.<sup>5</sup>

**Effect on Validity of Contract.** — The provision prohibiting discrimination between shippers is applicable to contracts made prior to its taking effect, and such a contract is void if it provides for lower rates for the transportation of property than those made to the public generally for like services.<sup>6</sup> But the fact of unjust discrimination by reason of an allowance of rebates will not invalidate bills of lading or contracts of affreightment so as to exempt the railroad company from liability thereon.<sup>7</sup>

**b. WHAT CONSTITUTES** — (1) *In General* — **Definition.** — Unjust discrimination within the meaning of section 2 consists in charging one person a different compensation from what is charged another for doing the like and contemporaneous service in the transportation of a like quantity of traffic under substantially similar circumstances and conditions.<sup>8</sup>

**"Device" Unnecessary.** — It is not necessary, in order to render a preference in rates unlawful, that such preference should be accomplished by means of any "device."<sup>9</sup>

**Not All Discriminations Illegal.** — It is not all discriminations or preferences that fall within the inhibition of the act, but only such as are unjust and unreason-

the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. Interstate Commerce Commission *v. Alabama Midland R. Co.*, 163 U. S. 144; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Wight v. U. S.*, 167 U. S. 512.

**1. Discrimination Between Localities Not Included.** — Interstate Commerce Commission *v. Western, etc., R. Co.*, 88 Fed. Rep. 186.

**2. Preference in Facilities Furnished.** — See *infra*, 7. *Undue Preference or Advantage.*

**Unjust Discrimination under Sections Two and Three Compared.** — Unjust discrimination is prohibited by both sections 2 and 3. The former relates to unjust discrimination in rates; the latter is comprehensive enough standing alone to include every form of unjust discrimination not only in rates but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service. *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

**3. One Act May Violate Each of First Four Sections.** — See Interstate Commerce Commission *v. Western, etc., R. Co.*, 93 Fed. Rep. 83.

**4. Rule at Common Law.** — Interstate Commerce Commission *v. Baltimore, etc., R. Co.*, 145 U. S. 263; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 30 Fed. Rep. 2, 28 Am. & Eng. R. Cas. 1; *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101. See generally the article CARRIERS OF GOODS, vol. 5, p. 154.

**5. Common Law Changed.** — *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

**Reasonable Charges May Create Unjust Discriminations.** — A charge may be perfectly reasonable under section 1 of the act, and yet create an unjust discrimination under section 2. Interstate Commerce Commission *v. Baltimore, etc., R. Co.*, 145 U. S. 263. See also *Great Western R. Co. v. Sutton, L. R. 4 H. L. 226*, decided under a similar provision in the English statute.

**6. Act Invalidates Existing Contracts.** — *Southern Wire Co. v. St. Louis Bridge, etc., R. Co.*, 38 Mo. App. 191, quoting *Rothschild v. Wabash R. Co.*, 15 Mo. App. 242, and reviewing *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453.

Rebates provided for by a contract entered into before the Interstate Commerce Act took effect cannot be recovered upon freight carried after the law took effect. *Bullard v. Northern Pac. R. Co.*, 10 Mont. 168, 45 Am. & Eng. R. Cas. 234.

**7. Act Does Not Relieve Carrier of Liability for Goods Carried.** — *Merchants' Cotton Press, etc., Co. v. Insurance Co. of North America*, 151 U. S. 368, distinguishing Interstate Commerce Commission *v. Baltimore, etc., R. Co.*, 145 U. S. 263.

**8. Unjust Discrimination Defined.** — *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101; Interstate Commerce Commission *v. Baltimore, etc., R. Co.*, 145 U. S. 281.

**9. "Device" Not Necessary to Render Discrimination Unlawful.** — *Scofield v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90.



able.<sup>1</sup> Perhaps any discrimination would be unjust and unreasonable where the circumstances and conditions of transportation are substantially similar, but a mere discrimination is not unjust and illegal where the conditions are substantially dissimilar.<sup>2</sup>

**Consideration for Discrimination.** — A discrimination is not unjust if made pursuant to some agreement by which the favored shipper gives the carrier an adequate consideration for reduced rates.<sup>3</sup>

**Burden of Proof.** — When rates are on their face relatively unequal and disproportionate, the burden is on the carrier to justify them.<sup>4</sup> Where rates are equal the burden of proof is upon the shipper to sustain the charge of unjust discrimination.<sup>5</sup>

(2) *Similarity of Circumstances and Conditions* — **In General.** — To render a discrimination unlawful the preference given to one shipper over another must be contemporaneous and under substantially similar circumstances and conditions.<sup>6</sup> Railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge.<sup>7</sup>

**How Determined.** — Beyond question, the carrier must judge for itself, in the first instance, what are the "substantially similar circumstances and conditions" which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law.<sup>8</sup> The action of the carrier in fixing and adjusting rates upon the claim that the circumstances and conditions of carriage are substantially dissimilar is subject to revision by the commission and the courts, when it is charged that such an action has resulted in rates unjust or unreasonable or in unjust discriminations and preferences.<sup>9</sup>

1. **Only Unjust and Unreasonable Discriminations Illegal.** — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, *affirming* 43 Fed. Rep. 37; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567.

2. See *infra*, (2) *Similarity of Circumstances and Conditions*.

3. **Adequate Consideration for Reduced Rates.** — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 281; Interstate Commerce Commission *v.* Texas, etc., R. Co., 52 Fed. Rep. 187.

4. **Unequal Rates.** — *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 254.

5. **Equal Rates.** — *Brownell v. Columbus, etc., R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

6. **Discrimination Not Unlawful Unless Circumstances and Conditions are Similar.** — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, *affirming* 43 Fed. Rep. 37, 3 Int. Com. Rep. 192; *Cowan v. Bond*, 39 Fed. Rep. 54; *U. S. v. Tozer*, 39 Fed. Rep. 369; *U. S. v. Egan*, 47 Fed. Rep. 112; *Larrison v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; *Burton Stock Car Co. v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 329, 1 Int. Com. C. Rep. 132; *Martin v. Southern Pac. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Chicago Board of Trade v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 410, 4 Int. Com. C.

Rep. 158; *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417; *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 Int. Com. Rep. 33, 5 Int. Com. C. Rep. 299; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; *Gulf, etc., R. Co. v. Miami Steamship Co.*, 86 Fed. Rep. 407; Interstate Commerce Commission *v.* Alabama Midland R. Co., 74 Fed. Rep. 715, *affirmed* 168 U. S. 144; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

7. **Inequality of Conditions Justifies Inequality of Rates.** — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 281 *affirming* 43 Fed. Rep. 51. See also the cases in the last note *supra*.

For various circumstances held not to justify a discrimination between rates for carrying live stock and rates for carrying meat products, see *Board of Trade v. Chicago, etc., R. Co.*, 3 Int. Com. Rep. 233, 4 Int. Com. C. Rep. 158.

8. **By Carrier in First Instance.** — Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 169.

9. **Revision by Commission and Courts.** — *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648.

**The Ultimate Power of determining the right and justice in the matter of discriminating rates rests with the courts.** Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. Rep. 107.



**Circumstances to Be Considered.** — A carrier is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which it will impose upon any particular traffic.<sup>1</sup> Whatever would be considered by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not unjust. Some charges might be unjust to shippers; others might be unjust to the carriers; the rights and interests of both must be regarded.<sup>2</sup>

**Difference in Cost.** — The discrimination between shippers is a lawful one if it is such as the carrier may fairly give because of the difference in cost, expense, or exceptional character of the service.<sup>3</sup>

**Differences Caused by Carrier.** — Differences in circumstances and conditions of transportation that are of a carrier's own creation or connivance, or that by reasonable effort on the part of the carrier might be avoided, cannot justify a discrimination in rates.<sup>4</sup>

**Competition.** — The phrase "under substantially similar circumstances and conditions," as used in the second section of the act, refers to the matter of carriage, and does not include competition between rival routes, which therefore cannot be considered,<sup>5</sup> although it is well settled that in considering whether the circumstances and conditions are substantially similar within the meaning of the third and fourth sections relating to undue preferences and long and short hauls, competition is one of the most important conditions which may and must be taken into consideration.<sup>6</sup> Discrimination in favor of particular shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic to one carrier which would otherwise go to another carrier, are unlawful, and cannot be justified on the ground of profit to the carrier allowing them.<sup>7</sup>

A "Like Kind of Traffic," as used in section 2, does not mean traffic that is

1. **Circumstances Considered in Fixing Rates.** — *Harris v. Cockermouth R. Co.*, 1 R. & Can. T. Cas. 97, 3 C. B. N. S. 693, 91 E. C. L. 693.

2. **Interests of Shippers and Carriers Both Considered.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 74 Fed. Rep. 715; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

3. **Difference in Cost Justifies Difference in Rates.** — *Interstate Commerce Commission v. Texas, etc., R. Co.*, 52 Fed. Rep. 187, *citing* U. S. 7, *Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

4. **Differences Caused with Carrier's Connivance.** — *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131.

5. **Transportation of Oil in Tank Cars and Barrels.** — When a carrier engages in transporting oil in tanks, and also in barrels in box cars in car loads, and charges for the weight of the barrel as well as the oil carried by the box car mode of transportation, but for the weight of the oil only when carried in tanks, it unjustly discriminates between shippers, and subjects the traffic to undue prejudice and disadvantage. *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131.

Where the evidence shows that the shipment of oil by barrel is more dangerous than the shipment in tank cars and that there is a greater chance of a return load where the shipment is by tank, the carrier is justified in making a charge for the weight of the barrel. *Re Relative Tank, etc., Rates on Oil*, 2 Int. Com. Rep. 245, 2 Int. Com. C. Rep. 365.

6. **Competition Cannot Be Considered.** — *Inter-*

*state Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, *following* *Wight v. U. S.*, 167 U. S. 512; *Interstate Commerce Commission v. Texas, etc., R. Co.*, 52 Fed. Rep. 187.

There are many expressions in earlier cases which seem to indicate a contrary view. See *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, *reversing* 57 Fed. Rep. 948, 20 U. S. App. 1; *Phipps v. London, etc., R. Co.*, (1892) 2 Q. B. 229, 50 Am. & Eng. R. Cas. 494; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, *affirming* 43 Fed. Rep. 37; *Interstate Commerce Commission v. Texas, etc., R. Co.*, 57 Fed. Rep. 948, 52 Fed. Rep. 187; *Manufacturers, etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *Bates v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 715, 3 Int. Com. C. Rep. 435.

7. **Competition as Affecting Similarity of Conditions under Third and Fourth Sections.** — See *infra*, 7. b. (2) *Undue Preference or Advantage — Circumstances to Be Considered*; and *infra*, 9. *Long and Short Hauls*.

7. **Discrimination in Favor of Particular Shippers to Divert Traffic from Rivals.** — *Interstate Commerce Commission v. Texas, etc., R. Co.*, 52 Fed. Rep. 189; *Harris v. Cockermouth, etc., R. Co.*, 3 C. B. N. S. 693, 91 E. C. L. 693; *Evershed v. London, etc., R. Co.*, 2 Q. B. D. 254. Compare *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 652.



identical, but means traffic of a like kind with other freight similar in character and cost of transportation.<sup>1</sup>

Question of Fact. — It is always a question of fact whether the circumstances and conditions are substantially similar.<sup>2</sup>

(3) *Classification of Freights.* — The act recognizes the right of carriers to classify freight.<sup>3</sup> But a classification of freights is unlawful if it is used as a device to effect unjust discrimination.<sup>4</sup> Goods really in the same class should be carried at the same rate.<sup>5</sup> Where articles which should properly be classified together are classified differently and a different rate charged, the carrier is guilty of unlawful discrimination.<sup>6</sup> Proof of lower classification of articles

1. Meaning of "Like Kind of Traffic." — *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447.

2. Similarity of Circumstances a Question of Fact. — *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 803, 43 U. S. App. 308, citing *Palmer v. London, etc., R. Co.*, L. R. 1 C. P. 588; *Phipps v. London, etc., R. Co.*, (1892) 2 Q. B. 229.

3. Classification of Freights Not Unlawful. — *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535; *Brownell v. Columbus, etc., R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

Principle of Classification. — Freights are generally classified according to expense of carriage, bulk, value, risk, competition, and other considerations affecting the cost and value of the transportation service. *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447.

The volume of business furnished to carriers by a particular article is a proper element to be considered in determining its classification and rates. So where ale, beer, and mineral waters are shipped in very much greater quantities than the complainant's medicines, it is a reason for giving a different classification. *Warner v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32.

Market value is one of the considerations in arranging a classification and fixing rates for carriage. *Warner v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32.

4. Classification as a Device to Cloak Discrimination. — *New York Board of Trade v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; *Warner v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535.

5. Goods in Same Class Should Be Carried at Same Rate. — *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417; *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252; *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Board of Trade v. Chicago, etc., R. Co.*, 3 Int. Com. Rep. 233, 4 Int. Com. C. Rep. 158; *Independent Refiners Assoc. v. Western New York, etc., R. Co.*, 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415; *Beaver v. Pittsburgh, etc., R. Co.*, 3 Int. Com. Rep. 564, 4 Int. Com. C. Rep. 733.

Grain and Grain Products belong to the same class. *McMorran v. Grand Trunk R. Co.*, 2

Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252.

Wheat and Wheat Flour. — Assuming that as a rule wheat and wheat flour should have the same classification and rate, a differential in favor of the wheat is a discrimination, but under particular circumstances and conditions it may not be unlawful. *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417.

Railroad Ties and Lumber. — Railroad ties should be classed the same as lumber, and the classification of such ties differently is an unjust discrimination. *Reynolds v. Western New York, etc., R. Co.*, 1 Int. Com. Rep. 685, 1 Int. Com. C. Rep. 393.

Oil and Its Products belong to the same class, and the rates thereon should correspond without reference to the manner of carrying the oil, whether in barrels or tanks. *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131.

Soaps Used for Like Purposes. — Where two kinds of soap are advertised and held out to the public as suitable for like purposes, and they are so used, they should receive the same classification and rates. *Beaver v. Pittsburgh, etc., R. Co.*, 3 Int. Com. Rep. 77, 4 Int. Com. C. Rep. 41.

Proper Classification — Generally. — See *Reynolds v. Western New York, etc., R. Co.*, 1 Int. Com. Rep. 685, 1 Int. Com. C. Rep. 393; *Martin v. Southern Pac. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252; *Bates v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 715, 3 Int. Com. C. Rep. 435; *Warner v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 74, 4 Int. Com. C. Rep. 32; *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Board of Trade v. Chicago, etc., R. Co.*, 3 Int. Com. Rep. 233, 4 Int. Com. C. Rep. 158; *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 Int. Com. Rep. 400, 4 Int. Com. C. Rep. 417; *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 Int. Com. Rep. 33, 5 Int. Com. C. Rep. 299; *Pyle v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 767, 1 Int. Com. C. Rep. 465; *Andrews Soap Co. v. Pittsburgh, etc., R. Co.*, 3 Int. Com. Rep. 77, 4 Int. Com. C. Rep. 41; *Beaver v. Pittsburgh, etc., R. Co.*, 3 Int. Com. Rep. 564, 4 Int. Com. C. Rep. 733.

6. Improper Classification Constitutes Discrimination. — *Reynolds v. Western New York, etc., R. Co.*, 1 Int. Com. Rep. 685, 1 Int. Com. C. Rep. 393.



widely dissimilar in weight, bulk, value, risk, and general character, is not sufficient to establish unjust classification, but to determine whether an article is properly classed it must be compared with the classification of analogous articles.<sup>1</sup>

**c. PARTICULAR INSTANCES — Discounts for Large Shipments.** — An agreement of a railroad company to give a discount from schedule rates to all persons who might receive consignments of thirty thousand tons or more in any one year, the ostensible object being to secure quick dispatch in unloading cars, constitutes an unjust discrimination.<sup>2</sup> The fact that a carrier receives much more traffic from one shipper than from another does not make the circumstances and conditions under which the two services were rendered substantially dissimilar so as to justify a discrimination in rate.<sup>3</sup>

**Carload Rates.** — Lower rates on carload lots than on quantities less than carloads are not unlawful.<sup>4</sup> But if the difference be so great as to destroy competition between large and small dealers, they will be deemed to constitute unlawful discrimination, especially upon articles that are necessary and in general use and furnish a large volume of business.<sup>5</sup>

**Manufacturer's Rate.** — A carrier has no right to give arbitrarily what is called a manufacturer's rate to certain persons and not to others.<sup>6</sup>

**Group Rates.** — The practice of making a group rate on shipments from all points within a certain territory does not constitute unjust discrimination in favor of the more distant shippers as against those who reside nearer the point of destination.<sup>7</sup>

**Mileage for Use of Shipper's Cars.** — An arrangement by which shippers of live stock are allowed to furnish improved stock cars for their own exclusive use and to receive an extraordinary mileage from the carrier for such use amounts to giving a rebate, and is an unjust discrimination as against competitive shippers.<sup>8</sup>

**1. Standard of Comparison.** — *Brownell v. Columbus, etc., Midland R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

**2. Discounts for Large Shipments Illegal.** — *Providence Coal Co. v. Providence, etc., R. Co.*, 1 Int. Com. Rep. 363, 1 Int. Com. C. Rep. 107.

**Guaranty of Large Amount Justifies Reduced Rates.** — But it is not an unjust discrimination for a company to carry at a lower rate in consideration of a guaranty of large quantities and full train loads at regular periods, provided the real object of the company is to obtain a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those shippers who cannot give such a guaranty. *Interstate Commerce Commission v. Texas, etc., R. Co.*, 52 Fed. Rep. 187, citing *Nicholson v. Great Western R. Co.*, 5 C. B. N. S. 366, 94 E. C. L. 366.

**3. Difference in Amount of Traffic Does Not Render Services Dissimilar.** — *U. S. v. Tozer*, 39 Fed. Rep. 369.

**4. Reduced Carload Rates Lawful.** — *Thurber v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473; *Brownell v. Columbus, etc., R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

**Carloads of Different Tonnage.** — Other things being equal, a higher charge in the aggregate should be made per carload of large tonnage than for one of less tonnage, but the rate per one hundred pounds should be less for the heavy tonnage than for the other. *Murphy v. Wabash R. Co.*, 3 Int. Com. Rep. 725, 5 Int. Com. C. Rep. 122.

**5. Excessive Difference in Rates Illegal.** — *Thurber v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 742, 3 Int. Com. C. Rep. 473; *Brownell v. Columbus, etc., Midland R. Co.*, 4 Int. Com. Rep. 285, 5 Int. Com. C. Rep. 638.

**6. Manufacturer's Rate.** — *Matter of Louisville, etc., R. Co.*, 5 Int. Com. C. Rep. 466.

**7. Group Rates Not Unlawful.** — *Howell v. New York, etc., R. Co.*, 2 Int. Com. Rep. 162, 2 Int. Com. C. Rep. 272; *Imperial Coal Co. v. Pittsburgh, etc., R. Co.*, 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618; *Rend v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 313, 2 Int. Com. C. Rep. 540.

**8. Excessive Mileage for Use of Shipper's Cars an Unlawful Rebate.** — *Rice v. Louisville, etc., R. Co.*, 1 Int. Com. Rep. 722, 1 Int. Com. C. Rep. 503; *Scofield v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90; *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; *Shamberg v. Delaware, etc., R. Co.*, 3 Int. Com. Rep. 502, 4 Int. Com. C. Rep. 630.

**Lawful Compensation for Use of Shipper's Cars.** — If a carrier is unable to supply rolling stock and the shipper supplies it for himself, it must be on such terms, as between shipper and carrier, as not to put others to disadvantage. A charge of unjust discrimination in shipping oil in tank cars owned by the shipper, and returning freights at low rates in the same cars, is not sustained unless there is proof of the payment of excessive mileage. *Rice v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193; *Rice v. Louisville, etc.,*



**Local and Through Rates.**—A through rate which is lower than a local rate does not constitute an unjust discrimination, and is lawful,<sup>1</sup> provided that the disparity between them is not so great as to be unreasonable,<sup>2</sup> and that section 4 in respect to long and short hauls is not violated.<sup>3</sup> Where goods or passengers are carried at a through rate between two points the circumstances and conditions of carriage are substantially dissimilar to those attending a carriage of goods from an intermediate point to the same destination.<sup>4</sup> A state railroad corporation doing business wholly within one state may agree to form a continuous line for carrying foreign freight at a through rate without thereby preventing itself from charging its ordinary local rates for domestic traffic originating within the state.<sup>5</sup>

A Special Rate for Carrying Immigrants to certain points on a railroad, which is less than half the amount charged to the public generally for the same service, constitutes an unjust discrimination.<sup>6</sup> But where the accommodations pro-

R. Co., 1 Int. Com. Rep. 722, 1 Int. Com. C. Rep. 503.

The rate charged the shipper should be the regular rate after deducting the established rate for the rent of the cars. *Scofield v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Co. C. Rep. 90.

Ordinarily an individual who owns a car, which he hires to a carrier, is not entitled to the exclusive use of it, but if he has a right to contract for such exclusive use, it must be on such terms as not to discriminate unjustly against shippers in cars furnished by the carrier. *Independent Refiners' Assoc. v. Western New York, etc., R. Co.*, 5 Int. Com. C. Rep. 415, 4 Int. Com. Rep. 162.

In *Rice v. Western New York, etc., R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131, it was held that the fact that a carrier does not own tank cars, but uses cars belonging to individuals, cannot be considered in determining whether or not there has been a discrimination in rates between oil carried in tank cars and oil carried in barrels.

**1. Reduced Through Rate Not Unlawful.**—*Parsons v. Chicago, etc., R. Co.*, 63 Fed. Rep. 903, affirmed 167 U. S. 447; *Milwaukee Chamber of Commerce v. Flint, etc., R. Co.*, 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; *Poughkeepsie Iron Co. v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195; *Coxe v. Lehigh Valley R. Co.*, 3 Int. Com. Rep. 460, 4 Int. Com. C. Rep. 535; *U. S. v. Tozer*, 39 Fed. Rep. 369; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. Rep. 37; *Union Pac. R. Co. v. U. S.*, 117 U. S. 355; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 281; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Harris v. Cockermouth, etc., R. Co.*, 1 R. & Can. T. Cas. 97, 3 C. B. N. S. 693, 91 E. C. L. 693; *Hozier v. Caledonian R. Co.*, 17 Sess. Cas. 302, 1 R. & Can. T. Cas. 27 (decided under the English Traffic Act).

**Joint Through Rates.**—If the local rates are reasonable, it does not constitute unlawful discrimination for a carrier to accept business from other carriers on through rates which, when divided among them, will give to any one of them less for its division than its own local rates. But this is subject to the condition that the through rate is not in itself illegal

either because of being less than some one of the locals, or being unjustly discriminating against individuals or localities, or so low as to burden other business with some part of the cost of the business on which it is imposed. *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

**2. Extent of Disparity in Rates.**—The mere fact that in any particular case the disparity between through and local rates was considerable will not warrant the circuit court of appeals in finding that such disparity constitutes an undue discrimination, especially where the disparity was not complained of by any one affected thereby. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**3. Long and Short Hauls.**—*Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567. And see *infra*, this section, 9. *Long and Short Hauls.*

**4. Circumstances of Through Traffic Substantially Different from Those of Local Traffic.**—*U. S. v. Tozer*, 39 Fed. Rep. 369.

The service rendered by the railway company in transporting local passengers from one point on its lines to another is not identical with the service rendered in transporting through passengers over the same rails. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Union Pac. R. Co. v. U. S.*, 117 U. S. 355.

It is only required that local rates shall be reasonable when compared with through rates, but not necessarily relatively equal, as there are many influences affecting local rates which do not apply to through rates, or if they do apply, do so in a less degree. *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. C. Rep. 584, 2 Int. Com. Rep. 414.

**5. Local Business of Connecting Carriers.**—*Chicago, etc., R. Co. v. Osborne*, 10 U. S. App. 430, distinguished in *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.

**6. Special Rates to Immigrants.**—*Elvey v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 804, 3 Int. Com. C. Rep. 652.

Such discrimination cannot be justified on the ground that the special rate is offered to immigrants to induce them to go to a section which is sparsely settled in order to build up



vided for immigrants are different from those provided for other travelers, it does not constitute an unjust discrimination for the carriers to make a class rate for immigrants and to decline to give the same rate to others.<sup>1</sup>

**Passes.** — The issuance of a free pass for transportation from one state to another to a person not within any of the exceptions contained in section 22 constitutes an unjust discrimination.<sup>2</sup>

**Party-rate Tickets.** — The issuance of a party-rate ticket for the transportation of ten or more persons at a rate less than that charged to a single individual for a like transportation on the same trip does not constitute an unjust discrimination against him within the meaning of section 2,<sup>3</sup> provided the party-rate tickets are offered to the public generally and the rate charged single passengers is not unreasonable.<sup>4</sup> Conceding the same terms of contract to all persons equally, a carrier may adopt both wholesale and retail rates for its transportation service. The act was not intended to ignore the principle that one can sell cheaper at wholesale than at retail.<sup>5</sup>

**Round-trip Tickets.** — Selling a round-trip ticket for a less rate than a one-way ticket is not an unjust and unreasonable discrimination.<sup>6</sup>

**The Sale of Mileage Tickets to Commercial Travelers,** and a refusal to sell to other travelers at the same rate, constitutes an unjust discrimination within the meaning of section 2.<sup>7</sup>

**Commission to Ticket Brokers.** — The placing of passenger tickets in the hands of brokers or "scalpers" to be disposed of at reduced rates under pretense of paying a commission, and the sale at such rates by the broker, constitutes an unjust discrimination.<sup>8</sup>

**Rebates.** — Giving a shipper a rebate denied to other shippers under similar conditions is an unjust discrimination within the meaning of the act.<sup>9</sup>

business along the line of the road. *Elvey v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 804, 3 Int. Com. C. Rep. 652.

1. **Different Accommodations to Immigrants Justify Difference in Rates.** — *Savery v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 210, 2 Int. Com. C. Rep. 338.

2. **Passes Constitute Unlawful Discrimination.** — *Ex p. Koehler*, 31 Fed. Rep. 315; *In re Charge to Grand Jury*, 66 Fed. Rep. 146; *Griffie v. Burlington, etc., R. Co.*, 2 Int. Com. Rep. 194, 2 Int. Com. C. Rep. 301; *Slater v. Northern Pac. R. Co.*, 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 359; *Harvey v. Louisville, etc., R. Co.*, 3 Int. Com. Rep. 793, 5 Int. Com. C. Rep. 153; *Matter of Boston, etc., R. Co.*, 5 Int. Com. C. Rep. 69. See also *infra*, this section, 13. *Mileage, Excursion, Commutation Tickets, etc.*

3. **Party-rate Tickets Not Unlawful.** — *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, 4 Int. Com. Rep. 92, *affirming* 43 Fed. Rep. 37, 3 Int. Com. Rep. 192, and *followed in* *Foster v. Cleveland, etc., R. Co.*, 56 Fed. Rep. 434; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 165.

*Contra.* — Both carload rates to passengers and party rates lower than for a single passenger are illegal. *Re Passenger Traffic*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 513.

Party-rate tickets and commutation tickets are not the same, and when a party-rate ticket is sold for less than the fare for a single passenger it is illegal. *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465. But see *infra*, this

section, 13. *Mileage, Excursion, Commutation Tickets, etc.*

**Circumstances Are Dissimilar.** — The transportation of ten persons on a single ticket is not substantially identical with the transportation of one person. *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263.

4. **Must Be Available to Public Generally.** — *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. Rep. 37, *affirmed* 145 U. S. 263.

5. **Lower Wholesale than Retail Rates.** — *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, *affirmed* 43 Fed. Rep. 37.

6. **Round-trip Tickets at Reduced Rates.** — *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263.

7. **Mileage Limited to Commercial Travelers.** — *Larrison v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; *Associated Wholesale Grocers v. Missouri Pac. R. Co.*, 1 Int. Com. Rep. 393, 1 Int. Com. C. Rep. 156.

**Release of Carrier from Liability — Effect.** — The fact that commercial travelers release the carrier from liability and that they may influence business in favor of the carrier does not render the circumstances of the carriage substantially different so as to justify such discrimination. *Larrison v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147.

8. **Pretended Commissions to "Scalpers."** — *Re Pass. Tariffs, etc.*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

9. **Rebates.** — *Wight v. U. S.*, 167 U. S. 512; *Interstate Commerce Commission v. Alabama*



An Allowance for Leakage or Waste made to shippers of oil in tank cars constitutes an unjust discrimination, where the same allowance is not made to shippers in barrels.<sup>1</sup>

Free Cartage. — The payment by a carrier of the expense of cartage to its station for one shipper and a refusal to pay the expense of such cartage for another shipper is equivalent to a rebate to the former, the railroad service proper being the same to each and the rate the same.<sup>2</sup> Where a carrier furnishes cars and takes the complainant's flour from his mill, he cannot complain that the company bears a part of the costs of carting the flour of other persons to the station, as in such case there is no discrimination.<sup>3</sup>

Compressing Cotton in Transit. — Where cotton is shipped at a through rate, it is not an unjust discrimination against shippers at an intermediate point for the carrier to interrupt the through carriage at that point and compress the cotton at its own expense, where such practice is in compliance with a recognized custom available to all shippers.<sup>4</sup>

Goods to Be Reshipped. — Billing freight to a certain point at a lower rate if it is to be reshipped beyond the point of destination is unlawful.<sup>5</sup>

Underbilling. — Unjust discrimination may result from underbilling, where the favored shipper pays less than is charged to others for the same service.<sup>6</sup>

7. Undue Preference or Advantage — *a.* IN GENERAL. — The third section of the Interstate Commerce Act makes it unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.<sup>7</sup> This section was taken substantially from the English Traffic Act, and in determining what constitutes an "undue or unreasonable preference or advantage," it will be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to those words by the English courts and intended to incorporate it into the statute.<sup>8</sup> The purpose of this section is to require carriers to treat all persons in the same situation impartially. Under it rates must be not only reasonable in themselves,

Midland R. Co., 168 U. S. 144; Bullard v. Northern Pac. R. Co., 10 Mont. 168, 45 Am. & Eng. R. Cas. 234; Matter of Grand Trunk R. Co., 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89; Matter of Louisville, etc., R. Co., 5 Int. Com. C. Rep. 466. Generally as to what constitutes a rebate, see Willoughby v. Chicago Junction R., etc., Co., 50 N. J. Eq. 656.

1. Allowance for Leakage. — Rice v. Western New York, etc., R. Co., 3 Int. Com. Rep. 162, 4 Int. Com. C. Rep. 131; Rice v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193.

2. Free Cartage Equivalent to Unlawful Rebate. — Hezel Milling Co. v. St. Louis, etc., R. Co., 3 Int. Com. Rep. 701, 5 Int. Com. C. Rep. 57. See also Stone v. Detroit, etc., R. Co., 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613; Wight v. U. S., 167 U. S. 512. But see Detroit, etc., R. Co. v. Interstate Commerce Commission, 74 Fed. Rep. 803, 43 U. S. App. 308.

3. Hezel Milling Co. v. St. Louis, etc., R. Co., 3 Int. Com. Rep. 701, 5 Int. Com. C. Rep. 57.

4. Compressing Cotton in Transit. — Cowan v. Bond, 30 Fed. Rep. 54.

See also similar questions treated as to whether or not they constitute an unlawful preference or advantage, *infra*, p. 143.

5. Lower Rate for Goods Intended for Further Shipment. — Northwestern Iowa Grain, etc., Shippers' Assoc. v. Chicago, etc., R. Co., 2 Int. Com. Rep. 431, 2 Int. Com. C. Rep. 604.

As to Milling in Transit, which presents a somewhat similar question, see *infra*, p. 143.

6. Underbilling Unlawful. — *Re* Underbilling, 1 Int. Com. Rep. 813, 1 Int. Com. C. Rep. 633.

7. Undue and Unreasonable Preferences or Advantages Prohibited. — Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission v. Brimson, 154 U. S. 447; Mattingly v. Pennsylvania Co., 2 Int. Com. Rep. 806, 3 Int. Com. C. Rep. 592; Maclean v. Chicago, etc., R. Co., 3 Int. Com. Rep. 711, 5 Int. Com. C. Rep. 84.

8. Language and Construction of English Traffic Act Adopted. — Interstate Commerce Commission v. Baltimore, etc., R. Co., 145 U. S. 284; McDonald v. Hovey, 110 U. S. 619. And see Hozier v. Caledonian R. Co., 17 Sess. Cas. 302, 1 R. & Can. T. Cas. 27; Jones v. Eastern Counties R. Co., 3 C. B. N. S. 718, 91 E. C. L. 718; Ransome v. Eastern Counties R. Co., 1 C. B. N. S. 437, 87 E. C. L. 437; Oxlade v. North Eastern R. Co., 1 C. B. N. S. 454, 87 E. C. L. 454; Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197.



but also relatively equal and reasonable, so as to prevent unjust discriminations. In this respect it changed the common law, which did not require common carriers to furnish the same facilities or make the same charges to all alike, so long as they carried for all who offered and charged only a reasonable compensation.<sup>1</sup> A carrier has no right to make rates so as to overcome the natural advantages of one place over another, or so as to build up one place or section at the expense of another.<sup>2</sup> A railroad cannot discriminate against a town which it does not reach and in whose carrying trade it does not participate.<sup>3</sup>

**b. WHAT CONSTITUTES — (1) In General — Definition.** — There is nothing in the act which defines what shall be held to be a due or an undue, a reasonable or an unreasonable, preference or advantage.<sup>4</sup> But discrimination must consist in the doing for or allowing to one party or place what is denied to another. It cannot be predicated of an action which in itself is impartial.<sup>5</sup>

**Preference or Advantage Not Necessarily Unlawful.** — The mere circumstance that there is in a given case a preference or advantage does not of itself show that such preference or advantage is unlawful.<sup>6</sup> The third section was not intended to prohibit all discriminations, but only those that are undue or unreasonable.<sup>7</sup> One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unrea-

#### 1. Relative Fairness and Impartiality Required.

— Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 37; *U. S. v.* Delaware, etc., R. Co., 40 Fed. Rep. 101; Detroit Board of Trade *v.* Grand Trunk R. Co., 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315; *Re* Tariffs of Transcontinental Lines, 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324; Manufacturers, etc., Union *v.* Minneapolis, etc., R. Co., 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; Raworth *v.* Northern Pac. R. Co., 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; Chamber of Commerce *v.* Great Northern R. Co., 5 Int. Com. C. Rep. 571, 4 Int. Com. Rep. 230; Eau Claire Board of Trade *v.* Chicago, etc., R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264; Lippman *v.* Illinois Cent. R. Co., 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; Toledo Produce Exch. *v.* Lake Shore, etc., R. Co., 3 Int. Com. Rep. 830, 5 Int. Com. C. Rep. 166; Boston Chamber of Commerce *v.* Lake Shore, etc., R. Co., 1 Int. Com. Rep. 754, 1 Int. Com. C. Rep. 436; Boards of Trade Union *v.* Chicago, etc., R. Co., 1 Int. Com. Rep. 608, 1 Int. Com. C. Rep. 215; Bates *v.* Pennsylvania R. Co., 2 Int. Com. Rep. 715, 3 Int. Com. C. Rep. 435; Crews *v.* Richmond, etc., R. Co., 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401.

**Reasonable Charge May Create Unlawful Preference.** — A charge may be perfectly reasonable under section 1 of the act and may create an unreasonable preference or advantage under section 3 of the act. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263.

**2. Carrier Should Not Discriminate So as to Equalize Conditions.** — Chamber of Commerce *v.* Great Northern R. Co., 5 Int. Com. C. Rep. 571; Raymond *v.* Chicago, etc., R. Co., 1 Int. Com. Rep. 627, 1 Int. Com. C. Rep. 230; Eau Claire Board of Trade *v.* Chicago, etc., R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264; Milwaukee Chamber of Commerce *v.* Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; Potter Mfg. Co. *v.* Chicago, etc.,

R. Co., 4 Int. Com. Rep. 223, 5 Int. Com. C. Rep. 514.

**Depriving Manufacturing Industry of Advantage of Favorable Location.** — Manufacturing industries should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their favorable location in respect of cost of raw material supplied from a common source, or of distance to the common market for the finished product. James *v.* Canadian Pac. R. Co., 5 Int. Com. C. Rep. 612.

**3. Road Cannot Discriminate Against Points Not Reached.** — Eau Claire Board of Trade *v.* Chicago, etc., R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 264.

**4. Undue Preference or Advantage Not Defined by Act.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Alabama Midland R. Co., 74 Fed. Rep. 715.

**5. Discrimination under Third Section Defined.** — Crews *v.* Richmond, etc., R. Co., 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; Martin *v.* Chicago, etc., R. Co., 2 Int. Com. Rep. 32, 2 Int. Com. C. Rep. 25.

Unjust discrimination under section 3 consists in giving any undue or unreasonable preference or advantage to any particular shipper or subjecting him to any undue or unreasonable prejudice or disadvantage in any respect whatever. *U. S. v.* Delaware, etc., R. Co., 40 Fed. Rep. 101.

**6. Preference or Advantage Not Necessarily Unlawful.** — Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 11 App. Cas. 97; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Alabama Midland R. Co., 74 Fed. Rep. 715.

**7. All Discrimination Not Prohibited.** — Interstate Commerce Commission *v.* Texas, etc., R. Co., 52 Fed. Rep. 187; Oregon Short Line, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. Rep. 465; Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 59 Fed. Rep. 402; Oregon



sonable disadvantage.<sup>1</sup> So a preference or advantage is not undue or unlawful unless the circumstances and conditions of carriage are substantially the same.<sup>2</sup>

**A Question of Fact.** — "It cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case."<sup>3</sup> Before the commission can adjudge that a carrier has acted unlawfully in giving undue preference or advantage, it must ascertain the facts.<sup>4</sup>

The Burden of Proving an Undue Preference or an undue prejudice rests upon the complaining party.<sup>5</sup>

(2) *Circumstances to Be Considered.* — In determining whether a preference or advantage is due or undue, the commission must consider among other facts those facts and matters which carriers, apart from the statute, would treat as calling for a preference or advantage in particular cases.<sup>6</sup> Besides the mere differences in charges, various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise, must all be considered.<sup>7</sup> The subject must be looked at broadly, and it is impossible to determine the question by a mere mathematical calculation.<sup>8</sup> Charges need not be fixed solely upon a

Short-Line, etc., R. Co. *v.* Northern Pac. R. Co., 61 Fed. Rep. 158.

1. **Discrimination Must Be Undue or Unreasonable.** — Little Rock, etc., R. Co. *v.* St. Louis Southwestern R. Co., 63 Fed. Rep. 775.

2. **Substantially Similar Circumstances and Conditions.** — Cowan *v.* Bond, 39 Fed. Rep. 54.

A preference to be undue must be a preference of a person similarly circumstanced and bringing a similar profit to the company. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 37.

3. **Question of Fact and Not of Law.** — Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 170, 74 Fed. Rep. 715; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 3 R. & Can. T. Cas. 426; Phipps *v.* London, etc., R. Co., (1892) 2 Q. B. 229; Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Palmer *v.* London, etc., R. Co., L. R. 1 C. P. 593.

**Illustrations—Questions for Jury.** — Whether a difference of twelve cents per hundred pounds between a local rate and the carrier's proportion of a through rate is an undue and unreasonable preference or advantage as against the local shipper is a question for the jury. U. S. *v.* Tozer, 39 Fed. Rep. 369.

When competition enters as an element in the determination of a case the question whether or not there is an undue preference or advantage is a question not of law but of fact. Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409.

**Criminality of Unreasonable Charge.** — A conviction for the violation of the "undue preference" clause of the act cannot be sustained where the criminality of the act is made to depend on whether the jury think a preference reasonable or unreasonable. To constitute a

crime, the act must be one the criminality of which the party is able to know in advance. Tozer *v.* U. S., 53 Am. & Eng. R. Cas. 14, 52 Fed. Rep. 917, quoting Chicago, etc., R. Co. *v.* Dey, 35 Fed. Rep. 866.

4. **Commission Must Ascertain Facts.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197. See also *infra*, this section, 14, *b.* *Proceedings Before Commission.*

**Evidence.** — Where a carrier is charged with unjust discrimination as against a certain shipper, it is competent for the carrier to show that during a long course of business neither the company nor any of its agents had ever manifested any unfriendly feeling toward the shipper, but on the other hand, just before the matter complained of, it had made extra exertions, in good faith, to serve the shipper in procuring cars from a connecting line. Riddle *v.* Baltimore, etc., R. Co., 1 Int. Com. Rep. 778, 1 Int. Com. C. Rep. 608.

5. **Burden of Proof.** — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 37; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Denaby Main Colliery Co. *v.* Manchester, etc., R. Co., 11 App. Cas. 97.

6. **Business Considerations.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Alabama Midland R. Co., 74 Fed. Rep. 715.

7. **Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 51, affirmed in 145 U. S. 284; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Boston Chamber of Commerce *v.* Lake Shore, etc., R. Co., 1 Int. Com. Rep. 754, 1 Int. Com. C. Rep. 436. See Oxlade *v.* North Eastern R. Co., 1 C. B. N. S. 454, 87 E. C. L. 454.**

8. **Mathematical Calculation Not the Test.** — Phipps *v.* London, etc., R. Co., (1892) 2 Q. B.



mileage basis.<sup>1</sup> Mileage, while a circumstance to be considered with all the other facts and conditions, is by no means controlling or even the most important.<sup>2</sup> Differences in population and tonnage traffic may constitute a circumstance or condition of dissimilarity and justify what would otherwise be an unlawful preference or advantage.<sup>3</sup> In determining whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment.<sup>4</sup>

A Joint Through Tariff agreed upon by two connecting lines, or the share of it which either line takes, is not the standard by which to determine whether either line by its local rates grants undue preferences.<sup>5</sup>

**Group Rates.** — The fact that a railroad company, in its schedule of freight rates, groups together two cities on its line some distance apart, and charges the same rate for carriage to both, is not to be treated as a conclusive admission that the service is performed under substantially similar circumstances and conditions within the meaning of the interstate commerce law, so as to make it necessarily unlawful to furnish, without additional charge, an additional service at the further city, by cartage from its depot to the places of business of the consignees.<sup>6</sup>

**Municipal Subscription to Road Does Not Justify Discrimination.** — The fact that one place has given municipal aid toward the building of a railroad is no reason for discriminating in its favor. All points, without reference to such things,

238, *quoted with approval* in *Interstate Commerce Commission v. Louisville, etc.*, R. Co., 73 Fed. Rep. 409; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 74 Fed. Rep. 715, *affirmed* 168 U. S. 144; *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315.

**1. Mileage Basis Need Not Be Adopted in Fixing Rates.** — *Interstate Commerce Commission v. Louisville, etc.*, R. Co., 73 Fed. Rep. 409; *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 199, 2 Int. Com. C. Rep. 315; *Eau Claire Board of Trade v. Chicago, etc.*, R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 254.

To fix a rate for a thousand miles at twice the sum prescribed for half the distance, under all circumstances, would be too arbitrary. *Eau Claire Board of Trade v. Chicago, etc.*, R. Co., 4 Int. Com. Rep. 65, 5 Int. Com. C. Rep. 254.

**2. Mileage Rate Not Alone the Test.** — *Interstate Commerce Commission v. Louisville, etc.*, R. Co., 73 Fed. Rep. 409, *citing* with approval *Phipps v. London, etc.*, R. Co., (1892) 2 Q. B. 242.

Much weight should be given to distance in establishing rates, but it is not an unconditional right to have them so fixed, from which a departure may not be justified by other conditions. The public benefits, the greater volume of business warranting lower rates, and competition furnish reasons which sometimes outweigh the mere consideration of distance. *Imperial Coal Co. v. Pittsburgh, etc.*, R. Co., 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618; *McMorran v. Grand Trunk R. Co.*, 2 Int. Com. Rep. 604, 3 Int. Com. C. Rep. 252.

**3. Differences in Population and Tonnage Traffic.** — It cannot be said that a railroad company may not reasonably, and without undue

preference or advantage, or unlawful discrimination, collect and deliver, at its own expense, goods at one city and not at another, where the difference in population is as seventy thousand to six thousand and in traffic one million tons to fifty-five thousand tons. *Detroit, etc.*, R. Co. *v. Interstate Commerce Commission*, 74 Fed. Rep. 832.

**Preferring Trade Centres.** — Large commercial places which are designated as trade centres are not, as a matter of right, entitled to more favorable rates than smaller places which are generally supplied from the trade centres; and it is not unlawful to give the smaller places as favorable rates as the large ones. Such distributing centres have no right to demand that the rates to more distant and smaller places shall be made up of the rate to the large place, plus the rate from there to the smaller places. Rates may be made directly to the small places less than the two rates. *Martin v. Chicago, etc.*, R. Co., 2 Int. Com. Rep. 32, 2 Int. Com. C. Rep. 25.

**4. Welfare of Localities to Be Considered.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 165, *citing with approval* *Texas, etc.*, R. Co. *v. Interstate Commerce Commission*, 162 U. S. 197.

**5. Joint Through Rates Not the Standard.** — *Tozer v. U. S.*, 53 Am. & Eng. R. Cas. 14, 52 Fed. Rep. 917; *Chicago, etc.*, R. Co. *v. Osborne*, 52 Fed. Rep. 912.

Divisions of a joint through rate among the carriers are sometimes inquired into for the purpose of ascertaining, from the divisions, whether a rate unreasonable in itself may not be traced to the inequality of such divisions. *Perry v. Florida Cent., etc.*, R. Co., 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

**6. Group Rates.** — *Detroit, etc.*, R. Co. *v. Interstate Commerce Commission*, 74 Fed. Rep. 803, 43 U. S. App. 308.



are entitled to equal rates.<sup>1</sup>

**Competition Between Rival Lines** existing at one point and not at another is a circumstance which may and must be taken into consideration in determining whether a preference or advantage given by a carrier to one of such points is undue or unreasonable.<sup>2</sup> The advantageous position of one trader in having his works so placed that he has two competing routes is as much a circumstance to be taken into consideration as the geographical position of another trader, who, though he has not the advantage of competition, is situated at a point on the line nearer the market.<sup>3</sup> But the mere fact that competition exists does not necessarily relieve the carrier from the restraints of the third section without regard to the nature and extent of the competition.<sup>4</sup>

**c. PARTICULAR INSTANCES — Conditions for Benefit of Carrier.** — A railway company may, if acting with a view to its own profit, impose conditions which may incidentally have the effect of favoring one class of traders or one town, or one portion of their traffic, provided the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company.<sup>5</sup>

**Carrier May Prefer Itself.** — It is not an unlawful discrimination for a carrier to prefer itself in its own proper business.<sup>6</sup>

**Overcoming Disadvantages.** — It is not an unlawful discrimination, preference, or advantage for a carrier to take such action as will protect itself against certain physical disadvantages under which it labors.<sup>7</sup>

**1. Discrimination Not Justified by Municipal Aid.** — *Lincoln Board of Trade v. Burlington, etc., R. Co.*, 2 Int. Com. Rep. 95, 2 Int. Com. C. Rep. 147.

**2. Competition Must Be Considered.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 74 Fed. Rep. 715; *Interstate Commerce Commission v. Western, etc., R. Co.*, 93 Fed. Rep. 83, *affirming* 88 Fed. Rep. 186; *James v. Canadian Pac. R. Co.*, 4 Int. Com. Rep. 274, 5 Int. Com. C. Rep. 612; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375; *Manufacturers, etc., Union v. Minneapolis, etc., R. Co.*, 3 Int. Com. Rep. 115, 4 Int. Com. C. Rep. 79; *King v. New York, etc., R. Co.*, 3 Int. Com. Rep. 272, 4 Int. Com. C. Rep. 251; *Phipps v. London, etc., R. Co.*, (1892) 2 Q. B. 242; *Mansion House Assoc. v. London, etc., R. Co.*, (1895) 1 Q. B. 932; *Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, 11 App. Cas. 97.

**Potential Water Competition**, although there is at the time but little actual competition, is a circumstance to be considered. *Interstate Commerce Commission v. Alabama Midland R. Co.*, 74 Fed. Rep. 715.

**Foreign Freights.** — In determining questions of the reasonableness of rates and of discrimination in regard to traffic originating in foreign countries, the courts may and should take into consideration, as constituting dissimilar conditions, circumstances existing beyond the seaboard of the United States (such as competition by ocean freights) as well as conditions prevailing within the United States. *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**3. Reason for Rule.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; *Interstate Commerce Commission*

*v. Baltimore, etc., R. Co.*, 145 U. S. 283; *Ransome v. Eastern Counties R. Co.*, 1 C. B. N. S. 437, 87 E. C. L. 437.

**4. Nature and Extent of Competition to Be Considered.** — *Interstate Commerce Commission v. Western, etc., R. Co.*, 93 Fed. Rep. 83; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 167.

**Competition Must Be Controlling Factor.** — Where a carrier sets up water competition as justifying established rates, the carrier must show by clear, affirmative evidence that the competition is such as to be a controlling factor. *James v. Canadian Pac. R. Co.*, 4 Int. Com. Rep. 274, 5 Int. Com. C. Rep. 612.

**5. Conditions for Benefit of Carrier.** — *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 43 Fed. Rep. 37.

**Preferring Most Profitable Traffic.** — A carrier has no right to refuse less desirable freights because more can be made in carrying another kind. *Riddle v. New York, etc., R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594.

**6. Self-Preference Not Unlawful.** — *Ilwaco R., etc., Co. v. Oregon Short Line, etc., R. Co.*, 57 Fed. Rep. 673, 15 U. S. App. 173; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 47 Fed. Rep. 771.

**7. Carrier May Protect Itself Against Physical Disadvantages.** — *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 832.

The fact that a carrier's station is located at a great distance from the traffic centre of the city, while the stations of rival and competing carriers are situated near the traffic centres of the city, shows such a dissimilarity of circumstances as to justify the former carrier in furnishing the accessorial service of free cartage, where to abandon the cartage service would result in the annihilation of the company's business at that point. *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 832.



**Free Cartage.** — The payment by a carrier of the expense of an accessorial cartage service at one point and not at another may or may not amount to an unlawful preference or advantage according to circumstances. It does not amount to an unlawful preference or advantage where there is no competition between such points and the cartage is paid by the carrier for its own advantage in order to secure traffic which would otherwise go by rival lines on account of the more convenient location of their stations and terminals.<sup>1</sup>

**Guaranty of Arrival on Time.** — The action of a railroad passenger agent in guaranteeing that a theatre troupe, to whom he sells a party-rate ticket, shall arrive at their destination at a given time, is not giving an undue or unreasonable preference or advantage.<sup>2</sup>

**Discrimination in Rates.** — Section 3 of the act does not refer solely to facilities offered to shippers, but also to rates, and a discrimination in rates may constitute an undue preference or advantage within the meaning of such section.<sup>3</sup>

**Party-rate Ticket.** — The issue by a railway company engaged in interstate commerce of a "party-rate ticket," for the transportation of ten or more persons from a place situated in one state or territory to a place situated in another state or territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not give an "undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the third section of the act.<sup>4</sup>

**The Issuance of a Free Pass** to a person not within any of the exceptions enumerated in section 22 constitutes the giving of an undue preference or advantage within the meaning of section 3.<sup>5</sup>

**Local and Through Rates.** — A through rate does not unjustly discriminate against an intermediate point because less, proportionally, than the rate from such point to the common destination.<sup>6</sup> The fact that a railway company

1. **Accessorial Cartage Service.** — *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 803, 43 U. S. App. 308.

"These English cases abundantly establish three propositions in relation to this subject: (1) That the collecting and delivery of goods is a separate and distinct business, notwithstanding the confusion to which we have adverted; (2) that the railroad companies, undertaking to do for themselves this separate business, cannot, by consolidating the compensation for each, avoid the restrictions that have been imposed upon them in respect of unlawful discriminations, and it is amply within the power of the railway commissions and the courts, according to the facts of each particular case, to separate the two, in order to prevent such an unlawful combination; (3) that, notwithstanding the separable and independent character of the two services, both, whether in the hands of the same or separate carriers, are subject to the rules and regulations prescribed by law to prevent unlawful discriminations." *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 832. *Citing Pickford v. Grand Junction R. Co.*, 10 M. & W. 399; *Parker v. Great Western R. Co.*, 7 M. & G. 253, 49 E. C. L. 253; *Parker v. Great Western R. Co.*, 6 El. & Bl. 77; *Baxendale v. North Devon R. Co.*, 3 C. B. N. S. 324, 91 E. C. L. 324; *Baxendale v. Great Western R. Co.*, 5 C. B. N. S. 309, 336, 94 E. C. L. 309, 336; *Garton v. Great Western R. Co.*, 5 C. B. N. S. 669, 94 E. C. L. 669; *Garton v. Bristol, etc., R. Co.*, 6 C. B. N. S. 639, 95 E. C. L. 639, 1 B. & S. 112, 101 E. C. L. 112; *Pegler v. Monmouthshire R., etc., Co.*, 6 H. & N. 644;

*Baxendale v. Bristol, etc., R. Co.*, 11 C. B. N. S. 787, 103 E. C. L. 787; *Baxendale v. Great Western R. Co.*, 14 C. B. N. S. 1, 108 E. C. L. 1, 16 C. B. N. S. 137, 111 E. C. L. 137; *Palmer v. London, etc., R. Co.*, L. R. 1 C. P. 588, L. R. 6 C. P. 194; *West v. London, etc., R. Co.*, L. R. 5 C. P. 622; *Parkinson v. Great Western R. Co.*, L. R. 6 C. P. 554; *Evershed v. London, etc., R. Co.*, 2 Q. B. D. 254, 3 Q. B. D. 134; *London, etc., R. Co. v. Evershed*, 3 App. Cas. 1029; *Manchester, etc., R. Co. v. Denaby Main Colliery Co.*, 13 Q. B. D. 674, 14 Q. B. D. 209; *Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, 11 App. Cas. 97; *Liverpool Corn Trade Assoc. v. London, etc., R. Co.*, (1891) 1 Q. B. 120.

2. **Guaranty of Arrival on Time Not an Unlawful Discrimination.** — *Foster v. Cleveland, etc., R. Co.*, 56 Fed. Rep. 434.

3. **Section Not Limited to Facilities.** — *U. S. v. Tozer*, 2 Int. Com. Rep. 597, *citing Denaby Main Colliery Co. v. Manchester, etc., R. Co.*, 3 R. & Can. T. Cas. 426, 11 App. Cas. 97.

4. **Party-rate Tickets Not an Undue Preference or Advantage.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, 4 Int. Com. Rep. 92, *affirming* 43 Fed. Rep. 37, 3 Int. Com. Rep. 192; *Foster v. Cleveland, etc., R. Co.*, 56 Fed. Rep. 434.

5. **Passes.** — *In re Charge to Grand Jury*, 66 Fed. Rep. 146.

6. *Milwaukee Chamber of Commerce v. Flint, etc., R. Co.*, 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 474, 2 Int. Com. C. Rep. 584.



charges a local shipper more for transporting property between two points on its road than it charges for the same services when the property transported is received from a connecting railroad and is carried under a joint tariff established by the two connecting carriers, is insufficient evidence to establish the charge of an undue preference or discrimination under the third section of the act.<sup>1</sup>

**Long and Short Hauls.** — Charging a greater rate for a shorter haul than for a longer one may constitute an undue preference or advantage within the meaning of the third section,<sup>2</sup> although this form of discrimination is specially prohibited by the fourth section of the act.<sup>3</sup> But if a greater charge for a shorter haul than for a longer one is not illegal under the fourth section, which deals specifically with such question, because of dissimilarity of circumstances and conditions, it cannot be held to be illegal under the broader and more comprehensive third section.<sup>4</sup>

**Furnishing Cars to Shippers.** — The public must be justly and equally served in the matter of furnishing cars,<sup>5</sup> and no preference can be given to regular patrons of the road at times of unusual pressure.<sup>6</sup>

**Choice of Cars.** — Where a railroad company contracts with a car company for a certain number of cars per year, such cars being adapted for use as live-stock cars and also convertible into coal cars, a refusal to transport stock in cars of another company, offered at the same rates, is not an unjust discrimination in favor of the car company whose cars were used, as the circumstances and conditions are not substantially similar.<sup>7</sup>

**Use of Shippers' Cars.** — If one shipper is subject to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road, the carrier's right to choose its own appropriate means of carriage is to that extent curtailed by the act.<sup>8</sup>

**1. Joint Through Rates Not a Discrimination Against Local Shippers.** — *Parsons v. Chicago, etc., R. Co.*, 63 Fed. Rep. 903 [*citing Tozer v. U. S.*, 52 Fed. Rep. 917]; *Poughkeepsie Iron Co. v. New York Cent., etc., R. Co.*, 3 Int. Com. Rep. 248, 4 Int. Com. C. Rep. 195.

**2. Greater Charge for Shorter Haul May Constitute Undue Preference or Advantage.** — *Interstate Commerce Commission v. Western, etc., R. Co.*, 88 Fed. Rep. 186; *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107; *Interstate Commerce Commission v. Western, etc., R. Co.*, 93 Fed. Rep. 83; *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234.

In *Jones v. Eastern Counties R. Co.*, 3 C. B. N. S. 718, 91 E. C. L. 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester.

The same rate may be maintained to an intermediate and a terminal point, and a higher rate may be maintained to a branch point off the direct through line, without amounting to an unjust discrimination between such points. *Lehmann v. Texas, etc., R. Co.*, 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44.

**3. Long and Short Hauls.** — See *infra*, this section, 9. *Long and Short Hauls.*

**Under the English Traffic Acts** a provision

substantially like the third section of the Interstate Commerce Act against undue preferences and advantages is made to serve substantially the same purpose as the fourth section of the act with respect to long and short hauls. *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 803, 43 U. S. App. 308.

**4. Charges Valid under Fourth Section Are Valid under Third Section.** — *Interstate Commerce Commission v. Western, etc., R. Co.*, 88 Fed. Rep. 194; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925.

**5. Cars Must Be Furnished Equally to All Shippers.** — *Riddle v. New York, etc., R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594.

**Refusing Cars for Less Profitable Traffic.** — A carrier is not justified in refusing cars for a certain kind of traffic, such as coal, on the ground that it cannot furnish cars for all of its business at the time, and that it can make more money in using the cars for other purposes. *Riddle v. New York, etc., R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594.

**6. Regular Patrons Not Entitled to Preference.** — *Riddle v. New York, etc., R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. C. Rep. 594, holding that cars should be furnished ratably to all shippers.

**7. Discrimination in Favor of Car Company.** — *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

**8. Permitting Shipper to Use His Own Cars.** — *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.



**Requiring Prepayment of Charges.** — An interstate carrier does not subject another carrier to undue or unreasonable disadvantage by exacting full payment of freight on all property received from it at a given station, although it does not require charges to be paid in advance on freight received from other individuals and competing carriers at such station.<sup>1</sup> The common-law right of requiring payment in advance of some customers and extending credit to others has not been taken away by the third section of the interstate law, which forbids subjecting any person to any undue or unreasonable disadvantage.<sup>2</sup>

**Interruption of Transit.** — Where a carrier refuses to all persons and all points alike a through rate for goods with the privilege of interrupting the transit at an intermediate point and then reshipping the goods, it is not guilty of discrimination although the refusal operates in favor of one place and against another.<sup>3</sup>

**8. Facilities for Interchange of Traffic — a. DUTY TO AFFORD EQUAL FACILITIES — In General.** — By the second clause of the third section, carriers subject to the provisions of the act are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines.<sup>4</sup> In the construction of this clause, the English authorities are of little assistance, as the English act is different from the Interstate Commerce Act.<sup>5</sup>

**Three Carriers Involved.** — To constitute an unjust discrimination within section 3, there must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.<sup>6</sup>

**Reasonable and Proper Facilities.** — The duty to afford facilities to connecting carriers is subject to the limitation that the facilities demanded are reasonable and proper.<sup>7</sup> In determining whether the facilities demanded are reasonable and proper, the interests of the road from which the facilities are required must be considered.<sup>8</sup>

**1. Payment in Advance Required from Some but Not from All.** — *Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co.*, 63 Fed. Rep. 775, affirming 59 Fed. Rep. 400. See also *infra*, this section, 8. *c. Duty to Advance Charges or Give Credit.*

**2. Common Law Unchanged.** — *Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co.*, 63 Fed. Rep. 775.

**3. Refusal to Permit Interruption of Transit.** — *Crews v. Richmond, etc., R. Co.*, 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401.

**Milling in Transit.** — As to whether giving the right of milling in transit to a certain point and not to others constitutes an undue preference or advantage, see *Crews v. Richmond, etc., R. Co.*, 1 Int. Com. Rep. 703, 1 Int. Com. C. Rep. 401; *Re St. Louis Millers' Assoc.*, 1 Int. Com. Rep. 22, 1 Int. Com. C. Rep. 20.

**Compressing Cotton in Transit.** — Where a carrier gives a through rate on cotton it is not a violation of sections 2 and 3 to give the same through rate with the privilege of having the cotton stopped at an intermediate point where it is compressed at the expense of the carrier, where the rate is open to all alike. *Cowan v. Bond*, 39 Fed. Rep. 54, 2 Int. Com. Rep. 542.

**4. Discrimination Between Connecting Carriers in Facilities or Rates Prohibited.** — Interstate

Commerce Commission *v. Brimson*, 154 U. S. 447; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101, citing *Scofield v. Lake Shore, etc., R. Co.*, 2 Int. Com. C. Rep. 116; *New York, etc., R. Co. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 542, 4 Int. Com. C. Rep. 702, distinguished in *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 47 Fed. Rep. 771; *Cutting v. Florida R., etc., Co.*, 30 Fed. Rep. 663; *New York, etc., R. Co. v. New York, etc., R. Co.*, 50 Fed. Rep. 867, 53 Am. & Eng. R. Cas. 7.

**5. English Authorities of No Assistance in Construction.** — *Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co.*, 61 Fed. Rep. 158, citing *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 559, and *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

**6. Carrier May Prefer Itself.** — *Ilwaco R., etc., Co. v. Oregon Short-Line, etc., R. Co.*, 57 Fed. Rep. 673; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 47 Fed. Rep. 771, 49 Am. & Eng. R. Cas. 23.

**7. Only Reasonable and Proper Facilities Need Be Furnished.** — *Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co.*, 61 Fed. Rep. 158.

**8. Interest of Road to Be Considered.** — *Oregon*



**Similar and Dissimilar Circumstances and Conditions.** — The clause requiring carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic, does not require that such facilities shall be afforded under dissimilar circumstances and conditions.<sup>1</sup> A company may prefer a connecting road with through facilities to one with only local facilities — a road that goes all the way to a certain point, to one going only part of the way.<sup>2</sup>

**Right and Duty Reciprocal.** — The statutory right of equal facilities is reciprocal, and one carrier must be able to furnish equal facilities with the other before it can complain of discrimination.<sup>3</sup>

**Only at Terminal Points.** — The statute refers only to facilities at terminal points.<sup>4</sup> A company making a physical connection at a point other than that at which the established road has already provided its facilities and conducts its interchange with other connecting lines, cannot demand or require an interchange at such point of physical connection without itself first furnishing at such point reasonable and proper facilities for the interchange sought.<sup>5</sup>

The Term "Facilities" does not embrace car equipment for the transportation of freight over the carrier's own road.<sup>6</sup>

**Preferences under First Paragraph.** — Of course the prohibition of unjust or undue preference and advantage contained in the first paragraph of the third section is applicable to connecting carriers as well as to other persons.<sup>7</sup> But it is not competent for a railroad company to appropriate the grievance of a traffic or locality under the first paragraph and complain on account of it as a discrimination against itself.<sup>8</sup>

**Rates and Charges.** — There must be no discrimination in rates and charges in favor of one connecting line or against another under similar circumstances and conditions.<sup>9</sup>

**Sale of Through Tickets.** — The act does not require one company to sell through tickets over another road. The right to sell through tickets and check through baggage arises only out of contract.<sup>10</sup>

Short-Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. Rep. 118.

The interstate commerce law does not require an interstate carrier to treat all its connecting carriers in precisely the same manner without reference to its own interests. Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co., 63 Fed. Rep. 775.

**1. Equal Facilities Not Required Where Circumstances Are Dissimilar.** — Little Rock, etc., R. Co. v. St. Louis Southwestern R. Co., 63 Fed. Rep. 775; Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. Rep. 465, citing Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 624; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 403; Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667.

**Discrimination Justified by Dissimilar Circumstances.** — Augusta Southern R. Co. v. Wrightsville, etc., R. Co., 74 Fed. Rep. 522.

**Illustrations.** — The fact that one company owns an interest in the stock of another is no excuse for discriminating in favor of such road as against other roads. New York, etc., R. Co. v. New York, etc., R. Co., 3 Int. Com. Rep. 542, 4 Int. Com. C. Rep. 702. *Distinguished* in Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 47 Fed. Rep. 771.

**2. Connecting Road with Through Facilities May Be Preferred.** — Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 47 Fed. Rep. 771, 49 Am. & Eng. R. Cas. 23.

**3. Right of Equal Facilities Reciprocal.** — Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 47 Fed. Rep. 771.

**4. Right Limited to Terminal Points.** — U. S. v. Delaware, etc., R. Co., 40 Fed. Rep. 101. Compare New York, etc., R. Co. v. New York, etc., R. Co., 4 Int. Com. C. Rep. 702.

**5. Physical Connection at Other than Terminal Points.** — Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 403, citing Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567. See also Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 667.

**6. "Facilities" Does Not Include Car Equipment.** — U. S. v. Delaware, etc., R. Co., 40 Fed. Rep. 101.

**7. Undue Preferences or Advantages Prohibited by First Paragraph.** — Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. Rep. 465.

For a discussion of the first paragraph of section 3, see *supra*, this section, 7. *Undue Preference or Advantage*.

**8. Preference Against Traffic or Locality.** — Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. Rep. 158.

**9. Discrimination in Rates Unlawful.** — Cutting v. Florida R., etc., Co., 30 Fed. Rep. 663; Augusta Southern R. Co. v. Wrightsville, etc., R. Co., 74 Fed. Rep. 522.

**10. Duty to Sell Through Tickets.** — Chicago, etc., R. Co. v. Pennsylvania Co., 1 Int. Com. Rep. 357, 1 Int. Com. C. Rep. 86. *Applied in*



**Use of Tracks and Terminal Facilities.** — The second paragraph of the third section expressly provides that it shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.<sup>1</sup> Therefore, in construing the statute it is necessary to ascertain whether what is asked in any particular case includes the use of the defendant's tracks and terminal facilities, because if it does the law itself denies the prayer.<sup>2</sup> The fact that one connecting carrier has a contract by which it is entitled to use the tracks and terminal facilities of another carrier, and that similar rights are denied to another connecting carrier, does not amount to an unlawful discrimination against the latter carrier.<sup>3</sup>

**Where a Company Has Running Privileges** over a part of the track of another company it is not required to violate its agreement as to the use of the track; and it is not a violation of the statute to refuse to receive and discharge traffic on the track, where the sufficiency of the local service rendered by the company owning the track is not questioned.<sup>4</sup>

**The Burden of Proof** is upon the carrier alleging the discrimination.<sup>5</sup>

**b. DUTY TO ARRANGE FOR JOINT THROUGH TRANSPORTATION — In General.** — Neither by the common law nor by the Interstate Commerce Act have the courts or the commission been vested with the power to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates for freight and passengers. Agreements of this nature under existing laws depend upon the voluntary action of the carriers concerned, and cannot be enforced without additional legislation.<sup>6</sup> This construction of the statute is based upon the fact that in enacting the Interstate Commerce Act, which was largely taken from similar statutes in England, Congress did not see fit to adopt that provision of the English Railway and Canal Traffic Act which expressly empowered the English commissions to compel connecting carriers to enter into such arrangements when they deemed it to the interest of the public that such arrangements should be made.<sup>7</sup>

**Discrimination Between Connecting Lines.** — The section of the statute requiring carriers to afford equal facilities for interchange of traffic, does not require an interstate carrier which enters into an arrangement with a connecting carrier for

Kentucky, etc., *Bridge Co. v. Louisville, etc.*, R. Co., 37 Fed. Rep. 567, 2 Int. Com. Rep. 351.

**1. Use of Tracks and Terminal Facilities Not Granted.** — *Little Rock, etc., R. Co. v. St. Louis, etc.*, R. Co., 59 Fed. Rep. 402; *Kentucky, etc., Bridge Co. v. Louisville, etc.*, R. Co., 37 Fed. Rep. 567; *Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co.*, 61 Fed. Rep. 158.

**Contract Rights Not Affected.** — *Iowa v. Chicago, etc.*, R. Co., 33 Fed. Rep. 391.

**2. Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 402.**

**3. May Allow One Carrier to Use Tracks and Terminals, and Refuse Like Privilege to Another.** — *Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co.*, 51 Fed. Rep. 475; *St. Louis Drayage Co. v. Louisville, etc., R. Co.*, 65 Fed. Rep. 39; *Little Rock, etc., R. Co. v. St. Louis, etc.*, R. Co., 63 Fed. Rep. 775; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 571; *Chicago, etc., R. Co. v. Pennsylvania R. Co.*, 1 Int. Com. C. Rep. 86. See also *infra*, *b. Duty to Arrange for Joint Through Transportation*.

**4. Running Privileges over Another's Tracks.** — *Alford v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 771, 3 Int. Com. C. Rep. 519.

**5. Burden of Proof upon Complaining Carrier —**

*Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co.*, 51 Fed. Rep. 465.

**6. Carriers Cannot Be Compelled to Enter into Arrangements for Joint Through Transportation.** — *Little Rock, etc., R. Co. v. St. Louis, etc.*, R. Co., 41 Fed. Rep. 559; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 3 Int. Com. C. Rep. 1; *Interstate Commerce Commission v. Western, etc., R. Co.*, 93 Fed. Rep. 83; *St. Louis Drayage Co. v. Louisville, etc., R. Co.*, 65 Fed. Rep. 41; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 59 Fed. Rep. 405; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Chicago, etc., R. Co. v. Osborne*, 10 U. S. App. 430, 52 Fed. Rep. 912; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 63 Fed. Rep. 778; *Chicago, etc., R. Co. v. Pennsylvania Co.*, 1 Int. Com. Rep. 360; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 2 Int. Com. Rep. 351, 37 Fed. Rep. 567; *Capehart v. Louisville, etc., R. Co.*, 3 Int. Com. Rep. 278, 4 Int. Com. C. Rep. 265.

**7. Construction with Reference to English Statutes.** — *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 63 Fed. Rep. 781; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 3 Int. Com. C. Rep. 9; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep.



through billing, rating, and loading, and for the use of its tracks and terminal facilities, to make the same arrangement with other connecting carriers, although the physical facilities for an interchange of traffic are the same, and a refusal to do so does not constitute an unlawful discrimination or an undue or unreasonable preference or advantage in favor of the carrier with which an interchange is made.<sup>1</sup> There is no principle of common law which forbids a single railroad corporation, or two or more such corporations, from selecting, from two or more other corporations, one which they will employ as the agency by which they will send freight beyond their own lines, on through bills of lading, or as their agent to receive freight, and transmit it on through bills to their own lines, and without breaking bulk; and the right to make such selection is not taken away by the interstate commerce law.<sup>2</sup>

**c. DUTY TO ADVANCE CHARGES OR GIVE CREDIT.** — A common carrier engaged in interstate commerce may at common law, and under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier.<sup>3</sup>

**d. DUTY TO DRAW CARS OF OTHER LINES.** — The provisions of the third section do not require a railroad company to receive freight in the cars in which it is tendered by a connecting line, and transport it in such cars, paying car mileage therefor, when it has cars of its own available for the transportation and the freight would not be injured by the transfer.<sup>4</sup>

**Cars of Private Company.** — The fact that carriers exchange cars with one another upon certain terms does not justify a private stock car company in claiming that it is unjustly discriminated against by the refusal of a carrier to pay it the same rate, because it is not a "connecting line," entitled to equal facilities for the interchange of traffic, under the second paragraph of section 2.<sup>5</sup>

567; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 559.

**1. Discrimination Between Connecting Carriers in Arrangements for Joint Through Transportation Not Unlawful.** — Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. Rep. 775; *affirming* 59 Fed. Rep. 400; Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. Rep. 407; Prescott, etc., R. Co. v. Atchison, etc., R. Co., 73 Fed. Rep. 439; Chicago, etc., R. Co. v. Pennsylvania R. Co., 1 Int. Com. C. Rep. 86; *Re* Joint Water, etc., Lines, 2 Int. Com. Rep. 486, 2 Int. Com. C. Rep. 645; Capehart v. Louisville, etc., R. Co., 3 Int. Com. Rep. 278, 4 Int. Com. C. Rep. 265; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567, *citing* Atchison, etc., R. Co. v. Denver, etc., R. Co., 110 U. S. 668, decided under a similar provision in the statute of Colorado.

In New York, etc., R. Co. v. New York, etc., R. Co., 4 Int. Com. C. Rep. 702, 50 Fed. Rep. 867, it was held that when a railroad connects with two competitors, under substantially similar conditions, even at points a little apart, if it makes through rates with one it must make the same with the other; but this was not followed, although *cited*, in Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 402.

**2. Right to Select Agencies.** — Prescott, etc., R. Co. v. Atchison, etc., R. Co., 73 Fed. Rep. 438, *explaining* New York, etc., R. Co. v. New York, etc., R. Co., 50 Fed. Rep. 867, which it practically *overrules*. St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 Fed. Rep. 39; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 563.

**3. Discrimination Not Unlawful.** — Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. Rep. 407; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 400; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 63 Fed. Rep. 775, *affirming* 59 Fed. Rep. 400; Southern Indiana Express Co. v. U. S. Express Co., 88 Fed. Rep. 662, *affirmed* 92 Fed. Rep. 1022; Oregon Short-Line, etc., R. Co. v. Northern Pac. R. Co., 15 U. S. App. 479, 61 Fed. Rep. 158, 51 Fed. Rep. 465; Matter of Application of Clark, 2 Int. Com. Rep. 797, 3 Int. Com. C. Rep. 649.

**4. No Duty to Draw Cars of Another Company.** — Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. Rep. 465; Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 407, 63 Fed. Rep. 775.

Generally, as to right to use tracks, etc., of a connecting carrier, see *supra*, this subdivision, *a. Duty to Afford Equal Facilities*.

**5. The Burton Stock Car Company,** which furnishes special improved live stock cars owned by it, to shippers over railroads, does not exchange with or use cars belonging to others, and is in no sense a "connecting line," entitled to equal facilities for interchange of traffic, under paragraph 2 of section 3 of the act to regulate commerce. Burton Stock Car Co. v. Chicago, etc., R. Co., 1 Int. Com. Rep. 320.

**Power to Compel Use of Cars of a Certain Kind.** — The act does not give the commission jurisdiction to order the carrier to furnish any particular equipment of cars, or in fact any cars at all. The latter part of section 3 only applies to furnishing proper facilities for the



**9. Long and Short Hauls — a. IN GENERAL.** — Section 4 of the act provides that it shall be unlawful for any common carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.<sup>1</sup> Charging a greater sum for a shorter than for a longer haul may also constitute a violation of section 1 which requires charges to be reasonable and just, and of section 2 which forbids unjust discrimination, and also of section 3 which forbids the giving of undue preferences and advantages.<sup>2</sup> The third section underlies the fourth, and supplies the principle on which it rests.<sup>3</sup>

**Rate Proportionately Less for Long Hauls.** — There is nothing in the statute preventing the making of the aggregate charge less in proportion for a longer than for a shorter haul, or less per hundred weight as the distance increases.<sup>4</sup>

**Free Cartage.** — If free cartage at a station furnished by the carrier has the effect of reducing the cost of carriage below the cost of carriage to a point nearer the point of shipment, it constitutes a violation of the long and short haul clause of the statute, and is unlawful.<sup>5</sup>

**Fast Freight Lines.** — If a railroad company permits a fast freight line to use its tracks, it is responsible for the long-haul rates made by the fast freight.<sup>6</sup>

**b. EQUAL CHARGE FOR LONGER AND SHORTER HAULS.** — Under the fourth section it is lawful for carriers to make and accept the same aggregate charge for long distances as for shorter ones, so long as it does not subject any person or kind of traffic to any undue or unreasonable prejudice or disadvantage within the meaning of the third section.<sup>7</sup>

interchange of traffic between connecting lines. *Scofield v. Lake Shore, etc., R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Com. C. Rep. 90; *Rice v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 841, 5 Int. Com. C. Rep. 193.

The provision of section 3 does not give the commission power to compel a railroad company to receive and run the cars of a private car company over its line, or to contract with the owners of such cars for the use thereof. *Worcester Excursion Car Co. v. Pennsylvania R. Co.*, 2 Int. Com. Rep. 792, 3 Int. Com. C. Rep. 577.

**1. Greater Charge for Shorter than for Longer Haul Prohibited.** — *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 862; *Osborne v. Chicago, etc., R. Co.*, 48 Fed. Rep. 49; *Thatcher v. Delaware, etc., Canal Co.*, 1 Int. Com. Rep. 356, 1 Int. Com. C. Rep. 152; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Northwestern Iowa Grain, etc., Shippers' Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. C. Rep. 604; *Stone v. Detroit, etc., R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613; *Merchants' Union v. Northern Pac. R. Co.*, 4 Int. Com. Rep. 183, 5 Int. Com. C. Rep. 478; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Lehmann v. Texas, etc., R. Co.*, 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44.

Generally, as to the construction of the long and short haul provision, see *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 220.

**Method of Fixing Rates Immaterial.** — *Osborne v. Chicago, etc., R. Co.*, 48 Fed. Rep. 49.

**2. Charge May Violate Each of First Four Sections.** — *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234. See also generally *supra*, this section, 6. *Unjust Discrimination*, and 7. *Undue Preference or Advantage*.

The unjust discrimination denounced by section 2 may exist where the long and short haul clause of section 4 is violated. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234.

**3. Principle of Third and Fourth Sections the Same.** — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

**4. Long-haul Charge May Be Proportionately Less than Short-haul Charge.** — *Farrar v. East Tennessee, etc., R. Co.*, 1 Int. Com. Rep. 764, 1 Int. Com. C. Rep. 480; *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 41; *New Orleans Cotton Exch. v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375.

**5. Free Cartage May Violate Statute.** — *Stone v. Detroit, etc., R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. C. Rep. 613.

**6. Fast Freight.** — *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 1 Int. Com. Rep. 571, 1 Int. Com. C. Rep. 158.

**7. Equality of Charges for Long and Short Hauls Not Illegal.** — *Gerke Brewing Co. v. Louisville, etc., R. Co.*, 4 Int. Com. Rep. 267, 5 Int. Com. C. Rep. 596; *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 803, 43 U. S. App. 308; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v.*



A Proviso in the fourth section provides that the prohibition of a greater charge for a shorter haul than for a longer one shall not be construed as authorizing as great a charge for the shorter as for the longer haul. But equality of charges is not prohibited. The result is that the charges for a longer and a shorter haul may be equal only when the circumstances and conditions of the transportation are so substantially dissimilar as to justify the discrimination.<sup>1</sup> Indeed, it has been said that only the same facts which would justify a greater charge for a shorter haul, will justify an equal charge for a longer and a shorter haul.<sup>2</sup>

**Group Rates.** — It is not always a violation of the fourth section to group stations of the shorter and longer haul at an equal rate.<sup>3</sup>

**c. DISSIMILARITY OF CIRCUMSTANCES AND CONDITIONS — (1) *As Justifying Greater Rate for Shorter Haul.*** — The prohibition against charging a greater sum for a shorter haul than for a longer one is limited by the express terms of the act to cases where the circumstances and conditions of the service are substantially similar. Where the circumstances and conditions are substantially dissimilar there is no prohibition, and a greater charge for a shorter haul than for a longer one is not illegal so far as the fourth section is concerned.<sup>4</sup>

**Degree of Dissimilarity.** — There is considerable confusion and conflict in the cases as to whether the existence of any dissimilarity, without regard to its character and extent, will justify a larger charge for a shorter than for a longer haul. The view generally entertained is that, if the circumstances and conditions at the longer distance point are substantially dissimilar to those at the shorter distance point, then the fourth section of the act is wholly inapplicable,<sup>5</sup> and the carrier may fix rates as it pleases without violating the

Brimson, 154 U. S. 447. See also Lippman v. Illinois Cent. R. Co., 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584.

**Presumption of Illegality.** — Where a company makes a certain charge to a given point, and the same charge to other places only from one third to two thirds of the same distance, the charges to the shorter points are presumptively unjust and illegal. *Re* Chicago, etc., R. Co., 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep. 231.

**1. Construction of Proviso.** — Detroit, etc., R. Co. v. Interstate Commerce Commission, 74 Fed. Rep. 803, 43 U. S. App. 308; Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission v. Brimson, 154 U. S. 447.

**2. Circumstances Justifying Equal Charges.** — Detroit, etc., R. Co. v. Interstate Commerce Commission, 74 Fed. Rep. 803, 43 U. S. App. 308.

**3. Group Rates Not Illegal.** — Detroit, etc., R. Co. v. Interstate Commerce Commission, 74 Fed. Rep. 803, 43 U. S. App. 308, *citing* Imperial Coal Co. v. Pittsburgh, etc., R. Co., 2 Int. Com. C. Rep. 618.

**4. Dissimilar Circumstances and Conditions Takes Case Out of Statute.** — Missouri Pac. R. Co. v. Texas, etc., R. Co., 31 Fed. Rep. 862; Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648; Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 173; Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U. S. 479; Interstate Commerce Commission v. East Tennessee, etc., R. Co., 85 Fed. Rep. 117; Interstate Commerce Commission v. Western, etc., R. Co., 88 Fed. Rep. 192; Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184; Inter-

state Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925; Junod v. Chicago, etc., R. Co., 47 Fed. Rep. 290; *Re* Southern R., etc., Assoc., 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; Boston, etc., R. Co. v. Boston, etc., R. Co., 1 Int. Com. Rep. 571; Martin v. Southern Pac. R. Co., 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; Milwaukee Chamber of Commerce v. Flint, etc., R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; James, etc., Buggy Co. v. Cincinnati, etc., R. Co., 3 Int. Com. Rep. 682, 4 Int. Com. C. Rep. 744; Trammell v. Clyde Steamship Co., 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324.

**In Cases of Doubt,** the doubt should go in favor of the application of the statute, and the conditions should be taken as substantially similar. Missouri Pac. R. Co. v. Texas, etc., R. Co., 31 Fed. Rep. 862, 31 Am. & Eng. R. Cas. 76, *followed* in Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209, and *quoted* in Interstate Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925.

**5. Substantial Dissimilarity Eliminates Fourth Section.** — Interstate Commerce Commission v. Western, etc., R. Co., 88 Fed. Rep. 195, *citing with approval* Matter of Louisville, etc., R. Co., 1 Int. Com. C. Rep. 57; Interstate Commerce Commission v. Atchison, etc., R. Co., 50 Fed. Rep. 300; Behlmer v. Louisville, etc., R. Co., 71 Fed. Rep. 839; Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144; and *disapproving* Interstate Commerce Commission v. East Tennessee, etc., R. Co., 85 Fed. Rep. 107, wherein it was held that the decision in the Alabama Midland railroad case did not go so far as this,



fourth section; but this does not preclude the courts or the commission from inquiring whether the rates to the shorter distance are unjust or unreasonable, or whether they constitute undue preference for, or unjust prejudice against, any locality within the meaning of other sections of the act.<sup>1</sup> This seems to be the better opinion. Some cases, however, take a contrary view, and hold that the fact that the conditions are not substantially similar does not authorize the carrier totally to disregard the statute and make such discrimination as it sees fit, for discrimination must be in proportion to the dissimilarity of conditions. Accordingly it is held to be competent, under the fourth section, to restrain the exaction of a greater charge for a shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made.<sup>2</sup> The commission has frequently held that when from any cause rates are made greater for a shorter than for a longer distance, the difference between such rates must not be unreasonable, but must be in proportion to the difference in conditions.<sup>3</sup>

(2) *What Constitutes* — *aa. IN GENERAL* — *Question of Fact.* — Whether or not the circumstances and conditions under which a railroad company has charged a greater compensation for a shorter than for a longer haul over the same line were substantially similar, is a question of fact depending upon the matters proved in each case.<sup>4</sup>

*Presumption and Burden of Proof.* — Neither before the courts nor the commission is there any presumption against the carrier that the conditions and circumstances are similar or dissimilar.<sup>5</sup> Before the defendant can be held guilty

but that even under that decision the dissimilarity in conditions must be proportionate to the difference in rates; and *criticising* the views of the commission in Savannah Bureau of Freight, etc., *v. Charleston, etc.*, R. Co., 7 Int. Com. C. Rep. 479.

As to whether the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraint of the third and fourth sections, see *Interstate Commerce Commission v. Western, etc.*, R. Co., 93 Fed. Rep. 83, *citing* *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144.

1. *Charge May Be Invalid under Other Sections.* — *Interstate Commerce Commission v. Western, etc.*, R. Co., 88 Fed. Rep. 186; *Louisville, etc.*, R. Co. *v. Behlmer*, 175 U. S. 648.

2. *Contrary View.* — *Interstate Commerce Commission v. East Tennessee, etc.*, R. Co., 85 Fed. Rep. 107, *distinguishing* *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144. But see *Interstate Commerce Commission v. Western, etc.*, R. Co., 88 Fed. Rep. 186, wherein this case is *disapproved*.

3. *Lehmann v. Southern Pac. Co.*, 3 Int. Com. Rep. 80, 4 Int. Com. C. Rep. 1; *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; *Board of Trade v. East Tennessee, etc.*, R. Co., 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546; *Gerke Brewing Co. v. Louisville, etc.*, R. Co., 4 Int. Com. Rep. 267, 5 Int. Com. C. Rep. 596.

4. *Similarity of Conditions a Question of Fact.* — *Missouri Pac. R. Co. v. Texas, etc.*, R. Co., 31 Fed. Rep. 862; *Osborne v. Chicago, etc.*, R. Co., 48 Fed. Rep. 49; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144; *Cincinnati, etc.*, R. Co. *v. Interstate Commerce Commission*, 162 U. S. 184.

*When Circumstances and Conditions of Carriage Are Substantially Different.* — *Interstate Commerce Commission v. Atchison, etc.*, R. Co., 50 Fed. Rep. 295, 50 Am. & Eng. R. Cas. 93; *Re Export Trade*, 1 Int. Com. Rep. 25, 1 Int. Com. C. Rep. 24; *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. C. Rep. 155; *Re Chicago, etc.*, R. Co., 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep. 231; *Rice v. Western New York, etc.*, R. Co., 2 Int. Com. Rep. 298, 2 Int. Com. C. Rep. 389; *Milwaukee Chamber of Commerce v. Flint, etc.*, R. Co., 2 Int. Com. Rep. 393, 2 Int. Com. C. Rep. 553; *James v. East Tennessee, etc.*, R. Co., 2 Int. Com. Rep. 609, 3 Int. Com. C. Rep. 225; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. C. Rep. 534.

The phrase "under Substantially Similar Circumstances," as used in sections 2 and 4, means the same thing. *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31.

5. *No Presumption Against Carrier.* — *Detroit, etc.*, R. Co. *v. Interstate Commerce Commission*, 74 Fed. Rep. 839, *citing* *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925; *Interstate Commerce Commission v. Atchison, etc.*, R. Co., 50 Fed. Rep. 295; and *Osborne v. Chicago, etc.*, R. Co., 48 Fed. Rep. 49, *reversed* 52 Fed. Rep. 912, 10 U. S. App. 430, but upon other points.

*Contra.* — Where a greater rate is charged for a shorter than for a longer concurrent haul over the same route, it is incumbent on the carrier to show the existence of substantially dissimilar circumstances and conditions to justify such charge. *Behlmer v. Louisville, etc.*, R. Co., 83 Fed. Rep. 898; *Re Southern R.,*



of a violation of the statute it must appear that the higher rate for the shorter distance was for like services and under similar circumstances as the longer haul.<sup>1</sup>

**Circumstances to Be Considered.** — In considering the power of the carrier of its own motion to charge a lesser rate for the longer haul, not only is the interest of the carrier to be taken into account, but also the interest of the public, especially at the place from which the traffic moved and the place to which it is to be delivered.<sup>2</sup>

*bb. COMPETITION BETWEEN RIVAL LINES — In General.* — It is now well settled that competition between rival carriers affecting rates to the longer distance point is a circumstance to be considered, and may be sufficient to render the circumstances and conditions of the transportation substantially dissimilar and justify a greater charge for the shorter than for the longer haul.<sup>3</sup> The commission formerly held that only competition with carriers who were not subject to the act created dissimilar circumstances and conditions taking a case out of the statute, except in very rare and peculiar cases of competition between railroads subject to the statute.<sup>4</sup> These decisions are now authoritatively

etc., Assoc., 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31.

1. *Junod v. Chicago, etc.*, R. Co., 47 Fed. Rep. 290.

2. **Interests of Public Shippers and Carriers to Be Considered.** — *Louisville, etc.*, R. Co. *v. Behlmer*, 175 U. S. 648; *Texas, etc.*, R. Co. *v. Interstate Commerce Commission*, 162 U. S. 197. See also similar cases under other sections of act; and *supra*, this section, 6. *Unjust Discrimination*; 7. *Undue Preference or Advantage*.

That the smaller charge for the longer haul is of great importance to the longer distance point, in enabling its merchants to build up a great trade that would otherwise be lost, is no justification for such discrimination. *Behlmer v. Louisville, etc.*, R. Co., 83 Fed. Rep. 898.

**Expense of Carriage.** — It is not a sufficient justification to show that the short-haul traffic is more expensive to the carrier, unless it be exceptionally so, nor that the long-haul traffic is exceptionally inexpensive. *Re Southern R.*, etc., Assoc., 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31.

3. **Competition Must Be Considered.** — *Atchison, etc.*, R. Co. *v. Denver, etc.*, R. Co., 110 U. S. 683; *Ex p. Koehler*, 12 Sawy. (U. S.) 446, 31 Fed. Rep. 315; *Missouri Pac. R. Co. v. Texas, etc.*, R. Co., 31 Fed. Rep. 862; *Junod v. Chicago, etc.*, R. Co., 47 Fed. Rep. 290; *Interstate Commerce Commission v. Atchison, etc.*, R. Co., 50 Fed. Rep. 295, 50 Am. & Eng. R. Cas. 93, 4 Int. Com. Rep. 323; *Re Southern R.*, etc., Assoc., 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; *Harwell v. Columbus, etc.*, R. Co., 1 Int. Com. Rep. 631, 1 Int. Com. C. Rep. 236; *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1; *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. C. Rep. 155; *Re Chicago, etc.*, R. Co., 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep. 231; *New Orleans Cotton Exch. v. Cincinnati, etc.*, R. Co., 2 Int. Com. Rep. 289, 2 Int. Com. C. Rep. 375; *James v. East Tennessee, etc.*, R. Co., 2 Int. Com. Rep. 609, 3 Int. Com. C. Rep. 225; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.*, 2 Int. Com.

Rep. 777, 3 Int. Com. C. Rep. 534; *Rice v. Atchison, etc.*, R. Co., 3 Int. Com. Rep. 263, 4 Int. Com. C. Rep. 228; *Merchants' Union v. Northern Pac. R. Co.*, 4 Int. Com. Rep. 183, 5 Int. Com. C. Rep. 478; *Board of Trade v. East Tennessee, etc.*, R. Co., 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546; *Gerke Brewing Co. v. Louisville, etc.*, R. Co., 4 Int. Com. Rep. 267, 5 Int. Com. C. Rep. 596; *Ex p. Koehler*, 31 Fed. Rep. 315; *Missouri Pac. R. Co. v. Texas, etc.*, R. Co., 31 Fed. Rep. 862; *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925; *Behlmer v. Louisville, etc.*, R. Co., 71 Fed. Rep. 835; *Interstate Commerce Commission v. Louisville, etc.*, R. Co., 73 Fed. Rep. 409; *Louisville, etc.*, R. Co. *v. Behlmer*, 175 U. S. 667; *Interstate Commerce Commission v. East Tennessee, etc.*, R. Co., 85 Fed. Rep. 107; *Brewer v. Central of Georgia R. Co.*, 84 Fed. Rep. 258; *Interstate Commerce Commission v. Western, etc.*, R. Co., 88 Fed. Rep. 186; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144; *Savannah Bureau of Freight, etc.*, *v. Charleston, etc.*, R. Co., 7 Int. Com. Rep. 479; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. Rep. 249; *Matter of Louisville, etc.*, R. Co., 1 Int. Com. C. Rep. 31; *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 326; *Louisville, etc.*, R. Co. *v. Behlmer*, 175 U. S. 648, *reversing* 42 U. S. App. 581, which *reversed* 71 Fed. Rep. 835; *Interstate Commerce Commission v. Baltimore, etc.*, R. Co., 145 U. S. 263; *Wight v. U. S.*, 167 U. S. 512; *Interstate Commerce Commission v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925; *Texas, etc.*, R. Co. *v. Interstate Commerce Commission*, 162 U. S. 197; *Foreman v. Great Eastern R. Co.*, 2 R. & Can. T. Cas. 202; *Harris v. Cockermouth, etc.*, R. Co., 1 R. & Can. T. Cas. 97; *Denaby Main Colliery Co. v. Manchester, etc.*, R. Co., 11 App. Cas. 97; *Phipps v. London, etc.*, R. Co., (1892) 2 Q. B. 248.

4. **Former View of Commission.** — *Re Southern R.*, etc., Assoc., 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; *Harwell v. Columbus, etc.*, R. Co., 1 Int. Com. Rep. 631, 1 Int. Com. C. Rep. 236; *Re Chicago, etc.*, R. Co., 2 Int. Com. Rep. 137, 2 Int. Com. C. Rep. 231; *Re Passenger*



overruled.<sup>4</sup> While competition may be considered, railroad companies may not underbid each other to a point which is not in itself remunerative, and then turn back on the line, and, taking advantage of the conditions existing at other localities where there is no competition, charge such rates for the shorter haul as shall make good their lack of profits in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable.<sup>2\*</sup> The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.<sup>3</sup>

**Nature and Sufficiency of Competition.** — In order to constitute dissimilarity under the fourth section of the act, the competition must be real and substantial, and not imaginary or trifling.<sup>4</sup> The character of the competition is immaterial, provided it is such competition as materially affects rates.<sup>5</sup> Water competition was especially in view.<sup>6</sup> Potential water competition, although there is but little actual water competition at any given time, is a circumstance to be considered.<sup>7</sup> One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it.<sup>8</sup> The competition of market with market is a circumstance to be considered in determining whether the con-

Tariffs, etc., *Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513; *Lehmann v. Southern Pac. Co.*, 3 Int. Com. Rep. 80, 4 Int. Com. C. Rep. 1; *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. C. Rep. 234; *Board of Trade v. East Tennessee, etc., R. Co.*, 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546; *Gerke Brewing Co. v. Louisville, etc., R. Co.*, 4 Int. Com. Rep. 267, 5 Int. Com. C. Rep. 596; *San Bernardino Board of Trade v. Atchison, etc., R. Co.*, 3 Int. Com. Rep. 138, 4 Int. Com. C. Rep. 104; *Savannah Bureau of Freight, etc., v. Charleston, etc., R. Co.*, 7 Int. Com. Rep. 479; *James, etc., Buggy Co. v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 682, 4 Int. Com. C. Rep. 744.

Competition of a railroad not subject to the Interstate Commerce Act has always been regarded as a dissimilarity justifying discriminating rates. *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 327, cited in *Detroit, etc., R. Co. v. Int. Commerce Commission*, 74 Fed. Rep. 832. See *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 327; *Gerke Brewing Co. v. Louisville, etc., R. Co.*, 5 Int. Com. C. Rep. 596.

1. *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144. And see generally cases cited in second preceding note of this section.

2. **Recouping Losses on Competitive Business.** — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

3. *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; *Lehmann v. Southern Pac. Co.*, 3 Int. Com. Rep. 80, 4 Int. Com. C. Rep. 1. See also *Board of Trade v. East Tennessee, etc., R. Co.*, 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546.

4. **Competition Must Be Real and Substantial.** — *Interstate Commerce Commission v. Western, etc., R. Co.*, 88 Fed. Rep. 186; *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648.

5. **Character Immaterial if Rates Are Affected.**

— *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648.

In *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 173, in order to guard against any misapprehension of the scope of the decision, the court said: "We do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of undue or unreasonable preference or advantage, or what are substantially similar circumstances and conditions." *Quoted with approval in Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648.

**Competition Not Originating at Initial Point.** — Substantial competition, although not originating at the initial point of the traffic, may also be considered. *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648.

**Competition Greater at Short than Longer Distance Point.** — Combined railroad and water competition in the carrying of lumber does not justify a greater charge for a shorter distance, where the carrier maintains the short distance rate, where the competition is more controlling than to the long distance. *James v. East Tennessee, etc., R. Co.*, 2 Int. Com. Rep. 609, 3 Int. Com. C. Rep. 225.

6. **Water Competition.** — *Interstate Commerce Commission v. Atchison, etc., R. Co.*, 50 Fed. Rep. 295.

7. **Potential Water Competition.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 74 Fed. Rep. 715.

8. **When Carriers Are Competitors.** — *Board of Trade v. East Tennessee, etc., R. Co.*, 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. Rep. 249; *Behlmer v. Louisville, etc., R. Co.*, 83 Fed. Rep. 898; *James, etc., Buggy Co. v. Cincinnati, etc., R. Co.*, 3 Int. Com. Rep. 682, 4 Int. Com. C. Rep. 744.



ditions of carriage are similar or dissimilar.<sup>1</sup>

*cc. LOCAL AND THROUGH RATES.*—A through rate may be less than an intermediate local rate without violating the long and short haul clause.<sup>2</sup>

**Joint Through Rate.**—A local rate between two points of the same road is not necessarily unlawful because it is higher than the rate charged under the joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies.<sup>3</sup> The statute applies, of course, to this new line and also to the component lines, but the charges made by one do not constitute a violation of the statute by the other.<sup>4</sup> The fact that one carrier's proportion of the through rate is lower than its local rate over its own line does not make the through rate unlawful.<sup>5</sup>

(3) *How Determined*—*aa. APPLICATION TO COMMISSION FOR RELIEF.*—A proviso in section 4 provides that the commission may, upon application and after investigation, authorize a carrier to charge less for longer than for shorter distances for the transportation of persons or property, and that the commission may from time to time prescribe the extent to which designated common

**1. Competition of Markets.**—Interstate Commerce Commission *v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925.

The question of competition of market with market, as constituting dissimilar circumstances and conditions, has been discussed in *James, etc., Buggy Co. v. Cincinnati, etc.*, R. Co., 4 Int. Com. C. Rep. 745.

**2. Through Rate Less than Intermediate Local Rate.**—*Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1. But see *Merchants' Union v. Northern Pac. R. Co.*, 4 Int. Com. Rep. 183, 5 Int. Com. C. Rep. 478; *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31.

The through rate must not be less than some one of the local rates. *Lippman v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584.

An intermediate rate should never exceed the through rate plus the local back to the intermediate place. *Martin v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. C. Rep. 1.

**3. Local Rate Higher than Joint Through Rate.**—*Parsons v. Chicago, etc.*, R. Co., 63 Fed. Rep. 903, *citing Chicago, etc., R. Co. v. Osborne*, 10 U. S. App. 430, 52 Fed. Rep. 912, 53 Am. & Eng. R. Cas. 18, *reversing* 48 Fed. Rep. 49, 49 Am. & Eng. R. Cas. 12; *Tozer v. U. S.*, 52 Fed. Rep. 917, 53 Am. & Eng. R. Cas. 14; *U. S. v. Mellen*, 53 Fed. Rep. 229.

**Meaning of Word "Line."**—There is a clear distinction between the term "railroad," as used in various parts of the Interstate Commerce Act, and the term "line" as used in section 4. Interstate Commerce Commission *v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925, 54 Am. & Eng. R. Cas. 365, 4 Int. Com. Rep. 332.

"The use of the word 'line' [in section 4 of the statute] is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the same line, so as to compel either company to graduate its tariff by that of the other." *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 912, 53 Am. & Eng. R. Cas. 18, 4 Int. Com. Rep. 257, *reversing* 48 Fed. Rep. 49, 49 Am.

& Eng. R. Cas. 12. *Quoted with approval* in Interstate Commerce Commission *v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925.

The word "line" as used in section 4, providing that no carrier should charge more "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance," means a physical line, and not a mere business or traffic arrangement; and under this construction a particular piece of railroad may be part of several lines. *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 1 Int. Com. Rep. 571, 1 Int. Com. C. Rep. 158.

**4. Relation of Joint Through Rates to Independent Local Rates.**—Interstate Commerce Commission *v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 937; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 912, 10 U. S. App. 430, *reversing* 48 Fed. Rep. 49; *Junod v. Chicago, etc., R. Co.*, 47 Fed. Rep. 290; *Allen v. Louisville, etc., R. Co.*, 1 Int. Com. Rep. 621, 1 Int. Com. C. Rep. 199.

The joint rate established over such line may be less than the sum of the local rates, or even less than the local rate of either company over that part of its road constituting a part of the joint line, without violating the long and short haul clause found in the fourth section. *Parsons v. Chicago, etc., R. Co.*, 63 Fed. Rep. 903, *citing Chicago, etc., R. Co. v. Osborne*, 10 U. S. App. 430, 52 Fed. Rep. 912.

Two or more connecting carriers cannot make a joint rate from one point to another point which is less than the joint rate to an intermediate point, but they may make a joint rate to a point without the local rates of either company to intermediate points being affected thereby. The local rate might be greater than the joint rate without this being a violation of the fourth section. *U. S. v. Mellen*, 53 Fed. Rep. 229, *quoted with approval* in Interstate Commerce Commission *v. Cincinnati, etc.*, R. Co., 56 Fed. Rep. 925.

**5. Lippman v. Illinois Cent. R. Co.**, 2 Int. Com. Rep. 414, 2 Int. Com. C. Rep. 584; *Imperial Coal Co. v. Pittsburgh, etc., R. Co.*, 2 Int. Com. Rep. 436, 2 Int. Com. C. Rep. 618; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. C. Rep. 534.



carriers may be relieved from the operation of the section.<sup>1</sup> This provision of the section was intended to apply only to exceptional cases.<sup>2</sup> The action of the commission upon application by a carrier for authority to charge less for longer than for shorter distances, is subject to review by the Circuit Court.<sup>3</sup>

*bb.* BY CARRIER IN FIRST INSTANCE. — A prior application to the commission is not necessary to justify a greater charge for a shorter haul than for a longer one, where the circumstances and conditions are substantially dissimilar, and the carrier may judge for itself in the first instance, but at its peril, whether the circumstances are such as to permit a greater charge for a shorter distance.<sup>4</sup> A failure to apply to the commission in the first instance is only a misprision of administration under the act, and cannot be held to impose any penalties of evidential presumptions in trying the fact. The trial proceeds in the courts on the same rules of evidence as to presumptions, burden of proof, and the like, whether the commission has acted preliminarily or not.<sup>5</sup> For a long time there was considerable conflict of opinion as to the proper construction of this provision for exceptions, and it was several times held that no exception was lawful unless made with the prior sanction of the commission.<sup>6</sup> Modifications and qualifications of this doctrine were made from time to time, the principal point of conflict and discussion being the effect of competition. The law has become settled, however, in favor of the contrary view, and is as first stated.<sup>7</sup> Where the circumstances and conditions are similar and the result to the carrier is injurious, relief can be obtained only through the commission.<sup>8</sup> The determination by the carrier that the circumstances

**1. Commission May Authorize Lower Charge for Longer Haul.** — *Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. Rep. 249; *Re Export Trade*, 1 Int. Com. Rep. 25, 1 Int. Com. C. Rep. 24; *Jurisdiction of Commission*, 1 Int. Com. Rep. 73; *Trammell v. Clyde Steamship Co.*, 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324.

**Form of Order Authorizing Lower Long-haul Charge.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. See *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 83 Fed. Rep. 249, wherein an order was held to be too indefinite to be enforced.

**2. When Commission Should Act.** — *Jurisdiction of Commission*, 1 Int. Com. Rep. 73, wherein it is said that where only general reasons operate, the general law should be left to its general course, however serious may be the consequences in particular cases and to particular roads and interests.

The mere probability or even certainty that injury will result to corporations or to individuals is not in itself ground for suspending the ordinary operations of the section. *Jurisdiction of Commission*, 1 Int. Com. Rep. 73.

**3. Review of Action by Circuit Court.** — *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 170.

**4. Carrier May Act Without Prior Application to Commission.** — *Interstate Commerce Commission v. Atchison, etc., R. Co.*, 50 Fed. Rep. 295, 50 Am. & Eng. R. Cas. 93, 4 Int. Com. Rep. 322, appeal dismissed in 149 U. S. 264; *Re Southern R., etc., Assoc.*, 1 Int. Com. Rep. 278, 1 Int. Com. C. Rep. 31; *Northwestern Iowa Grain, etc., Shippers' Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. C. Rep. 604; *Trammell v. Clyde Steamship Co.*, 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324;

*Louisville, etc., R. Co. v. Behlmer*, 175 U. S. 648, *disapproving* 4 Int. Com. Rep. 520; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, *quoting with approval* *Matter of Louisville, etc., R. Co.*, 1 Int. Com. C. Rep. 31, *per* Cooley, J.; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925; *Behlmer v. Louisville, etc., R. Co.*, 71 Fed. Rep. 835; *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107; *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 803, 43 U. S. App. 308; *Interstate Commerce Commission v. Western, etc., R. Co.*, 88 Fed. Rep. 186. See also *Board of Trade v. East Tennessee, etc., R. Co.*, 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546. But see *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 193.

**5. Effect of Failure to Apply to Commission — Presumptions.** — *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 838.

**6. Prior Application to Commission Held Necessary.** — *Osborne v. Chicago, etc., R. Co.*, 48 Fed. Rep. 49; *Board of Trade v. East Tennessee, etc., R. Co.*, 4 Int. Com. Rep. 213, 5 Int. Com. C. Rep. 546; *Trammell v. Clyde Steamship Co.*, 4 Int. Com. Rep. 120, 5 Int. Com. C. Rep. 324; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925; *Cooley, J.*, in *Matter of Louisville, etc., R. Co.*, 1 Int. Com. C. Rep. 53.

**7. Conflicting Opinions as to Construction.** — See *Osborne v. Chicago, etc., R. Co.*, 48 Fed. Rep. 54, *disapproved* in *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 946; *Behlmer v. Louisville, etc., R. Co.*, 83 Fed. Rep. 898, *disapproved* in *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144.

**8. Application to Commission Necessary Where Conditions Substantially Similar.** — *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 862,



are substantially dissimilar and that therefore the section is not applicable is, of course, subject to review by the commission and is to be determined ultimately by the court.<sup>1</sup>

**10. Filing and Publishing Schedules** — *a. DUTY TO ESTABLISH AND PUBLISH* — Statutory Provision. — The sixth section of the act makes it the duty of every common carrier subject to its provisions to print and keep for public inspection schedules showing the rates, fares, and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad.<sup>2</sup>

**Duty of Carriers to Devise Methods of Framing Tariff.** — It is uniformly held by the commission that carriers themselves should devise the methods by which their tariffs of rates should be framed in conformity with the law, without special suggestions from the commission.<sup>3</sup>

31 Am. & Eng. R. Cas. 76, followed in Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209, and quoted in Interstate Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925.

**1. Review of Decision by Commission and Courts.** — Interstate Commerce Commission v. East Tennessee, etc., R. Co., 85 Fed. Rep. 107; Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184; Louisville, etc., R. Co. v. Behlmer, 175 U. S. 648, citing Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 173.

**2. Statutory Requirement of Publication.** — § 6, Interstate Com. Act; Gerber v. Wabash R. Co., 63 Mo. App. 145; Missouri, etc., R. Co. v. Trinity County Lumber Co., 1 Tex. Civ. App. 553; Dillingham v. Fischl, 1 Tex. Civ. App. 546; U. S. v. Howell, 56 Fed. Rep. 21; Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; *Re* Passenger Tariffs, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649; Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465; *Re* Tariffs of Transcontinental Lines, 2 Int. Com. Rep. 203, 2 Int. Com. C. Rep. 324; Rice v. Louisville, etc., R. Co., 1 Int. Com. Rep. 722, 1 Int. Com. C. Rep. 503; New Orleans Cotton Exch. v. Louisville, etc., R. Co., 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694; Interstate Commerce Commission v. Baltimore, etc., R. Co., 43 Fed. Rep. 37.

**Excursion Rates.** — The provision of section 6, relating to the publication of rate sheets, applies to passenger excursion rates. Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465; Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147.

But in Interstate Commerce Commission v. Baltimore, etc., R. Co., 43 Fed. Rep. 37, the court expressed a doubt whether a railroad company's rates on mileage, excursion, or commutation and passenger tickets or other special rates allowed by section 22 of the act are required to be printed and posted in its offices and furnished the commission in conformity with section 6 of the act.

**Schedules of Freight through Foreign Countries.** — See § 6, Int. Com. Act, as amended March 2, 1889.

**Schedules on International Roads.** — See Matter of Grand Trunk R. Co., 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89.

**3. Duty of Carriers to Frame Tariffs Without Suggestions from Commission.** — *Re* Tariffs of

Columbus, etc., R. Co., 2 Int. Com. Rep. 11, 1 Int. Com. C. Rep. 626.

**The Commission May Determine and Prescribe the Form** in which the schedules required by the act to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient. Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U. S. 479.

**Practice of Commission to Refuse Specific Approval of Rate Sheets Submitted.** — See *Re* Passenger Tariffs, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649.

**Duty to Post in Two Public Places in Depot, Station, or Office.** — Int. Com. Act, § 6, as amended March, 1889; New Orleans Cotton Exch. v. Louisville, etc., R. Co., 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694; New York Board of Trade, etc. v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447; Gerber v. Wabash R. Co., 63 Mo. App. 145; U. S. v. Howell, 56 Fed. Rep. 21; Interstate Commerce Commission v. Baltimore, etc., R. Co., 43 Fed. Rep. 37; Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465.

**Carrier Not Relieved from Duty in Case of Freight for Export.** — New Orleans Cotton Exch. v. Louisville, etc., R. Co., 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694.

**Place of Posting Inland Joint Rate for Foreign Traffic.** — An inland joint rate for foreign traffic, with any advances or reductions therein, should be published by posting them in a public place at a depot where the freight is received at a port of entry, and also at its place of destination in the United States. New York Board of Trade, etc., v. Pennsylvania R. Co., 3 Int. Com. Rep. 417, 4 Int. Com. C. Rep. 447.

**Posting Not Essential to Establishment of Rate.** — U. S. v. Howell, 56 Fed. Rep. 21.

**Posting Unnecessary to Conviction for Conspiracy to Procure Less than Established Rates.** — U. S. v. Howell, 56 Fed. Rep. 21.

**Proceedings by Mandamus for Failure to Publish Schedule.** — See Int. Com. Act, § 6, as amended March 2, 1889. See also *infra*, this section, 14. *Enforcement of Act.*

**Injunction to Prevent Transportation by Carrier Until Rule Complied With.** — See Int. Com. Act, § 6, as amended March 2, 1889. See generally *infra*, this section, 14. *Enforcement of Act.*



**b. DUTY TO FILE SCHEDULE — In General.** — It is made the duty of every common carrier subject to the provisions of the Interstate Commerce Act to file with the commission copies of its schedules of rates, fares, and charges, which have been established and published as required, and promptly to notify said commission of all changes made in the same;<sup>1</sup> and it is also the duty of such carrier to file with the commission, copies of all contracts, agreements, or arrangements with other common carriers, in relation to any traffic affected by the provisions of the act, to which such carrier may be a party.<sup>2</sup>

**Duty to File Copies of Joint Tariffs of Rates, Fares, and Charges.** — In addition to the above provision it is expressly required that where passenger and freight cars pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with said commission.<sup>3</sup>

**c. CONTENTS OF SCHEDULE — In General.** — It is provided by the act that the schedules required to be printed by a common carrier, in addition to showing the rates, fares, and charges in force, shall plainly state the places upon its railroads between which property and passengers will be carried, shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges.<sup>4</sup>

**Joint Schedules.** — A joint freight rate over several individual roads must show what carriers unite in establishing it.<sup>5</sup>

**d. CONTRACTS PRESUMED TO BE WITH REFERENCE TO SCHEDULE — In General.** — It is held that every shipper must be presumed to know of the existence of the schedules, and that they are open for his inspection, and also of the terms of the act rendering invalid every contract of affreightment not made in accordance therewith,<sup>6</sup> and that, therefore, where a contract for an interstate shipment has been made and is sued on, or property rights are made dependent thereon, the shipper must be held to have contracted with reference to, and in accordance with, the rates fixed by the schedules, regardless of the terms of his contract.<sup>7</sup>

**Schedule Rate Payable Though Lower Rate Given by Mistake.** — In accordance with this presumption, it has been held that the schedule rate of freight is payable on

**1. Duty to File Copies with Commissioners.** — Int. Com. Act, § 6, as amended March 2, 1889; *Boston Fruit, etc., Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546.

**Commission Will Consider Filed Schedules Without Being Specially Put in Evidence.** — *Boston Fruit, etc., Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 493, 4 Int. Com. C. Rep. 664.

**2. Duty to File Copies of All Contracts and Agreements with Other Carriers.** — Int. Com. Act, § 6, as amended March 2, 1889.

**3. Filing Copies of Joint Tariffs.** — Int. Com. Act, § 6, as amended March 2, 1889; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546.

**Unnecessary for Each Corporation to File Schedule.** — *In re Joint Tariffs, etc.*, 1 Int. Com. C. Rep. 225.

**Publication as Ordered by Commission.** — See Int. Com. Act, § 6, as amended March 2, 1889.

**Publication of Tariff at Non-competing Point Unnecessary.** — *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 912, 53 Am. & Eng. R. Cas. 18, 4 Int. Com. Rep. 257, *reversing* 49 Am. & Eng. R. Cas. 12, 48 Fed. Rep. 49.

**Direction by Commission as to Manner, etc., of Publication.** — Int. Com. Act, § 6, as amended March 2, 1889; *New Orleans Cotton Exch. v. Louisville, etc., R. Co.*, 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694.

**Filing Raises No Presumption as to Legality.** — *San Bernardino Board of Trade v. Atchison, etc., R. Co.*, 3 Int. Com. Rep. 138, 4 Int. Com. C. Rep. 104.

**Proceedings on Failure to File.** — The manner of proceeding in case of failure to file schedules is the same as in the case of failure to publish such schedule. See Int. Com. Act, § 6, as amended March 2, 1889.

**4. Statutory Provision as to Requisites of Schedule.** — Int. Com. Act, § 6, as amended March 2, 1889; *Wight v. U. S.*, 167 U. S. 512.

**5. Joint Schedules.** — *Lehmann v. Texas, etc., R. Co.*, 3 Int. Com. Rep. 706, 5 Int. Com. C. Rep. 44.

**6. Knowledge of Existence of Schedules and Necessity of Compliance Therewith Presumed.** — *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

**7. Presumption that Shipper Contracted with Reference to Schedule Rates.** — *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.



a shipment even though the carrier has by mistake given a lower rate.<sup>1</sup>

**Joint Tariff Rates to Be Collected by Delivering Lines.** — In the case of freight transported over connecting lines, which lines have a joint tariff in accordance with the provision of the Interstate Commerce Act, the line which delivers such freight must collect for such transportation the interstate commerce rate, and not that named in the bill of lading.<sup>2</sup>

**Established Rate Recoverable Notwithstanding Unlawfulness of Carrier's Act.** — Though it is unlawful for a carrier to make a lower rate than that published, this fact will not prevent the carrier from recovering the established rate, where, from the evidence, it appears that such rate of compensation is reasonable.<sup>3</sup>

**e. EFFECT OF VARIANCE FROM SCHEDULED RATES — Unlawful to Charge or Receive More or Less than Schedule Rate.** — By section 6 of the act it is made unlawful for a common carrier, after it has established and published its schedule of rates, fares, and charges as prescribed by the act, to charge, demand, collect, or receive from any person a greater or less compensation for transportation of persons or property, or for any service connected therewith, than is specified in such published schedule of rates, fares, and charges.<sup>4</sup> A carrier or agent knowingly receiving or demanding either less or more than the fixed rates is guilty of a misdemeanor, and, upon conviction, subject to fine and imprisonment.<sup>5</sup>

**Connivance of Shipper with Carrier.** — It is further provided that if any person, by connivance with the carrier, knowingly secures transportation at less than the regular rates, he is likewise subject to the penalties of the act.<sup>6</sup>

**f. CHANGE OF SCHEDULES — Requisites in Case of Advance.** — It is provided by the act that "no advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect."<sup>7</sup>

**1. Schedule Rate Payable Notwithstanding Contract for Lower Rate.** — *Gerber v. Wabash R. Co.*, 63 Mo. App. 145.

**2. Duty of Delivering Line to Collect Established Rate Notwithstanding Bill of Lading.** — *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50; *Gulf, etc., R. Co. v. Nelson*, 4 Tex. Civ. App. 345.

**3. Unlawful Act Will Not Prevent Recovery of Higher Rate.** — *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553.

**4. Unlawful to Charge More or Less than Schedule Rates.** — *Mobile, etc., R. Co. v. Dismukes*, 94 Ala. 131; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546; *Re Passenger Tariffs, etc., Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513; *Matter of Grand Trunk R. Co.*, 2 Int. Co Rep 496, 3 Int. Com. C. Rep. 89; *U. S. v. Michigan Cent. R. Co.*, 43 Fed. Rep. 26; *U. S. v. Mellen*, 53 Fed. Rep. 229; *Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co.*, 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465; *Wight v. U. S.*, 167 U. S. 512.

**Immaterial Whether Rates Given Directly or Through Others.** — Any rates lower than those established by the regular tariff are illegal, whether tickets are sold directly or through others. *Re Passenger Tariffs, etc., Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

**5. Misdemeanor Punishable by Fine and Imprisonment.** — *Wight v. U. S.*, 167 U. S. 512; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *Dillingham v. Fischl*, 1 Tex. Civ. App. 546; *Missouri, etc., R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553. See *infra*, this section, 14. c. (3) *Criminal Proceedings*.

**Knowledge Essential to Criminal Liability.** — *U. S. v. Michigan Cent. R. Co.*, 43 Fed. Rep. 26, 3 Int. Com. Rep. 287.

**6. Connivance of Shipper to Secure Lower Rates Punishable.** — *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *U. S. v. Howell*, 56 Fed. Rep. 21. See *infra*, this section, 14. c. (3) *Criminal Proceedings*.

**7. Notice of Advance in Rates.** — Interstate Com. Act, § 6, as amended March 2, 1889; *New York Produce Exch. v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 553, 3 Int. Com. C. Rep. 137.

**Manner of Showing Changes.** — Interstate Com. Act, § 6, as amended March 2, 1889.

**Advances or Reduction to Be Sent to the Commission and Made Public According to Statute.** — When changes are made in passenger rates, the advances or reductions should be sent to the commission and made public, as required by the statute. A new individual or joint passenger tariff must be posted at the stations to which it applies. *Re Passenger Tariffs*, 2 Int. Com. Rep. 445, 2 Int. Com. C. Rep. 649.

**Rule Applicable to Joint Tariffs.** — Interstate Com. Act, § 6, as amended March 6, 1889.



**Requisites in Case of Reduction.** — Reductions in such published rates, fares, or charges may, under the act, only be made after three days' previous notice, to be given in the same manner that notice of advance in rates must be given.<sup>1</sup>

**11. Continuous Carriage.** — The seventh section of the act makes it unlawful for any common carrier subject to the provisions of the act to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination; and no breaking of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily to interrupt such continuous carriage or to evade any of the provisions of the act.<sup>2</sup>

**12. Pooling Contracts.** — Section 5 of the act makes it unlawful for any carrier subject to the provisions of the act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance is deemed a separate offense.<sup>3</sup> This section does not invalidate a contract subject thereto as a whole, but only the pooling provisions therein,<sup>4</sup> nor does it apply to a pooling contract between a railroad company and a pipe line company for the transportation of oil.<sup>5</sup>

**13. Mileage, Excursion, Commutation Tickets, etc.** — Section 22 of the act, as amended by Act of March 2, 1889,<sup>6</sup> provides that nothing in the act shall prevent the carriage, storing, or handling of property free or at reduced rates in certain enumerated cases, or the free carriage of certain enumerated classes of persons, or their carriage at reduced rates, or the issuance of mileage, excursion, or commutation tickets.<sup>7</sup> The object of this section was to settle

**1. Notice of Reduction of Rates.** — Interstate Com. Act, § 6, as amended March 2, 1889; *New York Produce Exch. v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 553, 3 Int. Com. C. Rep. 137; *Re Passenger Tariffs, etc., Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. C. Rep. 513.

**Same Rule Applicable in Case of Joint Tariffs.** — Interstate Com. Act, § 6, as amended March 2, 1889.

**Unlawful to Vary from Day to Day to Meet Fluctuations in Ocean Rates.** — Under the act as amended March 2, 1889, requiring ten days' previous notice of advance and three days' notice of intended reductions in rates, it is unlawful to vary from day to day to meet fluctuations in ocean rates. *New York Produce Exch. v. New York Cent., etc., R. Co.*, 2 Int. Com. Rep. 553, 3 Int. Com. C. Rep. 137.

**2. Interruption of Continuous Carriage.** — *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, wherein it was held upon the facts that this section had not been violated; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Matter of Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. C. Rep. 89.

**What Is Not a Through Shipment — Illustration.** — Where live stock is shipped with the understanding that it may be unloaded at an intermediate point to test the market there, but to be reloaded if the market is not satis-

factory, at the option of the shipper, such shipment cannot be treated as a through shipment. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 721, 3 Int. Com. C. Rep. 450.

**3. Pooling Contracts Forbidden.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

**4. Contract as Whole Not Invalidated.** — *Ives v. Smith*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 46, affirming 3 N. Y. Supp. 645.

**5. Pooling Contract Between Carrier and Pipe Line Company Not Within the Statute.** — *Independent Refiners' Assoc. v. Western New York, etc., R. Co.*, 4 Int. Com. Rep. 162, 5 Int. Com. C. Rep. 415.

**6.** 25 U. S. Stat. at L. 862, § 9, Rev. Stat. U. S., Supp. (1874-91) 690, § 9.

**7. Construction of Statute in General.** — *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263.

**Government Property.** — *Matter of Indian Supplies*, 1 Int. Com. Rep. 22, 1 Int. Com. C. Rep. 15; *Matter of U. S. Commission of Fish and Fisheries*, 1 Int. Com. Rep. 606, 1 Int. Com. C. Rep. 21.

**Disabled Soldiers or Sailors.** — *Re Inmates of National Homes*, 1 Int. Com. Rep. 75, 1 Int. Com. C. Rep. 28.

**Religious Teachers.** — *Re Religious Teachers*, 1 Int. Com. Rep. 21.

**Public Officers and "Eminent Gentlemen."** — See



beyond all doubt that a discrimination in favor of certain persons therein named should not be deemed unjust, but it does not follow that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive.<sup>1</sup> A person who receives no compensation except free transportation over the road for "throwing what business he conveniently can in their way," is not an employee within the meaning of the statute permitting free transportation of employees.<sup>2</sup> The families of officers and employees of the road are not included in any of the exceptions named in section 22.<sup>3</sup> The section should be regarded as a legislative declaration that not merely mileage and excursion, but passenger tickets generally, based upon the commutation principle of conceding a reasonable deduction from regular local rates in consideration of the frequency or quantity of the traffic, if reasonable and just in their charges, do not come within the evils intended to be remedied by the act.<sup>4</sup> Thus although a party-rate ticket is neither a mileage nor an excursion ticket within the meaning of the section,<sup>5</sup> it falls within the same principle and is not illegal.<sup>6</sup>

**14. Enforcement of Act — a. ELECTION OF TRIBUNAL — (1) In General.** — By section 9 of the Interstate Commerce Act persons claiming to be damaged by a violation of the provisions of the act are given an election to sue in the courts of the United States for such damage, or to make complaint to the commission. But they cannot pursue both remedies.<sup>7</sup>

(2) *Jurisdiction of State Courts.* — A party thus seeking damages alleged to have been sustained in consequence of the violation of the act by a carrier cannot bring suit before a state court, because such court is without jurisdiction to enforce the right, but his redress is confined to the two methods provided by the act.<sup>8</sup> Were it otherwise, the party aggrieved would have a third alternative mode of redress not contemplated by the act.<sup>9</sup>

**b. PROCEEDINGS BEFORE COMMISSION — (1) Jurisdiction — (a) How Acquired — Complaint Unnecessary.** — It is expressly provided by section 12 of the Interstate Commerce Act that the commission may institute an inquiry on its own motion and to the same effect as though complaint had been made,<sup>10</sup> and neither complaint nor complainant is necessary to give the commission jurisdiction to

Matter of Boston, etc., R. Co., 3 Int. Com. Rep. 717, 5 Int. Com. C. Rep. 69.

*Land Explorers or Settlers.* — See Smith v. Northern Pac. R. Co., 1 Int. Com. Rep. 611, 1 Int. Com. C. Rep. 208.

**1. Section Illustrative and Not Exclusive.** — Interstate Commerce Commission v. Baltimore, etc., R. Co., 145 U. S. 263.

**2. Who Are Employees.** — Slater v. Northern Pac. R. Co., 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 359.

**3. Families of Employees.** — *Ex p.* Koehler, 12 Sawy. (U. S.) 446, 31 Fed. Rep. 315, 1 Int. Com. Rep. 317; *Re* Order of Railway Conductors, 1 Int. Com. Rep. 18, 1 Int. Com. C. Rep. 8.

**4. The Commutation Principle of Passenger Tickets.** — Interstate Commerce Commission v. Baltimore, etc., R. Co., 43 Fed. Rep. 45. See generally Associated Wholesale Grocers v. Missouri Pac. R. Co., 1 Int. Com. Rep. 393, 1 Int. Com. C. Rep. 156; Larrison v. Chicago, etc., R. Co., 1 Int. Com. Rep. 369, 1 Int. Com. C. Rep. 147; Sidman v. Richmond, etc., R. Co., 2 Int. Com. Rep. 766, 3 Int. Com. C. Rep. 512.

**5. Party-rate, Mileage, Excursion, and Commutation Tickets.** — Interstate Commerce Commission v. Baltimore, etc., R. Co., 145 U. S. 277; Pittsburgh, etc., R. Co. v. Baltimore,

etc., R. Co., 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465.

**6. Party-rate Tickets Authorized.** — Interstate Commerce Commission v. Baltimore, etc., R. Co., 145 U. S. 277. *Contra*, Pittsburgh, etc., R. Co. v. Baltimore, etc., R. Co., 2 Int. Com. Rep. 729, 3 Int. Com. C. Rep. 465.

**7. Right to Elect Between Proceedings before Commission and in Federal Courts.** — Interstate Commerce Commission v. Louisville, etc., R. Co., 73 Fed. Rep. 409; Copp v. Louisville, etc., R. Co., 43 La. Ann. 511, 26 Am. St. Rep. 198.

**8. State Courts Have No Jurisdiction.** — Copp v. Louisville, etc., R. Co., 43 La. Ann. 511, 26 Am. St. Rep. 198.

**Jurisdiction in Cases Growing Out of Interstate Commerce.** — The fact that a given subject, like interstate commerce, is beyond the state legislative control, does not *ipso facto* prevent the courts of the state from exercising jurisdiction over cases which grow out of this commerce. Murray v. Chicago, etc., R. Co., 62 Fed. Rep. 24, 4 Int. Com. Rep. 806.

**9. Remedies Provided by Act Exclusive.** — Copp v. Louisville, etc., R. Co., 43 La. Ann. 511, 26 Am. St. Rep. 198.

**10. Commission May Institute Inquiry on Own Motion.** — Matter of Alleged Excessive Freight Rates, 3 Int. Com. Rep. 151, 4 Int. Com. C.



investigate supposed violations of the provisions of the act.<sup>1</sup>

(b) **Extent of Jurisdiction** — *aa. JURISDICTION STRICTLY STATUTORY.* — The jurisdiction of the Interstate Commerce Commission is dependent entirely upon statute, and cannot be extended over subjects other than those defined by the Interstate Commerce Act, under which the commission is organized.<sup>2</sup> Every ground of the commission's jurisdiction, as defined by the statute, "relates directly or indirectly to the transportation of persons and freight by carriers at fair and reasonable rates and with absolute impartiality as to facilities and accommodations."<sup>3</sup>

*bb. JURISDICTION IN PENAL ACTIONS AND PROSECUTIONS.* — The commission has no jurisdiction over suits for penalties nor in criminal prosecutions.<sup>4</sup>

*cc. JURISDICTION OVER FOREIGN CARRIERS.* — The commission has jurisdiction of foreign carriers engaged in transporting passengers and property for a continuous carriage or shipment from places in the United States to places in adjacent foreign countries.<sup>5</sup>

*dd. JURISDICTION AS TO RECEIVERS* — **Jurisdiction Not Affected by Appointment of Receiver.** — The jurisdiction of the commission will not be affected by the fact that a receiver has been appointed for a railroad company.<sup>6</sup>

**Leave of Court Not Essential to Jurisdiction.** — Prior leave of a court which has appointed a receiver is not necessary to entitle a shipper to complain against such receiver, in a proceeding before the commission, or to give the commission jurisdiction in such proceeding.<sup>7</sup>

(2) **Function of Commission** — (a) **In General.** — By the Interstate Commerce Act the commission is expressly authorized and required to enforce the provisions of such act.<sup>8</sup>

(b) **Duty as to Abstract, Collateral, and Ex Parte Questions.** — The commission is only required, however, to express opinions when a controversy is pending involving a violation of the statute,<sup>9</sup> and it does not lend its aid to parties by expressing opinions on abstract questions, or on *ex parte* statements of the facts, or upon questions merely presented for the purpose of gaining a construction of the statute.<sup>10</sup> Where the evidence introduced raises a collateral question as to whether the statute has been violated outside of the issues presented, a new

Rep. 116; *Interstate Commerce Commission v. Detroit, etc.*, R. Co., 57 Fed. Rep. 1005.

1. **Complaint Unnecessary.** — *Florida R. Commission v. Savannah, etc.*, R. Co., 5 Int. Com. C. Rep. 13, 136; *Matter of Acts, etc.*, of Grand Trunk R. Co., 3 Int. Com. C. Rep. 89.

2. **Jurisdiction Statutory.** — *Matter of Express Cos.*, 1 Int. Com. C. Rep. 369.

3. **Jurisdiction over Transportation by Carriers.** — *Traders', etc.*, Union v. Philadelphia, etc., R. Co., 1 Int. Com. C. Rep. 371.

**Merchandise Intended to Be Transported to Another State by Second Carrier.** — See *Missouri, etc.*, R. Tie, etc., Co. v. Cape Girardeau, etc., R. Co., 1 Int. Com. C. Rep. 30; *New Jersey Fruit Exch. v. Central R. Co.*, 2 Int. Com. C. Rep. 142.

**Claim for Damages Not Entertained Where Defendant Entitled to Jury Trial.** — *Heck v. East Tennessee, etc.*, R. Co., 1 Int. Com. C. Rep. 775, 1 Int. Com. C. Rep. 495.

4. **No Jurisdiction over Penal Actions and Prosecutions.** — Report of Interstate Commerce Commission, 3 Int. Com. C. Rep. 431.

5. **Jurisdiction over Foreign Carriers.** — *Matter of Acts, etc.*, of Grand Trunk R. Co., 3 Int. Com. C. Rep. 89.

6. **Jurisdiction Not Affected by Appointment of**

**Receiver.** — *Board of Trade v. Alabama Midland R. Co.*, 6 Int. Com. C. Rep. 1.

**Receivership Subsequent to Complaint.** — See *Trammell v. Clyde Steamship Co.*, 5 Int. Com. C. Rep. 324, 4 Int. Com. C. Rep. 120.

7. **Leave of Court to Proceed Unnecessary.** — *Evans v. Union Pac. R. Co.*, 6 Int. Com. C. Rep. 523.

8. **Duty to Enforce Provisions of Act.** — *Texas, etc.*, R. Co. v. Interstate Commerce Commission, 162 U. S. 197.

**Duty to Have Abuses Suppressed.** — See U. S. v. Missouri Pac. R. Co., 65 Fed. Rep. 909.

9. **Opinions Necessary Only in Pending Controversy.** — *Matter of Order of Railway Conductors*, 1 Int. Com. C. Rep. 8, 1 Int. Com. C. Rep. 18.

**Case Within Jurisdiction of Commission Must Be Stated.** — *Re Iowa Barb Steel Wire Co.*, 1 Int. Com. C. Rep. 605.

10. **Will Not Express Opinions on Ex Parte Statements of Facts.** — *Matter of Order of Railway Conductors*, 1 Int. Com. C. Rep. 8; *Matter of Southern Pac. R. Co.*, 1 Int. Com. C. Rep. 6; *Matter of Iowa Barb Steel Wire Co.*, 1 Int. Com. C. Rep. 17; *Matter of St. Louis Millers' Assoc.*, 1 Int. Com. C. Rep. 20; *Matter of Disabled Soldiers, etc.*, 1 Int. Com. C. Rep. 28; *Missouri, etc.*, R. Tie, etc., Co. v. Cape Girardeau, etc., R. Co., 1 Int. Com. C. Rep. 30.



proceeding will be instituted, and such collateral question not decided until all the parties have been heard.<sup>1</sup>

(3) *Nature of Proceeding*. — (a) *Mode of Procedure*. — The mode of procedure before the commission conforms in many respects to the regular practice of courts, but the commission is not a court and does not exercise judicial powers.<sup>2</sup>

(b) *Doctrine of Estoppel Inapplicable*. — The commission not being a court, the doctrine of estoppel is not applicable to parties appearing before it. Thus, a person who appears before the commission as a member of a committee which represents a mercantile association, and institutes proceedings which are afterward dismissed, is not thereby estopped from instituting a similar proceeding in his own name.<sup>3</sup>

(4) *Parties*. — It is provided by section 13 of the Interstate Commerce Act that "any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society," may file complaints for a violation of the provisions of the statute.<sup>4</sup>

*Personal Interest Unnecessary*. — In order that a person may make a complaint before the commission for a violation of the provisions of the act, it is not necessary that he should have a personal interest in such violation;<sup>5</sup> in fact, it is expressly provided by section 13 of the act that "no complaint shall, at any time, be dismissed because of the absence of direct damage to the complainant."<sup>6</sup>

*Sufficient if Matter Amounts to Public Grievance*. — It will be sufficient if such person complains of a matter which amounts to a public grievance.<sup>7</sup>

*Parties Defendant*. — In proceedings before the commission, where a carrier is directly interested in the investigation, and is responsible in whole or in part for the matter complained of, and the merits of the controversy cannot be investigated in its absence, it should be made a party to the controversy.<sup>8</sup>

(5) *Evidence*. — (a) *Necessity for in Support of Complaint*. — In proceedings by complaint before the commission such complaint must be supported by evidence, or it will be dismissed for want of proof.<sup>9</sup>

(b) *Burden of Proof on Complainant*. — Where a charge of excessive rates is made against a carrier in proceedings before the commission, the complainant

1. Effect of Introducing Collateral Question. — *Business Men's Assoc. v. Chicago, etc., R. Co.*, 2 Int. Com. Rep. 48, 2 Int. Com. C. Rep. 73.

2. Nature of Proceeding. — *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567. See also *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; and see *supra*, this section, 3. b. *Administrative, Judicial, and Legislative Powers*.

3. Estoppel Not Applicable to Parties Appearing Before Commission. — *Toledo Produce Exch. v. Lake Shore, etc., R. Co.*, 3 Int. Com. Rep. 830, 5 Int. Com. C. Rep. 166.

Complainant Not Estopped by Contract Before Passage of Statute Fixing Rates. — *Haddock v. Delaware, etc., R. Co.*, 3 Int. Com. Rep. 302, 4 Int. Com. C. Rep. 296.

4. Provision of Act as to Who May Complain. — *Boston Fruit, etc., Exch. v. New York, etc., R. Co.* 3 Int. Com. Rep. 604, 4 Int. Com. C. Rep. 664; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197. See II ENCYC. OF PL. AND PR. 484.

5. Personal Interest Unnecessary. — *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 1 Int. Com. Rep. 571, 1 Int. Com. C. Rep. 158; *James v. Canadian Pac. R. Co.*, 5 Int. Com. C. Rep. 612, 4 Int. Com. Rep. 274; *Boston Fruit, etc.,*

*Exch. v. New York, etc., R. Co.*, 3 Int. Com. Rep. 604, 4 Int. Com. C. Rep. 664.

6. Complaint Not to Be Dismissed for Absence of Direct Damage to Complainant. — *Interstate Commerce Commission v. Detroit, etc., R. Co.*, 57 Fed. Rep. 1005; *James v. Canadian Pac. R. Co.*, 5 Int. Com. C. Rep. 612, 4 Int. Com. Rep. 274.

Immaterial that Rate Complained of Works No Direct Injury to Complainant. — *James v. Canadian Pac. R. Co.*, 5 Int. Com. C. Rep. 614, 4 Int. Com. Rep. 274.

7. Sufficient if Matter Complained of Amounts to Public Grievance. — *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 1 Int. Com. Rep. 571, 1 Int. Com. C. Rep. 158.

8. Joinder of Carrier Responsible in Whole or in Part for Matter Complained of. — *Riddle v. Pittsburgh, etc., R. Co.*, 1 Int. Com. Rep. 773, 1 Int. Com. C. Rep. 490. See further as to matters of procedure, vol. II ENCYC. OF PL. AND PR., p. 482.

9. Complaint Must Be Supported by Proof. — *Holbrook v. St. Paul, etc., R. Co.*, 1 Int. Com. C. Rep. 102; *Fulton v. Chicago, etc., R. Co.*, 1 Int. Com. C. Rep. 104; *Leonard v. Union Pac. R. Co.*, 1 Int. Com. Rep. 627; *Rice v. St. Louis Southwestern R. Co.*, 4 Int. Com. Rep. 321; *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529.



assumes the burden of proof to sustain such charge.<sup>1</sup>

(c) **Right to Take Proofs Where Defendant Fails to Answer.** — Where a complaint is filed by aggrieved shippers under section 13, for discrimination, and the defendant carrier fails to answer or make any defense, the commission will proceed to take such proofs as it may deem proper and reasonable, and will make such order as the nature of the case may seem to demand.<sup>2</sup>

(6) **Right to Require Attendance of Witnesses, Production of Books, Papers, etc.** — (a) **In General.** — By section 12 of the Interstate Commerce Act as amended February 10, 1891, the commission is empowered to require by subpœna the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.<sup>3</sup> Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States, at any designated place of hearing.<sup>4</sup>

(b) **Enforcement of Order** — *aa. COMMISSION CANNOT PUNISH DISOBEDIENCE AS A CONTEMPT.* — The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to the commission for final determination, as that body is merely a subordinate administrative or executive tribunal, and such a body could not, under our system of government and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.<sup>5</sup>

*bb. RIGHT TO INVOKE AID OF UNITED STATES COURT* — (*aa*) **Statutory Provision.** — In case of disobedience to the subpœna, it is expressly provided by section 12 of the act that "the commission or any party to a proceeding before the commission may invoke the aid of any court of the United States, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents, under the provisions of this section."<sup>6</sup>

**Issuance of Order by Federal Court.** — Any of the circuit courts of the United States, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of the act or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so desired) and give evidence touching the matter in question.<sup>7</sup>

1. **Burden of Proof on Complainant.** — *Fulton v. Chicago, etc., R. Co.*, 1 Int. Com. C. Rep. 104.

2. **Taking Proof in Case of Failure to Answer.** — *Tecumseh Celery Co. v. Cincinnati, etc., R. Co.*, 5 Int. Com. C. Rep. 663, 4 Int. Com. Rep. 318.

3. **May Require Attendance and Testimony of Witnesses and Production of Books and Papers.** — Int. Com. Act, § 12, Rev. Stat. U. S., Supp., vol. 1, p. 891; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

**Provision Constitutional.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

**Making Out Prima Facie Case.** — Under the Revised Statutes of the United States, section 869, a *prima facie* case must be made to the effect that the paper, writing, written instrument, book, or document is in the possession or power of the witness, and that the same, if produced, will be competent and material evidence for the party applying therefor, before the *subpœna duces tecum* is issued. *Rice v. Cincinnati, etc., R. Co.*, 2 Int. Com. Rep. 584, 3 Int. Com. C. Rep. 186.

**Denial of Application for Production of Books and Papers of Third Parties.** — Where the appli-

cation is for the production of books or papers of third parties, the application may be denied, where it appears that injustice might be done such parties by the production of such books or papers. *Haddock v. Delaware, etc., R. Co.*, 3 Int. Com. Rep. 302, 4 Int. Com. C. Rep. 296.

4. **May Be Required from Any Place in United States to Any Designated Place.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

5. **Commission May Not Punish for Contempt.** — The question of punishing a witness for contempt cannot arise before the commission, for in a judicial sense there is no such thing as contempt of a subordinate administrative body. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

6. **May Invoke Aid of United States Court in Case of Disobedience to Subpœna.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

7. **Issuance of Order by Federal Court.** — Int. Com. Act, § 12, as amended Feb. 10, 1891.

**Provisions Not Unconstitutional.** — *Interstate Commerce Commission v. Brimson*, 154 U. S.



(bb) *Nature and Object of Proceeding under Provision.* — Such a proceeding is not merely ancillary and advisory, nor is its object merely to obtain an opinion of the circuit court that would be without operation upon the rights of the parties. Any judgment rendered will be a final and indisputable basis of action as between the commission and the defendant, and furnish a precedent for similar cases. The judgment is none the less one of a judicial tribunal dealing with questions judicial in their nature and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.<sup>1</sup>

(cc) *Grounds of Defense in Such Proceedings.* — Prior to the amendment of Feb. 11, 1893, in a proceeding in a circuit court to compel a witness to produce books and papers before the commission, it was held that the defendant might contend that he was protected by the Constitution from making answer to the questions propounded to him, or that he was not bound to produce books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for, related to the particular matter under investigation, or to any matter which the commission was entitled under the Constitution or laws to investigate. This issue being determined in his favor by the court, the petition of the commission to compel such production of documents and answers to questions could be dismissed upon its merits.<sup>2</sup> By the amendment referred to, it is now provided that no person shall be excused from attending and testifying, or from producing books, papers, etc., before the commission, on the ground or for the reason that the testimony or evidence may tend to criminate or subject him to a penalty or forfeiture, and it is further provided that no person shall be prosecuted or subjected to any penalty or forfeiture for any transaction concerning which he might testify or produce evidence before the commission.<sup>3</sup> The statute as amended is constitutional and deprives the witness of his constitutional right to refuse to answer or produce books and papers.<sup>4</sup>

(dd) *Failure to Obey Order Punishable as Contempt* — **In General.** — Where upon application to the circuit court the latter orders the carrier to appear before the commission or to produce books or papers, any failure to obey such order may be punished by the court as contempt thereof.<sup>5</sup>

(7) *Findings of Fact* — (a) **In General.** — The commission, in proceedings before it, should make findings of fact upon which its conclusions are based, which findings should be included in the report.<sup>6</sup>

447, reversing *In re Interstate Commerce Commission*, 53 Fed. Rep. 476.

1. **Proceeding Not Merely Ancillary and Advisory.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

2. **Grounds of Defense in Proceedings to Compel Production of Books and Papers.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, examining and distinguishing *Hayburn's Case*, 2 Dall. (U. S.) 409; *U. S. v. Ferreira*, 13 How. (U. S.) 40; *U. S. v. Todd*, 13 How. (U. S.) 52, note; *Gordon v. U. S.*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222.

No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution; and therefore Rev. Stat. U. S., § 860, providing that no evidence given shall be in any manner used against the witness, is not coextensive with the constitutional provision, and the witness cannot be compelled to answer where he states that his answers

might tend to criminate him. *Counselman v. Hitchcock*, 142 U. S. 547, distinguished in *U. S. v. Patterson*, 150 U. S. 65.

3. **Amendment of Act.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, in which case the court said: "That act was not in force when this case was determined below; nor does it reach the question whether a proceeding like the present one can be maintained in a circuit court of the United States."

4. **Amendment Removes Constitutional Objection.** — *Brown v. Walker*, 161 U. S. 591.

5. **Disobedience to Order Punishable as Contempt.** — Int. Com. Act, § 12, as amended Feb. 10, 1891; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

**Disobedience to Final Order of Court Essential Before Punishment for Contempt.** — *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

6. **Duty to Make Findings.** — See *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.



(b) **Duty to Dispose of Issues of Fact.** — Where an issue of fact is raised before the commission, its failure to dispose of it is an error of law.<sup>1</sup>

(c) **Duty to Receive and Take into Account Evidence of Facts.** — Where in a given case it is the duty of the commission to receive and take into account evidence of certain facts, its failure to do so is error of law.<sup>2</sup>

(8) **Report** — (a) **Duty of Commission to Make Report.** — It is the duty of the commission to make reports in writing in respect to complaints before it.<sup>3</sup>

(b) **Requisites of Report** — *aa. IN GENERAL.* — With regard to the general requisites of the report of findings of facts and conclusions by the commission, it may be stated generally that it is not sufficient for the commission in reporting its findings and conclusions to do so in such a general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. It is not sufficient for the report to be made up of mere conclusions, but it should show what the issues in the case are, and what facts the commission finds in regard to such issues. It should make suitable reference to the evidence adduced in regard to any particular question where there is a conflict in the proof, showing how the commission settles the disputed fact; or, if the evidence in regard to any issue is undisputed, it should state that fact.<sup>4</sup>

*bb. RECOMMENDATION AS TO REPARATION.* — Such report should include, in addition to the findings of fact, the recommendation of the commission, as to what reparation, if any, shall be made by any common carrier, to any party or parties who may be found to have been injured.<sup>5</sup>

(g) **Order of Commission** — (a) **Right to Make Order Pendente Lite.** — Where an investigation by the commission has been finished as to some matters, but not as to others, it may make an order *pendente lite* as to the matters in which the investigation has been concluded, and the case may be retained for further consideration as to the matters in which it is unfinished.<sup>6</sup>

(b) **When Order Unnecessary** — *aa. IN GENERAL.* — Where matters complained of are cured at any stage of the proceedings before the final opinion is rendered by the commission, so as to conform to the relief prayed for, no opinion will be rendered and no order made.<sup>7</sup>

*bb. NO ORDER MADE WHERE TARIFF ABANDONED BEFORE COMPLAINT MADE.* — No order will be made where a tariff complained of was abandoned by the carriers for a long time before the complaint was made, and shortly after the tariff was put in force, because such order would be void and useless.<sup>8</sup>

1. **Error to Fail to Dispose of Issues of Fact.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.

2. **Error to Fail to Receive and Take into Account Evidence of Facts.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.

**Order Set Aside for Error in Excluding Relevant Facts from Consideration.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, reversing 20 U. S. App. 1, 57 Fed. Rep. 948.

3. **Duty to Make Report.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.

4. **Requisites of Report.** — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

**Cumulative or Immaterial Evidence.** — See *Riddle v. Pittsburgh, etc., R. Co.*, 1 Int. Com. C. Rep. 490.

5. **Should Contain Findings of Fact and Recom-**

**mendation as to Reparation.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

6. **Right to Make Order Pendente Lite.** — *Matter of Boston, etc., R. Co.*, 5 Int. Com. C. Rep. 69.

7. **Order Unnecessary Where Matters Complained of Are Cured Before Final Opinion.** — *Manufacturers', etc., Union v. Minneapolis, etc., R. Co.*, 1 Int. Com. Rep. 630, 1 Int. Com. C. Rep. 227; *Lincoln Board of Trade v. Union Pac. R. Co.*, 2 Int. Com. Rep. 101, 2 Int. Com. C. Rep. 229; *Harris v. Duval*, 2 Int. Com. Rep. 514, 3 Int. Com. C. Rep. 128; *New Orleans Cotton Exch. v. Louisville, etc., R. Co.*, 3 Int. Com. Rep. 523, 4 Int. Com. C. Rep. 694; *Fulton v. Chicago, etc., R. Co.*, 1 Int. Com. Rep. 375, 1 Int. Com. C. Rep. 104; *Rawson v. Newport News, etc., R. Co.*, 2 Int. Com. Rep. 626, 3 Int. Com. C. Rep. 266; *Pennsylvania Co. v. Louisville, etc., R. Co.*, 2 Int. Com. Rep. 603, 3 Int. Com. C. Rep. 223.

8. **Order Unnecessary Where Tariff Abandoned.** — *Rawson v. Newport News, etc., R. Co.*, 2 Int. Com. Rep. 626, 3 Int. Com. C. Rep. 266.



*cc. EFFECT OF ANSWER PROMISING COMPLIANCE WITH THE LAW.* — Where a complaint is made of a failure to comply with the law, and the railroad answers, and avows a purpose to comply, it must be assumed that it will do so, and is doing so, until there is evidence to the contrary.<sup>1</sup>

(c) *Requisites of Order — Order Should Be Definite.* — An order by the commission should not consist merely of a general statement of the duty of a carrier as defined by the law, but should be sufficiently definite to form the basis of a decree by the federal court to enforce obedience.<sup>2</sup>

*No Objection that Order Is Made in Terms to Operate Indefinitely.* — It is no ground for objecting to the commission's order, or to the circuit court's decree for the enforcement thereof, that such order is in terms made to operate indefinitely, and contains no reservation of the power to modify it accordingly as conditions may change.<sup>3</sup>

(d) *Nature and Effect of Order — aa. IN GENERAL.* — An order of the commission is essentially an administrative one and is not final or conclusive in the sense of a judgment or decree of a court. There are no private vested rights in the order of the commission, and if necessity should arise in the future it may be changed.<sup>4</sup> The commission is not a court, but merely a special tribunal whose duties, though largely administrative, are sometimes *quasi* judicial.<sup>5</sup>

*bb. ORDER BINDING ON SUCCESSOR OF RAILROAD COMPANY.* — Where a valid order is made by the commission in a proper proceeding, it will be binding on the successor of such company,<sup>6</sup> since otherwise a lawful order, such, for instance, as one against unlawful discrimination by a railroad company, made after due investigation by the commission, might be nullified by the subsequent reorganization of the company or transfer of its railroad franchises to another corporation.<sup>7</sup>

*cc. EFFECT OF DECISION AS A PRECEDENT.* — In making a decision upon a question of fact in respect to traffic of one section of the country, the commission does not thereby necessarily lay down a principle for application in another section of the country where the nature of the traffic is so different as to require altogether different rulings.<sup>8</sup>

(e) *Manner of Enforcing Orders of Commission.* — While, under section 12 of the statute, the commission is authorized to investigate, find facts, reach conclusions, and make orders, yet such findings, conclusions, and orders can be enforced only through the federal courts,<sup>9</sup> and the commission itself has no authority to enforce its decision or award.<sup>10</sup>

1. *Assumption Where Answer Promises Compliance.* — *Holbrook v. St. Paul, etc., R. Co., 1 Int. Com. Rep. 323, 1 Int. Com. C. Rep. 102.*

2. *Order Too Indefinite to Be Basis of Decree of Federal Court.* — *Farmers' L. & T. Co. v. Northern Pac. R. Co., 83 Fed. Rep. 249.*

3. *No Objection that by Its Terms Order Is Made to Operate Indefinitely.* — *Interstate Commerce Commission v. Louisville, etc., R. Co., 73 Fed. Rep. 409.*

4. *Order Administrative and Not Final or Conclusive.* — *Interstate Commerce Commission v. Louisville, etc., R. Co., 73 Fed. Rep. 409; Toledo Produce Exch. v. Lake Shore, etc., R. Co., 3 Int. Com. Rep. 830, 5 Int. Com. C. Rep. 166; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567.*

5. *Commission Merely a Special Tribunal.* — *Toledo Produce Exch. v. Lake Shore, etc., R. Co., 3 Int. Com. Rep. 830, 5 Int. Com. C. Rep. 166.* See generally *supra*, this section, 3. *b. Administrative, Judicial, and Legislative Powers.*

6. *Order Binding on Successor of Carrier.* — *Interstate Commerce Commission v. Western New York, etc., R. Co., 82 Fed. Rep. 192;*

*Behlmer v. Louisville, etc., R. Co., 83 Fed. Rep. 898*, in which latter case it was held that an order against several railroad companies directing them to desist from unlawful freight charges under an arrangement between such companies would be binding on the successor of one of those companies notwithstanding the order did not contain the name of the successor.

7. *No Evasion by Reorganization or Transfer of Franchise.* — *Interstate Commerce Commission v. Western New York, etc., R. Co., 82 Fed. Rep. 192.*

8. *Decision as a Precedent.* — *Matter of Rates on Oil, 2 Int. Com. C. Rep. 365.*

9. *Enforceable Only in Federal Courts.* — *Matter of Alleged Excessive Freight Rates, 3 Int. Com. Rep. 151, 4 Int. Com. C. Rep. 116; Interstate Commerce Commission v. Detroit, etc., R. Co., 57 Fed. Rep. 1005.* See *infra*, this section, 14. *c. (2) Proceedings to Enforce Orders of Commission.*

10. *Commission Without Authority to Enforce.* — *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567, 2 Int. Com. Rep. 351.*



(10) *Rehearing*. — The question of the procedure for a rehearing is discussed elsewhere.<sup>1</sup> An order for a rehearing which involves considerable expense to the parties will not be granted unless the commission is satisfied at the argument for a rehearing that the result might be changed.<sup>2</sup>

(11) *Reparation* — (a) *Right of Commission to Award*. — Before the amendment of March 2, 1889, it was held that since the act failed to provide for trial by jury on application to the federal courts to enforce the awards of the commission, the latter could not award reparation for past damages to the person injured.<sup>3</sup> By this amendment, however, provision is now made for trial by jury when necessary in proceedings to enforce the commission's order, and it is the duty of the commission to pass on all questions of reparation for past damages whenever raised.<sup>4</sup>

(b) *Burden of Proof on Complainant Where Reparation Claimed*. — Where the complaint is against unreasonable rates, and a claim for reparation is made, the burden of proof is on the complainant to support the claim; and the commission will refuse to award reparation unless sufficient evidence is introduced to enable it to determine what reparation is due.<sup>5</sup>

(c) *Measure of Damages — Duty to Determine Reasonable Rate*. — In order to determine the amount of reparation to be made in cases of charging excessive rates, the commission must in all cases first determine what is a reasonable rate.<sup>6</sup>

(d) *Determination Whether Property Held by Receiver Is Subject to Order of Reparation*. — Where the property of a carrier goes into the hands of a receiver after the acts complained of before the commission, the question whether such property is subject to an order of reparation made by the commission must be raised in the federal courts on an application to enforce the order.<sup>7</sup>

(12) *Refunding of Excessive Rates — Power to Order*. — The commission may, under some circumstances, order the refunding of excessive rates; thus, for instance, where a passenger has, under a mistake of facts, bought two tickets for a continuous ride, where he might have bought a through ticket at a less sum, the commission will order a return of the excess, though it appear that the two charges were regular local rates, and that the carriers acted in good faith, without any intention of misleading or defrauding the complainant.<sup>8</sup>

c. PROCEEDINGS IN FEDERAL COURTS — (1) *Without Prior Application to Commission* — (a) *Application by Commission to Enforce Provisions and Punish Violations* — aa. *IN GENERAL*. — Under the amendments of March 2, 1889, and February 10, 1891, to the Interstate Commerce Act, "upon the request of the commission it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under

1. See II ENCYC. OF PL. AND PR. 488.

2. *Order Will Not Be Granted Unless It Appears that Result Might Be Changed*. — *Riddle v. Pittsburgh, etc., R. Co.*, 1 Int. Com. Rep. 773, 1 Int. Com. C. Rep. 490.

3. *No Power to Award Prior to Amendment of March 2, 1889*. — *Council v. Western, etc., R. Co.*, 1 Int. Com. C. Rep. 339; *Heck v. East Tennessee, etc., R. Co.*, 1 Int. Com. C. Rep. 495, 1 Int. Com. Rep. 775; *Riddle v. New York, etc., R. Co.*, 1 Int. Com. C. Rep. 594, 1 Int. Com. Rep. 787; *Rawson v. Newport News, etc., Co.*, 3 Int. Com. C. Rep. 266.

4. *Duty under Amendment to Pass on Questions of Reparation*. — Act of March 2, 1889; *Maeloon v. Chicago, etc., R. Co.*, 5 Int. Com. C. Rep. 84; *Rawson v. Newport News, etc., Co.*, 3 Int. Com. C. Rep. 266.

5. *Burden of Proof on Complainant to Support Claim*. — *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

6. *Duty to Determine What Is Reasonable Rate*. — *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

*Measure of Reparation Where Unreasonable Rates Charged*. — In cases of charging unreasonable rates, the measure of reparation due to an injured party is the difference between the rate actually charged and the reasonable rate which should have been charged. *Perry v. Florida Cent., etc., R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. C. Rep. 97.

7. *Question Determined on Application to Federal Court to Enforce Order*. — *Loud v. South Carolina R. Co.*, 5 Int. Com. C. Rep. 529, 4 Int. Com. Rep. 205.

8. *Court May Order Excessive Rate Refunded*. — *Sanger v. Southern Pac. R. Co.*, 2 Int. Com. Rep. 548, 3 Int. Com. C. Rep. 134.

*Commission Will Not Take Cognizance Where Question Pending in Federal Court*. — *Harris v. Duval*, 2 Int. Com. Rep. 514, 3 Int. Com. C. Rep. 128.



the direction of the attorney-general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof." <sup>1</sup> These amendments obviate the necessity formerly existing under the original act, of a formal preliminary proceeding before the commission and a decision therein by it in order to give jurisdiction to the federal courts.<sup>2</sup>

**Costs and Expenses of Such Proceedings.** — The costs and expenses of such original proceedings are to be paid out of the appropriation for the expenses of the courts of the United States.<sup>3</sup>

*bb. MANNER OF ENFORCEMENT — (aa) Mandamus.* — **For Refusal or Neglect to Publish Schedules.** — It is expressly provided by the act that if a common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges, such carrier shall, in addition to other penalties prescribed by the act, be subject to a writ of mandamus at the relation of the commission to compel compliance, and that a failure to comply shall be punishable as and for a contempt.<sup>4</sup>

*(bb) Injunction.* — In addition to the writ of mandamus authorized in case of neglect or refusal by a common carrier to file or publish its schedules or tariffs of rates, fares, and charges, it is provided by the act that the commission may apply to the United States circuit court in the proper district for a writ of injunction against the common carrier to restrain him from receiving or transporting property, until he has complied with the provision of the act.<sup>5</sup>

*(b) Application by Persons Injured by Violation of Act — aa. ACTIONS FOR DAMAGES — Jurisdiction of Court.* — One who is injured by reason of the violation of the Interstate Commerce Act by a carrier may bring an action in the federal courts for damages.<sup>6</sup>

*bb. SUITS FOR RELIEF FROM ILLEGAL DISCRIMINATION — Mandamus to Compel Equal Facilities to Shippers.* — It is provided by the Interstate Commerce Act that a writ of mandamus may issue upon the relation of any person or persons, firm or corporation, alleging the violation of any of the provisions of the act which prevents the relator from having interstate traffic moved by the carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said carrier, for like traffic under similar conditions to any other shipper.<sup>7</sup>

**Special Remedies Provided by Act Cumulative.** — The special remedies provided by the act are cumulative, and not exclusive of the general remedies given by the judiciary act conferring jurisdiction of all suits and controversies arising under an Act of Congress, regardless of any diversity of citizenship between the parties.<sup>8</sup>

*(2) Proceedings to Enforce Orders of Commission — (a) Jurisdiction of Federal Courts — aa. IN GENERAL.* — In case of violation, refusal, or neglect by a carrier to obey any lawful order or requirement of the commission, the circuit court of

1. Application by Commission. — *U. S. v. Missouri Pac. R. Co.*, 65 Fed. Rep. 903; *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.

2. Preliminary Proceedings Before Commission Unnecessary. — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

3. Payment of Costs and Expenses. — *U. S. v. Missouri Pac. R. Co.*, 65 Fed. Rep. 903.

4. Application for Mandamus. — Section 6 of Interstate Com. Act as amended March 2, 1889; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479; *Interstate Commerce Commission v. Brimson*, 154 U. S. 460.

5. Enforcement by Injunction. — Section 6 of Interstate Com. Act as amended March 2,

1889; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

6. Actions for Damages in Federal Courts. — *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 912; *Van Patten v. Chicago, etc., R. Co.*, 74 Fed. Rep. 981; *Parsons v. Chicago, etc., R. Co.*, 167 U. S. 447; *Loud v. South Carolina R. Co.*, 4 Int. Com. Rep. 205, 5 Int. Com. C. Rep. 529; *Copp v. Louisville, etc., R. Co.*, 43 La. Ann. 511, 26 Am. St. Rep. 198.

7. Mandamus for Illegal Discrimination. — *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

Not Authorized Where Unjust Discrimination Is Not Made Out. — *U. S. v. Delaware, etc., R. Co.*, 40 Fed. Rep. 101.

8. Special Remedies of Act Cumulative and Not Exclusive of General Remedies. — Little Rock,



the United States, in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, upon a hearing and determination of the matter, may restrain the violation of, or enjoin obedience to, the order or requirement by the commission.<sup>1</sup>

*bb. JURISDICTION INDEPENDENT OF CITIZENSHIP OF PARTIES.* — The right asserted by a petitioner in asking a federal court to enforce an order of the commission arises, and is claimed, under a law of the United States relating to a subject-matter over which Congress has exclusive control; and this is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties.<sup>2</sup>

*cc. NO OBJECTION THAT COMPLAINANT BEFORE COMMISSION HAD NO REAL GRIEVANCE.* — Upon application to the circuit court to enforce the order of the commission it is no ground of objection to the granting of the relief asked that the complainants before the commission had no real grievance.<sup>3</sup> When the case reaches the circuit court on the petition of the commission, it is the complaint of the commission which gives the court jurisdiction, and the *bona fides* of the complainant cannot be attacked by impeaching the good faith of those who, in the first instance, induced the commission to take action.<sup>4</sup>

(b) *Parties* — *aa. WHO MAY APPLY* — (*aa*) *Generally.* — By section 16 of the Interstate Commerce Act it is provided that the application to the circuit courts of the United States, upon the violation, refusal, or neglect to obey or perform any legal order or requirement of the commission, may be made either by the commission or any company or person interested in such order or requirement.<sup>5</sup>

(*bb*) *Capacity of Commission to Sue as Body Corporate.* — The Interstate Commerce Commission is a body corporate with legal capacity to be a party plaintiff in the federal courts.<sup>6</sup>

*bb. PARTIES DEFENDANT* — (*aa*) *Carrier Jointly Concerned with Defendant, Proper but Not Necessary Party.* — In proceedings against a carrier to enforce an order of the

etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. Rep. 772.

**1. Jurisdiction of United States Circuit Courts.** — Section 16 of Interstate Com. Act as amended by Act of March 22, 1889; Interstate Commerce Commission *v.* Northeastern R. Co., 74 Fed. Rep. 72; U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 903; Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 239; Slater *v.* Northern Pac. R. Co., 2 Int. Com. Rep. 243, 2 Int. Com. C. Rep. 359; Interstate Commerce Commission *v.* Texas, etc., R. Co., 57 Fed. Rep. 948, 4 Int. Com. Rep. 408; Interstate Commerce Commission *v.* Western New York, etc., R. Co., 82 Fed. Rep. 192; Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. Rep. 107; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. Rep. 249; Interstate Commerce Commission *v.* Southern Pac. Co., 74 Fed. Rep. 42; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 56 Fed. Rep. 925; Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. Rep. 272; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. Rep. 981; Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. Rep. 177; Interstate Commerce Commission *v.* Atchison, etc., R. Co., 50 Fed. Rep. 295.

**Necessity for Valid Order by Commission and Violation by Carrier.** — Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 83 Fed. Rep. 249.

**2. Jurisdiction Independent of Citizenship of Parties.** — Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567, 2 Int. Com. Rep. 351; Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. Rep. 177; Interstate Commerce Commission *v.* Atchison, etc., R. Co., 50 Fed. Rep. 295, 50 Am. & Eng. R. Cas. 93; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. Rep. 730, 53 Am. & Eng. R. Cas. 307, *following* Pettibone *v.* U. S., 148 U. S. 197; Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. Rep. 771. See also Interstate Commerce Commission *v.* Southern Pac. R. Co., 74 Fed. Rep. 42.

**3. No Objection that Complainant Had No Real Grievance.** — Interstate Commerce Commission *v.* Detroit, etc., R. Co., 57 Fed. Rep. 1005.

**4. Jurisdiction Given by Commission's Complaint.** — Interstate Commerce Commission *v.* Detroit, etc., R. Co., 57 Fed. Rep. 1005. See also Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. Rep. 272.

**5. Application by Commission or Any One Interested in Order.** — Interstate Commerce Commission *v.* Northeastern R. Co., 74 Fed. Rep. 72; Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. Rep. 177.

**6. Commission a Body Corporate with Capacity to Sue.** — Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, *citing* Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 264, and Interstate Commerce Commission *v.* Atchison, etc., R. Co., 149 U. S. 264.



commission another carrier jointly concerned with the defendant in making the forbidden rate is a proper but not a necessary party defendant.<sup>1</sup>

(*bb*) *Enforcement Against One Company Within Court's Jurisdiction.* — Where an order is made by the commission in a proceeding against two railroad companies as to a joint rate, such order if disobeyed may be enforced by the circuit court against one company alone, which is within its jurisdiction, if the other cannot be made a party, being beyond the court's jurisdiction.<sup>2</sup>

(*c*) *Nature of Proceeding* — *aa. WHETHER EQUITABLE OR LEGAL* — *Equitable Proceedings* — Where the order violated or to which obedience is refused or neglected is one which is not founded upon a controversy requiring a trial by jury, the commission or person interested may apply by petition to the circuit court sitting in equity in the proper district, which court shall have power to hear and determine the matter on notice to the carrier complained of, and such court shall proceed to hear and determine the matter speedily, as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end the court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of the petition.<sup>3</sup>

*Legal Proceedings.* — If the matters involved in the order violated or to which obedience is refused are founded upon a controversy requiring a trial by jury, the company or person injured may apply by petition to the circuit court sitting as a court of law in the proper district, and the court shall, by its order, fix the time and place for the trial of the cause, and a copy of the petition and order should be served upon the defendants.<sup>4</sup>

*Jury Trial.* — If at the time appointed either party shall demand a jury or omit to waive a jury, the court shall, by its order, direct the marshal to summon a jury to try the cause.<sup>5</sup>

*Waiver of Jury.* — If, however, all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon.<sup>6</sup>

*bb. SUCH PROCEEDINGS ORIGINAL IN THEIR NATURE.* — A suit brought by the commission in the United States Circuit Court to enforce an order of the commission is an original and independent proceeding,<sup>7</sup> and the court is not restricted to the mere ministerial duty of enforcing an order of the commission.<sup>8</sup>

(*d*) *Evidence* — *aa. FINDINGS OF FACT* — *EFFECT AS EVIDENCE* — (*aa*) *Statutory Provisions.* — When cases begun before the commission reach the courts, the only legal effect given by the act to the findings of the commission is to make them

1. *Carrier Jointly Concerned Proper but Not Necessary Party.* — Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197, *affirming* 20 U. S. App. 1, 57 Fed. Rep. 948, 52 Fed. Rep. 187.

2. *Enforcement Against Company Within Court's Jurisdiction.* — Interstate Commerce Commission v. Texas, etc., R. Co., 57 Fed. Rep. 948.

3. *Court Shall Hear and Determine as Court of Equity.* — Section 16 of Int. Com. Act as amended March 22, 1889; Interstate Commerce Commission v. East Tennessee, etc., R. Co., 85 Fed. Rep. 107. See also Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144; Interstate Commerce Commission v. Northeastern R. Co., 74 Fed. Rep. 72.

*Duty of Court to Enforce Provision as to Speedy Hearing.* — See Interstate Commerce Commission v. Cincinnati, etc., R. Co., 64 Fed. Rep. 981.

4. *Statutory Provision.* — Interstate Com. Act, § 16, as amended March 2, 1889.

5. *Right to Jury Trial.* — Interstate Com. Act, § 16, as amended March 2, 1889.

6. *Waiver of Jury.* — Interstate Com. Act, § 16, as amended March 2, 1889.

7. *Proceedings Original and Independent.* — Interstate Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 925, *affirmed* 162 U. S. 184; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567.

8. *Court Not Restricted to Enforcing Order.* — Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567.

*Duty to Investigate Merits of Controversy and Form Independent Judgment.* — Interstate Commerce Commission v. Cincinnati, etc., R. Co., 56 Fed. Rep. 950, *quoting with approval* Interstate Commerce Commission v. Lehigh Valley R. Co., 49 Fed. Rep. 177.



simply *prima facie* proof of the facts found, subject to be re-litigated on a trial *de novo* as to the whole matter.<sup>1</sup>

**The Fact that Commission Files Petition Gives No Additional Weight.** — The statute affords no ground for making any distinction between an application to the court by the commission itself and such an application by the original complainants, at whose instance the order sought to be enforced was made, and no additional weight is given thereby to the findings of fact.<sup>2</sup>

(*bb*) **Construction of Findings.** — The findings of the commission on which it bases an order requiring carriers to cease and desist from making certain charges as unreasonable and unjust, which are made *prima facie* evidence of the facts therein stated on the hearing of a petition by the commission asking a court to enjoin obedience to such order, will not, in view of the terms of the statute and its remedial character, be given a narrow construction on the hearing of a demurrer to the petition, on the ground that such findings do not sustain the order made.<sup>3</sup>

**bb. RIGHT TO CONSIDER TESTIMONY USED BEFORE COMMISSION AND HEAR ADDITIONAL PROOF.** — By analogy to the proceedings in equity upon appeal, the testimony used before the commission can properly be brought to the consideration of the court upon the hearing of a petition to enforce an order of the commission.<sup>4</sup> The court may direct that the testimony be produced, and may examine it by way of looking into the grounds upon which the findings of fact were made by the commission.<sup>5</sup>

**Court Not Concluded by Findings or Conclusions of Commission.** — When the petition is filed by the commission for the purpose of enforcing an order of its own, the court is authorized to hear and determine the matter as a court of equity, which necessarily implies that the court is not concluded by the findings or conclusions of the commission.<sup>6</sup>

**1. Findings of Fact Merely Prima Facie Evidence.** — *U. S. v. Missouri Pac. R. Co.*, 65 Fed. Rep. 903; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567, 2 Int. Com. Rep. 351; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 64 Fed. Rep. 984; *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 94 Fed. Rep. 272; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925; *Interstate Commerce Commission v. Atchison, etc., R. Co.*, 50 Fed. Rep. 295, 4 Int. Com. Rep. 323, appeal dismissed 149 U. S. 264; *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 Fed. Rep. 177; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.

**Statutory Provision Constitutional.** — No valid constitutional objection can be urged against making the findings of the commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within the well-recognized powers of the legislature, and in no respect encroaches upon the court's proper functions. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567.

**2. No Additional Weight Where Commission Files Petition.** — *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 Fed. Rep. 177.

**3. Findings Liberally Construed.** — *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 94 Fed. Rep. 272.

**4. May Consider Testimony Used Before Com-**

**mission.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 64 Fed. Rep. 981; *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 73 Fed. Rep. 409.

**Right of Parties to Introduce and Use Testimony Taken Before Commission.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 64 Fed. Rep. 982.

**5. Court May Direct Production of Testimony.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 64 Fed. Rep. 981.

**Court May Examine Facts on Own Account or Send Case Back to Commission.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 239.

**6. Court Not Concluded by Findings of Commission.** — *Texas, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 239; *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 94 Fed. Rep. 272.

**Jurisdiction to Review Findings.** — The Circuit Court has jurisdiction to review the finding of the interstate commerce commission on the questions of fact whether there has been in any particular instance an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, giving effect to those findings as *prima facie* evidence of the matters therein stated. *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144. See also *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.



**Court Not Confined to Re-examination of Case.** — The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo* upon proper pleadings and proof; the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.<sup>1</sup>

(e) **Decision upon Application** — *aa. GENERAL PRINCIPLES CONTROLLING* — (aa) *Orders Which Should Be Enforced* — Orders Correct but Based on Wrong Section of Act. — The order of the commission should be enforced by the court if it is correct under any section of the act, notwithstanding the commission has erroneously based it upon some other section of the act.<sup>2</sup>

**Orders Which Are Just though Reasons Given Do Not Correspond with Court's View.** — Although the reasons given by the commission for its order do not correspond with the view taken by the court, the order will be enforced, if it be a just and reasonable one, and sustained by the facts.<sup>3</sup>

**Orders Forbidding Discrimination in Rates.** — Even though some discrimination might be justifiable, an order of the commission which forbids discrimination in rates should be enforced by the circuit court when the rates charged by the carrier are in fact unlawful and no showing is made by the carrier as to what discrimination is lawful under the circumstances.<sup>4</sup>

(bb) **When Enforcement Properly Refused** — **Only Lawful Orders to Be Enforced.** — It is only lawful orders of the commission that the courts are required by section 16 of the act to enforce,<sup>5</sup> and an application to the court to enforce a void order of the commission should be dismissed.<sup>6</sup>

**Order Ignoring Element of Value of Service in Fixing Compensation.** — An order will not be enforced, which, in forbidding a carrier to charge greater compensation for transporting a manufactured article than for transporting the material of which it is manufactured, ignores the value of the service in fixing the compensation and denies remuneration for additional risk in transporting.<sup>7</sup>

**Orders Resting upon Erroneous Principles.** — An order made by the commission which rests upon erroneous principles will not be judicially enforced.<sup>8</sup>

(cc) **Duty to Remand Case to Commission.** — Where the commission, owing to a mistaken view of law, has failed to weigh the evidence and make certain essential findings of fact, it is the duty of the court in reversing the decision of the commission to remand the case to the commission in order that it

**1. Right to Hear Additional Proof.** — *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 951; *Interstate Commerce Commission v. Chicago, etc., R. Co.*, 94 Fed. Rep. 272; *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107; *Interstate Commerce Commission v. Western, etc., R. Co.*, 88 Fed. Rep. 186; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 56 Fed. Rep. 925; *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 64 Fed. Rep. 981; *U. S. v. Missouri Pac. R. Co.*, 65 Fed. Rep. 907; *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184.

**2. Order Correct but Based on Wrong Section of Act.** — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

**3. Just and Reasonable Orders to Be Enforced.** — *Interstate Commerce Commission v. East Tennessee, etc., R. Co.*, 85 Fed. Rep. 107.

**4. Orders Forbidding Discrimination.** — *Interstate Commerce Commission v. Texas, etc., R. Co.*, 57 Fed. Rep. 948, 20 U. S. App. 1.

**5. Only Lawful Orders Need Be Enforced.** — *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 832.

**6. Dismissal of Application to Enforce Void Order.** — *Interstate Commerce Commission v. Northeastern R. Co.*, 83 Fed. Rep. 611, *affirming* 74 Fed. Rep. 70, wherein the order in question assumed to fix maximum rates.

**Illustration of Void Order.** — An arbitrary and peremptory order to abandon the accessorial cartage service at a certain point without regard to any rates, or without option as to readjustment of them, is void and will not be enforced by the courts. *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 840.

**7. Orders Ignoring Element of Value of Service.** — *Interstate Commerce Commission v. Delaware, etc., R. Co.*, 64 Fed. Rep. 723.

**8. Orders Resting on Erroneous Principles.** — *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 74 Fed. Rep. 784.



may, if it sees fit, proceed therein according to law, and the court should not itself make findings of fact.<sup>1</sup>

*bb. LIMITATION OF POWER OF COURT IN DISPOSING OF ORDER — Power Limited to Approval or Disapproval.* — The jurisdiction of the federal Circuit Court is limited to an approval or disapproval and to an enforcement or refusal to enforce an order of the commission.<sup>2</sup>

*No Power to Modify.* — Such court is without power or authority to treat the case as one originally instituted in the court and make an order or decree of its own, or to modify the order of the commission for the purpose of making it conform to the opinion of the court in case the court should entertain a different opinion from that of the commission.<sup>3</sup>

*(f) Enforcement of Order — aa. IN GENERAL.* — If on the hearing or on report of persons appointed by the court it be made to appear to the circuit court that the lawful order or requirement of the commission drawn in question has been violated or disobeyed by a carrier, such court shall issue a writ of injunction or other proper process to restrain the carrier from further continuing such violation or disobedience of such order or requirement, and enjoining obedience.<sup>4</sup>

*bb. PUNISHMENT FOR DISOBEDIENCE TO PROCESS OF CIRCUIT COURT.* — In case of disobedience to the writ of injunction or other proper process, mandatory or otherwise, the court may issue writs of attachment or any other writs of said court, which may be applicable against the offender, or may fine the offender for every day after a day named that such offender disobeys the order.<sup>5</sup>

*(g) Appeal — aa. TO WHAT COURT TAKEN.* — The provision of section 16 of the Interstate Commerce Act as amended March 2, 1859, so far as it allowed an appeal from the decree of the United States Circuit Court to the Supreme Court direct, when the matter in question exceeded two thousand dollars, was repealed by the Judiciary Act of March 3, 1891, and an appeal in such cases must now be taken first to the Circuit Court of Appeals, and not to the Supreme Court.<sup>6</sup>

*bb. REVERSAL AND REMAND IN CIRCUIT COURT OF APPEALS.* — Where, on appeal to the Circuit Court of Appeals from the decree of the Circuit Court enforcing the

1. *Duty to Remand Case to Commission.* — Louisville, etc., R. Co. *v.* Behlmer, 175 U. S. 648, *citing* Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 184, 238.

2. *Power Limited to Approval or Disapproval, and to Enforcement or Refusal to Enforce.* — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409.

3. *Court Has No Power to Modify.* — Interstate Commerce Commission *v.* Louisville, etc., R. Co., 73 Fed. Rep. 409; Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. Rep. 840, *citing* Interstate Commerce Commission *v.* Delaware, etc., R. Co., 64 Fed. Rep. 723; Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567; Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. Rep. 177; Shinkle, etc., Co. *v.* Louisville, etc., R. Co., 62 Fed. Rep. 690; Little Rock, etc., R. Co. *v.* East Tennessee, etc., R. Co., 47 Fed. Rep. 772. *Compare* Interstate Commerce Commission *v.* East Tennessee, etc., R. Co., 85 Fed. Rep. 107; Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 175.

*Cannot Substitute New Order or Regulation.* — Detroit, etc., R. Co. *v.* Interstate Commerce Commission, 74 Fed. Rep. 841.

4. *Issuance of Order Restraining Violation and Enjoining Obedience to Order of Commission.* —

Int. Com. Act, § 16, as amended March 22, 1889.

*Enforcement by Injunction.* — Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. Rep. 37, *affirmed* 145 U. S. 263; Interstate Commerce Commission *v.* Chicago, etc., R. Co., 94 Fed. Rep. 272; U. S. *v.* Missouri Pac. R. Co., 65 Fed. Rep. 903; Interstate Commerce Commission *v.* Lehigh Valley R. Co., 49 Fed. Rep. 177; Shinkle, etc., Co. *v.* Louisville, etc., R. Co., 62 Fed. Rep. 690; Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. Rep. 981.

*When Preliminary Injunction Properly Denied.* — A preliminary injunction to compel a carrier to obey an order on the interstate commerce commission in reference to freight rates will be denied when the answer denies that the rates charged by the defendant and passed on by the commission were unreasonable or unjust. Shinkle, etc., Co. *v.* Louisville, etc., R. Co., 62 Fed. Rep. 690, *following* Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 64 Fed. Rep. 981.

5. *Punishment as for Contempt.* — Int. Com. Act, § 16, as amended March 2, 1889.

6. *Appeal to Be to Circuit Court of Appeals.* — Interstate Commerce Commission *v.* Atchison, etc., R. Co., 149 U. S. 264. See also Texas, etc., R. Co. *v.* Interstate Commerce Commis-



order of the commission in a proceeding against a carrier for discrimination, if the Circuit Court of Appeals is of opinion that the commission erred in excluding from consideration the fact of certain competition, the court should reverse the decree, set aside the commission's order, and remand the cause to the commission to be proceeded in by the latter according to law.<sup>1</sup>

*cc. REVIEW IN SUPREME COURT OF QUESTION AS TO REASONABLENESS OF DISCRIMINATION.* — Where the finding of the commission as to whether or not certain discrimination in rates is justified by the circumstances has been accepted and approved by the Circuit Court of Appeals, the question of fact as to whether conditions were so dissimilar as to justify such rates will not be reviewed by the Supreme Court, nor will the latter court be disposed to review questions as to the reasonableness of rates when the existing rates have been found reasonable by the Circuit Court, and the Circuit Court of Appeals has concurred.<sup>2</sup>

*dd. EFFECT OF APPEAL AS SUPERSEDEAS.* — The provision in section 16 of the Act of Feb. 4, 1887, as amended by the Act of March 2, 1889, that appeals to the Supreme Court from judgments of Circuit Courts in proceedings to enforce an order of the commission shall not operate to stay or supersede the order of the court, or the execution of any writ or process thereon, does not refer to an appeal from a judgment of a Circuit Court of Appeals, and such an appeal to the Supreme Court from a judgment of a Circuit Court of Appeals operates as a supersedeas to the judgment or decree of the Circuit Court of Appeals.<sup>3</sup>

(3) *Criminal Proceedings.* — According to the tenth section of the Interstate Commerce Act the violations of the provisions of the act by any common carrier subject to such provisions, or, where such carrier is a corporation, by any agent of such corporation, will constitute a misdemeanor punishable by a fine,<sup>4</sup> and for which an indictment will lie in the federal courts.<sup>5</sup>

sion, 162 U. S. 197; Louisville, etc., R. Co. v. Behlmer, 169 U. S. 644.

1. *Reversal and Remanding to Commission for Failure to Consider Facts.* — Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197.

2. *Review of Questions as to Reasonableness of Rates.* — Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184.

3. *Effect of Appeal from Circuit Court of Appeals to Supreme Court.* — Louisville, etc., R. Co. v. Behlmer, 169 U. S. 644.

4. *Punishable by Fine Not Exceeding Five Thousand Dollars.* — Section 10 of the act makes any violation of the provisions of the act a misdemeanor punishable by a fine not exceeding five thousand dollars. U. S. v. Missouri Pac. R. Co., 65 Fed. Rep. 903.

5. *Violation of Provisions of Act Indictable as a Misdemeanor.* — U. S. v. Cleveland, etc., R. Co., 3 Int. Com. Rep. 290; U. S. v. Egan, 3 Int. Com. Rep. 459; U. S. v. Edmondson, 3 Int. Com. Rep. 639; U. S. v. Mott, 3 Int. Com. Rep. 583; U. S. v. Stimson, 3 Int. Com. Rep. 636; U. S. v. Robertson, 3 Int. Com. Rep. 636; U. S. v. Wyckoff, 3 Int. Com. Rep. 731; U. S. v. Ferme nich, 3 Int. Com. Rep. 731; U. S. v. Swift, 3 Int. Com. Rep. 731; U. S. v. Long, 3 Int. Com. Rep. 380; U. S. v. Tozer, 37 Fed. Rep. 635, 2 Int. Com. Rep. 422; U. S. v. Muller, 3 Int. Com. Rep. 376.

*For Giving Undue or Unreasonable Preference or Advantage.* — U. S. v. Tozer, 37 Fed. Rep. 635; U. S. v. Hanley, 71 Fed. Rep. 672.

*For Granting Free Transportation.* — U. S. v. Cleveland, etc., R. Co., 3 Int. Com. Rep. 290.

*For Carrying Passengers at Less than Lawful Rates.* — U. S. v. Egan, 3 Int. Com. Rep. 459.

*For Falsely Billing for Transportation.* — U. S. v. Edmondson, 3 Int. Com. Rep. 639; U. S. v. Mott, 3 Int. Com. Rep. 583.

*For Falsely Weighing.* — U. S. v. Edmondson, 3 Int. Com. Rep. 382; U. S. v. Mott, 3 Int. Com. Rep. 583; U. S. v. Morsman, 42 Fed. Rep. 448; U. S. v. Howell, 56 Fed. Rep. 21.

*For Obtaining Less than Regular or Schedule Rates.* — U. S. v. Stimson, 3 Int. Com. Rep. 636; U. S. v. Robertson, 3 Int. Com. Rep. 636; U. S. v. Muller, 3 Int. Com. Rep. 376; U. S. v. Wyckoff, 3 Int. Com. Rep. 731; U. S. v. Ferme nich, 3 Int. Com. Rep. 731; U. S. v. Swift, 3 Int. Com. Rep. 731; U. S. v. Long, 3 Int. Com. Rep. 380.

*Same — How Offense of Unjust Discrimination Committed.* — The offense of "unjust discrimination" under section 2 of the Interstate Commerce Act (24 U. S. Stat. at Large, p. 379) is not confined to discrimination by means of some device, as by a special rate, rebate, or drawback, but is committed by directly giving different rates to different persons; and an indictment under that section need not aver by what particular device the discrimination was accomplished. U. S. v. Tozer, 37 Fed. Rep. 635.



**INTERVAL.** — See note 1.

**INTERVALE.** — See note 2.

**INTERVENE.** — To interpose voluntarily in an action or other proceeding, with leave of court.<sup>3</sup>

**INTERVENING.** — See note 4.

**INTERVENING CAUSE.** — See the title PROXIMATE AND REMOTE CAUSE.

**INTERVENING DAMAGES.** — Intervening damages are such as are occasioned to an appellee by the delay incident to the appeal.<sup>5</sup>

1. **Interval.** — “At an *interval* of not less than fourteen days,” requires that fourteen days shall intervene or elapse between the two dates. The phrase is exclusive of the two dates. *In re Railway Sleepers Supply Co.*, 54 L. J. Ch. 720, 29 Ch. D. 204. See also *In re Miller's Dale*, etc., *Lime Co.*, 31 Ch. D. 211. And see generally the title TIME, COMPUTATION OF.

**Lucid Interval.** — See the title INSANITY, vol. 16, p. 558.

2. **Intervale.** — In an action brought by the plaintiff against the defendant to recover damages for the conversion of a quantity of hay, the plaintiff's right to recover depended upon whether the hay in question was “upland” or *intervale*. The court said: “I have not been able to find any legal definition of either ‘upland’ or *intervale*. The latest dictionaries define *intervale* to be ‘a tract of low ground between hills or along the banks of a stream, usually alluvial land enriched by the overflowing of the river or fertilizing deposits of earth from the adjacent hill.’ ‘Upland’ is there defined as ‘ground elevated above meadows and valleys,’ ‘slopes of hills,’ etc., ‘ground elevated above the meadows and *intervales* which lie on the banks of rivers’ near the sea or between hills.” *Guild v. Dodd*, 31 Nova Scotia 194.

3. *Rapalje and L. Law Dict.*

4. **Intervening Tide Lands.** — A statute provided that municipal corporations should have the right to extend their street over *intervening* tide lands. Construing this statute, the

court in *State v. Forrest*, 11 Wash. 231, said: “This space between the harbor reserve and the high-tide line must be considered as ‘*intervening* tide lands,’ irrespective of the location of the low-tide line, or, where the low-tide line intervenes between the inner harbor line and the high-tide line, the right to extend streets, it would seem, must end with the low-tide line, for the easement or grant is only over ‘tide lands,’ and if tide lands end at the low-tide line, streets must also end there.”

5. **Intervening Damages.** — *Peasely v. Buckminster*, 1 Tyler (Vt.) 267. See also *Richardson v. Hitchcock*, 28 Vt. 757; *Probate Ct. v. Sargent*, 37 Vt. 16; *State Treasurer v. Wells*, 27 Vt. 276; *Sargeant v. Sargeant*, 20 Vt. 297; *Green v. Shurtliff*, 19 Vt. 592; *Roberts v. Warner*, 17 Vt. 46; *McGregor v. Balch*, 17 Vt. 562.

This phrase is used in certain statutes providing for security to be given on taking appeals. It means such damages, “resulting from the delay, as are occasioned by a material alteration in the circumstances or situation of the party appealing or reviewing subsequent to the entering of the recognizance, such as the bankruptcy or removal of the party beyond process.” Expenses in procuring witnesses, engaging counsel, and other charges incurred in defending the original suit are not such, being provided for in the fee bill. *Peasely v. Buckminster*, 1 Tyler (Vt.) 264. Nor does it include interest accruing after taking of appeal. *Stearns v. Brown*, 1 Pick. (Mass.) 532. And see *Swan v. Picquet*, 4 Pick. (Mass.) 465.



# INTERVENTION.

BY WALTER CARRINGTON.

- I. DEFINITION, 180.
- II. JURISDICTION, 180.
- III. RIGHT TO INTERVENE, 180.
  - 1. *In General*, 180.
    - a. *Under Statutes*, 180.
    - b. *In Equity*, 183.
  - 2. *Existence of Another Remedy Does Not Affect the Right*, 185.
  - 3. *Exercise of Right Optional*, 185.
  - 4. *Right May Be Waived*, 185.
- IV. RIGHTS, DUTIES, AND LIABILITIES OF INTERVENER, 185.
  - 1. *Right to Have Claims Adjudicated*, 185.
  - 2. *Right to Trial by Jury*, 185.
  - 3. *Limits of Intervener's Rights*, 185.
  - 4. *Liability for Costs*, 186.
- V. EFFECT OF JUDGMENT ON INTERVENER'S RIGHTS, 186.

## CROSS-REFERENCE.

For matters of *PROCEDURE* see the title *INTERVENTION* in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. II, p. 494.

**I. DEFINITION.** — Intervention is the admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings.<sup>1</sup>

**II. JURISDICTION.** — One who files a petition to intervene, thereby submits to the jurisdiction of the court.<sup>2</sup> He assumes the position of plaintiff against those who are called upon to answer his complaint in intervention, and is subject to all the rules which regulate pleading and practice between plaintiffs and defendants in similar cases.<sup>3</sup>

**III. RIGHT TO INTERVENE** — 1. *In General* — *a. UNDER STATUTES.* — In several of the United States there are statutes authorizing intervention under certain circumstances. Under some of these statutes any person having an interest in the matter in litigation, in the success of either party or an interest

1. *Term Defined.* — 1 *Bouvier's Law Dict.* 114. In *Hyman v. Cameron*, 46 Miss. 725, intervention was defined to be "the act by which a person, not originally a party, 'comes between them,' claiming an interest in the subject-matter, and interposes his claim, which is generally adverse to one or both of the original litigants."

2. *Petition to Intervene a Submission to the Jurisdiction.* — *Bowdoin College v. Merritt*, 59 Fed. Rep. 6; *Jack v. Des Moines, etc.*, R. Co., 49 Iowa 627; *Hoover v. York*, 30 La. Ann. 752; *Arnold v. Weimer*, 40 Neb. 216; *Arnold v. Globe Invest. Co.*, 40 Neb. 225; *Elliott v. Ivers*, 6 Nev. 287. See also *West v. His Creditors*, 8 Rob. (La.) 123.

3. *Clapp v. Phelps*, 19 La. Ann. 461, 92 Am. Dec. 545; *Braithwaite v. Akin*, 3 N. Dak. 365; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85.

*North Dakota Statute.* — And this is the rule under the North Dakota statute, *Comp. Laws*, § 4886. *Braithwaite v. Akin*, 3 N. Dak. 365.

*Under the Civil Code of Colorado*, § 22, which declares that "an intervention takes place where a third person is permitted to become a party to an action between other parties," jurisdiction does not depend upon the record of the permission. The permission is presumed where nothing to the contrary appears, and the court has assumed jurisdiction. *Grove v. Foutch*, 6 Colo. App. 357.



against both, may intervene.<sup>1</sup> It has generally been held that the interest which will entitle a person to intervene under this provision must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation.<sup>2</sup> In some

**1. Interest in the Matter in Litigation Warrants Intervention.** — *United States.* — *Smith v. Gale*, 144 U. S. 509.

*California.* — *Brooks v. Hager*, 5 Cal. 281; *Yuba County v. Adams*, 7 Cal. 37; *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Davis v. Eppinger*, 18 Cal. 379, 79 Am. Dec. 184; *Speyer v. Ihmels*, 21 Cal. 281, 81 Am. Dec. 157; *Gradwohl v. Harris*, 29 Cal. 150; *Stich v. Dickinson*, 38 Cal. 608; *Robinson v. Crescent City Mill, etc., Co.*, 93 Cal. 316.

*Colorado.* — *Westcott v. Patton*, 10 Colo. App. 544; *Limberg v. Higginbotham*, 11 Colo. 316; *Henry v. Travelers' Ins. Co.*, 16 Colo. 179; *Morey v. Lett*, 18 Colo. 128; *Wood v. Denver City Water Works Co.*, 20 Colo. 253, 46 Am. St. Rep. 288.

*Dakota.* — *Gale v. Frazier*, 4 Dak. 196.

*Iowa.* — *Taylor v. Adair*, 22 Iowa 279; *Brown v. Bryan*, 31 Iowa 556; *Young v. Tucker*, 39 Iowa 596; *Dunham v. Greenbaum*, 56 Iowa 303; *Richards v. Lyon County*, 69 Iowa 612; *Conley v. Zerber*, 74 Iowa 699; *Des Moines Ins. Co. v. Lent*, 75 Iowa 522; *Phares v. Buser*, (Iowa 1899) 79 N. W. Rep. 120.

*Minnesota.* — *Mann v. Flower*, 26 Minn. 479; *Dennis v. Spencer*, 51 Minn. 259, 38 Am. St. Rep. 499; *Steenerson v. Great Northern R. Co.*, 60 Minn. 461; *Smith v. St. Paul*, 65 Minn. 295.

*Nebraska.* — *Welborn v. Eskey*, 25 Neb. 193, 195; *Kansas, etc., R. Co. v. Fitzgerald*, 33 Neb. 137; *Commercial Nat. Bank v. State Bank*, 33 Neb. 292; *Moline v. Hamilton*, 56 Neb. 132; *McConniff v. Van Dusen*, 57 Neb. 49.

*Nevada.* — *Harlan v. Eureka Min. Co.*, 10 Nev. 92.

*New Mexico.* — *Union Trust Co. v. Atchison, etc., R. Co.*, 8 N. Mex. 327; *Miller v. Socorro*, 9 N. Mex. 416.

*North Dakota.* — *Bray v. Booker*, 6 N. Dak. 526.

*South Dakota.* — *Dunn v. National Bank*, 11 S. Dak. 305; *Yetzer v. Young*, 3 S. Dak. 263; *McClurg v. State Bindery Co.*, 3 S. Dak. 362, 44 Am. St. Rep. 799; *Taylor v. Volga Bank*, 9 S. Dak. 572.

**2. Character of Interest Required.** — This rule which was enunciated by Justice Field in *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, has been followed in several states.

*United States.* — *Smith v. Gale*, 144 U. S. 509.

*California.* — *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Stich v. Dickinson*, 38 Cal. 608. *Compare Yuba County v. Adams*, 7 Cal. 35; *Davis v. Eppinger*, 18 Cal. 379, 79 Am. Dec. 184; *Speyer v. Ihmels*, 21 Cal. 281, 81 Am. Dec. 157.

*Dakota.* — *Gale v. Frazier*, 4 Dak. 196.

*Minnesota.* — *Bennett v. Whitcomb*, 25 Minn. 148; *Lewis v. Harwood*, 28 Minn. 428; *Dennis v. Spencer*, 51 Minn. 259, 38 Am. St. Rep. 499; *Steenerson v. Great Northern R. Co.*, 60 Minn. 461.

*Nevada.* — *Harlan v. Eureka Min. Co.*, 10 Nev. 92.

*North Dakota.* — *Bray v. Booker*, 6 N. Dak. 526.

*South Dakota.* — *Yetzer v. Young*, 3 S. Dak. 263; *McClurg v. State Bindery Co.*, 3 S. Dak. 362, 44 Am. St. Rep. 799.

In *South Dakota* it has been held that an assignee for the benefit of creditors, in the absence of peculiar facts, has no such interest in the "matter in litigation" as entitles him to intervene to defend a purely personal action against his assignor. *McClurg v. State Bindery Co.*, 3 S. Dak. 362, 44 Am. St. Rep. 799.

Under the *Iowa Statute* (Code 1860, § 2930; Code 1897, § 3594), an equitable owner of a promissory note may intervene in an action at law against the maker, instituted by the person holding the possession and legal title to the note. In such case the intervenor claims adversely to both the plaintiff and the defendant. *Taylor v. Adair*, 22 Iowa 279.

Under the *Nebraska Statute* (Comp. Stat., § 5638) a person claiming ownership of property in litigation may, at any time before trial, become a party to the action by intervention, and have his claim adjudicated. *McConniff v. Van Dusen*, 57 Neb. 49.

But an intervenor must plead some interest in the subject-matter of the litigation; a mere denial of the plaintiff's right is insufficient to give him a standing in court. *Welborn v. Eskey*, 25 Neb. 193, 195; *Moline v. Hamilton*, 56 Neb. 132.

Under the *New Mexico Statute* a taxpayer may be granted leave to intervene in an appeal taken under section 286 of the Compiled Laws of 1897 by a claimant feeling aggrieved by the action of the city council. *Miller v. Socorro*, 9 N. Mex. 416.

The *Louisiana Statute* (Garland's Rev. Code La. 1894, § 390) provides that "in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit, or an interest opposed to both." *Boyd v. Heine*, 41 La. Ann. 393; *Emerson v. Fox*, 3 La. 178.

It is essential to the right to intervene under this statute that the intervenor should assert a right and interest in himself to support the claim of one party against the other, or to oppose both. *Morris v. Cain*, 35 La. Ann. 763.

Such interest must be direct and closely connected with the object in dispute, founded on some right, claim, or lien, either conventional or legal. *Brown v. Saul*, 4 Mart. N. S. (La.) 434, 16 Am. Dec. 175.

Creditors who have attached the same property may intervene in a prior attachment proceeding by another creditor. *H. B. Claffia Co. v. Feibelman Co.*, 44 La. Ann. 518. See also *New Orleans Canal, etc., Co. v. Beard*, 16 La. Ann. 345, 79 Am. Dec. 582. But see *Gasquet v. Johnson*, 1 La. 425.



states the right to intervene is confined to actions for the recovery of real or personal property in the subject-matter of which the intervener has an interest.<sup>1</sup>

Under the New York Statute,<sup>2</sup> where a person not a party to an action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment.<sup>3</sup> The right to intervene under this statute is confined to parties whom it is necessary to bring in, and who are interested in the subject of the action.<sup>4</sup> But when these conditions exist the right to be brought in is an absolute right.<sup>5</sup>

One whose title to land depends on the validity of a certain will may intervene in a suit brought to annul the will, in order to set up and vindicate his title; and the intervener's title being thus put at issue, the plaintiff may contest it to show that the former had no right to intervene. *Hoover v. York*, 30 La. Ann. 752.

In a suit by provisional seizure for rent of a stable, one has a right to intervene who avers that he is the owner of the horses seized, and that he pays rent to the lessee of the stable to keep said horses there. *King v. Harper*, 33 La. Ann. 496.

A third person who discloses no interest in a suit to annul a sale, on the ground that the vendor has not complied with its terms and conditions, cannot be permitted to intervene in the suit. *Jemison v. Barrow*, 24 La. Ann. 171.

An individual creditor cannot intervene in a suit against his debtor by another creditor, unless his claim is liquidated by judgment. *Brown v. Saul*, 4 Mart. N. S. (La.) 434, 16 Am. Dec. 175.

Under the Missouri Practice Act, in order that a third party might be permitted to come into a suit and set up his claim to the subject-matter in controversy, or his defense, it was not required that he should be a necessary party. So where a party sought the specific enforcement of a contract to convey land, it was held that a third person, not a party to the suit as originally instituted, who claimed the same land by an alleged superior title under the person against whom such specific enforcement was sought, might be permitted to come in and defend, if a decree between the original parties of the suit would affect his rights injuriously, as by casting a shadow on his title. *Carter v. Mills*, 30 Mo. 432.

In Texas the right to intervene exists, although there is no statute providing for it. The practice on the subject rests upon the principle that a party should be permitted to do that voluntarily which, if known, a court of equity would require to be done. *Del Rio Bldg., etc., Assoc. v. King*, 71 Tex. 731. See also *Hanna v. Drennan*, 2 Tex. Unrep. Cas. 536; *Garrett v. Gaines*, 6 Tex. 435; *Field v. Gantier*, 8 Tex. 74; *Burditt v. Glasscock*, 25 Tex. Supp. 45; *Whitman v. Willis*, 51 Tex. 421; *Pool v. Sanford*, 52 Tex. 621.

1. Statutes Confining Intervention to Actions for the Recovery of Property.—*North Carolina*.—*Toms v. Watson*, 66 N. Car. 417; *Wade v. Sanders*, 70 N. Car. 277; *Thomas v. Kelly*, 74 N. Car. 417; *Rollins v. Rollins*, 76 N. Car. 264; *Colgrove v. Koonce*, 76 N. Car. 363; *Cecil v. Smith*, 81 N. Car. 285; *Young v. Greenlee*, 82 N. Car. 346; *Lytle v. Burgin*, 82 N. Car. 301;

*Sims v. Goettle*, 82 N. Car. 268; *Keathly v. Branch*, 84 N. Car. 202; *McDonald v. Morris*, 89 N. Car. 99; *Taylor v. Apple*, 90 N. Car. 343; *Asheville Division No. 15 v. Aston*, 92 N. Car. 588.

*Tennessee*.—*Hill v. Bowers*, 4 Heisk. (Tenn.) 272; *Hunt v. Wing*, 10 Heisk. (Tenn.) 139; *Stretch v. Stretch*, 2 Tenn. Ch. 140; *Lowenheim v. Lockhard*, 2 Baxt. (Tenn.) 214; *Treece v. Treece*, 5 Lea (Tenn.) 221; *Haynes v. Rizer*, 14 Lea (Tenn.) 246; *Wilson v. Eifer*, 7 Coldw. (Tenn.) 31.

In *North Carolina* the intervener must have an interest in the controversy. It is not enough that he has an interest in the thing which is the subject of controversy. *Wade v. Sanders*, 70 N. Car. 277; *Colgrove v. Koonce*, 76 N. Car. 363; *Keathly v. Branch*, 84 N. Car. 202; *McDonald v. Morris*, 89 N. Car. 99; *Asheville Division No. 15 v. Aston*, 92 N. Car. 588.

Under a Massachusetts Statute (Pub. Stat. 1882, p. 64, § 31), if, in an action to recover a deposit in a savings bank, it appears that the same fund is claimed by another party than the plaintiff, the court may order the proceedings to be amended by making such claimant a party defendant thereto. *Underwood v. Boston Five Cents Sav. Bank*, 141 Mass. 305.

2. Code Civ. Pro., § 452.

3. Rule under the New York Statute.—*Uhlfelder v. Tamsen*, 15 N. Y. App. Div. 436; *People v. Albany, etc., R. Co.*, 77 N. Y. 232; *Johnston v. Donovan*, 106 N. Y. 269; *Ladd v. Stevenson*, 112 N. Y. 325, 8 Am. St. Rep. 748; *Chapman v. Forbes*, 123 N. Y. 532; *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619; *Bohnet v. New York*, 150 N. Y. 279; *Wall v. Beach*, 20 N. Y. App. Div. 480; *Lewisohn v. Anaconda Copper Min. Co.*, 29 N. Y. App. Div. 552; *Union Trust Co. v. Boker*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 85; *Dayton v. Wilkes*, 5 Bosw. (N. Y.) 655; *Hornby v. Gordon*, 9 Bosw. (N. Y.) 656; *Schuyler v. Hargous*, 3 Robt. (N. Y.) 673; *Glenville Woolen Co. v. Ripley*, 6 Robt. (N. Y.) 530; *Waring v. Waring*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 246; *Kelsey v. Murray*, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 294; *Judd v. Young*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 79; *Tallman v. Hollister*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 508; *Haas v. Craighead*, 19 Hun (N. Y.) 396; *Earle v. Hart*, 20 Hun (N. Y.) 75; *Quigley v. Quigley*, 45 Hun (N. Y.) 23; *Davies v. Fish*, 47 Hun (N. Y.) 314; *Zundel v. Tacke*, 47 Hun (N. Y.) 239; *Christman v. Thatcher*, 48 Hun (N. Y.) 446; *Lawton v. Lawton*, 54 Hun (N. Y.) 415.

4. *Lewisohn v. Anaconda Copper Min. Co.*, 29 N. Y. App. Div. 552. And see *Kelsey v. Murray*, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 294; *Chapman v. Forbes*, 123 N. Y. 532.

5. Right Absolute.—*Haas v. Craighead*, 19



**No Rights Acquired by an Unauthorized Interference.** — One who attempts to intervene in an action pending between other parties without bringing himself within the provisions of the statute authorizing such intervention, is a mere interloper who acquires no rights by his unauthorized interference, unless objection thereto is waived. His pleadings are unknown to the law, and cannot have any legal effect.<sup>1</sup>

**b. IN EQUITY.** — In equity no one is entitled to be made or to become a party to a suit unless he has an interest in its object.<sup>2</sup> But it is the usual practice to permit strangers to the litigation claiming an interest in its subject-matter to intervene on their own behalf to assert their titles.<sup>3</sup>

**In a Suit In Personam** a person who has no interest, in a legal sense, in its subject-matter cannot compel the plaintiff to make him a party.<sup>4</sup>

**But in a Suit In Rem**, where the court has jurisdiction over the *res*, and its decree affects the interest therein of all persons having any such interest, a person who has a lien or claim upon or other interest in the *res* may intervene and be heard in behalf of such interest.<sup>5</sup>

**Where the Pleadings in a Case Contain Scandal Against a Stranger** he may intervene.<sup>6</sup>

Hun (N. Y.) 396; Earle v. Hart, 20 Hun (N. Y.) 75; Lawton v. Lawton, 54 Hun (N. Y.) 415; Uhlfelder v. Tamsen, 15 N. Y. App. Div. 436; People v. Albany, etc., R. Co., 77 N. Y. 232; Johnston v. Donovan, 106 N. Y. 269; Ashton v. Rochester, 133 N. Y. 187, 28 Am. St. Rep. 619. Compare Wall v. Beach, 20 N. Y. App. Div. 480; Bohnet v. New York, 150 N. Y. 279.

Under this statute a party to the action cannot make application to have a third party brought in. Chapman v. Forbes, 123 N. Y. 532.

**1. Unauthorized Interference.** — Des Moines Ins. Co. v. Lent, 75 Iowa 522. See also Harlan v. Eureka Min. Co., 10 Nev. 92.

**2. Who May Intervene.** — *Ex p.* Mensing, 55 Fed. Rep. 17; Krippendorf v. Hyde, 110 U. S. 276.

**3. Interest in Subject-matter** — *United States*. — French v. Gapen, 105 U. S. 509; Krippendorf v. Hyde, 110 U. S. 276; Williams v. Morgan, 111 U. S. 684; Billings v. Aspen Min., etc., Co., 51 Fed. Rep. 338; Florida v. Georgia, 17 How. (U. S.) 478.

*Florida*. — Robertson v. Baker, 11 Fla. 231. *Mississippi*. — Hyman v. Cameron, 46 Miss. 725.

*South Carolina*. — *Ex p.* Kenmore Shoe Co., 50 S. Car. 154.

*Texas*. — Whitman v. Willis, 51 Tex. 421.

**As to the Right of the Attorney-General of the United States** to appear in suits between individuals, in the United States Supreme Court, when he suggests that the public interests are involved in the decision, and in a suit between two states involving the question of the boundary between them, if the other states are interested in the adjustment of the boundary. See Florida v. Georgia, 17 How. (U. S.) 478.

**Cases in Which There Is No Interest Warranting Intervention.** — An agreement with an attorney to pay him for collecting a claim a certain per cent. of the amount collected, does not give him such an interest in the claim as will entitle him to intervene personally in a suit in chancery concerning it. Kelley v. Newman, 79 Ill. App. 285.

Where all that could be inferred from the matters stated in the petition for intervention

was that the petitioner had a common interest with the defendant in defeating the suit, because if successful in that suit the complainant might sue the petitioner, the petition was held to have been properly denied. Thomas Huston Electric Co. v. Sperry Electric Co., 46 Fed. Rep. 75.

A person cannot intervene in a suit to bring into it a question not in issue in the suit, and which cannot properly be in issue in it, where the matters sought to be raised would be available to the person seeking to intervene in a suit against him by the plaintiff. Page v. Holmes Burglar Alarm Tel. Co., 18 Blatchf. (U. S.) 118.

**Intervention Not Allowed Where It Would Oust the Jurisdiction of the Court.** — It has been held that in a suit in equity brought by alien plaintiffs against citizens of New York, a person not stated to be a citizen of New York cannot, upon his application to intervene, be made a defendant, because that would oust the jurisdiction of the court. Drake v. Goodridge, 6 Blatchf. (U. S.) 151. But see *supra*, this title, *Jurisdiction*.

**No Error Can Be Assigned on Appeal** in permitting the apparent owner of the subject-matter of the suit to intervene, where no exception or objection was taken in the court below. Barner v. Bayless, 134 Ind. 600.

**4. Intervention in Suits In Personam.** — Coleman v. Martin, 6 Blatchf. (U. S.) 119; Drake v. Goodridge, 6 Blatchf. (U. S.) 151.

**5. Intervention in Suits In Rem.** — Coleman v. Martin, 6 Blatchf. (U. S.) 119.

**The Theory** of this is, that the person, by his interest in the *res*, has an interest, in a legal sense, in the subject-matter of the controversy. But in a suit *in personam*, a person not a party to the suit can have no interest, in a legal sense, in a personal claim made in the suit, against a defendant therein, unless it is necessary that such person, not a party, should be made a party in order to enforce such claim properly. Coleman v. Martin, 6 Blatchf. (U. S.) 119.

**6. Where the Pleadings Contain Scandal Against a Stranger.** — Anderson v. Jacksonville, etc., R. Co., 2 Woods (U. S.) 628.



Where a Stranger Purchases the Subject of Litigation Pending the Suit, he may intervene for the protection of his rights.<sup>1</sup>

Persons Belonging to a Class Represented in the Suit are regarded as *quasi* parties, and may be heard on petition or motion.<sup>2</sup>

*Cestuis Que Trust* are entitled to intervene to protect their interests in suits affecting the trust property, as, for instance, in suits by or against trustees.<sup>3</sup> But it has generally been held that such intervention will be allowed only when the trustee has been guilty of fraud or negligence, or is incompetent properly to represent the interests of the beneficiaries.<sup>4</sup>

Persons Interested in Fund under Control of Court. — Where a person has an interest in a fund which is in the custody or under the control of the court, and he desires to secure its proper administration and distribution, he may intervene for that purpose.<sup>5</sup>

**1. Where Stranger Purchases the Subject of Litigation Pending Suit.** — *Anderson v. Jacksonville, etc., R. Co., 2 Woods (U. S.) 628; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106.*

**2. Persons Belonging to a Class Represented in Suit** — *United States*. — Internal Imp. Fund *v. Greenough*, 105 U. S. 527; *Central R., etc., Co. v. Pettus*, 113 U. S. 116; *Anderson v. Jacksonville, etc., R. Co., 2 Woods (U. S.) 628; Forbes v. Memphis, etc., R. Co., 2 Woods (U. S.) 323; Myers v. Fenn, 5 Wall. (U. S.) 205; George v. St. Louis Cable, etc., R. Co., 44 Fed. Rep. 117; Fidelity Trust, etc., Co. v. Mobile St. R. Co., 53 Fed. Rep. 850; Ogilvie v. Knox Ins. Co., 2 Black. (U. S.) 539.*

*Massachusetts*. — *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303.

*New York*. — *Hallett v. Hallett*, 2 Paige (N. Y.) 432.

**Stockholders.** — Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud. *Bayliss v. Lafayette, etc., R. Co., 8 Biss. (U. S.) 193.* See the title STOCKHOLDERS.

**3. Intervention by Cestuis Que Trust** — *England*. — *Drew v. Harman*, 5 Price 319.

*United States*. — *Kerrison v. Stewart*, 93 U. S. 155; *Carter v. New Orleans*, 19 Fed. Rep. 659; *Williams v. Morgan*, 111 U. S. 684; *Farmers' L. & T. Co. v. Missouri, etc., R. Co., 21 Fed. Rep. 264; Fidelity Trust, etc., Co. v. Mobile St. R. Co., 53 Fed. Rep. 851.*

*Alabama*. — *Ex p. Printup*, 87 Ala. 148.

*Tennessee*. — *Birdsong v. Birdsong*, 2 Head (Tenn.) 289; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525.

**Mortgagees of Real Estate** may be properly admitted as parties defendant to a suit in equity by the result of which their security might be impaired. *Everett v. Edwards*, 149 Mass. 588, 14 Am. St. Rep. 462.

**A Holder of Railroad Bonds Secured by a Mortgage** under foreclosure has an interest in the amount of the trustee's compensation which entitles him to intervene and to contest it. *Williams v. Morgan*, 111 U. S. 684. See also *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459.

**4. When Cestuis Que Trust May Intervene.** — *Richards v. Chesapeake, etc., R. Co., 1 Hughes (U. S.) 36; Skiddy v. Atlantic, etc., R. Co., 3*

*Hughes (U. S.) 350; Wetmore v. St. Paul, etc., R. Co., 1 McCrary (U. S.) 466; Farmers' L. & T. Co. v. Kansas City, etc., R. Co., 53 Fed. Rep. 182; Clyde v. Richmond, etc., R. Co., 55 Fed. Rep. 448.* See also *Burbank v. Burbank*, 152 Mass. 254.

**A Creditor of a Corporation** is not entitled to intervene in an action by the receiver of the corporation for the enforcement of the individual liability of the stockholders, where it does not appear that the receiver is not prosecuting the case in good faith for the best interests of the creditors, or that he has disregarded or violated the duties of his trust. *Brown v. Brink*, 57 Neb. 606.

**Intervention by Residuary Legatee Where Executor Is Disqualified.** — Where a bill is exhibited against an executor, involving the interests of the residuary legatee, and the executor is disqualified by his situation from representing the interests and protecting the rights of the legatee, such legatee will be admitted to defend the bill in person. *Melick v. Melick*, 17 N. J. Eq. 156.

**5. Persons Having Interest in Fund under Control of Court.** — *Carlin v. Jones*, 55 Ala. 630; *Ex p. Printup*, 87 Ala. 148; *Ex p. Breedlove*, 118 Ala. 172; *Tuck v. Manning*, 150 Mass. 211; *Ex p. Kenmore Shoe Co.*, 50 S. Car. 154.

**Illustrations.** — Thus persons who seek to establish an equitable lien over a fund which is sought to be distributed in a cause, may intervene therein. *Ex p. Kenmore Shoe Co.*, 50 S. Car. 140.

Persons who hold assignments of the interest of parties in a fund in court, or liens upon it, are permitted to appear as claimants; but creditors who have acquired neither an assignment nor a lien on the fund are not permitted to intervene. *Tuck v. Manning*, 150 Mass. 211.

**One Who Claims the Title to Property in the Hands of a Receiver may Intervene.** *Pelham v. Newcastle*, 3 Swanst. 290. And see *Farmers' L. & T. Co. v. Toledo, etc., R. Co., 43 Fed. Rep. 223. Compare Cutting v. Florida R., etc., Co., 45 Fed. Rep. 444.*

**Purchaser of Railroad Not Entitled to Intervene in Suit by Receiver.** — One who purchased a railroad in the hands of a receiver, and who during the preparation of a case by the receiver against another railroad, stood by without offering any assistance or suggestion as to the issues involved, was held not entitled to object to the refusal of the court to substitute him as plaintiff in the case about a year after its sub-



**Stranger Cannot Intervene to Continue Suit After Abandonment.** — A person not a party to a suit cannot intervene for the purpose of continuing the suit after the plaintiff's claim has been abandoned or adjusted.<sup>1</sup>

**2. Existence of Another Remedy Does Not Affect the Right.** — The right of intervention is not affected by the existence of another remedy.<sup>2</sup>

**3. Exercise of Right Optional.** — A person having a right to intervene cannot be compelled to do so. The exercise of the right is optional.<sup>3</sup>

**4. Right May Be Waived.** — The right to intervene may be waived.<sup>4</sup>

**IV. RIGHTS, DUTIES, AND LIABILITIES OF INTERVENER.** — **1. Right to Have Claims Adjudicated.** — The intervener is entitled to have his claims adjudicated, and this right cannot be defeated by the dismissal by the plaintiff of the original suit,<sup>5</sup> nor by the plaintiff's being nonsuited.<sup>6</sup>

**2. Right to Trial by Jury.** — An intervener may claim the right of trial by jury, and this though neither the original plaintiff nor defendant has demanded that right.<sup>7</sup>

**3. Limits of Intervener's Rights.** — The intervener must take the suit as he finds it.<sup>8</sup> He is bound by the record of the case at the time of his intervention.<sup>9</sup> If he claims property in controversy he can interfere only so far as is necessary to prove his right to it. He cannot under such circumstances contest the plaintiff's claim against the defendant,<sup>10</sup> or raise an issue as to the formality of the pleadings, or the regularity of the procedure in the principal cause;<sup>11</sup> nor can he plead exceptions having for their object the dismissal of the action.<sup>12</sup> He cannot change the issue between the parties, nor raise a new one.<sup>13</sup> He cannot insist upon a change in the form of proceedings,<sup>14</sup> nor delay the trial of the action.<sup>15</sup>

mission, and when judgment was about to be rendered, where the new issues set up would have necessitated a reopening of the case. *Ritchie v. Cincinnati, etc., R. Co.*, (Ky. 1893) 21 S. W. Rep. 641.

**1. Rhoades v. Pennsylvania Ins. Co.**, 93 Fed. Rep. 533; *Hyman v. Cameron*, 46 Miss. 725.

**2. Right Not Affected by the Existence of Another Remedy.** — *Coffey v. Greenfield*, 55 Cal. 382; *Taylor v. Volga Bank*, 9 S. Dak. 572.

**3. Exercise of Right of Intervention Is Optional.** — *Hazard v. Agricultural Bank*, 11 Rob. (La.) 326; *Le Blanc v. Dashiell*, 14 La. 274; *Lannes v. Courege*, 31 La. Ann. 74. See also *Bennett v. Kiber*, 76 Tex. 385.

**4. Waiver.** — *Meissner v. Meissner*, 68 Wis. 336.

**5. Elliott v. Ivers**, 6 Nev. 287; *Field v. Gantier*, 8 Tex. 74.

**6. Nonsuit of Plaintiff Does Not Dismiss Intervention.** — *Poehlmann v. Kennedy*, 48 Cal. 201.

**7. Lacroix v. Menard**, 3 Mart. N. S. (La.) 339, 15 Am. Dec. 161.

**8. Cahn v. Ford**, 42 La. Ann. 965.

**9. Late v. Armorer**, 14 La. Ann. 838; *Hudson v. Morris*, 55 Tex. 595.

**10. West v. His Creditors**, 8 Rob. (La.) 123; *Cahn v. Ford*, 42 La. Ann. 965.

**Under the Provision of the Louisiana Code of Practice**, art. 389, an intervener cannot, without the consent of the plaintiff, substitute himself in the place and stead of the defendant. *Clapp v. Phelps*, 19 La. Ann. 461, 92 Am. Dec. 545; *Mayer v. Stahr*, 35 La. Ann. 57.

**11. Intervener Cannot Raise an Issue as to the Regularity of Proceedings** — *Louisiana*. — *Clamageran v. Bucks*, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185; *Lee v. Bradlee*, 8 Mart. (La.) 55; *West v. His Creditors*, 8 Rob. (La.) 123;

*Yeatman v. Estill*, 13 La. Ann. 222; *Fleming v. Shields*, 21 La. Ann. 118, 99 Am. Dec. 719; *Cahn v. Ford*, 42 La. Ann. 965; *Gasquet v. Johnson*, 1 La. 425; *Emerson v. Fox*, 3 La. 178; *Valsain v. Cloutier*, 3 La. 170, 22 Am. Dec. 179.

*North Carolina*. — *Blair v. Puryear*, 87 N. Car. 101.

*Texas*. — *Nenney v. Schluter*, 62 Tex. 327; *Bateman v. Ramsey*, 74 Tex. 589.

See also *Toms v. Warson*, 66 N. Car. 417; *Sims v. Goettle*, 82 N. Car. 268.

**12. West v. His Creditors**, 8 Rob. (La.) 123; *Cahn v. Ford*, 42 La. Ann. 965.

**13. Intervener Cannot Change Issue or Raise a New One.** — *Mayer v. Stahr*, 35 La. Ann. 57; *Carraby v. Morgan*, 5 Mart. N. S. (La.) 499. See also *Van Gorden v. Ormsby*, 55 Iowa 657; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722.

**14. Intervener Cannot Insist upon Change in Form of Proceedings.** — *Van Gorden v. Ormsby*, 55 Iowa 657; *Kassing v. Walter*, (Iowa 1896) 65 N. W. Rep. 832; *Carraby v. Morgan*, 5 Mart. N. S. (La.) 499.

**15. Intervener Cannot Delay Trial of Action** — *Iowa*. — *Van Gorden v. Ormsby*, 55 Iowa 657; *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722.

*Louisiana*. — *Gaines v. Page*, 15 La. Ann. 108; *Perkins v. Perkins*, 20 La. Ann. 257; *Taylor v. Boedicker*, 22 La. Ann. 79; *Lacroix v. Menard*, 3 Mart. N. S. (La.) 339, 15 Am. Dec. 161; *Walker v. Dunbar*, 6 Mart. N. S. (La.) 627.

*Texas*. — *Eccles v. Hill*, 13 Tex. 65; *Smalley v. Taylor*, 33 Tex. 668.

An intervention, which in its consequences, if the intervener should prove successful, would result in postponing the determination of the cause as between the original parties,



4. **Liability for Costs.**—The intervener is liable for costs if a judgment is rendered against him.<sup>1</sup> If he makes a joint defense, he thereby renders himself liable for costs jointly with the defendants.<sup>2</sup> But he is not liable for costs which had accrued before he came into the suit.<sup>3</sup>

**V. EFFECT OF JUDGMENT ON INTERVENER'S RIGHTS.**—An intervener is bound by the judgment in the suit in which he intervenes.<sup>4</sup> But where a person appears in a suit and announces his intention to intervene, but files no petition, and subsequently withdraws, he is not concluded by the judgment in the suit.<sup>5</sup>

**INTER VIVOS.** (See also the title GIFTS, vol. 14, p. 1014.)—*Inter vivos* means between living persons:

**INTESTATE.** (See also the titles SUCCESSION; WILLS.)—A person dies intestate who has made no will at all, or has made one not legally valid, or if the testament he has made is revoked or made useless, or if no one has become heir under it.<sup>6</sup>

**INTESTATE LAWS.**—See the title SUCCESSION.

**INTIMATE.**—See note 7.

will not be allowed. *Ragland v. Wisrock*, 61 Tex. 391.

**Time to Which Intervener Is Entitled.**—But though the intervener will not be allowed to retard the trial of a cause, yet he is entitled to the time necessary to have his intervention served and put at issue, before the cause can be tried. *Silbernagel v. Silbernagel*, 32 La. Ann. 765. See also *Perkins v. Perkins*, 20 La. Ann. 257.

1. **Intervener's Liability for Costs.**—*Sheldon v. Gunn*, 56 Cal. 582.

2. *Kinnear v. Flanders*, 17 Colo. 11; *Davis v. Sharron*, 15 B. Mon. (Ky.) 64; *Spruill v. Arrington*, 109 N. Car. 192.

3. *Railsback v. Patton*, 34 Neb. 490.

4. **Effect of Judgment.**—*Witter v. Fisher*, 27 Iowa 9.

Where the Intervener Adopts the Allegations of the Plaintiff and prays for the same relief, the judgment affects alike both plaintiff and intervener. *Hudson v. Morris*, 55 Tex. 595.

5. *Wilson v. Trowbridge*, 71 Iowa 345.

6. **Intestate.**—*Rapalje and L. Law Dict.*; *Bouv. Law Dict.*

In *Den v. Mugway*, 15 N. J. L. 331, it was said: "But if he died *intestate*, that is, without making any will, the land was to go over, as the plaintiff urges. A will was not required disposing of the share in question, nor of any land whatever, nor of any particular goods. If he had made a will bequeathing only a toothpick or a cent, he would not have died *intestate*."

7. **Intimate.**—A charge that a man has been *intimate* with his brother's wife is not equivalent to a charge of adultery. *Adams v. Stone*, 131 Mass. 433.

In *Foster v. Hanchett*, 68 Vt. 319, it was said: "In *McCarty v. Coffin*, 157 Mass. 478, the offer was to show that the plaintiff 'had had an *intimacy* with several different men.' The word *intimacy* was held to mean nothing more than close and familiar acquaintance, and hence that the testimony offered was not admissible for any purpose." See also the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882.

But the following publication was held actionable *per se*: "Complaints from outside parties were sent to the department, one asking for his dismissal on account of *intimacy* with a well-known young local elocutionist." *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187. In this connection the court said: "In its ordinary signification, and as generally applied to persons, the word *intimacy* would be understood to mean a proper friendly relation of the parties; but as employed in the article referred to, it has, and evidently was intended to have, a very different meaning. It conveys the idea of an improper relation, an *intimacy* at least disreputable and degrading, and tending to such an extent to unfit the plaintiff for the position he held, that 'outside parties' were prompted to make complaint to the post-office department and request his dismissal." See generally the title LIBEL AND SLANDER.

**Intimate Acquaintance.** (See also ACQUAINTANCE, vol. 1, p. 569.)—The *California Code Civ. Pro.*, § 1870, subdiv. 10, which makes competent "the opinion of an *intimate* acquaintance respecting the mental sanity of a person, the reason for the opinion being given," excludes such evidence by others than *intimate* acquaintances, who are, by unreserved intercourse, familiar with the varying moods and temperaments of the person whose soundness is questioned. But the statutory rule is necessarily more or less indefinite, and a large discretion must be conceded to the trial court; if the conclusion reached is one that can be reasonably entertained consistently with the idea of *intimacy* of acquaintance, it will not be reviewed by the appellate court. *Carpenter's Estate*, 94 Cal. 407.

In *State v. Murray*, 11 Oregon 423, it was said: "The only question raised by the objection was as to whether these witnesses were *intimate* acquaintances of the appellant within the sense and meaning of said subdivision 10 of section 696, Civil Code. The meaning of the word *intimate* as used in said provision of the statute is close friendship or acquaintance, familiarity. It is there employed to qualify the word 'acquaintance,' and the legislature evi-



**INTIMIDATION.** (See also the titles **DURESS**, vol. 10, p. 323; **ELECTIONS**, vol. 10, p. 776; **LABOR COMBINATIONS**; **THREATS**.)—See note 1.

**INTIMIDATION OF VOTERS.**—See the title **ELECTIONS**, vol. 10, p. 776.

**INTO.**—See note 2.

**INTOXICATE — INTOXICATED — INTOXICANTS.**—The word “intoxi-

dently intended by the terms ‘*intimate acquaintance*’ that the witness, in order to be competent to give an opinion in such a case, should be more than a casual or an ordinary acquaintance of the person whose sanity was drawn in question.”

**1. Conspiracy.** (See also the title **CONSPIRACY**, vol. 6, p. 830.)—As used in an indictment for conspiracy to obtain changes in the government, laws, and constitution by *intimidation*, “the word *intimidation* is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate.” Tindal, C. J., in *O’Connell v. Reg.*, 11 Cl. & F. 235.

**Intimidating.**—A statute provided that if any two or more persons should confederate or bind themselves together for the purpose of *intimidating*, alarming, or disturbing any person or persons, they should be guilty of a felony. *Embry v. Com.*, 79 Ky. 441. In construing this statute the court said: “*Intimidating*, alarming, and disturbing, in the sense the words are obviously used by the legislature, as well as according to their legal significance, imply the use of physical force or menace, and involve a breach of the peace.”

**Intimidation—Robbery.** (See also the title **ROBBERY**.)—A *Georgia* statute defined robbery as larceny committed by force or *intimidation*. In construing this statute, the court in *Long v. State*, 12 Ga. 320, said: “*Intimidation*, as I have before stated, is constructive force. As ‘force’ in our definition is the same with the ‘violence’ of the common-law definition, so *intimidation* in ours is synonymous with ‘putting in fear’ in the common law definition. ‘Putting in fear’ is the meaning of *intimidation*. To *intimidate* is to make fearful—to inspire with fear. The construction, therefore, which the British courts have put upon ‘putting in fear’ is just that construction which is due in our courts to *intimidation*. Robbery may be committed by putting one in fear of injury to the person, to property, or to character. In relation to all cases of robbery by *intimidation*, it is held that where property is extorted by fear it is robbery, although it be taken under color of a gift.”

**Intimidation.**—“Threats and *intimidation*,” in a legal sense, import not merely an evil but an unlawful act about to be done. *Payne v. Western, etc., R. Co.*, 13 Lea (Tenn.) 508.

**2. Into.** (See also **IN**; **TO**.)—By the English Public Health Act of 1875, a local authority was empowered to carry any sewer “*into*, *through*, or *under*” any lands within its district, and the act provided for compensation to

all persons sustaining damage by reason of the exercise of the powers of the act in relation to any matters as to which they were not themselves in default. A local board proceeded, under this act, to carry a sewer across the plaintiff’s pleasure grounds on such a level that the bottom of the sewer would be only slightly below the surface, and a permanent embankment about six feet high would be made. It was held that they were authorized so to do, for that the act did not confine them to carrying a sewer underground. *Roderick v. Aston Local Board*, 5 Ch. D. 328. In this case Jessel, M. R., said: “Now I am asked to say that the words ‘*into*, *through*, or *under*’ mean simply ‘*under*.’ I decline to say so. Why am I asked to make three words into one? The word ‘*under*’ is distinguished by the word ‘*or*’ from *into* or ‘*through*.’ The board may not only carry a sewer under, but ‘*into*, *through*, or *under*.’ It is said that means that they must make the sewer by means of a tunnel, or, if by a cutting, that they must cover over the cutting so that the sewer shall always be carried under. But taking the ordinary meaning of the English language, if I am to carry anything *into*, *through*, or *under* land, that does not mean that it must be wholly under.”

**Into Court.**—A delivery of a defendant *into* court by his sureties signifies “a delivery to the officers of the court who are under the control of the court and can take custody of the principal under the direction of the court.” The delivery must be made during the session of the court. *Converse v. Washburn*, 43 Vt. 132.

**Into Port.**—A vessel being towed from one dock to another is not passing “*into* and out of” port within a pilot act. *The Maria*, L. R. 1 A. & E. 358.

A ship chartered to load a cargo at a port in the East Indies and to proceed to Belle Isle, Scilly, Queenstown, or Falmouth for orders to discharge at a port in the United Kingdom or on the continent, which proceeded to Falmouth and there received orders to go to Bremen, where she discharged, carried her cargo *into* a port in England within the meaning of an act regulating the jurisdiction of admiralty courts. The act does not mean carried *into* for delivery. *The Pieve Superiore*, L. R. 4 A. & E. 170.

**Into the State.**—An exception in a statute of limitations, that where the debtor is absent from the state at the time the cause of action accrues suit may be brought “after his return *into*” the state, means after his return within the jurisdictional limits of the state, where the process of the courts of the state will run. A removal to an Indian nation, where such process will not run, is not such a return, though the nation is within the territorial limits of the state. *Smith v. Bond*, 8 Ala. 386. See generally the title **LIMITATION OF ACTIONS**



cate" means to become inebriated or drunk, but intemperance does not necessarily imply drunkenness. It is defined to be the immoderate use of anything.<sup>1</sup>

1. Intemperance. — *Mullinix v. People*, 76 Ill. 213, wherein it was held error to charge that "a person who is in the habit of drinking *intoxicating* liquors intemperately is a person who is in the habit of getting *intoxicated*." "Intemperance does not necessarily imply drunkenness."

*Intoxicated*. — In *Elkin v. Buschner*, (Pa. 1888) 16 Atl. Rep. 102, the trial court charged that whenever a man was under the influence of liquor so as not to be entirely himself he was *intoxicated*, though he could walk straight, and though he might attend to his business, and might not give any outward and visible signs to the casual observer that he was drunk. On appeal this was held no error. See also *Fink v. Garman*, 40 Pa. St. 105.

*Intoxicated Condition*. — In an action for personal injuries the court was asked to charge that if the defendant undertook to go down stairs unaided after the lights were put out, in a state of *intoxication*, he was guilty of contributory negligence. The judge declined, and the appellate court said: "The judge refused to charge that in so many words, but did substantially charge it in modified form by

defining the words '*intoxicated condition*' as meaning if he were in such a state as to be incapable of giving the attention to what he was doing which a man of prudence and reasonable intelligence would give. That modification of the request was substantially correct." *Kenney v. Rhineland*, 28 N. Y. App. Div. 250.

*Intoxicated — Spirituous Liquors*. — In *State v. Kelley*, 47 Vt. 294, it was held that the word *intoxicated* meant *intoxicated* on spirituous liquors; and that a complaint made that the respondent "became and was found *intoxicated*" was sufficient, without alleging upon what he became *intoxicated*.

*Intoxicants*. — In *In re McLaughlin*, 58 Vt. 139, it was said: "The third mittimus recites that the prisoner was 'duly convicted of the crime of selling *intoxicants*,' etc. The state's attorney does not seriously claim this is of much value as a warrant for the relator's imprisonment. The term *intoxicants* not yet being introduced into the prohibitory statutes, it would seem like exercising a little 'arbitrary freedom' to substitute it, in a criminal proceeding, for 'intoxicating liquor.'"



# INTOXICATING LIQUORS.

BY W. A. MARTIN.

## I. DEFINITION, 197.

## II. WHAT LIQUORS AND COMPOUNDS THEREOF ARE WITHIN PROHIBITIONS OF STATUTES, 198.

1. *Alcohol*, 198.
2. *Whiskey*, 198.
3. *Brandy*, 198.
4. *Rum*, 199.
5. *Gin*, 199.
6. *Wine*, 199.
7. *Beer*, 200.
8. *Ale*, 202.
9. *Porter*, 202.
10. *Cider*, 253.
11. *Liquors Used for Preserving Fruits and in Culinary Preparations*, 203.
12. *Medicinal and Toilet Preparations Containing Alcohol*, 204.

## III. CONSTITUTIONALITY OF LIQUOR LAWS, 206.

1. *Statutes Prohibiting Manufacture and Sale of Intoxicating Liquors*, 206.
2. *Statutes Regulating Sale of Intoxicating Liquors*, 208.
3. *License Laws*, 208.
  - a. *In General*, 208.
  - b. *Statutes Restricting to Certain Classes of Persons the Right to Sell*, 210.
  - c. *Statutes Requiring Applicant to Give Bond*, 211.
  - d. *Statutes Requiring Consent of Persons Living in Vicinity of Proposed Saloon*, 211.
  - e. *Statutes Prohibiting Sales or Gifts to Certain Classes of Persons*, 212.
  - f. *Statutes Prohibiting Sales and Requiring Closing of Saloons at Certain Times*, 212.
  - g. *Statutes Prohibiting Employment of Women and Children in Saloons*, 213.
  - h. *Screen Laws*, 213.
  - i. *Statutes Prohibiting Sales in Certain Localities*, 214.
  - j. *Statutes Authorizing Revocation of License*, 215.
4. *Statutes Declaring What Liquors Shall Be Deemed Intoxicating*, 216.
5. *Statutes Discriminating Against Liquors of Other States and Countries*, 216.
6. *Statutes Forbidding Gifts of Liquors*, 217.
7. *Statutes Prohibiting Sales in Bawdy Houses*, 218.
8. *Statutes Making It an Offense to Keep Place for Unlawful Sale*, 218.
9. *Statutes Making It an Offense to Keep Liquors with Intent to Sell Unlawfully*, 218.
10. *Statutes Imposing Fine and Imprisonment for Violation of Liquor Laws*, 218.
11. *Statutes Providing for Forfeiture of Licensee's Bond*, 219.
12. *Statutes Providing for Forfeiture of Liquors Illegally Kept*, 219.
13. *Statutes Making Judgments for Fines and Taxes Liens on Leased Property*, 219.
14. *Statutes Forbidding Recovery for Liquors Illegally Sold and Authorizing Recovery Back of Money Paid Therefor*, 220.
15. *Statutes Declaring Places for Manufacture and Sale Nuisances*, 220.



## INTOXICATING LIQUORS.

16. *Local Option Laws*, 221.
17. *Prohibition Laws*, 221.
18. *Civil Damage Acts*, 221.
19. *Statutes Regulating Liquor Traffic in Alaska*, 221.
20. *Constitutionality of Statutes as Affected by Interstate Commerce Clause*, 221.
21. *Town Agent System of License and Sales*, 221.
22. *Statutes Providing for Treatment and Cure of Inebriates*, 221.
23. *Statutes Authorizing Attorneys' Fees*, 222.
24. *Statutes Authorizing Taxes or License Fees*, 222.
25. *Statutes Delegating Legislative Power*, 224.
26. *Statutes Prescribing Rules of Evidence*, 225.
27. *Statutes Prescribing Rules of Pleading*, 226.
28. *Title and Subject-matter of Statutes*, 227.
  - a. *Nature and Object of Constitutional Provisions*, 227.
  - b. *Application of Constitutional Provisions*, 227.
    - (1) *What Enactments Valid under Title "To Regulate" or "Restrain,"* 227.
    - (2) *What Enactments Valid under Title "To Prohibit,"* 228.
    - (3) *Miscellaneous*, 228.
29. *Who May Question Validity of Statute*, 230.

### IV. LICENSE LAWS, 230.

1. *Definition of License*, 230.
2. *Necessity of License*, 230.
3. *Nature and Effect of License*, 230.
  - a. *In General*, 230.
  - b. *Rights of Partners under License*, 231.
  - c. *Right of Licensee to Sell by Agent*, 231.
  - d. *License Does Not Pass to Personal Representatives*, 232.
  - e. *Right to Assign or Transfer License*, 232.
    - (1) *License Not Assignable Without Statutory Authority Therefor*, 232.
    - (2) *Under Statutes Authorizing Assignment*, 233.
    - (3) *Transfer of License to Other Place or Building*, 235.
  - f. *Right to Mortgage License*, 235.
  - g. *Duration of Term of License*, 235.
4. *Right to License Not Absolute Right*, 236.
5. *Licenses Subject to Laws in Force When Granted*, 236.
6. *Number of Licenses Required*, 237.
  - a. *Different Places of Business*, 237.
  - b. *Different Kinds of Business*, 237.
  - c. *Licenses Required by Different Jurisdictions*, 237.
7. *What Places May Be Licensed*, 239.
8. *Eligibility of Applicant for License*, 239.
9. *Fitness and Moral Qualifications of Applicant*, 240.
10. *Power to Grant Licenses*, 241.
  - a. *In General*, 241.
  - b. *Delegation of Power*, 242.
11. *Disqualification of Members of Licensing Board*, 242.
12. *Petition or Application for License*, 243.
  - a. *Necessity for Application or Petition*, 243.
  - b. *Necessary Allegations*, 243.
  - c. *Affidavit of Applicant*, 244.
  - d. *Filing of Application or Petition*, 245.
  - e. *Notice of Application or Petition*, 245.
    - (1) *Necessity and Object of Notice*, 245.
    - (2) *Requirements of Notice*, 245.
    - (3) *Time of Giving Notice*, 246.
    - (4) *Publication of Notice*, 246.



## INTOXICATING LIQUORS.

13. *Recommendation of Petition or Application*, 247.
  - a. *Necessity of Recommendation*, 247.
  - b. *Who Is Qualified to Sign Recommendation*, 247.
  - c. *Miscellaneous*, 248.
14. *Consent of Resident Property Owners, or Freeholders Living in Vicinity*, 249.
15. *Remonstrances or Counter Petitions*, 250.
  - a. *Right to Remonstrate*, 250.
  - b. *Filing of Remonstrance*, 250.
  - c. *Form and Allegations of Remonstrance*, 251.
  - d. *Withdrawal of Remonstrance*, 251.
16. *Hearing of Application and Remonstrance*, 252.
  - a. *Time of Hearing*, 252.
  - b. *Evidence*, 252.
17. *Discretion in Granting and Refusing Licenses*, 254.
  - a. *In General*, 254.
  - b. *What Constitutes Abuse of Discretion*, 255.
18. *Review of Action of Licensing Authorities*, 257.
  - a. *Appeal*, 257.
  - b. *Certiorari*, 258.
  - c. *Mandamus*, 260.
19. *Enjoining or Prohibiting Grant of License*, 260.
20. *Prosecution of Licensing Authorities for Wrongfully Granting or Refusing License*, 261.
21. *Civil Actions Based on Refusal to Issue or on Revocation of License*, 261.
22. *Form and Requisites of License*, 261.
  - a. *In General*, 261.
  - b. *Description of Premises*, 262.
23. *Revocation of License*, 262.
  - a. *Power to Revoke*, 262.
    - (1) *In General*, 262.
    - (2) *By Repeal of Statute*, 263.
  - b. *Jurisdiction to Revoke Licenses*, 263.
  - c. *Grounds for Revoking Licenses*, 264.
  - d. *Proceedings to Revoke Licenses*, 266.
    - (1) *Nature of Proceedings*, 266.
    - (2) *Who May Institute*, 267.
    - (3) *Complaint*, 267.
    - (4) *Notice to Licensee of Proceedings*, 268.
    - (5) *Hearing, Findings, and Judgment*, 269.
  - e. *Review*, 269.
24. *License Fees*, 270.
  - a. *License Fees Not Taxation*, 270.
  - b. *Fixing Amount of Fees*, 270.
  - c. *Payment of Fees*, 271.
  - d. *Collection of Fees*, 271.
  - e. *Disposition of Fees*, 272.
  - f. *Recovery Back of Fees on Refusal or Revocation of License*, 272.
  - g. *Recovery Back of Illegal or Excessive Fees*, 273.
25. *License Bonds*, 273.
  - a. *Necessity and Object of Bond*, 273.
  - b. *Form and Requirements of Bond*, 274.
  - c. *Approval of Bond*, 276.
    - (1) *In General*, 276.
    - (2) *Action for Refusal to Approve Bond*, 276.
  - d. *Who May Be Sureties*, 276.
  - e. *What Operates as Discharge of Sureties*, 277.
  - f. *What Constitutes Breach*, 277.
  - g. *Validity of Contract to Pay Surety for Acting as Such*, 278.
  - h. *Actions on Bond*, 278.



## INTOXICATING LIQUORS.

26. *Town Agent System of License and Sales*, 279.
  - a. *Nature and Necessity of Appointment*, 279.
  - b. *Powers and Duties of Agent*, 280.

### V. MUNICIPAL CONTROL OF LIQUOR TRAFFIC, 280.

1. *In General*, 280.
2. *Grant to Municipality of Exclusive Power of Control*, 281.
3. *Concurrent Powers of Control by State and Municipality*, 282.
4. *Constitutional Limitations on Delegative Power of Legislature*, 283.
5. *Constitutional Limitations on Power to Pass Ordinances*, 283.
6. *Power to Require and Grant Licenses*, 283.
  - a. *In General*, 283.
  - b. *What Statutes Give Power*, 283.
  - c. *Extent of Power Delegated*, 284.
7. *Power to Impose and Fix Amount of License Fees*, 285.
8. *Discrimination in Fees Imposed*, 286.
9. *Power to Prohibit Traffic in Intoxicating Liquors*, 286.
10. *Power to Prohibit Keeping Liquors for Unlawful Sale*, 287.
11. *Power to Revoke Licenses*, 287.
12. *Power to Make Purchase of Liquor Punishable*, 287.
13. *Ordinances Prohibiting Sales on Sundays and Election Days*, 287.
14. *Ordinances Requiring Closing of Saloons on Certain Days and During Certain Hours*, 288.
15. *Ordinances Prohibiting Sales in Particular Localities*, 289.
16. *Ordinances Prohibiting Employment of Women in Saloons*, 289.
17. *Ordinances Prohibiting Sales to Drunkards*, 289.
18. *Ordinances Requiring Consent of Adjacent Property Owners*, 289.
19. *Ordinances Requiring Bond*, 289.
20. *Extraterritorial Effect of Ordinances*, 289.
21. *Ordinances Good in Part and Bad in Part*, 290.
22. *Delegation of Power by Municipal Corporation*, 290.
23. *Repeal of Ordinances*, 290.

### VI. INTERSTATE AND FOREIGN TRAFFIC IN INTOXICATING LIQUORS AS AFFECTED BY STATE LIQUOR LAWS, 290.

1. *Importations of Intoxicating Liquors from Foreign Countries*, 290
  - a. *Who May Sell in Original Packages*, 290.
  - b. *Sales in Original Packages Only Permissible*, 291.
  - c. *Effect of Wilson Law on Importations from Foreign Countries*, 291.
2. *Importations of Intoxicating Liquors from Another State*, 291.
  - a. *Rule Established by "License Cases,"* 291.
  - b. *Rule in "Original Package Cases,"* 292.
  - c. *Wilson Act*, 293.
    - (1) *Provisions and Purposes of Enactment*, 293.
    - (2) *Constitutionality*, 293.
    - (3) *Necessity of Additional State Legislation to Render Act Operative*, 293.
    - (4) *Operation and Effect*, 294.
3. *What Is Original Package*, 294.
4. *Statutes Prohibiting Manufacture or Keeping for Sale in Another State*, 296.

### VII. LAWS AGAINST ADULTERATION OF INTOXICATING LIQUORS, 296.

### VIII. WHAT CONSTITUTES SALE, 297.

1. *In General*, 297.
2. *Barter, Loan, or Exchange*, 298.
3. *Devices or Subterfuges to Evade Liquor Laws*, 299.

### IX. WHAT IS PLACE OF SALE, 300.

1. *Where Goods Sold Are Unascertained*, 300.
2. *Where Goods Are Delivered to Carrier on Purchaser's Order*, 300.
3. *Where Goods Are Shipped C. O. D.*, 300.



## INTOXICATING LIQUORS.

4. *Where Goods Are Sold on Order of Agent Subject to Principal's Approval*, 301.
5. *Where Goods Are Delivered by Seller in Person or by Agent*, 301.
6. *Where Sale Is Conditional*, 302.

### X. PROPERTY AND CONTRACT RIGHTS AS AFFECTED BY LIQUOR LAWS, 302.

1. *Intoxicating Liquors as Property*, 302.
  - a. *In General*, 302.
  - b. *Subject of Larceny*, 303.
  - c. *Actions for Wrongful Taking of Intoxicating Liquors*, 303.
    - (1) *Where Liquors Are Lawfully Acquired or Kept*, 303.
    - (2) *Where Liquors Are Kept for Unlawful Purpose*, 303.
  - d. *Remedies of Owner of Liquors Taken under Search and Seizure Acts*, 304.
  - e. *Actions for Destruction of Liquors by Private Persons*, 305.
2. *Right to Recover Price of Liquors Illegally Sold*, 305.
  - a. *Statement and Application of Rule*, 305.
  - b. *Repeal of Statute Declaring Contract of Sale Invalid*, 306.
  - c. *Evidence*, 306.
3. *Status of Notes Given for Price of Liquors Illegally Sold*, 307.
  - a. *Rights of Payee*, 307.
    - (1) *Where Liquors Are Sole Consideration for Note*, 307.
    - (2) *Where Liquors Are Partial Consideration for Note*, 308.
  - b. *Rights of Innocent Purchaser*, 308.
  - c. *Evidence in Action on Note*, 309.
4. *Status of Mortgage to Secure Price of Liquors*, 309.
5. *Right to Recover Back Money Paid for Liquors Illegally Sold*, 309.
  - a. *Recovery by Direct Action*, 309.
  - b. *Recovery by Way of Set-off or Counterclaim*, 311.
  - c. *Amendment or Repeal of Statutes as Affecting Recovery*, 311.
6. *Status of Entire and Divisible Contracts of Sale of Liquors*, 311.
7. *Status of Contracts of Sale Made in Another State*, 312.
  - a. *In General*, 312.
  - b. *Effect of Knowledge of Purpose to Resell Illegally and Assistance Therein*, 312.
    - (1) *General Rule*, 312.
    - (2) *Under Special Statutory Provisions*, 313.
8. *Status of Executory Contracts of Sale of Liquors*, 314.
9. *Status of Judgment for Price of Liquors*, 314.
10. *Status of Award for Price of Liquors*, 314.
11. *Mortgages of Liquors*, 314.
12. *Insurance of Liquors*, 315.
13. *Liability of Liquors to Attachment and Execution*, 315.
14. *Actions for Refusal to Sell Liquors*, 315.
15. *Leases of Premises on Which Intoxicating Liquors Are Sold*, 315.
  - a. *Right of Lessor to Recover Rent*, 315.
  - b. *Right of Lessor to Recover Possession*, 316.
16. *Conditions in Deeds Prohibiting Sales on Premises Conveyed*, 316.
17. *Covenants and Agreements Respecting Licensed Houses*, 317.
18. *Other Contracts as Affected by Liquor Laws*, 317.

### XI. LIQUOR NUISANCES, 318.

1. *What Constitutes Nuisance at Common Law*, 318.
2. *What Constitutes Nuisance under Statutes*, 318.
3. *Constitutionality of Statutes*, 319.
4. *Criminal Responsibility for Maintaining Liquor Nuisance*, 320.
  - a. *Parties Responsible for Maintaining Nuisances*, 320.
  - b. *Effect of Former Acquittal or Conviction of Similar Offense*, 321.
5. *Injunction and Abatement of Liquor Nuisance*, 321.
  - a. *Injunction*, 321.



## INTOXICATING LIQUORS.

- (1) *In General*, 321.
- (2) *Against Whom Injunction Is Operative*, 322.
- b. *Abatement*, 323.
- c. *Who May Maintain Proceedings for Injunction and Abatement*, 324.
- d. *Proceedings for Contempt in Violating Injunction*, 324.
- e. *Right of Private Person to Recover Damages for or to Enjoin Nuisance*, 325.
- 6. *Evidence in Criminal Prosecutions and in Proceedings for Injunction and Abatement*, 326.
  - a. *Competency*, 326.
  - b. *Sufficiency*, 327.

## XII. OFFENSES AGAINST LIQUOR LAWS AND PROSECUTIONS THEREUNDER, 328.

- 1. *Sales Without License*, 328.
  - a. *In General*, 328.
  - b. *Sales Before Issuance of License*, 329.
  - c. *Sales After Expiration or Revocation of License*, 329.
  - d. *Effect of Impossibility of Obtaining License*, 329.
  - e. *Burden of Proving License or No License*, 330.
- 2. *Sales under Void Licenses*, 331.
- 3. *Sales Not Protected by License*, 332.
- 4. *Selling, Giving, or Furnishing to Minors*, 333.
  - a. *General Scope of Prohibitory Statutes*, 333.
  - b. *Consent of Parent or Guardian*, 334.
  - c. *Knowledge or Ignorance of Minority as Affecting Responsibility*, 335.
    - (1) *View that Ignorance of Minority Is Immaterial*, 335.
    - (2) *View that Knowledge of Minority Is Element of Offense*, 335.
  - d. *Purchase for Minor by Adult*, 336.
    - (1) *Liability of Seller*, 336.
    - (2) *Liability of Purchaser*, 337.
  - e. *Purchase for Others by Minor*, 337.
  - f. *Aiding and Abetting in Sale*, 338.
  - g. *Conviction as Affecting Liability for Other Offenses*, 338.
  - h. *Evidence*, 338.
    - (1) *Seller's Ignorance or Knowledge of Purchaser's Minority*, 338.
    - (2) *Consent of Parent*, 340.
    - (3) *Minority of Purchaser*, 340.
    - (4) *Other Matters of Evidence*, 340.
- 5. *Allowing Minors to Enter and Remain on Premises*, 341.
- 6. *Sales to Intoxicated Persons, Persons of Intemperate Habits, Habitual Drunkards, etc.*, 341.
  - a. *Sales to Intoxicated Persons*, 341.
  - b. *Sales to Persons of Intemperate Habits, Habitual Drunkards, etc.*, 342.
    - (1) *In General*, 342.
    - (2) *Knowledge or Ignorance of Purchaser's Habits as Affecting Liability of Seller*, 342.
    - (3) *Notice to Seller of Purchaser's Intemperate Habits*, 343.
    - (4) *Who Are Drunkards, Persons of Intemperate Habits, etc.*, 343.
    - (5) *Evidence*, 343.
- 7. *Sales to Slaves and Free Negroes*, 344.
- 8. *Sales to Indians and Introducing Intoxicating Liquor into Indian Country*, 344.
- 9. *Sales to Informers*, 346.
- 10. *Sales to Make Test Case*, 346.
- 11. *Sales, Gifts, or Keeping Open on Prohibited Days*, 346.



## INTOXICATING LIQUORS.

- a. Sales or Gifts on Sunday, 346.*
- b. Sales or Gifts on Election Day, 347.*
- c. Keeping Open on Sunday, 348.*
- d. Keeping Open on Election Day, 348.*
- e. Selling or Keeping Open on Legal Holiday, 349.*
- f. What Constitutes Keeping Open on Prohibited Days, 349.*
  - (1) In General, 349.*
  - (2) What Rooms Are Within Prohibition, 350.*
    - (a) Adjoining or Disconnected Rooms Used for Drinking, 350.*
    - (b) Same Room Used for Drinking and for Other Purposes, 350.*
- g. Selling or Keeping Open on Sunday by Publicans, Innkeepers, etc., 351.*
- h. Evidence, 352.*
  - (1) In Prosecutions for Sunday Sales or Gifts, 352.*
  - (2) In Prosecutions for Keeping Open on Sunday, 352.*
- i. Former Acquittal or Conviction of Similar Offense as Bar, 352.*
- 12. Selling or Keeping Open for Sale During Prohibited Hours, 352.*
- 13. Illegal Sales by Wholesale Dealers, 353.*
- 14. Illegal Manufacture and Sales by Manufacturer, 353.*
- 15. Illegal Sales by Tavern Keeper, Hotel Keeper, and Innkeeper, 354.*
- 16. Violations of Liquor Laws by Druggists and Drug Clerks, 355.*
  - a. Illegal Sales in General, 355.*
    - (1) Necessity for License or Permit and Strict Compliance Therewith, 355.*
    - (2) Necessity for Physician's Prescription, 355.*
    - (3) Requisites and Sufficiency of Prescription, 356.*
    - (4) Legality of Sales as Affected by Element of Intent, 356.*
  - b. Sales to Minors, 357.*
  - c. Other Offenses, 357.*
  - d. Illegal Sales by Drug Clerks, 358.*
  - e. Sale of What Liquors Prohibited, 358.*
- 17. Sales by Physicians, 358.*
- 18. Sales by Persons Who Are Both Physicians and Druggists, 359.*
- 19. Sales for Medicinal Purposes, 359.*
- 20. Furnishing of Intoxicating Liquors by Social Clubs, 360.*
  - a. Sales by Clubs Organized to Evade Law, 360.*
  - b. Sales by Clubs to Persons Not Members, 360.*
  - c. Furnishing of Liquors by Bona Fide Social Clubs to Members, 361.*
    - (1) Where There Is No Legislation Specially Mentioning Clubs, 361.*
      - (a) View that Clubs May Furnish Members with Liquor, 361.*
      - (b) View that Clubs Cannot Furnish Liquor to Members, 361.*
    - (2) Under Statutes Containing Provisions Specially Mentioning Clubs, 362.*
- 21. Sales Within Prohibited Distance of Churches, Schools, etc., 362.*
  - a. Churches and Schools, 362.*
  - b. Public Buildings and Institutions, 364.*
- 22. Selling or Giving Away Intoxicating Liquors in House of Ill Fame, 364.*
- 23. Giving or Furnishing Intoxicating Liquor in Theatres, 365.*
- 24. Selling Intoxicating Liquor to be Drunk on Premises, 365.*
  - a. Drinking on Premises Not Element of Offense, 365.*
  - b. Necessity of Intent that Liquors Be Drunk on Premises, 365.*
  - c. Sale in What Quantity Violation of Law, 365.*
  - d. Construction of Terms "On," "On or About," "Adjacent," "Premises," etc., 366.*
- 25. Sales Without Giving Bond, 366.*



## INTOXICATING LIQUORS.

26. *Selling Without Having Paid Occupation Tax or Posted Receipt*, 366.
  27. *Violation of Statute Requiring Keeping of Statement and Making Report of Manufacture and Sale*, 366.
  28. *Furnishing Intoxicating Liquor to Constable*, 367.
  29. *Giving Away Intoxicating Liquor*, 367.
  30. *Maintaining Place, Building, Tenement, etc., for Unlawful Keeping or Sale of Intoxicating Liquors*, 368.
    - a. *Maintaining Place or Building for Unlawful Keeping or Sale*, 368.
    - b. *Maintaining Tenement for Unlawful Keeping or Sale*, 369.
    - c. *Evidence*, 369.
      - (1) *Competency*, 369.
      - (2) *Sufficiency*, 370.
  31. *Maintaining Liquor Nuisances*, 371.
  32. *Keeping Disorderly House*, 371.
  33. *Permitting Unlawful Assemblies*, 371.
  34. *Permitting Drunkenness*, 371.
  35. *Permitting or Suffering Gaming in Drinking House*, 371.
  36. *Keeping Tippling House*, 371.
  37. *Keeping Intoxicating Liquors for Unlawful Sale*, 372.
    - a. *Nature and Elements of Offense*, 372.
    - b. *Evidence*, 374.
      - (1) *Competency*, 374.
        - (a) *Evidence in Behalf of Prosecution*, 374.
        - (b) *Evidence in Behalf of Defendant*, 375.
      - (2) *Probative Force and Sufficiency of Evidence*, 375.
  38. *Being Common Seller*, 376.
    - a. *What Constitutes Offense*, 376.
    - b. *Jurisdiction*, 377.
    - c. *Competency of Evidence*, 377.
    - d. *Sufficiency of Evidence*, 378.
    - e. *Competency of Witnesses*, 378.
    - f. *Effect of Acquittal or Conviction of Other Offense Involving Same Sale*, 379.
    - g. *Second Offense*, 379.
  39. *Engaging in or Pursuing Business of Selling Intoxicating Liquors Without License*, 379.
  40. *Illegal Transportation*, 380.
  41. *Breach of Screen Laws*, 381.
  42. *Employment of Women in Saloons*, 382.
  43. *Keeping Wineroom for Women*, 382.
  44. *Importation and Sale of Intoxicating Liquors in Alaska*, 382.
  45. *Jurisdiction of Prosecutions under Liquor Laws*, 383.
  46. *Limitations*, 384.
  47. *Liability as Affected by Ignorance of Intoxicating Properties of Liquors*, 384.
  48. *Effect of Prior Conviction or Acquittal of Same or Similar Offense*, 384.
- XIII. CIVIL AND CRIMINAL LIABILITY ARISING OUT OF AGENCY, MARRIAGE, ETC.,**  
384.
1. *Liability of Employer for Violations of Liquor Laws by Servant or Agent*, 384.
    - a. *Civil Liability*, 384.
    - b. *Criminal Liability*, 385.
      - (1) *For Authorized Violations of Law*, 385.
      - (2) *For Violations of Law Unauthorized and Against Instructions*, 386.
        - (a) *View that Employer Is Not Liable*, 386.
        - (b) *View that Employer Is Liable*, 387.
        - (c) *Evidence in Prosecution for Violation of Law by Servant or Agent*, 388.



2. *Personal Liability of Servant or Agent for Violations of Liquor Laws*, 389.
  - a. *To What Extent Protected by Employer's License*, 389.
  - b. *Selling Liquors of Another on One's Own License*, 389.
  - c. *Selling Without License for One Who Has No License*, 389.
  - d. *Other Violations of Liquor Laws*, 390.
  - e. *What Constitutes Servant or Agent*, 391.
  - f. *Several Liability of Employer and Servant or Agent*, 391.
3. *Criminal Liability of Purchaser*, 391.
  - a. *When Purchasing for His Own Consumption*, 391.
  - b. *When Purchasing for Another's Consumption*, 392.
4. *Liability of Husband and Wife for Violation of Liquor Laws*, 392.
  - a. *Liability of Wife for Her Own Acts*, 392.
  - b. *Liability of Husband for Acts of Wife*, 393.
  - c. *Liability of Husband Acting as Agent of Wife*, 394.
  - d. *Joint and Several Liability of Husband and Wife*, 394.
5. *Liability of Partners*, 394.
6. *Liability of Owner or Lessor for Violations of Law on Leased Premises*, 394.
  - a. *Criminal Liability*, 394.
  - b. *Liability under Civil Damage Acts*, 395.
    - (1) *Personal Liability of Owner or Lessor*, 395.
    - (2) *Liability of Leased Premises*, 395.
  - c. *Liability of Premises for Fines Assessed Against Occupant*, 396.

## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 11, p. 513.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AGRICULTURAL SOCIETIES*, vol. 2, p. 18; *CIVIL DAMAGE ACTS*, vol. 6, p. 36; *GAMING*, vol. 14, p. 664; *HABITUAL DRUNKARDS*, vol. 15, p. 221; *ILLEGAL CONTRACTS*, vol. 15, p. 927; *INNS AND INNKEEPERS*, vol. 16, p. 505; *INTOXICATION*, *post*; *LOCAL OPTION*; *NUISANCES*; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*; *POLICE POWER*; *REVENUE LAWS*; *SEARCHES AND SEIZURE*; *STATUTES*; *SUNDAY*.

**I. DEFINITION.** — The term "intoxicating liquors" is frequently defined by the statutes regulating or prohibiting the traffic in intoxicating liquors, and when this is done no question can arise as to what particular liquors or compounds thereof or other substances are intoxicating. In its usual acceptation the term means those liquors the use of which in such quantities as may be practically drunk is ordinarily or commonly attended with intoxication, either entire or partial.<sup>1</sup>

**1. Definition.** — Intoxicating Liquor Cases 25 Kan. 767, 31 Am. Rep. 284; *People v. Zeiger*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 355; *Excise Com'rs v. Taylor*, 21 N. Y. 173; *Malone v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 381.

As to what particular kinds of liquors are intoxicating, see the following section.

**Spirituos Liquors.** — The term "spirituous liquors" ordinarily means distilled liquors. *Allred v. State*, 89 Ala. 112; *Gnadinger v. Com.*, 4 Ky. L. Rep. 514; *State v. Munger*, 15 Vt. 290; *State v. Oliver*, 26 W. Va. 426, 53 Am. Rep. 79; *Clifford v. State*, 29 Wis. 327. As to what particular kinds of liquors are considered spirituous, see the next section *infra*.

**Terms "Intoxicating" and "Spirituos" Distinguished.** — The terms "intoxicating" and "spirituous" are not synonymous. *McDuffie*

*v. State*, 87 Ga. 687; *Com. v. Livermore*, 4 Gray (Mass.) 18; *Clifford v. State* 29 Wis. 327. They bear the relation to each other of genus and species. All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. *Com. v. Herrick*, 6 Cush. (Mass.) 468. And an indictment for unlawful sales of spirituous and intoxicating liquors is not supported by evidence of sales of liquors which are intoxicating but not spirituous. *Com. v. Livermore*, 4 Gray (Mass.) 18.

**Liquor or Liquors.** — The word "liquor," as commonly used, includes all that are spirituous, vinous, or malt. *People v. Crilley*, 20 Barb. (N. Y.) 246; *State v. Brittain*, 89 N. Car. 576. Thus champagne is included in the term "liquors." *Kizer v. Randleman*, 5 Jones L. (50 N. Car.) 428. And lager beer has been



**II. WHAT LIQUORS AND COMPOUNDS THEREOF ARE WITHIN PROHIBITIONS OF STATUTES** — 1. **Alcohol.** — There is some difference of opinion as to whether alcohol is within the meaning of the statutes regulating the liquor traffic. One decision lays down the broad doctrine that "alcohol is not either ardent or vinous spirits or liquor of any kind" the sale of which is in any manner restricted or attempted to be regulated,<sup>1</sup> and another decision holds that alcohol is not a "vinous or spirituous liquor" within the licensing acts.<sup>2</sup> On the other hand it has been held that alcohol is a "spirituous and intoxicating liquor," and that this fact is so commonly known that the courts will take judicial notice of it.<sup>3</sup> In other cases it has been held that the courts do not judicially know that alcohol is an intoxicating drink, but that if it is, and it is plain that the selling is a subterfuge to evade the law, the seller will be punishable.<sup>4</sup> Of course, if alcohol is expressly mentioned in a statute prohibiting sales of intoxicating liquors to certain classes of persons, a sale of alcohol to a person of the designated class will be a violation of the statute.<sup>5</sup>

2. **Whiskey.** — Whiskey is a spirituous,<sup>6</sup> distilled,<sup>7</sup> or intoxicating liquor<sup>8</sup> within the meaning of the statutes regulating the liquor traffic which contain these terms. The courts will take judicial notice of such fact, and juries may so find without specific evidence to prove it.<sup>9</sup> It is not a drug in the sense that an apothecary may sell it without having procured a retail license.<sup>10</sup>

3. **Brandy.** — Brandy is a spirituous and intoxicating liquor within the meaning of the statutes regulating the liquor traffic,<sup>11</sup> and the courts will take

held to be within the meaning of this word. *Hollender v. Magone*, 38 Fed. Rep. 912.

**Distilled Spirits.** — See **DISTILLED SPIRITS**, vol. 9, p. 615.

**Sweet Spirits of Nitre** were not within the statute 6 Geo. IV., c. 80, §§ 6, 7, or within 7 and 8 Geo. IV., c. 53, § 32. *Bailey v. Harris*, 12 Q. B. 905, 64 E. C. L. 905, 18 L. J. Q. B. 115, 13 Jur. 311.

**Malt Liquors.** — The term "malt liquors" is said to embrace portlet, ale, beer, and the like, which are the result or product of a process by which grain—usually barley—is steeped in water to the point of germination, the starch of the grain thus being converted into saccharine matter, which is kiln dried, then mixed with hops, and by a further process of brewing made into a beverage. *Allred v. State*, 89 Ala. 112. See also *infra*, subsections *Beer*, *Ale*, *Porter*.

**Fermented Liquors.** — For liquors included in the term "fermented liquors," see *infra*, subsections *Beer*, *Ale*, *Porter*, *Cider*.

**Vinous Liquors.** — For definition of this term see *infra*, subsection *Wine*.

1. **Alcohol.** — *State v. Martin*, 34 Ark. 340. But see subsequent *Arkansas* decisions in this section.

2. **Not a Vinous or Spirituous Liquor.** — *Lemly v. State*, 70 Miss. 241 in which it was said: "Alcohol is an ingredient or quality of vinous and spirituous liquor of all kinds, but alcohol, specifically, is neither the one nor the other. It is a distinct thing. It is the intoxicating principle of vinous and spirituous liquors."

3. **Contrary View.** — *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350.

4. **View that Courts Do Not Judicially Know that Alcohol Is Intoxicating.** — *Winn v. State*, 43 Ark. 151; *State v. Witt*, 39 Ark. 216. See also *Bennett v. People*, 30 Ill. 389, in which it was said: "It is not in common parlance so considered [as an intoxicating liquor], although it

is the basis of all spirituous liquors. We are not prepared to say, however, that selling pure alcohol is not selling spirituous liquor."

5. **Statutes Prohibiting Sales of Alcohol.** — *Emerson v. State*, 43 Ark. 372.

**Diluted Alcohol.** — Where a statute prohibits the sale of intoxicating liquors and provides that the words "intoxicating liquors" "shall be construed to mean alcohol, wine," etc., alcohol, no matter how much it may be diluted, is within the terms of the statute. Proof that the mixture contains alcohol is sufficient to show that it is an intoxicating liquor. *State v. Certain Intoxicating Liquors*, 76 Iowa 243.

6. **Whiskey a Spirituous Liquor.** — *Freiberg v. State*, 94 Ala. 91; *Wall v. State*, 78 Ala. 418; *Frese v. State*, 23 Fla. 267; *People v. Webster*, 2 Dougl. (Mich.) 92.

7. **A Distilled Liquor.** — *State v. Williamson*, 21 Mo. 496.

8. **An Intoxicating Liquor.** — *Edgar v. State*, 37 Ark. 219; *Carmon v. State*, 18 Ind. 450; *Schlicht v. State*, 56 Ind. 173; *Eagan v. State*, 53 Ind. 162; *State v. Jones*, 3 Ind. App. 121; *State v. Hickman*, 54 Kan. 225; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Com. v. Curran*, 119 Mass. 206.

9. **Judicial Notice of Intoxicating Properties.** — See cases cited in preceding notes.

"Courts are not supposed to be ignorant of what everybody else is presumed to know. And what is thus known juries are permitted to find, without specific proof being adduced in its support." *Wall v. State*, 78 Ala. 418.

"**Nerve Tonic.**" — The sale of "nerve tonic" is within the prohibition of the statutes regulating the sale of intoxicating liquors, where it is shown that the nerve tonic is rye whiskey. *Kinnebrew v. State*, 80 Ga. 232.

10. **Whiskey Not a Drug.** — *Gault v. State*, 34 Ga. 533.

11. **Brandy Spirituous and Intoxicating.** — *State v. Wadsworth*, 30 Conn. 55; *Intoxicating*



judicial notice of this fact from the commonly accepted definition of the word "brandy," whether it be "California brandy," "French brandy,"<sup>1</sup> "black-berry brandy,"<sup>2</sup> or any other kind.<sup>3</sup>

4. **Rum.** — Rum is an intoxicating and spirituous liquor, and proof of this fact is not necessary, as it is a matter of common knowledge.<sup>4</sup>

5. **Gin.** — Gin is a spirituous<sup>5</sup> and intoxicating liquor,<sup>6</sup> and no proof that it is intoxicating is necessary, as this is a matter of common knowledge.<sup>7</sup>

6. **Wine.** — Wine is defined by some lexicographers as the fermented juice of grapes,<sup>8</sup> and by others as first the fermented juice of grapes, and second the fermented juice of certain fruits resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived, as ginger wine, gooseberry wine, currant wine, etc.<sup>9</sup> It has been held that a sale of wine made from grapes and from blackberries is within a statute making it unlawful to sell "vinous or alcoholic" liquors.<sup>10</sup> But it has also been held that the term "vinous" does not apply to the juice of fruits which are grown on trees, such as cider.<sup>11</sup> It has been held that champagne wine is included within the term "liquors."<sup>12</sup> Although one decision seems to hold that whether wine is or is not an intoxicating liquor is a question for the jury,<sup>13</sup> the decided weight of authority is that wine is an intoxicating liquor and that the courts will take judicial notice of this fact.<sup>14</sup> There is some conflict of authority as to whether wine is a spirituous liquor. Some decisions hold that it is not,<sup>15</sup> on the ground that spirituous liquors

Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; State *v. Tisdale*, 54 Minn. 105; State *v. Munger*, 15 Vt. 290.

1. **Judicial Knowledge of Intoxicating Property.** — State *v. Tisdale*, 54 Minn. 105.

2. *Fenton v. State*, 100 Ind. 598.

3. State *v. Tisdale*, 54 Minn. 105.

**Words Descriptive of Brandy.** — The addition to the term "brandy" of the other words does no more than designate the article as a particular kind of brandy. *Fenton v. State*, 100 Ind. 598.

4. **Rum an Intoxicating and Spirituous Liquor.** — State *v. Wadsworth*, 30 Conn. 55; State *v. Moity*, 3 Hill L. (S. Car.) 187; State *v. Munger*, 15 Vt. 290.

**A Spirituous Liquor Within United States Revenue Laws.** — Rum is a spirituous liquor within the United States revenue laws prohibiting the sale of spirituous liquors without payment of the taxes. *U. S. v. Angell*, 11 Fed. Rep. 35.

5. **Gin a Spirituous Liquor.** — State *v. Munger*, 15 Vt. 290.

6. **Gin an Intoxicating Liquor.** — Intoxicating Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; *Com. v. Peckham*, 2 Gray (Mass.) 515.

7. **Intoxicating and Spirituous Qualities Matter of Common Knowledge.** — *Com. v. Peckham*, 2 Gray (Mass.) 514.

**Proof that Liquor Is Gin.** — Any person is competent to testify whether a particular article is gin. This is not a matter requiring expert evidence. *Com. v. Timothy*, 8 Gray (Mass.) 480.

8. **Definition of Wine.** — *Adler v. State*, 55 Ala. 16; *Caswell v. State*, 2 Humph. (Tenn.) 402, quoting from Johnson's and Webster's Dictionaries.

9. *Feldman v. Morrison*, 1 Ill. App. 460, quoting from Worcester's Dictionary.

10. **Wine a Vinous or Alcoholic Liquor.** — *Reyfelt v. State*, 73 Miss. 415.

11. **Cider Not a Vinous Liquor.** — *Feldman v. Morrison*, 1 Ill. App. 463. Compare *Com. v. Reyburg*, 122 Pa. St. 299, in which it was held that it was a question for the jury whether cider was a vinous or spirituous liquor within a statute prohibiting sales of such liquors without license.

12. **Champagne Wine a Liquor.** — *Kizer v. Randleman*, 5 Jones L. (50 N. Car.) 428. The statute construed forbade a credit of more than ten dollars for liquors sold.

13. **Wine — Whether an Intoxicating Liquor.** — State *v. Page*, 66 Me. 418.

14. **Judicial Knowledge of Intoxicating Properties.** — *Wolf v. State*, 59 Ark. 297, 43 Am. St. Rep. 34; State *v. Stapp*, 29 Iowa 551; *Worley v. Spurgeon*, 38 Iowa 465; State *v. Curley*, 33 Iowa 359; State *v. Packer*, 80 N. Car. 442. See also *Jackson v. State*, 19 Ind. 312, in which it was said that a court does not judicially know that wine is not intoxicating, and will not question the right of the legislature to declare it intoxicating.

**Non-intoxicating Wines.** — Under a statute prohibiting the sale of any vinous liquors within a certain territory a sale of wine within such district will constitute the offense whether it be intoxicating or not. *Hatfield v. Com.*, 120 Pa. St. 395. So if the statute forbids the sale of wine without license it is not necessary to constitute the offense that the wine sold be intoxicating. *Schwab v. People*, 4 Hun (N. Y.) 520.

**Port Wine.** — On proof of a sale of port wine the fact of its intoxicating quality is a matter of common knowledge and can be passed on by the jury without proof. State *v. Packer*, 80 N. Car. 439.

15. **Wine Considered a Spirituous Liquor.** — State *v. Moore*, 5 Blackf. (Ind.) 118; *Caswell v. State*, 2 Humph. (Tenn.) 402; *Fritz v. State*, 1 Baxt. (Tenn.) 15, overruling State *v. Sharrer*, 2 Coldw. (Tenn.) 323.



are those procured by distillation but not by fermentation.<sup>1</sup> In other decisions it is said that whether wine is a spirituous liquor is a question for the jury.<sup>2</sup> In another decision it is held that the words "spirituous liquor" as used in the statute include wine.<sup>3</sup>

7. Beer. — Although there is one decision in which it is held that beer is included in the term "spirituous liquors,"<sup>4</sup> the weight of authority is to the effect that beer is neither a spirituous<sup>5</sup> nor a vinous liquor.<sup>6</sup> Where it is expressly provided by statute that lager beer shall be deemed intoxicating it may be so described in the indictment,<sup>7</sup> and no evidence to show that it is not intoxicating will be admitted.<sup>8</sup> According to some decisions lager beer falls within the term "intoxicating liquors" if the use of it is ordinarily or commonly attended with entire or partial intoxication, and whether such is the fact is to be decided by the jury upon the evidence in the case.<sup>9</sup> But these decisions are not in accord with the weight of authority, which is to the effect that the court will take judicial notice that lager beer is malt liquor<sup>10</sup> and that it is intoxicating.<sup>11</sup> The courts are not in accord as to

1. Caswell v. State, 2 Humph. (Tenn.) 402.

2. Spirituous Qualities Held a Question of Fact. — State v. Lowry, 74 N. Car. 121; State v. Good, 31 Me. 515.

After wine "has remained a certain time, the length of which depends on the temperature and perhaps on other causes, it will, especially if the berries were fully ripe, or if sugar has been added, undergo a fermentation by which alcohol is generated, and after a certain longer time it may undergo another fermentation in which the alcohol will be converted into vinegar. So that whether at any given time alcohol is present is a question of fact to be determined by some of the tests known to scientific men or by evidence of its effects in producing intoxication." State v. Lowry, 74 N. Car. 121.

3. Wine Held a Spirituous Liquor. — State v. Giersch, 98 N. Car. 720, in which the court said: "'Spirituous' means containing, partaking of, spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. Hence spirituous liquors imply such liquors as above defined — as contain alcohol and thus have spirit — no matter by what particular name denominated, or in what liquid form or combination they may appear." See also State v. Nash, 97 N. Car. 514, in which the question is discussed but not decided; and Jones v. Surprise, 64 N. H. 243, where it was held that a sale of intoxicating wine is prohibited by a statute prohibiting the sale of "spirituous" liquors. The statute defined the term "intoxicating liquors" as follows: "By the words 'spirit,' 'spirituous,' or 'intoxicating liquors,' shall be intended all spirituous or intoxicating liquor and all mixed liquor any part of which is spirituous or intoxicating, unless otherwise expressly declared."

4. Beer — Whether Considered Vinous or Spirituous Liquor. — State v. Giersch, 98 N. Car. 720.

5. Generally Held Not a Spirituous Liquor. — Tinker v. State, 90 Ala. 647; State v. Brindle, 28 Iowa 512; Gnadinger v. Com., 4 Ky. L. Rep. 514; King v. Com., 4 Ky. L. Rep. 623; Fritz v. State, 1 Baxt. (Tenn.) 15; State v. Oliver, 26 W. Va. 426, 53 Am. Rep. 79.

6. Not a Vinous Liquor. — Tinker v. State, 90 Ala. 647; State v. Brindle, 28 Iowa 512.

7. Lager Beer — Whether Considered Intoxicating. — Com. v. Anthes, 12 Gray (Mass.) 29.

8. Com. v. Anthes, 12 Gray (Mass.) 29; Com. v. Bubser, 14 Gray (Mass.) 83; Com. v. Brelsford, 161 Mass. 63. Compare State v. Cloughly, 73 Iowa 626, in which it was held that where the statute classes beer as intoxicating, the burden is on the person charged with the sale of beer to show that the beer he sold was not intoxicating, if he so claims.

Statutes Providing that Liquors Containing Certain Amount of Alcohol Will Be Deemed Intoxicating. — Where it is provided by statute that "lager beer," Com. v. Snow, 133 Mass. 575, or "malt liquors," State v. Guinness, 16 R. I. 401, containing more than a designated percent, of alcohol shall be deemed intoxicating, it is immaterial whether such liquors are not intoxicating, and evidence to show that fact will not be admitted.

9. Lager Beer — Whether Intoxicating, Question for Jury. — People v. Zeiger, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 355; People v. Hart, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 289; Dillman v. People, 4 N. Y. Wkly. Dig. 251; People v. Schewe, 29 Hun (N. Y.) 122. See also Rau v. People, 63 N. Y. 277.

10. Judicial Knowledge that Lager Beer Is Intoxicating Malt Liquor. — Watson v. State, 55 Ala. 159; Adler v. State, 55 Ala. 16; Tinker v. State, 90 Ala. 647; Waller v. State, 38 Ark. 656; Netso v. State, 24 Fla. 363; State v. Goyette, 11 R. I. 592; State v. Rush, 13 R. I. 198.

11. Judicial Knowledge that Lager Beer Is Intoxicating. — State v. Church, 6 S. Dak. 89; State v. Giersch, 98 N. Car. 720; State v. Rush, 13 R. I. 198; State v. Gravelin, 16 R. I. 408; State v. Kibling, 63 Vt. 636.

Strong Beer is an intoxicating liquor within the meaning of the statutes regulating or prohibiting the sale of intoxicating liquors. People v. Hawley, 3 Mich. 330; Excise Com'rs v. Taylor, 21 N. Y. 173; Nevin v. Ladue, 3 Den. (N. Y.) 43; Excise Com'rs v. Freeoff, (Supm. Ct. Spec. T.) 17 How. Pr. (N. Y.) 442; Markle v. Akron, 14 Ohio 586. Contra, People v. Crilley, 20 Barb. (N. Y.) 246. It has been held, though, that fermented beer is not strong beer, and that the defendant's admission that he had sold "ale, strong beer, or fermented beer," without a license, does not prove him guilty of an offense. Nevin v. Ladue, 3 Den. (N. Y.) 437.



the meaning of the word "beer" when taken in its ordinary acceptation. It is a fermented liquor and is produced mainly from malt, but it may also be produced by the fermentation of various other substances, such as ginger, spruce, etc. In a number of decisions it is held that the courts cannot take judicial notice that beer is an intoxicating liquor, and that in the absence of evidence as to its quality and effect it does not import an intoxicating liquor.<sup>1</sup> These decisions proceed upon the theory that the term "beer" includes both intoxicating and non-intoxicating liquors, and cannot be said, in its ordinary meaning, necessarily to imply an intoxicating drink.<sup>2</sup> On the other hand, the doctrine maintained by the weight of authority is that the word "beer," without qualification, in its ordinary acceptation imports a malt and intoxicating liquor,<sup>3</sup> and that the court will take judicial notice of this fact;<sup>4</sup> and if on a prosecution for selling beer the defendant is shown to have made the sale charged, it is competent for him to show that the beer was not intoxicating, but if he relies on this as a defense, the burden is on him to show it. In the absence of evidence to the contrary, beer will always be presumed to be an intoxicating liquor.<sup>5</sup>

**"Pop Beer."**—Where the evidence establishes beyond reasonable doubt that the liquor sold is lager beer it makes no difference whether the liquor sold was "pop beer" or home-made beer. *State v. Kibling*, 63 Vt. 636.

**1. View that the Word "Beer" Does Not Import Intoxicating Liquor.**—*Netso v. State*, 24 Fla. 363; *Hansberg v. People*, 120 Ill. 21, 60 Am. Rep. 549; *Com. v. Hardiman*, 9 Gray (Mass.) 136; *Com. v. Bloss*, 116 Mass. 56; *Blatz v. Rohrbach*, 116 N. Y. 450 [*overruling People v. Wheelock*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 9]; *State v. Beswick*, 13 R. I. 220, 43 Am. Rep. 26; *State v. Sioux Falls Brewing Co.*, 5 S. Dak. 39.

**2. Reason for Rule.**—See cases cited in preceding note.

In *State v. Beswick*, 13 R. I. 220, 43 Am. Rep. 26, "the [lower] court instructed the jury that beer is a well-known malt liquor, and if the defendant sold under that name something which was not a malt liquor, it ought to appear in the testimony, or otherwise the jury should presume it was a malt liquor. We think this was error. We do not think there is any presumption of law that when a man speaks of beer he means a malt liquor, but we think that what he means is purely a question of fact for the jury. It is matter of common knowledge that there are beverages containing neither malt nor any other intoxicating ingredient which are called beers."

And see *BEER*, vol. 3, p. 907.

**3. View that Beer Imports a Malt and Intoxicating Liquor**—*United States v. Ducournau*, 54 Fed. Rep. 138.

*Georgia*.—*Snider v. State*, 81 Ga. 755, 12 Am. St. Rep. 350.

*Indiana*.—*Myers v. State*, 93 Ind. 251 [*overruling Lathrope v. State*, 50 Ind. 555; *Schlosser v. State*, 55 Ind. 82; *Shaw v. State*, 56 Ind. 188; *Plunkett v. State*, 69 Ind. 68; *Kurz v. State*, 79 Ind. 488]; *Douglas v. State*, 21 Ind. App. 302; *Welsh v. State*, 126 Ind. 71; *Dant v. State*, 106 Ind. 79; *Stout v. State*, 96 Ind. 407; *Mullen v. State*, 96 Ind. 304.

*Kansas*.—*State v. Teissedre*, 30 Kan. 477; *State v. Jenkins*, 32 Kan. 480; *State v. May*, 52 Kan. 53; *State v. Volmer*, 6 Kan. 371.

*Minnesota*.—*State v. Dick*, 47 Minn. 375;

*State v. Tisdale*, 54 Minn. 105; *State v. Baden*, 37 Minn. 212.

*Missouri*.—*State v. Houts*, 36 Mo. App. 265; *State v. Effinger*, 44 Mo. App. 81.

*Nebraska*.—*Kerkow v. Bauer*, 15 Neb. 150. *New Jersey*.—*Murphy v. Montclair*, 39 N. J. L. 673.

*Texas*.—*Whitcomb v. State*, 2 Tex. Civ. App. 301.

*Wisconsin*.—*Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621.

And see *BEER*, vol. 3, p. 907.

**4. Judicial Knowledge that Beer Is Intoxicating.**—*U. S. v. Ducournau*, 54 Fed. Rep. 138; *Myers v. State*, 93 Ind. 251; *Douglas v. State*, 21 Ind. App. 302; *State v. Teissedre*, 30 Kan. 477; *State v. Effinger*, 44 Mo. App. 81; *Maier v. State*, 2 Tex. Civ. App. 296; *Whitcomb v. State*, 2 Tex. Civ. App. 301; *Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621.

**Use of the Word "Beer" by Witnesses.**—When the word "beer" is used by a witness the court will take judicial notice that it means a malt and intoxicating liquor. *State v. Teissedre*, 30 Kan. 477; *State v. Jenkins*, 32 Kan. 480; *State v. Dick*, 47 Minn. 375; *Maier v. State*, 2 Tex. Civ. App. 296; *Briffitt v. State*, 32 Kan. 480, 46 Am. Rep. 621.

**Use of the Word "Beer" in Indictment.**—When the word "beer" is used in an indictment it will be taken to mean beer in the common acceptance; to wit, a fermented liquor which contains alcohol. *State v. Houts*, 36 Mo. App. 265; *Murphy v. Montclair*, 39 N. J. L. 673.

**Use of the Word "Beer" in Petition on Bond.**—Where the word "beer" is used in a petition in an action on a liquor dealer's bond, the court will take judicial notice that a malt and intoxicating liquor is meant. *Maier v. State*, 2 Tex. Civ. App. 296.

**5. Burden on Defendant to Show that Beer Sold Is Not Intoxicating.**—*Scout v. State*, 96 Ind. 407; *State v. Spiers*, 103 Iowa 711; *State v. Teissedre*, 30 Kan. 477; *State v. Jenkins*, 32 Kan. 480; *Maier v. State*, 2 Tex. Civ. App. 296; *State v. May*, 52 Kan. 53.

**Competency of Evidence.**—While it is competent to show that the beer sold was not intoxicating, evidence that under a certain formula a non-intoxicating liquor may be made which is



8. Ale. — Ale is a fermented<sup>1</sup> malt liquor,<sup>2</sup> and by reason of the fact that it is produced by fermentation and not by distillation it is generally conceded that it is not a spirituous liquor within the meaning of the statutes regulating the liquor traffic.<sup>3</sup> It has been held that ale is a "strong liquor" within the meaning of a statute using that term,<sup>4</sup> and if the statutes expressly provide that ale shall be deemed an intoxicating liquor, it will be so held, and proof that it is intoxicating is unnecessary.<sup>5</sup> There is some conflict of authority on the question whether ale will be considered an intoxicating liquor in the absence of a statute expressly so providing. An examination of the reported decisions discloses one holding and one dictum to the effect that it will be so considered without proof,<sup>6</sup> and another decision to the effect that ale will be deemed an intoxicating liquor unless expressly excepted from the operation of the statute.<sup>7</sup> On the other hand, there is a decision to the effect that it is a question for the jury to determine whether ale is or is not an intoxicating liquor.<sup>8</sup>

9. Porter. — Porter, it has been said, is embraced in the term "malt liquors."<sup>9</sup>

sometimes called beer is wholly irrelevant in the absence of proof that the beer sold was made from such formula. *State v. Jenkins*, 32 Kan. 480.

"Hop Beer." — On a prosecution for selling a liquid called "hop beer" it is for the jury to determine whether it is a malt liquor and intoxicating. *State v. Starr*, 67 Me. 242; *State v. McCafferty*, 63 Me. 223.

"Botanic Beer." — The appellant sold a liquor called "botanic beer," without having a retail license for the sale of beer. It contained sugar, herbs, and water, but had no hops or malt, and had six per cent. of proof spirit. It was held that such liquor was beer within the meaning of 48 & 49 Vict., c. 51, § 4, and that the appellant was rightly convicted. *Howorth v. Minns*, 56 L. T. N. S. 316, 51 J. P. 7.

"Hop Tea." — Where a person is charged with violating the prohibition law by selling an article called "hop tea," it is for the jury to determine whether such liquor is intoxicating. *State v. May*, 52 Kan. 53.

"New Era Beer." — On a prosecution for selling spirituous and malt liquors the offense is not proved by showing that the defendant sold a drink called "New Era beer," which was not known to be intoxicating. *Connolly v. Atlanta*, 79 Ga. 664.

1. Ale a Fermented Liquor. — *State v. Lemp*, 16 Mo. 389. See also cases cited in following note.

2. Ale a Malt Liquor. — *Allred v. State*, 89 Ala. 112; *Wiles v. State*, 33 Ind. 206.

3. Ale Not a Spirituous Liquor. — *Com. v. Jordan*, 18 Pick. (Mass.) 228; *Com. v. Thayer*, 5 Met. (Mass.) 246; *Walker v. Prescott*, 44 N. H. 511; *State v. Adams*, 51 N. H. 568; *Fleming v. New Brunswick*, 47 N. J. L. 231; *People v. Crilley*, 20 Barb. (N. Y.) 246. To the contrary is *State v. Sharrer*, 2 Coldw. (Tenn.) 323; but this case is inferentially overruled by *Fritz v. State*, 1 Baxt. (Tenn.) 15.

Ale Mixed with Intoxicating Liquors. — Although ale is not a spirituous liquor it may be so mixed with liquors of that character as to bring it within the prohibition of a statute regulating or prohibiting the sale of intoxicating liquors. *Walker v. Prescott*, 44 N. H. 511.

4. Ale a Strong Liquor. — *Excise Com'rs v. Freeoff*, (Supm. Ct. Spec. T.) 17 How. Pr. (N. Y.) 442; dictum in *Nevin v. Ladue*, 3 Den. (N. Y.) 437. *Contra*, *People v. Crilley*, 20 Barb. (N. Y.) 246.

5. Ale Whether Considered Intoxicating. — *State v. Wadsworth*, 30 Conn. 55; *Com. v. Curran*, 119 Mass. 206; *Com. v. Shea*, 14 Gray (Mass.) 386; *Com. v. Locke*, 114 Mass. 288.

Statute Providing that Fermented Liquor Shall Be Deemed Intoxicating. — Ale is a fermented liquor and an intoxicating drink within the meaning of a statute providing that all fermented drinks shall be considered intoxicating and prohibiting a sale thereof without license. *State v. Lemp*, 16 Mo. 389.

6. Whether Considered an Intoxicating Liquor — Affirmative View. — *People v. Hawley*, 3 Mich. 330; dictum in *Blatz v. Rohrbach*, 116 N. Y. 450.

7. *Johnston v. State*, 23 Ohio St. 556.

8. View that Intoxicating Qualities Question of Fact. — *State v. Biddle*, 54 N. H. 379. See also *State v. Barron*, 37 Vt. 57, in which it is said that whether ale is intoxicating or not is a question of fact, but the court in this case arrived at a result practically in opposition to that stated in the text, by holding that it may be submitted to the jury without evidence, since everybody understands that it is intoxicating, and that the jury may act upon such common knowledge. In this case the court further said: "It is possible that ale may be manufactured with so small a proportion of the intoxicating properties as not to come within the class that are denominated intoxicating liquors. If so it must form an exception to the general rule, and if a respondent would avail himself of such a fact, it is incumbent upon him to prove it."

"Hop Ale." — A court does not judicially know that "hop ale" is intoxicating. There must be affirmative proof to establish this fact, and where the prosecuting witness testifies that he does not know whether this substance is intoxicating or not, a conviction cannot be sustained. *Barnes v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 491.

9. Porter a Malt Liquor. — *Allred v. State*, 89 Ala. 112.



It is not a spirituous liquor,<sup>1</sup> but if designated by statute as intoxicating liquor, it would seem that no proof that it is such will be necessary.<sup>2</sup>

**10. Cider.** — Where the word "cider" is used in the statutes regulating or prohibiting the traffic in liquors, it will be held to include all kinds of cider, whether fermented or unfermented, and whether it possesses intoxicating properties or is not intoxicating.<sup>3</sup> This is also the case where the statute declares that cider shall be considered an intoxicating liquor;<sup>4</sup> and where the statute prohibits the sale of fermented cider, this will include all fermented cider regardless of the stage of fermentation or intoxicating properties.<sup>5</sup> It has been held — properly, it is believed — that cider is not a vinous<sup>6</sup> or a spirituous liquor within the meaning of statutes using these terms.<sup>7</sup> If the statute enumerates "fermented liquors" among others, fermented or "hard" cider is included.<sup>8</sup> If the statute enumerates certain liquors, but provides that "the enumeration shall not prevent any other pure or mixed liquors from being regarded as intoxicating," it has been held that on a prosecution thereunder for selling cider it must be proved that the cider was intoxicating.<sup>9</sup> According to some decisions it is a matter of common knowledge that fermented or hard cider is intoxicating, and no proof of such fact is necessary;<sup>10</sup> but another decision holds that whether fermented cider is an intoxicating liquor is a question of fact, and that it cannot be determined as a matter of law by the court.<sup>11</sup>

**11. Liquors Used for Preserving Fruits and in Culinary Preparations.** — As regards fruits preserved in spirits, it is held that if the liquor in which the fruit is put up is capable of being drunk as a beverage and contains alcohol in sufficient quantities to render it intoxicating, such preparation will be within

**1. Not a Spirituous Liquor.** — *State v. Adams*, 51 N. H. 568.

**2. When Deemed an Intoxicating Liquor.** — *Com. v. Locke*, 114 Mass. 288. See also *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837, in which it was held that the sale of porter, though in a damaged condition and unpalatable so long as it retains its intoxicating properties, is illegal.

**3. Construction of Statutes Containing the Word "Cider."** — *State v. McNamara*, 69 Me. 133; *State v. Roach*, 75 Me. 123; *State v. Spaulding*, 61 Vt. 505. See also *Ex p. Noel*, 6 Montreal Leg. N. 150.

"It is said that the juice of apples is not cider until it is fermented. This is perhaps technically correct, but not in popular understanding. The apple juice when it comes from the cider press is immediately and universally called cider by the people generally. The term should be construed according to such universal use and understanding." *State v. Spaulding*, 61 Vt. 512.

**4. Construction of Statute Declaring Cider Intoxicating.** — *Com. v. Dean*, 14 Gray (Mass.) 99; *Com. v. Smith*, 102 Mass. 144.

**5. Construction of Statutes Containing Words "Fermented Cider."** — *People v. Adams*, 95 Mich. 541.

**6. Cider Not a Vinous Liquor.** — *Feldman v. Morrison*, 1 Ill. App. 460. But see *Com. v. Reyburg*, 122 Pa. St. 299, where it was held that whether or not it is a vinous liquor is a question for the jury.

**Evidence.** — Evidence that persons drinking the cider were affected as if they had been drinking whiskey or beer will authorize a submission to the jury of the question whether it was vinous or spirituous. *Com. v. Reyburg*, 122 Pa. St. 299.

**7. Cider Not a Spirituous Liquor.** — *State v. Adams*, 51 N. H. 568; *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79.

**8. Fermented Cider a Fermented Liquor.** — *People v. Foster*, 64 Mich. 715.

**9. Com. v. Chappel**, 116 Mass. 7.

**10. Whether Fermented Cider an Intoxicating Liquor.** — *State v. Valure*, 95 Iowa 401; *State v. Hutchinson*, 72 Iowa 561; *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. Rep. 570. See also *State v. McLafferty*, 47 Kan. 140, where it was held that hard cider will be presumed to be intoxicating until the contrary is shown. To the same effect see *State v. Schaefer*, 44 Kan. 90; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

**Whether Peach Cider Is Intoxicating** is a question of fact to be determined by the jury under proper instructions. *Topeka v. Zufall*, 40 Kan. 47.

**"Pure Apple Cider."** — Under a statute which requires dealers in cider except "pure apple cider" of domestic growth to obtain a license, it has been held an offense to sell fermented cider without a license. In reaching this conclusion the court said: "That pure apple cider, in the legislative mind, is something different from cider to be taxed, is quite plain. Legislatures, as well as courts, take notice of matters of common knowledge; and the custom of our farmers of selling sweet apple cider in the summer and fall was well known to them. \* \* \* The legislature was dealing in measures to exclude alcoholic drinks, and it could not have intended to legalize the sale of alcoholic cider." *State v. Crawley*, 75 Miss. 919.

**11. State v. Biddle**, 54 N. H. 379.



the meaning of the statutes regulating the liquor traffic.<sup>1</sup> If persons were allowed to evade the statutes by merely adding some other article or ingredient to intoxicating liquors when made the subject of traffic, the law could be evaded with the greatest facility by any person who desired it.<sup>2</sup> On the other hand, if only enough intoxicating liquor is used in the preservation of the fruit to impart a flavor of liquor used, the preparation is not within the meaning of the statutes.<sup>3</sup> An article generally and properly known and used for culinary purposes and not generally classed as a beverage is not within the statutes although it contains alcohol and may or does in fact produce intoxication.<sup>4</sup>

**12. Medicinal and Toilet Preparations Containing Alcohol.** — It has been held that whatever is generally and popularly known as medicine or an article for the toilet, recognized and the formula for its preparation prescribed in the United States Dispensatory or like standard authority, and not among the liquors ordinarily used as intoxicating beverages, such as tincture of gentian, paregoric, bay rum, cologne, etc., is not an intoxicating liquor within the meaning of the statutes regulating and prohibiting the traffic in intoxicating liquors, and the courts may so declare as a matter of law, notwithstanding such articles contain alcohol and may produce intoxication.<sup>5</sup>

**Question for Jury.** — Whether articles not known to the United States Dispensatory, or other similar standard authority, compounds of intoxicating liquors with other ingredients, whether put up upon a single prescription and for a single case or compounded upon a given formula and sold under a specific name, as bitters, cordials, tonics, etc., are within or without the statute, is a question of fact for the jury and not a question of law for the court.<sup>6</sup>

**Evidence.** — The composition and character of the article and the amount of alcohol in it; whether it does readily or with difficulty produce intoxication; whether it is agreeable or nauseous to the taste; whether it is used or not used as a medicine to cure disease; whether it is generally kept and sold by druggists as a medicine; whether it is frequently resorted to and used as a beverage, are competent matters to be given in evidence to determine whether the article sold is or is not within the prohibition of the statutes.<sup>7</sup>

**1. Liquors Used for Preserving Fruits — When a Violation of Statutes.** — *Ryall v. State*, 78 Ala. 410; *Musick v. State*, 51 Ark. 165; *Thurber v. Eastern Bldg., etc., Assoc.*, 116 N. Car. 75; *Petteway v. State*, 36 Tex. Crim. 97; *U. S. v. Stafford*, 20 Fed. Rep. 720. Compare *Holland v. Com.*, 7 Ky. L. Rep. 223, in which it was held that the statute was not intended to interfere with the traffic of fruits preserved in liquors; that while one trafficking in liquors under the pretense of selling fruits would be liable to the penalties announced, an indictment for selling liquors which specifies the sale of "a bottle of brandy peaches" as the act constituting the offense does not state an offense.

**2. Ryall v. State**, 78 Ala. 411.

**Illustrations.** — A conviction for selling liquor without a license is sustained by proof that the defendant sold brandy cherries in pint and quart bottles containing one half their capacity of intoxicating liquors. *Musick v. State*, 51 Ark. 165.

**3. When Not a Violation of the Statute.** — *U. S. v. Stafford*, 20 Fed. Rep. 720. In *Rabe v. State*, 39 Ark. 204, which was a prosecution for selling brandy peaches without having paid the tax and procured a license, it was held that the sale of bottles containing six peaches surrounded by one gill of syrup which tasted like strong liquor and which the witnesses

thought might intoxicate if enough were drunk, though it was very weak, was not a violation of the law.

**4. Intoxicating Liquors Used in Culinary Preparations.** — *Holcomb v. People*, 49 Ill. App. 73; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

**Extract of Lemon.** — Extract of lemon is not an intoxicating liquor within the meaning of the statutes, though it may contain sufficient alcohol to produce intoxication. *Holcomb v. People*, 49 Ill. App. 73.

**5. When Intoxicating Properties a Question for Court.** — *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284. See also *Carl v. State*, 87 Ala. 17.

**6. When Intoxicating Properties a Question for Jury.** — *Allred v. State*, 89 Ala. 112; *Carl v. State*, 89 Ala. 93; *Brantley v. State*, 91 Ala. 47; *Wadsworth v. Dunnam*, 117 Ala. 661; *Wall v. State*, 78 Ala. 418; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *State v. Coulter*, 40 Kan. 87; *Rush v. Com.*, (Ky. 1898) 47 S. W. Rep. 585; *Russell v. Sloan*, 33 Vt. 659. See also *Butler v. State*, 25 Fla. 347; *State v. Muncey*, 28 W. Va. 494.

**7. Evidence that May Be Considered in Determining Intoxicating Properties.** — *Brantley v. State*, 91 Ala. 47; *Carl v. State*, 87 Ala. 17; *Wadsworth v. Dunnam*, 98 Ala. 610; *State v. Coulter*, 40 Kan. 87; *Parrot v. Com.*, 6 Ky. L.



The fact that a moderate and reasonable use of the article will not produce intoxication will not take it out of the prohibition of the statutes. According to this standard no liquor whatever would be intoxicating.<sup>1</sup>

The Test Laid Down by a Number of Decisions is as follows: If a compound or preparation be such that the distinctive character and effects of intoxicating liquors are gone, and its use as a beverage is rendered undesirable or practically impossible by reason of the other ingredients,<sup>2</sup> and the liquor is used merely as a vehicle for or preservation of the other ingredients,<sup>3</sup> or to extract their virtues and hold them in solution,<sup>4</sup> the article will not be within the prohibition of the statute, although its use may produce intoxication. On the other hand, if the liquor is the predominant ingredient, and sufficiently retains its intoxicating qualities to render the mixture reasonably susceptible of use as a beverage, it is within the prohibition of the statute.<sup>5</sup> The laws cannot

Rep. 221; *King v. State*, 58 Miss. 739, 38 Am. Rep. 344; *Prather v. State*, 12 Tex. App. 402; *Russell v. Sloan*, 33 Vt. 659.

**Applications of Rule Governing Admission of Evidence.**—On a trial for a violation of the liquor laws by selling intoxicating bitters the state may prove the intoxicating character of the bitters by the experimental effect of their use (*Brantley v. State*, 91 Ala. 47), or by the opinion of a witness not an expert but who has had personal experience or observation which enables him to form an opinion (*Carl v. State*, 87 Ala. 17; *Parrott v. Com.*, 6 Ky. L. Rep. 221); and that the bitters were bought and used for a beverage and drunk as such by many persons of the community and elsewhere. *Carl v. State*, 87 Ala. 17. On the other hand the defendant is entitled to prove any facts or circumstances tending to show that the article sold is a medicine and not an intoxicating liquor. *Prather v. State*, 12 Tex. App. 402. And therefore the refusal of the court to allow the defendant to answer the question, "What proportion of intoxicating liquor did these bitters contain?" is erroneous. *Com. v. Pease*, 110 Mass. 412.

1. **Test in Determining Whether Preparation Within Prohibition of Statutes.**—*Wadsworth v. Dunnam*, 98 Ala. 610, 117 Ala. 661.

2. **When Not Within Prohibition.**—*U. S. v. Stubblefield*, 40 Fed. Rep. 454; *Wadsworth v. Dunnam*, 98 Ala. 610, 117 Ala. 661; *Carl v. State*, 87 Ala. 17; *State v. Laffer*, 38 Iowa 422; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *Bertrand v. State*, 73 Miss. 51; *State v. Haymond*, 20 W. Va. 18, 43 Am. Rep. 787; *Russell v. Sloan*, 33 Vt. 656. Compare *Chapman v. State*, 100 Ga. 311.

3. *King v. State*, 58 Miss. 740, 38 Am. Rep. 344; *Carl v. State*, 87 Ala. 17.

4. *U. S. v. Stubblefield*, 40 Fed. Rep. 454.

"The True Inquiry is, whether the liquor used is necessary to extract and preserve the medicinal qualities of the other ingredients, and its distinctive intoxicating character is so counteracted, or greatly impaired, that its reasonable and ordinary use will not intoxicate. \* \* \* If the compound \* \* \* would nauseate before it would intoxicate, it is not desirable, and is not reasonably susceptible of being used as a beverage, or as a substitute for the ordinary intoxicating drinks." *Carl v. State*, 89 Ala. 98.

**Preparations Held Not Within Prohibition of Statutes—Gum Camphor and Alcohol.**—A mix-

ture of gum camphor and alcohol sold as medicine is not within the prohibition of the statutes. It is unpalatable as a beverage and unlikely to be used as such. *State v. Haymond*, 20 W. Va. 18, 43 Am. Rep. 787.

"*Lemon Ginger*," and "*Empire Drug Bitters*,"—These preparations consist of about one-third alcohol and the rest distilled water and extracts from herbs, etc. The amount of alcohol used in this preparation is not greater than is necessary to extract the curative properties from the herbs used. They are medicinal preparations notwithstanding that men of strong appetites for drink may occasionally buy them and become intoxicated by an immoderate use thereof, and one who deals in them is not a liquor dealer within the statutes defining a liquor dealer as one who sells distilled spirits or wines. *U. S. v. Stubblefield*, 40 Fed. Rep. 454. So it has been held that a sale of tincture of ginger pharmaceutically prepared in good faith as a medicine by a duly licensed druggist, was not within the prohibition of the statutes. *Bertrand v. State*, 73 Miss. 51.

"*Busby's Bitters*,"—On the other hand, a conviction may be had on proof of a sale of "*Busby's bitters*" or "*Busby's improved system invigorant*" or decoction of whiskey compounded in quantities sufficient to intoxicate, with bitter herbs, barks, and other medicinal ingredients, which was bad for use as a beverage, and when so used produced intoxication. *Wall v. State*, 78 Ala. 417.

"*Dr. Anderson's Bitters*,"—So it has been held that evidence that the defendant sold without license a liquid called "*Dr. Anderson's bitters*," which the purchaser thought tasted or smelt like whiskey, though he did not believe it contained intoxicating liquor, is sufficient to sustain a conviction. *Rush v. Com.*, (Ky. 1898) 47 S. W. Rep. 585.

*Cordial*.—And a sale of a cordial made of whiskey sweetened and scented with peppermint has been held a violation of the statute. *State v. Bennet*, 3 Harr. (Del.) 565.

5. **When Within Prohibition.**—*Carl v. State*, 87 Ala. 17, 89 Ala. 93; *Wall v. State*, 78 Ala. 418; *Wadsworth v. Dunnam*, 98 Ala. 610, 117 Ala. 661; *Faircloth v. State*, 73 Ga. 426; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *State v. Laffer*, 38 Iowa 422; *Com. v. Ramsdell*, 130 Mass. 68; *King v. State*, 58 Miss. 740, 38 Am. Rep. 344; *Bertrand*



be evaded by disguising intoxicating liquors sold as a beverage with some tincture or preparation which will give to the liquor, to some extent, the flavor or appearance of medicine,<sup>1</sup> or by mixing with the liquor drugs, barks, or seeds which have medicinal qualities.<sup>2</sup>

**Statutes under Which Tests Not Applicable.**—The tests stated in the preceding paragraph are not applicable in some jurisdictions, because the provisions of some statutes are broader and make special mention of the preparations discussed.<sup>3</sup>

**III. CONSTITUTIONALITY OF LIQUOR LAWS**—1. **Statutes Prohibiting Manufacture and Sale of Intoxicating Liquors.**—The legislatures of the respective states, in the exercise of the police power, have authority to enact laws entirely prohibiting the manufacture and sale of intoxicating liquors within the state.<sup>4</sup> This authority rests upon the acknowledged right of the states of

*v. State*, 73 Miss. 51; *James v. State*, 21 Tex. App. 355; *Russell v. Sloan*, 33 Vt. 656.

1. *Russell v. Sloan*, 33 Vt. 656.

2. *King v. State*, 58 Miss. 740, 38 Am. Rep. 344.

3. **Decisions under Certain Statutes.**—Because of the sweeping provisions contained in some statutes, the tests stated in the text are not applicable in all jurisdictions. Thus the *Arkansas* Court has held, under a statute prohibiting sales without license of any ardent liquors or "any compound or preparations thereof, commonly called tonics, bitters, or medicated liquors," in any quantity or for any purpose whatsoever, that it is a violation of the law to sell preparations called "home bitters," and "home sanative cordial," which contain twenty per cent. of alcohol, although the alcohol is necessary to preserve the other ingredients, and the preparations, if taken largely, would act as an emetic and are not capable of being used as a beverage. *Gostorf v. State*, 39 Ark. 450. The same ruling was made with respect to a similar preparation called "Fitzpatrick's bitters," in *Foster v. State*, 36 Ark. 258. In the later case of *Davis v. State*, 50 Ark. 17, the court seems to have receded somewhat from the position taken by the earlier cases. In this case the defendant was convicted of selling without license an intoxicating compound called "McLean's strengthening cordial," but the reviewing court approved the following instructions: "If the jury believe from the evidence that the article sold by the defendant was not used and could not be used as a beverage, you would be authorized to acquit the defendant," and that "it was not the intention of the law to prohibit the sale of medicines because they contained a proportion of alcohol;" and that therefore the fact that "the article sold by the defendant contained alcohol is not of itself evidence that the sale of such article without license was unlawful."

In *Missouri* it has been held, under a statute making it unlawful to sell without license intoxicating liquors and declaring that intoxicating liquors shall be construed to mean spirituous liquors, or any composition of which spirituous liquor is a part, that the sale without a license of a bitters containing intoxicating liquors was a violation of the law, though the preparation sold was authorized and stamped by the United States to be sold as a "bitters"—a proprietary medicine, and that it was immaterial that an excise tax had

been paid on it to the United States government. *State v. Lillard*, 78 Mo. 136. So under a statute prohibiting druggists from selling medicated bitters containing alcohol, without obtaining a license, a sale without a license of medicated bitters containing alcohol was held a violation of the statute, although the alcohol used was only sufficient for the purpose of securing and preserving the medicinal properties of the medicine, and was a necessary and constituent element to maintain and preserve the medicinal qualities. *State v. Wilson*, 80 Mo. 303.

In *Connecticut* it has been held, under a statute providing that the term "spirituous liquors and intoxicating liquors" shall be held to include "all mixed liquors" and "all mixed liquor of which a part is spirituous and intoxicating," that spirituous and intoxicating liquors do not lose their identity when compounded with drugs and chemicals for use as medicine. *State v. Gray*, 61 Conn. 39.

In *Texas* it has been held, under a statute requiring persons who propose to pursue the sale of spirituous, vinous, or malt liquors, or "intoxicating bitters," to obtain a license, that an indictment charging the illegal sale of intoxicating liquors will be supported by proof of the sale of intoxicating medicated bitters. *Prinzel v. State*, 35 Tex. Crim. 274.

4. **Power to Prohibit Manufacture and Sale of Intoxicating Liquor—United States.**—*In re Rahrer*, 140 U. S. 545; *Cantini v. Tillman*, 54 Fed. Rep. 969; *Munn v. Illinois*, 94 U. S. 113; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Tanner v. Alliance*, 29 Fed. Rep. 196; *Foster v. Kansas*, 112 U. S. 205; *Eilenbecker v. Plymouth County*, 134 U. S. 31; *Mugler v. Kansas*, 123 U. S. 623; *Kansas v. Bradley*, 26 Fed. Rep. 289; *In re Brosnahan*, 18 Fed. Rep. 62; *License Cases*, 5 How. (U. S.) 504; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Crowley v. Christensen*, 137 U. S. 86.

*Georgia.*—*Howell v. State*, 71 Ga. 225, 51 Am. Rep. 259; *Perdue v. Ellis*, 18 Ga. 586.

*Illinois.*—*Jones v. People*, 14 Ill. 196; *Kettering v. Jacksonville*, 50 Ill. 39; *Schwuchow v. Chicago*, 68 Ill. 444.

*Indian Territory.*—*U. S. v. Cohn*, (Indian Ter. 1899) 52 S. W. Rep. 38.

*Iowa.*—*Kaufman v. Dostal*, 73 Iowa 691; *McLane v. Bonn*, 70 Iowa 752; *Criag v. Florang*, 71 Iowa 761; *McLane v. Leicht*, 69 Iowa 401; *Drake v. Kaiser*, 73 Iowa 703; *Dickinson v. Heeb Brewing Co.*, 73 Iowa 705; *Santo v.*



the Union to control their purely internal affairs and in so doing to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the general powers of the government.<sup>1</sup> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens and to the preservation of good order and the public morals.<sup>2</sup>

**Specific Objections.** — The fact that a statute prohibits the sale of liquors which may have been manufactured or bought previous to its passage does not, for that reason, make it an *ex post facto* law, since so far as it prohibits such selling it is prospective, and if it lessens the value of such liquors, these civil consequences do not make it retroact criminally in such sense as to bring it within the definition of an *ex post facto* law.<sup>3</sup> So it cannot be urged as an objection that such legislation deprives a person of property without due process of law simply because it diminishes the value of property owned before the enactment of the statute.<sup>4</sup> And these statutes are not objectionable as being an appropriation of private property for the public benefit, in the sense in which a taking of property by the exercise of the state's power of eminent domain is such a taking or appropriation.<sup>5</sup> Neither are they in violation of that part of the Fourteenth Amendment to the United States Constitution which declares that no state shall make laws abridging the privileges and immunities of citizens of the United States.<sup>6</sup> And the fact that the statutes prohibit the manufacture of intoxicating liquors for one's use cannot be urged

State, 2 Iowa 165, 63 Am. Dec. 487; State v. Donehey, 8 Iowa 396.

*Kansas.* — State v. Lindgrove, 1 Kan. App. 51; Haug v. Gillett, 14 Kan. 142; State v. Whisner, 35 Kan. 277; Prohibitory Amendment Cases, 24 Kan. 700; Foster v. State, 32 Kan. 765.

*Kentucky.* — Stickrod v. Com., 86 Ky. 285; Com. v. Weller, 14 Bush (Ky.) 218, 29 Am. Rep. 407.

*Michigan.* — People v. Gallagher, 4 Mich. 244; People v. Hawley, 3 Mich. 330.

*Missouri.* — Austin v. State, 10 Mo. 591.

*Nebraska.* — Hunzinger v. State, 39 Neb. 653; Shannon v. State, 39 Neb. 658; Soehl v. State, 39 Neb. 659; Rowels v. State, 39 Neb. 659.

*Rhode Island.* — State v. Fitzpatrick, 16 R. I. 54; State v. Paul, 5 R. I. 185; State v. Keeran, 5 R. I. 497.

*South Dakota.* — State v. Brennan, 2 S. Dak. 384.

*Vermont.* — State v. Lovell, 47 Vt. 493.

*Wisconsin.* — State v. Ludington, 33 Wis. 107.

1. **Basis of Legislative Power.** — State v. Brennan, 2 S. Dak. 384.

2. **Extent of Police Power.** — Boston Beer Co. v. Massachusetts, 97 U. S. 33; License Cases, 5 How. (U. S.) 504; Mugler v. Kansas, 123 U. S. 623. See also the title POLICE POWER.

**Traffic in Liquors on Different Footing from Other Kinds of Business.** — Restraints upon the traffic in spirituous liquors are not like such as restrict the ordinary vocations of life which advance human happiness, or trade and commerce that neither produce immorality, suffering, nor want. This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed on it might be obnoxious as an illegal restraint

of trade, when applied to other pursuits. Schwuchow v. Chicago, 68 Ill. 444.

3. **Ex Post Facto Laws.** — State v. Paul, 5 R. I. 185; State v. Keeran, 5 R. I. 497. See generally the title EX POST FACTO LAWS, vol. 12, p. 525.

4. **Not a Taking of Property Without Due Process of Law.** — Mugler v. Kansas, 123 U. S. 623; Tanner v. Alliance, 29 Fed. Rep. 196; Drake v. Kaiser, 73 Iowa 703; Dickinson v. Heeb Brewing Co., 73 Iowa 705; People v. Gallagher, 4 Mich. 244. And see the title DUE PROCESS OF LAW, vol. 10, p. 287.

Legislation of this character may be enforced against persons who, at the time, happened to own property whose chief value consisted in its fitness for the purposes prohibited, without compensating them for the diminution in its value, resulting from the prohibitory enactments. Mugler v. Kansas, 123 U. S. 623.

5. **Not an Appropriation of Private Property for Public Benefit.** — Mugler v. Kansas, 123 U. S. 623. See also the title EMINENT DOMAIN, vol. 10, p. 1043.

6. **Not an Abridgment of Immunities and Privileges** — United States. — Bartemeyer v. Iowa, 18 Wall. (U. S.) 129; Mugler v. Kansas, 123 U. S. 623; Kansas v. Bradley, 26 Fed. Rep. 289; Foster v. Kansas, 112 U. S. 205; Tanner v. Alliance, 29 Fed. Rep. 196.

*Iowa.* — Kaufman v. Dostal, 73 Iowa 691; McLane v. Leicht, 69 Iowa 401; Dickinson v. Heeb Brewing Co., 73 Iowa 705.

*Kansas.* — State v. Lindgrove, 1 Kan. App. 51; Prohibitory Amendment Cases, 24 Kan. 700.

*South Dakota.* — State v. Brennan, 2 S. Dak. 384.

See the title CIVIL RIGHTS, vol. 6, p. 68; CONSTITUTIONAL LAW, vol. 6, p. 965.



as an objection to their constitutionality.<sup>1</sup> It has likewise been urged as an objection to this species of legislation that it impairs the obligation of contracts; but the courts have not so considered it.<sup>2</sup>

**2. Statutes Regulating Sale of Intoxicating Liquors.** — In a previous section it has been shown that the legislature may entirely prohibit the sale of intoxicating liquors, and if this be so it follows, as a necessary consequence, that it may regulate and restrain sales of liquors. Indeed, this power has been too long and too well settled to admit of any question.<sup>3</sup> The legislature may regulate the mode and manner and the circumstances of conducting the liquor trade, and may surround the right to pursue the trade with such conditions, restrictions, and limitations as it may deem proper.<sup>4</sup>

**3. License Laws** — *a. IN GENERAL.* — In exercising the power to regulate the sale of intoxicating liquors, the legislature may validly require one desiring to engage in the business of selling intoxicating liquors to take out a license as a condition of doing business, and may make it an offense to sell without obtaining such license.<sup>5</sup> There is nothing in a requirement of this nature

1. *Mugler v. Kansas*, 123 U. S. 623; *State v. Lovell*, 47 Vt. 493.

2. **Impairing Obligation of Contracts.** — *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Brown v. State*, 82 Ga. 224; *People v. Hawley*, 3 Mich. 330; *State v. Paul*, 5 R. I. 185. See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1038.

In *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 667, it was said: "The necessary powers of the legislature over all subjects of internal police, being a part of the general grant of legislative power given by the constitution, cannot be sold, given away, or relinquished. Irrevocable grants of property and franchises may be made, if they do not impair the supreme authority to make laws for the right government of the state; but no one legislature can curtail the power of its successors to make such laws as they may deem proper, in matters of police."

**Application of Rule.** — A statute which forbids the sale of intoxicating liquors without excepting persons holding unexpired licenses, operates to revoke such license, but it is not for that reason unconstitutional, because a license is not a contract, but a mere form. *Brown v. State*, 82 Ga. 224.

**3. Constitutionality of Statutes Regulating Sales** — *United States*. — License Cases, 5 How. (U. S.) 504; *Mugler v. Kansas*, 123 U. S. 623; *Giozza v. Tiernan*, 148 U. S. 657; *Kidd v. Pearson*, 128 U. S. 1; *U. S. v. Ronan*, 33 Fed. Rep. 117.

*Arizona*. — *Territory v. Connell*, (Ariz. 1888) 16 Pac. Rep. 209.

*California*. — *Matter of Guerrero*, 69 Cal. 88; *Matter of Bickerstaff*, 70 Cal. 35.

*Georgia*. — *Whitten v. Covington*, 43 Ga. 421.

*Indiana*. — *Harrison v. Lockhart*, 25 Ind. 112.

*Iowa*. — *Our House No. 2 v. State*, 4 Greene (Iowa) 172; *Zumhoff v. State*, 4 Greene (Iowa) 526.

*Kansas*. — *Monroe v. Lawrence*, 44 Kan. 607; *Matter of Jahn*, 55 Kan. 694.

*Kentucky*. — *Anderson v. Com.*, 9 Bush (Ky.) 569; *Burnside v. Lincoln County Ct.*, 86 Ky. 423; *Stickrod v. Com.*, 86 Ky. 285.

*Louisiana*. — *Garrett v. Aby*, 47 La. Ann. 618.

*Maine*. — *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782; *Lunt's Case*, 6 Me. 412.

*Maryland*. — *Cahen v. Jarrett*, 42 Md. 575; *Keller v. State*, 11 Md. 525, 69 Am. Dec. 226.

*Mississippi*. — *Rohrbacher v. Jackson*, 51 Miss. 735.

*Missouri*. — *State v. Searcy*, 20 Mo. 489.

*New Hampshire*. — *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611.

*New York*. — *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.

*Rhode Island*. — *State v. Gravelin*, 16 R. I. 407.

*South Carolina*. — *State v. Turner*, 18 S. Car. 106.

*Texas*. — *Ex p. Bell*, 24 Tex. App. 428; *Bell v. State*, 28 Tex. App. 96.

*Wisconsin*. — *State v. Ludington*, 33 Wis. 107.

**4. Power of Legislature to Regulate Manner of Conducting Traffic.** — *Giozza v. Tiernan*, 148 U. S. 657; *Kidd v. Pearson*, 128 U. S. 1; *Ex p. Bell*, 24 Tex. App. 428.

**Basis of Power to Regulate.** — "Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and therefore it has long been settled that the law-making power may throw such restraints around that traffic as, in the judgment of that department of the government, may be necessary to secure the peace and welfare of society, and persons who wish to deal in such an article must conform to the regulations prescribed, or they cannot claim the right so to do." *State v. Turner*, 18 S. Car. 106. See also *Charleston v. Ahrens*, 4 Strobb. L. (S. Car.) 241; License Cases, 5 How. (U. S.) 504.

**5. Constitutionality of Statutes Requiring License** — *United States*. — *Crowley v. Christensen*, 137 U. S. 86; *U. S. v. Ronan*, 33 Fed. Rep. 117; *Gray v. Connecticut*, 159 U. S. 74; License Tax Cases, 5 Wall. (U. S.) 462; *Miller v. Ammon*, 145 U. S. 421; *Giozza v. Tiernan*, 148 U. S. 657; *Kidd v. Pearson*, 128 U. S. 1; *Reymann Brewing Co. v. Bristol*, 92 Fed. Rep. 28.

*Arizona*. — *Territory v. Connell*, (Ariz. 1888) 16 Pac. Rep. 209.

*California*. — *Matter of Guerrero*, 69 Cal. 88.

*Illinois*. — *Dennehy v. Chicago*, 120 Ill. 627.

*Indiana*. — *Haggart v. Stehlin*, 137 Ind. 43; *Thomasson v. State*, 15 Ind. 449; *O'Dea v. State*, 57 Ind. 31.



which is in violation of any state or federal constitutional provision. These statutes do not deny the equal protection of the laws or abridge the privileges and immunities of a citizen,<sup>1</sup> nor can they be objected to on the ground that they impose a tax or take private property for public use without compensation.<sup>2</sup>

**An Exercise of Police Power.** — The licensing of the business of selling intoxicating liquors is an exercise, not of the taxing power, but of the police power of the state.<sup>3</sup>

**Regulating Conditions upon Which Licenses Granted.** — So, also, in addition to the power to require licenses of those desiring to engage in the traffic, the legislature has the further power to impose what conditions it thinks proper upon which licenses may be granted, and to regulate the conduct of the business after the applicant has obtained a license.<sup>4</sup> Thus the legislature may confer upon municipalities the right to determine the places where saloons may be kept;<sup>5</sup> leave the question of the granting of a license to a vote of the electors of a municipality;<sup>6</sup> limit the number of licenses in any given locality;<sup>7</sup> and classify by population, for the purpose of fixing a minimum license fee in the several townships and cities.<sup>8</sup> It may require saloon keepers to keep their licenses posted in a conspicuous place in their saloons<sup>9</sup> or to conduct their business in a room where no other kind of business is carried on, and may prohibit music and other amusements in a place where liquor is sold.<sup>10</sup> So it may prohibit the giving away of any food to be eaten on the premises where liquor is sold;<sup>11</sup> require druggists to keep a record of all prescriptions compounded by them, and to produce them in court whenever lawfully required to do so, and may make a failure to do so a misdemeanor;<sup>12</sup> and regulate the

*Kentucky.* — *Mason v. Lancaster*, 4 Bush (Ky.) 406.

*Louisiana.* — *State v. Boston Club*, 45 La. Ann. 585; *State v. Mattie*, 48 La. Ann. 728.

*Maryland.* — *Keller v. State*, 11 Md. 525, 69 Am. Dec. 226.

*Massachusetts.* — *Com. v. Fredericks*, 119 Mass. 199; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Martin*, 108 Mass. 29, note; *Com. v. Blackington*, 24 Pick. (Mass.) 352.

*Michigan.* — *Wolf v. Lansing*, 53 Mich. 367; *Kitson v. Ann Arbor*, 26 Mich. 325.

*Minnesota.* — *Rochester v. Upman*, 19 Minn. 108; *Winona v. Whipple*, 24 Minn. 61; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344.

*New Hampshire.* — *Pierce v. State*, 13 N. H. 536.

*New York.* — *Ingersoll v. Skinner*, 1 Den. (N. Y.) 540.

*Pennsylvania.* — *Doberneck's Application*, 35 Pa. L. J. 476, 45 Leg. Int. (Pa.) 256; *Boyle's Retail Liquor License*, 190 Pa. St. 577.

*Rhode Island.* — *State v. Peckham*, 3 R. I. 289.

*South Carolina.* — *Charleston v. Ahrens*, 4 Strobb. L. (S. Car.) 241.

*Vermont.* — *Bancroft v. Dumas*, 21 Vt. 456.

*Wisconsin.* — *State v. Ludington*, 33 Wis. 107; *Tenney v. Lenz*, 16 Wis. 566.

1. Not in Violation of Fourteenth Amendment. — *Crowley v. Christensen*, 137 U. S. 86; *U. S. v. Ronan*, 33 Fed. Rep. 117.

2. Not a Taking of Private Property for Public Use. — *Rochester v. Upman*, 19 Minn. 108.

3. Licensing Sales an Exercise of Police Power. — *Rock County v. Edgerton*, 90 Wis. 288.

4. Imposing Conditions upon Which License Granted. — *U. S. v. Ronan*, 33 Fed. Rep. 117; *Cahen v. Jarrett*, 42 Md. 571; *State v. Luding-*

*ton*, 33 Wis. 107. See also decisions cited in subsequent notes in this section.

A license is held by the licensee "not as a matter of primary and absolute right, but as a favor, which, like all favors, must be received upon such terms and conditions, and subject to such burdens and inconveniences, as the donor thinks proper to impose, and the donee elects to accept. Unlike other trades and employments which it is the right of the citizen to pursue undisturbed by arbitrary legislative interference and control, the person who engages in this must, within the limitations above indicated, do so subject to such disadvantages and restraints as may be prescribed by the law-making power which authorizes it." *State v. Ludington*, 33 Wis. 115.

5. Designating Places Where Saloons May Be Kept. — *Sherlock v. Stuart*, 96 Mich. 193.

6. Leaving Question of License to Voters of Municipality. — *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344.

7. Limiting Number of Licenses in Designated Locality. — *Decie v. Brown*, 167 Mass. 290.

8. Classification by Population to Determine Amount of Fee. — *Paul v. Judge*, 50 N. J. L. 585, in which it was said that this was a valid classification and imparted to the law the quality of general legislation.

9. Requiring Posting of Licenses. — *Ex p. Bell*, 24 Tex. App. 428.

10. Requiring that No Other Business Be Conducted in Saloon. — *State v. Gerhardt*, 145 Ind. 439.

11. Prohibiting Free Lunches. — *People v. City Prison*, 6 N. Y. App. Div. 520.

12. Requiring Druggists to Keep Record of Prescriptions. — *People v. Henwood*, (Mich. 1900) 82 N. W. Rep. 70; *State v. Davis*, 117 Mo. 614.



liquor trade in a variety of ways which are discussed at length in the following paragraphs. These statutes, however, must be so drafted as not to discriminate between persons of the same class, or they will be invalid.<sup>1</sup>

**6. STATUTES RESTRICTING TO CERTAIN CLASSES OF PERSONS THE RIGHT TO SELL** — **Residents, Male Persons, Citizens, etc.** — Statutes which prohibit the granting of licenses to any persons other than residents of the state,<sup>2</sup> or to persons who have not resided within the state for two years,<sup>3</sup> or to any person other than "a male inhabitant" of the state,<sup>4</sup> are not in violation of a clause of the Federal Constitution which provides that the citizens of a state shall be entitled to all the privileges and immunities of citizens in the several states. These provisions are a valid exercise of the police power of the state.<sup>5</sup> So a provision that licenses shall be granted only to citizens of the United States of good moral character who shall have complied with all the requirements of the act is not in violation of a constitutional provision that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the law.<sup>6</sup> It is also a valid exercise of legislative power to restrict to male persons the right to sell.<sup>7</sup>

**Persons of Good Moral Character.** — The legislature may properly enact statutes providing that licenses shall be granted to none but persons of good character. A statute of this character is not in violation of a constitutional provision which forbids the granting "to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," nor does it violate a provision declaring that all men are equal and endowed with the right of acquiring, possessing, and protecting property.<sup>8</sup>

**Druggists, Physicians, etc.** — So it is a valid exercise of legislative power to restrain the right to sell liquors for medicinal, mechanical, or scientific purposes, to a designated class of persons, such as druggists, whom the legislature may deem peculiarly fitted for such duty.<sup>9</sup>

**1. Class Legislation to Be Avoided.** — *Monmouth v. Popel*, 183 Ill. 634, *affirming* 81 Ill. App. 512.

**2. Statutes Restricting Right of Sale to Residents.** — *Mette v. McGuckin*, 18 Neb. 323.

**3. Statutes Restricting Right to Sell to Persons Residing Two Years in State.** — *Austin v. State*, 10 Mo. 591.

**4. Statutes Restricting Right of Sale to Male Inhabitants.** — *Welsh v. State*, 126 Ind. 71.

**5. Statutes Not in Violation of "Privilege and Immunity" Clause.** — See cases cited in the three preceding notes.

It is not an unreasonable requirement that a person who desires to avail himself of a license to retail intoxicating liquors shall submit himself to the jurisdiction of the state, by becoming an inhabitant thereof, to the end that he may be readily apprehended and punished for any violation of the law in connection with his business. *Welsh v. State*, 126 Ind. 78; *Mette v. McGuckin*, 18 Neb. 323.

**6. Statutes Limiting Right to Sell, to Citizens of the United States.** — *Trageser v. Gray*, 73 Md. 250.

**7. Statutes Limiting Right to Sell, to Male Persons.** — *Blair v. Kilpatrick*, 40 Ind. 312, in which it was held that a provision of this character was not in violation of the constitutional provision that the legislature "shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

**8. Statutes Restricting Right of Sale, to Persons**

**of Good Character.** — *In re Ruth*, 32 Iowa 250. See also *Trageser v. Gray*, 73 Md. 250. Compare *Robison v. Miner*, 68 Mich. 549, in which it was held that a provision which allows the local boards to refuse approval of a bond of any person "whose character and habits would render him or her an unfit person to conduct the business of selling liquor," is unconstitutional because it lays down no uniform standard and allows the local boards to deprive any person of the right of selling on their private judgment as to his unfitness.

**9. Statutes Restricting Right to Sell, to Druggists.** — *Kohn v. Melcher*, 29 Fed. Rep. 433; *Koester v. State*, 36 Kan. 32; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

**Constitutional Objections Held Untenable.** — Statutes restricting the right to sell intoxicating liquors for certain purposes, to a designated class of persons, such as druggists, are not unconstitutional as being class legislation. *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

Nor do they interfere with the freedom of interstate commerce, or violate the constitutional guaranty to the citizens of each state of all the privileges and immunities of citizens in the several states, or abridge the privileges and immunities of citizens of the United States. *Kohn v. Melcher*, 29 Fed. Rep. 433.

**Restricting to Physicians the Right to Prescribe Intoxicating Liquors.** — It is not an exercise of arbitrary power, nor the grant of an exclusive privilege to any man or set of men in the sense



c. **STATUTES REQUIRING APPLICANT TO GIVE BOND.** — The statutes by which the retailing of intoxicating liquors is regulated frequently require that an applicant for a license shall give bond, conditioned on the due observance of the laws, for the payment of fines and penalties imposed for a violation thereof and sometimes for the payment of damages caused by the sale of intoxicating liquors to certain classes of persons. The constitutionality of these statutes has been upheld.<sup>1</sup> Such statutes do not abridge the privileges and immunities of citizens, nor deprive any citizen of property without due process of law, nor deny to any person the equal protection of the law.<sup>2</sup> So a statute providing that a dealer shall not sell in any other place than that specified by the bond without giving notice and executing another bond is not unconstitutional.<sup>3</sup> On the other hand, a statute prohibiting liquor dealers from becoming sureties on liquor bonds is unconstitutional.<sup>4</sup> But a provision that no person shall become a surety on more than two bonds has been upheld.<sup>5</sup> A statute vesting in the county treasurer the power to require new bonds in any contingency which he shall determine requires it, is unconstitutional.<sup>6</sup>

d. **STATUTES REQUIRING CONSENT OF PERSONS LIVING IN VICINITY OF PROPOSED SALOON.** — It is ordinarily provided by the statutes, that before an application for a license to sell intoxicating liquors shall be granted the applicant must procure the consent or recommendation of a designated number of persons living in the vicinity of the place for which a license is sought, these persons usually being voters of the district, township, or ward in which the proposed saloon is to be located, or residents or taxpayers in such district, township, ward, or city block. The validity of these statutes has been frequently assailed on constitutional grounds, but they have been uniformly upheld as being a valid exercise of the police power.<sup>7</sup> They are not in viola-

of the term as used in the Bill of Rights, to restrict the right of prescribing liquor, purely as medicinal, to a profession peculiarly fitted to determine when it should be so used, and of which any person who may qualify himself has the constitutional right to become a member. *Sarrils v. Com.*, 83 Ky. 330.

1. **Constitutionality of Statutes Requiring Bond.** — *Giozza v. Tiernan*, 148 U. S. 557; *Bell v. State*, 28 Tex. App. 96; *McGuire v. Glass*, (Tex. App. 1890) 15 S. W. Rep. 127; *State v. Fisher*, 33 Wis. 154.

2. **Not in Violation of Fourteenth Amendment.** — *Giozza v. Tiernan*, 148 U. S. 557.

3. **Statutes Requiring Separate Bonds for Separate Places of Business.** — *People v. Brown*, 85 Mich. 119.

4. **Statutes Prohibiting Liquor Dealers from Becoming Sureties.** — *Kuhn v. Detroit*, 70 Mich. 534, in which it was said that the right to sign a bond or other contract cannot be made to depend upon the business in which one is engaged.

5. **Statutes Prohibiting Persons from Signing More than Two Bonds.** — *Walcott v. Judge*, 112 Mich. 311.

6. **Statutes Giving County Treasurer Power to Require New Bond.** — *Robison v. Miner*, 68 Mich. 549. In this case the court said that the effect of the statute was to work a forfeiture of the rights obtained by paying the taxes imposed for the year's business, as well as the destruction of the business.

7. **Statutes Requiring Consent of Persons Living in Vicinity Valid** — *United States*. — *Crowley v. Christensen*, 137 U. S. 86, *reversing* 43 Fed. Rep. 243; *In re Hoover*, 30 Fed. Rep. 51.

*California*. — *Ex p. Christensen*, 85 Cal. 208.

*Florida*. — *State v. Brown*, 19 Fla. 563.

*Georgia*. — *Whitten v. Covington*, 43 Ga. 421.

*Illinois*. — *Swift v. People*, 162 Ill. 534, *reversing* 60 Ill. App. 395.

*Indiana*. — *Groesch v. State*, 42 Ind. 557.

*Mississippi*. — *Rohrbacher v. Jackson*, 51 Miss. 735.

*Canada*. — *Danaher v. Peters*, 17 Can. Sup. Ct. 44.

**Provisions Held Valid.** — The following provisions have been held valid:

An act requiring applications for license to be indorsed by the signatures of one-third of the taxpayers of the district in which a license is asked. *Danaher v. Peters*, 17 Can. Sup. Ct. 44.

An ordinance providing that the applicant "shall, before receiving such license, produce the written recommendation of four of his nearest neighbors, each signature to represent a separate and distinct establishment." *Whitten v. Covington*, 43 Ga. 421.

An ordinance making the issuance of a license depend upon the permission of the board of police commissioners, or, if that cannot be obtained, upon the approval of twelve property owners in the block in which the business is to be carried on. *Ex p. Christensen*, 85 Cal. 208.

A statute requiring the application to be supported by a petition of a majority of the male citizens over twenty-one years of age, and a majority of the female citizens over eighteen years, residents, etc. *Rohrbacher v. Jackson*, 51 Miss. 735.



tion of any clause of the Fourteenth Amendment.<sup>1</sup> It has also been urged that provisions of this nature are unconstitutional as delegating legislative power to the classes of persons whose consent or recommendation must be obtained. This contention has likewise been held untenable.<sup>2</sup> So it has been held that no question as to the violation of the interstate commerce clause arises under these provisions.<sup>3</sup> Nor can they be considered unconstitutional as in restraint of trade.<sup>4</sup>

*e. STATUTES PROHIBITING SALES OR GIFTS TO CERTAIN CLASSES OF PERSONS.* — The laws regulating the traffic in intoxicating liquors very generally provide that liquors shall not be sold or given to certain classes of persons who are considered peculiarly susceptible to injury from the use thereof. The constitutionality of these statutes has been uniformly upheld.<sup>5</sup> It is a valid exercise of legislative power to prohibit sales or gifts of intoxicating liquors to minors,<sup>6</sup> to persons of known intemperate habits,<sup>7</sup> to Indians,<sup>8</sup> to free persons of color, during the existence of slavery,<sup>9</sup> or to students.<sup>10</sup> These statutes are not arbitrary class legislation, nor do they abridge the privileges or immunities of citizens of the United States, or deprive any person of liberty or property without due process of law.<sup>11</sup> Nor is there anything in the various state constitutions which restrains the legislature from imposing upon those who are allowed to sell spirituous liquors, as regards the persons to whom they may sell, such conditions as may be deemed proper and required for the good of the community.<sup>12</sup>

*f. STATUTES PROHIBITING SALES AND REQUIRING CLOSING OF SALOONS AT CERTAIN TIMES.* — The laws under which the retail traffic in intoxicating liquors is licensed usually provide that during certain days and hours no sales shall be made, and that the places where the traffic is carried on shall be closed.<sup>13</sup> The constitutionality of these statutes has been frequently assailed, but they have been uniformly upheld as not being in contravention of any federal or state constitutional provision.<sup>14</sup> A provision that no sales shall be made on Sunday is a valid regulation under the police power of the state,<sup>15</sup> and is

1. Not in Violation of Fourteenth Amendment. — *State v. Brown*, 19 Fla. 563; *In re Hoover*, 30 Fed. Rep. 51; *Crowley v. Christensen*, 137 U. S. 86, reversing 43 Fed. Rep. 243; *Ex p. Christensen*, 85 Cal. 208.

2. Not a Delegation of Legislative Power. — *Groesch v. State*, 42 Ind. 557; *Swift v. People*, 162 Ill. 534, following *Chicago v. Stratton*, 162 Ill. 494. 53 Am. St. Rep. 325.

3. Not in Violation of Interstate Commerce Clause. — *Ex p. Christensen*, 85 Cal. 208.

4. Not in Restraint of Trade. — *Danaher v. Peters*, 17 Can. Sup. Ct. 44.

5. Constitutionality of Statutes Prohibiting Sales or Gifts to Certain Classes of Persons — *United States*. — U. S. v. Holliday, 3 Wall. (U. S.) 407. *Alabama*. — *Lodano v. State*, 25 Ala. 64. *Indiana*. — *Allen v. State*, 52 Ind. 486.

*Minnesota*. — *State v. Wise*, 70 Minn. 99. *Pennsylvania*. — *Com. v. Zelt*, 138 Pa. St. 615; *Com. v. Silverman*, 138 Pa. St. 642; *Altenburg v. Com.*, 126 Pa. St. 602.

*Texas*. — *Goldsticker v. Ford*, 62 Tex. 390.

Forbidding Sales or Gifts of Imported Liquors. — State laws prohibiting the sale of liquors to minors and to persons of known intemperate habits are valid regulations as applied to imported liquors sold in the original packages, since they do not interfere with the general power to import and sell, and but incidentally affect interstate commerce by protecting two classes who are wards of the law, one of them not *sui juris* and the other practically not *sui juris*. *Com. v. Zelt*, 138 Pa. St. 616.

6. Sales to Minors. — *Allen v. State*, 52 Ind. 486; *Com. v. Zelt*, 138 Pa. St. 616; *Com. v. Silverman*, 138 Pa. St. 642; *Goldsticker v. Ford*, 62 Tex. 390.

7. Sales to Persons of Known Intemperate Habits. — *Com. v. Zelt*, 138 Pa. St. 616.

8. Sales to Indians. — U. S. v. Holliday, 3 Wall. (U. S.) 407; *Lodano v. State*, 25 Ala. 64; *State v. Wise*, 70 Minn. 99.

Statute Prohibiting Sales to Indians — Basis of Authority to Enact. — A statute which makes it an offense to sell intoxicating liquors to an Indian, under charge of an Indian agent, is based upon the power of Congress to regulate the commerce with the Indian tribes. U. S. v. Holliday, 3 Wall. (U. S.) 407.

9. Sales to Free Persons of Color. — *Lodano v. State*, 25 Ala. 64.

10. Sales to Students. — See *Lodano v. State*, 25 Ala. 64.

11. Not Class Legislation, Nor in Violation of Due Process of Law. — *State v. Wise*, 70 Minn. 99.

12. Not in Violation of State Constitutions. — *Lodano v. State*, 25 Ala. 64.

13. Statutes Forbidding Sales and Requiring Closing of Saloons at Certain Times. — See statutes of various states regulating the liquor traffic.

14. See cases cited in subsequent notes in this section.

15. Statutes Prohibiting Sales on Sunday Valid — *Indiana*. — *Thomasson v. State*, 15 Ind. 449; *Schlict v. State*, 31 Ind. 246.



also authorized by the authority inherent in a state to prohibit any manner of work or business on Sunday.<sup>1</sup> Statutes of this character are not in violation of the constitutional provisions against impairing the obligation of contracts<sup>2</sup> and which forbid the divestiture of vested rights.<sup>3</sup> nor do they impair any religious rights granted by the federal or state constitution.<sup>4</sup> It is also competent for the legislature, as a police regulation, to prohibit the sale of liquors on election days and other public days;<sup>5</sup> and it is a fair exercise of legislative power to require saloon keepers to close their places of business and permit no person to enter therein during the days or hours when the sale of intoxicating liquors is forbidden.<sup>6</sup>

*g. STATUTES PROHIBITING EMPLOYMENT OF WOMEN AND CHILDREN IN SALOONS.* — An ordinance making it an offense for the proprietor of a place where intoxicating liquors are sold to employ females to serve his customers has been held constitutional.<sup>7</sup> So also statutes prohibiting the sale of liquors in any place where women and minors are employed are valid,<sup>8</sup> and an ordinance providing that licenses to sell liquors shall not be granted to persons who have employed females as waitresses has been upheld.<sup>9</sup> Statutes of this character are not considered to discriminate between persons,<sup>10</sup> nor do they violate a provision that no person shall be disqualified on account of sex from entering upon or pursuing any lawful business, vocation, or profession.<sup>11</sup>

*h. SCREEN LAWS.* — Statutes which provide that retail dealers shall not maintain any screens or other obstructions so as to prevent a view of the interior of their premises during days or hours when sales are prohibited and when the premises are required to be closed, have been held constitutional.<sup>12</sup>

*Louisiana.* — *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

*Minnesota.* — *State v. Ludwig*, 21 Minn. 202.

*New Jersey.* — *Richards v. Bayonne*, 61 N. J. L. 496.

*Texas.* — *Gabel v. Houston*, 29 Tex. 335.

1. *State v. Ludwig*, 21 Minn. 205.

**Object of Statutes Forbidding Sales on Sunday.** — The provisions forbidding the sale of liquors on Sunday have not for their object the enforcement of the observance of the Christian Sabbath, but are merely police regulations under the police power of the state for the preservation of public order. *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

2. **Not an Impairment of Obligation of Contracts.** — *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

3. **Not an Impairment of Vested Rights.** — *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

4. **Not an Impairment of Religious Rights.** — *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224; *State v. Ludwig*, 21 Minn. 202; *Gabel v. Houston*, 29 Tex. 335.

5. **Statutes Prohibiting Sales on Election Days Valid.** — *Thomasson v. State*, 15 Ind. 449.

6. **Statutes Requiring Closing of Saloons Valid** — *Indiana.* — *State v. Gerhardt*, 145 Ind. 439; *Decker v. Sargeant*, 125 Ind. 404; *Davis v. Fasig*, 128 Ind. 271; *Hedderich v. State*, 101 Ind. 564.

*New Jersey.* — *Richards v. Bayonne*, 61 N. J. L. 496.

*Ohio.* — *Moliter v. State*, 20 Cinc. L. Bul. 323, 10 Ohio Dec. (Reprint) 324.

*Tennessee.* — *Bennett v. Pulaski*, (Tenn. Ch. 1899) 52 S. W. Rep. 915.

"The power to prohibit the sale of intoxicating liquors, in the interest of public safety or

welfare, during certain prescribed periods, is not denied. The legislature, possessing this right as it unquestionably does, may further exercise or extend it so as to require a proprietor of a liquor saloon to securely close the same and permit no person to enter therein, as provided by this section, during the times when the sale of intoxicating liquors is forbidden. This legislative power is recognized and settled in the cases of *Decker v. Sargeant*, 125 Ind. 404; *Davis v. Fasig*, 128 Ind. 271." *State v. Gerhardt*, 145 Ind. 466.

7. **Prohibiting Employment of Women in Saloons.** — *Bergman v. Cleveland*, 39 Ohio St. 651.

8. **Prohibiting Sales in Places Where Women or Children Employed.** — *Ex p. Hayes*, 98 Cal. 555; *State v. Reynolds*, 14 Mont. 383.

9. **Prohibiting Licensing of Places Where Women Employed.** — *Foster v. Board of Police*, 102 Cal. 485, 41 Am. St. Rep. 194.

10. **Statutes Not Objectionable for Discrimination.** — *Foster v. Board of Police*, 102 Cal. 483, 41 Am. St. Rep. 194.

11. **Not a Discrimination on Account of Sex.** — *Ex p. Hayes*, 98 Cal. 555.

**Not Ex Post Facto Law.** — An ordinance providing that licenses shall not be granted to persons who have employed females as waitresses, is not a criminal law and hence is not an *ex post facto* law. *Foster v. Board of Police*, 102 Cal. 483, 41 Am. St. Rep. 194.

12. **Statutes Prohibiting Obstructions During Times When Sales Forbidden Upheld.** — *Com. v. Casey*, 134 Mass. 194; *Robison v. Haug*, 71 Mich. 38; *State v. Doyle*, 15 R. I. 325.

**Failure of Statute to Define Obstruction.** — A statute requiring liquor dealers to remove all obstructions which might prevent a view of the interior of the premises on Sunday is not un-



These statutes do not authorize unreasonable searches and seizures, nor violate the provision that no one shall be deprived of life, liberty, or property without due process of law.<sup>1</sup>

**Prohibiting Obstructions During Business Hours.** — Whether it is a valid exercise of legislative power to require a liquor dealer to remove all obstructions to an interior view of his premises during business hours, is a matter of some doubt. In one decision a statute of this nature was declared unconstitutional.<sup>2</sup> In another decision, where the question of the constitutionality of such a statute was not directly raised, a conviction for a violation thereof was sustained on appeal.<sup>3</sup>

**2. STATUTES PROHIBITING SALES IN CERTAIN LOCALITIES.** — Statutes prohibiting sales of intoxicating liquors in certain localities are not in violation of any state or federal constitutional provision,<sup>4</sup> provided they apply equally to all persons within the territorial limits prescribed in the statute.<sup>5</sup> And where a statute prohibits the sale of liquor in a particular locality, it is not essential to the validity of the act that the locality should be defined by the boundary of a city, town, or civil district.<sup>6</sup> The legislature may prohibit sales in a single county<sup>7</sup> or in any particular counties or districts, or even in arbitrary geographical divisions of counties.<sup>8</sup> So the validity of statutes which prohibit the sale of intoxicating liquors within a designated distance of churches has been upheld,<sup>9</sup> and that, too, although the territory described is within the limits of a town whose charter had, prior to the enactment of the statute, empowered it to license liquor selling.<sup>10</sup> The legislature may also prohibit the sale of intoxicating liquors within designated distances of colleges or other institutions of learning,<sup>11</sup> fairs,<sup>12</sup> soldiers'

constitutional because it does not define what constitutes an obstruction. *State v. Doyle*, 15 R. I. 325, the court saying: "As it would be well-nigh impossible to define in advance all the obstructions which might be devised to conceal the interior of a licensed bar-room from the view of the passer-by, if such definition were held to be necessary it would be possible to defeat the object of the statute by the use of a different obstruction from those embraced in the definition."

**1. Due Process of Law.** — *Robison v. Haug*, 71 Mich. 38.

**2. Statutes Prohibiting Obstructions During Business Hours.** — *Steffy v. Monroe City*, 135 Ind. 466, 41 Am. St. Rep. 436, in which case the court took the view that such a provision was void as being prohibitive of a legal business and not merely regulative.

**3. Com. v. Costello**, 133 Mass. 192. See also dictum in *Robison v. Haug*, 71 Mich. 38.

**4. Prohibition of Sales in Certain Localities Constitutional.** — *Hudgins v. State*, 46 Ala. 208; *Barnes v. State*, 49 Ala. 342; *Powell v. State*, 69 Ala. 10; *Howell v. State*, 71 Ga. 225, 51 Am. Rep. 259; *State v. Joyner*, 81 N. Car. 534; *Heck v. State*, 44 Ohio St. 536; *State v. Frost*, (Tenn. 1900) 54 S. W. Rep. 986. See also cases cited in subsequent notes in this section.

**5. McCuen v. State**, 19 Ark. 630; *Heck v. State*, 44 Ohio St. 536; *Driggs v. State*, 52 Ohio St. 37; *State v. Berlin*, 21 S. Car. 292.

Laws regulating the sales of liquor are police regulations, and the legislature may prescribe different regulations in different localities; such laws must apply equally to all persons within the territorial limits affected. *State v. Berlin*, 21 S. Car. 292.

**6. Locality — How Defined.** — *Sarrls v. Com.*, 83 Ky. 328.

**7. Prohibition of Sales in Single Counties.** — *Stickrod v. Com.*, 86 Ky. 285; *Anderson v. Com.*, 13 Bush (Ky.) 485; *Creekmore v. Com.*, (Ky. 1889) 12 S. W. Rep. 628; *State v. Joyner*, 81 N. Car. 534. See also *McClay v. Lincoln*, 32 Neb. 412; *Hunzinger v. State*, 39 Neb. 653.

**8. Prohibition of Sales in Particular Counties or Districts.** — *Creekmore v. Com.*, (Ky. 1889) 12 S. W. Rep. 628; *Anderson v. Com.*, 13 Bush (Ky.) 485; *State v. Pond*, 93 Mo. 606.

**9. Prohibition of Sales Near Churches.** — *Trammell v. Bradley*, 37 Ark. 374; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Wilson v. Thompson*, 56 Ark. 113; *State v. Muse*, 4 Dev. & B. L. (20 N. Car.) 319; *State v. Snow*, 117 N. Car. 774.

"There can be no doubt that the legislature hath power, and that there is an obligation, in sound morals and true policy, on that body, to protect the decency of divine worship by prohibiting any actual interruption of those engaged in worship, or any practices at or near the place in which the legislature may see a tendency to produce such interruption." *State v. Muse*, 4 Dev. & B. L. (20 N. Car.) 320.

**10. State v. Snow**, 117 N. Car. 774.

**11. Prohibition of Sales Near Schools.** — *Dorman v. State*, 34 Ala. 216; *Hudgins v. State*, 46 Ala. 208; *Trammell v. Bradley*, 37 Ark. 374; *O'Leary v. Cook County*, 28 Ill. 534; *State v. Rauscher*, 1 Lea (Tenn.) 96.

**Due Process of law.** — A statute which prohibits the sale of intoxicating liquors within a designated distance of an institution of learning does not deprive any person of property without due process of law. *Dorman v. State*, 34 Ala. 216.

**12. Prohibition of Sales Near Fairs.** — *State v. Stovall*, 103 N. Car. 416; *Heck v. State*, 44 Ohio St. 536.



homes,<sup>1</sup> camp meetings,<sup>2</sup> and orphan asylums.<sup>3</sup> So a statute authorizing the prohibition of sales in residence portions of cities is not unconstitutional as granting special privileges or immunities.<sup>4</sup> There is likewise no constitutional objection to statutes prohibiting the sale of liquors outside of a town or city and permitting their sale, under license, within towns or cities.<sup>5</sup> And a law prohibiting the sale of liquor within a designated distance of the limits of a town is not objectionable on the ground that it is not uniform in its provisions.<sup>6</sup>

*j.* **STATUTES AUTHORIZING REVOCATION OF LICENSE.** — Statutes vesting the licensing board with power to revoke a license upon the application of an owner of real estate adjoining the premises in which the license is to be exercised,<sup>7</sup> or on a conviction of the licensee of any violation of the liquor laws,<sup>8</sup> or on a violation of the liquor laws,<sup>9</sup> have been held valid. These statutes, it is held, are not in violation of the constitutional right to a jury trial,<sup>10</sup> nor do they impair the obligation of contracts<sup>11</sup> nor take property without due process of law, because a license, whether revocable in terms or not revocable, is neither a contract nor property in any constitutional sense, but is subject, at all times, to the police power of the state.<sup>12</sup> Neither are these statutes in violation of a constitutional prohibition against depriving any person of his rights, immunities, and privileges.<sup>13</sup>

**Statute Not Objectionable for Want of Uniformity.** — A statute which prohibits the sale of intoxicating liquors within a designated distance of an agricultural fair is not objectionable for want of uniformity, because it applies to persons within prescribed limits, and not to one just beyond such limits. *Heck v. State*, 44 Ohio St. 536.

**Not Objectionable as Conferring Special Rights or Creating Monopolies.** — Neither is a statute of this character unconstitutional on the ground that it confers special rights or privileges, or as creating monopolies, or as taking away vested rights. *State v. Stovall*, 103 N. Car. 416.

**1. Prohibition of Sales Near Soldiers' Homes.** — *Whitney v. Grand Rapids Tp.*, 71 Mich. 234; *State v. Barringer*, 110 N. Car. 525; *Driggs v. State*, 52 Ohio St. 37.

**Constitutional Objections to Statute Raised and Overruled.** — A statute making it unlawful to sell intoxicating liquors within a designated distance of a soldiers' home is not in violation of a constitutional provision that all laws of a general nature shall have a uniform operation throughout the state. *Driggs v. State*, 52 Ohio St. 37.

Neither is such statute unconstitutional as depriving one of life, liberty, or property without due process of law, or as abridging the privileges or immunities of citizens, or as denying to any person the protection of the law. *Whitney v. Grand Rapids Tp.*, 71 Mich. 234.

**2. Prohibition of Sales Near Camp Meetings.** — *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, in which the statute was held not void as in restraint of trade or as creating a monopoly in favor of those persons referred to in the proviso and discriminating against others.

**3. Prohibition of Sales Near Orphan Asylums.** — *State v. Barringer*, 110 N. Car. 525.

**4. Prohibition of Sales in Residence Portion of City.** — *Shea v. Muncie*, 148 Ind. 14.

**5. Prohibition of Sales in County and Licensing in City.** — *State v. Berlin*, 21 S. Car. 292; *U. S. v. Ronan*, 33 Fed. Rep. 120; *In re Hoover*, 30 Fed. Rep. 51.

"The exception of incorporated towns and cities from the operation of the law complained of was doubtless considered necessary and proper because of the difference in social and police conditions existing between town and country, and because of the larger powers as to local government usually granted to towns and cities. If such exception amounts to discrimination, it cannot be said to deny to any person the equal protection of the laws, as the exception affects localities and not persons, and persons similarly situated come under the same rule." *U. S. v. Ronan*, 33 Fed. Rep. 120.

**6. Prohibiting Sale Within Designated Distance of Town.** — *State v. Schroeder*, 51 Iowa 197; *Centerville v. Miller*, 51 Iowa 712; *Toledo v. Edens*, 59 Iowa 352; *Neifing v. Pontiac*, 56 Ill. 172.

An act of the legislature will not be declared special legislation, within the meaning of the constitution, solely because at the time of its enactment there was only one county in the state to which its provisions were applicable. If the law is general in its terms, and restricted by its terms to no particular locality, and operates equally upon all of a group of objects, it is not a special law. *McClay v. Lincoln*, 32 Neb. 412; *Hunzinger v. State*, 39 Neb. 653.

**7. Statutes Providing for Revocation of License.** — *Young v. Blaisdell*, 138 Mass. 344.

**8. Martin v. State**, 23 Neb. 371.

**9. La Croix v. Fairfield County**, 50 Conn. 321, 47 Am. Rep. 648.

**10. Not a Violation of Right to Jury Trial.** — *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. Rep. 648; *Voight v. Excise Com'rs*, 59 N. J. L. 358.

**11. Not an Impairment of Obligation of Contracts.** — *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. Rep. 648.

**12. Not a Taking of Property Without Due Process of Law.** — *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. Rep. 648; *Martin v. State*, 23 Neb. 371.

**13. Not Deprivation of Rights, Immunities, and Privileges.** — *Young v. Blaisdell*, 138 Mass. 344.



4. **Statutes Declaring What Liquors Shall Be Deemed Intoxicating.** — The constitutionality of statutes declaring that lager beer,<sup>1</sup> wine,<sup>2</sup> and alcohol<sup>3</sup> shall be deemed intoxicating has been upheld; so has a statute providing that the word "intoxicating" shall include any liquors or mixtures of liquors containing more than two per cent. by weight of alcohol.<sup>4</sup> And a statute enacting that any beverage containing more than one per cent. of alcohol "shall be deemed to be intoxicating liquor" has been held constitutional.<sup>5</sup> It is hardly probable, however, that a statute declaring a liquor to be intoxicating would be upheld if the liquor were of such a character that the court could judicially know that it was not intoxicating. In one case in which a statute declaring a certain liquor intoxicating was upheld, the court seemed to base its decision, in a measure, on the ground that it did not judicially know that such liquor was not intoxicating.<sup>6</sup>

5. **Statutes Discriminating Against Liquors of Other States and Countries — In Respect to Right of Sale.** — In a number of states statutes have been enacted the effect of which is to permit the sale of domestic wines and cider and to prohibit the sale of foreign wines and cider. In a few decisions the constitutional validity of these statutes has been upheld.<sup>7</sup> But the weight of authority is that no state can discriminate, in the exercise of its police power, in favor of its own products and manufactures and against the products and manufactures of other states, and that the statutes in question are unconstitutional and void.<sup>8</sup>

**Violation of Interstate Commerce Clause.** — These statutes are considered as in violation of the interstate commerce clause,<sup>9</sup> for commerce among the states is not free when a commodity is, by reason of its foreign growth or manufacture, subjected by state legislation to discriminating regulations or burdens.<sup>10</sup>

**Denial of Immunities and Privileges of Citizens.** — They have also been declared unconstitutional as being repugnant to the provision by which the citizens of a state are declared to be entitled to all the immunities and privileges of the citizens of the several states.<sup>11</sup>

**In Respect to Taxation.** — It is also well settled that a state cannot, in the exercise of its taxing power, impose upon the products of another state, brought within its limits for sale or use, a heavier burden or tax than upon like products of its own territory, nor discriminate against a citizen by reason

1. Lager Beer. — *Com. v. Anthes*, 12 Gray (Mass.) 29.

2. Wine. — *Jackson v. State*, 19 Ind. 312.

3. Alcohol. — *State v. Intoxicating Liquors*, 76 Iowa 243.

4. Liquors Containing Over Two Per Cent. Alcohol. — *State v. Guinness*, 16 R. I. 401; *State v. Gravelin*, 16 R. I. 407.

5. Liquor Containing Over One Per Cent. Alcohol. *Com. v. Brelsford*, 161 Mass. 61.

6. See *Jackson v. State*, 19 Ind. 312.

7. **Statutes Prohibiting Sales of Foreign Liquors — View that They Are Constitutional.** — *State v. Stucker*, 58 Iowa 406; *McGuire v. State*, 42 Ohio St. 530.

8. **View that They Are Unconstitutional — United States.** — *Weil v. Calhoun*, 25 Fed. Rep. 865; *Ex p. Kinnebrew*, 35 Fed. Rep. 52.

*Alabama.* — *McCreary v. State*, 73 Ala. 480; *Vines v. State*, 67 Ala. 73; *Powell v. State*, 69 Ala. 10.

*Arkansas.* — *State v. Deschamp*, 53 Ark. 490; *State v. Marsh*, 37 Ark. 356.

*North Carolina.* — *State v. Nash*, 97 N. Car. 514.

9. **Statutes Held to Violate Interstate Commerce Clause.** — *Ex p. Kinnebrew*, 35 Fed. Rep. 52; *Weil v. Calhoun*, 25 Fed. Rep. 865; *McCreary*

*v. State*, 73 Ala. 480; *State v. Marsh*, 37 Ark. 356; *State v. Deschamp*, 53 Ark. 490.

10. *Webber v. Virginia*, 103 U. S. 344.

11. **Statutes Held to Violate Fourteenth Amendment.** — *McCreary v. State*, 73 Ala. 480.

**Particular Statutes Held Unconstitutional.** — A statute requiring licenses for the sale of intoxicating liquors, but excepting from its operation those who manufacture and sell wines in the state from home-grown fruit, is unconstitutional. *State v. Marsh*, 37 Ark. 356.

And so is a statute which prohibits the sales of wines in certain districts, but permits any person who grows or raises grapes or berries in such districts to sell wines of his own make upon the premises where such grapes or berries are grown. *State v. Deschamp*, 53 Ark. 490.

So a general local-option law which, after prohibiting the sale of intoxicating liquors, provides that nothing in the act shall be so construed as to prevent the manufacture, sale, and use of domestic wines or cider, is unconstitutional so far as it discriminates against the importation and sale of wines manufactured in other states. *Ex p. Kinnebrew*, 35 Fed. Rep. 52.



of his being engaged in thus bringing in and selling them.<sup>1</sup> This rule applies to intoxicating liquors as well as to any other kind of products.<sup>2</sup> Statutes of this character are in direct violation of the interstate commerce clause.<sup>3</sup> It is, of course, competent for the state to impose a uniform tax on all sales made in it, whether they be made by a citizen of it or a citizen of some other state.<sup>4</sup>

**Construction of Statutes Unconstitutional in Part.** — It is a well-settled rule of construction that if some of the provisions of a statute are unconstitutional while others are consistent with the constitution, the latter will be upheld if they can be separated and stand without the unconstitutional parts of the law. The unconstitutional parts will be considered as stricken out of the statute.<sup>5</sup>

**6. Statutes Forbidding Gifts of Liquors.** — Statutes forbidding gifts of intoxicating liquors have been held constitutional.<sup>6</sup> A gift of liquor may be as injurious to the public as a sale. The legislature may, looking to the public

**1. Discriminative Taxation Against Foreign Liquors.** — *Guy v. Baltimore*, 100 U. S. 434; *Welton v. Missouri*, 91 U. S. 275; *Vines v. State*, 67 Ala. 73.

**2. Walling v. Michigan**, 116 U. S. 446; *Tiernan v. Rinker*, 102 U. S. 123.

**3. Statutes Held to Violate Interstate Commerce Clause.** — *Walling v. Michigan*, 116 U. S. 466, reversing 53 Mich. 264; *Tiernan v. Rinker*, 102 U. S. 123; *Welton v. Missouri*, 91 U. S. 275.

**Particular Statutes Held Unconstitutional.** — A statute which imposes a tax upon persons who, not residing or having their place of business within the state, engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the state from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors in the state, is in violation of the interstate commerce clause. *Walling v. Michigan*, 116 U. S. 446.

So a statute requiring that annual taxes shall be paid upon the occupation of liquor-selling generally, but excepting wines or beer manufactured in the state, is unconstitutional and inoperative in so far as it makes a discrimination against the sale of wines and beer manufactured in another state. *Tiernan v. Rinker*, 102 U. S. 123.

**4. Uniform Taxation Unobjectionable.** — *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hinson v. Lott*, 8 Wall. (U. S.) 148.

**Illustration.** — A statute imposing a tax of fifty cents per gallon on all spirituous liquors brought into a state is constitutional, where the same tax is imposed on liquors manufactured in the state. *Hinson v. Lott*, 8 Wall. (U. S.) 148.

**5. Construction of Statutes Unconstitutional in Part** — *United States*. — *Tiernan v. Rinker*, 102 U. S. 123; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492.

*Alabama*. — *Powell v. State*, 69 Ala. 10; *Mobile, etc., R. Co. v. State*, 29 Ala. 573; *McCreary v. State*, 73 Ala. 480.

*Arkansas*. — *State v. Marsh*, 37 Ark. 356.

*California*. — *Mills v. Sargent*, 36 Cal. 379.

*Illinois*. — *Nelson v. People*, 33 Ill. 390.

*Indiana*. — *Clark v. Ellis*, 2 Blackf. (Ind.) 8.

*Iowa*. — *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487.

*Ohio*. — *Stevens v. State*, 61 Ohio St. 597.

And see the title STATUTES.

**Where the Provisions Are All Connected in Subject-matter**, depending on each other, operating together for the same purpose, or otherwise so connected that it cannot be presumed that the legislature would have passed the one without the other, the constitutional invalidity of the one part will vitiate the other, and both must fall. *Powell v. State*, 69 Ala. 11.

**Application of Rule — In Respect to Sale of Liquors.** — In applying the rule stated in the text it has been held that where a local statute prohibiting the sale of intoxicating liquors contains a proviso excepting from its operation domestic wines, a person selling other liquors than those mentioned in the proviso is punishable under the act, although the proviso is unconstitutional as discriminating against foreign wines. *Powell v. State*, 69 Ala. 10.

So according to some decisions it does not necessarily follow that because a part of the proviso is unconstitutional, the whole proviso is therefore void; and it has been held that where a statute contains a proviso purporting to make the sale of domestic wines lawful and the sale of foreign wines unlawful, only that part of the proviso which purports to make the sales of foreign wines unlawful will be considered unconstitutional, and the remainder of the proviso will protect a seller of domestic wines. *State v. Marsh*, 37 Ark. 356; *State v. Nash*, 97 N. Car. 514.

In *McCreary v. State*, 73 Ala. 480, the court arrived at practically the opposite conclusion. In this case the whole proviso was held void and a seller punishable under the general provisions of the statute as though it contained no proviso.

**In Respect to Taxation.** — Although a statute requiring the payment of an annual tax on the occupation of liquor selling generally contains a proviso which is unconstitutional because it excepts from its operation certain domestic liquors, one engaged in selling both domestic and foreign liquors cannot object to the tax imposed by the statute on liquors other than those mentioned in the proviso. The statute is inoperative only so far as it discriminates against foreign liquors mentioned in the proviso. *Tiernan v. Rinker*, 102 U. S. 123.

**6. Constitutionality of Statutes Forbidding Gifts of Liquors.** — *Powers v. Com.*, 90 Ky. 167. See also *supra*, this section, *Statutes Prohibiting Sales or Gifts to Certain Classes of Persons*.



health, or to its peace or morals, and in the exercise of the police power, forbid not only the sale but the gift of any article calculated to injure these public interests.<sup>1</sup>

7. **Statutes Prohibiting Sales in Bawdy Houses.** — A statute which prohibits the sale, exchange, or giving away of intoxicating liquors in bawdy houses is not unconstitutional as making acts criminal which are not *malum in se* and as making no exception of acts which are done ignorantly or with good motive. It does not abridge the privileges and immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law.<sup>2</sup>

8. **Statutes Making It an Offense to Keep Place for Unlawful Sale.** — Statutes which make it an indictable offense to keep a place for the unlawful sale of intoxicating liquors have been held constitutional.<sup>3</sup>

9. **Statutes Making It an Offense to Keep Liquors with Intent to Sell Unlawfully.** — Although at common law the possession of an instrument of crime, accompanied by an intent to use it, is not a crime without some overt act, it may nevertheless be made so by statute, and a statute making it an offense to keep intoxicating liquors with intent to sell in violation of law is valid.<sup>4</sup>

10. **Statutes Imposing Fine and Imprisonment for Violation of Liquor Laws.** — The power of the legislature to provide for the punishment of offenses against the liquor laws is undoubted.<sup>5</sup> But a limitation on this right is that the punishment inflicted must not violate the federal or state constitutional provision against excessive fines or cruel and unusual punishment.<sup>6</sup> In the notes hereto are set out some decisions illustrative of what statutes are and what statutes are not unconstitutional as being in violation of these provisions.<sup>7</sup>

1. *Powers v. Com.*, 90 Ky. 167.

2. *Prohibiting Sales in Bawdy Houses.* — *Schmeltz v. State*, 8 Ohio Cir. Ct. 82, 4 Ohio Cir. Dec. 287.

3. *Statutes Making It an Offense to Keep Place for Unlawful Sale.* — *Com. v. Owens*, 114 Mass. 252; *Com. v. Howe*, 13 Gray (Mass.) 26.

4. *Statutes Making It an Offense to Keep Liquors for Unlawful Sale.* — *State v. Wheeler*, 62 Vt. 439.

5. See *Com. v. Clapp*, 5 Gray (Mass.) 97; *Com. v. Burns*, 9 Gray (Mass.) 132; *People v. Quant*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 410; *Ingersoll v. Skinner*, 1 Den. (N. Y.) 540; *People v. Huntingdon*, 4 N. Y. Leg. Obs. 187.

6. See generally the title CRUEL AND UNUSUAL PUNISHMENT, vol. 8, p. 436.

7. *Statutes Held Constitutional.* — The constitutional provisions, it has been held, are not violated by statutes imposing a fine for the illegal sale of intoxicating liquors of twice the amount required for a license, *Frese v. State*, 23 Fla. 267; or subjecting a person making a single unlawful sale to the payment of a fine of ten dollars and costs of prosecution, and imprisonment in the House of Correction for not less than twenty nor more than thirty days, *Com. v. Hitchings*, 5 Gray (Mass.) 482; *Com. v. Pomeroy*, 5 Gray (Mass.) 486, note; or imposing a penalty in addition to the forfeiture of the license, *Com. v. Brothers*, 158 Mass. 200; *Com. v. Kinsley*, 133 Mass. 578.

So a provision fixing the punishment at a fine of not less than three hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than six nor more than twelve months, or by both such fine and imprisonment, is not unconstitutional. *Ex p. Swann*, 96 Mo. 44.

Nor is a statute providing for the punishment of a second offense which at most can be one year at hard work in the House of Correction, with a fine of three hundred dollars or, in lieu thereof, three years' imprisonment, unconstitutional. *State v. Hodgson*, 66 Vt. 134.

And the imposition of a fine of not less than one hundred dollars nor more than five hundred dollars and the costs of prosecution, or imprisonment in the county jail not less than ninety days nor more than one year, or both such fine and imprisonment, is a valid exercise of a legislative power. *Luton v. Newaygo Circuit Judge*, 69 Mich. 613; *Robison v. Miner*, 68 Mich. 549.

*Statutes Held Unconstitutional.* — On the other hand, a statute providing that on a conviction of a violation of the liquor laws the licensee shall, in addition to fines imposed, be debarred from continuing business for one year, is unconstitutional and void. And so is a statute which provides that on a second offense the offender shall be debarred from selling liquor for five years. *Robison v. Miner*, 68 Mich. 549, where it was said: "The penalties in this act, which are imperative and not discretionary, must necessarily break up business, and are not measured by any standard of proportion or amount. The only measure of restraint is the value of the business broken up, and this may reach tens or hundreds of thousands of dollars. \* \* \* Any fine or forfeiture is unusual which has not some limitation of value, and any punishment is unusual which forfeits any civil rights."

And a statute providing that where an appeal is taken from the judgment of a justice or judge, the defendant, in the event of a final conviction before the jury, shall pay and suffer the double amount of fines, penalties, and im-



A Statute Which Provides for a Heavier Punishment for a Second Offense is not unconstitutional as an *ex post facto* law in regard to one who was convicted of the first offense before the passage of such statute. The increased punishment contemplated by the statute is not for what was done before its passage, but for the subsequent violation of it.<sup>1</sup>

**11. Statutes Providing for Forfeiture of Licensee's Bond.** — A statute which provides that the conviction of the licensee of an offense against the liquor laws shall work a forfeiture of his bond is not unconstitutional as taking property of the sureties without due process of law.<sup>2</sup>

**12. Statutes Providing for Forfeiture of Liquors Illegally Kept.** — In a number of jurisdictions there are statutes which provide for the forfeiture of liquors illegally kept and for their destruction or sale for the benefit of the municipality in which they were kept. The constitutionality of these statutes has been uniformly upheld.<sup>3</sup> Laws of this character fall within that large class of powers which are essential to the regulation, promotion, and preservation of morals, health, and the general well-being and prosperity of the people, and may, in an eminent degree, be regarded as police regulations.<sup>4</sup> These statutes are not objectionable on the ground that they take private property for public use without compensation therefor.<sup>5</sup>

**Right to Trial by Jury.** — Neither can statutes giving original jurisdiction of forfeiture proceedings to courts sitting without a jury be objected to as violating the constitutional right to jury trial where right of appeal to courts sitting with a jury is thereby given.<sup>6</sup>

**13. Statutes Making Judgments for Fines and Taxes Liens on Leased Property.** — In a number of jurisdictions statutes have been enacted which provide that a judgment for fines and penalties against one selling in violation of the liquor laws shall be a lien upon the property of a person who permits it to be so used in carrying on the unlawful traffic. The constitutionality of these statutes has been upheld.<sup>7</sup>

prisonment awarded against him by the justice or judge from whose judgment the appeal was taken, is unconstitutional. *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782.

1. *State v. Woods*, 68 Me. 409.

**2. Statutes Providing for Forfeiture of Bond.** — *Welch v. McKane*, 55 Conn. 25, in which case the court said: "This is a case where the parties entered into a contract obligation in view of the provisions of the statute as to what should constitute a breach of the bond and give the right to sue upon it. In this way the provisions of the statute became part of the contract, so that both principal and surety in the bond are made liable upon the conviction of the principal, provided there is no appeal."

**Liability of Sureties for Damages.** — A statute making a liquor dealer and his sureties liable for injuries occasioned by one who has become intoxicated with liquor obtained from such dealer is not unconstitutional because it makes a licensed seller and his sureties responsible for an assault made by the buyer of liquor from the licensee though the sale was lawful. *Howes v. Maxwell*, 157 Mass. 333.

**3. Statutes Providing for Forfeiture of Liquors Illegally Kept.** — *Oviatt v. Pond*, 29 Conn. 479; *State v. Brennan*, 25 Conn. 278; *State v. Jordan*, 72 Iowa 377; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *In re McSoley*, 15 R. I. 608; *In re Fitzpatrick*, 16 R. I. 60; *Lincoln v. Smith*, 27 Vt. 328.

**4. Statutes Valid Exercise of Police Power.** — *Lincoln v. Smith*, 27 Vt. 337.

**5. Not a Taking of Private Property for Public**

Use. — *State v. Brennan*, 25 Conn. 278; *Oviatt v. Pond*, 29 Conn. 479; *State v. Snow*, 3 R. I. 64.

**Similar Offenses in Which Forfeiture of Property Imposed.** — "There is no such thing as an absolute right of property in society, or an absolute right to the enjoyment of it irrespective of the rights of others. As an illustration of such restriction we may notice that counterfeiting is a crime, and the tools used in carrying it on are forfeited; so of gambling and the cards used in it; so of horse racing, smuggling, dealing in lottery tickets, and fishing on forbidden days, and the like. The appliances used are all forfeited, or, if not forfeited, it is universally admitted that they might be, as the proper mode of preventing a repetition of the offenses." *Oviatt v. Pond*, 29 Conn. 488.

**6. Not Violation of Right to Jury Trial.** — *State v. Brennan*, 25 Conn. 278; *In re Fitzpatrick*, 16 R. I. 60.

**Recognizance on Appeal — Effect of Invalidity on Constitutionality of Statutes.** — A statute which provides that where judgment of forfeiture is entered against intoxicating liquors they shall be immediately destroyed unless an appeal is taken is not wholly unconstitutional because it requires a recognizance containing an unconstitutional condition, if the recognizance is complete without such condition. *In re McSoley*, 15 R. I. 608.

**7. Statutes Held Constitutional.** — *Polk County v. Hierb*, 37 Iowa 361; *State v. Snyder*, 34 Kan. 425; *Harden v. State*, 32 Kan. 637.

**Objections on Constitutional Grounds Held Untenable.** — Statutes of the character mentioned



14. **Statutes Forbidding Recovery for Liquors Illegally Sold and Authorizing Recovery Back of Money Paid Therefor.** — In some states statutes have been enacted providing that no recovery shall be had for the value of liquors sold in violation of law, and these statutes have been declared constitutional.<sup>1</sup> So a statute authorizing the recovery back of money paid for liquors illegally sold is, as regards a contract of sale made in the state by a resident of the state and a nonresident, not unconstitutional as being in violation of the interstate commerce law.<sup>2</sup>

15. **Statutes Declaring Places for Manufacture and Sale Nuisances.** — Statutes which declare that places where intoxicating liquors are illegally manufactured or sold shall be considered nuisances, and which provide for their abatement and for the punishment of the persons maintaining them, have been uniformly upheld as not being in violation of any federal or state constitutional provision.<sup>3</sup> These statutes are not objectionable as depriving the parties of prop-

erty in the text have been held not objectionable as being in violation of a constitutional provision that no conviction shall work a forfeiture of estate. *State v. Snyder*, 34 Kan. 425.

Neither are they in contravention of a constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. *Polk County v. Hierb*, 37 Iowa 361. In this case it was further urged that these statutes inflict punishment upon one man for the crime of another. The court, however, considered that there was nothing in this contention, since the statute subjects a person's property to forfeiture for his own act, and not for that of another. In reaching this conclusion the court reasoned as follows: "Intoxicating liquor cannot be manufactured or sold without vessels to contain it or a place in which the manufacture or the sale is conducted. The party who knowingly furnishes these vessels and this *locus* assists another to perpetrate a crime. It is for this act and not for the other's crime that his property is liable to a charge if judgment shall be rendered against the other."

Nor are these statutes objectionable as being *ex post facto* laws, because an *ex post facto* law is a retroactive criminal law, and because the statutes do not make the act of permitting property to be used for an unlawful purpose a crime, but merely provide that the property shall be liable to a charge which shall be a lien thereon. *Polk County v. Hierb*, 37 Iowa 361.

It has also been held that such a statute is not invalid as impairing vested rights. *Polk County v. Hierb*, 37 Iowa 361.

**Statutes Making Taxes Lien on Premises Where Liquors Sold.** — In *Ohio* it has been held that a statute providing a lien on real estate occupied by a tenant who is a dealer in liquors for a tax on the occupation of liquor selling is not a license law, and therefore is not in conflict with a constitutional provision that "no license to traffic in intoxicating liquors shall hereafter be granted in this state." *Adler v. Whitbeck*, 44 Ohio St. 539. Although the court does not say so, the apparent effect of this decision is squarely to *overrule* *Butzman v. Whitbeck*, 42 Ohio St. 223, and *State v. Sinks*, 42 Ohio St. 345.

1. **Provisions Held Constitutional.** — A statute providing that no action of any kind shall be maintained for the recovery of possession of spirituous liquor or the value thereof, the same

being kept in violation of law, is constitutional. *Thurston v. Adams*, 41 Me. 419. See also *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639. And a statute which provides that no action shall be maintained for intoxicating liquors purchased out of the state for sale within the state in violation of law is constitutional. *Barrett v. Delano*, (Me. 1888) 14 Atl. Rep. 288; *Meservey v. Gray*, 55 Me. 540.

**Statute Requiring Proof that Liquors Were Lawfully Sold to Authorize Recovery.** — It has been held that a statute which declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained, or injured, unless he can prove that the liquor was sold according to the provisions of the act, or was lawfully kept and owned by him, is repugnant to the provisions of the constitution for the protection of liberty and property, and is absolutely void. *People v. Toynbee*, (Supm. Ct. Gen. T.) 2 Park. Crim. Cas. (N. Y.) 329.

2. *Connolly v. Scarr*, 72 Iowa 223.

3. **Constitutionality of Laws in Regard to Liquor Nuisances** — *United States*. — *Kidd v. Pearson*, 128 U. S. 1; *Eilenbecker v. Plymouth County*, 134 U. S. 31; *Mugler v. Kansas*, 123 U. S. 623; *Schmidt v. Cobb*, 119 U. S. 286.

*Indiana*. — *Douglass v. State*, 72 Ind. 385.

*Iowa*. — *Craig v. Werthmueller*, 78 Iowa 598; *McLane v. Leicht*, 69 Iowa 401; *Our House No. 2 v. State*, 4 Greene (Iowa) 172; *Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19; *State v. Jordan*, 72 Iowa 377.

*Kansas*. — *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182; *State v. Campbell*, 50 Kan. 433.

*Massachusetts*. — *Com. v. Howe*, 13 Gray (Mass.) 26.

**Constitutionality of Ordinance.** — An ordinance which declares the selling of spirituous liquors to be a nuisance and imposes a fine for the offense is valid if the corporate powers conferred upon the town are broad enough to authorize the ordinance. *Goddard v. Jacksonville*, 15 Ill. 589, 60 Am. Dec. 773.

**Removal to Federal Court.** — Where a bill to declare a nuisance and to abate a place for the sale of intoxicating liquors as a beverage was removed to the Circuit Court, on the ground that the statutes under which the proceedings were had, although declared valid by the highest court of the state, were in violation of the



erty without due process of law,<sup>1</sup> nor as denying to the defendant the right of trial by jury,<sup>2</sup> nor as abridging or restricting the liberties or immunities of citizens of the United States.<sup>3</sup>

**16. Local Option Laws.** — A discussion of the constitutionality of local option laws will be found elsewhere.<sup>4</sup>

**17. Prohibition Laws.** — For a discussion of the constitutionality of these laws, reference is made to another title in this work.<sup>5</sup>

**18. Civil Damage Acts.** — The constitutionality of the civil damage acts is discussed in another place.<sup>6</sup>

**19. Statutes Regulating Liquor Traffic in Alaska.** — The statutes providing a civil government for Alaska provide that the importation, manufacture, and sale of intoxicating liquors in that district, except for medicinal, mechanical, and scientific purposes, are prohibited under the penalties provided for the wrongful importation of distilled spirits by a designated section of the Revised Statutes of the United States. By that section the President has power to restrict and regulate, or to prohibit, the importation and use of distilled spirits into and within the territory of Alaska, and it imposes fine and imprisonment for a wilful violation of such regulations. By order of the President, the landing of intoxicating liquors at any port or place in Alaska is prohibited, except upon the permit of the chief officer of the customs at such port or place to be issued upon evidence satisfactory to such officer that the liquors are imported and are to be used solely for sacramental, medicinal, mechanical, or scientific purposes. By a subsequent order of the President, sales for medicinal, mechanical, and scientific purposes can be made only by such persons in the territory as shall have obtained a special permit from the governor of the territory to sell liquors therein upon certain specified conditions. All objections to these statutes on constitutional grounds have been held to be without merit, and their constitutionality has been sustained.<sup>7</sup>

**20. Constitutionality of Statutes as Affected by Interstate Commerce Clause.** — The constitutionality of statutes restricting the sale of intoxicants as affected by the interstate commerce clause of the Federal Constitution is considered in a subsequent section.<sup>8</sup>

**21. Town Agent System of License and Sales.** — As shown in another section, there is in some of the New England states a system of appointing certain persons, usually designated "town agents," to purchase and sell intoxicating liquors for the towns in which they are appointed, for purposes designated by the statutes. In the main these statutes have not been objected to on constitutional grounds, but it has been held that a statute is unconstitutional so far as it authorizes the agent to purchase liquors at the expense of the town for which he is appointed, without its assent either express or implied, or without giving indemnity to the town for the faithful performance of the duties of his agency.<sup>9</sup>

**22. Statutes Providing for Treatment and Cure of Inebriates.** — A number of states have enacted statutes the purpose of which is to provide for the treatment and cure of indigent inebriates. In *Colorado* it has been held that a con-

Civil Rights Law and the Constitution of the United States, a decree remanding the cause, as presenting no federal question, was affirmed by a divided court. *Schmidt v. Cobb*, 119 U. S. 286.

**1. Due Process of Law.** — *Mugler v. Kansas*, 123 U. S. 623; *State v. Jordan*, 72 Iowa 377; *Craig v. Werthmueller*, 78 Iowa 598; *Carlton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446.

**2. Right to Jury Trial.** — *State v. Jordan*, 72 Iowa 377.

**3. Abridging Privileges of Citizens of United States.** — *Kidd v. Pearson*, 128 U. S. 1.

**4.** See the title LOCAL OPTION LAWS.

**5.** See the title PROHIBITION.

**6.** See the title CIVIL DAMAGE ACTS, vol. 6, p. 36.

**7. Constitutionality of Statutes Upheld.** — *Endleman v. U. S.*, 86 Fed. Rep. 456; *Nelson v. U. S.*, 12 Sawy. (U. S.) 285.

**8.** See *infra*, this title, *Interstate and Foreign Traffic in Intoxicating Liquors as Affected by State Liquor Laws*.

**9.** *Atkins v. Randolph*, 31 Vt. 226. And see *infra*, this title, *License Laws — Town Agent System of License and Sales*.



stitutional provision that no appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the state, does not prohibit the legislature from conferring upon counties the power to use county funds in the treatment and cure of their indigent inebriates in the manner provided by the statute conferring the power.<sup>1</sup> In *Maryland* it has been held that a statute authorizing the court, on petition, to send any habitual drunkard for treatment and cure to an institution within the state maintained for such persons, at the expense of the county or city of his residence, if neither he nor his petitioning kin is financially able to incur the expense, does not make an unconstitutional use of money raised by taxation.<sup>2</sup> In *Wisconsin* a statute practically identical in its provisions with that of *Maryland* has been declared unconstitutional on the ground that such use of public money is not for a public purpose.<sup>3</sup> In *Michigan* a statute authorized the release of a person charged with being disorderly on account of drunkenness, on a recognizance conditioned that he would immediately take treatment for the cure of drunkenness, from some corporation organized by law for such purpose and required to make and file reports in reference thereto, and that he would obey all regulations prescribed by those administering such cure. It was further provided that such person might be acquitted and discharged at the end of sixty days on proof that he had conformed to such conditions. This statute was held unconstitutional as permitting unofficial persons to prescribe rules which should acquit persons charged with crime.<sup>4</sup> In *New York* it has been held that even though a person voluntarily becomes a patient in one of these institutions and signs an agreement to remain there for a designated length of time, the persons in charge of such institution have no authority to keep him there by force; and this holding was based on the ground that no contract which deprives a person of his liberty can be specifically enforced by a judgment or order of court.<sup>5</sup>

**23. Statutes Authorizing Attorneys' Fees.** — A statute which provides for the taxation and allowance of a fee for the attorney appearing for the commonwealth in the prosecution under the liquor law, when a fine is imposed under those laws, is constitutional.<sup>6</sup>

**24. Statutes Authorizing Taxes or License Fees — In General.** — The power of the legislature to tax or impose license fees on the occupation of manufacturing and selling intoxicating liquors is undoubted,<sup>7</sup> and it may also define what are liquor dealers within the meaning of the laws.<sup>8</sup>

**1. Colorado Statute.** — *In re House*, 23 Colo. 87, holding further that the passage of an act of this nature is not prohibited by the constitutional provision that the General Assembly shall not allow to any special commission, private corporation, or association any power to make, supervise, or interfere with any municipal improvements, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

**2. Maryland Statute.** — *Baltimore v. Keeley Institute*, 87 Md. 106.

**3. Wisconsin Statute.** — *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, 60 Am. St. Rep. 105.

**4. Michigan Statute.** — *Happy Home Clubs v. Alpena County*, 99 Mich. 117. And see the title CONSTITUTIONAL LAW, vol. 6, p. 1021.

**5. New York Statute.** — *Matter of Baker*, (Supm. Ct.) 29 How. Pr. (N. Y.) 485.

It has also been held that a statute providing for the commitment of inebriates, lost to self-

control, to one of these institutions, without any provision for examination on their own motion and for determining whether they were such inebriates, was in violation of the constitutional provision that no person shall be deprived of liberty without due process of law. *Matter of Janes*, (Supm. Ct.) 30 How. Pr. (N. Y.) 446. And see the title HABITUAL DRUNKARDS, vol. 15, p. 243.

**6. Constitutionality of Statutes Authorizing Attorneys' Fees.** — *Com. v. Munn*, 14 Gray (Mass.) 361.

**7. Power of Legislature to Impose Taxes or License Fees.** — See *State v. Volkman*, 20 La. Ann. 585; *State v. Rolle*, 30 La. Ann. 991, 31 Am. Rep. 234; *Adler v. Whitbeck*, 44 Ohio St. 539; *Durach's Appeal*, 62 Pa. St. 491; *Kurth v. State*, 86 Tenn. 134; *Napier v. Hodges*, 31 Tex. 294; *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182; *Albrecht v. State*, 8 Tex. App. 216. See also cases cited in subsequent notes.

**8. Power to Define Liquor Dealers.** — *Kurth v. State*, 86 Tenn. 134.



**License Fees Not Taxes.** — According to the great weight of authority, the power inherent in the legislature to regulate the exercise of privileges and of following pursuits and occupations does not fall properly within its taxing powers, but falls within its police powers.<sup>1</sup> License fees exacted by the general law regulating the traffic in intoxicating liquors are not taxes within the meaning of any constitutional provision relating to taxation, but are nothing more than the price paid for the privilege of doing a thing the doing of which the legislature has a right to prohibit altogether. These laws are regarded as police regulations enacted with the view of restraining and regulating a business regarded as evil in its effects upon society.<sup>2</sup> It does not follow that because the license is large, or because it may become a part of the public revenue, it is therefore a tax.<sup>3</sup> Many fines, penalties, and forfeitures that are not derived from taxation become a part of the public revenue of the state. The disposition made of the fund derived from the license fees does not necessarily determine the character of such license.<sup>4</sup> Laws of this character are not within the meaning of constitutional provisions providing for equality and uniformity in taxation,<sup>5</sup> or within the meaning of a provision that no tax shall be levied except in pursuance of law,<sup>6</sup> or a provision requiring that all specified state taxes, excepting those received from certain mining companies, shall be applied "in paying the interest upon the primary school, university, and other educational funds, and the interest and principal of the state debt."<sup>7</sup>

**Must Be Uniform.** — But whether these laws are regarded as an exercise of the taxing power or as an exercise of police power, the principle of uniform operation requires simply that they shall bear equally in their burdens upon all persons standing in the same class. A law is uniform in its operation where every person who is brought within the relation and circumstances provided for is alike affected by it.<sup>8</sup> The constitutional provisions under consideration

1. **License Fees Not Taxes.** — *Straub v. Gordon*, 27 Ark. 625. See also cases cited in the following note.

2. *Alabama*. — *Ex p. Marshall*, 64 Ala. 267.  
*Arizona*. — *Territory v. Connell*, (Ariz. 1888) 16 Pac. Rep. 209.

*Arkansas*. — *Straub v. Gordon*, 27 Ark. 625;  
*Henry v. State*, 26 Ark. 523.

*Idaho*. — *State v. Doherty*, 2 Idaho 1105.  
*Illinois*. — *East St. Louis v. Wehrung*, 46 Ill.

392; *U. S. Distilling Co. v. Chicago*, 112 Ill. 19.

*Indiana*. — *Thomasson v. State*, 15 Ind. 449.

*Kentucky*. — *Com. v. Fowler*, 96 Ky. 166.

*Maryland*. — *Keller v. State*, 11 Md. 525, 69

Am. Dec. 226.

*Michigan*. — *Youngblood v. Sexton*, 32 Mich.

406.

*Minnesota*. — *State v. Cassidy*, 22 Minn. 312,

21 Am. Rep. 765; *State v. Klein*, 22 Minn. 328.

*Missouri*. — *State v. Hudson*, 78 Mo. 302.

*Nebraska*. — *Pleuler v. State*, 11 Neb. 569.

*New York*. — *People v. Murray*, 4 N. Y.

App. Div. 185.

*Ohio*. — *Senior v. Ratterman*, 44 Ohio St.

661; *Anderson v. Brewster*, 44 Ohio St. 576;

*Adler v. Whitbeck*, 44 Ohio St. 539.

*South Dakota*. — *State v. Buechler*, 10 S.

Dak. 156.

**License Fee for Support of Inebriate Asylums.** —

A statute requiring from every liquor dealer the payment of a license fee of ten dollars for the maintenance and support of an asylum for inebriates, in addition to other fees and licenses, is a legitimate exercise of the police power of the state, and does not impose an un-

equal tax within the meaning of the constitutional prohibition. *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *State v. Klein*, 22 Minn. 328.

3. **Size of Fee Does Not Make It a Tax.** — *State v. Hudson*, 78 Mo. 305; *State v. Hipp*, 38 Ohio St. 225.

4. **Character of License Not Determined by Fee.** — *State v. Hudson*, 78 Mo. 305.

5. **Statutes Not Within Constitutional Provisions for Equality and Uniformity of Taxation** — *Alabama*. — *Ex p. Marshall*, 64 Ala. 267.

*Idaho*. — *State v. Doherty*, 2 Idaho 1105.

*Illinois*. — *East St. Louis v. Wehrung*, 46 Ill.

392; *U. S. Distilling Co. v. Chicago*, 112 Ill. 19.

*Indiana*. — *Thomasson v. State*, 15 Ind. 449.

*Missouri*. — *State v. Hudson*, 78 Mo. 302.

*Nebraska*. — *Pleuler v. State*, 11 Neb. 566.

*Ohio*. — *Senior v. Ratterman*, 44 Ohio St.

661; *Anderson v. Brewster*, 44 Ohio St. 576.

*South Dakota*. — *State v. Buechler*, 10 S.

Dak. 156.

6. *Henry v. State*, 26 Ark. 523; *Straub v.*

*Gordon*, 27 Ark. 625.

7. *Youngblood v. Sexton*, 32 Mich. 406, in which case the act objected to as unconstitutional appropriated the fees to the use of the towns, villages, and cities in which the business taxed was carried on. The court held that it was not a state tax within the meaning of the constitution.

8. **Principle of Uniformity Explained.** — *Timm v. Harrison*, 109 Ill. 594; *State v. Volkman*, 20 La. Ann. 585; *State v. Rolle*, 30 La. Ann. 991, 31 Am. Rep. 234; *Pleuler v. State*, 11 Neb. 558;



do not require equality and uniformity as between different classes.<sup>1</sup> The legislature may classify the different kinds of liquor dealers and impose differential taxes upon such classes,<sup>2</sup> and it may impose a tax on liquor dealers and exempt manufacturers.<sup>3</sup>

**Taxation of Liquor Traffic Not License to Sell.** — The taxation of the business of selling intoxicating liquors is no license of such business. Therefore a statute which provides for an assessment upon the business of trafficking in intoxicating liquors is not, in effect, a license law, and is not within the constitutional provision prohibiting the granting of licenses to sell intoxicating liquors.<sup>4</sup>

**25. Statutes Delegating Legislative Power.** — In a number of states so-called local option laws have been enacted under the provisions of which the question of permitting or prohibiting the sale of intoxicating liquors in any given locality is to be determined by the voters of that locality at an election to be held for that purpose. These statutes have been assailed as being unconstitutional on the ground that they delegate legislative power to the voters. This contention has, in a majority of cases, been held untenable.<sup>5</sup> The legislature may validly enact a law to take effect or to go into operation on the happening of a future event or contingency, and such contingency may be a vote of the people.<sup>6</sup>

**These Statutes Are Complete in Themselves.** — They prescribe police regulations and leave it to popular vote to determine, not whether it shall be lawful or unlawful to sell intoxicating liquors, but whether a license shall or shall not be granted.<sup>7</sup> They merely delegate the power to determine some fact or facts

or privileges themselves, and is not money received for licenses. *Portwood v. Baskett*, 64 Miss. 213.

**4. Taxation of Traffic Not License.** — *Youngblood v. Sexton*, 32 Mich. 406; *People v. Walling*, 53 Mich. 264; *Anderson v. Brewster*, 44 Ohio St. 576; *Adler v. Whitbeck*, 44 Ohio St. 539.

**5. Delegating Authority** — *Dakota*. — *Territory v. O'Connor*, 5 Dak. 397.

*Georgia*. — *Caldwell v. Barrett*, 73 Ga. 604.  
*Indiana*. — *Groesch v. State*, 42 Ind. 547.  
*Kentucky*. — *Com. v. Weller*, 14 Bush (Ky.) 218 29 Am. Rep. 407.

*Maryland*. — *Hammond v. Haines*, 25 Md. 541, 90 Am. Dec. 77; *Fell v. State*, 42 Md. 72, 20 Am. Rep. 83; *Slymer v. State*, 62 Md. 237.

*Michigan*. — *Feek v. Bloomington*, 82 Mich. 393.

*Minnesota*. — *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344.

*Mississippi*. — *Lemon v. Peyton*, 64 Miss. 161; *Schulherr v. Bordeaux*, 64 Miss. 59.

*Missouri*. — *State v. Pond*, 93 Mo. 606.

*New Jersey*. — *Paul v. Judge*, 50 N. J. L. 585; *State v. Morris County*, 36 N. J. L. 72, 13 Am. Rep. 422.

*Ohio*. — *Gordon v. State*, 46 Ohio St. 607.

*Pennsylvania*. — *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716.

*Texas*. — *Holley v. State*, 14 Tex. App. 505.

*Vermont*. — *State v. Parker*, 26 Vt. 357.

*Virginia*. — *Savage v. Com.*, 84 Va. 619.

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**7. Statutes Complete in Themselves.** — *State v. Morris County*, 36 N. J. L. 72, 13 Am. Rep. 422; *Locke's Appeal*, 72 Pa. St. 496, 13 Am. Rep. 716; *Savage v. Com.*, 84 Va. 619.

**1. Applications of Rule.** — A law imposing a smaller license tax on proprietors of bars or drinking saloons kept on steamboats than on the owners of bars kept on land does not violate a clause of the constitution prescribing equality and uniformity of taxation. A state has the power of dividing into classes the objects of taxation, and the distinction which exists between those bars justifies the difference made in the price of the licenses. *State v. Rolle*, 30 La. Ann. 992, 31 Am. Rep. 234. See also *Timm v. Harrison*, 109 Ill. 594; *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 186.

A law requiring a liquor dealer to pay a tax and exempting manufacturers where the sales are of one gallon and over is not objectionable for want of uniformity. *Senior v. Ratterman*, 44 Ohio St. 678.

A law taxing all of a class alike, as liquor dealers within five miles of a town at one price, and liquor dealers at wayside inns at a less price, is not invalid for want of uniformity. *Territory v. Connell*, (Ariz. 1888) 16 Pac. Rep. 209.

**2. Legislature May Classify Different Kinds of Dealers.** — *Timm v. Harrison*, 109 Ill. 593.

**3. Legislature May Exempt Manufacturers.** — *Senior v. Ratterman*, 44 Ohio St. 678.

**Tax on Privilege of Retailing Not "Money" for License.** — A statute imposing a tax on the privilege of retailing liquors in a certain district and devoting the proceeds to the payment of bonds issued in that district is not in violation of the constitutional provision that all moneys received for licenses for selling intoxicating liquors shall be devoted to the support of the free schools. The tax is levied on the licenses

*Senior v. Ratterman*, 44 Ohio St. 678; *Durach's Appeal*, 62 Pa. St. 491; *Albrecht v. State*, 8 Tex. App. 228; *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182.

*Georgia*. — *Caldwell v. Barrett*, 73 Ga. 604.

*Indiana*. — *Groesch v. State*, 42 Ind. 547.

*Kentucky*. — *Com. v. Weller*, 14 Bush (Ky.) 218 29 Am. Rep. 407.

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upon which the law makes or intends to make its own action depend.<sup>1</sup> On the other hand, a local option statute which makes the repeal of an existing statute dependent upon the vote of the people is invalid as a delegation of legislative authority.<sup>2</sup>

**Illustrations.** — A constitutional provision which gives to the legislature the exclusive right to license the sale of intoxicating liquors and which prohibits a delegation of this power to municipal corporations does not prevent the legislature from authorizing municipal corporations to prohibit the sale of intoxicating liquors within their boundaries.<sup>3</sup> So a statute which provides that if a majority of the legal voters of a township or ward file a remonstrance against the granting of a license to any applicant no license shall be granted for a period of two years is not unconstitutional as delegating legislative power.<sup>4</sup> Under a constitutional provision declaring the sale of alcoholic liquors a police regulation and conferring upon the legislature the power to regulate their sale, the legislature may delegate such power to the several police juries and may provide a uniform penalty for the violation of any regulation made by them.<sup>5</sup> It is also competent to confer on designated courts the power to determine whether license shall be granted, or to confer upon municipal corporations the power to regulate the sale of liquors within their own limits.<sup>6</sup>

**26. Statutes Prescribing Rules of Evidence.** — In a number of jurisdictions there are statutes which formulate certain rules of evidence applicable in prosecutions for violations of the liquor laws. The constitutionality of these statutes has been frequently assailed, but for the most part they have been held a valid exercise of legislative power. The following statutes have been held not unconstitutional: a statute providing that unexplained possession of liquors found under circumstances indicating an intent to sell unlawfully shall authorize a condemnation thereof;<sup>7</sup> a statute providing that the prosecution need not, in the first instance, prove that the defendant has not a permit from the state;<sup>8</sup> a statute making the presence of people in a saloon on days when sales are forbidden *prima facie* evidence of violating the law in selling liquor on those days;<sup>9</sup> a statute providing that delivery of intoxicating liquors in or from any building or place other than a dwelling house "shall be deemed *prima facie* evidence of a sale and be punishable as such sale;"<sup>10</sup> a statute

1. Power to Determine Facts on Which Action of Law Depends Delegated. — *Holley v. State*, 14 Tex. App. 505.

2. Making Repeal of Statute Dependent upon Vote. — *State v. Geebrick*, 5 Iowa 491; *Turner v. Saxon*, (Wash. Ter. 1889) 20 Pac. Rep. 685; *Thornton v. Territory*, 3 Wash. Ter. 482; *Lessman v. Territory*, 3 Wash. Ter. 452.

"To say that what is now the law shall not hereafter, or shall not for a specified time, be the law, is in effect to declare the law to be otherwise than it now is, and is a clear exercise of the law-making power." *State v. Morris County*, 36 N. J. L. 72, 13 Am. Rep. 422.

3. *Florence v. Brown*, 49 S. C. 332. In this case it was contended that the right to prohibit the doing of any act is coextensive with the right to license the doing of such act. The court disposed of this contention as follows: "The power to prohibit is not always coextensive with the power to grant; or, to express the idea upon which this argument rests more accurately, the power to prohibit is not limited by the power to grant. It cannot be denied that a municipal corporation may be, and often has been, invested by its charter with the power to prohibit breaches of the peace, keeping of gaming houses or bawdy houses,

and to provide such other police regulations as may be necessary for the maintenance of peace and good order within the corporate limits; and yet it has never been supposed, so far as we are informed, that such power involves the right to license breaches of the peace or the keeping of gaming or bawdy houses."

4. *State v. Gerhardt*, 145 Ind. 439.

5. Delegating Power to Police Juries. — *State v. Harper*, 42 La. Ann. 312.

6. Conferring Power on Courts to Determine Question of Granting License. — See *Savage v. Com.*, 84 Va. 619.

7. Presumption Arising from Possession. — *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *Lincoln v. Smith*, 27 Vt. 328. See also *State v. Cunningham*, 25 Conn. 195; and the title EVIDENCE, vol. II, p. 551.

8. Placing Burden of Showing License on Defendant. — *Mugler v. Kansas*, 123 U. S. 623, in which case it was held that a statute of this sort is not unconstitutional as depriving the defendant of the presumption of innocence, since he can produce the permit if he has one.

9. Presumption from Presence of People in Saloon During Prohibited Days. — *State v. Gerhardt*, 145 Ind. 439.

10. Presumption from Delivery in Building Other



providing that three several sales shall be sufficient evidence of a violation of the statute making it a punishable offense to be a common seller;<sup>1</sup> a statute providing that "evidence of the sale or keeping of intoxicating liquors for sale in any building, place, or tenement shall be *prima facie* evidence that the sale or keeping is illegal;"<sup>2</sup> a statute making proof of a delivery of intoxicating liquors sufficient evidence of a sale when an illegal sale is charged;<sup>3</sup> a statute providing that when it is proved that a physician gave a prescription to another person for intoxicating liquor, the burden is upon the physician to show that the liquor was needed as a medicine by the person for whom it was prescribed;<sup>4</sup> and a statute providing that it shall not be necessary to prove an actual sale of intoxicating liquors in any building, place, or tenement, in order to establish the character of such premises as a common nuisance, but that the notorious character of any such premises shall be evidence that such premises are a nuisance.<sup>5</sup> There is no constitutional objection to the passage of a law that the presumption of innocence may be overcome by a contrary presumption founded upon the experience of human conduct, and enacting what evidence shall be sufficient to overcome such presumption of innocence.<sup>6</sup>

**27. Statutes Prescribing Rules of Pleading.** — It is competent for legislatures to prescribe the form of an indictment in a given case, providing they violate no constitutional provision.<sup>7</sup> A legislature may modify and simplify the forms in criminal proceedings,<sup>8</sup> but cannot authorize the courts to dispense with the allegation, in indictments for criminal offenses, of a material fact which, under the law whose violation is alleged, forms an ingredient of the offense.<sup>9</sup> It cannot dispense with the requirement of a distinct presentation of an offense against the law, for this is an inalienable right granted to the defendant by the constitution.<sup>10</sup>

than Dwelling. — *Com. v. Wallace*, 7 Gray (Mass.) 222; *Com. v. Rowe*, 14 Gray (Mass.) 47; *Com. v. Williams*, 6 Gray (Mass.) 1. It is to be noted, however, that this presumption is liable to be rebutted by attending circumstances or other facts.

1. Presumption from the Making of Three Sales. — *Com. v. Burns*, 9 Gray (Mass.) 132.

2. Presumption from Sale or Keeping that Sale or Keeping Is Illegal. — *State v. Higgins*, 13 R. I. 330. See also *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

3. Presumption of Sale from Act of Delivery. — *State v. Hurley*, 54 Me. 562; *State v. Day*, 37 Me. 244.

4. Placing Burden on Physician to Show Necessity of Liquor Prescribed. — *Com. v. Minor*, 88 Ky. 422.

Evidence of Drinking on Premises. — The provision of an excise law (Laws N. Y. 1857, c. 628, § 11) which enacts that where a person is seen to drink intoxicating liquor on the premises of one who has simply a license to sell liquor not to be drunk on the premises, it shall be *prima facie* evidence that the liquor was sold by the occupant of the premises or his agent with the intent that it should be drunk thereon, is not violative of the constitutional guaranties of due process of law and trial by jury. *Excise Com'rs v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705.

5. Presumption from Notorious Character of Premises. — *State v. Wilson*, 15 R. I. 180; *State v. Waldron*, 16 R. I. 191.

Statutes Making It an Offense to Keep Places Where Liquor Is Reputed to Be Sold are not unconstitutional, as such reputation legitimately tends to prove the actual character of the place

which is the real basis of the prosecution; but evidence that this reputation is untrue is admissible in defense. *State v. Thomas*, 47 Conn. 550, 36 Am. Rep. 98. Compare *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

6. *Lincoln v. Smith*, 27 Vt. 328. To the same effect see *Santo v. State*, 2 Iowa 166, 63 Am. Dec. 487; *Com. v. Minor*, 88 Ky. 422; *Com. v. Williams*, 6 Gray (Mass.) 6.

7. Legislature May Prescribe Form of Indictment. — *State v. Comstock*, 27 Vt. 553.

8. Legislature May Simplify Proceedings. — *State v. Learned*, 47 Me. 426.

9. *Hewitt v. State*, 25 Tex. 722.

A statute providing that in any indictment for the unlawful sale of spirituous liquors it shall not be necessary to specify the variety, but that the defendant, on application before trial, may obtain a statement of the particular variety which it is expected to prove, is not unconstitutional. *Kiefer v. State*, 87 Md. 562.

10. Offense Must Be Stated. — *State v. Learned*, 47 Me. 433; *Hewitt v. State*, 25 Tex. 722.

A statutory form of indictment that the respondent "became a dealer in intoxicating liquors without having license therefor, contrary to the form of the statute in such case made and provided," is not in violation of a statutory provision that "the accused shall have the right to demand the cause and nature of his accusation." *State v. Comstock*, 27 Vt. 553.

Amendments. — A provision allowing the amendment of an allegation of a former conviction, on the trial of an indictment for a second offense against that statute, is in violation of a constitutional provision that no person shall be held to answer to any claim or



**28. Title and Subject-matter of Statutes —** *a.* NATURE AND OBJECT OF CONSTITUTIONAL PROVISIONS. — The constitutions of the various states usually contain provisions which in substance declare that no law shall embrace more than one subject and that the subject must be clearly expressed in the title.<sup>1</sup>

*b.* APPLICATION OF CONSTITUTIONAL PROVISIONS — (1) *What Enactments Valid under Title "To Regulate" or "Restrain."* — Many of the laws enacted for the purpose of restraining, regulating, and prohibiting the traffic in intoxicating liquors have been attacked on the ground that they are in violation of the constitutional provisions heretofore mentioned.

**Statutes Held Valid.** — Where the title of an act is "to regulate" or "restrain" the sale of intoxicating liquors, the following enactments thereunder are within the object expressed by the title and are constitutional: a provision that where the house in which liquors are sold shall be kept in a disorderly manner it shall be deemed a nuisance;<sup>2</sup> a provision requiring the applicant for a license to give bond conditioned for the due observance of the liquor laws;<sup>3</sup> a provision prohibiting sale by the small measure;<sup>4</sup> a provision prohibiting the furnishing of liquors to minors and intemperate persons;<sup>5</sup> a provision that any one who causes the intoxication of another shall be compelled to pay for his care while so intoxicated;<sup>6</sup> a provision giving to designated courts jurisdiction of offenses for its violation;<sup>7</sup> a provision for the enforcement of the statute and imposing penalties for its violation;<sup>8</sup> a provision for remonstrances against granting a license;<sup>9</sup> a provision making a violation of the act a misdemeanor punishable by indictment;<sup>10</sup> a provision relating to the duties of constables and repealing any local liquor laws;<sup>11</sup> and a provision declaring certain rules of evidence to be applied in prosecutions for violation of the act.<sup>12</sup>

**Statutes Held Invalid.** — On the other hand, a provision in a statute for the punishment of persons for drunkenness is not expressed in the title under discussion,<sup>13</sup> nor will it support an amendment increasing the license tax for the sale of liquors.<sup>14</sup> And it is likewise well settled that an act whose title pro-

offense until it is fully and plainly, substantially, and formally described to him. *Com. v. Holley*, 3 Gray (Mass.) 458.

**Statutes Dispensing with the Necessity of Alleging a Former Conviction** are unconstitutional. *State v. Freeman*, 27 Vt. 523.

**1. Constitutional Provisions — Substance.** — See the constitutional provisions of the various states. For a full general treatment of this subject, see the title **STATUTES**.

**2. Declaring Disorderly Tippling Houses Nuisances.** — *Com. v. Sellers*, 130 Pa. St. 32; *O'Kane v. State*, 69 Ind. 183; *Fletcher v. State*, 54 Ind. 462. See also *Davis v. State*, 52 Ind. 488; *Collins v. State*, 58 Ind. 5; *Swigart v. State*, 67 Ind. 287. In all of these cases the constitutionality of the provision mentioned in the text was upheld, although the question of its constitutionality was not directly raised.

**3. Requiring Applicant to Give Bond.** — *Kane v. State*, 78 Ind. 103.

**4. Prohibiting Sales by Small Measure.** — *Paul v. Judge*, 50 N. J. L. 585.

**5. Prohibiting Sales to Minors and Drunkards.** — *Com. v. Silverman*, 138 Pa. St. 642.

**6. Civil Damage Provisions.** — *Werner v. Edmiston*, 24 Kan. 147, in which case the constitutionality of a following provision that every person who should be injured in his property or means of support by any intoxicated person, or in consequence of intoxication, might recover therefor of the person causing the intoxication, was also upheld.

**7. Provisions as to Jurisdictions of Offenses.** — *Hingle v. State*, 24 Ind. 28 [*overruling Lauer v. State*, 22 Ind. 461]; *State v. Gerhardt*, 145 Ind. 440.

**8. Provisions for Enforcement and for Penalties.** — *State v. Gerhardt*, 145 Ind. 440.

Where the Title of an Act Is "An Act Relating to Intoxicating Liquors," a provision declaring to be nuisances all places where persons are allowed to resort to drink intoxicating liquor as a beverage, and providing for the punishment of the owners or keepers thereof, is properly included in such title. *State v. Campbell*, 50 Kan. 433.

**9. Providing for Remonstrances.** — *State v. Gerhardt*, 145 Ind. 440.

**10. Providing for Punishment by Indictment.** — *Com. v. Watson*, 2 Pa. Dist. 526.

**11. Provisions Relating to Duties of Constables and for Repeal of Laws.** — *Com. v. Sellers*, 130 Pa. St. 32.

**12. Provisions as to Evidence.** — *Floek v. State*, 34 Tex. Crim. 314. The provision whose constitutionality was upheld was as follows: "The payment of the United States special tax as a seller of spirituous, vinous, or malt liquors shall be held to be *prima facie* evidence that the person or persons paying such tax are engaged in selling such liquors."

**13. Provisions for Punishment of Drunkenness.** — *State v. Young*, 47 Ind. 150; *People v. Beadle*, 60 Mich. 22.

**14. Increasing Liquor Tax.** — *State v. Wright*, 14 Oregon 365.



vides simply that it is to "regulate" the sale of liquors cannot contain a provision "prohibiting" the sale without violating the constitutional provisions.<sup>1</sup> Intrinsically, regulation and prohibition are entirely different; no sale which is prohibited is regulated, and no sale which is regulated is prohibited.<sup>2</sup>

(2) *What Enactments Valid under Title "To Prohibit."* — Where the title of a statute is "to prohibit" the sale of intoxicating liquors, the following provisions in the body of the statute are expressed in the title and are constitutional: a clause providing fines and penalties for its violation, and the method to enforce them;<sup>3</sup> a provision as to the time when and the manner in which the law shall be made operative;<sup>4</sup> a proviso that the prohibition shall not apply to persons holding licenses until such licenses shall expire, to the sale of domestic wines, and to the dispensing of alcoholic stimulants for medicinal use by practicing physicians;<sup>5</sup> a clause declaring what liquors shall be considered within the prohibition of the act.<sup>6</sup>

(3) *Miscellaneous.* — The title of "dramshops" covers a provision as to the application of funds arising from license taxes on saloons.<sup>7</sup>

**1. Provisions for Prohibition of Sales — Alabama.** — *Miller v. Jones*, 80 Ala. 89.

*Indiana.* — *Sweet v. Wabash*, 41 Ind. 7.

*Iowa.* — *Cantril v. Sainer*, 59 Iowa 26.

*Michigan.* — *People v. Gadway*, 61 Mich. 285, 1 Am. St. Rep. 578; *Matter of Hauck*, 70 Mich. 396; *Keefer v. Hillsdale*, 70 Mich. 473.

*New Jersey.* — *State v. Fay*, 44 N. J. L. 477.

*Ohio.* — *Bronson v. Oberlin*, 41 Ohio St. 478, 52 Am. Rep. 90.

*South Carolina.* — *Heise v. Council*, 6 Rich. L. (S. Car.) 404.

**2. Regulation and "Prohibition" Distinguished.** — *Miller v. Jones*, 80 Ala. 89; *State v. Fay*, 44 N. J. L. 477.

**3. Statutes Providing Penalties and Fines.** — *Martin v. Blattner*, 68 Iowa 286; *Helvenstine v. Yantis*, 88 Ky. 695.

**An Act Prohibiting "the Sale of Alcoholic, Spirituous, or Malt Liquors, or Intoxicating Bitters,"** is not rendered unconstitutional by another clause which describes all the liquors contemplated as "intoxicating liquors," alcoholic, spirituous, and malt liquors and intoxicating bitters being comprehended in the phrase "intoxicating liquors." *Bell v. State*, 91 Ga. 227; *Redding v. State*, 91 Ga. 231.

**A Title Prohibiting Sales "Except for Medical, Scientific, and Mechanical Purposes,"** is sufficiently comprehensive to cover a provision giving a right of action for damages to any one injured by an intoxicated person against the person who furnished the liquor which caused the intoxication. *Durein v. Pontious*, 34 Kan. 353. And see *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

**A Title Authorizing "a Vote to Be Taken on the Proposition to Sell Spirituous Liquors as a Beverage"** sufficiently covers a provision prescribing rules of evidence in prosecutions for liquor selling. *Gayle v. Owen County Ct.*, 83 Ky. 61. A similar title covers a provision that on a majority vote in favor of prohibition the sale shall be unlawful, and that licenses theretofore granted shall be lawful until the expiration; and declares the sale a misdemeanor and provides a punishment, and provides for a second vote if the law be not accepted by the first one. *Burnside v. Lincoln County Ct.*, 86 Ky. 423.

**Prohibiting Issuing of Licenses.** — Where the

title of an act is "an act to prohibit the issuing of licenses" to sell, a clause in the act providing punishment for the sale of liquors without a license is unconstitutional as not being embraced in the title of the act. *Com. v. Frantz*, 135 Pa. St. 389; *Hatfield v. Com.*, 120 Pa. St. 395.

**Prohibition "Except as Herein Provided."** — Where an act is entitled "an act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein provided," the body of the statute may properly contain provisions for the regulation of the traffic in intoxicating liquors, because regulating a thing is prohibiting it except in accordance with certain rules. *Cantini v. Tillman*, 54 Fed. Rep. 969.

**Prohibiting Sale to Minors.** — An act which prohibits the sale of liquor to drunken persons, entitled "an act to amend an act \* \* \* entitled 'an act to prevent the sale or giving or delivering liquors to minors,'" is unconstitutional and void. *Hyman v. State*, 87 Tenn. 109.

**Title — Prohibiting Sale to Certain Classes of Persons.** — An act entitled "an act to prevent the sale or delivery of intoxicating liquors \* \* \* to habitual drunkards; to provide a remedy against persons selling liquor to husbands or children in certain cases," and which requires all saloons to be closed on Sunday and at eleven o'clock at night, is constitutional. *Kurtz v. People*, 33 Mich. 279.

**4. Time and Manner of Making Law Operative.** — *McGruder v. State*, 83 Ga. 616; *Neighbors v. Com.*, (Ky. 1888) 9 S. W. Rep. 718.

**5. Saving Clauses in Prohibition Act.** — *Butler v. State*, 89 Ga. 821.

**6. Clause Declaring What Liquor Within Prohibition.** — *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259.

**7. "Dramshops" — Application of License Fees.** — *State v. County Ct.*, 128 Mo. 427.

**An Act Entitled "Dramshops — Gambling Devices in,"** the full title to which enumerates certain gambling devices "or other device for gaming or amusement," sufficiently covers a provision prohibiting sparring, boxing, wrestling, and cockfighting in dramshops, though these devices are not specifically mentioned. *State v. Blackstone*, 115 Mo. 424.



**Incorporation.** — Where an act is entitled "an act to incorporate" a town, village, city, or college, the title has been held to cover provisions in the act prohibiting or regulating the sale of intoxicating liquors within the corporate limits or a designated distance thereof.<sup>1</sup>

**"Sale."** — It has been held that an act to prohibit the sale of liquor is not unconstitutional because in the body of the act it is made unlawful also to give away intoxicating liquors.<sup>2</sup>

**Regulating Elections.** — A statute entitled "an act regulating elections" may properly provide for the closing of liquor shops on election days;<sup>3</sup> but a statute entitled "an act to create a school district" cannot constitutionally prohibit the sale of spirituous liquors within that district.<sup>4</sup> A statute entitled "an act to provide a remedy against persons selling liquor to husbands or children in certain cases," is not unconstitutional because it prohibits the sale of liquors to minors, intoxicated persons, and persons in the habit of getting intoxicated, and gives a right of action against the seller.<sup>5</sup> In addition to the decisions already shown there are many others in which the constitutionality of statutes has been passed upon. These decisions are set out in the notes.<sup>6</sup>

1. **Incorporation — Regulation or Prohibition of Liquor Traffic.** — *Ex p.* Moore, 62 Ala. 471; *O'Leary v. Cook County*, 28 Ill. 524; *Neifung v. Pontiac*, 56 Ill. 173.

"An Act to Reorganize" a Village is broad enough to include a provision giving to the village the right to make police regulations and prohibiting the sale of intoxicating liquors. *Gloversville v. Howell*, 7 Hun (N. Y.) 345.

A title expressing the statute to be an act to amend an act incorporating a town, which latter act merely authorizes the collection of a tax for selling liquors, does not sustain a provision in the amendatory act prohibiting the sale of intoxicating liquors. *Ex p.* Cowert, 92 Ala. 94.

2. *State v. Adamson*, 14 Ind. 296; *Edgar v. Com.*, 7 Ky. L. Rep. 441; *Stickrod v. Com.*, 86 Ky. 285; *Parkinson v. State*, 14 Md. 185, 74 Am. Dec. 522. See also *McArthur v. State*, 60 Ga. 444. *Compare Com. v. Doll*, 6 Pa. Co. Ct. 49, in which case it was held that where the title of the act is "to restrain and regulate the sale of intoxicating liquors," a clause forbidding a person not a seller of liquors to give intoxicating drink to another on Sunday is unconstitutional, since the title gives no notice to those not engaged in the business of selling liquors.

3. **Regulating Elections — Closing Saloons on Election Day.** — *English v. State*, 7 Tex. App. 171.

4. **Creating School District — Prohibiting Liquor Traffic in.** — *Montgomery v. State*, 88 Ala. 141.

5. *Flower v. Witkovsky*, 69 Mich. 371. See also *People v. Laning*, 73 Mich. 284.

6. **Titles Held Insufficient to Cover Provisions of Statute.** — The title "to provide for licensing boats, hacks, and other vehicles by incorporated camp-meeting associations or seaside resorts, and for the better government of the same" will not sustain provisions regulating the manufacture and sale of liquors at such resorts. *Grover v. Ocean Grove Camp-Meeting Assoc.*, 45 N. J. L. 399.

The title "an act to authorize police juries to make such regulations as they may deem proper to prohibit or regulate the sale, barter, or exchange of intoxicating liquors or merchandise on Sundays," does not authorize a

provision that violations of such ordinances shall be considered misdemeanors and that the facts therein described shall be enforced on information. *State v. Baum*, 33 La. Ann. 981, *overruling State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

**Titles Held Sufficient to Cover Provisions of Statute.** — The title "an act to provide a local option law for the incorporated cities, towns, and villages of this state," sufficiently indicates a proviso that the act shall not apply to a city, town, or village in which the sale of ardent spirits shall thereafter be prohibited by legislative enactments. *State v. Chester*, 18 S. Car. 464.

The title "liquors," in an original act, is sufficient to sustain provisions of an amendatory act regulating the sale. *In re White*, 33 Neb. 812.

The title "to provide for the collection of the special taxes imposed by law on dealers in spirituous or malt liquors, or intoxicating bitters, and for other purposes," authorizes a provision that a failure to pay such taxes shall be a misdemeanor. *Brown v. State*, 73 Ga. 38. See also *State v. Forkner*, 94 Iowa 1.

The title "an act to regulate, restrain, license or prohibit the sale of intoxicating liquors," sufficiently indicates a provision that ten per cent. of the license fees shall be paid into the state treasury. *State v. Spokane Falls*, 2 Wash. 40.

The title "an act to prohibit the sale of intoxicating liquors within certain limits" authorizes a provision prohibiting the sale of "plantation bitters" under the name of patent medicines. *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259.

Where the title of a statute is "an act to amend [acts] relating to the practice of pharmacy," the statute may contain provisions amending the laws authorizing the sale of liquors for whatever purposes. *State v. Aulman*, 76 Iowa 624.

The title "an act to prohibit the sale, giving away, or otherwise disposing of spirituous, vinous, or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base, in Calhoun county," sufficiently indicates provisions for the exemption of wines and liquors



29. **Who May Question Validity of Statute.** — One whose rights are not affected or prejudiced by the provisions of a statute restricting or prohibiting the sale of or traffic in intoxicating liquors cannot assail such statute on the ground that it is unconstitutional.<sup>1</sup>

**IV. LICENSE LAWS** — 1. **Definition of License.** — A license is a permission granted by some competent authority to do an act which without such permission would be illegal.<sup>2</sup> Its object is to confer a right that does not exist without a license.<sup>3</sup>

2. **Necessity of License.** — At common law there was no restriction on the right to sell intoxicating liquors, but inasmuch as the liquor traffic is productive of pauperism and crime, and is attended with great evils to society, the various states, in the exercise of the police power, have enacted statutes regulating and restricting it or entirely prohibiting it.<sup>4</sup> The imposition of a license fee is one of the most common forms of regulation and restriction, when this and not total prohibition is the purpose of the statutes.

**Retail Dealers.** — As the selling of liquors by the dram is most likely to be productive of the evils and abuses sought to be prevented, the statutes of all states require license of retail dealers, whatever they may be called, as dram-shop keepers, saloon keepers, keepers of tippling houses, etc.<sup>5</sup>

3. **Nature and Effect of License** — *a.* **IN GENERAL.** — A license is not a contract between the state and the person licensed, but is merely a permit to do something which without it would be unlawful.<sup>6</sup> Licenses have neither the quality of a contract nor that of property, in the absence of statutes giving that character to them. They form a portion of the internal police system of the state, are issued in the exercise of its police powers, and are subject to the discretion of the state government, which may modify, revoke, or continue them as it may deem fit.<sup>7</sup>

**Under Present New York Statute.** — A liquor-tax certificate constitutes, under

for specified uses, and the prohibition of the sale of "bitters or medicines with sufficient alcohol or spirituous liquors therein to make a man drunk." *Ramagnano v. Crook*, 85 Ala. 226.

Where the title of a third statute is to amend a second, and of the second to amend the first, the title of the third is broad enough to comprehend the whole subject-matter of the first and second; and if that subject-matter embraces penalty as well as duty, both duty and penalty are within the title of the third statute. *Alberson v. Hamilton*, 82 Ga. 30.

1. **Who May Question Validity of Statute.** — *Wagner v. Garrett*, 118 Ind. 114; *State v. Gerhardt*, 145 Ind. 439; *Stickrod v. Com.*, 86 Ky. 285; *Burnside v. Lincoln County Ct.*, 86 Ky. 423; *Van Wert v. Brown*, 47 Ohio St. 477; *State v. Rouch*, 47 Ohio St. 478; *Ex p. Bell*, 24 Tex. App. 428. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1090.

2. **License Defined.** — *Youngblood v. Sexton*, 32 Mich. 419; *Pleuler v. State*, 11 Neb. 564; *State v. Hipp*, 38 Ohio St. 199.

"A license is essentially the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or at least not enjoyed by a class of citizens to which the licensee belongs. A common right is not the creature of a license law." *State v. Frame*, 39 Ohio St. 413.

3. **Object of License.** — *Chilvers v. People*, 11 Mich. 43.

After reviewing the definitions of license

given in the cases already cited, the court said in *Adler v. Whitbeck*, 44 Ohio St. 558: "The result of the definitions that have been given of a license is implied in its etymology, is in conformity to the sense in which the word is ordinarily used, and may be regarded as strictly accurate. That is permitted that cannot be done without permission; and to say that a person is permitted, licensed, to do what he may lawfully do without permission, is a misuse of words."

4. See the statutes of various states regulating or prohibiting the traffic in intoxicating liquors.

5. **Retail Dealers.** — See the statutes of the various states.

**As to the Necessity of a License** for various classes of persons and for sales under various circumstances, see *infra*, this title, *Offenses Against Liquor Laws and Prosecutions Thereunder*.

6. See *infra*, this section, *Revocation of License*. See also the title LOCAL OPTION LAWS.

**Conditions on Which Granted.** — A person who receives a license does so with the tacit condition and knowledge that it is at all times within the control of the legislature. *McKinney v. Salem*, 77 Ind. 213; *Nelson v. State*, 17 Ind. App. 403.

7. **Licenses Subject to Modification or Revocation by Legislature.** — *Hevren v. Reed*, 126 Cal. 219; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 659.



the present law,<sup>1</sup> a species of property transferable by the party procuring it. The privilege or right which it confers upon the holder cannot be revoked except in the manner and for the causes prescribed in the statute; and the holder may invoke the general rules of law for the protection of property, in any proceeding having for its object the forfeiture or destruction of the right which the certificate confers.<sup>2</sup>

**Licenses Are Not Created by Implication.** — Thus a conviction of violating the liquor laws does not operate as a license.<sup>3</sup> So a statute which provides that after a designated day in any year no person shall engage in the sale of intoxicating liquors without a license does not authorize any person to engage in selling intoxicating liquors without a license before that date.<sup>4</sup>

**b. RIGHTS OF PARTNERS UNDER LICENSE.** — A license may be granted to a partnership where the individual members composing it show that they are fit persons and have complied with the requisites of the statutes.<sup>5</sup> And a license so granted will protect one of the partners in selling intoxicating liquors although the other may have retired from the firm.<sup>6</sup> Yet a license granted to one member of a firm does not authorize another member of the firm, who is not licensed, to make sales.<sup>7</sup> And *a fortiori* a license issued to one firm confers no authority to sell on another firm a member of which is also a member of the firm to which the license was issued.<sup>8</sup> A sale by an unlicensed member of a firm does not come within the rule authorizing a sale by an agent.<sup>9</sup>

**c. RIGHT OF LICENSEE TO SELL BY AGENT.** — Although, as will be subsequently shown, a license is not in general assignable, a person who has been duly licensed may nevertheless conduct his business by an agent or servant,<sup>10</sup> and of course the agent will be protected by the principal's license in making a sale,<sup>11</sup> provided the sales are such as are authorized by the license.<sup>12</sup> The mere removal of a licensed retailer to another county does not abrogate his license and render his clerk liable to criminal prosecution for selling under

1. Laws N. Y. 1897, c. 312, § 18, amending Laws N. Y. 1896, c. 112, § 27.

2. Matter of Lyman, 160 N. Y. 96; Frank v. Forgotston, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1118.

3. Conviction of Illegal Selling Not a License. — State v. McBride, 4 McCord L. (S. Car.) 332, in which case the court said: "It would, indeed, be rather a strange deduction that a conviction for an offense expressly prohibited by law should operate as an authority to the accused to go on in the commission of the same offense."

4. Prohibition of Sales After Certain Date Not License to Sell Before Such Date. — Moog v. Hanon, 93 Ala. 503.

5. License May Be Granted to Firm. — Long v. State, 27 Ala. 32; State v. Gerhardt, 3 Jones L. (48 N. Car.) 178.

6. Effect of Retirement of One Partner. — U. S. v. Glab, 1 McCreary (U. S.) 166; Com. v. James, 98 Ky. 30; State v. Gerhardt, 3 Jones L. (48 N. Car.) 178. In the *Kentucky* case cited it was said: "The remaining member is certainly not rendered less fit personally to exercise the privileges of the license because his partner has retired." See also Hill v. Thixton, 94 Ky. 96. *Contra*, State v. Zermuehlen, (Iowa 1899) 81 N. W. Rep. 154.

7. License to One Member No Protection to Other Members. — Long v. State, 27 Ala. 32; Shaw v. State, 56 Ind. 188; State v. McConnell, 90 Iowa 197; Lovejoy v. Com., 13 Ky. L. Rep. 976; Com. v. Hall, 8 Gratt. (Va.) 588.

A license to one man to keep a tavern at his house in a village will not authorize another, who formed a partnership with the first in the sale of intoxicating liquors when the first was authorized to sell under his license, to sell liquors at a house on the same lot and within the same inclosure with the tavern. Com. v. Hall, 8 Gratt. (Va.) 588.

8. Wharton v. King, 69 Ala. 365.

9. Partner Not on Same Footing as Agent. — Long v. State, 27 Ala. 36; Shaw v. State, 56 Ind. 188.

**Reason for Rule.** — "One partner is not the mere clerk or mere agent of his copartner, nor entirely under his control and superintendence. Each partner has rights and powers, and is subject to responsibilities, which do not attach nor appertain to a mere clerk or agent." Long v. State, 27 Ala. 36.

10. License Protects Agent. — Thompson v. State, 37 Ala. 151; State v. Keith, 37 Ark. 96; Runyon v. State, 52 Ind. 320; Duncan v. Com., 2 B. Mon. (Ky.) 281, 38 Am. Dec. 152; Barnes v. Com., 2 Dana (Ky.) 388; People v. Buffum, 27 Hun (N. Y.) 216.

11. Licensee May Sell by Agent. — Thompson v. State, 37 Ala. 151; Runyon v. State, 52 Ind. 320; Pickens v. State, 20 Ind. 116; State v. McNeeley, 1 Winst. L. (60 N. Car.) 234.

12. Sales Must Be Within Scope of License. — Provo City v. Shurtliff, 4 Utah 15, holding that a druggist's clerk is not protected in making sales for other than medicinal purposes.



such license.<sup>4</sup> It has been held that one who voluntarily removes from the state forfeits and abandons his right to his license, by the act of removal, and that he cannot thereafter maintain such business by means of an agent.<sup>2</sup> But there are decisions which maintain that one who is absent in the military service of the country for an indefinite period of time may nevertheless carry on the business by agent.<sup>3</sup> It is to be noted, however, that the business cannot be carried on by agent — or by the principal himself — at any other place than that authorized by the license.<sup>4</sup>

*d. LICENSE DOES NOT PASS TO PERSONAL REPRESENTATIVES.* — As a license is purely a personal trust, it ends with the life of the licensee and does not pass to his personal representatives, and they are not protected in carrying on the business under such license.<sup>5</sup> It has been held, however, that an administrator need not take out a license for the sale of spirituous liquors to enable him to dispose of such liquors belonging to the estate, in payment of a debt or otherwise.<sup>6</sup>

*e. RIGHT TO ASSIGN OR TRANSFER LICENSE* — (1) *License Not Assignable Without Statutory Authority Therefor.* — It is well settled that in the absence of statute providing otherwise a license to sell intoxicating liquors cannot be assigned or transferred to another by the licensee.<sup>7</sup> A license is purely a personal trust<sup>8</sup> and implies special confidence in the licensee.<sup>9</sup> The law looks to the person to whom the right has been granted, for the faithful discharge of the duties imposed by the grant.<sup>10</sup> The most important condition attached to the granting of licenses to sell intoxicating liquors is that the person licensed shall possess certain moral qualifications which render him fit for the exercise of the franchise intrusted to him. As a consequence of what is said, it is obvious that one to whom a license to sell intoxicating liquors has been transferred is not protected in making sales under such license,<sup>11</sup> and

1. Removal of Licensee from County. — *Thompson v. State*, 37 Ala. 151.

2. Voluntary Removal of Licensee from State. — *Krant v. State*, 47 Ind. 520.

3. Absence of Licensee on Military Service. — *Pickens v. State*, 20 Ind. 116; *State v. McNeeley*, 1 Winst. L. (60 N. Car.) 234.

4. Sales Must Be at Place Authorized by License. — *People v. Lester*, 80 Mich. 643.

5. Right of Personal Representatives to Conduct Business under License. — *U. S. v. Overton*, 2 Cranch (C. C.) 42; *People v. Sykes*, 96 Mich. 452; *In re Grimm*, 181 Pa. St. 233; *Blumenthal's Petition*, 125 Pa. St. 412.

6. Right of Administrator to Sell En Bloc. — *Williams v. Troop*, 17 Wis. 463, in which case the court said: "We do not think it would be a fair or proper construction of the excise law to say that it required an administrator to obtain a license before he could sell or dispose of liquors belonging to his intestate. He is a person whose plain legal duty it is to sell property, collect and pay the debts, and settle up the estate committed to his charge."

7. License Not Assignable in Absence of Statute — *Connecticut*. — *Gilday v. Warren*, 69 Conn. 237.

*Delaware*. — *State v. Prettyman*, 3 Harr. (Del.) 570.

*Florida*. — *State v. Sumter*, 22 Fla. 1.

*Indiana*. — *Strahn v. Hamilton*, 38 Ind. 57; *Heath v. State*, 105 Ind. 342; *Godfrey v. State*, 5 Blackf. (Ind.) 151; *Runyon v. State*, 52 Ind. 320.

*Iowa*. — *Lewis v. U. S.*, 1 Morr. (Iowa) 199.

*Kentucky*. — *Com. v. Branamon*, 8 B. Mon. (Ky.) 374; *Com. v. Bryan*, 9 Dana (Ky.) 310.

*Massachusetts*. — *Com. v. Hadley*, 11 Met. (Mass.) 71.

*Nebraska*. — *State v. Lydick*, 11 Neb. 366.

*New Jersey*. — *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 177.

*New York*. — *Alger v. Weston*, 14 Johns. (N. Y.) 231; *Sanderson v. Goodrich*, 46 Barb. (N. Y.) 616; *Matter of Place*, 27 N. Y. App. Div. 561.

*North Carolina*. — *State v. McNeeley*, 1 Winst. L. (60 N. Car.) 234.

*Pennsylvania*. — *In re Grimm*, 181 Pa. St. 233; *Blumenthal's Petition*, 125 Pa. St. 412.

*Licensee May Employ Agent.* — While a license is a personal trust and cannot be assigned, a party licensed may authorize others to act with and under him in executing the powers granted to him by the license. *Per Shaw, C. J.*, in *Com. v. Hadley*, 11 Met. (Mass.) 71.

8. License a Personal Trust — *Kentucky*. — *Com. v. Bryan*, 9 Dana (Ky.) 310.

*Massachusetts*. — *Com. v. Hadley*, 11 Met. (Mass.) 71.

*Nebraska*. — *State v. Lydick*, 11 Neb. 366.

*New Jersey*. — *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 177.

*New York*. — *Alger v. Weston*, 14 Johns. (N. Y.) 231.

9. Confidence in Licensee Implied. — *State v. Bayne*, 100 Wis. 35.

10. *Com. v. Bryan*, 9 Dana (Ky.) 310.

11. Assigned License No Protection to Assignee in Selling. — *Com. v. Bryan*, 9 Dana (Ky.) 310; *State v. Lydick*, 11 Neb. 366; *Alger v. Weston*, 14 Johns. (N. Y.) 231.

*Applications of Rule.* — Where A obtained a license to keep a tavern, and B agreed to pay



the good faith of the party assuming to purchase the license does not in any way affect his responsibility for sales thereunder.<sup>1</sup> Another consequence of this rule is that an agreement to assign or transfer a license is absolutely void, and as between the parties is not enforceable;<sup>2</sup> and a note for which a part of the consideration is such an assignment is to that extent void.<sup>3</sup>

(2) *Under Statutes Authorizing Assignment.* — In the preceding subdivision of this section it was shown that in the absence of statute so providing a license cannot be assigned or transferred. It yet remains to be considered how far this rule is affected by special legislation on the subject. In a number of jurisdictions there are special statutory provisions authorizing the transfer of licenses.

In Pennsylvania the statute provides that if the licensee shall die, remove, or cease to occupy the place in which he is licensed to sell, the license may be transferred by the authority granting it, on compliance with the requisitions of the law in all respects except publication, which shall not, in such case, be required.<sup>4</sup> Under this statute the uniform practice is to grant a transfer of the license upon a proper case being shown to the court.<sup>5</sup> Whenever the licensee removes from the licensed premises, from whatever cause, the court can transfer the license to a new party, and that, too, without the consent of the original licensee;<sup>6</sup> but in case of the transfer of the license, the transferee must pay to the original licensee a part of the license fee in proportion to the unexpired term of the current year.<sup>7</sup> In case of the death of the licensee the court may transfer the license to his personal representative,<sup>8</sup> and in such case the personal representative cannot use the license for his own profit. On

for the license and sold liquors in an adjoining room which he rented from a third person, not being at all under the control of A, it was held that B was not protected by A's license, but was liable for keeping a tippling house. *Com. v. Branamon*, 8 B. Mon. (Ky.) 374.

One who held a license from a city to retail intoxicating liquors sold out his stock in trade, furniture, and fixtures to the defendant, and assigned his license to him. It was held that such license was no defense to an indictment against the defendant for selling liquors without having obtained a license therefor. *State v. Lydick*, 11 Neb. 366.

**Subterfuge to Evade License Laws.** — Where an instrument is merely a cover for the absolute transfer of a saloon business, though in form an appointment as barkeeper or seller, the license of the seller furnishes no protection to the purchaser. *Heath v. State*, 105 Ind. 342.

1. **Good Faith of Purchaser — Effect on Responsibility.** — *State v. Bayne*, 100 Wis. 35.

2. **Agreement to Assign License Void.** — *Sanderson v. Goodrich*, 46 Barb. (N. Y.) 616.

3. **Invalidity of Note for Which Assigned License Part Consideration.** — *Strahn v. Hamilton*, 38 Ind. 56.

**License Cannot Be Committed to Receiver.** — A saloon keeper's license is personal to the holder, and cannot be delegated or committed to a receiver. *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 177.

4. **Pennsylvania Statute.** — Act Pa. April 20, 1858, § 7, Bright. Purd. Dig. Laws Pa. (1894), p. 1229.

5. **Transfer Allowed in Proper Case.** — *Leibeknecht's License*, 14 Pa. Co. Ct. 571; *Leahy's License*, 14 Pa. Co. Ct. 430; *Summa's License*, 12 Pa. Co. Ct. 667; *Heilig's License*, 12 Pa. Co. Ct. 538; *Hanlen's License*, 3 Pa. Co. Ct. 474; *Doyle's License*, 6 Kulp (Pa.) 356.

**Rights of Creditor on Transfer of License.** — The creditor of one licensed to sell intoxicating liquors has no interest in the question whether the license should be transferred to another. *Breen's License*, 13 Pa. Co. Ct. 141.

**Violation of License Laws by Licensee — Effect on Right of Transfer.** — If a necessity exists for the licensing of certain premises as a public place, and the owner had no knowledge that his tenant who occupied such place for the purpose of selling liquors had violated the law, a transfer will be granted. *Quirk's License*, 17 Pa. Co. Ct. 327.

**Grant to Unfit Applicant on Condition that License Be Transferred.** — The right to transfer a license is not general, and can be granted only when the party licensed has died or removed or has ceased to keep the licensed house. Where a license is refused because the applicant has violated the law, a license will not be granted to him upon condition that it be transferred. *Forest House License*, 5 Northam Co. Rep. (Pa.) 17.

**Transfer on Dissolution of Partnership.** — Where a license has been granted to two partners it may, on dissolution of the partnership, be transferred to the partner continuing the business. *Kornman's License*, 13 Pa. Co. Ct. 147.

6. **Consent of Licensee to Transfer Unnecessary.** — *Doyle's License*, 6 Kulp (Pa.) 356; *Leibeknecht's License*, 14 Pa. Co. Ct. 571; *Summa's License*, 12 Pa. Co. Ct. 667; *Leahy's License*, 14 Pa. Co. Ct. 430.

7. **Licensee Entitled to Payment for Unexpired Portion of Term.** — *Summa's License*, 12 Pa. Co. Ct. 667; *Leibeknecht's License*, 14 Pa. Co. Ct. 571; *Doyle's License*, 6 Kulp (Pa.) 356.

8. **Transfer of License to Personal Representative.** — *Theis's Case*, 6 Pa. Co. Ct. 396.



procuring a transfer of the license to himself he is liable as trustee to creditors and all other parties in interest.<sup>1</sup> In granting a transfer of a license the action of the court vested with power so to do is discretionary, and the lawful exercise of such power is not reviewable by the Supreme Court.<sup>2</sup> In all cases it is essential to a valid transfer of a license that there must have been a party legally licensed, as a condition precedent to the vesting of the court's jurisdiction to grant a decree for the transfer of the license.<sup>3</sup>

In Connecticut the statute provides that any licensee may, with the consent of the county commissioners, transfer his license to any other suitable person, but the person to whom such a license is to be transferred shall make a similar application, procure a like recommendation, and execute a bond of the same amount and character, as is required of the person to whom such license was originally granted. Under this provision it has been held that the act of the licensee in selling and delivering the certificate of the license to the purchaser is not sufficient to invest the latter with title to the license against attaching creditors, without any act on the part of the commissioners.<sup>4</sup>

New York. — Under a recent New York statute, the provisions of which are set out in the notes,<sup>5</sup> a licensee may sell or assign his liquor-tax certificate.<sup>6</sup> He may assign or transfer it either absolutely or as security for money advanced by the assignee to enable him to procure the license.<sup>7</sup> Under this statute the certificate has the status of property and is invested with the qualities of being assigned, transferred, and disposed of.<sup>8</sup> An assignment to one who advances the money for the purchase of the certificate is paramount and prior to the claim of the judgment creditor,<sup>9</sup> and the assignment is not subject to collateral attack.<sup>10</sup>

1. Rights and Obligations of Personal Representative on Transfer. — *Reilly's Estate*, 6 Pa. Dist. 252.

2. Discretion of Licensing Authorities Not Reviewable. — *Breen's License*, 2 Pa. Dist. 652; *Blumenthal's Petition*, 125 Pa. St. 416.

3. *Re Umholtz*, 43 W. N. C. (Pa.) 495.

4. Connecticut Statute — Assignment Without Consent of Licensing Authorities Invalid. — *Gilday v. Warren*, 69 Conn. 239.

5. New York Statute. — Laws N. Y. 1896, c. 112, § 25, provides that if a licensee afterwards chooses to discontinue the traffic, he may surrender the certificate and thereupon be entitled to receive a *pro rata* amount of the tax paid for the unexpired term; that if he should die, or if a receiver or assignee of his property be appointed, his executor or receiver or assignee may receive the cash value thereof for the unexpired term, or, under certain restrictions, may continue the business. Section 27 authorizes the licensee to sell or transfer his certificate to any corporation, association, firm, or individual not forbidden by the act to traffic in liquor. Section 28 provides that the proper officer may, on certiorari, be directed to consent to such transfer where he has improperly refused to do so.

6. License Transferable. — *Niles v. Mathusa*, (County Ct.) 19 Misc. (N. Y.) 96, 20 N. Y. App. Div. 483; *Matter of Jenney*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 244; *People v. Manzer*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 293; *D. M. Koehler, etc., Co. v. Flebbe*, 21 N. Y. App. Div. 210.

7. Assignable Either Absolutely or as Security. — *Niles v. Mathusa*, 20 N. Y. App. Div. 483.

8. Certificate Has Status of Property. — *Matter of Jenney*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 244.

9. Assignment Paramount to Claim of Judgment Creditor. — *Niles v. Mathusa*, (County Ct.) 19 Misc. (N. Y.) 96.

10. Assignment Not Subject to Collateral Attack. — *Herman v. Goodson*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 604, in which case it was held that a receiver of a licensee who has transferred the right to his liquor-tax certificate cannot retain the certificate and collect the rebate for the unexpired coupons without first having the transfer set aside, and may be required to surrender the certificate to the assignee thereon.

Assignment Conditional on Demand. — If an agreement to assign a liquor license is conditioned on demand there will be a sufficient demand when the person entitled to the assignment claims it in a proceeding to appoint a receiver for the licensee's property. *Niles v. Mathusa*, 20 N. Y. App. Div. 483.

Reasons Insufficient to Justify Refusal of Transfer. — While a county treasurer has a right to withhold his consent to the transfer of a license, he must have an adequate reason therefor, and is not justified in so doing by the fact that an old complaint has been made against the holder that he was carrying on a liquor business in a room connected with his grocery, in violation of the provisions of the liquor law. *People v. Manzer*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 292.

Right of Assignee to Rebate. — By provisions of the New York statutes the holder of a liquor-tax certificate cannot recover a rebate for the unexpired term if he has violated the liquor laws. *People v. Lyman*, 156 N. Y. 408, affirming 27 N. Y. App. Div. 527.

Filing an Assignment of a liquor-tax certificate for collateral security in order that it may be valid as against creditors of the assignor



(3) *Transfer of License to Other Place or Building.* — In the absence of statute authorizing the transfer of a license from one house or locality to another house or locality, it is apprehended that the licensing authorities have no power to permit such transfer.<sup>1</sup> Under some statutes a transfer of a license to another place or building is permissible.<sup>2</sup>

**Right of Transfer to Other Premises under Pennsylvania Statute.** — A recent Pennsylvania statute<sup>3</sup> provides for the transfer of licenses from one place to another in the event of a partial or complete destruction of the building occupied by the licensee, or on refusal of the owner to extend or renew a lease for the premises. It further provides that the applicant for transfer shall present to the court a petition setting forth all the facts necessary under existing laws for original applications for liquor licenses. Under this last provision it has been held that good practice requires the petitioner to set forth the grounds on which the transfer is asked, and that the court may in its discretion require it. It was held, however, that such averments were not essential to a valid order transferring a license, and that such order will be sustained if the applicants shall have presented a petition setting forth all the facts necessary under existing laws for original applications for liquor licenses.<sup>4</sup>

**f. RIGHT TO MORTGAGE LICENSE.** — It has been held in *New York* that a liquor-tax certificate is personal property, capable of being mortgaged, and that where a person has given a chattel mortgage covering a liquor-tax certificate owned by him, if he cashes it in and receives a rebate, and appropriates it to his own use after a demand made by the mortgagee for the amount due on the mortgage which he has not complied with, he is guilty of a misdemeanor.<sup>5</sup>

**g. DURATION OF TERM OF LICENSE.** — The duration of the term during which the licensee shall exercise the privilege conferred by the license is a matter of statutory regulation. The term is usually for one year from the date of the issue of the license, or until the end of the excise year, irrespective of the date of issue, according as the statutes may provide.<sup>6</sup> Where the law declares that all licenses shall be for the term of one year, the licensing board

s unnecessary. Such certificate is merely a chose in action. *Matter of Jenney*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 244; *Niles v. Mathusa*, 20 N. Y. App. Div. 483; *D. M. Koehler, etc., Co. v. Flebbe*, 21 N. Y. App. Div. 210.

**1. Transfer of License to Other Place or Building.** — *Shelling v. Com.*, 11 Ky. L. R. 675; *Laib v. Hare*, 163 Pa. St. 481; *Rohm's License*, 14 Pa. Co. Ct. 202; *Burns's License*, 14 Pa. Co. Ct. 174, 3 Pa. Dist. 429; *Gerke Brewing Co.'s Petition*, 40 Pittsb. Leg. J. 420. See also *People v. Board of Excise*, 91 Hun (N. Y.) 269.

**The Pennsylvania Statute** gives no authority for a transfer to the sheriff's vendor, or to any person purchasing from him, especially if such person was never in possession of the premises at the expiration of the term. *Hotel Cambridge License*, 20 Pa. Co. Ct. 229.

**2. For the Construction of the British Acts**, see *Boodle v. Birmingham*, 45 J. P. 635; *Traynor v. Jones*, 63 L. J. M. C. 31, (1894) 1 Q. B. 83, 10 Reports 26, 69 L. T. N. S. 862, 42 W. R. 201, 58 J. P. 132; *Ex p. Minnett*, 51 J. P. 84.

**3. Laws Pa. 1897**, p. 297.

**4. McKibbins's Application**, 11 Pa. Super. Ct. 421.

It has further been held that on application by a tenant for transfer of his license, the owner of the premises has sufficient interest to authorize an appeal by him from an order

granting leave to make the transfer. *McCabe's License*, 11 Pa. Super. Ct. 560.

**What Amounts to Transfer.** — An application was filed for a retail license at No. 2129 East Dauphin street; subsequently the same applicant filed an application marked "change of location" for a license at 2118 and 2120 East Dauphin street. The first application was refused, the second granted. This was held not to be a transfer of an existing license from one place to another, but the ordinary case of a license upon an application in due form, and the Act of July 15, 1897, P. L. 297, did not apply. *Heuberger's License*, 8 Pa. Super. Ct. 625.

**5. Mortgage of License.** — *People v. Durante*, 19 N. Y. App. Div. 292. See also *Niles v. Mathusa*, 20 N. Y. App. Div. 483.

**Construction of Mortgage.** — A chattel mortgage executed May 15, 1896, which included, among other things, the mortgagor's right, title, and interest "to a license to sell beer or to a renewal thereof," was held to cover a liquor-tax certificate obtained by him in June, 1896, under Laws 1896, c. 112, which had then gone into effect. *McNeeley v. Welz*, 20 N. Y. App. Div. 566.

**6. Term of License Usually One Year.** — See *Gurley v. State*, 65 Ga. 157; *State v. Warner*, 4 Ind. 604; *Schwarm v. State*, 82 Ind. 470; *Disbrow v. Saunders*, 1 Den. (N. Y.) 149; *Brown*



has no power to grant a license for a less time than one year.<sup>1</sup> But a statute providing that all licenses shall expire at the end of one year from the time when they are granted has been held to be merely a limitation of the power of the licensing board, and within this limitation the board has full power to determine the period of the license.<sup>2</sup> Although it is provided that the licensing board can grant a license for a longer period than one year, the time does not begin and terminate with the term of office of the board which grants the license. Such board can grant a license which expires beyond its term of office, provided the term of the license does not exceed one year and does not begin to take effect after the board's term of office has expired.<sup>3</sup> The time when the license becomes operative is not the date when the application for license is granted and an order is made for its issuance, but the date when it is actually issued.<sup>4</sup>

**4. Right to License Not Absolute Right.** — It is a fundamental principle that there is no inherent right in a citizen or in any one to sell intoxicating liquors by retail, and that there is not a vested right in any person to have a liquor license.<sup>5</sup>

**5. Licenses Subject to Laws in Force When Granted.** — In another subdivision of this section it is shown that the repeal of a statute under which the license was granted operates as a revocation of the license.<sup>6</sup> Although there are a few decisions to the contrary,<sup>7</sup> the weight of authority establishes the proposition that a state, in granting a license, does not abandon its authority to change, at any time, the condition upon which sales may be made, and that a license is subject to all regulations established by legislation subsequent to the grant of the license.<sup>8</sup> The reason of this is that a permit to sell intoxicating

*v. Lutz*, 36 Neb. 527; *Hendersonville v. Price*, 96 N. Car. 426; *Wilmington v. Roby*, 8 Ired. L. (30 N. Car.) 255.

**1. When Term for Less than Year.** — *Gurley v. State*, 65 Ga. 157.

**2. Discretion of Board in Fixing Term.** — *People v. Gainey*, 8 Hun (N. Y.) 60.

**3. Term Need Not Begin and End with Board's Term of Office.** — *Hendersonville v. Price*, 96 N. Car. 423.

**4. License Operative from Date of Issuance.** — *Brown v. State*, 27 Tex. 335.

**Computation of Time.** — A license to retail intoxicating liquors for one year, granted on the first day of September and not received and paid for until the third day of that month, will not include and protect sales made by the licensee on the fourth day of September of the following year, whether the license becomes operative from Sept. 1 or from Sept. 3. *Schwarm v. State*, 82 Ind. 470.

A statute which provides that the commissioners of excise shall meet in their respective towns on the first Monday in May in each year and on such other days as the supervisor shall appoint, and gives power to them to grant licenses which shall be in force, unless revoked, until the day after the first Monday in May in the succeeding year, does not mean the calendar but the excise year. Although licenses may be granted at a period subsequent to May 1, they are all to expire with the current excise year — on the day named in the next following May. *Disbrow v. Saunders*, 1 Den. (N. Y.) 149.

**5. No Vested Right to License** — *United States*. — *Crowley v. Christensen*, 137 U. S. 86; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Mugler v. Kansas*, 123 U. S. 623.

*Arkansas*. — *Ex p. Levy*, 43 Ark. 42; *Edgar*

*v. State*, 45 Ark. 356; *Drew County v. Bennett*, 43 Ark. 364.

*New York*. — *People v. Waters*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 1; *People v. Bennett*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 10.

*North Carolina*. — *Guy v. Cumberland County*, 122 N. Car. 471.

*South Carolina*. — *State v. Aiken*, 42 S. Car. 222.

*Wyoming*. — *State v. Cheyenne*, 7 Wyo. 417.

**6. See infra**, this section, *Revocation of License*.

**7. Statutes Changing Conditions under Which Right Exercised.** — *State v. Andrews*, 28 Mo. 14; *Hannibal v. Guyott*, 18 Mo. 515; *State v. Andrews*, 26 Mo. 171. See also dictum in *Foster v. Dow*, 29 Me. 442.

**8. Dakota.** — *Elk Point v. Vaughn*, 1 Dak. 115.

*Indiana*. — *Moore v. Indianapolis*, 120 Ind. 483.

*Iowa*. — *State v. Mullenhoff*, 74 Iowa 271.

*Louisiana*. — *State v. Isabel*, 40 La. Ann. 340.

*Maine*. — *State v. Fairfield*, 37 Me. 517.

*Ohio*. — *Hirn v. State*, 1 Ohio St. 15.

*Pennsylvania*. — *Com. v. Sellers*, 130 Pa. St. 32; *Com. v. Donahue*, 149 Pa. St. 104.

**Applications of Rule.** — A holder of a license to sell intoxicating liquors is subject to a provision enacted subsequent to the issuance of his license which prohibits the sale of intoxicating liquors to minors, *State v. Fairfield*, 37 Me. 517; to an ordinance making it an offense punishable by fine to keep open a saloon after ten o'clock P. M., *State v. Isabel*, 40 La. Ann. 340; to an ordinance increasing the fees for license, *Moore v. Indianapolis*, 120 Ind. 484; *Elk Point v. Vaughn*, 1 Dak. 115; to a statute prohibiting the furnishing of liquors to minors and persons of intemperate habits, *Com. v.*



liquors is but an exercise of the police power of the state in which no one can so acquire a vested right or contract interest that control of the traffic in liquor may not be resumed when the interests of society demand it.<sup>1</sup>

**6. Number of Licenses Required** — *a.* DIFFERENT PLACES OF BUSINESS. — One license will not authorize the person or persons licensed to conduct the business in more than one place. A license is necessary for each place in which the business is conducted.<sup>2</sup> A sale at any other place than that designated in a license is illegal.<sup>3</sup>

*b.* DIFFERENT KINDS OF BUSINESS. — So, also, separate licenses are required for different kinds of business connected with the manufacture and sale of intoxicating liquors. The law does not intend that by paying for a license of one class a party should exercise the rights and enjoy the privilege conferred by another class.<sup>4</sup>

*c.* LICENSES REQUIRED BY DIFFERENT JURISDICTIONS. — The grant of a license by one jurisdiction does not affect the right of another jurisdiction in the same territory to exact an additional license fee, nor authorize the licensee to sell in violation of the law of the other.<sup>5</sup> Thus the payment of a town or city license does not relieve a liquor seller of the necessity of obtaining a state license,<sup>6</sup> unless the charter of the town or city exempts it from the provision

Sellers, 130 Pa. St. 32; and to a statute requiring that saloons shall be located on the ground floor and so arranged as to allow a view of the interior, *Nelson v. State*, 17 Ind. App. 403.

So it has been held that a statute prohibiting wholesale dealers from selling brewed or malt liquors in quantities less than twelve pint bottles, and from permitting the drinking of liquor on the premises where it is sold, applies to dealers whose licenses were granted before the passage of the act. *Com. v. Donahue*, 149 Pa. St. 104.

**Construction of Statute Containing Saving Clause.** — A statute which declares that the repeal of a statute does not affect any "right" which has accrued under and by virtue of the statute repealed contemplates property rights only, and has no application to a permit to sell intoxicating liquors which becomes a nullity on the repeal of the statute under which it was granted. *State v. Mullenhoff*, 74 Iowa 271.

**1. Reason for Rule.** — *Schwuchow v. Chicago*, 68 Ill. 444; *Moore v. Indianapolis*, 120 Ind. 484; *Com. v. Sellers*, 130 Pa. St. 36.

**2. Separate License Required for Each Place of Business.** — *State v. Walker*, 16 Me. 241.

**3. State v. Prettyman**, 3 Harr. (Del.) 570; *State v. Walker*, 16 Me. 241; *Wason v. Severance*, 2 N. H. 501; *Matter of Lyman*, 40 N. Y. App. Div. 46; *Zinner v. Com.*, (Pa. 1888) 14 Atl. Rep. 431.

**Applications of Rule.** — A small building on the same lot with a dwelling house, at the distance of forty-five rods from it, with a passage-way between, is not an apartment or dependence of the dwelling house, though the same person occupies the whole lot, including the house and building, and a license to the occupant which authorizes him to sell spirituous liquors in his dwelling house does not authorize him to sell them in the small building. *Com. v. Estabrook*, 10 Pick. (Mass.) 293.

But it has been held that a single license will authorize the proprietor of a hotel to maintain three separate rooms of the hotel as bars, these rooms all being on one floor, screened off by partitions having direct and immediate connection by doorways, all of which are accessible

to the guests without going outside of the hotel. *St. Louis v. Gerardi*, 90 Mo. 640. See also *Hochstadler v. State*, 73 Ala. 24.

In *Sanders v. Elberton*, 50 Ga. 178, it was held that whether two rooms in a particular house in which it is proposed to sell intoxicating liquors are two distinct places is a question of fact, and the judgment of the town council, holding that they are two distinct places, will not be disturbed if the evidence justifies, though it may not require, such a conclusion by the council.

**Right of Agent to Sell at Places Other than That Occupied by Principal.** — An agent of a firm engaged in the sale of liquors cannot carry on such business at a place separate from and not connected with the saloon kept by his principals, under a tax paid by them. *People v. Lester*, 80 Mich. 643.

**4. Separate Licenses Required for Different Kinds of Business.** — *Harris v. People*, 1 Colo. App. 289; *New Orleans v. Jane*, 34 La. Ann. 667; *State v. Sies*, 30 La. Ann. 918; *State v. Cahen*, 35 Md. 236; *People v. Greiser*, 67 Mich. 490.

**Illustrations.** — Thus a manufacturer of beer who has paid only the manufacturer's tax, cannot sell at retail unless he also pays the retail tax. *People v. Greiser*, 67 Mich. 490. So where a license only authorizes the dealer to sell bottled goods, he cannot, under such license, keep beer on tap to be drawn into pitchers and vessels of customers. *Harris v. People*, 1 Colo. App. 289. And a license to sell in quantities less than a pint does not authorize a sale in quantities greater than a pint. *State v. Cahen*, 35 Md. 236. A retail grocer's license entitling the licensee to sell in quantities less than a gallon to be consumed out of their store does not authorize them to sell liquor by the glass. *State v. Sies*, 30 La. Ann. 918.

**5. Several Licenses Required by Different Jurisdictions.** — *Lutz v. Crawfordsville*, 109 Ind. 467. See also cases cited in subsequent notes in this section.

**6. Municipal Licenses — Necessity of State Laws.** — *Lutz v. Crawfordsville*, 109 Ind. 466; *Adams*



of the general laws of the state regulating the sale of intoxicating liquors and places the whole matter under the exclusive control of the town or city authorities.<sup>1</sup> So the obtaining of a license from a city or town does not relieve the liquor dealer of the necessity of obtaining a county license<sup>2</sup> where the town or city charter contains nothing which excludes the right of the county to demand a license for the sale of intoxicating liquors.<sup>3</sup> On the other hand, the grant of a license by a state or county does not interfere with the power of another jurisdiction, such as an incorporated city or town, to exact a license, the exactment being in the nature of a restraint upon traffic.<sup>4</sup> And it has been held that an ordinance requiring a license of a retailer in intoxicating liquors applies to dealers who have obtained county or state licenses prior to the enactment of the ordinance,<sup>5</sup> for it is a general rule that a person who has a license to sell liquor is bound by subsequent legislation on the subject.<sup>6</sup>

**Federal License No Protection in Violating State Laws.** — The payment of a United States revenue tax and the procurement of a United States license to sell intoxicating liquors furnish no protection to one who violates the laws of a state regulating or prohibiting the traffic in intoxicating liquors. A license from the United States government is only a protection from prosecution by its authority.<sup>7</sup> The reason for this is well stated in the leading case upon this

*v. Stephens*, 7 Ky. L. Rep. 223; *Furman v. Knapp*, 19 Johns. (N. Y.) 248.

**Village License.** — A license from a village does not of itself authorize the sale of intoxicating liquors. A liquor seller must also have a license from the commissioners of the town. *Clintonville v. Keeting*, 4 Den. (N. Y.) 342.

1. *State v. Wheeler*, 27 Minn. 76.

2. **Municipal Licenses — Necessity of County Laws** — *Alabama*. — Page *v. State*, 11 Ala. 849; *State v. Estabrook*, 6 Ala. 653.

*California*. — *Matter of Lawrence*, 69 Cal. 608.

*Indiana*. — *Wagner v. Garrett*, 118 Ind. 114; *Linkenhelt v. Garrett*, 118 Ind. 599.

*Missouri*. — *State v. Sherman*, 50 Mo. 265; *State v. Harper*, 58 Mo. 530; *Sharp v. Carthage*, 48 Mo. App. 26; *Austin v. State*, 10 Mo. 591.

*North Carolina*. — *State v. Propst*, 87 N. Car. 560.

*Wyoming*. — *State v. Cheyenne*, 7 Wyo. 417.

A town has the right to limit licenses issued by it for the sale of intoxicating liquors, to such persons as have procured and hold a license from the board of commissioners. *Wagner v. Garrett*, 118 Ind. 114.

3. *State v. Sherman*, 50 Mo. 265; *State v. Harper*, 58 Mo. 530; *Sharp v. Carthage*, 48 Mo. App. 26.

A person carrying on the business of a liquor dealer in a city within the county is not exempted from the payment of a license tax duly levied by a board of supervisors, by reason of the fact that he has paid a license tax of a similar kind in pursuance of an ordinance enacted by the municipal authorities of the city. *Matter of Lawrence*, 69 Cal. 608.

**Effect of Obtaining Permission from Town Commissioners.** — An Act of Assembly requiring a citizen of a town to get permission of the commissioners thereof to retail intoxicating liquors within its limits does not confer the right to retail; the applicant must also get a license to retail from the county commissioners, but such court license will protect him though it runs beyond the time embraced in the permission

of the commissioners. *Parsley v. Hutchins*, 2 Jones L. (47 N. Car.) 159.

4. **State or County Licenses — Necessity of Municipal License** — *Dakota*. — *Elk Point v. Vaughn*, 1 Dak. 108.

*Georgia*. — *Cuthbert v. Conly*, 32 Ga. 211.

*Indiana*. — *Lutz v. Crawfordsville*, 109 Ind. 466; *McKinney v. Salem*, 77 Ind. 213.

*Kentucky*. — *Warden v. Louisville*, 11 Ky. L. Rep. 179; *Com. v. Helback*, 101 Ky. 166.

*Missouri*. — *Independence v. Noland*, 21 Mo. 394.

In the absence of controlling legislation respecting the sale of intoxicating liquors, it is competent for cities and towns to require a corporate license of persons who may desire to sell such liquors, and to punish persons selling without license. The powers exercised by municipal corporations are superadded to those exercised by the territory in the same locality. *Elk Point v. Vaughn*, 1 Dak. 108.

5. *People v. Raims*, 20 Colo. 489; *Elk Point v. Vaughn*, 1 Dak. 108; *Cuthbert v. Conly*, 32 Ga. 211; *McKinney v. Salem*, 77 Ind. 213. But compare *Chastain v. Calhoun*, 29 Ga. 333; *Matter of Schmitker*, 6 Neb. 108.

6. **Holder of License Bound by Subsequent Legislation.** — *Elk Point v. Vaughn*, 1 Dak. 115.

7. **Federal License No Protection for Violation of State Laws** — *United States*. — *In re Jordan*, 49 Fed. Rep. 238; *McGuire v. Com.*, 3 Wall. (U. S.) 387; *License Tax Cases*, 5 Wall. (U. S.) 462; *Carney v. Iowa*, 5 Wall. (U. S.) 480, note; *Vervear v. Com.*, 5 Wall. (U. S.) 475.

*Arkansas*. — *Pierson v. State*, 39 Ark. 221.

*Dakota*. — *Territory v. O'Connor*, 5 Dak. 408.

*Illinois*. — *Block v. Jacksonville*, 36 Ill. 302.

*Indiana*. — *State v. Mathis*, 18 Ind. App. 608.

*Iowa*. — *State v. Stutz*, 20 Iowa 488; *State v. McCleary*, 17 Iowa 44; *State v. Carney*, 20 Iowa 82; *State v. Baughman*, 20 Iowa 497; *Stommel v. Timbrel*, 84 Iowa 336; *State v. Adams*, 20 Iowa 486.

*Kentucky*. — *Com. v. Anderson*, 9 Ky. L. Rep. 406.

*Maine*. — *State v. Delano*, 54 Me. 501.



subject as follows: "The granting of a license \* \* \* must be regarded as nothing more than a mere form of imposing a tax, and as implying nothing except that the licensee shall be subject to no penalties under national law if he pays it. \* \* \* These licenses give no authority. They are mere receipts for taxes."<sup>1</sup> Congressional legislation imposing a license fee is only a form of taxation, which does not make lawful any business which was not lawful before.<sup>2</sup> Congress has no power to license citizens of a state to violate its laws regulating its own internal police.<sup>3</sup>

**7. What Places May Be Licensed.** — A license, it is apprehended, cannot be granted for a building to be erected in the future. A licensee must be the occupant of an existing building in which the sale of liquor is to be conducted.<sup>4</sup> A license will not be granted to one who has a conditional agreement that he shall occupy in the event of a license being granted.<sup>5</sup>

**8. Eligibility of Applicant for License** — *Residence, Citizenship, etc.* — The statutes relating to the issue of licenses usually require that the applicant shall be a resident of the county or town where he proposes to do business, or that he shall be a citizen, inhabitant, etc. If the statute makes it a prerequisite to the obtaining of a license that the applicant be a taxpaying male citizen, no license should be issued unless this is shown.<sup>6</sup> A statute providing that any

*Massachusetts.* — *Com. v. Halbrook*, 10 Allen (Mass.) 200; *Com. v. McNamee*, 113 Mass. 12; *Com. v. Thorniley*, 6 Allen (Mass.) 445; *Com. v. Keenan*, 11 Allen (Mass.) 262; *Com. v. Sanborn*, 116 Mass. 61; *Com. v. O'Donnell*, 8 Allen (Mass.) 548.

*Minnesota.* — *State v. Funk*, 27 Minn. 318.

*North Carolina.* — *State v. Hazell*, 100 N. Car. 471; *State v. Joyner*, 81 N. Car. 534; *State v. Downs*, 116 N. Car. 1064; *State v. Stevens*, 114 N. Car. 873.

*Tennessee.* — *Boyd v. State*, 12 Lea (Tenn.) 687.

*Virginia.* — *Com. v. Sheckels*, 78 Va. 36.

**Applications of Rule.** — A license from the United States government to sell intoxicating liquors is no protection to one selling intoxicating liquors without a state license, *License Tax Cases*, 5 Wall. (U. S.) 462; *Pierson v. State*, 39 Ark. 219; *State v. Funk*, 27 Minn. 318; or selling in violation of local option laws, *Com. v. Anderson*, 9 Ky. L. Rep. 406; or in violation of the state prohibitory law, *In re Jordan*, 49 Fed. Rep. 238; *State v. Stutz*, 20 Iowa 488; *State v. Carney*, 20 Iowa 82; *State v. Baughman*, 20 Iowa 497.

So a United States license is no defense to a prosecution for maintaining a liquor nuisance, *Stommel v. Timbrel*, 84 Iowa 336; or for keeping a tenement used for the sale of intoxicating liquors, *Com. v. McNamee*, 113 Mass. 12.

And a sale on a steamboat plying within the limits of the state is not protected by a United States license. *Pierson v. State*, 39 Ark. 219; *Boyd v. State*, 12 Lea (Tenn.) 689; *Com. v. Sheckels*, 78 Va. 36. Selling liquor by the drink at the bar of a steamer is not interstate commerce, and as a general rule the law permits the state to exercise full control over public ways of every kind within its limits. *Boyd v. State*, 12 Lea (Tenn.) 689.

**Sales Merely Incidental to the Seller's Business.** — A license from the federal government is no protection to one selling in violation of the laws of a state, although the sale is merely incidental to the seller's business. *Com. v. O'Donnell*, 8 Allen (Mass.) 548.

**1. Reason for Rule.** — *License Tax Cases*, 5 Wall. (U. S.) 462. To the same effect see *Territory v. O'Connor*, 5 Dak. 408; *Block v. Jacksonville*, 36 Ill. 302; *Boyd v. State*, 12 Lea (Tenn.) 689.

**2.** *Boyd v. State*, 12 Lea (Tenn.) 689.

**3. Limitations of Legislative Power of Congress.** — *Block v. Jacksonville*, 36 Ill. 301.

The effect of a license from the federal government is now declared in accordance with the preceding cases by statute. *Rev. Stat. U. S.*, § 3243.

**4. License for Building Not in Existence.** — *Warren St. Chapel v. Board of Excise Com'rs*, 56 N. J. L. 411.

**5. Conditional Agreement for Lease of Building.** — *Durham's Application*, 2 Montg. Co. Rep. (Pa.) 125.

**Building Used as Dwelling.** — Since, under Acts Mass. 1888, c. 139, § 1, a license to sell liquor not to be drunk on the premises may not be "granted to be exercised in any dwelling house," it follows that a license to sell in a "one and a half story building" is void if the building is used partly as a dwelling house; and this whether the shop in the building wherein the liquor is sold has or has not means of connection with the rest of the house. *Com. v. McCormick*, 150 Mass. 270.

As to the prohibition on granting licenses within a certain distance of churches, etc., see *supra*, this title, *Constitutionality of Liquor Laws* — *License Laws* — *Statutes Prohibiting Sales in Certain Localities*.

**6.** *McCreary v. Rhodes*, 63 Miss. 608; *State v. Cooper County*, 66 Mo. App. 96; *Jones v. Thro*, 2 Mo. App. Rep. 1303. See also *McGee v. Beall*, 63 Miss. 455, in which case it was held that where a statute authorizes boards of supervisors to license any persons residing in their respective counties, the petition must show that the applicant is a resident of the county, or it will be invalid; *People v. Davis*, 45 Barb. (N. Y.) 494, holding that if the licensing board is authorized only to issue licenses to residents of the town or state where it is proposed to keep the inn, a



male inhabitant having certain other qualifications may obtain a license by certain proceedings which it prescribes, applies alike to all of the male inhabitants of the state of the class to which a license may be granted, without reference to their residence in any particular place in the state.<sup>1</sup>

**Qualifications as to Sex.** — A statute providing that any male inhabitant having certain other specified qualifications may obtain a license by proceeding in the manner therein described, by implication prohibits women from obtaining a license.<sup>2</sup>

**Corporations and Partnerships.** — A corporation may be licensed to sell intoxicating liquor. The term "person" is a generic term which includes artificial persons as well as natural.<sup>3</sup> So a partnership is a person within the meaning of the licenses and statutes.<sup>4</sup>

**9. Fitness and Moral Qualifications of Applicant.** — By the express wording of the statutes or by necessary implication therefrom the applicant for a license must possess certain qualifications showing fitness for the business in which he proposes to engage. The various statutes require one or more of the following qualifications: That the applicant shall be a sober person, or of good moral character, or not "in the habit of becoming intoxicated," or that he shall not have violated any of the liquor laws, or any of the laws of the state.<sup>5</sup> Occasional indulgence in intoxicating liquors does not of itself constitute such immorality or unfitness as will warrant refusal of a license.<sup>6</sup> So from the fact that a person becomes intoxicated in a single instance it does not follow as a matter of law that such person is disqualified on the ground of immorality.<sup>7</sup>

**Other Immorality than Habit of Becoming Intoxicated.** — Under a statute providing that remonstrances may be filed "against the granting of such license to any applicant on account of immorality or other unfitness, as is specified in this act," and requiring that the applicant "be a fit person to be intrusted with the sale of intoxicating liquor," and "not in the habit of becoming intoxicated," but that "in no case shall a license be granted to a person in the habit of becoming intoxicated," other species of immorality than the habit of becoming intoxicated may warrant the rejection of an application for license.<sup>8</sup>

**Conviction of Felony.** — In the absence of a statute providing otherwise, the fact that the applicant was years before convicted of felony which has since been pardoned does not preclude his receiving a license;<sup>9</sup> and although a

license issued to the resident of another town or city in another county is void.

1. *Ex p. Laboyteaux*, 65 Ind. 545. See also *Reg. v. De Rutzen*, 1 Q. B. D. 55; *Doberneck's Appeal*, 1 Pa. Super. Ct. 99. In the last case it was held that the fact that the applicant was not a citizen of the borough where the place for which a license was sought was located did not constitute ground for refusing a wholesale license, there being no requirement in the act prescribing that the applicant should be a citizen of any particular locality.

**Inhabitant of House Where Business Is Conducted.** — The *New Jersey Inn and Tavern Act* does not require that the person applying for the license thereunder shall be an inhabitant of the house in which he contemplates keeping an inn. *Amerman v. Hill*, 52 N. J. L. 326.

2. *Woodford v. Hamilton*, 139 Ind. 481.

It is a maxim of the law that the express mention of one person or thing is the exclusion of another. *Woodford v. Hamilton*, 139 Ind. 481, citing *Whart. Leg. Max. II.*

3. *Enterprise Brewing Co. v. Grime*, 173 Mass. 252; *Gulf Brewing Co.'s License*, 11 Pa. Co. Ct. 346. Compare *State v. St. Louis Club*, 125 Mo. 308.

4. *State v. Moniteau County Ct.*, 45 Mo. App 387.

**Insolvent Companies.** — A license will not be granted to an insolvent hotel company the property of which is in the hands of a receiver. *Cambridge Spring Co.'s License*, 20 Pa. Co. Ct. 564.

**Recording Charter of Corporation.** — A corporation is not compelled to record itself in the recorder's office as required by the *Pennsylvania Corporation Act of 1874*, but it can file a petition for a license to sell intoxicating liquors. *Gulf Brewing Co.'s License*, 11 Pa. Co. Ct. 346.

5. See the various statutory provisions on this subject.

6. **Occasional Indulgence in Liquors.** — *Calder v. Sheppard*, 61 Ind. 219.

7. **Becoming Intoxicated in Single Instance.** — *Lynch v. Bates*, 139 Ind. 206, holding that the question whether the applicant was thereby disqualified was for the jury.

8. *Grummon v. Holmes*, 76 Ind. 585, overruling *Calder v. Sheppard*, 61 Ind. 219. See also *Hill v. Perry*, 82 Ind. 28; *Groscop v. Rainier*, 111 Ind. 361.

9. **Where Person Is Pardoned.** — *People v. Sackett*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 405.



statute provides that a conviction of violating the liquor laws shall disqualify a person to receive another license for five years, one who has been convicted of violating such laws cannot be held to be disqualified where the conviction was subsequently vacated.<sup>1</sup> A statute providing that every person convicted of felony shall be forever disqualified from receiving a license applies to persons convicted both before and after its passage,<sup>2</sup> but it does not apply to one who has been convicted but subsequently pardoned.<sup>3</sup>

**Violation of Liquor Laws.** — Under some statutes a person who has been convicted of violating the liquor laws is disqualified from obtaining a license; but under some of these statutes a single violation is not of itself sufficient to disqualify the applicant,<sup>4</sup> though repeated violations will be sufficient.<sup>5</sup> A license will be refused to one who has sold intoxicating liquors on Sunday,<sup>6</sup> or to minors,<sup>7</sup> or who sells to habitual drunkards.<sup>8</sup>

**Disorderly Neighborhood.** — A license will not be refused on evidence of general disorder in the neighborhood, unless the applicant is connected with the disorder by some violation of the law at least.<sup>9</sup>

**10. Power to Grant Licenses** — *a.* **IN GENERAL.** — The power to grant licenses to sell intoxicating liquors is usually vested by statute in some court or judge, such as an ordinary or a county or probate judge, or in some designated board of officers, such as an excise board or board of county commissioners, or the common council or board of aldermen of a town or city.<sup>10</sup> While these authorities are vested with considerable discretion in granting licenses, they are nevertheless bound by the statutory provisions relating thereto. Thus if a statute provides that no license shall be granted for less than a year, a license for four months only will be void.<sup>11</sup> The licensing

**1. Where Conviction Is Subsequently Vacated.** — *Horton v. License Com'rs*, 19 R. I. 650.

**2. Special Statutes Relating to Convictions.** — *Reg. v. Vine*, L. R. 10 Q. B. 195, 13 Cox C. C. 43.

**3. Hay v. Justices**, 24 Q. B. D. 561.

**4. Single Violation of Liquor Laws.** — *Bourjohn's Application*, 2 Pa. Co. Ct. 33.

**5. Repeated Violation of Liquor Laws.** — *Evans v. Com.*, 95 Ky. 231; *Quirk's License*, 17 Pa. Co. Ct. 327; *Wright's Application*, 1 Wilcox (Pa.) 84; *Bourjohn's Application*, 2 Pa. Co. Ct. 33.

Where it appears from the answers to interrogatories that the applicant for license, while previously engaged in the liquor business, had sold to persons in the habit of becoming intoxicated, and that he did not keep an orderly house, and is not a fit person to be intrusted with the sale of intoxicating liquors, he is not entitled to a judgment on such answers. *Bronson v. Dunn*, 124 Ind. 252.

**Violation of Laws by Applicant when Agent of Another.** — Upon an application for a license by the father of a previous licensee whose license was revoked, a license will be refused upon evidence of repeated violations of law by the applicant as agent for his son. *Rutherford's License*, 2 Pa. Co. Ct. 78.

**Sales by Person under Defective Bond.** — Where a liquor seller's bond was executed and accepted in good faith, and other requirements of the statute were complied with by the applicant, it was held that sales under the license would not be a criminal offense and disqualify the person from applying for a license although the bond was invalid for want of the principal's name. *North v. Barringer*, 147 Ind. 224.

**6. Selling on Sunday.** — *Quirk's License*, 17 Pa. Co. Ct. 327.

**7. Selling to Minors.** — *Livingston v. Corey*,

33 Neb. 366; *Quirk's License*, 17 Pa. Co. Ct. 327. See also *Hardesty v. Hine*, 135 Ind. 72.

**Ignorance of Purchaser's Minority.** — Where an applicant for license has violated the law against selling to minors, a license may be refused even though the applicant did not know that the purchasers were minors. *Quirk's License*, 17 Pa. Co. Ct. 327.

**8. Selling to Habitual Drunkards.** — *State v. Kaso*, 25 Neb. 607.

**9. General Disorder Near Licensed Place.** — *Hellings's License*, 2 Pa. Co. Ct. 76.

**Persons of Immoral Character.** — A person who keeps a disorderly house is not a person of good moral character and is not entitled to a license. *Ouachita County v. Rolland*, 60 Ark. 516; *People v. Mills*, 91 Hun (N. Y.) 142, 144; *People v. Murray*, 2 N. Y. App. Div. 607.

**10. What Authorities Have Power to License.** — See *Siloam Springs v. Thompson*, 41 Ark. 456; *State v. Brandon*, 28 Ark. 410; *Mathis v. State*, 93 Ga. 38; *Doster v. State*, 93 Ga. 43; *McCrea v. Billingslea*, 89 Md. 767; *Charleston v. Hollenback*, 3 Strobb. L. (S. Car.) 355; *Ailstock v. Page*, 77 Va. 386.

**Power of Lay Judges.** — Associate judges, unlearned in the law, may grant or refuse a liquor license without the concurrence of the law judge. *Branch's License*, 164 Pa. St. 427; *Sperring's Application*, 7 Pa. Super. Ct. 131; *Leister's Appeal*, 20 W. N. C. (Pa.) 224; *Reiber v. Boos*, 110 Pa. St. 594.

**Issuing License During Recess of Court.** — If a statute provides that licenses shall be issued at a regular term of court, a license issued by the judge or clerk in vacation will be void. *State v. Kennedy*, 1 Ala. 31.

**11. Necessity of Obeying Statutory Requirements** — *As to Term of License.* — *Gurley v. State*, 65 Ga. 157.



authorities cannot grant licenses to persons not possessed of the qualifications specified in the statute.<sup>1</sup> If authorized to grant only retail licenses they cannot grant wholesale licenses.<sup>2</sup> If a statute requires payment of a license fee in advance, they cannot issue a valid license unless this requirement is complied with.<sup>3</sup> So they have no authority to grant a license except on application in each case by persons desiring licenses.<sup>4</sup> They cannot issue a license to be operative in territory other than that in which the statute vests them with power to issue licenses.<sup>5</sup> And if the licenses authorized to be issued in a designated locality are limited to a designated number, any license issued in excess of that number will be void.<sup>6</sup> In the absence of statutes so providing, they have no power to decide upon the general propriety of granting licenses.<sup>7</sup>

**b. DELEGATION OF POWER.** — Where by statute the power of granting liquor licenses is vested in some designated court or board, this power cannot be delegated to any person or persons whatsoever.<sup>8</sup>

**11. Disqualification of Members of Licensing Board.** — It has been held that members of a board whose duty it is to pass upon applications for liquor licenses disqualify themselves from acting upon such application by signing the petition on which the application is made, and if their votes are necessary to the granting of the license, no valid license can be issued.<sup>9</sup> The disqualification, according to these decisions, is founded upon the fact that by signing the application they have become interested in the issuance of the license, or at least have prejudged the question.<sup>10</sup> It is to be noted, however, that this view does not meet with universal approval. It has been held that the mayor and aldermen of a municipality are not so interested in the case as to disqualify them from hearing and deciding upon such application because of the fact that they have signed the petition.<sup>11</sup> And this view finds support in other decisions in which the question of the issuance of licenses to sell intoxicating liquors is not involved.<sup>12</sup>

**1. As to Personal Qualifications of Applicant.** — *People v. Norton*, 7 Barb. (N. Y.) 477.

**2. As to Kinds of License.** — *Adams v. Gormley*, 69 Ga. 743.

**3. As to Payment of License Fee.** — *Handy v. People*, 29 Ill. App. 99.

**4. As to Application.** — *Hennepin County v. Robinson*, 16 Minn. 381.

**5. As to Territory in Which License Operative.** — *Phillips v. Tecumseh*, 5 Neb. 312.

**6. As to Number of Licenses in Designated Locality.** — *Com. v. Hayes*, 149 Mass. 32.

**7. General Propriety of Granting Licenses.** — *Schlaudecker v. Marshall*, 72 Pa. St. 200.

**8. Delegation of Power to Issue Licenses.** — *Thorn v. Atlanta*, 77 Ga. 661; *Mayson v. Atlanta*, 77 Ga. 662; *Hennepin County v. Robinson*, 16 Minn. 381; *Winants v. Bayonne*, 44 N. J. L. 114.

**Application of Rule.** — Where a statute confers on the board of county commissioners the authority to grant liquor licenses, the county attorney cannot as such, by virtue of authority from the board or as its agent, hear or determine the question of granting license, and any license granted by him is void. *Hennepin County v. Robinson*, 16 Minn. 381.

So if the statute vests the power of issuing licenses in the common council, the propriety of granting a license must be passed upon by that body, and cannot be delegated by ordinance to the mayor. *Winants v. Bayonne*, 44 N. J. L. 114.

Neither can the clerk of the board exercise the discretion and authority vested in it as to

the issuance of licenses. *Thorn v. Atlanta*, 77 Ga. 661.

**9. View that Members Signing Petition Are Disqualified.** — *Powell v. Egan*, 42 Neb. 482; *State v. Kaso*, 25 Neb. 607; *Foster v. Frost*, 25 Neb. 731; *Vanderlip v. Derby*, 19 Neb. 165; *State v. Weber*, 20 Neb. 467.

**10. Reason for Holding.** — *Powell v. Egan*, 42 Neb. 482.

**Effect of Substituting New Petitioners.** — The disqualification of the members of a licensing board who have signed a petition for a liquor license is not removed by withdrawing the petition, erasing their signatures, obtaining others in their stead, and refileing the petition so changed. *Powell v. Egan*, 42 Neb. 482.

**11. View that Members Signing Petition Are Not Disqualified.** — *Ferguson v. Brown*, 75 Miss. 214. This decision proceeds upon the theory that the interest which will disqualify is not a general interest in a public proceeding which the judge feels in common with the mass of the citizens, but a pecuniary or property interest, or one affecting his individual rights. See also *Lemon v. Peyton*, 64 Miss. 161, a case somewhat similar in principle, in which it was held that a member of a board of supervisors who canvasses for or signs a petition for an election under the local option law is not thereby disqualified from acting on such petition in his official capacity in pursuance of the terms of the law.

**12. Medlin v. Taylor**, 101 Ala. 239; *Rogers v. Cypert*, (Ark. 1881), cited in *Foreman v. Marianna*, 43 Ark. 329; *Sauls v. Freeman*, 24 Fla.



**12. Petition or Application for License — a. NECESSITY FOR APPLICATION OR PETITION.** — To obtain a license to sell intoxicating liquors the statutes provide that an application or petition therefor must be made by the person desiring it, to the licensing board or other authority having power to grant it. The presentation of such petition or application containing the statements required by statute is an indispensable condition precedent to the issuance of such license,<sup>1</sup> and a license issued without it is necessarily void and no protection to the licensee.<sup>2</sup>

**b. NECESSARY ALLEGATIONS — In General.** — The petition or application must allege all the facts which the statutes make conditions precedent to the granting of a license, but it seems that mere informalities in the petition will not be a valid ground for refusal.<sup>3</sup> So it has been held that although the petition fails to recite all the jurisdictional facts necessary to the issuance of a license, yet if these facts sufficiently appear in the order granting the license, the order will not be reversed because of the defect in the petition.<sup>4</sup> Nevertheless, if an application for a license is defective it cannot be cured by alleging the necessary facts on a petition for a writ of certiorari to review the action of the licensing board in refusing to grant the license.<sup>5</sup>

**Description of Premises.** — A petition filed and an application for a license to sell intoxicating liquors should contain such a description of the premises where it is proposed to conduct the business as indicates the exact location, and if it does this it is sufficient.<sup>6</sup>

209, 12 Am. St. Rep. 190; *Lemon v. Peyton*, 64 Miss. 161; *Dallas v. Peacock*, 89 Tex. 58.

**1. Necessity for Petition or Application.** — *Roberts v. State*, 26 Fla. 360; *State v. Young*, 17 Kan. 414; *Hearn v. Brogan*, 64 Miss. 334; *State v. Weber*, 20 Neb. 467; *People v. Board of Excise*, 91 Hun (N. Y.) 94.

**Application to Change Place of Business.** — An application to change a barroom to some other place in the county is an application for license to sell liquor by retail, for which the applicant has no license. *Lester v. Price*, 83 Va. 648.

**Application for License After Revocation.** — Where a previous license has been revoked it seems that a new application should be treated as for a new house, which places the burden as to the necessity upon the petitioner. *Rutherford's License*, 2 Pa. Co. Ct. 78.

**Amendment of Petition.** — A petition for a retail license cannot be amended as to any material matter after the date of the filing. *Sherry's License*, 12 Pa. Co. Ct. 129.

**Right of Applicant to Withdraw Application.** — Where the court finds that the house applied for is necessary for the accommodation of the public, it will not permit an applicant who has been reported to the court as an unfit person to withdraw his petition on the day of the hearing so as to affect the granting of the license to the house in case the proper person shall make application for any portion of the license year. *Heilig's License*, 2 Pa. Dist. 342.

**2. License Issued Without Proper Application Void.** — *State v. Young*, 17 Kan. 414.

**3. Informalities in Petition.** — *Hearn v. Brogan*, 64 Miss. 334; *State v. Heege*, 37 Mo. App. 338.

"A petition filed in an application for a license to sell intoxicating liquors should comply with the requirements of the law and include all things which the law prescribes shall appear therein, but it will not be construed in accordance with strict rules. Its

substance or import will be mainly considered in determining whether it is sufficient. Mere informalities will not be regarded." *Waugh v. Graham*, 47 Neb. 157.

**Applicant and Persons Recommending Joining in One Petition.** — Under a statute providing that an application for a license as a dramshop keeper shall be made in writing to the County Court and shall state specifically where the dramshop shall be kept, an application signed by taxpayers, verified by the applicant, and stating the place where the dramshop is to be kept, is a substantial compliance with the statute though not in the form of a petition of the applicant. *State v. Heege*, 37 Mo. App. 338. See also *Hearn v. Brogan*, 64 Miss. 334.

**4. How Defective Petition Cured.** — *State v. Cauthorn*, 40 Mo. App. 94.

**5. Addition of Necessary Averments in Petition for Certiorari.** — *People v. Board of Excise*, 91 Hun (N. Y.) 94.

**6. Describing Location of Premises.** — *Reg. v. Penkridge*, 61 L. J. M. C. 132, 66 L. T. N. S. 371, 56 J. P. 87; *Murphy v. Monroe County*, 73 Ind. 483; *Waugh v. Graham*, 47 Neb. 153; *Porter's License*, 4 Kulp (Pa.) 356.

**Defective Description.** — It has been held, however, that although the application does not specify the house in which the applicant intends to sell, the neglect becomes immaterial if the order of the court fixes the place. *Cravens v. Adair County Ct.*, (Ky. 1895) 30 S. W. Rep. 414.

**Stating Name of Owner of Premises.** — Where the statute requires that the name of the owner of the premises where the applicant intends to sell shall be stated in the application, an application which does not contain this statement will be rejected. *Donmoyer's License*, 9 Pa. Co. Ct. 304.

**Description Held Sufficient.** — An application for license to sell intoxicating liquors at "number 1005 Elizabeth avenue, the corner



**Qualifications of Applicant.** — The statutes usually require certain qualifications of applicants for liquor licenses, and these qualifications must be alleged in the petition or application. Under some statutes the application must show the age, citizenship, and place of residence of the applicant, and if these facts are not shown it should be rejected.<sup>1</sup> So under other statutes it must be shown that the petitioner is a man of good moral character and temperate habits, and a failure to set out these facts will be a good ground for refusing the petition.<sup>2</sup> If the statute requires that the petitioner be a male person, a failure to allege this directly will not invalidate the application if the fact sufficiently appears from the petition.<sup>3</sup>

**Character of Sales.** — In the absence of a statute so requiring it is not necessary to state in a petition for a liquor license whether the applicant desires to sell at wholesale or retail.<sup>4</sup>

**Alleging Recommendation of Applicant.** — Where a statute requires the applicant to procure a recommendation in writing signed by twenty householders and freeholders within the limits of the incorporated town in which the applicant proposes to engage in business, a petition stating that the applicant produced "the recommendation of more than twenty respectable householders and freeholders of said town and district" does not show a compliance with the statute in that regard.<sup>5</sup>

**Affidavit.** — If the statutes require an applicant for a license to make affidavit for the due observance of the liquor laws, the petition must allege that the applicant has made the required affidavit.<sup>6</sup>

**c. AFFIDAVIT OF APPLICANT.** — If the statute requires an affidavit of the applicant for the due observance of the liquor laws, as, for instance, that he will not sell to minors or drunkards, keep open on Sunday, etc., an affidavit omitting any of these statements does not authorize the issuance of a license, and a license which is issued thereon will be void.<sup>7</sup> If the statute requires an

of Spring street, in said city," sufficiently designates the place. *Orcutt v. Reingardt*, 46 N. J. L. 337.

**1. Qualifications of Applicant — Necessity for Alleging.** — *Loeb v. Duncan*, 63 Miss. 91; *People v. Board of Excise*, 91 Hun (N. Y.) 94.

**2. Character and Habits of Petitioner.** — *In re Wheelin*, 26 W. N. C. (Pa.) 72.

A license issued on a petition which fails to set out that the applicant therein presented is of good reputation is void. *McCreary v. Rhodes*, 63 Miss. 308; *Corbett v. Duncan*, 63 Miss. 85.

**Statement of Date of Birth.** — If a statute requires that the petition shall state the place of birth of the applicant, and, if a naturalized citizen, where and when naturalized, the date of birth is a material matter, especially if it affects his naturalization, and should be given. *Sherry's License*, 12 Pa. Co. Ct. 129.

**3. Sex of Applicant.** — *Hearn v. Brogan*, 64 Miss. 334.

**Qualification as to Residence.** — Under a statute authorizing boards of supervisors "to grant license to any person resident within their respective counties" to retail liquors, a license granted without its being shown to the board by the petition or otherwise that the petitioner is a resident of the county in which he presents his application is invalid. And such objection, being a jurisdictional one, may be raised for the first time on appeal. *McGee v. Beall*, 63 Miss. 455. See also *McCreary v. Rhodes*, 63 Miss. 308.

**Residence in House Where License Granted.** — The statute 3 & 4 Vict., c. 61, § 2, which enacts

that "every applicant for a license to retail beer shall produce to the officer of excise a certificate from an overseer that he is the real resident, holder, and occupier of the house in which he shall apply to be licensed," is directory only, and therefore a license may be valid notwithstanding the certificate omits to state that the applicant is such householder. *Thompson v. Harvey*, 4 H. & N. 254.

**4. Statement as to Quantity.** — *Brown v. Lutz*, 36 Neb. 527. See also *Hearn v. Brogan*, 64 Miss. 334, in which case it was held that a petition for a license to sell generally, without specifying what quantity the applicant intended to sell, is not for that reason insufficient where, by the statute, one licensed to retail may sell in any quantity, and the only license the authorities do grant is to retail.

**Description of Liquor Which It Is Intended to Sell.** — A petition asking for a license "to sell spirituous or intoxicating liquors, wines, and beer," is a sufficient application under a statute providing that an applicant for a license shall present a petition asking the board of county commissioners to grant the right "to sell such liquors, wines, or beer." *State v. Jefferson County*, 20 Fla. 425.

**5. Recommendation of Applicant.** — *Glenn v. Lynn*, 89 Ala. 608, the court saying: "It does not appear that all of them, though residents of the district, resided within the corporate limits of the town."

**6. Affidavit.** — *Glenn v. Lynn*, 89 Ala. 608.

**7. Affidavit of Intention to Observe Laws.** — *Russell v. State*, 77 Ala. 89.

**Affidavit Not to Adulterate Liquors.** — An



affidavit that the signatures to the application of those recommending it are genuine and procured without fraud or deceit, the applicant, in making the affidavit, should have such personal knowledge of the circumstances of their signing as will enable him to swear in good faith that none of the means prohibited by the statute have been used in procuring their signatures.<sup>1</sup>

*d. FILING OF APPLICATION OR PETITION.* — The statutes usually require that the petition shall be filed with a designated officer and remain on file for a designated period of time before it is acted upon. These statutes are not directory, but are mandatory, and no jurisdiction to grant a license can be acquired unless this requirement is strictly complied with.<sup>2</sup> An applicant for a license will be permitted to file his application *nunc pro tunc* when filing in time was prevented by sickness.<sup>3</sup>

*e. NOTICE OF APPLICATION OR PETITION* — (1) *Necessity and Object of Notice.* — In most jurisdictions the statutes governing and regulating the granting of licenses require the applicant to give notice of his intention to apply for a license.<sup>4</sup> The object of the notice is to give as wide publicity as possible to the application, so that if any person knows of any violation of the license law by the applicant or any valid reason why a license should not be granted to him he may make objection.<sup>5</sup> This notice is jurisdictional process and is absolutely essential to confer upon the licensing board power to act.<sup>6</sup>

(2) *Requirements of Notice.* — The notice must set forth the name of the applicant; and if the name of a firm is given without stating the names of the persons who compose the firm, this will not constitute a proper designation of the applicants.<sup>7</sup>

*Description of Place.* — So it is usually required that the notice shall accurately describe the place where the applicant desires to sell liquors, and a notice

affidavit that the applicant will not "mix or adulterate with any poisonous substance whatever" is not a compliance with a statute requiring an oath "not to mix or adulterate with any substance whatever," and a license granted on such affidavit is void and no protection to the seller. *Hall v. State*, 9 Lea (Tenn.) 574.

1. *Affidavit of Genuineness of Signatures.* — *State v. Sumter County*, 22 Fla. 364.

2. *Necessity of Filing Petition.* — *State v. Heege*, 37 Mo. App. 338.

3. *Filing Nunc pro Tunc.* — *Mann's Application*, 2 Chest. Co. Rep. (Pa.) 209.

*Filing in Vacation — Granting of Provisional License.* — Under a statute providing that a petition for a license shall be filed in the office of the clerk of the County Court and by the clerk laid before the court at the first term thereafter, and further providing that the clerk may, in the vacation of the court, grant licenses to dramshop keepers until the next term of the court in the same manner as if such license had been granted by the court, it was held that if the petition is filed with the clerk while the court is in session it is ready for immediate consideration unless delayed or continued by the court. But if filed in vacation the clerk may be authorized to grant the license until the next term, but whether he grants it or refuses it he must lay the matter before the court at its next session. *State v. Moniteau County Ct.*, 45 Mo. App. 387.

4. *Necessity of Notice.* — See statutory provisions regulating the granting of licenses.

*Effect of Statute Requiring Notice of Application to Sell at Retail.* — A statute which requires that notice of an application to sell liquor at

retail shall be posted for ten days at the court house and four other places does not apply to an application for a druggist's license with privilege to sell liquors. *Evans v. Com.*, 95 Ky. 231.

*Notice Is Not Required in Arkansas*, and as the applicant must circulate a petition in the town where he desires to sell liquors, the case does not belong to that class of cases where the court upon general principles should order that notice be given. *Blackwell v. State*, 36 Ark. 184.

5. *Object of Notice.* — *Com. v. Bearce*, 150 Mass. 392; *State v. South Omaha*, 33 Neb. 876.

6. *Notice Jurisdictional Process.* — *Zielke v. State*, 42 Neb. 750; *Pelton v. Drummond*, 21 Neb. 492; *Brown v. Murphy*, 51 N. J. L. 250.

*Invalidity of License Granted Without Proper Notice.* — It has been held that a license issued without the statutory notice will be considered void and so held even in a collateral proceeding, such as a prosecution for selling without license. *Zielke v. State*, 42 Neb. 750. But in *Hornaday v. State*, 43 Ind. 306, it was held that the question whether proper notice by publication has been given by an applicant for license cannot be inquired into in a prosecution against such person for retailing intoxicating liquors without license. The court took the view that while those affected might have appealed to the Circuit or Common Pleas Court or have instituted a direct proceeding to set aside the order granting the license, the conclusiveness of the decision could not be called in question in a criminal prosecution for selling without license.

7. *Name of Applicant.* — *Com. v. Bearce*, 150 Mass. 392; *Loeb v. Duncan*, 63 Miss. 89.



which does not comply strictly with this requirement will be insufficient.<sup>1</sup>

(3) *Time of Giving Notice.* — If the statute requires that notice be published for a given length of time before action is taken on the license, any action taken by the licensing board before the expiration of that time will be void.<sup>2</sup>

(4) *Publication of Notice.* — If the statute requires publication of the notice, it will be presumed in the absence of legislative intimation to the contrary that the notice is to be published in the ordinary language of the state and in a newspaper published in the same language.<sup>3</sup> If the statute requires publication of the notice in the newspaper having the largest circulation in the county, the selection by the applicant of the paper in which to publish the notice will not be inquired into in the absence of a showing of bad faith on his part.<sup>4</sup> If the statute requires publication of the notice for a designated period of time the publication must be continuous. If the paper is a daily, the notice must be published daily. If the paper is a weekly, a publication once a week for the designated time will be sufficient.<sup>5</sup> Where a statute

1. *Description of Premises.* — *Com. v. Bearce*, 150 Mass. 389; *Dexter v. Cumberland*, 17 R. I. 222.

*Notices Held Sufficient.* — A notice published in a newspaper, of an application for a license to sell intoxicating liquors, gave the first name and surname and initial letter of the middle name of the applicant, the class of the license applied for, and described his place of business as "in a building known as K.'s block, on the easterly side of M. street, at the corner of S. street." The applicant had a druggist sign in the front of the shop occupied by him in K.'s block, which shop was the third from the corner of the two streets; neither the block nor the street was numbered, and the applicant wrote his name as it appeared in the published notice. It was held that the notice was a sufficient compliance with Pub. Stat. Mass. (1832), c. 100, § 6. *Braconier v. Packard*, 136 Mass. 50.

So under a statute requiring that the notice shall state "the particular location or the place where" the business is to be carried on, a notice which describes the place as "a certain building on lot 1, block number 14," etc., is a sufficient compliance with the statute though the lot designated contains more than one building. *Whitlock v. Bartholomew*, 91 Iowa 246.

*Notices Held Insufficient.* — Under a statute requiring that the notice should give "a particular description of the premises on which the license is to be exercised, designating the building or part of a building to be used," a notice describing the place where the applicant desired to sell liquor as "the first floor of a building situated on the easterly side of South Main street, owned by Catherine Bearce," was insufficient. *Com. v. Bearce*, 150 Mass. 389.

So where there was no street named Main street in a town, and where the only lots therein numbered 23 were lots 23 east and 23 west, both situate upon Michigan street, a notice of an intention to apply for a license to retail intoxicating liquors which described the location of the proposed place of sale as being upon lot 23 on Main street was insufficient. *Barnard v. Graham*, 120 Ind. 135.

And a notice which gives nothing but the name of the applicant and the name of the

street does not sufficiently comply with a statute requiring a designation in the notice of the particular place, in order that owners of land within two hundred feet of it may file objections. *Dexter v. Cumberland*, 17 R. I. 222.

2. *Time of Giving Notice.* — *Pelton v. Drummond*, 21 Neb. 492.

For Decisions under the English Statute, see *Reg. v. Pownall*, (1893) 2 Q. B. 158; *Reg. v. Justices*, 10 B. & S. 840, 39 L. J. M. C. 17, L. R. 5 Q. B. 33, 21 L. T. N. S. 490, 18 W. R. 259; *Reg. v. Armstrong*, 65 L. J. M. C. 35.

3. *Publication of Notice—Language.* — *City Pub. Co. v. Jersey City*, 54 N. J. L. 437, in which case it was held that an ordinance designating a newspaper published in a foreign tongue in which notice shall be given is void.

*English Statute—Service of Notice of Application on Policy.* — See *Reg. v. Riley*, 53 J. P. 452; *Reg. v. Birley*, 55 J. P. 88.

4. *Applicant's Discretion in Selecting Paper.* — *Lambert v. Stevens*, 29 Neb. 283. See also *Brown v. Merrick County*, 18 Neb. 355.

*Paper Must Have Bona Fide Subscribers.* — The statute relating to the publication of the notice of application for liquor license contemplates that the newspaper in which such notices are to be published must be one having bona fide subscribers. The circulation of the paper is not to be determined alone from the number of subscribers in the county, but from the subscription list and the bona fide average of such publication combined. *Rosewater v. Pinzenscham*, 38 Neb. 835.

5. *Publication Must Be Continuous.* — *State v. South Omaha*, 33 Neb. 870; *Rosewater v. Pinzenscham*, 38 Neb. 835.

*Authority of Licensing Board to Designate Paper.* — Under a statute providing that no action shall be taken upon an application for a liquor license unless two weeks' notice of the filing thereof has been given in the newspaper published in the county having the largest circulation therein, the licensing board has no authority to designate the newspaper in which the publication shall be made. *Rosewater v. Pinzenscham*, 38 Neb. 835.

*Several Editions of Daily Paper—How Notice Published.* — Where the matter published in each of the several editions of a daily paper is not substantially the same, and each edition



requires publication of "the petition with the names and marks thereto attached," the failure to publish the marks of a few petitioners whose names are published will not vitiate the notice,<sup>1</sup> and such statute does not require the publication of the affidavit to the petition.<sup>2</sup> So under a statute requiring the publication of the petition, with the full names of the petitioners, the names of the witnesses to signatures made by proper mark of the signers need not be published.<sup>3</sup>

**13. Recommendation of Petition or Application — a. NECESSITY OF RECOMMENDATION.** — In most jurisdictions the petition or application must be recommended by a designated number of persons who are either voters, freeholders, property owners, citizens, or taxpayers, etc., according as the statute may provide. This recommendation is under some statutes an indorsement of the petition or application for a license, and under others a separate petition signed by the number and class of persons designated by the statute. If the number of persons recommending the application is less than the number designated by statute the application should be refused;<sup>4</sup> and a license issued without the required recommendation or on a recommendation signed by a smaller number of persons than that designated by statute is void,<sup>5</sup> and affords no protection to the seller.<sup>6</sup> So no license can be issued where the recommendation is signed by persons other than those designated in the statute.<sup>7</sup> And it has been held that to warrant the reversal of a judgment refusing to grant a license it must affirmatively appear that the requisite number of persons recommended the petition.<sup>8</sup>

**b. WHO IS QUALIFIED TO SIGN RECOMMENDATION.** — Where a statute requires a recommendation signed by registered voters it has been held that the applicant has the same right as any other registered voter to sign his own recommendation.<sup>9</sup> And a person otherwise a qualified voter is not disqualified to recommend the granting of a license by the fact that his taxes have

has a different heading or name, and is sent to a different set of subscribers, liquor notices should be entered in but one edition thereof. The circulation alone will determine whether the notice was entered in the proper paper. Whether several editions of a daily paper are separate and distinct publications is a question of fact to be determined from the evidence by the licensing board. *Rosewater v. Pinzenscham*, 38 Neb. 835.

**Evidence as to Circulation.** — A petitioner's affidavit that the notice was published on certain days and that the newspaper has the largest circulation in the county is only *prima facie* evidence and may be impeached by competent evidence to the contrary. *Rosewater v. Pinzenscham*, 38 Neb. 835.

**1. State v. Sumter County**, 22 Fla. 1, in which case it was said: "The publication of the names identifies the petitioners sufficiently for all the practical purposes for which the publication was intended." See also *Polk County v. Johnson*, 21 Fla. 584.

**2. Affidavit to Petition.** — *Polk County v. Johnson*, 21 Fla. 579.

**3. Names of Witnesses to Marksmen.** — *Ferguson v. Brown*, 75 Miss. 214.

**4. Number of Signers Required by Statute Must Be Obtained.** — *State v. Sumter County*, 22 Fla. 364; *Van Nortwick v. Bennett*, 62 N. J. L. 151.

**Failure of Statute to Provide Method of Obtaining Recommendation — Effect.** — An act requiring the applicant for a liquor license to secure a recommendation from a majority of the householders in the precinct is not inoperative

because it provides no way of obtaining such a recommendation. *Jones v. Hilliard*, 69 Ala. 300.

**Estimating Number of Signatures — Several Petitions.** — Where a person circulates several petitions for a license to retail liquors, the headings of which differ materially, and after the names are signed he selects one and appends thereto the names signed to the other petitions, erasing the headings of the latter, and by thus combining the list of names obtains a majority of the voters, no license can be granted on such petition. *Collins v. Barrier*, 64 Miss. 21.

**5. License Without Required Recommendation Void.** — *Eureka v. Davis*, 21 Kan. 578; *Welsford v. Weidlein*, 23 Kan. 601; *Cahen v. Jarrett*, 42 Md. 571; *House v. State*, 41 Miss. 737; *State v. Higgins*, 71 Mo. App. 180; *State v. Weber*, 20 Neb. 467; *Hillsboro v. Smith*, 110 N. Car. 417.

**6. Seller Not Protected by Void License.** — *Hillsboro v. Smith*, 110 N. Car. 417.

**7. Only Persons Designated by Statute Can Recommend Application.** — *State v. Heege*, 37 Mo. App. 338. In this case it was held that where the statute provided that no license should be granted until a petition signed by a majority of the assessed taxpayers in the block or square in which the dramshop was to be kept had been presented, a petition which merely purported to be signed by a majority of the taxpayers of the town was insufficient.

**8. Ex p. Cox**, 19 Ark. 688.

**9. Applicant for License.** — *State v. Sumter County*, 22 Fla. 1.



been paid by the applicant for the license, if the payment is not made in the way of a bribe and with an understanding as to the voter's exercise of the right of suffrage.<sup>1</sup> But if the statute requires that the petition shall be recommended by "reputable freeholders," a large number of persons to whom land has been conveyed for a single consideration in order to qualify them to sign a recommendation are not reputable freeholders, because the transaction is fraudulent.<sup>2</sup>

Women and Minors who reside in a city and own property therein and are regularly assessed are to be counted in determining whether a petition presented for a dramshop license in such city is signed by a majority of the "assessed taxpaying citizens therein" as required by statute.<sup>3</sup>

But Citizens Residing Outside of the City, although owning property therein and regularly assessed, are not to be counted.<sup>4</sup>

c. MISCELLANEOUS — Right to Withdraw Signature. — After a recommendation for license has been presented to the licensing board and jurisdiction is acquired, one whose signature has not been procured by fraud cannot, without the consent of the board, withdraw his name and divest the board of jurisdiction.<sup>5</sup>

What Signing Is Sufficient. — The fact that one of the signatures is in lead pencil will not render the application insufficient.<sup>6</sup> The signature, it seems, should be in the handwriting of the person recommending the application. It has been held that a mark or the signing of the name of a person recommending the application by one authorized to sign for him is not sufficient.<sup>7</sup>

Amendments. — After a petition has been filed and notice thereof given, it may be amended by the addition of signatures of other persons recommending it, and a republication of the notice after such amendment is unnecessary.<sup>8</sup> Whether it can be amended after hearing by the addition of the names of the necessary signers is a matter of some doubt. There are rulings both ways on this question.<sup>9</sup>

1. Person Whose Taxes Are Paid by Applicant. — *Ferguson v. Brown*, 75 Miss. 214.

2. Persons to Whom Land Is Conveyed. — *Austin v. Atlantic City*, 48 N. J. L. 118.

Signing Recommendations for Several Licenses. — A statute which provides that a person signing a recommendation for a beer license shall not sign a recommendation for another beer license within a certain time does not disqualify such person from signing a recommendation for a tavern license within that time. *Orcutt v. Reingardt*, 46 N. J. L. 337.

So under a statute providing that the petition shall embrace a certificate signed by at least twelve reputable citizens of the township, it is no objection to a petition for a hotel license that six of the twelve certifiers have signed the petition of another applicant. *Meredith's License*, 2 Pa. Co. Ct. 82.

Qualification of Person Who Has Signed Petition and Counter Petition. — A statute which provides that any name found on both petition and counter petition shall be counted against the granting of the license does not preclude one who has signed both the petition and the counter petition from withdrawing his name from the counter petition by signifying his desire therefor by another written petition. *Perkins v. Henderson*, 68 Miss. 631.

Qualified Voter — Taxes of What Year to Be Paid. — A constitutional provision that to be a qualified elector one must have paid, on or before the first day of February of the year in which he shall offer to vote, all taxes for the two preceding years, requires that the taxes of

the petitioners for license to retail intoxicating liquors shall have been paid for two years preceding the year in which they sign, since qualified voters alone are competent petitioners. *Ferguson v. Brown*, 75 Miss. 214.

3. Women and Minors Regularly Assessed. — *State v. County Ct.*, 90 Mo. 193.

4. Citizens Owning Property in City but Not Living There. — *State v. County Ct.*, 90 Mo. 593. See also *State v. Meyers*, 80 Mo. 601.

5. Signatures Cannot Be Withdrawn. — *Orcutt v. Reingardt*, 46 N. J. L. 337. To the same effect see *Hunsberger's Application*, 2 Montg. Co. Rep. (Pa.) 132.

6. Signing with Pencil. — *Schoner's License*, 8 Pa. Co. Ct. 453, *disapproving* *Smith's Application*, 3 Pa. Co. Ct. 314.

7. Signature Must Be in Person's Own Handwriting. — *Grant's License*, 2 Pa. Co. Ct. 87; *Faulkner's License*, 2 Pa. Co. Ct. 86.

Attestation of Signature. — Although the statute requires on application for a permit that those recommending the application shall each sign in the presence of two witnesses, it does not require that the witnesses subscribe or attest the signatures. *State v. Sumter County*, 22 Fla. 1.

8. Addition of Names After Filing Petition. — *Livingston v. Corey*, 33 Neb. 366.

9. Amending Petition After Hearing — *View that Amendment Will Not Be Permitted*. — *Heery's Petition*, 4 Kulp (Pa.) 57.

*View that Amendment Is Permissible*. — In *State v. Jefferson County*, 20 Fla. 425, a petition for a license signed by less than a majority of



**14. Consent of Resident Property Owners, or Freeholders Living in Vicinity. —**

In a number of jurisdictions there are statutes, varying somewhat in their terms, which require persons making application for a license to procure the consent of a designated number of the residents, property owners, freeholders, or voters, living within a designated distance of the premises where it is proposed to sell liquor. In construing provisions of this character it has been held that a license issued without such consent having been procured is void.<sup>1</sup> It has been held, however, that if through mistake the applicant has obtained the consent of less than the required number of property owners at the time of making the application, and the license is nevertheless issued, he may supply the omitted owners' consent thereafter.<sup>2</sup> Where a statute requires the filing of a written consent from all resident freeholders owning property within a designated distance of the premises where the business is to be carried on, the term "resident freeholder" means all freeholders resident in the city where the application for permission to sell is made;<sup>3</sup> and the consent of the owners of property within the designated distance must be obtained if they are residents of the state, whether they reside upon the property or away from it.<sup>4</sup> A provision that no license shall be granted except upon the consent of a majority of *bona fide* householders or property owners within a designated distance of the proposed location of the saloon means either one or the other indifferently and without distinction.<sup>5</sup> If a statute requires the applicant to obtain the consent of the owners of at least two-thirds of the buildings occupied exclusively for dwelling houses within a designated distance of the location of the proposed liquor store, it will be held to include all buildings intended for dwellings, though vacant at the time of the application.<sup>6</sup> So it

the voters of a district was denied. At the ensuing regular meeting an additional number of names, thus making a majority, was affixed to the original petition on file, and the whole was duly authenticated and published. It was held that though this was irregular, it was nevertheless permissible, no fraud being imputed.

**1. Consent a Condition Precedent to Issuance of License. —** *Metcalf v. State*, 76 Ga. 308.

**Operation of Statutes. —** Where there is a saving clause in such a statute to the effect that such consent shall not be required in cases where traffic in liquor is actually lawfully carried on in such premises when the statute takes effect, an abandonment of such use of the premises deprives them of their privileged character, and a subsequent applicant for a certificate must obtain the consent of two-thirds of the owners of dwellings situated within two hundred feet. *Matter of Ritchie*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 341; *Matter of Bridge*, 36 N. Y. App. Div. 533; *Kessler v. Cashin*, (Supm. Ct. App. Div.) 60 N. Y. Supp. 1141.

**Retroactive Effect of Statutes. —** A provision that consents once obtained inure to the benefit of subsequent dealers on the same premises has no retroactive force. *Matter of MacVicker*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 383.

**Determination of Facts Relating to Consent, Distance, etc. —** In *New York* it is for the county treasurer to determine from the application or otherwise the number of buildings occupied exclusively as dwellings whose nearest entrance is within the specified distance of the premises in which it is proposed to carry on the traffic in liquor. *People v. Hoag*, 11 N. Y. App. Div. 74.

**Evidence of Consent. —** In an action involving the sufficiency of the statement of consent, the best evidence of who were legal voters of the city at the last election is the poll books and registration lists of that election, although they are not records in the sense that they may not be attacked for fraud. *State v. Pressman*, 103 Iowa 449.

**What Written Statement Sufficient. —** A statute requiring that "a written statement of consent signed by a majority of the voters" be filed with the auditor is sufficiently complied with by the filing of the following statement: "Petition and consent under section 17, known as the 'Mulct Law.' \* \* \* The undersigned, residents and voters of Oskaloosa, Iowa, respectfully petition and consent that said city of Oskaloosa shall be under the operation of the provisions of said law." *State v. Mateer*, 94 Iowa 42.

**2. Supplying Omissions After Issuance of License. —** *Matter of Johnson*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 498.

**Residents of Another County. —** In *Georgia*, provided the license is not sought in an incorporated town or city, the nearest residents to the premises where the liquor is to be sold are the persons to give their consent. It is immaterial that they reside in another county or in an incorporated city or town. *Ballew v. State*, 84 Ga. 138.

**3. "Resident Freeholder" Defined. —** *State v. Greenway*, 92 Iowa 472.

**4. Consent of Owners Not Residing on Property Necessary. —** *State v. Mateer*, 94 Iowa 42.

**5. Shepard v. New Orleans**, 51 La. Ann. 847.

**6. Vacant Dwellings Within Meaning of Statute. —** *Matter of Ruland*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 504.



includes a building in which the occupant resides, but which she uses occasionally in washing for others,<sup>1</sup> and an addition to a business block which has no inside communication with the rest of the block, but is used exclusively for a dwelling, and which has a separate street number.<sup>2</sup>

**Measurement of Distances.** — In determining the distance between a dwelling house and a liquor store, the distance is to be measured in a straight line, and not by the traveled route between the two places,<sup>3</sup> and the distance is to be measured from the room in which the liquor is to be sold if the room alone is to be used for that purpose.<sup>4</sup>

**15. Remonstrances or Counter Petitions** — *a. RIGHT TO REMONSTRATE.* — It is very generally provided by the statutes that where application is made for a license to sell intoxicating liquors, remonstrances or counter petitions may be filed in opposition thereto.<sup>5</sup> Statutes designate the persons who may oppose the granting of licenses, and none other than those designated can do so.<sup>6</sup> The right given to a voter by statute to remonstrate may be exercised through the agency of a duly authorized attorney. The remonstrance cannot be rejected because the remonstrators' names are signed by such attorney.<sup>7</sup>

*b. FILING OF REMONSTRANCE* — **Before Whom Filed.** — The remonstrance must be filed with the licensing board before which the application is pending, and no remonstrance which is not so filed will be considered.<sup>8</sup> On appeal from the action of the licensing board no new remonstrance can be permitted,<sup>9</sup> nor can parties who have not signed the remonstrance originally filed oppose the license on such appeal.<sup>10</sup>

**Time of Filing.** — The time of filing a remonstrance is a matter of statutory regulation, and under some statutes it has been held that the remonstrance is

1. *Matter of Lyman*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 568. See also *Matter of Ruland*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 504.

2. *Matter of Lyman*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 568.

3. **Distances to Be Measured in Straight Line.** — *State v. Greenway*, 92 Iowa 472; *Matter of Bridge*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 213, 56 N. Y. Supp. 1105.

4. **Measuring from Room in Which Liquor Sold.** — *State v. Mateer*, 94 Iowa 42. See also *Matter of Ruland*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 504.

5. **Remonstrances and Counter Petitions.** — See the statutes of the various jurisdictions regulating the liquor traffic.

6. **Who May File Remonstrances.** — *Massey v. Dunlap*, 146 Ind. 350; *Law, etc., Soc.'s Petition*, 185 Pa. St. 572; *In re License*, 34 Pa. L. J. (Pa.) 329.

**Applications of Rule.** — Where a statute provides that the license shall not be granted if a remonstrance signed by a majority of the legal voters of any township or ward in any city shall be filed, a remonstrance against the issuance of a license in a city ward should be signed by a majority of the voters therein. It will be insufficient if signed by a majority of the voters of the township in which the city is located. *Massey v. Dunlap*, 146 Ind. 350.

**In Iowa** any person may object to the application, even though he has no property or interest which may be affected by the granting of the license. *Darling v. Boesch*, 67 Iowa 702.

**How Right to Remonstrate Lost.** — If a remonstrant ceases to be a voter of the township for which the license is sought, during the pend-

ency of the cause after the filing of his remonstrance, he will thereby lose the privilege of being a remonstrant. *List v. Padgett*, 96 Ind. 126.

**Objections to Qualifications of Remonstrants** — **How Lost.** — Where the board of commissioners, without objection on the part of the applicant, entertains and acts upon a remonstrance, and hears and determines the questions thereby presented, and on appeal the Circuit Court does likewise, also without objection, all objections to the remonstrants are waived by the applicant, and the latter is estopped to deny that they are legal voters of the township. *Groscop v. Rainier*, 111 Ind. 361.

7. **Remonstrant May Act Through Attorney.** — *Castle v. Bell*, 145 Ind. 8.

**Remonstrance by Railroad Company** — **Who May Make.** — An objection may be made in behalf of a railroad company, in its corporate name, by its superintendent, on the instruction of the general manager, who has the right so to instruct. *Lonsdale Co. v. License Comrs*, 18 R. I. 5.

8. **Remonstrance Must Be Filed with Licensing Board.** — *Miller v. Wade*, 58 Ind. 91; *Ex p. Miller*, 98 Ind. 451; *List v. Padgett*, 96 Ind. 126.

9. **New Remonstrances on Appeal Not Permissible.** — *Miller v. Wade*, 58 Ind. 91.

10. **New Parties to Remonstrance Not Permissible on Appeal.** — *Ex p. Miller*, 98 Ind. 451; *List v. Padgett*, 96 Ind. 126.

**Filing with Clerk of Licensing Board Sufficient.** — The village clerk is clerk of the board of village trustees, and a remonstrance filed in the office of such clerk is "filed in the office where the application is made," and is sufficient. *Vanderlip v. Derby*, 19 Neb. 165.



seasonably filed at any time before the license is granted.<sup>1</sup>

*c. FORM AND ALLEGATIONS OF REMONSTRANCE.* — Letters, petitions, or requests to judges in their individual capacity should have no influence on them in passing upon an application for license,<sup>2</sup> and under most statutes remonstrances should be directed against the issuance of a license to some particular applicant, and not to any applicant within the district township or ward under consideration.<sup>3</sup> Nevertheless, a remonstrance against the issuance of a license to a designated person "or any applicant" will be good, and the addition of the words quoted, for the insertion of which there was no legal authority, may be rejected as surplusage.<sup>4</sup> Those who are authorized to object to the issuance of a license may exercise their right by separate remonstrances directed against the same person. It is not necessary that the names of the remonstrants be signed to the same paper.<sup>5</sup> If it is required that the remonstrants shall be legal voters, a remonstrance stating that the signers are "residents and voters" sufficiently shows this fact.<sup>6</sup> The grounds on which it is sought to defeat the application should be stated with such reasonable degree of certainty as will advise the applicant of the charges that he will have to meet.<sup>7</sup>

*Amendment of Remonstrance.* — On appeal from the action of a licensing board to the Circuit Court, the court may permit an amendment making the remonstrance more specific and adding new specifications under the original objections, where no new parties are introduced,<sup>8</sup> and it is an abuse of discretion of the court to refuse such amendment.<sup>9</sup>

*d. WITHDRAWAL OF REMONSTRANCE.* — Until the beginning of the period during which it is required that the remonstrance shall be on file, any remonstrant must be deemed to have the absolute right by some affirmation of his

**1. Filing at Any Time Before Issuance of License Sufficient.** — *Rogers v. Hahn*, 63 Miss. 578; *Vanderlip v. Derby*, 19 Neb. 165.

**How Time Computed.** — Under a statute which requires that a remonstrance shall be filed "three days before any regular session of the board of commissioners," a remonstrance filed on August 29 is in time where the regular session of the board begins on Monday, September 2. *Flynn v. Taylor*, 145 Ind. 533; *Conwell v. Overmeyer*, 145 Ind. 698.

**2. Communications to Judges in Their Individual Capacity Not Considered.** — *Gore's Application*, 5 L. T. N. S. (Pa.) 105.

**3. Remonstrances Must Be Directed Against Particular Applicant.** — *State v. Gerhardt*, 145 Ind. 439, and *Wilson v. Mathis*, 145 Ind. 493, construing a statute which provides that "it shall be unlawful," etc., "to grant such license to such applicant therefor;" *Collins v. Barrier*, 64 Miss. 21. *Compare Woods v. Pratt*, 5 Blackf. (Ind.) 377, in which case it was held that a remonstrance against granting a license to any person to retail ardent spirits in the town for three years was sufficient under a statute providing that "no license shall be granted to any person residing within any town or township where a majority of the freeholders in such town or township shall remonstrate against the granting of the same."

**Remonstrance Remaining on File Applicable to Second Petition.** — *Rhode Island Perkins Horse Shoe Co. v. License Com'rs*, 19 R. I. 643.

**4. Remonstrance Not Vitiated by Surplusage.** — *Thompson v. Hiatt*, 145 Ind. 530. *Compare Collins v. Barrier*, 64 Miss. 21.

**Joinder of Several Applicants in Remonstrance.** — Whether two or more persons can be joined

in the same remonstrance does not seem to be well settled. In *Massey v. Dunlap*, 146 Ind. 350, it was held that this was not permissible; but in *Collins v. Barrier*, 64 Miss. 21, the opposite view was taken.

**5. Filing of Separate Paper by Remonstrants Permissible.** — *Head v. Doehleman*, 148 Ind. 145; *Flynn v. Taylor*, 145 Ind. 533; *Thompson v. Hiatt*, 145 Ind. 530; *Wilson v. Mathis*, 145 Ind. 493.

**6. Alleging Qualifications of Remonstrants.** — *Head v. Doehleman*, 148 Ind. 145.

It is not necessary, however, that the petition allege that the signers are "a majority of the legal voters of the township," though the statute requires that the remonstrance shall be signed by such majority. *Head v. Doehleman*, 148 Ind. 145.

**The Majority of Voters in a Ward is determined by aggregating the vote of such ward as cast therein at the last city election.** *Massey v. Dunlap*, 146 Ind. 350.

**7. Statement of Grounds to Defeat Application.** — *Grummon v. Holmes*, 76 Ind. 585.

**The Sufficiency of Facts Can Be Tested by Demurrer,** but not by a motion to strike out parts thereof. *Fletcher v. Crist*, 139 Ind. 121.

**Verification.** — If the statute requires the verification of a remonstrance by the affidavit of the objector it cannot be considered unless it is so verified. *Palmer's License*, 3 Pa. Co. Ct. 314.

**8. What Amendments Permissible.** — *Stockwell v. Brant*, 97 Ind. 474; *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; *Hardesty v. Hine*, 135 Ind. 72; *Fletcher v. Crist*, 139 Ind. 124.

**9. Refusal to Permit Amendments Improper.** — *Hardesty v. Hine*, 135 Ind. 72.



own to withdraw his name from the remonstrance, whether it is or is not actually filed; <sup>1</sup> but after the expiration of the time for filing a remonstrance, the remonstrants have no right to withdraw their names therefrom so as to leave a smaller number than is required by law.<sup>2</sup>

**16. Hearing of Application and Remonstrance — a. TIME OF HEARING.** — Under some statutes, when application for a liquor license is made and remonstrances are filed the licensing board is required to fix a time for the hearing thereof. This provision is mandatory, and a license cannot be legally issued without appointing a time for hearing, and giving to both the applicant and the remonstrants a reasonable opportunity to be heard.<sup>3</sup> If the licensing board refuses to grant a reasonable time, mandamus will lie to compel it to do so; <sup>4</sup> and if it refuses to take testimony, the court to which an appeal is taken will remand the cause, that such testimony may be taken and a decision rendered thereon.<sup>5</sup>

**Adjournment.** — After a day has been appointed for the hearing, the hearing may be adjourned to a subsequent day to suit the convenience of the court or of the applicants and remonstrants.<sup>6</sup>

**Personal Attendance.** — The applicant may be required to attend the hearing in person, and on his failure to appear except by attorney his application may be dismissed.<sup>7</sup>

**b. EVIDENCE.** — Where a remonstrance which denies any jurisdictional matter is filed, the burden is on the petitioner to prove these jurisdictional facts,<sup>8</sup> as, for instance, that the applicant is a resident,<sup>9</sup> or that signers of the application are resident freeholders, or that the petition is signed by a majority of the freeholders of the ward.<sup>10</sup>

**Fitness of Applicant.** — The question of the applicant's fitness is one of fact,<sup>11</sup> and the burden is on the applicant to show that he is a fit person to retail or to sell intoxicating liquors.<sup>12</sup> As bearing upon the question of unfitness, evi-

1. *State v. Gerhardt*, 145 Ind. 439.

2. **Withdrawal After Expiration of Time for Filing Not Permissible.** — *Sutherland v. McKinney*, 146 Ind. 611; *State v. Gerhardt*, 145 Ind. 439; *Conwell v. Overmeyer*, 145 Ind. 698.

One of the objectors cannot defeat the object of the remonstrance by withdrawing it and allowing the issuance of the license in the absence of other signers and without their consent. *State v. Coleman*, 34 Neb. 440.

3. **Necessity of Fixing Time for Hearing.** — *State v. Reynolds*, 18 Neb. 433; *Vanderlip v. Derby*, 19 Neb. 165; *State v. Coleman*, 34 Neb. 440; *State v. Weber*, 20 Neb. 467; *Clark v. State*, 24 Neb. 263; *Steinkraus v. Hurlbert*, 20 Neb. 519; *State v. Hanlon*, 24 Neb. 608; *Bowman's License*, 167 Pa. St. 644.

**Reasonable Time to Produce Testimony** must be given. *State v. Coleman*, 34 Neb. 440; *State v. Reynolds*, 18 Neb. 431; *Clark v. State*, 24 Neb. 263; *Dufford v. Nolan*, 46 N. J. L. 87; *Brown v. Matthews*, 51 N. J. L. 253.

**What Is Not Reasonable Time.** — Where at ten o'clock P. M. a licensing board adjourned to nine o'clock A. M. the next day for a hearing of the remonstrants, it was held that such time was not reasonable, and amounted to a substantial denial of a hearing. *State v. Weber*, 20 Neb. 467.

**Fixing Time by Consent.** — A hearing is not premature where the parties consent to a hearing of a remonstrance after the time for filing other remonstrances has expired. *Hollembaek v. Drake*, 37 Neb. 680.

4. **Mandamus to Compel Allowance of Reasonable Time.** — *Clark v. State*, 24 Neb. 263.

**Application for Mandamus—Inquiry as to Falsity of Remonstrance.** — Upon an application for mandamus to compel the appointment of a time for the hearing of a remonstrance, it is no defense to allege, nor will the court inquire into, the falsity of the facts alleged in the remonstrance. It is sufficient if a remonstrance is filed. *State v. Reynolds*, 18 Neb. 431.

**The Failure of the Remonstrant to Object** does not confer upon the licensing body the right to issue the license without appointing a time for the hearing. *State v. Reynolds*, 18 Neb. 431.

5. **Remanding Proceeding to Take Testimony.** — *Steinkraus v. Hurlbert*, 20 Neb. 519.

6. **Adjournments Permissible.** — *Bowman's License*, 167 Pa. St. 644.

7. **Applicant May Be Required to Attend Hearing.** — *In re Wheelin*, 134 Pa. St. 554, 26 W. N. C. (Pa.) 72.

8. **Burden on Petitioner to Show Jurisdictional Facts.** — *McGee v. Beall*, 63 Miss. 455; *Lambert v. Stevens*, 29 Neb. 283; *Brown v. Lutz*, 36 Neb. 527. See also *Com. v. Kerns*, 38 W. N. C. (Pa.) 438.

9. *McGee v. Beall*, 63 Miss. 455.

10. *Lambert v. Stevens*, 29 Neb. 283.

The official register of the state is conclusive as to the number of inhabitants in a city in which a petition for license is sought. *In re Certain Voters*, 108 Iowa 368.

11. **Personal Fitness of Applicant.** — *State v. Gerhardt*, 145 Ind. 439.

12. **Burden of Proving Fitness.** — *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; *Hill v. Perry*, 82 Ind. 28; *Stockwell v. Brant*, 97 Ind. 474; *Chandler v. Ruebelt*, 83 Ind. 139.



dence of the general reputation of the applicant and of the place and of specific violations of the law by the applicant are admissible.<sup>1</sup>

**Proof of New Matter.** — Where the remonstrance sets up new matter, as that certain signers of the application were made freeholders to enable them to sign, the burden is on the remonstrants to establish such new matter.<sup>2</sup>

**Necessity for License.** — Under some statutes a license will not issue unless a necessity therefor is established<sup>3</sup> by proofs pertinent to each particular case,<sup>4</sup> and the court determines the question of necessity from all the evidence, and grants or refuses a license accordingly.<sup>5</sup> On the question of necessity the court may consider the petitions for and against the licenses,<sup>6</sup> the number and character of the petitioners for and against the licenses,<sup>7</sup> the knowledge and ability of such petitioners to form an opinion,<sup>8</sup> the sworn testimony of witnesses,<sup>9</sup> the prevailing public opinion of the neighborhood,<sup>10</sup> the wants of the community, and the effects on business and society in general.<sup>11</sup> In determining the question of necessity, the court should also utilize its own knowledge of the subject.<sup>12</sup>

**Depositions** are not necessary unless some fact is at issue; if taken upon the point of necessity they should show something more than a mere opinion.<sup>13</sup>

**Unsuitableness of Location.** — Evidence to show that it would be inexpedient to grant a license because of the locality of the proposed saloon is competent.<sup>14</sup>

**1. What Evidence Competent on Question of Fitness.** — *Pelley v. Wills*, 141 Ind. 688; *Hardesty v. Hine*, 135 Ind. 72; *State v. Gerhardt*, 145 Ind. 439; *Luzerne County Licenses*, 4 Kulp (Pa.) 527.

Unfitness may be proved by specific acts. *Stockwell v. Brant*, 97 Ind. 474.

On an application for liquor license, remonstrants may show that the applicant, at various times, as saloon keeper under a previous license, allowed minors to be about a pool table in his saloon, and that he threw dice with a minor in his saloon, when things of value were won and lost. *Hardesty v. Hine*, 135 Ind. 72.

So testimony as to the conduct of persons congregating around the saloon formerly kept by the applicant, and going in and out, is competent, although the former place was one where liquor was sold by the quart. *Stockwell v. Brant*, 97 Ind. 474.

**Opinion of Witness as to Applicant's Fitness Inadmissible.** — *Stockwell v. Brant*, 97 Ind. 474. See also *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156.

**Testimony of Intoxication Referring to a Time Too Remote** from the present, as four or five years, is without force in itself as evidence to show that the applicant is in the habit of becoming intoxicated. *Calder v. Sheppard*, 61 Ind. 219.

**Conviction of Violating Liquor Laws as Evidence.** — A justice's judgment that the applicant has violated the license laws, afterwards vacated on appeal, is not a conviction within the statute making conviction of violating the license laws conclusive evidence of the unfitness of the applicant. *Smith's Appeal*, 65 Conn. 135.

**2. Burden on Remonstrants to Prove New Matter Alleged.** — *Lambert v. Stevens*, 29 Neb. 283.

**3. Proving Necessity for License.** — *Luzerne County Licenses*, 4 Kulp (Pa.) 527; *Frey's License*, 3 Pa. Co. Ct. 93. See also cases cited in subsequent notes bearing on this question.

**4. Luzerne County Licenses**, 4 Kulp (Pa.) 527.

**5. Question of Necessity Determinable from All the Evidence.** — *Frey's License*, 3 Pa. Co. Ct. 93.

**6. What Evidence Competent — Petitions for and Against License.** — *Luzerne County Licenses*, 4 Kulp (Pa.) 527.

**7. Number and Character of Petitioners.** — *Montgomery County Licenses*, 4 Montg. Co. Rep. (Pa.) 77; *Washington County Licenses*, 8 Pa. Co. Ct. 169; *Crawford County Licenses*, 5 Pa. Co. Ct. 34; *Chester County Licenses*, 3 Pa. Co. Ct. 304; *Morris's License*, 3 Pa. Co. Ct. 307; *Wayne County Licenses*, 3 Pa. Co. Ct. 301; *In re License Applications*, 19 W. N. C. (Pa.) 357, 359.

**8. Ability to Form Opinion.** — *In re License Applications*, 19 W. N. C. (Pa.) 357; *In re Vandike*, 13 W. N. C. (Pa.) 294; *Grant's Application*, 2 Chest. Co. Rep. (Pa.) 73.

**9. Sworn Testimony of Witnesses.** — *Luzerne County Licenses*, 4 Kulp (Pa.) 527.

**10. Public Opinion.** — *Callahan's Application*, 2 Montg. Co. Rep. (Pa.) 117; *Smith's Petition*, 3 Del. Co. Rep. (Pa.) 46; *Severn's License*, 2 Pa. Co. Ct. 75.

**11. Wants of Community and Effect on Business.** — *Montgomery County Licenses*, 4 Montg. Co. Rep. (Pa.) 77.

**12. Utilizing Court's Personal Knowledge.** — *Conroy's Application*, 3 Pa. Co. Ct. 52; *Bourjohn's Application*, 2 Pa. Co. Ct. 33; *Erie Licenses*, 4 Pa. Dist. 167; *Philadelphia Licenses*, 4 Pa. Dist. 201.

**Previous Licensing of House.** — That a house has once been licensed is *prima facie* evidence of its necessity. *Bourjohn's Application*, 2 Pa. Co. Ct. 33.

The granting of a license is an adjudication that the house is a necessity, and such adjudication can be limited only by a change of circumstances. *Rief's License*, 2 Lehigh Valley L. Rep. (Pa.) 400.

**13. Depositions.** — *Perkins's Petition*, 2 Del. Co. Rep. (Pa.) 38.

**14. Unsuitableness of Location.** — *Eslinger v. East*, 100 Ind. 434.



If the court, upon an inspection of petitions and remonstrances, finds that there is no necessity for the sale of liquors in the county, it may in its discretion refuse all applications for license.<sup>1</sup>

**17. Discretion in Granting and Refusing Licenses** — *a. IN GENERAL.* — The right of courts or licensing boards to exercise discretion in granting and refusing licenses depends in a large measure on the wording of the statutes regulating the licensing system. There are a number of decisions which apparently hold, under the statutes which they construe, that one who has shown that he is possessed of all the qualifications required by statute and who has complied with all the terms made by statute prerequisites to the issuance of a license, is entitled to a license, and that the licensing authorities have no power to refuse it.<sup>2</sup> The great majority of decisions, however, hold that the statutes which they construe vest the licensing authorities with the right to exercise discretion in granting or refusing licenses.<sup>3</sup> These decisions all proceed upon the theory that the act of the licensing board or court vested with the power of issuing licenses is not merely ministerial, but that the licensing body acts in a judicial capacity.<sup>4</sup>

1. King's Application, 2 Pa. Co. Ct. 17. See also *In re License Applications*, 2 Pa. Co. Ct. 30.

2. Right to Exercise Discretion. — *Henry v. Barton*, 107 Cal. 535; *State v. Justices*, 15 Ga. 408; *Miller v. Wade*, 58 Ind. 91; *State v. Meyers*, 80 Mo. 601; *Bean v. County Ct.*, 33 Mo. App. 635; *Ex p. Persons*, 1 Hill (N. Y.) 655; *People v. Hilliard*, 28 N. Y. App. Div. 140; *McLeod v. Scott*, 21 Oregon 94.

3. Right to Exercise Discretion Exists — *Arkansas*. — *Ex p. Levy*, 43 Ark. 42.

*Connecticut*. — *Batters v. Dunning*, 49 Conn. 479; *Hopson's Appeal*, 65 Conn. 140.

*District of Columbia*. — *U. S. v. Douglass*, 19 D. C. 99; *U. S. v. District Com'rs*, 6 Mackey (D. C.) 409.

*Florida*. — *Polk County v. Johnson*, 21 Fla. 578.

*Illinois*. — *Zanone v. Mound City*, 103 Ill. 552; *Swift v. People*, 63 Ill. App. 453.

*Indiana*. — *Hardesty v. Hine*, 135 Ind. 72; *State v. Bonnell*, 119 Ind. 494.

*Kansas*. — *Stanley v. Monnet*, 34 Kan. 709.

*Kentucky*. — *Pierce v. Com.*, 10 Bush. (Ky.) 7; *Thompson v. Koch*, 98 Ky. 400; *Heblich v. Judge*, (Ky. 1889) 10 S. W. Rep. 465; *Adams v. Stephens*, 88 Ky. 443.

*Minnesota*. — *Hennepin County v. Robinson*, 16 Minn. 381.

*Mississippi*. — *Perkins v. Ledbetter*, 68 Miss. 327.

*Missouri*. — *State v. Justices*, 39 Mo. 521.

*Nebraska*. — *State v. Hanlon*, 24 Neb. 608; *State v. Cass County*, 12 Neb. 56.

*New Jersey*. — *Van Nortwick v. Bennett*, 62 N. J. L. 151.

*New York*. — *People v. Andrews*, 54 N. Y. Super. Ct. 183; *People v. Bennett*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 10; *People v. Excise Com'rs*, (County Ct.) 4 Misc. (N. Y.) 331; *People v. Board of Excise*, (Brooklyn City Ct. Gen. T.) 16 N. Y. Supp. 798; *People v. Excise Com'rs*, (Brooklyn City Ct. Spec. T.) 12 Misc. (N. Y.) 296; *People v. Dalton*, (N. Y. Super. Ct. Spec. T.) 7 Misc. (N. Y.) 558; *People v. Excise Com'rs*, 75 Hun (N. Y.) 224; *People v. Excise Com'rs*, (Supm. Ct. Spec. T.) 25 N. Y. Supp. 873; *Matter of Schomaker*, (C. Pl. Spec. T.) 15 Misc. (N. Y.) 648; *In re Bloomingdale*,

(Supm. Ct. Spec. T.) 38 N. Y. Supp. 162; *People v. Murray*, (N. Y. Super. Ct. Spec. T.) 38 N. Y. Supp. 177; *People v. Excise Com'rs*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 547.

*North Carolina*. — *Maxton v. Robeson County*, 107 N. Car. 335; *Atty.-Gen. v. Justices*, 5 Ired. L. (27 N. Car.) 315; *Jones v. Moore County*, 106 N. Car. 438; *Hillsboro v. Smith*, 110 N. Car. 417; *Mathis v. Duplin County*, 122 N. Car. 416.

*Pennsylvania*. — *Schlaudecker v. Marshall*, 72 Pa. St. 206; *Quinton's License*, 169 Pa. St. 115; *Gross's License*, 161 Pa. St. 344; *Johnson's License*, 156 Pa. St. 322; *Lauck's Application*, 2 Pa. Super. Ct. 53; *Kelminski's License*, 164 Pa. St. 231; *Mead's License*, 161 Pa. St. 375; *Gemas's License*, 169 Pa. St. 43; *Susquehanna County Licenses*, 3 Pa. Co. Ct. 616; *Knarr's Petition*, 127 Pa. St. 554; *Nordstrom's Petition*, 127 Pa. St. 542; *Ostertag's Petition*, 144 Pa. St. 426; *In re Conway*, (Pa. 1885) 1 Atl. Rep. 727; *Raudenbusch's Petition*, 120 Pa. St. 328; *Indiana County Licenses*, 6 Pa. Dist. 358; *American Brewing Co.'s License*, 161 Pa. St. 378; *Leister's Appeal*, (Pa. 1887) 11 Atl. Rep. 387; *Pollard's Petition*, 127 Pa. St. 507; *Com. v. Kerns*, 2 Pa. Super. Ct. 59; *Wolff's Petition*, 138 Pa. St. 316; *McCaffrey's Petition*, 138 Pa. St. 319; *Goldman's Petition*, 138 Pa. St. 321; *Babb v. Taylor*, 2 Pa. Super. Ct. 38; *Reed's Appeal*, 114 Pa. St. 452.

*South Carolina*. — *Charleston v. Hollenback*, 3 Strobb. L. (S. Car.) 351.

*Utah*. — *Perry v. Salt Lake City*, 7 Utah 143.

*Virginia*. — *Ailstock v. Page*, 77 Va. 386; *Leighton v. Maury*, 76 Va. 865; *French v. Noel*, 22 Gratt. (Va.) 454.

*Wisconsin*. — *State v. Downer*, 21 Wis. 274.

4. Board Acts in Judicial Capacity — *Alabama*. — *Dunbar v. Frazer*, 78 Ala. 529; *Ramagnano v. Crook*, 85 Ala. 226.

*Connecticut*. — *Hopson's Appeal*, 65 Conn. 140.

*Florida*. — *Polk County v. Johnson*, 21 Fla. 578.

*Indiana*. — *State v. Tippecanoe County*, 45 Ind. 501.

*Nebraska*. — *Waugh v. Graham*, 47 Neb. 153.

*New York*. — *People v. Excise Com'rs*, (County Ct.) 4 Misc. (N. Y.) 330.



**Nature and Extent of Discretion.** — The next question to be considered is the nature and extent of this discretion, and it is a question of considerable difficulty. Some decisions clearly hold that this discretion is absolute and that the action of the licensing board is final and subject to no sort of review.<sup>1</sup> There are also other decisions which might, perhaps, be so construed.<sup>2</sup> The great weight of authority, however, is opposed to this view. The doctrine laid down by the majority of decisions is that the discretion which the licensing authorities possess is a sound legal discretion, to be exercised wisely and not arbitrarily or according to caprice or prejudice.<sup>3</sup> The meaning of the term "discretion," when granted by the law either expressly or impliedly, in connection with the exercise of official duty, is that the decision shall be the outcome of examination and consideration. In other words, it shall constitute the discharge of official duty, and not a mere expression of personal will.<sup>4</sup> To arrive at a rightful judgment, this discretion must be exercised in the particular case and upon the facts and circumstances before the court after they have been heard and duly considered,<sup>5</sup> regard being had to the interests and policy of the state as manifested in the statutes, as well as to the interests of the applicant and of the community in which the business is to be carried on.<sup>6</sup> An arbitrary disapproval without an examination of relevant facts, expressing nothing but the mood of the officer, is not the exercise of discretionary power within the meaning of the term.<sup>7</sup>

**b. WHAT CONSTITUTES ABUSE OF DISCRETION.** — Refusals of licensing authorities to grant licenses on the following grounds have been held to be arbitrary and abuse of discretion: the refusal of a license on the ground that there were already sufficient saloons in the block, ward, or township, when a license was subsequently granted to another applicant to sell liquor in the same

*Pennsylvania.* — *Gemas's License*, 169 Pa. St. 43; *Schlaudecker v. Marshall*, 72 Pa. St. 206.

*Utah.* — *Perry v. Salt Lake City*, 7 Utah 143.  
*Virginia.* — *Leighton v. Maury*, 76 Va. 865.

**1. View that Discretion Is Absolute.** — *French v. Noel*, 22 Gratt. (Va.) 454; *Ex p. Yeager*, 11 Gratt. (Va.) 655; *Hein v. Smith*, 13 W. Va. 358; *Ex p. Whittington*, 34 Ark. 394. The force of this decision is much weakened by the later decision of *Ex p. Levy*, 43 Ark. 42.

**2.** See *infra*, this section, *Review of Action of Licensing Authorities — Mandamus*.

**3. View that Discretion Cannot Be Exercised Arbitrarily** — *Arkansas.* — *Ex p. Levy*, 43 Ark. 42.

*Connecticut.* — *Hopson's Appeal*, 65 Conn. 140.

*District of Columbia.* — *U. S. v. District Com'rs*, 6 Mackey (D. C.) 409; *U. S. v. Douglass*, 19 D. C. 99.

*Florida.* — *Polk County v. Johnson*, 21 Fla. 578.

*Illinois.* — *Swift v. People*, 63 Ill. App. 453.

*Kentucky.* — *Thompson v. Koch*, 98 Ky. 409; *Pierce v. Com.*, 10 Bush (Ky.) 7.

*New Jersey.* — *Van Nortwick v. Bennett*, 62 N. J. L. 151.

*New York.* — *Martin v. Symonds*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 6; *People v. Excise Com'rs*, (County Ct.) 4 Misc. (N. Y.) 330; *McNaughton v. Board of Excise*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 457; *People v. Excise Com'rs*, (Brooklyn City Ct. Spec. T.) 12 Misc. (N. Y.) 296; *People v. Excise Com'rs*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 621.

*North Carolina.* — *Atty.-Gen. v. Justices*, 5

*Ired. L.* (27 N. Car.) 315; *Muller v. Buncombe County*, 89 N. Car. 171; *Jones v. Moore County*, 106 N. Car. 438.

*Pennsylvania.* — *Mead's License*, 161 Pa. St. 375; *American Brewing Co.'s License*, 161 Pa. St. 378; *Prospect Brewing Co.'s Application*, 24 W. N. C. (Pa.) 177; *Raudenbusch's Petition*, 120 Pa. St. 328; *Nordstrom's Petition*, 127 Pa. St. 553; *Schlaudecker v. Marshall*, 72 Pa. St. 206; *Doberneck's Appeal*, 1 Pa. Super. Ct. 99; *Pollard's Petition*, 127 Pa. St. 507; *License Applications*, 2 Pa. Co. Ct. 603; *Kistler's License*, 2 Pa. Co. Ct. 604; *Mercer County License Applications*, 3 Pa. Co. Ct. 43; *Johnson's License*, 156 Pa. St. 322; *Kelminski's License*, 164 Pa. St. 231; *Centre County Licenses*, 9 Pa. Co. Ct. 376; *Indiana County Licenses*, 6 Pa. Dist. 358; *Gross's License*, 161 Pa. St. 344; *Gemas's License*, 169 Pa. St. 43; *Quinton's License*, 169 Pa. St. 115; *Reigner's License*, 11 Pa. Co. Ct. 401.

*Virginia.* — *Ailstock v. Page*, 77 Va. 386.

**4. Discretion Defined.** — *U. S. v. Douglass*, 19 D. C. 99.

**5. Facts and Circumstances of Particular Case to Be Considered.** — *U. S. v. District Com'rs*, 6 Mackey (D. C.) 409; *Pierce v. Com.*, 10 Bush (Ky.) 7; *Schlaudecker v. Marshall*, 72 Pa. St. 206; *Kelminski's License*, 164 Pa. St. 233; *Johnson's License*, 156 Pa. St. 322; *Prospect Brewing Co.'s Application*, 24 W. N. C. (Pa.) 177; *Ailstock v. Page*, 77 Va. 390.

**6. Interests of Community to Be Considered.** — *Atty.-Gen. v. Justices*, 5 *Ired. L.* (27 N. Car.) 315; *Ailstock v. Page*, 77 Va. 386.

**7. Arbitrary Refusal Not an Exercise of Discretion.** — *U. S. v. Douglass*, 19 D. C. 99.



block, ward, or township;<sup>1</sup> a refusal on the ground that the members of the licensing board were elected for the purpose of refusing licenses;<sup>2</sup> a refusal because of personal views that the scope of the licensing laws is against public policy;<sup>3</sup> a refusal because the applicant "made a promise last year not to apply for a license this year;"<sup>4</sup> a refusal of a distiller's license on the ground that there was no necessity for it, where this was not made by statute a prerequisite to the issuance of such license;<sup>5</sup> a refusal to grant a license on the ground that the former proprietor of the place to be licensed, who was another than the present proprietor, was guilty of infractions of the law.<sup>6</sup>

It is Not an Abuse of Discretion to refuse a license on the personal knowledge of the court of the unfitness of the applicant.<sup>7</sup> Nor is it an abuse of discretion to refuse a license to one having the requisite personal qualifications if there are other reasons against granting the license.<sup>8</sup> So it is in the discretion of the licensing board to refuse a license on the ground that the place where it is proposed to sell liquor is not a suitable one.<sup>9</sup> And the discretion of the board or court is not abused by a decision which is apparently wrong.<sup>10</sup> It is not an abuse of discretion to refuse a license on the ground that a sufficient number of places in the town have already been licensed,<sup>11</sup> or to refuse a license for a new place before the surrender of the current or existing license.<sup>12</sup> A refusal of a distiller's license on the ground that the licensing body is not satisfied that the place can be and will be used as a distillery is not an abuse of discretion;<sup>13</sup> nor is it an abuse of discretion to refuse on the grounds that the applicant had violated the liquor laws during the preceding year and that the remonstrants against the petition were largely in excess of the persons recommending it.<sup>14</sup> That the premises are subject to a covenant against the sale of

1. Refusing License to One Applicant and Granting to Another. — *Ex p. Levy*, 43 Ark. 42; *People v. Excise Com'rs*, (Brooklyn City Ct. Spec. T.) 12 Misc. (N. Y.) 296; *People v. Mills*, 91 Hun (N. Y.) 144.

2. Refusal of License Because Elected for That Purpose. — *McNaughton v. Board of Excise*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 457; *Marin v. Symonds*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 6; *People v. Excise Com'rs*, (County Ct.) 4 Misc. (N. Y.) 330. *Contra*, *People v. Excise Com'rs*, 75 Hun (N. Y.) 224.

3. Personal Views that License Laws Are Against Public Policy. — *Indiana County Licenses*, 6 Pa. Dist. 358.

4. Promise of Petitioner Not to Apply for License. — *Donoghue's License*, 5 Pa. Super. Ct. 1.

5. Refusal for Want of Necessity. — *Doylestown Distilling Co.'s Appeal*, 41 W. N. C. (Pa.) 313; *Gemas's License*, 169 Pa. St. 43; *Reigner's License*, 11 Pa. Co. Ct. 401.

6. Refusal for Infractions of Law by Former Proprietor. — *Doberneck's Appeal*, 1 Pa. Super. Ct. 99.

7. Unfitness of Applicant. — *Indiana County Licenses*, 6 Pa. Dist. 358; *Raudenbusch's Petition*, 120 Pa. St. 328.

8. State v. Justices, 39 Mo. 521; *Muller v. Buncombe County*, 89 N. Car. 171.

9. Unsuitableness of Place. — *U. S. v. District Com'rs*, 6 Mackey (D. C.) 409; *Muller v. Buncombe County*, 89 N. Car. 172; *Swift v. People*, 63 Ill. App. 453; *Hillsboro v. Smith*, 110 N. Car. 417.

Thus a license to keep a saloon will not be granted in a locality where a saloon would be a nuisance. *Swift v. People*, 63 Ill. App. 453.

And it has been held that in the exercise of

the discretion given to them, the commissioners of the *District of Columbia* may provide by rule that no license may be granted to sell at retail in any grocery or provision store. *U. S. v. District Com'rs*, 6 Mackey (D. C.) 409.

10. Decision Apparently Wrong Not Abuse of Discretion. — *U. S. v. Douglass*, 19 D. C. 99; *Lauck's Application*, 2 Pa. Super. Ct. 53.

11. Sufficient Number of Places Already Licensed. — *People v. Bennett*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 10; *People v. Mills*, 91 Hun (N. Y.) 144.

A Recital in a Decree denying an application for a liquor license that, "taking into consideration our personal knowledge and information in this case, as we are required to do in most applications, we have determined that another licensed place in Sunbury is unnecessary," shows a legal reason for refusing the license which precludes a review on the merits by the appellate court. *Gross's Appeal*, 1 Pa. Super. Ct. 640.

12. Refusal Because Applicant Holds Unexpired License. — *In re Bloomingdale*, (Supm. Ct. Spec. T.) 38 N. Y. Supp. 162. See also *Swift v. Klein*, 163 Ill. 269.

13. Refusal Because Proposed Distillery Cannot Be So Used. — *Lauck's Application*, 2 Pa. Super. Ct. 53.

14. Violation of Liquor Laws by Applicant. — *Leister's Appeal*, (Pa. 1887) 11 Atl. Rep. 387.

While the fact that the number of remonstrances against granting a retail liquor license exceeds the number of those signing the recommendation is not conclusive that the license is not a matter of public necessity, a refusal to grant a license based on such remonstrances is not an abuse of discretion. *Sparrow's Petition*, 138 Pa. St. 116.



intoxicating liquors thereon, has been held good ground for refusing a license.<sup>1</sup> An alteration of a petition for license by erasing therefrom the name of the person whom the registered voters at the time of the signing understood to be the person to whom such license was to be granted, and the insertion of the name of another person, is a sufficient ground for refusal to grant the license.<sup>2</sup>

**18. Review of Action of Licensing Authorities** — *a. APPEAL* — *How Authorized.* — In a number of jurisdictions appeals from the action of the licensing authorities in granting or refusing licenses are specially provided for by the statutes regulating the liquor traffic, and in others it is considered that appeals are authorized by the general statutory provisions.<sup>3</sup> In some jurisdictions the action of the licensing board is not appealable. The remedy is by mandamus to compel the issuance of a license wrongfully refused,<sup>4</sup> or by certiorari to review the action of the board in wrongfully issuing a license.<sup>5</sup>

**Who Is Entitled to Appeal.** — The question who is entitled to appeal from an order or decree refusing or granting a liquor license is a matter of statutory regulation and construction.<sup>6</sup>

**1. Premises Subject to Covenant Against Sale of Liquor.** — Snyder's License, 2 Pa. Dist. 785. But compare Barnegat City Beach Assoc. v. Busby, 44 N. J. L. 627.

**2. Alteration of Petition by Substituting Another Applicant.** — Polk County v. Johnson, 21 Fla. 579.

**3. Jurisdictions Where Appeal Allowed** — *England.* — Reg. v. Schneider, 11 Q. B. D. 66; Reg. v. Justices, 24 Q. B. D. 341.

*Connecticut.* — Beard's Appeal, 64 Conn. 526; Hopson's Appeal, 65 Conn. 149.

*Indiana.* — See *Ex p. Dunn*, 14 Ind. 122; *State v. Tippecanoe County*, 45 Ind. 508; *Wilson v. Mathis*, 145 Ind. 493; *Groscof v. Rainier*, 111 Ind. 361.

*Kentucky.* — Thompson v. Koch, 98 Ky. 400.

*Nebraska.* — Waugh v. Graham, 47 Neb. 153; Lydick v. Korner, 13 Neb. 10; *State v. Bonsfield*, 24 Neb. 517; *Lindstrom v. Carey*, 33 Neb. 366.

*New York.* — People v. Sackett, 15 N. Y. App. Div. 290.

*Pennsylvania.* — Branch's License, 164 Pa. St. 427.

*Virginia.* — Ailstock v. Page, 77 Va. 386; *Ex p. Lester*, 77 Va. 663; *Lester v. Price*, 83 Va. 648.

In *Nebraska*, where an appeal to the District Court is permitted, it is held that this appeal is in no sense a proceeding in error, but an appeal requiring a decision upon the merits of the case. *State v. Bonsfield*, 24 Neb. 517.

In *Virginia* an appeal to the Circuit Court is provided for, and this is considered an application *de novo*, and the action of the court is final, it being provided by statute that no appeal, writ of error, or supersedeas shall lie thereto. *Lester v. Price*, 83 Va. 648.

In *Kentucky* it is held that on appeal the case is not to be tried *de novo*, but the court must act on the evidence before the licensing board. *Thompson v. Koch*, 98 Ky. 400.

In *Pennsylvania* the appeal provided for is merely a substitute for certiorari. *Brown's Appeal*, 2 Pa. Super. Ct. 63; *Branch's License*, 164 Pa. St. 427; *Collarn's Petition*, 134 Pa. St. 551.

**4. Jurisdictions in Which Appeal Is Not Allowed.** — *Bean v. County Ct.*, 33 Mo. App. 636.

**5. State v. County Ct.**, 47 Mo. App. 647.

**6. County Treasurer.** — A county treasurer is a "party aggrieved" by an order compelling him to issue a liquor-tax certificate, and is entitled to appeal, he being directed by an order to do an act which he has no authority to do. *People v. Sackett*, 15 N. Y. App. Div. 290.

**Persons Not Parties to Proceedings to Obtain License.** — After final disposition of an application for license has been made, no person having appeared during the pendency of the proceedings to oppose by remonstrance or otherwise the granting of the license, no right of appeal is allowed to one who voluntarily intervenes subsequently for the purpose of appealing. *Gibboney's Appeal*, 6 Pa. Super. Ct. 26.

**Resident Taxpayer.** — Where a resident taxpayer takes an appeal from an order of the licensing board granting a license to retail liquor, the fact that persons other than the appellant, having no interest in the proceedings, have agreed to pay part of the expenses of the appeal is no ground for remanding it. *Ferguson v. Brown*, 75 Miss. 214.

**Applicants or Remonstrants.** — Under the *Indiana* statutes either an applicant or a remonstrant may appeal from the decision of the board of commissioners. *Wilson v. Mathis*, 45 Ind. 493; *State v. Tippecanoe County*, 45 Ind. 501; *Ex p. Dunn*, 14 Ind. 122; *Hardy v. McKinney*, 107 Ind. 364; *Ludwig v. State*, 18 Ind. App. 520.

In *Mississippi* signers of a counter petition requesting the refusal of a license have a right of appeal. *Collins v. Barrier*, 64 Miss. 21.

In *Virginia* an applicant is entitled to appeal from the decision of the licensing board to the Circuit Court, but so far as he is concerned the decision of the Circuit Court is final. *Ailstock v. Page*, 77 Va. 386.

In *Nebraska* a remonstrant cannot appeal from an order overruling his license, but may appeal from an order granting a license. *Moore v. State*, (Neb. 1899) 79 N. W. Rep. 163.

An Attorney who appears in behalf of a temperance union which opposes the grant of a license, not being a resident taxpayer of the district in which the license is asked, has no right in *Mississippi* to appeal from the decision



**Notice of Appeal.** — In a proceeding to review the action of the authorities granting or refusing a license, the county or public corporation whose acts are to be reviewed must be made a defendant,<sup>1</sup> and citizens who make themselves parties to the proceedings as contestants and oppose the granting of the license should be served with process upon appeal or writ of error.<sup>2</sup>

**The Hearing.** — Statements made in the record cannot be impeached. If the record states that the petition was heard on a certain day, an assignment of error that the petition was refused without giving a hearing to the applicant cannot be considered.<sup>3</sup> And decisions on questions of fact will not be reviewed.<sup>4</sup> The decree granting or refusing a liquor license will be sustained if the record is free from irregularity and shows no abuse of discretion by the trial court.<sup>5</sup>

**Presumptions on Appeal.** — If the record is regular in all respects and the reasons for the court's decision do not appear, it will be presumed that there was a legal reason therefor,<sup>6</sup> and a mere surmise as to what the reasons were is not sufficient to repel the presumption that the court had a legal reason for its decision and did not decide arbitrarily.<sup>7</sup>

**Effect of Appeal.** — In one state it has been held that an appeal from an order granting a license does not suspend the right of the applicant to the license pending the appeal, and that if he tenders a proper bond and the license fee he may sell although the officer whose duty it is to issue a license refuses to do so.<sup>8</sup> Under the statutes of another state it is the duty of the licensing board, on notice of appeal, to withhold the license until the expiration of a sufficient time within which an appeal may be taken, and if a license is issued and an appeal is taken, it is the duty of the board to recall the license until the appeal is decided.<sup>9</sup> Nevertheless, in order to prevent the issuing of the license, an appeal must be taken immediately and perfected as soon as a transcript can, with reasonable diligence, be procured and filed in the court to which the appeal must be taken;<sup>10</sup> and a license issued after a reasonable time to take an appeal has elapsed, but before it is taken, is valid notwithstanding a notice of intention to appeal.<sup>11</sup>

**b. CERTIORARI.** — In the absence of a statute providing otherwise,<sup>12</sup> the decisions of a board or tribunal vested with the power of issuing licenses on questions of fact cannot be reviewed upon certiorari.<sup>13</sup> Only questions of law

of the licensing board granting the license. *Clark v. Pratt*, (Miss. 1892) 11 So. Rep. 631.

1. *Wood v. Riddle*, 14 Oregon 254.

2. *Remonstrants*. — *Leighton v. Maury*, 76 Va. 865.

3. *Record Cannot Be Impeached.* — *Quinn's License*, 11 Pa. Super. Ct. 554; *Welsh's License*, 11 Pa. Super. Ct. 558.

4. *Decisions on Questions of Fact.* — *McCabe's License*, 11 Pa. Super. Ct. 560.

**Evidence in Support or Denial of Allegation in Remonstrance.** — Evidence adduced at the hearing in support or in denial or rebuttal of an allegation of fact in a remonstrance is not a part of the record and cannot be considered on appeal from a decree granting a license. *Donovan's License*, 44 W. N. C. (Pa.) 34.

5. *Where Decree Sustained.* — *Donovan's License*, 44 W. N. C. (Pa.) 34.

6. *Presumptions on Appeal.* — *Di Nubile's License*, 11 Pa. Super. Ct. 571; *Meenan's License*, 11 Pa. Super. Ct. 575.

7. *Sweeney's License*, 11 Pa. Super. Ct. 569.

8. *Effect of Appeal.* — *Padgett v. State*, 93 Ind. 396.

9. *State v. Bonsfield*, 24 Neb. 517; *State v. Bays*, 31 Neb. 514.

10. *State v. Elwood*, 37 Neb. 473.

11. *Lydick v. Korner*, 13 Neb. 10.

12. **Special Statutory Provisions.** — The New Jersey statute makes it the duty of the Supreme Court, upon a certiorari reviewing the proceedings of any special tribunal, to determine questions of fact as well as of law and to reverse or affirm the proceedings according to the justice of the case. It was held that an excise board is a special tribunal within the meaning of this statute. *Smith v. Board of Excise*, 46 N. J. L. 315.

**Objections Not Raised Before Licensing Board.** — Even though the reviewing court is vested by statute with the power to determine disputed questions of fact as well as of law on certiorari, when a prosecutor, having a legal right to make an objection in the tribunal whose judgment he questions, has made no effort to present that objection there, the court will not consider such objection and thereon examine disputed questions of fact. *Smith v. Board of Excise*, 46 N. J. L. 312.

13. **Question of Fact Not Reviewable on Certiorari.** — *Darling v. Boesch*, 67 Iowa 705; *Jane v. Alley*, 64 Miss. 446; *State v. Moniteau County Ct.*, 45 Mo. App. 387; *People v. Waters*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 1; *People v. Bennett*, (Supm. Ct. Spec. T.) 4 Misc. (N.



are reviewable.<sup>1</sup> The only questions which can be considered are whether the inferior tribunal had jurisdiction of the subject-matter involved<sup>2</sup> and whether it has exceeded its jurisdiction, or otherwise acted in violation of the law;<sup>3</sup> and only those errors which are apparent upon the face of the record can be corrected upon certiorari.<sup>4</sup> Until final action is taken on an application there is nothing which the applicant can have reviewed upon certiorari. The determination of the licensing board not to grant licenses can be complained of only when it has acted upon some particular license.<sup>5</sup>

**Who Is Entitled to Apply for Writ.** — Any persons who, being entitled to remonstrate against the granting of a license, have appeared before the licensing board and made remonstrances are entitled to apply by writ of certiorari to review the action of the board in granting a license.<sup>6</sup> And it has been held that only parties to the record of proceedings which it is sought to review can maintain and prosecute this writ.<sup>7</sup> A person who was not a party has, however, been permitted to maintain and prosecute the writ, in some cases, owing to the peculiar circumstances attending them.<sup>8</sup>

Y.) 10; Pollard's Petition, 127 Pa. St. 507; Reed's Appeal, 114 Pa. St. 452.

**1. Questions of Law Reviewable.** — *Jane v. Alley*, 64 Miss. 446; *Martin v. Symonds*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 6; *People v. Waters*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 1; *People v. Bennett*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 10; Reed's Appeal, 114 Pa. St. 452; Pollard's Petition, 127 Pa. St. 507.

**Office of Common-law Writ of Certiorari.** — The only office which the common-law writ of certiorari performs is to cause the report of a proceeding to be certified from an inferior to a superior tribunal. Upon the return of the writ the case is tried solely upon the record. *McCreary v. Rhodes*, 63 Miss. 313.

"Its office extends, unquestionably, to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings, that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law or by well settled principles of the common law." *People v. Board of Assessors*, 39 N. Y. 81.

**2. Jurisdiction of Subject-matter.** — *McCreary v. Rhodes*, 63 Miss. 313; Pollard's Petition, 127 Pa. St. 522.

**3. Excess of Jurisdiction.** — *Darling v. Boesch*, 67 Iowa 705; *Corbett v. Duncan*, 63 Miss. 85; Pollard's Petition, 127 Pa. St. 522.

**4. Only Errors on Face of Record Reviewable.** — *Corbett v. Duncan*, 63 Miss. 85; *McCreary v. Rhodes*, 63 Miss. 313; Reed's Appeal, 114 Pa. St. 452.

**Applications of Rule — In General.** — If a remonstrance is filed, setting forth that the petitioner is disqualified because he is not a citizen of the United States, or is not of temperate habits, or is not of good moral character, it is the duty of the court to hear the case, and if the remonstrances are sustained by evidence, to refuse a license; and the refusal on such grounds alone is an exercise of discretionary power which is not reviewable. Pollard's Petition, 127 Pa. St. 507.

**Petitions For and Against License.** — The Supreme Court will not review, upon certiorari, the petitions for and against the granting of a license to sell liquor. They are not matters of

record, but are in the nature of evidence for the information of the conscience of the court. *People v. Waters*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 1; Reed's Appeal, 114 Pa. St. 452.

**5. Final Judgment Only Reviewable.** — *Lexington v. Sargent*, 64 Miss. 621.

**6. Who May Apply for Writ.** — *Darling v. Boesch*, 67 Iowa 702; *Lexington v. Sargent*, 64 Miss. 621; *Dufford v. Staats*, 54 N. J. L. 286; *Barneget City Beach Assoc. v. Busby*, 44 N. J. L. 627; *Dufford v. Nolan*, 46 N. J. L. 87; *Smith v. Board of Excise*, 46 N. J. L. 312; *Orcutt v. Reingardt*, 46 N. J. L. 337; *Batchelder v. Erb*, 47 N. J. L. 92; *Austin v. Atlantic City*, 48 N. J. L. 118; *Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219; *Amerman v. Hill*, 52 N. J. L. 326.

**Remonstrance at Any Time Before Final Action Sufficient.** — A qualified voter of a city who appears before the licensing board of such city some time before a petition for license is filed or before final action thereon, and objects to the issuance of such license, is thereby connected with the proceedings sufficiently to enable him to prosecute a writ of certiorari to have them reviewed. *McCreary v. Rhodes*, 63 Miss. 308.

**What Objections Permissible.** — Remonstrants against granting licenses may present special facts for the jurisdiction of the city council under the city charter, and if refused a hearing at a time and place within the discretion of the council such facts may be shown upon certiorari to revoke licenses granted. *Austin v. Atlantic City*, 48 N. J. L. 118.

**Objecting to Election to Determine Minimum License Fee.** — Where notice is given of an application for an election to determine the minimum license fee for selling intoxicating liquors in the township, a person who appears in answer thereto and objects to the order for an election becomes a party to the proceedings in such sense that he may maintain a writ of certiorari to review them. *Middleton v. Robbins*, 54 N. J. L. 566.

**7. Parties to Record.** — *Lexington v. Sargent*, 64 Miss. 621; *McCreary v. O'Flinn*, 63 Miss. 204.

**8. Persons Not Parties to Record.** — In *Dexter v. Cumberland*, 17 R. I. 225, it was held unnecessary that the applicant should be a party to the record, and sufficient that he should be



c. **MANDAMUS.** — The rule is laid down by a number of decisions that where a court or board authorized to issue licenses is, by statute, either expressly or impliedly vested with discretion in the exercise of its functions, its action in refusing a license cannot be controlled or interfered with by mandamus.<sup>1</sup> Other decisions hold that this discretion cannot be controlled or interfered with by mandamus except where it has been arbitrarily exercised or where there is a clear case of abuse of discretion.<sup>2</sup> It is probable that the rule laid down by the line of decisions first cited is subject to this qualification although it is not expressly so stated. Where the licensing authorities act arbitrarily and abuse that discretion, it has been held that mandamus will lie to compel them to issue a license.<sup>3</sup> This remedy, however, can be invoked only where a clear legal right is shown and where the writ is required to protect the petitioner from substantial injury.<sup>4</sup>

19. **Enjoining or Prohibiting Grant of License.** — It is doubtful whether in any case a writ of injunction or prohibition will issue to restrain the licensing authorities from granting a liquor license. In one decision it was held that

interested in the subject-matter upon which the record acts. The objection to the granting of the license was that the notice filed by the applicant did not, as required by statute, designate the place where the proposed liquor traffic was to be carried on. It was held that the property owners could bring certiorari.

1. **Action of Board Not Controlled by Mandamus** — *Alabama.* — *Dunbar v. Frazer*, 78 Ala. 529; *Ramagnano v. Crook*, 85 Ala. 226.

*Connecticut.* — *Batters v. Dunning*, 49 Conn. 479.

*Kansas.* — *Stanley v. Monnet*, 34 Kan. 708.

*Kentucky.* — *Heblich v. Judge*, (Ky. 1889) 10 S. W. Rep. 465.

*Minnesota.* — *State v. Carver County*, 60 Minn. 510.

2. **Except in Case of Abuse of Discretion** — *Indiana.* — *State v. Bonnell*, 119 Ind. 494. But see *State v. Tippecanoe County*, 45 Ind. 501.

*Maryland.* — *Devin v. Belt*, 70 Md. 352.

*Michigan.* — *Post v. Sparta*, 64 Mich. 597.

*Nebraska.* — *State v. Cass County*, 12 Neb. 56.

*New York.* — *In re Excise License*, (N. Y. Super. Ct. Spec. T.) 38 N. Y. Supp. 425; *People v. Haughton*, (Supm. Ct.) 3 How. Pr. N. S. (N. Y.) 135.

*North Carolina.* — *Jones v. Moore County*, 106 N. Car. 436; *Muller v. Buncombe County*, 89 N. Car. 171; *Maxton v. Robeson County*, 107 N. Car. 335.

*Pennsylvania.* — *Sparrow's Petition*, 138 Pa. St. 116; *Johnson's License*, 165 Pa. St. 315; *Nordstrom's Petition*, 127 Pa. St. 542.

3. *Dakota.* — *Territory v. McPherson*, 6 Dak. 27.

*Florida.* — *Polk County v. Johnson*, 21 Fla. 578.

*Georgia.* — *Brock v. State*, 65 Ga. 437; *Eve v. Simon*, 78 Ga. 120.

*New York.* — *People v. Haughton*, (Supm. Ct.) 3 How. Pr. N. S. (N. Y.) 135; *People v. Andrews*, 54 N. Y. Super. Ct. 183.

4. *State v. Bonnell*, 119 Ind. 494.

**Who May Maintain Proceedings.** — A retail liquor dealer who has money invested in the business is a person beneficially interested in the issuance of a license to him by the county commissioners, within the meaning of a statute which provides for the issuance of a writ of mandamus on the application of the party

beneficially interested, and therefore he, as well as the territory, may maintain a proceeding to compel the county board to issue a license to him. *Territory v. McPherson*, 6 Dak. 27.

**Mandamus to Compel Performance of Ministerial Duty.** — Mandamus is the proper remedy to compel the issuance of a dramshop license by the proper officer when the only discretion of such officer in the matter is as to the sufficiency of the surety. *State v. Ruark*, 34 Mo. App. 325.

Under the statutes of *Massachusetts*, the mayor of the city, in signing a license for the sale of intoxicating liquors, performs a merely ministerial duty, and if the license is granted by the board of aldermen the signing by the mayor can be enforced by mandamus. *Bracnieri v. Packard*, 136 Mass. 50.

**Premature Application for License.** — Where the applicant for a license already has a license which has several months to run before expiration, mandamus will not lie to compel the issuance of a new license. *State v. Bonnell*, 119 Ind. 494.

**Fendency of Indictments Against Applicant.** — Mandamus will not lie to compel the issuance of a license to an applicant against whom indictments for violation of the liquor laws are pending. *State v. Weeks*, 93 Mo. 499.

**Mandamus to Compel Approval of Bond.** — On an application for mandamus to compel a licensing board to approve a liquor bond, if it appears that there were various estimates of the value of the property of one of the sureties not exempt from execution, varying from less than six thousand dollars to as high as ten thousand dollars, and the property of the surety is required to be of the value of six thousand dollars, the application must be denied, as there is nothing to show an arbitrary rejection by the board. *Post v. Sparta*, 64 Mich. 597.

**Mandamus to Compel Issuance of License — Officer Not Authorized.** — Where a city has not authorized the tax collector to issue liquor licenses, mandamus does not lie to compel him to issue a license on the tender of the fee and costs, though the general statute authorizes the city to confer upon its officers authority to issue such license. *Puckett v. State*, 33 Fla. 385.



the act of the board in granting a license is *quasi* judicial, and if erroneous the remedy is by appeal or certiorari, and not by injunction.<sup>1</sup> So in another decision it was held that no court has jurisdiction to restrain the licensing board from granting, in its discretion, licenses for the sale of intoxicating liquors.<sup>2</sup> In one case a writ prohibiting the consideration of a petition insufficient to give jurisdiction to the board was discharged because the board had not acted or shown any intention to act thereon. It cannot be assumed that a tribunal will act in a matter over which it has no jurisdiction, until it has done some act indicating an intention to do so.<sup>3</sup> And in another case it was held that, as the grant of a license in a town where the traffic in intoxicating liquors was prohibited by law would be absolutely void, a grant of a writ of prohibition was not necessary to restrain a grant of such license.<sup>4</sup>

**20. Prosecution of Licensing Authorities for Wrongfully Granting or Refusing License.** — While licensing boards are vested with a large discretion in granting or refusing licenses, they will nevertheless be indictable if they perversely abuse their discretion by obstinately refusing to exercise it at all, or by exercising it in a way to defeat the legislative intent or to oppress an individual, as this is a corrupt violation of duty and law.<sup>5</sup> Although the law allows them to judge for themselves, it requires an honest judgment in subordination to the law, and punishes a dishonest view, that is, one given in opposition to the known law.<sup>6</sup> On the other hand, the members of the licensing board will also be indictable if they wilfully or corruptly grant licenses to persons not possessing the proper qualifications.<sup>7</sup>

**21. Civil Actions Based on Refusal to Issue or on Revocation of License.** — An application for a license to sell intoxicating liquors is a judicial proceeding,<sup>8</sup> and those who are vested with the authority of issuing licenses are not personally liable in an action against them to recover damages alleged to have resulted from their action in such a proceeding.<sup>9</sup> So it has been held that an action cannot be maintained against a municipality for damages caused by a revocation, even when the licensee has done no overt or unlawful act which would afford cause for revocation.<sup>10</sup>

**22. Form and Requisites of License** — *a.* **IN GENERAL.** — The statutes usually

1. *Northern Pac. R. Co. v. Whalen*, 3 Wash. Ter. 452.

2. *Leigh v. Westervelt*, 2 Duer (N. Y.) 618. See also *Gayle v. Owen County Ct.*, 83 Ky. 66.

3. *Romberger v. Water Valley*, 63 Miss. 218.

4. *Beckham v. Howard*, 83 Ga. 89.

5. *Rex v. Williams*, 3 Burr. 1317; *Rex v. Harris*, 3 Burr. 1330; *Atty.-Gen. v. Justices*, 5 Ired. L. (27 N. Car.) 315.

**Instances.** — See *Rex v. Hann*, 3 Burr. 1716, where an information against justices of the peace was granted for refusing, from motives of resentment, to grant an ale license.

In *Rex v. Williams*, 3 Burr. 1317, an information against justices of the peace was granted for a refusal to grant licenses to those publicans who voted against the justices' recommendation of candidates for members of Parliament for the borough.

6. *Atty.-Gen. v. Justices*, 5 Ired. L. (27 N. Car.) 315.

**Neglect of Duty Indictable.** — Where the commissioners of excise of a town have failed entirely to discharge their official duty and to ascertain the disability and want of accommodation of one to whom they issued a license, a conviction of neglect of duty will be sustained. *People v. Worsley*, (Supm. Ct. Gen. T.) 17 N. Y. St. Rep. 610.

7. **Corrupt or Wilful Granting of License.** — *Rex*

*v. Holland*, 1 T. R. 692; *Rex v. Sainsbury*, 4 T. R. 451; *People v. Norton*, 7 Barb. (N. Y.) 477; *People v. Jones*, 54 Barb. (N. Y.) 311; *State v. Kite*, 81 Mo. 97.

8. **Refusal to Issue License.** — *Halloran v. McCullough*, 68 Ind. 179; *Castle v. Bell*, 145 Ind. 8.

9. **Liability of Licensing Board.** — *Basset v. Godschall*, 3 Wils. C. Pl. 121; *Halloran v. McCullough*, 68 Ind. 179.

**Action Against Person Making Remonstrance.** — A remonstrance is a privileged communication, and an action for libel will not lie upon it except upon proof of express malice; proof of falsity alone is not sufficient. *Metzler v. Romine*, 9 Pa. Co. Ct. 171.

**Action for Maliciously Obstructing Issuance of License.** — In an action for maliciously obstructing an application for license, an allegation that the city council ordered the city clerk to issue such license to the plaintiffs upon the payment of the license fee, which they took with them and tendered to the city treasurer, and demanded of the city clerk to issue and deliver to them the license, which demand the clerk, being instigated by the other defendants, wrongfully refused, was held not sufficient to constitute a cause of action. *Claus v. Hardy*, 31 Neb. 35.

10. **Wrongful Revocation of License.** — *Ison v. Griffin*, 38 Ga. 623.



require that a license to sell intoxicating liquors shall be in writing, and a parol license affords no protection to one selling under it.<sup>1</sup> So a certificate of the clerk of the licensing board that a person has been licensed does not amount to a license.<sup>2</sup> A license should bear date of the day when issued, and takes effect from that date.<sup>3</sup> If a license is signed by the requisite number of the members of the licensing board, it is not invalidated by the fact that it was prepared and signed by two of the members before the meeting of the board.<sup>4</sup> To avoid liability for selling without license the applicant must see that the license is granted and signed by those having authority to grant it;<sup>5</sup> and if the statute requires that the oath of the applicant shall be indorsed on the back of the license, the license will be void if this is not done.<sup>6</sup> If a license recites the payment of a smaller fee than is required by statute, it is absolutely void.<sup>7</sup>

*b. DESCRIPTION OF PREMISES.* — The statutes do not permit a party who has obtained a license to retail, to do so at more than one place. And in order to prevent evasions of the law the statutes usually provide that the house or place in which the business is to be conducted shall be described in the license.<sup>8</sup> In construing these statutes there is some diversity of opinion as to their effect. In one decision it has been held that a statute requiring the license to specify the house in which retailing is to be conducted is directory to the officer whose duty it is to issue the license; and where the house has been specified in the petition for license and in the order authorizing its issuance, a failure to specify the house in the license does not render it void, and the licensee is protected in making sales thereunder.<sup>9</sup> On the other hand, it has been held, under a statute practically identical in its provisions with the foregoing, that a license which does not specify the place of business is defective and affords no protection to the licensee although the defect is the fault of the board granting it.<sup>10</sup>

**23. Revocation of License** — *a. POWER TO REVOKE* — (1) *In General.* — Licenses to sell liquor are not agreements between the state and the person

**1. License Must Be in Writing.** — *Lawrence v. Gracy*, 11 Johns. (N. Y.) 179. See also *State v. Moore*, 14 N. H. 451.

**2. Certification of License Not Equivalent to License.** — *Com. v. Spring*, 19 Pick. (Mass.) 396, in which case it was further held that such a certificate is not conclusive evidence of the grant of the license, but it may be controlled by the records of the court. Compare *State v. Brandon*, 28 Ark. 410, in which case it was held that where a party has a license signed by the clerk and authenticated by the seal of the county, and countersigned by the collector, he has all that the law requires him to have, and the presumption will be that the County Court authorized the issue of the license upon a proper petition presented to it.

**Resolution Authorizing License** — *How Entered.* — The resolution of the city council authorizing sales of intoxicating liquors under the mulct law by one who has otherwise complied with the law need not be entered upon the ordinance book. All that is necessary is that it be entered in the minutes of the proceedings of the council and attested by the proper officers. *Clark v. Riddle*, 101 Iowa 270.

**3. Date.** — *Keiser v. State*, 78 Ind. 430, overruling *Vannoy v. State*, 64 Ind. 447; *State v. Wilcox*, 66 Ind. 557.

**License Does Not Relate Back to Time of Granting.** — A license to sell intoxicating liquors does not relate back to the order of the board of commissioners granting it, though so dated,

so as to legalize sales made between the date of the order and that of the issuing of the license. *Keiser v. State*, 78 Ind. 430.

**4. License Signed Before Meeting of Board Valid.** — *Flint v. Rowell*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 572, affirmed 123 N. Y. 633.

**5. License Must Be Signed by Proper Officials.** — *Cronin v. Stoddard*, 97 N. Y. 272.

**6. Indorsement of Applicant's Oath on License.** — *Pope v. State*, 2 Swan (Tenn.) 611.

**For a Form of License Held Sufficient under the Massachusetts Statute** see *Murphy v. Nolan*, 126 Mass. 542.

**7. License Showing Payment of Less Fee than Required.** — *Townsend v. State*, 2 Blackf. (Ind.) 151.

**Certificate Authorizing Change of Place.** — It has been held that a certificate authorizing the licensee to change his place of business must, in order to have any effect, be authenticated by the signatures of the chairman of the selectmen and of the township clerk as required for the original license. *Com. v. Merriam*, 136 Mass. 433; *Com. v. Salmon*, 136 Mass. 431.

**8. Sale at One Place Only** — *Description of Premises.* — *Horan v. Chief Justice*, 27 Tex. 230.

**9. Goforth v. State**, 60 Miss. 756.

**10. Com. v. Merriam**, 136 Mass. 433.

**Specifying Rooms in Which Liquor Is Sold.** — The Massachusetts statute does not require that the license issued to one who holds a license as an innholder shall specify the room or rooms in which liquor shall be sold or kept,



licensed, giving to the latter vested rights and partaking of the nature of contracts, but are merely temporary permits to do what otherwise would be an offense, issued in the exercise of the police power and subject to the direction of the government, which may revoke them as it deems fit. The license is at all times subject to annulment at the pleasure of the legislature.<sup>1</sup> It is competent for that body in its discretion to annex any conditions to the granting of licenses which it may deem proper and to prescribe causes of forfeiture,<sup>2</sup> or it may revoke licenses by a repeal of the law under which the licenses were obtained.<sup>3</sup> There is nothing in the revocation of licenses as thus provided for which is in conflict with the federal or state constitutional provisions forbidding the enactment of laws impairing the obligation of contracts,<sup>4</sup> nor can it be said that it violates the constitutional inhibition against depriving persons of property without due process of law.<sup>5</sup>

(2) *By Repeal of Statute.* — The repeal of a statute under which a license was granted, before the expiration of the license, operates as a revocation thereof,<sup>6</sup> but as repeals by implication are not favored, and penal statutes are strictly construed, it has been held that such an operation will not be given to the law by mere implication, in the absence of words clearly expressing such intention.<sup>7</sup>

*b. JURISDICTION TO REVOKE LICENSES.* — Under most statutes the power to revoke licenses is vested in the board or tribunal issuing them,<sup>8</sup> and where

but a victualler's license must specify such room or rooms. *Com. v. Cauley*, 150 Mass. 272.

1. *Licenses Mere Temporary Permits Which Are Revocable* — *Alabama.* — *Powell v. State*, 69 Ala. 10.

*Connecticut.* — *La Croix v. Fairfield County*, 50 Conn. 321, 47 Am. Rep. 648.

*Indiana.* — *McKinney v. Salem*, 77 Ind. 213; *State v. Bonnell*, 119 Ind. 494; *Moore v. Indianapolis*, 120 Ind. 483; *State v. Gerhardt*, 145 Ind. 439.

*Iowa.* — *McCoy v. Clark*, 104 Iowa 491; *Columbus City v. Cutcomp*, 61 Iowa 672; *Hurber v. Baugh*, 43 Iowa 514; *State v. Schmidt*, 65 Iowa 556; *State v. Mullenhoff*, 74 Iowa 271.

*Maryland.* — *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83.

*Massachusetts.* — *Calder v. Kurby*, 5 Gray (Mass.) 597; *Com. v. Brennan*, 103 Mass. 70; *Moran v. Goodwin*, 130 Mass. 158, 39 Am. Rep. 443.

*Mississippi.* — *Moore v. State*, 48 Miss. 147, 12 Am. Rep. 367.

*New Hampshire.* — *State v. Holmes*, 38 N. H. 225.

*New Jersey.* — *Voight v. Board of Excise Com'rs*, 59 N. J. L. 358.

*New York.* — *People v. Police, etc., Com'rs*, 59 N. Y. 92; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People v. Wright*, 3 Hun (N. Y.) 306.

*Oregon.* — *State v. Horton*, 21 Oregon 83.

*Virginia.* — *Sights v. Yarnalls*, 12 Gratt. (Va.) 292.

*Wisconsin.* — *Richland County v. Richland Center*, 59 Wis. 591, 29 Alb. L. J. 412.

2. *Power of Legislature to Annex Conditions to Granting of License.* — *State v. Horton*, 21 Oregon 84.

*Conditions Implied in Grant of License.* — The person who receives a license does so with the tacit condition and knowledge that it is at all times within the control of the legislature of the state. *McKinney v. Salem*, 77 Ind. 213.

3. See *infra*, this subsection, *By Repeal of Statute.*

4. *Statutes Providing for Revocation Not Impairment of Obligation of Contracts.* — *Kresser v. Lyman*, 74 Fed. Rep. 765; *Powell v. State*, 69 Ala. 10; *Brown v. State*, 82 Ga. 224; *Moore v. State*, 36 Miss. 137.

5. *Not Deprivation of Property Without Due Process of Law.* — *Kresser v. Lyman*, 74 Fed. Rep. 765; *Sprayberry v. Atlanta*, 87 Ga. 120.

*Revocation by Vote of Electors.* — Where the question of licensing the sale of liquors in a particular city is left to a vote of the electors with a provision that if the vote is that no licenses shall be granted the sale thereafter shall be a misdemeanor, their decision that no licenses shall be granted operates as a revocation of existing licenses. *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344.

6. *Revocation by Repeal.* — *Kresser v. Lyman*, 74 Fed. Rep. 765; *Brown v. State*, 82 Ga. 224; *Columbus City v. Cutcomp*, 61 Iowa 672; *State v. Mullenhoff*, 74 Iowa 271; *Prohibitory Amendment Cases*, 24 Kan. 700; *Calder v. Kurby*, 5 Gray (Mass.) 597; *State v. Holmes*, 38 N. H. 225 [*overruling Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376]; *Hirn v. State*, 1 Ohio St. 15; *Rowland v. State*, 12 Tex. App. 418.

7. *No Repeal by Implication.* — *Hirn v. State*, 1 Ohio St. 15. See also *McNally's Case*, 3 Pa. Co. Ct. 671; *Bush v. District of Columbia*, 1 App. Cas. (D. C.) 1.

A license to sell intoxicating liquor, granted for one year, is annulled by the passage within the year of a statute prohibiting all sales of intoxicating liquors except in certain cases not within such license. *Calder v. Kurby*, 5 Gray (Mass.) 597.

8. *Board Issuing License May Revoke.* — *Hevren v. Reed*, 126 Cal. 219; *Sullivan v. Borden*, 103 Mass. 470; *Lambert v. Rahway*, 58 N. J. L. 578; *People v. Police, etc., Com'rs*, 59 N. Y. 95; *Dolan's Appeal*, 108 Pa. St. 564; *Davis v. Com.*, 75 Va. 944.



power to revoke is by statute vested exclusively in a designated board, it cannot by ordinance or otherwise be delegated to any other board or officer.<sup>1</sup> While the statutes usually authorize a licensing board to exercise a sound discretion in revoking licenses, this discretion must nevertheless be exercised in a reasonable and not in a wilful manner. The board cannot revoke a license arbitrarily and without cause.<sup>2</sup> On the other hand, the board cannot arbitrarily refuse to revoke the license, when the grounds of revocation prescribed by statute are clearly made out.<sup>3</sup>

**c. GROUNDS FOR REVOKING LICENSES.**—The grounds for revoking licenses are usually prescribed by statute. It may be stated as a general rule that any violation of the liquor laws will be a sufficient ground for revocation,<sup>4</sup> and it cannot be urged as an objection that the licensee has been convicted and punished in a criminal proceeding for the acts which constitute the grounds of revocation. The licensee might pay his fine and go on in his illegal traffic, and might well afford to do so, making money out of the operation.<sup>5</sup>

**Violations of Liquor Law — Keeping Disorderly Place.**—Thus it has been held that any one or more of the following violations of the liquor law will constitute sufficient grounds to revoke a liquor license: selling on Sunday;<sup>6</sup> keeping open on Sunday;<sup>7</sup> selling liquor in larger quantities than authorized by the license;<sup>8</sup> making sales to persons in a state of intoxication;<sup>9</sup> selling to

**1. Power to Revoke Cannot Be Delegated.**—*Lambert v. Rahway*, 58 N. J. L. 578.

**Disqualification of Members of Licensing Board.**—It has been held that a member of a town board who hires a minor to purchase liquor in order to obtain evidence against the licensee is incompetent to sit as a member on a hearing to revoke the license for making sales to minors. *State v. Bradish*, 95 Wis. 205 (by a divided court).

**2. Discretion in Revoking License — Arbitrary Exercise Illegal.**—*State v. Dwyer*, 21 Minn. 512; *Pehrson v. Ephraim*, 14 Utah 147.

**3. Arbitrary Refusal to Revoke Illegal.**—*People v. Meakim*, 133 N. Y. 214; *Genova's License*, 3 Pa. Dist. 722.

The power to revoke a license does not authorize the depriving of a licensee of the use of his property by force. *Baldwin v. Smith*, 82 Ill. 162.

**Rescinding Order for License Before Issuance.**—If a licensing board has power to annul a license actually issued, it may rescind an order granting a license before issuance thereof. *Sights v. Yarnalls*, 12 Gratt. (Va.) 292. Until delivery to the applicant it is within the control of the licensing board, which has power to withhold or revoke any license authorized or granted. *Hagan v. Briggs*, 62 N. J. L. 150.

**Effect of Special Statutory Provision Affecting Power to Revoke.**—A statute providing that no license to sell liquor shall be granted in a designated town for a term less than a year does not deprive the supervisors of that town of the power of revoking such license, elsewhere conferred in such statute, before the expiration of the year for which the license was granted. *State v. Dwyer*, 21 Minn. 512.

**4. Grounds of Revocation — In General.**—*State v. Schmidt*, 65 Iowa 556; *Com. v. Brothers*, 158 Mass. 200; *Com. v. Wall*, 145 Mass. 216; *Martin v. State*, 23 Neb. 371; *Matter of Lyman*, 28 N. Y. App. Div. 127, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 524; *People v. Meyers*, 95 N. Y. 223; *In re Templeton*, 4 Lanc. L. Rev. (Pa.) 242; *Bosch's License*, 5 Pa. Co. Ct. 315;

*Slowitzski's License*, 5 Kulp (Pa.) 108; *Genova's License*, 3 Pa. Dist. 722; *Forest House License*, 5 Northam. Co. Rep. (Pa.) 17.

The act casts upon the licensee the necessity, in order to protect himself in the enjoyment of his licensed premises, of seeing to it that no violation shall be committed thereon, and he may not claim that the offense was committed without his knowledge or consent. *People v. Meyers*, 95 N. Y. 223.

**Grounds of Forfeiture under English Statute.**—The justices are not warranted in adjudicating a forfeiture of the license without legal proof of a former conviction; a mere reference to the records of the Petty Sessions where former convictions were entered will not suffice. *Cross v. Watts*, 13 C. B. N. S. 239, 106 E. C. L. 239, 11 W. R. 210.

**Revocation of Assigned License.**—Where a liquor license was assigned shortly after it was granted, and the original licensee continued to do business thereunder, and in so doing regularly violated the liquor law, it was held that the license might be revoked notwithstanding the property rights therein of the assignee. *Matter of Bradley*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 301.

**5. Effect of Criminal Punishment for Acts for Which Revocation Is Asked.**—*Davis v. Com.*, 75 Va. 947; *Cherry v. Com.*, 78 Va. 375.

**6. Sunday Sales.**—*Matter of Lyman*, 28 N. Y. App. Div. 127, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 524; *Niblock's License*, 3 Montg. Co. Rep. (Pa.) 153; *Davis v. Com.*, 75 Va. 944.

**Sales by Servant.**—A liquor license will be revoked for sales made on Sunday, though the licensee gave orders not to make such sales, if he was not diligent in enforcing such orders. *Matter of Lyman*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 524.

**7. Keeping Open on Sunday.**—*Rodden v. License Com'rs*, (R. I. 1891) 21 Atl. Rep. 1020.

**8. Selling in Unauthorized Quantities.**—*Meehan's Appeal*, 11 Pa. Super. Ct. 579.

**9. Sales to Intoxicated Persons.**—*Gartenstein's License*, 15 Pa. Co. Ct. 612; *Com. v. McCand-*



persons of known intemperate habits;<sup>1</sup> and selling to minors.<sup>2</sup> So it will be sufficient ground to revoke a license that the business is conducted at a place not mentioned in the petition or license;<sup>3</sup> that sales have been made during prohibited hours;<sup>4</sup> that the licensee has violated the screen laws;<sup>5</sup> that the licensee permits disorderly persons to assemble on the licensed premises or maintains the premises in a disorderly manner;<sup>6</sup> that the licensee permits gambling on the premises;<sup>7</sup> or that the licensee has failed to keep his liquor-tax certificate posted.<sup>8</sup>

**Sales by Women.** — Under the *New York* statute, permitting a woman not a member of the licensee's family to sell intoxicating liquors on the licensee's premises is ground for revocation.<sup>9</sup>

**License Secured Improvidently or Not in Conformity with Law.** — In addition to the grounds already enumerated, the following have been held sufficient to warrant the revocation of a license: a failure to comply with the steps made conditions precedent by statute to the obtaining of a license;<sup>10</sup> a material error in the description of the premises in the original petition for license,

less, 3 Pa. Dist. 30; *Com. v. Elliott*, 4 Pa. Dist. 89.

**1. Sales to Persons of Known Intemperate Habits.** — *Garey's License*, 11 Pa. Co. Ct. 468, in which case it was held, under a statute making it unlawful to sell intoxicating liquors to a person "of known intemperate habits," that the license might be revoked without showing that the seller knew the person to be of intemperate habits.

**2. Sales to Minors** — *Georgia*. — *Sprayberry v. Atlanta* 87 Ga. 120.

*New York*. — *People v. Woodman*, 15 Daly (N. Y.) 136.

*Oregon*. — *State v. Horton*, 21 Oregon 83.

*Pennsylvania*. — *Tierney's License*, 11 Pa. Co. Ct. 406; *Gartenstein's License*, 15 Pa. Co. Ct. 612; *In re Carlson*, 127 Pa. St. 331; *Niblock's License*, 3 Montg. Co. Rep. (Pa.) 153; *Kelly's License*, 3 Del. Co. Rep. (Pa.) 84; *Gillespie's License*, 3 Pa. Dist. 461; *In re Gowan*, 1 Pearson (Pa.) 83; *Com. v. Elliott*, 4 Pa. Dist. 89; *Moyer's License*, 20 Pa. Co. Ct. 663.

*Virginia*. — *Lillienfeld v. Com.*, 92 Va. 818.

**Good Faith of Licensee No Defense.** — It is immaterial that the sale was made in good faith and that the seller was informed and believed that the minors were of full age. *In re Carlson*, 127 Pa. St. 331; *Gillespie's License*, 3 Pa. Dist. 461.

**Sales by Agent or Servant.** — So to warrant a revocation of the license it is not necessary that the dealer should have made the sales in person. Sales to minors by the licensee's agent or bartender in his presence and with his knowledge and consent will authorize a revocation of the license. *People v. Woodman*, 15 Daly (N. Y.) 136. See also *Tierney's License*, 11 Pa. Co. Ct. 406, where it was held that a license could be revoked where liquor was sold to a minor and it appeared that the proprietor did not exercise such supervision as would have prevented such a sale; *State v. Beloit*, 74 Wis. 267, in which case it was held sufficient to justify the revocation of a license that the licensee was present when his agent or barkeeper sold liquor to minors, though he did not see them buy it and had previously given orders to his barkeeper not to sell to minors.

**3. Sales at Place Not Designated by License.** — *Com. v. Joseph Kohnle Brewing Co.*, 1 Pa. Super. Ct. 627.

**4. Sales During Prohibited Hours.** — *Matter of Lyman*, 28 N. Y. App. Div. 127.

**5. Violation of Screen Laws.** — *Com. v. Moore*, 145 Mass. 244; *Com. v. McDonnough*, 150 Mass. 504; *Com. v. Kane*, 143 Mass. 92.

**Purpose for Maintaining Screens Immaterial.** — To maintain curtains in the windows in such a way as to interfere with a view of the interior constitutes a violation of the license, irrespective of the purpose for which the curtains were maintained. *Com. v. Moore*, 145 Mass. 244.

**6. Permitting Disorderly Assemblages.** — *People v. Murray*, 2 N. Y. App. Div. 607; *Matter of Schomaker*, (C. Pl. Spec. T.) 15 Misc. (N. Y.) 648; *Simmons's License*, 15 Pa. Co. Ct. 618; *Com. v. McCandless*, 3 Pa. Dist. 30; *Com. v. Elliott*, 4 Pa. Dist. 89.

**Premises Resorted to by Thieves and Prostitutes** are not suitable for the sale of liquors, and a license to sell intoxicating liquors there is properly revoked. *People v. Murray*, 2 N. Y. App. Div. 607.

It is immaterial that the disreputable persons allowed on the premises behaved with decency while there. *Com. v. Simmons*, 4 Pa. Dist. 35.

**7. Permitting Gambling.** — *Ballentine v. State*, 48 Ark. 45; *Brockway v. State*, 36 Ark. 629.

**8. Failure to Post Liquor-tax Certificate.** — *Matter of Mitchell*, 41 N. Y. App. Div. 271.

**9. Permitting Sales by Women.** — A revocation will not be warranted by a showing that a woman sold liquors on the licensee's premises unless it further appears that she sold with his permission or was not a member of his family. *People v. Excise Com'rs*, 2 N. Y. App. Div. 89.

**10. Failure to Perform Conditions Precedent to Obtaining License.** — *State v. Johnson*, 37 Neb. 362; *State v. Hanlon*, 24 Neb. 608; *Com. v. Shoenheiter*, Pub. Ledger (Pa.) Nov. 22, 1890.

**Payment of License Fee with Worthless Check.** — Where a retail liquor license was paid for by a check, and the bank failed the next day, before presentation, it was held that this was not a payment, and that the court would revoke the license on failure of the licensee to take up the check. *Com. v. Shoenheiter*, Pub. Ledger (Pa.) Nov. 22, 1890.



there being no such place as that described;<sup>1</sup> a noncompliance with the terms imposed by the licensing court as the condition on which the renewal would be granted;<sup>2</sup> that the license was improvidently granted;<sup>3</sup> that the license was fraudulently obtained,<sup>4</sup> as by a deception of the court,<sup>5</sup> whether the statements made by the applicant were or were not intentionally false,<sup>6</sup> or by bribery of one of the judges;<sup>7</sup> that the licensee took out the license for another who had violated a law and was in consequence disqualified to obtain a license in his own name;<sup>8</sup> that after a remonstrance against the issuing of a license had been filed and overruled, and an appeal had been taken, the license was issued before the appeal was disposed of.<sup>9</sup>

**A License Issued in Violation of a Statute** prohibiting the traffic in intoxicating liquors within a designated distance of a church or school will be revoked if it be shown that the place licensed is within the prohibited distance.<sup>10</sup>

**d. PROCEEDINGS TO REVOKE LICENSES** — (1) *Nature of Proceedings.* — Proceedings for the revocation of licenses vary because of the difference in the wording of the statutes. Under some provisions a conviction of violating the liquor laws *ipso facto* renders the license void,<sup>11</sup> and it can no longer afford to the licensee any justification or protection.<sup>12</sup> Under other statutes, on conviction of the licensee of a violation of the liquor laws the court renders a judgment declaring the license forfeited as a consequence of conviction.<sup>13</sup>

**1. Misdescription of Premises in Application.** — *Hoyniak's License*, 9 Kulp (Pa.) 368.

**Failure to Pay Fee Within Designated Time.** — Failure to pay the license fee within the time designated by statute is a sufficient ground for revocation. *Re Umholtz*, 43 W. N. C. (Pa.) 495.

**2. Noncompliance with Conditions of Renewal.** — *In re Gerstlauer's License*, 5 Pa. Dist. 97.

**3. License Improvidently Granted.** — *Com. v. Cavanaugh*, 2 Pa. Co. Ct. 344; *Hasting's Case*, 39 Leg. Int. (Pa.) 440; *Matter of Kelley*, 18 Phila. (Pa.) 446, 42 Leg. Int. (Pa.) 141.

It is good ground to revoke a license that under a local option law the town in which the license was granted has voted against licenses, the license having been issued in good faith by the county treasurer before he learned of the action of the town. *Matter of Lyman*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 278.

**4. Fraudulently Obtaining License.** — *Decker v. Board of Excise*, 57 N. J. L. 603.

**5. Deception of Court.** — *Matter of Fall*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 611; *Butler's License*, 3 Montg. Co. Rep. (Pa.) 189.

**6. Matter of Fall**, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 611. See also *Matter of Lyman*, 160 N. Y. 96, where it was held also that a revocation must be sought for some prior violation of the law, and that an application in which it is sought to convict the licensee of an infraction of the law and to have the license forfeited as a result of the conviction is not warranted by the statute.

**7. Bribery of Judge.** — *Lacey's Petition*, 2 Del. Co. Rep. (Pa.) 177.

**8. Taking Out License for Another.** — *Hollemback v. Drake*, 37 Neb. 680.

**9. Issue of License Pending Appeal from Order Granting.** — *State v. Bays*, 31 Neb. 514.

**10. License to Sell at Place Within Prohibited Distance of Church.** — *Matter of McCusker*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 446. See also *In re Kessler*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 888, *affirmed* (Supm. Ct. App. Div.) 60 N. Y. Supp. 1141.

**The Measurement of Distance between the church and the place in which the liquor traffic is to be carried on must, under the *New York* statute, be made in a straight line from the nearest entrance of one building to the nearest entrance of the other, without regard to the way in which the streets run between them.** *Matter of McCusker*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 446.

**What Is a Building Used "Exclusively" as a Church.** — A synagogue is used exclusively as a church within the meaning of the statutes, though the basement thereof is rented by the trustees to several societies connected with the synagogue and largely composed of its members, the rentals being used to maintain the synagogue. *Matter of McCusker*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 446.

**Duration of Use of Property as Church.** — If a building within the prohibited distance was used as a church at the time when the application for license was made, it is immaterial how long it has been or will be thus used. *In re Korndorfer*, (Supm. Ct. Spec. T.) 49 N. Y. Supp. 559.

**Renting Adjoining Building Within Prescribed Limits.** — Where one obtains a license to sell intoxicating liquors just beyond the prescribed limits, he does not become entitled to sell within the prescribed limits by renting an adjoining building therein and cutting an opening between the two buildings. *Matter of Place*, 27 N. Y. App. Div. 561.

**11. Statutes under Which Conviction Renders License Void.** — *Golden v. Bingham*, 61 Ind. 198; *Com. v. Kiley*, 150 Mass. 325; *People v. Tighe*, 5 Hun (N. Y.) 25; *People v. Meyers*, 95 N. Y. 223; *People v. Woodman*, (N. Y. Super. Ct. Spec. T.) 4 N. Y. Supp. 532.

**12. People v. Tighe**, 5 Hun (N. Y.) 25.

**13. Statutes under Which Court Declares License Void on Conviction.** — *Ballentine v. State*, 48 Ark. 45.

Under a *Nebraska* statute the license board is required to revoke a liquor license on conviction of the licensee of violating the liquor



**Quo Warranto.** — Under the statutes of one state it is held that an information in the nature of a quo warranto lies to test the validity of a license and to oust the licensee from exercising the privileges and franchises thereby conferred.<sup>1</sup>

**Mandamus.** — In another jurisdiction it has been held that a mandamus will be issued in a proper case to compel the revocation of a license issued pending an appeal from an order overruling a remonstrance to the application therefor.<sup>2</sup>

**Formal Proceeding Necessary.** — Under other statutes, formal proceedings to revoke licenses are instituted before some court or other tribunal vested by statute with power to revoke licenses if good cause be shown therefor. This proceeding is not a criminal but a special proceeding, civil in its nature,<sup>3</sup> and the revocation of a license is not a punishment for any specific offense, but is merely the withdrawal of a privilege which the state grants to carry on a legitimate business.<sup>4</sup>

(2) **Who May Institute.** — The statutes usually declare by whom the proceedings shall be instituted. In one jurisdiction the proceedings may be instituted by the prosecuting attorney or any other person.<sup>5</sup> In another, the cause may be prosecuted by the informant in the name of the state, but as the proceedings are civil in their nature they need not be brought in the name of the state.<sup>6</sup>

(3) **Complaint.** — Where the statutes require a complaint to the licensing board, it has no authority to revoke without such complaint.<sup>7</sup> The complaint need not be in writing unless the statute so provides;<sup>8</sup> and it has also been held under a statute of this character that on appeal matters which were not presented in the petition cannot be urged as grounds for revocation.<sup>9</sup> Under a statute providing for the revocation of licenses and requiring the filing of a written complaint it has been held that a complaint which does not specify the offenses distinctly or the time when they were committed will be fatally defective.<sup>10</sup> But in another decision construing a similar statute it was held that the strict rules of criminal pleading were not applicable to complaints

laws; the duty of the board is simply ministerial. *Martin v. State*, 23 Neb. 371.

**Conviction Implies Final Judgment.** — It is to be noted, however, that the word "conviction" implies a final judgment, conclusively establishing guilt. A verdict of guilty, not followed by a judgment, does not operate to revoke a license. *Com. v. Kiley*, 150 Mass. 325.

1. **Statutes Authorizing Quo Warranto to Test Validity of License.** — *Swarth v. People*, 109 Ill. 621; *Handy v. People*, 29 Ill. App. 99.

2. **Mandamus to Revoke License.** — *State v. Bays*, 31 Neb. 514; *Byrum v. Peterson*, 34 Neb. 237.

3. **Statutes under Which Separate Proceedings to Revoke Are Necessary.** — *State v. Schmidt*, 65 Iowa 556.

4. **Revocation Not Punishment, but Loss of Privilege.** — *Davis v. Com.*, 75 Va. 944.

5. **Proceedings by Prosecuting Attorney or Any Other Person.** — *Cherry v. Com.*, 78 Va. 375.

6. **Proceedings in Name of State.** — *State v. Schmidt*, 65 Iowa 556.

In *New York* the statute (Laws 1897, c. 312, § 19, amending Laws 1896, c. 112, § 28, subdiv. 2) authorizes any citizen of the state to apply for a cancellation of a liquor license. Under this statute a citizen not a resident of the contiguous district, and without pecuniary interest, may institute proceedings for a revocation on the ground that the licensee has not obtained the consent of two-thirds of those resid-

ing within two hundred feet of the saloon. *In re Kessler*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 888, *affirmed* (Supm. Ct. App. Div.) 60 N. Y. Supp. 1141.

7. **Necessity of Complaint.** — *State v. Lamos*, 26 Me. 258. See also *Downs v. State*, 19 Md. 571.

**Amendments.** — In *Illinois*, where an information in the nature of quo warranto lies to test the validity of a license, it has been held that the information is amendable. *Handy v. People*, 29 Ill. App. 99.

In *Indiana* it has been held that in a proceeding to forfeit a liquor license the existence of a license must be alleged and proved. *Brubaker v. State*, 89 Ind. 577. See also *Davis v. State*, 52 Ind. 488.

In *Pennsylvania*, under a statute (Act May 13, 1887, § 7, P. L. 108) which provides that a license may on notice be revoked, on sufficient cause being shown, or on proof that the licensee has violated the liquor laws, the act must be specified with sufficient certainty, if the rule to show cause is based on an *ex parte* affidavit. *Meenan's Appeal*, 11 Pa. Super. Ct. 579.

8. **Whether Written Complaint Necessary.** — *State v. Lamos*, 26 Me. 258.

9. **Grounds Not Alleged Not Considered on Appeal.** — *Matter of Purdy*, 40 N. Y. App. Div. 133.

10. **Precision Required in Stating Grounds for Revocation.** — *State v. Tomah*, 80 Wis. 198.



of this nature.<sup>1</sup> The complaint, it has been held, should show that the petitioner is one authorized by statute to file it, or it will be fatally defective.<sup>2</sup>

**Verification.** — Under the *New York* statute requiring the verification of the petition it has been held that as to matters stated on information and belief it is not necessary for the petitioner to state the grounds of his belief.<sup>3</sup>

(4) *Notice to Licensee of Proceedings.* — As already shown, it is the practice under some statutes, where the licensee is convicted on a prosecution for a violation of the liquor laws, for the court to make an order revoking the license, and under others a conviction is *ipso facto* a revocation of the license. Under other statutes, however, the proceeding to revoke is a separate and distinct one. Such statutes usually provide that notice of the proceedings for revocation shall be given to the licensee, and a revocation of a license without the prescribed notice is a nullity.<sup>4</sup> So if the statutes provide for a hearing of the proceedings, but are silent as to notice, it will be implied that the licensee is to be notified and is to have an opportunity to be heard.<sup>5</sup> In some decisions it has been held that the action of the licensing board is judicial in its nature, and that the power of revocation can be exercised only upon notice and hearing.<sup>6</sup> If, however, the license itself contains the conditions of forfeiture as prescribed by the ordinance under which it was granted, a licensee who has been convicted of illegal sales is not entitled to any notice of the forfeiture of his license.<sup>7</sup> And where a statute provides that the license shall be revoked by the mayor and council on conviction of the licensee of any violation of any law or ordinance appertaining to the sale of liquors, the mayor and council are required to revoke the license, and no notice to the licensee of their action is necessary.<sup>8</sup>

**What Notice Must Contain.** — The notice is sufficient if it makes the charge in general terms, provided the charge is sufficiently certain to enable the person whose license it is sought to revoke to understand the ground upon which the revocation will be asked.<sup>9</sup>

1. *Com. v. Bearce*, 150 Mass. 389.

2. **Authority of Petitioner to Make Complaint.**

— *People v. McGowan*, 44 N. Y. App. Div. 30.

3. *People v. McGowan*, 44 N. Y. App. Div. 30.

4. **Notice of Proceedings to Revoke — Statutes Requiring Notice.** — *Plummer v. Com.*, 1 Bush (Ky.) 26; *State v. Lamos*, 26 Me. 261; *People v. McGlyn*, 62 Hun (N. Y.) 237; *Deignan v. License Com'rs*, 16 R. I. 727; *Lillienfeld v. Com.*, 92 Va. 818; *Oshkosh v. State*, 59 Wis. 425. See also *Miles v. State*, 53 Neb. 305.

5. **When Right to Notice Implied.** — *Young v. Blaisdell*, 138 Mass. 344. See also *Gaertner v. Fond du Lac*, 34 Wis. 497; *People v. Excise Com'rs*, 2 N. Y. App. Div. 89, holding that where a statute provides that a board of excise may revoke a license if the licensee shall permit a woman not a member of his family to sell intoxicating liquors on the licensed premises, a revocation of the license without notice to the licensee of the complaint or hearing is a nullity.

**Notice to One Member of Firm — Sufficiency.** — On proceedings to revoke a license of a firm it will be sufficient to give notice of the proceedings to one member of the firm. *Com. v. Bearce*, 150 Mass. 389.

**Service on "Holder" of Certificate.** — Under a statute providing that a copy of the petition for revocation shall be served on the "holder" of the certificate, service of a copy on the person authorized to sell liquors under the certificate will be sufficient, without serving a copy of the petition on one who holds the certificate

as security. *Matter of Lyman*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 300.

Where service on a licensee's agent in his absence is objected to, the objection is waived by the appearance of the licensee by attorney upon the return of the summons and obtaining an adjournment without objecting for want of reasonable service. *People v. Haughton*, 41 Hun (N. Y.) 558.

**Notice that License Has Been Revoked.** — If any notice to a licensee that his license has been revoked is necessary, verbal notice is sufficient. *Coin. v. Hamer*, 128 Mass. 76.

**Order to Appear and Show Cause Against Revocation.** — Where, in a proceeding to annul a liquor-tax certificate, the statute provides for the granting of "an order requiring the holder of such certificate \* \* \* to appear \* \* \* on a day specified therein, not more than ten days after the granting thereof," an order made returnable fifteen days, instead of not more than ten as required by the statute, after the granting thereof, will be reversed. *Moser v. Scheib*, 16 N. Y. App. Div. 379.

6. *Lambert v. Rahway*, 58 N. J. L. 578; *Pehrson v. Ephraim*, 14 Utah 147.

7. **License Containing Conditions of Forfeiture.** — *Sprayberry v. Atlanta*, 87 Ga. 120.

8. **Revocation on Conviction of Violating Liquor Laws.** — *Martin v. State*, 23 Neb. 371.

9. **Contents of Notices.** — *Lillienfeld v. Com.*, 92 Va. 818; *Cherry v. Com.*, 78 Va. 378.

**Proceeding Is Summary.** — The proceeding is a summary one, and such strict and technical



(5) *Hearing, Findings, and Judgment.* — In proceedings of this nature, the tribunal conducting the hearing is not confined to the strict rules which obtain upon the trial of an issue before a jury, but great latitude is allowed, that the court may be satisfied whether it has intrusted the sale of liquor to an unfit person and whether the law has been violated.<sup>1</sup> On a proceeding to revoke, the licensee is not entitled to a trial by a jury.<sup>2</sup> The proceedings not being criminal in their nature, the licensee is a competent witness in his own behalf.<sup>3</sup>

*e. REVIEW.* — The action of a tribunal revoking or refusing to revoke a license to sell intoxicating liquors is reviewable,<sup>4</sup> but only in some proceeding to which the licensing board is a party.<sup>5</sup>

*Methods of Obtaining.* — In one state it is held that under the statutes there is an adequate remedy by appeal, and that certiorari will not lie;<sup>6</sup> but certiorari is the remedy usually employed.<sup>7</sup>

*What Errors Reviewable.* — Except where the practice is changed by statute,<sup>8</sup> only errors of law will be reviewed on certiorari.<sup>9</sup>

*As Stay of Proceedings.* — Certiorari operates as a stay of proceedings from the time of its service, unless the execution of the judgment or order complained of has begun;<sup>10</sup> but the revocation of a license and a service of the copy of an order to that effect constitute an extinguishment of the license, and a writ of certiorari granted subsequently to such extinguishment does not bar a prose-

rules as are applied to indictments and other forms of accusation in criminal prosecutions will not be required. *Lillienfeld v. Com.*, 92 Va. 818.

*Notice Held Sufficient.* — A notice which states the charge as "selling and causing to be sold to minors whiskey, wine, and beer," is sufficient. *Lillienfeld v. Com.*, 92 Va. 818.

1. *Strict Rules of Evidence Not Applicable.* — *Lillienfeld v. Com.*, 92 Va. 821. See also *People v. Wright*, 3 Hun (N. Y.) 306; *People v. Haughton*, 41 Hun (N. Y.) 558.

*Reference.* — Under a statute providing for the appointment of a referee to take testimony if necessary, and for the revocation of the license when it is shown that a material statement in the application for license is false, there is no necessity to order a reference where the petition for revocation is supported by four uncontroverted affidavits showing the falsity of a statement by the applicant. *Matter of Bridge*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 213.

2. *Right to Jury Trial.* — *La Croix v. Fairfield County*, 50 Com. 321, 47 Am. Rep. 648; *State v. Schmidt*, 65 Iowa 556; *People v. Wright*, 3 Hun (N. Y.) 306; *People v. Police*, etc., Com'rs, 59 N. Y. 93; *Cherry v. Com.*, 78 Va. 375.

3. *A Continuance for the absence of the licensee's counsel will not be granted where the application is not under oath, and the licensee, being present, does not make any showing that other counsel could not be had.* *State v. Northfield*, 41 Minn. 211.

4. *Competency of Witnesses.* — *Cherry v. Com.*, 78 Va. 375.

As to the Sufficiency of Findings, see *Com. v. Moylan*, 119 Mass. 109; *State v. Beloit*, 74 Wis. 267.

*Revocation Not Suspended by Giving Bail or by Supersedeas Bond After Judgment.* — *State v. Schmidt*, 65 Iowa 556.

4. *Revocation Proceedings Reviewable.* — *State*

*v. Schmidt*, 65 Iowa 556; *Com. v. Wall*, 145 Mass. 216; *People v. Forbes*, 52 Hun (N. Y.) 30; *People v. McGlyn*, 62 Hun (N. Y.) 237, affirmed 13 N. Y. 602; *Gaertner v. Fond du Lac*, 34 Wis. 503.

5. *Board Revoking License Necessary Party.* — *Com. v. Wall*, 145 Mass. 216.

*Not Reviewable in Prosecution of Licensee.* — The action of a board in revoking a license cannot be reviewed in a criminal prosecution of the licensee. *Com. v. Wall*, 145 Mass. 216.

6. *Methods of Obtaining Review — Appeal.* — *State v. Schmidt*, 65 Iowa 556.

7. *Certiorari.* — *People v. Forbes*, 52 Hun (N. Y.) 30; *Gaertner v. Fond du Lac*, 34 Wis. 497. See also *People v. McGlyn*, 62 Hun (N. Y.) 237, affirmed 13 N. Y. 602; *In re Carlson*, 127 Pa. St. 330, Rodden v. License Com'rs, (R. I. 1891) 21 Atl. Rep. 1020; *Deignan v. License Com'rs*, 16 R. I. 727; *Newman v. State*, 76 Wis. 112.

Thus certiorari lies where a license has been revoked without cause and without giving to the licensee notice and opportunity to be heard. *Gaertner v. Fond du Lac*, 34 Wis. 497.

*Injunction Does Not Lie.* — *Gaertner v. Fond du Lac*, 34 Wis. 497.

8. *People v. McGlyn*, 62 Hun (N. Y.) 237.

9. *Errors of Law Reviewed.* — *Rodden v. License Com'rs*, (R. I. 1891) 21 Atl. Rep. 1020. See also *In re Carlson*, 127 Pa. St. 330; *Meehan's Appeal*, 11 Pa. Super. Ct. 579.

*A Presumption as to Proper Exercise of Discretion will be indulged in the absence of record evidence to the contrary.* *Dolan's Appeal*, 108 Pa. St. 564.

10. *Certiorari — When Stay of Proceedings.* — *Gaertner v. Fond du Lac*, 34 Wis. 503; *Newman v. State*, 76 Wis. 112.

*Vacating Order Staying Proceeding.* — An order in a writ of certiorari staying proceedings under a revocation may be vacated by the judge who granted it. *Neuman v. State*, 76 Wis. 112.



cution for sales made during the pendency either of the writ or of an appeal from a judgment affirming the action of the board.<sup>1</sup>

**24. License Fees — a. LICENSE FEES NOT TAXATION.** — As heretofore shown in another connection, license fees are not considered taxation and are not within the constitutional provisions regarding equality and uniformity.<sup>2</sup>

**b. FIXING AMOUNT OF FEES.** — Under some statutes it has been held that no license can be issued until the amount of the license fee has been fixed.<sup>3</sup> In a number of jurisdictions the amount of the license fee to be paid in any given locality is to be determined by the population of that locality.<sup>4</sup> Classification by population for the purpose of fixing license fees in the several townships and cities is a valid classification and imparts to the law the quality of general legislation.<sup>5</sup> If the statute provides that the population of a town is to be determined "by the last preceding enumeration of the state or general government," this method of determining the population is exclusive. Parol evidence on this question is not admissible.<sup>6</sup> Under some statutes an election is held to determine the minimum license fee for selling intoxicating liquors.<sup>7</sup>

**Reasonableness of Amount.** — The power to license necessarily implies the power to fix the amount of the license fee,<sup>8</sup> and generally speaking the reasonableness of the amount exacted is not a question with which the courts can concern themselves.<sup>9</sup> There seems to be, however, this limitation on the power of exacting license fees: they must not be so burdensome and oppressive as to amount to an absolute prohibition;<sup>10</sup> but the fee imposed will be presumed

1. *Neuman v. State*, 76 Wis. 112.

2. See *supra*, this title, *Constitutionality of Liquor Taxes — Statutes Authorizing Taxes or License Fees*.

3. **Fee Must Be Fixed Before License Issued.** — *State v. Hudson*, 78 Mo. 302.

4. **Fixing Amount of Fee by Population.** — See *Paul v. Judge*, 50 N. J. L. 585; *Matter of Lyman*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 629; *People v. Medberry*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 8; *Lyman v. McGreivey*, 25 N. Y. App. Div. 68; *Com. v. Smolter*, 126 Pa. St. 137; *Com. v. Miller*, 126 Pa. St. 157, 6 Pa. Co. Ct. 478; *Liquor License Fees*, 6 Pa. Co. Ct. 483; *Hoffman v. Matthes*, 6 Pa. Co. Ct. 487; *Com. v. Shoup*, 9 Pa. Co. Ct. 289; *State v. Keaough*, 68 Wis. 135.

5. **Validity of Classification.** — *Paul v. Judge*, 50 N. J. L. 585. See also *Com. v. Robinson*, 9 Pa. Super. Ct. 569.

6. **Statutory Method of Determining Population Exclusive.** — *State v. Keaough*, 68 Wis. 135. See also *Lyman v. McGreivey*, 25 N. Y. App. Div. 68, *affirmed* 54 N. E. Rep. 1093.

**Cities of Third Class.** — Where a city containing the requisite number of inhabitants to make it a city of the third class has not accepted the provisions of a statute as required by another statute declaring what shall be cities of the third class, it is not a city of the third class, and an applicant for a license in such city is not required to pay the amount required in cities of the third class. *Com. v. Shoup*, 9 Pa. Co. Ct. 289.

**Payment of Proportionate Part of Fee.** — Where two persons apply for a license to sell liquor in the same hotel, and the one is granted and the other continued, and the person who receives a license fails to pay the fee and his license is revoked by the clerk, a license for the rest of the year may be granted to the other person, whose application was continued, on

payment of a due proportion of the license fee. *Russell's License*, 11 Pa. Co. Ct. 505.

**Who May Object to Fee.** — One who has failed to take out a license as required by an ordinance and who continues to sell in violation thereof cannot object that the fee was in excess of the authority of the common council. *Moore v. Indianapolis*, 120 Ind. 483.

7. **Election to Determine Minimum Fee.** — See *Middleton v. Robbins*, 53 N. J. L. 555, 54 N. J. L. 566, where it was determined that the notice of such election must state the amount, or it will be invalid.

**Who May Object to Order for Election.** — An order for an election to determine a minimum license fee is not reviewable on application of the owner or licensee of a hotel. *Middleton v. Robbins*, 53 N. J. L. 555.

8. **Power to Fix License Fee.** — *Portland v. Schmidt*, 13 Oregon 18.

9. **Reasonableness of Fee Not Question for Courts.** — *Matter of Guerrero*, 69 Cal. 95; *Dennehy v. Chicago*, 120 Ill. 627.

10. **Fee Imposed Must Not Amount to Prohibition.** — *Sweet v. Wabash*, 41 Ind. 7; *Portland v. Schmidt*, 13 Oregon 18. But compare *State v. Ludington*, 33 Wis. 113, in which case the court said: "It [the legislature] may couple the license with conditions so oppressive, burdensome, and unjust that no citizen can afford to apply for or accept the privilege and engage in the business, and thus the act, though nominally otherwise, may amount to a prohibitory law." This statement was made merely *arguendo*. As shown elsewhere (*supra*, this title, III. 28, b. (i) *What Enactments Valid under Title "To Regulate" or "Restrict"*), a statute the title of which is "to regulate and restrain the traffic in intoxicating liquors" and the body of which is "to prohibit," is unconstitutional, because the body of the statute is not expressed in the title. It



to be reasonable unless the contrary clearly appears on the face of the law which imposes it.<sup>1</sup>

*c. PAYMENT OF FEES.* — Under the statutory provisions regulating the issuance of licenses, it is an almost invariable rule that the license fee must be paid before the issuance of the license, that this payment is a condition precedent to the validity of the license, and that a license issued without such payment is void.<sup>2</sup> The payment of a smaller sum than is required by statute does not authorize the issuance of a license. The license fee must be paid in full.<sup>3</sup> According to the weight of authority, license fees are payable only in money. The giving of a note in full or part payment will not be sufficient, and the note will be void.<sup>4</sup> And according to the particular wording of a statute it was held in another decision that a note might be given in payment for a license.<sup>5</sup>

*d. COLLECTION OF FEES.* — Unless there is some statutory provision expressly authorizing it, a civil action to recover the amount of a license fee

seems clear, then, that what is said in the Wisconsin case is not in accord with the rule relating to the entitling of statutes.

*1. Presumption as to Reasonableness of Fee.* — *Matter of Guerrero*, 69 Cal. 95.

*Fee Held Reasonable.* — It cannot be assumed that the exaction of a license fee of fifty dollars for each quarter of a year is so excessive as to be prohibitive of the business of selling intoxicating liquors. *Ex p. Hurl*, 49 Cal. 557.

*2. Payment of Fee Before Issuance of License Necessary* — *Illinois*. — *Handy v. People*, 29 Ill. App. 99; *Munsell v. Temple*, 8 Ill. 93; *Lombard v. Cheever*, 8 Ill. 469; *Spake v. People*, 89 Ill. 617.

*Michigan*. — *Doran v. Phillips*, 47 Mich. 228.

*Mississippi*. — *McWilliams v. Phillips*, 51 Miss. 196.

*Missouri*. — *Craig v. Smith*, 31 Mo. App. 286.

*Nebraska*. — *Zielke v. State*, 42 Neb. 750; *State v. Lincoln*, 6 Neb. 12; *Claus v. Hardy*, 31 Neb. 35.

*Oregon*. — *McLeod v. Scott*, 21 Oregon 94.

*3. Payment of Part Does Not Authorize Issuance.* — *Handy v. People*, 29 Ill. App. 99; *Spake v. People*, 89 Ill. 617; *Craig v. Smith*, 31 Mo. App. 286.

*The Tax Imposed upon Liquor Dealers Is Not a Mere Debt*, but is a condition precedent to making sales, and a liability which county officers must enforce by summary collection, to be made by continuous renewal of warrants if necessary, and, in case of nonpayment, by criminal prosecution. *Doran v. Phillips*, 47 Mich. 228.

*Effect of Tender of License Fee.* — The license fee must be paid into the treasury before the issuance of a license, and no formal tender of the amount to the treasurer without payment will support an action against another officer refusing to issue a license. *Claus v. Hardy*, 31 Neb. 35.

*4. License Fees Usually Payable in Money.* — *Hencke v. Standiford*, 66 Ark. 535; *Doran v. Phillips*, 47 Mich. 228; *McWilliams v. Phillips*, 51 Miss. 196; *Newsom v. Thighen*, 30 Miss. 414; *Craig v. Smith*, 31 Mo. App. 286; *Zielke v. State*, 42 Neb. 750.

*Personal Liability of Officer Receiving Note.* — Where a county treasurer takes notes in payment for a license, the notes are void, and he

is liable to the county for the amount of the license. *McWilliams v. Phillips*, 51 Miss. 196.

*Liability for Fee of Innocent Purchaser from Licensee.* — Where a town council, in violation of its ordinance, issues a license before the whole of a fee required by the ordinance has been paid, it cannot subject to the payment of the balance of the fee a stock in trade purchased from the licensee by one who was ignorant of the fact that the whole fee had not been paid. The purchaser had the right to presume that the fee had been paid, because the law required its payment before the license issued. The only remedy is to revoke the license or to declare it void. *Wicker v. Siesel*, 80 Ga. 724.

*Payment in Certificates of Police Commissioners.* — A tender of the certificates of the police commissioners, whose office is created by a law which also provides that their certificates of indebtedness shall be receivable in payment of all city taxes, is not a sufficient tender in payment of a liquor license, as a license is not a tax. *East St. Louis v. Wehrung*, 46 Ill. 392.

*Why Notes Are Void.* — It is sometimes said that the notes are void as being contrary to public policy, inasmuch as the whole law could be annulled if the authorities chose to take notes. *Doran v. Phillips*, 47 Mich. 228.

Sometimes it is said that such a note, being in payment for a void license, imposes no obligation to pay, and so is without consideration. *Hencke v. Standiford*, 66 Ark. 535.

*In Georgia*, under the peculiar provisions of the statute, where the licensee received his license the note may be collected. *Appling County v. McWilliams*, 69 Ga. 840.

*In Kentucky* the law regulating licenses in cities of the second, third, fourth, and fifth classes does not require, as in cities of the first class, payment before issuance, but the city councils may regulate the issuance of such licenses and the time and manner of issuance. A note taken in payment may be collected. *Fulton v. Blythe*, (Ky. 1895) 30 S. W. Rep. 1018; *Searcy v. Lawrenceburg*, (Ky. 1899) 50 S. W. Rep. 534.

*5. Powers v. Decatur*, 54 Ala. 214, construing a statute authorizing municipal corporations to "provide for licensing and regulating retailers of liquors within" their limits and to fix the sum to be paid.



from one selling without a license does not lie.<sup>1</sup> So where a statute which creates a tax provides a special remedy for its collection, the remedy is exclusive, and an action to recover the tax will not lie unless it is expressly so provided.<sup>2</sup> In some jurisdictions express provision is made by statute for the collection of license fees by suit.<sup>3</sup>

*e.* **DISPOSITION OF FEES.**—The fund created by licensing the sale of intoxicating liquors is under the absolute control of the legislature, and it may enact such statutes as it deems fit for the disposition thereof.<sup>4</sup> These statutes usually provide that the moneys thus received shall be paid over to or devoted to the use of one or more of the following objects or purposes: municipal corporations, *i. e.*, counties, cities, townships, or villages, in which the fees are assessed and collected;<sup>5</sup> poor funds;<sup>6</sup> homes for inebriates;<sup>7</sup> school funds, etc.<sup>8</sup> Where a liquor tax belonging to a village is assessed and collected by township officers and used for township purposes, mandamus will lie to compel its payment over to the village authorities.<sup>9</sup> Where money due to a township is, by mistake of the county treasurer, paid to a village therein, he may deduct the amount so paid from the share due to the village of a tax subsequently levied.<sup>10</sup> The right of a municipality to a liquor tax assessed therein vests at the date at which the tax is payable, and if it is not then paid the subsequent annexation of the territory to that of some other municipality before its payment does not transfer to the latter the right to the money.<sup>11</sup>

*f.* **RECOVERY BACK OF FEES ON REFUSAL OR REVOCATION OF LICENSE.**—In regard to the recovery back of license fees on the refusal to grant a license or on the revocation of a license, the authorities are not at all harmonious. If a statute authorizes a license to be operative up to a certain date and

**1. Civil Action to Recover Usually Does Not Lie.**—*Chicago v. Enright*, 27 Ill. App. 559; *State v. Adler*, 68 Miss. 487. See also *Hencke v. Standiford*, 66 Ark. 535; *McBride v. State Revenue Agent*, 70 Miss. 716; *Adams v. Fragiaco*, 70 Miss. 799; *State v. Piazza*, 66 Miss. 426.

**2. State v. Piazza**, 66 Miss. 426.

A suit will not lie in behalf of a state to recover the amount of an unpaid privilege tax imposed by statute upon retailers who sell or give away liquors in quantities less than one pint. The summary remedy for its collection by the sheriff and the penalty provided by statute must be deemed sufficient to secure payment of such tax. *State v. Piazza*, 66 Miss. 426.

So where a statute imposes penalties of five hundred dollars, recoverable by a state, county, or city respectively, a suit by the state revenue agent to recover the license tax which the retailer should have paid is not maintainable. *McBride v. State Revenue Agent*, 70 Miss. 716; *Adams v. Fragiaco*, 70 Miss. 799.

**3. Statutory Authorization for Suit to Recover Fee.**—See *Sacramento v. Dillman*, 102 Cal. 107; *Ex p. Benjamin*, 65 Cal. 310. See also *Marshall County v. Knoll*, 102 Iowa 573.

**Effect of Statute Authorizing Collection of Fees on Right to Prosecute Criminally.**—A statute authorizing prosecutions by the state against those guilty of selling intoxicating liquors is not impliedly repealed, as regards prosecution for sales without license in a city, by a statute giving to the cities the power to license and regulate the sale of intoxicating liquors and to provide for the collection of the license tax thereon by suit or otherwise. *State v. Hoepfner*, 9 Wash. 680.

**4. Control of Legislature over Disposition of Fees.**—*Rock County v. Edgerton*, 90 Wis. 288.

**5. Municipal Corporations.**—See *Springwells Tp. v. Wayne County Treasurer*, 58 Mich. 240; *Marquette County v. Dillon*, 49 Mich. 244; *Winona v. Whipple*, 24 Minn. 61; *People v. Williams*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 463; *South Bethlehem v. Hemingway*, 16 Pa. Co. Ct. 103; *State v. Spokane Falls*, 2 Wash. 40; *Walworth County v. Whitewater*, 17 Wis. 103.

**County Treasurer Agent of Municipality.**—Under a statute which requires the county treasurer to place moneys collected for liquor taxes to the credit of the contingent fund of a township, village, or city from which they were collected, the treasurer, in collecting and accounting for the tax, is the agent of the municipality and not of the county, and his failure to account for it does not warrant the municipality in withholding an equivalent amount from the county taxes. *Marquette County v. Dillon*, 49 Mich. 244.

**6. Poor Funds.**—*People v. Harris*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 256; *Allegheny County v. Wellsville*, 90 Hun (N. Y.) 23; *Churchill v. Herrick*, 32 Wis. 357; *Green County v. Monroe*, 55 Wis. 175.

**7. Homes for Inebriates.**—*People v. Board of Police*, 63 N. Y. 623.

**8. School Funds.**—*Eminence v. Wilson*, (Ky. 1898) 45 S. W. Rep. 81.

**9. Mandamus to Compel Payment of Fees.**—*Decatur v. Decatur*, 33 Mich. 335.

**10. Money Paid under Mistake of Fact.**—*Grosse Pointe v. Treasurer*, 85 Mich. 44. See also *Port Richmond v. Richmond County*, 11 N. Y. App. Div. 217.

**11. At What Time Right to Tax Vests.**—*Spring-*



no longer upon payment of half the required annual fee, and the licensee pays the full fee on promise of the board to refund the excess if the license should be held void after that date, he will be entitled to recover back the excess if compelled to surrender the license after that date.<sup>1</sup> So in some states it is settled law that where an applicant for a license to sell liquor has paid the license fee, and the license has afterwards been canceled without fault or act of forfeiture by the licensee, he may recover back a part of the license fee proportionate to the period during which he is not permitted to enjoy the license.<sup>2</sup> On the other hand, in some cases it has been held that where payment of the amount required by statute is a condition precedent to the making of an application for license, money paid into the county treasury for a license which was refused by the County Court is not recoverable.<sup>3</sup> Similarly it has been held that where a petition for prohibition is denied and a license is granted, and thereafter the petition is sustained on appeal, the licensee cannot recover so much of the tax as is proportioned to the remainder of his unexpired license, whether the license was or was not revoked by the judgment sustaining the petition.<sup>4</sup> So it has been held that where the licensee pays the liquor tax before approval of the bond, and begins business before such approval, but abandons it after a conviction of violating the law, he cannot recover back the tax so paid.<sup>5</sup>

*g.* **RECOVERY BACK OF ILLEGAL OR EXCESSIVE FEES.** — It is well settled that one who has voluntarily paid a license fee which is excessive or illegal cannot recover it back,<sup>6</sup> and the fact that business necessities compelled the obtaining of such a license will not alter the voluntary character of the payment.<sup>7</sup> Notwithstanding a person may believe the law which requires of him the payment of a license to be invalid and oppressive, still, if he pays the demand without any other compulsion than the mere existence of the law which requires it, rather than submit his liability to the arbitrament of a court, he cannot afterwards say that he paid under compulsion.<sup>8</sup>

**25. License Bonds** — *a.* **NECESSITY AND OBJECT OF BOND.** — In most jurisdictions liquor dealers are required to give bond that they will observe the provisions of the liquor laws and that they will pay any fines or penalties assessed against them for violation thereof. The giving of the required bond

wells Tp. *v.* Wayne County Treasurer, 58 Mich. 240.

**1. Recovery Back of Fees on Refusal or Revocation of License.** — *Nurnberger v. Barnwell*, 42 S. Car. 158.

**2. View that License Fees Are Recoverable.** — *School Dist. No. 34 v. Thompson*, 51 Neb. 857; *State v. Cornwell*, 12 Neb. 470; *Lydick v. Korner*, 15 Neb. 500; *State v. Weber*, 20 Neb. 467; *Chamberlain v. Tecumseh*, 43 Neb. 221; *Auburn v. Mayer*, (Neb. 1899) 78 N. W. Rep. 462; *People v. Sackett*, 15 N. Y. App. Div. 290 (*reversing* 17 Misc. (N. Y.) 406; *Hirn v. State*, 1 Ohio St. 15; *State v. Buechler*, 10 S. Dak. 156).

In *New York* a recovery can be had where the license was surrendered, not where it was revoked. *Matter of Johnson*, (Supm. Ct. Spec. T.) 18 Misc. Rep. (N. Y.) 498.

**3. View that License Fees Are Not Recoverable.** — *Trainor v. Multnomah County*, 2 Oregon 214; *McLeod v. Scott*, 21 Oregon 94.

**4. Peyton v. Hot Spring County**, 53 Ark. 236.

In a case nearly identical in its facts with the preceding one it was held that where a license was granted by a licensing board, and on appeal the license was refused within the year covered by the license, the payment must be

considered to have been voluntary and could not be recovered back. *Monroe County v. Kreuger*, 88 Ind. 231.

**5. Abandonment of Business After Violating Liquor Laws.** — *Curry v. Tawas Tp.*, 81 Mich. 355.

**6. Voluntary Payments Not Recoverable.** — *Cahaba v. Burnett*, 34 Ala. 400; *Thomson v. Norris*, 62 Ga. 538; *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323; *Sullivan v. McCammon*, 51 Ind. 264; *Providence v. Shackelford*, (Ky. 1899) 50 S. W. Rep. 542; *Emery v. Lowell*, 127 Mass. 138; *Baker v. Bucklin*, 43 N. Y. App. Div. 336; *Custin v. Viroqua*, 67 Wis. 314. *Compare Callaway v. Milledgeville*, 48 Ga. 309.

In *Drew County v. Bennett*, 43 Ark. 364, it was held that as the revenue act fixed the amount of license for the sale of liquor, and deprived the County Court of discretion as to the amount, any excess exacted by the County Court above the amount fixed by the statute was recoverable from the county.

**7. Payment from Business Necessities Does Not Alter Character of Payment.** — *Custin v. Viroqua*, 67 Wis. 314.

**8. Payment Voluntary unless Litigated.** — *Cahaba v. Burnett*, 34 Ala. 400. See also the title IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1099.



is held to be a condition precedent to the validity of the license.<sup>1</sup> The licensing authorities have power at any time before approval of the bond to set aside an order granting a license;<sup>2</sup> and where a license is issued without bond being given it is absolutely void and affords no protection to the holder.<sup>3</sup>

**b. FORM AND REQUIREMENTS OF BOND — To Whom Bond Should Run.** — The bond should be made to the state, in the absence of authority express or clearly implied to make it to a municipality or some officer as obligee therein.<sup>4</sup> The mere fact that municipal corporations are made agencies of the state to issue licenses or that any local officer is made the custodian of the bond does not of itself authorize such a corporation to take the bond in its own name under general laws regulating and licensing the traffic.<sup>5</sup> It has been held in one decision that where the statute requires that the bond be made payable to the state, a bond made payable to the county judge is void.<sup>6</sup> But in another decision construing a statute requiring that the bond be made payable to the state, but providing that it might be sued upon for the use of any person injured by reason of sales by the licensee, it was held that the bond was available to any person who might have sustained injuries by such sales, although it ran in the name of a village instead of the state.<sup>7</sup>

**Imposing Additional Conditions.** — A bond is void if it imposes upon the business of the licensee restraints in addition to those imposed by statute and not authorized thereby.<sup>8</sup> It must be noted, however, that mere surplusage will

**1. Necessity of Bond.** — *Keiser v. State*, 78 Ind. 430; *Crutz v. State*, 4 Ind. 385; *State v. Willard*, 39 Mo. App. 251; *State v. Ludington*, 33 Wis. 107; *State v. Fisher*, 33 Wis. 154. See also *Horan v. Chief Justice*, 27 Tex. 226.

**Receiving Liquor Tax Before Bond Filed Not Compellable.** — A county treasurer has no right to receive and receipt for a liquor tax under the liquor law until the statutory bond is filed in his office, and mandamus will not lie to compel him to do so. *Atty.-Gen. v. Huebner*, 91 Mich. 436; *Rode v. Phelps*, 80 Mich. 610.

**2. Order for License May Be Set Aside Before Bond Approved.** — *Crutz v. State*, 4 Ind. 385.

**3. License Issued Without Bond No Protection.** — *Keiser v. State*, 78 Ind. 430; *State v. Fisher*, 33 Wis. 154; *State v. Ludington*, 33 Wis. 107.

**4. To Whom Bond Should Run.** — *Minneapolis v. Olson*, (Minn. 1899) 78 N. W. Rep. 877; *St. James v. Hingtgen*, 47 Minn. 521, in which case it was further held that where a bond is erroneously taken in the name of a village instead of in the name of the state, the county attorney is not authorized on his own motion and without the consent of the village to prosecute it in the name of the village, even assuming that the bond is enforceable at all, which question was not decided.

**Bond to Village or County — Failure to Insert Treasurer's Name.** — A licensee's bond to "the city treasurer" of a designated village is not invalid for failure to insert his name. *Tripp v. Norton*, 10 R. I. 125.

And it has been held that the bond may be made payable to the county treasurer without either naming him or containing the words "and his successors in office." *Redpath v. Nottingham*, 5 Blackf. (Ind.) 267.

**Excessive Amount.** — Where one section of a statute requires dramshop keepers to give a penal bond for two thousand dollars, and another section provides for a bond in the sum of five hundred dollars to guard against

the adulteration of liquors, one for twenty-five hundred dollars, covering all the conditions prescribed in both bonds, is not void for excess in the amount of the penalty, although it would be better to take two separate bonds from the dramshop keeper with the penalties and conditions fixed by the statute respectively. *Greene County v. Wilbite*, 29 Mo. App. 463.

**5. Bonds Taken in Name of Municipal Corporation.** — *St. James v. Hingtgen*, 47 Minn. 521.

**6. Bond Payable to County Judge — When Void.** — *State v. Vinson*, 5 Tex. Civ. App. 315.

**7. Bond in Name of Village.** — *Thomas v. Hinkley*, 19 Neb. 324.

**8. Bonds Imposing Additional Restraints to Those Imposed by Statute.** — *Crosby v. Snow*, 16 Me. 121; *Com. v. Kelly*, 9 Gray (Mass.) 259; *Crawley v. Com.*, 123 Pa. St. 275. But compare *Lyman v. Brucker*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 594, in which case it was held that a bond conditioned not to violate the liquor tax law "or any act amendatory thereof or supplementary thereto," though broader in its terms than the statute required, was not for that reason void; *Code Civ. Pro. N. Y.*, § 729, providing that a bond substantially conforming to the requirements of the statute under which it is given will be sufficient if it does not prejudice the rights of the party for whose benefit it is given.

A bond given by a person convicted under a statute which requires him to give bond not to violate any law "concerning the sale of spirituous or intoxicating liquors" is void if conditioned that he shall not violate any law "concerning the manufacture or sale of spirituous or intoxicating liquors." *Com. v. Kelly*, 9 Gray (Mass.) 259. Compare *Providence v. Bligh*, 10 R. I. 208, in which case it was held that a licensee's bond conditioned that the principal "shall not violate any of the provisions" of the laws of *Rhode Island*, sufficiently complies with a statute requiring a bond that the licensee "will not violate any of the provisions of this act."



not vitiate a bond.<sup>1</sup>

**Effect of Various Omissions, Irregularities, and Errors Considered.** — If a bond is in strict compliance with the statute, the neglect of the sureties to attach the statutory affidavits thereto will not so invalidate the bond as to relieve them from liability.<sup>2</sup> So it has been held that the bond is not invalid for want of date,<sup>3</sup> or because the principal's name is not given,<sup>4</sup> or because it contained blanks at the time of the signing which were subsequently filled up in accordance with the understanding and expectation of the obligors,<sup>5</sup> or because the sureties on the bond have not been notified that they have been accepted as such and that the license has issued,<sup>6</sup> or because the name of the county in which the business is to be carried on is omitted,<sup>7</sup> or because of alterations which do not change the legal effect of the bond,<sup>8</sup> or because of failure to file the bond,<sup>9</sup> or because the bond contains clerical errors, provided there is no difficulty in ascertaining from the whole instrument, applied to the subject-matter, the intention of the parties.<sup>10</sup> So it has been held that a bond signed by the principal both as principal and surety, although defective, is not void where there is a special statutory provision authorizing the amendment of defective bonds if made within a reasonable time.<sup>11</sup> Where the penalty has, by mistake, been left in blank, the bond will be held valid at the lowest statutory penalty, when the sureties have justified in that sum in accordance with a statute requiring that the justification shall conform to the penalty.<sup>12</sup>

**That a Married Woman Is Principal in Her Own Bond** does not, in some jurisdictions, render it void.<sup>13</sup>

**Approval by Licensing Authorities.** — Whether it is essential to the validity of a bond that it be approved by the licensing authorities does not seem to be well settled. This point has been ruled both ways.<sup>14</sup>

**Provision for Payment of Damages.** — If a bond fails to provide, as required by statute, for the payment of all damages which may be adjudged against the

1. **Surplusage Does Not Vitate Bond.** — *Crawley v. Com.*, 123 Pa. St. 275; *Com. v. Deibert*, 2 Pa. Dist. 53; *Com. v. Shannon*, 2 Pa. Co. Ct. 142.

2. **Effect of Failure to Annex Affidavits.** — *People v. Laning*, 73 Mich. 284, in which case it was said that the justification by affidavit forms no part of the bond. "It was the duty of the sureties to annex the required affidavit, and a neglect of this duty is no defense to their liability as sureties upon the bond."

**Liability of Council from Neglect to Require Affidavits.** — The acceptance by the common council of a liquor dealer's bond unaccompanied by the statutory affidavits of the sureties may render the council liable for neglect of duty. *People v. Laning*, 73 Mich. 284.

3. **Failure to Affix Date.** — *Harper v. Golden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 623.

4. **Failure to Give Principal's Name.** — *North v. Barringer*, 147 Ind. 224.

5. **Blanks Filled In Subsequent to Signing.** — *Greene County v. Wilhite*, 29 Mo. App. 459.

6. **Failure to Notify Sureties of Their Acceptance.** — *Coggeshall v. Pollitt*, 15 R. I. 168.

7. **Failure to Give Name of County.** — *State v. Sitterle*, (Tex. Civ. App. 1894) 26 S. W. Rep. 764.

8. **Alterations Not Changing Legal Effect.** — *Starr v. Blatner*, 76 Iowa 356.

9. **Failure to File Bond.** — *Brockway v. Petted*, 79 Mich. 620; *People v. Laning*, 73 Mich. 284; *Harper v. Golden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 623.

**Bond Relates Back to Date.** — When afterwards filed the bond relates back to its date

and covers the time prior to its filing. Filing is not essential to its validity. *Brockway v. Petted*, 79 Mich. 620.

10. **Clerical Errors.** — *Howes v. Maxwell*, 157 Mass. 333, citing *Leonard v. Speidel*, 104 Mass. 356, and *Hewes v. Cooper*, 115 Mass. 42.

**Instance.** — Though a bond is issued by selectmen, a recital that the receipt was issued by the mayor and aldermen will not render it invalid and unenforceable if the intent of the parties can be ascertained from the whole instrument. *Howes v. Maxwell*, 157 Mass. 333.

11. **Signing by Principal as Both Principal and Surety.** — *Clark v. Riddle*, 101 Iowa 270.

**Failure of the Affidavit to State that the Sureties Are Not Liquor Dealers** and that neither is a surety upon any other bond, as required by statute, does not render the bond void, as the requirements mentioned are unconstitutional and void. *Kuhn v. Detroit*, 70 Mich. 534.

12. **Penalty in Bond Not Stipulated.** — *Garrison v. Steele*, 46 Mich. 98.

13. **Married Woman as Principal in Bond.** — *Amperse v. Kalamazoo*, 59 Mich. 78, in which case it was said that the right of a married woman to engage and carry on any legal business in her own name and in her own right with her husband's consent is no longer an open question in *Michigan*.

14. **Failure of Board to Approve Bond — That Approval Is Necessary.** — *Garrison v. Steele*, 46 Mich. 98.

**That Approval Is Not Necessary.** — *Coggeshall v. Pollitt*, 15 R. I. 168; *Harper v. Golden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 623.



licensing parties, it is a nullity, and no action can be maintained thereon for a breach of its provisions.<sup>1</sup>

**Original Bond Refused -- Second Granted.** — An order granting a liquor license will not be reversed because the record shows that the bond originally filed was not accepted, if another bond filed on the day when the license was granted was accepted.<sup>2</sup>

**c. APPROVAL OF BOND — (1) In General.** — Where a liquor bond is presented to the licensing authorities for approval, the applicant is entitled to prompt action upon it.<sup>3</sup> In passing upon this application the licensing authorities are necessarily vested with considerable discretion; and where they have exercised this discretion in good faith, and have passed upon the bond, mandamus will not lie to control their action if there was no abuse of discretion.<sup>4</sup> In passing upon the bond the board cannot exercise this discretion in a capricious or arbitrary manner.<sup>5</sup> While the board is not bound by the affidavits of the sureties,<sup>6</sup> and may consider competent testimony concerning the value of their property,<sup>7</sup> it has no right to disregard the affidavits without legal proof<sup>8</sup> or to reject sureties without at once giving the reason and a speedy opportunity to meet the evidence or supply other sureties.<sup>9</sup> If a bond is rejected, valid reasons should be given, and should appear of record;<sup>10</sup> and when, upon an order to show cause, the return shows no reason for rejecting the bond, it will be assumed that the rejection was arbitrary.<sup>11</sup>

**(2) Action for Refusal to Approve Bond.** — A city is not liable for damages for the refusal of its common council to approve a sufficient bond, and so far as its liability is concerned it cannot matter whether the neglect of the council was wilful or otherwise.<sup>12</sup> Nor can the members of such council be held liable in their individual capacity for refusing to approve such bond.<sup>13</sup>

**d. WHO MAY BE SURETIES.** — The statutes requiring bond of liquor deal-

**1. Bond Containing No Provision for Payment of Damages.** — *Sexson v. Kelley*, 3 Neb. 104.

**2. Filing of Second Bond.** — *Branch's License*, 164 Pa. St. 427. See also *Rief's License*, 2 Lehigh Val. L. Rep. (Pa.) 400, where it was held that if one of the proposed sureties is a nonresident of the ward the court will allow the filing of a new bond.

**3. Prompt Action Required of Board.** — *Amperse v. Kalamazoo*, 59 Mich. 78.

**4. Action of Board Not Reviewable Unless Discretion Abused.** — *Parker v. Portland*, 54 Mich. 308; *Post v. Sparta*, 64 Mich. 597; *McHenry v. Chippewa*, 65 Mich. 9; *Palmer v. Hartford*, 73 Mich. 96; *Wolfson v. Rubicon Tp.*, 63 Mich. 49; *Nordstrom's Petition*, 127 Pa. St. 542.

**Proper Exercise of Discretion Illustrated.** — It is a proper exercise of discretion to refuse to approve a bond when the name of one of the sureties has been erased, apparently after they had qualified, *Nordstrom's Petition*, 127 Pa. St. 542; or where one of the sureties is apparently not responsible for the penalty, *Palmer v. Hartford*, 73 Mich. 96; or where the evidence as to the pecuniary responsibility of one of the sureties is conflicting, *Wolfson v. Rubicon Tp.*, 63 Mich. 49.

**Filing by Treasurer Clerical Duty Only.** — No discretion in regard to the receipt and filing of a liquor dealer's bond is lodged in the county treasurer, who is bound to receive and file it when presented with the approval of the town board indorsed thereon. His duty is merely clerical, and is not intended as an act to give effect to the bond. *Brockway v. Pitted*, 79 Mich. 620.

**5. Arbitrary Exercise of Discretion Improper.** — *Amperse v. Kalamazoo*, 59 Mich. 78; *Mixer v. Manistee County*, 26 Mich. 422; *Potter v. Homer*, 59 Mich. 8; *Wolfson v. Rubicon Tp.*, 63 Mich. 49; *Post v. Sparta*, 63 Mich. 323; *Warner v. Lawrence*, 62 Mich. 251; *Court-right v. Newaygo*, 96 Mich. 290; *McLeod v. Scott*, 21 Oregon 94.

**6. Evidence for Board.** — *Palmer v. Hartford*, 73 Mich. 96.

**7. Wolfson v. Rubicon Tp.**, 63 Mich. 49; *Post v. Sparta*, 63 Mich. 323.

**8. McLeod v. Scott, 21 Oregon 94.**

**9. Cannot Reject Sureties Without Giving Reason.** — *Potter v. Homer*, 59 Mich. 8; *Amperse v. Kalamazoo*, 59 Mich. 78; *Post v. Sparta*, 63 Mich. 323; *McLeod v. Scott*, 21 Oregon 94.

**10. Reasons for Rejection Should Appear of Record.** — *Amperse v. Kalamazoo*, 59 Mich. 78; *Mixer v. Manistee County*, 26 Mich. 422; *Potter v. Homer*, 59 Mich. 8.

**11. Assumption in Case Record Does Not Show Objections.** — *Amperse v. Kalamazoo*, 59 Mich. 78.

**What Petition for Order to Show Cause Should Allege.** — Where mandamus is sought to compel a municipal council to approve a liquor dealer's bond, the petition for an order to show cause should state the respondent's reason for refusing, if any was given, and the circumstances of the refusal; otherwise the reason must be presumed sufficient and the order may be refused. *Goss v. Vermontville*, 44 Mich. 319; *Negly v. Sturgis*, 44 Mich. 1.

**12. Action Against Municipality.** — *Amperse v. Kalamazoo*, 75 Mich. 228, 13 Am. St. Rep. 432.

**13. Action Against Members of Council.** — *Amperse v. Winslow*, 75 Mich. 234.



ers usually declare what qualifications as to residence, property, etc., shall be necessary. Under a statute providing that the sureties must be "freeholders of the county in which the license is to be granted," freeholders, though non-residents, may be sureties.<sup>1</sup> But where the statute provides that the signers of the application for license shall be residents of the ward or township, and also requires that the sureties shall be signers of the application, the sureties must be residents of the ward or township.<sup>2</sup>

*e.* WHAT OPERATES AS DISCHARGE OF SURETIES. — Where a change occurs in the membership of a firm of liquor sellers, this operates to discharge the sureties on their bond.<sup>3</sup> But the sureties are not discharged from the obligation of the bond by the imprisonment of the licensee for nonpayment of fine and costs. They cannot escape liability for such fine and costs by any imprisonment suffered by the licensee by reason of his default.<sup>4</sup> Nor can a surety discharge himself by removal from the corporate limits; and he is not relieved by the county treasurer's notifying the principal to file a new bond and to close his saloon until this is done.<sup>5</sup>

*f.* WHAT CONSTITUTES BREACH. — The bond in question is conditioned on the due observance of the liquor laws. Any violations of these laws will constitute a breach of the bond.<sup>6</sup> Thus a breach of the bond occurs when the law is broken in any of the following ways: employing minors in a saloon;<sup>7</sup> selling to minors;<sup>8</sup> allowing minors to enter and remain on the licensed premises;<sup>9</sup> selling to students;<sup>10</sup> selling to persons addicted to the use of intoxicants as a beverage;<sup>11</sup> failing to make reports required by law;<sup>12</sup> failing to keep a quiet house;<sup>13</sup> keeping a gaming table,<sup>14</sup> or permitting

1. Freeholders. — *Matthews v. People*, 159 Ill. 399, reversing 53 Ill. App. 306, 59 Ill. App. 146.

2. Residents of Ward or Township. — *Schantz's License*, 1 Pa. Co. Ct. 361; *Gingrich's License*, 1 Pa. Co. Ct. 360; *Beerbower's Application*, 2 Chest. Co. Rep. (Pa.) 208.

3. Change in Membership of Firm. — *Mathews v. Garman*, 110 Mich. 559.

4. Imprisonment of Licensee for Nonpayment of Fine. — *Com. v. Shannon*, 2 Pa. Co. Ct. 142; *Com. v. Fendler*, 1 Kulp (Pa.) 120; *Brown v. Com.*, 114 Pa. St. 335.

5. Removal of Surety from Corporate Limits. — *Wright v. Treat*, 83 Mich. 110.

6. Violations of Liquor Laws Breach of Bond. — *State v. McEntee*, 68 Iowa 381; *State v. Martland*, 71 Iowa 543; *Lightner v. Com.*, 31 Pa. St. 341; *Tripp v. Hennessy*, 10 R. I. 129.

Under Statutes Making Convictions a Breach of the Bond. — A conviction of the principal constitutes a breach, and it is not necessary in a civil suit upon the bond to prove by any other evidence a violation by the principal of the provisions of the act. *Welch v. McKane*, 55 Conn. 25.

Procuring Violations of Law — Effect on Right of Recovery. — In an action for breach of a liquor bond in selling on Sunday, the plaintiff is not estopped to claim the penalty of the bond on account of the sale having been made to a police officer sent by the chief of police to ascertain whether the defendant was selling unlawfully and to buy from him if he was, it appearing that the defendant was not induced to sell by anything said or done by the officer. *Tripp v. Hennessy*, 10 R. I. 129.

7. Employment of Minors in Saloon. — *Goldsticker v. Ford*, 62 Tex. 385.

Minors Whose Disabilities Have Been Removed. — Where a statute provides that a minor whose disabilities have been removed shall be deemed

of full age and shall have all the privileges appertaining to one who has reached his majority, except that of voting, the employment of a minor whose disabilities have been removed does not constitute a breach of the bond. *State v. Curtis*, 8 Tex. Civ. App. 506.

8. Sales to Minors. — *Harlan v. Richmond*, 108 Iowa 161; *Harper v. Golden*, (Tex. Civ. App. 1897) 39 S. W. Rep. 623.

9. Allowing Minors on Premises. — *Drake v. State*, (Tex. Civ. App. 1893) 23 S. W. Rep. 620; *State v. Meyer*, (Tex. Civ. App. 1893) 23 S. W. Rep. 427, in which case it was further held that it was immaterial whether the dealer or his agent believed or had reason to believe that the minor was over twenty-one years of age.

Partnership with Minor. — Where the breach charged is that the defendant permitted a minor to enter and remain on the premises, the fact that the minor was a partner in the business will be no defense if he was not a party to the bond in suit. *Drake v. State*, (Tex. Civ. App. 1893) 23 S. W. Rep. 398.

10. Sale to Student — Compromise with Parent. — *Daniels v. Grayson College*, 20 Tex. Civ. App. 562, holding that where a liquor dealer's bond is conditioned not to sell to students, it is no defense to an action for breach thereof, by the college of which the student is a member, that the defendant has effected a compromise with the student's father.

11. *Harlan v. Richmond*, 108 Iowa 161.

12. Failure to Make Reports. — *State v. McEntee*, 68 Iowa 381. See also *State v. Martland*, 71 Iowa 543; *State v. Humber*, 73 Iowa 767, 34 N. W. Rep. 829; *State v. De Kruif*, 72 Iowa 488.

13. Failure to Keep Quiet House. — *State v. Curtis*, 8 Tex. Civ. App. 506.

14. Keeping Gaming Table. — *People v. Harri-*



gambling on the premises.<sup>1</sup>

*g. VALIDITY OF CONTRACT TO PAY SURETY FOR ACTING AS SUCH.* — A contract by a third party to pay a surety on a liquor license bond of an applicant for so becoming surety, the money to be paid back if the application be refused, is not unenforceable as contrary to public policy.<sup>2</sup>

*h. ACTIONS ON BOND — Who May Maintain.* — The question who may maintain actions for breach of bonds is purely one of statutory regulation and construction. In the notes hereto are set out some decisions bearing upon this question.<sup>3</sup>

*Jurisdiction.* — The fact that suit is brought in the name of a county judge does not disqualify him to try the action.<sup>4</sup>

*Conviction Not Condition Precedent to Suit on Bond.* — A statute providing that "if any licensed person shall be convicted of the violation of" the liquor laws "his bond shall be put in suit" does not make it a condition precedent to a suit on the bond that he should be so convicted.<sup>5</sup> But in case of conviction the record thereof is conclusive evidence of breach of the bond.<sup>6</sup>

*Estoppel to Deny Validity of License.* — In an action on such bond neither the licensee nor his bondsmen can deny that the license was issued in conformity to law.<sup>7</sup> Where the facts are undisputed it is a question of law whether the

son, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 247.

1. *Keeping Slot Machine for Gambling.* — Lyman *v.* Brucker, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 594.

2. *Payment for Acting as Surety.* — Bing *v.* Willey, 146 Pa. St. 381.

3. *Who May Sue on Bond — Arkansas.* — Under a statute providing that any person who has lost money at gaming in a dramshop may have an action against the bond of the keeper thereof (Mansf. Dig., § 4518), no action can be maintained on such a bond by one whose employee embezzled money from him and lost it on his own account in the dramshop. Grant *v.* Owens, 55 Ark. 49.

*Iowa.* — One of the sections of an Iowa statute provides that on condition broken the district attorney shall sue on the bond. Another section subsequently enacted provides that suit on the bond may be brought in the name of the state on relation of any citizen of the county. It has been held that these two sections are not inconsistent; that the latter merely limits the former, and that action may be maintained by a citizen as provided by the latter section. State *v.* Martland, 71 Iowa 543; State *v.* De Kruif, 72 Iowa 488; State *v.* Hummer, 73 Iowa 767, 34 N. W. Rep. 829.

*New York.* — In People *v.* Eckman, 63 Hun (N. Y.) 209, it was held that the commissioners of excise of the city of New York were the proper persons to bring an action for a breach of a covenant in a bond given to the people upon the issuance of a license to sell intoxicating liquors at a saloon in that city. See also Excise Com'rs *v.* Burtis, 103 N. Y. 136.

*Rhode Island.* — Although a statute requiring bond to be given to the city treasurer makes no provision that the bond shall run to the treasurer or his successors in office, the latter may nevertheless maintain an action thereon. Granger *v.* Hayden, 17 R. I. 179.

In Texas a statute provides that the district or county attorney shall institute actions to recover statutory penalties in the name of the state for the use and benefit of the county;

hence action is properly brought in the name of the state. Drake *v.* State, (Tex. Civ. App. 1893) 23 S. W. Rep. 398; State *v.* Eggerman, 81 Tex. 569.

Under a statute allowing any person aggrieved by the violations of the bond to sue thereon, one who has lost money gambling in a saloon is not entitled to sue on the bond. No one can make his own misconduct the ground for an action in his favor. Seiffer *v.* McLean, 7 Tex. Civ. App. 158.

Under a similar statute the college of which a student to whom liquor was sold is a member may sue on the bond for the breach. Daniels *v.* Grayson College, 20 Tex. Civ. App. 562.

4. *What Is Not Disqualification.* — Grady *v.* Rogan, 2 Tex. App. Civ. Cas., § 259.

In Texas suits for penalties may be brought in the District Court. State *v.* Eggerman, 81 Tex. 569.

5. *Conviction Not Necessary to Suit on Bond.* — Coggeshall *v.* Pollitt, 15 R. I. 168. See also Granger *v.* Hayden, 17 R. I. 179.

6. *Conviction as Evidence of Breach.* — Welch *v.* McKane, 55 Conn. 25.

7. *Estoppel to Deny Validity of Licenses.* — Schullherr *v.* State, 68 Miss. 227.

*Estoppel to Deny Recital of Bond.* — The sureties on a liquor dealer's bond are estopped to deny its recital that at the time of its execution their principal was carrying on the business of selling liquor. Brockway *v.* Petted, 79 Mich. 620.

And where the bond recites that the principal is an incorporated club, the surety is estopped to deny such incorporation. Lyman *v.* Gramercy Club, (Supm. Ct. App. Div.) 57 N. Y. Supp. 376.

*Estoppel to Deny Validity of Bond.* — Where the obligors do not ask to have the bond amended so as to comply with the statute and permit the principal to obtain privileges by reason of such bond having been given, they are estopped to deny its validity. Lyman *v.* Brucker, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 594.



principal and surety are liable on the bond.<sup>1</sup>

**Extent of Liability.** — The measure of the sureties' liability must be determined by the law under which the license was granted and the bond was given, and the conditions of the bond cannot be broader than the statute.<sup>2</sup>

**Retrial of Original Suit Against Principal.** — In a suit against the sureties on a liquor dealer's bond to recover the amount of a judgment for damages recovered against the principal, the sureties cannot retry the original suit upon the merits.<sup>3</sup>

As to the Surety's Liability under the "Civil Damage Acts," see the title CIVIL DAMAGE ACTS, vol. 6, p. 50.

**26. Town Agent System of License and Sales** — *a. NATURE AND NECESSITY OF APPOINTMENT.* — In a number of the New England states the system prevails of appointing certain persons, usually designated "town agents," to sell or to purchase and sell for the towns in which they receive their appointments intoxicating liquors for certain designated purposes, and they receive as compensation for so doing a percentage of the profits from the sales or a fixed salary, as the statutes may provide.<sup>4</sup> The agent is not a city or town officer.<sup>5</sup>

**No Person Whatever Can Sell Unless Appointed as Agent,**<sup>6</sup> and the appointment is by statute vested in certain officers, such as county or state commissioners for the sale of intoxicating liquors, selectmen of towns, etc.<sup>7</sup> The statutes require the agent to give a bond for the faithful performance of his duties, and he can perform no act until he has done so.<sup>8</sup>

1. *Lyman v. Gramercy Club*, (Supm. Ct. App. Div.) 57 N. Y. Supp. 376.

**Nature and Extent of Liability.** — The liability of the sureties is secondary and that of the principal is primary; and a judgment obtained against the principal in an action by a municipality for a penalty for keeping open on Sunday is available to the sureties in an action on the bond by the municipality under the doctrine of *res judicata*. *Jenkins v. Danville*, 79 Ill. App. 339.

2. **Measure of Sureties' Liability.** — *Crawley v. Com.*, 123 Pa. St. 275.

**Minor Not to "Enter and Remain" on Premises.** — Where one of the conditions of the bond is that the licensee shall not permit any minor to "enter and remain" in his place of business, it is erroneous for the court to instruct that the bond requires that the licensee shall not permit any minor to "enter in" his place of business. *Smith v. Geer*, 10 Tex. Civ. App. 252.

3. *People v. Laning*, 73 Mich. 284.

4. See statutes of *Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont*.

5. **Not a Town Officer.** — *State v. Weeks*, 67 Me. 60; *Plainfield v. Batchelder*, 44 Vt. 9.

Under the statutes of *Vermont* he is an officer of the law. *Plainfield v. Batchelder*, 44 Vt. 9. Under the statutes of *Maine* his situation is not an office at all, but merely an employment which ceases if not renewed at the end of the year. *State v. Weeks*, 67 Me. 60.

**A Town Agent Does Not Hold Over** until his successor is chosen. *State v. Weeks*, 67 Me. 60.

6. **Appointment Necessary.** — *State v. Hall*, 39 Me. 107, in which case it was held that neither a physician nor an apothecary could sell spirituous liquors for mixture with medicinal ingredients by the purchaser, although the purchase was made at the same time with the liquor, unless appointed by the town as agent. See also *State v. Barker*, 3 R. I. 280.

7. See various statutory provisions on this subject.

**When Selectmen Liable for Failure to Make Appointment.** — Selectmen are not liable to the penalty provided by statute for failure to appoint an agent, if they have in due season appointed a person who has declined to serve or has failed to give bond after accepting the appointment, and if there has been no wilful or careless omission to appoint another. *Sears v. Tyler*, 10 Allen (Mass.) 469; *Rowe v. Edmands*, 3 Allen (Mass.) 334.

8. **Necessity of Giving Bond.** — *Foxcroft v. Crooker*, 40 Me. 308; *State v. Shaw*, 32 Me. 570; *Com. v. Pillsbury*, 12 Gray (Mass.) 127; *Rowe v. Edmands*, 3 Allen (Mass.) 334; *Atkins v. Randolph*, 31 Vt. 226.

**Effect of Giving Bond After Issuance of License.** — Where the statute provides that no license shall be granted until the bond is executed and delivered to the treasurer, a license granted before the delivery of the bond is void. Although the bond is given subsequent to the issuance of the license, sales thereunder will nevertheless be illegal. *State v. Shaw*, 32 Me. 570.

**Consequences of Failure to Give Bond** — *Liability of Agent to Criminal Prosecution.* — One who assumes to sell intoxicating liquor as town agent without giving bond will be criminally liable for making illegal sales. *State v. Shaw*, 32 Me. 570; *Com. v. Pillsbury*, 12 Gray (Mass.) 127.

**Nonliability of Town for Purchases by Agent.** — Where an agent who has failed to give bond purchases liquor, the town is not liable for the purchase price. *Atkins v. Randolph*, 31 Vt. 226.

**No Recovery of Price for Liquors Sold by Agent.** — Where an agent sells liquors without giving the statutory bond, the town cannot recover the price for the liquor so sold. And in



**6. POWERS AND DUTIES OF AGENT.**—The agent has no other powers than those authorized by statute, and in the performance of his duties he must keep himself strictly within its provisions. He can make sales only within the city or town appointing him, or he will be criminally liable.<sup>1</sup> If he is authorized by statute to purchase liquors for the town, the purchases must be made in the manner and from the parties designated by statute.<sup>2</sup> If the statute designates the selectmen as the purchasing agents for the town, the town agent cannot bind the town by his purchases of liquors as town agent.<sup>3</sup> The selectmen, however, may make him their special agent for that purpose, or may ratify his unauthorized purchases.<sup>4</sup> He must make no sales except such as are authorized by law,<sup>5</sup> and at the termination of his agency he must account to the town for the liquors remaining on hand and for the proceeds of such as have been sold.<sup>6</sup> The property in the liquors is in the town appointing the agent,<sup>7</sup> and he cannot shield himself from responsibility to pay over the proceeds to the town on the ground that the sales were made in violation of the provisions of the law under which he sold.<sup>8</sup>

**V. MUNICIPAL CONTROL OF LIQUOR TRAFFIC** — 1. In General. — In the absence of statutory authority, municipalities have no power to regulate by ordi-

an action to recover the price for liquors sold by the town agent, the burden is on the town to show by legal evidence that he was the legal agent, and the original bond and certificate or a properly certified record will constitute the legal evidence required. *Foxcroft v. Crooker*, 40 Me. 308.

1. Statutes under Which Appointment Made to Be Strictly Construed. — *State v. Shaw*, 35 N. H. 217.

2. Purchases Must Be Made in Accordance with Statute. — *State v. Intoxicating Liquors*, 68 Me. 187.

Noncompliance with Statute Designating Persons from Whom Liquor Shall Be Purchased. — If, under the statute, the town agent is authorized to purchase liquors only from an agent appointed by the governor to furnish liquors to town agents, the town is not liable for liquors purchased by such agent from others. *Lauten v. Allentown*, 58 N. H. 239. See also *State v. Intoxicating Liquors*, 68 Me. 187.

In *Vermont* it is held to be against public policy that a commissioner under the liquor law should avail himself of his office to sell liquors to the town agent whom he appoints. *Baldwin v. Coburn*, 39 Vt. 441.

Sales to Agent by Unauthorized Person — Right to Recover Price. — A sale of liquors to the selectmen of a town in *Maine* was made in Boston by the plaintiffs, who were not licensed to sell by the laws of Massachusetts. It was held that the plaintiffs could not recover from the town the price of the liquors sold, although the town was, by the statutes of *Maine*, authorized to purchase. *Dudley v. Buckfield*, 51 Me. 254. Compare *Kidder v. Knox*, 48 Me. 551.

Responsibility of Third Persons Selling to Agent. — Where a party may lawfully sell to a town agent, he cannot be held responsible for the uses to which the agent puts the liquor or the intent with which he purchased it. *Street v. Hall*, 29 Vt. 165.

3. Cannot Purchase Where Statute Designates Selectmen. — *Barton v. Pittsford*, 44 Vt. 371; *Erwin v. Richmond*, 42 Vt. 557; *Topsham v. Rogers*, 42 Vt. 189.

Where Agents Give Personal Obligation to Pay

for Liquors. — Where selectmen, in purchasing liquors for their town, acted for the town, the fact that they gave their personal obligation to pay for the liquors does not affect the question of ownership by the town. *Lemington v. Blodgett*, 37 Vt. 210.

4. Town Agent as Agent of Selectmen. — *Topsham v. Rogers*, 42 Vt. 189; *Barton v. Pittsford*, 44 Vt. 371.

5. Sales Must Be Authorized by Law. — *State v. Fisher*, 35 Vt. 584.

Sales for Drinking Unlawful. — Some of the statutes provide that sales may be made only for certain declared purposes, and a sale made for the general purpose of drinking is unlawful. *State v. Keen*, 34 Me. 500; *State v. Parks*, 29 Vt. 70; *State v. Fisher*, 35 Vt. 584.

Sales on Credit. — Where sales on credit by the state agent to town and city agents are prohibited, no action lies for the price of liquors so sold. *Mansfield v. Stoneham*, 15 Gray (Mass.) 149.

A Sale by an Agent of His Own Liquors for His Own Profit is unlawful. *State v. Putnam*, 38 Me. 296.

Evidence. — Evidence of the general reputation of an agent for prudence and caution in the discharge of his duties as agent is inadmissible in a prosecution for liquor selling. *State v. Fisher*, 35 Vt. 584.

But the books of an agent showing other sales to the same party may be introduced against him as tending to show his acquaintance with the party, the frequency of his calls, and the extent of his purchases. *Stanton v. Simpson*, 48 Vt. 628.

6. Duty to Account for Proceeds. — *Washington v. Eames*, 6 Allen (Mass.) 417.

7. Property in Liquors. — *Washington v. Eames*, 6 Allen (Mass.) 417; *State v. Putnam*, 38 Me. 296.

Action Against Town Agent for Proceeds of Sale. — Assumpsit on the general counts lies in favor of the town against its agent to recover money withheld arising from the sales of liquor. The presumption is that such money belongs to the town. *Lemington v. Blodgett*, 37 Vt. 215.

8. *Topsham v. Rogers*, 42 Vt. 189.



nance the sale of intoxicating liquor.<sup>1</sup> It is perfectly competent, however, for the legislature to delegate to a municipality the power to regulate the liquor traffic within its limits, provided there is nothing in the constitution which prohibits it from so doing.<sup>2</sup> It may confer upon municipal corporations the right to deal with the liquor traffic in a manner not provided for in the general law.<sup>3</sup> A statute delegating powers to regulate the liquor traffic is not in violation of a constitutional provision that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits" of the state,<sup>4</sup> or of a constitutional provision which forbids the legislature to pass any local or special laws.<sup>5</sup> The power conferred on a municipality by legislative grant may at any time be revoked by a repeal of the statute conferring it.<sup>6</sup> A municipality cannot exercise the power conferred on it to suppress the liquor traffic, by refusing to accept a liquor bond. The law contemplates some formal action upon the subject, by ordinance, and not otherwise.<sup>7</sup>

**2. Grant to Municipality of Exclusive Power of Control.** — It is competent for the legislature, in the absence of constitutional restrictions, to confer upon a municipality the exclusive control of the traffic in intoxicating liquors within its limits.<sup>8</sup> A municipal charter and by-laws may expressly or by necessary implication supersede the general laws on the subject within the limits of a corporation.<sup>9</sup> But before the intention of conferring this power on municipal corporations can be imputed to the legislature, the language of the statute must be clear to that effect, and susceptible of no other reasonable construction.<sup>10</sup> If the exclusive power to grant licenses is delegated to a municipality no other authority can require or grant licenses<sup>11</sup> or interfere in any manner whatever with the granting of licenses,<sup>12</sup> and the possession of a license granted by a municipality is a complete defense to a prosecution under the general state laws for selling without a license.<sup>13</sup> Where exclusive control of the liquor traffic within its limits is delegated to a municipality a person is not indictable under the general laws of the state for sales of intoxicating liquors made within

**1. Statutory Authority for Exercise of Power Necessary.** — *McFee v. Greenfield*, 62 Ind. 21; *Cowley v. Rushville*, 60 Ind. 327; *Walter v. Columbia City*, 61 Ind. 24. And see *Martinsville v. Frieze*, 33 Ind. 507.

**2. Power of Legislature to Delegate.** — *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Com. v. Fredericks*, 119 Mass. 199; *Sherlock v. Stuart*, 96 Mich. 193; *St. Paul v. Troyer*, 3 Minn. 291; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; *Burckhalter v. McConnellsville*, 20 Ohio St. 308; *State v. Haines*, (Oregon 1899) 58 Pac. Rep. 39; *Moundsville v. Fountain*, 27 W. Va. 186.

**3. Sherlock v. Stuart**, 96 Mich. 193.

**4. Constitutional Provisions Not Violated by Statutes.** — *Const. W. Va.*, art. 6, § 46; *Moundsville v. Fountain*, 27 W. Va. 182.

**5. State v. King**, 37 Iowa 462.

**6. Revocation of Power.** — *Gutzwiller v. People*, 14 Ill. 142.

**7. Hawkins v. Litchfield**, (Mich. 1899) 79 N. W. Rep. 570.

**8. Legislative Power to Delegate Exclusive Control to Municipality.** — *Cunningham v. People*, 1 Colo. App. 155; *Craddock v. State*, 18 Tex. App. 567. See also *State v. Haines*, (Oregon 1899) 58 Pac. Rep. 39.

**9. Craddock v. State**, 18 Tex. App. 567.

In construing the powers of a corporation, whether public or private, the courts must adopt a strict rather than a liberal construc-

tion, and must hold that only such powers and rights can be exercised under charters as are clearly comprehended within the words of the grant or derived therefrom by necessary implication; and cases of ambiguity or doubt arising out of the terms used by the legislature must be resolved against the power. *Flood v. State*, 19 Tex. App. 584.

**10. Legislative Intent Must Be Clearly Apparent.** — *Territory v. Webster*, 5 Dak. 355; *Sloan v. State*, 8 Blackf. (Ind.) 363; *State v. Nolan*, 37 Minn. 16; *Angerhoffer v. State*, 15 Tex. App. 613.

For an illustration of a statute held to confer exclusive control, see *State v. Wheeler*, 27 Minn. 76.

Statutes held not to confer exclusive control may be found in *Territory v. Webster*, 5 Dak. 355; *Sloan v. State*, 8 Blackf. (Ind.) 361; *State v. Young*, 17 Kan. 414; *House v. State*, 41 Miss. 737; *Angerhoffer v. State*, 15 Tex. App. 613; *Flood v. State*, 19 Tex. App. 585; *Ex p. Ginnochio*, 30 Tex. App. 584.

**11. Grant of Exclusive Power to License—Effect.** — *Hetzer v. People*, 4 Colo. 45; *State v. Wheeler*, 27 Minn. 76; *Phillips v. Tecumseh*, 5 Neb. 312.

**12. Coulterville v. Gillen**, 72 Ill. 599.

**13. Municipal License a Defense to Prosecution under General Laws.** — *Hetzer v. People*, 4 Colo. 45; *Coulterville v. Gillen*, 72 Ill. 599; *Bennett v. People*, 30 Ill. 389; *Gardner v. People*, 20 Ill. 431.



the municipal limits.<sup>1</sup> Where exclusive power to license, tax, restrain, prohibit, and suppress tippling houses is granted to a municipality, and it accepts the power and issues licenses thereunder, a person holding a license from the municipality cannot be prosecuted for keeping open on Sunday under a general statute making it an offense to do so; and this is so although the ordinances passed by the municipality in pursuance of this power do not forbid keeping open on Sunday.<sup>2</sup>

**3. Concurrent Powers of Control by State and Municipality.** — It is also well settled that the legislature may enact statutes under which both the state and the municipality may exercise certain powers in controlling the liquor traffic within the limits of the municipality.<sup>3</sup> As illustrative of this principle it may be stated that it is competent for the legislature to confer on the state and on a municipality concurrent jurisdiction to require a license for selling intoxicating liquor within the municipality.<sup>4</sup> In this case a license from the municipality is merely a protection against prosecution under its own ordinances. It is no bar to a prosecution for selling without a license from the state authorities.<sup>5</sup> And the converse of this proposition is equally true: a license from the state affords no protection in a prosecution for selling without a municipal license.<sup>6</sup> Illegal sales of intoxicating liquors punishable under the general law may also be made punishable by ordinance.<sup>7</sup> The legislature may authorize a municipality to impose new additional penalties and punishments for acts already penal by the general laws of the state,<sup>8</sup> and may provide a different punishment from that attached by the general laws.<sup>9</sup>

1. *Com. v. Luck*, 2 B. Mon. (Ky.) 296; *State v. Wheeler*, 27 Minn. 76.

2. *Prosecution under General Law for Keeping Open on Sunday.* — *Huffsmith v. People*, 8 Colo. 175, 54 Am. Rep. 550; *Cunningham v. People*, 1 Colo. App. 155.

The grant of exclusive power and authority to one jurisdiction to restrain, regulate, or prohibit a business as to every day in the week is irreconcilable with the existence of a concurrent power to prohibit the exercise of the same vocation upon a single day in the week. *Huffsmith v. People*, 8 Colo. 175, 54 Am. Rep. 550.

**Enactment of Ordinances Condition Precedent to Grant of License.** — Where the exclusive control of the liquor traffic within its limits is delegated to a municipality, such business can be carried on only under ordinances duly passed by the corporate authorities thereof. Until this is done no application can be made and no other step taken towards the procurement of a license to sell liquors within the limits of such corporation. *State v. Andrews*, 11 Neb. 523.

**3. Concurrent Exercise of Powers.** — See cases cited in subsequent notes in this subdivision.

**4. Power of State and Municipality to Require Separate Licenses.** — *Hetzer v. People*, 4 Colo. 45; *Paton v. People*, 1 Colo. 77; *Ambrose v. State*, 6 Ind. 351; *Sloan v. State*, 8 Blackf. (Ind.) 361; *Wightman v. State*, 10 Ohio 452. See also *supra*, *License Laws* — 6. *c. Licenses Required by Different Jurisdictions*; also *infra*, this section, subdiv. 6. *Power to Require and Grant Licenses*.

**5. Municipal License No Protection for Selling Without State License.** — *Paton v. People*, 1 Colo. 77; *Ambrose v. State*, 6 Ind. 351; *Sloan v. State*, 8 Blackf. (Ind.) 361; *Lutz v. Crawfordsville*, 109 Ind. 466; *Adams v. Stephens*, 7 Ky. L. Rep. 223; *Furman v. Knapp*, 19 Johns.

(N. Y.) 248; *Wightman v. State*, 10 Ohio 452.

**6. State License No Protection for Selling Without Municipal License.** — *Elk Point v. Vaughn*, 1 Dak. 108; *Com. v. Helback*, 101 Ky. 166.

In order that a license granted by a municipality may be a defense to a prosecution under the general laws for selling without a license there must be an exclusive delegation of power to require license from the municipality. *Ambrose v. State*, 6 Ind. 351; *Sloan v. State*, 8 Blackf. (Ind.) 361.

**7. Sales Punishable under General Law May Be Made Punishable under Ordinance.** — *Hill v. Dalton*, 72 Ga. 314; *State v. Harris*, 50 Minn. 128; *State v. Ludwig*, 21 Minn. 202; *State v. Langdon*, 31 Minn. 316; *Bailey v. State*, 30 Neb. 855; *Cohoes v. Moran*, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 385; *Angerhoffer v. State*, 15 Tex. App. 613.

**8. Legislature May Authorize Municipality to Impose Additional Penalties.** — *Wolf v. Lansing*, 53 Mich. 367; *State v. Ludwig*, 21 Minn. 202; *State v. Charles*, 16 Minn. 474; *Brooklyn v. Toynbee*, 31 Barb. (N. Y.) 282; *Cohoes v. Moran*, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 385; *Angerhoffer v. State*, 15 Tex. App. 613.

**9. Hill v. State**, 72 Ga. 314; *State v. Langdon*, 31 Minn. 316; *State v. Lee*, 29 Minn. 451; *State v. Harris*, 50 Minn. 128, in which case it was said that an ordinance may be valid and effectual even though it relates to matters which are made offenses and declared punishable under the general law and though the punishment prescribed in both be not the same; *Bailey v. State*, 30 Neb. 855. And see the title *JEOPARDY*, *post*.

The Enactment of a Liquor-tax Law does not estop the state from empowering municipal corporations further to regulate the local sale of liquor by requiring saloon keepers to take out licenses. *Wolf v. Lansing*, 53 Mich. 367.



4. **Constitutional Limitations on Delegative Power of Legislature.** — Legislatures cannot delegate powers to municipalities in contravention of the organic laws under which they derive their authority.<sup>1</sup>

5. **Constitutional Limitations on Power to Pass Ordinances.** — A municipality can pass no ordinance inconsistent with the constitution of the state or of the United States.<sup>2</sup> And this is of course true whether the constitutional provision relates especially to intoxicating liquors<sup>3</sup> or does not so relate.<sup>4</sup> Thus, if the constitution contains a provision prohibiting the manufacture and sale of intoxicating liquors, a municipality has no right to license such sales.<sup>5</sup> And it has been held that an ordinance which authorizes the closing of a saloon by force without a prior judicial declaration that it is a nuisance and an order for its abatement is unconstitutional.<sup>6</sup>

6. **Power to Require and Grant Licenses** — *a.* **IN GENERAL.** — In the absence of statutory authority therefor contained in the general laws of the state, or in their charters, municipalities have no power to require licenses for the sale of intoxicating liquors within their boundaries, to provide for the imposition of penalties and punishment for selling without license, or to impose conditions on which licenses may be granted and sales made.<sup>7</sup> It is, however, clearly competent for the legislature to delegate this power to municipalities,<sup>8</sup> and the exercise of it is not an abridgment of the privileges and immunities of citizens,<sup>9</sup> in derogation of the common rights of the citizens,<sup>10</sup> or in restraint of trade.<sup>11</sup> It is equally clear that the legislature, after granting this power, may take it away by repealing the statute which confers the power.<sup>12</sup>

*b.* **WHAT STATUTES GIVE POWER.** — Power is given by provisions in the general laws of the state or in municipal charters authorizing municipalities to "restrain and prohibit" the traffic in intoxicating liquors;<sup>13</sup> to "restrain, prohibit, and suppress" tippling houses;<sup>14</sup> to "tax" or "restrain" the sale of

1. *Yazoo City v. State*, 48 Miss. 440; *Bingham v. Camden*, 40 N. J. L. 156.

2. **Ordinances Inconsistent with Constitution Void.** — *Baldwin v. Smith*, 82 Ill. 162; *State v. Topeka*, 30 Kan. 653; *Smith v. Knoxville*, 3 Head (Tenn.) 245. See the title **ORDINANCES**, in this work.

3. *State v. Topeka*, 30 Kan. 653.

4. *Baldwin v. Smith*, 82 Ill. 162.

5. **Constitutional Prohibition Against Manufacture and Sale.** — *State v. Topeka*, 31 Kan. 452; *State v. Leavenworth*, 36 Kan. 314.

**Ordinances Originally Void as Affected by Repeal of Constitutional Prohibition.** — An ordinance making provision for licensing the sale of liquors, adopted under the authority of a charter granted at a time when the constitution prohibited the enactment of license laws, is void, and the subsequent repeal of the constitutional prohibition does not make it valid. *Mt. Pleasant v. Vansice*, 43 Mich. 361, 38 Am. Rep. 193.

**Effect of Removal of Constitutional Prohibition.** — The removal of the constitutional prohibition against licensing the sale of intoxicating liquors does not authorize a municipality to license saloons under a charter granted before the amendment of the constitution. *Dewar v. People*, 40 Mich. 401, 29 Am. Rep. 545.

6. **Ordinances in Violation of "Due Process of Law" Provision.** — *Baldwin v. Smith*, 82 Ill. 162.

7. **Statutory Authorization Necessary.** — See *Martinsville v. Frieze*, 33 Ind. 507; *Steinmetz v. Versailles*, 40 Ind. 249; *Deutschman v. Charlestown*, 40 Ind. 449.

**Statutes Giving Power to Tax.** — A provision in a city charter granting to common councils the right not only to regulate and prohibit the sale of spirituous liquors, but also to fix the amount of the assessment to be paid for license, and directing that it be paid into the city treasury for the use of the city, authorizes the taxing power for revenue purposes. *Flanagan v. Plainfield*, 44 N. J. L. 118.

8. **Delegation of Power by Legislature Proper.** — *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Drew County v. Bennett*, 43 Ark. 364; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Com. v. Fredericks*, 119 Mass. 199; *State v. Dwyer*, 21 Minn. 512; *St. Paul v. Troyer*, 3 Minn. 291; *State v. Haines*, (Oregon 1899) 58 Pac. Rep. 39. See also *Coulterville v. Gillen*, 72 Ill. 599; *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773; *Lawrenceburg v. Wuest*, 16 Ind. 337. And see cases cited in subsequent notes in this section.

9. **No Abridgment of Privileges and Immunities.** — *Tanner v. Alliance*, 29 Fed. Rep. 196; *Matter of Bickerstaff*, 70 Cal. 35.

10. **Not in Derogation of Common Rights of Citizens.** — *Charleston v. Ahrens*, 4 Strobb. L. (S. Car.) 241.

11. **Not in Restraint of Trade.** — *Rochester v. Upman*, 19 Minn. 108.

12. **Repeal of Statute Conferring Power.** — *Gutzweller v. People*, 14 Ill. 142.

13. **Power to Restrain and Prohibit.** — *St. Louis v. Smith*, 2 Mo. 113.

14. **Power to "Restrain, Prohibit, and Suppress."** — *Emporia v. Volmer*, 12 Kan. 622.



liquor;<sup>1</sup> to "license, regulate, and prohibit" the selling or giving away of intoxicating liquors;<sup>2</sup> to "license, regulate, and restrain" the sale of intoxicating liquors;<sup>3</sup> to "license, tax, regulate, and restrain" barrooms and drinking shops;<sup>4</sup> to make by-laws for "the regulating, restraining, and suppressing" of places for the sale of intoxicating liquors at retail;<sup>5</sup> to "regulate or prohibit" and to "impose a tax" on sales;<sup>6</sup> to restrain and regulate tippling houses, and to levy and collect upon them license fees not exceeding a certain amount;<sup>7</sup> or to pass "every by-law or regulation that shall appear to them requisite and necessary for the security, welfare, and convenience of the said city, or for preserving peace, order, and good government within the same."<sup>8</sup> On the other hand, a statute providing that no town "shall charge any person who may obtain a license under the provisions of this act more than the following sums," confers no power to license the sale of liquors.<sup>9</sup> So it has been held that power to license is not conferred under a grant of authority to "regulate," but in the light of the other rulings shown in this section this does not seem to be the proper construction of the term.<sup>10</sup> It has likewise been held that the power to license is not conferred by a charter provision conferring power on the municipality to pass ordinances "for preserving peace and good order" or "for the more effectual suppression of immorality."<sup>11</sup>

C. EXTENT OF POWER DELEGATED. — In delegating this power the legislature may invest a municipality with the exclusive right to license the traffic within its limits, and no license from the state or county authorities will be necessary for the protection of the parties so licensed.<sup>12</sup> Under this grant of power the county authorities have no right to interfere in any manner with the granting of license within the municipality; if the latter sees fit to refuse a license, the county authorities have no power to act in the matter, and a license issued by them is void.<sup>13</sup> So the grant of power may be such that the license which the municipality is authorized to require is in addition to that required by the state.<sup>14</sup> A prosecution for selling liquor without a license required by a city ordinance will not bar a prosecution under a state law for

1. Power to "Tax" or "Restrain." — *Mt. Carmel v. Wabash County*, 50 Ill. 60.

2. Power to "License, Regulate, and Prohibit." — *Dennehy v. Chicago*, 120 Ill. 627; *Miller v. Ammon*, 145 U. S. 421. In this latter case the court followed the construction placed upon the ordinance by the Supreme Court of Illinois. See also *Ammon v. Chicago*, 26 Ill. App. 641.

3. Power to License, Regulate, and Restrain. — *Vinson v. Monticello*, 118 Ind. 103; *Gertz v. Monticello*, 118 Ind. 600.

To Regulate and License Sale of Liquors. — The power to control the sale of liquor within the limits of a municipality is conferred by a statute which authorizes the municipality to regulate and license the sale of liquor. *State v. Haines*, (Oregon 1899) 58 Pac. Rep. 39.

4. Power to "License, Tax, Regulate, and Restrain." — *Matter of Schneider*, 11 Oregon 288.

5. Power of "Regulating, Restraining, and Suppressing." — *Clintonville v. Keeting*, 4 Den. (N. Y.) 341.

6. Power to "Regulate," "Prohibit," or "Impose" a Tax. — *Keokuk v. Dressell*, 47 Iowa 597. In this case the court seemed to consider that the power to license was included in the clause "to prohibit," it having been decided in a former case (*Burlington v. Bumgardner*, 42 Iowa 673) that the power to regulate did not include the power to license.

7. Power to Restrain, Regulate, and Levy License Fee. — *State v. Stevens*, 114 N. Car. 873.

8. To Pass By-laws, etc. — *Heisembrittle v. Charleston*, 2 McMull. L. (S. Car.) 233. See also *Charleston v. Ahrens*, 4 Strobb. L. (S. Car.) 241. Compare *Com. v. Turner*, 1 Cush. (Mass.) 493, in which case it was held that a statute authorizing towns to make all by-laws that may be necessary to preserve the peace, good order, and internal police therein, and to enact suitable penalties, etc., does not authorize the making of a by-law by any town prohibiting the sale therein by any person not duly licensed according to law, of any strong beer, ale, or other intoxicating liquors in less quantities than twenty-eight gallons and that delivered and carried away all at one time.

9. Power to Charge License Fee. — *Walter v. Columbia City*, 61 Ind. 24.

10. Power to "Regulate." — *Burlington v. Bumgardner*, 42 Iowa 673.

11. *Schlachter v. Stokes*, (N. J. 1899) 43 Atl. Rep. 571.

12. Grant of Exclusive Power to License. — *Coulterville v. Gillen*, 72 Ill. 599; *Bennett v. People*, 30 Ill. 389; *State v. Pfeifer*, 26 Minn. 175; *State v. Fleckenstein*, 26 Minn. 177.

13. Effect of Grant. — *Coulterville v. Gillen*, 72 Ill. 599.

14. Grant of Power in Addition to That of State. — *Elk Point v. Vaughn*, 1 Dak. 108.



the same offense.<sup>1</sup>

**7. Power to Impose and Fix Amount of License Fees.**—If the statute delegating to a municipality the power of licensing traffic in liquor within its limits fixes a minimum and maximum fee which a municipality may impose, it must keep strictly within these limits.<sup>2</sup> If the statute is silent as to the right to require a license fee and fix the amount thereof, this power is necessarily implied in the grant of power to license the traffic.<sup>3</sup> There is, of course, this restriction on the power to fix the license fee, namely, that it must not be so large as to amount to a prohibition of the business of selling liquor. The power to license and regulate does not include the power to prohibit.<sup>4</sup> The price which a municipality may require for a license to retail is not limited to the sum fixed by the general law for a license to retail. As one of the incidental powers of a corporation, "the council may certainly transcend that limit, provided their ordinance is not in its nature prohibitory."<sup>5</sup> A grant of power to a municipality to license for police purposes merely must be exercised as a means of regulation only, and cannot be used as a source of revenue.<sup>6</sup> But the municipality, under the authority given to it to license, may impose such a charge as will cover not only the necessary expense of issuing it, but also the additional labor of officers and other expenses imposed by the business.<sup>7</sup> The amount of a license fee or charge is to be considered in determining whether the exaction is not really one of revenue or prohibition instead of one of regulation under the police power.<sup>8</sup> The population of the municipality, the profitable nature of the business, the character of the business which it is proposed to license and its effects upon the community, and the additional expense necessarily entailed by a police supervision of the business are all proper subjects of inquiry in arriving at a legal and just conclusion in fixing a price which will not be prohibitory.<sup>9</sup> The fee imposed will be presumed to be reasonable and within the authority conferred upon the municipality, unless the contrary appears upon the face of the ordinance, or is shown by evidence.<sup>10</sup> Unless the charter or statutory provisions from which

**1. Prosecution for Same Act under Ordinance and State Laws.**—*State v. Stevens*, 114 N. Car. 873.

**2. Under Statutes Fixing Minimum and Maximum Fee.**—*Kniper v. Louisville*, 7 Bush (Ky.) 599; *State v. Chase*, 33 La. Ann. 287. See also *Drew County v. Bennett*, 43 Ark. 366.

**Who May Object to Ordinance for Unreasonableness of Fee.**—The objection that a license under an ordinance is so unreasonable as to amount to a prohibition cannot be raised in a prosecution for selling without license by one who has sold liquor without trying to obtain a license at any price. *Hensoldt v. Petersburg*, 63 Ill. 141.

**3. Under Statutes Merely Conferring Power to License.**—*Ex p. Sikes*, 102 Ala. 173; *In re Stuart*, 61 Cal. 374; *Ex p. Wolters*, 65 Cal. 269; *People v. Blom*, (Mich. 1899) 78 N. W. Rep. 1015; *Portland v. Schmidt*, 13 Oregon 17; *Hadlan v. Olympia*, 2 Wash. Ter. 340.

**4. Imposition of Fees Amounting to Prohibition Not Permissible.**—*Ex p. Sikes*, 102 Ala. 173; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Berry v. Cramer*, 58 N. J. L. 278; *Portland v. Schmidt*, 13 Oregon 17.

**5. Fees Not Limited to Amount Required by General Statutes.**—*Ex p. Burnett*, 30 Ala. 461. See also *Petitfils v. Jeanerette*, 52 La. Ann. 1005; *Hadlan v. Olympia*, 2 Wash. Ter. 340.

**6. Grant of Power for Regulation and Not for Revenue.**—*Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85.

**7. Ottumwa v. Zekind**, 95 Iowa 626, 58 Am. St. Rep. 447. See also *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85.

**8. Van Hook v. Selma**, 70 Ala. 361, 45 Am. Rep. 85; *Atkins v. Phillips*, 26 Fla. 281; *Burlington v. Putnam Ins. Co.*, 31 Iowa 103; *Ottumwa v. Zekind*, 95 Iowa 626, 58 Am. St. Rep. 447; *Van Baalen v. People*, 40 Mich. 258.

**9. Matters to Be Considered in Fixing Fee.**—*Ex p. Sikes*, 102 Ala. 173.

**10. Presumption as to Reasonableness of Fee.**—*Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Matter of Guerrero*, 69 Cal. 88; *Elk Point v. Vaughn*, 1 Dak. 113; *Atkins v. Phillips*, 26 Fla. 281; *Ottumwa v. Zekind*, 95 Iowa 626, 58 Am. St. Rep. 447; *Burlington v. Putnam Ins. Co.*, 31 Iowa 103; *Van Baalen v. People*, 40 Mich. 258; *Portland v. Schmidt*, 13 Oregon 17.

**License Fees Held Not Prohibitory.**—The following license fees have been held not prohibitory or unreasonable: a license fee of fifty dollars for every ninety days, *Ex p. Hurl*, 49 Cal. 557; a license fee of twenty-five dollars a month, *Ex p. Benninger*, 64 Cal. 291; an annual license fee of two hundred dollars, *Ex p. McNally*, 73 Cal. 632; a license fee of fifty dollars a month, *Matter of Guerrero*, 69 Cal. 88; a license fee of five hundred dollars a year, *Elk Point v. Vaughn*, 1 Dak. 108; *Wiley v. Owens*, 39 Ind. 429; a license fee of two hundred dollars a year, it not being shown that the business was unprofitable to those engaged in it, *Ex p. Sikes*, 102 Ala. 173.



the municipality derives its power to impose a tax so requires, the municipality is not bound to levy its license taxes on sales of intoxicating liquors by annual ordinance, but has power to enact a general ordinance of this character to remain in force until repealed in some manner provided by law.<sup>1</sup>

**8. Discrimination in Fees Imposed.**—It is not a valid objection to an ordinance fixing a license fee or to a statute which grants the power to enact it, that the same license fee is not required by all the cities in the state.<sup>2</sup> Nor is an ordinance fixing the fee to be paid for the privilege of selling intoxicating liquors invalid because such fee is larger than that imposed on any other business.<sup>3</sup> Municipalities may tax privileges in whatever proportion they choose, provided the inequality is not such as to be oppressive on a particular class of the community.<sup>4</sup> So an ordinance which merely discriminates between different localities in a city, according to the advantages which they may present for the business for which license is sought, leaving all persons at equal liberty to apply for license in whatever locality they may think proper, and making no distinction between persons but between places only, is open to no objection.<sup>5</sup> On the other hand, an ordinance permitting a certain class of persons (druggists) who have obtained permission under another ordinance to sell liquors in quantities of less than one gallon, for designated purposes, to sell liquor in quantities of more than one gallon, but which prohibits other persons from so doing without being subject to fine, is invalid.<sup>6</sup>

**9. Power to Prohibit Traffic in Intoxicating Liquors.**—It is competent for the legislature, in the absence of constitutional provisions to the contrary, to delegate to municipalities the power to prohibit the traffic in intoxicating liquors; but this power must be clearly expressed in the statutes delegating it.<sup>7</sup> A statute which gives to municipalities the power to "regulate" the traffic in intoxicating liquors does not confer upon it the power to prohibit the traffic absolutely.<sup>8</sup> It is likewise well settled that the power to license does not include the power of absolute prohibition.<sup>9</sup> Nor does a statute

**Power to Appoint Collector.**—The power to impose a license fee and provide for its collection includes the power to appoint a suitable person to collect it. *Matter of Lawrence*, 69 Cal. 611; *People v. Ferguson*, 65 Cal. 288.

**1. Passage of Annual Ordinance Not Necessary.**—*Canova v. Williams*, (Fla. 1899) 27 So. Rep. 30.

**2. Same License Fee in All Cities Not Required.**—*Wiley v. Owens*, 39 Ind. 430.

**3. Imposition of Larger Fees on Liquor Traffic than on Other Business Proper.**—*Ex p. Hurl*, 49 Cal. 558.

**4. Inequality Must Not Be Oppressive on Particular Class.**—*Columbia v. Beasley*, 1 Humph. (Tenn.) 241.

**5. Discrimination Between Different Localities in City.**—*East St. Louis v. Wehrung*, 46 Ill. 394, in which case it was further said: "Such an ordinance would be founded on the self-evident fact that a business may be conducted with much more profit in some streets of a town than in others, and the privilege, therefore, more valuable."

**6. Monmouth v. Popel**, 183 Ill. 634.

**7. Authority of Legislature to Delegate Power.**—*Ex p. Sikes*, 102 Ala. 173; *Harris v. Livingston*, 28 Ala. 579.

**Protection Conferred by County License.**—Where a town or city is vested with power to prohibit sales of liquors, the possession of a license from a county is no defense to a prosecution for selling in violation of a town ordinance. *Meskeu v. Highlands*, 9 Colo. App. 255.

**Power to Prohibit Sale of Non-intoxicating Liquors.**—A city ordinance prohibiting the sale of hop tea and other liquors containing alcohol in insufficient quantities to intoxicate is unauthorized and void. *Fontana v. Grant*, 6 Kan. App. 462.

**8. Power to Prohibit Not Included in Power to Regulate.**—*Ex p. Sikes*, 102 Ala. 173; *Miller v. Jones*, 80 Ala. 89; *Ex p. Reynolds*, 87 Ala. 138; *Ex p. Anniston*, 90 Ala. 516; *Tuck v. Waldron*, 31 Ark. 462; *Mernaugh v. Orlando*, (Fla. 1899) 27 So. Rep. 34; *Sweet v. Wabash*, 41 Ind. 8; *Loeb v. Attica*, 82 Ind. 175, 42 Am. Rep. 494; *Bennett v. Pulaski*, (Tenn. Ch. 1899) 52 S. W. Rep. 913; *Logan City v. Buck*, 3 Utah 307.

**An Ordinance "Regulating the Use and Sale of Intoxicating Liquors,"** but in fact entirely prohibitory, is invalid for want of compliance with the law requiring that the subject of an ordinance shall be clearly expressed in its title. *Cantril v. Sainer*, 59 Iowa 26.

**The Power to Regulate, However, Includes the Power of Partial Prohibition**—to encumber the sale with conditions and limitations, to hinder and prevent in degree, and to prescribe reasonable rules. *Provo City v. Shurtliff*, 4 Utah 17. Compare *Bennett v. Pulaski*, (Tenn. Ch. 1899) 52 S. W. Rep. 913.

**9. Power to Prohibit Not Included in Power to License.**—*Miller v. Jones*, 80 Ala. 89; *Ex p. Reynolds*, 87 Ala. 138; *Ex p. Sikes*, 102 Ala. 173; *Ex p. Anniston*, 90 Ala. 516; *Tuck v. Waldron*, 31 Ark. 462; *Hill v. Decatur*, 22 Ga.



authorizing a municipality "to provide by ordinance against the evils resulting from the sale of intoxicating liquors" therein confer the power of absolute prohibition.<sup>1</sup> Authority to "restrain" has been held to include the power to prohibit,<sup>2</sup> and under special clauses the same power has been recognized.<sup>3</sup>

**10. Power to Prohibit Keeping Liquors for Unlawful Sale.** — Where there is no general statute making it an offense to keep liquors for illegal sale, a municipality, by virtue of charter provisions which authorize it to "regulate the police of the city and to pass and enforce all necessary police ordinances" and "to do all acts [and] make all regulations which may be necessary or expedient for the promotion of health, morals, or temperance of the residents of the city," may pass an ordinance prohibiting any one from keeping within the limits of the city any intoxicating liquors for the purpose of illegal sale;<sup>4</sup> and this power may be exercised by municipalities wherein the sale of liquor is lawful under license, as well as by those within the limits of which the sale is entirely prohibited.<sup>5</sup>

**11. Power to Revoke Licenses.** — Where power is conferred on a city to prohibit entirely the sale of intoxicating liquors, or to regulate and license such sale, at discretion, the city may impose as a condition that a license granted shall be subject to revocation on the violation of any of the ordinances regulating the traffic.<sup>6</sup>

**12. Power to Make Purchase of Liquor Punishable.** — A charter provision of a municipality which authorizes its mayor and aldermen to "pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort, and security of the city and the citizens thereof not inconsistent with the constitution and laws" of the state and the United States, does not authorize the passage of an ordinance making it penal for one who has lawfully purchased alcoholic liquors within the limits of the municipality to receive such liquors therein without paying a specific tax of a given amount for the privilege of so doing.<sup>7</sup>

**13. Ordinances Prohibiting Sales on Sundays and Election Days.** — The power of the legislature to pass laws prohibiting the pursuit of any secular employ-

203; *Sweet v. Wabash*, 41 Ind. 8; *Rossell v. Garon*, 50 N. J. L. 358; *Portland v. Schmidt*, 13 Oregon 17.

The Imposition of a Fee Amounting to Prohibition is not justified under the power to license. *Portland v. Schmidt*, 13 Oregon 17.

1. *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90.

To Provide for "Good Order, Decency, and Decorum." — Authority to provide for the "preservation of good order, decency, and decorum" within a town, where the town was in a prohibition county, has been held to include power to prohibit. *Fortner v. Duncan*, 91 Ky. 171.

2. Authority to Restrain Includes Authority to Prohibit. — *Smith v. Warrior*, 99 Ala. 481. Compare *Emporia v. Volmer*, 12 Kan. 622.

But the power to "regulate and restrain" has been held not to confer power to prohibit. *Mernaugh v. Orlando*, (Fla. 1899) 27 So. Rep. 34.

3. Authority to "License, Prohibit, or Regulate" carries, of course, full power to deal with the liquor traffic in any way, *Gunnarsson v. Sterling*, 92 Ill. 569; as by prohibiting sales in any part of a town and providing for licenses in another part, so long as the discrimination is not arbitrary or unreasonable, *People v. Cregier*, 138 Ill. 401.

A charter conferring on the municipality authority "to prevent the selling of spirituous,

vinous, or malt liquors, \* \* \* whenever they may deem it expedient," carries full power to prohibit the selling at retail or wholesale of such liquors. The construction of this clause is not affected by the fact that it follows in the same sentence clauses giving to the municipality authority to regulate retail trade and close up retail establishments for a temporary period only. *Ex p. Florence*, 78 Ala. 419.

4. *Papworth v. Fitzgerald*, 106 Ga. 378. To the same effect see *Paulk v. Sycamore*, 104 Ga. 728; *Cunningham v. Griffin*, 107 Ga. 690.

5. *Paulk v. Sycamore*, 104 Ga. 728.

6. Power of Municipality to Revoke Licenses. — *Schwuchow v. Chicago*, 68 Ill. 441. See also *Sprayberry v. Atlanta*, 87 Ga. 120, in which case it was held that the power of revocation was conferred by a statute giving to municipalities full power and authority to regulate the retailing of ardent spirits and at their discretion to issue licenses to retail or to withhold them.

A proviso in a statute granting power to license, etc., that no license shall be granted for a shorter term than one year, does not deprive the supervisors of the right to revoke a license before the expiration of the year for which it was granted. *State v. Dwyer*, 21 Minn. 512.

7. *Henderson v. Heyward*, (Ga. 1899) 34 S. E. Rep. 590.



ment on Sunday is undoubted; <sup>1</sup> and it is well settled that the legislature may confer on municipalities the power to pass ordinances prohibiting sales of intoxicating liquors on Sunday. <sup>2</sup> It is likewise competent for the legislature to delegate to municipalities the power of prohibiting sales on election days. <sup>3</sup>

**14. Ordinances Requiring Closing of Saloons on Certain Days and During Certain Hours.** — The legislature may delegate to municipal corporations the power to require that places for the sale of intoxicating liquors shall be closed on Sundays and election days, and during certain hours of the day. <sup>4</sup> The construction of various enactments with reference to the existence of such a power is pointed out in the note. <sup>5</sup>

**Ordinance Must Be Reasonable.** — To be legitimate the prohibition must be so restricted as not to interfere unreasonably or oppressively with the rights conferred by the state. <sup>6</sup>

**1. Legislative Power to Prohibit Secular Employment on Sunday.** — *Karwisch v. Atlanta*, 44 Ga. 204; *Piqua v. Zimmerlin*, 35 Ohio St. 510; *Gabel v. Houston*, 29 Tex. 347.

**Sunday Law Constitutional.** — There is nothing in the constitution of the United States or of the several states to prevent the legislature from forbidding the pursuit of worldly business on Sunday. *Gabel v. Houston*, 29 Tex. 347.

**2. Delegation of Power to Municipality Proper.** — *State v. Ludwig*, 21 Minn. 202; *Nashville v. Linck*, 12 Lea (Tenn.) 499.

**3. Delegation of Power to Prohibit Sales on Election Days.** — *State v. Ludwig*, 26 Minn. 202.

**Provisions Held to Delegate Power.** — The power to prohibit sales on Sundays and election days is authorized by a legislative grant of power to a municipality to "grant licenses and regulate" the liquor traffic. *State v. Ludwig*, 21 Minn. 202.

So power to "license, tax, and regulate," *Nashville v. Linck*, 12 Lea (Tenn.) 499; to pass such by-laws and ordinances, with adequate penalties, as the mayor and council shall, from time to time, deem expedient for the government of the municipality, not contrary to the constitution of the state or of the United States, *Megowan v. Com.*, 2 Met. (Ky.) 7 (see also *Minden v. Silverstein*, 36 La. Ann. 912); and to restrain traffic and provide for the good order of the city, *Portland v. Schmidt*, 13 Oregon 17, authorize the prohibition of sales of liquor at designated times.

The power of regulation extends not only to the act of the person licensed, but to the times when and the places where such sales are made. *State v. Ludwig*, 21 Minn. 202.

**4. Ordinance Requiring Closing of Saloons.** — *State v. Welch*, 36 Conn. 216; *Hood v. Von Glahn*, 88 Ga. 405; *State v. Harris*, 50 Minn. 128.

For an ordinance on Sunday closing held valid as against the objection that it was fatally vague and uncertain, see *Ex p. Peacock*, 25 Fla. 479.

**5. Laws Held to Delegate Power to Require Closing on Sunday** — *Power to "Regulate."* — *Piqua v. Zimmerlin*, 35 Ohio St. 507; *Gabel v. Houston*, 29 Tex. 335. See also *Decker v. Sargeant*, 125 Ind. 404; *Davis v. Fasig*, 128 Ind. 271.

*Power to "License and Regulate."* — *State v. Ludwig*, 21 Minn. 202.

*Power to "License, Regulate, and Restrain."* — *Schwuchow v. Chicago*, 68 Ill. 444.

*Power to Pass Ordinances in Relation to Keeping Open Tippling Shops on Sunday.* — *Hood v. Von Glahn*, 88 Ga. 405.

*Power to Pass Ordinances for Peace and Good Order.* — *Staats v. Washington*, 45 N. J. L. 318.

*Power to Pass Ordinances for Security and Welfare of City.* — *Morris v. Rome*, 10 Ga. 532.

**6. Ordinance Must Be Reasonable.** — *Ward v. Greeneville*, 8 Baxt. (Tenn.) 230, 35 Am. Rep. 700; *Bennett v. Pulaski*, (Tenn. Ch. 1899) 52 S. W. Rep. 913.

**Ordinances Held Reasonable.** — An ordinance requiring the closing of saloons at nine o'clock P. M. and prohibiting all sales of liquor after that hour. *Smith v. Knoxville*, 3 Head (Tenn.) 245.

An ordinance prohibiting sales after ten o'clock at night and before four o'clock in the morning. *Staats v. Washington*, 45 N. J. L. 318; *Bennett v. Pulaski*, (Tenn. Ch. 1899) 52 S. W. Rep. 913.

An ordinance requiring that all places for the sale of intoxicating liquors shall be closed between eleven o'clock P. M. and five o'clock A. M. *Decker v. Sargeant*, 125 Ind. 404; *Davis v. Fasig*, 128 Ind. 271.

**Ordinances Held Unreasonable.** — On the other hand, an ordinance forbidding licensed retailers of spirituous liquors to sell between the hours of six o'clock P. M. and six o'clock A. M. is invalid as being an unreasonable exercise of the power. A prohibition which deprives a party of several hours of daylight in which he is forbidden to exercise the right conferred by the state is unreasonable and oppressive. *Ward v. Greeneville*, 8 Baxt. (Tenn.) 228, 35 Am. Rep. 700.

So also an ordinance requiring all retailers to close doors and forbear to sell at all times when "any denomination of Christian people" is holding divine services anywhere in the town is unreasonable and invalid. *Gilham v. Wells*, 64 Ga. 192. And so is an ordinance which prohibits saloon keepers from putting screens on their windows to obstruct a view into their premises between ten o'clock in the evening and four o'clock in the morning. *Bennett v. Pulaski*, (Tenn. Ch. 1899) 52 S. W. Rep. 913.

A statute authorizing towns "to make such by-laws, rules, and regulations for the better government of the town as they may deem necessary," does not empower the town to pass an ordinance making it "unlawful for any barkeeper, clerk, or agent, or any person whatsoever, to keep open, or be or remain in,



**15. Ordinances Prohibiting Sales in Particular Localities.** — The power to enact an ordinance prohibiting sales of intoxicating liquors in residence portions of a city may be delegated by a statute expressly so providing.<sup>1</sup> Such authority may, moreover, be delegated by a statute conferring power to "grant" licenses,<sup>2</sup> and it may be included in other delegated powers.<sup>3</sup>

**16. Ordinances Prohibiting Employment of Women in Saloons.** — An ordinance prohibiting the employment of women in saloons is authorized by a statute conferring on municipalities power to regulate such places.<sup>4</sup>

**17. Ordinances Prohibiting Sales to Drunkards.** — Under a charter provision empowering a municipality to prevent and restrain drunkenness, the council has authority to pass an ordinance prohibiting sales or gifts of intoxicating liquor to habitual drunkards.<sup>5</sup>

**18. Ordinances Requiring Consent of Adjacent Property Owners.** — Under a delegated power to grant licenses a municipality may enact an ordinance requiring the applicant to produce the written recommendation of a certain number of his nearest neighbors before receiving a license.<sup>6</sup>

**19. Ordinances Requiring Bond.** — Under the delegated power to "license, tax, regulate, and restrain," a municipality may require as a condition of granting a license a bond to comply with the provisions of the ordinance under which it is issued.<sup>7</sup>

**20. Extraterritorial Effect of Ordinances.** — A municipality cannot give extra-territorial effect to its ordinances except so far as it may be fairly authorized by statute to do so.<sup>8</sup> Authority to exact payment of a license fee from any one selling intoxicating liquors within one mile of a town is valid as a police regulation, but it seems would be unconstitutional if a tax for purposes of

a barroom or other place where spirituous or intoxicating liquors are sold, between the hours of ten o'clock P. M. and four o'clock A. M." *State v. Thomas*, 118 N. Car. 1221.

**1. Statutes Delegating Power in Express Terms.** — *Shea v. Muncie*, 148 Ind. 14.

**Residence Portion of City.** — A portion of a city used mostly for residence purposes cannot be considered a business portion of the city, within the meaning of an ordinance permitting sales of intoxicating liquors within the business portion, because a few grocery shops are maintained therein. So the use of a dwelling house in part by boarders does not make the house a "business" house within the meaning of such ordinance. *Shea v. Muncie*, 148 Ind. 14.

**A Discrimination in the Places** which may or may not be licensed does not create a monopoly in the business of selling liquors. *People v. Cregier*, 138 Ill. 401.

**2. Under Statutes Delegating Power to "Grant" Licenses.** — *Swift v. People*, 63 Ill. App. 453.

**3. Statutes Delegating Power to Prohibit Sales in Particular Localities.** — Such power exists under statutes delegating power to "license, regulate, prohibit, or suppress." *Valverde v. Shattuck*, 19 Colo. 104. See also *People v. Cregier*, 138 Ill. 401; *In re Wilson*, 32 Minn. 145; *State v. Kantler*, 33 Minn. 69.

**Under a Delegation of Power to Regulate the Matter of Granting Licenses**, an ordinance may be enacted prohibiting the grant of licenses for places notorious as resorts for lewd, disreputable, and vicious persons, and as being conducted in a disorderly manner and requiring constant police surveillance. *State v. Cheyenne*, 7 Wyo. 417.

**4. Statutes Authorizing Municipalities to "Regulate."** — *Bergman v. Cleveland*, 39 Ohio St. 651. See also *Ex p. Hayes*, 98 Cal. 555.

**Ordinance Forbidding Chairs in Saloons.** — An ordinance providing for the regulation and licensing of saloons, which prohibits the placing of chairs or seats in saloons and provides a penalty for a violation thereof, is reasonable and valid. *Brown v. Lutz*, 36 Neb. 527.

**5. Prohibiting Sales to Drunkards.** — *Woods v. Prineville*, 19 Oregon 108.

**6. Consent of Adjacent Property Owners.** — *Whitten v. Covington*, 43 Ga. 421.

An ordinance making the issuance of a license depend upon the approval of a designated number of adjacent property owners is not in violation of the Federal Constitution as making the issuance of a license dependent upon the arbitrary will and pleasure of others. *Ex p. Christensen*, 85 Cal. 208; *Ex p. Holmquist*, (Cal. 1891) 27 Pac. Rep. 1099.

**7. Under Power to "License, Tax, Regulate, and Restrain."** — *Matter of Schneider*, 11 Oregon 288.

**To "Prevent," Except So Far as Licensed.** — A bond of this nature may be required under a charter provision authorizing the municipality to "prevent" the carrying on of a business except so far as licensed. *Kitson v. Ann Arbor*, 26 Mich. 325.

**Mandamus Will Not Lie to Compel Acceptance of a Bond** by a municipal board which objects to it on the ground that one of the sureties is not financially responsible, where it is not shown that the board has acted arbitrarily or in bad faith. *Divine v. Lakeview*, (Mich. 1899) 80 N. W. Rep. 109.

**8. Extraterritorial Effect.** — *Strauss v. Pontiac*, 40 Ill. 301.



municipal revenue only.<sup>1</sup> So the legislature may confer on municipalities the power to regulate all places for the sale of intoxicating liquors within two miles of its limits and to require licenses from the keepers of such places, as well those who have licenses from the state or county as those who have not.<sup>2</sup>

21. **Ordinances Good in Part and Bad in Part.** — An ordinance may be invalid so far as it exceeds the authority conferred upon the common council, and good for what is within its authority, where the excess of the act of the council is separable from what it has authority to do.<sup>3</sup>

22. **Delegation of Power by Municipal Corporation.** — Where a statute vests in a municipal corporation power to regulate or prohibit the traffic in intoxicating liquors, this is done with the intention that such power shall be exercised by the municipal corporation itself and in the mode prescribed. This power cannot be delegated to others or to any individual.<sup>4</sup> It is a legislative act which the municipality itself must perform, and can be exercised only by ordinance enacted in the manner prescribed in the charter.<sup>5</sup>

23. **Repeal of Ordinances.** — A general statute on the subject of licensing the sale of intoxicating liquors repeals by implication the existing provisions of municipal charters embracing the same matters, except in particulars expressly excepted by the statute.<sup>6</sup>

The Repeal, Pending a Prosecution Thereunder, of an Ordinance prescribing a penalty for its violation puts an end to all proceedings under it unless saved by a clause in the repealing ordinance;<sup>7</sup> and an improper conviction under an ordinance repealed by a general statute is no bar to a prosecution under such statute for the same act.<sup>8</sup>

**VI. INTERSTATE AND FOREIGN TRAFFIC IN INTOXICATING LIQUORS AS AFFECTED BY STATE LIQUOR LAWS** — 1. **Importations of Intoxicating Liquors from Foreign Countries** — *a.* **WHO MAY SELL IN ORIGINAL PACKAGES.** — As regards the sale of intoxicating liquors imported from foreign countries the decisions all agree that the importer has the right to sell them in any state in the original packages<sup>9</sup> in which they were received, regardless of state statutes imposing taxes on or requiring licenses from those engaged in selling intoxicating liquors or of statutes otherwise restricting or prohibiting the sale of intoxicating liquors.<sup>10</sup>

1. *Falmouth v. Watson*, 5 Bush (Ky.) 660.

2. *Lutz v. Crawfordsville*, 109 Ind. 466.

3. **Enforceability of Ordinance Valid in Part.** — *Ex p. Cowert*, 92 Ala. 94; *Ex p. Stephen*, 114 Cal. 278; *Elk Point v. Vaughn*, 1 Dak. 108; *Harbaugh v. Monmouth*, 74 Ill. 367; *Wagner v. Garrett*, 118 Ind. 115; *Cantril v. Sainer*, 59 Iowa 26; *Eldorado v. Burlingame*, 62 Iowa 32; *State v. Priester*, 43 Minn. 373; *McCrea v. Washington*, 18 Cinc. L. Bul. 66, 10 Ohio Dec. (Reprint) 29. See also the title ORDINANCES.

4. **Power to Regulate or Prohibit Cannot Be Delegated.** — *Kinmundy v. Mahan*, 72 Ill. 462; *East St. Louis v. Wehrung*, 50 Ill. 28; *State v. Kantler*, 33 Minn. 69; *In re Wilson*, 32 Minn. 145; *Riley v. Trenton*, 51 N. J. L. 498.

**Power Cannot Be in Part Delegated to Mayor.** — *St. Louis v. Wehrung*, 50 Ill. 28; *State v. Kantler*, 33 Minn. 69.

5. **Power of Legislative Act to Be Performed by Municipality.** — *In re Wilson*, 32 Minn. 148, holding, however, that executive and ministerial acts, such as approving the bond, receiving the license fee, and issuing the license, may be delegated to designated officers.

6. **Repeal by Implication.** — *Platteville v. McKernan*, 54 Wis. 487. See also *Ex p. Joffe*, 46 Mo. App. 360.

**Repeal by Express Provision of Statute.** — *Gutzwiller v. People*, 14 Ill. 142.

**Repeal by Adoption of Local Option Law.** — *Turner v. Forsyth*, 78 Ga. 683.

7. **Effect of Repeal Pending Prosecution.** — *Naylor v. Galesburg*, 56 Ill. 285.

8. **Right to Prosecute under Repealing Law.** — *People v. Furman*, 85 Mich. 110.

9. **For a Complete Discussion of the "Original Package"** Cases see the title INTERSTATE COMMERCE, *ante*, p. 34.

10. **Right of Importer to Sell in Original Packages** — *Alabama.* — *Hinson v. Lott*, 40 Ala. 123. *Delaware.* — *State v. Allmond*, 2 Houst (Del.) 612.

*Maine.* — *State v. Robinson*, 49 Me. 285.

*Maryland.* — *Bode v. State*, 7 Gill (Md.) 329.

*Massachusetts.* — *Bradford v. Stevens*, 10 Gray (Mass.) 379; *Richards v. Woodward*, 113 Mass. 285; *Com. v. Holbrook*, 10 Allen (Mass.) 201; *Com. v. Kimball*, 24 Pick. (Mass.) 359, 35 Am. Dec. 326.

*New Hampshire.* — *Carlton v. Bailey*, 27 N. H. 230; *State v. Fuller*, 33 N. H. 250.

*New York.* — *People v. Quant*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 410; *Wynhamer v. People*, 20 Barb. (N. Y.) 567.

*Rhode Island.* — *State v. Amery*, 12 R. I. 64; *State v. Peckham*, 3 R. I. 296; *McGuinness v. Bligh*, 11 R. I. 94.

*South Carolina.* — *Charleston v. Ahrens*, 4 Strobb. L. (S. Car.) 241.



It is equally well settled, however, that this right to sell is restricted to the importer himself or to an agent acting in his behalf. When the commodity has passed from the importer's hands into the hands of a purchaser it has then lost its distinctive character as an import and has become subject to the laws of the state.<sup>1</sup>

*b. SALES IN ORIGINAL PACKAGES ONLY PERMISSIBLE.* — So it is also settled that the importer himself can sell only in the original package. When the original package has been broken up for use or for retail by the importer the thing imported becomes a component part of the general mass of property in the state and subject to its laws.<sup>2</sup>

*c. EFFECT OF WILSON LAW ON IMPORTATIONS FROM FOREIGN COUNTRIES.* — Under the provisions of the Wilson Law enacted by Congress in 1890, and which is discussed in a subsequent section as affecting interstate commerce, it is probable, although the question has not yet been decided, that an original package of intoxicating liquor imported from a foreign country is subject to all the laws of the state into which it is imported regulating or prohibiting the traffic in that commodity.<sup>3</sup>

**2. Importations of Intoxicating Liquors from Another State** — *a. RULE ESTABLISHED BY "LICENSE CASES."* — In the "license cases" decided in 1847, the validity of statutes prohibiting sales of intoxicating liquors without license, as applied to sales in the original packages of intoxicating liquor by one importing them from a sister state, was upheld, and the statutes were declared to be constitutional in the absence of any conflicting federal legislation.<sup>4</sup> The

*Vermont.* — *Jones v. Hard*, 32 Vt. 481.

**Keeping Intoxicating Liquor in Original Packages with Intention to Sell Unlawfully.** — The doctrine stated in the text seems to have been unduly limited in *State v. Intoxicating Liquors*, 65 Me. 556. In this case it was held that imported foreign liquors are liable to seizure and forfeiture while the importer retains possession thereof in original packages but for the purpose and with the intent to break them and sell the liquors in quantities less than a package. The court said: "A sale in the original package only being authorized by the federal statute, the breaking and selling in a less quantity is without that authority and is within the prohibition of the state law; and a fixed intent that the package shall be broken and sold must place the liquors in the same category." (Practically the same doctrine was announced in *Knowlton v. Doherty*, 87 Me. 518, 47 Am. St. Rep. 349.) As it is a fundamental principle that merchandise in the hands of the importer in the original package is protected by the constitutional provision mentioned in the text, it is impossible to see on what valid ground these decisions can be based.

**Knowledge of Intent to Resell Unlawfully.** — A state statute permitting an importer to sell in the original package intoxicating liquor imported by him legalizes such sale although he knows that the purchaser intends to resell and will resell the liquor in violation of the statute. *Richards v. Woodward*, 113 Mass. 285.

So it has been held that a state statute which authorizes a recovery of all payments made for liquors sold in violation of the state liquor laws is in violation of the interstate commerce clause so far as it affects a sale of liquor in another state to a resident in that state in order to enable the purchaser to violate the liquor laws of that state, and that the purchaser can-

not recover the price paid therefor. *Wind v. Iler*, 93 Iowa 316.

**Burden of Proving that Liquors Are Imported.** — In some states it is held that if a person claims the right to sell intoxicating liquors on the ground that he has imported them, the burden is on him to show that he was the importer. *State v. Robinson*, 49 Me. 285; *Carlton v. Bailey*, 27 N. H. 230.

**1. Right to Sell in Original Package Restricted to Importer.** — *Hinson v. Lott*, 40 Ala. 123; *State v. Allmond*, 2 Houst. (Del.) 612; *King v. McEvoy*, 4 Allen (Mass.) 110; *People v. Quant*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 410; *Wynhamer v. People*, 20 Barb. (N. Y.) 567; *State v. Peckham*, 3 R. I. 296; *Jones v. Hard*, 32 Vt. 481.

**Taxing Sales at Auction of Imported Liquors.** — A state statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales is, when applied to imported liquors in the original package sold by him for the importer, void as laying a duty on imports and being a regulation of commerce. *Cook v. Pennsylvania*, 97 U. S. 566.

**Who Is Not an Importer.** — One who receives from an importer and duly forecloses a mortgage of a cask of intoxicating liquors which is in the United States warehouse in bond, and pays the duties and receives the cask of liquors, does not thereby become the importer thereof. *King v. McEvoy*, 4 Allen (Mass.) 110.

**2. Right of Importer Restricted to Sale in Original Package.** — *Hinson v. Lott*, 40 Ala. 123; *State v. Allmond*, 2 Houst. (Del.) 612; *State v. Robinson*, 49 Me. 285; *People v. Quant*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 410. See also the title INTERSTATE COMMERCE, *ante*, p. 34.

**3. See *infra*, this section, *Wilson Act*.**

**4. Doctrine of License Cases.** — *Pierce v. New*  
Volume XVII.



doctrine of the License Cases was applied in numerous decisions by the state courts, which held that liquors imported from one state into another were, for the purposes of sale, whether in the original packages or not, subject to all the laws of the state into which they were imported prescribing the terms upon which intoxicating liquors might be sold, it being considered that the police or taxing power of the state thus exercised did not infringe on the power delegated to Congress to regulate commerce between the states.<sup>1</sup>

**b. RULE IN "ORIGINAL PACKAGE CASES."**—In 1890 the United States Supreme Court decided that a state statute prohibiting the sale of intoxicating liquors except for designated purposes and under a license is, as applied to a sale by the importer in the original packages of liquors manufactured and brought in from another state, in violation of the interstate commerce clause,<sup>2</sup> and *Pierce v. New Hampshire*<sup>3</sup> was directly overruled. At the same time another decision was handed down in which it was held that a statute imposing a tax on the manufacture and selling at wholesale of intoxicating liquors is, so far as it affects a manufacturer of another state selling in the original packages in the state, in violation of the interstate commerce clause.<sup>4</sup> The principles enunciated by these decisions were necessarily though somewhat reluctantly adopted and applied by the state courts. The general rule formulated by these decisions and those just mentioned may be briefly stated as follows: An importer of intoxicating liquors into any state from any other state or country can by himself or agent sell such liquors so long as they remain in the unbroken packages in which they existed during their transportation, without regard to the laws of the state into which such liquors are imported, and without regard to the size of the packages.<sup>5</sup> In other words,

Hampshire, reported with other cases in the License Cases, 5 How. (U. S.) 504. See also *Hinson v. Lott*, 8 Wall. (U. S.) 148.

**1. Rule in License Cases Adopted by State Courts**—*Alabama*.—*Hinson v. Lott*, 40 Ala. 123.

*Iowa*.—*Collins v. Hills*, 77 Iowa 181; *Leisy v. Hardin*, 78 Iowa 286, subsequently reversed in 135 U. S. 100; *State v. Zimmerman*, 78 Iowa 615; *State v. Bowman*, 79 Iowa 566; *Grousen-dorf v. Howat*, 77 Iowa 187.

*Kansas*.—*State v. Fulker*, 43 Kan. 237.

*Michigan*.—*People v. Lyng*, 74 Mich. 579, subsequently reversed in 135 U. S. 161.

*New Hampshire*.—*Dunbar v. Locke*, 62 N. H. 442, overruled by subsequent New Hampshire decisions after the decision of *Leisy v. Hardin*, 135 U. S. 100.

*Rhode Island*.—*State v. Fitzpatrick*, 16 R. I. 54.

**Decisions Tending in Opposite Direction.**—In 1887 it was held that a statute forbidding common carriers to bring intoxicating liquor into the state from another state or territory, without first being furnished with a certificate under the seal of the auditor of the county into which the liquor was to be transported, certifying that the consignee was authorized to sell intoxicating liquors in the county, was in violation of the interstate commerce clause. *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465. In this case it was also intimated that the right of transportation of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages, but as the determination of this question was unnecessary to the decision of the case it was left open. See also the dictum of Marshall, C. J., in *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

**2. Original Package Decision.**—*Leisy v. Hardin*, 135 U. S. 100, reversing 78 Iowa 286.

**3. Pierce v. New Hampshire**, one of the License Tax Cases, 4 How. (U. S.) 504.

Since the License Tax Cases the doctrine has been established by the United States Supreme Court that the failure of Congress to legislate upon a question of interstate commerce is equivalent to the declaration that interstate commerce shall be free and untrammelled. *Welton v. Missouri*, 91 U. S. 275. See further upon this point the title INTERSTATE COMMERCE, ante, p. 34.

**4. Lyng v. Michigan**, 135 U. S. 161, reversing *People v. Lyng*, 74 Mich. 579.

**5. Adoption of Rule in Leisy v. Hardin by State Courts.**—*Keith v. State*, 91 Ala. 2; *Harrison v. State*, 91 Ala. 62; *Smith v. State*, 54 Ark. 248; *State v. Pfeleajor*, 81 Iowa 759; *State v. Coonan*, 82 Iowa 400; *State v. Corrick*, 82 Iowa 451; *State v. Winters*, 44 Kan. 723; *Com. v. Gagne*, 153 Mass. 205; *Carstair v. O'Donnell*, 154 Mass. 357; *Durkee v. Moses*, 67 N. H. 115 [overruling *Dunbar v. Locke*, 62 N. H. 442]; *Jones v. Surprise*, 64 N. H. 243; *Doherty v. Cotter*, 68 N. H. 37; *Jones v. Sanborn*, 68 N. H. 602; *Vearteau v. Bacon*, 65 Vt. 516.

**Limitation of Rule in Leisy v. Hardin by Pennsylvania Supreme Court.**—In two Pennsylvania decisions, *Com. v. Zelt*, 138 Pa. St. 615, and *Com. v. Silverman*, 138 Pa. St. 642, it was held that a state statute making it a punishable offense to sell intoxicating liquors to minors and persons of known intemperate habits applies to sales by the importer in the original packages. In these cases the court noticed and commented on the case of *Leisy v. Hardin*, 135 U. S. 100, but said that this holding was not in conflict with the doctrine of



the goods received for interstate commerce remain under the shelter of the interstate commerce clause of the Federal Constitution unless by a sale in the original packages they have been commingled with the general mass of property of the state or unless the original packages have been broken by the importer.<sup>1</sup>

*c. WILSON ACT — (1) Provisions and Purpose of Enactment.* — The establishment of the doctrine of the "original package cases" was followed almost immediately by the passage of the so-called Wilson bill, which provides that "All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, \* \* \* and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."<sup>2</sup>

*Object of Statute.* — The purpose of Congress in adopting this statute was declared by the United States Supreme Court to have been to allow state laws to operate on liquor shipped from one state into another so as to prevent the sale of original packages in violation of the state laws.<sup>3</sup>

(2) *Constitutionality.* — Naturally enough the constitutionality of this law was at once assailed. It was objected that the provision was unconstitutional and void for the reason that it assumed to confer upon the states the power to regulate interstate commerce. This objection was considered untenable, and the courts held that it was not a delegation but an exercise of the power of Congress to regulate commerce between the states.<sup>4</sup> It was also said that "in surrendering their own power over external commerce the states did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress."<sup>5</sup>

(3) *Necessity of Additional State Legislation to Render Act Operative.* — Shortly after the enactment of the Wilson Law a decision was handed down in the federal Circuit Court in which it was held that additional legislation by a state was necessary to bring the provision of the Wilson Law into operation within the state.<sup>6</sup> Other decisions of the federal Circuit Court handed down during the same month maintained the contrary doctrine, as did also decisions in various state courts.<sup>7</sup> And this view was taken in the United States Supreme Court, upon the ground that the state statutes regulating or prohibiting liquor traffic were not void, but their operation was merely limited to property strictly within the jurisdiction of the state.<sup>8</sup> It

that decision. In view of the enactment of the Wilson Law, the provisions of which will be noticed in a subsequent section, these decisions are of no practical importance.

1. See cases cited in preceding note.

*Enjoining Interference with Sale of Original Packages.* — In *M. Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561, it was held that a proceeding might be maintained to enjoin a prosecuting attorney from maintaining proceedings to prevent a nonresident importer from selling by agent intoxicating liquors in the original package.

*Release of Habeas Corpus.* — A person in prison for a violation of the state liquor laws as to selling in original packages may be released on habeas corpus. *In re Beine*, 42 Fed. Rep. 545. But the courts of the United States may exercise discretion as to whether they will discharge the prisoner in advance of the trial in the state court. *U. S. v. Fiscus*, 44 Fed. Rep. 395. See also the title HABEAS CORPUS, vol. 15, p. 153.

2. 26 U. S. Stat. at L. 313, c. 728; Rev. Stat. U. S., Supp. (1874-1891) 779, c. 728.

3. *Object of Statute.* — *In re Rahrer*, 140 U. S. 545; *Rhodes v. Iowa*, 170 U. S. 412; *Vance v. W. A. Vandercook Co.*, 170 U. S. 445.

4. *Constitutionality of Statute.* — *In re Spickler*, 43 Fed. Rep. 653; *In re Van Vliet*, 43 Fed. Rep. 761; *In re Rahrer*, 140 U. S. 545; *State v. Fraser*, 1 N. Dak. 425.

5. *In re Rahrer*, 140 U. S. 561.

6. *Additional State Legislation Necessary to Render Statute Operative.* — *In re Rahrer*, 43 Fed. Rep. 556, reversed in 140 U. S. 545.

7. *Additional Legislation Unnecessary.* — *In re Spickler*, 43 Fed. Rep. 653; *In re Van Vliet*, 43 Fed. Rep. 761. To the same effect are *In re Jordan*, 49 Fed. Rep. 238, decided after the reversal of *In re Rahrer*, 43 Fed. Rep. 556; *Tinker v. State*, 90 Ala. 638; *Com. v. Calhane*, 154 Mass. 115; *Com. v. Gagne*, 153 Mass. 205; *State v. Fraser*, 1 N. Dak. 425; *State v. Lord*, 66 N. H. 479.

8. *In re Rahrer*, 140 U. S. 545, reversing 43

Volume XVII.



may be regarded as settled law, therefore, that to render the statute operative new state legislation on the subject is unnecessary, and that the statute gives full force and effect to existing state legislation.<sup>1</sup>

(4) *Operation and Effect.*—To determine accurately the operation and effect of the statute is a matter of some difficulty, but it is believed that the decisions on the question will warrant the following conclusions: (1) It can, of course, have no application to sales made before its enactment,<sup>2</sup> but it does apply to all imported liquors subsequently sold in the original packages, whether imported before or after its passage.<sup>3</sup> (2) It confers no new powers on the states, but merely removes a protection from the imported package and places it under state jurisdiction.<sup>4</sup> (3) An importer of liquors from another state has no right to sell them in the original package or otherwise except on the terms prescribed by the legislature of the state where the sales are made.<sup>5</sup> (4) When intoxicating liquors are shipped from one state into another they do not become subject to any state police regulation on crossing the boundaries of the state into which they are shipped, but retain their character as an article of interstate commerce until delivered into the hands of the consignee; but upon such delivery they become subject to these regulations.<sup>6</sup>

*Receiving for His Own Use.*—As a corollary to this last proposition it may be stated that the receiver in one state of intoxicating liquors sent from another state has the constitutional right to receive them for his own use without regard to any law to the contrary.<sup>7</sup>

**3. What Is Original Package.**—Some difficulty has been experienced in determining the exact meaning of the term "original package." It has been defined, and properly it is believed, as "the package delivered by the importer

Fed. Rep. 556. See also *In re Jordan*, 49 Fed. Rep. 239, which follows the preceding case.

1. See the cases cited in the two preceding notes.

2. *Sales Before Enactment of Wilson Act.*—*Wind v. Iler*, 93 Iowa 316; *Carstairs v. O'Donnell*, 154 Mass. 357.

3. *Liquors Imported Before but Sold After Enactment of Wilson Bill.*—*Tinker v. State*, 90 Ala. 638, in which case it was said: "The withdrawal of federal regulations applies to all liquors 'transported'—not such only as shall be transported—'into the state or remaining therein for use.'"

4. *No New Powers Conferred on States.*—*In re Rahrer*, 140 U. S. 564; *Ex p. Edgerton*, 59 Fed. Rep. 115; *Rhodes v. Iowa*, 170 U. S. 412; *In re Langford*, 57 Fed. Rep. 575.

5. *Importer Can Sell Only on Terms Prescribed by Statute.*—*Vance v. W. A. Vandercook Co.*, 170 U. S. 438; *In re Rahrer*, 140 U. S. 545; *Indianapolis v. Bieler*, 138 Ind. 30; *State v. Lord*, 66 N. H. 479.

6. *Importation Subject to State Laws Only on Delivery to Consignee.*—*Rhodes v. Iowa*, 170 U. S. 412 [*reversing State v. Rhodes*, 90 Iowa 496]; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438; *In re Van Vliet*, 43 Fed. Rep. 761; *Ex p. Jervey*, 66 Fed. Rep. 961; *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298. Compare *In re Langford*, 57 Fed. Rep. 570, where it was held that the expression "upon arrival in such state," as used in the Wilson Act, meant neither on entrance in the border of the state nor on delivery to the consignee, but upon reaching its destination.

*Moving Liquors from Railroad Depot to Warehouse.*—Where intoxicating liquors are shipped from one state into another, moving the goods into the station from the platform on

which they are put on arrival, to the freight warehouse, is a part of the interstate commerce transportation, as such transportation does not cease until the delivery of the consignment into the hands of the consignee. *Rhodes v. Iowa*, 170 U. S. 412, *reversing State v. Rhodes*, 90 Iowa 496.

7. *Consignee May Receive for His Own Use Regardless of State Laws.*—*Vance v. W. A. Vandercook Co.*, 170 U. S. 438; *Scott v. Donald*, 165 U. S. 58, *affirming 76 Fed. Rep. 559*. See also *State v. Wade*, 63 Vt. 80.

*Dispensary Act.*—The *South Carolina Dispensary Act* of March 5, 1897, amending the Act of March 6, 1896, No. 61, is unconstitutional in so far as it compels any resident of the state who desires to order alcoholic liquor for his own use first to communicate his purpose to a state chemist, and in so far as it deprives any nonresident of the right to ship by means of interstate commerce any liquor into South Carolina unless previous authority is obtained from the officers of that state. It subjects the constitutional right of the nonresident to ship into the state, and of a resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of rights which the statute itself acknowledges. *Vance v. W. A. Vandercook Co.*, 170 U. S. 438.

*Bringing Liquor into Port of State and Unloading on Wharf.*—One who merely brings a consignment of liquor into a port of a state and unloads the consignment on the wharf is not punishable therefor, irrespective of the statutory provisions of that state. *Ex p. Edgerton*, 59 Fed. Rep. 115. *A fortiori* one who brings liquors into a port without unloading them is not punishable. *Ex p. Jervey*, 66 Fed. Rep. 957.



to the carrier at the initial place of shipment, in the exact condition in which it was shipped." <sup>1</sup> It is agreed that the importer decides for himself the size and form of the package which he seeks to import, <sup>2</sup> and that the size of the package has nothing to do with determining whether it is or is not an original package. <sup>3</sup> Accordingly, single bottles of intoxicating liquors packed and sealed or nailed up in boxes made of pasteboard or wood and shipped and sold in that shape are original packages. <sup>4</sup> But it seems to be well settled that although bottles of imported liquors are sealed and placed in separate wrappers, if they are placed together in a wooden box or in casks for shipment, the box or cask, and not each bottle, will be the original package. <sup>5</sup> The box will be considered the original package even though it be open. <sup>6</sup> It has been held, however, that if bottles sealed and wrapped are delivered to the carrier for transportation and some of them are by him placed in an open box for convenience, without the importer's knowledge, each bottle will be an original package. <sup>7</sup> On the other hand, if the boxes furnished by the carrier are packed by the importer himself, it is immaterial to whom the boxes belong, although they are to be returned to the carrier after the importer has emptied them; the boxes and not the bottles will be the original packages. <sup>8</sup> So one who receives bottles of intoxicating liquors as original packages, and opens and pours out the liquor into glasses which he delivers to customers, sells the contents, and does not sell the original packages. <sup>9</sup>

1. Definition. — *Guckenheimer v. Sellers*, 81 Fed. Rep. 997.

2. Size of Package Determined by Importer. — *Guckenheimer v. Sellers*, 81 Fed. Rep. 998; *State v. Winters*, 44 Kan. 723.

3. Size Immaterial. — *In re Beine*, 42 Fed. Rep. 545; *Schollenberger v. Pennsylvania*, 171 U. S. 1, reversing *Com. v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32; *Keith v. State*, 91 Ala. 7.

The right of the importer to sell does not depend upon the question whether the original package was or was not suitable for retail trade, but is the same whether the sale is to consumers or to wholesale dealers, provided only original packages are sold. *Schollenberger v. Pennsylvania*, 171 U. S. 1.

4. Bottle Packed Singly Original Package. — *In re Beine*, 42 Fed. Rep. 546.

A distiller manufactured forty-five gallons of whiskey, which he put into a barrel, placing upon it a government stamp for that number of gallons. Subsequently he surrendered the stamp, and received nine five-gallon stamps in lieu thereof. Thereupon he divided the barrel into nine packages containing five gallons each, stamped them, and sold one of the packages. It was held that the package thus sold was an "original package," within *Sand. & H. Dig. Stat. Ark.*, § 4851, authorizing the sale of liquors by the manufacturer without license in original packages of not less than five gallons. *State v. Southard*, 60 Ark. 247.

5. Box or Cask in Which Several Bottles Placed Original Package. — *In re Harmon*, 43 Fed. Rep. 372; *U. S. v. One Hundred and Thirty-two Packages Spirituous Liquors, etc.*, 76 Fed. Rep. 364; *Guckenheimer v. Sellers*, 81 Fed. Rep. 999; *Keith v. State*, 91 Ala. 2; *Harrison v. State*, 91 Ala. 62; *State v. Board of Assessors*, 46 La. Ann. 145, 49 Am. St. Rep. 318; *May v. New Orleans*, 51 La. Ann. 1064; *Haley v. State*, 42 Neb. 556, 47 Am. St. Rep. 718; *Com. v. Bishman*, 138 Pa. St. 639; *State v.*

*Chapman*, 1 S. Dak. 414. *Contra*, *State v. Coonan*, 82 Iowa 400; *State v. Miller*, 86 Iowa 638, the doctrine of which cases was overruled in *McGregor v. Cone*, 104 Iowa 465, where the question as to what was an original package arose in the case of a shipment of cigarettes.

"If in single bottles, shipped singly, or if in packages of three or more securely fastened together and marked, or if in a box, barrel, crate, or other receptacle, the single bottle in the one instance, the three or more bottles in another instance, the barrel, box, crate, or other receptacle, respectively constitute the original package." *Guckenheimer v. Sellers*, 81 Fed. Rep. 997.

6. Open Box. — *In re Harmon*, 43 Fed. Rep. 372; *Keith v. State*, 91 Ala. 2; *State v. Chapman*, 1 S. Dak. 414.

7. Bottles Packed in Box by Carrier. — *Keith v. State*, 91 Ala. 2.

8. Boxes Furnished by Carrier. — *In re Harmon*, 43 Fed. Rep. 372.

Drawing Bung from Barrel. — Where liquors are shipped from one state into another in barrels, if on receipt thereof the consignee, for the purpose of testing the liquors, draws the bungs therefrom, the liquors do not thereby become a part of the general mass of property of the state and subject to its laws. *Wind v. Iler*, 93 Iowa 316. Compare *Wasserboehr v. Boulter*, 84 Me. 165, 30 Am. St. Rep. 344, holding that where a dealer in one state contracted by his agent in another for a sale of liquor there in the original packages, and that the purchaser was to have a certain length of time in which to return it if unsatisfactory, the sale was not in the original packages because it was not complete before the defendant should receive, unseal, and sample the liquor.

9. Opening and Selling Contents of Bottles. — *Hopkins v. Lewis*, 84 Iowa 690.

As to what is an original package generally, see also the title INTERSTATE COMMERCE, *ante*, p. 34.



4. **Statutes Prohibiting Manufacture or Keeping for Sale in Another State.** — The fact that an article is manufactured for export to another state, does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.<sup>1</sup> A statute which prohibits the manufacture or sale of intoxicating liquors except for mechanical, medicinal, culinary, and sacramental purposes only, and which authorizes the abatement as a nuisance of any building used for the unlawful manufacture of liquors, is not in violation of the interstate commerce clause as applied to a case in which the liquors were manufactured for exportation and sale outside the state.<sup>2</sup> It has likewise been held that a law which forbids the keeping of intoxicating liquors in one state for sale in another is not in violation of the interstate commerce clause.<sup>3</sup> To what extent the force of these decisions has been shaken by the decision of *Leisy v. Hardin*,<sup>4</sup> is purely conjectural and yet to be determined. While these decisions were cited with approval in the majority opinion in the latter case, it was said in the dissenting opinion that the principles applicable to congressional supervision of the manufacture within a state of intoxicating liquors intended for sale in another state appear to apply with hardly less force to the regulation by Congress of the sale within one state of intoxicating liquors brought from another state.<sup>5</sup> The Wilson Act, it is apprehended, in no way affects the rule laid down by these decisions.

VII. **LAWS AGAINST ADULTERATION OF INTOXICATING LIQUORS.** — In a number of jurisdictions statutes have been enacted to prevent the adulteration of liquor as well as its sale when adulterated. These statutes are not unconstitutional as depriving persons of their property or liberty without due process of law, and the enactment thereof is a legitimate exercise of the police power of a state.<sup>6</sup> Under the statutes of some states it is made an offense to sell intoxicating liquors without first having taken oath and given bond not to adulterate intoxicating liquors offered for sale.<sup>7</sup> It is not necessary to constitute the offense that both acts specified should have been omitted. The omission of either constitutes the offense.<sup>8</sup> These statutes apply to sales by all persons whatsoever, and irrespective of the quantity sold.<sup>9</sup> Where it is

1. **Constitutionality of Statutes Prohibiting Manufacture for Sale in Another State.** — *Coe v. Errol*, 116 U. S. 517.

2. *Kidd v. Pearson*, 128 U. S. 1, *affirming* 72 Iowa 348; *Craig v. Werthmueller*, 78 Iowa 598; *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447. See also *Mugler v. Kansas*, 123 U. S. 632.

3. **Keeping in One State for Sale in Another.** — *State v. Fitzpatrick*, 16 R. I. 59.

4. *Leisy v. Hardin*, 135 U. S. 100, 112.

5. Dissenting opinion of Justices Gray, Harlan, and Brewer, in *Leisy v. Hardin*, 135 U. S. 157.

6. **Constitutionality of Statutes.** — *Ex p. Kohler*, 74 Cal. 38, construing the Act of March 7, 1887.

**Sale of Whiskey as Beverage.** — In *Ohio* the sale of adulterated drugs is prohibited, and whiskey is recognized as a drug, so that the sale of adulterated whiskey is an offense against the statute though it is sold as a beverage or commodity. *State v. Hutchinson*, 56 Ohio St. 82.

7. **Oath and Bond Not to Adulterate Liquors.** — *State v. Melton*, 38 Mo. 368; *State v. Ferguson*, 72 Mo. 297; *State v. Goff*, 65 Mo. App. 498; *State v. Summers*, 142 Mo. 586; *Levi v. State*, 4 Baxt. (Tenn.) 289; *Newman v. State*, 7 Lea (Tenn.) 617; *State v. Martin*, 3 Heisk. (Tenn.) 487. See further the title ADULTERATION, vol.

I, p. 739, note, where also some decisions under the *English* statute against selling to the prejudice of a purchaser are noticed.

8. **What Omission Constitutes Offense.** — *State v. Crowley*, 37 Mo. 369.

9. **Statutes Apply to All Persons.** — *State v. Hays*, 38 Mo. 368.

**Statutes Apply to Druggists.** — One section of the *Missouri* statute provides that it shall be an offense for "any person or persons" to sell or offer to sell any spirituous or alcoholic liquors without first making oath not to adulterate such liquors and giving bond to secure costs for violations thereof. Another section provides that the statute shall not be so construed as to prevent druggists from mixing and adulterating liquors for medical and mechanical purposes to be used by them in their business. Under this statute it is held unlawful for a physician to sell intoxicating liquors without taking oath and giving bond as provided, and that the latter section must be understood as taken in subjection to the provisions requiring the making of oath and the giving of bond. *State v. Ferguson*, 72 Mo. 297; *State v. Goff*, 65 Mo. App. 498; *State v. Summers*, 142 Mo. 586, *overruling* *State v. Hughes*, 35 Mo. App. 515, and *State v. Roller*, 77 Mo. 120. The same ruling has been made in *Tennessee* under a statute nearly identical in terms. *Newman v. State*, 7 Lea (Tenn.) 617.



made an offense to sell or offer to sell intoxicating liquors without their having been inspected by the proper officer in the manner required by statute, it is for the state to prove, in a prosecution for a violation of the statute, that the liquors have not been inspected.<sup>1</sup>

**VIII. WHAT CONSTITUTES SALE — 1. In General** — Agreement to Sell. — In determining questions of civil and criminal liability under the liquor laws it is often a question of some difficulty to determine whether the transaction in question was a sale within the meaning of these laws. It has been held that a mere agreement to sell without delivery does not constitute a sale.<sup>2</sup> To constitute the offense there must be a completed sale which passes the property.<sup>3</sup> It is not necessary, however, that the liquors be sold for cash. A sale on credit is as much a violation of law as a sale for cash;<sup>4</sup> and the fact that payment cannot be enforced does not make the transaction any the less a sale.<sup>5</sup> So the fact that the person charged with making a sale made no profit out of it does not make the transaction not a sale.<sup>6</sup>

**Agreement to Pay Necessary.** — To constitute a transaction a sale there must be an agreement to pay, and delivery without more is not a sale.<sup>7</sup> If there is an agreement to pay it is immaterial that the agreed price is merely nominal and altogether inadequate.<sup>8</sup> Provided there is an agreement, express or implied, to pay for the liquors purchased, it is not necessary that the liquors should be

**1. Burden of Proof.** — *Sovereign v. State*, 4 Ohio St. 489. *Contra*, *State v. Finn*, 38 Mo. App. 504.

**Number of Inspections Required.** — A statute which makes it a punishable offense to sell or offer to sell any spirituous or intoxicating liquors not inspected as thereafter provided, and which in a subsequent section makes it the duty of the inspector to inspect all alcoholic liquors imported into or manufactured in the county unless they have the inspector's brand of some other county, which is made evidence of the purity of the article, contemplates the inspection of the article upon its importation into any county or when it is manufactured and before it is offered for sale. A single inspection is all that is required, and it is entirely immaterial in what county it is made. *Woodworth v. State*, 4 Ohio St. 487.

**When Noninspection No Defense to Action for Price of Liquors Sold.** — Under the provisions of the inspection statute set forth in the preceding note, the penalty and prohibition do not attach to a sale of spirituous liquors which are pure but not inspected, made before an inspector has been appointed and has qualified in the county where the sale was made, and the price of liquors so sold may be recovered. *Smith v. Kibbee*, 9 Ohio St. 563.

**2. Agreement to Sell.** — *Williams v. Feiniman*, 14 Kan. 289; *Com. v. Williams*, 6 Gray (Mass.) 9; *Riley v. State*, 43 Miss. 397; *Bauchor v. Warren*, 33 N. H. 183.

**Rule Where Statute Makes Delivery Prima Facie Evidence of Sale.** — In *New Hampshire*, where the statute provides that delivery of cider in a less quantity than ten gallons shall be deemed *prima facie* evidence of a sale, it is error to charge the jury that delivery is a violation of law. *State v. Prescott*, 67 N. H. 203.

A provision in a statute that the delivery of intoxicating liquor in certain places shall be deemed *prima facie* evidence of a sale must be confined strictly to cases under that statute. *Com. v. Taylor*, 113 Mass. 4.

**Rule Where Statute Makes Delivery Sufficient Evidence of Sale.** — In *Maine* delivery of intoxicating liquors is sufficient evidence of sale, as the statute expressly so provides. *State v. Fairfield*, 37 Me. 517.

**Personal Delivery to Person Asking for Liquors.** — To consummate a sale of spirituous liquors it is not necessary that such liquors should be handed to a person who asked for them, and that they should be paid for by, or charged to, some one. *Kimball v. People*, 20 Ill. 348.

**3. Property Must Pass.** — *Perkins v. State*, 92 Ala. 66; *Ihrig v. State*, 40 Ind. 422; *Stevenson v. State*, 65 Ind. 409; *Com. v. Burns*, 8 Gray (Mass.) 482; *State v. Greenleaf*, 31 Me. 517; *Emerson v. Noble*, 32 Me. 380; *Riley v. State*, 43 Miss. 397; *State v. Cutting*, 3 Oregon 260.

**4. Sales on Credit.** — *Perkins v. State*, 92 Ala. 66; *Stevenson v. State*, 65 Ind. 409; *Emerson v. Noble*, 32 Me. 380; *Com. v. Burns*, 8 Gray (Mass.) 482; *Riley v. State*, 43 Miss. 397.

**Sale on Condition Not Complied With.** — In *Taylor v. State*, 121 Ala. 39, it was held proper to refuse an instruction that "if the jury believe it was a conditional sale, unless the conditions of sale have been complied with there was no sale, and defendant must be acquitted."

**5. Inability to Enforce Payment — Effect.** — *State v. Greenleaf*, 31 Me. 517; *Emerson v. Noble*, 32 Me. 380.

**6. Absence of Profit to Seller.** — *Ladwig v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 390.

**7. Agreement to Pay Necessary.** — *Com. v. Packard*, 5 Gray (Mass.) 101; *Com. v. Williams*, 6 Gray (Mass.) 9.

Testimony of a witness that he called for intoxicating liquor at a public house kept by the defendant, that by the defendant's order a waiter delivered it to him, that the witness had never paid the defendant nor the waiter, that he offered to pay, but that the defendant declined to take anything, is no evidence of a sale of intoxicating liquors. *Com. v. Packard*, 5 Gray (Mass.) 101.

**8. Nominal Payment.** — *Read v. Storey*, 6 H. & N. 423. See also *State v. Clare*, 5 Iowa 509.



paid for at all to constitute a sale.<sup>1</sup>

**Drinking of Liquor Unnecessary.** — A sale is complete when the liquor is delivered, although the purchaser does not drink or intend to drink the entire glass. The motive of the purchaser and his disposition of the liquor are immaterial.<sup>2</sup>

**Sale of Liquor Business.** — A sale of a saloon business *en bloc* is not within the meaning of a statute prohibiting a sale of intoxicating liquors without a license.<sup>3</sup> Nor does a single sale in gross of a stock of liquors make the seller a dealer.<sup>4</sup>

**The Assignment of a Duebill payable in intoxicating liquors does not constitute the seller a dealer.**<sup>5</sup>

**Prescription by Physician.** — A practicing physician who prescribes intoxicating liquors to be taken as medicine by a patient is not guilty of a sale.<sup>6</sup>

**Delivery of Liquor by a Bailee to the owner of it is not in violation of a statute making it unlawful to "sell, give away, or otherwise dispose of" liquor.**<sup>7</sup>

**Giving or Furnishing as Act of Hospitality.** — The weight of authority holds that the mere act of giving or furnishing intoxicating liquors in one's own house to guests as a matter of hospitality or kindness does not constitute a violation of the statute.<sup>8</sup>

**Distillation of Liquor on Shares.** — So where a person distills liquor from fruit furnished to him by another, receiving in consideration a part of the product, he does not make sale by delivering to the owner of the fruit the latter's share of the liquor.<sup>9</sup>

**2. Barter, Loan, or Exchange — Held Not to Be Sales.** — There is some difference of opinion as to whether an exchange, barter, or loan of intoxicating liquors is a sale within the meaning of the liquor laws. As the almost universally accepted meaning of the term "sale" is a contract between parties passing rights of property for money paid or agreed to be paid therefor, it would seem that these transactions are not within the prohibition of the statute. It has accordingly been held that a barter or exchange,<sup>10</sup> or a loan,<sup>11</sup> of intoxi-

**1. No Payment Made.** — *State v. Cutting*, 3 Oregon 260.

**2. Dillman v. People**, 4 N. Y. Wkly. Dig. 251.

**3. Sale of Saloon Business.** — *Smith v. Heine-man*, 118 Ala. 195; *Forwood v. State*, 49 Md. 531. But see *Ladd v. Dillingham*, 34 Me. 316, in which case it was held that the sale of all the stock of goods, wares, medicines, furniture, and fixtures in a store embraces spirituous liquors in such store belonging to the seller, and if he had no license to sell such liquors the whole sale is void.

**4. Sale in Gross of Stock of Liquors.** — *Overall v. Bezean*, 37 Mich. 506, holding that such a sale by one who has not paid a tax as a whole-sale dealer is not illegal so as to invalidate a note given for the price.

**5. Assignment of Due Bill Payable in Intoxicating Liquor.** — *Schweyer v. Oberkoetter*, 25 Ill. App. 183.

**6. Prescription by Physician.** — *Schaffner v. State*, 8 Ohio St. 642. See also *Key v. State*, 37 Tex. Crim. 77, in which case it was held that a physician who, after prescribing intoxicating liquor to be taken as medicine by a patient, obtains from him money to purchase the liquor, procures it, and turns it over to the patient, is not guilty of selling the liquor.

**7. Delivery to Owner by Bailee.** — *Amos v. State*, 73 Ala. 498.

**8. Giving or Furnishing as Act of Hospitality.** — *Reynolds v. State*, 73 Ala. 3; *Albrecht v. People*, 78 Ill. 510; *State v. Standish*, 37 Kan. 643; *Com. v. Carey*, 151 Pa. St. 368. *Contra*, *Cearfoss v. State*, 42 Md. 403.

**Illustration of Rule.** — Where a person owning a brewery receives friends at his house and sends out to his brewery and procures a pitcher of beer with which he treats his friends, this will not constitute a violation of the statute prohibiting a gift of intoxicating liquors. *Albrecht v. People*, 78 Ill. 510.

**Statute Excluding from Its Operation Gifts to Invited Guests.** — Where a prohibitory liquor law excepts from its provisions persons who give liquor to "their invited guests at their own household," one whom another has invited to his house for the purpose of giving a drink to him is to be regarded as an invited guest within the meaning of the statute. *Powers v. Com.*, 90 Ky. 167.

**Statutes Prohibiting Giving Away Except at Private Dwellings or Their Dependencies.** — Where a statute prohibits the giving away of intoxicating liquors except at private dwelling houses or their dependencies, the giving away of liquor in a room which is not the donor's dwelling house, but in which no business is conducted, is a violation of the statute. It is therefore unlawful to give away intoxicating liquor in one's barn or granary. *State v. Camp*, 64 Vt. 295.

**9. Henderson v. State**, 120 Ala. 360.

**10. Barter Held Not to Be Sale.** — *Taylor v. State*, 121 Ala. 39; *Gillam v. State*, 47 Ark. 555; *Stevenson v. State*, 65 Ind. 409.

**11. Loan.** — *Taylor v. State*, 121 Ala. 39; *Robinson v. State*, 59 Ark. 341; *Skinner v. State*, 97 Ga. 690, in which case the court said that such a transaction has in it none of the ele-



cating liquors is not a sale within the meaning of the statutes.

**Held to Be Sales.** — On the other hand, it has been held that a loan of intoxicating liquors, to be returned in kind, is a sale within the meaning of the statute.<sup>1</sup> And it has also been held that an exchange of intoxicating liquors for some other commodity is a sale.<sup>2</sup> And it has been held that a delivery of liquors in payment of a debt<sup>3</sup> or in payment for services performed<sup>4</sup> is a sale.

**3. Devices or Subterfuges to Evade Liquor Laws.** — Where a sale or gift of liquor would be contrary to law, no trick, device, subterfuge, or pretense will be allowed to evade the operation or defeat the policy of the laws, if liquor be thereby procured.<sup>5</sup>

ments which inhere in what is familiarly designated as a "trade." See also *Coker v. State*, 91 Ala. 92.

**1. Loan Held to Be Sale.** — *Com. v. Abrams*, 150 Mass. 393; *Keaton v. State*, 36 Tex. Crim. 259; *Bruce v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 683.

**2. Exchange.** — *Howard v. Harris*, 8 Allen (Mass.) 297; *Com. v. Clark*, 14 Gray (Mass.) 367, in which latter case it was further held that it was immaterial whether the liquor was delivered at the time of receiving the commodity or afterwards.

**3. Delivering Liquors in Payment of Debt.** — *State v. Potect*, 86 N. Car. 612.

**4. In Payment of Services Rendered.** — *Bescher v. State*, 32 Ind. 480; *Mason v. Lothrop*, 7 Gray (Mass.) 354.

**The Delivery of Whiskey as Compensation for the Use of a Buggy**, in performance of an agreement so to do, has been held to be a sale of whiskey. *Paschal v. State*, 84 Ga. 326.

**5. Devices to Evade Liquor Laws — Alabama.** — *Marcus v. State*, 89 Ala. 23; *Billingsley v. State*, 96 Ala. 114; *Boggus v. State*, 78 Ala. 26; *Roberson v. State*, 100 Ala. 38.

*Arkansas.* — *Looney v. State*, 43 Ark. 389; *Rabe v. State*, 39 Ark. 204.

*Illinois.* — *Rickart v. People*, 79 Ill. 85.

*Indiana.* — *Murphy v. State*, 1 Ind. 366; *Kyle v. State*, 18 Ind. App. 136.

*Iowa.* — *State v. Devine*, 4 Iowa 443; *State v. Hutchins*, 74 Iowa 20.

*Kansas.* — *State v. Standish*, 37 Kan. 643; *State v. Smith*, 51 Kan. 120.

*Kentucky.* — *Stamper v. Com.*, (Ky. 1897) 42 S. W. Rep. 915.

*Maryland.* — *Archer v. State*, 45 Md. 33.

*Massachusetts.* — *Com. v. Geary*, 146 Mass. 139; *Com. v. Thayer*, 8 Met. (Mass.) 525.

*Mississippi.* — *Johnson v. State*, 63 Miss. 228.

*New Hampshire.* — *State v. Simons*, 17 N. H. 83.

*North Carolina.* — *State v. McMinn*, 83 N. Car. 668; *State v. Kirkham*, 1 Ired. L. (23 N. Car.) 384.

*Ohio.* — *Kober v. State*, 10 Ohio St. 444; *State v. Decker*, 10 West. L. J. 328, 1 Ohio Dec. (Reprint) 527.

*Oregon.* — *State v. Cutting*, 3 Oregon 260.

*Pennsylvania.* — *Waller v. Com.*, 88 Pa. St. 137, 32 Am. Rep. 429.

*Texas.* — *Williams v. State*, 23 Tex. App. 499; *Hartgraves v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 331; *Sutton v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 501.

*Virginia.* — *Richardson v. Com.*, 76 Va. 1007.

See also *infra*, this title, *Offenses Against Liquor Laws and Prosecutions Thereunder — Furnishing of Intoxicating Liquors by Social Clubs.*

**Illustrations of Unsuccessful Device — Putting Peaches in Liquor.** — Putting a few peaches or cherries in a bottle of liquor to evade the law and selling the bottle with its contents is a sale of liquor. *Rabe v. State*, 39 Ark. 204.

*Selling Whiskey as Turpentine.* — *Looney v. State*, 43 Ark. 389.

*Giving Away Intoxicating Liquors with Other Articles Purchased* constitutes a sale of the liquors and a violation of the law. *Com. v. Thayer*, 8 Met. (Mass.) 525; *State v. Simons*, 17 N. H. 83; *Kober v. State*, 10 Ohio St. 444. As, for instance, where one sells a stick of candy for twelve and one-half cents and gives away a drink of liquor with it, *State v. Cutting*, 3 Oregon 260; or where the price of cigarettes sold is intended and is sufficient to cover the price of whiskey afterwards nominally given to the purchaser, *Archer v. State*, 45 Md. 33; *State v. Decker*, 10 West. L. J. 328, 1 Ohio Dec. (Reprint) 527.

So it has been held in a prosecution for sales without license, that the defense that the defendant, a butcher, sold beef to a person and gave whiskey to him without consideration is not sustained where it appears that the beef was worth much less than the amount paid therefor and was not delivered until several days later. *Marcus v. State*, 89 Ala. 23.

**Purchasing for Accommodation of Others.** — Evidence that the defendant purchased a large quantity of whiskey and alcohol for others and that such other persons drank the liquor upon his premises shows a device to evade the liquor laws, and the defendant may be convicted of illegally selling whiskey. *Hartgraves v. State*, (Tex. Civ. 1897) 43 S. W. Rep. 331.

**Receiving Whiskey and Leaving Money.** — Proof that the defendant delivered whiskey to one who placed money within the defendant's reach, *State v. Wiggin*, 20 N. H. 449; *McClure v. State*, 43 Ark. 75; or that in the defendant's presence a person helped himself to liquor belonging to the defendant and put money in a designated place, *State v. McMinn*, 83 N. Car. 668; or that a person put money in a certain place in a room and was then excluded therefrom and on his return found a glass of liquor, *Henry v. State*, 113 Ind. 304, is sufficient to make out a sale in violation of the law.

**Accepting Pasteboard Checks for Liquor.** — Where a person purchases of the defendant a pasteboard check with the figures 25 on it, for



**IX. WHAT IS PLACE OF SALE — 1. Where Goods Sold Are Unascertained.** — In both civil actions and criminal prosecutions based on the sale of intoxicating liquor it frequently becomes important to determine the place of sale. The question is often a very perplexing one, but the following rules may be laid down: Where, by the terms of a contract for the sale of intoxicating liquors, it remains for the seller to fix upon the specific liquors to answer the order, to separate them from a larger quantity, and to forward them in accordance with agreement, the place of sale must for all purposes be considered to be the place where the seller performs these acts.<sup>1</sup>

**2. Where Goods Are Delivered to Carrier on Purchaser's Order.** — Where, without the intervention of an agent, a person orders intoxicating liquors from a dealer in another town or state, and in compliance therewith the liquors are delivered to a common carrier to be transported to the buyer, the title vests immediately on delivery to the carrier, and the sale is consummated at that place, and will be considered as so consummated in determining whether the seller has violated the liquor laws of the state where the purchaser resides<sup>2</sup> or in determining the validity of the contract and the respective rights of the buyer and seller thereunder.<sup>3</sup>

**3. Where Goods Are Shipped C. O. D.** — A somewhat different question is presented when the sales are made C. O. D. There is much diversity of opinion as to whether sales of this character are to be deemed absolute sales on the part of the vendor with a provision for withholding delivery until actual payment, so as to preserve the lien for the price, or only as executory contracts of sale not completed until actual delivery into the hands of the buyer. In a number of decisions it has been held that for the purpose of determining

which he gives twenty five cents, and the defendant accepts such check for beer, this constitutes a sale of the beer. *Billingsly v. State*, 95 Ala. 114.

*Sales in Bulk and Delivery in Small Quantities.* — Where a sale of intoxicating liquors in less than a designated quantity by one not licensed is prohibited by statute, a contract of sale by an unlicensed dealer for an amount not within the prohibition, and a delivery thereof in parcels at different times, is a violation of the law. *Rickart v. People*, 79 Ill. 85; *Murphy v. State*, 1 Ind. 266; *State v. Kirkham*, 1 Ired. L. (23 N. Car.) 384; *Richardson v. Com.*, 76 Va. 1007.

But where a dealer to whom a purchaser applied for whiskey, being out of it, purchased a gallon from another dealer, partly with the money of such customer and partly with his own, and divided with the customer, it was held a joint purchase and not a sale in a quantity less than a gallon. *Johnson v. State*, 63 Miss. 228.

**1. Sale of Unascertained Goods.** — *Herron v. State*, 51 Ark. 133; *Dunn v. State*, 82 Ga. 27; *Abberger v. Marrin*, 102 Mass. 70; *Dolan v. Green*, 110 Mass. 322; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140. See also *Fuller v. Leet*, 59 N. H. 163; *Garland v. Lane*, 46 N. H. 245. And see the title SALES.

**Ascertaining Shrinkage or Leakage.** — Where a bargain was made in New York for liquors which had been sent to the seller's agent in Michigan, the purchaser to pay for and to be allowed leakage and shrinkage, and the purchaser examined the liquors in Michigan and took them, it was held that the contract was to be regarded as made in and subject to the laws of Michigan. The right of property must pass out of the vendor into the vendee,

which is not the case where something remains to be done by the vendor before delivery can take place. *Myers v. Carr*, 12 Mich. 63.

**2. Delivery to Carrier on Order of Purchaser — As Affecting Criminal Liability.** — *U. S. v. Shriver*, 23 Fed. Rep. 134; *Herron v. State*, 51 Ark. 133; *Brechwald v. People*, 21 Ill. App. 215; *State v. Wingfield*, 115 Md. 428; *Pearson v. State*, 66 Miss. 510; *Garbracht v. Com.*, 96 Pa. St. 449, 42 Am. Rep. 550; *State v. Hughes*, 22 W. Va. 743; *Sarbecker v. State*, 65 Wis. 171, 56 Am. Rep. 624.

**3. As Affecting Validity of Contract — Illinois.** — *Coffeen v. Huber*, 78 Ill. App. 455.

*Iowa.* — *Engs v. Priest*, 65 Iowa 232. See also *Whitlock v. Workman*, 15 Iowa 351.

*Massachusetts.* — *Finch v. Mansfield*, 97 Mass. 89; *Abberger v. Marrin*, 102 Mass. 70.

*Michigan.* — *Webber v. Donnelly*, 33 Mich. 469.

*New Hampshire.* — *Lynch v. Stott*, 67 N. H. 589; *Garland v. Lane*, 46 N. H. 245.

*Vermont.* — *Dame v. Flint*, 64 Vt. 533; *Backman v. Mussey*, 31 Vt. 547; *McConihe v. McMann*, 27 Vt. 96; *Tuttle v. Holland*, 43 Vt. 542; *Erwin v. Stafford*, 45 Vt. 390.

That delivery of goods ordered to a carrier in behalf of a purchaser is in general a consummation of the sale, see *Dutton v. Solomonson*, 3 B. & P. 584; *Cooke v. Ludlow*, 2 B. & P. N. R. 119 and note; *Vale v. Bayle*, 1 Cowp. 294; *Watkins v. Paine*, 57 Ga. 50; *Owens v. Weedman*, 82 Ill. 409; *Wade v. Moffett*, 21 Ill. 110; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Pacific Iron Works v. Long Island R. Co.*, 62 N. Y. 272. See further the title SALES.



whether the seller has violated the liquor laws in force where the buyer lives, a sale C. O. D. is not complete until delivery, acceptance, and payment of the price by the person ordering the liquors.<sup>1</sup> At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C. O. D., the sale is completed when the liquor is delivered to the carrier.<sup>2</sup>

**4. Where Goods Are Sold on Order of Agent Subject to Principal's Approval.**—Where orders for the purchase of intoxicating liquors are given to an agent who has no authority to sell, which orders are forwarded to the principal for his approval, the contract is considered as made at the place where the order is filled.<sup>3</sup> It has been held, however, that a sale of intoxicating liquors by an agent is consummated at the place where the order is given, unless such order, after being forwarded to the principal, is to be subject to his approval before it is filled.<sup>4</sup>

**5. Where Goods Are Delivered by Seller in Person or by Agent.**—If the seller of intoxicating liquors, in person or by his agent, delivers the goods to the purchaser and receives the price therefor at the latter's place of business without the intervention of a common carrier, the place of delivery is the place of sale, and it is of no importance where the order for the liquor was given or the agreement to sell was made.<sup>5</sup> While the goods are in the hands of the

**1. Rule that Sale Is Not Complete till Delivery to Purchaser.**—*U. S. v. Shriver*, 23 Fed. Rep. 134; *U. S. v. Cline*, 26 Fed. Rep. 515; *State v. U. S. Express Co.*, 70 Iowa 271; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557. And see further the title SALES.

**2. Rule that Sale Is Complete on Delivery to Carrier**—*Alabama*.—*Pilgreen v. State*, 71 Ala. 368.

*Arkansas*.—*Hunter v. State*, 55 Ark. 357; *Berger v. State*, 50 Ark. 20. See also *Bunch v. Potts*, 57 Ark. 257.

*Kentucky*.—*Com. v. Russell*, 11 Ky. L. Rep. 576; *Com. v. Kearns*, 15 Ky. L. Rep. 332; *Current v. Com.*, 11 Ky. L. Rep. 764; *James v. Com.*, (Ky. 1897) 42 S. W. Rep. 1107. See also *Bennett v. Com.*, 11 Ky. L. Rep. 370.

*Maine*.—*State v. Intoxicating Liquors*, 73 Me. 278.

*Pennsylvania*.—*Com. v. Fleming*, 130 Pa. St. 138.

*West Virginia*.—*State v. Flanagan*, 38 W. Va. 53, 45 Am. St. Rep. 836; *State v. Hughes*, 22 W. Va. 743.

**3. When Orders Must Be Approved by Principal**—*United States*.—*Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357.

*Alabama*.—*Newman v. State*, 88 Ala. 115.

*Illinois*.—*Coffeen v. Huber*, 78 Ill. App. 455; *Monmouth v. Popel*, 183 Ill. 634, 81 Ill. App. 512.

*Iowa*.—*Tagler v. Shipman*, 33 Iowa 194, 11 Am. Rep. 118; *Taylor v. Pickett*, 52 Iowa 469; *Engs v. Priest*, 65 Iowa 232; *State v. Colby*, 92 Iowa 463.

*Kansas*.—*Williams v. Feiniman*, 14 Kan. 288; *McCarty v. Gordon*, 16 Kan. 35.

*Massachusetts*.—*Frank v. Hoey*, 128 Mass. 263.

*Michigan*.—*Kling v. Fries*, 33 Mich. 275; *Monaghan v. Reid*, 40 Mich. 665; *Rindskopf v. De Ruyter*, 39 Mich. 1, 33 Am. Rep. 340.

*New Hampshire*.—*Fuller v. Leet*, 59 N. H. 163; *Lynch v. Stott*, 67 N. H. 589.

*Wisconsin*.—*Sarbecker v. State*, 65 Wis. 171, 56 Am. Rep. 624.

**Sale by Sample.**—Where an order for intoxicating liquors is taken by an agent subject to the approval of his principal, the fact that the sale is by sample and the buyer expressly reserves to himself the right to reject the goods if they fail to correspond with the sample does not change the place of the contract. It will still be considered as made where the order is filled. *Gill v. Kaufman*, 16 Kan. 571; *McCarty v. Gordon*, 16 Kan. 35; *Snider v. Koehler*, 17 Kan. 432. See also *Haug v. Gillett*, 14 Kan. 140.

In *Vermont*, if an agent takes orders for intoxicating liquors and forwards them to his principal, the contract is considered as being partly made at the place where the order is given and partly at the place where it is filled, and if it is prohibited by the laws of the place where the order is taken it is illegal. *Starace v. Rossi*, 69 Vt. 303; *Backman v. Mussey*, 31 Vt. 547; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187. See also *Beverwick Brewing Co. v. Oliver*, 69 Vt. 323.

**4. Where Order Not Subject to Principal's Approval.**—*Taylor v. Pickett*, 52 Iowa 467; *Tegler v. Shipman*, 33 Iowa 194, 11 Am. Rep. 118; *Gross v. Scarr*, 71 Iowa 656; *Com. v. Eggleston*, 128 Mass. 408. To the same effect see *Felton v. Fuller*, 29 N. H. 121. But compare *Dunn v. State*, 82 Ga. 27.

**5. Delivery by Seller or Agent**—*Arkansas*.—*Yowell v. State*, 41 Ark. 355; *Blackwell v. State*, 42 Ark. 275.

*Georgia*.—*Doster v. State*, 93 Ga. 43; *Bagby v. State*, 82 Ga. 786.

*Illinois*.—*Spring Valley v. Henning*, 42 Ill. App. 159.

*Iowa*.—*Gipps Brewing Co. v. De France*, 91 Iowa 108, 51 Am. St. Rep. 329; *Bartel v. Hobson*, 107 Iowa 644; *Cameron v. Fellows*, (Iowa 1899) 80 N. W. Rep. 567; *Carter v. Bartel*, (Iowa 1900) 81 N. W. Rep. 462.

*Massachusetts*.—*Com. v. Greenfield*, 121



seller or his agent the contract is executory, and either party may impose conditions or recede from it.<sup>1</sup> The rule stated has been applied in prosecutions for the violation of local option laws,<sup>2</sup> in prosecutions for sales in territory not covered by the seller's license,<sup>3</sup> and in prosecutions of a foreign dealer for sales in a prohibition state.<sup>4</sup>

**6. Where Sale Is Conditional.** — Where a contract of sale for intoxicating liquors between persons living at different places provides that the buyer shall have a specified time in which to inspect the goods and reject them if unsatisfactory, title vests in the buyer on delivery of the goods to the carrier, and the place of such delivery is deemed the place of sale.<sup>5</sup> Goods so sold pass to the purchaser subject to the option in him to return them, and if he fails to exercise this option in the proper time the price of the goods may be recovered as upon an absolute sale.<sup>6</sup>

#### X. PROPERTY AND CONTRACT RIGHTS AS AFFECTED BY LIQUOR LAWS —

**1. Intoxicating Liquors as Property — a. IN GENERAL** — Liquors Lawfully Acquired and Kept. — Intoxicating liquors, when lawfully acquired and kept, are property and as such are entitled to the protection of the law equally with other species of property.<sup>7</sup>

**Liquors Unlawfully Acquired or Kept.** — So the majority of decisions hold that

Mass. 40; *Com. v. Hugo*, 164 Mass. 161; *Suit v. Woodhall*, 113 Mass. 391.

*Missouri*. — *State v. Houts*, 36 Mo. App. 265.

*New Jersey*. — *Shuster v. State*, 62 N. J. L. 521.

*New York*. — *People v. Capen*, 26 Hun (N. Y.) 377.

*Ohio*. — *Jung Brewing Co. v. Talbot*, 59 Ohio St. 511.

*Pennsylvania*. — *Com. v. Holstine*, 132 Pa. St. 357.

*Tennessee*. — *Bryant v. State*, 89 Tenn. 581.

*Texas*. — *Lafferty v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 374; *Northcutt v. State*, 35 Tex. Crim. 584.

**1. Contract Executory.** — *State v. Houts*, 36 Mo. App. 265. See also the cases cited in the preceding note.

**2. Violation of Local Option Laws.** — *Yowell v. State*, 41 Ark. 355; *Blackwell v. State*, 42 Ark. 275; *Bagby v. State*, 82 Ga. 786; *State v. Houts*, 36 Mo. App. 265; *Northcutt v. State*, 35 Tex. Crim. 584.

**3. Sales in Territory Not Covered by License.** — *Doster v. State*, 93 Ga. 43; *Com. v. Greenfield*, 121 Mass. 40; *Com. v. Hugo*, 164 Mass. 161; *Shuster v. State*, 62 N. J. L. 521; *People v. Capen*, 26 Hun (N. Y.) 377; *Com. v. Holstine*, 132 Pa. St. 357; *Bryant v. State*, 89 Tenn. 581.

**4. Sales in Violation of Prohibition Laws.** — *Gipps Brewing Co. v. De France*, 91 Iowa 108, 51 Am. St. Rep. 329.

**Instances.** — A wholesale liquor dealer, licensed to sell liquors at a designated place in C. county, was accustomed to fill orders from G. county, where he had no license, sending the goods by his own wagon. The driver of this wagon furnished to customers, under general orders, bottled beer from a common stock carried in the wagon, collecting the price on delivery. It was held that these transactions constituted sales in G. county. *Shuster v. State*, 62 N. J. L. 521.

So it has been held that where beer is warehoused in a certain town and delivered by agents, it must be deemed to have been sold in that town, although the principal lives in an adjoining town and has his office there and

receives communications there from persons wanting beer. *Spring Valley v. Henning*, 42 Ill. App. 159.

And the delivery of a keg of beer to a purchaser and the receipt from him of the purchase money by the agent in a county where the local option law is in force constitute an indictable violation of that law, although the order for the beer has been previously given to the defendant in another county. *State v. Houts*, 36 Mo. App. 265.

**Shipment to Agent for Delivery to Purchaser.** — Where a vendor of liquor takes a bill of lading deliverable to his agent, the title does not vest in the vendee until actual delivery. If delivery is made to the vendee by the vendor's agent at a place where the sale of liquor is forbidden, the vendee and his agents are guilty. *Berger v. State*, 50 Ark. 20. To the same effect see *Com. v. Burgett*, 136 Mass. 450.

**5. Conditional Sale.** — *Westheimer v. Weisman*, 60 Kan. 753; *Schlesinger v. Stratton*, 9 R. I. 578; *Mack v. Lee*, 13 R. I. 293. *Contra*, *Wasserboehr v. Boulter*, 84 Me. 165, 30 Am. St. Rep. 344; *Wilson v. Stratton*, 47 Me. 120.

As supporting the proposition stated in the text, see the following decisions, which are directly in point, except that the sales were of goods other than intoxicating liquors: *Moss v. Sweet*, 3 Eng. L. & Eq. 311; *Bianchi v. Nash*, 1 M. & W. 545; *Beverly v. Lincoln Gas-Light, etc., Co.*, 6 Ad. & El. 829, 33 E. C. L. 222; *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630.

**6. Moss v. Sweet**, 3 Eng. L. & Eq. 311; *Schlesinger v. Stratton*, 9 R. I. 578.

And see the title **CONDITIONAL SALES**, vol. 6, p. 462 *et seq.*

**7. Liquors Lawfully Acquired and Kept.** — *Niles v. Fries*, 35 Iowa 41; *Preston v. Drew*, 33 Me. 559, 54 Am. Dec. 639; *Dunbar v. Boston*, 101 Mass. 317; *Brown v. Perkins*, 12 Gray (Mass.) 89.

**Intoxicating Liquors Taxable.** — Intoxicating liquors of domestic manufacture, not kept for illegal sale, are subject to taxation the same as any other kind of property. *Dunbar v. Boston*, 101 Mass. 317.



even though intoxicating liquors are unlawfully acquired or kept for illegal use, they nevertheless retain the character of property and are entitled to the protection of the law.<sup>1</sup>

*b. SUBJECT OF LARCENY.* — It is not a defense to a prosecution for stealing intoxicating liquors that the liquors stolen were kept in violation of law or to be sold for illegal purposes. The thing taken is property and the subject of larceny.<sup>2</sup>

*c. ACTIONS FOR WRONGFUL TAKING OF INTOXICATING LIQUORS* — (1) *Where Liquors Are Lawfully Acquired or Kept.* — It is well settled that one who has lawfully acquired and keeps intoxicating liquors may maintain an action against one who wrongfully takes them from his possession, either to recover possession or to recover their value.<sup>3</sup> This is true although it is provided by statute that no action "of any kind" shall be maintained "for the recovery or possession of intoxicating or spirituous liquors or the value thereof."<sup>4</sup>

(2) *Where Liquors Are Kept for Unlawful Purpose.* — In the absence of a statute providing otherwise, the fact that intoxicating liquors were kept for unlawful sale will be no defense to an action for wrongfully converting them.<sup>5</sup> This, however, is the limit to which the courts will go. Special damages will not be allowed for the breaking up of the plaintiff's business by the conversion.<sup>6</sup>

*Effect of Special Statutory Provisions.* — A statute which provides that no action shall be brought on claims or demands contracted or given for intoxicating liquors sold in violation of law does not prevent the owner of liquors wrongfully converted from maintaining an action therefor, even though he had intended to sell them illegally.<sup>7</sup> The decisions are conflicting under a statute which provides that no action shall be maintained to recover possession of intoxicating liquors or the value thereof, or that no action shall be maintained to recover possession of intoxicating liquors or the value thereof except such as are sold or purchased in accordance with law. Under the provision first mentioned it has been held that where intoxicating liquors have been wrong-

1. *Liquors Unlawfully Acquired or Kept.* — *Monty v. Arneson*, 25 Iowa 388; *Easter v. Traylor*, 41 Kan. 495; *Breck v. Adams*, 3 Gray (Mass.) 569; *Brown v. Perkins*, 12 Gray (Mass.) 89; *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124; *Fuller v. Bean*, 30 N. H. 181; *State v. Johnson*, 33 N. H. 465. *Contra*, *Oviatt v. Pond*, 29 Conn. 479. As sustaining the view stated in the text, see the following subdivisions of this section. It will also be noted that there are some decisions which seem to be in accord with *Oviatt v. Pond*, 29 Conn. 479.

2. *Liquor Unlawfully Kept Subject of Larceny.* — *State v. May*, 20 Iowa 305; *Com. v. Coffee*, 9 Gray (Mass.) 139.

Money acquired by the illegal sale of intoxicating liquors may be the subject of larceny from the possessor. *Com. v. O'Rourke*, 10 Cush. (Mass.) 397.

3. *Liquors Lawfully Acquired or Kept.* — *Niles v. Fries*, 35 Iowa 41; *Dolan v. Buzzell*, 41 Me. 473; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Jones v. Fletcher*, 41 Me. 254; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Sullivan v. Park*, 33 Me. 438; *Robinson v. Barrows*, 48 Me. 186; *Ingalls v. Baker*, 13 Allen (Mass.) 449; *Fisher v. McGirr*, 1 Gray (Mass.) 2, 61 Am. Dec. 381; *Harrison v. Nicholls*, 31 Vt. 709.

4. *Effect of Statutory Provisions on Right of Action.* — *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639.

5. *Liquors Kept for Unlawful Sale.* — *Smith v.*

*Dinkelspiel*, 91 Ala. 528, wherein it was held that an owner of intoxicating liquors wrongfully attached could maintain an action of trespass notwithstanding the fact that the liquors were kept to be sold without license; *Hamilton v. Goding*, 55 Me. 419; *Howe v. Jolly*, 68 Miss. 323, holding that the fact that a firm was unlawfully engaged in the sale of intoxicating liquors constituted no defense to an action by one partner against the other for a wrongful conversion of the liquors; *Fuller v. Bean*, 30 N. H. 181. To the same effect as the *Alabama* case cited see *Niles v. Fries*, 35 Iowa 41. See also *infra*, this section, *Liability of Liquors to Attachment and Execution*.

6. *Special Damages to Business by Conversion Not Recoverable.* — *Smith v. Dinkelspiel*, 91 Ala. 528, in which case it was said that "parties engaging in a business offensive to and prohibited by the law must be regarded as having forfeited its protection, so far as respects such business."

7. *Hamilton v. Goding*, 55 Me. 419; *Adams v. McGlinchy*, 66 Me. 474. See also *Cohen v. Manuel*, 91 Me. 277; *Bliss v. Winslow*, 80 Me. 274, 6 Am. St. Rep. 195.

The owner of intoxicating liquors held in *Maine*, and intended for illegal sale in that state, may maintain an action of trespass for the unauthorized conversion of the goods by the sheriff acting by his deputy under color of his office. *Hamilton v. Goding*, 55 Me. 419, wherein it was also held that recovery in such an action does not constitute a sale.



fully taken from one who has acquired or keeps them in violation of law an action therefor is not maintainable.<sup>1</sup> Under the second provision, or under statutes nearly identical in their import, it has been held that the owner of intoxicating liquors unlawfully acquired or kept cannot maintain an action against one who has wrongfully converted them.<sup>2</sup> Other decisions construing this provision or other provisions similar thereto maintain the contrary.<sup>3</sup> In one of these cases it was said that these statutes cannot be so construed as to extend protection to a mere wrongdoer and shield him from all liability for injury done to the property of another; that if such were the purpose of the statute it would be unconstitutional.<sup>4</sup> In another case it was said that as these provisions are in derogation of ordinary rights in regard to property, they should receive a strict construction.<sup>5</sup>

**d. REMEDIES OF OWNER OF LIQUORS TAKEN UNDER SEARCH AND SEIZURE ACTS.** — Where intoxicating liquors are taken on a warrant lawfully issued under the search and seizure acts, the owner cannot maintain replevin against the officer for the liquors seized.<sup>6</sup> Liquors so held and seized are in the custody of the law,<sup>7</sup> and must there remain until final action is had upon the complaint on which the seizure was made.<sup>8</sup> On the other hand, the owner may have his action against the officer making the seizure, where the liquor is seized without warrant,<sup>9</sup> where liquors not described in the warrant are seized,<sup>10</sup> where the officers seizing the liquors show no justification therefor,<sup>11</sup> or where the officer refuses to return the goods upon the subsequent

1. *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Dolan v. Buzzell*, 41 Me. 473. See also *Black v. McGilvery*, 38 Me. 287; *Robinson v. Barrows*, 48 Me. 186. *Contra*, dictum in *Sullivan v. Park*, 33 Me. 438. This statute, as shown by the preceding notes, is no longer in force.

**Repeal of Statute — Effect.** — When the possession of property intended for sale in violation of law is made criminal by a statute, no action can be maintained, while such statute is in force or after its repeal, for the conversion of such property while the statute was in force. *Robinson v. Barrows*, 48 Me. 186.

2. *Oviatt v. Pond*, 29 Conn. 479; *Schlesinger v. Chapman*, 52 Conn. 271; *Donohue v. Maloney*, 49 Conn. 163; *Sommer v. Cate*, 22 Iowa 585; *Walker v. Shook*, 49 Iowa 264; *Bowen v. Hale*, 4 Iowa 430; *Funk v. Israel*, 5 Iowa 438. See also *Howe v. Stewart*, 40 Vt. 145.

**Applications of Doctrine — Seizure of Property for Debt of Another.** — Where liquors which are being sold in violation of law by one as agent for another are levied upon as the property of the agent, the owner cannot maintain an action of replevin against the levying creditor to recover possession. *Donohue v. Maloney*, 49 Conn. 163. To the same effect see *Oviatt v. Pond*, 29 Conn. 479.

**The Right of Stoppage in Transitu** cannot be enforced by suit in *Vermont* as to intoxicating liquors sold therein contrary to law, the statute having taken away all right of action for the recovery or possession thereof. *Howe v. Stewart*, 40 Vt. 145.

**Conversion by Carrier.** — In an action to recover the value of intoxicating liquors lost or destroyed by a common carrier, the plaintiff cannot recover unless he owned or possessed such liquors with lawful intent. *Sommer v. Cate*, 22 Iowa 585. And the burden is on him to prove this fact. *Sommer v. Cate*, 22 Iowa 585, *overruling Bowen v. Hale*, 4 Iowa 430.

3. *Monty v. Arneson*, 25 Iowa 383; *Breck v. Adams*, 3 Gray (Mass.) 569; *Fisher v. McGirr*,

1 Gray (Mass.) 2, 61 Am. Dec. 381; *Ingalls v. Baker*, 13 Allen (Mass.) 449; *Barron v. Arnold*, 16 R. I. 22.

**Conditional Sale.** — If a person to whom intoxicating liquors have been delivered for examination, under an agreement that he shall pay cash for them if they suit him, and return them if they do not, and that they shall not become his property till paid for, refuses, on demand, to pay for them or to return them, and conceals them, he is liable to an action for their conversion, notwithstanding the statutes forbidding the sale of intoxicating liquors. *Booraem v. Crane*, 103 Mass. 522.

**Mortgage of Intoxicating Liquors.** — Trover lies for intoxicating liquors in favor of a mortgagee thereof against one who has seized the property under attachment as being the property of the mortgagor. *Cobb v. Farr*, 16 Gray (Mass.) 597.

4. *Fisher v. McGirr*, 1 Gray (Mass.) 48, 61 Am. Dec. 381.

5. *Barron v. Arnold*, 16 R. I. 22, holding further that the statute applies only to that class of actions where the plaintiff seeks to recover the possession or value of liquors which, by some act of his own or by some act or contract to which he is a party, are held or have been disposed of in violation of law.

6. **Liquors Taken under Search and Seizure Acts.** — *Funk v. Israel*, 5 Iowa 451; *State v. Harris*, 38 Iowa 246; *Weir v. Allen*, 47 Iowa 482; *Musgrave v. Hall*, 40 Me. 498; *Allen v. Staples*, 6 Gray (Mass.) 491.

7. **Liquors in Custodia Legis.** — *Allen v. Staples*, 6 Gray (Mass.) 491, *citing Ilsley v. Stubbs*, 5 Mass. 283; *Smith v. Huntington*, 3 N. H. 78.

8. *Musgrave v. Hall*, 40 Me. 498.

9. **Seizure Without Warrant.** — *Weston v. Carr*, 71 Me. 356; *Reed v. Adams*, 2 Allen (Mass.) 413.

10. **Seizure of Liquors Not Described in Warrant.** — *Arthur v. Flanders*, 10 Gray (Mass.) 107.

11. **Seizure Without Justification.** — *Breck v. Adams*, 3 Gray (Mass.) 569.



abatement of the proceedings because the notice to the owner was not returned to the proper court; and this although no order is passed for the return of the liquors.<sup>1</sup> This is true although it is provided by statute that no action shall be maintained against any officer for seizing any intoxicating liquor, unless such liquor was legally kept by the owner.<sup>2</sup>

*e.* ACTION FOR DESTRUCTION OF LIQUORS BY PRIVATE PERSONS. — As private persons cannot abate a common nuisance unless it obstructs their own rights,<sup>3</sup> they have no right to destroy intoxicating liquors belonging to another whether kept for illegal sales or for other purposes, and the owner may maintain an action for damages for such destruction.<sup>4</sup>

**2. Right to Recover Price of Liquors Illegally Sold** — *a.* STATEMENT AND APPLICATION OF RULE. — It is a general rule of law that a contract made in violation of a statute is void, and that where a cause of action cannot be established without relying on an illegal contract there can be no recovery.<sup>5</sup> It is accordingly held that one who sells liquors in violation of law is not entitled to recover the agreed price. This rule has been applied to sales under the following circumstances: without license;<sup>6</sup> in a manner not authorized by the license held by the seller;<sup>7</sup> before giving bond;<sup>8</sup> to a habitual

**1. Refusal to Return Goods on Abatement of Proceedings.** — *Ewings v. Walker*, 9 Gray (Mass.) 95. Compare *Walker v. Shook*, 49 Iowa 264, in which case it was held that where the officer making the seizure is adjudged to have no authority for detaining the liquors, the owner, when sued to recover damages for the retention, must show that he owned and kept them with a lawful intent; and the fact that the officer had been ordered by the court to return them did not relieve him from the necessity of making such allegation and proof.

**2.** See the *Massachusetts* cases cited in preceding notes.

**3.** See the title ABATEMENT OF NUISANCES, vol. 1, p. 80 *et seq.*

**4. Destruction of Liquor as Nuisance by Private Person.** — *Turner v. Hitchcock*, 20 Iowa 310; *Brown v. Perkins*, 12 Gray (Mass.) 89.

**5. Contracts in Violation of Statute Void.** — *Pollock on Contracts* 233 *et seq.*; *Miller v. Ammon*, 145 U. S. 426; *Harris v. Runnels*, 12 How. (U. S.) 79; *U. S. Bank v. Owens*, 2 Pet. (U. S.) 527; *Gunter v. Lecky*, 30 Ala. 591; *Penn v. Bornman*, 102 Ill. 523; *Pangborn v. Westlake*, 36 Iowa 546; *Alexander v. O'Donnell*, 12 Kan. 608.

**Construction of Prohibitory Statutes.** — If a statute declares a sale without license to be unlawful, a sale without license is void, although the statute does not expressly so provide or impose a penalty for so doing. So where a statute imposes a penalty upon any person who shall sell intoxicating liquors without a license, the contract to sell will be illegal. *Lewis v. Welch*, 14 N. H. 294; *Griffiths v. Wells*, 3 Den. (N. Y.) 226. For a discussion of the effect on contracts of the statute prohibiting the doing of an act and imposing a penalty therefor, see *Miller v. Ammon*, 145 U. S. 426; *Harris v. Runnels*, 12 How. (U. S.) 80; *Jones v. Surprise*, 64 N. H. 246.

**6. Sales Without License** — *United States*. — *Miller v. Ammon*, 145 U. S. 421.

*Alabama*. — *Moog v. Hannon*, 93 Ala. 503.

*Illinois*. — *Wempen v. Girard*, 84 Ill. App. 130.

*Kansas*. — *Alexander v. O'Donnell*, 12 Kan. 608; *Dobson v. Hope*, 7 Kan. 161.

*Kentucky*. — *Vannoy v. Patton*, 5 B. Mon. (Ky.) 248.

*Maine*. — *Cobb v. Billings*, 23 Me. 470; *Ladd v. Dillingham*, 34 Me. 316.

*Massachusetts*. — *Bolduc v. Randall*, 107 Mass. 121.

*Minnesota*. — *Solomon v. Dreschler*, 4 Minn. 278.

*Nebraska*. — *Gillen v. Riley*, 27 Neb. 158.

*New Hampshire*. — *Lewis v. Welch*, 14 N. H. 294.

*New York*. — *Griffith v. Wells*, 3 Den. (N. Y.) 226.

*Vermont*. — *Bancroft v. Dumas*, 21 Vt. 456; *Boutwell v. Foster*, 24 Vt. 485; *Briggs v. Campbell*, 25 Vt. 704.

*Wisconsin*. — *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

**Taking Out License Subsequent to a Sale**, although before the sale the seller petitioned for a license and at the time of the sale there were no commissioners who could grant licenses, will not enable the seller to recover the price. *Bolduc v. Randall*, 107 Mass. 121.

**License Issued to Agent.** — Where it is provided by statute that an account for liquors sold in quantities less than a quart will not support an action unless the seller shows a license to make sales in that quantity at the date thereof, a license to the seller's agent will not authorize sales by the principal, and he cannot recover on an account for liquors sold in quantities less than a quart. *Stallings v. Lee*, (Ala. 1899) 26 So. Rep. 211.

**7. Sales Not Authorized by License.** — *Miller v. Ammon*, 145 U. S. 421; *Alexander v. O'Donnell*, 12 Kan. 608; *Dolson v. Hope*, 7 Kan. 161; *Murphy v. McNulty*, 145 Mass. 464; *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376; *State v. Perkins*, 26 N. H. 9; *Bergeron v. Fleury*, 7 Rev. Leg. 183.

Where one whose license authorizes him to sell only at his shop permits his driver to deliver from a wagon to regular customers under orders then and there given to the driver, such sales are unlawful and will not support an action for the price. *Murphy v. McNulty*, 145 Mass. 464.

**8. Sales Without Giving Bond.** — *Loranger v. Jardine*, 56 Mich. 518.



drunkard;<sup>1</sup> with the express purpose of enabling the seller to resell the liquors in violation of law;<sup>2</sup> in violation of a statute forbidding credit in excess of a certain amount to a purchaser of intoxicating liquors;<sup>3</sup> in violation of a statute requiring that sales should be made for cash;<sup>4</sup> in violation of a statute containing an absolute prohibition of a sale of spirits unless delivered in quantities amounting to more than twenty shillings in value, at one time;<sup>5</sup> by a druggist without a prescription from a physician;<sup>6</sup> by a druggist as a beverage;<sup>7</sup> in violation of the prohibition law;<sup>8</sup> and where a sale was made of a stock of intoxicating liquors, to a woman, to be retailed by her, the statute prohibiting women from retailing intoxicating liquors.<sup>9</sup>

**No Recovery When Indictment Would Lie.** — Whenever an indictment can be sustained for the illegal selling of liquors, the price cannot be recovered.<sup>10</sup>

**Sales by Agent.** — No action lies to recover the proceeds of intoxicating liquors sold in violation of law by one to whom they have been intrusted by the owner for the purpose of being so sold.<sup>11</sup>

**b. REPEAL OF STATUTE DECLARING CONTRACT OF SALE INVALID.** — The subsequent repeal of an act prohibiting the sale of intoxicating liquors can have no effect to give a right of action on a contract made in contravention of the act while it was in force.<sup>12</sup>

**c. EVIDENCE.** — Where, in an action to recover the price of intoxicating liquors, the defense that the sale was for any reason illegal is set up, the burden of proof is on the defendant to show this fact.<sup>13</sup> In the notes hereto

**1. Sales to Habitual Drunkards.** — *Campbell v. Jones*, 2 Tex. Civ. App. 263.

**Sales to Drunkard After Notice Not to Sell.** — Sales of liquors by a dealer after the purchaser's wife has notified him not to sell to her husband are unlawful under the *Michigan* statute (How. Annot. Stat. Mich. (1882), §§ 2271, 2275), and any agreements for such sales are void, and the price of the liquors can neither be recovered nor allowed on an account between the dealer and the purchaser. *Loranger v. Jardine*, 56 Mich. 518.

**2. Sales to Enable Purchaser to Resell Illegally.** — *Kohn v. Melcher*, 43 Fed. Rep. 641.

**3. Giving Credit in Violation of Statute.** — *Sappington v. Carter*, 67 Ill. 482; *Kizer v. Randleman*, 5 Jones L. (50 N. Car.) 428.

**4. Cash Sales Required.** — *Mansfield v. Stoneham*, 15 Gray (Mass.) 149.

**Duebill.** — Where it was provided by statute that no recovery for a greater sum than fifty cents should be had on an account for liquors sold in quantities less than one quart, it was held that no more than fifty cents could be recovered on a duebill given for liquors sold by the drink. *Sappington v. Carter*, 67 Ill. 482.

Where a plaintiff's account is for spirituous liquors sold in quantities less than one quart, the entire claim exceeding fifty cents is made void by statute and a recovery on it is expressly prohibited; and where a duebill is given for such liquors sold in quantities less than one quart, no recovery can be had on the same except as to fifty cents. *Sappington v. Carter*, 67 Ill. 482.

**5. Violation of Statute Prohibiting Sales in Quantities Worth Less than Twenty Shillings.** — *Burnaeat v. Hutchinson*, 5 B. & Ald. 241, 7 E. C. L. 83.

**Cross Demands.** — Under the statute mentioned in the text, where parties having cross demands settled and balanced their accounts it was held no defense to an action brought for the balance that a great part of the amount was

for spirituous liquors delivered in quantities under twenty shillings in value. *Dawson v. Remnant*, 6 Esp. 24.

**Sales of Two Kinds of Spirits to an Amount Over Twenty Shillings.** — If a person sells two sorts of spirits at the same time to an amount above twenty shillings, he may recover the price, although the amount of each species of spirits is under twenty shillings. *Owens v. Porter*, 4 C. & P. 367, 19 E. C. L. 422.

**6. Sales by Druggist Without Prescription.** — *Davenport's Estate*, 4 Kulp (Pa.) 231.

**7. Sales of Liquor as Beverage by Druggist.** — *Davenport's Estate*, 4 Kulp (Pa.) 231.

**8. Sales in Violation of Prohibition Law.** — *Ludlow v. Hardy*, 38 Mich. 690. See also *Dearborn v. Hoit*, 41 Me. 120.

**9. Sales of Intoxicating Liquors to Woman to Be Retailed by Her.** — *Woodford v. Hamilton*, 139 Ind. 481.

**10. Jones v. Surprise**, 64 N. H. 246; *Bliss v. Brainard*, 41 N. H. 256; *Lewis v. Welch*, 14 N. H. 294.

**11. Sales by Agent.** — *Galligan v. Fannan*, 7 Allen (Mass.) 255. See also *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564, in which case it was held that where the owner of intoxicating liquor put it in the hands of the defendant for illegal sale, under an arrangement between them that the defendant should sell the liquor and pay the proceeds to the plaintiff to apply upon the defendant's debt to him, the plaintiff was so far a party to the illegal contract to sell that he could not recover the proceeds.

**12. Repeal of Statutes.** — *Hathaway v. Moran*, 44 Me. 67; *Bancher v. Mansel*, 47 Me. 58; *Robinson v. Barrows*, 48 Me. 186.

**New Promise After Repeal of Statute.** — A sale of liquors in violation of the prohibitory liquor law cannot support a new promise made after the repeal of the law. *Ludlow v. Hardy*, 38 Mich. 690.

**13. Burden on Defendant to Show Illegality.** — *Ressegien v. Van Wagenen*, 77 Iowa 351;



are set out some decisions bearing on the competency and sufficiency of certain kinds of evidence to prove the illegality of sales on which the recovery sought is based.<sup>1</sup>

**3. Status of Notes Given for Price of Liquors Illegally Sold — a. RIGHTS OF PAYEE — (1) Where Liquors Are Sole Consideration for Note.** — It is well settled that the payee or a holder affected with notice of the character of the consideration cannot recover on a promissory note or bill of exchange given in payment for intoxicating liquors sold in violation of law;<sup>2</sup> and the legal rights of the parties are in no wise affected by the fact that they supposed that they were acting in accordance with the provisions of the law.<sup>3</sup> The rule applies

*Portsmouth Brewing Co. v. Smith*, 155 Mass. 100; *Brown v. McHugh*, 36 Mich. 433; *Gillen v. Riley*, 27 Neb. 158; *Silverman v. Rumbarger*, 4 Pa. Super. Ct. 439; *Clohesy v. Roedelheim*, 99 Pa. St. 56; *Herlock v. Riser*, 1 McCord L. (S. Car.) 481; *M'Auley v. Lawler*, 9 N. Bruns. 600. See also *Myers v. Carr*, 12 Mich. 63. *Contra*, *Solomon v. Dreschler*, 4 Minn. 278; *Bliss v. Brainard*, 41 N. H. 256, *overruling* without mention *Kidder v. Norris*, 18 N. H. 532.

**Defense that Sale Was Unlawful in State Where Made.** — Where the defense is set up that the sale was unlawful in the state where it was made, the burden of proof is on the defendant to show that fact. *Silverman v. Rumbarger*, 4 Pa. Super. Ct. 439.

**Defense that Sale Violates Local Option Law.** — Where the defense in an action to recover the price of liquors sold is that the liquors were sold to the defendant in a county where the local option law was in force, it is not enough for the defendant to show an agreement or contract to sell in that county. He must also prove the actual consummation of the sale by the delivery of the goods there. *Clohesy v. Roedelheim*, 99 Pa. St. 56.

**1. Competency of Evidence — Intemperate Habits of Purchaser.** — If the defense is based on the fact that the sales were made to a man of known intemperate habits, a witness who is acquainted with the defendant's character in the neighborhood may testify that it was that of "a man of intemperate habits," in order to show the plaintiff's knowledge thereof. *Collins v. Jones*, 83 Ala. 365.

**Indictment of Purchaser for Maintaining Nuisance.** — In an action on a note in which the defendant pleaded that it was given by him for liquor sold in violation of law, an indictment against the defendant for nuisance committed in the sale of intoxicating liquors is not competent evidence in his behalf. *Taylor v. Pickett*, 52 Iowa 467.

**General Course of Dealing Between Plaintiff and Defendant.** — Where the defense is that the plaintiff knew that the liquors would be illegally resold, and aided in effecting this violation of law, bills for other liquors previously sold to the defendant by the plaintiff are admissible to show the course of dealing between the parties, in connection with the plaintiff's knowledge that the defendant was a dealer in liquors. *Hubbell v. Flint*, 13 Gray (Mass.) 277.

**Sufficiency of Evidence.** — Evidence that the business of an insolvent debtor was the sale of intoxicating liquors at retail and that the notes which he owed were all given to pay for

such liquors is not sufficient to prove that the consideration of them was illegal. *Blake v. Sawin*, 10 Allen (Mass.) 349. For a case where the evidence was held sufficient to prove an illegal sale, see *Andrews v. Frye*, 104 Mass. 234.

**2. Rights of Payee — Iowa.** — *Taylor v. Pickett*, 52 Iowa 467; *Braith v. Guelick*, 37 Iowa 212.

*Kansas.* — *Glass v. Alt*, 17 Kan. 444.

*Maine.* — *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Webster v. Sanborn*, 47 Me. 471.

*Massachusetts.* — *Holden v. Cosgrove*, 12 Gray (Mass.) 216; *Hubbell v. Flint*, 13 Gray (Mass.) 277; *Weil v. Golden*, 141 Mass. 364; *Orcutt v. Symonds*, 107 Mass. 382; *Nourse v. Pope*, 13 Allen (Mass.) 87.

*Mississippi.* — *Cotten v. McKenzie*, 57 Miss. 418.

*New Hampshire.* — *Coburn v. Odell*, 30 N. H. 540; *Kidder v. Blake*, 45 N. H. 530; *Doolittle v. Lyman*, 44 N. H. 608; *Bliss v. Brainard*, 41 N. H. 256.

*New York.* — *Turck v. Richmond*, 13 Barb. (N. Y.) 533.

*Ohio.* — *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

*Texas.* — *Campbell v. Jones*, 2 Tex. Civ. App. 263.

*Vermont.* — *Converse v. Foster*, 32 Vt. 828; *Driggs v. Campbell*, 25 Vt. 704.

*Wisconsin.* — *Gorsuth v. Butterfield*, 2 Wis. 237.

*Contra.* — *Yundt v. Roberts*, 5 S. & R. (Pa.) 139.

And see generally the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 189 *et seq.*

**Novation.** — Where A was indebted to B upon an illegal consideration, and B owed to C a valid bill, and, by novation, A made his promissory note to C in settlement of his debt to B and of B's debt to C, it was held that the illegal consideration of A's debt to B could not be pleaded against the notes so given, where C had no knowledge of such illegal consideration. *Bower v. Webber*, 69 Iowa 286. See also the title *NOVATION*.

**Sales in Another State.** — The provision of Gen. Stat. Mass., c. 86, § 61, that securities for debt "given in whole or in part for the price of liquor sold in violation of this chapter" should be void against holders with notice of the unlawful consideration, applied only to sales made in *Massachusetts*. *Abberger v. Marrin*, 102 Mass. 70; *Ely v. Webster*, 102 Mass. 304; *Tracy v. Webster*, 102 Mass. 307, note.

**3. Ignorance of Law — Effect.** — *Webster v. Sanborn*, 47 Me. 471.



to notes given for liquors sold without a license,<sup>1</sup> for liquors sold in violation of a statute prohibiting the sale thereof to be drunk on the premises,<sup>2</sup> for liquors sold to a habitual drunkard or person of intemperate habits,<sup>3</sup> and for liquor sold with the knowledge that it will be resold in violation of law.<sup>4</sup> So the rule applies although the sale was made on credit and the note was given at a subsequent period.<sup>5</sup> And it is likewise immaterial that the note was given in a state where the contract would have been legal, the whole transaction between the parties constituting the sale being in a state where it was unlawful.<sup>6</sup>

**Repeal of Statutes.** — The repeal of a statute expressly declaring void a note given for liquors illegally sold does not restore to validity a note given for liquors illegally sold during the existence of the repealed statute.<sup>7</sup> It is otherwise if the repealed statute merely suspends the remedy upon the note.<sup>8</sup>

(2) *Where Liquors Are Partial Consideration for Note.* — Where part of the consideration for which a note is given is a sale of intoxicating liquor in violation of law, the note is wholly void and no recovery can be had thereon.<sup>9</sup> The illegal part of the consideration cannot be separated from the legal, and taints the whole.<sup>10</sup>

**b. RIGHTS OF INNOCENT PURCHASER.** — It is well settled that a note given for the purchase price of spirituous liquors illegally sold is good in the hands of an indorsee for value without notice of the illegality of the consideration, when acquired before maturity.<sup>11</sup>

1. **Liquors Sold Without License.** — *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Turck v. Richmond*, 13 Barb. (N. Y.) 533.

2. **Sales of Liquor to Be Drunk on Premises.** — *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

3. **Liquors Sold to Drunkards.** — *Campbell v. Jones*, 2 Tex. Civ. App. 263. See also *Morgan v. Farned*, 83 Ala. 367.

4. **Knowledge of Purpose to Sell Unlawfully.** — *Hubbell v. Flint*, 13 Gray (Mass.) 277; *Weil v. Golden*, 141 Mass. 364.

5. **Sales on Credit.** — *Glass v. Alt*, 17 Kan. 444; *Briggs v. Campbell*, 25 Vt. 704; *Converse v. Foster*, 32 Vt. 828.

6. *Briggs v. Campbell*, 25 Vt. 704.

7. **Repeal of Statutes Making Notes Void.** — *Gorsuth v. Butterfield*, 2 Wis. 237. See also *Holden v. Cosgrove*, 12 Gray (Mass.) 216, in which case it was held that the repeal of a statute making unlawful the sale of liquor for which the note in suit was given did not legalize the sale or affect in any way the right of the defendant to set up the illegality of the sale as a defense.

8. **Repeal of Statute Suspending Remedy on Note.** — *Johnson v. Meeker*, 1 Wis. 436. Here the repealed statute merely provided that no suits should be brought on notes given for liquor bills, and that such suits, if brought, should be dismissed. The court said: "When the remedy upon a contract has been suspended by a statute, the repeal of the statute restores the remedy in all cases, except where rights have become vested by virtue of the statute while it was in force." To the same effect see *Bird v. Fake*, 1 Pin. (Wis.) 290.

9. **Where Part of Consideration Is Intoxicating Liquors** — *Alabama*. — *Wadsworth v. Dunnam*, 117 Ala. 661.

*Iowa*. — *Taylor v. Pickett*, 52 Iowa 467; *Braith v. Guelick*, 37 Iowa 212; *Quigley v. Duffey*, 52 Iowa 610.

*Maine*. — *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592.

*Massachusetts*. — *Nourse v. Pope*, 13 Allen (Mass.) 87; *Brigham v. Potter*, 14 Gray (Mass.) 522; *Perkins v. Cummings*, 2 Gray (Mass.) 258; *Warren v. Chapman*, 105 Mass. 87.

*Mississippi*. — *Cotten v. McKenzie*, 57 Miss. 418.

*New Hampshire*. — *Kidder v. Blake*, 45 N. H. 530; *Coburn v. Odell*, 30 N. H. 541.

*Ohio*. — *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 192.

**Note for Balance of Account for Liquors Illegally Sold.** — Where partial payments have been made, less than the amount charged for ardent spirits sold without license, a note given for the balance of the account will be entirely void. *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592.

**Responsibility of Surety.** — No action can be maintained against a surety upon a promissory note given in part for the price of liquor unlawfully sold, although such surety received from the principal a full indemnity for signing the note. *Nourse v. Pope*, 13 Allen (Mass.) 87.

**Application of Payments.** — Where a note was given for an amount due on an account, some items of which were legal and others illegal, being for intoxicating liquors, and the account was continued and payments were afterwards made on account generally, it was held that, the note being void, the legal items of account included therein should be regarded as still due on account and the subsequent payments should be applied thereto. *Quigley v. Duffey*, 52 Iowa 610. See also the title **APPLICATION OF PAYMENTS**, vol. 2, p. 442 and notes.

10. **Illegal Consideration Taints Whole Note.** — *Braith v. Guelick*, 37 Iowa 212. See also *Widoe v. Webb*, 20 Ohio St. 435, 5 Am. Rep. 664. And see the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 192; **ILLEGAL CONTRACTS**, vol. 15, p. 988.

11. **Note Acquired Before Maturity.** — *Baxter v.*



**Holder Who Purchased After Maturity.** — The rule is otherwise where the party takes the paper after maturity, unless the terms of the statute are broad enough to protect him.<sup>1</sup>

**Not Holder for Value.** — There can be no recovery on a note given in payment for spirituous liquors by a third person who has paid nothing therefor, and who has agreed to make payment only in case he succeeds in collecting it.<sup>2</sup>

**c. EVIDENCE IN ACTION ON NOTE.** — The burden of proving that a note in suit was given in payment for liquors illegally sold is on the defendant.<sup>3</sup> But when this has been shown the burden is on the plaintiff to show that he is a holder for a valuable consideration without notice of the illegality of the contract,<sup>4</sup> and (except in *Maine*)<sup>5</sup> that the plaintiff acquired the note before maturity.<sup>6</sup>

**4. Status of Mortgage to Secure Price of Liquors.** — A mortgage made to secure a note for which a part of the consideration is a sale of spirituous liquor in violation of law is wholly void.<sup>7</sup>

**5. Right to Recover Back Money Paid for Liquors Illegally Sold — a. RECOVERY BY DIRECT ACTION.** — In the absence of statute providing otherwise

*Ellis*, 57 Me. 178; *Norris v. Langley*, 19 N. H. 423; *Great Falls Bank v. Farmington*, 41 N. H. 32; *Doe v. Burham*, 31 N. H. 426; *Cobb v. Doyle*, 7 R. I. 550; *Campbell v. Jones*, 2 Tex. Civ. App. 263; *Pindar v. Barlow*, 31 Vt. 529; *Converse v. Foster*, 32 Vt. 828 (but see *infra*, this note, as to present rule); *Johnson v. Meeker*, 1 Wis. 436. See also *Bottomley v. Goldsmith*, 36 Mich. 27; *Paton v. Coit*, 5 Mich. 505, 72 Am. Dec. 58. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 198.

**Rule in Vermont.** — Under a statute which provides that "no action of any kind shall be had or maintained in any court in this state for the recovery or possession of intoxicating liquor or the value thereof, except such as is sold or purchased in accordance with the provisions of this chapter," a note given for intoxicating liquors illegally sold has been held void even in the hands of an innocent holder. *Streit v. Sanborn*, 47 Vt. 702.

**1. Notes Acquired After Maturity.** — *Bissell v. Gowdy*, 31 Conn. 47; *Rock Island Nat. Bank v. Nelson*, 41 Iowa 563. See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 312 *et seq.*

**Maine — Purchaser After Maturity Protected by Statute.** — Under the Maine statute (Rev. Stat. 1883, c. 27, § 56), which provides that no action shall be maintained on a note given for intoxicating liquors, but that "this section shall not extend to negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract," the holder for value of such note without notice may recover thereon though he purchased it after maturity. *Wing v. Ford*, 89 Me. 140; *Field v. Tibbetts*, 57 Me. 358, 99 Am. Dec. 779; *Hapgood v. Needham*, 59 Me. 443.

**The Rights of a Purchaser from an Innocent Holder** are the same as those of an innocent holder. *Dillingham v. Blood*, 66 Me. 140. See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 308.

**2. Where Holder Has Not Paid Amount of Note.** — *Oakes v. Merrifield*, 93 Me. 207.

**3. Defendant Must Show Illegality.** — *Hapgood v. Needham*, 59 Me. 443; *Brigham v. Potter*, 14 Gray (Mass.) 522; *Craig v. Proctor*, 6 R. I.

547. See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 320.

In *New Hampshire* a sale of liquor is presumed to be illegal, and consequently one who sues upon a note given for liquors must prove that he was legally authorized to make a sale. *Doolittle v. Lyman*, 44 N. H. 608.

**4. Plaintiff Must Show Bona Fide Purchase.** — *Rock Island Nat. Bank v. Nelson*, 41 Iowa 563; *Cottle v. Cleaves*, 70 Me. 256; *Baxter v. Ellis*, 57 Me. 178; *Hapgood v. Needham*, 59 Me. 442; *Field v. Tibbetts*, 57 Me. 358, 99 Am. Dec. 779; *Holden v. Cosgrove*, 12 Gray (Mass.) 216; *Paton v. Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Bottomley v. Goldsmith*, 36 Mich. 27. See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 321.

**5. In Maine**, as already shown, it is immaterial whether the note be purchased before or after maturity. See the preceding subdivision.

**6. Before Maturity.** — *Paton v. Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Bottomley v. Goldsmith*, 36 Mich. 27. See also *Barlow v. Scott*, 12 Iowa 63.

**Knowledge that Payee Is Liquor Seller — Effect.** — A purchaser of negotiable paper is not, by mere knowledge that the payee is engaged in selling intoxicating liquors, put upon inquiry to ascertain whether the consideration of the paper was a lawful sale of such liquors. *Bottomley v. Goldsmith*, 36 Mich. 27.

**Presumption of Good Faith — Sufficiency of Evidence.** — One who has purchased for value, in due course of business and under circumstances not calculated to awaken suspicion, a note given for intoxicating liquors, will be presumed, until the contrary is shown, to have no notice of its illegality. *Swett v. Hooper*, 62 Me. 54.

**7. Mortgage to Secure Purchase Price of Liquors.** — *Brigham v. Potter*, 14 Gray (Mass.) 522. And see the title *MORTGAGES*.

**Effect of Foreclosure of Mortgage.** — The foreclosure of a mortgage of land has the effect of a payment of the debt, and makes absolute the title to the mortgagee although the consideration for promissory notes which the mortgage was made to secure was the price of intoxicating liquors sold in violation of law. *McLaughlin v. Cosgrove*, 99 Mass. 4.



one who has purchased intoxicating liquors from one not authorized to sell them, and who has received and paid therefor, cannot recover back the money so paid, when no element of oppression or deceit enters into the case.<sup>1</sup>

**Under Statutes.** — But in order to discourage the illegal sale of intoxicating liquors statutes have been enacted in a number of jurisdictions authorizing the recovery back of money or other things of value paid or given for liquors illegally sold, and this right has been recognized and enforced in a considerable number of cases.<sup>2</sup> The right of recovery is not affected by the fact that the purchaser bought the liquors to resell them illegally.<sup>3</sup>

**Nature of Action.** — The remedy given by the statutes is enforceable by a civil action, and is in all respects governable by the rules applicable in such actions.<sup>4</sup>

**Limit of Recovery.** — The purchaser is entitled to recover back only the amount actually paid by him for the intoxicating liquors.<sup>5</sup>

**1. Money Paid Not Recoverable at Common Law.** — *Connally v. McConnell*, 1 Penn. (Del.) 133; *Ellsworth v. Mitchell*, 31 Me. 251; *Mudgett v. Morton*, 60 Me. 260; *Thayer v. Partridge*, 47 Vt. 423. See also the title IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1099.

**Payment of Claim in Spirituous Liquors.** — A statute which makes void all accounts of grocers or others retailing spirituous liquors in less quantities than one quart, in excess of fifty cents, has no application to the payment or satisfaction of judgment by means of such an account. As the statute does not make the sale illegal, but only prevents the enforcement of the account, a payment of the account cannot be recovered back. *Smith v. Hickman*, 68 Ill. 314.

**2. Recovery Back of Money Paid for Liquors Illegally Sold** — *Iowa*. — *Carlin v. Heller*, 34 Iowa 256; *Church v. Simpson*, 25 Iowa 408; *Becker v. Betten*, 39 Iowa 668; *Torbert v. Clough*, 72 Iowa 220; *Tolman v. Johnson*, 43 Iowa 127; *Gipps Brewing Co. v. De France*, 91 Iowa 108, 51 Am. St. Rep. 329; *Lindt v. Uihlein*, (Iowa 1899) 79 N. W. Rep. 73.

*Massachusetts*. — *Walan v. Kerby*, 99 Mass. 1; *McLaughlin v. Cosgrove*, 99 Mass. 4; *Adams v. Goodnow*, 101 Mass. 81; *Orcutt v. Symonds*, 107 Mass. 382.

*Michigan*. — *Friend v. Dunks*, 37 Mich. 25; *Schafer v. Boyce*, 41 Mich. 256; *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590.

*Vermont*. — *Yeartau v. Bacon*, 65 Vt. 516.

**What Is Sale Within Rule.** — A statute which authorizes the recovery back of moneys paid for liquors applies only to sales in the ordinary sense of the term, where the title passes from one owner to a new and different one, and not to releases on dissolution of partnership. *Jacobs v. Stokes*, 12 Mich. 381.

**Exchange of Property for Liquors.** — One who has exchanged property for liquors sold in violation of law may, instead of suing upon a promise to pay therefor, treat the transaction as void and sue for the value of the property, and if the defense of accord and satisfaction is then set up, he may in reply set up the illegal nature of the transaction. *Smith v. Grable*, 14 Iowa 429.

So where land is sold, the consideration of which is intoxicating liquors, the vendor may recover it back though he was a participant in

the violation of the law; and the vendee is not entitled to an allowance for improvements made by him on the land. *Lindt v. Uihlein*, (Iowa 1899) 79 N. W. Rep. 73.

**Iowa** — **Demand Made Condition Precedent to Eringing Suit.** — *Schmidt v. Kiser*, 75 Iowa 457; *Schober v. Rosenfeld*, 75 Iowa 455.

**Sales by Partners.** — Where a suit was brought against a partnership to recover back the price paid for liquor sold in violation of law, and it appeared that one of the partners had a license to make such sales, it was held that the action could not be sustained unless it should be shown that the other partner sold the liquor, the presumption of law being that the sale was made by the partner who had the right to sell. *Webber v. Williams*, 36 Me. 512.

**Sales Made Outside of State.** — The statutory provisions for recovering back money paid for liquors illegally sold have no application to a sale made outside of the state, even though in contemplation of the subsequent illegal sale of liquors in the state by the purchaser. *Wind v. Iler*, 93 Iowa 316.

**Limitations.** — Under the laws of *Iowa* an action to recover back money paid for liquors illegally sold will not be barred until five years from the time of payment. *Woodward v. Squires*, 41 Iowa 677.

**3. Purchase for Illegal Purpose Immaterial.** — *Orcutt v. Symonds*, 107 Mass. 382; *Yeartau v. Bacon*, 65 Vt. 516.

**4. Nature of Action.** — *Woodward v. Squires*, 39 Iowa 435.

**5. Amount Recoverable.** — *Carlin v. Heller*, 34 Iowa 256; *Orcutt v. Symonds*, 107 Mass. 382; *Jacobs v. Stokes*, 12 Mich. 381.

**Liquors Included Among Other Purchases.** — Although the statute avoids all contracts the consideration of which in whole or in part consists of liquors sold in violation of law, yet if a purchase includes other articles besides liquors the purchaser is not entitled to recover more than the amount actually paid for the liquors. *Jacobs v. Stokes*, 12 Mich. 381; *McGuinness v. Bligh*, 11 R. I. 94.

**Effect of Giving Note in Payment.** — The giving of a note to the seller does not amount to payment, and the buyer cannot recover the amount thereof until he has paid it. This is true although the note was transferred to a third party by the seller and is still outstanding. *Carlin v. Heller*, 34 Iowa 256.



**Agency as Defense.** — It is no defense to the action that the defendant sold the liquors and received the money merely as agent for another.<sup>1</sup>

**Assignability and Survivorship of Claim.** — A claim for the recovery of money paid for intoxicating liquors is assignable;<sup>2</sup> and it has also been held that a claim of this nature survives.<sup>3</sup>

**b. RECOVERY BY WAY OF SET-OFF OR COUNTERCLAIM.** — A direct action to recover the purchase price is not the only remedy; a claim of money paid for intoxicating liquors illegally sold may be set up by way of a set-off or counterclaim.<sup>4</sup> An allowance of illegal items by way of a set-off can have no greater effect than would have been given to their actual payment in cash.<sup>5</sup>

**c. AMENDMENT OR REPEAL OF STATUTES AS AFFECTING RECOVERY.** — The right of recovery is a vested right which subsequent amendments<sup>6</sup> or repeal<sup>7</sup> of the statute under which the cause of action accrued cannot affect, especially where the repealing statute saves "all actions pending and all causes of action which have accrued."<sup>8</sup>

**6. Status of Entire and Divisible Contracts of Sale of Liquors.** — Where a claim sued on is partly for intoxicating liquors sold in violation of law and partly for other items, the right of recovery for such items as constitute a legal claim depends on whether the contract is divisible or apportionable. If it is not there can be no recovery for either the legal or the illegal items.<sup>9</sup> But on the other hand, if the contract is apportionable a recovery will be allowed for all the items except the liquors illegally sold.<sup>10</sup>

**1. Agency as a Defense.** — *Sellers v. Arie*, 99 Iowa 515.

**2. Assignability of Claim.** — *Sellers v. Arie*, 99 Iowa 515.

**3. Survivorship of Claim.** — *Yeartean v. Bacon*, 65 Vt. 517.

**4. Set-off or Counterclaim.** — *Tolman v. Johnson*, 43 Iowa 127; *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590; *Fried v. Dunks*, 37 Mich. 27; *Walan v. Kerby*, 99 Mass. 1.

**Effect of Receipt on Right of Set-off.** — If a purchaser of intoxicating liquor sold in violation of law, in settling mutual accounts with the seller credits him with the price thereof, receives from him the payment of the balance found due in such allowance, and gives to him a receipt in full settlement of the accounts, such payment and receipts do not have the effect of an accord and satisfaction to bar an action to recover the amount so credited. *Walan v. Kerby*, 99 Mass. 1.

**5. *Walan v. Kerby***, 99 Mass. 1.

**6. Amendment of Statute.** — *Peters v. Goulden*, 27 Mich. 171.

**7. Repeal of Statute.** — *Adams v. Goodnow*, 101 Mass. 81; *Dewey v. Dolan*, 121 Mass. 9; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590.

**8. *Webber v. Howe***, 36 Mich. 150, 24 Am. Rep. 590.

**9. No Recovery on Indivisible Contracts.** — *Gipps Brewing Co. v. De France*, 91 Iowa 108, 51 Am. St. Rep. 329; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240; *Ladd v. Dillingham*, 34 Me. 316; *Goodwin v. Clark*, 65 Me. 280; *Wirth v. Roche*, 92 Me. 383; *Holt v. O'Brien*, 15 Gray (Mass.) 311; *Cotten v. McKenzie*, 57 Miss. 418. See also the title *ILLEGAL CONTRACTS*, vol. 15, p. 988.

**10. Recovery on Apportionable Contracts for Legal Items.** — *Goodwin v. Clark*, 65 Me. 280; *Towle v. Blake*, 38 Me. 528; *Cochrane v. Clough*, 38 Me. 25; *Boyd v. Eaton*, 44 Me. 51, 69 Am.

Dec. 83; *Plummer v. Erskine*, 58 Me. 61; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Chase v. Burkholder*, 18 Pa. St. 52.

**What Are Entire Contracts.** — If intoxicating liquors are illegally sold with an agreement that the vessels containing them, sold at the same time, may be returned and the buyer credited with the price charged, this is an entire and indivisible contract, and no action lies to recover the price of the vessels not returned. *Gipps Brewing Co. v. De France*, 91 Iowa 108, 51 Am. St. Rep. 329; *Holt v. O'Brien*, 15 Gray (Mass.) 311; *Bligh v. James*, 6 Allen (Mass.) 570.

Where there is a written contract for the sale of all the stock of goods in an apothecary's shop, the spirituous liquors in the store belonging to the vendor are *ex vi terminorum* included, and if the vendor has no license the contract cannot be enforced by him either in whole or in part. In such case the making of a separate schedule of the liquors by direction of both parties, if designed, is an evasion of the statute and cannot make the contract effectual as to the other goods. *Ladd v. Dillingham*, 34 Me. 316.

Where beer is purchased in bottles and the purchase of the bottles is merely incidental to that of the beer for its keeping and transportation, the contract is indivisible, and the vendor cannot recover the price of the bottles in which the beer is contained. *Wirth v. Roche*, 92 Me. 383.

**What Are Divisible Contracts.** — Where the sale of a portion of goods sold is prohibited by law, and the sale is not for a gross sum as the price of the whole, but at stipulated prices for the prohibited goods and stipulated prices for the residue, the illegality of the sale of the portion prohibited will not render the sale of the residue illegal. *Goodwin v. Clark*, 65 Me. 280; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605.

**Who Is Not Entitled to Set Up Illegality of**  
Volume XVII.



**7. Status of Contracts of Sale Made in Another State** — *a. IN GENERAL.* — The validity of a sale of intoxicating liquors is determined by the laws of the state where it is made, and if it is illegal in such state there can be no recovery in the courts of the state into which the liquors are transported and where the purchaser resides.<sup>1</sup> But as a general rule, a sale of intoxicating liquors valid in the state where made will sustain an action in the courts of a state whose laws do not permit such a contract, in the absence of a statute expressly or inferentially providing otherwise.<sup>2</sup> This rule is subject to a few exceptions which are considered in the following subdivision.

*b. EFFECT OF KNOWLEDGE OF PURPOSE TO RESELL ILLEGALLY AND ASSISTANCE THEREIN* — (1) *General Rule.* — Where liquors are sold in one state for transportation into another, the fact that the purchaser takes them there to be kept or resold in violation of law does not invalidate the sale, if the seller has no knowledge of the illegal purpose for which the purchaser bought them and if there is no special statutory provision to the contrary.<sup>3</sup> So, in the absence of a statute providing otherwise, the mere fact that the seller had reasonable cause to believe that liquors were to be kept or resold in violation of the laws of another state will not affect the validity of the sale.<sup>4</sup> Although there are a few decisions which maintain a contrary doctrine,<sup>5</sup> the decided weight of authority is to the effect that mere knowledge by the vendor of intoxicating liquors lawfully sold in one state, that the vendee intends to use them in violation of the laws of another state, will not defeat an action brought in such other state by the vendor against the vendee for the purchase price.<sup>6</sup> If,

**Items.** — Where articles of partnership contemplated the sale of liquors, and the stock, on dissolution, contained them, and on settlement one partner was charged with the price of them and authorized to pay certain debts incurred in their purchase, it was held that the other partner, when sued for contribution, could not set up the liquor law in defense to items paid for such debts. *McGunn v. Hanlin*, 29 Mich. 481.

**1. Contracts Void in State Where Made.** — *Dudley v. Buckfield*, 51 Me. 254; *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100; *Theo. Hamm Brewing Co. v. Young*, (Minn. 1899) 79 N. W. Rep. 111; *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447.

A statute of the state of *Iowa* prohibited the manufacture for sale or the selling of intoxicating liquors in that state, for any purpose except for pharmaceutical, medical, chemical, and sacramental purposes, and then only by persons holding permits from the proper authorities. A brewing company, without a permit, manufactured and sold in Iowa a quantity of beer to be transported to Nebraska. It was held that the contract was in valid, and that no recovery could be had thereon in the courts of Nebraska. *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447.

**2. Contracts Valid in State Where Made.** — *Kansas.* — *Julius Winkelmeyer Brewing Assoc. v. Nipp*, 6 Kan. App. 730.

*Maine.* — *Torrey v. Corliss*, 33 Me. 333; *Bancher v. Cilley*, 38 Me. 553; *Barnard v. Field*, 46 Me. 526.

*Massachusetts.* — *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *Milliken v. Pratt*, 125 Mass. 376, 28 Am. Rep. 241.

*Michigan.* — *Monaghan v. Reid*, 40 Mich. 665; *Kling v. Fries*, 33 Mich. 275.

*Nebraska.* — *Wagner v. Breed*, 29 Neb. 720.

*New Hampshire.* — *Gassett v. Godfrey*, 26 N.

H. 415; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Garland v. Lane*, 46 N. H. 245; *Fuller v. Leet*, 59 N. H. 163; *Woolsey v. Bailey*, 27 N. H. 217; *Bancher v. Warren*, 33 N. H. 183; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

*Rhode Island.* — *Read v. Taft*, 3 R. I. 175.

*Vermont.* — *Street v. Hall*, 29 Vt. 165.

**3. Seller's Ignorance of Illegal Purpose.** — *Gassett v. Godfrey*, 26 N. H. 415; *Buck v. Albee*, 27 Vt. 190.

**4. Reasonable Cause to Believe Liquors Would Be Resold Illegally.** — *Adams v. Coulliard*, 102 Mass. 167; *Hutchkiss v. Finan*, 105 Mass. 86; *Ely v. Webster*, 102 Mass. 304; *Lindsey v. Stone*, 123 Mass. 332; *Finch v. Mansfield*, 97 Mass. 89; *Savage v. Mallory*, 4 Allen (Mass.) 492; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205.

**5. Seller's Knowledge of Illegal Purpose.** — *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596; *Hotham v. Phillips*, 23 N. Bruns. 136; *Furlong v. Russell*, 24 N. Bruns. 478, following *Pearce v. Brooks*, L. R. 1 Exch. 217, in which case it was said to be settled law that "any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover the price of the thing so supplied."

**6. Iowa.** — *Louisville Second Nat. Bank v. Curren*, 36 Iowa 555; *Dalter v. Laue*, 13 Iowa 538; *Tegler v. Shipman*, 33 Iowa 195, 11 Am. Rep. 118; *Whitlock v. Workman*, 15 Iowa 351.

*Kansas.* — *Samuel Bowman Distilling Co. v. Nutt*, 34 Kan. 729; *Westheimer v. Nutt*, 34 Kan. 731; *Feineman v. Sachs*, 33 Kan. 621, 52 Am. Rep. 547.

*Maine.* — *Bancher v. Mansel*, 47 Me. 58.

*Massachusetts.* — *Dater v. Earl*, 3 Gray (Mass.) 482.



however, the vendor in any way, no matter how slight, aids the vendee in his unlawful design to violate the laws of the other state, such participation will prevent the vendor from maintaining an action to recover the purchase price.<sup>1</sup> The courts are agreed on the invalidity of the sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state and requires an act on the part of the seller in furtherance of the scheme.<sup>2</sup> According to the weight of authority, however, to render the sale void and defeat a recovery for the price, it is necessary that there be some participation or interest of the seller in the act itself.<sup>3</sup>

**Sale with "View" to Illegal Resale.**—There is, in addition to the decisions already cited on the subject under discussion, a line of authorities which hold that mere knowledge that the purchaser intends to resell the liquors in violation of the laws of another state will not invalidate the sale. These decisions are distinguishable from the decisions heretofore cited, in the particular that active participation in the unlawful purpose and acts of the purchaser is not essential to render the sale invalid. According to these decisions, a sale with knowledge of the intended illegal resale by the purchaser "with a view" that the illegal sale shall be consummated,<sup>4</sup> or a sale with knowledge of the illegal purpose of the vendee, and with the intent to assist in carrying out such purpose,<sup>5</sup> is invalid.

(2) *Under Special Statutory Provisions.*—Where there is a statute making unlawful sales with intent to enable the purchaser to violate the liquor laws, there can be no recovery for a sale so made.<sup>6</sup> If there is a special statutory

*Michigan.*—Webber v. Donnelly, 33 Mich. 469; Gambs v. Sutherland, 101 Mich. 355.

*New Hampshire.*—Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Fisher v. Lord, 63 N. H. 514; Durkee v. Moses, 67 N. H. 115.

*New York.*—Kreiss v. Seligman, 8 Barb. (N. Y.) 439.

*Vermont.*—Tuttle v. Holland, 43 Vt. 542; McConihe v. McMann, 27 Vt. 95; Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187.

See also Anheuser-Busch Brewing Assoc. v. Mason, 44 Minn. 318, 20 Am. St. Rep. 580.

**1. Participation in Unlawful Act of Purchaser.**—Kohn v. Melcher, 43 Fed. Rep. 641; Feineman v. Sachs, 33 Kan. 621, 52 Am. Rep. 547; Samuel Bowman Distilling Co. v. Nutt, 34 Kan. 729; Banchor v. Mansel, 47 Me. 58; Foster v. Thurston, 11 Cush. (Mass.) 322; M'Intyre v. Parks, 3 Met. (Mass.) 207; Orcutt v. Nelson, 1 Gray (Mass.) 536; Fisher v. Lord, 63 N. H. 514; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Aiken v. Blaisdell, 41 Vt. 655.

**Participation Held Sufficient to Bar Claim.**—Any act beyond the mere sale which aids the purchaser in his unlawful design will be sufficient to bar a claim for the purchase price. Banchor v. Mansel, 47 Me. 58. As, for instance, where the seller at the defendant's request and to prevent a seizure of the liquors marks the casks in a peculiar way, omitting the defendant's name, Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; or packs the liquors for transportation in a way to conceal the fact that the packages contain liquor, Fisher v. Lord, 63 N. H. 514. See also Aiken v. Blaisdell, 41 Vt. 655.

**Purchaser's Right to Recover Back Price.**—Although a company in one state sells liquor knowing that it will be resold illegally in another state, and actively assists in carrying

out the illegal purpose, the purchaser is not for that reason entitled to recover back the amount paid therefor, notwithstanding no action would lie in favor of the seller to recover the price. Bollinger v. Wilson, (Minn. 1899) 79 N. W. Rep. 109.

**2. Purchase to Use Illegally in Another State.**—Fisher v. Lord, 63 N. H. 514; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154. See also Waymell v. Reed, 5 T. R. 599; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Hull v. Ruggles, 56 N. Y. 424; Aiken v. Blaisdell, 41 Vt. 656.

**3.** See cases cited in the preceding notes.

**4. Sales with "View" to Illegal Resale.**—Graves v. Johnson, 156 Mass. 211, 32 Am. St. Rep. 446; Webster v. Munger, 8 Gray (Mass.) 584.

**5. Sales with "Intent" to Further Illegal Resale.**—Territt v. Bartlett, 21 Vt. 184; McConihe v. McMann, 27 Vt. 95; Smith v. Allen, 23 Vt. 298.

**6. Special Statutory Provisions—Making Sales with Intent to Assist Purchaser to Violate Laws.**—Fishel v. Bennett, 56 Conn. 40; Dalter v. Laue, 13 Iowa 538; Whitlock v. Workman, 15 Iowa 351; Louisville Second Nat. Bank v. Curren, 36 Iowa 555; Davis v. Bronson, 6 Iowa 410; Marienthal v. Shafer, 6 Iowa 223.

To render the sale invalid it must be shown that the vendor made it with the intention of enabling the purchaser to violate the laws of the state into which the liquors were to be transported. Louisville Second Nat. Bank v. Curren, 36 Iowa 555; Whitlock v. Workman, 15 Iowa 351.

**Knowledge of Agent Binds Principal.**—Where liquors are sold by an agent to be illegally retailed, and the agent has knowledge of the purchaser's intention, this knowledge binds the principal, and he cannot recover the price of the liquors thus sold. Fishel v. Bennett, 56 Conn. 40.



provision prohibiting a recovery if the vendee knew or had reasonable cause to believe that the liquor would be resold in violation of law, knowing or having reasonable cause to believe that liquors will be illegally sold will defeat an action for the price.<sup>1</sup> Of course a recovery may be had where the vendor did not know or have reasonable cause to believe that the liquors would be sold in violation of law.<sup>2</sup> Where it is provided by statute that no action shall be maintained for the price of intoxicating liquors purchased out of the state with intention to sell them in violation of the law, if a person purchases intoxicating liquors out of the state with intention to sell any part thereof in violation of law the seller cannot recover the price of the liquors although he had no knowledge of the purchaser's intention.<sup>3</sup>

**Repeal of Statutes.** — A statute which provides that no action shall be maintained for the price of liquor sold in another state to be imported and sold in violation of law, under such circumstances that the vendor would have reasonable cause to believe that the purchaser entertained such illegal purpose, affects the remedy only;<sup>4</sup> and on the repeal of such statute an action may be maintained to recover the price of intoxicating liquors sold in another state while the statute was in force, by a person who had reasonable cause to believe that the buyer intended to bring them into the state where the statute was in force to be there kept or sold in violation of law.<sup>5</sup>

**8. Status of Executory Contracts of Sale of Liquors.** — Where a contract for the sale of intoxicating liquors is in violation of the laws regulating the liquor traffic, no action can be maintained for damages for breach thereof, both because it is illegal and because enforcement of it would be opposed to the policy of the liquor laws.<sup>6</sup>

**9. Status of Judgment for Price of Liquors.** — A judgment recovered on a claim founded upon the illegal sale of intoxicating liquors is not void. If the defense of illegality is not interposed before judgment, it is lost.<sup>7</sup> This is the case even with judgment by confession, and a judgment so recovered will not be opened.<sup>8</sup>

**10. Status of Award for Price of Liquors.** — Where a claim consists in whole or in part of the price of intoxicating liquors sold in violation of law, and an award is made allowing the claim, the parties are concluded thereby in the absence of corruption or mistake on the part of the arbitrators.<sup>9</sup>

**11. Mortgages of Liquors.** — The authorities are not in accord as to whether intoxicating liquors can be mortgaged. According to some decisions, if a sale would be unlawful such a mortgage is void for all purposes, as the mortgage is a conditional sale.<sup>10</sup> On the other hand it has been held that though it be

1. Knowledge or Reasonable Cause to Believe Liquor Will Be Resold Illegally. — *Jones v. Surprise*, 64 N. H. 243; *Dunbar v. Locke*, 62 N. H. 442.

2. *Holden v. Brooks*, 66 N. H. 184.

3. *Meservey v. Gray*, 55 Me. 540; *Knowlton v. Doherty*, 87 Me. 518, 47 Am. St. Rep. 349; *McGlinchy v. Winchell*, 63 Me. 31.

4. Repeal of Statutes. — *Hotchkiss v. Finan*, 105 Mass. 86.

5. *Lindsey v. Stone*, 123 Mass. 332; *Hotchkiss v. Finan*, 105 Mass. 86; *Adams v. Coul-lard*, 102 Mass. 167; *Ely v. Webster*, 102 Mass. 304.

6. Executory Contracts. — *Niagara Falls Brewing Co. v. Wall*, 98 Mich. 158; *Bach v. Smith*, 2 Wash. Ter. 145.

Sale of Land and Intoxicating Liquors — Specific Performance. — Where an agreement is made to sell a lot, a building thereon, and a large quantity of intoxicating liquors, for a gross sum, and neither of the parties has any license to sell intoxicating liquors, the agreement is

void, and specific performance thereof cannot be enforced. *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240.

7. Status of Judgment for Price of Intoxicating Liquors — Generally. — *Smith v. Leddy*, 50 Iowa 112.

8. Judgment by Confession. — *Shumaker v. Reed*, 13 Pa. Co. Ct. 547. See also *Smith v. Joyce*, 12 Barb. (N. Y.) 21.

Effect of Statute Declaring Liens Void. — A statute making void all liens which shall have been made for or on account of intoxicating liquors sold in violation of law does not include a lien arising from a judgment recovered in an action for the price of intoxicating liquors illegally sold. *Smith v. Leddy*, 50 Iowa 112.

9. Allowance of Claim on Award. — *Davis v. Wentworth*, 17 N. H. 568.

10. View that Mortgage of Liquors Is Void. — *Korman v. Henry*, 32 Kan. 49; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240; *Flersheim v. Cary*, 39 Kan. 178; *Hay v. Parker*, 55 Me. 355.



conceded that the mortgage is a sale, within the meaning of a statute prohibiting it, the mortgagee nevertheless acquires a title which will sustain an action against one taking the liquors without authority.<sup>1</sup>

**12. Insurance of Liquors.** — A contract of insurance directly insuring a stock of intoxicating liquors kept to be sold in violation of law is void because the direct and immediate effect of the contract is to protect and encourage an unlawful traffic.<sup>2</sup> So where only a small proportion of the property insured consists of intoxicating liquors, and nothing of illegality appears in the contract or in the design in entering into it, and the contract is collateral to the occasional acts of selling, the policy is not invalidated.<sup>3</sup>

**13. Liability of Liquors to Attachment and Execution.** — The liability of intoxicating liquors to attachment and sale on execution depends entirely on the question whether an officer can legally sell intoxicating liquors. If, as is held in some states, the sale thereof by such officer is in violation of the laws regulating traffic, this property is not subject to attachment<sup>4</sup> or execution.<sup>5</sup> On the other hand, if, as held in other states, an officer of the law can legally sell intoxicating liquors, they are subject to attachment<sup>6</sup> and sale on execution.<sup>7</sup>

**14. Actions for Refusal to Sell Liquors.** — Where a statute provides that a druggist "may" sell intoxicating liquors on proper application, it is discretionary with the druggist to sell intoxicating liquors on such application, and he is not liable in an action for damages for a refusal to sell.<sup>8</sup>

**15. Leases of Premises on Which Intoxicating Liquors Are Sold** — *a.* **RIGHT OF LESSOR TO RECOVER RENT.** — In a number of jurisdictions the leasing of premises on which intoxicating liquors are sold is a matter of statutory regulation. The lessor cannot recover rent of premises leased for the illegal sale of liquor if a statute prohibits under penalty the leasing of premises for such purpose<sup>9</sup> or declares void a lease of this character.<sup>10</sup> On the other hand, a

**Mortgage Including Other Property than Liquors.**

— Where a chattel mortgage is given on property a part of which consists of intoxicating liquors, the mortgage is void, not only as to the liquor but as to all the property included in the mortgage. *Flersheim v. Cary*, 39 Kan. 178; *Korman v. Henry*, 32 Kan. 49.

**1. Mortgagee's Action Against Trespasser.** — *Cobb v. Farr*, 16 Gray (Mass.) 597. See also *Bagg v. Jerome*, 7 Mich. 145, in which case it was held that a mortgage of intoxicating liquors under which possession has been taken by the mortgagee cannot be treated as void, under the prohibitory liquor law, as between the mortgagor and the mortgagee, nor as between the latter and the creditors of the former, unless made to defraud such creditors.

**2. Insurance of Liquors Not Permissible.** — *Kelly v. Home Ins. Co.*, 97 Mass. 288; *Johnson v. Union M. & F. Ins. Co.*, 127 Mass. 555; *Lawrence v. National F. Ins. Co.*, 127 Mass. 557 note; *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 423, 38 Am. Rep. 687. But see *Feibelman v. Manchester F. Assur. Co.*, 108 Ala. 180; *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308, which seem to maintain a contrary doctrine. See also the title FIRE INSURANCE, vol. 13, p. 298.

**3. Insuring Liquors in Stock in Drug Store.** — *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687. See also *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124, which is almost identical with the above case in the facts shown and the conclusions reached.

**Increasing Insurer's Risk by Keeping Intoxicating Liquors on Premises.** — Where a fire policy contained a clause against an increase of risk, and the insured, for a substantial portion of the term covered by the policy, used the prem-

ises for illegal liquor selling, but before a loss by fire obtained a license to sell such liquors there, it was held that if the temporary illegal use of the property caused an increase of risk, the policy might be treated by the insurer as wholly void. *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116.

**4. View that Intoxicating Liquors Are Not Attachable.** — *Nichols v. Valentine*, 36 Me. 322; *Barron v. Arnold*, 16 R. I. 22.

**5. Not Subject to Execution.** — *Standard Oil Co. v. Angevine*, 6 Kan. App. 312; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Cobb v. Farr*, 16 Gray (Mass.) 597; *Ingalls v. Baker*, 13 Allen (Mass.) 449.

**6. View that Intoxicating Liquors Are Attachable.** — *Schlesinger v. Chapman*, 52 Conn. 271; *Oviatt v. Pond*, 29 Conn. 479; *Howe v. Stewart*, 40 Vt. 145.

**7. Donohue v. Maloney**, 49 Conn. 163; *Fears v. State*, 102 Ga. 274; *Monty v. Arneson*, 25 Iowa 383; *Wildermuth v. Cole*, 77 Mich. 483; *State v. Johnson*, 33 N. H. 466.

**8. Damages Not Recoverable for Refusal to Sell.** — *Treahey v. Holliday*, 43 Kan. 29.

**Town Agent.** — In *Dwianels v. Parsons*, 98 Mass. 470, it was held that a town agent was not liable to damages to any person for refusing under any circumstances to sell intoxicating liquor.

**9. Statute Imposing Penalty on Lessor.** — *Mitchell v. Scott*, 62 N. H. 596. See also, as supporting this view, *Bartlett v. Vinor*, Carth. 252; *Bliss v. Brainard*, 41 N. H. 256; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Lewis v. Welch*, 14 N. H. 294.

**10. Statute Declaring Lease Void.** — See *Justice v. Lowe*, 26 Ohio St. 372.



recovery of rent may be had where the lease contemplates the lawful sale of intoxicating liquors on the premises, although the statute provides that all contracts whereby any premises shall be leased and occupied for the sale of intoxicating liquors shall be void. The statute includes illegal sales only.<sup>1</sup>

**b. RIGHT OF LESSOR TO RECOVER POSSESSION.** — Where a statute makes a lease void when the premises are used for the sale of intoxicating liquors and provides that after the sale of intoxicating liquors on the premises the lessor shall be considered and held to be in possession thereof, an action of forcible entry and detainer will lie for the recovery of the premises.<sup>2</sup> The fact that the lessor knew at the time when he executed the lease that the premises were to be used for the unlawful selling of intoxicating liquors does not prevent his recovering possession.<sup>3</sup>

**16. Conditions in Deeds Prohibiting Sales on Premises Conveyed.** — A condition in a deed of land that intoxicating liquors shall not be manufactured or sold thereon and that if the condition be broken the deed shall become void and the title shall revert to the grantor is constitutional and not repugnant to the estate granted;<sup>4</sup> and it is immaterial that liquors may be lawfully sold in the

1. *Goodall v. Gerke Brewing Co.*, 56 Ohio St. 257, reversing 3 Ohio Dec. 58; *Weitzel v. Slavin*, 7 Ohio Cir. Dec. 155, 13 Ohio Cir. Ct. 221. *Contra*, *Canfield v. Vacha*, 3 Ohio N. P. 158, 4 Ohio Dec. 240, following *Goodall v. Gerke Brewing Co.*, 1 Ohio N. P. 284, 3 Ohio Dec. 58, which was subsequently reversed, as shown above.

**Lease Not Contemplating Sale of Liquors on Premises.** — A lease which contains no provision for the sale of intoxicating liquors on the premises is not avoided by the subsequent use of the premises for the sale of liquors. *Kittredge v. Allemania Soc.*, 3 Ohio N. P. 312, 3 Ohio Dec. 217.

2. **Action to Recover Possession of Premises.** — *Justice v. Lowe*, 26 Ohio St. 372; *McGarvey v. Puckett*, 27 Ohio St. 669. See also *People v. Bennett*, 14 Hun (N. Y.) 63.

3. **Knowledge of Unlawful Purpose — Effect.** — *Justice v. Lowe*, 26 Ohio St. 374.

**Effect of Paying Rent in Advance.** — The payment of rent in advance for the entire term will not prevent an avoidance of the lease for a violation of the liquor laws. *McGarvey v. Puckett*, 27 Ohio St. 669.

4. **Legality of Condition Prohibiting Sales of Intoxicating Liquors.** — *Cowell v. Colorado Springs Co.*, 100 U. S. 55. See also *Post v. Weil*, 8 Hun (N. Y.) 418. And see the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 9, note 1.

An agreement that the vendor of property is not to allow the sale of intoxicating liquors in any building owned by him or afterwards conveyed is not such a restraint of trade as is against public policy. *Anderson v. Rowland*, 18 Tex. Civ. App. 460.

**Condition Binding Grantee, His Heirs or Assigns.** — Where a deed conveys land in fee on condition that neither the grantee nor his heirs or assigns shall ever sell or permit to be sold any intoxicating liquors upon the premises conveyed, and that the land shall be forfeited back to the grantor whenever such condition shall be broken, the condition runs with the land and is binding not only upon the grantee himself but also upon his assigns, and the land may be recovered back by the grantor from the grantee or from any assignee of him who may

commit a breach of the condition. *O'Brien v. Wetherell*, 14 Kan. 616. To the same effect see *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363.

**Waiving Performance of Condition.** — The condition by which the land is to revert to the grantor should it ever be used for carrying on the sale of intoxicating liquors cannot be enforced if the grantor permits the continuance of such use and the making thereafter of valuable improvements without objection, or if no substantial injury is individually sustained by him in consequence of such use. *Barrie v. Smith*, 47 Mich. 130. And see the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 16.

**Breach by Tenant of Grantee.** — The open and public sale of intoxicating liquors by a tenant of the grantee on the premises with the assent of the grantee and with his knowledge, and without reasonable diligence on his part to prevent it, will work a forfeiture of the estate. *Collins Mfg. Co. v. Marcy*, 25 Conn. 247.

**Sale for Business Purposes.** — If property is sold under the agreement that it may be used for business purposes, the vendee cannot be restricted from selling liquors thereon. *Woodhaven Junction Land Co. v. Solly*, 74 Hun (N. Y.) 637, 26 N. Y. Supp. 150.

**Condition that Lessee Shall Not Sell Intoxicating Liquors.** — A lease of premises containing the condition that the lessee shall not, for the entire term of the lease, engage in liquor traffic in the town where the leased premises are situated, is not void as against public policy. *Sell v. Branen*, 70 Ill. App. 471.

**What Is Breach of Covenant.** — A deed of land contained a covenant by the grantee that no building to be erected on the land should be used as a public house, tavern, or beer shop. A lessee of the grantee obtained a license authorizing him to sell at his shop on the land beer not to be drunk on the premises, and sold beer there accordingly. It was held that this constituted a breach of the covenant. *London, etc., Land, etc., Co. v. Field*, 50 L. J. Ch. 549, 16 Ch. D. 645.

So it has been held that a covenant not to use a house as an inn, public house, or tap-



state where the leased property is situated.<sup>1</sup> Where the deed imposes a forfeiture and gives a right of entry for breach of the condition, the grantor may recover upon proof of the breach, without previous entry, demand, or notice,<sup>2</sup> and the grantee is estopped from denying the validity of the title conveyed by the deed under which he took possession of the land.<sup>3</sup>

**17. Covenants and Agreements Respecting Licensed Houses.** — Upon a sale of a public house as a going concern, time is of the essence of the contract,<sup>4</sup> and if at the expiration of the time set for completing the contract the vendors are not in a position to transfer the license, the purchaser may repudiate the contract.<sup>5</sup> On a parol lease of a public house there is no implied agreement that the tenant shall do no act whereby the license shall become forfeited.<sup>6</sup>

**18. Other Contracts as Affected by Liquor Laws.** — In the notes hereto are set out other decisions which cannot be classified elsewhere, in which certain contracts are held to be in violation of the liquor laws and for that reason not enforceable.<sup>7</sup>

room, or for the sale of spirituous liquors, ale, or beer, is broken by the sale therein of spirits or beer in bottles, though the house is not used as a public house and the liquors are not sold at retail, or to be drunk on the premises. *Feilden v. Slater*, L. R. 7 Eq. 523, 38 L. J. Ch. 379.

A covenant not to use a house as a beer house, inn, or public house for the sale of spirituous liquors is not infringed by the sale of beer at retail to be drunk off the premises. *London, etc., R. Co. v. Garnett*, 39 L. J. Ch. 25, L. R. 9 Eq. 26. And a covenant not to use a house as a public house for the sale of beer, wine, malt liquors, or spirits is not broken by taking out an ordinary excise license for the sale of beer (not spirits) not to be drunk on the premises. *Pease v. Coats*, 36 L. J. Ch. 57, L. R. 2 Eq. 688.

**1. Lawfulness of Liquor Selling Immaterial.** — *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391.

**2. Entry, Demand, and Notice — When Unnecessary.** — *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Plumb v. Tubbs*, 41 N. Y. 443.

**3. Cowell v. Colorado Springs Co.**, 100 U. S. 55.

**4. Time of Essence of Contract.** — *Cowles v. Gale*, 41 L. J. Ch. 14, L. R. 7 Ch. 12, 25 L. T. N. S. 524; *Coslake v. Till*, 1 Russ. 376; *Day v. Luhke*, L. R. 5 Eq. 336, 16 W. R. 719.

**5. Right of Purchaser to Repudiate Contract.** — *Cowles v. Gale*, L. R. 7 Ch. 12, 41 L. J. Ch. 14, 25 L. T. N. S. 524; *Modlen v. Snowball*, 31 L. J. Ch. 44, 10 W. R. 24.

If on the sale of a public house the vendor is not able to fulfil the contract and assign the license on the day set, he is liable to refund the deposit money and recoup the purchaser in damages. *Claydon v. Green*, L. R. 3 C. P. 511.

**6. Implied Covenant by Tenant.** — A took by parol a licensed public house of B, but having three times been convicted of offenses connected with the management of such house, the magistrates refused to renew the license. Upon an action by B against A upon his implied covenant not to suffer the premises to be used in a manner calculated to produce a forfeiture of the license it was held that no such covenant should be implied and that the action

could not be maintained. *Maw v. Hindmarsh*, 28 L. T. N. S. 644.

**7. For Services Rendered in Furtherance of Illegal Liquor Traffic** there can be no recovery. *Goodwin v. Clark*, 65 Me. 280. See also *Timson v. Moulton*, 3 Cush. (Mass.) 269. Compare *Bryson v. Haley*, 68 N. H. 337, in which case it was held that a person who furnishes labor and materials in the fitting up of a bar and saloon may recover therefor although he knew the illegal purpose for which they would be used.

It has been held that a father may recover for services performed by his infant son in unlawfully selling intoxicating liquors, if he did not know the character of the services while his son was performing them. *Emery v. Kempton*, 2 Gray (Mass.) 257.

**Warranty — Sale of Horse for Liquors.** — No action lies on a warranty given on the sale of a horse, the price of which was paid in spirituous liquors which the purchaser could not legally sell. *Howard v. Harris*, 8 Allen (Mass.) 297.

**Agreement to Pay for Liquor Illegally Sold.** — An agreement by the purchaser of a saloon to pay for beer sold to the prior owner cannot be enforced by the party selling the beer where he knew that it was to be retailed in violation of law. *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596.

**Contracts in Restraint of Trade.** — A contract upon a sufficient consideration not to engage in the traffic of intoxicating liquors for a certain time and within a certain territory is not in contravention of public policy and may be enforced. *Harrison v. Lockhart*, 25 Ind. 112; *McAlister v. Howell*, 42 Ind. 15. See the title RESTRAINT OF TRADE.

**Sale of Claim for Rent.** — The sale of a claim for rent, the consideration of which is intoxicating liquors illegally sold, is void, and there can be no recovery thereon. *Davis v. Slater*, 17 Iowa 250.

**An Agreement to Enable a Person to Sell Without a License** is illegal, a license being required for the protection of the public morals. *Ritchie v. Smith*, 6 C. B. 462, 60 E. C. L. 462.

**A Loan in Aid of Liquor Traffic** to be conducted under a license is not against public policy, and, not being violative of any statute, is valid. *Germantown Brewing Co. v. Booth*, 162 Pa. St. 100.



**XI. LIQUOR NUISANCES** - 1. **What Constitutes Nuisance at Common Law.** — The mere selling of intoxicating liquors is not a nuisance at common law,<sup>1</sup> unless the house in which they are sold is disorderly. In this case the house is a nuisance because of the disorderly conduct therein, whether the keeper is licensed or unlicensed.<sup>2</sup>

2. **What Constitutes Nuisance under Statutes.** — In a number of jurisdictions the statutes make many acts other than the keeping of a licensed or unlicensed place in a disorderly manner a nuisance, and make the offender criminally punishable and the place where the nuisance is kept liable to injunction and abatement.

**Selling in Violation of Law.** — Thus under a number of the statutes any place where liquors are sold in violation of law is a nuisance,<sup>3</sup> as where sales are made without license even though the liquors were sold for an innocent purpose,<sup>4</sup> or where one having a license makes sales not within the scope of the license.<sup>5</sup> As none of these statutes makes it an element of the offense that the place where the intoxicating liquors are sold should be kept in a disorderly manner, it is not necessary that the place should be so kept to make it a nuisance.<sup>6</sup> Neither is it necessary that the liquors so sold shall be drunk on the premises.<sup>7</sup> It is not necessary to constitute the offense that the place be

**Bond Given by Agent Making Illegal Sales.** — A bond given by an agent in *Iowa* to his principal in another state, with reference to the business of selling intoxicating liquors in *Iowa* without compliance with the law, is invalid. *Fred Miller Brewing Co. v. Stevens*, 102 *Iowa* 60.

1. **Sale of Liquors Not Nuisance.** — *Com. v. McDonough*, 13 *Allen* (Mass.) 581.

2. **Disorderly Tippling House Nuisance.** — See the title *DISORDERLY HOUSES*, vol. 9, p. 521.

3. **Places Where Liquor Is Sold Unlawfully.** — *State v. Waynick*, 45 *Iowa* 516; *State v. Wamboid*, 74 *Iowa* 605; *Craig v. Plunkett*, 82 *Iowa* 474; *State v. Harris*, 64 *Iowa* 287; *State v. Webber*, 76 *Iowa* 686; *State v. Salts*, 77 *Iowa* 193; *Craig v. Werthmueller*, 78 *Iowa* 598; *Cameron v. Fellows*, (*Iowa* 1899) 80 *N. W. Rep.* 567; *Com. v. Murray*, 138 *Mass.* 508; *Com. v. Baker*, 152 *Mass.* 337; *State v. Rozum*, 8 *N. Dak.* 548; *State v. Harrington*, (*N. H.* 1899) 45 *Atl. Rep.* 404; *State v. Chapman*, 1 *S. Dak.* 414.

**Nuisance a Distinct Offense from Illegal Selling.** — The offense of maintaining a nuisance by illegally selling intoxicating liquors is a distinct offense from illegally selling intoxicating liquors. A party is punishable for the offense of thus maintaining a nuisance, either independently of or in addition to the punishment for illegally selling liquor. *State v. Waynick*, 45 *Iowa* 516; *State v. Howorth*, 70 *Iowa* 157.

**Sales by Club in No-license Town.** — If, in a city which has voted not to grant licenses to sell intoxicating liquors, a club, whether incorporated or unincorporated, by its agent uses a place for the purchase and storage of intoxicating liquors for its members and for dispensing to each member upon his order portions of the liquor belonging to and kept for him, the place is a common nuisance, and such agent may be convicted of maintaining it. *Com. v. Baker*, 152 *Mass.* 337.

**Knowledge or Intent as Element of Offense.** — Under some statutes the very keeping of a place where intoxicating liquors are sold with-

out a license is a nuisance, without regard to the knowledge or intent of the proprietor. *State v. Fraser*, 1 *N. Dak.* 425. But under other statutes it must be shown that the keeper of the place or his agent intended to make unlawful sales of intoxicating liquors, as well as that they were so made. *Nicholson v. People*, 29 *Ill. App.* 57.

**Clerical Error in Resolution Permitting Sales.** — Where a city council passes a resolution permitting the sale of intoxicating liquor by an applicant for a license, and the resolution is signed by the mayor, it is not a ground to abate as a nuisance the place where the applicant makes sales of liquors, that the clerk has by mistake omitted the signature of the mayor from the copy of the resolution filed with the county auditor, the mistake having been corrected before trial of the abatement proceeding. *Clark v. Riddle*, 101 *Iowa* 270.

4. **Sales Without License.** — *Craig v. Plunkett*, 82 *Iowa* 474.

**Sales by Agent of Importer.** — Since the enactment of the *Wilson Act* an agent in *Massachusetts* of a wholesale dealer in intoxicating liquors in another state, who sells or offers for sale such liquors, whether in the original package or otherwise, shipped to him by such dealer, may be convicted of keeping a common nuisance although he sells no other liquors. *Com. v. Calhane*, 154 *Mass.* 115.

**Sunday Sales.** — Under a statute providing that places where intoxicating liquors are sold in violation of law shall be deemed nuisances, a place where intoxicating liquors are sold by a licensed dealer on Sunday is not a nuisance where there is no statute prohibiting sales on Sunday by licensed dealers. *State v. Wacker*, 71 *Wis.* 672.

5. **Sales Not Authorized by License.** — *State v. Webber*, 76 *Iowa* 686; *State v. Salts*, 77 *Iowa* 193; *McCoy v. Clark*, 104 *Iowa* 491; *State v. Davis*, 44 *Kan.* 60; *Com. v. Murray*, 138 *Mass.* 508.

6. **Keeping in Disorderly Manner Unnecessary.** — *Howard v. State*, 6 *Ind.* 444.

7. **Drinking on Premises Unnecessary.** — *State*



kept as charged for any particular length of time.<sup>1</sup> It is the nature of the acts done, not the length of time during which they are committed, which constitutes the offense.<sup>2</sup>

**Keeping for Unlawful Sale.** — Under some statutes the keeping of intoxicating liquors for unlawful sale renders the place where they are kept a nuisance.<sup>3</sup> As an element of the nuisance thus committed it is essential that intoxicating liquors be kept in the place charged to be a nuisance.<sup>4</sup> It is not, however, an element of this offense that the intent be to sell in and from the building where the liquors are kept. If one house is used for the sale of liquors which are kept in another, both are nuisances.<sup>5</sup> So it is not necessary that the sale of liquors be one of the main purposes of keeping the place complained of; it is enough if liquor selling was one of the purposes, though it may have been only an incidental and subordinate purpose.<sup>6</sup> A conviction of a nuisance thus committed may under some statutes be based on proof of a single sale. One sale may disclose the unlawful intent as well as the keeping.<sup>7</sup> To warrant a conviction of this offense under other statutes it has been held that the place where the liquor was kept for unlawful sale must be shown to have been used as a place of "public resort,"<sup>8</sup> and that a single sale does not make the place a nuisance or the seller the keeper of a nuisance within the meaning of the statutes. A series of sales is necessary.<sup>9</sup>

**Manufacturing Without License.** — Under the statutes of one state it has been held that to manufacture intoxicating liquors without a permit renders the manufactory a nuisance, even though the liquors are manufactured for export only.<sup>10</sup>

**Keeping Place in Disorderly Manner.** — If a statute declares a place where liquors are sold to be a nuisance if kept in a disorderly manner, the gist of the offense does not consist in the selling, but in the keeper's doing it or allowing it to be done in a place kept by him in a disorderly manner.<sup>11</sup>

**Keeping Open on Sunday.** — Under the statutes of one state the keeping open of a place for the sale of intoxicating liquors on Sunday constitutes a nuisance.<sup>12</sup>

**3. Constitutionality of Statutes.** — The constitutionality of the statutes mentioned above, providing that certain acts in relation to the liquor traffic

*v. Roach*, 75 Me. 123; *State v. Fraser*, 1 N. Dak. 425.

**A Hotel Is a "Place" Within the Meaning of a Statute** providing that all buildings, places, or tenements used for the illegal keeping or sale of intoxicating liquors shall be deemed common nuisances. *Com. v. Purcell*, 154 Mass. 388.

**1. Length of Time of Keeping.** — *Nicholson v. People*, 29 Ill. App. 57.

**2. Length of Time of Commission Not Element of Offense.** — *Com. v. Gallagher*, 1 Allen (Mass.) 592.

Proof that the nuisance is maintained on a single occasion. *Com. v. Cogan*, 107 Mass. 212; *Com. v. Higgins*, 16 Gray (Mass.) 19, as for the space of two hours. *Com. v. Gallagher*, 1 Allen (Mass.), 592, or for a half hour. *State v. Lord*, 8 Kan. App. 257, is sufficient.

**3. Keeping for Unlawful Sale.** — *State v. Freeman*, 27 Iowa 333; *State v. Harris*, 64 Iowa 287; *State v. Tierney*, 74 Iowa 238; *State v. Shank*, 79 Iowa 47; *State v. Dugan*, 52 Kan. 27; *State v. Reno*, 41 Kan. 674.

**4. Keeping Liquors on Premises Element of Offense.** — *State v. Tierney*, 74 Iowa 238; *State v. Hass*, 22 Iowa 193; *State v. Harris*, 27 Iowa 429; *State v. Shank*, 79 Iowa 47.

**5. Intent to Sell from Building Where Kept Not an Element.** — *State v. Viers*, 82 Iowa 397.

To constitute a nuisance in unlawfully keep-

ing intoxicating liquors for sale the existence of intoxicating liquors in the place described is essential; but where there was no question on the trial that liquors were thus kept it was held that an instruction which did not call the attention of the jury to the necessity of proving that fact was not prejudicial. *State v. Shank*, 79 Iowa 47.

**6. Incidental Sales May Be Sufficient.** — *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838.

**7. Single Sale Sufficient to Establish Intent.** — *State v. Reyelts*, 74 Iowa 499.

**8. Use as Place of Public Resort Necessary.** — *Miller v. State*, 3 Ohio St. 478; *State v. Stone*, 54 Vt. 550; *State v. Paige*, 50 Vt. 445.

**9. Series of Sales Held Necessary.** — *Miller v. State*, 3 Ohio St. 488.

**10. Manufacturing Without Permit.** — *Craig v. Werthmueller*, 78 Iowa 598; *Pearson v. International Distillery*, 72 Iowa 348.

**11. Keeping Disorderly Place Gist of Offense.** — *Fletcher v. State*, 54 Ind. 462.

Where a statute declares to be nuisances houses where drunkenness, quarreling, or breach of the peace is carried on or permitted to the disturbance of others, the offense is committed by permitting the acts designated on one occasion. *State v. Pierce*, 65 Iowa 85.

**12. Keeping Open on Sunday.** — *Cotant v. Hobson*, 98 Iowa 318.



shall make the places where these acts are done nuisances, and providing for the injunction and abatement of such nuisances by courts of equity, making offenders against the statute criminally punishable and providing for the fine and imprisonment of those disobeying injunctions, has been frequently assailed on numerous grounds, but they have successfully withstood all attacks. One of the principal objections raised is that the statutes are in violation of the constitutional provision which declares that no person shall be deprived of life, liberty, or property without due process of law. Both the state and federal courts agree that this contention has no ground on which to stand.<sup>1</sup> It has also been held that these statutes are not unconstitutional as abridging the privileges or immunities of citizens of the United States.<sup>2</sup> Equally untenable is the contention that the statutes are in contravention of the constitutional right to jury trial. Equity has jurisdiction to abate nuisances independently of any statutory authority, and in equity cases the right to jury trial is not secured by any constitutional provision.<sup>3</sup> So it has been further held that the statutes do not violate a constitutional provision that the accused shall meet the witnesses face to face.<sup>4</sup> Nor can they be said to be unconstitutional on the ground that the legislature has no power to enforce a criminal law by civil action,<sup>5</sup> nor on the ground that they provide cruel and unusual punishment.<sup>6</sup> So statutes providing a penalty of imprisonment for disobedience of an injunction against maintaining a liquor nuisance are not in conflict with the constitutional provision that there shall be no involuntary servitude except for the punishment of crime.<sup>7</sup>

**4. Criminal Responsibility for Maintaining Liquor Nuisance — a. PARTIES RESPONSIBLE FOR MAINTAINING NUISANCES.** — As stated in the preceding subdivision of this section, the maintenance of a liquor nuisance is made by the statutes an offense which is punishable by fine or imprisonment or both. An owner who assents to the use of his premises by the defendant for illegal sales is guilty of maintaining a nuisance.<sup>8</sup> But it has been held that mere knowledge of the owner without permission is not sufficient; that to constitute the offense there must be permission or consent as well as knowledge.<sup>9</sup> One

1. Not in Violation of Due Process of Law. — *Mugler v. Kansas*, 123 U. S. 623; *Schmidt v. Cobb*, 119 U. S. 286; *Streeter v. People*, 69 Ill. 595; *Our House No. 2 v. State*, 4 Greene (Iowa) 172; *McLane v. Leicht*, 69 Iowa 408; *Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19; *State v. Jordan*, 72 Iowa 377; *Martin v. Blattner*, 68 Iowa 286; *Com. v. Howe*, 13 Gray (Mass.) 26; *Carleton v. Rugg*, 149 Mass. 550, 14 Am. St. Rep. 446.

2. Not Abridgment of Privileges or Immunities. — *Mugler v. Kansas*, 123 U. S. 623; *Martin v. Blattner*, 68 Iowa 286.

3. Not Violation of Right to Jury Trial. — *Mugler v. Kansas*, 123 U. S. 623; *Schmidt v. Cobb*, 119 U. S. 286; *Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19; *Martin v. Blattner*, 68 Iowa 286; *Manderscheid v. Plymouth County*, 69 Iowa 240; *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182; *Carleton v. Rugg*, 149 Mass. 554, 14 Am. St. Rep. 446; *State v. Markuson*, 5 N. Dak. 147; *State v. Mitchell*, 3 S. Dak. 223.

**Contempt in Disobeying Injunction.** — The constitutional provision giving the right to trial by jury has no application to proceedings to punish for contempt for disobeying an order enjoining a liquor nuisance. *Eilenbecker v. Plymouth County*, 134 U. S. 39; *State v. Jordan*, 72 Iowa 378; *State v. Markuson*, 7 N. Dak. 155, 5 N. Dak. 147; *State v. Mitchell*, 3 S. Dak. 223. See also the title CONTEMPT, vol. 7, p. 66.

4. Confronting Witnesses — Provisions Not Violated. — *State v. Mitchell*, 3 S. Dak. 223.

5. Not Enforcement of Criminal Law by Civil Action. — *Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19. And see the titles ABATEMENT OF NUISANCES, vol. 1, p. 64 *et seq.*; EQUITY, vol. 11, p. 195 *et seq.*; INJUNCTIONS, vol. 16, p. 363.

6. Cruel and Unusual Punishment — Provision Against Not Violated. — *McLaughlin v. State*, 45 Ind. 338; *Bepley v. State*, 4 Ind. 264, 58 Am. Dec. 628.

**Penalty for Violating Injunction.** — While a penalty of five hundred dollars for the violation of an injunction against the unlawful sale of intoxicating liquors is extraordinary, a statute imposing such a penalty is not for that reason unconstitutional. *Jordan v. Circuit Ct.*, 69 Iowa 177. See also *State v. Markuson*, 5 N. Dak. 147.

7. Not Infliction of Involuntary Servitude. — *Martin v. Blattner*, 68 Iowa 286.

**An Ordinance Which Declares the Selling of Intoxicating Liquors to Be a Nuisance and imposes a fine for the offense is valid if the corporate powers conferred upon the town are broad enough to authorize the ordinance.** *Goddard v. Jacksonville*, 15 Ill. 589, 60 Am. Dec. 773.

8. Liability of Owner — Consent to Illegal Use of Property. — *Com. v. Hayes*, 167 Mass. 176.

9. Knowledge of Illegal Use Insufficient. — *State v. Stafford*, 67 Me. 125. See also *State v. Frazier*, 79 Me. 95, in which case it was held that to constitute the offense of aiding in the main-



who unlawfully sells intoxicating liquors from a building of which he has charge or control is guilty of maintaining a nuisance,<sup>1</sup> and this is true although the liquors are kept by some other person.<sup>2</sup> It is not necessary that the defendant be the owner or even that he be a lessor under a formal lease of the place charged to have been kept as a nuisance. It is sufficient if he be shown to have been maintaining a nuisance at such place, and the ownership or even the rightful possession of the place is immaterial.<sup>3</sup> A person may commit the offense by agent as well as in person.<sup>4</sup> But where liquors are kept for unlawful sale, an illegal sale by the agent without the knowledge and consent of the principal will not render the latter criminally liable for keeping a nuisance.<sup>5</sup> According to some decisions, all who aid or abet in the commission of the offense of maintaining a nuisance are principals and are equally guilty.<sup>6</sup> According to others a servant or agent is not guilty of the offense if his assistance in maintaining the nuisance is under the direct personal supervision of the master;<sup>7</sup> but if the servant in carrying on the business of his employer and in the absence of his employer is authorized by him to make illegal sales, and does so, he will be guilty of maintaining a nuisance.<sup>8</sup>

#### b. EFFECT OF FORMER ACQUITTAL OR CONVICTION OF SIMILAR OFFENSE.

— The former acquittal or conviction of the offense of keeping intoxicating liquors with intent to sell unlawfully will not bar a prosecution for maintaining a liquor nuisance although the same acts are relied on to substantiate both charges.<sup>9</sup> The converse of this proposition is also true.<sup>10</sup> So the offense of maintaining a liquor nuisance is a distinct offense from that of selling intoxicating liquors unlawfully, and an acquittal or conviction of either is no bar to an indictment for the other even upon the same evidence.<sup>11</sup>

**5. Injunction and Abatement of Liquor Nuisance** — *a. INJUNCTION* — (1) *In General*. — As already shown, all liquor nuisances are liable to injunction and abatement, and the acts constituting the nuisance both at common law and under certain statutory provisions have already been sufficiently explained.<sup>12</sup>

tenance of a nuisance it must appear that the place was either let for the illegal use or that the illegal use was permitted, that is, consented to, by the defendant either as owner of the place or as a person having control thereof.

**1. Liability of Person in Control of Building.** — State v. Lund, 51 Kan. 124.

The Word "Keeper" embraces any one who, though not the owner, has the possession of both the room and the liquors which, together with the unlawful business, are under his care and subject to his management and control. Schultz v. State, 32 Ohio St. 276.

**2. Liquors Kept by Another Person.** — State v. Cox, 1 Kan. App. 447.

**3. Ownership of Property Unlawfully Used Immaterial.** — State v. Arnold, 98 Iowa 253.

**4. Liability for Acts of Agent.** — Com. v. Galligan, 156 Mass. 270. See also Com. v. Hyland, 155 Mass. 7.

**5. Sales Without Principal's Knowledge.** — State v. Hayes, 67 Iowa 27. See further *infra*, this title, *Civil and Criminal Liability Arising Out of Agency, Marriage, etc.*

**6. Aiders and Abettors — Liability.** — State v. Lord, 8 Kan. App. 257; State v. Hoxie, 15 R. I. 1, 2 Am. St. Rep. 838; State v. Cox, 52 Vt. 471.

**7. Personal Superintendence of Master.** — Com. v. Galligan, 144 Mass. 171.

**8. Acts Done by Servant on His Own Responsibility.** — Com. v. Galligan, 144 Mass. 171; Com. v. Kimball, 105 Mass. 465.

**Punishment.** — The punishment for the crime of maintaining a liquor nuisance in Iowa is

that provided by the statutes of that state for nuisances generally. State v. McGrew, 11 Iowa 112; State v. Collins, 11 Iowa 141; State v. Schilling, 14 Iowa 455; State v. Little, 42 Iowa 51; State v. Dean, 44 Iowa 648.

In Massachusetts, Pub. Stat. (1882), c. 155, § 53, which provides for punishment for keeping liquor nuisances by fine "or" imprisonment, is superseded by chapter 101, § 7, a later statute, which provides for punishment by fine "and" imprisonment. Com. v. Fletcher, 157 Mass. 14.

Where the defendant has been convicted of maintaining a liquor nuisance, the governor may remit the fine, but cannot remit the costs nor suspend their execution. State v. Mateer, 105 Iowa 66.

**9. Effect of Conviction of Keeping with Intent to Sell on Prosecution for Nuisance.** — State v. Harris, 64 Iowa 287; State v. Lincoln, 50 Vt. 644; State v. Wheeler, 62 Vt. 439.

**10. Effect of Conviction of Maintaining Nuisance on Prosecution for Keeping with Intent to Sell.** — State v. Jangraw, 61 Vt. 39.

**11. Effect of Conviction of Maintaining Nuisance on Prosecution for Unlawful Selling.** — Com. v. Carpenter, 100 Mass. 204; State v. McGill, 65 Vt. 547.

**12. See *supra*, this section, *What Constitutes Nuisance at Common Law*, and *What Constitutes Nuisance under Statutes*.**

**Judgment by Default.** — Representations made by the sheriff to a defendant in an injunction proceeding as to whether judgment by default



**No Injunction Against Mere Selling.** — An injunction does not run against a person for the mere selling of liquor in violation of law. It operates to abate and enjoin a nuisance conducted by him, but no court has jurisdiction simply to enjoin one from selling liquor independently of the place where the nuisance exists.<sup>1</sup>

**Permanent and Temporary Injunction.** — Where the defendant admits the nuisance, and therefore it would be proper to enter a permanent injunction at once, the fact that a temporary injunction is entered will not render it improper for the court at a subsequent time without further hearing to enter a permanent injunction.<sup>2</sup>

**When Illegal Use Must Exist.** — An injunction cannot issue unless the illegal use of the premises exists at the time of filing the petition;<sup>3</sup> but there are authorities to the effect that the fact that the owner of the property ceases to use it for improper purposes at about the time when the case is reached for trial, does not render it erroneous to enter a decree of abatement.<sup>4</sup>

**Injunction — When Bar to Further Proceedings.** — An injunction against a liquor nuisance, even though no writ of abatement issues, will in general be a bar to an action against the same defendant by another citizen for continuing the same nuisance on the premises, and the continuance of the nuisance may be prevented by contempt proceedings.<sup>5</sup> But although an injunction granted against a liquor nuisance remains in full force, a second injunction may be granted if the first was obtained with fraudulent intent and by collusion with the defendant, for the purpose of allowing it to remain without enforcement.<sup>6</sup>

**Extent of Closing Required.** — Under a statute providing that a place proved to be a nuisance shall be closed for a year, unless bond is given by the owner to abate the nuisance, the place must be closed for all purposes unless such bond is given, and a decree that the place be closed against the purpose prohibited is erroneous.<sup>7</sup>

(2) **Against Whom Injunction Is Operative.** — The owner of a building used for the unlawful sale of intoxicating liquors cannot be enjoined and rendered liable for the costs of the proceedings unless he has knowledge of the unlawful use of his building, and consents thereto.<sup>8</sup> Accordingly, an injunction should

will be rendered are not binding on the state, and, if relied on by the defendant, they constitute no ground for setting aside the judgment by default as fraudulent. *Seddon v. State*, 100 Iowa 378.

**Effect of Supersedeas Bond.** — A supersedeas bond given on appeal to the Supreme Court from a decree granting an injunction does not suspend the injunction nor prevent a violation thereof from being punishable. *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509.

**Territory in Which Decree Is Operative.** — Where suit for an injunction against a liquor nuisance was begun before the statutory provision making a judgment in such case effectual throughout the judicial district in which it was rendered, but the judgment for an injunction was not entered until after the statute took effect, it was held that the injunction was applicable throughout the judicial district, and that no special order of the court to that effect was necessary. *McGlasson v. Johnson*, 86 Iowa 477.

**As to the Service of an Order to Close** see *State v. Clark*, 62 Vt. 278.

**1. Mere Sales Cannot Be Enjoined.** — *Clark v. Riddle*, 101 Iowa 270, in which it was held that an injunction will not issue against the owner of a building for illegal sales made elsewhere than in the building, the illegal sale of intoxicating liquors not being in itself a ground

for injunction. To the same effect see *State v. Frahm*, (Iowa 1899) 80 N. W. Rep. 209.

**2. Permanent Injunction Entered Without Further Hearing.** — *Cunningham v. Gaynor*, 87 Iowa 449.

**3. Nuisance Must Exist at Beginning of Suit.** — *Sharp v. Arnold*, 108 Iowa 203; *State v. Saunders*, 66 N. H. 39.

It has also been held that no order to shut up or vacate the place in question can rightfully be made unless a nuisance continues to exist at the time when the order is made. *Miller v. State*, 3 Ohio St. 475.

**4. Cessation of Nuisance Near Time of Trial.** — *Danner v. Hotz*, 74 Iowa 389; *Halfman v. Spreen*, 75 Iowa 309; *Judge v. Kribs*, 71 Iowa 183; *Tibbetts v. Burster*, 76 Iowa 176. See also *Elwood v. Price*, 75 Iowa 228.

**5. Prior Injunction as Bar to Further Proceedings.** — *Steyer v. McCauley*, 102 Iowa 105.

**6. Injunction Obtained through Collusion.** — *Cameron v. Tucker*, 104 Iowa 211.

**7. McCoy v. Clark**, (Iowa 1899) 80 N. W. Rep. 538.

**8. Owner's Knowledge and Consent to Unlawful Use Necessary.** — *State v. Price*, 92 Iowa 181; *State v. Severson*, 88 Iowa 714; *State v. Lawler*, 85 Iowa 564; *Morgan v. Koestner*, 83 Iowa 134; *Merryfield v. Swift*, 103 Iowa 167; *Drake v. Kingsbaker*, 72 Iowa 441; *Eckert v. David*, 75 Iowa 302; *Shear v. Brinkman*, 72 Iowa 698.



not issue against a building in which a nuisance has been maintained by a tenant when the owner of the building, upon being informed of the nuisance, has taken steps to have it abated, and there is nothing tending to show that this was not done in good faith.<sup>1</sup> Pursuing the same train of reasoning, it has been held that sales made by trespassers, without the owner's knowledge and consent, do not authorize a decree against the owner ordering that the building be closed and that the owner pay costs and attorney's fees.<sup>2</sup> If the owner knows of the unlawful use to which his premises are being put, and consents thereto, an injunction may properly be granted against him;<sup>3</sup> and the case is the same where he is wilfully ignorant of the use being made of the premises.<sup>4</sup> It is the duty of the owner, when he has knowledge of the illegal use to which his premises are being put, to take steps to prevent such use.<sup>5</sup> Before a judgment affecting the property used in an unlawful traffic can be lawfully executed, all persons interested as owners in the property should be before the court. Hence a decree forbidding the maintenance of premises as a nuisance, and providing for the destruction of the property, cannot be entered when some of the owners of the property are not parties to the suit.<sup>6</sup>

**b. ABATEMENT.**—Under the statutes, where an injunction is granted against the maintenance of a liquor nuisance, the court is authorized, by way of abating the nuisance, to order the destruction of the liquor found on the premises and the removal and sale of all furniture and fixtures and all movable property used in the unlawful business.<sup>7</sup> Furthermore, where the court finds that a nuisance exists and makes an order enjoining it, it is error to refuse an order for its abatement.<sup>8</sup> Under some statutes a seizure of the liquors may be made before judgment and the liquors be destroyed afterwards if the judgment goes against the defendant.<sup>9</sup> In some jurisdictions a court of equity cannot restrain by injunction a party charged with illegally selling intoxicating liquors, or abate the building in which the illegal traffic occurs, until the owner has been convicted of such unlawful selling at the place named in the bill.<sup>10</sup>

**1. Steps to Abate — Good Faith of Owner.**—*Shear v. Brinkman*, 72 Iowa 698; *Drake v. Kingsbaker*, 72 Iowa 441; *Eckert v. David*, 75 Iowa 302; *Merryfield v. Swift*, 103 Iowa 167; *Morgan v. Koestner*, 83 Iowa 134.

**2. Sales by Trespasser Without Owner's Knowledge.**—*Merryfield v. Swift*, 103 Iowa 167.

**3. Unlawful Use of Building with Owner's Knowledge.**—*State v. Grim*, 85 Iowa 415; *Overton v. Schindele*, 85 Iowa 715; *Hamilton v. Baker*, 91 Iowa 100; *Gray v. Stienes*, 69 Iowa 124; *Carter v. Steyer*, 93 Iowa 533.

**4. Owner's Wilful Ignorance of Unlawful Use.**—*State v. Grim*, 85 Iowa 415.

**Knowledge of Illegal Use — When Evidence Unnecessary.**—A knowledge of the purpose for which the premises were being used not being denied by the owner of the premises, no evidence of that fact is necessary in order to sustain the decree against him. *Overton v. Schindele*, 85 Iowa 715.

**5. Duty of Owner to Prevent Illegal Use.**—*State v. Williams*, 90 Iowa 513.

**Efforts to Abate Held Insufficient.**—If on receiving notice of the illegal use made of his premises the owner makes no effort to put an end to it, except by serving upon the tenant a notice to quit, and then permits the tenant to remain in possession for some days, he must be held to have had information and to have acquiesced in the sales after that time. *State v. Grim*, 85 Iowa 415.

**Nonresident Owner — Notice.**—Where the owner is a nonresident of the town where the premises are situated, proof of the reputation

of the place will not be sufficient to show notice of its character to the owner. *State v. Price*, 92 Iowa 181.

**6. All Interested in Property Necessary Parties.**—*Shear v. Green*, 73 Iowa 688; *Pearson v. International Distillery*, 72 Iowa 348.

**When There Is a Failure to Join Remaindermen as Parties** a decree ordering the closing of the premises for a certain period ceases to be operative on the death of the owner of the life interest, even though this occurred before the expiration of the period named in the decree. Not being made parties, their rights cannot be prejudicially affected. *Danner v. Hotz*, 74 Iowa 389.

**7. Abatement — Destruction of Liquors.**—*State v. Adams*, 81 Iowa 595; *Drake v. Jordan*, 73 Iowa 707; *Craig v. Werthmueller*, 78 Iowa 598; *McLane v. Bonn*, 70 Iowa 752. See also *State v. Lindgrove*, 1 Kan. App. 51.

**8. Necessity of Abatement When Injunction Granted.**—*McClure v. Braniff*, 75 Iowa 38.

**9. Seizure of Liquors Before Judgment.**—See *State v. Lindgrove*, 1 Kan. App. 51; *Gen. Stat. Kan.* (1897), c. 101, § 50.

**Action in Rem.**—Such an action is against the thing as well as against the person, and as the person has notice and his day in court upon which to defend the forfeiture of his property as well as the punishment of himself, the provision for forfeiture is not unconstitutional. *Craig v. Werthmueller*, 78 Iowa 598.

**10. Necessity of Convicting Defendant of Nuisance.**—*Hartley v. Henretta*, 35 W. Va. 222.



The provisions as to abatement of the nuisance are applicable to acts committed before the enactment of these provisions.<sup>1</sup>

*c. WHO MAY MAINTAIN PROCEEDINGS FOR INJUNCTION AND ABATEMENT.* — The statutes usually provide that proceedings for the injunction and abatement of liquor nuisances may be maintained by the attorney-general or by the prosecuting officer or a citizen of the county where the nuisance is committed. When they are instituted by a citizen the proceedings are for all purposes an action instituted in behalf of the public the same as though brought by the attorney-general or prosecuting officer.<sup>2</sup> In such proceedings no private interest of the plaintiff is involved. The injury which it is sought to remedy by the proceeding is an injury to the public rather than an injury to an individual citizen.<sup>3</sup> The action is maintainable by one who is both a citizen and the prosecuting officer of the county where the nuisance is committed;<sup>4</sup> and where suit has been instituted by a citizen the right to prosecute it to judgment does not determine by the plaintiff's removal to another county.<sup>5</sup> The proceedings cannot be maintained by a citizen of another county than that in which the nuisance exists.<sup>6</sup> No proof that the plaintiff is a citizen of the county is necessary when the pleadings of the defendant consist merely in a general denial of the allegations of the petition.<sup>7</sup>

*d. PROCEEDINGS FOR CONTEMPT IN VIOLATING INJUNCTION.* — Special provision is made in a number of jurisdictions for the punishment of those who act in violation of an injunction against the maintenance of a liquor nuisance. The proceeding to punish for a contempt in disobeying such an injunction is criminal in its nature, and by it a disobedience to civil authority is punished.<sup>8</sup> To render one liable as for contempt in violating an injunction

**1. Retroactive Effect of Statutes.** — *McLane v. Bonn*, 70 Iowa 752; *Drake v. Jordan*, 73 Iowa 707; *McClure v. Braniff*, 75 Iowa 38.

**2. Action by Citizen — Nature and Effect.** — *Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19; *McQuade v. Collins*, 93 Iowa 25; *Wood v. Baer*, 91 Iowa 477; *Applegate v. Winebrenner*, 66 Iowa 68; *Geyer v. Douglass*, 85 Iowa 101; *Cameron v. Kapinos*, 89 Iowa 564; *Dickinson v. Eichorn*, 78 Iowa 710.

**Who Is a Citizen Within Statutes.** — Any person over twenty-one years of age who has his present home and domicile in any county, although it may be for a temporary purpose, is a citizen of that county provided he has a fixed intent to remain there for an indefinite period of time, and has no home, domicile, or right of domicile elsewhere. *Fuller v. McDonnell*, 75 Iowa 220.

**Motive of Citizen in Instituting Proceedings Immaterial.** — To a suit by a citizen to enjoin a liquor nuisance, it is no defense that the suit was brought in bad faith and to annoy the defendant, and an allegation to that effect in an answer should be stricken out. The suit is brought solely for the public benefit. *McQuade v. Collins*, 93 Iowa 22.

**Notice to Prosecuting Officer Unnecessary.** — Under the Iowa statute it is not necessary for a citizen who institutes a proceeding in his own name to abate a nuisance to notify the prosecuting officer of the existence of the nuisance. *Wood v. Baer*, 91 Iowa 475; *Lewis v. Hogan*, 91 Iowa 734.

**Effect of Suit by One Citizen on Action Brought by Another.** — An injunction against a liquor nuisance and proceedings pending thereunder for contempt will bar an action by another citizen for a similar offense on the same prem-

ises though no writ of abatement has issued. *Steyer v. McCauley*, 102 Iowa 105.

**Upon the Death of a Party in Whose Name a Suit to Abate a Liquor Nuisance Has Been Maintained,** his administrator or heir is not entitled to be substituted in his place, but on application of a person duly authorized, the name of the state may be substituted. This principle is equally applicable where a suit is brought to set aside the decree rendered in such action. *Geyer v. Douglass*, 85 Iowa 93.

**3. Private Interest of Citizen Not Involved.** — *Conley v. Zerber*, 74 Iowa 699; *Applegate v. Winebrenner*, 66 Iowa 67.

**4. Person Both Citizen and Prosecuting Officer May Maintain Action.** — *State v. Sioux Falls Brewing Co.*, 2 S. Dak. 363.

**5. Removal of Citizen to Another County — Effect.** — *Judge v. Kahl*, 74 Iowa 486.

**6. Citizen of Another County.** — *Applegate v. Winebrenner*, 66 Iowa 67.

**Intervention.** — Where one citizen of a county has brought an action to restrain and abate a liquor nuisance, another citizen of the same county has no right to intervene and join the plaintiff in the prosecution. *Conley v. Zerber*, 74 Iowa 699.

**7. Proof of Citizenship — When Unnecessary.** — *Littleton v. Harris*, 73 Iowa 167; *Shear v. Green*, 73 Iowa 688; *Kaufman v. Dostal*, 73 Iowa 691.

**8. Nature of Proceeding.** — *Grier v. Johnson*, 88 Iowa 99; *Fisher v. Cass County*, 75 Iowa 232. See also the title CONTEMPT, vol. 7, p. 58.

**Acts Committed Before Enactment of Statute.** — It has been held that a person may be adjudged guilty of contempt in violating an injunction against maintaining a liquor nuisance, though the action in which the injunction was granted



against maintaining a liquor nuisance on his premises, it is not necessary that he himself should have committed the act complained of. If it appears that he has knowledge of and permits a violation of the injunction by an occupant of the premises, he is punishable.<sup>1</sup> Yet it has been held that mere knowledge of the owner that the premises are used for the sale of intoxicating liquors and his failure to take steps to avoid the lease and to re-enter the premises are not sufficient to render him punishable.<sup>2</sup> A decree enjoining the owner of premises from maintaining a liquor nuisance thereon is not operative as against a lessee thereof who has no knowledge of the decree<sup>3</sup> or as against a subsequent purchaser or his lessees, and it is quite immaterial whether they have or have not knowledge of the decree.<sup>4</sup> If, however, the decree enjoins "all persons" from maintaining a liquor nuisance on the premises, a lessee will be within the terms of the order.<sup>5</sup> So it has been held that a bartender may be guilty of violating an injunction directed against the maintenance of a liquor nuisance by his employer.<sup>6</sup> In a proceeding to punish for contempt it is no defense that the accused has acted in good faith upon the advice of counsel in regard to selling liquor in violation of the injunction,<sup>7</sup> or that he did not think that he was acting in violation of law.<sup>8</sup> A decree declaring that the "defendants are enjoined," and ordering that "a perpetual injunction issue against the defendants" (naming them) "forever restraining them" from selling intoxicating liquors on the premises described, is self-executing, and a violation thereof a contempt although no formal injunction has been issued.<sup>9</sup>

**Prior Conviction of Contempt.** — A conviction of contempt for violation of an injunction against selling intoxicating liquors is no bar to a conviction and punishment for sales in violation of the injunction subsequent to the first conviction.<sup>10</sup> The only means of reversing an order punishing or refusing to punish for contempt for violating an injunction against maintaining a liquor nuisance is by certiorari.<sup>11</sup> The order is not reviewable on appeal.<sup>12</sup>

#### e. RIGHT OF PRIVATE PERSON TO RECOVER DAMAGES FOR OR TO ENJOIN

was begun before the statute providing for the punishment for such contempts took effect. *McGlasson v. Johnson*, 86 Iowa 477.

**Right of Citizen Prosecuting Contempt Proceeding to Employ Counsel.** — The right of a citizen to employ counsel for the purpose of abating a nuisance by means of injunction extends also to the employment of counsel in a proceeding for contempt to punish disobedience of the injunction. *Maloney v. Traverse*, 87 Iowa 306.

**Attorneys' Fees.** — A statute allowing to attorneys prosecuting contempt proceedings in violating an injunction against a liquor nuisance "ten per cent. of the amount of the fine assessed" and requiring the clerk to pay over that amount when the "fine is paid" does not render the county liable for services rendered in a proceeding for contempt. *Sims v. Pottawattamie County*, 91 Iowa 442. See also as to attorney's fees *State v. Durein*, 46 Kan. 695.

**1. Liability of Owner of Premises.** — *De France v. Traverse*, 85 Iowa 422; *England v. Johnson*, 86 Iowa 751; *Cameron v. Kapinos*, 89 Iowa 561; *Bartel v. Hobson*, 107 Iowa 644.

**2. Failure to Take Steps to Prevent Violation of Injunction.** — *Koester v. State*, 36 Kan. 27.

**Assessing Fine and Costs Against Premises.** — A fine, together with the costs of the contempt proceedings, may be enforced against the premises used for the illegal purposes by the agent or the owner with his knowledge, even though he was not a party to the contempt

proceeding. *Cameron v. Kapinos*, 89 Iowa 561.

**3. Decree Against Owner — Effect as to Lessee.** — *Newcomer v. Tucker*, 89 Iowa 486.

**4. Effect as to Subsequent Purchaser or His Lessees.** — *Buhlman v. Humphrey*, 86 Iowa 597.

**5. Decree Enjoining "All Persons" — Effect.** — *Silvers v. Traverse*, 82 Iowa 52.

**6. Violation of Injunction by Bartender.** — *Hawks v. Fellows*, 108 Iowa 133.

**7. Advice of Counsel as a Defense.** — *Lindsay v. Hatch*, 85 Iowa 332; *State v. Stevenson*, 104 Iowa 50.

**8. Good Faith of Defendant as a Defense.** — *State v. Bowman*, 79 Iowa 566.

**9. Self-executing Decree for Injunction.** — *Bartel v. Hobson*, 107 Iowa 644. See also *Hawks v. Fellows*, 108 Iowa 133.

**10. Prior Conviction of Contempt.** — *Rosenthal v. Hobson*, (Iowa 1898) 77 N. W. Rep. 488.

**11. Order Reviewable by Certiorari.** — *Currier v. Mueller*, 79 Iowa 316; *State v. Buchanan County*, 84 Iowa 167; *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509.

**12. Order Not Reviewable on Appeal.** — *Currier v. Mueller*, 79 Iowa 316.

**Admitting to Bail.** — The District Court has no authority to admit to bail a person adjudged guilty of contempt in violating an injunction against maintaining a liquor nuisance. Such authority is possessed only by the court which can issue a writ of certiorari. *State v. Buchanan County*, 84 Iowa 167.



**NUISANCE.** — Where a saloon is established in a portion of a city devoted to residences, churches, schools, etc., and the property in the near vicinity thereof is thereby largely reduced in its selling and rental value, one whose home has thus been reduced in value and rendered odious to him may maintain an action to recover damages for the injury thereby caused. And in such case a license to sell constitutes no defense to the action.<sup>1</sup> An employer cannot maintain a suit for an injunction to prevent the use of a building for the sale of intoxicating liquors on the ground that his employees buy intoxicating liquors there and are thereby rendered unfit for work.<sup>2</sup> A civil damage act giving a right of action against a liquor seller or against the owner of the place where it is sold cannot be construed as authorizing an injunction to prevent the use of the building for future sales.<sup>3</sup>

**6. Evidence in Criminal Prosecutions and in Proceedings for Injunction and Abatement** — *a. COMPETENCY.* — To prove the maintenance of a liquor nuisance it is competent to show sales of intoxicating liquors by the defendant in the building alleged to be a nuisance,<sup>4</sup> and after illegal sales in such building have been established it is competent to show similar sales in barns and buildings appurtenant thereto.<sup>5</sup> It may also be shown that intoxicating liquors were found on the premises;<sup>6</sup> that appliances for selling liquors were found there;<sup>7</sup> that the defendant attempted to conceal the liquors when the premises were searched;<sup>8</sup> that intoxicated persons were seen coming from the place charged to be a nuisance;<sup>9</sup> that persons who frequented the place and bought liquors there were addicted to the use of intoxicating liquors;<sup>10</sup> that the defendant made statements to the effect that he intended to make unlawful sales of intoxicating liquors;<sup>11</sup> that the defendant, a hotel keeper, maintained curtains and screens which interfered with a view of the interior of the premises;<sup>12</sup> that

**1. Recovery of Damages for Nuisance — License No Defense.** — *Haggart v. Stehlin*, 137 Ind. 43. In this case an injunction was asked for, but the court, in sending back the case for trial, expressed grave doubt as to whether that remedy was available.

**2. Right of Employer to Enjoin Sales to Employees.** — *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157.

**3. Northern Pac. R. Co. v. Whalen**, 149 U. S. 157.

**4. Evidence of Sales in Building Alleged to Be Maintained as Nuisance.** — *Com. v. Farrand*, 12 Gray (Mass.) 177; *Com. v. Kelley*, 116 Mass. 341.

**Sales After Commencement of Action.** — Where the petition for abatement of a liquor nuisance charges a continuing and not a past offense, evidence of sales made after the beginning of the action is competent. *Hall v. Coffin*, 108 Iowa 466.

**5. Evidence of Sales in Buildings Appurtenant.** — *State v. Arnold*, 98 Iowa 253.

**Evidence of Sales Other than Those Designated in Complaint.** — To convict the defendant for maintaining a nuisance under the prohibitory liquor law, it has been held that the prosecution need not rely upon sales which the prosecuting witness had in mind at the time when he verified the complaint. *State v. Tegder*, 6 Kan. App. 762; *State v. Wood*, 49 Kan. 711.

**Certificate Showing Purchase of Liquor.** — On a prosecution for maintaining a liquor nuisance, certificates which show that liquors have been purchased from the defendant, although not matters of public record, are admissible to corroborate the testimony of witnesses that

they procured liquor from the defendant. *State v. Huff*, 76 Iowa 200.

**6. Finding Liquor on Premises.** — *State v. Wright*, 98 Iowa 702; *Com. v. Lyons*, 160 Mass. 174; *Com. v. Sullivan*, 156 Mass. 229; *Com. v. Murphy*, 153 Mass. 290.

**Amount and Kind of Liquors.** — On the prosecution of a pharmacist for keeping a liquor nuisance it is competent for the jury to consider the amount and kind of liquors in determining the purpose for which they were kept by the defendant. *State v. Shank*, 74 Iowa 649.

**7. Finding Appliances for Liquor Selling.** — *State v. Wright*, 98 Iowa 702; *State v. O'Connor*, 3 Kan. App. 594; *Com. v. Brothers*, 158 Mass. 200; *Com. v. Cogan*, 107 Mass. 212; *Com. v. Davenport*, 2 Allen (Mass.) 299.

**8. Attempt to Conceal Liquors.** — *State v. Fertig*, 70 Iowa 272; *Com. v. Locke*, 145 Mass. 401; *Com. v. Nally*, 151 Mass. 63; *Com. v. Sullivan*, 156 Mass. 487.

**9. Intoxicated Persons Coming from Premises.** — *State v. Pierce*, 65 Iowa 85; *Com. v. Meaney*, 131 Mass. 55; *Com. v. Finnerty*, 148 Mass. 162; *Com. v. Taylor*, 14 Gray (Mass.) 26.

**Evidence that Persons Carried Jugs and Pitchers from the Premises is competent.** *Com. v. Heywood*, 105 Mass. 188.

**10. Character of Frequenters of Place.** — *State v. McConnell*, 90 Iowa 197. See also *State v. Fleming*, 86 Iowa 294.

**11. Defendant's Statements as to Intended Use of Liquors.** — *Com. v. Davenport*, 2 Allen (Mass.) 299. See also *State v. Davis*, (N. H. 1898) 41 Atl. Rep. 207.

**12. Obstructing Interior View of Premises.** — *Com. v. Barnes*, 138 Mass. 511.



the defendant gave intoxicating liquors to minors;<sup>1</sup> and that the defendant had been convicted of the offense of illegally selling intoxicating liquors during a period which included the time of maintaining the alleged liquor nuisance.<sup>2</sup> So the record of the defendant's conviction of the offense of being a common seller is competent on the issue whether he has maintained a liquor nuisance, provided the conviction was based on sales made at the same place.<sup>3</sup> To show ownership or control of the building claimed to have been maintained as a nuisance, it is competent to show that the defendant procured and paid for the shingling of the building<sup>4</sup> or that the defendant claimed liquors seized under a libel and taken from the premises described in the complaint.<sup>5</sup> So evidence that the defendant obtained a license to keep the premises as a hotel is competent to identify him as the owner thereof.<sup>6</sup> A receipt for the rent of the premises, executed by the owner to a person other than the defendant who is not a party and who is out of the state, is not competent to prove that he and not the defendant maintained the nuisance.<sup>7</sup> Evidence of the general reputation of the place or building kept by the defendant is inadmissible<sup>8</sup> unless it is otherwise provided by statute.<sup>9</sup> So it is not competent at a prosecution of this nature to permit the jury to taste or smell the contents of a bottle seized on the defendant's premises.<sup>10</sup> The defendant in a proceeding for maintaining a nuisance cannot show, in his own behalf, in order to prove that the liquors were held for lawful purposes, that liquors seized by the sheriff on the defendant's premises in a prior proceeding were restored to him after trial.<sup>11</sup>

**b. SUFFICIENCY.** — It is for the court to determine whether there is sufficient evidence of the maintenance of a nuisance to go to the jury, and for the jury to determine whether such evidence warrants a conviction.<sup>12</sup> By some statutes proof of the manufacture, sale, or keeping with intent to sell in violation of law is presumptive proof of the offense of maintaining a nuisance;<sup>13</sup>

**1. Gifts of Liquor to Minors.** — *State v. O'Connor*, 3 Kan. App. 594.

**2. Conviction of Illegal Sales.** — *Com. v. Brelsford*, 161 Mass. 61. See also *State v. Collins*, 68 N. H. 299.

**3. Conviction of Being Common Sellers.** — *Com. v. Austin*, 97 Mass. 595. See also *State v. Hall*, 179 Me. 501.

A Plea of Guilty in a Former Prosecution will not justify a conviction when the justice before whom the former prosecutions were had testified that the defendant on pleading guilty said that he was not guilty, but could not afford to fight the city, and would therefore pay the fine and costs. *State v. Beam*, 1 Kan. App. 688.

**Evidence to Prove Intoxicating Properties of Liquor Sold.** — The opinion of a witness who bought and drank in the defendant's saloon, as to the nature of the liquor bought, is competent. *State v. Miller*, 53 Iowa 84.

The result of an analysis of liquor illegally obtained from the defendant's saloon is competent. *Com. v. Brelsford*, 161 Mass. 61.

**4. Ownership or Control of Building.** — *Com. v. Mead*, 153 Mass. 284.

**5. State v. Collins**, 68 N. H. 299.

**6. Com. v. Sullivan**, 156 Mass. 229.

**Other Evidence to Show Ownership or Control.** — A conveyance of the premises charged to be maintained as a nuisance by the defendant, to his wife, raises no presumption that she was the proprietor of the business where the defendant and his family lived on the premises and he conducted the business. *State v. Neeson*, 101 Iowa 733.

Where it is claimed that a hotel building was maintained as a liquor nuisance, and a witness testifies to sales made in a barn appurtenant to the hotel, he may be allowed to testify further that from the fact that the defendant kept his horses in the barn and had control of the hotel he also had control of the barn. *State v. Arnold*, 98 Iowa 253.

**7. Receipt for Rent.** — *Com. v. Tobin*, 160 Mass. 156.

**Identifying Liquor.** — At the trial of a complaint for maintaining a liquor nuisance a certificate by the state assayer of the result of his analysis of certain beer is admissible in evidence for the purpose of identifying the beer so analyzed as that taken from the defendant's premises. *Com. v. Brelsford*, 161 Mass. 61.

**8. General Reputation of Place.** — *State v. Fleming*, 86 Iowa 294; *Com. v. Eagan*, 151 Mass. 45.

**9. State v. Waldron**, 16 R. I. 191; *State v. Wilson*, 15 R. I. 180.

**10. Permitting Jury to Taste Liquors.** — *State v. Lindgrove*, 1 Kan. App. 51.

**11. Restoration of Liquors After Seizure.** — *State v. Zimmerman*, 78 Iowa 614.

**12. For Evidence Held Sufficient to Go to the Jury**, see *Com. v. Taylor*, 14 Gray (Mass.) 26; *Com. v. Buckley*, 147 Mass. 581; *State v. Harrington*, (N. H. 1899) 45 Atl. Rep. 404.

**13. Presumptive Proof of Nuisance.** — *State v. Guisenhouse*, 20 Iowa 227; *State v. Baughman*, 20 Iowa 497; *State v. Arie*, 95 Iowa 375; *State v. Farley*, 87 Iowa 22.



and where proof of finding liquor in the possession of the defendant in any place except the private dwelling is made presumptive evidence by statute that such liquor is illegally held for sale, the proof of such finding will be sufficient evidence of a nuisance committed by keeping with intent to sell.<sup>1</sup> A judgment enjoining a liquor nuisance will not be disturbed if there is any evidence to sustain it though an apparent preponderance of the evidence may be against the judgment.<sup>2</sup>

## XII. OFFENSES AGAINST LIQUOR LAWS AND PROSECUTIONS THEREUNDER—

**1. Sales Without License — a. IN GENERAL.** — In the absence of statutes requiring a license from those engaged in selling intoxicating liquors, a sale of intoxicating liquors without license, either at retail or wholesale, is not an offense.<sup>3</sup> It is, however, very generally provided by statute that one wishing to engage in selling intoxicating liquors must first obtain a license authorizing it, and that those selling without license shall be punishable by fine and imprisonment or both.<sup>4</sup>

**Sales Exempted from Operation of License Laws.** — In a number of jurisdictions the statutes requiring licenses of those who make sales of intoxicating liquors exempt from their operation persons manufacturing wine and cider from fruit which they have grown, the object of these statutes being to encourage the planting of vineyards and orchards and the manufacture of wine and cider. There are also statutes which permit persons who distill intoxicating liquors from products raised by themselves to sell such liquors without license under certain circumstances. As these statutes have been declared unconstitutional by the United States Supreme Court as being in violation of the interstate commerce clause of the Federal Constitution, no consideration of their provisions is necessary.<sup>5</sup>

**Single Sale Constitutes Offense.** — Where a statute prohibits the sale of intoxicating liquors without a license, a single act in contravention of the statute will constitute the offense. A repetition of the sale is not an essential element of the offense prohibited.<sup>6</sup> The offense is not a continuing one in the sense

**1. Sufficiency of Evidence.** — *State v. Norton* 41 Iowa 430.

**For Other Decisions in Which the Evidence Was Held Sufficient to show the maintenance of a nuisance** see *Bepley v. State*, 4 Ind. 264, 58 Am. Dec. 628; *Littleton v. Harris*, 73 Iowa 167; *State v. Wambold*, 74 Iowa 605; *State v. Douglass*, 75 Iowa 432; *State v. Matheison*, 77 Iowa 485; *State v. Schultz*, 79 Iowa 478; *Craig v. Plunkett*, 82 Iowa 474; *State v. Baskins*, 82 Iowa 761; *Wagner v. Holmes*, 88 Iowa 728; *Nichols v. Thomas*, 89 Iowa 394; *State v. Fleming*, 86 Iowa 294; *State v. Oder*, 92 Iowa 767; *State v. Cleary*, 97 Iowa 413; *State v. Wright*, 98 Iowa 702; *State v. Skillicorn*, 104 Iowa 97; *Hall v. Coffin*, 108 Iowa 466; *McCoy v. Clark*, (Iowa 1899) 81 N. W. Rep. 159; *Com. v. Glennan*, 116 Mass. 46; *Com. v. Coolidge*, 138 Mass. 193; *Com. v. Clynes*, 150 Mass. 71; *Com. v. Kelley*, 152 Mass. 486; *Com. v. Hughes*, 154 Mass. 598; *State v. Mitchell*, 3 S. Dak. 223.

**For Cases in Which the Evidence Was Held Insufficient** see *State v. Flusche*, 79 Iowa 765; *State v. Gegner*, 88 Iowa 748.

**2. Preponderance of Evidence in Defendant's Favor.** — *Sickinger v. State*, 45 Kan. 414.

**3. State v. Haines**, (Oregon 1899) 58 Pac. Rep. 39.

**4. See the statutes of the various jurisdictions regulating and prohibiting the liquor traffic.**

**5. See supra, this title, Constitutionality of**

*Liquor Laws — Statutes Discriminating Against Liquors of Other States and Countries.*

**For a Construction of These Provisions**, see *Jeffries v. State*, 52 Ark. 420; *Galloway v. State*, 60 Ark. 362; *Mandeville v. Baudot*, 49 La. Ann. 236; *Com. v. Mahoney*, 152 Mass. 493; *State v. Jaeger*, 63 Mo. 403; *State v. Wyl*, 55 Mo. 67; *State v. Heard*, 64 Mo. App. 334; *State v. Kennerly*, 98 N. Car. 657; *State v. Whissenhunt*, 98 N. Car. 682; *State v. Hazell*, 100 N. Car. 471; *State v. Sutton*, 100 N. Car. 474.

**6. Single Sale Constitutes Offense — Alabama.** — *McPherson v. State*, 54 Ala. 221; *Lawson v. State*, 55 Ala. 118; *Sanders v. State*, 58 Ala. 371; *Martin v. State*, 59 Ala. 34.

*Florida.* — *Jordan v. State*, 22 Fla. 528; *Frese v. State*, 23 Fla. 267; *Dansey v. State*, 23 Fla. 316.

*Michigan.* — *People v. Kropp*, 52 Mich. 582.

*Missouri.* — *State v. Small*, 31 Mo. 197; *Kansas City v. Muhlback*, 68 Mo. 638.

*Ohio.* — *State v. Shanks*, Tappan (Ohio) 45.

*Pennsylvania.* — *Com. v. Dixon*, 1 Wilcox (Pa.) 211.

*South Carolina.* — *State v. Cassety*, 1 Rich. L. (S. Car.) 90; *State v. Anderson*, 3 Rich. L. (S. Car.) 172.

*Vermont.* — *State v. Bugbee*, 22 Vt. 32; *State v. Chandler*, 15 Vt. 425; *State v. Paddock*, 24 Vt. 312.

*Virginia.* — *Lewis v. Com.*, 90 Va. 843.



that a repetition of the sale is an element of the offense.<sup>1</sup>

*b. SALES BEFORE ISSUANCE OF LICENSE.* — According to the weight of authority a license has no retroactive effect and does not operate to legalize sales made before its issuance. It cannot cure a past offense or legalize a crime.<sup>2</sup> It has accordingly been held that a license to sell intoxicating liquors does not relate back to the date of the order of a board or court granting permission to obtain it so as to legalize sales made *ad interim*.<sup>3</sup> So the execution of the required bond and the tender of the required fee will not protect the applicant in making sales before the license is issued.<sup>4</sup> It has been held, however, in some decisions, that a person who has performed all the steps requisite to the issuance of the license, such as giving bond and paying the license fee, will be protected in making sales before the actual issuance of the license.<sup>5</sup>

*c. SALES AFTER EXPIRATION OR REVOCATION OF LICENSE.* — A person whose license has expired has no right in virtue thereof or under any common right of the citizen to continue to sell spirituous liquors.<sup>6</sup> So a person who continues to sell intoxicating liquors after his license has been revoked renders himself subject to the penalty prescribed for such sales.<sup>7</sup>

*d. EFFECT OF IMPOSSIBILITY OF OBTAINING LICENSE.* — The fact that it was impossible at the time of the sale for the party selling to obtain a license is no defense to a prosecution for selling intoxicating liquors without license.<sup>8</sup> Therefore it is no defense that no license could legally be granted at the place where the sale was made,<sup>9</sup> or that it was impossible for the licensee to renew

1. *Offense Not Continuing.* — *Dansey v. State*, 23 Fla. 316.

2. *License Has No Retroactive Effect.* — *Edwards v. State*, 22 Ark. 253; *Roberts v. State*, 26 Fla. 360; *Keiser v. State*, 78 Ind. 430 [*overruling Vannoy v. State*, 64 Ind. 447; *State v. Wilcox*, 66 Ind. 559]; *Dudley v. State*, 91 Ind. 312; *Wiles v. State*, 33 Ind. 208; *Com. v. Welch*, 144 Mass. 356; *Bolduc v. Randall*, 107 Mass. 121; *Zeglin v. Carver County*, 72 Minn. 17; *State v. Hughes*, 24 Mo. 147; *Almshouse Com'rs v. Osterhoudt*, 23 Hun (N. Y.) 66; *Brown v. State*, 27 Tex. 335.

3. *Relation Back to Order of Board Granting.* — *Wiles v. State*, 33 Ind. 208; *Dudley v. State*, 91 Ind. 312; *Keiser v. State*, 78 Ind. 430; *Com. v. Welch*, 144 Mass. 356; *State v. Hughes*, 24 Mo. 147; *Brown v. State*, 27 Tex. 335.

*Sales Pending Appeal and Judgment Granting License.* — An appeal from the judgment of the Circuit Court granting a license to sell liquor does not suspend the right of the applicant to the license pending the appeal, and if he renders a proper bond and a license fee he may sell though the county auditor unlawfully refuses to issue the license. A judgment is not impaired by an appeal, but remains in full force. *Padgett v. State*, 93 Ind. 396.

4. *Execution of Bond and Tender of Fee.* — *Roberts v. State*, 26 Fla. 360; *State v. Bach*, 36 Minn. 234; *State v. Cron*, 23 Minn. 140.

*Tender of Fee.* — The fact that the applicant made tender of the fee, which was refused, will not protect him in selling without a license. *Kadgith v. Bloomington*, 58 Ill. 229.

5. *Performance of All Requisite Steps by Applicant.* — *Prather v. People*, 85 Ill. 36; *Vannoy v. State*, 64 Ind. 447; *State v. Wilcox*, 66 Ind. 557. These *Indiana* decisions are *overruled* in *Keiser v. State*, 78 Ind. 430. See also *State v. White*, 23 Ark. 275, in which case the court

held that it was undoubtedly not proper for the applicant to make sales under the circumstances mentioned, but that no criminal liability attached therefor.

6. *Sales After Expiration or Revocation of License.* — *Com. v. Putnam*, 4 Gray (Mass.) 16; *Forwood v. State*, 49 Md. 531; *New York v. Mason*, 4 E. D. Smith (N. Y.) 142; *State v. Brady*, 14 R. I. 508. See also *Lehritter v. State*, 42 Ind. 482.

*What Is Sale Within Statute.* — Where a retailer whose license has expired discontinues business he may, without renewing his license, lawfully sell his stock of goods on hand, provided this is done in good faith. *Forwood v. State*, 49 Md. 531.

7. *Revocation of License.* — *Com. v. Hamer*, 128 Mass. 76; *Neuman v. State*, 76 Wis. 112.

8. *Impossibility of Obtaining License.* — *State v. Tucker*, 45 Ark. 55; *Reese v. Atlanta*, 63 Ga. 344; *Welsh v. State*, 126 Ind. 71; *Indianapolis v. Fairchild*, 1 Ind. 315; *State v. Kantler*, 33 Minn. 69; *State v. Langdon*, 31 Minn. 316; *State v. McNeary*, 88 Mo. 144; *Hunzinger v. State*, 39 Neb. 653. Compare *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346, wherein it was held that a tavern keeper who has a legal and competent license is not liable to the penalty for retailing liquors after his license has expired and before the time for the next meeting of the commissioners for the purpose of granting licenses.

9. *That License Could Not Be Legally Granted.* — *State v. Tucker*, 45 Ark. 55; *Indianapolis v. Fairchild*, 1 Ind. 315; *Welsh v. State*, 126 Ind. 71; *State v. Brown*, 41 La. Ann. 771; *State v. Kantler*, 33 Minn. 69; *State v. Funk*, 27 Minn. 318; *State v. McNeary*, 88 Mo. 143.

*No Provision by Law for Granting License.* — The fact that no provision is made by law for granting a license to sell intoxicating liquors upon the Ohio river does not authorize the



his license because of the sickness of the officer whose duty it was to issue licenses.<sup>1</sup>

**Effect of Wrongful Refusal of License.** — Where intoxicating liquors are sold without license the seller is punishable therefor although he had made application for such license and it had been wrongfully refused.<sup>2</sup>

**Motive Immaterial.** — Punishment must follow an infraction of the law, regardless of the reason which prevented the obtaining of a license or the motive actuating the offender who in dereliction of his duty refused to grant it.<sup>3</sup>

**Compelling Issuance by Mandamus.** — The law usually provides an efficient remedy by mandamus to compel a recalcitrant officer to perform his duties, and this is the sole remedy to which an applicant for a license can resort on a wrongful refusal to issue it.<sup>4</sup>

**e. BURDEN OF PROVING LICENSE OR NO LICENSE.** — Although there are a few decisions which maintain a contrary doctrine,<sup>5</sup> the rule is settled by the weight of authority that where a license or permit to sell intoxicating liquors would be a defense to a prosecution for a violation of the liquor laws, the burden is on the defendant to show that he has such license or permit, and not on the state to show that he is without it.<sup>6</sup>

Sale thereof without a license. *Welsh v. State*, 126 Ind. 71.

**Sale by Local Option District.** — The fact that the sale was made in a local option district in which no license could be granted is no defense or protection for selling without license. *State v. Funk*, 27 Minn. 318.

**1. Sickness of Officer Whose Duty It Was to Issue License.** — *Reese v. Atlanta*, 63 Ga. 344.

**2. Sales Where License Has Been Wrongfully Refused** — *Georgia*. — *Brock v. State*, 65 Ga. 437. *Illinois*. — *Kadgihn v. Bloomington*, 58 Ill. 229.

*Massachusetts*. — *Com. v. Blackington*, 24 Pick. (Mass.) 352.

*Missouri*. — *Kansas City v. Flanders*, 71 Mo. 283; *State v. Jamison*, 23 Mo. 331; *State v. Huntley*, 29 Mo. App. 278.

*New York*. — *New York v. Mason*, 4 E. D. Smith (N. Y.) 142; *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346.

*Texas*. — *Curry v. State*, 28 Tex. App. 477.

*Wisconsin*. — *State v. Downer*, 21 Wis. 277.

**3. State v. Myers**, 63 Mo. 324.

**4. Mandamus Only Remedy.** — *Roberts v. State*, 26 Fla. 360; *Kadgihn v. Bloomington*, 58 Ill. 229; *Kansas City v. Flanders*, 71 Mo. 283.

The case would not be changed, however, if the law provided no remedy at all, since nothing but the granted license confers immunity from punishment. *Kansas City v. Flanders*, 71 Mo. 283.

**5. In Wisconsin** it is settled that on a trial for selling without a license the prosecution must produce presumptive evidence that the defendant had no license before he can be called on to prove the contrary. *Mehan v. State*, 7 Wis. 670; *Hepler v. State*, 58 Wis. 47.

**In Massachusetts** this rule formerly prevailed, *Com. v. Thurlow*, 24 Pick. (Mass.) 374, but it has been changed by express statutory enactment. See the Massachusetts cases cited in the next following note.

**In Kansas** it was formerly the rule that the prosecution was bound to prove by competent evidence, in order to sustain a verdict of "guilty," that the defendant had no permit at the time of the commission of the alleged offense. *State v. Kuhuke*, 26 Kan. 405; *State*

*v. Nye*, 32 Kan. 201; *State v. Schweiter*, 27 Kan. 499. The rule in this state has also been changed by statute. See the Kansas decisions cited in the next following note.

**6. Burden on Defendant to Show License.** — *Canada*. — *Ex p. Parks*, 8 N. Bruns. 237.

*United States*. — *U. S. v. Nelson*, 29 Fed. Rep. 202.

*Arkansas*. — *Flower v. State*, 39 Ark. 209; *Ruble v. State*, 51 Ark. 176; *Rana v. State*, 51 Ark. 481; *State v. Devers*, 38 Ark. 517; *Evans v. State*, 54 Ark. 227; *Williams v. State*, 35 Ark. 430.

*Georgia*. — *Fuller v. State*, 17 Ga. 213; *Sharp v. State*, 17 Ga. 290.

*Illinois*. — *Noecker v. People*, 91 Ill. 468.

*Indiana*. — *Shearer v. State*, 7 Blackf. (Ind.) 99; *Taylor v. State*, 49 Ind. 555; *Stevenson v. State*, 65 Ind. 409.

*Iowa*. — *State v. Kriechbaum*, 81 Iowa 633; *State v. Cloughly*, 73 Iowa 626; *State v. Bencke*, 9 Iowa 203; *State v. Collins*, 11 Iowa 141.

*Kansas*. — *State v. Crow*, 53 Kan. 662 (under special statutory provision); *State v. Harlan*, (Kan. App. 1899) 58 Pac. Rep. 274.

*Kentucky*. — *Haskill v. Com.*, 3 B. Mon. (Ky.) 342; *Orme v. Com.*, (Ky. 1900) 55 S. W. Rep. 195.

*Maine*. — *State v. Crowell*, 25 Me. 171; *State v. Woodward*, 34 Me. 293; *State v. Churchill*, 25 Me. 306.

*Massachusetts*. — *Com. v. Shea*, 115 Mass. 102 (under special statutory provision); *Com. v. Dean*, 110 Mass. 357; *Com. v. Kennedy*, 108 Mass. 292; *Com. v. Leo*, 110 Mass. 414; *Com. v. Conneally*, 108 Mass. 480; *Com. v. Lahy*, 8 Gray (Mass.) 459; *Com. v. Curran*, 119 Mass. 206; *Com. v. Murphy*, 10 Gray (Mass.) 1; *Com. v. Certain Intoxicating Liquors*, 122 Mass. 8; *Com. v. Kelly*, 10 Cush. (Mass.) 69; *Com. v. Ryan*, 9 Gray (Mass.) 137; *Com. v. Certain Intoxicating Liquors*, 122 Mass. 36; *Com. v. Bellows*, 115 Mass. 139; *Com. v. Carpenter*, 100 Mass. 204; *Com. v. Tuttle*, 12 Cush. (Mass.) 503.

*Michigan*. — *Smith v. Adrian*, 1 Mich. 495.

*Minnesota*. — *State v. Schmail*, 25 Minn. 370; *State v. Bach*, 35 Minn. 234; *State v. Ahern*, 54 Minn. 195.



**Reason for Rule.** — One court has assigned as a reason for so holding, that a plea of "not guilty" to a charge of selling without a license amounts to an allegation of selling with a license, and that he who alleges an affirmative must prove it.<sup>1</sup> But the great majority of the decisions are based on the ground that the subject-matter of the averment lies peculiarly in the knowledge of the defendant, who can easily show a permit or license if he has one, while proof of a negative averment by the prosecution might be attended with considerable inconvenience.<sup>2</sup> This reasoning is in strict accordance with the well-settled rule of evidence that when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party the averment is taken as true unless it is proved by the other party.<sup>3</sup>

**2. Sales under Void Licenses.** — A sale of intoxicating liquors under a license which is for any reason unauthorized and void will be as much in violation of the law as a sale without any license. Every condition imposed by the statute under which the license is granted must be strictly complied with.<sup>4</sup> It is accordingly well settled that a person who sells intoxicating liquors under licenses granted under the following circumstances will be guilty of a violation of the law: where the license is granted before the required bond is given by the applicant;<sup>5</sup> where the license is issued without the indorsement thereon of the oath prescribed;<sup>6</sup> where the license is issued on the payment of a smaller sum than required by law;<sup>7</sup> where the license is issued on credit;<sup>8</sup>

*Mississippi.* — *Easterling v. State*, 35 Miss. 210; *Thomas v. State*, 37 Miss. 353; *Pond v. State*, 47 Miss. 39; *Fairly v. State*, 63 Miss. 333.

*Missouri.* — *State v. Lipscomb*, 52 Mo. 32; *Kansas City v. Muhlback*, 68 Mo. 640; *Schmidt v. State*, 14 Mo. 137; *State v. Wilson*, 39 Mo. App. 114; *State v. Geise*, 39 Mo. App. 189; *State v. Edwards*, 60 Mo. 490; *Wheat v. State*, 6 Mo. 455.

*Nebraska.* — *Hornberger v. State*, 47 Neb. 40.

*New Hampshire.* — *State v. Adams*, 6 N. H. 532; *State v. McGlynn*, 34 N. H. 422; *State v. Shaw*, 35 N. H. 217; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *State v. Simons*, 17 N. H. 83; *State v. Perkins*, 53 N. H. 437.

*New Jersey.* — *Plainfield v. Watson*, 57 N. J. L. 525; *Greeley v. Passaic*, 42 N. J. L. 87; *Jackson v. Camden*, 48 N. J. L. 89.

*New York.* — *Jefferson v. People*, 101 N. Y. 19; *Potter v. Deyo*, 19 Wend. (N. Y.) 361; *New York v. Mason*, 4 E. D. Smith (N. Y.) 142; *People v. Maxwell*, 83 Hun (N. Y.) 157; *Schwab v. People*, 4 Hun (N. Y.) 520.

*North Carolina.* — *State v. Emery*, 98 N. Car. 668; *State v. Sorrell*, 98 N. Car. 738; *State v. Morrison*, 3 Dev. L. (14 N. Car.) 299.

*Oregon.* — *State v. Cutting*, 3 Oregon 260.

*Rhode Island.* — *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838.

*South Carolina.* — *Geuing v. State*, 1 McCord L. (S. Car.) 573.

*Texas.* — *Lucio v. State*, 35 Tex. Crim. 320.

*Vermont.* — *State v. Fisher*, 35 Vt. 584.

*Washington.* — *State v. Shelton*, 16 Wash. 590.

**Sales by Agent.** — The rule as to the burden of proof stated in the text applies to an agent selling for another as well as to the proprietor himself. If the person for whom the agent makes the sale has a license, this is matter of defense. *Rana v. State*, 51 Ark. 481; *Evans v. State*, 54 Ark. 227; *State v. McNeary*, 14 Mo. App. 410, *affirmed* 88 Mo. 143.

**Where a Person Is Charged with Aiding and Abetting Another in Sales of intoxicating liquors without a license the burden is on the prosecu-**

tion to show that the principal had no license. This offense was not within the rule stated in the text. Where one is charged with aiding in an offense committed by another the prosecution must show that the act done was criminal, and that he aided, abetted, or assisted in the commission of it. *Berning v. State*, 51 Ark. 550.

**Maintaining Nuisance — Burden of Proof.** — The rule established by the *Massachusetts* statute that in all prosecutions for selling spirituous liquors without license the burden of proof shall be on the defendant does not apply on an indictment for a nuisance by keeping a building for the unlawful sale and unlawful keeping of intoxicating liquors. *Com. v. Lahy*, 8 Gray (Mass.) 459.

1. *Sharp v. State*, 17 Ga. 290.

2. *Williams v. Pindall*, 35 Ark. 434; *State v. Nulty*, 57 Vt. 547. See also decisions cited in the second preceding note.

3. *State v. Wilson*, 39 Mo. App. 114; *State v. Lipscomb*, 52 Mo. 32; *State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; 1 *Greenleaf on Evidence* (16th ed.), § 79.

4. **Sales under Void License.** — See cases cited in subsequent notes in this subdivision.

5. **License Granted Before Giving Bond.** — *Houser v. State*, 18 Ind. 106; *Keiser v. State*, 78 Ind. 430; *State v. Shaw*, 32 Me. 570; *State v. Fisher*, 33 Wis. 154; *State v. Ludington*, 33 Wis. 107.

**Giving Bond Condition Precedent.** — The giving of the bond required by the excise law is an essential condition precedent to the validity of the license to sell intoxicating liquors, and a license granted without such bond affords no protection to the licensee. *State v. Fisher*, 33 Wis. 154.

6. **Indorsement of Oath on License.** — *Pope v. State*, 2 Swan (Tenn.) 611.

7. **Payment of Smaller License Fee than Required.** — *Spake v. People*, 89 Ill. 617; *Townsend v. State*, 2 Blackf. (Ind.) 151.

8. **Licenses Issued on Credit.** — *Handy v. Peo-*



where the license is issued without a written recommendation of the board of commissioners, when such recommendation is required by law;<sup>1</sup> where the license is issued without the required notice of application therefor;<sup>2</sup> where the license is granted without the petition of a majority of the legal voters,<sup>3</sup> freeholders,<sup>4</sup> or residents<sup>5</sup> of the place where the liquor is to be sold, when such a petition is required by statute; where the license is issued by a licensing board or officers thereof having no authority to issue it;<sup>6</sup> where the license is issued by the board of commissioners without the requisite number of votes by the members thereof;<sup>7</sup> where the license is parol, the statute requiring that it shall be written;<sup>8</sup> where the license assumes to authorize sales on premises whereon the statute does not permit such sales;<sup>9</sup> where the license is issued in excess of the number permitted by statute to be granted in any particular locality.<sup>10</sup>

**3. Sales Not Protected by License.** — It happens not infrequently that a person holding a license to sell intoxicating liquors renders himself amenable to the law by sales which the license does not authorize him to make. If, for instance, the law prohibits the sale of intoxicating liquors except for certain designated purposes, a sale for any other purpose than that designated will be a violation of the law.<sup>11</sup> So where a license only authorizes a sale of intoxicating liquors in designated quantities, a sale of any quantity other than those designated, whether larger or smaller, will constitute a violation of the law.<sup>12</sup> It is likewise well settled that a person holding a license to sell intoxicating liquors can sell only at the place designated in the license, and a sale at any other place will constitute a violation of the law.<sup>13</sup> It is also unlawful for a

ple, 29 Ill. App. 99; *Houser v. State*, 18 Ind. 106; *Zielke v. State*, 42 Neb. 750.

**1. Licenses Issued Without Recommendation of Commissioners.** — *State v. Moore*, 1 Jones L. (46 N. Car.) 276. Compare *Stevens v. Emson*, 33 L. T. N. S. 821, where it was held that an irregular license (because not signed by the proper justice) would protect the defendant from penal consequences.

**2. License Issued Without Notice of Application.** — *Zielke v. State*, 42 Neb. 750. But compare *Hornaday v. State*, 43 Ind. 306.

**3. License Granted Without Petition of Voters.** — *House v. State*, 41 Miss. 737.

**4. Freeholders.** — *Metcalf v. State*, 76 Ga. 308.

**5. Residents.** — *Welsford v. Weidlein*, 23 Kan. 601; *State v. Young*, 17 Kan. 414.

**6. Licenses Issued by Unauthorized Officers.** — *Mayson v. Atlanta*, 77 Ga. 662; *Flaucher v. Camden*, 56 N. J. L. 244; *Cronin v. Stoddard*, 97 N. Y. 271; *Palmer v. Doney*, 2 Johns. Cas. (N. Y.) 346.

**7. Licenses Issued Without Requisite Number of Votes.** — *Com. v. Moran*, 148 Mass. 453.

**8. Parol Licenses.** — *Lawrence v. Gracy*, 11 Johns. (N. Y.) 179.

**9. Sales Which License Cannot Authorize.** — *Com. v. McCormick*, 150 Mass. 270. In this case a license was issued to sell intoxicating liquors in a house used partly as a dwelling, the statute providing that no license should be granted to be exercised in any dwelling house.

**10. Licenses in Excess of Number Authorized by Statute.** — *State v. Shaw*, 32 Me. 570; *Com. v. Hayes*, 149 Mass. 32.

**11. Sales for Unauthorized Purpose.** — *Whaley v. State*, 87 Ala. 83; *Owens v. People*, 56 Ill. App. 569; *State v. Yager*, 72 Iowa 421; *State v. Adams*, 20 Iowa 486; *State v. Perkins*, 26 N. H. 9; *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376; *State v. Emery*, 98 N. Car. 768;

*State v. Fisher*, 35 Vt. 584; *State v. Parks*, 29 Vt. 70.

**12. Sales in Quantities Not Authorized by License.** — *Lillensteine v. State*, 46 Ala. 498; *Whaley v. State*, 87 Ala. 83; *Bach v. State*, 61 Ark. 326; *Harris v. People*, 1 Colo. App. 289; *Schumm v. Gardener*, 25 Ill. App. 633; *State v. Cahen*, 35 Md. 236; *People v. Greiser*, 67 Mich. 490; *Trost v. State*, 64 Miss. 188; *People v. Davis*, 45 Barb. (N. Y.) 494; *People v. Bradley*, 58 Hun (N. Y.) 601, 11 N. Y. Supp. 594.

**Retailing under Manufacturer's License.** — A manufacturer of beer who has paid the manufacturer's tax only cannot sell at retail unless he pays either the retail tax or the wholesale and retail tax. *People v. Greiser*, 67 Mich. 490.

**License to Sell Bottled Goods.** — Where a license merely authorizes a dealer to sell bottled goods he cannot lawfully, under such license, keep beer on tap to be drawn into pitchers and other vessels of customers, and it is immaterial that sales are not made in smaller quantities than a quart. *Harris v. People*, 1 Colo. App. 289.

**13. Sales at Places Not Authorized by License.** — *Ash v. Lynn*, 12 Jur. N. S. 485; *Hannant v. Foulger*, 8 B. & S. 425, 36 L. J. M. C. 119; *Bartel v. Hobson*, 107 Iowa 644; *Creekmore v. Com.*, (Ky. 1889) 12 S. W. Rep. 628; *Com. v. Holland*, (Ky. 1889) 47 S. W. Rep. 216; *Com. v. Asbury*, (Ky. 1898) 47 S. W. Rep. 217; *Com. v. Welch*, 147 Mass. 374; *People v. Bouchard*, 82 Mich. 156; *State v. Fredericks*, 16 Mo. 382; *State v. Young*, 70 Mo. App. 52; *State v. Gerhardt*, 3 Jones L. (48 N. Car.) 178; *Com. v. Holstine*, 132 Pa. St. 357; *Horan v. Chief Justice*, 27 Tex. 226; *Pearce v. State*, 35 Tex. Crim. 150; *Travis v. State*, 37 Tex. Crim. 486; *Com. v. Hall*, 8 Gratt. (Va.) 588.

**Designating Place of Business — What Con-**  
Volume XVII.



dealer to sell any other kinds of liquors than those mentioned in the license.<sup>1</sup> A restaurant or tavern keeper's license will be no protection against a prosecution for retailing intoxicating liquors unless this is expressly authorized by such license.<sup>2</sup> And where a druggist's license expressly prohibits the sale of liquors to be drunk on the premises, a sale of this kind will be in violation of the law.<sup>3</sup> A federal license to sell intoxicating liquors furnishes no protection to one selling without a state license.<sup>4</sup>

**4. Selling, Giving, or Furnishing to Minors**—*a. GENERAL SCOPE OF PROHIBITORY STATUTES.*—In most if not all jurisdictions, statutes have been enacted with the design of preventing minors from getting and using intoxicating liquors.<sup>5</sup> Some of these statutes merely prohibit a sale of intoxicating liquors to a minor; others prohibit either a sale or a gift, while there are others which are even more comprehensive in their scope and prohibit the "furnishing" of intoxicating liquors to minors.<sup>6</sup> So there are statutes which prohibit the sale of intoxicating liquors to students of designated schools, and a sale to a student of any of these schools is a violation of the statute whether he be a minor or an adult.<sup>7</sup>

**All Minors Within Purview of Statute.**—A minor who is married,<sup>8</sup> or who is carrying on business for himself,<sup>9</sup> or whose civil disabilities have been removed by

tutes.—Where a person establishes a bar in a saloon building, and sells liquor there, and posts his license, he thereby designates a house in which he is to sell intoxicating liquors by virtue of his license, and by retailing it also at his grocery he renders himself amenable to the statute prohibiting the sale of intoxicating liquors at any place other than that designated in the license. *Pearce v. State*, 35 Tex. Crim. 150.

**1. Sales of Other Liquors than Authorized by License.**—*Gersteman v. State*, 35 Tex. Crim. 318; *Lucio v. State*, 35 Tex. Crim. 320.

**2. Restaurant or Tavern License.**—*Page v. State*, 11 Ala. 849; *Nicrosi v. State*, 52 Ala. 336; *Com. v. Thayer*, 5 Met. (Mass.) 246; *Benson v. Moore*, 15 Wend. (N. Y.) 260.

**3. Druggist's License.**—*Spake v. People*, 89 Ill. 617.

**4. Federal License No Protection for Sales Without State License.**—*McGuire v. Com.*, 3 Wall. (U. S.) 387; *Pervear v. Com.*, 5 Wall. (U. S.) 475; *State v. Carney*, 20 Iowa 82; *State v. Adams*, 20 Iowa 486; *State v. Baughman*, 20 Iowa 497; *Stommel v. Timbrel*, 84 Iowa 336; *State v. Delano*, 54 Me. 501; *Com. v. Thorniley*, 6 Allen (Mass.) 445; *Com. v. Holbrook*, 10 Allen (Mass.) 200; *Com. v. Sanborn*, 116 Mass. 61; *Peitz v. State*, 68 Wis. 538.

**Sales in Violation of Prohibition Laws.**—The fact that a person holds a United States revenue license to retail liquors is no defense in a prosecution for illegally selling under the state law. Such license does not authorize the holder to violate the law of the state. *State v. McCleary*, 17 Iowa 44; *State v. Carney*, 20 Iowa 82.

**Orders Not Taken at Place of Business.**—One who has a license to sell intoxicating liquors at his place of business does not violate his license by taking orders away from such place. Such a transaction is not a sale, and he may return to his place of business, set aside the goods ordered, and deliver them. *Com. v. Smith*, 16 Pa. Co. Ct. 644.

**5. See the Statutes of the Various States regu-**

lating the sale of intoxicating liquors, and see the decisions cited *infra*, this section.

It is considered that persons of immature age more readily contract abnormal appetites and dangerous habits than persons of mature years and experience, and the main object of the statutes is to prevent them from acquiring habits of dissipation that would unfit them for usefulness. *Payne v. State*, 74 Ind. 203; *Hunter v. State*, 101 Ind. 241; *Sumner v. State*, 4 Ind. App. 403; *State v. Lawrence*, 97 N. Car. 493.

**6. Scope of Statutes.**—See the statutes of the various states regulating the liquor traffic.

**7. Sales to Students.**—*State v. Cooper*, 35 Mo. App. 532.

**A Writing School, though to Continue for the Term of Twenty Days Only**, is a school within the meaning of a statute forbidding the sale of spirituous liquor to a minor, student, or pupil of any college or academy. *Farrall v. State*, 32 Ala. 557.

**Necessity of Notice to Saloon Keeper.**—The *Minnesota* statute provides that any parent, etc., may give notice to any saloon keeper, forbidding him to furnish intoxicating liquor to the person named in the notice, and that if any one to whom such notice was given furnishes intoxicating liquors to the person named in the notice, he shall be guilty of a misdemeanor. It was held that the sale after notice is a distinct offense from the sale to minors, students, and habitual drunkards, and that to make out the latter offense no written notice need be shown. *State v. Hyde*, 27 Minn. 153.

**8. Married Minors.**—*State v. Scoggins*, 107 N. Car. 559.

**9. Minor Carrying On Business for Himself.**—*Pounders v. State*, 37 Ark. 399. Compare *Brosee v. State*, 5 Ind. 76, in which case it was held that a sale to a minor who was in business for himself, of a barrel of brandy to be used in that business, was not a violation of the statute. This case is distinguishable from the *Arkansas* case, in which the sale was of liquor to be drunk by the minor.



decree of court,<sup>1</sup> or who has been emancipated by his parents,<sup>2</sup> is still a minor within the meaning of the laws prohibiting sales of intoxicating liquors to minors.

**Ownership of the Liquors sold or given to a minor** is not, it seems, necessary to constitute the offense;<sup>3</sup> and under the statutes of one state, a person having "any interest in" liquors sold to a minor is subject to the penalty prescribed by the statute.<sup>4</sup>

**Knowledge of Intoxicating Properties.** — It has also been held that knowledge that the liquor sold was intoxicating is not an element of the offense.<sup>5</sup>

**Each Sale Separate Offense.** — Under some of the statutes, each sale constitutes a separate offense, and there may be as many convictions as there are sales made.<sup>6</sup>

**What Classes of Persons Prohibited from Making Sales to Minors.** — So far as the reported decisions show, the statutes prohibiting the sale of intoxicating liquors to minors are broad enough to include all persons whatsoever. It is, therefore, a matter of no importance that the person making the sale is not licensed at all or is licensed to sell to another and a different class of persons only.<sup>7</sup>

**Punishment and Penalties.** — All of the statutes, it is believed, make a violation thereof an offense which may be prosecuted by indictment, and some, in addition, render the seller liable in a civil action on his bond to recover a penalty.<sup>8</sup>

**b. CONSENT OF PARENT OR GUARDIAN — When Consent Authorized by Statute.** — In a number of jurisdictions the statutes permit the sale of intoxicating liquors to infants on the written consent of parents or guardians. These statutes are strictly construed, and the seller will not be protected unless the consent is in writing.<sup>9</sup>

**Nature of Order Required to Protect Seller.** — A special order for a sale on one occasion will of course protect the seller.<sup>10</sup> There is some conflict of opinion as to whether the authority must be special as contradistinguished from general. According to one decision it need not be special.<sup>11</sup> According to others it must be special, and it is held that a general permit without limitation as

1. Minor Whose Civil Disabilities Are Removed, — *Coker v. State*, 91 Ala. 92.

2. Emancipated Minor. — *Slaughter v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 247.

3. See *infra*, this subsection, *Aiding and Abetting in Sale*.

4. Person Interested in Liquor Sold. — *Fahey v. State*, 62 Miss. 402.

5. Knowledge of Intoxicating Properties Not Essential. — *Byars v. Mt. Vernon*, 77 Ill. 467.

6. Each Sale Separate Offense. — *Emerson v. State*, 43 Ark. 372; *State v. Blahut*, 48 Ark. 34; *McNeil v. Collinson*, 130 Mass. 167.

7. Persons Prohibited from Making Sales. — *Johnson v. People*, 83 Ill. 431; *Meyer v. State*, 50 Ind. 18; *Johnson v. State*, 74 Ind. 197; *State v. Hamilton*, 75 Ind. 238; *State v. Gowgill*, 75 Ind. 599; *Cobleigh v. McBride*, 45 Iowa 116; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Com. v. Tabor*, 138 Mass. 496; *State v. McGinnis*, 30 Minn. 48; *Altenburg v. Com.*, 126 Pa. St. 602.

8. Punishment and Penalties Provided. — See the statutes of the different states regulating the liquor traffic.

Former Statutory Provisions in Missouri. — Prior to 1885 (Rev. Stat. 1889, § 4588), the remedy for selling to minors in Missouri was by civil action only. *State v. McCance*, 110 Mo. 398; *State v. Slaughter*, 17 Mo. App. 142; *State v. Amor*, 77 Mo. 568.

9. Consent Must Be in Writing. — *Hill v. State*, 37 Ark. 395; *Blahut v. State*, 54 Ark. 538; *State v. Coenan*, 45 Iowa 567; *Com. v. Davis*, 12 Bush (Ky.) 240; *State v. Fairfield*, 37 Me. 517; *State v. Bruder*, 35 Mo. App. 475; *State v. Johnson*, 44 Mo. App. 84; *State v. Compas*, 61 Mo. App. 290; *Jones v. State*, 32 Tex. Crim. 108; *Kuhn v. State*, 34 Tex. Crim. 85; *Hannaman v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 538.

Subsequent Consent or Ratification Is No Defense. — *Slaughter v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 247. And where there has been an oral consent prior to the sale, a reduction of the consent to writing after the sale is no defense. *State v. Bruder*, 35 Mo. App. 475.

Sending Minor to Purchase Drinks for Father. — It is no defense to a prosecution for illegal selling of liquor to a minor to be drunk by himself, that the father was in the habit of sending the son to the defendant's saloon after liquor to be drunk by the father. *Boatright v. State*, 77 Ga. 717.

The Fact that the Minor Has Neither Parents nor Guardian from whom he might obtain consent does not affect the defendant's liability. *Blair v. State*, 81 Ga. 628; *Herchenbach v. State*, 34 Tex. Crim. 122.

10. Order for One Purchase. — *Payne v. State*, (Tex. App. 1892) 19 S. W. Rep. 677.

11. General Authority Sufficient. — *Mascowitz v. State*, 49 Ark. 170.



to time or quantity is void and does not protect the seller.<sup>1</sup>

**When Consent Not Authorized by Statute.** — Unless the statute expressly provides that the parent or guardian may give consent to a sale of liquors to the minor, they have no power to do so, and if they assume to give their consent it is of no effect and will not protect the seller.<sup>2</sup> The parent or guardian is as much without authority to grant such permission as any other person.<sup>3</sup>

**c. KNOWLEDGE OR IGNORANCE OF MINORITY AS AFFECTING RESPONSIBILITY** — (1) *View that Ignorance of Minority Is Immaterial.* — In jurisdictions where the word “knowingly” is omitted from the statutes (and there are very few statutes in which it is employed) there is much conflict of authority as to whether intent is an element of the offense. The probable weight of authority is to the effect that one selling to a minor does so at his peril; that ignorance of the age of the person to whom intoxicating liquor was sold is no excuse, and that, irrespective of good faith and honest intention, the mere fact of selling to the minor constitutes the entire offense.<sup>4</sup> These decisions proceed upon the theory that where a statute commands the doing or omission of an act which in the absence of such statute might be done or omitted, ignorance of the fact or state of things contemplated by the statute will not excuse its violation.<sup>5</sup> It is held, however, in two jurisdictions where this view obtains, that the fact that the seller acted in good faith should be considered in mitigation of the penalty, although it does not excuse the offense.<sup>6</sup>

(2) *View that Knowledge of Minority Is Element of Offense.* — In opposition to the doctrine stated in the preceding section it is held in a number of jurisdictions where the word “knowingly” is omitted from the statutes, that where the seller honestly believes the minor to be of full age, after having exer-

**1. Invalidity of General Permit.** — *Gill v. State*, 86 Ga. 751; *Dixon v. State*, 86 Ga. 754; *Connolly v. People*, 42 Ill. App. 36.

**These Decisions Are Not Entirely Harmonious.** — Two of the decisions hold that an order must be given for each sale. *Gill v. State*, 86 Ga. 751; *Dixon v. State*, 86 Ga. 754. In the other it was said that there could be circumstances under which the order could properly include more than one sale, and that if the order showed on its face that the parent held control of the supply as to times and quantity, then it would be special although it authorized a sale to the minor for more than one time. *Connolly v. People*, 42 Ill. App. 36.

**2. Consent of Parent When Unauthorized by Statute.** — *State v. Clottu*, 33 Ind. 409; *State v. Lawrence*, 97 N. Car. 492. See also *Lauer v. State*, 24 Ind. 131.

**3. State v. Lawrence, 97 N. Car. 492.**

**4. Statutes Omitting “Knowingly” — View that Defendant Sells at His Peril —** *Arkansas*. — *Edgar v. State*, 37 Ark. 219; *Redmond v. State*, 36 Ark. 58; *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399.

*Connecticut*. — *State v. Kinkead*, 57 Conn. 173; *Barnes v. State*, 19 Conn. 398.

*Illinois*. — *Farmer v. People*, 77 Ill. 322; *Flynn v. Galesburg*, 12 Ill. App. 200; *McCutcheon v. People*, 69 Ill. 601.

*Iowa*. — *Jamison v. Burton*, 43 Iowa 282; *McCoy v. Clark* (Iowa 1899) 81 N. W. Rep. 159; *State v. Thompson*, 74 Iowa 119; *Fielding v. Le Grange*, 104 Iowa 530; *State v. Ward*, 75 Iowa 641.

*Kentucky*. — *Ulrich v. Com.*, 6 Bush (Ky.) 400.

*Maryland*. — *Peterson v. State*, 83 Md. 194; *Carroll v. State*, 63 Md. 551.

*Massachusetts*. — *Com. v. Gould*, 158 Mass. 499; *Com. v. Joslin*, 158 Mass. 482; *Com. v. Stevens*, 155 Mass. 291.

*Mississippi*. — *O’Flinn v. State*, 66 Miss. 7.

*Missouri*. — *State v. Bruder*, 35 Mo. App. 475.

*Pennsylvania*. — *In re Carlson*, 127 Pa. St. 330; *Com. v. Sellers*, 130 Pa. St. 32; *Eick’s License*, 4 Pa. Dist. 461; *Com. v. Steffner*, 2 Pa. Dist. 152; *Com. v. Baumler*, 20 Pa. Co. Ct. 273. Compare *Com. v. Liebtreu*, 1 Pearson (Pa.) 107.

*South Dakota*. — *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834.

*West Virginia*. — *State v. Baer*, 37 W. Va. 1; *State v. Farr*, 34 W. Va. 84; *State v. Gilmore*, 9 W. Va. 641; *State v. Cain*, 9 W. Va. 571.

*Wisconsin*. — *State v. Hartfiel*, 24 Wis. 61.

See also the *Texas* decisions of *McGuire v. Glass*, (Tex. App. 1890) 15 S. W. Rep. 127, and *State v. Meyer*, (Tex. Civ. App. 1893) 23 S. W. Rep. 427, in which it was held that a liquor dealer violates the conditions of his bond by permitting a minor to enter and remain upon his premises although he believes that the minor is over twenty-one years old.

**Where a Statute Provides that a Sale to a Minor Shall Be Prima Facie Evidence of intent to violate the law, intent is a necessary element, and proof of due diligence and good faith will protect the seller.** *People v. Welch*, 71 Mich. 548.

**5. Reason for Rule.** — *Redmond v. State*, 36 Ark. 58; *State v. Bruder*, 35 Mo. App. 475; *State v. Hartfiel*, 24 Wis. 61.

**6. Good Faith Competent in Mitigation.** — *Redmond v. State*, 36 Ark. 58; *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399; *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834.



cised proper caution to ascertain whether he is of age or a minor, the sale does not constitute a criminal violation of the statute.<sup>1</sup> If the offense denounced in the statute consists in "knowingly" selling intoxicating liquors to minors, to support a conviction it must be shown that at the time of the sale the seller knew the purchaser to be a minor.<sup>2</sup>

**Diligence Required in Ascertaining Age of Minor.** — Where intent is a necessary element of the offense, due diligence on the part of the seller in ascertaining the minor's age is of course essential to protect him from responsibility for the sale.<sup>3</sup> The courts, however, are not agreed as to what constitutes due diligence. According to some decisions it seems that a reliance by the seller on the minor's appearance and the representations of the latter that he is of age may furnish a sufficient ground on which to base an acquittal, it being for the jury to determine whether these facts show due diligence on the part of the seller.<sup>4</sup> On the other hand, it has been held that the due diligence required is not shown by a reliance on the appearance of the minor without inquiry as to his age,<sup>5</sup> or by a reliance on the appearance of the minor and on his representations that he was of age.<sup>6</sup> So it has been held that inquiry by the seller of persons having no better means of knowledge than the seller himself does not constitute due diligence; that inquiry must be made of such persons as to satisfy the jury that the inquiry was honest and not a mere subterfuge or cover for crime.<sup>7</sup>

**d. PURCHASE FOR MINOR BY ADULT** — (1) *Liability of Seller.* — The decisions are not harmonious as to the criminal liability of the seller where an adult purchases liquor for a minor with money furnished by the minor or merely by way of "treating" him. This lack of harmony is due to some extent, but not altogether, to the different wording of the statutes. If the statutes merely prohibit the sale of liquors to a minor, it is clear that no criminal responsibility attaches to the seller where an adult treats a minor to a drink; the sale is to the purchaser and not to the minor.<sup>8</sup> If, however, the statute prohibits "furnishing" liquors to a minor, such a transaction is a violation of the statute.<sup>9</sup> There is a conflict of authority as to whether a

1. Statutes Omitting "Knowingly" — View that Intent Is Element of Crime — *Alabama.* — *Freiberg v. State*, 94 Ala. 91; *Adler v. State*, 55 Ala. 16; *Bain v. State*, 61 Ala. 75.

*Georgia.* — *Harkey v. State*, 89 Ga. 478; *Reich v. State*, 63 Ga. 616.

*Indiana.* — *Kreamer v. State*, 106 Ind. 192; *Hunter v. State*, 101 Ind. 241; *Rineman v. State*, 24 Ind. 80; *Thomasson v. State*, 15 Ind. 449; *State v. Kalb*, 14 Ind. 403; *Farbach v. State*, 24 Ind. 77; *Goetz v. State*, 41 Ind. 162; *State v. Shoemaker*, 4 Ind. 100; *Moore v. State*, 65 Ind. 382; *Mulreed v. State*, 107 Ind. 62; *Payne v. State*, 74 Ind. 203; *Robinius v. State*, 63 Ind. 235; *Ross v. State*, 116 Ind. 495.

*Michigan.* — *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374.

*Ohio.* — *Aulfather v. State*, 4 Ohio St. 467; *Miller v. State*, 3 Ohio St. 475.

*Texas.* — *Fielding v. State*, (Tex. Crim. 1899) 52 S. W. Rep. 69.

2. Statutes Containing Word "Knowingly" — Knowledge Element of Offense. — *Perry v. Edwards*, 44 N. Y. 223; *Williams v. State*, 23 Tex. App. 70; *Pressler v. State*, 13 Tex. App. 95; *Reynolds v. State*, 32 Tex. Crim. 36; *Slaughter v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 247; *Henderson v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 618; *Jones v. State*, 32 Tex. Crim. 108; *Gaines v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 367; *Schurzer v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 23; *Hunter v. State*, 18 Tex. App. 447, 51 Am. Rep. 319.

3. See the cases cited in the subsequent notes in this subdivision.

4. What Constitutes Due Diligence. — *People v. Welch*, 71 Mich. 548; *Gaines v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 367; *Jones v. State*, 32 Tex. Crim. 108; *McGuire v. State*, (Tex. App. 1891) 15 S. W. Rep. 917. In *Texas* the statute prohibiting sales to minors contains the word "knowingly;" the *Michigan* decision is under a statute making a sale of intoxicating liquor to a minor *prima facie* evidence of intent to violate the law.

5. Reliance on Minor's Appearance. — *Mulreed v. State*, 107 Ind. 62.

6. Reliance on Appearance and Representations. — *Reich v. State*, 63 Ga. 616; *Harkey v. State*, 89 Ga. 478; *Goetz v. State*, 41 Ind. 162; *Swigart v. State*, 99 Ind. 111; *Behler v. State*, 112 Ind. 140.

7. Inquiries of Persons Not Having Better Means of Knowledge. — *Reich v. State*, 63 Ga. 616.

8. Treating Minor — Statute Prohibiting Sale Only. — *Ward v. State*, 45 Ark. 351; *State v. Peo*, 1 Penn. (Del.) 525; *Siegel v. People*, 106 Ill. 89; *St. Goddard v. Burnham*, 124 Mass. 578.

A Joint Sale to a Minor and an Adult is a violation of a statute prohibiting sales to minors. *Edgar v. State*, 45 Ark. 356.

9. Treating Minors — Statute Prohibiting "Furnishing." — *People v. Neumann*, 85 Mich. 98; *State v. Munson*, 25 Ohio St. 381. Compare



seller will be criminally responsible for a sale under these circumstances where the statute prohibits selling or giving, or selling or giving away. A number of decisions hold that no responsibility attaches to the seller.<sup>1</sup> Others hold that the seller is responsible on the ground that all persons who participate in an act or transaction which is a misdemeanor are alike guilty.<sup>2</sup>

**Purchasing as Agent for Minor.** — If one sells liquor to another without notice that he is purchasing for a minor, he is not criminally responsible.<sup>3</sup> He will, of course, be liable if he knows that the party purchasing is simply acting as agent for a minor,<sup>4</sup> or if he has good reason to know this fact.<sup>5</sup>

(2) *Liability of Purchaser.* — Unless the statute prohibits "furnishing" liquors to minors,<sup>6</sup> one who purchases liquor for a minor with the latter's money, and at his request, is not criminally responsible.<sup>7</sup> It is otherwise where the statute prohibits a gift of liquor to a minor and the purchaser gives it to him without recompense.<sup>8</sup>

*c. PURCHASE FOR OTHERS BY MINOR* — **Purchase for Undisclosed Principal.** — It is well settled that where a minor purchases liquor for an undisclosed principal, the seller is guilty of a violation of the statutes.<sup>9</sup> A conviction will not be avoided by a subsequent disclosure of the agency<sup>10</sup> or by the fact that the minor at the time of making the purchase tells the seller that he is purchasing for another but cannot disclose his name.<sup>11</sup>

**Purchase for Disclosed Principal.** — Whether a delivery to a minor for a disclosed

State *v. Best*, 108 N. Car. 747, under a statute (Code N. Car. 1883, § 1077) making it unlawful for a dealer to "part with" intoxicating liquors to a minor "for a compensation, \* \* \* either directly or indirectly."

1. **Statutes Prohibiting Selling or Giving Away** — View that Seller Is not Responsible. — State *v. Peo*, 1 Penn. (Del.) 525; Siegel *v. People*, 106 Ill. 89; Kurz *v. State*, 79 Ind. 488 [overruled by implication in Topper *v. State*, 118 Ind. 110]; Bartman *v. State*, 38 Tex. Crim. 543.

2. **View that Seller Is Responsible.** — Page *v. State*, 84 Ala. 446; Topper *v. State*, 118 Ind. 110; Com. *v. Steffner*, 2 Pa. Dist. 152.

3. **Sale Without Notice that Liquor Is for Minor.** — Gillan *v. State*, 47 Ark. 555.

4. **Sale with Notice that Liquor Is for Minor.** — Liles *v. State*, 88 Ala. 139; Siegel *v. People*, 106 Ill. 90; Starling *v. State*, 34 Tex. Crim. 295.

Where a seller refuses to sell liquors to a minor, but at his suggestion the liquor is purchased for the minor by a bystander, with the minor's money, this is a violation of the statute, and the seller is criminally responsible. Liles *v. State*, 88 Ala. 139; Starling *v. State*, 34 Tex. Crim. 295.

5. **Reasonable Grounds to Believe that Liquor Is for Minor.** — State *v. Scoggins*, 107 N. Car. 959.

6. **Liability of Purchaser** — "Furnishing" Liquor. — Burnett *v. State*, 92 Ga. 474; State *v. Best*, 108 N. Car. 747. In the first of these cases it was held, and in the latter it was said, that one who purchases liquor for a minor with money provided by the minor is guilty of "furnishing" the minor with liquor.

7. **"Selling" or "Giving" Liquor.** — Campbell *v. State*, 79 Ala. 271; Morgan *v. State*, 81 Ala. 72; Young *v. State*, 58 Ala. 358; Cox *v. State*, (Miss. 1888) 3 So. Rep. 373; Johnson *v. State*, 63 Miss. 230. *Contra*, Com. *v. Davis*, 12 Bush (Ky.) 240, in which case it was held that one who purchases liquor for a minor with money

furnished by him "gives" it to him within the meaning of the statute prohibiting the giving or selling to minors; Foster *v. State*, 45 Ark. 361, holding that where a party purchases liquor for a minor with the minor's money he is not only an agent of the minor for the purchase, but is also procurer of the sale, and therefore is punishable as principal for violating the statute prohibiting sales to minors.

8. Parkinson *v. State*, 14 Md. 185, 74 Am. Dec. 522.

**What Is Gift to Minor.** — Where, in compliance with another's request to pass a bottle of whiskey, the defendant in the dark handed it to a bystander unknown to him, and a minor in the crowd drank from the bottle, he was held not guilty of a gift to the minor, whether he delivered the bottle directly or immediately to him, unless such delivery was made consciously and intentionally for the purpose, and not mechanically. Miller *v. State*, 55 Ark. 188.

9. **Purchase for Undisclosed Principal.** — Siceluff *v. State*, 52 Ark. 56; Neely *v. State*, 60 Ark. 68, 46 Am. St. Rep. 148; Com. *v. Fowler*, 145 Mass. 398; Ritcher *v. State*, 63 Miss. 304; Monaghan *v. State*, 66 Miss. 513; Ross *v. People*, 17 Hun (N. Y.) 591; Hannaman *v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 538.

As between a seller and an agent who deals with him without disclosing the fact, the agent as well as the principal is the purchaser. Siceluff *v. State*, 52 Ark. 56; Neely *v. State*, 60 Ark. 68, 46 Am. St. Rep. 148.

**Although a Minor Acts as Agent of His Parent** in purchasing liquor, if that fact is not disclosed to the seller at the time of the purchase a sale made without the parent's written consent is unlawful. Siceluff *v. State*, 52 Ark. 56.

10. **Effect of Subsequent Disclosure of Agency.** — Siceluff *v. State*, 52 Ark. 56.

11. **Refusal to Disclose Principal's Name.** — Neely *v. State*, 60 Ark. 66, 46 Am. St. Rep. 148.



principal will render the seller criminally liable is not well settled. He will, of course, be liable if the statute expressly provides (as it does in *Massachusetts*) that sales shall not be made to a minor for himself or for any other person whatsoever.<sup>1</sup> Where the statutes contain no express prohibition to this effect, the decisions are very conflicting. The probable weight of authority is that a delivery of liquor to a minor whom the seller knows to be acting as agent for an adult is not an offense.<sup>2</sup> Even where this view is taken the seller is bound to ascertain and know that the minor is purchasing for an adult, and where he permits himself to be deceived by the purchaser, who in fact obtains the liquor for his own use, he will be responsible.<sup>3</sup> But there are a number of decisions to the contrary. An examination of the statutes under which these opposite results are reached discloses such similarity in wording that the difference in the holdings cannot be ascribed to the difference in the statutes themselves.<sup>4</sup>

**If a Minor Purchases for Another Minor, the seller will be responsible.<sup>5</sup>**

**Sale to Minor Treating Adult.** — So where a minor invites an adult to drink, and the minor calls for a non-intoxicating drink and the person treated calls for beer, and the drinks are served and the minor pays for them, this is a sale of intoxicating liquors to the minor and a violation of the statute.<sup>6</sup>

**f. AIDING AND ABETTING IN SALE.** — It is a punishable offense to aid and abet in making a sale of intoxicating liquors to minors.<sup>7</sup>

**g. CONVICTION AS AFFECTING LIABILITY FOR OTHER OFFENSES.** — A conviction for selling liquor to a minor without the consent of his parent is no bar to a prosecution for the same act under the law against selling liquor without a license.<sup>8</sup>

**h. EVIDENCE — (1) Seller's Ignorance or Knowledge of Purchaser's Minority — Burden of Proof.** — Where the statute makes it an offense to sell "knowingly,"

**1. Purchase for Disclosed Principal.** — *Com. v. Joslin*, 158 Mass. 482; *Com. v. O'Leary*, 143 Mass. 95; *O'Connell v. O'Leary*, 145 Mass. 311; *Com. v. Gould*, 158 Mass. 499. Before the enactment of this statute it was held that a sale and delivery of intoxicating liquor to an infant for his parent's use, if this was known to the seller at the time of the sale, was not a sale to a minor within the meaning of a statute prohibiting such sales. *Com. v. Lattinville*, 120 Mass. 385.

This liability rests on the ground that a sale to others through the agency of a minor is illegal, and not on the ground that the sale is to the minor. Because a sale of intoxicating liquor made or attempted to be made to an adult through the agency of a minor child is illegal, it does not therefore become a sale to the minor. *O'Connell v. O'Leary*, 145 Mass. 311.

**2. View that Seller Is Not Guilty of Offense.** — *Wallace v. State*, 54 Ark. 542; *State v. McMahon*, 53 Conn. 407, 55 Am. Rep. 140; *Dixon v. State*, 89 Ga. 785; *Com. v. Lattinville*, 120 Mass. 385; *Monaghan v. State*, 66 Miss. 513; *State v. McLain*, 49 Mo. App. 398; *State v. Walker*, 103 N. Car. 413; *Randall v. State*, 14 Ohio St. 435; *Waldstien v. State*, 29 Tex. App. 82. See also as tending to support this view *Laing v. State*, 9 Tex. Civ. App. 136.

**3. Liability When Deceived by Minor.** — *Dixon v. State*, 89 Ga. 785; *Com. v. Finnegan*, 124 Mass. 324. See also *State v. McLain*, 49 Mo. App. 398.

**Minor's Statement that Liquor Is Purchased for Another.** — In a prosecution for the unlawful sale of intoxicating liquor to a boy eleven years old, the statement of the boy at the time,

and the belief of the defendant founded on such statement, that the liquor was for the boy's sick mother, were held to constitute no valid or legal defense. 'The sale was recklessly made to a child of tender years, without any caution or proper inquiry. *Holmes v. State*, 88 Ind. 145.

**4. View that Seller Is Guilty of Offense.** — *State v. Fairfield*, 37 Me. 517; *People v. Garrett*, 68 Mich. 487; *Horsky v. State*, (Tex. Crim. 1896) 36 S. W. Rep. 443; *Yakel v. State*, 30 Tex. App. 397. It will be noticed that these *Texas* decisions are in direct conflict with the decisions in the same state cited in the second preceding note, and that no mention is made of such decisions in either of the cases cited in this note.

**5. Minor Purchasing for Another Minor.** — *Fehn v. State*, 3 Ind. App. 568; *Com. v. Kirby*, 12 Pa. Co. Ct. 175.

**6. Minor Treating Adult.** — *Sumner v. State*, 4 Ind. App. 403.

**7. Aiding and Abetting Sale.** — *Hill v. State*, 62 Ala. 168; *Johnson v. People*, 83 Ill. 431, holding that one employed in making change for parties engaged in unlawfully selling intoxicating liquors to minors was guilty of aiding and abetting in the sale; *Cagle v. State*, 87 Ala. 38, holding that an unmarried girl seventeen years old was guilty of aiding and abetting in an illegal sale to a minor where she poured out and delivered the liquor under the orders and instructions of her mother, to whom it belonged and to whom the price was paid.

**8. Conviction of Sale to Minor — Other Offenses.** — *Blair v. State*, 81 Ga. 629.



etc., the burden of proof is on the state to show that the defendant knew that the purchaser was a minor.<sup>1</sup> And the same doctrine prevails where the word "knowingly" does not occur in the statute. It is held in states where intent is considered an element of the offense that the burden of proof that the seller acted in good faith, believing the minor to be an adult, is on the seller.<sup>2</sup>

**Personal Appearance of Minor.** — In determining the question of the seller's good faith in making a sale to a minor, the court or jury cannot look at the personal appearance of the alleged minor who may be before it.<sup>3</sup> The age and appearance, etc., of the minor may be shown either in behalf of or against the defendant, but must be proved by witnesses who have seen and known him and are capable of testifying in such matters.<sup>4</sup>

**Other Evidence to Show Guilty Knowledge or Want of It.** — The defendant is not confined to evidence of age or appearance. He may produce any facts tending to show good faith on his part.<sup>5</sup> And, on the other hand, the state is not confined to evidence of age or appearance, but may adduce evidence of other facts tending to show guilty knowledge.<sup>6</sup>

**Question for Jury.** — The good faith of the seller is to be determined by the jury from all the facts and circumstances adduced in evidence.<sup>7</sup> And where

1. **Burden of Proof — When on State.** — *Williams v. State*, 23 Tex. App. 70; *Schurzer v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 23; *Reynolds v. State*, 32 Tex. Crim. 36.

2. **When on Seller.** — *Marshall v. State*, 49 Ala. 21; *Farbach v. State*, 24 Ind. 77; *Rineman v. State*, 24 Ind. 80; *State v. Shoemaker*, 4 Ind. 100; *Fehn v. State*, 3 Ind. App. 568. See also *Harkey v. State*, 89 Ga. 478.

3. **Jury Cannot Consider Appearance of Minor Testifying Before Them.** — *Robinius v. State*, 63 Ind. 235; *Ihinger v. State*, 53 Ind. 251; *McGuire v. State*, (Tex. App. 1891) 15 S. W. Rep. 918. But see the title EVIDENCE, vol. II, p. 538.

4. **Testimony as to Age and Appearance.** — *Marshall v. State*, 49 Ala. 21; *State v. Kalb*, 14 Ind. 404; *Ross v. State*, 116 Ind. 495; *Koblenschlag v. State*, 23 Tex. App. 264; *Walker v. State*, 25 Tex. App. 445; *Garner v. State*, 28 Tex. App. 561; *McGuire v. State*, (Tex. App. 1891) 15 S. W. Rep. 918; *Wakefield v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 470. And see the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 490.

**What Evidence Competent as to Age, Appearance, etc.** — A witness may very properly testify as to the purchaser's age, judging from his appearance at the time of the sale. *State v. Kalb*, 14 Ind. 404; *Koblenschlag v. State*, 23 Tex. App. 264; *Garner v. State*, 28 Tex. App. 561; *Walker v. State*, 25 Tex. App. 448. The reason for this is that opinion, as far as it consists of a statement of an effect produced on the mind, becomes primary evidence, hence admissible whenever the condition of things is such that it cannot be reproduced and made palpable to the jury. *Garner v. State*, 28 Tex. App. 561.

It is not competent, however, for the witness to give his opinion as to how others would be impressed by these physical marks of age, and therefore witnesses should not be permitted to testify that, judging from the appearance of the purchaser, a man of ordinary observation (*Koblenschlag v. State*, 23 Tex. App. 264) or a prudent man (*Walker v. State*, 25 Tex. App. 448) would take the purchaser to be a minor.

**Exclusion of Evidence as to Age and Appearance Is Not Ground for Reversal** where no additional evidence of diligence on the part of the seller is offered, and in his statement to the jury he denies that he furnished any liquor to the alleged minor or knew him. *Harkey v. State*, 89 Ga. 478.

5. *Fehn v. State*, 3 Ind. App. 568.

**Evidence in Defendant's Behalf.** — It was held proper to ask a purchaser (who in this case wore whiskers) whether he had not voted at elections for two years, as this tended to impeach him on the question of age and show good faith of the defendant in believing him to be of age. *Brown v. State*, 24 Ind. 113.

So it may be shown that the person's family or the community treated him as an adult. *State v. Kalb*, 14 Ind. 404.

And all matters transpiring at the time of the sale are competent as part of the *res gesta*, and as bearing upon the question of criminal intent. *People v. Welch*, 71 Mich. 548.

On the other hand, evidence that the defendant was accustomed to inquire the age of those who desired to purchase liquor, when they appeared to be under twenty-one years old, is properly excluded as being irrelevant. *Randall v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 411.

6. **Evidence in Behalf of State.** — *Behler v. State*, 112 Ind. 140; *Reed v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 1074, in which case it was held proper to show what occurred between the defendant and the father of the purchaser, as tending to show that the defendant had knowledge of the purchaser's age.

**Fabrication of Evidence** may be shown as bearing on the question of guilty knowledge. *Behler v. State*, 112 Ind. 140; *Sears v. State*, 35 Tex. Crim. 442.

7. **Good Faith of Seller Question for Jury.** — *Adler v. State*, 55 Ala. 18; *Bain v. State*, 61 Ala. 75.

**Sufficiency of Evidence to Show Guilty Knowledge.** — Where it appeared that the defendant sold intoxicating liquors to three minors, one of whom was only sixteen years old, this was held sufficient to show that the defendant



the evidence bearing on the question of the seller's good faith is conflicting, a judgment of conviction will not be reversed.<sup>1</sup>

(2) *Consent of Parent.* — Where the prosecution is for selling intoxicating liquor to a minor without the consent of the parent, and the sale is proved, the burden of proof is on the seller to show that he had such consent, for this is a matter peculiarly within his own knowledge.<sup>2</sup> Testimony regarding a written order from the minor's parent is properly excluded when the defendant does not account for its nonproduction.<sup>3</sup>

(3) *Minority of Purchaser.* — In a prosecution for the sale of liquor to a minor, the burden of proving the minority of the purchaser is on the state.<sup>4</sup> The age of the alleged minor may be shown by witnesses, first describing the appearance of the person and then giving their opinion of his age.<sup>5</sup> So it may be proved by the testimony of the minor himself,<sup>6</sup> who may derive his knowledge from an entry in the family Bible, without producing it,<sup>7</sup> or from any other source of information,<sup>8</sup> as, for instance, from prior statements to him by his mother.<sup>9</sup> And the minor's statement as to his age is competent although there is evidence tending to show that his father and mother are living.<sup>10</sup>

(4) *Other Matters of Evidence — Proof of Sales.* — In a prosecution for selling intoxicating liquors to minors, there can be no conviction for any sale other than that charged,<sup>11</sup> and evidence of other sales is not competent as tending to show the sale charged.<sup>12</sup> A sale may be proved by the testimony of one who procured the liquor solely for the purpose of giving evidence against the seller.<sup>13</sup> It is not competent, however, for the father of the minor to testify

knew that the latter minor was such when he made the sale. *Bivens v. State*, (Tex. Crim. 1898) 43 S. W. Rep. 1007.

For other cases in which the evidence sufficiently showed that the defendant knew that the purchaser was a minor, see *Sears v. State*, 35 Tex. Crim. 442; *Schurzer v. State*, 34 Tex. Crim. 276.

On the other hand, where it appeared that the minor's brother-in-law told the defendant that the minor was of age, that to all appearances he was of age, and that the defendant thought him to be so, it was held that a conviction was not justified. *Wakefield v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 470. See also *Robinius v. State*, 67 Ind. 94, in which the facts were held insufficient to show guilty knowledge.

1. *Conflicting Evidence.* — *Ross v. State*, 116 Ind. 495.

2. *Consent of Parent — Burden of Proof* — *Alabama.* — *Farrall v. State*, 32 Ala. 557.

*Arkansas.* — *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399; *Hall v. State*, 36 Ark. 150.

*Georgia.* — *Reich v. State*, 63 Ga. 620; *Ridling v. State*, 56 Ga. 601.

*Illinois.* — *Monroe v. People*, 113 Ill. 670.

*Texas.* — *Reynolds v. State*, 32 Tex. Crim. 36; *Jones v. State*, 32 Tex. Crim. 108; *Hannaman v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 538; *Kuhn v. State*, 34 Tex. Crim. 85.

*Competency of Evidence to Show Consent.* — On the trial of an indictment for selling intoxicating liquor to a minor without the written consent of his parent, it is error to exclude evidence that the liquor was drawn and delivered to the minor in pursuance of an agreement between the parent and the defendant on the previous day for its purchase and subsequent

delivery to the minor. This evidence has a legitimate tendency to prove the sale to the parent and not to the son. *Randall v. State*, 14 Ohio St. 435.

3. *State v. Gillaspie*, (W. Va. 1899) 34 S. E. Rep. 733.

4. *Minority of Purchaser — Burden of Proof.* — *Amsden v. State*, 52 Ind. 454; *Lindner v. State*, 93 Ind. 254.

5. *Opinions of Witnesses from Appearance of Purchaser.* — *Benson v. McFadden*, 50 Ind. 431; *Com. v. O'Brien*, 134 Mass. 198; *State v. Douglass*, 48 Mo. App. 39.

6. *Testimony of Minor as to His Own Age.* — *Bain v. State*, 61 Ala. 75; *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399; *Ehlert v. State*, 93 Ind. 76; *Reed v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 1074; *State v. Cain*, 9 W. Va. 559.

7. *Entries in Family Bible.* — *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399.

8. *Other Sources of Information.* — *Edgar v. State*, 37 Ark. 219.

9. *Information Derived from Minor's Mother.* — *Bain v. State*, 61 Ala. 75.

10. *State v. Cain*, 9 W. Va. 559.

*As to the Sufficiency of Evidence to Show Minority.* — See *Ehlert v. State*, 93 Ind. 76 [*criticizing dictum in Meyer v. State*, 50 Ind. 18]; *Smith v. State*, 23 Ind. 117; *Dolke v. State*, 99 Ind. 229.

11. *No Conviction of Sales Not Charged.* — *State v. Yockey*, 49 Mo. App. 443.

12. *Evidence of Other Sales — Competency.* — *Com. v. Nagle*, 157 Mass. 554; *State v. Austin*, 74 Minn. 463; *Freedman v. State*, 37 Tex. Crim. 115. But compare *Com. v. Stevens*, 155 Mass. 291.

13. *Proving Sale by Testimony of Informer.* — *Com. v. Murphy*, 155 Mass. 284.



that he told the defendant's father that the defendant was making illegal sales to his son.<sup>1</sup> The sufficiency of evidence is, of course, a question for the jury.<sup>2</sup>

**Necessity of Showing that Defendant Was Liquor Dealer.** — While any person, whether licensed or unlicensed, may be punished for selling intoxicating liquors to minors, it is necessary to prove that the defendant was a dramshop keeper, if the indictment so charges.<sup>3</sup>

**5. Allowing Minors to Enter and Remain on Premises.** — In a number of jurisdictions the statutes prohibit liquor sellers from allowing minors to enter and remain on their premises for any purpose, and for so doing make them liable to fine or to a suit on their bonds for a penalty. Where the word "knowingly" is omitted from the statute, it has been held that the seller acts at his peril in allowing minors on his premises, and is not protected by a *bona fide* belief that the minor is of age.<sup>4</sup> To constitute the offense it is of course necessary that the seller knew that the minor was on his premises.<sup>5</sup>

**6. Sales to Intoxicated Persons, Persons of Intemperate Habits, Habitual Drunkards, etc.** — *a. SALES TO INTOXICATED PERSONS.* — In a number of jurisdictions it is made an offense to sell intoxicating liquors to persons intoxicated at the time of the sale.<sup>6</sup>

**Classes of Persons Prohibited from Selling.** — If the statute prohibits sales by "any person," it is not necessary to the commission of the offense that the seller be licensed.<sup>7</sup>

**Knowledge or Ignorance of Intoxication as Element of Offense.** — If the statute makes it an offense to sell liquor to a person "knowing him to be in a state of intoxication," knowledge of the intoxication or a reasonable ground to believe that the purchaser is intoxicated is an element of the offense.<sup>8</sup> The same holding has been made in a state where the statute does not expressly make knowledge an element of the offense.<sup>9</sup> But there are decisions under statutes of the same import as the one last mentioned which take the contrary view.<sup>10</sup>

**A Sale to One Known to Be the Agent** of the intoxicated person constitutes the offense.<sup>11</sup>

**Treating Intoxicated Person.** — It has also been held that the seller will be liable although the liquor is bought and paid for by a third person treating the person intoxicated.<sup>12</sup>

**What Is Intoxicated Person.** — The intoxication must be the result of drinking liquors,<sup>13</sup> and a person is intoxicated when he is so far under the influence of

1. *Dick v. People*, 47 Ill. App. 223.

2. **Sufficiency Question for Jury.** — *Hale v. State*, 36 Ark. 150.

For cases involving the sufficiency of evidence to show sales, see *Central Bank Block Assoc. v. James*, 81 Ga. 762; *Stultz v. State*, 96 Ind. 456; *Com. v. Gavin*, 160 Mass. 523.

3. **That Defendant Was Liquor Dealer.** — *State v. Douglass*, 48 Mo. App. 39.

4. **Bona Fide Mistake No Defense.** — *State v. Kinkead*, 57 Conn. 173; *Stern v. State*, 53 Ga. 229, 21 Am. Rep. 266; *Allison v. Richmond*, 51 Mo. App. 133; *State v. Meyer*, (Tex. Civ. App. 1893) 23 S. W. Rep. 427; *McGuire v. Glass*, (Tex. App. 1890) 15 S. W. Rep. 127.

Allowing a minor to remain on the premises for fifteen or twenty minutes will authorize a conviction. *Armstrong v. State*, 14 Ind. App. 566.

**Verbal Consent of a Parent** where the statute requires a written consent is no defense. *State v. Johnson*, 44 Mo. App. 84.

**Admitting a Minor into Business as Partner** and allowing him to remain on the premises is a violation of the statute. *Drake v. State*, (Tex. Civ. App. 1893) 23 S. W. Rep. 398.

**Employing a Minor to Work on Premises** is a violation of the statute, and the fact that the mother of the boy gave her written consent is immaterial. *Goldsticker v. Ford*, 62 Tex. 385.

5. **Knowledge of Minor's Presence Necessary.** — See *State v. Kinkead*, 57 Conn. 173; *People v. Hughes*, 86 Mich. 180.

6. See the statutes of the various jurisdictions.

7. **What Persons Prohibited from Selling.** — *Altenburg v. Com.*, 126 Pa. St. 602.

8. **Intent — Whether Necessary Element — Affirmative View.** — *Brow v. State*, 103 Ind. 133.

9. *Whitton v. State*, 37 Miss. 379.

10. **Negative View.** — *Church v. Higham*, 44 Iowa 482; *Com. v. Julius*, 143 Mass. 132.

11. **Sale to Agent of Intoxicated Person.** — *Schullherr v. State*, 68 Miss. 227.

12. **Treating Intoxicated Person.** — *State v. Hubbard*, 60 Iowa 466, in which case the statute prohibited giving or selling, etc.

13. **Intoxication Must Result from Drinking Liquors.** — *State v. Kelley*, 47 Vt. 295, in which case it was said that intoxication caused by the use of drugs is not within the purview of the statute.



intoxicating liquors that his passions are visibly excited or his judgment impaired by the liquor.<sup>1</sup>

**Evidence.**—Persons who saw the defendant at the time of the sale may testify from their personal observation whether he was intoxicated.<sup>2</sup> To prove intoxication at the time of the sale, it has been held that evidence that the purchaser was intoxicated six hours before the sale is incompetent.<sup>3</sup> Whether the person was or was not intoxicated at the time of the sale is a question to be determined by the jury from all the facts and circumstances in evidence.<sup>4</sup>

**b. SALES TO PERSONS OF INTEMPERATE HABITS, HABITUAL DRUNKARDS, ETC.**—(1) *In General.*—In a number of jurisdictions statutes have been enacted making it an offense to sell intoxicating liquors to persons of intemperate habits, habitual drunkards, and persons "in the habit of becoming intoxicated."<sup>5</sup> It is not necessary to the commission of the offense that the person to whom the sale is made be intoxicated at the time of the sale.<sup>6</sup> Where a dealer sells liquor to a third person with a knowledge that a person of known intemperate habits is to participate in the drinking of it, and permits such person at his bar and in his presence to join in the drinking, this is a violation of the statute.<sup>7</sup> Receiving money from a person of known intemperate habits to purchase liquors for his use, so using the money, and delivering the liquor is not a sale or gift and is not punishable.<sup>8</sup>

(2) *Knowledge or Ignorance of Purchaser's Habits as Affecting Liability of Seller.*—As in the case of a sale of intoxicating liquors to minors,<sup>9</sup> in some jurisdictions where knowledge is not expressly made an element of the offense by statute it is held that the seller acts at his peril in making sales, and that his ignorance of the intemperate habits of the purchaser is no defense.<sup>10</sup> This rule is by no means universal. There are a number of decisions which hold to the contrary.<sup>11</sup> Under statute making it an offense to sell intoxicating liquor to one "known" to be a person of intemperate habits, the decisions are in direct conflict. In one jurisdiction it is held that it is not necessary that such habits be "known" to the seller; that the phrase is merely descriptive of a class of persons to whom the dealer sells at his peril, his intent in making sales

1. *Indicia of Intoxication.*—*State v. Pierce*, 65 Iowa 85. See also *Elkin v. Buschner*, (Pa. 1888) 16 Atl. Rep. 102.

2. *Competency of Evidence to Prove.*—See *State v. Pike*, 49 N. H. 407.

3. *State v. Hubbard*, 60 Iowa 466. Compare *Kammann v. People*, 124 Ill. 481.

*Evidence that Purchaser Lost Money at Time of Sale.*—For the purposes of fixing the time of the sale and to show the condition of the prosecuting witness, it is proper to allow him to testify that he lost his money on the occasion of the sale. *Brow v. State*, 103 Ind. 133.

4. *Question for Jury.*—*Kammann v. People*, 26 Ill. App. 48.

*Defense.*—If the degree of intoxication should be so slight as not to be noticeable by the seller, or if, on account of concealment, deception, or any other peculiarity in any case, it should escape detection, although reasonable care was exercised, this would be a legitimate defense. *Brow v. State*, 103 Ind. 133. See also *Whitton v. State*, 37 Miss. 379.

5. *Sales to Intemperate Persons, etc.*—See the statutes of the various jurisdictions.

*All Persons Interested in the Liquor Sold are Liable.*—*Dahmer v. State*, 56 Miss. 787.

*A Sale of Liquor to a Person of Known Intemperate Habits is a violation of the statute, although the purchaser makes the statement that the liquor is ordered by a doctor for sick-*

*ness in the purchaser's family.* *McDonald v. Casey*, 84 Mich. 505.

6. *Intoxication at Time of Sale Unnecessary.*—*Fountain v. Draper*, 49 Ind. 441; *Fink v. Garman*, 40 Pa. St. 95; *Konetzki's License*, 6 Montg. Co. Rep. (Pa.) 82; *Monaghan's License*, 6 Montg. Co. Rep. (Pa.) 84.

7. *Sale to Person Treating Drunkard.*—*Walton v. State*, 62 Ala. 197; *Smith v. State*, 55 Ala. 1.

8. *Purchasing as Agent for Habitual Drunkard.*—*Young v. State*, 58 Ala. 358.

9. See *supra*, this section, *Selling, Giving, or Furnishing to Minors.*

10. *Where Statute Does Not Expressly Make Knowledge an Element.*—*Barnes v. State*, 19 Conn. 398; *Mapes v. People*, 69 Ill. 523; *Humpeler v. People*, 92 Ill. 400; *Dudley v. Sautbine*, 49 Iowa 650, 31 Am. Rep. 165; *State v. Thompson*, 74 Iowa 119; *State v. Ward*, 75 Iowa 637; *State v. Heck*, 23 Minn. 549; *State v. Farr*, 34 W. Va. 84.

Undoubtedly this would not be the rule in some jurisdictions, even though the statute did not expressly make knowledge of the intemperate habits of the purchaser an element of the offense. See *supra*, this section, *Selling, Giving, or Furnishing to Minors.*

11. *Contra.*—*Farrell v. State*, 45 Ind. 371; *Deveny v. State*, 47 Ind. 208; *Williams v. State*, 48 Ind. 306. See also *Miller v. State*, 5 Ohio St. 275.



being immaterial.<sup>1</sup> In other jurisdictions it has been held that the intemperate habits of the purchaser must be known to the seller.<sup>2</sup> If the statute makes it an offense "knowingly" to sell, etc., knowledge of the purchaser's intemperate habits is of course a necessary element of the offense.<sup>3</sup>

(3) *Notice to Seller of Purchaser's Intemperate Habits.* — Some statutes prohibiting sales of intoxicating liquors to persons of intemperate habits provide that notice must be given to the dealer not to sell, and unless the requisite notice has been given the seller is not guilty of a violation of the statutes.<sup>4</sup> The notice must be given by the person designated in the statute, or no criminal responsibility can attach to the seller.<sup>5</sup>

(4) *Who Are Drunkards, Persons of Intemperate Habits, etc.* — Some of the statutes prohibit sales to "drunkards" or "habitual drunkards." The question what constitutes a drunkard or habitual drunkard is treated elsewhere.<sup>6</sup> Other statutes forbid sales to persons of intemperate habits or persons in the habit of becoming intoxicated. Intemperate habits cannot be imputed unless when occasion offers there is a disposition or probable inclination to drink to excess; if sobriety is the rule and occasional intoxication the exception, the case is not within the statute. On the other hand, if the rule or habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, the charge of intemperance is established.<sup>7</sup>

(5) *Evidence.* — To make out the offense, the prosecution must prove a sale.<sup>8</sup> It must also show that the purchaser was a person of intemperate habits<sup>9</sup> at the time of the sale.<sup>10</sup>

*Proof of Intemperate Habits.* — That the purchaser was a man of intemperate habits may be shown by his own testimony<sup>11</sup> or by that of a witness who has knowledge of the purchaser and of his habits.<sup>12</sup> Whether a person possesses

1. *Where Statute Forbids Sale to "Known" Drunkard.* — *Com. v. Zelt*, 138 Pa. St. 615; *Garay's License*, 11 Pa. Co. Ct. 468; *Lawler's License*, 5 Montg. Co. Rep. (Pa.) 135; *Com. v. Swihart*, 138 Pa. St. 629; *Com. v. Pendergast*, 138 Pa. St. 633. *Contra*, *Com. v. Wilhelm*, 6 Pa. Co. Ct. 30.

2. *Seller Must Have Knowledge of Intemperate Habits.* — *Tatum v. State*, 63 Ala. 147; *Smith v. State*, 55 Ala. 1; *Jones v. State*, 100 Ala. 88; *Lane v. State*, 85 Ala. 11; *Collins v. Jones*, 83 Ala. 365; *Stallings v. State*, 33 Ala. 425; *Com. v. McNeff*, 145 Mass. 406.

3. *One Who Purchases Intoxicating Liquors for an Intemperate Person is criminally liable for furnishing him with intoxicating liquors.* *Com. v. Wilhelm*, 6 Pa. Co. Ct. 30.

4. *Statute Making It Offense "Knowingly" to Sell.* — *Com. v. Bell*, 14 Bush (Ky.) 433.

5. *Necessity for Notice.* — *Geraghty v. State*, 110 Ind. 103; *State v. Smith*, 122 Ind. 178; *Engle v. State*, 97 Ind. 122; *Dolan v. State*, 122 Ind. 141; *State v. Gutekunst*, 24 Kan. 252; *Taylor v. Carroll*, 145 Mass. 95; *Tate v. Donovan*, 143 Mass. 590; *Kennedy v. Saunders*, 142 Mass. 9.

6. *Who May Give Notice.* — *Engle v. State*, 97 Ind. 122.

7. *Sufficiency of Notice.* — Where the statute provides that the notice must be given by a citizen of the township or ward in which the drunkard lives, a notice by the wife of a citizen is insufficient. *Engle v. State*, 97 Ind. 122. See also *Taylor v. Carroll*, 145 Mass. 95; *Tate v. Donovan*, 143 Mass. 590; *Kennedy v. Saunders*, 142 Mass. 9.

8. See the title HABITUAL DRUNKARDS, vol. 15, p. 221.

9. *Who Are Persons of Intemperate Habits.* — *Tatum v. State*, 63 Ala. 147.

10. *Question for Jury.* — Where the statute prohibited sales to persons in the habit of becoming intoxicated, and the evidence showed that the person had been intoxicated only from three to five times within the two years next before the trial, it was held that the court could not direct the jury that the purchaser was or was not a person in the habit of becoming intoxicated; that this was a matter for the jurors to determine. *Kammann v. People*, 124 Ill. 481; *Murphy v. People*, 90 Ill. 59.

11. *Intemperance Not Necessarily Drunkenness.* — *Mullinix v. People*, 76 Ill. 211.

12. *Proof of Sale Necessary.* — *Tatum v. State*, 63 Ala. 147; *Jones v. State*, 100 Ala. 88; *Miller v. State*, 107 Ind. 152. See also *Pergande v. People*, 36 Ill. App. 169.

13. *Intoxicating Properties of Liquor.* — The state must prove that the liquor sold was intoxicating. *Deveny v. State*, 47 Ind. 208.

14. *Proof of Intemperate Habits Necessary.* — *Tatum v. State*, 63 Ala. 147; *Jones v. State*, 100 Ala. 88.

15. *Time of Sale.* — *Zeizer v. State*, 47 Ind. 129; *Dolan v. State*, 122 Ind. 141.

If the statute requires a notice to the seller not to sell intoxicating liquors to a person of intemperate habits, it must be shown that the person was in the habit of becoming intoxicated at the time when the notice was given. *Dolan v. State*, 122 Ind. 141.

16. *Testimony of Purchaser.* — *Tatum v. State*, 63 Ala. 147.

17. *Testimony of Witness Acquainted with Purchaser's Habits.* — *Tatum v. State*, 63 Ala. 148; *Collins v. Jones*, 83 Ala. 365; *Gallagher v.*



intemperate habits is a fact directly provable and not an opinion or conclusion from other facts.<sup>1</sup> It is not competent, however, for a witness to testify that the purchaser has a reputation of being a man of intemperate habits.<sup>2</sup> Whether a person is of intemperate habits is a question of fact to be passed upon by the jury.<sup>3</sup>

**Seller's Knowledge of Purchaser's Intemperate Habits.** — The seller's knowledge of the purchaser's intemperate habits, where this is a necessary element of the offense, is likewise a question for the jury;<sup>4</sup> and the inference of such knowledge may be drawn from facts which lead to the conclusion that the seller had reason to believe that such were the habits of the purchaser.<sup>5</sup> The burden of proof is on the defendant to show that he was ignorant of the habits of the purchaser.<sup>6</sup> To fasten knowledge on the defendant it may be shown that the purchaser was a person of notoriously intemperate habits.<sup>7</sup> For this purpose it may also be shown that the defendant was in the habit of selling to such purchaser.<sup>8</sup>

**7. Sales to Slaves and Free Negroes.** — Formerly, in a number of the slave states, there were statutes making it an offense to sell or give intoxicating liquors to slaves<sup>9</sup> and free negroes.<sup>10</sup>

**8. Sales to Indians and Introducing Intoxicating Liquor into Indian Country.** — Both federal and state statutes have been enacted with the view of preventing Indians from obtaining and using intoxicating liquors. The federal statute enacted with this design prohibits among other things the introduction of ardent spirits into the Indian country under any pretense;<sup>11</sup> but the mere

People, 120 Ill. 179; *Mapes v. People*, 69 Ill. 523.

**1. Intemperance a Fact and Not a Conclusion.** — *Gallagher v. People*, 29 Ill. App. 397, 401, *affirmed* 120 Ill. 179.

**2. Reputation for Intemperate Habits — Competency.** — *Collins v. Jones*, 83 Ala. 365.

**3. Question for Jury.** — *Kamman v. People*, 24 Ill. App. 388, *affirmed* 124 Ill. 481; *State v. Pratt*, 34 Vt. 323.

**Sufficiency of Evidence to Prove Intemperate Habits.** — To support a conviction of selling liquor to one who is in the habit of getting intoxicated, it is sufficient to show that he has frequently become intoxicated, and thereby has acquired an involuntary tendency to become intoxicated. *Murphy v. People*, 90 Ill. 59; *Mapes v. People*, 69 Ill. 523. See also *State v. Pratt*, 34 Vt. 323.

**Negative Evidence.** — The testimony of witnesses having "a pretty fair knowledge" of a person's habits that they never saw him intoxicated is negative evidence and does not disprove affirmative evidence of others as to having seen him in that condition. *Murphy v. People*, 90 Ill. 59.

**4. Seller's Knowledge of Purchaser's Habits.** — *Elam v. State*, 25 Ala. 53; *Smith v. State*, 55 Ala. 1; *Crabtree v. State*, 30 Ohio St. 382.

**5. Smith v. State, 55 Ala. 1.**

**6. Burden of Proving Ignorance of Intemperate Habits.** — *Farrell v. State*, 45 Ind. 371; *Deveny v. State*, 47 Ind. 203.

**7. Evidence that Purchaser Was Notoriously Intemperate.** — *Stallings v. State*, 33 Ala. 425 [*overruling Stanley v. State*, 26 Ala. 26]; *Collins v. Jones*, 83 Ala. 365; *Price v. Mazange*, 31 Ala. 701; *Atkins v. State*, 60 Ala. 45; *Adams v. State*, 25 Ohio St. 584.

**8. Frequent Sales to Purchaser.** — *Wickwire v. State*, 19 Conn. 477.

**Testimony of Defendant in Another Case.** — On a prosecution for selling liquors to persons of known intemperate habits, it may be shown

that the defendant had testified in another case that he knew that the purchaser had frequently been intoxicated, and that he had sold liquor to him but never when intoxicated, if such sales were made during the period charged in the complaint. *Com. v. McNeff*, 145 Mass. 406.

**9. Sales to Slaves — Alabama.** — *Shuttleworth v. State*, 35 Ala. 415; *Powell v. State*, 27 Ala. 51; *Boltze v. State*, 24 Ala. 89.

*Arkansas.* — *Powell v. State*, 21 Ark. 509.

*Georgia.* — *Reinhart v. State*, 29 Ga. 522.

*Kentucky.* — *Com. v. Hatton*, 15 B. Mon. (Ky.) 537.

*Maryland.* — *Rawlings v. State*, 2 Md. 201.

*Mississippi.* — *Bond v. State*, 13 Smed. & M. (Miss.) 265; *Jolly v. State*, 8 Smed. & M. (Miss.) 145.

*North Carolina.* — *State v. McNair*, 1 Jones L. (46 N. Car.) 180; *Page v. Luther*, 6 Jones L. (51 N. Car.) 413; *State v. Plunket*, 1 Ired. L. (23 N. Car.) 115.

*South Carolina.* — *State v. Harrington*, 12 Rich. L. (S. Car.) 293; *State v. Williams*, Riley L. (S. Car.) 94; *State v. Schroder*, 3 Hill L. (S. Car.) 61; *State v. Lefronty*, Riley L. (S. Car.) 155; *State v. Glasgow*, Dudley L. (S. Car.) 40; *State v. Bohles*, Rice L. (S. Car.) 145; *State v. Stone*, Rice L. (S. Car.) 147; *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 525, 47 Am. Dec. 578; *State v. Rudolph*, Riley L. (S. Car.) 298; *Charleston v. Van Roven*, 2 McCord L. (S. Car.) 465.

*Tennessee.* — *Brown v. State*, 2 Head (Tenn.) 180; *State v. Weeks*, 7 Humph. (Tenn.) 522; *State v. Bradshaw*, 2 Swan (Tenn.) 627.

*Virginia.* — *Johnson v. Com.*, 12 Gratt. (Va.) 714.

**10. Sales to Free Negroes.** — See *Tucker v. State*, 24 Ala. 77; *Rawlings v. State*, 2 Md. 201; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *State v. Sonnerkalb*, 2 Nott & M. (S. Car.) 280.

**11. Introduction into Indian Country.** — *Rev. Stat. U. S.*, § 2139; *In re Boyd*, 49 Fed. Rep. 48.



transportation of ardent spirits as an article of commerce through the Indian country between places outside thereof is not a violation of the provision, and liquor so transported is not subject to seizure while in transit nor after its arrival at its place of destination.<sup>1</sup> This statute and a number of state statutes also prohibit the sale or gift of intoxicating liquors to Indians, and their constitutionality has been uniformly upheld.<sup>2</sup> These statutes are operative notwithstanding the Indian has abandoned his nomadic life and tribal relations and adopted the habits of civilized life,<sup>3</sup> or has enlisted in the United States army;<sup>4</sup> and the fact that the Indian may be living upon allotted land and not drawing any annuity from the government does not authorize the sale to such Indian of intoxicating liquors, provided he is still under the supervision and control of an Indian agent.<sup>5</sup> It is not an offense, however, to sell liquor to an Indian on whom the rights, privileges, and immunities of citizenship have been conferred by laws of the United States.<sup>6</sup> The sale of intoxicating liquors to an Indian in territory in proximity to the Indian country is a violation of the federal statute.<sup>7</sup> Under the power to regulate commerce with the Indian tribes Congress may prohibit traffic in liquors in the vicinity of the Indian

**Sale of Lager Beer Not Prohibited.**—Lager beer is not a spirituous liquor or wine within the meaning of Rev. Stat. U. S., § 2139, prohibiting the introduction of such liquors into the Indian country. *Sarlls v. U. S.*, 152 U. S. 570. See also *In re McDonough*, 49 Fed. Rep. 360; *Tincker v. State*, 90 Ala. 647; *Com. v. Grey*, 2 Gray (Mass.) 501, 61 Am. Dec. 476.

Fermented liquors, though intoxicating, are not spirituous. *Com. v. Grey*, 2 Gray (Mass.) 501, 61 Am. Dec. 476. But see *contra*, *U. S. v. Ellis*, 51 Fed. Rep. 808.

**Rochester Tonic.**—Under Act Cong. March 1, 1895 (28 U. S. Stat. at L. 697, § 8), which forbids the sale of "any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever," it is an offense to sell in the Indian Territory a malt liquor called "Rochester tonic," whether intoxicating or not intoxicating. *U. S. v. Cohn*, (Indian Ter. 1899) 52 S. W. Rep. 38.

**Grade of Offense under Federal Statute.**—Selling intoxicating liquors to an Indian is not a felony under Rev. Stat. U. S., § 2139, which makes the offense punishable by imprisonment for not more than two years and by a fine not exceeding three hundred dollars. *Bruguier v. U. S.*, 1 Dak. 5.

**Indian Agent May Seize Property Used for Illegal Transportation.**—An Indian agent in charge of an Indian reservation has authority, under Rev. Stat. U. S., § 2140, to seize a team, harness, and wagon of one who unlawfully uses them to convey a quantity of spirituous liquor into a reservation, whether such person is a white person or an Indian. *Webb v. Nickerson*, 11 Oregon 382.

**The Payment of a Special Internal Revenue Tax for selling liquors in a collection district does not authorize the licensee to introduce or to attempt to introduce spirituous liquors or wines into the Indian country in violation of the law.** *U. S. v. Forty-three Gallons Whiskey*, 93 U. S. 188, 108 U. S. 491; *U. S. v. Ellis*, 51 Fed. Rep. 808.

**The Quantity of Liquor Introduced or Sold is immaterial in determining the offense under the statute.** *Parris v. U. S.*, (Indian Ter. 1896) 35 S. W. Rep. 243.

**1. Transportation through Indian Country.**—

*U. S. v. Twenty-Nine Gallons Whisky*, 45 Fed. Rep. 847; *U. S. v. Four Bottles Sour-Mash Whisky*, 90 Fed. Rep. 720; *U. S. v. Carr*, 2 Mont. 234.

**2. Constitutionality of Statutes Prohibiting Sale or Gift to Indians.**—*U. S. v. Holliday*, 3 Wall. (U. S.) 407; *U. S. v. Forty-three Gallons Whiskey*, 93 U. S. 188; *People v. Bray*, 105 Cal. 344; *State v. Wise*, 70 Minn. 99; *Territory v. Guyott*, 9 Mont. 46.

Such a statute is a valid exercise of the police power of the state and does not violate any constitutional rights or immunities to which such Indians are entitled. *People v. Bray*, 105 Cal. 344.

**3. Abandonment of Nomadic Habits and Adoption of Civilized Life.**—*U. S. v. Osborn*, 2 Fed. Rep. 58; *People v. Bray*, 105 Cal. 344.

**4. Enlistment in Army.**—*U. S. v. Hurshman*, 53 Fed. Rep. 543.

**5. Indians Not Drawing Annuity from Government.**—*Renfrow v. U. S.*, 3 Okla. 161.

**6. Indians Who Are Citizens.**—*U. S. v. Hurshman*, 53 Fed. Rep. 544. See *contra*, *People v. Bray*, 105 Cal. 344.

**7. Sales in Territory in Proximity to Indian Country.**—*U. S. v. Twenty-nine Gallons Whisky*, 45 Fed. Rep. 847; *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *U. S. v. Burdick*, 1 Dak. 137.

**What Constitutes Being in Charge of Indian Agent.**—The federal statute (Rev. Stat. U. S., § 2139) prohibits the sale of spirituous liquors or wine to any Indian "under the charge of any Indian superintendent or agent." Under this statute it is held that where liquor has been sold to an Indian, it is not necessary to constitute the offense that the Indian agent should have actual control or immediate personal superintendence over such Indian, if the tribe to which he belongs is under the charge of the agent, and the Indian, although not residing on the reservation, still maintains his tribal relations. *U. S. v. Flynn*, 1 Dill. (U. S.) 451.

An Indian cannot, by simply absenting himself from the reservation, renounce his tribal relation or cease to be under the charge of the reservation agent. *U. S. v. Earl*, 17 Fed. Rep. 75.



country.<sup>1</sup> Where the act of selling or giving liquors to Indians is an offense against both federal and territorial laws, the party may by the same act violate both statutes and render himself punishable under both.<sup>2</sup>

**9. Sales to Informers.** — It is not a defense to a prosecution for an illegal sale of intoxicating liquor that the defendant was entrapped into making a sale to an informer hired by the prosecution for the purpose of obtaining evidence on which a conviction might be based.<sup>3</sup> It is likewise no defense that the informer, not at the instigation of the prosecution, but merely with a view to prosecute and obtain a reward, procured the defendant to violate the law.<sup>4</sup>

Where the Statute Does Not Make the Purchaser of Liquor Illegally Sold Criminally Responsible, persons who may confederate together to induce a liquor seller to violate the liquor law in order that they may get the penalty are not guilty of conspiracy.<sup>5</sup>

**Informer's Right to Penalties.** — In the notes hereto are set out some decisions in which the informer's right to a moiety of the penalty was considered.<sup>6</sup>

**10. Sales to Make Test Case.** — One who sells liquor in violation of the law to make a test case and determine its validity is none the less guilty of a violation of the law and punishable therefor.<sup>7</sup>

**11. Sales, Gifts, or Keeping Open on Prohibited Days** — *a. SALES OR GIFTS ON SUNDAY.* — In nearly or quite all jurisdictions there are statutes making it an offense to sell intoxicating liquors on Sunday.<sup>8</sup>

**License No Protection.** — If the sale of intoxicating liquors on Sunday is prohibited by statute, the fact that the seller is licensed will afford no protection to him from the consequences of a sale made on that day.<sup>9</sup>

**Giving to Family or Guests.** — The use of liquors by a private citizen in his own house on Sunday and the furnishing thereof to his own family, guests, or friends are not within the prohibition of the statute.<sup>10</sup>

**1. Power of Congress to Prohibit.** — *U. S. v. Forty-three Gallons Whiskey*, 93 U. S. 188.

**2. Party Punishable under Both State and Federal Statutes.** — *Territory v. Coleman*, 1 Oregon 191, 75 Am. Dec. 554.

**3. Sales to Informers — Procured by Prosecutor.** — *Evanston v. Myers*, 172 Ill. 266, reversing 70 Ill. App. 205; *Rater v. State*, 49 Ind. 507; *Com. v. Murphy*, 155 Mass. 284; *People v. Rush*, 113 Mich. 539; *People v. Murphy*, 93 Mich. 41; *Excise Com'rs v. Backus*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 33. Compare *Ford v. Denver*, 10 Colo. App. 500. *Contra*, *People v. Braisted*, 13 Colo. App. 532; *Walton v. Canon City*, (Colo. App. 1900) 59 Pac. Rep. 840.

**4. Sale Procured by Informer to Obtain Reward.** — *People v. Curtis*, 95 Mich. 212; *People v. Everts*, 112 Mich. 194.

**5. Conspiracy — What Constitutes.** — *Com. v. Kostenbauder*, (Pa. 1886) 20 Atl. Rep. 995.

**6. Whether Expense of Prosecution Is to Be Deducted from Informer's Moiety.** — Under a statute providing that the selectmen of a town shall prosecute at the town's expense persons violating the liquor laws, but that the statute shall not be construed to prevent any person from prosecuting another for a violation of the liquor law and that such persons shall be entitled to one-half of every fine collected through such prosecution, one who causes a prosecution for a violation of the law prohibiting the sale of spirituous liquor to be instituted and carried on without any expense to the county and state is entitled to one-half the fine collected through such prosecution, although witnesses summoned by the solicitor at the expense of the county to testify in other cases

also testified before the grand jury in the case upon which the prosecutor's complaint was founded. *Pierce v. Hillsborough County*, 57 N. H. 324.

**Remission of Fine by Governor.** — Where the governor is empowered by the constitution to remit fines unless otherwise directed by law, and the statute regulating the sales of intoxicating liquors declares that forfeitures in all cases shall be disposed of "one half to the informer and the other half to the board of commissioners in their respective districts, to be applied by them to the repairs of the roads and bridges," the governor may remit a moiety of the penalty given by the act to the commissioners of roads, but not the part given to the informer. In the case of the latter there is a vested interest, adverse to the state, as soon as the conviction takes place. *State v. Williams*, 1 Nott & M. (S. Car.) 26.

See also the title INFORMERS, vol. 16, p. 323.

**7. Sales to Make Test Case — Criminal Liability.** — *Lambert v. State*, 37 Tex. Crim. 232.

**8. See the statutes of the different states regulating the liquor traffic.**

**9. Sunday Sale Not Protected by License.** — *Marmont v. State*, 48 Ind. 21; *State v. Ambs*, 20 Mo. 214; *Lambert v. State*, 8 Mo. 492; *State v. Barker*, 4 Sneed (Tenn.) 554; *State v. Eskridge*, 1 Swan (Tenn.) 413.

**10. Giving to Family or Guests.** — *Austin v. State*, 22 Ind. App. 221; *Com. v. Carey*, 151 Pa. St. 368.

**Gift of Liquor on Sunday to Procure Votes.** — A person who drives about on Sunday to urge persons to vote at a coming election, carrying on his person a flask of whiskey for his own personal use, and giving away drinks merely



The Question What Persons Are Within the Prohibition depends altogether on the wording of the statute. If the statute enumerates by classes persons who cannot sell, a person not mentioned in the statute cannot be guilty of the offense therein prohibited.<sup>1</sup>

*b. SALES OR GIFTS ON ELECTION DAY.* — In probably all jurisdictions there are statutes making it an offense to sell intoxicating liquors on election days. These statutes vary widely in their phraseology, which will account for the lack of harmony in the decisions based upon them.

*What Hours Included in Election Day.* — If the statute defines election day to be from sunrise to sunset, it is not violated by a sale after sunset.<sup>2</sup> If the statute forbids a sale or gift "upon the day"<sup>3</sup> or during the "entire day"<sup>4</sup> of an election, it is violated by a sale or gift during any of the twenty-four hours between midnight and midnight.

*Place of Sale.* — If the statute forbids a sale or gift "at or near" the place of election, the word "near" means within reasonable or convenient access.<sup>5</sup> If the statute prohibits sales "upon the day of any election in the township, town, or city where the same may be holden," a sale in the city, though outside of the ward in which a special election is being held, is a violation of the statute.<sup>6</sup>

*What Is Election Within Statutes.* — An election for a school director at an annual meeting has been held not an election within the statutes.<sup>7</sup> But an election authorizing a city to construct waterworks is a "municipal election" within a statute prohibiting sales on the day of a municipal election.<sup>8</sup> So a "primary election" is within the meaning of a statute forbidding a sale or gift of intoxicating liquors "upon the day of any election;"<sup>9</sup> and an election under a general law providing for such an election on the same day in each militia district of the several counties of the state is a state election within a statute prohibiting the sale or furnishing of intoxicating liquor to any one on days of election, county or municipal.<sup>10</sup>

*Ownership of Liquors.* — It is not necessary to the offense that the person giving away the liquors owned them.<sup>11</sup>

*Purpose of Sale or Gift.* — And the purpose with which the sale or gift was made is likewise immaterial.<sup>12</sup>

*What Gifts Prohibited.* — Under a statute prohibiting a gift on election day, it

to produce good feeling, is not guilty of violating the *Pennsylvania* statute prohibiting a sale or gift of intoxicating liquors on Sunday. *Com. v. Heckler*, 168 Pa. St. 575.

*When Bar to Prosecution under Other Statutes.* — In order that a person be exempt from conviction upon an indictment for the sale of intoxicating liquor in the cities of *New Jersey* state on Sunday, under the provisions of the sixty-first section of the act entitled "an act for the punishment of crimes," the municipality must not only have the power, by its charter, to enact ordinances providing a penalty for such offense, but the ordinance must by its terms provide such penalty, and it must embrace within its provisions the class of persons who claim the benefit of its protection. *Von Der Leith v. State*, 60 N. J. L. 46.

1. *Persons Prohibited from Selling Intoxicating Liquor.* — *Bode v. State*, 7 Gill (Md.) 326, in which case it was held that the *Maryland* statute applied only to licensed tavern keepers or licensed retailers of spirituous liquors and that it had no application to importers.

2. *What Hours Included in Election Day.* — *Wooster v. State*, 6 Baxt. (Tenn.) 533.

3. *"Upon the Day" of Election.* — *Com. v. Murphy*, 95 Ky. 38, in which it was held that it made no difference that the statute pre-

scribed that voting should cease at four o'clock P. M. See to the same effect *Rose v. State*, 107 Ga. 697.

4. *During "Entire Day" of Election.* — *Lawrence v. State*, 7 Tex. App. 192.

5. *Place of Sale* — "At or Near." — *Manis v. State*, 3 Heisk. (Tenn.) 315, in which case it was held that in the country a sale or gift within a mile and a quarter of the place of election was within the act. See also *State v. Powell*, 3 Lea (Tenn.) 165, holding that whether a saloon was at or near the voting place was a question of fact, not of law.

6. *Qualter v. State*, 120 Ind. 92. Compare *Liquor Dealers' Petition*, 19 Pa. Co. Ct. 329; *Smith v. State*, 18 Tex. App. 454.

7. *Election for School Director.* — *Stout v. State*, 43 Ark. 415.

8. *Municipal Elections to Authorize Waterworks.* — *State v. Kidd*, 74 Ind. 554.

9. *Primary Election.* — *State v. Hirsch*, 125 Ind. 207.

10. *Election of Constable.* — *Rose v. State*, 107 Ga. 697.

11. *Ownership of Liquors.* — *Keith v. State*, 38 Tex. Crim. 678.

12. *Purpose of Sale or Gift.* — *Wolf v. State*, 59 Ark. 297, 43 Am. St. Rep. 34; *Keith v. State*, 38 Tex. Crim. 678.



has been held — erroneously, it is believed — that it is unlawful to give liquors to a friend in one's own house on election day, as a matter of hospitality.<sup>1</sup>

*c. KEEPING OPEN ON SUNDAY.* — The statutes in a number of jurisdictions make it an offense to keep open saloons, tippling houses, and other drinking places on Sunday.<sup>2</sup> A keeping open for any length of time, however brief, will constitute the offense,<sup>3</sup> and it is immaterial that the purpose for which the place was opened was innocent.<sup>4</sup>

*Sale Not Necessary Element.* — To render one amenable to the statute prohibiting the keeping open of a drinking place, it is not necessary that he should have made a sale of intoxicating liquors.<sup>5</sup>

*Keeping Open and Selling Distinct Offenses.* — The statutes regulating the liquor traffic usually make it an offense either to keep open or to sell on prohibited days. These offenses are distinct,<sup>6</sup> and one who keeps open a drinking place and sells on a prohibited day may be punished for both offenses.<sup>7</sup>

*d. KEEPING OPEN ON ELECTION DAY.* — So in most jurisdictions statutes have been enacted which prohibit the keepers of drinking houses from keeping open their places of business on election days.<sup>8</sup>

*What Hours Included in Election Day.* — If the statute provides that saloons shall be closed on "election day,"<sup>9</sup> or "during any portion of the day on which an election is held,"<sup>10</sup> or "during the entire day of any election,"<sup>11</sup> a day of twenty-four hours is meant, and the saloon must be closed during the whole of that time.

*The Permission of the Judges of Election to Keep Open during any part of that time is no justification for so doing, as they are devoid of authority to give such permission.*<sup>12</sup>

**1. Gifts to Friend by Way of Hospitality.** — *Cearfoss v. State*, 42 Md. 403. That this is an altogether unwarrantable construction of the statute, see *supra*, this title, *What Constitutes Sale*.

**2. Statutory Provisions.** — *Palmer v. State*, 2 Oregon 66. See also decisions cited in subsequent notes in this section, and see the statutes of the various jurisdictions.

**Liability for Acts of Servant.** — In order for the proprietor of a tippling house which is kept open by his clerk on Sunday to protect himself from punishment, he must show that the keeping open was done not only without his knowledge but also without his consent, express or implied. *Klug v. State*, 77 Ga. 734.

**Evidence — Question for Jury.** — On a prosecution for keeping open on Sunday, where it appears that the defendant maintained three rooms, which he maintained respectively for the sale of tobacco, for the sale of liquor, and as a card room, it is for the jury to determine what room was used for the sale of intoxicating liquors. *People v. Scranton*, 61 Mich. 244.

**Prosecution for Keeping Open as Bar to Further Actions.** — Where a city prosecutes a saloon keeper for keeping open on Sunday and recovers a penalty which is paid, it cannot sue him and his sureties on the bond for a violation of the same ordinance. *Jenkins v. Danville*, 79 Ill. App. 339.

**3. Length of Time Immaterial.** — *Monsees v. State*, 78 Ga. 110.

**4. Purpose of Keeping Open Immaterial.** — *Klug v. State*, 77 Ga. 734; *Monsees v. State*, 78 Ga. 110; *People v. Talbot*, (Mich. 1899) 79 N. W. Rep. 688.

**Evidence.** — In a prosecution for keeping

open a tippling house on Sunday, evidence that both the door of the house and the gate of the palings surrounding it were open and that the clerk and another were seen in the house warrants a conviction. *Klug v. State*, 77 Ga. 734.

**5. Sale Not Element of Offense of Keeping Open.** — *Hall v. State*, 3 Ga. 18; *Lucas v. State*, 92 Ga. 454; *Baldwin v. Chicago*, 68 Ill. 418; *Purefoy v. People*, 65 Ill. App. 169; *Koop v. People*, 47 Ill. 327; *People v. Cox*, 70 Mich. 247; *People v. Cummerford*, 58 Mich. 328; *People v. Bowkus*, 109 Mich. 360; *People v. Schottey*, 116 Mich. 1; *Lederer v. State*, 24 Cinc. L. Bul. 153, 11 Ohio Dec. (Reprint) 31.

**6. Selling and Keeping Open Distinct Offenses.** — *State v. Ambs*, 20 Mo. 214; *Hudson v. Geary*, 4 R. I. 485.

**7. Party Selling and Keeping Open Punishable for Both.** — *State v. Ambs*, 20 Mo. 214.

**8. Statutory Provisions.** — See the statutes of the various jurisdictions.

**Evidence.** — On a prosecution for keeping open on election day any building in which it is reported that intoxicating liquors are kept for sale, evidence may be given of the reputation of the building on other than election days. *State v. Cady*, 47 Conn. 46.

**9. Construction of Phrase "Election Day."** — *Schuck v. State*, 50 Ohio St. 493.

**10. "During Any Portion" of Election Day.** — *Jones v. State*, 32 Tex. Crim. 533.

**11. "During the Entire Day" of Election.** — *Haines v. State*, 7 Tex. App. 30. See also *Janks v. State*, 29 Tex. App. 233; *Lawrence v. State*, 7 Tex. App. 192.

**12. Permission of Election Judges to Keep Open.** — *English v. State*, 7 Tex. App. 171; *Jones v. State*, 32 Tex. Crim. 533.



**Invalidity of Election.** — On a prosecution for keeping open on election day, it cannot be set up as a defense that the order under which the election was held was invalid<sup>1</sup> or that the election was not held on the proper date.<sup>2</sup>

**Place of Sale.** — Under the *Pennsylvania* statute,<sup>3</sup> where a special election is held in a single ward in a city, liquor selling in any other ward in the city is lawful.<sup>4</sup>

**e. SELLING OR KEEPING OPEN ON LEGAL HOLIDAY — What Are Legal Holidays.** — In a number of jurisdictions, the sale of intoxicating liquors or the keeping open of a place where such liquors are sold on legal holidays is made an offense. Where the statute prohibiting the keeping open of drinking places or the sale of intoxicating liquors on legal holidays, designates certain holidays or "any legal holiday," only general legal holidays are included, and a day made a holiday for a certain purpose (in relation to claims on commercial paper) is not within the meaning of the former statute.<sup>5</sup> On the other hand, although the statute forbidding keeping open drinking places or sales on legal holidays does not enumerate the holidays, a day which is by another statute made a holiday for all purposes will be within the prohibition of the former statute.<sup>6</sup> The term "legal holiday" has also been held to include any day appointed by the governor or by the President as a day for fasting and prayer, when a statute other than that regulating the liquor traffic declares that it shall be a legal holiday.<sup>7</sup> If a legal holiday falls on Sunday and the statute provides that the Monday following shall be a legal holiday, the latter day will be within the meaning of a statute prohibiting sales or keeping open drinking places on legal holidays.<sup>8</sup>

**f. WHAT CONSTITUTES KEEPING OPEN ON PROHIBITED DAYS — (1) In General.** — The decisions are not altogether harmonious as to what constitutes the offense of keeping open on prohibited days. This lack of harmony can scarcely be attributed to a difference in the wording of the statutes; they merely declare that drinking places shall not be "kept open" or "kept open at all," or that they shall be "closed." In *Illinois* it is held that the offense is made out when it is shown that a drinking place is kept open for tippling purposes,<sup>9</sup> but that it is essential to the offense that the place be kept open for such purposes,<sup>10</sup> and that the statute is not violated by permitting persons to perform work pertaining to the business of keeping a saloon,<sup>11</sup> or by permitting people to resort there.<sup>12</sup> The decisions just cited are against the weight of authority. Under similar statutes it is very generally held that drinking places

**1. Invalidity of Election — Effect on Responsibility.** — *Geib v. State*, 31 Tex. Crim. 514; *Janks v. State*, 29 Tex. App. 233.

**2. Election Not Held on Proper Date.** — *Wear v. State*, 35 Tex. Crim. 30.

**3. The Pennsylvania Statute** provides that no person shall furnish liquor to another "on any day upon which elections are now or hereafter may be required to be held." Act Pa. May 13, 1887, § 17, *Bright. Purd. Dig. Laws Pa.* (1894), p. 1230.

**4. Tenth Ward Election**, 5 Pa. Dist. 287.

**5. What Are Legal Holidays — "Decoration Day."** — *State v. Atkinson*, 139 Ind. 426; *Ruge v. State*, 62 Ind. 388.

**6. Christmas.** — *Reithmiller v. People*, 44 Mich. 280, in which Christmas day was held to be a "legal holiday" within the meaning of a statute directing the closing of saloons on legal holidays and election days.

**7. Thanksgiving Day.** — *People v. Ackerman*, 80 Mich. 588.

**8. Holiday Falling on Sunday.** — *People v. Thielman*, 115 Mich. 66.

**9. Keeping Open for Tippling Purposes — Illinois Rule.** — *Koop v. People*, 47 Ill. 327.

**10. Weidman v. People**, 7 Ill. App. 38; *Patten v. Centralia*, 47 Ill. 370.

**11. Doing Work in Saloon Pertaining to Business.** — *Purefoy v. People*, 65 Ill. App. 167, holding that where a person was admitted to change the bar fixtures, the offense of keeping open was not committed, although after doing his work he obtained intoxicating liquor.

**12. Permitting People to Resort to Saloon.** — *Weidman v. People*, 7 Ill. App. 38.

**Not Necessary that Place Be Kept Open as on Week Days.** — It is not necessary, to constitute the offense under the statute, that the house be kept open as on ordinary days; the statute will be violated if the place is so kept that access may be had thereto and facilities afforded for the obtaining of intoxicating drinks, and it is not material whether the access is by the front door or back door, or whether the door is kept open or is opened only on application for admittance. *Kroer v. People*, 78 Ill. 294.



cannot be opened for any purposes whatever,<sup>1</sup> and that the intent with which they are opened is immaterial.<sup>2</sup> It has accordingly been held that the statute is violated when a drinking place is opened to do any work appertaining to the running of the place,<sup>3</sup> as, for instance, cleaning up,<sup>4</sup> or for the transaction of any other business.<sup>5</sup> The statute is also violated by allowing patrons of the place or other persons to enter or to congregate there;<sup>6</sup> by allowing a bartender to enter and get a drink for himself<sup>7</sup> or to get tobacco for others;<sup>8</sup> or by the admission of a relative, suddenly taken ill on the street, where there are other places equally convenient and where other persons are also indiscriminately admitted.<sup>9</sup> So it has been held that the fact that the saloon keeper's only entrance to his home was through a room adjoining the saloon and separated from it by swinging doors only was not a defense to a prosecution for keeping such room open on Sunday.<sup>10</sup> On the other hand, the statute is not violated by opening the place at the request of an officer to allow him to search for a person, although a crowd follows him in.<sup>11</sup> If liquor is actually sold, it is not necessary that it be drunk on the premises.<sup>12</sup>

(2) *What Rooms Are Within Prohibition* — (a) *Adjoining or Disconnected Rooms Used for Drinking.* — A room connected with a saloon where intoxicating liquors can be served on prohibited days and where liquors are served occasionally or habitually on ordinary days is part of the saloon, and to keep it open on a prohibited day is a violation of the statutes.<sup>13</sup> So rooms not connected with the saloon will be considered a part of it within the statutes, if liquors are sometimes served and sold there.<sup>14</sup>

(b) *Same Room Used for Drinking and for Other Purposes.* — Where a room is used for a saloon as well as for other purposes, it must be kept closed on prohibited days or the statute forbidding the keeping open of saloons or drinking places will be violated.<sup>15</sup>

1. *Rule in Other Jurisdictions* — *Georgia.* — *Williams v. State*, 100 Ga. 511; *Moneses v. State*, 78 Ga. 110; *Klug v. State*, 77 Ga. 734; *Hussey v. State*, 69 Ga. 54.

*Indiana.* — *State v. Mathis*, 20 Ind. App. 699.

*Michigan.* — *People v. Cummerford*, 58 Mich. 328; *People v. Schotkey*, 116 Mich. 1; *People v. Taylor*, 110 Mich. 491; *People v. Minter*, 59 Mich. 558; *Kurtz v. People*, 33 Mich. 279; *People v. Blake*, 52 Mich. 566.

*Ohio.* — *State v. Heibel*, 54 Ohio St. 321.

2. *Intent Immaterial.* — *People v. Blake*, 52 Mich. 566. See also the cases in the note preceding.

3. *Opening to Do Work Pertaining to Place.* — *Rosenthal v. Hobson*, (Iowa 1898) 77 N. W. Rep. 488; *People v. Waldvogel*, 49 Mich. 337; *People v. Minter*, 59 Mich. 557; *McKinney v. Nashville*, 96 Tenn. 79.

4. *Cleaning Up Saloon.* — *People v. Waldvogel*, 49 Mich. 337.

5. *Other Business.* — *Klug v. State*, 77 Ga. 735, in which case it was held that keeping a place open to dry fruit or other goods constituted the offense.

6. *Allowing People to Congregate.* — *State v. Mathis*, 20 Ind. App. 699; *People v. Waldvogel*, 49 Mich. 337; *State v. Heibel*, 54 Ohio St. 321.

7. *Allowing Bartender to Enter for Drink.* — *People v. Crowley*, 90 Mich. 366.

8. *People v. Schotkey*, 116 Mich. 1.

9. *Allowing Sick Relative to Enter.* — *People v. Taylor*, 110 Mich. 491.

10. *No One Attending Bar.* — If persons are admitted, it is not important that there is no one attending bar, if the liquor is accessible. *People v. Cummerford*, 58 Mich. 328.

10. *People v. Talbot*, (Mich. 1899) 79 N. W. Rep. 688. *Contra*, *Hannan v. District of Columbia*, 12 App. Cas. (D. C.) 265, holding that where a saloon keeper had no means of ingress to and egress from his home except through the saloon, an opening of the saloon for the purpose of entering his house was not within the statute.

11. *Allowing Officer to Enter.* — *Miller v. State*, 68 Miss. 533.

12. *Liquor Sold Need Not Be Drunk on Premises.* — *Harris v. People*, 1 Colo. App. 289.

13. *Keeping Open Rooms Connected with Saloon.* — *People v. Cox*, 70 Mich. 247; *People v. Ringsted*, 90 Mich. 371; *People v. Hughes*, 90 Mich. 368; *People v. Scranton*, 61 Mich. 244; *People v. Higgins*, 56 Mich. 159; *People v. Bowkus*, 109 Mich. 360; *People v. Koob*, 109 Mich. 358; *Lederer v. State*, 5 Ohio Cir. Ct. 623, 3 Ohio Cir. Dec. 303; *Morganstern v. Com.*, 94 Va. 787.

14. *Keeping Open Tippling House — Restaurant and Barroom Adjoining.* — Where a restaurant and barroom managed by the same person are separated by a partition, and liquor is furnished on Sunday by a clerk to a customer in the restaurant, such person is guilty of keeping open a tippling house on Sunday within the statute prohibiting that offense, and it is immaterial whether liquor was brought at the time directly from the barroom or was already in the restaurant. *Harmon v. State*, 92 Ga. 455. To the same effect see *Cooper v. State*, 88 Ga. 441.

14. *People v. Whipple*, 108 Mich. 587.

15. *One Room Used for Several Purposes.* — *Harris v. People*, 1 Colo. App. 289; *Lederer*



*g.* SELLING OR KEEPING OPEN ON SUNDAY BY PUBLICANS, INNKEEPERS, ETC. — Both in *England* and in the *United States* there are statutes prohibiting publicans, tavern keepers, and hotel keepers from furnishing or selling intoxicating liquors on Sunday or during certain hours of that day. Under some of these statutes the prohibition against the selling or furnishing includes a sale or furnishing to all classes of persons whatsoever; under others, sales to certain classes of persons under certain circumstances will be protected.

**Statute Forbidding Worldly Employment.** — In *Pennsylvania*<sup>1</sup> a sale on Sunday to a traveler or guest is within the meaning of the general Sunday law forbidding all "worldly employment" on that day, but in *Delaware*<sup>2</sup> the contrary has been held.

**Statutes Prohibiting Sales Except to Guests or Travelers.** — The *New York* statute has been held not to prohibit the furnishing of wines or liquors by the persons under consideration to guests entertained by them.<sup>3</sup> In *Massachusetts* the statute permits an innkeeper to sell liquors on Sunday to "guests who have resorted to his house for food or lodging."<sup>4</sup> And in *England* a publican is permitted to sell intoxicating liquors on Sunday to a traveler.<sup>5</sup> Under none of these statutes will a sale be lawful if the person to whom the liquor was sold or furnished resorted to the inn, hotel, or public house merely for the purpose of drinking;<sup>6</sup> and according to one decision the fact that a cold luncheon is served with the liquor will not exempt the seller from liability.<sup>7</sup> A person is a "traveler" within the meaning of the statute, whether he is traveling for business or for pleasure.<sup>8</sup> But by a recent statute in *England*<sup>9</sup> he is not deemed a traveler unless the place where he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare.<sup>10</sup>

**Statute Prohibiting Sunday Sales by Housekeeper.** — An innkeeper is a "housekeeper" within the meaning of a statute prohibiting any housekeeper from selling any strong liquor on Sunday.<sup>11</sup>

**Ordinance Prohibiting Exposing Intoxicating Liquor for Sale.** — An ordinance prohibiting an innkeeper from exposing intoxicating liquor for sale on Sunday is not violated by having liquor in its usual place in the bar without some positive act offering to sell it.<sup>12</sup>

**Statutes Forbidding Keeping Open.** — It has been held that a statute forbidding the keeping open on Sunday of any room in which it is reputed that intoxicating liquors are exposed for sale does not include a room in an inn or boarding house used only for furnishing regular meals to boarders.<sup>13</sup>

*v. State*, 24 Cinc. L. Bul. 153, 11 Ohio Dec. (Reprint) 31.

**Carrying On Drug Store and Saloon in One Room.** — Where a druggist has a saloon keeper's license and sells liquor in the same room in which he sells his drugs, the room must be closed on Sunday. *McNeill v. State*, 92 Tenn. 719. See also *Elkin v. State*, 63 Miss. 129.

**Place Used as Garden and Saloon.** — Where the keeper of a garden, used as a pleasure resort, maintains therein a bar at which intoxicating liquors are sold on week days, he must, in order to comply with the statutes, close access to the bar completely on Sunday, by closing either the bar itself or the garden. *People v. Beller*, 73 Mich. 640.

1. *Omit v. Com.*, 21 Pa. St. 426.

2. *Hall v. State*, 4 Harr. (Del.) 132.

3. *Matter of Breslin*, 45 Hun (N. Y.) 210.

4. *Com. v. Towle*, 138 Mass. 490; *Com. v. Molter*, 142 Mass. 533; *Pub. Stat. Mass.* (1882), c. 100, § 9.

5. See the English cases cited in subsequent notes of this subdivision.

6. **Guests Merely for Purpose of Procuring Liquor.** — *Penn v. Alexander*, (1893) 1 Q. B. 522; *Parker v. Reg.* 2 Ir. R. 404; *Fisher v. Howard*, 11 Jur. N. S. 305; *Taylor v. Humphries*, 17 C. B. N. S. 539, 112 E. C. L. 539; *Com. v. Hagan*, 140 Mass. 289; *Com. v. Moore*, 145 Mass. 244.

7. **Serving Luncheon with Drinks.** — *Com. v. Hagan*, 140 Mass. 289.

8. **What Is a Traveler.** — *Atkinson v. Sellers*, 5 C. B. N. S. 442, 94 E. C. L. 442; *Taylor v. Humphries*, 17 C. B. N. S. 539, 112 E. C. L. 539; *Penn v. Alexander*, (1893) 1 Q. B. 522; *Peplow v. Richardson*, L. R. 4 C. P. 168.

9. 37 & 38 Vict., c. 49, § 10.

10. *Coulbert v. Troke*, 33 L. T. N. S. 340, 24 W. R. 41; *Cowap v. Atherton*, (1893) 1 Q. B. 49.

11. **"Housekeeper."** — *State v. Fearson*, 2 Md. 310.

12. **Prohibiting Exposing Intoxicating Liquor for Sale.** — *Houtsch v. Jersey City*, 29 N. J. L. 316; *Grimes v. Jersey City*, 29 N. J. L. 320.

13. *State v. Gregory*, 47 Conn. 277. See also *State v. Ryan*, 50 Conn. 411, in which case it



*h. EVIDENCE — (1) In Prosecutions for Sunday Sales or Gifts.* — Where the statute makes it an offense for a licensed "dramshop keeper" or an "inn-keeper" to sell intoxicating liquors on Sunday, the prosecution must show that the defendant was such keeper.<sup>1</sup> On a prosecution for selling liquors on Sunday, the defendant may be asked how many times he has been convicted of violating the Sunday laws.<sup>2</sup> After identifying the proprietor of a saloon, it is competent to ask a witness as to the contents of a license card which he testified that he had seen in the saloon.<sup>3</sup>

*Sufficiency of Evidence.* — In all cases the sufficiency of the evidence on which to base a conviction is a question for the jury.<sup>4</sup>

*(2) In Prosecutions for Keeping Open on Sunday — Competency.* — Where by statute there can be but a single offense of opening a saloon on any particular Sunday, proof of several acts of opening is admissible after one has been shown, the others not constituting distinct offenses.<sup>5</sup>

*Sufficiency.* — The sufficiency of the evidence on which a conviction is sought is always a question to be passed upon by the jury.<sup>6</sup>

*i. FORMER ACQUITTAL OR CONVICTION OF SIMILAR OFFENSE AS BAR.* — A conviction for selling liquor without a license is no bar to a prosecution for keeping open on Sunday, though the same acts of sale are relied on in proof of each case.<sup>7</sup> And on the other hand, a conviction for Sunday sales is no bar to a prosecution for selling without a license, though the same sales are relied on in both prosecutions.<sup>8</sup> So an acquittal in a prosecution for selling on Sunday cannot be treated as a former acquittal upon a prosecution for furnishing liquor to intoxicated persons.<sup>9</sup>

**12. Selling or Keeping Open for Sale During Prohibited Hours.** — In probably

was held that under such statute, if the reputation applies to the whole house, it may be kept open on Sundays for the admission of boarders and travelers.

**1. Evidence that Defendant Was Dramshop Keeper.** — *State v. Kurtz*, 64 Mo. App. 123, 2 Mo. App. Rep. 913.

**Evidence that Defendant Was Innkeeper.** — *People v. Page*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 600.

**Proof of Purchaser's Name.** — If, under a statute making it an offense to sell intoxicating liquor on Sunday, it is necessary to show the purchaser's name, the fact that the state did not prove the name of the alleged purchaser is immaterial, if it appears that the defendant himself made such proof. *Stolte v. State*, 115 Ind. 128.

**2. Former Conviction.** — *Levine v. State*, 35 Tex. Crim. 647.

**3. State v. Hogan**, 67 Conn. 581.

**4. Com. v. Stevens**, 153 Mass. 4.

So the presence of the proprietors and others in the saloon on Sunday is *prima facie* evidence of a violation of the statute prohibiting the sale of intoxicating liquors or the allowing of saloons to be open on Sunday. *Efinger v. State*, 9 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 417. For other cases in which the evidence was held sufficient to convict, see *Smith v. State*, 105 Ga. 724; *Lehrer v. State*, 42 Ind. 383; *Pierce v. State*, 109 Ind. 535; *Zapf v. State*, 11 Ind. App. 360; *Dant v. State*, 106 Ind. 79; *Com. v. Molter*, 142 Mass. 533; *Com. v. Harrison*, 11 Gray (Mass.) 310; *Com. v. McNeese*, 156 Mass. 231; *People v. Beller*, 73 Mich. 640.

**Evidence Held Insufficient.** — See *People v. Owens*, 148 N. Y. 648, *affirming* 91 Hun (N. Y.) 344; *Hendricks v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 124.

**5. People v. Cox**, 70 Mich. 247.

**Statement by Prosecuting Witness at Time of Sale.** — Where it is shown that the defendant's saloon, which was situated in the building in which he lived, was open on Sunday, and a person apparently having authority sold liquor at such time and place, it is competent to show in behalf of the prosecution what was said by the prosecuting witness to a person who sold the liquor to him and what such person said in reply. *Pierce v. State*, 109 Ind. 535.

**Evidence of Other Sales.** — On a prosecution for selling liquor on a Sunday in November, it is competent to show that the defendant was selling not only during that month, but also during other months in the year. *Lynn v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 878.

**Testimony as to the Conduct and Statement of the Defendant's Wife**, who was in the saloon when it was entered by the officers on Sunday, is admissible as tending to show that it was being kept open. *State v. Hogan*, 67 Conn. 581.

**6. Question for Jury.** — *People v. Scranton*, 61 Mich. 244; *People v. Kridler*, 80 Mich. 592.

**Evidence Held Sufficient to Convict.** — See *Williams v. State*, 100 Ga. 511; *People v. Crowley*, 90 Mich. 366; *People v. Blake*, 52 Mich. 566; *People v. Schottey*, 66 Mich. 708; *People v. Baumann*, 52 Mich. 584; *People v. Kridler*, 80 Mich. 592; *State v. Meagher*, 49 Mo. App. 571; *McKinney v. Nashville*, 96 Tenn. 79.

**7. Former Acquittal or Conviction of Similar Offense.** — *Com. v. Harrison*, 11 Gray (Mass.) 308; *Weaver v. Mt. Vernon*, 6 Ohio Dec. 436.

**8. Arrington v. Com.**, 87 Va. 96.

**9. Altenburg v. Com.**, 126 Pa. St. 602.

Volume XVII.



all jurisdictions there are statutes which prohibit the sale of intoxicating liquors during designated hours, or prohibit the keeping open for sale during designated hours of places where intoxicating liquors are sold. If the statute forbids keeping open for the sale of intoxicating liquors, the mere fact of the keeping open without any exposure of the liquors for sale is not an offense.<sup>1</sup> If, however, the statute requires that a saloon shall be "closed" during certain hours, it is not closed within the meaning of the statute so long as it is possible for persons desiring liquor to get in peaceably or so long as any customer who is inside at the time for closing remains inside.<sup>2</sup> The fact that such a statute has not been observed or enforced will not deprive it of authority or be any defense for its violation.<sup>3</sup>

**13. Illegal Sales by Wholesale Dealers.** — Unless there is some statutory provision requiring it, it is not necessary for wholesale dealers to take out licenses, and they are therefore not punishable for selling without license.<sup>4</sup> But where a statute provides that "all persons" who shall sell intoxicating liquors without obtaining a license shall be guilty of a misdemeanor and punishable, wholesale dealers are not exempted from its provisions.<sup>5</sup> And where a statute forbids the sale of intoxicating liquors in any quantity without first obtaining a license, a sale in wholesale quantities without license is unlawful.<sup>6</sup>

**14. Illegal Manufacture and Sales by Manufacturer.** — In the absence of some express statutory provision to the contrary, the manufacture of intoxicating liquors is a lawful business, and the sale thereof in packages or casks, according to the custom of dealers in such articles, without license is also lawful in the absence of express statutory provision requiring a license.<sup>7</sup> It is well settled, however, that a state may prohibit absolutely the manufacture and sale of intoxicating liquors without violating any federal or state constitutional pro-

**1. Keeping Open Without Exposure for Sale.** — *Cassell v. Ovenden*, 2 Q. B. D. 383, 25 W. R. 692.

**To What Houses English Statute Applies.** — The Licensing Act 1874 (37 & 38 Vict., c. 49, § 3), which provides that all premises in which intoxicating liquors are sold by retail are to be closed during certain hours, is not confined to premises licensed by the justices to sell intoxicating liquors, but includes premises in which intoxicating liquors are sold in pursuance of an excise license. *Martin v. Barker*, 50 L. J. M. C. 109, 29 W. R. 789.

**2. When Saloon Is Considered "Closed."** — *People v. Cummerford*, 58 Mich. 328.

When a saloon keeper, after the hour prescribed by statute for closing, remains in his saloon with his bartender and another, and they all take a drink after cleaning and scrubbing the saloon, this will constitute a keeping open of the saloon during prohibited hours. *People v. James*, 100 Mich. 522.

**What Rooms on Premises Used for Liquor Selling Must Be Closed.** — Where the rooms owned and managed by a saloon keeper are arranged for use together, and for the accommodation of customers are fitted with appliances for games as well as for keeping liquors, it is necessary under the liquor law that all of the rooms be closed to the public during unseasonable hours. *People v. Hughes*, 97 Mich. 543. See also *Bridgen v. Heighes*, 1 Q. B. D. 330.

**3. Prior Nonenforcement of Statute — Effect.** — *In re Whitney*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 838.

**4. Wholesaler Need Not Have License Unless Required by Statute.** — *Hunter v. State*, 79 Ga. 365.

**5. Effect of Statutes Requiring "All Persons" to Take Out License.** — *State v. Cummings*, 17 Neb. 311.

**6. Effect of Statutes Prohibiting Sale in "Any Quantities" Without License.** — *State v. Turner*, 18 S. Car. 103. See also *Fincannon v. State*, 93 Ga. 418.

**Wholesale Dealers Who Are Not Manufacturers.** — Wholesale dealers who are not manufacturers are within the provisions of a statute which taxes "the business of trafficking in intoxicating liquors," and which defines "trafficking" as buying and selling but as not including the manufacture of liquor and the sale thereof by the manufacturer. *Senior v. Ratterman*, 44 Ohio St. 661.

**Ordinances Requiring Several Separate License Fees.** — Where an ordinance requires every one engaged in brewing or distilling and all agencies of brewers and distillers and all wholesale dealers in malt liquors to pay a license fee, each agency of any distillery or brewery or other wholesale establishment is required to pay a separate license fee. *Indianapolis v. Bieler*, 138 Ind. 30.

**7. Illegal Manufacture and Sale.** — *Lawson v. Com.*, 14 B. Mon. (Ky.) 181; *State v. Orth*, 38 Minn. 150; *Scanlan v. Childs*, 33 Wis. 663.

**Application of Rule.** — A manufacturer of intoxicating liquors may sell them in quantities to a dealer who sells them to other persons, the dealer having a license for that purpose. *Scanlan v. Childs*, 33 Wis. 666. But it has been held that a sale of beer, whether to a dealer or to a consumer, cannot lawfully be made by an agent from a warehouse or store-room in a city other than that in which the brewery is located, without first obtaining a



vision,<sup>1</sup> and therefore a state may impose such restrictions as it pleases on the manufacture and sale of intoxicating liquors. Where a statute absolutely prohibits the manufacture of intoxicating liquor, a person cannot manufacture it even for his own use, or sell it;<sup>2</sup> and if the manufacturer is required to obtain a permit to manufacture and sell liquors he cannot legally sell them without obtaining such permit.<sup>3</sup> A manufacturer licensed under the laws of the United States cannot sell liquor of his own manufacture in violation of the laws of a state.<sup>4</sup>

**Retail Sales.** — As regards sales of intoxicating liquors at retail without license, the statutes prohibiting such sales are generally held applicable to manufacturers. They have no more right to make such sales than any other class of persons.<sup>5</sup>

**15. Illegal Sales by Tavern Keeper, Hotel Keeper, and Innkeeper.** — The word "tavern," according to the lexicographers, originally meant a place where liquors were sold to be drunk on the premises;<sup>6</sup> but in a number of states its meaning has become synonymous with "inn" or "hotel," and it denotes a house for the entertainment of travelers as well as for the sale of liquors.<sup>7</sup> It has accordingly been held in a number of decisions that a license to keep a tavern necessarily includes the right to retail intoxicating liquors,<sup>8</sup> but there are decisions to the contrary.<sup>9</sup>

license from the city in which the sale is made. *Mayer v. State*, 83 Wis. 339. To the same effect see *Peitz v. State*, 68 Wis. 538.

**1. State May Prohibit Manufacture Absolutely.** — See *supra*, this title, *Constitutionality of Liquor Laws*.

**2. State v. Lovell**, 47 Vt. 493.

**3. Sale Without License — When Illegal.** — *Becker v. Betten*, 39 Iowa 668.

**4. Effect of Federal License.** — *State v. Hazell*, 100 N. Car. 471.

**5. Retail Sales by Manufacturer.** — See *Keller v. State*, 11 Md. 525, 69 Am. Dec. 226; *State v. Benz*, 41 Minn. 30; *State v. Schroeder*, 43 Minn. 231. See also *People v. Greiser*, 67 Mich. 490.

**6. "Tavern" Defined.** — *State v. Chamblyss*, Cheves L. (S. Car.) 220, 34 Am. Dec. 593, *citing* Webster's and Johnson's Dictionaries.

**7. Synonymous with Inn or Hotel.** — *Bonner v. Welborn*, 7 Ga. 296; *St. Louis v. Siegrist*, 46 Mo. 593; *Rafferty v. New Brunswick F. Ins. Co.*, 18 N. J. L. 484; *Overseers of Poor v. Warner*, 3 Hill (N. Y.) 150; *Hirn v. State*, 1 Ohio St. 19; *State v. Chamblyss*, Cheves L. (S. Car.) 220, 34 Am. Dec. 593. See also *Savie v. Chipman*, 1 Mich. 118.

**8. Whether Tavern License Authorizes Sales of Liquor.** — *Hirn v. State*, 1 Ohio St. 19; *State v. Chamblyss*, Cheves L. (S. Car.) 220, 34 Am. Dec. 593; *Road Com'rs v. Dennis*, Cheves L. (S. Car.) 229; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179.

**9. State v. Cloud**, 6 Ala. 630; *Page v. State*, 11 Ala. 849; *St. Louis v. Siegrist*, 46 Mo. 593.

**Who May Sell under Tavern License.** — One who vends spirituous liquors in a room of a tavern house which is in subordination to the tavern, by permission of the tavern keeper, is protected by the license of the latter. *Duncan v. Com.*, 2 B. Mon. (Ky.) 281, 38 Am. Dec. 152.

**Sales in What Quantities Authorized.** — One licensed as an innkeeper has no right to sell by the gallon liquor to be carried away. *Benson v. Moore*, 15 Wend. (N. Y.) 260.

**Restaurant and Lodging-house Keepers Not Innkeepers.** — A keeper of a restaurant who has no beds for the accommodation of travelers is not an innkeeper, and a lodging-house keeper is not an innkeeper, merely because he may send out and procure cooked food for his guests. A mere lodging house in which no provision is made for supplying the lodgers with their meals is wanting in one of the essential requisites of an inn. *Kelly v. Excise Com'rs*, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 327.

**Furnishing Liquor with Meals.** — The furnishing of liquors by a boarding-house keeper to his guests at meals, without its having been contracted for, is a sale within a statute requiring "any one engaging in the sale of intoxicating liquors" to procure a license, and is punishable. *Lauer v. District of Columbia*, 11 App. Cas. (D. C.) 453.

**Common Victualler.** — A person licensed as a common victualler and to sell intoxicating liquors to be drunk on the premises may be convicted of keeping a "public bar," within Pub. Stat. Mass., c. 100, § 9, cl. 5, if he sells and delivers, not in connection with food, intoxicating liquors indiscriminately to such persons as may call for them, over a bar or counter, though there is no public display of the liquors, and though the bar is also used for luncheon purposes. *Com. v. Rogers*, 135 Mass. 536; *Com. v. Everson*, 140 Mass. 292. See also *Com. v. Salmon*, 136 Mass. 431.

**Sales by Restaurant Keeper Not Authorized by License.** — A restaurant keeper, regularly licensed as such by the city of Montgomery, having a wholesale but no retail license from the state, who sells vinous liquors only to persons taking meals at his restaurant, the liquors being drunk by them only while eating, is guilty of an indictable offense under section 3618 of the Revised Code of Alabama in force in 1867 (Crim. Code 1896, § 5076). *Nicrosi v. State*, 52 Ala. 336.

**Restriction as to Place of Sale.** — A tavern license restricts the sale of liquor to the place



**16. Violations of Liquor Laws by Druggists and Drug Clerks — *α*. ILLEGAL SALES IN GENERAL —** (1) *Necessity for License or Permit and Strict Compliance Therewith.* — There is some difference of opinion as to whether a druggist who sells intoxicating liquors for medicinal purposes is guilty of violating a statute which prohibits retailing without license and which contains no saving clause in respect to druggists. Some decisions under statutes of this character maintain that sales of intoxicating liquors for medicinal purposes by druggists who have no license are lawful if made in good faith.<sup>1</sup> Other decisions hold that under a statute requiring a license to retail intoxicating liquors, a druggist having no license will be punishable for selling liquors if the statute contains no saving clause in favor of druggists.<sup>2</sup> And the person holding the license or permit must in making sales comply strictly with the requirements thereof in all particulars.<sup>3</sup> The fact that at the time when the liquors were seized they were not actually in the defendant's possession is no defense to a prosecution for selling intoxicating liquors for other than authorized purposes.<sup>4</sup>

(2) *Necessity for Physician's Prescription.* — In a number of jurisdictions the statutes provide that druggists cannot sell intoxicating liquors except on the prescriptions of physicians, and under these statutes a sale of intoxicating liquors without the required prescription will be illegal, even though it is made for medicinal purposes.<sup>5</sup> If, however, the statutes permitting sales for medicinal purposes do not require a prescription, a druggist making a sale without a

as well as to the person licensed. *State v. Prettyman*, 3 Harr. (Del.) 570. But a tavern keeper duly licensed may have his barroom in an apartment which is not connected by any doorway with his main building, but is separate from it, and may there retail spirituous liquors by himself or his partner without a violation of law, provided this separate room constitutes in good faith a part of the licensed tavern and is not used as a fraudulent shield. *Gray v. Com.*, 9 Dana (Ky.) 300, 35 Am. Dec. 136.

**1. Sales by Unlicensed Druggists Lawful if in Good Faith.** — *Downell v. State*, 2 Ind. 658; *Hooper v. State*, 56 Ind. 153; *Jakes v. State*, 42 Ind. 473; *Hainline v. Com.*, 13 Bush (Ky.) 350; *State v. Wray*, 72 N. Car. 253.

**2. Sales by Unlicensed Druggists Held Illegal — Arkansas.** — *Flower v. State*, 39 Ark. 210; *Woods v. State*, 36 Ark. 36; *State v. Butcher*, 40 Ark. 362; *Chew v. State*, 43 Ark. 361; *Battle v. State*, 51 Ark. 97.

*Colorado.* — *Chipman v. People*, 24 Colo. 520.

*Georgia.* — *Chapman v. State*, 100 Ga. 311.

*Illinois.* — *Wright v. People*, 101 Ill. 126; *Noecker v. People*, 91 Ill. 494.

*Iowa.* — *State v. Fissell*, 67 Iowa 616.

*Kansas.* — *Salina v. Seitz*, 16 Kan. 143.

*Kentucky.* — *Eastham v. Com.*, (Ky. 1899) 49 S. W. Rep. 795.

*Maine.* — *State v. Hall*, 39 Me. 107.

*Massachusetts.* — *Com. v. Kimball*, 24 Pick. (Mass.) 366.

*Missouri.* — *State v. Workman*, 75 Mo. App. 454.

*Nebraska.* — *Brown v. State*, 9 Neb. 189; *Warwick v. Rounds*, 17 Neb. 412.

*Tennessee.* — *The Druggist Cases*, 85 Tenn. 449.

**Impossibility of Obtaining License.** — Where a statute requires a license, and imposes a tax on druggists for selling intoxicating liquors for other than medicinal purposes, a sale of intoxicating liquors by a druggist without obtaining the license is a violation of the statute,

although there is no provision made by the statute by which he can obtain a license. *Rosenham v. Com.*, (Ky. 1886) 2 S. W. Rep. 230.

**License Issued, though Not Paid For.** — Where a license has been issued, though not paid for, and the druggist in good faith tenders payment, which is refused, the license will protect him in making sales. *Storms v. Com.*, (Ky. 1899) 49 S. W. Rep. 451, reversing (Ky. 1898) 47 S. W. Rep. 262.

**3. Compliance with Requirements of Permit Necessary.** — *State v. Salts*, 77 Iowa 193; *State v. Yager*, 72 Iowa 421; *State v. Shaw*, 58 N. H. 72; *State v. Brown*, 60 N. H. 205.

**Application of Rule.** — If a permit authorizes sales for the "necessities of medicine," a sale for any other purpose is a violation of the law. *State v. Salts*, 77 Iowa 193.

So where a statute authorizes registered pharmacists to keep spirituous liquors for compounding their medicines it will be an offense to sell liquors not compounded with medicines. *State v. Shaw*, 58 N. H. 72. And this is true although they were sold to others for the purpose of being compounded with medicines. *State v. Brown*, 60 N. H. 205.

*4. State v. Ward*, 75 Iowa 637.

**5. Statutes Making Prescriptions Necessary.** — *Woods v. State*, 36 Ark. 36; *Barton v. State*, 99 Ind. 89; *Maupin v. Com.*, 1 Ky. L. Rep. 281; *Com. v. Reynolds*, 6 Ky. L. Rep. 520; *Com. v. McGrorty*, 5 Ky. L. Rep. 674; *State v. Hendrix*, 98 Mo. 374; *Nichols v. State*, 37 Tex. Crim. 546; *State v. Cox*, 23 W. Va. 797. See also *Thompson v. State*, 37 Ark. 408; *State v. Robertson*, 24 Mo. App. 232.

**Statutes Limiting Sales to Physicians — Right of Druggists to Sell.** — Where a statute makes the sale of liquors unlawful, but contains a provision that physicians may prescribe intoxicating liquors to their patients as medicine, a druggist may sell liquors for medicinal purposes upon a physician's prescription although the statute contains no proviso excepting such



prescription will not be guilty of a violation of law, if he made the sale in good faith.<sup>1</sup> The burden is on the defendant to show that the sale was made on the prescription of a physician if the statute requires a prescription.<sup>2</sup> If a prescription is shown, this, it seems, will be a complete defense irrespective of the good faith of the physician who gave it.<sup>3</sup>

(3) *Requisites and Sufficiency of Prescription.* — A prescription, to authorize a sale, must in all things conform to the statute.<sup>4</sup> It must be in writing. A mere verbal order will furnish no protection to the seller.<sup>5</sup> While the prescription must be addressed to some one if the statute so prescribes,<sup>6</sup> it is not necessary that the writing should be in the form of an order on the druggist requesting him to furnish the article.<sup>7</sup> The name of the person for whom the prescription is to be filled should be stated,<sup>8</sup> and the prescription should be signed and dated by the physician giving it.<sup>9</sup> If the statute requires that the prescription shall state that the liquor is a necessary remedy, the prescription will be insufficient without this statement;<sup>10</sup> and if the statute requires that the prescription shall state that the liquors are "absolutely" necessary, a prescription in which the word "absolutely" is omitted will furnish no protection to the seller.<sup>11</sup> The quantity required, and the purpose for which the liquors are to be used, should also be specified.<sup>12</sup> If the statute requires that the prescription be "had and obtained from some regularly registered and practicing physician," the prescription will be no defense unless it be shown that it was obtained from a regularly registered physician.<sup>13</sup> Only one sale can be made on one prescription, whether the statute expressly so provides<sup>14</sup> or not.<sup>15</sup> And a sale made before a prescription was written is not protected thereby, although the prescription was given in good faith.<sup>16</sup> Nor is a sale protected by a prescription given to the defendant for which the party purchasing the liquor had not applied and of which he had no knowledge.<sup>17</sup>

(4) *Legality of Sales as Affected by Element of Intent.* — Whether a druggist has a license or permit to sell intoxicating liquors for medicinal purposes,

sales from its operation. *Parker v. Com.*, (Ky. 1889) 12 S. W. Rep. 276; *Com. v. Reynolds*, 89 Ky. 147.

The contrary conclusion has been reached under a similar statute in *Arkansas*. *Battle v. State*, 51 Ark. 97.

1. Under Statutes Not Requiring Prescription. — *Brooks v. State*, 65 Miss. 445. See also *State v. Robertson*, 24 Mo. App. 232; *State v. Roller*, 77 Mo. 120.

Statute Construed Not to Require Prescription. — An ordinance prohibiting the sale of intoxicating liquors without license, but providing that it shall not apply to sales by druggists upon the prescription of a reputable physician and for medical purposes, does not prohibit a sale by a druggist for medical purposes without the prescription of a physician. *Prowitt v. Denver*, 11 Colo. App. 70.

2. Burden of Showing Prescription. — *Maupin v. Com.*, 1 Ky. L. Rep. 281; *State v. Searcy*, 46 Mo. App. 421.

3. Good Faith of Physician Giving Prescription. — *Prowitt v. Denver*, 11 Colo. App. 70; *State v. Bevans*, 52 Mo. App. 130.

4. Conformity to Statutory Provisions Necessary. — *Irish v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 634; *State v. Cox*, 23 W. Va. 797. See also other decisions cited in subsequent notes to this subdivision.

5. Written Prescription Necessary. — *Caldwell v. State*, 18 Ind. App. 48; *Kyle v. State*, 18 Ind. App. 139; *Irish v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 634; *State v. Cox*, 23 W. Va. 797.

6. Necessity of Addressing Prescription. — *Kyle v. State*, 18 Ind. App. 136; *Caldwell v. State*, 18 Ind. App. 48.

7. Prescription Need Not Be in Form of Order. — *State v. Bluefield Drug Co.*, 43 W. Va. 144.

8. Name of Person for Whom Prescription Is Written. — *Caldwell v. State*, 18 Ind. App. 49; *State v. Berkeley*, 41 W. Va. 455; *State v. Bluefield Drug Co.*, 43 W. Va. 144.

9. Signature and Date. — *State v. Clevenger*, 25 Mo. App. 653.

10. Statement that Liquor Prescribed Is Necessary Remedy. — *State v. Howers*, 65 Mo. App. 639; *State v. Nixdorf*, 46 Mo. App. 494.

11. Statement that Liquor Prescribed Is Absolutely Necessary. — *State v. Tetrick*, 34 W. Va. 137; *State v. Denoon*, 34 W. Va. 139; *State v. Berkeley*, 41 W. Va. 460.

12. Statement of Quantity and Purpose of Furnishing. — *Kyle v. State*, 18 Ind. App. 136; *Caldwell v. State*, 18 Ind. App. 48; *State v. Bluefield Drug Co.*, 43 W. Va. 144.

13. Prescription Obtained from One Not Regularly Licensed Physician. — *State v. Millikan*, 24 Mo. App. 462.

14. One Sale Only on One Prescription. — *State v. May*, 33 S. Car. 39.

15. *Carrington v. Com.*, 78 Ky. 83. Compare *Danville v. Forman*, (Ky. 1897) 43 S. W. Rep. 682.

16. Sale Before Prescription. — *State v. Hale*, 72 Mo. App. 78.

17. Prescription Furnished to Druggist and Not to Purchaser. — *Miller v. State*, 37 Tex. Crim. 35.



or is allowed by statute to sell for such purposes without license, or, as is the case in a few jurisdictions, is considered to be entitled to sell for such purposes without license although the statute which prohibits sales without license contains no exception in his favor, the druggist must nevertheless exercise due caution and good faith in making sales or he will be punishable.<sup>1</sup> Even the prescription of a physician will not protect the seller if he knows that it is used merely as a pretense to obtain liquor to drink as a beverage.<sup>2</sup> If a prescription is not required by statute, and the liquor is sold on the application of the purchaser, the sale will not be protected if the seller knew that the purchaser wanted it merely as a beverage.<sup>3</sup> On the other hand, a druggist acting in good faith in making a sale has a right to rely upon the statement made by the purchaser as to the use for which the liquor is intended, unless facts or circumstances known to him show such statement to be false, or are sufficient to satisfy the druggist, acting in good faith and in an honest endeavor to obey the law, that the purpose is not as stated by the purchaser.<sup>4</sup>

**Evidence.** — Whether a sale was or was not made in good faith is of course a question for the jury to determine from all the facts and circumstances of the case.<sup>5</sup> Where a sale is proved the burden is on the defendant to show that it was legal.<sup>6</sup>

**b. SALES TO MINORS.** — If a statute forbids sales to minors without the written consent of a parent, a sale to a minor without such consent will render the seller liable to prosecution although the liquor was sold for medicinal purposes.<sup>7</sup> If the statute requires the written consent of the parent or the prescription of a practicing physician, a sale without either will be illegal.<sup>8</sup>

**c. OTHER OFFENSES — Gifts of Intoxicating Liquors by Druggists.** — Where the statute prohibits the sale or gift of intoxicating liquors except under the conditions named, such a restriction applies to licensed pharmacists as well as to saloon keepers, and they are liable for giving away intoxicating liquors for unlawful purposes.<sup>9</sup>

**Keeping Open and Selling on Sunday.** — If a licensed retailer of intoxicating liquors is forbidden by statute to keep open his place of business on Sunday, a person who holds both a pharmacist's and a retailer's license and who sells both drugs and liquors in one store must keep it closed on Sunday, unless keeping open the part in which the drugs are sold affords no access to the part in which the liquors are sold.<sup>10</sup> So if a statute prohibits a druggist from selling

**1. Good Faith in Making Sales Necessary.** — *Baumeil v. State*, 26 Fla. 71; *Hottendorf v. State*, 89 Ind. 282; *State v. Thompson*, 74 Iowa 119; *State v. Harris*, 64 Iowa 287; *State v. Knowles*, 57 Iowa 669; *State v. Hoagland*, 77 Iowa 135; *State v. Oeder*, 80 Iowa 72; *Haynie v. State*, 32 Miss. 400; *McGuire v. State*, 37 Miss. 369; *State v. Mitchell*, 28 Mo. 562; *Com. v. Patterson*, 16 W. N. C. (Pa.) 193.

**2. When Prescription No Protection.** — *Com. v. Gould*, 158 Mass. 499; *Com. v. Patterson*, 16 W. N. C. (Pa.) 193.

**3. Sales Without Prescription — When Not Protected.** — *State v. Knowles*, 57 Iowa 671; *State v. Thompson*, 74 Iowa 119; *Com. v. Joslin*, 158 Mass. 482.

**4. Reliance on Statements of Purchaser.** — *People v. Hinchman*, 75 Mich. 587; *State v. Mitchell*, 28 Mo. 562. See also *Com. v. Joslin*, 158 Mass. 482.

**5. Good Faith Question for Jury.** — *State v. Huff*, 76 Iowa 200.

**6. Defendant Must Show Legality of Sale.** — *Baumeil v. State*, 26 Fla. 71; *State v. Cloughly*, 73 Iowa 626; *Com. v. Perry*, 148 Mass. 160.

**7. Where Statute Requires Consent of Parent.**

— *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350; *State v. Skillicorn*, 104 Iowa 97.

**8. Where Statute Requires Consent of Parent or Prescription.** — *Page v. State*, 84 Ala. 446.

**Statute Requiring Requisition of Physician.** — Where a statute provides that a sale or gift of liquor to a minor is unlawful unless made upon the requisition of a physician for medicinal purposes, the requisition must be a written application or request to the seller by the physician himself. *Bain v. State*, 61 Ala. 75.

**Sales by Physician Who Is Also a Dealer.** — A practicing physician who keeps on hand intoxicating liquors for the purpose of sale or profit is a dealer within the meaning of the statute, and if he prescribes as medicine for a minor, knowing him to be such, any of the liquors mentioned in the statute, and thereupon sells or gives liquor to him, he is guilty of a violation of the statute notwithstanding he acted in good faith. *State v. McBrayer*, 98 N. Car. 619.

**9. Giving Away Intoxicating Liquors.** — *State v. Harris*, 64 Iowa 287.

**10. Keeping Open on Sunday.** — *Elkin v. State*, 63 Miss. 130.



intoxicating liquor on Sunday unless the person to whom the liquor is sold shall have first procured a written prescription from a practicing physician in the county where the liquor is sold, a prescription to justify a sale on Sunday must be explicit in its terms and must have reference to its being filled on that day.<sup>1</sup>

**d. ILLEGAL SALES BY DRUG CLERKS — Liability of Clerks.** — Where a druggist holds a permit or license to sell intoxicating liquors for designated purposes, no criminal responsibility can attach to his clerks, servants, or agents for sales in conformity therewith.<sup>2</sup> But where sales are made by such persons for purposes other than those authorized by the permit or license,<sup>3</sup> or at places not authorized by the permit,<sup>4</sup> they will be criminally responsible.

**Liability of Employer.** — Where a druggist in good faith instructs his clerks not to sell to minors, he will not be criminally responsible for a sale by his clerk to a minor made under a mistaken belief that the purchaser is of age.<sup>5</sup> A druggist will be criminally responsible, however, where he is cognizant of the fact that his clerk is making illegal sales.<sup>6</sup>

**e. SALE OF WHAT LIQUORS PROHIBITED.** — So long as liquors retain their character as intoxicating liquors, capable of being used as a beverage, notwithstanding other ingredients may have been mixed with them, a sale thereof without license will be unlawful.<sup>7</sup> But when they are so compounded with other substances as to lose their distinctive character as intoxicating liquors, and are no longer desirable for use as a beverage, and are, in fact, medicine, a sale thereof without license is not a violation of the law.<sup>8</sup>

**17. Sales by Physicians.** — Unless physicians are expressly excepted from the operation of the statutes prohibiting sales of intoxicating liquors without license, they can no more sell intoxicating liquors to their patients for medicinal purposes than can any other persons.<sup>9</sup> And of course a sale of intoxicating liquors for medicinal purposes by a physician not holding a permit will be unlawful where the statute expressly provides that physicians or druggists shall not sell intoxicating liquors without first obtaining a permit.<sup>10</sup> In many of the states the statutes expressly except from their operation sales made by physicians for medicinal purposes, but the utmost good faith and circumspection are required of the physician in making the sale. If it is clearly apparent that a physician acted in good faith in selling liquors to be used as medicine, such sales will be protected;<sup>11</sup> and this is true although he fails to record the sales in a book as required by statute, that being a separate and distinct offense.<sup>12</sup> Of course, if the physician knew that the party to whom he sold the liquor did not need it, or negligently failed to make an examination of the patient,<sup>13</sup>

1. Sales on Sunday. — *Edwards v. State*, 121 Ind. 450. See also *Tilford v. State*, 109 Ind. 359.

2. Liability of Clerks. — *State v. Copp*, 34 Kan. 522; *Provo City v. Shurtliff*, 4 Utah 15.

3. Sales for Unauthorized Purposes. — *Provo City v. Shurtliff*, 4 Utah 15.

4. Sales at Unauthorized Places. — *State v. Copp*, 34 Kan. 522.

5. Liability of Employer. — *Com. v. Stevens*, 153 Mass. 421, 25 Am. St. Rep. 647. See also *State v. Findley*, 45 Iowa 435.

6. *Elwood v. Price*, 75 Iowa 228.

7. *Davis v. State*, 50 Ark. 17; *State v. Laffer*, 38 Iowa 422; *Com. v. Ramsdell*, 130 Mass. 68; *Warrick v. Rounds*, 17 Neb. 411. See also *Com. v. Fowler*, 98 Ky. 648; *Com. v. Hallett*, 103 Mass. 452.

8. *State v. Laffer*, 38 Iowa 422; *Com. v. Ramsdell*, 130 Mass. 68.

**Evidence.** — The mere fact that an article sold contains alcohol is not of itself evidence

that the sale of such article without license is unlawful. *Davis v. State*, 50 Ark. 17.

9. Right to Sell When Not Authorized by Statute. — *Thomason v. State*, 70 Ala. 20; *Carson v. State*, 69 Ala. 226; *State v. Hall*, 39 Me. 107. *Contra*, *State v. Larrimore*, 19 Mo. 391.

10. Right to Sell When Statute Requires Permit. — *State v. Benadom*, 79 Iowa 90; *State v. Fleming*, 32 Kan. 588.

11. Sales Made in Good Faith Protected. — *State v. Field*, 89 Iowa 34; *Com. v. Green*, 80 Ky. 178; *Com. v. Minor*, 88 Ky. 422; *State v. Young*, 36 Mo. App. 517; *Stovall v. State*, 37 Tex. Crim. 337; *McQuerry v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 990.

A Dentist is not a physician within the meaning of a statute prohibiting the sale of liquor on Sunday unless prescribed by a physician. *State v. McMinn*, 118 N. Car. 1259.

12. Failure to Record Sales — Effect. — *Sarrils v. Com.*, 83 Ky. 327.

13. Knowledge that Patient Did Not Need Liquor. — See *Com. v. Green*, 80 Ky. 178.



or made a careless and superficial examination and prescribed an amount entirely too large,<sup>1</sup> or if he sold to a person merely at the suggestion of the latter and not on his own prescription as a medical adviser,<sup>2</sup> he is punishable for a violation of the statute.

**Giving False Prescriptions.** — In a number of states it is made an offense for a physician to give a prescription by which intoxicating liquor may be obtained from a druggist by one who does not actually need it as a medicine. Under these statutes the physician must act in entire good faith. It is his duty to examine and ascertain whether the liquor is absolutely necessary as a medicine.<sup>3</sup>

**18. Sales by Persons Who Are Both Physicians and Druggists.** — Where the statutes provide that sales of intoxicating liquors for medicinal purposes shall be made only on a written prescription by a regularly licensed physician, there is some conflict of authority as to whether a person who is both a physician and a druggist can sell intoxicating liquors for medicinal purposes on his own prescription. That he can do so has been denied in one decision,<sup>4</sup> while other decisions hold that he can,<sup>5</sup> and some hold that such person need not make out and preserve a written prescription.<sup>6</sup> Other decisions hold that he must make out a written prescription just as though it was to be filled at the store of some other person.<sup>7</sup>

**19. Sales for Medicinal Purposes.** — Where it is provided by statute that no person who has not obtained a license shall sell intoxicating liquors for any purpose, and the statute does not expressly except sales by physicians, druggists, or other persons, of intoxicating liquors for medicinal purposes, it would seem that a sale of this character would be a violation of the law. But there are rulings both ways on this question. Some decisions hold that although a sale of this character is perhaps a violation of the strict letter of the law, it is nevertheless not within the mischief aimed at by the statute, if made in good faith, and does not render the seller punishable as for a violation of the statute.<sup>8</sup> The weight of authority is, however, to the contrary. The

**1. Careless or Superficial Examination of Patient.** — *West v. State*, 35 Tex. Crim. 48.

**2. Selling on Suggestion of Purchaser.** — *State v. Cloughly*, 73 Iowa 626. See also *Redding v. State*, 91 Ga. 231.

**"Administering" Construed.** — The giving by a physician of an order for a quart of whiskey, on a drugstore in which he himself is a partner, without more, is not the administering of a medicine within the *Alabama* statute, but an illegal sale of spirituous liquors contrary to the terms of the statute. *Brinson v. State*, 89 Ala. 105.

**3. Giving False Prescriptions.** — *State v. Roberts*, 33 Mo. App. 524; *State v. Atkinson*, 33 S. Car. 100; *West v. State*, 35 Tex. Crim. 48; *State v. Berkeley*, 41 W. Va. 455.

**4. Sales by Physician on His Own Prescription** — *View that Sale Is Illegal.* — *State v. Anderson*, 81 Mo. 78.

**5. View that Sale Is Legal.** — *Tilford v. State*, 109 Ind. 359; *Com. v. Matthews*, 3 Ky. L. Rep. 473; *State v. Clevenger*, 25 Mo. App. 653; *State v. Pollard*, 72 Mo. App. 230; *Boone v. State*, 10 Tex. App. 418, 38 Am. Rep. 641.

**6. Necessity of Making Out Written Prescription.** — *Com. v. Matthews*, 3 Ky. L. Rep. 473; *Boyd v. Com.*, MS: Jan. 10, 1879, *cited in Lindsay v. Com.*, 99 Ky. 164.

**7. Tilford v. State**, 109 Ind. 360; *State v. Carnahan*, 63 Mo. App. 248; *State v. Bailey*, 73 Mo. App. 576.

**8. View that Sales May Be Made for Medicinal**

**Purposes Without License** — *Indiana.* — *Donnell v. State*, 2 Ind. 658; *Thomasson v. State*, 15 Ind. 449; *Jakes v. State*, 42 Ind. 473; *Beardsley v. State*, 49 Ind. 245; *Ball v. State*, 50 Ind. 595; *Hooper v. State*, 56 Ind. 153; *Mitchell v. State*, 63 Ind. 574; *Elrod v. State*, 72 Ind. 292; *Hattendorf v. State*, 89 Ind. 282; *Nixon v. State*, 76 Ind. 524; *Barton v. State*, 99 Ind. 89. See also *Leppert v. State*, 7 Ind. 300.

*Kentucky.* — *Anderson v. Com.*, 9 Bush (Ky.) 569; *Hainline v. Com.*, 13 Bush (Ky.) 350.

*Missouri.* — *State v. Larrimore*, 19 Mo. 392.

*North Carolina.* — See *State v. Wray*, 72 N. Car. 253. Compare *State v. Dalton*, 101 N. Car. 680, *disapproving* a dictum in *State v. Wool*, 86 N. Car. 708.

**The United States Revenue Law** (Rev. Stat. U. S., § 3242), requiring liquor dealers to pay a special tax, is not violated by an apothecary who in good faith uses spirituous liquors exclusively for the preparation or manufacture of medicines, although he has not paid the tax and is not expressly excepted from the operation of the statute. *U. S. v. Calhoun*, 39 Fed. Rep. 604.

**Sale Not Made in Good Faith.** — In *Zapf v. State*, 11 Ind. App. 360, the defendant sold whiskey to a person in his saloon on Sunday, the purchaser saying nothing at the time as to the purpose for which he wanted the liquor, though he had previously told the defendant, when buying liquor, that he wanted it for weak lungs. It appeared also that at the same



majority of the decisions hold that the seller will be guilty of a violation of the law unless such sales are expressly excepted from the operation of the statute,<sup>1</sup> especially where provision is made by statute or ordinance for the granting of permits to druggists or physicians to sell intoxicating liquors for medicinal purposes.<sup>2</sup>

**20. Furnishing of Intoxicating Liquors by Social Clubs — a. SALES BY CLUBS ORGANIZED TO EVADE LAW.** — However much the authorities may differ as to the right of a *bona fide* social club to sell intoxicating liquors without compliance with the laws regulating the liquor traffic, it is well settled that if the organization of the club is merely a fraudulent device to enable it to carry on the traffic of selling intoxicating liquors without being subjected to the burdens imposed by statute on those engaged in that traffic, sales by such club without compliance with the statutes will not be protected.<sup>3</sup> The same is true where the club is organized to evade a local option<sup>4</sup> or prohibition statute.<sup>5</sup>

**Who Punishable.** — Any one selling as a member or as agent, steward, or president of such club will be punishable.<sup>6</sup>

**b. SALES BY CLUBS TO PERSONS NOT MEMBERS.** — A sale by a club to persons not members is undoubtedly illegal unless the club is licensed to sell intoxicating liquors;<sup>7</sup> and this is true notwithstanding the fact that the member inviting the person to whom the liquor was sold was also responsible for the payment thereof.<sup>8</sup> And it would seem that a furnishing of intoxicating liquors to its own members by a club requires a license if by its constitution strangers visiting the club can obtain liquors under the same terms as members.<sup>9</sup>

time the defendant sold liquor to other persons without inquiring their purpose in buying it. It was held that a conviction for an illegal sale would not be set aside on the ground that the sale was for medicinal purposes. See also *People v. Safford*, 5 Den. (N. Y.) 112.

**Liquor "Purchased" but Not "Sold" for Medicinal Purposes.** — Even where the view stated in the text prevails, a person should be convicted of making an illegal sale where it appears that the liquor was purchased for medicinal purposes, but that it was not sold for that purpose. *Leppert v. State*, 7 Ind. 300.

**Question for Jury.** — Whether a sale was or was not for a medicinal purpose is a question for the jury. *Mitchell v. State*, 63 Ind. 574.

**1. View that Sales for Medicinal Purposes Cannot Be Made Without License — Alabama.** — *Carson v. State*, 69 Ala. 236; *Carl v. State*, 89 Ala. 93; *Thomason v. State*, 70 Ala. 20.

*Arkansas.* — *Flower v. State*, 39 Ark. 210; *State v. Butcher*, 40 Ark. 362; *Chew v. State*, 43 Ark. 361; *Woods v. State*, 36 Ark. 36; *Battle v. State*, 51 Ark. 97.

*Connecticut.* — *State v. Gray*, 61 Conn. 39.

*Georgia.* — *Gault v. State*, 34 Ga. 533; *Chapman v. State*, 100 Ga. 311.

*Maine.* — *State v. Brown*, 31 Me. 522; *State v. Hall*, 39 Me. 107.

*Massachusetts.* — *Com. v. Kimball*, 24 Pick. (Mass.) 366; *Com. v. Sloan*, 4 Cush. (Mass.) 52.

*Ohio.* — *Schaffner v. State*, 8 Ohio St. 642.

*South Carolina.* — *State v. Thornburg*, 16 S. Car. 482.

*Tennessee.* — *Philips v. State*, 2 Yerg. (Tenn.) 458; *The Druggist Cases*, 85 Tenn. 449.

*Vermont.* — *State v. Chandler*, 15 Vt. 425.

*Wisconsin.* — *State v. Downer*, 21 Wis. 274; *State v. Gummer*, 22 Wis. 441.

**2. Chipman v. People**, 24 Colo. 520; *Wright v. People*, 101 Ill. 126; *Noecker v. People*, 91 Ill. 494; *State v. Bissell*, 67 Iowa 616; *Salina v. Seitz*, 16 Kan. 143; *Warwick v. Rounds*, 17

*Neb.* 412; *Brown v. State*, 9 Neb. 189; *State v. Cloyd*, 34 Neb. 600.

**3. Clubs Organized to Evade Liquor Laws — Sales Without License.** — *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21; *State v. Mercer*, 32 Iowa 405; *Com. v. Ewig*, 145 Mass. 119; *Com. v. Smith*, 102 Mass. 144; *State v. Tindall*, 40 Mo. App. 271; *People v. Andrews*, 115 N. Y. 427, reversing 50 Hun (N. Y.) 591; *Com. v. Brem*, 5 Pa. Super. Ct. 104; *Klein v. Livingston Club*, 177 Pa. St. 224, 55 Am. St. Rep. 717; *Com. v. Tierney*, 148 Pa. St. 552; *Winters v. State*, 33 Tex. Crim. 395; *Koenig v. State*, 33 Tex. Crim. 367. See also *Boldt v. State*, 72 Wis. 7.

**4. Evasion of Local Option Law.** — *Krnavek v. State*, 38 Tex. Crim. 44; *Sutton v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 501; *Arnold v. State*, 38 Tex. Crim. 1.

**5. Evasion of Prohibition Law.** — *State v. Horacek*, 41 Kan. 87.

**6. Who Are Punishable for Making Sales.** — *Marmont v. State*, 48 Ind. 21; *State v. Horacek*, 41 Kan. 87; *Com. v. Ewig*, 145 Mass. 119; *State v. Tindall*, 40 Mo. App. 271; *People v. Andrews*, 115 N. Y. 427, reversing 50 Hun (N. Y.) 591; *Com. v. Tierney*, 148 Pa. St. 552; *Krnavek v. State*, 38 Tex. Crim. 44.

**7. Sales to Persons Not Members Illegal.** — *Pendennis Club v. Louisville*, 7 Ky. L. Rep. 831; *Com. v. Pomphret*, 137 Mass. 569.

**8. Responsibility of Club Member for Payment.** — *Pendennis Club v. Louisville*, 7 Ky. L. Rep. 831.

**9. Status of Club Whose Constitution Permits Sales to Persons Not Members.** — *University Club v. Ratterman*, 3 Ohio Cir. Ct. 18, 2 Ohio Cir. Dec. 11.

**Sales at Picnic by Member of Club.** — The sale at a picnic by a member of a club to other persons and members, of tickets exchangeable for beer, is indictable as a sale without license. *Com. v. Loesch*, 153 Pa. St. 502.



c. FURNISHING OF LIQUORS BY BONA FIDE SOCIAL CLUBS TO MEMBERS — (1) *Where There Is No Legislation Specially Mentioning Clubs* — (a) **View that Clubs May Furnish Members with Liquor.** — As was intimated at the beginning of this section, there is much difference of opinion as to the status of a *bona fide* social club under the liquor laws in the matter of distributing intoxicating liquors to its members. The rule deducible from a number of decisions is that where a club is organized in good faith for social purposes, with a limited and selected membership, and in which the furnishing of intoxicating liquors is without profit to the club and merely incidental to the main purpose of its organization, such furnishing will not constitute a "sale" within the meaning of statutes prohibiting sales without a license<sup>1</sup> or on Sunday,<sup>2</sup> or requiring the payment of a privilege tax as a retail liquor dealer,<sup>3</sup> and that the house occupied by such a club is not one for retailing intoxicating liquors and a public house under a statute prohibiting the playing of cards at such places.<sup>4</sup>

(b) **View that Clubs Cannot Furnish Liquor to Members.** — Contrary to the doctrine laid down in the preceding subdivision of this section it is held in many decisions that the furnishing of intoxicating liquors by a *bona fide* social club, although this be merely incidental to the general purposes of its organization and without profit to the club, is a sale within the meaning of the statutes requiring licenses for the sale of intoxicating liquors<sup>5</sup> or prohibiting sales

1. **Furnishing to Members Not Within License Laws** — *England*. — *Graff v. Evans*, 8 Q. B. D. 373 (the leading case on this subject).

*Maryland*. — *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419.

*Massachusetts*. — *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *Com. v. Smith*, 102 Mass. 144; *Com. v. Ewig*, 145 Mass. 119.

*Missouri*. — *State v. St. Louis Club*, 125 Mo. 308.

*Montana*. — *Barden v. Montana Club*, 10 Mont. 330, 24 Am. St. Rep. 27.

*New York*. — *People v. Hamilton*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 11; *People v. Adelphi Club*, 149 N. Y. 5, 52 Am. St. Rep. 700 [*distinguishing* *People v. Andrews*, 115 N. Y. 427; and *overruling* *People v. Sinell*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 40; *People v. Bradley*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 562; and *People v. Luhrs*, (Ct. Sess.) 7 Misc. (N. Y.) 503, 79 Hun (N. Y.) 415].

*Pennsylvania*. — *Klein v. Livingston Club*, 177 Pa. St. 224, *affirming* 5 Pa. Dist. 85; *Com. v. Smith*, 2 Pa. Super. Ct. 474.

*South Carolina*. — *State v. McMaster*, 35 S. Car. 1, 28 Am. St. Rep. 826.

*Texas*. — *State v. Austin Club*, 89 Tex. 20.

*Virginia*. — *Piedmont Club v. Com.*, 87 Va. 540.

**Proprietary Clubs and "Members' Clubs" Distinguished.** — In the case of a members' club the property is in the members themselves. In the case of a proprietary club the property is in the proprietary company. A sale, therefore, to a member of a proprietary club without a license is unlawful. *Bowyer v. Percy Supper Club*, (1893) 2 Q. B. 154, in which case the reviewing court said: "I am wholly unable to see any distinction in principle between this case and the case of a friendly society arranging with the landlord of a public house that they should have the use of a room in the public house on certain occasions and be supplied by him with liquors."

2. **Not Within Sunday Closing Laws.** — *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419.

3. **Not Within Statute Requiring Payment of Privilege Tax.** — *People v. Hamilton*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 11; *Tennessee Club v. Dwyer*, 11 Lea (Tenn.) 452, 47 Am. Rep. 298.

4. **Club House Not House for Retailing Liquors.** — *Koenig v. State*, 33 Tex. Crim. 367, 47 Am. St. Rep. 35; *Winters v. State*, 33 Tex. Crim. 395.

**Keeping by Member for His Own Use.** — The keeping of intoxicating liquors at the club house, by a member, for his own individual use, is not a violation of the *South Carolina* Dispensary Act, making it punishable for any person by himself or others to keep a club or other place where liquors are received or kept for use or to barter or sell them as a beverage. *Donald v. Scott*, 76 Fed. Rep. 554.

5. **Sales Held in Violation of License Law** — *Alabama*. — *Martin v. State*, 59 Ala. 34.

*District of Columbia*. — *Army, etc., Club v. District of Columbia*, 8 App. Cas. (D. C.) 544.

*Mississippi*. — *Nogales Club v. State*, 69 Miss. 218.

*New Jersey*. — *Newark v. Essex Club*, 53 N. J. L. 99.

*New York*. — *People v. Luhrs*, (Ct. Sess.) 7 Misc. (N. Y.) 503; *People v. Bradley*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 594; *People v. Sinell*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 40. These decisions, as shown in the preceding subdivision of this section, are *overruled* in *People v. Adelphi Club*, 149 N. Y. 5, 52 Am. St. Rep. 700.

*North Carolina*. — *State v. Neis*, 108 N. Car. 787.

*Ohio*. — *University Club v. Ratterman*, 3 Ohio Cir. Ct. 18, 2 Ohio Cir. Dec. 11.

*Pennsylvania*. — *Com. v. Steffner*, 2 Pa. Dist. 152; *Erie Licenses*, 4 Pa. Dist. 167. These decisions are *overruled* in *Klein v. Livingston Club*, 177 Pa. St. 224, 55 Am. St. Rep. 717.

*West Virginia*. — *State v. Shumate*, 44 W. Va. 490.

**Liability of Club for Acts of Steward.** — In *Newman v. Jones*, 17 Q. B. D. 132, the appellants,



within local option districts<sup>1</sup> or requiring that tippling houses shall be closed on Sunday.<sup>2</sup> So it has been held that furnishing liquors by a club to its members renders it liable to taxation under a state<sup>3</sup> or federal<sup>4</sup> statute imposing a tax on retail dealers in intoxicating liquors. It has been held, however, that a city has no power to impose such an ordinance where the statute merely provides that municipal corporations shall have power "to grant licenses to retail spirituous liquors \* \* \* to keepers of drinking saloons and eating houses, apart from taverns."<sup>5</sup> A license tax may be collected from a *bona fide* club which furnishes liquors to its members without profit where a statute requires licenses from those "selling or giving away, or otherwise disposing of," intoxicating liquors.<sup>6</sup> Such a club keeping intoxicating liquors to be sold to its members may be prosecuted for unlawfully keeping with intent to sell, under a statute providing that no corporation or association shall deposit or have in its possession any intoxicating liquors with intent to sell them or give them away at its place of business, and that the members of a corporation or association so doing shall be liable and shall suffer imprisonment.<sup>7</sup>

(2) *Under Statutes Containing Provisions Specially Mentioning Clubs.*—Where a club buys liquor in large quantities and supplies it to members, no member being allowed to drink without paying directly out of his individual means to the club the price charged, there is a selling by retail within an ordinance requiring a license of every club-house and clubroom wherein liquor is sold by retail.<sup>8</sup> It has also been held that a statute providing that "all buildings or places used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquors to their members or others shall be deemed common nuisances," applies to a building used by an incorporated club to procure for and dispense to its members intoxicating liquors bought for and belonging to them individually.<sup>9</sup>

21. *Sales within Prohibited Distance of Churches, Schools, etc.* — *a. CHURCHES AND SCHOOLS.* — In many jurisdictions statutes have been enacted making it an offense to sell intoxicating liquors within a designated distance from churches and schools.<sup>10</sup>

*Churches.* — A building used primarily as a school, but where preaching is occasionally permitted, in accordance with the terms of the deed by which the building was conveyed, is not a church within the meaning of statutes of this character.<sup>11</sup> Nor is a mission, not connected with any church, devoted to the reformation of fallen women, a church;<sup>12</sup> nor a building in process of erection

who were trustees and members of the managing committee of a club, were convicted under the licensing acts for selling liquor without a proper license to persons not members of the club. It appeared that the liquor was sold in the club premises by the steward of the club, who in selling it acted contrary to the orders of the appellants and without their knowledge and consent. The money which he received for the liquors was paid by him to the account of the club. It was held that the appellants were not, under the circumstances, responsible for the acts of the steward.

1. *Sales Held in Violation of Local Option Law.* — *State v. Easton Social, etc., Club*, 73 Md. 97; *State v. Lockyear*, 95 N. Car. 633, 59 Am. Rep. 287; *Krnavek v. State*, 38 Tex. Crim. 44 [*distinguishing Koenig v. State*, 33 Tex. Crim. 367, 47 Am. St. Rep. 35; *Winters v. State*, 33 Tex. Crim. 395; *State v. Austin Club*, 89 Tex. 20, cited in the preceding subdivision of this section].

2. *Sales Held in Violation of Sunday Law.* — *Mohrman v. State*, 105 Ga. 709.

3. *Liability to Taxation* — *State Statute.* — *People v. Soule*, 74 Mich. 250.

4. *Federal Statute.* — *U. S. v. Wittig*, 2 Lowell (U. S.) 466.

5. *State v. McMasters*, 35 S. Car. 1, 28 Am. St. Rep. 826.

6. *License Tax.* — *State v. Boston Club*, 45 La. Ann. 585.

7. *Chesapeake Club v. State*, 63 Md. 446.

8. *Kentucky Club v. Louisville*, 92 Ky. 309.

9. *Nuisances.* — *Com. v. Baker*, 152 Mass. 337. See also *Com. v. Fleckner*, 167 Mass. 13.

10. Under section 43 of the *New York Excise Law*, as amended by Laws 1893, c. 480, § 11, no person could be licensed to keep a saloon within two hundred feet of a school or church, except one who had been licensed for that purpose and at that place previous to its passage, and whose license was in force when the law was enacted. *People v. Murray*, 148 N. Y. 171.

11. *Building Where Religious Services Are Occasionally Held.* — *State v. Midgett*, 85 N. Car. 538.

12. *Mission for Reformation of Prostitutes.* — *People v. Dalton*, (C. Pl. Spec. T.) 9 Misc. (N. Y.) 249.



to be used as a church.<sup>1</sup> If the statute names a particular church within a certain distance of which sales are prohibited, the removal of the church does not render the statute inoperative;<sup>2</sup> and if two churches are named, a sale not within the prohibited distance from one of the churches, but within the prohibited distance from the other, will be unlawful.<sup>3</sup>

**Schools.** — If a statute forbids sales of intoxicating liquors within a designated distance from an educational institution, a license to sell within that territory is void and affords no protection to a person making sales therein.<sup>4</sup> If a particular school is named in the statute, the prohibition therein contained is not affected by the destruction of the school.<sup>5</sup> So a sale during vacation will be a violation of the statute if it contains no exceptions in favor of such sales;<sup>6</sup> and a sale on a steamboat plying on a waterway of the state, if within the distance prohibited by statute, is punishable.<sup>7</sup> The school must belong to one of the classes or grades of schools indicated in the prohibiting act.<sup>8</sup> If it is made an offense to erect any stand or place of business for the sale of liquors within a designated distance of a schoolhouse, to sell within the prohibited limits is not an offense unless the seller erects a stand or place of business for this purpose.<sup>9</sup> If a statute provides that no license shall be granted for the sale of intoxicating liquors in any building on the same street within

**1. Unfinished Building to Be Used as Church.** — *People v. Lammerts*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 343.

**Camp Meetings.** — Where a statute makes it an offense for any one without permission of those in charge of a camp meeting to establish any place for vending provisions, refreshments, or intoxicating liquors within a mile of such meeting, but provides that any one who has his regular place of business within such limits shall not be required to suspend his business, the proviso is not intended to be limited to those who might have a business within the prescribed limits at the time when the act was passed, but applies equally to all who may in good faith establish a place of business therein at any time when no camp meeting is in progress. Nevertheless, a person cannot, on the eve of a meeting being held, establish a place for the sale of the prohibited articles for a short period or during the session of the meeting and claim protection under the proviso. *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580.

**2. Removal of Church — Effect on Operation of Statute.** — *State v. Eaves*, 106 N. Car. 752, in which case the court took the view that the object of the statute was to protect the people in the vicinity of the church as well as the church. The court said: "The test is, what spot was designated by the legislature as the point from which the territory exempted is to be measured, and no one except the legislature can change or repeal the statute."

**3. Prohibition Against Selling in Vicinity of Two Churches — Construction.** — *Carlisle v. State*, 91 Ala. 1.

**Effect of Local Option Election in Favor of License.** — Where a local option law provides that an election in favor of license shall not affect localities in which the sale of liquor is prohibited by law, a local option election in favor of license in a town situated within two miles of a church does not affect the operation of a statute which forbids sales within two miles of such church. *State v. Hollingsworth*, 100 N. Car. 535.

**How Distance Estimated.** — See *St. Thomas' Church v. Board of Excise*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 831; *Butler v. State*, 89 Ga. 821.

**4. Educational Institutions — Invalidity of License to Sell within Prohibited Territory.** — *Blackwell v. State*, 36 Ark. 178; *Com. v. Whelan*, 134 Mass. 206.

**What Is Building Occupied Exclusively as Schoolhouse.** — A building which is used for a parochial school, but which is also the place of residence of the teachers and persons in charge and of the members of the order by whom the building is owned and equipped, is "occupied exclusively as a \* \* \* schoolhouse," within a statute prohibiting the licensing of a saloon within a designated distance of a building so used. *People v. Murray*, 148 N. Y. 171.

**5. Prohibition Against Selling in Vicinity of Particular School.** — *Love v. Porter*, 93 Ala. 384; *State v. Edwards*, 47 La. Ann. 688.

**6. Sales During Vacation Not Protected.** — *Tillery v. State*, 10 Lea (Tenn.) 35.

**7. Sales on Steamboats.** — *Boyd v. State*, 12 Lea (Tenn.) 687.

**8. School Must Be Within Prohibited Class.** — *Blackwell v. State*, 36 Ark. 178, in which case it was held that a common school is not within the meaning of a statute forbidding the sale of intoxicating liquors within three miles of an academy, college, university, or institute of learning, though in a building under lease from the trustees of an academy or university or institute of learning.

**Sales by Manufacturers.** — Where a statute makes it unlawful for any person to sell intoxicating liquors within four miles of an incorporated institution of learning, but provides that the act shall not apply to sales by manufacturers in wholesale packages or quantities, it is unlawful for manufacturers to sell for purposes of consumption within four miles of an incorporated institution of learning. *State v. Tarver*, 11 Lea (Tenn.) 658; *Harrison v. State*, 96 Tenn. 548.

**9. Erecting Stand Within Prohibited Distance.** — *State v. Sowers*, 111 N. Car. 685.



a designated distance of a school building, a schoolhouse facing upon a lot abutting upon a street, but which does not itself abut upon the street, must be taken to be upon the street or streets from which it has entrances and with which it is connected by the use of it as a schoolhouse.<sup>1</sup> If the entrances to a schoolhouse are from two streets, it is on both streets within the meaning of the statute.<sup>2</sup>

*b. PUBLIC BUILDINGS AND INSTITUTIONS.*—The statutes frequently prohibit the sale of intoxicants within specified distances from public or state buildings, hospitals or asylums, fairs, parks, and other places or institutions. Examples of the construction of such provisions are given in the notes.<sup>3</sup>

*Place Where Railroad Is Being Constructed.*—A statute making it an offense to sell intoxicating liquors within a designated distance of the located line of a railroad "during the construction of the said road" applies only to that part of the road actually undergoing construction.<sup>4</sup>

*Carrying Intoxicating Liquors to Church.*—A statute which prohibits carrying to a church or other place where the people have assembled for divine worship any liquor or intoxicating drink is violated when one attending such exercises at a church has in his buggy a bottle containing whiskey, and the buggy is left standing within one or two hundred yards of the church building during the exercises. It cannot be urged as defense that the liquor was carried there to be used by the wife of the person carrying it in case of a sudden attack of illness.<sup>5</sup>

**22. Selling or Giving Away Intoxicating Liquors in House of Ill Fame.**—Where a statute imposes a penalty for selling or giving away intoxicating liquors in a house of ill fame, and further provides that any judgment therefor

1. *Com. v. Jenkins*, 137 Mass. 572, holding that an entrance to a cellar of a school building, across the engine-house lot thereof, used only by the janitor, is not such connection with the street on which the lot abuts that the schoolhouse can be said to be on that street. See *Com. v. Heaganey*, 137 Mass. 574.

*Boarding Up Entrance on Street.*—The situation of a building on a street cannot be changed by boarding up the door and window upon such street. *Com. v. Whelan*, 134 Mass. 206.

*How Distances Estimated.*—See *State v. Greenway*, 92 Iowa 472; *Com. v. Jones*, 142 Mass. 573; *In re Liquor Locations*, 13 R. I. 736.

2. *Com. v. Heaganey*, 37 Mass. 574.

3. *Courthouse.*—If it is made an offense to sell intoxicating liquors within a designated distance of a courthouse, a license to sell in that territory is void and affords no protection to the seller. *State v. Witter*, 107 N. Car. 792.

*State Prisons, Insane Asylums, etc.*—It is competent for a legislature to prohibit the sale of intoxicating liquors within certain distances from a state prison, insane asylum, or the state university, if in its opinion the well-being of the youth being educated at the university, or the discipline and reformation of convicts, or the health of the insane will be thereby promoted or preserved. *Ex p. McClain*, 61 Cal. 436, 44 Am. Rep. 554.

*Soldiers' Homes.*—Where a person is indicted under a statute prohibiting the sale of intoxicating liquors within one and a half miles outside of the boundary line of the lands occupied by a national home for disabled volunteer soldiers, it is not error to admit parol evidence of an officer and of one of the managers of the institution to prove the existence of such

national home, its occupation by disabled volunteer soldiers of the United States, and the boundary line of its lands. *Driggs v. State*, 52 Ohio St. 37.

As to measurement of distance, see *U. S. v. Johnson*, 12 App. Cas. (D. C.) 92.

*Parks.*—The maintenance of a place within a designated park for the sale of intoxicating liquors is not prohibited by a statute which provides that no place for the sale of intoxicating liquors shall be maintained "within a district embraced within the limits of eight hundred feet outside of the out boundary" of such park. *State v. Schweickardt*, 109 Mo. 496.

*Fairs.*—A statute which makes it unlawful to sell intoxicating liquors within two miles of the place where any agricultural fair is being held applies not only during the hours in which the gates of the grounds are open for the admission of the public, but during the entire time from the opening of the fair until its close. *Theis v. State*, 54 Ohio St. 245. See also the title *AGRICULTURAL SOCIETIES*, vol. 2, p. 24.

4. *Place Where Railroad Is Being Constructed.*—*State v. Hampton*, 77 N. Car. 526.

*Prohibition Against Selling Unless "Licensed by the State."*—On a prosecution under a statute making it an offense to sell intoxicating liquors within three miles of a designated railroad, during the period of its construction, "unless licensed by the state," it is a complete defense to show a license granted by the county commissioners of the county in which the selling takes place, as the commissioners are the agents of the state for that purpose. *State v. Dobson*, 65 N. Car. 346.

5. *Bice v. State*, 109 Ga. 117.



shall be a lien on the property where the liquor is sold or given away, there is no lien for the statutory penalty on leased premises used as a house of ill fame and where intoxicating liquors are sold or given away, unless the property is leased to be used as a house of ill fame or unless the owner has knowledge that it is being so used.<sup>1</sup>

**23. Giving or Furnishing Intoxicating Liquor in Theatres.** — A statute which prohibits giving or furnishing liquors in theatres or in "any apartment opening into the same" is violated where the owner maintains a bar in an adjoining building connected with a winerom by stairs and furnishes his guests with tickets by which they obtain liquor in the winerom.<sup>2</sup>

**24. Selling Intoxicating Liquor to Be Drunk on Premises** — *a.* **DRINKING ON PREMISES NOT ELEMENT OF OFFENSE.** — In a number of jurisdictions the statutes variously provide that it shall be an offense to sell intoxicating liquors to be drunk "on," "on or about," or "in or upon" the premises where sold, without first obtaining a license therefor or under a license which does not authorize sales of that character. To constitute this offense it is not necessary that the liquors should have been drunk on the premises, or that they should have been drunk at all. If sold with the intent that the liquors should be drunk on the premises, the offense is complete.<sup>3</sup>

*b.* **NECESSITY OF INTENT THAT LIQUORS BE DRUNK ON PREMISES.** — According to the decisions of one state it is no defense that the liquors were drunk on the premises without the defendant's knowledge and against his directions.<sup>4</sup> But the weight of authority is against this holding. The sale must be made with intent that the liquors sold shall be drunk on the premises.<sup>5</sup>

*c.* **SALE IN WHAT QUANTITY VIOLATION OF LAW.** — If the statute does not specify the quantity or amount of liquor, the sale of any quantity of liquor to be drunk on the premises will constitute the offense.<sup>6</sup> If, however, the statute prohibits selling in designated quantities, a sale of the prohibited quantity must be shown.<sup>7</sup>

1. *State v. Maloney*, 6 Ohio Dec. 209, 4 Ohio N. P. 197.

2. "Apartment" Opening into Theatre. — *State v. White*, 7 Baxt. (Tenn.) 158. This statute provided that on a second conviction the license of the theatre should be revoked. *Thompson v. State*, 7 Coldw. (Tenn.) 553.

**What Is Place of Amusement.** — The words "other place of amusement," in the *Pennsylvania* statute prohibiting sales of intoxicating liquors at theatres, circuses, and any "other place of amusement," refer to amusements of a character kindred to theatres, circuses, and museums. They do not include beer gardens where there is music and where refreshments are served. *Com. v. Mehler*, 45 Leg. Int. (Pa.) 55; *Hastings's Case*, 39 Leg. Int. (Pa.) 440; *Gable's Case*, 3 Kulp (Pa.) 204. But compare *Gartenstein's License*, 15 Pa. Co. Ct. 612, 4 Pa. Dist. 37, in which case it was held that a hall containing a stage whereon a nightly programme of vocal and instrumental music is rendered, and where dancing is permitted (admission thereto being free to both sexes, and the programme being changed weekly), is a "place of amusement," within the Act of 1881 prohibiting the sale of liquor in such a place.

3. **Unnecessary that Liquors Be Drunk on Premises.** — *Eisenman v. State*, 49 Ind. 511; *Com. v. Luddy*, 143 Mass. 563; *Sanderlin v. State*, 2 Humph. (Tenn.) 318. But see *Gulick v. State*, 50 N. J. L. 468, where the contrary was held under a statute making it unlawful to sell without license liquor in smaller quanti-

ties than a quart, "if the same is drunk on or about the premises."

**Sale of Liquor as Medicine.** — A druggist's license, though authorizing sales of intoxicating liquors for medicinal purposes, does not authorize a sale as medicine of intoxicating liquor to be drunk on the premises. *Com. v. Frost*, 155 Mass. 273.

**Exemptions under Merchant's License.** — Where a person kept a few goods in his shop, for the purpose of protecting himself against the statute against tippling shops, and it appeared that his principal business was selling liquor and that the liquor was drunk on the premises, it was held that he did not come within the proviso of the statute which excepted merchants who sell liquor to be used off their premises. *Com. v. McGeorge*, 9 B. Mon. (Ky.) 3.

4. **Intent Held Unnecessary.** — *Whaley v. State*, 87 Ala. 83; *Jones v. State*, 96 Ala. 56.

5. **Intent Held Necessary.** — *O'Connor v. State*, 45 Ind. 347, 354; *Excise Com'rs v. Merchant*, 103 N. Y. 143, 57 Am. Rep. 705; *Sanderlin v. State*, 2 Humph. (Tenn.) 315; *Scott v. State*, 25 Tex. Supp. 168; *Cochran v. State*, 26 Tex. 678. See also *Rater v. State*, 49 Ind. 507; *Wood v. State*, 9 Ind. App. 42; *Com. v. Chaney*, 148 Mass. 6; *Moore v. State*, 12 Ohio St. 387.

6. **Quantity Not Designated by Statute.** — *Morris v. State*, 47 Ind. 503; *Schlicht v. State*, 56 Ind. 173; *Schilling v. State*, 116 Ind. 210.

7. **Quantity Designated by Statute.** — *State v. Brosius*, 39 Mo. 534; *Tagan v. State*, 47 N. J.



*d. CONSTRUCTION OF TERMS "ON," "ON OR ABOUT," "ADJACENT," "PREMISES," ETC.* — Where the prohibition of the statute is against selling intoxicating liquors to be drunk "on," "at," or "in" the premises, it is necessary, to constitute the offense, that the liquors be drunk in some place over which the defendant has the legal right to exercise authority or control;<sup>1</sup> but where the statute uses the term "on or about" or "adjacent" it has been held that to constitute the offense it is not necessary that the defendant have the legal right to exercise authority or control of the premises where the liquor is drunk.<sup>2</sup>

**25. Sales Without Giving Bond.** — The statutes governing the licensing system usually require the applicant for a license to give bond conditioned for the proper observance of their requirements, for the payment of costs arising from prosecutions for a violation thereof, and for the payment of fines and penalties which may be imposed in such prosecutions. It is well settled that the giving of such bond is an essential condition precedent to the validity of the license, and a license granted without it furnishes no protection to the licensee.<sup>3</sup> The same is true where a bond insufficient for any reason is given;<sup>4</sup> and one who sells without having given bond is liable to the statutory penalties although he sells merely as agent or servant of the owner.<sup>5</sup>

**26. Selling Without Having Paid Occupation Tax or Posted Receipt.** — Where a statute requires the payment of an occupation tax and the posting of the receipt therefor in the place where the business is conducted, no sales can be legally made without first complying with these requirements.<sup>6</sup> To make out a violation of this requirement proof of the specific sales is not required.<sup>7</sup>

**27. Violation of Statute Requiring Keeping of Statement and Making Report of Manufacture and Sale.** — Where a statute concerning the manufacture and sale of spirituous and intoxicating liquors requires among other things the keeping

L. 175; *Herrman v. Pratt*, 52 N. J. L. 306. See also *Boyle v. Com.*, 14 Gratt. (Va.) 674.

**1. Constructions of Words and Phrases in Statutes.** — *Downman v. State*, 14 Ala. 242; *Swan v. State*, 11 Ala. 594; *Compher v. State*, 18 Ind. 447; *State v. Brosius*, 39 Mo. 534. See also the definitions *ADJACENT*, vol. 1, p. 633; *APPURTENANCE* — *APPURTENANT*, vol. 2, p. 520; *AT*, vol. 3, p. 167; *HOUSE*, vol. 15, p. 767; *IN*, vol. 16, p. 123.

**What Are Premises under Statutes.** — See *Cross v. Watts*, 13 C. B. N. S. 239, 106 E. C. L. 239; *Deal v. Schofield*, 8 B. & S. 760; *Swan v. State*, 11 Ala. 594; *Pearce v. State*, 40 Ala. 720; *Moore v. State*, 12 Ohio St. 387.

**What Are "Appurtenances" of Premises.** — See *Stockwell v. State*, 85 Ind. 522.

**Construction of Word "House."** — See *Schilling v. State*, 116 Ind. 200.

**2. "On or About" — "Adjacent."** — *Whaley v. State*, 87 Ala. 83; *Brown v. State*, 31 Ala. 353; *Christian v. State*, 40 Ala. 376; *Powell v. State*, 63 Ala. 177; *Patterson v. State*, 36 Ala. 297; *Easterling v. State*, 30 Ala. 46; *Banda-low v. People*, 90 Ill. 218; *Varble v. Com.*, 3 Ky. L. Rep. 694. See also *Daly v. State*, 33 Ala. 431.

**3. Sales Without Giving Bond.** — *Houser v. State*, 18 Ind. 106; *State v. Shaw*, 32 Me. 570; *Com. v. Welch*, 144 Mass. 356; *People v. Foster*, 64 Mich. 715; *People v. De Groot*, 111 Mich. 245; *State v. O'Connor*, 65 Mo. App. 325; *State v. Fisher*, 33 Wis. 155; *State v. Ludington*, 33 Wis. 107.

**4. Insufficient Bond.** — *Wolcott v. Judge*, 112 Mich. 311, holding that where the bond given was defective because one of the sureties was

disqualified, the person giving it was punishable for making sales of intoxicating liquors, although the bond was given in good faith and was sufficient in form and had been approved by the municipal authorities.

**5. Sales by Agent.** — *People v. De Groot*, 111 Mich. 245; *State v. O'Connor*, 65 Mo. App. 325.

**Sales in Places Other than Specified in Bond.** — *Laws Mich.* 1887, Act 313, § 8, prohibited the selling of liquor in any other place than specified in the dealer's bond without giving notice and filing another bond, and further provided that any sale made in violation of such section should be a misdemeanor punishable as provided in section 6 of that act. Section 6 did not provide any penalty or punishment whatever, but section 7 of the same act provided that any person engaged in business without paying the tax, executing bond, etc., should be deemed guilty of a misdemeanor. It was held that the reference in section 8 to section 6 might be regarded as surplusage, and that for a violation of section 8 a defendant might be punished under section 7. *People v. Brown*, 85 Mich. 119.

**6. Failure to Pay Tax and Post Receipt.** — *People v. Breidenstein*, 65 Mich. 65; *People v. Paquin*, 74 Mich. 35; *People v. Telford*, 56 Mich. 541; *Schwartz v. State*, 32 Tex. Crim. 387.

**7. Proof of Specific Sales Unnecessary.** — *People v. Breidenstein*, 65 Mich. 65.

**Proof of Nonpayment of Tax.** — A deputy county treasurer may testify orally to the non-payment of the liquor tax, the treasurer not being required to keep a record of those who



of a tabular statement in which shall be entered the date of each sale, the name of the purchaser, etc., there is a sufficient compliance with the law and a sale is valid if the manufacturer's or seller's books kept in the usual course of business contain the same entries as those required for the tabular statement, though not in tabular form.<sup>1</sup> In one jurisdiction it is provided by statute that druggists holding permits to sell intoxicating liquors for specified purposes shall make monthly reports of all sales made by them, to be filed among the public records of the county, and that a failure to do so shall render the seller liable to a penalty. As regards the time for filing the report the statute is regarded as mandatory, and the making of the return after the date fixed by statute will be no defense to an action for the penalty.<sup>2</sup> It has been held that the penalty provided by the statute cannot be avoided on the ground of mistake, at least in an action at law.<sup>3</sup> The statute includes sales made on prescription.<sup>4</sup> A failure to make the reports required by statute does not render the seller liable to the punishment prescribed for making illegal sales, though it subjects him to a penalty.<sup>5</sup>

**28. Furnishing Intoxicating Liquor to Constables.** — Where it is made an offense for a licensed liquor dealer knowingly to furnish liquor to any constable while on duty, knowledge on the part of the seller that the constable was on duty is an essential element of the offense.<sup>6</sup> But knowledge of a servant of the seller who commits the prohibited act is attributable to the master, and if a servant sells liquor to a constable knowing him to be on duty the master can be convicted although he had no knowledge of the act of the servant.<sup>7</sup>

**29. Giving Away Intoxicating Liquor.** — Whether a gift of intoxicating liquors is an offense depends upon the wording of the statutes. If the statute merely forbids the sale of intoxicating liquors, a gift thereof without any expectation of compensation is not punishable.<sup>8</sup> If, however, it is provided that the giv-

pay, but merely to report to the county clerk at the end of the month the number of such persons paying the tax during the preceding month. *People v. Paquin*, 74 Mich. 35.

**1. What Is Sufficient Compliance with Law.** — *Barnard v. Houghton*, 34 Vt. 264, in which case it was further held that where the form of tabular statement given in the statute contained an entry, "purpose of sale," but the tenth section of the law providing for the sale by manufacturers did not contain a provision requiring such an entry, the form contained in the statute could not be considered as adding a new requirement thereto.

**Return of Retailers by Constable.** — Where a statute requires a constable to make return of retailers of liquors, and to state whether within his knowledge there is any place within his bailiwick kept and maintained in violation of law, the word "retailers" cannot be considered with reference to druggists as such. *Com. v. Porter*, 10 Phila. (Pa.) 217, 31 Leg. Int. (Pa.) 398.

A city ordinance making it the duty of the city marshal on the first day of every month to ascertain and report to the city council the names of all persons engaged in the liquor traffic, giving their places of business, whether licensed or unlicensed, and to make complaint against all persons selling liquor without license, applies to all persons engaged in the liquor traffic, and it is the duty of the marshal to comply with the requirements of the ordinance without reference to the quantity of liquor sold at each sale by persons engaged in the traffic. *State v. Cummings*, 17 Neb. 311.

**2. Effect of Filing Report After Specified Time.**

— *State v. McEntee*, 68 Iowa 381; *State v. Chamberlin*, 74 Iowa 266. Compare *Abbott v. Sartori*, 57 Iowa 656, in which case a former statute providing for the filing of the report of sale was held to be so far directory as to authorize the filing of the return at any time before the beginning of the action.

**3. Effect of Mistake.** — *State v. Chamberlin*, 74 Iowa 266.

**4. Statute Includes Sales on Prescription.** — *State v. Chamberlin*, 74 Iowa 266.

**5. Seller Not Subject to Penalty for Illegal Sales.** — *State v. Von Haltschuberr*, 72 Iowa 541.

**Evidence.** — For the purpose of procuring an indictment against a pharmacist for maintaining a liquor nuisance, the grand jury may consider as evidence against him the monthly reports which the law requires him to file. The introduction of these reports for the purpose of obtaining an indictment does not amount to compelling the defendant to testify against himself. *State v. Smith*, 74 Iowa 580. And such evidence is competent in the prosecution of a druggist based on illegal sales. *State v. Cummins*, 76 Iowa 133; *State v. Huff*, 76 Iowa 200.

The reports are admissible without proof of the defendant's signature thereto. *State v. Thompson*, 74 Iowa 119.

**6. Knowledge that Constable Is on Duty Necessary.** — *Sherras v. De Rutzen*, (1895) 1 Q. B. 918, 64 L. J. M. C. 218.

**7. Master Liable for Acts of Servant.** — *Mullins v. Collins*, L. R. 9 Q. B. 292, 43 L. J. M. C. 67.

**8. Statutes Prohibiting Sale Do Not Include Gifts.** — *Gillan v. State*, 47 Ark. 555; *McGruder v. State*, 83 Ga. 616; *State v. Hutchins*, 74 Iowa



ing away of intoxicating liquors shall be deemed an unlawful selling, a gift as well as a sale is a punishable offense.<sup>1</sup> If a statute expressly prohibits the giving away of intoxicating liquors, one who casually finds liquor and passes it to another who drinks it is guilty of the offense prohibited.<sup>2</sup> And a statute prohibiting the giving away of intoxicating liquors applies to all persons, whether licensed or unlicensed, if not expressly limited by its terms to licensed persons.<sup>3</sup>

**30. Maintaining Place, Building, Tenement, etc., for Unlawful Keeping or Sale of Intoxicating Liquors** — *a. MAINTAINING PLACE OR BUILDING FOR UNLAWFUL KEEPING OR SALE.* — By some statutes it is made an offense to keep a "place" or a "building" for the unlawful keeping or sale of intoxicating liquors. A whole building occupied by the defendant a part of which is used in violation of the statute is a building within the meaning of the statute.<sup>4</sup> But the keeping of an apartment in a building, which apartment is held separately from the rest of the building, is not a keeping of a "building," but the keeping of a tenement.<sup>5</sup> A building in which liquors are sold although no liquors are kept therein is within the meaning of the statute.<sup>6</sup> So a person who keeps his house as a receptacle for another's liquors with intent to aid his illegal sales,<sup>7</sup> or who knowingly permits other persons to keep liquors therein for such purpose,<sup>8</sup> acts in violation of the statute although he does not himself intend to make any sale.<sup>9</sup> To constitute the offense it is not necessary

20; *State v. Cutting*, 3 Oregon 260; *Wood v. Territory*, 1 Oregon 223.

**1. Statutes Declaring that Gifts Shall Be Deemed Sales.** — *Church v. Higham*, 44 Iowa 482; *Woolheather v. Risley*, 38 Iowa 486; *Dahmer v. State*, 56 Miss. 787.

**Construction of Term "Furnish."** — See *FURNISH*, vol. 14, p. 567; *GIVE* — *GIVEN* — *GIVING*, vol. 14, p. 1070; and *supra*, this section, *Purchase for Minor by Adult*.

**Furnishing Liquor to Be Used in Another District.** — Where a statute makes it an offense for any one to sell or furnish intoxicating liquors in a certain district, a conviction may be had for furnishing a quart of whiskey to a person in that district, though it was to be used by another out of the district and though the facts did not show the sale. *Dukes v. State*, 77 Ga. 738.

**2. Statutes Prohibiting Gift.** — *State v. Gibson*, 121 N. Car. 680.

**Gift in Consideration of Other Property.** — If a statute makes it an offense to give away intoxicating liquors "in consideration of the purchase of any other property," a person cannot be convicted of an illegal gift unless it be alleged and shown that the gift was in consideration of the purchase of other property. *State v. Finan*, 10 Iowa 19.

**3. To What Persons Applicable.** — *Com. v. Heckler*, 14 Pa. Co. Ct. 465.

**4. Building Part of Which Is Used for Prohibited Purpose.** — *Com. v. Shattuck*, 14 Gray (Mass.) 23.

**Keeping Place Where Liquors Are Sold "in a Disorderly Manner."** — Under a statute making it an offense to keep a place where intoxicating liquors are sold, etc., in a disorderly manner, the words "in a disorderly manner" refer not to the place kept, but to the acts of selling, bartering, etc., at or in the place kept, and an affidavit in a prosecution under this section which fails to allege any such disorderly acts is insufficient. *Nace v. State*, 117 Ind. 114.

**Statute Forbidding Sale at Place of "Public**

**Resort."** — Where a statute provides that "no person shall sell or furnish cider \* \* \* at or in a victualling house, tavern, grocery, shop, cellar, or other place of public resort," the term "other place of public resort" means a place actually frequented and resorted to with the same freedom as a tavern, victualling house, or grocery; and a dwelling house which has become a place of public resort for the purposes only of drinking cider is within the statute. *State v. Spaulding*, 61 Vt. 505.

It has been held that the keeping of a cellar or a grocery for the unlawful sale of intoxicating liquors is the keeping of a place of public resort where intoxicating liquors are sold in violation of law. *O'Keefe v. State*, 24 Ohio St. 175.

**Place Where Intoxicating Liquors Are Reputed to Be Kept for Sale.** — Where a statute imposes a penalty on every person who shall keep a place where it is reputed that intoxicating liquors are kept for sale without license therefor, it is sufficient that the place is reputed to be one where intoxicating liquors are kept for sale, and not necessary that it be reputed that they were kept for sale without license. *State v. Buckley*, 40 Conn. 246.

**5. Apartment Held Separately from Building.** — *Com. v. McCaughey*, 9 Gray (Mass.) 296.

**6. Building Where Liquors Are Sold but Not Kept.** — *State v. Viers*, 82 Iowa 397.

**7. Building Where One Wrongfully Keeps Another's Liquors.** — *Com. v. Lynch*, 160 Mass. 298.

**8. Com. v. Reed, 162 Mass. 215; *Com. v. Hayes*, 167 Mass. 176.**

**9. Intent.** — Where a statute makes it unlawful for any person to keep a saloon or any other place where any such liquors are sold, given away, etc., the offense is complete if the facts proven justify the conclusion that the defendant kept and furnished liquors in his shop, and the intent is immaterial. *People v. Bacon*, 117 Mich. 187.

**Negating Lawful Purpose.** — In a prosecution for using a building for the purpose of



that any sale should have actually been made,<sup>1</sup> nor is it necessary that the place should be a place of "public resort."<sup>2</sup>

**b. MAINTAINING TENEMENT FOR UNLAWFUL KEEPING OR SALE.**—In some jurisdictions it is made an offense to maintain a "tenement" for the illegal keeping or sale of intoxicating liquors. A tenement, it has been held, is not necessarily an entire building. It may be the whole or part of a building,<sup>3</sup> or a single room<sup>4</sup> which might be properly called a shop,<sup>5</sup> or a cellar in a dwelling house,<sup>6</sup> or a lot of land with detached buildings upon it.<sup>7</sup> To constitute the offense it is necessary either that the defendant be the proprietor of the place in question<sup>8</sup> or be interested in the profits of the business,<sup>9</sup> or that as agent or servant he have entire control and superintendence of the place in question for some period of time, but it is immaterial how brief that period is.<sup>10</sup> One who was merely present aiding and abetting in acts of proprietorship and control cannot be convicted of maintaining a tenement.<sup>11</sup> It is not an element of the offense that there be an act of sale or offering for sale,<sup>12</sup> nor is it necessary that the place should be kept mainly for the sale of intoxicating liquors.<sup>13</sup> A building cannot be said to be used for the illegal sale of intoxicating liquors on the strength of a single casual sale made without premeditation in the course of a lawful business;<sup>14</sup> but it has been held that a conviction may be sustained on proof of three illegal sales.<sup>15</sup> If the defendant attempts to justify sales on the ground that he is duly licensed, the burden is on him to show this fact.<sup>16</sup>

**c. EVIDENCE**—(1) *Competency.*—A great variety of evidence is competent to prove a violation of the statutes making the keeping of these places for the unlawful sale of intoxicating liquors an offense. Thus on the question of intent it may be shown that the defendant made sales of intoxicating liquors;<sup>17</sup>

selling intoxicating liquors in violation of law it is not necessary for the prosecution to show that the liquors were not kept in original vessels or packages and that they were not sold for mechanical, medicinal, or sacramental purposes, as these matters are proper grounds of defense. *State v. Becker*, 20 Iowa 438.

**1. Sale Not Element of Offense.**—*State v. Estlinbaum*, 47 Kan. 293.

**2. Building Need Not Be Place of Public Resort.**—*Oshe v. State*, 37 Ohio St. 404.

**3. Tenement May Be Whole or Part of Building.**—*Com. v. Quinlan*, 153 Mass. 483; *Com. v. Lee*, 148 Mass. 8.

**4. Single Room.**—*Com. v. Godley*, 11 Gray (Mass.) 454; *Com. v. Hill*, 14 Gray (Mass.) 24.

**5. Com. v. Godley**, 11 Gray (Mass.) 454.

**6. Com. v. Welch**, 2 Allen (Mass.) 510.

**7. Land with Detached Buildings on It.**—*Com. v. Patterson*, 153 Mass. 5, in which case it was held that this constituted only one tenement.

**Personal Property May Be Tenement.**—A two-story building of five rooms which is supported by railroad sleepers, has a chimney built upon the ground, and steps from the door to the ground, and in which the defendant has lived for ten years, is a tenement. Even if personal property, it was occupied as a dwelling, and in the modern use of the word it was properly described as a tenement. *Com. v. Mullen*, 166 Mass. 377.

**Grocery Shop and Adjoining Room.**—An indictment for keeping "a certain tenement" for the illegal sale and keeping of intoxicating liquors may be sustained by proof of keeping a grocery shop and twice selling intoxicating liquors in an adjoining room in the same building. *Com. v. McArdy*, 11 Gray (Mass.) 456.

**Separate Rooms Constituting One Tenement.**—Where it appeared that the defendant occupied and controlled a room in one part of a building as a saloon and a room in another part as a living room or kitchen, and sold liquors in both of them, it was held that such use would not make separate tenements of the two rooms, and the prosecution could not be required to elect in which room the defendant's tenement was. *Com. v. Clynes*, 150 Mass. 71.

**8. Proprietor.**—*Com. v. Sisson*, 126 Mass. 48; *Com. v. Boyle*, 145 Mass. 373.

**9. Interest in Business.**—*Com. v. Jennings*, 107 Mass. 488.

**10. Of Person Having Control of Building.**—*Com. v. Kimball*, 105 Mass. 465; *Com. v. Dowling*, 114 Mass. 259; *Com. v. Burke*, 114 Mass. 261.

**11. Aider or Abettor—Liability of.**—*Com. v. Galligan*, 144 Mass. 171.

**12. Selling or Offering for Sale Unnecessary.**—*Com. v. Boyle*, 145 Mass. 373.

**13. Keeping Mainly for Illegal Sales Unnecessary.**—*Com. v. Burke*, 114 Mass. 261.

**14. Single Casual Sale Not Proof of Unlawful Keeping.**—*Com. v. Patterson*, 138 Mass. 498; *Com. v. Hayes*, 150 Mass. 506. See also *Nicholson v. People*, 29 Ill. App. 57, where it was held that the offense was not committed by a single sale made without the actual consent or permission of the keeper.

**15. Com. v. Tabor**, 138 Mass. 496.

**16. Burden of Proving License.**—*Com. v. Shea*, 115 Mass. 102; *Com. v. Kennedy*, 108 Mass. 292; *Com. v. Conneally*, 108 Mass. 480; *Com. v. Rafferty*, 133 Mass. 574.

**17. Evidence of Sales Competent.**—*State v. Estlinbaum*, 47 Kan. 291; *Com. v. Greenen*, 11 Allen (Mass.) 241; *Com. v. Higgins*, 16 Gray



that intoxicating liquors were found on the defendant's premises;<sup>1</sup> that attempts were made to secrete liquors when the premises were being searched by officers;<sup>2</sup> that people went upon the defendant's premises sober and came away drunk;<sup>3</sup> that intoxicated persons congregated near the defendant's premises;<sup>4</sup> and that the place occupied by the defendant was fitted up with the common appliances for the sale of intoxicating liquors.<sup>5</sup> The defendant's occupation of the tenement both before and after the period during which the commission of the offense is charged is competent as affording proof of his occupation during such period, but proof of the criminal use of the tenement must be confined to such period.<sup>6</sup> The record of a plea of guilty to a complaint charging the unlawful keeping of intoxicating liquors for sale at a certain time and place is competent on a trial of the same defendant for keeping and maintaining at the same time and place a tenement used for the illegal keeping of such liquors.<sup>7</sup> To show that the defendant was the keeper of the tenement in question, it may be shown that barrels of liquor bearing the defendant's name or initials arrived at a freight house and were taken off upon vehicles running to the tenement, and that he requested a witness to say nothing about his having liquors come there.<sup>8</sup> It may also be shown for this purpose that kegs bearing the defendant's name were found in the tenement.<sup>9</sup>

(2) *Sufficiency* — To Be Submitted to Jury. — It is for the court to determine

(Mass.) 19; Com. v. Dowdican, 114 Mass. 257. See also Com. v. Owens, 114 Mass. 252.

1. **Finding Liquors on Premises.** — State v. Illsley, 81 Iowa 49; Com. v. Welch, 142 Mass. 473.

**Finding Liquor in Cellar under Building.** — Where it appeared that the defendant kept a saloon containing a bar and liquors, situated "in a large block," it was held that evidence that liquor was found in the cellar "under the building," although there was no evidence that the cellar was connected with the saloon, was competent. Com. v. Pierce, 107 Mass. 487.

**Finding Liquor in Neighboring Building Belonging to Defendant.** — Where it was shown that the defendant owned a neighboring house and that he was accustomed to carry beer therefrom to the place which he was charged to be keeping for the unlawful sale of intoxicating liquors, and that men usually went into such building when he carried the beer thereto, it was held that proof that intoxicating liquors were found in such neighboring house was competent. Com. v. Lyons, 160 Mass. 174.

**Finding Liquor in Building in Rear of Dwelling House.** — Evidence is admissible to show that intoxicating liquors were found in a building in the rear of a dwelling house, in one of the rooms of which was the defendant's bar; that there was a path leading from the rear of the house to the building; and that the defendant's name was attached to one of the vessels containing liquor. Com. v. Kahlmeyer, 124 Mass. 322.

**Concealment of Liquor in Adjoining Building.** — Evidence that a tavern keeper had intoxicating liquors concealed in an outbuilding adjoining the tavern, and attempted to deceive a witness about the fact, is competent upon the issue whether he was using the tavern for the illegal sale and illegal keeping of intoxicating liquors. Com. v. Doe, 108 Mass. 418.

**Misconduct of Officer Making Search.** — The fact that intoxicating liquors were found in a tenement by an officer with a search warrant is not

rendered inadmissible as evidence, on a prosecution for keeping a tenement for the illegal sale of intoxicating liquors, by reason of the officer having misconducted himself in serving the warrant. Com. v. Welsh, 110 Mass. 359.

2. **Attempt to Hide Liquor from Officer.** — Com. v. Daily, 133 Mass. 577; Com. v. Kahlmeyer, 124 Mass. 322.

3. **Drunken People Coming Away from Premises.** — Com. v. Dowdican, 114 Mass. 257; Com. v. Higgins, 16 Gray (Mass.) 19. See also Com. v. Kennedy, 97 Mass. 224.

4. **Intoxicated Persons Congregating Near Premises.** — Com. v. Wallace, 143 Mass. 88.

5. **Appliances for Selling Liquors.** — Com. v. Higgins, 16 Gray (Mass.) 19; Com. v. Doe, 108 Mass. 418.

**A Card with the Defendant's Name and the words "dealer in imported wines and liquors," which the defendant told a witness had been printed a year before, is admissible in a prosecution for keeping a tenement for the illegal sale of intoxicating liquors.** Com. v. Twombly, 119 Mass. 104.

6. **Occupation of Tenement Before and After Offense.** — State v. Knott, 5 R. I. 293.

7. **Record of Conviction of Similar Offense.** — Com. v. Hazeltine, 108 Mass. 479.

8. Com. v. Jennings, 107 Mass. 488.

**Other Evidence to Connect Defendant with Keeping of Tenement.** — The defendant's name being Matthew F. Owens, evidence is admissible that the tenement bore a sign with the name Mattie F. Owens upon it. Com. v. Owens, 114 Mass. 252.

So evidence that the defendant had previously resided in the building, that he had it shingled a few months before the offense charged, and that he was seen in the building during the time when the liquors were alleged to have been sold, sufficiently connects him with the premises to render admissible a deed of the premises made nine years previous to one bearing the defendant's name. Com. v. Mead, 153 Mass. 284.

9. Com. v. Jennings, 107 Mass. 488.



whether there is any evidence of the offense charged. If there is, it is properly submitted to the jury to determine whether it is sufficient to make out the offense.<sup>1</sup>

**To Sustain Conviction.** — The delivery of liquor at the defendant's place; the manner in which the place is fitted up; the finding of liquors there; the number of persons about the premises and their condition; the sale of intoxicating liquors, etc., all tend to prove that the place was kept for the illegal sale of intoxicating liquors.<sup>2</sup>

**31. Maintaining Liquor Nuisances.** — Prosecutions for maintaining liquor nuisances are considered elsewhere.<sup>3</sup>

**32. Keeping Disorderly House.** — All matters relating to the keeping of disorderly houses by persons engaged in the traffic of intoxicating liquors will be found discussed in another part of this work.<sup>4</sup>

**33. Permitting Unlawful Assemblies.** — An *English* statute provides a penalty for "every person who occupies or keeps any \* \* \* place where excisable liquors are sold, \* \* \* and knowingly lodges or harbors thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein."<sup>5</sup>

**34. Permitting Drunkenness.** — Where it is made an offense for a licensed person to permit drunkenness on the licensed premises, the licensee cannot be convicted of this offense unless he knew that the person found on the premises was drunk.<sup>6</sup> Nor can he be convicted of the offense by reason of the fact that he has gotten drunk on his own premises.<sup>7</sup> Serving with drink the person found drunk on the premises is not material to the offense. No actual sale is necessary to constitute the offense of permitting drunkenness,<sup>8</sup> and the conviction may be sustained on evidence that a person who had been drinking on the premises was found drunk at some distance from them.<sup>9</sup>

**35. Permitting or Suffering Gaming in Drinking House.** — This portion of the subject has already received full treatment.<sup>10</sup>

**36. Keeping Tippling House.** — The meaning of the term "tippling house"

**1. Sufficiency of Evidence to Go to Jury.** — *Com. v. Bryan*, 148 Mass. 455.

**Evidence Held Sufficient to Be Submitted to Jury.** — See *Com. v. Lufkin*, 167 Mass. 553; *Com. v. Moore*, 147 Mass. 528; *Com. v. Hoyer*, 9 Gray (Mass.) 292.

**2. Sufficiency of Evidence to Sustain Conviction.** — *Com. v. Campbell*, 116 Mass. 32; *Com. v. Hughes*, 165 Mass. 7; *Com. v. Kinsley*, 108 Mass. 24; *Com. v. Wallace*, 143 Mass. 88.

**Evidence Held Sufficient to Connect Defendant with Keeping Tenement.** — See *Com. v. Merriam*, 148 Mass. 425; *Com. v. Sisson*, 126 Mass. 48; *Com. v. Locke*, 148 Mass. 125.

**Evidence Held Sufficient to Show Keeping Tenement for Unlawful Sale.** — See *Com. v. Conneally*, 108 Mass. 480; *Com. v. Kinsley*, 108 Mass. 24; *Com. v. Rooney*, 142 Mass. 474; *Com. v. Gayley*, 122 Mass. 334.

**3. See *supra*, this title, *Liquor Nuisances*.**

**4. See the title DISORDERLY HOUSES, vol. 9, p. 521.**

**5. English Statute.** — 32 & 33 Vict., c. 99, § 10.

On a prosecution for violating this statute it appeared that the defendant, who occupied a place where excisable liquors were sold, allowed persons to hold a meeting there for the purpose of getting up a subscription for the wife and children of a man charged with an offense or for procuring means for his defense. At the meeting there were several thieves or reputed thieves who were known by the defendant to be such, but no disorderly conduct

occurred, and the meeting was not held pursuant to any unlawful design. It was held that such meeting was in violation of the statute, as it afforded opportunity and inducement to devise crime. *Marshall v. Fox*, L. R. 6 Q. B. 370.

**Competency of Witness.** — In *Parker v. Green*, 2 B. & S. 299, 110 E. C. L. 299, 8 Jur. N. S. 409, it was held that a prosecution under the statute 9 Geo. IV., c. 61 (which was similar in tenor to the one set out in the text hereto), was a criminal proceeding, and therefore the defendant was not competent as a witness.

**6. Permitting Drunkenness — Knowledge as Element of Offense.** — *Somerset v. Wade*, (1894) 1 Q. B. 574.

**7. Getting Drunk on One's Own Premises.** — *Warden v. Tye*, 35 L. T. N. S. 852, 46 L. J. M. C. 111; *Lester v. Torrens*, 2 Q. B. D. 403, 46 L. J. M. C. 280.

**8. Furnishing with Liquor Unnecessary.** — *Hope v. Warburton*, (1892) 2 Q. B. 134.

**9. Evidence Sufficient to Sustain Conviction.** — *Ethelstane v. Oswestry*, 33 L. T. N. S. 339.

**Effect of Statute Making It Offense to Sell to Drunken Person.** — Where a licensed person sells intoxicating liquor to a drunken person he may be convicted of the offense of permitting drunkenness although the same act is punishable under another statute making it an offense to sell intoxicating liquors to a drunken person. *Edmunds v. James*, 61 L. J. M. C. 56.

**10. See the titles GAMING, vol. 14, p. 675 *et seq.*; GAMING HOUSES, vol. 14, p. 699 *et seq.***



varies somewhat because of the difference in the wording of the statutes making it an offense to keep such a house, but in general it may be defined as a building or room in which intoxicating liquors are habitually sold in small quantities to be drunk on the premises.<sup>1</sup> According to this definition it is an element of the offense of keeping a tippling house that the liquor should be drunk on the premises, and it is believed that the decisions, without exception, sustain this view.<sup>2</sup> It is also a necessary element under most statutes that the sale should be made by a person having no license.<sup>3</sup> So it has been held an element of the offense that the retailing of intoxicating liquors should be in a house kept by the defendant for that purpose.<sup>4</sup> And it would seem that the liquor must be bought at the place where it is drunk.<sup>5</sup> The definition of the term given necessarily implies that more than one sale is necessary, and it has been so held.<sup>6</sup> But to prove the offense evidence of a single sale is competent although not conclusive proof of keeping a tippling house.<sup>7</sup> It is also an element of the offense that the sale be in quantities prohibited by the statutes.<sup>8</sup> Disorderly conduct in the premises where the liquor is sold is not an element of the offense.<sup>9</sup> A house may be a liquor shop although the proprietor may have combined with liquor selling the sale of other articles.<sup>10</sup>

**37. Keeping Intoxicating Liquors for Unlawful Sale — a. NATURE AND ELEMENTS OF OFFENSE.** — In a number of jurisdictions it is made an offense to keep intoxicating liquors with intent to sell them unlawfully.<sup>11</sup>

**Nature of Offense.** — This offense is a continuing one which may extend over

**1. Tippling House Defined.** — *Yankton v. Douglass*, 8 S. Dak. 441; *Bishop on Statutory Crimes* (2d ed.), § 1065.

**Evidence to Prove Offense.** — On a trial of an indictment for keeping a tippling house at a certain time, evidence of an offense at a subsequent time is inadmissible. *Barnes v. Com.*, 2 Dana (Ky.) 388.

And it has been held that on a prosecution for keeping a tippling house testimony that intoxicating liquors had been drunk in the defendant's house more than twice does not authorize the deduction that they were drunk with his consent or were sold by him. *Lucker v. Com.*, 4 Bush (Ky.) 440.

On a prosecution for keeping a tippling house the question by whom a witness for the prosecution was employed to act as detective, is entirely irrelevant to the issue. *State v. Rollins*, 77 Me. 380.

**"Keeping Open" Tippling House.** — To constitute the keeping open of a tippling house it has been held one of the ingredients of the offense that liquor should be sold or drunk. *Fant v. People*, 45 Ill. 260. But compare the cases cited *supra*, this section, *Sales, Gifts, or Keeping Open on Prohibited Days*.

**2. Drinking on Premises Element of Offense.** — *Emporia v. Volmer*, 12 Kan. 622; *Cole v. Com.*, 8 Dana (Ky.) 31; *Herine v. Com.*, 13 Bush (Ky.) 295; *State v. Hadlock*, 43 Me. 284; *State v. Inness*, 53 Me. 536; *State v. McNamara*, 69 Me. 135; *Com. v. Dean*, 21 Pick. (Mass.) 334; *Yankton v. Douglass*, 8 S. Dak. 441.

**3. Sales Without License Element of Offense.** — *Emporia v. Volmer*, 12 Kan. 622; *Com. v. Campbell*, 5 Bush (Ky.) 311; *Com. v. Riley*, 14 Bush (Ky.) 44; *Webster v. Com.*, 7 Dana (Ky.) 215; *Our v. Com.*, 9 Dana (Ky.) 30; *Com. v. Allen*, 15 B. Mon. (Ky.) 1; *Com. v. Harvey*, 16 B. Mon. (Ky.) 2; *Com. v. Baird*, 4 S. & R. (Pa.) 141; *Dunnaway v. State*, 9 Verg. (Tenn.) 350; *Bush v. Republic*, 1 Tex. 455.

**4. Sales in House Kept for That Purpose Element**

**of Offense.** — *Our v. Com.*, 9 Dana (Ky.) 30. See also *Bush v. Republic*, 1 Tex. 455.

**5. Liquor Must Be Bought Where Drunk.** — *Dunnaway v. State*, 9 Verg. (Tenn.) 350.

**6. Plurality of Sales Necessary to Constitute Offense.** — *Woods v. Com.*, 1 B. Mon. (Ky.) 75; *Hinton v. Com.*, 7 Dana (Ky.) 216; *Dunnaway v. State*, 9 Verg. (Tenn.) 350. *Contra*, *State v. Inness*, 53 Me. 536. See also the title *DISORDERLY HOUSES*, vol. 9, p. 522.

**7. Evidence to Prove Offense.** — *Hinton v. Com.*, 7 Dana (Ky.) 216, in which case it was further held to be error to instruct the jury that the fact of selling liquor in any quantity to be drunk in the seller's house was evidence that he kept a tippling house. The court considered this instruction too broad and as having a tendency to mislead the jury.

**8. Sales in Quantity Prohibited by Statute Necessary.** — *Moore v. State*, 9 Verg. (Tenn.) 353; *Bush v. Republic*, 1 Tex. 455.

**9. Disorderly Conduct on Premises Not an Element.** — *Fant v. People*, 45 Ill. 259; *Emporia v. Volmer*, 12 Kan. 622.

**Disorderly House and Tippling Houses Distinguished.** — See *Emporia v. Volmer*, 12 Kan. 622. And see the title *DISORDERLY HOUSES*, vol. 9, p. 508.

**10. Selling Other Articles in Same Building.** — *Wooster v. State*, 6 Baxt. (Tenn.) 533.

**11. Statutory Regulations.** — See the statutes regulating the liquor traffic in *Connecticut*, *Georgia*, *Iowa*, *Maine*, *Massachusetts*, *New Hampshire*, and *Rhode Island*.

**Joint Act of Keeping.** — Where the keeping of liquors is the joint act of the defendant and another, and there is a joint intent on their part that the liquors should be sold by the latter alone in violation of law, and the keeping was to facilitate such unlawful sale, the defendant may be convicted of unlawfully keeping for sale intoxicating liquors with intent unlawfully to sell them. *Com. v. Ahearn*, 160 Mass. 300.



a long or a short period of time,<sup>1</sup> and so long as there has been no interruption there is but one keeping.<sup>2</sup> Possession of intoxicating liquors for sale constitutes the offense though only for a single occasion and for a short time.<sup>3</sup> It is to be noted that this offense is entirely distinct and separate from that of making unlawful sales. It follows, therefore, that a prosecution for keeping for unlawful sale is not barred by liability to a prosecution for unlawful selling<sup>4</sup> or by a conviction or an acquittal of a charge of making illegal sales.<sup>5</sup>

**What Constitutes Offense.** — To constitute the offense a sale is not necessary.<sup>6</sup> It is also unnecessary that the liquors should have been exposed or offered for sale. An attempt to sell is not an element of the offense.<sup>7</sup> An intent to sell unlawfully is a necessary element of the offense.<sup>8</sup> But the guilty intent necessary to constitute the offense does not necessarily include knowledge by the defendant of the intoxicating properties of the liquor kept for sale.<sup>9</sup> Ownership of the liquor is not a necessary element of the offense. It will be sufficient that the defendant is in possession and exercises control of the liquors with the intent to sell them unlawfully;<sup>10</sup> and it is not necessary to constitute the offense that the person keeping the intoxicating liquors for unlawful sale intended to make the unlawful sale himself.<sup>11</sup>

**Place of Keeping for Unlawful Sale.** — If the statute describing the offense does not contain words limiting the offense to the keeping of liquors with intent to sell them within the state, the keeping of liquors within the state will be an offense although they are kept with the intent to export them and sell them in another state.<sup>12</sup> So where a statute makes it an offense to sell intoxicating liquors within the state contrary to law, the intent need not be to sell in or from the building in which the liquors are kept.<sup>13</sup>

**Authority to Sell in Certain Places.** — If a person keeps intoxicating liquors with intent to sell them in violation of law he is punishable although he may have

1. **Keeping for Sale Continuing Offense.** — *Com. v. Finnerty*, 148 Mass. 166; *Com. v. Purdy*, 146 Mass. 138; *Com. v. Vincent*, 165 Mass. 18; *Hans v. State*, 50 Neb. 164.

2. **Keeping Without Interruption One Keeping.** — *Hans v. State*, 50 Neb. 164.

3. **Keeping on Single Occasion Offense.** — *Com. v. Cleary*, 105 Mass. 384.

4. **Liability to Prosecution for Unlawful Sales.** — *Menken v. Atlanta*, 78 Ga. 668; *Mabra v. Atlanta*, 78 Ga. 679.

5. **Conviction or Acquittal of Unlawful Selling — Effect.** — *State v. Head*, 3 R. I. 135.

6. **Sale Unnecessary.** — *Com. v. Meskill*, 165 Mass. 142; *Com. v. Tay*, 146 Mass. 146; *Com. v. Boyle*, 145 Mass. 373; *State v. McGlynn*, 34 N. H. 422.

7. **Exposure for Sale Unnecessary.** — *Com. v. Meskill*, 165 Mass. 142; *Com. v. Henderson*, 140 Mass. 303; *Com. v. Fraher*, 126 Mass. 56; *Com. v. McCue*, 121 Mass. 358; *Com. v. Tay*, 146 Mass. 146; *Com. v. Atkins*, 136 Mass. 160; *Com. v. Sprague*, 128 Mass. 75; *Com. v. Dolan*, 121 Mass. 374; *Com. v. Curran*, 119 Mass. 206; *Com. v. Peto*, 136 Mass. 155; *State v. McGlynn*, 34 N. H. 422.

8. **Intent to Sell Unlawfully Necessary.** — *Menken v. Atlanta*, 78 Ga. 668; *Com. v. Canny*, 158 Mass. 210.

**Possession with Intent to Consummate Sale Sufficient.** — *Menken v. Atlanta*, 78 Ga. 668; *Mabra v. Atlanta*, 78 Ga. 679.

9. **Knowledge of Intoxicating Properties Unnecessary.** — *Com. v. Goodman*, 97 Mass. 117; *Com. v. Savery*, 145 Mass. 212.

10. **Ownership of Liquor Unnecessary.** — *Com. v. O'Reilly*, 116 Mass. 15.

11. **Intent to Sell in Person Unnecessary.** — *State v. Kaler*, 56 Me. 88, in which case it was said that the law is violated where there is a keeping with the intent that an unlawful sale shall be made in the state by any person, or with the intent to aid or assist in such unlawful sale.

**Liability of Agent.** — A bartender employed to sell liquors may be convicted of keeping for sale. *State v. McGuire*, 64 N. H. 529.

12. **Place of Keeping for Unlawful Sale.** — *State v. Guinness*, 16 R. I. 401; *State v. Fitzpatrick*, 16 R. I. 54.

**Selling Intoxicating Liquors from Person.** — Under a statute which forbids the keeping of intoxicating liquors without specifying any particular building or locality, a person who keeps intoxicating liquors secreted on his person with intent to sell whenever he can find one willing to purchase is guilty of the offense. *State v. Harris*, 64 Iowa 288; *Com. v. Ryan*, 160 Mass. 172.

**Sales in Outhouse.** — Where an indictment or information charges one with illegally keeping intoxicating liquors in a dwelling house and its appurtenances, evidence that he kept liquors in his stable, not used in connection with the dwelling house, and that the stable was used exclusively by the defendant and the dwelling house exclusively by another person, will not support a conviction. The offense is local in its character, and the place where it is alleged that the liquors were kept must be proved as alleged. *State v. Kelleher*, 81 Me. 340.

13. **Sale in Building Where Liquors Are Kept Unnecessary.** — *State v. Viers*, 82 Iowa 397. See also *Com. v. Certain Intoxicating Liquors*, 116 Mass. 24, 27.



authority to sell them in some town or city in the state.<sup>1</sup>

*b. EVIDENCE* — (1) *Competency* — (a) *Evidence in Behalf of Prosecution*. — In prosecutions for keeping intoxicating liquors with intent to sell in violation of law, a great variety of evidence is admissible. To prove the unlawful intent with which liquors are kept it is competent to show sales of intoxicating liquors by the defendant.<sup>2</sup> While it would seem that evidence of sales at periods remote from the time at which the commission of the offense is alleged would not be admissible, it has been held proper to admit proof of sales made two days,<sup>3</sup> three weeks,<sup>4</sup> or three months<sup>5</sup> before the occasion in question. It may also be shown that at the time of the offense charged intoxicating liquors were found on the premises,<sup>6</sup> and that they were concealed.<sup>7</sup> So the prosecution may show an attempt to conceal made when the place was raided or when the defendant was arrested.<sup>8</sup> A keeping of intoxicating liquors a short time before<sup>9</sup> or after<sup>10</sup> the offense charged may be shown. Bills for intoxicating liquors made out to the defendant, the correctness of which has been assented to by him by an omission to speak, are admissible.<sup>11</sup> And evidence to show that the defendant paid special taxes as a retail liquor dealer is competent to prove the fact that he kept intoxicating liquors for sale.<sup>12</sup> Evidence of ingress and egress of persons on the premises under suspicious circumstances is

1. *Authority to Sell in Certain Places*. — *State v. Connelly*, 63 Me. 213.

2. *Evidence of Sales* — *Connecticut*. — *State v. Mead*, 46 Conn. 22; *State v. Raymond*, 24 Conn. 204; *State v. Hartwick*, 49 Conn. 101. *Georgia*. — *Johnson v. Atlanta*, 79 Ga. 507.

*Iowa*. — *State v. Hale*, 91 Iowa 367; *State v. Fleming*, 86 Iowa 294; *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *State v. Sartori*, 55 Iowa 340; *State v. Farley*, 87 Iowa 22; *State v. Arie*, 95 Iowa 375; *State v. Munzenmaier*, 24 Iowa 87.

*Massachusetts*. — *Com. v. Cotton*, 138 Mass. 500; *Com. v. Stoehr*, 109 Mass. 365; *Com. v. Henderson*, 140 Mass. 303; *Com. v. Kane*, 150 Mass. 294; *Com. v. Hoar*, 121 Mass. 375; *Com. v. Lynch*, 151 Mass. 358.

*Michigan*. — *People v. Caldwell*, 107 Mich. 374.

*Nebraska*. — *Rauschkolb v. State*, 46 Neb. 658.

*Rhode Island*. — *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838.

*Vermont*. — *Lincoln v. Smith*, 27 Vt. 328.

3. *Sales Made Two Days Before Offense Charged*. — *Com. v. Henderson*, 140 Mass. 303.

4. *Sales Made Three Weeks Before Offense Charged*. — *Com. v. Stoehr*, 109 Mass. 365.

5. *Sales Made Three Months Before Offense Charged*. — *Com. v. Cotton*, 138 Mass. 500.

6. *Finding Intoxicating Liquors on Premises*. — *Com. v. Tenney*, 148 Mass. 452; *Com. v. Berry*, 109 Mass. 366; *Com. v. Finnerty*, 148 Mass. 162; *Com. v. Downey*, 145 Mass. 377; *Com. v. Gillon*, 148 Mass. 15; *Com. v. Hurley*, 160 Mass. 10; *Com. v. McHugh*, 147 Mass. 401.

*United States Revenue Stamps on Beer Kegs*. — Where the offense charged is that of keeping malt liquor for sale it may be shown that United States revenue stamps were found on beer kegs in the defendant's possession, for the purpose of proving that the kegs contained malt liquor. *State v. Wright*, 68 N. H. 351.

*Condition of Room Where Liquors Were Alleged to Be Kept*. — On the trial of a complaint for keeping intoxicating liquors on a certain day

with intent to sell them in violation of law, evidence of the condition of the room where the liquors were alleged to be kept, as to the appointments and fixtures, at eight o'clock in the morning of the next day, is admissible. *Com. v. Powers*, 123 Mass. 244.

7. *Concealment of Liquors*. — *Com. v. Finnerty*, 148 Mass. 162; *Com. v. Berry*, 109 Mass. 366.

8. *Attempt to Conceal Liquors When Police Raid Made*. — *Com. v. McHugh*, 147 Mass. 401.

*Attempt to Conceal When Arrested*. — *Com. v. Hurley*, 158 Mass. 160.

*Devices to Conceal Liquor on Premises*. — Evidence of finding a trap in a barn nearly two months and a half after the date of the indictment is not too remote when taken in connection with the defendant's declaration that he had a concealed trap which would hold a large quantity of liquor. *Com. v. Neylon*, 159 Mass. 541.

9. *Keeping of Liquors Shortly Before Offense*. — *Com. v. Lynch*, 151 Mass. 358; *State v. Colston*, 53 N. H. 483.

*For What Reasons Evidence Competent*. — In *State v. Colston*, 53 N. H. 483, it was said that if the state of circumstances is once shown to exist they must be presumed to have continued until something is shown to rebut the presumption.

10. *Keeping of Liquors Shortly After Offense Charged*. — *Com. v. Neylon*, 159 Mass. 541; *Com. v. Matthews*, 129 Mass. 487.

11. *Bills for Intoxicating Liquors in Defendant's Name*. — *Com. v. Neylon*, 159 Mass. 541.

12. *Payment of Liquor Tax by Defendant*. — *State v. White*, 70 Vt. 225; *State v. Intoxicating Liquors*, 44 Vt. 208.

*Evidence Competent to Show Payment of Retail Taxes*. — The assessment rolls made by assessors under the United States laws, and entries of collectors under the same laws, are competent to show payment of a special tax as a retail liquor dealer. *State v. Intoxicating Liquors*, 44 Vt. 208.



competent,<sup>1</sup> especially where such persons go in sober and come out drunk.<sup>2</sup> It may also be shown that articles and utensils used in the liquor trade were found on the premises.<sup>3</sup> Admissions by the defendant, if not too remote, are competent evidence against him;<sup>4</sup> and the question whether the evidence is too remote is for the court to decide.<sup>5</sup> Evidence of a refusal by the defendant to stop selling liquors is admissible;<sup>6</sup> but evidence of a promise not to sell any more liquors on certain conditions cannot be introduced.<sup>7</sup> The state may show consignments to the defendant of packages apparently containing liquors,<sup>8</sup> and it may be shown that the defendant kept other liquors than those charged in the indictment.<sup>9</sup> A former conviction of a similar offense may be given in evidence upon the question of intent.<sup>10</sup> To connect the defendant with the offense charged it may be shown that there was a sign with the defendant's name over a door in the building where the liquors were found.<sup>11</sup> It cannot be shown that a complaint was made against a person other than the defendant for illegally keeping intoxicating liquors in the same place about ten days or two weeks before the date of the complaint against the defendant.<sup>12</sup>

(b) *Evidence in Behalf of Defendant.* — Statements made by the defendant at the time of the arrest are not competent evidence in his behalf.<sup>13</sup>

(2) *Probative Force and Sufficiency of Evidence.* — To make out the offense of keeping intoxicating liquors with intent to sell them unlawfully the state need not prove a sale nor an attempt to make a sale.<sup>14</sup> But the state is bound to produce some evidence of the intoxicating qualities of the liquors and some evidence that they were kept for unlawful sale such as would warrant a jury in finding the defendant guilty after giving to him the benefit of a reasonable doubt.<sup>15</sup> Evidence of unlawful sales of intoxicating liquors tends very strongly to show a keeping for unlawful sale;<sup>16</sup> and the unlawful intent with which the liquors were kept may be presumed from the fact of their sale in violation of law.<sup>17</sup> So under some statutes the finding of intoxicating liquors on the

1. Presence of Stranger on Premises. — *Com. v. Brothers*, 158 Mass. 200; *Com. v. Finnerty*, 148 Mass. 162.

2. Inebriated Condition. — *Com. v. O'Donnell*, 143 Mass. 178; *Com. v. Kennedy*, 97 Mass. 224.

3. Articles and Utensils of Liquor Traffic. — *Com. v. Wallace*, 123 Mass. 400. See also *Com. v. Ham*, 150 Mass. 122, in which case it was held competent to show that beer teams bearing the defendant's name and driven by his employees were seen in the town delivering jugs and that in one instance the defendant himself was seen driving a similar team with jugs.

4. Admissions of Defendant. — *Com. v. Kyne*, 162 Mass. 146; *Com. v. Dearborn*, 109 Mass. 368; *State v. Wright*, 68 N. H. 351. See generally the title *CONFESSIONS*, vol. 6, p. 520.

5. *Com. v. Kyne*, 162 Mass. 146.

6. Refusal of Defendant to Stop Selling. — *State v. Stanton*, 37 Conn. 422.

7. Promise of Defendant to Stop Selling. — *Com. v. Purdy*, 147 Mass. 29.

8. Consignments of Liquor to Defendant. — *State v. Mead*, 46 Conn. 22.

9. Keeping of Other Liquors than Charged. — *State v. Gorman*, 58 N. H. 77; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

10. Conviction of Similar Offense. — *State v. Plunkett*, 64 Me. 534.

11. Connecting Defendant with Offense. — *Com. v. Certain Intoxicating Liquors*, 122 Mass. 36.

12. Arrest at Same Place of Another Person for Same Offense. — *Com. v. Brown*, 136 Mass. 171.

13. Statements Made by Defendant When Arrested. — *Com. v. Boutwell*, 162 Mass. 230.

*Evidence in Defendant's Behalf Held Competent.* — At the trial of an indictment for keeping intoxicating liquors with intent to sell them unlawfully, if the defendant is employed to deliver liquors, both intoxicating and not intoxicating, to customers of his employer on a certain route, upon proof that he delivered two or three bottles of intoxicating liquors to a customer buying nonintoxicating liquors, in a town where his employer was not licensed to sell intoxicating liquors, he may show that he was authorized by his employer to give occasionally to any customer on his route a few bottles of such liquor. *Com. v. Cotton*, 138 Mass. 500.

14. State Need Not Show Sale or Attempt to Sell. — See *supra*, this subsection, *Nature and Elements of Offense*.

15. State Must Show Unlawful Intent. — *Hollingsworth v. Atlanta*, 79 Ga. 503.

16. Evidence of Unlawful Sales — Effect. — *State v. Hartwick*, 49 Conn. 104; *State v. Mead*, 46 Conn. 22; *Com. v. Hoar*, 121 Mass. 375.

17. *State v. Hale*, 91 Iowa 367; *State v. Munzenmaier*, 24 Iowa 87; *State v. Sartori*, 55 Iowa 340, under a statute expressly so providing; *Hornberger v. State*, 47 Neb. 40; *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838, under a statute similar to that of Iowa.

*Presumption — How Affected by Lapse of Time.* — Though the inference drawn from sales of liquors on the premises is weakened, it is not



premises is presumptive evidence of an intent to sell unlawfully.<sup>1</sup> It has been held that the following evidence would warrant a conviction: the finding of intoxicating liquors on the premises, coupled with the additional evidence that the defendant attempted to obstruct the officers making the search,<sup>2</sup> or that he made false denials in addition to his attempt to obstruct the search,<sup>3</sup> or that he possessed facilities for delivering and did actually deliver liquors in various parts of the town,<sup>4</sup> or that drunken persons were seen on the premises.<sup>5</sup> So it has been held sufficient to sustain a conviction, that intoxicating liquors and utensils and appliances for making sales were found on the premises;<sup>6</sup> that in addition to these facts the defendant attempted to obstruct the search of the officers;<sup>7</sup> that the defendant's place was resorted to at all times of the day and night;<sup>8</sup> or that the defendant formerly sold liquors under a license that had expired.<sup>9</sup> Other cases in which the evidence was held sufficient or insufficient to sustain the conviction are cited in the note.<sup>10</sup>

**38. Being Common Seller** — *a*. **WHAT CONSTITUTES OFFENSE.** — In a number of jurisdictions the statutes make it an offense to be a "common seller" of intoxicating liquors.<sup>11</sup>

**Number of Sales.** — The word "common" means frequent, usual, customary, and habitual. A common seller, therefore, in the absence of a statute specifically defining the term, is one who sells frequently, usually, customarily, and habitually.<sup>12</sup> It is obvious, then, that a plurality of sales is essential to constitute one a common seller,<sup>13</sup> and some statutes have made three sales the smallest number on which a conviction can be based. Proof of any smaller number will be insufficient.<sup>14</sup> Where these statutes are in force, proof of three or more sales has been repeatedly held sufficient on which to base a conviction;<sup>15</sup> and it is immaterial whether the sales were made on the same day or on

destroyed, by the fact that a month elapsed between such sales and the finding of the liquor and the day stated in the complaint. *Com. v. Shea*, 160 Mass. 6.

**1. Evidence of Finding Intoxicating Liquors on Premises.** — *State v. Arie*, 95 Iowa 375; *State v. Farley*, 87 Iowa 22; *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *State v. Fleming*, 86 Iowa 294; *Lincoln v. Smith*, 27 Vt. 328.

**2. Finding Liquors on Premises and Attempt to Obstruct Search.** — *Com. v. Shaw*, 116 Mass. 8.

**3. False Denials and Attempt to Obstruct Search.** — *Com. v. Lynch*, 164 Mass. 541.

**4. Facilities for and Actual Delivery of Liquors.** — *Com. v. Ham*, 150 Mass. 122.

**5. Drunken Persons on Premises.** — *Com. v. McKenna*, 158 Mass. 207.

**6. Finding Intoxicating Liquors and Appliances for Selling.** — *Com. v. Martin*, 162 Mass. 402. See also *Com. v. Gallagher*, 124 Mass. 29.

**7. Additional Evidence of Attempt to Obstruct Search.** — *Com. v. McManus*, 161 Mass. 64.

**8. Additional Evidence that Place Is Common Resort.** — *Com. v. Wallace*, 123 Mass. 401.

**9. Additional Evidence that Defendant Formerly Had License.** — *Com. v. Canny*, 158 Mass. 210.

**10. Evidence Held Sufficient to Sustain Conviction.** — See *Com. v. McConnell*, 11 Gray (Mass.) 204; *Com. v. Peto*, 136 Mass. 155; *Com. v. McNeese*, 156 Mass. 231; *Com. v. Certain Intoxicating Liquors*, 116 Mass. 27; *Com. v. Kendrick*, 147 Mass. 444; *Com. v. Dearborn*, 109 Mass. 368.

**Evidence Held Insufficient to Sustain Conviction.** — *Connolly v. Atlanta*, 79 Ga. 664; *State v. Johnson*, 92 Iowa 768; *State v. Severson*, 88

Iowa 714; *Com. v. Certain Intoxicating Liquors*, 116 Mass. 21.

**Burden of Proving License.** — When a person charged with keeping intoxicating liquors for sale in violation of law is shown to have kept them for sale, the burden is on him to prove that he had a license or authority to do so. *Com. v. Curran*, 119 Mass. 206.

**11. See the statutes of Maine, Massachusetts, Rhode Island, and Vermont**, regulating the sale of intoxicating liquors. As to discharge as a poor convict of one sentenced to fine and imprisonment, see *Gannon v. Adams*, 8 Gray (Mass.) 395.

**12. Meaning of "Common Seller."** — *State v. O'Conner*, 49 Me. 594.

**13. Plurality of Sales Necessary.** — *State v. Inness*, 53 Me. 536; *State v. O'Conner*, 49 Me. 594.

**14. Statutes Making Three Sales Necessary.** — *Com. v. Tubbs*, 1 Cush. (Mass.) 2; *State v. Johnson*, 3 R. I. 94.

**15. Proof of Three or More Sales Sufficient.** — *Com. v. Barker*, 14 Gray (Mass.) 412; *Com. v. Lamere*, 11 Gray (Mass.) 319; *Com. v. Rumrile*, 1 Gray (Mass.) 388; *Com. v. Armstrong*, 7 Gray (Mass.) 49; *Com. v. Burns*, 9 Gray (Mass.) 287; *Com. v. Perley*, 2 Cush. (Mass.) 559; *Com. v. Graves*, 97 Mass. 114; *Com. v. Odlin*, 23 Pick. (Mass.) 275; *State v. Johnson*, 3 R. I. 94.

**Gaming for Drinks.** — One playing a game with three persons who severally lose under an agreement that each loser shall treat is liable as a common seller in three distinct sales, if he furnishes the liquor for the treats, although no settlement or payment is made until the playing is concluded. *Com. v. Hogan*, 97 Mass. 120.



different days.<sup>1</sup> In this regard all that is necessary is to show that the three sales were made within the time charged.<sup>2</sup> It is likewise immaterial whether the sales were made to the same person or to different persons.<sup>3</sup> In the absence of statutory regulation as to the number of sales constituting the offense, no particular number of sales need be proved, but the jury must be satisfied from the evidence that selling intoxicating liquor was the defendant's common and ordinary business,<sup>4</sup> and proof of three sales has been held sufficient to sustain a conviction.<sup>5</sup>

**Knowledge of Intoxicating Properties of Liquors.** — It has been held that one may be convicted of being a common seller, although he did not know or suppose that the liquor sold by him was intoxicating.<sup>6</sup>

**Liquors Manufactured by Another.** — Nor is it necessary, under a statute providing for the punishment of "a manufacturer of any spirituous or intoxicating liquors for sale or a common seller thereof," that the liquors sold should have been manufactured by the defendant.<sup>7</sup>

**Traveling Seller.** — It has also been held that one carrying intoxicating liquors on his person and selling them is indictable as a common seller.<sup>8</sup>

**License as Innkeeper or Victualler.** — The fact that one holds a license as innkeeper or victualler will not prevent his conviction as a common seller.<sup>9</sup>

**Joint Indictment.** — Where two persons are jointly indicted for the offense of being a common seller, one may be convicted and the other acquitted;<sup>10</sup> and either defendant may be convicted for any sale made by him, without reference to any joint participation or privity of the two defendants in such sale, or joint interest in the liquor sold.<sup>11</sup>

**b. JURISDICTION.** — Jurisdiction of courts to try the offense of being a common seller is solely a matter of statutory regulation.<sup>12</sup>

**c. COMPETENCY OF EVIDENCE — Evidence in Behalf of State.** — In a prosecution for being a common seller of intoxicating liquors, it is competent, as tending to prove the offense, to show that the defendant kept a bar<sup>13</sup> and that there were on his premises articles indicating a traffic in liquors.<sup>14</sup> Evidence to prove the drinking of intoxicating liquors on the defendant's premises is also competent,<sup>15</sup> and so are admissions made by the defendant.<sup>16</sup> The state may

1. Sales on Same or Different Days Immaterial. — *Com. v. Perley*, 2 Cush. (Mass.) 559; *Com. v. Rumrile*, 1 Gray (Mass.) 388; *Com. v. Graves*, 97 Mass. 115.

2. Sufficient to Show Sales Within Time Charged. — *Com. v. Barker*, 14 Gray (Mass.) 412; *Com. v. Lamere*, 11 Gray (Mass.) 319.

3. Sales to Same or Different People Sufficient. — *Com. v. Odlin*, 23 Pick. (Mass.) 275.

**Distinct Transactions at Single Visit of Purchasers.** — Evidence of three transactions with delivery, sales, and purchases distinct from each other, although at a single visit of the purchasers and in pursuance of a preconceived plan to obtain evidence against the liquor seller, is competent proof of these sales. *Com. v. Graves*, 97 Mass. 115.

4. Number of Sales in Absence of Statutory Regulations. — *State v. O'Connor*, 49 Me. 594.

5. *State v. Day*, 37 Me. 244. See also *Com. v. Snow*, 14 Gray (Mass.) 385, where the three sales were held not proved.

6. **Knowledge of Intoxicating Properties.** — *Com. v. Boynton*, 2 Allen (Mass.) 160, in which case it was said that if the defendant purposely sold intoxicating liquor, he was bound at his peril to ascertain the nature of the article sold. See also *Com. v. Goodman*, 97 Mass. 117; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Daly*, 148 Mass. 428.

7. **Liquors Manufactured by Another.** — *Com. v. Brailey*, 3 Gray (Mass.) 456.

8. **Traveling Seller.** — *State v. Grimes*, 68 Me. 418.

9. **License as Innkeeper or Victualler.** — *State v. Davis*, 23 Me. 403; *Foster v. Haines*, 13 Me. 307; *State v. Woodward*, 34 Me. 293.

10. *Com. v. Brown*, 12 Gray (Mass.) 135; *Com. v. Cook*, 12 Allen (Mass.) 543.

11. *Com. v. Cook*, 12 Allen (Mass.) 542.

12. **Jurisdiction of Various Courts** — *Justice of the Peace*. — *Osborn v. Sargent*, 23 Me. 527. *Compare State v. Peck*, 32 Vt. 173.

*Court of Common Pleas.* — *State v. Stinson*, 17 Me. 154.

*Police Court.* — *Com. v. Carr*, 11 Gray (Mass.) 463.

13. **Keeping Bar.** — *Com. v. Norton*, 16 Gray (Mass.) 30; *Com. v. Cotter*, 97 Mass. 336.

14. **Indicia of Liquor Traffic.** — *Com. v. Lamere*, 11 Gray (Mass.) 319; *Com. v. Blood*, 11 Gray (Mass.) 74; *Com. v. Webster*, 6 Allen (Mass.) 593; *Com. v. Cotter*, 97 Mass. 336; *Com. v. Tubbs*, 1 Cush. (Mass.) 2.

15. **Drinking on Premises.** — *Com. v. Leighton*, 7 Allen (Mass.) 528; *Com. v. Boyden*, 14 Gray (Mass.) 101; *Com. v. Munn*, 14 Gray (Mass.) 361.

16. **Admissions of Defendant.** — *Com. v. Hildreth*, 11 Gray (Mass.) 327.



introduce evidence of sales of which there was no evidence before the grand jury.<sup>1</sup> The record of a former conviction for a single sale during the time charged in the indictment may be given in evidence.<sup>2</sup> It is also competent to show that during the time of the alleged offense the defendant had a federal license to sell liquors.<sup>3</sup> On the other hand, evidence that the defendant kept a public house during a part of the time covered by the indictment is inadmissible in support of the charge.<sup>4</sup>

**Evidence in Behalf of Defendant.** — A defendant cannot show in his own behalf that on certain occasions he had refused to sell intoxicating liquors to those desiring to purchase, as such evidence has no tendency to disprove evidence that he had made such sales at other times.<sup>5</sup> Where the statute provides that lager beer shall be considered intoxicating, the defendant cannot introduce evidence to show that it is not intoxicating.<sup>6</sup>

**d. SUFFICIENCY OF EVIDENCE.** — In order to warrant the conviction of one indicted for being a common seller, it is not necessary to prove the sales by direct evidence. The offense may be made out by circumstantial evidence or by circumstantial in connection with direct evidence,<sup>7</sup> or by admissions of the defendant.<sup>8</sup> Proof by witnesses who have actually seen the sales is not necessary.<sup>9</sup> The possession of a federal license alone is insufficient to sustain a conviction.<sup>10</sup> Under the statutes of one state, proof of delivery of intoxicating liquors is "sufficient" evidence of sale.<sup>11</sup> And under the statutes of another it is *prima facie* evidence of sale.<sup>12</sup> In one state mere proof of sales of intoxicating liquor is not sufficient to sustain the conviction. The burden is on the state to show that the sales were made without license.<sup>13</sup> In another state, if the defendant relies on a license to sell, the burden is upon him to prove it.<sup>14</sup>

**e. COMPETENCY OF WITNESSES.** — In a prosecution of one indicted as a common seller, the parties entitled to the penalty may testify in behalf of the state,<sup>15</sup> and so may one who has purchased liquor merely to obtain evidence

That silence of the defendant is no admission see *Com. v. Harvey*, 1 Gray (Mass.) 487.

1. Sales Not Testified to Before Grand Jury. — *Com. v. Phelps*, 11 Gray (Mass.) 73.

2. Former Conviction of Single Sale. — *State v. Gorham*, 67 Me. 247.

3. Federal License. — *State v. Gorham*, 65 Me. 270; *State v. Wiggin*, 72 Me. 425; *State v. O'Connell*, 82 Me. 30.

The revenue collector's books are competent to prove the payment of a federal license, *State v. Gorham*, 65 Me. 270; or a certified copy of the record from such books is admissible, *State v. Wiggin*, 72 Me. 425; *State v. O'Connell*, 82 Me. 30.

In Maine the Payment to the United States of a Special Tax as a Retail Liquor Dealer is made *prima facie* evidence that the person paying such tax is a common seller of intoxicating liquor. *State v. Intoxicating Liquors*, 80 Me. 57.

4. Keeping Public House. — *Com. v. Madden*, 1 Gray (Mass.) 486.

5. Refusal to Sell on Other Occasions. — *Com. v. Barlow*, 97 Mass. 597.

6. Evidence that Liquor Was Not Intoxicating. — *Com. v. Bubser*, 14 Gray (Mass.) 83; *Com. v. Anthes*, 12 Gray (Mass.) 29.

7. Proof by Circumstantial Evidence Sufficient. — *State v. Hynes*, 66 Me. 114; *State v. Wiggin*, 72 Me. 425; *Com. v. Cotter*, 97 Mass. 336; *Com. v. Van Stone*, 97 Mass. 548; *Com. v. Dady*, 7 Allen (Mass.) 531; *Com. v. Mahony*, 14 Gray (Mass.) 46.

Proof of sales to one person, with certain circumstantial evidence, was held insufficient in *Com. v. Tubbs*, 1 Cush. (Mass.) 2.

Having Proved Repeated Sales, it is unnecessary to prove that the persons to whom such sales were made were not druggists, apothecaries, or physicians. *Com. v. Livermore*, 4 Allen (Mass.) 434.

8. Admissions. — *State v. Wiggin*, 72 Me. 425.

9. Proof by Eyewitnesses Unnecessary. — *State v. Hynes*, 66 Me. 114.

10. Possession of Federal License. — *State v. Intoxicating Liquors*, 80 Me. 57; *State v. O'Connell*, 82 Me. 30.

As to the competency of such evidence see *supra*, this page.

11. Delivery as Proof of Sale. — *State v. Day*, 37 Me. 244; *State v. Fairfield*, 37 Me. 517.

12. Delivery Prima Facie Evidence of Sale. — *Com. v. Thrasher*, 11 Gray (Mass.) 57; *Com. v. Dobbey*, 14 Gray (Mass.) 44; *Com. v. Pillsbury*, 12 Gray (Mass.) 127. See also *Com. v. Williams*, 6 Gray (Mass.) 2; *Com. v. Wallace*, 7 Gray (Mass.) 222.

13. Proof of Authority to Sell. — *Com. v. Livermore*, 2 Allen (Mass.) 292; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *Com. v. Cashman*, 8 Allen (Mass.) 580.

14. *State v. Woodward*, 34 Me. 293; *State v. Crowell*, 25 Me. 171; *State v. Churchill*, 25 Me. 306.

15. Competency of Witnesses. — *State v. Woodward*, 34 Me. 293; *State v. Stuart*, 23 Me. 111.



against the defendant.<sup>1</sup> A person who is to participate in the profits of the business with the defendant is also a competent witness for the state and may be compelled to testify in its behalf.<sup>2</sup>

*f. EFFECT OF ACQUITTAL OR CONVICTION OF OTHER OFFENSE INVOLVING SAME SALE.* — The conviction of a person for the offense of keeping a drinking or tippling house is no bar to his prosecution for being a common seller though both indictments cover the same period of time and are supported by the same acts of illegal sale.<sup>3</sup> On the same principle, a conviction for keeping a tenement for the unlawful sale of intoxicating liquors is no bar to a prosecution for being a common seller at the same time and place;<sup>4</sup> and the mere fact that by unlawful sales a town agent has made himself liable to a revocation of his appointment and to a suit on his bond does not protect him from a prosecution for being a common seller.<sup>5</sup> On the other hand, the acquittal<sup>6</sup> or conviction<sup>7</sup> of the offense of being a common seller is no bar to a prosecution for a single unlawful sale within the same period.

*g. SECOND OFFENSE.* — On a trial for being a common seller, it is competent to show that the defendant has been convicted of being a common seller on a former occasion.<sup>8</sup>

**39. Engaging in or Pursuing Business of Selling Intoxicating Liquors Without License.** — In a number of jurisdictions it is made an offense to engage in or pursue the occupation or business of selling intoxicating liquors without first having procured a license therefor. It is to be noted that this is a distinct offense from that of selling intoxicating liquors without license. It does not consist in the mere selling of liquor without license.<sup>9</sup> To engage in and carry on or pursue a business signifies that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. The doing of a single act pertaining to a particular business will not be construed as engaging in or carrying on the business or occupation.<sup>10</sup> It has accordingly been held that evidence of a single sale is not sufficient to make out the offense.<sup>11</sup> One act may, however, be sufficient to constitute an engaging in

**1. Party Purchasing to Obtain Evidence.** — *Com. v. Graves*, 97 Mass. 114.

**2. Party Participating in Profits with Defendant.** — *State v. Davis*, 23 Me. 403.

**3. Conviction of Similar Offense Involving Same Sale.** — *State v. Inness*, 53 Me. 536, where it was said that the same acts constituted two distinct offenses.

**4. Conviction of Keeping Tenement for Illegal Sale.** — *Com. v. Cutler*, 9 Allen (Mass.) 486.

An Acquittal for Keeping an Illegal Tenement is no bar to a prosecution for being a common seller although the same sales are relied on to sustain both indictments. *Com. v. Bubser*, 14 Gray (Mass.) 83.

The Conviction of a Husband for Maintaining a Liquor Nuisance is no bar to the conviction of his wife for being a common seller although the same sales constitute both offenses. *Com. v. Welch*, 97 Mass. 593.

**5. Liability to Suit on Bond.** — *State v. Keen*, 34 Me. 500.

**6. Acquittal of Being Common Seller.** — *Com. v. Hudson*, 14 Gray (Mass.) 11.

Where an indictment contains two counts, one for keeping a tenement for unlawful sales and the other for being a common seller, and the defendant pleads guilty to the first count and the second is *nolle prosequi* by arrangement with the prosecuting officer, this constitutes no defense to a second indictment for the offense of being a common seller although no sales are shown subsequent to the dismissal of

the first indictment. *Com. v. Cutler*, 9 Allen (Mass.) 486.

**7. State v. Coombs**, 32 Me. 529; *State v. Maher*, 35 Me. 225.

**8. Second Offense.** — *State v. Lashus*, 79 Me. 504.

**9. Offense Different from Selling Without License.** — *Williams v. State*, 23 Tex. App. 499; *La Norris v. State*, 13 Tex. App. 43; *McReynolds v. State*, 26 Tex. App. 374. See also *supra*, this section, *Sales Without License*.

**10. Doing of Single Act Not Carrying On Business.** — *Lemons v. State*, 50 Ala. 130; *Abel v. State*, 90 Ala. 631; *Harris v. State*, 50 Ala. 127; *Standford v. State*, 16 Tex. App. 332.

**Who Is "Dealer" in Intoxicating Liquor.** — It has been held that a person does not become a dealer in intoxicating liquors by signing a due bill payable in whiskey and wine. *Schweyer v. Oberkoetter*, 25 Ill. App. 183. See further *DEAL — DEALER*, vol. 8, p. 846.

**11. Single Sale Does not Constitute Offense.** — *Moore v. State*, 16 Ala. 411; *Bryant v. State*, 46 Ala. 302; *Lemons v. State*, 50 Ala. 130; *Mansfield v. State*, 17 Tex. App. 468; *Halfin v. State*, 18 Tex. App. 410; *Wells v. State*, 18 Tex. App. 417; *Merritt v. State*, 19 Tex. App. 435.

**Contra.** — The Penalty for "Dealing in the Selling" of foreign or domestic distilled spirituous liquors is incurred by a single act of the seller without license. *State v. Chandler*, 15 Vt. 425. See this case more fully set out under *DEAL — DEALERS*, vol. 8, p. 847.



or carrying on of the business, according to the intent with which the act is done and other proof in the case;<sup>1</sup> and it does not require even a single sale to constitute the offense, for a person may engage in business without succeeding in it even to the extent of one sale.<sup>2</sup> But it is not enough that, having the liquor on hand for his own use, the defendant let another have it as a matter of kindness or neighborly feeling, although he may have taken compensation for the accommodation.<sup>3</sup>

**40. Illegal Transportation — Transporting for Unlawful Sale.** — Where it is made an offense to transport intoxicating liquors from place to place within a state, knowing or having reasonable cause to believe that they will be sold unlawfully, one who carries liquor from place to place knowing that it is to be sold, but having no reasonable cause to believe that such sale is illegal, is not guilty of the offense denounced by the statute.<sup>4</sup> The statute applies equally whether the liquor is owned by the person who transports it or by another.<sup>5</sup> To justify a conviction, it is not necessary that the defendant should have begun and completed the transportation. It will be sufficient that he knowingly aided and assisted in transporting the liquors for unlawful sale.<sup>6</sup> And an employee of an express company which is engaged in the illegal transporting of liquors is punishable where after their arrival in the city he aids in forwarding them to their destination with reasonable cause to believe that they are to be sold unlawfully.<sup>7</sup> A transportation of intoxicating liquors from one place to another in the same town is within the meaning of the statutes;<sup>8</sup> and it has also been held that the carrying of intoxicating liquors from the platform of a railroad company to its freight depot is a sufficient transportation by its agent to render him punishable under the statute.<sup>9</sup>

**Receiving for Purpose of Transportation.** — If the statute makes it an offense to receive for the purpose of conveying to another person liquor intended for

**1. One Act with Proof of Intent Sufficient.** — *Abel v. State*, 90 Ala. 631, in which case it was further said: "If a party makes all necessary preparations to carry on the business, holds himself out as a wholesale liquor dealer, and solicits trade as such, and makes one sale in violation of the law, intending to continue the business, he is engaged in or carrying on the business, within the meaning of the law."

**2. Crime Complete Without Sale.** — *Williams v. State*, 23 Tex. App. 500; *Standford v. State*, 16 Tex. App. 332.

**3. Furnishing as Matter of Kindness.** — *U. S. v. Bonham*, 31 Fed. Rep. 808. See also *U. S. v. Jackson*, 1 Hughes (U. S.) 531.

**It Is for the Jury to Decide How Many Sales and what preparation and appointments in a barroom are necessary in each case to constitute the offense of carrying on the business of retailing liquors.** *U. S. v. Jackson*, 1 Hughes (U. S.) 532; *Harris v. State*, 50 Ala. 127; *McReynolds v. State*, 26 Tex. App. 374. And it is error for the court to tell the jury how many sales will constitute the offense. *McReynolds v. State*, 26 Tex. App. 372.

**4. Unlawful Transportation.** — *Com. v. Babcock*, 110 Mass. 109.

Where the statute prohibits "any common carrier or other person" from transporting liquor, a person engaged in the liquor traffic, though not a common carrier, may be convicted. *State v. Reilly*, 108 Iowa 735. See also *State v. Campbell*, 76 Iowa 122.

**5. Com. v. McCluskey, 116 Mass. 64.**

**6. Beginning and Completing Transportation Unnecessary.** — *Com. v. Currier*, 164 Mass. 544.

**7. Liability of Express Agent.** — *Com. v. Brown*, 154 Mass. 55.

**8. Transportation Between Places in Same Town** — *Com. v. Waters*, 11 Gray (Mass.) 81. See also *State v. Campbell*, 76 Iowa 122, in which case it was held that the transportation of liquors from wholesale to retail dealers in the same city was a transportation within the statute.

**Peddling from House to House.** — Having intoxicating liquor in a wagon attached to a horse, under circumstances tending to show that the possessor is carrying and peddling the liquor from house to house, will support an indictment for illegally transporting it from place to place. *Com. v. McConnell*, 11 Gray (Mass.) 204.

**Lawful Sale in Another City — Effect.** — To a complaint for carrying intoxicating liquor, with reasonable cause to believe that it was intended for sale in violation of law, from place to place in a city where it was not lawful to sell such liquor, it is no defense that it was lawfully sold in another city to the person to whom the defendant was carrying it. *Com. v. McLaughlin*, 108 Mass. 477.

**9. Transportation from Railroad Platform to Freight Depot.** — *State v. Campbell*, 76 Iowa 122. Compare *Com. v. Waters*, 11 Gray (Mass.) 81, in which case it was said, though not necessary to a decision: "It is not every possible removal of spirituous liquor which will make a person employed by the owner to do it guilty of a criminal offense. Thus, if the removal were only upon the premises of the owner, or from one to another of his warehouses, or from one to another part of his



unlawful sale, the offense consists in receiving for the purpose of conveying to the purchaser, and thus completing the sale.<sup>1</sup>

**Evidence.** — On a prosecution for carrying intoxicating liquor with reasonable cause to believe that it was intended for sale in violation of law, evidence of the reputation of the place to which the liquors were transported, at the time, as a place where liquors were sold, is admissible as tending to show that the defendant had reasonable cause to believe that the liquors were to be sold there contrary to law, the town being one in which licenses were not granted.<sup>2</sup> So it may be shown that liquor was sold at places where the liquor in question was left by the defendant;<sup>3</sup> and evidence of the declarations of a carrier is admissible to prove that he had some cause of belief that the liquors transported by him would be unlawfully sold.<sup>4</sup>

**41. Breach of Screen Laws.** — In a number of jurisdictions the statutes make it unlawful to maintain screens or obstructions of any sort to prevent a clear view of the interior of the premises where liquors are sold. This prohibition, under some statutes, extends only to days and hours at which sales may not lawfully be made; under others it extends to all times whatsoever.<sup>5</sup> The intent with which one puts up devices which obstruct a view into the premises where liquors are sold is immaterial.<sup>6</sup> The statutes are violated by blinds placed on the outside of a room in such fashion that a view into the room can be had only by stooping down and peering through the slats;<sup>7</sup> by a painted glass window which interferes with a view of the interior of the premises;<sup>8</sup> by the closing of a shutter over one window so that it materially interferes with a view of the business;<sup>9</sup> or by the obstruction of the view of a part of the

shop, this would constitute no offense and would be no violation of law." This seems to be a more reasonable and just construction of the statute.

1. *Com. v. Locke*, 114 Mass. 288.

2. **Reputation of Place to Which Liquors Carried.** — *Com. v. Loewe*, 162 Mass. 518. See also *Com. v. Harper*, 145 Mass. 100.

3. **Sales at Place to Which Liquors Carried.** — *Com. v. McLaughlin*, 108 Mass. 477.

4. **Declarations of Defendant.** — *Com. v. Certain Intoxicating Liquors*, 107 Mass. 386.

**For Other Cases on the Question of Proof of Reasonable Cause** to believe that liquor will be sold unlawfully, see *Com. v. Kenney*, 115 Mass. 149; *Com. v. Commeskey*, 13 Allen (Mass.) 585.

**Evidence of Acquittal of Consignee.** — The defendant cannot introduce evidence that the person to whom it was charged that the liquors were being conveyed had been tried and acquitted for keeping the same liquors with intent to sell. *Com. v. Waters*, 11 Gray (Mass.) 81.

**Circumstantial Evidence Sufficient.** — *Com. v. Fisher*, 138 Mass. 504.

5. See the statutes of the several states.

**Liability for Act Done by Servant.** — Under the *Massachusetts* statute a person may be convicted of a breach of the screen law although the illegal act was done by his servant in his absence, without his knowledge or consent, and in violation of his instructions. *Com. v. Kelley*, 140 Mass. 441.

6. **Intent Not Element of Offense.** — *Com. v. Moore*, 145 Mass. 244.

7. **Blinds on Outside of Room.** — *Com. v. Costello*, 133 Mass. 192.

**Whether a Screen Placed Inside the Door Obstructed a View** into premises where liquor was sold is a question for the jury, and evidence

is competent to show that it did not. *Merzbacher v. State*, (Tex. Civ. App. 1896) 36 S. W. Rep. 308.

8. **Painted Glass Window.** — *Com. v. Sawtelle*, 150 Mass. 320.

**The Fact that Windows Open on Private Grounds** does not render it incompetent to prove that the view through the windows, or one of them, was obstructed. *Com. v. Brothers*, 158 Mass. 200.

**Obstructing View from Alley.** — Where the statute provides that all screens which obstruct a view of the bar from the street or alley must be removed on days when the law requires that saloons shall be closed, it will be sufficient to show that the alley was at the time open to the general public, without proving dedication. *People v. Kennedy*, 105 Mich. 75.

**Obstructing Door of Middle Room.** — Where a person uses for selling liquors a middle room the entrance to which is from the street by a door leading into the front room and thence by a door to the middle room, screens on the windows of the front room which interfere with a view of the door to the middle room constitute a violation of the statute. *Com. v. Kane*, 143 Mass. 92.

**Board Partition between Rooms, Constituting Part of Realty.** — A board partition between different rooms, extending from floor to ceiling, fastened in the usual manner, and intended by the owner when he placed it there as a permanent accession to the realty, is not a "device" within the meaning of an ordinance prohibiting saloon keepers from permitting any blinds, screens, shades, "or other device," etc. *Shultz v. Cambridge*, 38 Ohio St. 659.

9. **Closing Shutter Over One Window.** — *Com. v. McDonnough*, 150 Mass. 504.



room in which a sale might be made.<sup>1</sup> The fact that the screen or obstruction existed when the license was granted does not authorize the maintenance thereof, and its removal is necessary.<sup>2</sup> It is not necessary to show that the licensing board had required the defendant to remove the obstruction.<sup>3</sup> A barroom also used as a hotel office is within the meaning of the statute;<sup>4</sup> and druggists are amenable to the law to the same extent as saloon keepers.<sup>5</sup> If the statute does not except days on which sales are prohibited, the offense may be committed on such a day,<sup>6</sup> and that too although no business is being done on the premises during that day.<sup>7</sup> The penalties or punishments for violating these laws are matters purely of statutory regulation.<sup>8</sup>

**42. Employment of Women in Saloons.** — Where a statute expressly delegates to incorporated towns and villages the power to regulate places where intoxicating liquors are sold, an ordinance making it an offense for a person engaged in selling intoxicating liquors to employ females to sell such liquors to his customers is authorized.<sup>9</sup> The discharge by a liquor seller of his female employees and the entering into partnership with them, after the approval of an act prohibiting the employment of females in saloons, is a violation of the spirit of a statute prohibiting the employment of females in saloons, and is punishable.<sup>10</sup>

**43. Keeping Wineroom for Women.** — In *Colorado* it is provided by statute that no saloon shall have or keep in connection with or as a part of it any wineroom or other place into which any female person shall be permitted to enter from the outside or from such saloon and there be supplied with any kind of liquor.<sup>11</sup> In construing this statute it has been ruled that a conviction is not warranted by evidence of a sale of intoxicating liquors to female servants in a room in the upper part of the saloon building used as a dining-room or restaurant, and which is in charge of such servants.<sup>12</sup>

**44. Importation and Sale of Intoxicating Liquors in Alaska.** — Under statutes prohibiting the importation, manufacture, and sale of intoxicating liquors in

**1. Partial Obstruction of View.** — *Nelson v. State*, 17 Ind. App. 403; *Componovo v. State*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1114. The statutes provide that the "whole" of the interior of premises in which liquor is sold must be visible from the street.

**Partitioning Part of the Room in Which Liquors Are Sold, for the Purpose of Renting a part of it, and not to obstruct the view, and in fact leaving the view of the bar unobstructed, is not an offense.** *State v. Andrews*, 82 Tex. 73.

**2. Obstruction Existing When License Granted.** — *Com. v. Sawtelle*, 150 Mass. 320; *Com. v. Brothers*, 158 Mass. 206. *Compare Com. v. Barnes*, 140 Mass. 447, in which case it was held that if a person is licensed to sell intoxicating liquors "in the front room and rear room of a certain floor of a building, and is not required by the licensing board to remove the partition between the two rooms, that partition is not within the provisions [of the statute] although it may obstruct the view of the interior of one or the other of such rooms from the public street."

**3. Order of Removal from Licensing Board Unnecessary.** — *Com. v. Brothers*, 158 Mass. 200.

**4. Barroom Used as Hotel Office.** — *People v. Carrel*, 118 Mich. 79.

**5. Druggists Amenable to Law.** — *Com. v. Brothers*, 158 Mass. 200.

**6. Sale on Prohibited Day.** — *Com. v. Auberton*, 133 Mass. 404.

**7. Com. v. Casey**, 134 Mass. 194.

**8. Penalty or Punishment Regulated by Statute.** — In *Massachusetts* the penalty is an avoidance of the license. *Com. v. Kane*, 143 Mass. 92; *Com. v. McDonnough*, 150 Mass. 504; *Com. v. Sawtelle*, 150 Mass. 320; *Com. v. Brothers*, 158 Mass. 205.

In *Indiana* the punishment prescribed by statute is fine or imprisonment or both. *State v. Mathis*, 18 Ind. App. 608.

**9. Statutory Provisions.** — *Bergman v. Cleveland*, 39 Ohio St. 651.

**Constitutionality Upheld.** — *Bergman v. Cleveland*, 39 Ohio St. 651. See also *Walter v. Com.*, 88 Pa. St. 137, 32 Am. Rep. 429.

**Contra.** — It has been held, however, that where the state constitution provides that no person shall on account of sex be disqualified for entering upon or pursuing any lawful business, vocation, or profession, an ordinance prohibiting the employment of females in dance cellars is unconstitutional. *Matter of Maguire*, 57 Cal. 604, 40 Am. Rep. 125.

**The Constitutionality of an Ordinance Requiring a Higher License from Saloons where Females Are Employed than where females are not employed has been upheld, notwithstanding the constitutional provision stated above.** *Exp. Felchlin*, 96 Cal. 360, 31 Am. St. Rep. 223, *distinguishing Matter of Maguire*, 57 Cal. 604, 40 Am. Rep. 125.

**10. Walter v. Com.**, 88 Pa. St. 137, 32 Am. Rep. 429.

**11. Laws Colo.** 1891, p. 315, § 1.

**12. Walker v. People**, 5 Colo. App. 37.



Alaska, except for medicinal, mechanical, and scientific purposes,<sup>1</sup> it has been held that the payment of a special tax levied by the general government on the business of retailing intoxicating liquors is no defense to a prosecution for sales made in violation of these statutes.<sup>2</sup>

**45. Jurisdiction of Prosecutions under Liquor Laws.** — The laws regulating and prohibiting the traffic in intoxicating liquors usually declare what courts shall have jurisdiction of offenses against their provisions; and as these statutes are subject to frequent changes an elaborate discussion of the decisions thereunder would be of little practical value.<sup>3</sup> Some general rules may, however, be properly stated. Where the court having jurisdiction and the mode of prosecution are distinctly pointed out, the statute must be strictly followed, and no other court than that named can take cognizance of the offense.<sup>4</sup> Where one court originally has jurisdiction of the offense, a statute which gives jurisdiction thereof to another court does not as a general rule divest the former of jurisdiction unless it contains an express provision to that effect.<sup>5</sup> If the statutes regulating the liquor traffic are silent as to jurisdiction of offenses against them, jurisdiction is to be determined by the general laws of the state regulating jurisdiction of criminal offenses.<sup>6</sup> The court within the district where the offense is committed has jurisdiction thereof, although the defendant resides without the district;<sup>7</sup> and a statute providing that an offense committed on the boundary of two or more counties or within a designated distance thereof is triable in either county applies to offenses against the liquor laws.<sup>8</sup> Where a preliminary examination of one charged with an offense against the liquor laws is held in a court having jurisdiction to try the offense, but not to hold the examination, and the person is bound over to answer the charges in another court having concurrent jurisdiction, and an information is subsequently filed in such court charging the same offense, the proceedings in the first named court may be treated as a nullity and the case treated as commenced originally in the latter court at the time when the information was filed.<sup>9</sup>

**1. Statutory Provisions.** — See *supra*, this title, *Constitutionality of Liquor Laws — Statutes Regulating Liquor Traffic in Alaska*. See also *U. S. v. Ash*, 75 Fed. Rep. 651; Act Cong. May 17, 1884, § 14, 23 U. S. Stat. at L. 28.

**2. Payment of Special Tax.** — *Endleman v. U. S.*, 86 Fed. Rep. 456; *U. S. v. Ash*, 75 Fed. Rep. 651.

**3. Justices' Courts** have been held to be vested with jurisdiction to try the following offenses against the liquor laws: sales on Sundays or election days, *Sanders v. State*, 34 Neb. 872; sales without license, *St. Louis v. Smith*, 2 Mo. 113; *State v. Woulfe*, 58 Ind. 17; keeping liquor nuisances, *State v. Allphin*, 2 Kan. App. 28; violations of prohibitory laws, *State v. Lund*, 49 Kan. 209; illegal transportation, *State v. Adams*, 49 S. Car. 518; *State v. Pickett*, 47 S. Car. 101; sales to drunkards, *State v. Lawrence*, 49 Ind. 515; sales to minors, *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374; sales without having paid taxes, *People v. Haas*, 79 Mich. 449.

**Police Courts** in some jurisdictions are vested with jurisdiction of certain offenses against the liquor laws, *Gassenheimer v. District of Columbia*, 6 App. Cas. (D. C.) 108; or sales in local option districts, *Hord v. Com.*, (Ky. 1895) 32 S. W. Rep. 176; or sales without license, *Salina v. Seitz*, 16 Kan. 143.

**District Courts** have been held to have jurisdiction of the following offenses: selling liquor without license; *Com. v. Hersey*, 144 Mass. 297; *State v. Bach*, 36 Minn. 234; or of other illegal sales, *State v. Nolan*, 15 R. I. 529; *Peo-*

*ple v. Sweetser*, 1 Dak. 295; violation of the prohibitory laws, *State v. Lund*, 49 Kan. 209; keeping a common nuisance, *Com. v. Gay*, 153 Mass. 211.

**Circuit Courts.** — *Lichtenstein v. State*, 5 Ind. 162; *Hord v. Com.*, (Ky. 1895) 32 S. W. Rep. 176.

**The Superior Court in North Carolina** has been held to have jurisdiction to try an indictment for violating a local option law. *State v. Snow*, 117 N. Car. 774.

**The Court of Special Sessions in New York** has been held to have jurisdiction to try an indictment for sales to minors. *People v. Koenig*, 9 N. Y. App. Div. 436.

**The Parish Court Commissioners** have jurisdiction to try offenses under the *Canada temperance act*. *Ex p. Perkins*, 24 N. Bruns. 66; *Ex p. Williamson*, 24 N. Bruns. 64.

**4. Statutes to Be Strictly Followed.** — *Com. v. Murphy*, 11 Gray (Mass.) 53; *State v. Patterson*, (N. Car. 1887) 4 S. E. Rep. 45.

**5. Subsequent Statutes Giving Jurisdiction to Other Courts — Effect.** — *Lichtenstein v. State*, 5 Ind. 162; *Com. v. Hudson*, 11 Gray (Mass.) 64; *People v. Koenig*, 9 N. Y. App. Div. 436. Compare *Gassenheimer v. District of Columbia*, 6 App. Cas. (D. C.) 108.

**6.** *State v. Nolan*, 15 R. I. 529.

**7. Place of Committing Offense Determines Jurisdiction.** — *Com. v. Hersey*, 144 Mass. 297.

**8. Cause Triable in Either of Two Counties.** — *State v. Rockwell*, 82 Iowa 429.

**9. Preliminary Examinations in Court Having No Jurisdiction Thereof.** — *State v. Lund*, 49 Kan. 209.



**46. Limitations.** — If the statutes regulating and prohibiting the liquor traffic are silent as to the time in which prosecutions for offenses thereunder must be instituted, the general laws prescribing the time within which criminal proceedings must be brought will govern.<sup>1</sup>

**47. Liability as Affected by Ignorance of Intoxicating Properties of Liquors.** — In all prosecutions for violations of the liquor laws the defendant's ignorance of the intoxicating properties of the liquors sold or kept for sale constitutes no defense. He is bound at his peril to know whether the liquors are intoxicating.<sup>2</sup>

**48. Effect of Prior Conviction or Acquittal of Same or Similar Offense.** — A person who has been tried and convicted or acquitted of an offense against the liquor laws cannot be tried again for the same offense. If on a prosecution for unlawfully selling intoxicating liquor the offense is considered continuous, a conviction will bar another prosecution for sales made at any time prior to the finding of the bill in the first indictment.<sup>3</sup> Where each sale is a separate offense and the defendant has made a number of sales a conviction based on a sale to one person is not a bar to a prosecution for a sale made to another person,<sup>4</sup> even though the sales were made at the same time.<sup>5</sup>

**What Amounts to Conviction or Acquittal.** — A discharge of a defendant, because "it does not appear that there is probable cause to believe defendant guilty," is not an acquittal which will bar a prosecution for the same offense in a higher court.<sup>6</sup> So it has been held that a verdict of guilty upon which no judgment has been rendered and to the rulings at the trial of which exceptions are still pending is no bar to a complaint for the same offense.<sup>7</sup> A former acquittal or conviction of an offense against the liquor laws is no bar to a prosecution for another distinct and separate offense although the same act or acts may be ingredients of each offense.<sup>8</sup>

**XIII. CIVIL AND CRIMINAL LIABILITY ARISING OUT OF AGENCY, MARRIAGE, ETC.** — **1. Liability of Employer for Violations of Liquor Laws by Servant or Agent** — *a. CIVIL LIABILITY.* — At common law the master is responsible for the wrongful acts of his servant done in the execution of the authority given by

**1. General Statute of Limitations Governs.** — *Frese v. State*, 23 Fla. 268.

**2. Ignorance of Intoxicating Properties** — *Alabama*. — *Compton v. State*, 95 Ala. 25; *Carl v. State*, 89 Ala. 93.

*Iowa*. — *State v. Valure*, 95 Iowa 401; *State v. Lindoen*, 87 Iowa 702.

*Kansas*. — *State v. Schaefer*, 44 Kan. 90; *State v. Moulton*, 52 Kan. 69.

*Massachusetts*. — *Com. v. Boynton*, 2 Allen (Mass.) 160; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Raymond*, 97 Mass. 567; *Com. v. O'Kean*, 152 Mass. 584; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Daly*, 148 Mass. 428; *Com. v. Savery*, 145 Mass. 212.

*Michigan*. — *People v. Ingraham*, 100 Mich. 539.

*Vermont*. — *State v. Tomasi*, 67 Vt. 312.  
See also the title *CRIMINAL LAW*, vol. 8, p. 291.

**3. State v. McBride**, 4 McCord L. (S. Car.) 332. See also specific subsections in this section, and generally the title *JEOPARDY*, *post*.

**4. Sales to Different Persons.** — See *Evans v. State*, 54 Ark. 227; *State v. Cassety*, 1 Rich. L. (S. Car.) 90.

**5. Benson v. State**, (Tex. Crim. 1898) 44 S. W. Rep. 168.

**6. Discharge for Want of Evidence—Preliminary Examination.** — *Com. v. Sullivan*, 156 Mass. 487.

**7. Verdict on Which No Judgment Is Entered.** — *Com. v. Fraher*, 126 Mass. 265. See also

*Com. v. Lahy*, 8 Gray (Mass.) 459. But compare *State v. Hines*, 68 Me. 202.

**Evidence of Separate Sales—Failure of Prosecution to Elect—Effect.** — Where there is evidence of two sales on a prosecution for selling without license and the prosecution does not elect on which sale a verdict will be demanded, a conviction will bar a subsequent prosecution for either sale. *Deshazo v. State*, 65 Ark. 38.

**8. Former Acquittal or Conviction of Similar Offense—Effect** — *Indiana*. — *State v. Gapen*, 17 Ind. App. 524.

*Iowa*. — *State v. Harris*, 64 Iowa 287.

*Kansas*. — *State v. Barber*, 2 Kan. App. 679.

*Kentucky*. — *Com. v. Vaughn*, 101 Ky. 603.

*Maine*. — *State v. Inness*, 53 Me. 536.

*Massachusetts*. — *Com. v. McCabe*, 163 Mass. 400.

*Michigan*. — *People v. Furman*, 85 Mich. 110. *Rhode Island*. — *State v. Head*, 3 R. I. 135.

*Vermont*. — *State v. Wheeler*, 62 Vt. 439; *State v. Jangraw*, 61 Vt. 39.

*Virginia*. — *Arrington v. Com.*, 87 Va. 96.

*Contra*. — *O'Brien v. State*, 91 Ala. 25.

And see *supra*, this section, *passim*.

**Conviction of Husband as Bar to Conviction of Wife for Similar Offense.** — The conviction of a man for keeping and maintaining a tenement as a nuisance during a certain period is no bar to a conviction of his wife for committing a like offense during the same time in the same tenement. *Com. v. Heffron*, 102 Mass. 148.



the master and for the purpose of performing what the master has directed, whether the wrong done be caused by the mere negligence of the servant or by a wrongful purpose to accomplish the master's business in an unlawful manner.<sup>1</sup> Therefore, if a statute makes sales of intoxicating liquors under designated circumstances tortious, and authorizes a recovery of damages against the tortfeasor, damages are recoverable against one for sales by his agent or servant in violation of the statute, although made without his knowledge or consent or against his express directions.<sup>2</sup> It has been held, however, that the fact that the sales were made without the knowledge and consent of the employer and in violation of his instructions is to be considered in mitigation of exemplary damages claimed.<sup>3</sup>

*b. CRIMINAL LIABILITY* — (1) *For Authorized Violations of Law.* — Where intoxicating liquors are sold illegally by the servant or agent with the knowledge and consent of the master or principal the latter is liable to the same degree as if he had made the sales in person.<sup>4</sup>

**1. Common-law Responsibility of Master.** — *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376. And see the titles *AGENCY*, vol. I, p. 1151; *MASTER AND SERVANT*.

**Rule of Respondeat Superior.** — *Draper v. Fitzgerald*, 30 Mo. App. 521.

**2. Liability for Damages Arising from Sales of Liquor by Servant.** — *Keedy v. Howe*, 72 Ill. 134; *Fentz v. Meadows*, 72 Ill. 541; *Layton v. Deck*, 63 Ill. App. 553; *Maier v. State*, 2 Tex. Civ. App. 296; *Brantigam v. While*, 73 Ill. 561; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Roberge v. Burnham*, 124 Mass. 277; *Hamer v. Eldridge*, 171 Mass. 250; *Draper v. Fitzgerald*, 30 Mo. App. 518; *Greene County v. Wilhite*, 29 Mo. App. 459; *Smith v. Reynolds*, 8 Hun (N. Y.) 128; *Amerman v. Kall*, 34 Hun (N. Y.) 126. See also *Mound City Paint, etc., Co. v. Conlon*, 92 Mo. 221; *Austin v. Carswell*, 67 Hun (N. Y.) 579.

**Actions Based on Illegal Sales to Minors** are within the rule of the text. *Greene County v. Wilhite*, 29 Mo. App. 459; *Draper v. Fitzgerald*, 30 Mo. App. 518; *Maier v. State*, 2 Tex. Civ. App. 296. And it has been held no defense to such an action that the servant or agent refused to accept payment for the liquor sold on discovering that the purchaser was a minor. *Maier v. State*, 2 Tex. Civ. App. 296.

**Civil Damage Acts.** — Sales to a Husband are a cause of action by the wife under the civil damage acts, though made against the defendant's orders. *Brantigam v. While*, 73 Ill. 561. See also the title *CIVIL DAMAGE ACTS*, vol. 6, p. 48.

**In Actions for Personal Injuries to a Purchaser** of intoxicating liquors it is no defense that the sale was contrary to the defendant's orders. *Smith v. Reynolds*, 8 Hun (N. Y.) 128.

**3. What Circumstances Considered in Mitigation of Damages.** — *Fentz v. Meadows*, 72 Ill. 541; *Brantigam v. While*, 73 Ill. 561; *Keedy v. Howe*, 72 Ill. 134.

**4. Employer Liable for Authorized Sales** — *Alabama.* — *Brooks v. State*, 105 Ala. 134; *Sellers v. State*, 98 Ala. 75; *Perkins v. State*, 92 Ala. 66; *Segars v. State*, 88 Ala. 146.

*Delaware.* — *State v. Burchinal*, 2 Harr. (Del.) 528.

*Georgia.* — *Lucas v. State*, 92 Ga. 454; *Johnson v. State*, 83 Ga. 553; *Forrester v. State*, 63 Ga. 349.

*Indiana.* — *Hofner v. State*, 94 Ind. 84.

*Iowa.* — *State v. McConnell*, 90 Iowa 197; *State v. Treeman*, 27 Iowa 333.

*Kansas.* — *State v. Falk*, 51 Kan. 298; *State v. Skinner*, 34 Kan. 256.

*Kentucky.* — *Com. v. Major*, 6 Dana (Ky.) 293.

*Maine.* — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

*Massachusetts.* — *Com. v. Hadley*, 11 Met. (Mass.) 68; *Com. v. Rooks*, 150 Mass. 59; *Com. v. Nichols*, 10 Met. (Mass.) 259, 43 Am. Dec. 432; *Com. v. Putnam*, 4 Gray (Mass.) 16; *Com. v. Holmes*, 119 Mass. 195; *Com. v. Joslin*, 158 Mass. 482; *Com. v. McNeese*, 156 Mass. 231; *Com. v. Hagan*, 140 Mass. 289.

*Michigan.* — *People v. Riley*, 71 Mich. 349.

*Missouri.* — *State v. Reiley*, 75 Mo. 521, *State v. McCance*, 110 Mo. 398.

*New Hampshire.* — *State v. Bonney*, 39 N. H. 206; *State v. Wiggins*, 20 N. H. 449.

*New York.* — *Hall v. McKechnie*, 22 Barb. (N. Y.) 244.

*Pennsylvania.* — *Zeigler v. Com.*, (Pa. 1888) 14 Atl. Rep. 237.

*South Carolina.* — *State v. Moore*, 49 S. Car. 438.

*Tennessee.* — *Thompson v. State*, 5 Humph. (Tenn.) 138; *State v. Caswell*, 2 Humph. (Tenn.) 399.

*Texas.* — *Beuchert v. State*, 37 Tex. Crim. 505; *Collins v. State*, 34 Tex. Crim. 95; *Gerstenkorn v. State*, 38 Tex. Crim. 621; *White v. State*, 11 Tex. App. 476.

*Vermont.* — *State v. Dow*, 21 Vt. 484.

*Wisconsin.* — *State v. Beloit*, 74 Wis. 267.

*Canada.* — *Taylor v. Gavin*, 18 Nova Scotia 335.

A general authority by an employer to his clerk to sell unlawfully will render him answerable criminally for any single sale made by the clerk in pursuance of such authority. *Kinnebrew v. State*, 80 Ga. 232.

**Sales by Servant or Agent of Firm.** — If a servant, agent, or clerk of a firm sells spirits belonging to his employers with the assent of both, they are both liable for the illegal sale. *Segars v. State*, 88 Ala. 144; *Sellers v. State*, 98 Ala. 72; *State v. Wiggins*, 20 N. H. 449.

**Sales by Wife or Daughter.** — Illegal sales by the wife or daughter of the defendant by his direction or with his assent will render him



The Rule Applies to All Illegal Sales irrespective of the causes making them illegal. Thus it applies to sales in violation of the Sunday laws;<sup>1</sup> to sales to persons of known intemperate habits;<sup>2</sup> to sales to minors;<sup>3</sup> to sales constituting the offense of keeping a tippling house;<sup>4</sup> or to sales in violation of local option laws.<sup>5</sup>

**Agent Having General Control of Principal's Business.** — An agent who has the general direction and control of his employer's business will be liable for sales made in violation of law by the servants or agents of the master if made with his knowledge and consent.<sup>6</sup>

(2) *For Violations of Law Unauthorized and Against Instructions* — (a) **View that Employer Is Not Liable** — **Statement of Rule.** — The general rule is well settled that the master is not criminally liable for the acts of his servant or agent done contrary to his orders and without any authority, express or implied, merely because they are within the course of his business and within the scope of the servant's employment.<sup>7</sup> Unless there is some statutory provision either expressly or impliedly modifying or abrogating this rule, it applies, of course, to acts done by servants or agents in violation of the liquor laws as well as to other acts which are criminal at common law or made so by statute. It has accordingly been held that a sale of intoxicating liquors by a servant or agent, for whatever cause illegal, will not render the master liable if done without his authority and consent or in violation of his instructions.<sup>8</sup> Nevertheless,

criminally responsible. *Lucas v. State*, 92 Ga. 454; *Com. v. Major*, 6 Dana (Ky.) 293; *Beuchert v. State*, 37 Tex. Crim. 505.

1. **Sales in Violation of Sunday Laws.** — *Com. v. McNeese*, 156 Mass. 231.

2. **Sales to Drunkards.** — *Zeigler v. Com.*, (Pa. 1888) 14 Atl. Rep. 237.

3. **Sales to Minors.** — *Com. v. Rooks*, 150 Mass. 59; *State v. McCance*, 110 Mo. 398.

4. **Keeping Tippling House.** — *Com. v. Major*, 6 Dana (Ky.) 293.

5. **Sales in Violation of Local Option Laws.** — See *Gerstenkorn v. State*, 38 Tex. Crim. 621.

6. **Liability of Agent Having General Control.** — *Faircloth v. State*, 73 Ga. 426; *State v. Dow*, 21 Vt. 484.

7. **Employer Not Criminally Liable for Unauthorized Acts of Servant.** — *Com. v. Stevens*, 155 Mass. 295; *State v. McGrath*, 73 Mo. 181; *State v. Reiley*, 75 Mo. 522. See also the titles AGENCY, vol. 1, p. 1161; MASTER AND SERVANT.

8. **Liability for Illegal Sales of Intoxicating Liquors by Servant** — *Alabama.* — See *Sellers v. State*, 98 Ala. 72.

*Connecticut.* — *Barnes v. State*, 19 Conn. 398.

*Indiana.* — *Hipp v. State*, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; *Lauer v. State*, 24 Ind. 131; *Pennybaker v. State*, 2 Blackf. (Ind.) 484; *Wreidt v. State*, 48 Ind. 579.

*Iowa.* — *State v. Hayes*, 67 Iowa 27.

*Louisiana.* — *Minden v. Silverstein*, 36 La. Ann. 912.

*Massachusetts.* — *Com. v. Putnam*, 4 Gray (Mass.) 16; *Com. v. Wachendorf*, 141 Mass. 270; *Com. v. Briant*, 142 Mass. 463, 56 Am. Rep. 707; *Com. v. Stevenson*, 142 Mass. 466; *Com. v. Rooks*, 150 Mass. 59; *Com. v. Nichols*, 10 Met. (Mass.) 259, 43 Am. Dec. 432.

*Michigan.* — *People v. Parks*, 49 Mich. 333.

*Minnesota.* — *State v. Mahoney*, 23 Minn. 181.

*Missouri.* — *State v. Durkem*, 23 Mo. App. 387; *State v. Heinze*, 45 Mo. App. 403; *State v. McGrath*, 73 Mo. 181; *State v. Reiley*, 75 Mo. 522; *Kirkwood v. Autenreith*, 21 Mo. App 73.

*New York.* — *People v. Utter*, 44 Barb. (N. Y.) 170.

*Ohio.* — *Anderson v. State*, 22 Ohio St. 305. *Pennsylvania.* — *Com. v. Newhard*, 3 Pa. Super. Ct. 215; *Com. v. Johnston*, 2 Pa. Super. Ct. 317.

*Rhode Island.* — *State v. Burke*, 15 R. I. 324.

*South Carolina.* — *State v. Williams*, 3 Hill L. (S. Car.) 91.

*Tennessee.* — *Neideiser v. State*, 6 Baxt. (Tenn.) 499.

*Texas.* — *Gerstenkorn v. State*, 38 Tex. Crim. 621; *Freedman v. State*, 37 Tex. Crim. 115.

*Canada.* — *Taylor v. Gavin*, 18 Nova Scotia 335.

**Application of Rule.** — The doctrine stated in the text has been applied in the case of the following illegal sales by agents or servants:

*Sunday Sales.* — *Wetzler v. State*, 18 Ind. 35; *People v. Utter*, 44 Barb. (N. Y.) 170; *State v. Heckler*, 81 Mo. 417; *State v. Burke*, 15 R. I. 324.

*Sales in Violation of Local Option Laws.* — *Wadsworth v. State*, 35 Tex. Crim. 584.

*Sales Without License.* — *State v. Baker*, 71 Mo. 475. See also *Sellers v. State*, 98 Ala. 72.

*Sales Not Within Scope of License.* — *Com. v. Hayes*, 145 Mass. 289.

*Sales Without Payment of Tax.* — *People v. Metzger*, 95 Mich. 121.

*Sales to Habitual Drunkards.* — *Barnes v. State*, 19 Conn. 398; *Lathrope v. State*, 51 Ind. 192; *People v. Parks*, 49 Mich. 333; *State v. Mahoney*, 23 Minn. 181; *State v. Shortell*, 93 Mo. 123.

*Sales to Minors.* — *Thompson v. State*, 45 Ind. 496; *Hanson v. State*, 43 Ind. 550; *Ihrig v. State*, 40 Ind. 422; *Com. v. Stevens*, 155 Mass. 291; *Com. v. Joslin*, 158 Mass. 482; *State v. Weber*, 111 Mo. 204; *State v. McCance*, 110 Mo. 398; *Anderson v. State*, 22 Ohio St. 305.

*Sales of Intoxicating Liquors to Be Drunk on Premises.* — *Anderson v. State*, 39 Ind. 553.

*Sales to Slaves.* — *State v. Bohles*, Rice L. (S. Car.) 145.



to entitle the defendant to an acquittal on the ground that a sale was made against his instructions, the instructions must have been made in good faith.<sup>1</sup> A violation of the Sunday-closing laws by a bartender,<sup>2</sup> or a violation of the bell-punch law by a bartender,<sup>3</sup> or allowing minors on the premises contrary to law,<sup>4</sup> will not render the employer liable where done without his knowledge or consent, or against his directions. If it is made an offense "knowingly" to permit gambling in a dramshop, the proprietor cannot be held responsible if his bartender, without his knowledge and consent, permitted gambling there.<sup>5</sup>

(b) **View that Employer Is Liable — Statement of Rule.** — In a number of jurisdictions the employer is criminally liable for a violation of the liquor laws by his agent or servant, although the acts which form the basis of the prosecution are done without his knowledge or consent, or against his directions given in good faith.<sup>6</sup> These statutes, though not differing materially, if at all, from the statutes in the states in which no criminal liability is held to attach to the employer under like circumstances, are, by the construction placed upon them, held to eliminate the element of guilty knowledge or intent. It has therefore been held that if the statute makes it an offense for "any person" to sell, etc.,<sup>7</sup> or for any person to sell "by agent or otherwise,"<sup>8</sup> or for any person to sell "by himself or another,"<sup>9</sup> or to sell "either directly or indirectly,"<sup>10</sup> or if the statute forbids any party to "permit" the prohibited act,<sup>11</sup> or if the statute requires that all saloons or dramshops shall be closed on Sunday and makes "any" dramshop proprietor or saloon keeper punishable for a violation thereof,<sup>12</sup> the master will be liable for a violation of the act by his agent or servant committed without his knowledge or consent and against his express directions.<sup>13</sup> And where the statute subjects to punishment not only the one violating the law by personally selling, but also any person who may own or have any interest in liquors sold contrary to law, it has been held that an employer will be liable for sales made by his agent or servant in violation of the law, notwithstanding such sales were made without his knowledge or consent and against his directions.<sup>14</sup> The fact that the employer attempts to

1. **Instructions Must Be Made in Good Faith.** — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Com. v. Rooks*, 150 Mass. 59; *Anderson v. State*, 22 Ohio St. 305.

2. **Violation of Sunday-closing Laws by Bartender.** — *Wilson v. State*, 19 Ind. App. 389.

3. **Violation of Bell-punch Law.** — *Gaiocchio v. State*, 9 Tex. App. 388, in which case it was held that a statute making it a misdemeanor for any liquor dealer, his clerk, agent, or employee, in selling liquors to fail to turn the crank of the proper register as required, does not render an employer criminally liable for the failure of his bartender to observe this law in making sales.

4. **Allowing Minors on Premises.** — *People v. Hughes*, 86 Mich. 180.

5. **Allowing Gambling in Saloon.** — *Wilson v. State*, 64 Ark. 586.

6. See the title *AGENCY*, vol. 1, p. 1161; see also the title *CRIMINAL LAW*, vol. 8, p. 291.

7. **Statute Making It an Offense for Any Person to Sell.** — *Carroll v. State*, 63 Md. 551. To the same effect see *Martin v. State*, 30 Neb. 507; *State v. Denoon*, 31 W. Va. 122.

8. **Selling "by Agent or Otherwise."** — *McCutcheon v. People*, 69 Ill. 601; *Mullinix v. People*, 76 Ill. 211; *Banks v. Sullivan*, 78 Ill. App. 298; *Dudley v. Sautbaine*, 49 Iowa 650, 31 Am. Rep. 165; *People v. Longwell*, (Mich. 1899) 79 N. W. Rep. 484, in which last-named case the provision was "by his clerk, agent, or

employee." See also *State v. Stockman*, (Kan. App. 1899) 58 Pac. Rep. 1006.

9. **Any Person Selling by Himself or Another.** — *Loeb v. State*, 75 Ga. 258; *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350. To the same effect see *Noecker v. People*, 91 Ill. 494.

10. **Person Selling "Directly or Indirectly."** — *State v. Kittelle*, 110 N. Car. 560, 28 Am. St. Rep. 698.

11. **Statute Prohibiting Permission of Act — Breach of Screen Laws.** — *Com. v. Kelley*, 140 Mass. 441.

12. **Statutes Prohibiting All Dramshops Opening on Sunday.** — *Banks v. Sullivan*, 78 Ill. App. 298; *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270; *People v. Blake*, 52 Mich. 566.

13. **Application of Rule.** — The rule stated in the text has been applied in prosecutions for the following offenses:

*Sales to Habitual Drunkards.* — *Mullinix v. People*, 76 Ill. 211; *Dudley v. Sautbaine*, 49 Iowa 650, 31 Am. Rep. 165.

*Sales to Minors.* — *Loeb v. State*, 75 Ga. 258; *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350; *Carroll v. State*, 63 Md. 551; *State v. Kittelle*, 110 N. Car. 560, 28 Am. St. Rep. 698.

*Sales on Sunday.* — *Martin v. State*, 30 Neb. 507.

*Keeping Open on Sunday.* — *Banks v. Sullivan*, 78 Ill. App. 298; *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270.

14. **Person Interested in Liquors Sold.** — *Mogler*



rescind an illegal sale will not exempt him from liability;<sup>1</sup> nor will his good faith in instructing his servant or agent to refuse to make sales of the class prohibited by statute aid him further than to commend a mitigation of the punishment imposed by law.<sup>2</sup>

**Intent Not Ingredient of Offense.** — These decisions, as heretofore stated, all proceed upon the theory that intent is not an essential ingredient of the offense.<sup>3</sup>

(c) **Evidence in Prosecutions for Violation of Law by Servant or Agent — Establishing Relationship of Master and Servant.** — On a prosecution of a master or principal for a violation of the liquor law by a servant or agent, the relation of master and servant or of principal and agent must be established;<sup>4</sup> and whether this relationship has been sufficiently established is a question to be determined by the jury from all the evidence.<sup>5</sup>

**Burden of Proof.** — Although there are a few decisions which maintain the contrary doctrine,<sup>6</sup> the weight of authority is to the effect that a sale by a servant is *prima facie* a sale by the employer,<sup>7</sup> and the burden of proof is on the defendant to show that such sale was without his knowledge or consent or contrary to his directions.<sup>8</sup> Unless the presumption raised by the sale is rebutted by the defendant this will furnish a sufficient basis for a conviction.<sup>9</sup>

**Questions for Jury.** — Whether the sale was with the authority or consent of the employer is a question of fact for the jury.<sup>10</sup> And where it is shown that instructions not to sell were given to a servant, the jury ought to determine whether such instructions were given in good faith.<sup>11</sup>

**Competency of Evidence.** — To show that sales were unauthorized the testimony of the defendant himself and of his clerk is competent.<sup>12</sup> And to show that they were made with the employer's assent the state may adduce evidence of sales by the employer himself.<sup>13</sup>

*v. State*, 47 Ark. 109; *Redmond v. State*, 36 Ark. 58; *Cloud v. State*, 36 Ark. 151; *State v. Keith*, 37 Ark. 96; *Edgar v. State*, 45 Ark. 356; *Lewis v. State*, 21 Ark. 209; *Teasdale v. State*, (Miss. 1887) 3 So. Rep. 245; *Fullwood v. State*, 67 Miss. 554; *Fahey v. State*, 62 Miss. 402; *Gathings v. State*, 44 Miss. 343; *Whitton v. State*, 37 Miss. 379; *Riley v. State*, 43 Miss. 397.

1. **Effect of Attempted Rescission of Sale.** — *Teasdale v. State*, (Miss. 1887) 3 So. Rep. 245.

2. *Mogler v. State*, 47 Ark. 111.

3. **Intent Not Ingredient of Offense.** — See the cases cited in the preceding notes.

4. **Relationship of Master and Servant Must Be Established.** — *Perkins v. State*, 92 Ala. 66; *Minden v. Silverstein*, 36 La. Ann. 912; *Com. v. Hagan*, 152 Mass. 565; *Com. v. Hurley*, 160 Mass. 10; *State v. Quinn*, 40 Mo. App. 573; *State v. Meagher*, 49 Mo. App. 572; *State v. Baker*, 71 Mo. 475; *Gerstenkorn v. State*, 38 Tex. Crim. 621.

5. **Question for Jury.** — *Com. v. Hurley*, 160 Mass. 10.

For Cases Wherein the Evidence Was Held Insufficient to establish the relation, see *Com. v. Hagan*, 152 Mass. 565; *State v. Quinn*, 40 Mo. App. 573.

6. **Proof of Sale by Servant Raises No Presumption.** — *Com. v. Hayes*, 145 Mass. 289; *Com. v. Stevenson*, 142 Mass. 466; *Com. v. Briant*, 142 Mass. 463, 56 Am. Rep. 707 (*discussing and distinguishing Com. v. Nichols*, 10 Met. (Mass.) 259, 43 Am. Dec. 432); *People v. Utter*, 44 Barb. (N. Y.) 170; *Gerstenkorn v. State*, 38 Tex. Crim. 621. See also *State v. Williams*, 3 Hill L. (S. Car.) 91.

7. **Sale by Servant Prima Facie Sale by Master.** — *State v. Wentworth*, 65 Me. 234, 20 Am.

Rep. 688; *State v. Brown*, 31 Me. 522; *State v. O'Connor*, 58 Minn. 193; *State v. Durkem*, 23 Mo. App. 387; *State v. Weber*, 111 Mo. 204; *State v. Quinn*, 40 Mo. App. 627; *State v. McCance*, 110 Mo. 398; *State v. Baker*, 71 Mo. 475; *State v. Heckler*, 81 Mo. 417; *State v. Shortell*, 93 Mo. 123; *State v. Reiley*, 75 Mo. 522; *Kirkwood v. Autenreih*, 21 Mo. App. 73; *Anderson v. State*, 22 Ohio St. 305.

**Effect of Certificate.** — In *Massachusetts* whenever a sale of alcohol is made by a druggist, the purchaser must give a certificate stating the use for which the alcohol is wanted, and this is to be cancelled in such manner as to show the date of cancellation. Under this statute the burden of proof rests upon the defendant. *Com. v. Berry*, 148 Mass. 160.

8. *State v. Heinze*, 45 Mo. App. 403; *State v. Heckler*, 81 Mo. 417; *State v. Meagher*, 49 Mo. App. 572. See also the cases cited in the preceding note.

9. **Presumption When Not Rebutted Basis for Conviction.** — *State v. Reiley*, 75 Mo. 522; *State v. Heinze*, 45 Mo. App. 415. See also the cases cited in the two preceding notes.

10. **Consent Question for Jury.** — *Neideiser v. State*, 6 Baxt. (Tenn.) 499.

11. **Good Faith in Giving Instructions.** — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

12. **Testimony of Defendant and His Agent.** — *State v. Weber*, 111 Mo. 204.

13. **Evidence of Sales by Employer.** — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688. To the same effect see *Sellers v. State*, 98 Ala. 72.

**Other Evidence Held Competent to Show that Sales Were Authorized.** — Evidence is admissible of sales in the defendant's shop before the date of the sale charged, although not made



**Sufficiency of Evidence.** — All that is necessary to be proved is the defendant's knowledge of and consent to the particular sale charged. It is not necessary to show knowledge of and consent to the general violation of the law by the servant.<sup>1</sup> While proof of a single illegal sale of liquor by the servant is not sufficient to raise the presumption that such unlawful sale was authorized by his employer,<sup>2</sup> a conviction may be based on a single unlawful sale shown conclusively to be with the master's knowledge and consent, although previously he had given to his servant instructions not to make unlawful sales.<sup>3</sup>

**2. Personal Liability of Servant or Agent for Violations of Liquor Laws — a. TO WHAT EXTENT PROTECTED BY EMPLOYER'S LICENSE — Sales Within Scope of License.** — If the employer has a license to sell intoxicating liquors the servant will be protected thereby to the same extent as the employer in making sales authorized by and within the scope of the license.<sup>4</sup> But on a prosecution for making illegal sales the burden is on the defendant to show that his employer had a license.<sup>5</sup>

**Sales Not Within Scope of License.** — The fact that the employer is licensed will not, however, protect him in sales not authorized thereby;<sup>6</sup> and acting as the servant or agent of one having a license will not protect the servant for knowingly violating its provisions.<sup>7</sup>

**The Burden is on the Defendant** to show that the sales were such as were authorized by the permit or license.<sup>8</sup>

**b. SELLING LIQUORS OF ANOTHER ON ONE'S OWN LICENSE.** — In *Arkansas* it has been held that one who has a license to sell intoxicating liquors may lawfully sell as agent for another who has no license.<sup>9</sup>

**c. SELLING WITHOUT LICENSE FOR ONE WHO HAS NO LICENSE.** — Independently of Any Statutory Provision on the subject, one who, having no license himself, sells intoxicating liquors as agent for another who has no license will be criminally responsible. The fact that he is merely an agent or servant constitutes no defense.<sup>10</sup> The agent who does the act can stand in no better situa-

in his presence, *Com. v. Dearborn*, 109 Mass. 368; or that the defendant was engaged in the business of selling liquors, and that he had stated a few days after the sale in question that he had sold intoxicating liquors and would continue the traffic, *State v. Bonney*, 39 N. H. 206.

**1. Consent of Master to Sale Charged.** — *Com. v. Rooks*, 150 Mass. 59.

**2. Proof of Single Sale by Servant.** — *State v. Mahoney*, 23 Minn. 181.

**3. When Conviction Warranted by Proof of Single Sale.** — *State v. Mueller*, 38 Minn. 497. For other decisions on the question of sufficiency or insufficiency of evidence to show knowledge and consent on the part of the employer, see *Com. v. McNeese*, 156 Mass. 231; *Com. v. Gavin*, 160 Mass. 523; *Com. v. Fitzgerald*, 14 Gray (Mass.) 14; *Com. v. Holmes*, 119 Mass. 195; *Hall v. McKechnie*, 22 Barb. (N. Y.) 244; *Savage v. Com.*, 84 Va. 619.

**4. Sales Within Scope of License.** — *State v. Keith*, 37 Ark. 96; *Johnson v. State*, 37 Ark. 98; *Keiser v. State*, 58 Ind. 379; *Runyon v. State*, 52 Ind. 320; *Pickens v. State*, 20 Ind. 116; *State v. Kriechbaum*, 81 Iowa 633; *State v. Hunt*, 29 Kan. 762; *State v. Copp*, 34 Kan. 522; *Excise Com'rs v. Dougherty*, 55 Barb. (N. Y.) 332; *People v. Buffum*, 27 Hun (N. Y.) 216; *State v. Hart*, 107 N. Car. 796.

**5. Burden of Proving License.** — *Rana v. State*, 51 Ark. 481; *State v. Devers*, 38 Ark. 518; *Berning v. State*, 51 Ark. 552; *State v. O'Connor*, 65 Mo. App. 324; *Hays v. State*, 13 Mo. 246.

**Presumption as to Ownership of Liquors Sold.** — On the trial of an indictment for selling intoxicating liquors without a license, where the state proves a sale made by the defendant it will be presumed in the absence of proof to the contrary that he was the owner of the liquor sold. *Rana v. State*, 51 Ark. 481.

**6. Sales Not Within Scope of License.** — *Marshall v. State*, 49 Ala. 21; *Butler v. Augusta*, 100 Ga. 370; *State v. Kriechbaum*, 81 Iowa 633; *State v. Walker*, 16 Me. 241.

It is no defense to a prosecution for selling at a place not authorized by license that the defendant was merely the agent of the person holding the license. *Excise Com'rs v. Dougherty*, 55 Barb. (N. Y.) 332; *Witherspoon v. State*, 39 Tex. Crim. 65.

**7. State v. Walker**, 16 Me. 241.

**8. Burden of Showing that Sales Were Authorized.** — *State v. Kriechbaum*, 81 Iowa 633.

**9. Sale of Another's Liquors by One Holding License.** — *Lane v. State*, 37 Ark. 272; *Johnson v. State*, 37 Ark. 98; *State v. Keith*, 37 Ark. 96.

**10. Servant or Agent Liable Independently of Statutory Provisions — Alabama.** — *Cagle v. State*, 87 Ala. 38; *Abel v. State*, 90 Ala. 631; *Dentler v. State*, 112 Ala. 70.

*Arkansas.* — *State v. Keith*, 37 Ark. 96; *Cloud v. State*, 36 Ark. 151; *Johnson v. State*, 37 Ark. 98; *Baird v. State*, 52 Ark. 326; *Rana v. State*, 51 Ark. 481; *State v. Devers*, 38 Ark. 517.

*Connecticut.* — *State v. Wadsworth*, 30 Conn. 55.

*Georgia.* — *Forrester v. State*, 63 Ga. 349.



tion than his principal. He justifies under him, and if the principal has no authority to sell the agent can have none.<sup>1</sup> A person who sells as agent of another is bound at his peril to ascertain whether his employer has a license. It is no defense that he did not know that his employer was unlicensed.<sup>2</sup> It is likewise immaterial that his services are gratuitous.<sup>3</sup> And a servant or agent will be liable whether the sales be made in the presence of the employer or in his absence.<sup>4</sup> The fact that the agent is a minor is no defense in the absence of proof that he was of such tender years as to be incapable of committing crime or was under duress.<sup>5</sup> So assuming without authority to act as agent of the owner does not exonerate the voluntary agent from criminal responsibility for selling intoxicating liquors.<sup>6</sup>

**Under Statutes Specially Affecting Responsibility.**—A servant or agent of one who has not paid the license tax is criminally responsible for selling intoxicating liquors where the statute makes liable for such sales "any person" who shall be "in any wise concerned" in selling, etc.,<sup>7</sup> or where the statute subjects to punishment "any person who shall pursue or follow any occupation" taxed by law without obtaining a license,<sup>8</sup> or where the statute provides that all persons violating the act, whether as owner or as clerk, agent, or servant, shall be equally liable as principals;<sup>9</sup> and under the latter statute a servant or agent who sells intoxicating liquors on prohibited days is equally liable with the principal.<sup>10</sup>

**d. OTHER VIOLATIONS OF LIQUOR LAWS — Violation of Local Option Laws.**—One who as agent or servant of another sells intoxicating liquors in violation of the local option law is punishable to the same extent as his employer.<sup>11</sup>

*Indiana.*—*Klepfer v. State*, 121 Ind. 491.

*Iowa.*—*State v. Finan*, 10 Iowa 19; *State v. Stucker*, 33 Iowa 395.

*Maine.*—*Roberts v. O'Connor*, 33 Me. 496.

*Massachusetts.*—*Com. v. Williams*, 4 Allen (Mass.) 587; *Com. v. Hadley*, 11 Met. (Mass.) 66; *Com. v. Ryan*, 160 Mass. 172; *Com. v. Green*, 163 Mass. 103.

*Mississippi.*—*Beck v. State*, 69 Miss. 217.

*Missouri.*—*Hays v. State*, 13 Mo. 246; *State v. Bryant*, 14 Mo. 340; *State v. Durkem*, 23 Mo. App. 387; *State v. O'Connor*, 65 Mo. App. 325; *State v. Canton*, 43 Mo. 48; *State v. Keith*, 46 Mo. App. 525.

*New Hampshire.*—*State v. Haines*, 35 N. H. 207.

*New York.*—*French v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 114; *People v. Luhrs*, (Ct. Sess.) 7 Misc. (N. Y.) 503.

*North Carolina.*—*State v. Wallace*, 94 N. Car. 827.

*Oregon.*—*State v. Chastain*, 19 Oregon 176.

*Tennessee.*—*State v. Caswell*, 2 Humph. (Tenn.) 399; *Thompson v. State*, 5 Humph. (Tenn.) 138.

*Vermont.*—*State v. Bugbee*, 22 Vt. 32.

**The Servant or Agent of an Incorporated Club** who sells intoxicating liquors to its members, the club having no license, is criminally liable. *People v. Luhrs*, (Ct. Sess.) 7 Misc. (N. Y.) 503.

**A Clerk or Agent for a Wholesale Liquor Dealer Without License** may be convicted for carrying on such business without license though he has no pecuniary interest other than agent or clerk. *Abel v. State*, 90 Ala. 631.

**A Defendant Who Alleges that He Sold in the Original Packages** as agent for an importer has the burden of establishing such defense. *Com. v. Zelt*, 138 Pa. St. 615; *Com. v. Pendergast*, 138 Pa. St. 633; *Com. v. Bishman*, 138 Pa. St. 639; *Com. v. Silverman*, 138 Pa.

St. 642. This was before the enactment of the Wilson Act.

**The Employer's Instructions to His Servant Are Not Competent** in favor of the servant when the latter is indicted. *Com. v. Tinkham*, 14 Gray (Mass.) 12.

**1. Agent and Principal Alike Responsible.**—*State v. Bugbee*, 22 Vt. 32.

**2. Ignorance that Employer Had No License Immaterial.**—*State v. Chastain*, 19 Oregon 176.

**3. Agent or Servant Liable though Services Were Gratuitous.**—*Cagle v. State*, 87 Ala. 38; *State v. Finan*, 10 Iowa 19; *State v. Herselus*, 86 Iowa 214; *Richardson v. Com.*, 11 Ky. L. Rep. 367; *State v. Keith*, 46 Mo. App. 525; *State v. Bugbee*, 22 Vt. 32.

**4. Seller Punishable Whether Sales in Presence or Absence of Employer.**—*Com. v. Ryan*, 160 Mass. 172; *Com. v. Hadley*, 11 Met. (Mass.) 66; *Com. v. Drew*, 3 Cush. (Mass.) 279; *State v. McGuire*, 64 N. H. 529.

**5. Minority of Agent No Defense.**—*Cagle v. State*, 87 Ala. 38.

**6. Acting Without Authority No Defense.**—*Com. v. Williams*, 4 Allen (Mass.) 587.

**7. "Any Person in Any Wise Concerned" in Selling.**—*Tardiff v. State*, 23 Tex. 169.

**8. Any Person Who Shall Pursue or Follow Any Occupation Without License.**—*Davidson v. State*, 27 Tex. App. 262; *La Norris v. State*, 13 Tex. App. 33, 44 Am. Rep. 699.

**9. Statute Making All Persons Selling Liable as Principals.**—*People v. Soule*, 74 Mich. 250; *People v. Meizger*, 95 Mich. 121.

**10. Sales on Prohibited Days.**—*People v. Ackerman*, 80 Mich. 588.

**11. Sales in Violation of Local Option Law.**—*Berger v. State*, 50 Ark. 20; *Menken v. Atlanta*, 78 Ga. 668; *People v. Rice*, 103 Mich. 350; *State v. Morton*, 42 Mo. App. 64; *Wolfe v. State*, 38 Tex. Crim. 537.



**Maintaining Liquor Nuisances.** — One who makes illegal sales as agent or servant of another cannot be convicted of maintaining a liquor nuisance if the acts done and complained of were done under the direction and supervision of the employer.<sup>1</sup> On the other hand, if the servant or agent exercises control and supervision of the building for any period of time, however brief, he will be liable for maintaining a liquor nuisance on the principle that the agent having the actual possession and participating in the unlawful purpose is equally guilty with the principal.<sup>2</sup>

**Keeping with Intent to Sell Unlawfully.** — A servant or agent who assists in committing the offense of keeping intoxicating liquor with the intent to sell it unlawfully is equally guilty with the employer.<sup>3</sup>

*e.* **WHAT CONSTITUTES SERVANT OR AGENT.** — One who merely acts as messenger and transmits the liquor from the seller to the buyer and the money from the buyer to the seller,<sup>4</sup> or one who merely at the owner's request sets out the glass into which the liquor is poured and from which it is drunk,<sup>5</sup> is not a servant or agent within the meaning of the rule.

*f.* **SEVERAL LIABILITY OF EMPLOYER AND SERVANT OR AGENT.** — Where at common law or by the terms of a statute a servant is punishable for a violation of the liquor law, it is no defense that the principal has been convicted for the same act.<sup>6</sup>

**3. Criminal Liability of Purchaser** — *a.* **WHEN PURCHASING FOR HIS OWN CONSUMPTION.** — With the exception of a decision in which the holding was based on the ground that a purchaser of intoxicating liquors is an aider and abettor in the act of selling,<sup>7</sup> the authorities are agreed that one who purchases intoxicating liquors for his own consumption is not guilty of a violation of the statutes making certain sales of intoxicating liquors illegal and punishable, whether he knew or did not know that the sale was in violation of the law.<sup>8</sup>

**1. Sales under Supervision of Employer.** — *Com. v. Galligan*, 144 Mass. 171; *Com. v. Churchill*, 136 Mass. 148; *Com. v. Murphy*, 145 Mass. 250; *State v. Gravelin*, 16 R. I. 407.

In *Iowa* and *Maine*, under statutes in force in those states, one who participates in the offense of keeping a liquor nuisance may be punished therefor although the capacity in which he acted was that of a servant or agent merely. *State v. Herselus*, 86 Iowa 214; *State v. Sullivan*, 83 Me. 417.

**2. Supervision and Control by Servant or Agent.** — *Com. v. Maroney*, 105 Mass. 467, note; *Com. v. Kimball*, 105 Mass. 465; *Com. v. Burke*, 114 Mass. 261; *Com. v. Dowling*, 114 Mass. 259; *Com. v. Brady*, 147 Mass. 583; *Com. v. Merriam*, 148 Mass. 425; *Com. v. Sinclair*, 138 Mass. 493; *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838.

**3. Keeping with Intent to Sell Unlawfully.** — *Com. v. Ryan*, 160 Mass. 172; *State v. McGuire*, 64 N. H. 529. See also *State v. Mercer*, 32 Iowa 405.

**4. What Is Servant or Agent.** — *Com. v. Williams*, 4 Allen (Mass.) 587. See also *Strickland v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 720.

**5.** *State v. Keith*, 46 Mo. App. 525. But see *Beck v. State*, 69 Miss. 217, where it was held that one who, at the request of an unlicensed liquor seller, though not in his employ, goes to the bar and gets liquor for a customer, handing the proceeds to the proprietor, is guilty of making a sale to the same extent as the proprietor. And see *supra*, this section, *Selling Without License for One Who Has No License*.

**6. Several Liability of Employer and Servant or Agent.** — *State v. Finan*, 10 Iowa 19; *People v. Ackerman*, 80 Mich. 588; *Thompson v. State*, 5 Humph. (Tenn.) 138; *Janks v. State*, 29 Tex. App. 233.

**7. Purchase for Consumption by Buyer.** — *State v. Bonner*, 2 Head (Tenn.) 136, *overruled* in *Harney v. State*, 8 Lea (Tenn.) 113. See the title AIDER AND ABETTOR, vol. 2, p. 29.

**8. Purchaser Not Guilty of Violation of Law.** — *Harrington v. State*, 36 Ala. 236; *State v. Teahan*, 50 Conn. 92; *Anderson v. State*, 32 Fla. 242; *Wakeman v. Chambers*, 69 Iowa 169, 58 Am. Rep. 218; *Sterling v. Jugenheimer*, 69 Iowa 211; *Com. v. Willard*, 22 Pick. (Mass.) 476; *Com. v. Downing*, 4 Gray (Mass.) 29; *State v. Baden*, 37 Minn. 213; *State v. Rand*, 51 N. H. 361, 12 Am. Rep. 127; *Harney v. State*, 8 Lea (Tenn.) 113, *overruling* *State v. Bonner*, 2 Head (Tenn.) 135; *State v. Miller*, 26 W. Va. 106.

**Competency of Purchaser as Witness.** — A purchaser of intoxicating liquors sold in violation of law, not being himself guilty of an offense, is not excusable from testifying on the ground that he might thereby criminate himself, and he is not an accomplice. *State v. Teahan*, 50 Conn. 92; *Wakeman v. Chambers*, 69 Iowa 169, 58 Am. Rep. 218; *Com. v. Willard*, 22 Pick. (Mass.) 476; *Com. v. Downing*, 4 Gray (Mass.) 29; *State v. Rand*, 51 N. H. 361, 12 Am. Rep. 127.

Even though the purchaser is in pursuit of evidence against persons selling contrary to law, he is not an accomplice so as to be within a statute requiring corroboration of accomplices. *State v. Baden*, 37 Minn. 212. See the



*b. WHEN PURCHASING FOR ANOTHER'S CONSUMPTION — Purchase as Agent of Buyer.* — A person who purchases intoxicating liquors as agent for another and who has no interest in making the sale is not guilty of selling to the person for whom they were purchased.<sup>1</sup> The fact that the party purchasing liquor for another intended to evade the law is immaterial.<sup>2</sup> One who procures intoxicating liquors for another with money furnished by the latter is guilty of violating a statute which prohibits furnishing, etc.<sup>3</sup>

*Purchase as Agent of Seller.* — One who purchases liquor for another is guilty of "selling" to him if he acts as the agent of the seller;<sup>4</sup> and this is true whether he made a profit or acted without compensation.<sup>5</sup>

**4. Liability of Husband and Wife for Violation of Liquor Laws — a. LIABILITY OF WIFE FOR HER OWN ACTS — Acts Done in Husband's Presence.** — A married woman who violates the liquor laws in the presence of her husband is presumed to have done so under his control and coercion, and is not criminally responsible therefor.<sup>6</sup> Coercion will be presumed though the husband is not present if he is so near that she is under his immediate influence and control.<sup>7</sup> But the mere fact that at the time of the act complained of the husband was in an adjoining room does not raise a conclusive presumption of law that the wife was acting under his coercion.<sup>8</sup>

titles ACCOMPLICES, vol. I, pp. 392, 401; DETECTIVES, vol. 9, p. 411.

**1. Purchasing as Agent for Another Generally Not Liable — Alabama.** — *Young v. State*, 58 Ala. 358; *Campbell v. State*, 79 Ala. 271; *Morgan v. State*, 81 Ala. 72; *Bryant v. State*, 82 Ala. 51; *Du Bois v. State*, 87 Ala. 101.

*Florida.* — *Anderson v. State*, 32 Fla. 242.

*Georgia.* — *White v. State*, 93 Ga. 47; *Jones v. State*, 100 Ga. 579; *Evans v. State*, 101 Ga. 780; *Cunningham v. State*, 105 Ga. 676.

*Kansas.* — See *State v. Smith*, 51 Kan. 120.

*Kentucky.* — *Bourman v. Com.*, 14 Ky. L. Rep. 174.

*Mississippi.* — *Waddle v. State*, (Miss. 1898) 24 So. Rep. 311; *Johnson v. State*, 63 Miss. 228.

*North Carolina.* — *State v. Taylor*, 89 N. Car. 577.

*Texas.* — *Bowan v. State*, (Tex. Crim. 1896) 35 S. W. Rep. 382; *Hood v. State*, 25 Tex. Crim. 585; *Wright v. State*, 35 Tex. Crim. 581; *Armstrong v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 981; *Treue v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 829.

*Contra.* — *Foster v. State*, 45 Ark. 362.

See also *supra*, this title, XII. 4. *b. Consent of Parent or Guardian.*

A person is not guilty of selling intoxicating liquors without a license where it appears that he merely ordered liquor for another from a dealer, and delivered it. *Waddle v. State*, (Miss. 1898) 24 So. Rep. 311.

**2. Intent to Evade Law Immaterial.** — *Vanarsdale v. State*, 35 Tex. Crim. 587.

**One Who Procures Others to Join with Him in Purchasing a Quantity of Liquor,** and who receives from each a proportionate share of the price and gives to each a proportionate share of the liquor purchased, is not guilty of selling to such other persons. *Johnson v. State*, 63 Miss. 228; *Com. v. Peters*, 2 Pa. Super. Ct. 1; *Reed v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 1093. *Contra*, *Hunter v. State*, 60 Ark. 312, two judges dissenting.

**3. Furnishing Intoxicating Liquor.** — *Burnett v. State*, 92 Ga. 474. See also *State v. Best*, 108 N. Car. 747.

**Whether This Would Constitute a Gift** within

the meaning of a statute prohibiting a gift of intoxicating liquors is a matter of some doubt. That it does constitute a gift, see *Com. v. Davis*, 12 Bush (Ky.) 240. That it does not constitute a gift, see *Young v. State*, 58 Ala. 358.

**Mere Device to Evade Law.** — It has been held, however, that one who receives money from another with the request to procure intoxicating liquor, and who shortly afterwards delivers the liquor, may be treated as the seller if no other person filling that character appears, and if it is not shown where, how, or from whom the intoxicating liquor was obtained. *Paschal v. State*, 84 Ga. 326; *Grant v. State*, 87 Ga. 265.

**4. Acting as Agent of Seller — Liability.** — *State v. Smith*, 51 Kan. 120; *Bourman v. Com.*, 14 Ky. L. Rep. 174; *State v. Morton*, 42 Mo. App. 64; *State v. Taylor*, 89 N. Car. 577. See also *Cunningham v. State*, 105 Ga. 676.

Merely buying intoxicating liquors for another whose money is used in making the purchase does not, as matter of law, constitute the person so doing the agent of both the seller and the buyer. Nor will the fact that the purchaser failed to disclose at the time of making the purchase the name of the person from whom he bought warrant of itself the conclusion that he is himself the seller. *Evans v. State*, 101 Ga. 780.

**5. Recompense Immaterial.** — *Bourman v. Com.*, 14 Ky. L. Rep. 174.

**6. Acts Done in Husband's Presence.** — *U. S. v. Bonham*, 31 Fed. Rep. 808; *Com. v. Burk*, 11 Gray (Mass.) 437; *Com. v. Munsey*, 112 Mass. 287; *Com. v. Welch*, 97 Mass. 593; *Com. v. Flaherty*, 140 Mass. 454; *Com. v. Gormley*, 133 Mass. 580; *State v. Collins*, 1 McCord L. (S. Car.) 355; *Charleston v. Van Roven*, 2 McCord L. (S. Car.) 465. See also the title HUSBAND AND WIFE, vol. 15, pp. 903, 904.

**7. Actual Presence of Husband Unnecessary.** — *Com. v. Munsey*, 112 Mass. 287; *Com. v. Burk*, 11 Gray (Mass.) 437; *Com. v. Flaherty*, 140 Mass. 454.

**8. Presence of Husband in Adjoining Room.** — *Com. v. Gormley*, 133 Mass. 580.



**Acts Done in Husband's Absence.** — If the violation of the law by the wife occurs in the absence of the husband, no presumption of coercion can arise;<sup>1</sup> and this is true even though the act is done in obedience to his orders.<sup>2</sup>

**Wife Living Apart from Her Husband.** — A wife living apart from her husband and not subject to his authority is punishable for violating the liquor laws.<sup>3</sup>

**A Wife Doing Business as Sole Trader** who violates the liquor laws is liable to punishment,<sup>4</sup> even though the act complained of was committed by her husband acting as her clerk, she being present.<sup>5</sup>

**b. LIABILITY OF HUSBAND FOR ACTS OF WIFE.** — The husband is not liable for illegal sales made by his wife in his absence and without his authority<sup>6</sup> or against his express instructions.<sup>7</sup> On the other hand, if a wife makes unlawful sales of intoxicating liquors in the presence or with the knowledge of her husband he is criminally liable therefor, the presumption being that she acted under his control and coercion.<sup>8</sup> If a married woman keeps intoxicating liquors for sale in violation of law in her husband's house, he is liable if he has knowledge of the fact and of her intent, unless he uses reasonable means to prevent her from carrying out such intent;<sup>9</sup> and this is true although the wife is doing business as a sole trader.<sup>10</sup> The same rule is applicable where the premises on which the illegal acts are committed are owned jointly by husband and wife.<sup>11</sup> Even though the building in which the violation of the liquor laws occurs is the sole and separate property of the wife, the husband will nevertheless be liable if the building is occupied by himself and his wife as a dwelling.<sup>12</sup>

**Evidence — Competency.** — Evidence of unlawful sales of intoxicating liquors made by a wife in her husband's house in his absence is competent to charge him with the offense.<sup>13</sup> So, also, after proof of a sale by the wife, the state may prove sales made by the husband on other occasions, as tending to show that the business was his, and that the wife acted as his agent.<sup>14</sup>

**Violation of Law by Concubine.** — The presumption that a wife who makes illegal sales of intoxicating liquors in her husband's presence does so under his control and coercion does not apply to sales made by a concubine, and the man will not be punishable unless the jury is satisfied that she was acting as his agent. *U. S. v. Bonham*, 31 Fed. Rep. 808.

**1. Acts Committed in Husband's Absence.** — *Smith v. Com.*, (Ky. 1899) 48 S. W. Rep. 1081; *Com. v. Murphy*, 2 Gray (Mass.) 511; *Com. v. Burk*, 11 Gray (Mass.) 437; *Com. v. Whalen*, 16 Gray (Mass.) 25; *Com. v. Butler*, 1 Allen (Mass.) 4; *Com. v. Gannon*, 97 Mass. 547; *Com. v. Munsey*, 112 Mass. 289; *State v. Haines*, 35 N. H. 207. See also the title *HUSBAND AND WIFE* vol. 15, p. 903.

**2. Obedience to Husband's Orders No Protection.** — *Com. v. Munsey*, 112 Mass. 289; *Com. v. Whalen*, 16 Gray (Mass.) 25. See also the title *HUSBAND AND WIFE*, vol. 15, p. 904.

**3. Wife Living Apart from Husband.** — *State v. Collins*, 1 McCord L. (S. Car.) 355.

**4. Doing Business as Sole Trader.** — *Excise Com'rs v. Palmer*, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 200; *Charleston v. Van Roven*, 2 McCord L. (S. Car.) 465.

**5. Charleston v. Van Roven**, 2 McCord L. (S. Car.) 465.

**6. Offenses Committed Without Husband's Consent.** — *Seibert v. State*, 40 Ala. 60; *Pennybaker v. State*, 2 Blackf. (Ind.) 484. See also the title *HUSBAND AND WIFE*, vol. 15, p. 902.

**7. State v. Baker**, 71 Mo. 475.

**8. Acts Committed in Husband's Presence.** — *Mulvey v. State*, 43 Ala. 316, 94 Am. Dec. 684; *Hensly v. State*, 52 Ala. 10; *Com. v. Gannon*,

97 Mass. 547; *Com. v. Reynolds*, 114 Mass. 306; *Geuing v. State*, 1 McCord L. (S. Car.) 573. See also the title *HUSBAND AND WIFE*, vol. 15, p. 902.

**9. Com. v. Walsh**, 165 Mass. 62; *Com. v. Barry*, 115 Mass. 146. See also the title *HUSBAND AND WIFE*, vol. 15, p. 901, note 9.

**10. Com. v. Barry**, 115 Mass. 146.

**11. Com. v. Kennedy**, 119 Mass. 211, where it was held, also, that the husband need have no interest in the stock in trade or in the profits.

**12. Com. v. Carroll**, 124 Mass. 30. See also *State v. McDaniel*, 1 Houst. Crim. Cas. (Del.) 506, and the title *DISORDERLY HOUSES*, vol. 9, p. 531.

**Premises Rented by Wife.** — If a married woman keeps intoxicating liquors for sale in violation of law in a hotel hired by her, and her husband aids her in so keeping, or if without actually and actively aiding her he is present and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he may be convicted of such illegal keeping. *Com. v. Pratt*, 126 Mass. 462.

**Actual Consent — When Necessary.** — A husband is liable criminally for the sales of liquors in his house by his wife without his actual consent, if done under circumstances from which his knowledge may be implied. *Com. v. Costello*, 4 Wilcox (Pa.) 182.

**13. Com. v. Coughlin**, 14 Gray (Mass.) 389; *Com. v. Hurley*, 14 Gray (Mass.) 411; *Com. v. Murphy*, 2 Gray (Mass.) 513. See also *Com. v. Reynolds*, 114 Mass. 306.

**14. State v. Roberts**, 55 N. H. 483. See also



*c.* **LIABILITY OF HUSBAND ACTING AS AGENT OF WIFE.** — A husband who sells intoxicating liquors as agent for his wife who has no license is liable.<sup>1</sup>

*d.* **JOINT AND SEVERAL LIABILITY OF HUSBAND AND WIFE.** — A husband and wife may be jointly indicted, and upon sufficient proof both may be convicted of keeping a liquor nuisance.<sup>2</sup> And the conviction of a husband for maintaining a liquor nuisance is no bar to the conviction of his wife for being a common seller, although the same evidence is relied on to prove both offenses.<sup>3</sup>

**5. Liability of Partners.** — In the absence of statutes expressly or by implication providing otherwise, one partner is not liable for illegal sales of intoxicating liquors made by another in his absence or without his knowledge or consent;<sup>4</sup> but the statutes of some states have been so construed as to change this rule.<sup>5</sup> If one partner makes unlawful sales of intoxicating liquors on account of the firm and with the consent of the other, the latter will be criminally liable for such sales.<sup>6</sup> A license to two persons to retail intoxicating liquors will protect one of them in selling intoxicating liquors during the period covered by the license, although the other may have retired from the firm;<sup>7</sup> but a license to one of two or more partners will not protect the unlicensed members of the firm in making sales.<sup>8</sup> A sale in such case by an unlicensed member of the firm does not come within the rule authorizing a sale by an agent.<sup>9</sup>

**6. Liability of Owner or Lessor for Violations of Law on Leased Premises** —  
*a.* **CRIMINAL LIABILITY.** — In a number of jurisdictions the lessor of premises which are used in violation of the liquor laws is, by statute, made indictable under some circumstances for the illegal use. Under any of these statutes the owner, it is apprehended, will be punishable if he leases his property with the express purpose that it shall be used in violation of the liquor laws,<sup>10</sup> or if after having leased them liquors are sold thereon by his authority and permission.<sup>11</sup> If the statute makes punishable any person who, being the owner of the premises, allows the sale of intoxicating liquors thereon, the owner will not be liable because of his mere noninterference with the illegal traffic of his tenant

*Hensley v. State*, 52 Ala. 10, where, to show authority for the particular act charged, it was held competent to prove other similar acts of the wife in the husband's presence.

**Living Together in Tenement.** — The fact that the defendant and his wife lived together in a tenement is competent to prove that she acted as his agent. *Com. v. Hyland*, 155 Mass. 7.

**1. Husband as Wife's Agent.** — *Faircloth v. State*, 73 Ga. 426; *Excise Com'rs v. Dougherty*, 55 Barb. (N. Y.) 332.

**2. Joint Liability of Husband and Wife.** — *Com. v. Tryon*, 99 Mass. 442.

**3.** *Com. v. Welch*, 97 Mass. 593.

**4. Sales by One Partner Without Other's Knowledge or Consent.** — *Acree v. Com.*, 13 Bush (Ky.) 353.

**5. Under the Statutes of Mississippi and Arkansas making it unlawful for any person to sell or be interested in the sale of intoxicating liquors, etc., one partner will be liable for illegal sales made by another although the sales were made in his absence and without his knowledge and consent.** *Robinson v. State*, 38 Ark. 641; *Waller v. State*, 38 Ark. 656; *Whitton v. State*, 37 Miss. 379.

**Evidence.** — A license to retail liquor issued to one indicted with several others is inadmissible to rebut proof that all the defendants are jointly engaged in the business of retailing. *Dahmer v. State*, 56 Miss. 787.

**6. Sales by One Partner with Other's Knowledge**

**and Consent.** — *State v. McLaughlin*, 47 Kan. 143; *Smith v. Adrian*, 1 Mich. 495; *State v. Wiggin*, 20 N. H. 449; *State v. Neal*, 27 N. H. 131; *State v. Scoggins*, 107 N. Car. 959.

For cases in which the seller was held not a partner, but a mere agent, and therefore prohibited by his employer's license, see *Keiser v. State*, 58 Ind. 379; *Burke v. State*, 72 Ind. 392.

**7. Sales by One Partner Where Firm Is Licensed.** — *State v. Gerhardt*, 3 Jones L. (48 N. Car.) 178.

**8. Sale by One Partner Not Protected by License of Another.** — *Long v. State*, 27 Ala. 36; *Shaw v. State*, 56 Ind. 188; *Com. v. Hall*, 8 Gratt. (Va.) 588. But see *Barnes v. Com.*, 2 Dana (Ky.) 388.

**9. Not Sale by Agent.** — *Shaw v. State*, 56 Ind. 188. See also *Long v. State*, 27 Ala. 36.

**Evidence.** — In a suit against a copartner to recover back money for liquors illegally sold, the proof of the illegal sale is insufficient, if one of the copartners had license to sell, unless it be shown that the sale was made by the other. In such case the presumption of law is that the sale was made by a partner who had a right to make it. *Webber v. Williams*, 36 Me. 512.

**10. Lease for Illegal Purposes.** — *State v. Potter*, 30 Iowa 587; *Com. v. Hayes*, 167 Mass. 176; *State v. Shanahan*, 54 N. H. 437.

**11. Authorizing Illegal Use After Lease for Legal Purposes.** — *State v. Potter*, 30 Iowa 587.



after he becomes aware of it, if the premises were originally leased for a lawful purpose.<sup>1</sup> And mere knowledge of the unlawful use without actual permission does not render the owner criminally liable where a statute provides a penalty against any person who knowingly permits a building owned by him to be used in violation of the liquor laws;<sup>2</sup> it must appear that after he became aware of such illegal use he did some act or made some declaration affirmatively assenting thereto.<sup>3</sup> Where a statute makes punishable one in control of a building who permits its use for the unlawful sale of liquors, or after notice of such use fails to take reasonable means to eject the occupant, such person is not punishable unless the lease specially saves control of the building, although the statute provides that the owner may in such case recover by entry or action.<sup>4</sup>

*b. LIABILITY UNDER CIVIL DAMAGE ACTS—(1) Personal Liability of Owner or Lessor.*—By some statutes the owner of premises who leases them knowing that they are to be used for the sale of intoxicating liquors, or who, having leased them for other purposes, knows that they are used for selling intoxicating liquors, is made liable for damages resulting from the sales of liquors thereon.<sup>5</sup> Under these statutes it is immaterial that the sale was lawful.<sup>6</sup> Under the statutes of another state the lessor cannot be held liable unless the sale causing the damage was unlawful.<sup>7</sup>

*Knowledge of Agent Imputed to Owner.*—The owner is chargeable with the knowledge of the agent making the lease.<sup>8</sup>

*(2) Liability of Leased Premises.*—In addition to the statutes just mentioned there are others somewhat similar in their provisions. The *Iowa* statute provides that premises used with the owner's knowledge in violation of the liquor laws shall be liable for any judgment rendered against the person violating the laws on such premises, and that the judgment shall be a lien thereon until paid.<sup>9</sup> Under this provision it is held unnecessary to show consent of the owner to an unlawful use of his property. To make out a *prima facie* case for holding the property liable it is sufficient to show that the unlawful use was with the owner's knowledge. If, notwithstanding that fact, the property is not liable, the burden is on the owner to show it.<sup>10</sup>

**1. Noninterference with Illegal Use.**—*Crocker v. State*, 49 Ark. 62. And see also the title *DISORDERLY HOUSES*, vol. 9, pp. 523, 529.

**2. Knowledge of Illegal Use Without Permission.**—*State v. Stafford*, 67 Me. 125.

**3. Assent Must Be Shown.**—*State v. Ballingall*, 42 Iowa 87.

**Person Having Authority to Let Premises.**—One who has authority to let a tenement and receive the rents has control of it within the meaning of a statute making punishable any one who, having control of premises, permits the occupant to use them in violation of the liquor laws. *State v. Frazier*, 79 Me. 95.

**A Mortgagee Who Has neither Possession nor Right of Possession cannot be convicted of permitting the occupant of a building owned by him to use it in violation of the liquor laws.** *State v. Bates*, 62 Vt. 184.

**4. Com. v. Wentworth**, 146 Mass. 36.

**5. Leasing with Knowledge that Liquors Will Be Sold on Premises.**—See the title *CIVIL DAMAGE ACTS*, vol. 6, p. 49.

**6. Legality of Sale—Effect.**—*Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Conklin v. Tice*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 803; *Ketcham v. Fox*, 52 Hun (N. Y.) 284. See also the title *CIVIL DAMAGE ACTS*, vol. 6, p. 42.

The liability attaches irrespective of negligence or the want of it on the part of the lessor

or lessee. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

**7. McGee v. McCann**, 69 Me. 79.

**8. Owner Chargeable with Knowledge of Agent.**—See the title *CIVIL DAMAGE ACTS*, vol. 6, p. 50. See also *Financial Assoc. v. State*, 6 Kan. App. 206.

**9. Liability of Premises.**—Code Iowa (1897), § 2422.

**10. Consent Not Necessary.**—*Judge v. Fournoy*, 74 Iowa 164; *Judge v. O'Connor*, 74 Iowa 166. See also *State v. Mateer*, 105 Iowa 66.

That the rule was otherwise under a former statute, see *Cobleigh v. McBride*, 45 Iowa 117; *Meyers v. Kirt*, 57 Iowa 422, 64 Iowa 28; *Loan v. Etzel*, 62 Iowa 431; *Cox v. Newkirk*, 73 Iowa 42; *Putney v. O'Brien*, 53 Iowa 117.

**Knowledge May Be Shown** by the general reputation of the place (on which point see also *Carter v. Steyer*, 93 Iowa 533), or by the fact that a written notice was given by any citizen of the county to the landlord or his agent. *Judge v. O'Connor*, 74 Iowa 166.

**There Is No Personal Liability under the Iowa Statute;** the remedy against the owner is confined to the subjection of the property, under this statute, to the payment of the judgment. *McVey v. Manatt*, 80 Iowa 132.

**Homesteads Are Not Exempt** under the *Iowa* statute from sales for judgments, fines, and costs on account of the illegal sales of liquors



In Ohio a somewhat similar statute exists.<sup>1</sup>

**Two Causes Are Open to the Party Aggrieved.** He may bring a joint action against lessor and lessee,<sup>2</sup> or, having obtained a judgment against the lessee, he may, by a separate action against the lessor, subject the premises to the payment of the judgment.<sup>3</sup>

**When Lien Attaches.**—The lien on the premises created by these statutes attaches only upon the rendition of a judgment against the lessor,<sup>4</sup> and is subordinate to that of a mortgage previously executed.<sup>5</sup> So property sold before suit brought cannot be subjected to the payment of damages caused by sales of liquor thereon prior to the conveyance;<sup>6</sup> and a lessor cannot be enjoined from selling his property on the ground that the property may be required to satisfy a judgment.<sup>7</sup>

**A Conveyance or Mortgage Pending a Suit** against the lessor to subject the property to the payment of the judgment against the lessee will be inferior to a judgment obtained in such suit against the lessor.<sup>8</sup>

**c. LIABILITY OF PREMISES FOR FINES ASSESSED AGAINST OCCUPANT.**—In some jurisdictions the statutes provide that premises which the lessor knowingly suffers to be occupied for the unlawful sale of intoxicating liquors shall be subject to a lien for all fines and costs assessed against the occupant

on such premises. See the title *HOMESTEAD*, vol. 15, p. 616. Although the building is used in violation of the liquor laws, this will not deprive the owner of homestead rights as against creditors not claiming under a violation of those laws. *Groneweg v. Beck*, 93 Iowa 717.

**A Judgment Against the Wrongdoer Cannot Be Split Up** and a part only charged as a lien upon the premises. *Arnold v. Barkalow*, 73 Iowa 183.

**Knowledge of Particular Sale Causing Damage Unnecessary.**—If the whole business is in violation of law the property will be subject to judgment, without knowledge on the part of the owner of the particular sale causing the damage. *Wing v. Benham*, 76 Iowa 17.

**As to the Owner's Liability for Costs**, see *McVey v. Manatt*, 80 Iowa 132; *Drake v. Kingsbaker*, 72 Iowa 441.

1. See *Mullen v. Peck*, 49 Ohio St. 447.

**This Statute Is Constitutional.**—*Mullen v. Peck*, 49 Ohio St. 447.

**The Term "Premises" as Used in the Liquor Law** is the synonym of "lands and tenements." *Bowers v. Pomeroy*, 21 Ohio St. 184.

**Only the Estate Which the Lessor Has in the Premises** can be subjected to fines, etc., for violation of the liquor laws. Interest in remainder and reversion cannot be made liable. *Mullen v. Peck*, 49 Ohio St. 447; *Dugan v. Neville*, 49 Ohio St. 462.

**2. Joint Action.**—*Loan v. Hiney*, 53 Iowa 89; *Buckham v. Grape*, 65 Iowa 538; *O'Brien v. Putney*, 55 Iowa 292; *Mullen v. Peck*, 49 Ohio St. 447.

**In Order to Maintain the Joint Action** under the Ohio Statute it is necessary that the lessor had knowledge that liquors were to be sold, on the premises leased, in violation of the law, or that, the premises being leased for other purposes, he knowingly permitted the sales that caused the injury. His liability under this section is personal; the damages are made a lien on all his real estate. *Mullen v. Peck*, 49 Ohio St. 447.

**Contribution.**—Under this statute the owner

and his tenant are joint wrongdoers, and the owner is not entitled to contribution from the tenant. *Zigler v. Rommel*, 4 Ohio Dec. 472.

**3. Separate Actions Against Lessor and Lessee.**—*McVey v. Manatt*, 80 Iowa 135; *La France v. Krayner*, 42 Iowa 143; *Buckham v. Grape*, 65 Iowa 535; *Mullen v. Peck*, 49 Ohio St. 447.

In Ohio, to maintain a separate action against the lessor, it is sufficient that the premises were leased "for the sale of intoxicating liquors," or permitted "to be so used." The unlawful character of the business is not involved. *Mullen v. Peck*, 49 Ohio St. 447.

**In Ohio the Defendant Cannot Controvert** in such action "the sales, or their illegal character, or the damages resulting therefrom;" but he may show that the lease was not for the purpose of selling intoxicating liquor, or that such use was not permitted, or that the unlawful sales did not take place on the premises. *Mullen v. Peck*, 49 Ohio St. 447.

**In Iowa, however**, the judgment against the lessee, though admissible for the purpose of showing that a judgment was obtained, is not conclusive as to the amount for which a lien may be declared against the lessor, except that in no event could the plaintiff's lien be for any greater amount. *Buckham v. Grape*, 65 Iowa 535. See also *McVey v. Manatt*, 80 Iowa 132.

**4. When Lien Attaches.**—*Goodenough v. McCoid*, 44 Iowa 659; *Bellinger v. Griffith*, 23 Ohio St. 619; *Mullen v. Peck*, 49 Ohio St. 460.

**5. Subordination of Lien to Mortgage Previously Executed.**—*Bell v. Cassem*, 158 Ill. 45; *Goodenough v. McCoid*, 44 Iowa 659.

**6. Sale of Property Before Suit to Subject Property to Lien.**—*Bellinger v. Griffith*, 23 Ohio St. 619.

**7. Enjoining Sale of Property.**—*Bonesteel v. Downs*, 73 Iowa 685, in which case it was said that a judgment must exist against a debtor before an injunction will issue restraining him from disposing of his property.

**8. O'Brien v. Putney**, 55 Iowa 292; *Myers v. Kirt*, 68 Iowa 124; *McClure v. Braniff*, 75 Iowa 38; *La Roche v. Brewer*, 8 Ohio Cir. Ct. 508, 5 Ohio Cir. Dec. 432.



for violations of the statutes.<sup>1</sup> Under these statutes, the premises will not be liable unless the lessor knowingly permitted the occupant to use them in violation of law;<sup>2</sup> but knowledge sufficient to excite the suspicions of a prudent man and to put him upon inquiry is equivalent to knowledge of the ultimate fact.<sup>3</sup> In *Kansas* it has been held that the lien attaches to the leased premises and operates on them from the date of the occupant's conviction;<sup>4</sup> and all conveyances after that date are subject to such lien.<sup>5</sup> One who purchases the property pending an action to enforce a lien against it for a fine and costs assessed against the occupant takes it subject to the result of such action.<sup>6</sup>

**1. Statutory Provisions.**— Gen. Stat. Kan. (1897), c. 101, § 43; Code Iowa (1897), § 2422.

**The Constitutionality of the Statutes** the substance of which is stated in the text has been uniformly upheld. *Polk County v. Hierb*, 37 Iowa 361; *State v. Snyder*, 34 Kan. 425; *Harden v. State*, 32 Kan. 637.

**Suspension of a Judgment for Maintaining a Liquor Nuisance**, on account of the defendant's health, does not remit the fine imposed on the defendant, but it will have the effect of preventing, during the suspension, the maintenance of an action to subject the real estate of the landlord to the payment of the fine. *State v. Mateer*, 105 Iowa 66.

**A Release of the Defendant**, under an order of the board of county commissioners, from confinement after commitment to the jail in good faith until the fines and costs are paid, will not defeat the state's right to enforce the lien, after an action to enforce it has been begun. *Financial Assoc. v. State*, 6 Kan. App. 206.

**Delay in Prosecuting Action—Effect.**— If the property has changed hands several times during the pendency of an action to enforce a lien against it for fines assessed against the occupant, and it was impossible to serve the owners with process, the delay thereby caused

will not estop the state from a recovery. *State v. Mateer*, 105 Iowa 66.

**Fine and Costs Prima Facie Amount of Lien.**— The fine and costs embraced in the judgment in the criminal action against the occupant are *prima facie* the amount of the lien. *Pfefferle v. State*, 39 Kan. 128.

**Witnesses—Competency.**— When the title of the real estate is in the name of the wife, the husband is a proper party defendant, and therefore a joint party with the wife and a competent witness. *Pfefferle v. State*, 39 Kan. 128.

**2. Knowledge Necessary.**— *State v. Mateer*, 105 Iowa 66; *Cordes v. State*, 37 Kan. 48.

**3. Cordes v. State**, 37 Kan. 48. And see *State v. Mateer*, 105 Iowa 66.

**The Knowledge of the Agent Is the Knowledge of the Owner.**— *Financial Assoc. v. State*, 6 Kan. App. 206.

**A Knowledge of the Particular Sale for Which the Occupant was Fined Is Unnecessary.**— *Cordes v. State*, 37 Kan. 48.

**4. When Lien Attaches.**— *Snyder v. State*, 40 Kan. 543; *State v. Pfefferle*, 33 Kan. 718.

**5. Snyder v. State**, 40 Kan. 543.

**6. Sale Pending Suit to Enforce Lien.**— *State v. Mateer*, 105 Iowa 66.



# INTOXICATION.

By W. A. MARTIN.

## I. DEFINITION, 399.

## II. INTOXICATION AS AFFECTING CONTRACTUAL LIABILITY, 399.

1. *Where Contract Is Express*, 399.
  - a. *Effect of Intoxication in Absence of Fraud of Other Contracting Party*, 399.
    - (1) *In General*, 399.
    - (2) *Degree of Intoxication Necessary*, 401.
    - (3) *Whether Contract Void or Merely Voidable*, 401.
    - (4) *Who May Avoid Contract*, 402.
  - b. *Status of Contracts of Intoxicated Persons in Case of Fraud of Other Party*, 402.
2. *Where Contract Is Implied*, 403.

## III. INTOXICATION AS AFFECTING RESPONSIBILITY FOR CRIME, 403.

1. *Voluntary Intoxication No Excuse for Crime*, 403.
  - a. *In General*, 403.
  - b. *Temporary Insanity Caused by Voluntary Intoxication*, 405.
  - c. *Voluntary Intoxication Rendering Party Unconscious of His Acts*, 405.
2. *Under What Circumstances and for What Purposes Evidence of Voluntary Intoxication Admissible*, 406.
  - a. *Crimes in Which Specific Intent Is Necessary Element*, 406.
    - (1) *Statement of Rule*, 406.
    - (2) *Necessity for Caution in Applying Rule*, 407.
    - (3) *What Degree of Intoxication Will Merit Consideration*, 407.
    - (4) *Capacity to Form Intent Question for Fury*, 407.
    - (5) *Competency and Sufficiency of Evidence to Prove Intoxication*, 408.
    - (6) *Intoxicated Person May Be Capable of Forming Intent*, 408.
    - (7) *Applications of Rule in Prosecutions for Particular Offenses*, 408.
      - (a) *Homicide*, 408.
      - (b) *Assaults*, 411.
      - (c) *Other Offenses*, 412.
  - b. *Cases in Which Specific Intent Is Not Element of Crime*, 413.
3. *Effect of Involuntary Intoxication on Responsibility for Crime*, 414.
4. *Responsibility for Crime of Persons Mentally Diseased from Use of Intoxicants*, 414.
  - a. *Persons Afflicted with Fixed Insanity from Use of Intoxicants*, 414.
  - b. *Persons Afflicted with Delirium Tremens*, 414.
  - c. *Dipsomaniacs*, 415.
5. *Responsibility of Insane Person Drunk at Time of Committing Act*, 416.

## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *CIVIL DAMAGE ACTS*, vol. 4, p. 542; *DRUNKENNESS*, vol. 7, p. 229; *INTOXICATING LIQUORS*, vol. 11, p. 513.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCIDENT INSURANCE*, vol. 1, p. 318; *ALCOHOLISM, INTEMPERANCE, AND NARCOTICS (IN INSURANCE)*, vol. 2, p. 38; *AMOTION*, vol. 2, p. 312; *ARREST*, vol. 2, p. 876; *ASSIGNMENTS*, vol. 2, p. 1012; *ATTEMPTS TO COMMIT CRIME*,



vol. 3, p. 263; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 165; *BLASPHEMY AND PROFANITY*, vol. 4, p. 581; *BONDS*, vol. 4, p. 627; *BREACH OF PROMISE OF MARRIAGE*, vol. 4, pp. 893, 900; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *CHARACTER (IN EVIDENCE)*, vol. 5, p. 859; *CIVIL DAMAGE ACTS*, vol. 6, p. 56; *CONFESSIONS*, vol. 6, p. 570; *CONSPIRACY*, vol. 6, p. 859; *CONTRACTS*, vol. 7, p. 144; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 441; *COUNTERFEITING*, vol. 7, p. 883; *CRIMINAL LAW*, vol. 8, p. 296; *DEEDS*, vol. 9, p. 123; *DISFRANCHISEMENT*, vol. 9, p. 485; *DIVORCE*, vol. 9, p. 723; *FAMILY AGREEMENTS OR SETTLEMENTS*, vol. 12, p. 877; *FELLOW SERVANTS*, vol. 12, pp. 917, 1026; *HABITUAL DRUNKARDS*, vol. 15, p. 221; *HIGHWAYS*, vol. 15, p. 474; *INNS AND INNKEEPERS*, vol. 16, p. 505; *INSANITY*, vol. 16, p. 565; *INTOXICATING LIQUORS*, *post*; *LIFE INSURANCE*; *MASTER AND SERVANT*; *NEGLIGENCE*; *PUBLIC OFFICERS*; *RESCISSION*; *TESTAMENTARY CAPACITY*.

**I. DEFINITION.** — The term "intoxicated" usually signifies a condition produced by drinking intoxicating spirituous liquors, and is equivalent to "drunk."<sup>1</sup>

**II. INTOXICATION AS AFFECTING CONTRACTUAL LIABILITY** — 1. **Where Contract Is Express** — *a. EFFECT OF INTOXICATION IN ABSENCE OF FRAUD OF OTHER CONTRACTING PARTY* — (1) *In General.* — Formerly it was held that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself.<sup>2</sup> But the rule is now well settled that where the obligor of a contract enters into it while intoxicated to a degree which disqualifies his mind to comprehend the subject of the contract and its nature and probable consequences, he is entitled to set up this condition as a defense to an action on the contract as a ground to set it aside,<sup>3</sup> though it has been said that the defense of intoxica-

**1. Intoxication Defined.** — *State v. Kelley*, 47 Vt. 294; *Anderson's L. Dict.*; *Black's L. Dict.*

"It is sometimes said that a person is intoxicated or drunk with opium, or with ether, or with laughing gas. But it is always felt and understood that such is an unusual and forced use of the words 'intoxicated,' 'drunk,' and the addition to them is needful in order to prevent misapprehension of the sense in which those words are thus used." *State v. Kelley*, 47 Vt. 296.

**2. Rule that Intoxication Does Not Affect Responsibility.** — *Co. Litt.* 247a; 2 *Kent's Com.* 451; *Yates v. Boen*, 2 *Str.* 1104; *Shaw v. Thackray*, 17 *Jur.* 1045; *Cole v. Robins*, *Buller N. P.* 172a; statements in *Webster v. Woodford*, 3 *Day (Conn.)* 96; *Grant v. Thompson*, 4 *Conn.* 203, 10 *Am. Dec.* 119, as to former rule.

**3. Rule that Excessive Intoxication Avoids Responsibility** — *England.* — *Hawkins v. Bone*, 4 *F. & F.* 311; *Gore v. Gibson*, 13 *M. & W.* 623; *Pitt v. Smith*, 3 *Campb.* 33; *Matthews v. Baxter*, L. R. 8 *Exch.* 132; *Cooke v. Clayworth*, 18 *Ves. Jr.* 12.

*Alabama.* — *Donelson v. Posey*, 13 *Ala.* 752.

*Arkansas.* — *Taylor v. Purcell*, 60 *Ark.* 606.

*California.* — *Pickett v. Sutter*, 5 *Cal.* 412.

*Colorado.* — *Hale v. Stery*, 7 *Colo. App.* 165.

*Connecticut.* — *Webster v. Woodford*, 3 *Day (Conn.)* 90.

*Delaware.* — *Drummond v. Hopper*, 4 *Harr. (Del.)* 327.

*Florida.* — *Mattair v. Card*, 18 *Fla.* 761.

*Illinois.* — *Menkins v. Lightner*, 18 *Ill.* 282;

*Bates v. Ball*, 72 *Ill.* 109.

*Indiana.* — *Joest v. Williams*, 42 *Ind.* 565, 13 *Am. Rep.* 377; *Cummings v. Henry*, 10 *Ind.* 109; *Harbison v. Lemon*, 3 *Blackf. (Ind.)* 51, 23 *Am. Dec.* 376; *Reinskopf v. Rogge*, 37 *Ind.* 207; *Jenners v. Howard*, 6 *Blackf. (Ind.)* 240.

*Iowa.* — *Mansfield v. Watson*, 2 *Iowa* 111; *Hawley v. Howell*, 60 *Iowa* 79.

*Kansas.* — *Franks v. Jones*, 39 *Kan.* 236.

*Michigan.* — *Wright v. Fisher*, 65 *Mich.* 275, 8 *Am. St. Rep.* 886; *Carpenter v. Rodgers*, 61 *Mich.* 384, 1 *Am. St. Rep.* 595.

*Mississippi.* — *Newell v. Fisher*, 11 *Smed. & M. (Miss.)* 431, 49 *Am. Dec.* 66.

*Missouri.* — *Haneklau v. Felchlin*, 57 *Mo. App.* 602; *Longhead v. B. F. Combs, etc.*, *Commission Co.*, 64 *Mo. App.* 559; *Broadwater v. Darne*, 10 *Mo.* 277; *Cavender v. Waddingham*, 5 *Mo. App.* 457.

*Nebraska.* — *Johnson v. Phifer*, 6 *Neb.* 401.

*New York.* — *Prentice v. Achorn*, 2 *Paige (N. Y.)* 30; *Rice v. Peet*, 15 *Johns. (N. Y.)* 503.

*Ohio.* — *French v. French*, 8 *Ohio* 215.

*Pennsylvania.* — *Bush v. Breinig*, 113 *Pa. St.* 310, 57 *Am. Rep.* 469; *Noel v. Karper*, 53 *Pa. St.* 97.

*South Carolina.* — *Berkley v. Cannon*, 4 *Rich. L. (S. Car.)* 136; *Williams v. Inabnet*, 1 *Bailey L. (S. Car.)* 343. *Contra*, *Rutherford v. Ruff*, 4 *Desaus. (S. Car.)* 365.

*Tennessee.* — *Birdsong v. Birdsong*, 2 *Head (Tenn.)* 290.

*Texas.* — *Reynolds v. Dechaums*, 24 *Tex.* 174, 76 *Am. Dec.* 101.

*Utah.* — *Smith v. Williamson*, 8 *Utah* 219.



tion is not favored.<sup>1</sup> So far as legal capacity is concerned, it is immaterial from what causes such a state of mind arises, whether by the party's own improvidence or otherwise. It is the state and condition of the mind itself that the law will notice, and not the causes that produced it.<sup>2</sup> It is not essential to the establishment of the intoxicated party's rights that the other contracting party knew of his condition when the contract was made,<sup>3</sup> though this would, of course, be an additional reason for granting relief.<sup>4</sup>

**Drunkenness Acquired for Purpose of Fraud.** — If a party makes himself drunk with the express purpose of avoiding a contract entered into by him while in that state, it may well be doubted whether he would be permitted to carry this fraud into effect.<sup>5</sup>

**Rights of Innocent Third Persons.** — While the maker of a negotiable note may avoid it as between himself and the payee or a transferee with knowledge of the facts if he (the maker) can show total intoxication on his part at the time he made the note, yet such defense cannot be set up against an innocent holder for value,<sup>6</sup> and the same rule has been applied to non-negotiable contracts.<sup>7</sup>

**Effect of Intoxication on Contracts Between Near Relatives.** — Agreements, if reasonable, and made to settle family disputes, will not be set aside because one of the parties was drunk, if it does not appear that any unfair advantage of his

*Vermont.* — Parrett v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; Conant v. Jackson, 16 Vt. 335; Bliss v. Connecticut, etc., Rivers R. Co., 24 Vt. 425; Foot v. Tewksbury, 2 Vt. 97. *Virginia.* — Arnold v. Hickman, 6 Munf. (Va.) 15; Wigglesworth v. Steers, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602; Reynolds v. Waller, 1 Wash. (Va.) 164.

*Wisconsin.* — Bursinger v. Watertown Bank, 67 Wis. 75, 58 Am. Rep. 848.

**Rule in New Jersey.** — In New Jersey a rule differing from that stated in the text obtains. To avoid a contract on the ground of intoxication in that state, it must be shown either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation. Hutchinson v. Tindall, 3 N. J. Eq. 357; Burroughs v. Richman, 13 N. J. L. 233, 23 Am. Dec. 717; Maxwell v. Pittenger, 3 N. J. Eq. 156; Wilmurt v. Morgan, March, 1827, N. J. Ch.; Rodman v. Zilley, 1 N. J. Eq. 320; Adams v. Ryerson, 6 N. J. Eq. 328. In one of these cases it was said that sound policy requires that intoxication shall not be a defense to those acts affecting property, unless brought about by the other party or unless it is so total as to be palpable evidence of fraud in a person entering into the contract with one so intoxicated. Burroughs v. Richman, 13 N. J. L. 233, 23 Am. Dec. 717. Yet if a person, while in a state of intoxication, though not induced by the act or procurement of the grantee, makes an absolute conveyance of his property without consideration, equity will relieve against the conveyance. Hutchinson v. Tindall, 3 N. J. Eq. 357. And equity will also interfere to set aside a contract where the sober contracting party imposed on the one intoxicated. Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519.

**The Rule in Kentucky** as stated in an early case seems to be the same as that in *New Jersey*. Campbell v. Ketcham, 1 Bibb (Ky.) 406.

**1. Defense of Intoxication Not Favored.** — Hall v. Moreman, 3 McCord L. (S. Car.) 477; Berkeley v. Cannon, 4 Rich. L. (S. Car.) 136.

**2. Law Considers State of Mind, Not Producing Causes.** — Bliss v. Connecticut, etc., Rivers R. Co., 24 Vt. 426.

**Intoxication Without Fraud or Artifice of Other Party.** — Hawkins v. Bone, 4 F. & F. 311; Donelson v. Posey, 13 Ala. 752; Mansfield v. Watson, 2 Iowa 111; French v. French, 8 Ohio 215; Bush v. Breinig, 113 Pa. St. 310, 57 Am. Rep. 469; Barrett v. Buxton, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; Conant v. Jackson, 16 Vt. 335; Berkeley v. Cannon, 4 Rich. L. (S. Car.) 136; Wigglesworth v. Steers, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602.

**3. Other Party's Knowledge of Condition Not Necessary.** — Hawkins v. Bone, 4 F. & F. 311.

**4. Knowledge of Other Party an Additional Ground for Relief.** — Gore v. Gibson, 13 M. & W. 623.

**5. Effect of Intoxication for Purpose of Avoiding Responsibility.** — 1 Parsons on Contracts (7th ed.) 384; 1 Daniel on Neg. Inst. (4th ed.), § 215.

**6.** See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 165.

It has even been held that the fact that the note was taken by such holder under circumstances which ought to have excited suspicion will not defeat a recovery; and that it must be shown that it was taken in bad faith. McSparran v. Neeley, 91 Pa. St. 17.

But see *Sentance v. Poole*, 3 C. & P. 1, 14 E. C. L. 179, which contains an intimation that the defense would be good even against a *bona fide* holder without notice. And see *Caulkins v. Fry*, 35 Conn. 170, in which it was said that where the maker of a negotiable note defends against a *bona fide* holder on the ground that he was intoxicated when he made the note, he must make out a case of complete intoxication.

**7. Rights of Assignee of Contract.** — Though an assignment of an agreement by A to B be objectionable on account of A's intoxication at the time, this intoxication cannot in any way affect B's subsequent assignment to C without notice. Campbell v. Brackenridge, 8 Blackf. (Ind.) 471.



condition was taken.<sup>1</sup>

(2) *Degree of Intoxication Necessary.* — Where a person seeks to avoid responsibility for a contract on the ground of intoxication alone, it must appear that the drunkenness was so excessive that he was utterly deprived of the use of his reason and understanding, and was altogether incapable of knowing the effect of what he was doing.<sup>2</sup> Any degree of intoxication which falls short of this will furnish no ground for release in the absence of fraud on the part of the other contracting party.<sup>3</sup> Mere ordinary drunkenness will not of itself avoid a deed or contract.<sup>4</sup> The fact that a party is too much intoxicated to transact business safely,<sup>5</sup> or is laboring under excitement from the use of intoxicating liquors,<sup>6</sup> or is even so much under the influence of drink that his reason, memory, and judgment are impaired,<sup>7</sup> or he does not clearly understand the business in hand, does not imply such intoxication as will enable him to avoid his contracts.<sup>8</sup>

*Intoxication Question for Jury.* — Whether a party was so intoxicated as to render him incompetent to contract, is a question for the jury.<sup>9</sup>

(3) *Whether Contract Void or Merely Voidable.* — Although there are a few decisions in which it has been held that the contract of one made at a time when he is too drunk to know what he is doing is wholly void,<sup>10</sup> the weight

1. *Contracts Between Near Relatives.* — *Cory v. Cory*, 1 Ves. 19; *Stockley v. Stockley*, 1 Ves. & B. 30. See also *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.) 67; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.

2. *Intoxication Which Deprives Party of Understanding Necessary* — *England.* — *Gore v. Gibson*, 13 M. & W. 623; *Lightfoot v. Heron*, 3 Y. & C. Exch. 586.

*Arkansas.* — *Taylor v. Purcell*, 60 Ark. 606.

*California.* — *Pickett v. Sutter*, 5 Cal. 412.

*Georgia.* — *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128.

*Illinois.* — *Schramm v. O'Connor*, 98 Ill. 539; *Shackelton v. Sebree*, 86 Ill. 616; *Bates v. Ball*, 72 Ill. 108.

*Indiana.* — *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

*Iowa.* — *Willcox v. Jackson*, 51 Iowa 208; *Mansfield v. Watson*, 2 Iowa 111.

*Kansas.* — *Franks v. Jones*, 39 Kan. 236.

*Maryland.* — *Johns v. Fritchey*, 39 Md. 259.

*Michigan.* — *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

*Missouri.* — *Cavender v. Waddingham*, 5 Mo. App. 457.

*Nebraska.* — *Johnson v. Phifer*, 6 Neb. 401.

*South Carolina.* — *Lee v. Ware*, 1 Hill L. (S. Car.) 313.

*Tennessee.* — *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121; *Woodson v. Gordon*, Peck (Tenn.) 196, 14 Am. Dec. 743; *Morris v. Nixon*, 7 Humph. (Tenn.) 579; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.

*Texas.* — *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.

*Vermont.* — *Foot v. Tewksbury*, 2 Vt. 97; *Barrett v. Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691.

*Virginia.* — *Loftus v. Maloney*, 89 Va. 576; *Arnold v. Hickman*, 6 Munf. (Va.) 15.

*What Evidence of Intoxication Is Competent.* — A party may show, in order to defeat a settlement made by him, that at the time he was incapable of contracting intelligently by reason of intoxication, and evidence of his intoxicated condition several hours after the settlement

may be given as tending to throw light on his condition when the settlement was made. *Phelan v. Gardner*, 43 Cal. 306.

*Evidence Held Insufficient to Show Complete Intoxication.* — Where it appears from the evidence that the defendant was conscious of his condition and knew what he was doing at the time of making the contract, this will not sustain a claim of complete intoxication and thereby avoid the contract. *Duker v. Franz*, 7 Bush (Ky.) 276. And where it appeared that the maker of a note was able to sign it and to remember the next morning that he had done so, and for what the note was given, it was held that this did not show a case of intoxication. *Caulkins v. Fry*, 35 Conn. 170.

For other cases in which it was held that the evidence was insufficient to show a complete state of intoxication, see *Lightfoot v. Heron*, 3 Y. & C. Exch. 586; *Rottenburgh v. Fowl*, (N. J. 1893) 26 Atl. Rep. 338; *Houston, etc., R. Co. v. Tierney*, 72 Tex. 312; *Loftus v. Maloney*, 89 Va. 576.

3. *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.

4. *Ordinary Drunkenness Insufficient to Avoid Contract.* — *Mansfield v. Watson*, 2 Iowa 111; *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121.

5. *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376.

6. *Excitement Caused by Drunkenness.* — *Cavender v. Waddingham*, 5 Mo. App. 457; *Johnson v. Phifer*, 6 Neb. 401.

7. *Impairment of Reason and Judgment by Intoxication.* — *Taylor v. Purcell*, 60 Ark. 609.

8. *Henry v. Ritenour*, 31 Ind. 136.

*Findings on Question of Intoxication.* — A finding that at the time the contract was made the "plaintiff's mind was in an abnormal condition, superinduced by drunkenness," has been held sufficiently exact and certain to show that he was then mentally incapable of making a contract. *Franks v. Jones*, 39 Kan. 236.

9. *Degree of Intoxication for Jury to Determine.* — *Cummings v. Henry*, 10 Ind. 109; *Prentice v. Achorn*, 2 Paige (N. Y.) 30; *Berkley v. Cannon*, 4 Rich. L. (S. Car.) 136.

10. *Contract — Whether Void or Voidable* — *View*



of authority is that such a contract is voidable only, and is therefore capable of ratification by the party when he becomes sober.<sup>1</sup> It has been held, however, that if the contract is totally without consideration it is void and incapable of being ratified.<sup>2</sup> If the party elects to avoid the contract, he must do so within a reasonable time,<sup>3</sup> and he must restore whatever consideration he has received.<sup>4</sup> Before he can recover the consideration moving from him, he must show in some way that he has rescinded the contract,<sup>5</sup> and the best evidence of this is the restoration of the consideration moving from the other party.<sup>6</sup>

(4) *Who May Avoid Contract.* — It is well settled that only the party or his legal representatives may avoid the contract on the ground of his intoxication.<sup>7</sup>

*b. STATUS OF CONTRACTS OF INTOXICATED PERSONS IN CASE OF FRAUD OF OTHER PARTY.* — If a person is too intoxicated at the time of making a contract to understand what he is doing, and in addition to that is imposed upon by the fraud of the other contracting party, equity will, of course, relieve against the contract.<sup>8</sup> While intoxication to this degree furnishes an adequate ground for relief at law, the fraud constitutes an equally sufficient ground for relief in equity. A much less degree of intoxication is necessary where this intoxication has been procured by the fraud of the other party, or where he has taken advantage of this partially intoxicated condition to make a hard and unconscientious bargain. Under these circumstances equity will relieve the party against whom the fraud has been practiced.<sup>9</sup> Contracts made by persons who are under the influence of liquor without being completely intoxicated are governed by the principles which apply in cases where

that Contract Is Void. — *Gore v. Gibson*, 13 M. & W. 623; *Thompson v. Leach*, 3 Mod. 301; *Berkley v. Cannon*, 4 Rich. L. (S. Car.) 136.

1. *View that Contract Is Merely Voidable* — *England.* — *Matthews v. Baxter*, L. R. 8 Exch. 133.

*Florida.* — *Mattair v. Card*, 18 Fla. 761.

*Illinois.* — *Menkins v. Lightner*, 18 Ill. 282.

*Indiana.* — *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Cummings v. Henry*, 10 Ind. 109; *McGuire v. Callahan*, 19 Ind. 128.

*Iowa.* — *Mansfield v. Watson*, 2 Iowa 111; *Hawley v. Howell*, 60 Iowa 79.

*Kansas.* — *Lacy v. Mann*, 59 Kan. 777, 53 Pac. Rep. 754.

*Kentucky.* — *Taylor v. Patrick*, 1 Bibb (Ky.) 168.

*Michigan.* — *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595.

*Mississippi.* — *Newell v. Fisher*, 11 Smed & M. (Miss.) 431, 49 Am. Dec. 66.

*Missouri.* — *Longhead v. B. F. Combs, etc.*, *Commission Co.*, 64 Mo. App. 559; *Broadwater v. Darne*, 10 Mo. 277; *Eaton v. Perry*, 29 Mo. 96.

*Pennsylvania.* — *Noel v. Karper*, 53 Pa. St. 97.

*South Carolina.* — *Williams v. Inabnet*, 1 Bailey L. (S. Car.) 343; *Berkley v. Cannon*, 4 Rich. L. (S. Car.) 136.

*Utah.* — *Smith v. Williamson*, 8 Utah 219.

*Virginia.* — *Arnold v. Hickman*, 6 Munf. (Va.) 15; *Loftus v. Maloney*, 89 Va. 576.

See also the title RESCISSION.

2. *Contract Without Consideration Void.* — *Newell v. Fisher*, 11 Smed. & M. (Miss.) 431, 49 Am. Dec. 66.

3. *Party Must Rescind in Reasonable Time.* — *Cummings v. Henry*, 10 Ind. 109.

4. *Must Restore Consideration.* — *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Hawley v. Howell*, 60 Iowa 79.

5. *Burden of Showing Rescission on Party Setting Up Intoxication.* — *Carpenter v. Rodgers*, 61 Mich. 384, 1 Am. St. Rep. 595; *Smith v. Williamson*, 8 Utah 219.

6. *Best Evidence of Rescission.* — See *Williams v. Inabnet*, 1 Bailey L. (S. Car.) 343.

*Evidence Held Sufficient to Show Ratification.* — The defendant while intoxicated gave his note and a Holstein bull in consideration of a Durham bull; he drove the Durham bull home, but on the same night returned it to the payees, who refused to receive it. Several days later, when the defendant was sober, he took a Durham heifer from the payees in exchange for the Durham bull. This evidence was held sufficient to show an intent to ratify the contract. *Smith v. Williamson*, 8 Utah 219.

7. *Only Party or Legal Representative May Avoid Contract.* — *Doe v. Harter*, 1 Ind. 427, 2 Ind. 252; *Lacy v. Mann*, 59 Kan. 777; *Eaton v. Perry*, 29 Mo. 96; *Wigglesworth v. Steers*, 111 N. Y. 70, 3 Am. Dec. 602.

8. *Fraud Superadded to Intoxication Sufficient to Impair Contracting Mind.* — *Thackrah v. Haas*, 119 U. S. 499; *Hutchinson v. Brown, Clarke* (N. Y.) 408.

9. *Lesser Degree of Intoxication Sufficient in Case of Fraud.* — *Mansfield v. Watson*, 2 Iowa 111; *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.) 67; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289; *White v. Cox*, 3 Hayw. (Tenn.) 79. See also *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128. And see *New Jersey* cases cited in note to section 1. a. (1) *In General* — *Rule in New Jersey*.



one party is in a condition which exposes him to the exercise of improper influence by the other party.<sup>1</sup>

**2. Where Contract Is Implied.** — With regard to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. In many cases the law does not require an actual agreement between the parties, but implies the contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus in actions for money paid by the plaintiff to the defendant's use, the action may lie against the defendant even though he may have protested against such a contract.<sup>2</sup> One who supplies a drunken man with the actual necessities of life may recover the price of them, if the party keeps them when he becomes sober,<sup>3</sup> although a count for goods bargained and sold would fail.<sup>4</sup>

**III. INTOXICATION AS AFFECTING RESPONSIBILITY FOR CRIME** — **1. Voluntary Intoxication No Excuse for Crime** — *a. IN GENERAL.* — The law is well settled that one who voluntarily intoxicates himself and beclouds his reason cannot set up such condition in excuse or mitigation of a crime committed while in that condition.<sup>5</sup> The effects of drunkenness upon the mind and upon men's

**1. Birdsong v. Birdsong**, 2 Head (Tenn.) 289.

**Inadequacy of Price as Evidence of Fraud.** — Where a party is intoxicated at the time of making the contract, inadequacy of price is direct evidence of fraud. *Crane v. Conklin*, 1 N. J. Eq. 357, 22 Am. Dec. 519; *Reynolds v. Waller*, 1 Wash. (Va.) 164.

**Evidence Held Insufficient to Show Fraud.** — Evidence that a party was intoxicated much of the time before making a contract, and was at times in no condition to transact business, but that on occasions when he was not under the influence of liquor he had frequently offered to convey the property in question for about the same price which was paid therefor, and that after making the conveyance he surrendered possession thereof without complaint and assisted in removing his personal property from the land conveyed, is insufficient to make a case of fraud within the rule. *Carter v. Davidson*, 73 Iowa 45.

**2. Implied Contracts.** — *Gore v. Gibson*, 13 M. & W. 625; *Haneklau v. Felchlin*, 57 Mo. App. 602; *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469.

**3. Contract Implied from Furnishing Necessaries.** — *Gore v. Gibson*, 13 M. & W. 625; *Richardson v. Strong*, 13 Ired. L. (35 N. Car.) 106, 55 Am. Dec. 430.

**4. Gore v. Gibson**, 13 M. & W. 627.

**5. Voluntary Intoxication No Excuse for Crime** — *England.* — *Rex v. Carroll*, 7 C. & P. 145, 32 E. C. L. 471; *Rex v. Meakin*, 7 C. & P. 297, 32 E. C. L. 514; *Rex v. Thomas*, 7 C. & P. 817, 32 E. C. L. 750; *Reg. v. Gamlen*, 1 F. & F. 90; *Rex v. Pearson*, 2 Lewin C. C. 144; *Rennie's Case*, 1 Lewin C. C. 76; *Burrow's Case*, 1 Lewin C. C. 75; *Rex v. Ayes*, R. & R. C. C. 166.

*United States.* — *U. S. v. Drew*, 5 Mason (U. S.) 28; *U. S. v. Cornell*, 2 Mason (U. S.) 91; *U. S. v. McGlue*, 1 Curt. (U. S.) 1; *U. S. v. Clarke*, 2 Cranch (C. C.) 158; *U. S. v. Forbes*, *Crabbe* (U. S.) 558; *U. S. v. Meagher*, 37 Fed. Rep. 875; *Hopt v. People*, 104 U. S. 631; *U. S. v. Claypool*, 14 Fed. Rep. 127.

*Alabama.* — *Tidwell v. State*, 70 Ala. 33; *Ford v. State*, 71 Ala. 385; *State v. Bullock*, 13 Ala. 473; *Whitten v. State*, 115 Ala. 72; *Engelhardt v. State*, 88 Ala. 100; *Mooney v. State*,

33 Ala. 419; *Beasley v. State*, 50 Ala. 149, 20 Am. Rep. 292; *Hill v. State*, 62 Ala. 168; *Fonville v. State*, 91 Ala. 39; *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133.

*Arkansas.* — *Casat v. State*, 40 Ark. 511; *Chrisman v. State*, 54 Ark. 283, 26 Am. St. Rep. 44.

*California.* — *People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 344; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Harris*, 29 Cal. 678.

*Connecticut.* — *State v. Fiske*, 63 Conn. 388.

*Dakota.* — *State v. Odell*, 1 Dak. 197.

*District of Columbia.* — *Harris v. U. S.*, 8 App. Cas. (D. C.) 20.

*Georgia.* — *Hanvey v. State*, 68 Ga. 612; *Estes v. State*, 55 Ga. 30; *Choice v. State*, 31 Ga. 424; *Mercer v. State*, 17 Ga. 146; *Golden v. State*, 25 Ga. 527; *Pierce v. State*, 53 Ga. 365.

*Illinois.* — *Rafferty v. People*, 66 Ill. 118; *McIntyre v. People*, 38 Ill. 514; *Upstone v. People*, 109 Ill. 169; *Fitzpatrick v. People*, 98 Ill. 269; *Dunn v. People*, 109 Ill. 635.

*Indiana.* — *Smurr v. State*, 88 Ind. 504; *Gill-oolley v. State*, 58 Ind. 182; *Aszman v. State*, 123 Ind. 347; *Bradley v. State*, 31 Ind. 492; *O'Herrin v. State*, 14 Ind. 420; *Cole v. State*, 75 Ind. 511; *Sanders v. State*, 94 Ind. 147; *Goodwin v. State*, 96 Ind. 550; *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469; *Surber v. State*, 99 Ind. 71; *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55; *Wagner v. State*, 116 Ind. 181.

*Iowa.* — *State v. Maxwell*, 42 Iowa 208.

*Kansas.* — *State v. White*, 14 Kan. 538; *State v. Mowry*, 37 Kan. 369.

*Kentucky.* — *Golliher v. Com.*, 2 Duv. (Ky.) 163, 87 Am. Dec. 493; *Smith v. Com.*, 1 Duv. (Ky.) 224; *Tyra v. Com.*, 2 Met. (Ky.) 1; *Buckhannon v. Com.*, 86 Ky. 110; *Wilkerson v. Com.*, 88 Ky. 29; *Conley v. Com.*, 98 Ky. 125; *McCarty v. Com.*, (Ky. 1892) 20 S. W. Rep. 229; *Benedict v. Com.*, 8 Ky. L. Rep. 256.

*Louisiana.* — *State v. Mullen*, 14 La. Ann. 577; *State v. Graviotte*, 22 La. Ann. 587; *State v. Coleman*, 22 La. Ann. 455, 27 La. Ann. 691.

*Maine.* — *State v. Verrill*, 54 Me. 408.

*Massachusetts.* — *Com. v. Malone*, 114 Mass. 295; *Com. v. Hawkins*, 3 Gray (Mass.) 463; *Com. v. Hagenlock*, 140 Mass. 125.



actions when under the full influence of liquor are facts known to every one,<sup>1</sup> and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd or doing any other act likely to be attended with dangerous or fatal consequences.<sup>2</sup> "There could rarely be a conviction for homicide if drunkenness avoided responsibility. Few violent crimes would probably be attempted without resorting to liquor both as a stimulant and as a shield, and the very fact, therefore, which shows peculiar malignant deliberation would be interposed as an excuse."<sup>3</sup>

**A Person Becomes Voluntarily Intoxicated,** within the meaning of the rule, although the liquor was furnished him by or at the request of the person killed.<sup>4</sup>

**Drunkenness as Aggravation of Crime.** — While drunkenness is no excuse for crime, it does not aggravate a crime or raise a crime of a lower to one of a higher grade.<sup>5</sup>

**Voluntary Intoxication for Purpose of Committing Crime.** — If one who intends to commit a crime becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act and intent thus carried out.<sup>6</sup>

*Michigan.* — *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *People v. Murray*, 72 Mich. 10; *Roberts v. People*, 19 Mich. 401; *Welch v. Ware*, 32 Mich. 77; *People v. Walker*, 38 Mich. 156.

*Minnesota.* — *State v. Welch*, 21 Minn. 22.

*Mississippi.* — *Kelly v. State*, 3 Smed. & M. (Miss.) 518.

*Missouri.* — *State v. Lowe*, 93 Mo. 547; *State v. Dearing*, 65 Mo. 530; *State v. Harlow*, 21 Mo. 446; *Schaller v. State*, 14 Mo. 502; *State v. Hundley*, 46 Mo. 414; *Whitney v. State*, 8 Mo. 165; *State v. O'Reilly*, 126 Mo. 597; *State v. Pitts*, 58 Mo. 556; *State v. Sneed*, 88 Mo. 138; *State v. Murphy*, 118 Mo. 7; *State v. Alcorn*, 137 Mo. 121.

*Nebraska.* — *Head v. State*, 43 Neb. 30; *O'Grady v. State*, 36 Neb. 320; *Schlencker v. State*, 9 Neb. 241.

*Nevada.* — *State v. Thompson*, 12 Nev. 140.

*New Hampshire.* — *State v. Avery*, 44 N. H. 392; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

*New Jersey.* — *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415.

*New York.* — *People v. Hammill*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 223; *People v. Robinson*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 235; *Kenny v. People*, 31 N. Y. 330; *People v. Kemmler*, 119 N. Y. 580; *People v. Pine*, 2 Barb. (N. Y.) 566; *People v. Eastwood*, 14 N. Y. 562; *People v. Leonardi*, 143 N. Y. 360; *People v. Willey*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 19; *People v. Fuller*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 16.

*North Carolina.* — *State v. John*, 8 Ired. L. (30 N. Car.) 330, 49 Am. Dec. 396; *State v. Potts*, 100 N. Car. 457; *State v. Wilson*, 104 N. Car. 873.

*Ohio.* — *State v. Turner*, Wright (Ohio) 20; *Pigman v. State*, 14 Ohio 555, 45 Am. Dec. 558; *Cline v. State*, 43 Ohio St. 332; *State v. Neil*, Tappan (Ohio) 120.

*Oregon.* — *State v. Zorn*, 22 Oregon 591.

*Pennsylvania.* — *McGinnis v. Com.*, 102 Pa. St. 66; *State v. McFall*, Add. (Pa.) 255; *Com. v. Cleary*, 148 Pa. St. 26; *Respublica v. Weidle*, 2 Dall. (Pa.) 88.

*South Carolina.* — *State v. Paulk*, 18 S. Car.

514; *State v. Stark*, 1 Strobh. L. (S. Car.) 479; *State v. Touhey*, (S. Car.) MSS. Dec. 819.

*Tennessee.* — *Pirtle v. State*, 9 Humph. (Tenn.) 663; *Swan v. State*, 4 Humph. (Tenn.) 136; *Cornwell v. State*, Mart. & Y. (Tenn.) 147; *Haile v. State*, 11 Humph. (Tenn.) 154; *Wilcox v. State*, 94 Tenn. 106.

*Texas.* — *Rather v. State*, 25 Tex. App. 623; *Houston v. State*, 26 Tex. App. 657; *Scott v. State*, 12 Tex. App. 31; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Outlaw v. State*, 35 Tex. 481; *White v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 556; *Ferrell v. State*, 43 Tex. 503; *Brown v. State*, 4 Tex. App. 275; *McCarty v. State*, 4 Tex. App. 461; *Payne v. State*, 5 Tex. App. 35; *Wenz v. State*, 1 Tex. App. 37.

*Vermont.* — *State v. Tatrow*, 50 Vt. 483.

*Virginia.* — *Boswell v. Com.*, 20 Gratt. (Va.) 860; *Willis v. Com.*, 32 Gratt. (Va.) 929.

*West Virginia.* — *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

*Wisconsin.* — *Cross v. State*, 55 Wis. 261.

*Wyoming.* — *Cook v. Territory*, 3 Wyo. 110.

**Coke's Statement of Rule.** — "As for a drunkard who is *voluntarius demon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." Co. Litt. 247a.

**The Reasons for the rule** are forcibly stated by Judge Denio in *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484.

1. *State v. Kraemer*, 49 La. Ann. 774; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Roberts v. People*, 19 Mich. 401.

2. *State v. Kraemer*, 49 La. Ann. 774.

3. *Wharton on Crim. Law* (10th ed.), § 49, citing *Nevling v. Com.*, 98 Pa. St. 323; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

4. **Liquor Furnished by Deceased.** — *State v. Sopher*, 70 Iowa 494.

5. **Drunkenness Not Aggravation of Crime.** — *McIntyre v. People*, 38 Ill. 514; *State v. Donovan*, 61 Iowa 369; *Ferrell v. State*, 43 Tex. 504. *Contra, dicta* in *U. S. v. Forbes*, Crabb (U. S.) 558; *Com. v. Hart*, 2 Brews. (Pa.) 546.

6. **Voluntary Intoxication for Purpose of Committing Crime.** — *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232; *Smith v. Com.*, 1 Duv. (Ky.) 224; *Blimm v. Com.*, 7 Bush (Ky.) 320.



**Unreasonable Belief of Danger Generated by Drunkenness.** — There is no principle of law which authorizes drunkenness to be invoked as a ground for enlarging the right of self-defense.<sup>1</sup>

**Constitutional Infirmary Rendering Person Unusually Susceptible to Influence of Liquor.** — It is also settled that it makes no difference in the degree of responsibility for crime that a man, by a constitutional infirmity or by accidental injury to the head or brain, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, knowing of this infirmity, he is responsible for his acts while in that condition.<sup>2</sup>

**b. TEMPORARY INSANITY CAUSED BY VOLUNTARY INTOXICATION.** — It is scarcely more than a repetition of the doctrine stated in the preceding section to state that temporary insanity immediately produced by intoxication does not destroy responsibility for crime where the accused, when sane and responsible, voluntarily made himself drunk.<sup>3</sup> To constitute insanity caused by intoxication a defense to an indictment for murder, it must be a settled insanity and not a mere temporary mental condition.<sup>4</sup>

**c. VOLUNTARY INTOXICATION RENDERING PARTY UNCONSCIOUS OF HIS ACTS.** — So, even when the intoxication is extreme, making the person unconscious of what he is doing, such intoxication is no defense to or excuse for crime.<sup>5</sup> The defendant may be perfectly unconscious of what he does and yet be responsible; he may be incapable of express malice, but the law may impute malice from the absence of provocation and from other circumstances

**1. Drunkenness Causing Unreasonable Belief of Danger.** — *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85; *Golden v. State*, 25 Ga. 527; *State v. Mullen*, 14 La. Ann. 577.

**2. Constitutional Infirmities Rendering Person Unusually Liable to Influence of Liquor.** — *Choice v. State*, 31 Ga. 424; *State v. Wilson*, 104 N. Car. 868. Compare *Terrill v. State*, 74 Wis. 278.

**Rule Not Applicable Where Party Ignorant of Infirmary.** — If a person be subject to a tendency to insanity which is liable to be excited by intoxication, of which he is ignorant, having no reason from his past experience or from information derived from others to believe that extraordinary effects are likely to result from his intoxication, he ought not to be held responsible for such extraordinary effects; and so far as the jury believes that his actions resulted from these, and not from the natural effects of drunkenness or from previously formed intentions, the same degree of competency should be required to render him capable of entertaining the intent, or responsible for it, as when the question is one of insanity alone. *Roberts v. People*, 19 Mich. 401.

**3. Temporary Insanity No Excuse for Crime** — *United States*, — U. S. v. Forbes, Crabbe (U. S.) 558; U. S. v. Drew, 5 Mason (U. S.) 28.

*Alabama*, — *State v. Bullock*, 13 Ala. 413.

*California*, — *People v. Travers*, 88 Cal. 233; *People v. Kerrigan*, 73 Cal. 222; *People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 344; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.

*Delaware*, — *State v. McGonigal*, 5 Harr. (Del.) 510; *State v. Thomas*, Houst. Crim. Cas. (Del.) 511.

*Florida*, — *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232.

*Georgia*, — *Beck v. State*, 76 Ga. 452.

*Illinois*, — *Upstone v. People*, 109 Ill. 169.

*Indiana*, — *Wagner v. State*, 116 Ind. 181.

*Kentucky*, — *Wilkerson v. Com.*, 88 Ky. 29; *Finley v. Com.*, 6 Ky. L. Rep. 443.

*Louisiana*, — *State v. Mullen*, 14 La. Ann. 577.

*Massachusetts*, — *Com. v. Hawkins*, 3 Gray (Mass.) 463.

*Michigan*, — *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

*Minnesota*, — *State v. Gut*, 13 Minn. 341.

*Missouri*, — *State v. Riley*, 100 Mo. 493; *State v. Hundley*, 46 Mo. 414; *State v. Cross*, 27 Mo. 332.

*Nebraska*, — *Schlencker v. State*, 9 Neb. 214.

*Nevada*, — *State v. Thompson*, 12 Nev. 140.

*New York*, — *Flanigan v. People*, 86 N. Y. 558, 40 Am. Rep. 556; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484.

*Tennessee*, — *Bennett v. State*, Mart. & Y. (Tenn.) 133; *Cornwell v. State*, Mart. & Y. (Tenn.) 147; *Henslie v. State*, 3 Heisk. (Tenn.) 202; *Haile v. State*, 11 Humph. (Tenn.) 157; *Pirtle v. State*, 9 Humph. (Tenn.) 663; *Swan v. State*, 4 Humph. (Tenn.) 136.

**4. To Be Defense Insanity Must Be Fixed.** — *People v. Travers*, 88 Cal. 233; *Beck v. State*, 76 Ga. 452.

**Permanent or Temporary Insanity Question for Jury.** — Whether a party committing a crime is under the influence of a fixed insanity, or a temporary insanity immediately induced by intoxication, is a question of fact for the jury, and its verdict will not be disturbed unless clearly against the evidence. *Upstone v. People*, 109 Ill. 169.

**5. Intoxication to Degree of Unconsciousness.** — *Engelhardt v. State*, 88 Ala. 100; *Garner v. State*, 28 Fla. 153, 29 Am. St. Rep. 232; *Beck v. State*, 76 Ga. 452; *Upstone v. People*, 109 Ill. 178; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Dearing*, 65 Mo. 530.



under which the act is done.<sup>1</sup> Instances of heinous offenses committed under such circumstances are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evilly disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intention. He says and does when drunk what he thinks when sober.<sup>2</sup>

2. Under What Circumstances and for What Purposes Evidence of Voluntary Intoxication Admissible — *a. CRIMES IN WHICH SPECIFIC INTENT IS NECESSARY ELEMENT* — (1) *Statement of Rule.* — Although, as already shown, voluntary intoxication constitutes neither excuse for nor palliation of crime, yet in cases in which a specific or particular intent or purpose is an essential or constituent element of the offense, intoxication, even though voluntary, becomes a matter for consideration and is competent evidence on the question whether the defendant was capable of forming such an intent or purpose at the time the act was perpetrated. When the nature and commission of the crime are made by law to depend upon the peculiar state and condition of the mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state or condition of the mind, is a proper subject for the consideration of the jury.<sup>3</sup> If the mental status required by law to constitute crime be one of deliberation and premeditation, and drunkenness excludes the

1. Express Malice Unnecessary. — *Upstone v. People*, 109 Ill. 169; *Boswell v. Com.*, 20 Gratt. (Va.) 860; *State v. Douglass*, 28 W. Va. 297; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

2. *Cornwell v. State*, Mart. & Y. (Tenn.) 158.

3. Intoxication as Affecting Intent — *England.* — *Reg. v. Doherty*, 16 Cox C. C. 306; *Reg. v. Doody*, 6 Cox C. C. 463; *Rex v. Pitman*, 2 C. & P. 423, 12 E. C. L. 201; *Reg. v. Gamlen*, 1 F. & F. 90.

*United States.* — *U. S. v. Roudenbush*, Baldw. (U. S.) 517; *Hopt v. People*, 104 U. S. 631; *U. S. v. Meagher*, 37 Fed. Rep. 875.

*Alabama.* — *King v. State*, 90 Ala. 612; *White v. State*, 103 Ala. 72; *Chatham v. State*, 92 Ala. 47; *Armor v. State*, 63 Ala. 173; *Mooney v. State*, 33 Ala. 419; *Ross v. State*, 62 Ala. 224; *Engelhardt v. State*, 88 Ala. 100; *Ford v. State*, 71 Ala. 385; *Tidwell v. State*, 70 Ala. 33.

*Arkansas.* — *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13; *Chrisman v. State*, 54 Ark. 283, 26 Am. St. Rep. 44.

*California.* — *People v. Nichol*, 34 Cal. 211; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Belencia*, 21 Cal. 544; *People v. Phelan*, 93 Cal. 111; *People v. Franklin*, 70 Cal. 641; *People v. Harris*, 29 Cal. 684; *People v. Williams*, 43 Cal. 344; *People v. Lane*, 100 Cal. 379; *People v. Lewis*, 36 Cal. 531.

*Connecticut.* — *State v. Fiske*, 63 Conn. 388; *State v. Johnson*, 40 Conn. 136, 41 Conn. 584.

*Dakota.* — *People v. Odell*, 1 Dak. 197.

*Delaware.* — *State v. Faino*, 1 Marv. (Del.) 492; *State v. Hurley*, Houst. Crim. Cas. (Del.) 28.

*Florida.* — *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232.

*Georgia.* — *Golden v. State*, 25 Ga. 527; *Bernhard v. State*, 76 Ga. 613.

*Illinois.* — *Schwabacher v. People*, 165 Ill. 618.

*Indiana.* — *Aszman v. State*, 123 Ind. 347.

*Iowa.* — *State v. Dorland*, 103 Iowa 168; *State v. Bell*, 29 Iowa 316; *State v. Maxwell*,

42 Iowa 268; *State v. Conners*, 95 Iowa 485; *State v. Donovan*, 61 Iowa 369.

*Kansas.* — *State v. Mowry*, 37 Kan. 369; *State v. White*, 14 Kan. 538; *State v. O'Neil*, 51 Kan. 651.

*Kentucky.* — *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164; *Keeton v. Com.*, 92 Ky. 522; *Shannahan v. Com.*, 8 Bush (Ky.) 463, 8 Am. Rep. 465; *Buckhannon v. Com.*, 86 Ky. 112; *Wilkerson v. Com.*, 88 Ky. 29; *Golliher v. Com.*, 2 Duv. (Ky.) 163, 87 Am. Dec. 493.

*Michigan.* — *Roberts v. People*, 19 Mich. 401; *People v. Haley*, 48 Mich. 495.

*Minnesota.* — *State v. Garvey*, 11 Minn. 154.

*Mississippi.* — *Kelly v. State*, 3 Smed. & M. (Miss.) 518.

*Nebraska.* — *Schlencker v. State*, 9 Neb. 241; *Head v. State*, 43 Neb. 30; *O'Grady v. State*, 36 Neb. 320; *Hill v. State*, 42 Neb. 503; *Smith v. State*, 4 Neb. 278.

*New Jersey.* — *Warner v. State*, 56 N. J. L. 689, 44 Am. St. Rep. 415; *Wilson v. State*, 60 N. J. L. 171.

*New York.* — *People v. Burns*, 33 Hun (N. Y.) 296; *People v. Mills*, 98 N. Y. 178; *People v. Robinson*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 235.

*Ohio.* — *Lytle v. State*, 31 Ohio St. 196; *Pigman v. State*, 14 Ohio 555, 45 Am. Dec. 558; *Cline v. State*, 43 Ohio St. 332; *Nichols v. State*, 8 Ohio St. 435.

*Oregon.* — *State v. Hansen*, 25 Oregon 401; *State v. Zorn*, 22 Oregon 591.

*Pennsylvania.* — *Com. v. Cleary*, 148 Pa. St. 26; *Nevling v. Com.*, 98 Pa. St. 322; *Com. v. Gentry*, 5 Pa. Dist. 703; *Keenan v. Com.*, 44 Pa. St. 55, 84 Am. Dec. 414.

*Tennessee.* — *Wilcox v. State*, 94 Tenn. 106; *Haile v. State*, 11 Humph. (Tenn.) 154; *Pirtle v. State*, 9 Humph. (Tenn.) 663; *Swan v. State*, 4 Humph. (Tenn.) 136; *Lancaster v. State*, 2 Lea (Tenn.) 575; *Norfleet v. State*, 4 Sneed (Tenn.) 340.

*Texas.* — *Ayres v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 396; *Evers v. State*, 31 Tex.



existence of such mental state, then the particular crime charged is not excused by drunkenness, but has not in fact been committed.<sup>1</sup> To regard the fact of intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines has been in point of fact committed.<sup>2</sup> If it be contended that to allow intoxication to be proven and yet to deny that under the law it either excuses or mitigates the offense involves an absurdity, it is sufficient to reply that in some cases the offender, although intoxicated, may be guilty of murder, while in others he may be guilty of manslaughter only.<sup>3</sup> It may happen, therefore, that evidence of intoxication of the accused at the time of the commission of the act for which he is arraigned may operate to reduce the crime charged to one of a lesser grade, or even to show that he is not guilty of any crime at all.<sup>4</sup>

(2) *Necessity for Caution in Applying Rule.* — It is merely stating a truism to say that great caution is necessary in the application of this doctrine, and those whose province it is to decide in such cases should be satisfied beyond a reasonable doubt, from all the facts and circumstances before them, that the unlawful act was committed by the accused when his mental condition was such that he did not know that he was committing a crime, and also that no design to do the wrong existed on his part before he became thus incapable of knowing what he was doing.<sup>5</sup> There is great danger that undue weight will be attached to the fact of drunkenness. Where it is shown in a criminal case, courts and juries should see that it is used only for the purposes stated and not as a cloak or justification for crime.<sup>6</sup>

(3) *What Degree of Intoxication Will Merit Consideration.* — The weight of authority holds that intoxication of the accused at the time of the commission of the crime cannot reduce its grade or excuse it unless the intoxication was so great as to deprive him of all power to deliberate and to form a guilty intent.<sup>7</sup>

(4) *Capacity to Form Intent Question for Jury.* — Whether the accused was so drunk at the time of committing the act as to be incapable of forming a design or an intent is always a conclusion to be drawn by the jury from all the evidence before it,<sup>8</sup> and not a question of fact to which a witness may

Crim. 329, 37 Am. St. Rep. 811; Delgado v. State, 34 Tex. Crim. 157; Scott v. State, 12 Tex. App. 31; Houston v. State, 26 Tex. App. 657; Rather v. State, 25 Tex. App. 623, Ferrell v. State, 43 Tex. 508; Riley v. State, (Tex. Crim. 1898) 44 S. W. Rep. 498; White v. State, (Tex. Crim. 1895) 30 S. W. Rep. 556; Wenz v. State, 1 Tex. App. 37; Colbath v. State, 2 Tex. App. 391; Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; Reagan v. State, 28 Tex. App. 227.

*Virginia.* — Hall v. Com., 78 Va. 678.

*Washington.* — State v. Dolan, 17 Wash. 499.

*West Virginia.* — State v. Douglass, 28 W. Va. 297; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

*Wisconsin.* — Bernhardt v. State, 82 Wis. 23; State v. Schingen, 20 Wis. 74; Ingalls v. State, 48 Wis. 647.

*Wyoming.* — Cook v. Territory, 3 Wyo. 110.

1. *Crime Not Committed if Drunkenness Excludes Intent.* — Mooney v. State, 33 Ala. 419; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; Wilson v. State, 60 N. J. L. 171; Swan v. State, 4 Humph. (Tenn.) 136; Norfleet v. State, 4 Sneed (Tenn.) 340; Pirtle v. State, 9 Humph. (Tenn.) 663.

*Effect of Confession on Admissibility of Evidence of Intoxication.* — Evidence of intoxication of

the accused at the time the crime was committed is inadmissible to reduce the grade of the crime, where he has pleaded guilty, and it appears from his confession and other evidence that the crime was deliberate and premeditated, and in accomplishment of a pre-existing plot, and that he knew at the time, and afterwards confessed, the part he took in it. People v. Miller, 114 Cal. 10.

2. Wilson v. State, 60 N. J. L. 184; Pirtle v. State, 9 Humph. (Tenn.) 663.

3. Buckhannon v. Com., 86 Ky. 112.

4. See subsequent divisions of this section, in which this doctrine is amply illustrated.

5. *Caution Necessary in Applying Doctrine.* — People v. Harris, 29 Cal. 684; People v. Leonardi, 143 N. Y. 366.

6. Cline v. State, 43 Ohio St. 334.

7. *Degree of Intoxication Necessary.* — Casat v. State, 40 Ark. 511; Aszman v. State, 123 Ind. 347; State v. Bruce, 48 Iowa 536, 30 Am. Rep. 403; Burchett v. Com., (Ky. 1886) 1 S. W. Rep. 423; Keenan v. Com., 44 Pa. St. 55, 84 Am. Dec. 414. *Contra*, People v. Leonardi, 143 N. Y. 360; Lancaster v. State, 2 Lea (Tenn.) 575.

8. *Capacity to Form Intent Question of Fact for Jury.* — Armor v. State, 63 Ala. 173; People v. Belencia, 21 Cal. 544; State v. Smith, 49 Conn. 376; State v. Bell, 29 Iowa 316; State v. Con-



testify.<sup>1</sup> And the mere fact of intoxication, no matter how complete or overpowering, is not conclusive evidence of the absence of capacity to form an intent to commit crime.<sup>2</sup> Evidence of intoxication should always be received with great caution and carefully examined in connection with other circumstances.<sup>3</sup>

(5) *Competency and Sufficiency of Evidence to Prove Intoxication.* — To show intoxication at the time of the commission of the act, evidence of the condition of a companion who had taken the same number of drinks as the defendant is not competent.<sup>4</sup> Nor is evidence that drunkenness had on former occasions deprived the defendant of his reason admissible to show that drunkenness at the time of the commission of the crime had that effect.<sup>5</sup> It is not competent for a witness to testify as to his impression of the defendant's condition, produced by what he had heard any other person than the accused say.<sup>6</sup> So it has been held that evidence of intoxication several hours before the crime was attempted is inadmissible.<sup>7</sup>

(6) *Intoxicated Person May Be Capable of Forming Intent.* — It is not to be understood, however, from anything here said, that the mere fact that the defendant was intoxicated at the time the act was committed will necessarily have the effect of lessening the degree of the crime charged, or of authorizing an acquittal. A person who is intoxicated may nevertheless be capable of deliberation and premeditation,<sup>8</sup> and a drunken man who commits a wrongful act wilfully and premeditatedly is as guilty in the eyes of the law as if he had been sober.<sup>9</sup> If a person resolves to commit a crime and then drinks to intoxication and commits the act, the fact of intoxication cannot lessen the degree of the offense, because he specifically intended to commit it.<sup>10</sup> Even where intent is a necessary ingredient of a crime, so long as the defendant is capable of conceiving a design he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his act.<sup>11</sup>

(7) *Applications of Rule in Prosecutions for Particular Offenses* — (a) *Homicide.* — The doctrine heretofore stated, with regard to intoxication as affecting the capacity to form a specific intent, has been applied in a large variety of crimes in which specific intent is a necessary element. The question will first be considered in relation to homicide. In nearly or quite all of the states of the Union, murder is divided into degrees, and to constitute murder in the first degree there must be, in most cases, actual express malice — actual intent

ners, 95 Iowa 485; *State v. White*, 14 Kan. 538; *People v. Mills*, 98 N. Y. 182.

1. *Not Question of Fact to Which Jury May Testify.* — *Armor v. State*, 63 Ala. 173.

2. *No Degree of Intoxication Conclusive as to Incapacity to Form Intent.* — *State v. White*, 14 Kan. 538.

3. *Evidence to Be Received with Caution.* — *People v. Belencia*, 21 Cal. 544; *People v. Lewis*, 36 Cal. 531; *People v. Franklin*, 70 Cal. 641.

4. *Evidence of Condition of One Drinking with Defendant.* — *Com. v. Cleary*, 135 Pa. St. 64.

5. *Drunkenness on Former Occasions.* — *People v. Kloss*, 115 Cal. 567; *State v. Hart*, 29 Iowa 268.

6. *Hearsay Evidence as to Defendant's Condition.* — *People v. Wreden*, 59 Cal. 392.

In a murder trial the defendant's intoxication cannot be established by evidence that he brought home a gallon of whiskey a day or two before the commission of the crime, and that on the night after the crime was committed there was but little of the whiskey left, to be followed by evidence of all the living members of the family that none of them tasted

the liquor but the defendant. *Com. v. Cloonen*, 151 Pa. St. 605.

7. *State v. Alcorn*, 137 Mo. 121.

8. *Intoxicated Person May Be Capable of Criminal Intent.* — *People v. Williams*, 43 Cal. 344; *State v. Smith*, 49 Conn. 376; *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415; *Kenny v. People*, 31 N. Y. 330; *State v. McFall*, Add. (Pa.) 257; *Cartwright v. State*, 8 Lea (Tenn.) 376; *State v. Douglass*, 28 W. Va. 297.

9. *May Be as Guilty as if Sober.* — *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415; *Pirtle v. State*, 9 Humph. (Tenn.) 672.

10. *Intent Formed Before Intoxication.* — *Smith v. Com.*, 1 Duv. (Ky.) 224; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

If an intoxicated person has the capacity to form an intent to take life, and conceives and executes such intent, it is not ground for reducing the degree of his crime to murder in the second degree, that he was induced to conceive it or to conceive it more suddenly by reason of his intoxication. *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415.

11. *Presumption as to Intent of Person Capable of Conceiving Design.* — *People v. Odell*, 1 Dak.



to take life. Drunkenness as a fact may, therefore, be proven as bearing upon the existence or nonexistence of this intent. In other words, it is competent evidence to show whether or not the accused was capable of forming a deliberate and premeditated intent to take life.<sup>1</sup> Upon a trial for murder it is proper for the jury to consider any state or condition of the accused at the time of the killing adverse to the proper exercise of the mind and the undisturbed possession of the faculties; and if there is evidence that the accused was intoxicated when the crime was committed, the jury may consider the evidence of intoxication as a circumstance to show that the act was not premeditated and to rebut the idea that it was done in the cool and deliberate state of mind necessary to constitute murder in the first degree.<sup>2</sup> If the evidence shows that at the time of committing the act the accused was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, his offense may thereby be lessened to murder in the second degree;<sup>3</sup> and in the absence of any intent to kill, to manslaughter in some of its grades.<sup>4</sup>

194; *Friery v. People*, 54 Barb. (N. Y.) 324; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484.

1. **Homicide — Evidence of Intoxication Competent to Show Absence of Premeditation**—*United States*.—*Hopt v. People*, 104 U. S. 631.

*Alabama*.—*Ford v. State*, 71 Ala. 385; *King v. State*, 90 Ala. 612.

*California*.—*People v. Lane*, 100 Cal. 379; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Belencia*, 21 Cal. 544; *People v. Nichol*, 34 Cal. 211.

*Connecticut*.—*State v. Johnson*, 40 Conn. 136, 41 Conn. 587.

*Delaware*.—*State v. Faino*, 1 Marv. (Del.) 492.

*Florida*.—*Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232.

*Georgia*.—*Golden v. State*, 25 Ga. 527.

*Indiana*.—*Aszman v. State*, 123 Ind. 356.

*Kansas*.—*State v. O'Neil*, 51 Kan. 651; *State v. Mowry*, 37 Kan. 369.

*Kentucky*.—*Shannahan v. Com.*, 8 Bush (Ky.) 463, 8 Am. Rep. 465; *Nichols v. Com.*, 11 Bush (Ky.) 576; *Buckhannon v. Com.*, 86 Ky. 110; *Wilkerson v. Com.*, 88 Ky. 29; *Madison v. Com.*, (Ky. 1891) 17 S. W. Rep. 164.

*Louisiana*.—*State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293.

*Massachusetts*.—*Com. v. Dorsey*, 103 Mass. 412.

*Nebraska*.—*Hill v. State*, 42 Neb. 503; *O'Grady v. State*, 36 Neb. 320; *Schlencker v. State*, 9 Neb. 241; *Smith v. State*, 4 Neb. 278.

*New Jersey*.—*Wilson v. State*, 60 N. J. L. 171.

*New York*.—*People v. Mills*, 98 N. Y. 176; *People v. Leonardi*, 143 N. Y. 360.

*Oregon*.—*State v. Hansen*, 25 Oregon 401; *State v. Zorn*, 22 Oregon 591.

*Pennsylvania*.—*Keenan v. Com.*, 44 Pa. St. 55, 84 Am. Dec. 414; *Nevling v. Com.*, 98 Pa. St. 322; *Com. v. Cleary*, 148 Pa. St. 26; *Com. v. Gentry*, 5 Pa. Dist. 703.

*Tennessee*.—*Haile v. State*, 11 Humph. (Tenn.) 154; *Pirtle v. State*, 9 Humph. (Tenn.) 663; *Swan v. State*, 4 Humph. (Tenn.) 136.

*Texas*.—*Colbath v. State*, 2 Tex. App. 391; *Ayres v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 396; *Delgado v. State*, 34 Tex. Crim. 157; *Houston v. State*, 26 Tex. App. 657; *Rather v. State*, 25 Tex. App. 623.

*West Virginia*.—*State v. Douglass*, 28 W. Va. 297; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

*Wisconsin*.—*Bernhardt v. State*, 82 Wis. 23.

*Wyoming*.—*Cook v. Territory*, 3 Wyo. 110. See also the title MURDER AND MANSLAUGHTER.

The Rule in England now seems to be that, the intention of the party guilty of murder being an element of the crime itself, the fact that a man was intoxicated at the time he caused the death of another may be taken into consideration by the jury in determining whether he formed the intention necessary to constitute the crime of murder. *Reg. v. Doherty*, 16 Cox C. C. 306; *Rex v. Meakin*, 7 C. & P. 297, 32 E. C. L. 514. See also *Rex v. Thomas*, 7 C. & P. 817, 32 E. C. L. 750. But there are cases which maintain the contrary doctrine. *Reniger v. Fogossa*, Plowd. 19; *Rex v. Carroll*, 7 C. & P. 145, 32 E. C. L. 471.

In Missouri the rule is directly contrary to that stated in the text. In this state evidence of intoxication is not admissible in a trial for homicide for any purpose whatever. It is not competent to show either that murder was not committed or to reduce its grade, nor is it competent evidence to determine whether the defendant acted wilfully, deliberately, and premeditatedly. *State v. Harlow*, 21 Mo. 446; *State v. Cross*, 27 Mo. 332; *State v. Edwards*, 71 Mo. 312; *State v. O'Reilly*, 126 Mo. 597; *State v. Hundley*, 46 Mo. 416; *State v. Ramsey*, 82 Mo. 133; *State v. Dearing*, 65 Mo. 530; *State v. Sneed*, 88 Mo. 138.

In Vermont the rule seems to be substantially the same as that in Missouri. *State v. Tatrow*, 50 Vt. 483.

2. *Smith v. State*, 4 Neb. 278. See also cases cited in the preceding note, and the title MURDER AND MANSLAUGHTER.

3. **Intoxication May Reduce to Murder in Second Degree**.—*State v. Faino*, 1 Marv. (Del.) 492; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232; *Wilson v. State*, 60 N. J. L. 171; *State v. Martin*, (N. J. Oyer & T. Ct. 1881), cited in *Wilson v. State*, 60 N. J. L. 184; *Com. v. Cleary*, 148 Pa. St. 26; *Com. v. Gentry*, 5 Pa. Dist. 703; *Ayres v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 396; *Rather v. State*, 25 Tex. App. 623; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Douglass*, 28 W. Va. 297.

4. **Reduction of Offense to Manslaughter**.—*Smith v. Com.*, 1 Duv. (Ky.) 224; *People v*



**Provocation.** — Where the crime was committed on provocation, intoxication may be considered in determining whether it was done in the heat of passion or from previous malice.<sup>1</sup> Where a provocation has been received which, if acted upon instantly, would mitigate the offense of a sober man, and the question in the case of a drunken man is whether that provocation was acted upon, the evidence of intoxication may be considered in deciding that question.<sup>2</sup>

**Antecedent Threats and Menaces.** — So when antecedent menaces or threats or revengeful expressions have been uttered by an intoxicated man, evidence of intoxication is admissible in determining whether they were merely the idle and unmeaning declarations of a drunken man, or whether they indicated actual malice and the intention to do what he threatened.<sup>3</sup>

**Evidence of Intoxication to Be Cautiously Considered.** — As the safety of society depends to a large extent upon the due administration of the criminal laws, the voluntary intoxication of an accused person should be most cautiously considered before arriving at a conclusion that it has in any way altered the character or grade of the homicide.<sup>4</sup>

**What Degree of Intoxication May Be Considered.** — Mere intoxication, in the absence of such mental incapacity resulting therefrom as renders one who takes the life of another incapable of thinking deliberately and meditating rationally upon the purpose to take human life, and which leaves him with full power to know the quality of his act and to abstain from doing it, is of course insufficient to reduce a homicide from murder in the first degree to murder in the second degree.<sup>5</sup> Although there are some decisions which maintain a contrary doctrine,<sup>6</sup> the weight of authority is that evidence of intoxication cannot be considered for the purpose of lowering the grade of the crime unless it appears that the intoxication was so great as to deprive the accused of the power to deliberate and to form a guilty intent.<sup>7</sup>

Leonardi, 143 N. Y. 366. See also *Smith v. State*, 4 Neb. 278.

1. **Consideration of Intoxication in Connection with Provocation.** — *State v. Johnson*, 41 Conn. 584; *Jones v. State*, 29 Ga. 594; *State v. Mullen*, 14 La. Ann. 577; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *State v. McCants*, 1 Spears L. (S. Car.) 384.

2. *State v. McCants*, 1 Spears L. (S. Car.) 384.

If a man is drunk, this is no excuse for any crime he may commit; but where provocation by a blow has been given to a person, who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered on the question whether he was excited by passion or acted from malice. *Rex v. Thomas*, 7 C. & P. 817, 32 E. C. L. 750.

**Killing Without Provocation.** — Where the killing of a person is absolutely without provocation, the fact that the crime was committed while the perpetrator was intoxicated does not affect its legal character. *Rafferty v. People*, 66 Ill. 118; *Upstone v. People*, 109 Ill. 169; *Carpenter v. Com.*, 92 Ky. 452; *Friery v. People*, 54 Barb. (N. Y.) 324.

3. **Consideration of Intoxication in Relation to Antecedent Threats.** — *Rex v. Thomas*, 7 C. & P. 817, 32 E. C. L. 750; *Harris v. State*, 34 Ark. 469; *State v. Hurley*, Houst. Crim. Cas. (Del.) 28.

4. **Evidence of Intoxication to Be Cautiously Considered.** — *People v. Leonardi*, 143 N. Y. 366.

5. **Degree of Intoxication Insufficient to Reduce Grade of Crime.** — *Walker v. State*, 85 Ala. 7, 7

Am. St. Rep. 17; *Aszman v. State*, 123 Ind. 356.

"There must be 'the absence of that self-determining power which, in a sane mind, renders it conscious of the real nature of its own purposes and capable of resisting wrong impulses.'" *Aszman v. State*, 123 Ind. 357.

6. See *Lancaster v. State*, 2 Lea (Tenn.) 575, in which it was held that, to render evidence of drunkenness admissible, it is not necessary that the drunkenness should have been so excessive as to render the defendant incapable of forming a deliberate purpose; and *People v. Leonardi*, 143 N. Y. 360, in which it was held that under a statute providing that in criminal cases where the motive or intent is a necessary element of the crime charged, the jury may consider the fact that the defendant was intoxicated at the time of committing the act, intoxication to reduce a homicide to murder of a lower degree need not be such as to deprive the defendant of all power of volition or of all ability to form an intent.

7. **Intoxication Must Deprive Accused of Power to Form Guilty Intent.** — *Casat v. State*, 40 Ark. 511; *Marshall v. State*, 59 Ga. 154; *Hanvey v. State*, 68 Ga. 614; *McIntyre v. People*, 38 Ill. 514; *Cluck v. State*, 40 Ind. 263; *Aszman v. State*, 123 Ind. 347; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *Burchett v. Com.*, (Ky. 1886) 1 S. W. Rep. 423; *State v. Trivas*, 32 La. Ann. 1089, 36 Am. Rep. 293; *Keenan v. Com.*, 44 Pa. St. 55, 84 Am. Dec. 414.

Mere Nervous Excitement superinduced by drinking is not sufficient to reduce murder in



**Intoxicated Man May Commit Murder in First Degree.** — It is, of course, possible for one to commit murder in the first degree while drunk. Where the accused, though intoxicated, has the capacity to form the intent, and does form and execute the intent, to take the life of another, the intoxication does not reduce the offense to murder in the second degree.<sup>1</sup>

(b) **Assaults — Assault with Intent to Kill.** — In all prosecutions for assault with intent to kill, intoxication of one accused of the offense is admissible in evidence, and should be considered in determining whether he actually entertained the specific intent essential to the crime charged.<sup>2</sup> Intoxication may produce a state of mind in which the accused would be totally incapable of entertaining or forming the positive and particular intent requisite to constitute the offense of assault with intent to kill,<sup>3</sup> and in such case the accused will be entitled to an acquittal of this felony,<sup>4</sup> not because of his drunkenness, but because he was in a state of mind resulting from drunkenness which negated the facts necessary to a conviction.<sup>5</sup>

**Assault with Intent to Commit Rape.** — So on a prosecution for assault with intent to commit rape, it is competent to show that at the time of the alleged offense the defendant was so intoxicated as to be incapable of forming the specific intent which is a necessary element of the crime.<sup>6</sup>

**Assault with Intent to Do Great Bodily Harm.** — And a person charged with assault with intent to do great bodily harm cannot be convicted if at the time of committing the alleged offense he was so drunk as not to know what he was doing.<sup>7</sup>

the first degree to a lower degree of homicide. *Casat v. State*, 40 Ark. 511.

**1. Intoxicated Person May Commit Murder in First Degree — Arkansas.** — *Casat v. State*, 40 Ark. 511.

*California.* — *People v. Williams*, 43 Cal. 344.

*Connecticut.* — *State v. Smith*, 49 Conn. 376.

*Georgia.* — *Beck v. State*, 76 Ga. 452.

*Indiana.* — *Cluck v. State*, 40 Ind. 264; *Aszman v. State*, 123 Ind. 357.

*Iowa.* — *State v. Bruce*, 48 Iowa 533, 30 Am. Rep. 403.

*Kentucky.* — *Burchett v. Com.*, (Ky. 1886) 1 S. W. Rep. 423.

*New Jersey.* — *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415.

*New York.* — *People v. Fish*, 125 N. Y. 136; *People v. Hammill*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 223; *Kenny v. People*, 31 N. Y. 330; *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556.

*Tennessee.* — *Cartwright v. State*, 8 Lea (Tenn.) 376; *Swan v. State*, 4 Humph. (Tenn.) 136.

See generally the title MURDER AND MANSLAUGHTER.

"That a man may be even grossly intoxicated, and yet be capable of forming an intent to kill or do any other criminal act, is indisputable; and if, while so intoxicated, he forms an intent to kill and carries it out with premeditation and deliberation, he is without doubt guilty of murder in the first degree, and the jury should, when such a defense is interposed, be so instructed." *People v. Leonardi*, 43 N. Y. 360.

**2. Assault with Intent to Kill — Intoxication May Be Considered.** — *Mooney v. State*, 33 Ala. 419; *Chrisman v. State*, 54 Ark. 283, 26 Am. St. Rep. 44; *State v. Fiske*, 63 Conn. 388; *People v. Odell*, 1 Dak. 189; *Dolan v. State*, 44

Neb. 643. See generally the title ASSAULT AND BATTERY, vol. 2, p. 952.

**3. Intoxication May Incapacitate from Forming Intent.** — *Mooney v. State*, 33 Ala. 419; *Ross v. State*, 62 Ala. 224; *Roberts v. People*, 19 Mich. 401.

**4. Acquittal Authorized.** — *Mooney v. State*, 33 Ala. 419; *State v. Fiske*, 63 Conn. 388; *People v. Odell*, 1 Dak. 189; *Roberts v. People*, 19 Mich. 401; *Dolan v. State*, 44 Neb. 643.

**5. Mooney v. State, 33 Ala. 419.**

**Who May Testify to Fact of Intoxication.** — Where a witness has testified to seeing the defendant intoxicated, and as to his condition, appearance, and action at that time, such witness is competent to testify as to the extent of the intoxication and to state whether the defendant appeared to be so intoxicated that he did not know what he was doing. *State v. Dolan*, 17 Wash. 499.

**Intoxication Insufficient to Require Acquittal.** — Evidence merely that the defendant was drunk when he joined one in committing the assault, without any evidence of the condition of his mind or that he was too drunk to reason or to know right from wrong, will not entitle him to require a charge to the jury that if he was so drunk that he did not know what he was doing, he should be found not guilty. *State v. Herdina*, 25 Minn. 161.

**6. Assault with Intent to Rape — Competency of Evidence of Intoxication.** — *Whitten v. State*, 115 Ala. 72; *State v. Donovan*, 61 Iowa 369; *Head v. State*, 43 Neb. 30. See generally the title RAPE.

**7. Assault with Intent to Do Bodily Harm.** — *State v. Garvey*, 11 Minn. 154.

**Maliciously Shooting with Intent to Wound.** — In a prosecution for maliciously shooting with intent to wound, evidence that the defendant was so much intoxicated that he could not form or have such intent is admissible. *Cline v. State*, 43 Ohio St. 332.



**Assault and Battery.** — On the other hand, the condition of the prisoner's mind not being an element of the offense of assault and battery, evidence of intoxication at the time of the alleged offense is not admissible.<sup>1</sup>

(c) **Other Offenses — Larceny.** — A mere intentional trespass to another's goods does not constitute this crime; there must in addition be a specific intent to steal.<sup>2</sup> The weight of authority, therefore, is that evidence of intoxication of the accused at the time of the taking is admissible to determine whether he was capable of forming the felonious intent which is a necessary element of the crime;<sup>3</sup> and if he was so under the influence of intoxicating liquor that the felonious intent could not be formed in his mind he is not guilty of larceny.<sup>4</sup>

**Robbery.** — Where the offense charged is robbery, the accused may show that he was too drunk to have any felonious intent at the time he committed the act.<sup>5</sup> But where the accused, while in full possession of his faculties, confesses to a robbery committed while he was intoxicated, the jury will be justified in holding him responsible, notwithstanding his intoxication.<sup>6</sup>

**Burglary.** — While the criminal intent to commit the crime of burglary may exist sufficiently in the mind of a drunken person,<sup>7</sup> yet if his intoxication was such that under its influence he was incapable of forming the essential wrongful intent, he will not be guilty of a crime.<sup>8</sup> Therefore, evidence of intoxication is admissible on the question of intent,<sup>9</sup> and if the evidence shows that the defendant was intoxicated to such a degree as to render him incapable of forming such intent, this will be a complete defense.<sup>10</sup>

**Suicide.** — While the mere fact of drunkenness is no excuse for this crime, it is a material fact for the jury to consider before coming to the conclusion that the accused really intended to destroy his life.<sup>11</sup> And if the jury reaches the conclusion that he was too drunk at the time to know what he was doing, there must be an acquittal.<sup>12</sup>

**Counterfeiting.** — One accused of the crime of passing a counterfeit bill cannot be convicted thereof if at the time he passed the bill he was too drunk to

1. **Assault and Battery — Evidence of Intoxication Not Competent.** — *Engelhardt v. State*, 88 Ala. 104.

2. **Larceny — Mere Trespass Not Crime.** — *Bishop's New Crim. Law*, § 411; *People v. Walker*, 38 Mich. 156; *People v. Cummins*, 47 Mich. 334.

**At Common Law**, where it required a particular intent in the doing of an act to constitute crime — as, for instance, larceny, where the intent to steal must accompany the act of taking — it may be shown in defense that the party charged was intoxicated to such a degree that he was incapable of entertaining the intent to steal, and that he neither then nor afterwards yielded it the sanction of his will. *Bartholomew v. People*, 104 Ill. 608, 44 Am. Rep. 97.

3. **Evidence of Intoxication Admissible to Show Absence of Intent.** — *Rex v. Pitman*, 2 C. & P. 423, 12 E. C. L. 201; *Chatham v. State*, 92 Ala. 47; *Bernhard v. State*, 76 Ga. 613; *Bartholomew v. People*, 104 Ill. 606, 44 Am. Rep. 97; *People v. Walker*, 38 Mich. 156; *People v. Cummins*, 47 Mich. 334; *Wenz v. State*, 1 Tex. App. 37; *Loza v. State*, 1 Tex. App. 488, 28 Am. Rep. 416; *Wright v. State*, 37 Tex. Crim. 627; *Hall v. Com.*, 78 Va. 678; *State v. Schingen*, 20 Wis. 74; *Ingalls v. State*, 48 Wis. 647. *Contra*, *O'Herrin v. State*, 14 Ind. 420; *Dawson v. State*, 16 Ind. 428, 79 Am. Dec. 439; *Com. v. Finn*, 108 Mass. 466. See generally the title LARCENY.

4. **Taking Not Criminal in Absence of Larcenous Intent.** — *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13; *Bernhard v. State*, 76 Ga. 613; *People v. Walker*, 38 Mich. 158; *State v. Schingen*, 20 Wis. 74.

**Degree of Drunkenness Necessary to Constitute Defense.** — Intoxication is not a defense to a prosecution for stealing unless the defendant was so drunk when the act was committed that he was incapable of understanding its nature. *Wright v. State*, 37 Tex. Crim. 627.

5. **Robbery — Evidence of Intoxication Competent.** — *Keeton v. Com.*, 92 Ky. 522. See generally the title ROBBERY.

6. **Effect of Confession.** — *People v. Gilmore*, (Cal. 1898) 53 Pac. Rep. 806.

7. **Burglary — Drunken Man May Form Intent to Commit.** — *State v. Bell*, 29 Iowa 319. See generally the title BURGLARY, vol. 5, p. 44.

8. **Cannot Commit if Incapable of Forming Intent.** — *State v. Bell*, 29 Iowa 316.

9. **Evidence of Intoxication Admissible.** — *People v. Phelan*, 93 Cal. 111; *State v. Maxwell*, 42 Iowa 208; *State v. Bell*, 29 Iowa 319; *State v. Connors*, 95 Iowa 485; *People v. Burns*, 33 Hun (N. Y.) 296.

10. **When Evidence of Intoxication Complete Defense.** — *Schwabacher v. People*, 165 Ill. 618.

11. **Suicide — Evidence of Intoxication Competent.** — *Reg. v. Doody*, 6 Cox C. C. 463. See generally the title SUICIDE.

12. **Acquittal.** — *Reg. v. Moore*, 3 C. & K. 319.



know what he was doing, or that the bill was a counterfeit.<sup>1</sup>

**Forgery.** — One accused of passing a forged instrument cannot be convicted of such offense if at the time of its commission he was so under the influence of liquor as not to be able to form a criminal intent, and the accused cannot complain of an instruction to this effect.<sup>2</sup>

**Bribery.** — On a trial for intent to bribe, evidence of intoxication is admissible for the consideration of the jury in deciding the question of intent.<sup>3</sup>

**Rape.** — Intoxication of the accused at the time of the commission of the alleged rape does not excuse him, but it bears upon the turpitude and quality of his crime, and should have an important influence in determining the extent of his punishment.<sup>4</sup>

**Perjury.** — On a prosecution for perjury, evidence that the accused was intoxicated at the time the alleged perjury was committed is a circumstance proper to be submitted to the consideration of the jury in determining whether the accused knowingly testified falsely.<sup>5</sup>

**b. CASES IN WHICH SPECIFIC INTENT IS NOT ELEMENT OF CRIME.** — Where the offense charged does not involve the necessity of any specific intent to commit, or where the law imputes a specific intent from the commission of the particular act, the fact that the defendant was intoxicated at the time he committed the act will not be considered for any purpose whatever.<sup>6</sup> There is no specific intent necessary to the commission of the following offenses: simple assault and battery;<sup>7</sup> arson resulting in death, where it appears that the act of firing was wilfully done;<sup>8</sup> murder in the second degree;<sup>9</sup> manslaughter, which is the unlawful killing of a human being without malice, express or implied, and without any admixture of deliberation;<sup>10</sup> illegal vot-

**1. Counterfeiting — No Conviction of Defendant Too Drunk to Form Intent.** — *U. S. v. Roudenbush*, Baldw. (U. S.) 514; *Pigman v. State*, 14 Ohio 555, 45 Am. Dec. 558. See generally the title COUNTERFEITING, vol. 7, p. 875.

**2. Forgery — What Degree of Intoxication Defense.** — *Riley v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 498. See generally the title FORGERY, vol. 13, p. 1081.

**3. Bribery — Evidence of Intoxication Admissible.** — *White v. State*, 103 Ala. 72. See generally the title BRIBERY, vol. 4, p. 907.

**4. Rape — Evidence of Intoxication Admissible in Determining Punishment.** — *People v. Murray*, 72 Mich. 10. See generally the title RAPE.

**A Texas Statute** provides that neither intoxication nor temporary insanity caused by the recent use of liquor shall constitute an excuse for crime, but that evidence of such temporary insanity may be shown in mitigation of the penalty, and, in cases of murder, for the purpose of determining the degree. In construing this statute it was held, on a prosecution for rape, that the statute does not eliminate the element of intent, and that in determining the existence of such intent the jury should be allowed to consider the mental condition of the accused, and the fact that he was intoxicated at the time of the alleged commission. *Reagan v. State*, 28 Tex. App. 227.

**5. Perjury — Evidence of Intoxication Admissible to Show Intent.** — *Lytle v. State*, 31 Ohio St. 196. *Contra*, *People v. Willey*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 19. This case is directly opposed to a long line of authorities which hold that where a specific intent is necessary to constitute a crime, evidence of intoxication is competent to show that no such intent existed, and therefore it is entitled to no weight as authority in the prosecution of this particu-

lar kind of offense. See generally the title PERJURY.

**6. Cases in Which Specific Intent Is Not Element of Crime — Alabama.** — *Engelhardt v. State*, 88 Ala. 104.

*California.* — *People v. Marseiler*, 70 Cal. 98; *People v. Franklin*, 70 Cal. 641; *People v. Langton*, 67 Cal. 427; *People v. Nichol*, 34 Cal. 215; *People v. Gordan*, 103 Cal. 568.

*Connecticut.* — *State v. Johnson*, 41 Conn. 584. *Illinois.* — *Rafferty v. People*, 66 Ill. 118; *Upstone v. People*, 109 Ill. 169.

*Minnesota.* — *State v. Welch*, 21 Minn. 22.

*New Jersey.* — *Wilson v. State*, 60 N. J. L. 171.

*New York.* — *People v. Jones*, 2 Edm. Sel. Cas. (N. Y.) 86.

**Assault with Deadly Weapon.** — *People v. Gordan*, 103 Cal. 568; *People v. Marseiler*, 70 Cal. 98; *People v. Franklin*, 70 Cal. 641.

**7. Assault and Battery.** — *Engelhardt v. State*, 88 Ala. 100.

**8. Arson.** — *People v. Jones*, 2 Edm. Sel. Cas. (N. Y.) 86.

**9. Murder in Second Degree.** — *People v. Nichol*, 34 Cal. 211; *State v. Johnson*, 41 Conn. 584; *Wilson v. State*, 60 N. J. L. 171; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484.

**Implied Malice Constitutes Crime.** — In the case of murder in the second degree, which rests upon implied malice, the jury may find the existence of malice although the prisoner's condition at the time of the act disproves express malice. *State v. Johnson*, 41 Conn. 584.

What constitutes murder in the second degree by a sober man is equally murder in the second degree if committed by a drunken man. *Wilson v. State*, 60 N. J. L. 184.

**10. Manslaughter.** — *People v. Langton*, 67 Cal. 427; *People v. Nichol*, 34 Cal. 215; *Wil-*



ing; <sup>1</sup> all cases of murder in the first degree in which the means employed or the circumstances attending the killing are by statute made conclusive on the question of intent and the degree of the crime; <sup>2</sup> all cases of murder by means of poison, lying in wait, or torture. <sup>3</sup> In prosecutions for these crimes, the fact of intoxication is altogether immaterial.

**3. Effect of Involuntary Intoxication on Responsibility for Crime.** — If a person be made drunk by a fraud or stratagem of another for the purpose of inducing him to commit, or aid in committing, a crime, he is not responsible for his acts, <sup>4</sup> and the rule would seem to be the same where intoxication is caused by the unskilfulness of his own physician. <sup>5</sup>

**4. Responsibility for Crime of Persons Mentally Diseased from Use of Intoxicants** — *a. PERSONS AFFLICTED WITH FIXED INSANITY FROM USE OF INTOXICANTS.* — If, by long habits of intoxication, habitual or fixed insanity is caused, although this madness was at first contracted voluntarily, the person so affected will nevertheless be deemed irresponsible for criminal acts committed by him. <sup>6</sup>

*b. PERSONS AFFLICTED WITH DELIRIUM TREMENS.* — If a person suffering with delirium tremens is so far insane as not to know the nature of his acts, he is no more punishable than he would be if he had contracted an habitual and fixed insanity from the use of intoxicating liquors. <sup>7</sup> Although

son *v. State*, 60 N. J. L. 171. Compare *State v. Dorland*, 103 Iowa 168, in which it was held that where it is the law of the case that conviction of manslaughter must depend upon whether the defendant aided another in a deadly assault, the intent of the defendant is so involved that his being intoxicated bears upon the formation of such intent, and it is erroneous to charge the jury that his intoxication does not affect his guilt or innocence.

**1. Illegal Voting.** — *State v. Welch*, 21 Minn. 22, in which it was held no defense to an indictment for voting twice that at the time of casting the second ballot the defendant did not know what he was doing or that he had previously voted. The court said: "Where the law declares the act done by the defendant to be a crime, the only question is, did the defendant intend to do the act which the law has forbidden? \* \* \* In no case can a defendant, by proof of intoxication, rebut the legal presumption that he knows and intends his voluntary acts." *Contra*, *People v. Harris*, 29 Cal. 679, in which the holding of the court was exactly the reverse of the holding in the case above cited.

**2. Murder in First Degree Where from Means Employed Degree Is Fixed by Law.** — *People v. Nichol*, 34 Cal. 211.

**3. Murder, etc.** — *People v. Nichol*, 34 Cal. 211.

**4. Intoxication Superinduced by Another's Fraud.** — See *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97.

**5. Intoxication Caused by Unskilfulness of Physician.** — See *People v. Robinson*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 235.

**6. Irresponsibility of Person Permanently Insane from Intoxication** — *England.* — *Rennie's Case*, 1 Lewin C. C. 76.

*United States.* — *U. S. v. Forbes*, Crabbe (U. S.) 558; *U. S. v. Drew*, 5 Mason (U. S.) 28; *U. S. v. Clarke*, 2 Cranch (C. C.) 158; *U. S. v. McGlue*, 1 Curt. (U. S.) 1.

*Alabama.* — *Beasley v. State*, 50 Ala. 152, 20 Am. Rep. 292.

*Arizona.* — *Territory v. Davis*, (Ariz. 1886) 10 Pac. Rep. 359.

*California.* — *People v. Blake*, 65 Cal. 275; *People v. Travers*, 88 Cal. 233.

*Delaware.* — *State v. McGonigal*, 5 Harr. (Del.) 510.

*Georgia.* — *Beck v. State*, 76 Ga. 452; *Choice v. State*, 31 Ga. 455.

*Indiana.* — *Bailey v. State*, 26 Ind. 422; *Fisher v. State*, 64 Ind. 440; *Dawson v. State*, 16 Ind. 428, 79 Am. Dec. 439; *O'Herrin v. State*, 14 Ind. 420; *Bradley v. State*, 31 Ind. 492; *Cluck v. State*, 40 Ind. 263.

*Louisiana.* — *State v. Kraemer*, 49 La. Ann. 774.

*Missouri.* — *State v. Riley*, 100 Mo. 493; *State v. Hundley*, 46 Mo. 414.

*Nebraska.* — *Hill v. State*, 42 Neb. 503.

*Nevada.* — *State v. Thompson*, 12 Nev. 140.

*New York.* — *Kenny v. People*, 31 N. Y. 330; *People v. Pearce*, 2 Edm. Sel. Cas. (N. Y.) 76.

*North Carolina.* — *State v. Potts*, 100 N. Car. 464; *State v. Wilson*, 104 N. Car. 871.

*Ohio.* — *State v. Thompson*, Wright (Ohio) 617.

*South Carolina.* — *State v. Paulk*, 18 S. Car. 514.

*Tennessee.* — *Cornwell v. State*, Mart. & Y. (Tenn.) 147; *Henslie v. State*, 3 Heisk. (Tenn.) 202.

*Texas.* — *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539.

*Virginia.* — *Boswell v. Com.*, 20 Gratt. (Va.) 860.

*West Virginia.* — *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

*Wisconsin.* — *Terrill v. State*, 74 Wis. 288. See generally the title *INSANITY*, vol. 16, p. 558.

Insanity of a permanent nature caused by drink, when once shown to exist, is presumed to continue until the contrary appears. *Wagner v. State*, 116 Ind. 181; *Goodwin v. State*, 96 Ind. 550; *State v. Potts*, 100 N. Car. 464.

**7. Irresponsibility of Persons Afflicted with Delirium Tremens** — *England.* — *Reg. v. Davis*, 14 Cox C. C. 563.

*United States.* — *U. S. v. McGlue*, 1 Curt. (U. S.) 1.



delirium tremens is the product of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable and by the law is distinguished from that madness which sometimes accompanies drunkenness.<sup>1</sup>

**Evidence.** — To render this defense available the burden is, of course, upon the defendant to show it to the jury by satisfactory proof.<sup>2</sup> It must also be shown to have existed at the very time the act was committed, inasmuch as it is a merely transient derangement of the mind.<sup>3</sup> The presumption of continued insanity does not apply, as in cases of fixed and settled insanity, for delirium tremens brought on by one's own procurement passes away with the removal of the existing cause.<sup>4</sup>

**c. DIPSO MANIACS.** — The law is not well settled as to whether or not dipsomania excuses crime. There are some decisions which hold that the law does not distinguish between an irresistible impulse for intoxicating drinks and the mere inordinate appetite for them brought on by a long-continued indulgence, and that the fact that a person becomes the victim of an appetite for strong drink which overcomes his will, amounting to a disease, is no excuse for a crime committed while he is intoxicated.<sup>5</sup> It has been held, however, in one decision, that it is proper for the trial court to instruct the jury that whether there is such a disease as dipsomania, and whether the defendant had that disease, and whether an act done by him was a product of such disease,

*Delaware.* — *State v. Hand*, 1 Marv. (Del.) 545; *State v. Dillahun*, 3 Harr. (Del.) 551; *State v. McGonigal*, 5 Harr. (Del.) 510; *State v. Thomas*, Houst. Crim. Cas. (Del.) 511; *State v. Davis*, 9 Houst. (Del.) 409.

*Indiana.* — *Wagner v. State*, 116 Ind. 181; *Goodwin v. State*, 96 Ind. 550.

*New York.* — *People v. Robinson*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 235.

*North Carolina.* — *State v. Potts*, 100 N. Car. 464; *State v. Sewell*, 3 Jones L. (48 N. Car.) 245.

*Ohio.* — *Maconnhey v. State*, 5 Ohio St. 77.

*Tennessee.* — *Henslie v. State*, 3 Heisk. (Tenn.) 203.

*Texas.* — *Erwin v. State*, 10 Tex. App. 700; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539.

**Reason for Rule.** — The reasons why a person who has committed a criminal act while afflicted with delirium tremens should not be held accountable therefor have been admirably stated by Wharton, as follows: (1) "Delirium tremens is not the intended result of drink in the same way that drunkenness is." (2) "There is no possibility that delirium tremens will be voluntarily generated in order to afford a cloak for a particular crime." (3) "So far as original cause is concerned, delirium tremens is not peculiar in being the offspring of indiscretion or guilt, for such is the case with many other kinds of insanity. \* \* \* It is the result, like many other manias, of prior vicious indulgences; but it differs from intoxication in being shunned rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt." Wharton on Crim. Law (10th ed.), § 48.

**Effect of Texas Statute on Defense of Delirium Tremens.** — The Texas statute (Penal Code, art. 41), providing that temporary insanity caused by the use of intoxicating liquors does not destroy responsibility for crime when the defendant made himself voluntarily drunk, applies only to insanity caused by the recent use of intoxicating liquors, and not to delirium

tremens, which is usually caused by abstinence from liquor after prolonged intoxication, and which is always involuntary. *Kelley v. State*, 31 Tex. Crim. 216.

**1. Delirium Tremens Distinguishable from Ordinary Drunkenness.** — *U. S. v. McGlue*, 1 Curt. (U. S.) 1; *Maconnhey v. State*, 5 Ohio St. 77.

"Drunkenness is one thing, and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. \* \* \* The man is a madman, and is to be treated as such, although his madness is only temporary." *Reg. v. Davis*, 14 Cox C. C. 563.

**2. Defendant Has Burden of Proof to Show Delirium Tremens.** — *State v. Thomas*, Houst. Crim. Cas. (Del.) 511.

**3. To Be Defense, Must Exist at Time Act Committed.** — *State v. Thomas*, Houst. Crim. Cas. (Del.) 511; *Wagner v. State*, 116 Ind. 181; *Goodwin v. State*, 96 Ind. 550; *State v. Sewell*, 3 Jones L. (48 N. Car.) 245; *State v. Potts*, 100 N. Car. 464.

**4. No Presumption of Continued Insanity.** — *State v. Potts*, 100 N. Car. 464.

**Proof of Antecedent Attacks.** — Proof of antecedent attacks of delirium tremens raises no presumption that the defendant was suffering from delirium tremens at the time the act was committed. *State v. Thomas*, Houst. Crim. Cas. (Del.) 511; *State v. Sewell*, 3 Jones L. (48 N. Car.) 245.

**5. Dipsomania Not Defense to Crime.** — *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *Flanigan v. People*, 86 N. Y. 559, 40 Am. Rep. 556; *State v. Potts*, 100 N. Car. 457. See also *Com. v. Gilbert*, 165 Mass. 45. See also the title *INSANITY*, vol. 16, p. 558. But see *Choice v. State*, 31 Ga. 473, in which Judge Lumpkin states some very cogent reasons why dipsomania should not excuse crime.



are questions of fact for the jury.<sup>1</sup>

5. **Responsibility of Insane Person Drunk at Time of Committing Act.**—If a man is insane when sober, the fact that he increased his insanity by the super-added excitement of liquor makes no difference. An insane person is irresponsible, whether drunk or sober.<sup>2</sup> But when an insane person commits a homicide during drunkenness, reliance must be placed upon the original insanity, not upon the subsequent drunkenness.<sup>3</sup>

**IN TRANSIT.**—See note 4.

**IN TRANSITU.**—See the title STOPPAGE IN TRANSITU.

**INTRINSIC.**—See note 5.

**INTRODUCE.**—See note 6.

**INTROMISSION.** (See also the title AGENCY, vol. 1, p. 930.)—A term signifying dealings in stocks, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal.<sup>7</sup>

**INTRUDE.**—See note 8.

1. **Contrary View.**—State v. Pike, 49 N. H. 399, 6 Am. Rep. 533. See also State v. Johnson, 40 Conn. 136.

2. **Drunkenness Superadded to Insanity.**—Choice v. State, 31 Ga. 456.

3. **Defense in Such Case Must Be Based on Insanity.**—State v. Kraemer, 49 La. Ann. 766.

4. **In Transit.** (See generally the title STOPPAGE IN TRANSITU.)—A bill of lading provided that the company and connecting carriers should not be liable for loss or damage to the cotton "while *in transit*." In construing this provision the court said: "Was the cotton, while on the compress platform, *in transit*, within the meaning of the bill of lading? It is contended upon the one side that the words *in transit* are the equivalent of the words *in transitu*, and that goods in the hands of a carrier are *in transit* from the moment of delivery to the carrier until they reach the hands of the consignee. In a sense, the meaning of the two phrases is the same; the one is a literal translation of the other. But as actually employed they have a materially different meaning and application. *In transit* means literally 'in course of passing from point to point,' and such is its common acceptance. Such also is the literal meaning of the phrase *in transitu*, but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It would seem, therefore, that if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. Had they done so, a more difficult question would have been presented. But here the words *in transit*—the words actually used—according to their ordinary signification apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract." Amory Mfg. Co. v. Gulf, etc., R. Co., 89 Tex. 419.

5. **Intrinsic Value.** (See also VALUE.)—In Little Rock Junction R. Co. v. Woodruff, 49

Ark. 381, the court said: "Webster recognizes a difference between *intrinsic* and 'exchangeable' value. Webster's Dictionary, 'Value.' We also read in the law books of the *pretium affectionis* which sometimes attaches to property and is recognized by the courts." Compare Harrison v. Young, 9 Ga. 359.

**Same—Banknotes.**—In State Bank v. Ford, 5 Ired. L. (27 N. Car.) 698, the court said: "The *intrinsic* value of a thing is its true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. Banknotes have, indeed, no *intrinsic* value. They only represent value by being the promise to pay money (which has *intrinsic* value) by persons of undoubted ability or credit, which induces the world to take them in the stead and at the value of money. They are as good as money, though without its *intrinsic* value, because money can be had for them when the holder will, and they pass as money."

**Same—Family Portrait.**—A carrier exempted itself by contract with the owner of goods carried, from liability for loss of "specie, drafts, bank bills," and other articles of great *intrinsic* value. It was held that a family portrait was not an article of great *intrinsic* value. Green v. Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 371.

6. **Introduce—Bill of Exceptions.**—In Kennedy v. Divine, 77 Ind. 492, it was said: "The appellee suggests that the bill of exceptions does not show that the evidence is in the record. The bill concludes thus: 'The above is all the evidence that was introduced on the trial;' and it is insisted that this statement is not sufficient. We think otherwise. The word *introduced*, as used, is synonymous with the word 'given,' and when so read the statement is sufficient."

7. **Stewart v. M'Kean**, 29 Eng. L. & Eq. 391. This case arose upon the construction of the following guaranty: "I hereby guarantee my brother H. B. M'Kean's *intromissions* as your agent, to the extent of five hundred pounds sterling."

8. **Poor Law.** (See also the title POOR AND POOR LAWS.)—The word *intrude*, as applied to paupers who have come into a parish and become chargeable, may apply to casual poor,



**INTRUDER.** (See also the titles DE FACTO OFFICERS, vol. 8, p. 771; PUBLIC OFFICERS.)—See note 1.

**INTRUSION.** (See also the titles REMAINDERS AND EXECUTORY INTERESTS.)—An intrusion is defined to be an entry by a stranger on lands after a particular estate of freehold in them is determined and before entry by the remainderman or reversioner.<sup>2</sup>

**INTRUSTED.**—See note 3.

**INURE.**—See note 4.

**INVALID.**—Invalid means having no force, effect, or efficacy; void; null.<sup>5</sup>

and does not show that they remain there. Reg. v. Willats, 7 Q. B. 516, 53 E. C. L. 516.

1. **Intruder.** (See also the titles ADVERSE POSSESSION, vol. 1, p. 787; TRESPASS.)—An intruder is one who enters upon land without even the right of possession or color of title. *Miller v. McCullough*, 104 Pa. St. 630. See also *O'Donnell v. McIntyre*, (County Ct.) 16 Abb. N. Cas. (N. Y.) 88.

When a defendant is in possession of land under a deed, claiming legal right to the possession of the premises in good faith, he cannot be ejected therefrom as an intruder, under the Code of Georgia. *Russel v. Chambers*, 43 Ga. 478. See also *McHan v. Stansell*, 39 Ga. 197.

2. Co. Litt. 277a; 3 Black. Com. 169, followed in *Boylan v. Deinzer*, 45 N. J. Eq. 497; *Hall v. Hall*, 3 Call (Va.) 490; *Hulick v. Scovil*, 9 Ill. 170.

In *Birthright v. Hall*, 3 Munf. (Va.) 540, the court said: "An intrusion is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. The reversioner or remainderman by this act is ousted (if I may use the expression), and the intruder becomes tenant to the lord. The reversioner or remainderman, however, may purge this intrusion by summary proceeding, without suit, to wit, by a formal and peaceable entry."

3. **Intrusted by His Employer.** (See also the title EMBEZZLEMENT, vol. 10, pp. 999, 1005.)—It has been held that money received by a clerk who was intrusted by his employer with bills to collect in the ordinary course of business was money intrusted to him by his employer, within the meaning of the latter words in an embezzlement statute. *Ex p. Ricord*, 11 Nev. 291.

**Factors' Act.** (See also the title FACTORS' ACTS, vol. 12, p. 614.)—In *Holton v. Hubbard*, 49 La. Ann. 736, it was said: "The English [Factor's] Act, as we understand it, maintained the pledge by the party intrusted with the bill of lading or warehouse receipt, provided the pledgee had no notice, from the documents or otherwise, that the party intrusted was not the real owner. We must presume intrusted in this act has the usual significance. We can appreciate that if the owner intrusts an agent with his property, or with the muniments of title creating all the indicia of ownership, the owner would be bound by the pledge as he would by any other disposition of his property by the agent, if the transfer was in good faith. In this case there was no intrusting by the owner of the factor with the indicia of title; all the owner did was to ship the rice to the factor for the purposes of sale, and he might well be deemed to rely on that limitation the law im-

poses on the factor's power, and of which all who deal with him are by law deemed to be apprised."

**Agistor's Lien.** (See also the title AGISTMENT, vol. 2, p. 3.)—A *New Hampshire* statute provided that any person to whom any horses, cattle, or other domestic animals should be intrusted to be pastured or boarded should have a lien thereon for his charges. It was held that a mortgagor could not intrust the horses to be boarded so as to subject them to a lien for their keeping, without the knowledge, acquiescence, or consent of the mortgagee, express or implied. *Sargent v. Usher*, 55 N. H. 289.

**Trustee—Process.**—A *Massachusetts* statute provided that every person having goods, effects, or credits of the principal defendant intrusted or deposited in his hands or possession might be summoned as trustee. In construing this statute the court said: "The words 'intrusted or deposited' imply, in their ordinary signification, something more than mere possession; but if it were otherwise, such a construction would be unreasonable and inadmissible, for thereby an innkeeper would be chargeable for the property of a traveler, which he might have in possession for the shortest time, and the hirer of a horse for a ride might be charged as trustee." *Staniels v. Raymond*, 4 Cush. (Mass.) 316.

4. **Inure and Descend.** (See generally the title HOMESTEAD, vol. 15, p. 516.)—A statute provided that a homestead should inure to the widow and the heirs of the party entitled to such exemption. In construing this statute in *Godwin v. King*, 31 Fla. 525, the court said: "The term inure is employed instead of 'accrue,' but this term is not equivalent to the word 'descend,' or any other word importing the descent of property. The exemption provided for is an exemption from forced sale for the debts of the homesteader who is the head of a family residing in this state, and this exemption is all that inures to the widow and heirs by virtue of the constitution. Upon no reasonable construction of language can the present constitution, any more than the former one, be construed as granting a title to, or the casting of a descent as to the homestead exemption upon, either the widow or heir. The homestead exemption inures to the widow as widow, and to the heirs as such, and their respective rights in this property must be ascertained from other sources." See also *Hinson v. Booth*, 39 Fla. 333.

5. **Invalid.**—A statute provided that if any conveyance for taxation should prove to be invalid, the lien of the state should be transferred to the purchaser. In construing this



**INVALIDATED.** — See note 1.

**INVASION.** (See also the titles FIRE INSURANCE, vol. 13, p. 131; WAR.) — An invasion is the incursion of an army for conquest or plunder. It usually implies a hostile force coming upon a state from without,<sup>2</sup> but a state may be said to be invaded when it is beset by a domestic rebellion.<sup>3</sup>

**INVEIGLE.** (See also the titles ABDUCTION, vol. 1, p. 162; KIDNAPPING.) — To persuade to something bad; to wheedle; to entice; to seduce; to beguile.<sup>4</sup>

statute the court said: "The word employed in the first of the sections quoted is *invalid*, and this word is defined by Webster to mean 'having no force, effect, or efficacy; void; null.' If a sale is null and void, it can convey nothing at all, for it is inconceivable that a void or null thing can convey a valid thing of any kind, character, or description, so that an *invalid* tax sale could not convey a lien." *State v. Casteel*, 110 Ind. 182.

In *Hood v. Perry*, 75 Ga. 311, the court, in speaking of sales by married women to their husbands, said: "But since that time the rule as to sales is different; they were thereby pronounced not valid, which, according to lexicographers, signifies in law that a contract, agreement, etc., has 'no force, effect, or efficacy;' that it is 'void,' 'null.' Webster's Dict., *verb. invalid*. This compound word has precisely the same meaning as the two words 'not valid;' 'in,' as a prefix of 'valid,' being used in a privative or negative sense."

**Void and Invalid in the Sense of Voidable.** (See also VOID AND VOIDABLE.) — In *Lawrence v. Hornick*, 81 Iowa 195, it was said: "While the word 'void' is of broader technical significance, it is often used in the sense of 'voidable.' An instance is to be found in *Gardner v. Early*, 69 Iowa 42, where a deed, because of a failure to carry forward the tax, is said to be *invalid* and 'void,' but the language immediately following, and other language of the opinion, clearly indicates that nothing more was intended than that it was a voidable instrument." See also *Mutual Ben. L. Ins. Co. v. Winne*, 20 Mont. 28.

**Invalid Against Creditors.** — A statute provided that where a transfer was *invalid* against creditors if the person to whom it was made should sell or dispose of the property, it might be seized or recovered in an action by the person entitled to recover. It was held that the words "*invalid* against creditors" should be treated as limited to transactions *invalid* against creditors *qua* creditors, and not as extending to transactions declared *invalid* for reasons other than those designed to protect creditors. *Conn v. Smith*, 17 Can. L. T. 423.

1. **Invalidated.** — An insurance policy provided that the insurance, "as to the interest of the trustee or successors only therein," should not "be *invalidated* by any act or neglect of the mortgagor or owner of the property insured." In construing this provision the court said: "We perceive no reason for holding, as contended by counsel for appellant, that the word *invalidate* should be held to mean a forfeiture of the policy for every purpose, and not simply its impairment. The same reason existed for not allowing it to be thus impaired as totally forfeited. One of the definitions given of the word by Webster is 'to weaken

or lessen the force of,' and to our minds it is clear this is the sense in which the word is here used." *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 458.

2. **Invasion.** — 1 Bishop on Crim. Law (7th ed.), § 161, note.

3. 1 Bishop on Crim. Law (7th ed.), § 49. And see *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117.

In *Boon v. Ætna Ins. Co.*, 12 Blatchf. (U. S.) 33, it was said: "An *invasion* necessarily supposed organization and military power or force."

4. Worcester's Dict., quoted in U. S. v. Aucarola, 17 Blatchf. (U. S.) 423, 1 Fed. Rep. 676. See also *People v. De Leon*, 47 Hun (N. Y.) 308.

**Inveigle and Entice.** (See also ENTICE, vol. 11, p. 48.) — Upon the use of this term in a statute against *inveigling* or enticing away slaves, the court said: "There does not appear to be any tangible or substantial distinction between the terms *inveigle* or 'entice,' as employed in this act. Both signify to allure, to incite, to instigate, to seduce, to the doing some improper act. It is true, 'entice' may be used in a good sense, but that is not its natural meaning, and when so used it is figurative, and shown to be so by the context." *Mooney v. State*, 8 Ala. 331.

**Force — Consent.** — As used in an act against kidnapping or abduction, "to *inveigle* involves no physical force, but such mental control over the person *inveigled* as to entice him to do what it is designed or intended to beguile him to do; and if this be accomplished by falsehood, by deceit, misrepresentation, or device, whatever it may be which captivates the mind, the crime is committed. \* \* \* The act of the appellant may be briefly stated as follows: With an intent to induce the complainant to leave this state, and for a wicked purpose, he made false representations which were believed to be true and relied upon, and being relied upon resulted in her departure. She was thus enticed, thus *inveigled*." The word involves consent. *People v. De Leon*, 47 Hun (N. Y.) 308, 109 N. Y. 226. See also *In re Kelly*, 46 Fed. Rep. 655.

**Same — United States Statute.** — Under an act "to protect persons of foreign birth against forcible constraint or involuntary servitude," influence brought to bear on parents of children in Italy to induce them to consent that their children should come to the United States with a man to earn money for him on the street, is *inveiglement*. The court said: "To *inveigle*, or persuade, or entice, necessarily implies that the person is persuaded or enticed and yields assent as the result of the persuading or enticing." *U. S. v. Aucarola*, 17 Blatchf. (U. S.) 423, 1 Fed. Rep. 676.



**INVENTED WORD.**—See note 1.**INVENTION.** (See also the title **PATENTS**.)—See note 2.**INVENTORY.** (See also such titles as **EXECUTIONS**, vol. 11, p. 666; **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 854; **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 650.)—An inventory is a list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and in some cases the land and tenements, of a person or persons.<sup>3</sup>

**1. Invented Word.** (See also the title **TRADE-MARKS**.)—An *English* statute provided that only *invented* words could be registered as trademarks. In holding that the word “soma-tose” was not an *invented word*, the court said in *Re Farbenfabriken*, (1894) 1 Ch. 652: “There is no statutory definition or description of an *invented word*; and I cannot myself see any legitimate ground for limiting its ordinary meaning. Any word which is in fact new, and not what may be called a colorable imitation of an existing word, is, in my opinion, an *invented word* within the meaning of the statute under consideration.”

In *Eastman Photographic Materials Co. v. Comptroller-Gen.*, (1898) A. C. 580, it was held that the word “solio” was capable of registration as an *invented word*. Lord Herschell said: “An *invented word* has of itself no meaning until one has been attached to it.”

In *In re Salt*, (1894) 3 Ch. 166, it was held that the word “eboline,” being a word compounded of the word “Eboli,” the name of a town in Italy, with the English suffix “ne,” was not an *invented word*. In *In re Densham*, (1895) 2 Ch. 176, it was held that the word “mazawattee” was an *invented word*.

**2. Invention.**—The actual creative act of an inventor is recognized as an *invention*, although he may have called to his assistance the ideas and creations of other parties, provided such ideas and creations are so used as to achieve new results. *Eastman Kodak Co. v. Reichenbach*, 79 Hun (N. Y.) 183.

**Inventions and Improvements.**—An inventor contracted with a company to assign to it certain letters patent and the *inventions*, methods, and processes covered by applications for letters patent made by him. By a supplemental instrument the inventor agreed that the former contract should “embrace in and among the *inventions* and improvements which I shall be bound thereunder to assign and transfer, \* \* \* any and all processes in the metallurgy of iron and steel.” In construing this contract the court said: “The term ‘improvement’ is a technical one in the patent practice, and is almost always used to designate the *invention* itself in making out applications. Thus, in the master’s report he describes numerous applications for patents, which the defendant notified the plaintiff on December 31, 1880, he had made, accompanied by a statement of his expenses in connection therewith. In all of them the *invention* is described as an ‘improvement’ or ‘improved process,’ or ‘improved method.’ We find nothing, therefore, in the use of the word ‘improvements’ which conflicts with its being intended to convey the same idea as the word *inventions*; on the contrary, it is manifest that they were used as synonymous terms through-

out all the papers which passed between the parties.” *Reese’s Appeal*, 122 Pa. St. 415.

**3. Inventory.**—See *Roberts, etc., Co. v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 344.

**Details.**—“The word *inventory* has a well-defined meaning in commercial circles, and is used to designate articles of merchandise or personal property, that the same may be distinguished, without any attempt to describe in detail the properties of each article.” *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 469.

In *Silver Bow Min., etc., Co. v. Lowry*, 5 Mont. 621, it was said: “An *inventory* is a list or schedule, or enumeration of property, setting out the names of the different articles, either singly or in classes. See *Bouvier, Inventory*. The *inventory* of a store, containing many thousand articles, as full and complete as the most accurate man of business could make it, would not contain a tenth part of the number of the articles set out separately in the list; large numbers would be classified, and would be as well described in that way as if mentioned singly. An *inventory* of a herd of sheep might be full if it contained the number in gross or the number of the classes. This would be true of a drove of hogs. It would be difficult, in many instances, to give any other *inventory* than the number only.”

**Insufficient Inventory.**—A statute provided that a sheriff in levying upon property should make a just and true *inventory* of the property seized. It was held that an indorsement upon the back of the writ as follows: “Levied on the goods and chattels, lands and tenements of the defendant, subject to incumbrance, to the value of \$5,” was insufficient. The court said: “It was decided in the case of *Watson v. Hoel*, *Coxe’s Rep.* 136; the sheriff having specified one or two articles, added, ‘and upon all the household property;’ and the court amerced him in the debt and costs, declaring this to be no *inventory* within the meaning of the act.” *Lloyd v. Wyckoff*, 11 N. J. L. 224.

**Inventory of Single Article.**—In *Smith v. Commonwealth Ins. Co.*, 49 Wis. 327, it was held that an *inventory* of a single article is made by naming the article.

**Invoice and Inventory Distinguished.**—In *Cramer v. Oppenstein*, 16 Colo. 498, it was said: “The statute requires the making of an *inventory*, not an invoice, of the attached property. An invoice is an account or catalogue of goods with the value, marks, or particular description thereof annexed; an *inventory* is a list or catalogue of property merely.”

**English Bills of Sale Act.** (See also the title **BILLS OF SALE**, vol. 4, p. 555.)—The English Bills of Sale Act of 1878 provided that every bill of sale should have attached thereto, or written therein, a schedule containing an *inventory* of the person’s chattels comprised in the bill of sale. It was held that by an *in-*



**IN VENTRE SA MERE.** — See the references given under EN VENTRE SA MERE, vol. 11, p. 20.

**INVEST—INVESTMENT.** (See also the title INVESTMENTS, *post.*)—To invest means to lay out money or capital in business with the view of obtaining an income or profit, as to invest money in bank stock; to employ for some profitable use; to convert into some other form of wealth, usually of a more or less permanent nature, as in the purchase of property or shares, or in loans secured by mortgage.<sup>1</sup>

*ventory* was meant a detailed list of goods, enumerating them with reasonable particularity, according to the well-understood usage of business men. *Witt v. Banner*, 20 Q. B. D. 114; *Carpenter v. Deen*, 23 Q. B. D. 566.

**Advertisement.** — The owners of a ship circulated advertisements of sale, beginning with the description of the ship, which stated her to be copper fastened, after which was a notice that the hull, masts, yards, and rigging were to be taken with all faults. Under this was printed the word *inventory*, which was followed by a list of the ship's stores and tackle. The owners afterwards executed a contract of sale, not stating that the ship was copper fastened, but warranting the delivery of the ship "according to the *inventory*" which had been exhibited. It was held that the word *inventory* in the contract referred only to the list of stores, and not to the prior part of the advertisement, and therefore that where the vessel was warranted according to the *inventory*, there was no warranty that the ship was copper fastened. *Taunton, J.*, said: "The words of the advertisement containing the description of the brig as copper fastened form no part of the *inventory*. The word *inventory* is placed after that description, at the head of a distinct list of articles. If it had been at the head of the paper, it might have been contended that the whole was the *inventory*." *Freeman v. Baker*, 5 B. & Ad. 797, 27 E. C. L. 194.

1. **Invest.** — *Savings Bank v. Barrett*, 126 Cal. 413.

In *Neel v. Beach*, 92 Pa. St. 226, it was said: "If stress be put on the word *invest*, one of its senses is 'to surround with or place in, as property in business;' another, 'to place so that it will be safe and yield a profit;' though it is commonly understood as giving money for some other property."

A charter provided that the corporation should *invest* no money in other than certain designated securities. In construing this statute in *Una v. Dodd*, 39 N. J. Eq. 186 the court said: "So far as I am aware, there is no technical legal definition of the term *investment* as applied to money. In its most comprehensive sense I think it is generally understood to signify the laying out of money in such a manner that it may produce a revenue, whether the particular method be a loan or the purchase of stocks, securities, or other property. In common parlance it means putting out money on interest, either by way of loan or the purchase of income-producing property."

**Deposit.** — A guardian, while seeking *investment*, deposited the assets of the trust estate in a bank temporarily in his name as guardian upon an agreement that he was to receive interest at three per cent., and he was to give

two weeks' notice of his desire to withdraw. The bank, then in good repute, failed three months afterwards. It was held that, the money being entered as a deposit merely, the provision for notice of withdrawal did not constitute the transaction an *investment*, but it was a reasonable provision not inconsistent with a bank deposit, and on the failure of the bank the guardian was not responsible. *Law's Estate*, 144 Pa. St. 499, *distinguishing* *Frankenfield's Appeal*, 11 W. N. C. (Pa.) 373, and *Baer's Appeal*, 127 Pa. St. 360. See also *State v. McFetridge*, 84 Wis. 515.

But money deposited in a bank has been held to be *invested*. *Jennings v. Davis*, 31 Conn. 143, the court saying: "It is not stated whether the money was deposited in the bank for safekeeping merely, or in the character of a loan to the bank for which a stipulated rate of interest was to be paid during its continuance there; nor is it material to inquire, because in either case the deposit (being a general as contradistinguished from a special one) created a debt in favor of the depositor and against the bank, and then the money became *invested* in that debt, and being thus *invested* in the name of Mrs. Morehouse was protected by the statute against her husband's claims upon it. Money paid for costly jewels or precious stones, though they produce no income, is as truly *invested* as money paid for bank stocks or government securities. It can make no difference whether the depositor took any written evidence of this *investment* or did not."

**Mortgages.** — Where a statute provided that savings and loan corporations might *invest* the funds of their stockholders and depositors, it was held that they might buy interest-bearing notes and mortgages. *Savings Bank v. Barrett*, 126 Cal. 413.

**Promissory Notes.** — In *Jennings v. Davis*, 31 Conn. 134, the court said: "Promissory notes \* \* \* are the subject of sale and transfer like ordinary articles of merchandise, and money paid for a note, and especially for a note carrying interest, may with entire propriety be said to be *invested* in that note."

In *Colorado Sav. Bank v. Evans*, 12 Colo. App. 342, it was said: "The word *invest* has been variously construed by the authorities to which we have referred, and has a significance — whether primary or secondary seems to us unimportant — which would include loans made by the discount of paper, or loans made on commercial paper, whether signed by two or more, and whether made to the order of the bank or made to another and transferred by indorsement."

A statute incorporating an insurance company provided that the directors might make such rules and by-laws as they deemed proper



**INVESTIGATE — INVESTIGATION.** — To investigate is to make search or inquiry for truth or facts.<sup>1</sup>

for the *investment* of the funds of the corporation which the business of insurance might not actively employ. In considering this provision in *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 392, the court said: "I know of no technical legal definition of the term *investment*, as applied to money. In common parlance it means the putting out of money on interest, and beyond all doubt the legislature meant that the corporation might put out or use and employ such part of their funds as the business of insurance did not actively employ; and the plea put in by the defendants alleges that their discounting of notes consists in *investing* the funds of the corporation which the business of insurance in the act mentioned did not actively employ, and no otherwise. If the mode of *investment* by discounting notes, which is nothing else than lending money on personal security, is not prohibited by the act of incorporation, then it appears to me to be authorized under the general and unqualified power of *investing* the funds not actively employed in the business of insurance."

**Partnership.** — A married woman testified that she had *invested* the rents collected by her husband in his mercantile business. The court said: "What is an *investment* of money by one person in the mercantile business of another? Is it not something more than a loan to that business? Mrs. Zimmer was a partner in life of her husband by marriage contract. They had no children, and there is a statement in the evidence that they had executed mutual wills testamentary in favor of each other. She lived for most of the time of conducting the mercantile business in the storehouse, and assisted in the business. Considered in connection with these facts, what does her *investment* of her money in his business mean? Was it not a contribution of her income to the capital of the business? And what is capital but the fund dedicated to a business to support its credit, to provide for contingencies, to suffer diminution from losses, and to derive accretion from gains and profits? When Mrs. Zimmer declares that she was an *investor* in her husband's business, does she not say that it was his business that she looked to and trusted, and that it was not himself personally that she was dealing with as a debtor?" *Lyon v. Zimmer*, 30 Fed. Rep. 410.

**Donation.** — A testator empowered trustees to *invest* certain property as a reserve fund. It was held that this did not authorize a trustee to donate a certain sum to a hotel company as a bonus to induce it to erect a large hotel. *Drake v. Crane*, 127 Mo. 103.

**Sale.** — Authority given by a principal to an agent to *invest* his money and look after his business generally will not enable the agent to sell his principal's property, even such as may be acquired as the result of the *investment*. *Smith v. Stephenson*, 45 Iowa 645.

A *New York* statute provided that nonresidents should be taxed on all sums *invested* in the business of banking or merchandise. It was held that the goods of a nonresident sent into New York for the purpose of sale with-

out reinvestment of the proceeds were not liable to taxation. *Parker Mills v. Tax Com'rs*, 23 N. Y. 244. See also *People v. Tax Com'rs*, 35 N. Y. 440; *State v. Engle*, 34 N. J. L. 428. And see the title **TAXATION**.

**Investments in Stock — Credits.** — In *Niles v. Shaw*, 50 Ohio St. 370, it was held that shares of stock in a national bank were *investments* in stock, and not credits, within the *Ohio* tax laws. See also *Chapman v. Wellington First Nat. Bank*, 56 Ohio St. 310.

**Invested in the Sense of Empowered.** — A statute provided that municipal and other corporations and individuals *invested* with the privilege of taking private property for public use should make just compensation for property taken, injured, or destroyed by the construction of their works. In construing this statute in *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 360, 17 W. N. C. (Pa.) 196, the court said: "The word *invested*, standing as it does alone, has undoubtedly a present signification, and cannot be made to embrace the future but by the addition of some verbal auxiliary."

**1. Investigation.** — A *New York* statute made it compulsory upon persons concerned in bribery to attend and testify upon any trial or *investigation*, but provided that their testimony should not be used against them in any subsequent criminal or civil proceedings. It was held that the testimony given before the railroad committee of the state senate, which committee had been appointed to *investigate* charges of bribery in connection with the Broadway Surface Railway Company, was an *investigation* within the meaning of the statute. *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 863.

**Investigation by Commissioners of Public Works.** (See also the titles **MUNICIPAL CORPORATIONS**; **SPECIAL OR LOCAL ASSESSMENTS**; **STREETS AND SIDEWALKS**.) — A statute required the commissioners of public works to make an *investigation* in reference to the assessment of special benefits to be derived from certain proposed public improvements. It was held that it was not necessary that the commissioners should go upon the grounds or streets of such public improvements and there *investigate*. It was sufficient that they *investigated* the matter in their office. *Wright v. Chicago*, 48 Ill. 285. The court said: "Full *investigation* of a subject, be it moral, political, or philosophical, can generally be better pursued in the closet than in the open air in crowded streets. Eminent lexicographers define *investigation* to be the action or process of searching minutely for truth, facts, or principles; a careful inquiry to find out what is unknown, either in the physical or moral world, and either by observation and experiment or by argument and discussion."

**Investigating Titles.** — An *English* statute regulated the fees which should be paid to solicitors for *investigating* titles. It was held that there might be an *investigation* of title without an abstract. In *Ex p. London*, 34 Ch. D. 455, Kay, J., said: "So that what the city solicitor did was this: Being referred by the vendors to a public Act under which they had



**INVESTITURE.** — Investiture at common law was equivalent to livery of seizin.<sup>1</sup>

acquired their title, and under which they were proceeding to sell, he read it, examined it, and came to the conclusion upon it that something more was wanted than the mere Act of Parliament, and that a formal authority signed by the lord chancellor was required. Accordingly he applied for and obtained that formal authority, which he would not have understood was wanted without having *investigated* the Act of Parliament; and thereupon he satisfied the chief clerk that it was not worth while to have a reference to the conveyancing counsel as to title, and the purchase was completed on that *investigation*. Now I am told that this was not an *investigation* of the title. I have put several points to counsel, which have not to my mind been satisfactorily answered. Suppose, instead of one Act mentioned by the vendors, they had mentioned half a dozen public Acts, and said: 'Under and by virtue of all these six Acts of Parliament which we give you the reference to, all being public Acts of Parliament, these properties are vested in us, and we have the power of sale;' and suppose the city solicitor, instead of reading one, had read six Acts of Parliament; would that have been an *investigation* of title or not? To my mind, there is only one possible answer. It does not matter how many Acts there were, or how long or short the title was. The question is, was the title *investigated*? Again, it is said no abstract was furnished, the vendors saying: 'We are not going to give you any evidence of title.' But did that make it less necessary for the solicitor to *investigate* that which they said was their title? There may be an *investigation* of title without any abstract. There may be an *investigation* of title without any evidence of title being furnished by the vendor. The reason here is manifest. The commissioners in effect said: 'We are not going to give you any evidence of title, because the

evidence of this title, being a public Act of Parliament, is so easily accessible to you that we need not supply you with a public Act of Parliament.' That is all the commissioners meant. They did not mean that the city solicitor was not to *investigate* that public Act of Parliament; and the solicitor would have been grossly wanting in his duty if he had not *investigated* it with the utmost possible care. Again, I put this question to counsel, to which no satisfactory answer has been given: Suppose this inquiry as to title had been retained, and the title had been referred to the conveyancing counsel; after the solicitor had read the Act of Parliament, suppose he had not been quite satisfied without the opinion of the conveyancing counsel, and had proceeded to take it; would there have been no *investigation* of title then? I have heard no answer to that at all; you cannot say there is no *investigation* of title because the title is a very short one, or because the title is a very easy one to *investigate*, or because the *investigation* took only five minutes instead of ten days. The question is, has there been an *investigation* of title? Here the title was a public Act of Parliament, which vested this property in the vendors. Whether it gave them a power of sale or not, was a question which the city solicitor had most carefully to consider, and his consideration of it led to his requiring a formal authority from the lord chancellor; it was in consequence of that *investigation* of the Act that the formal authority was obtained."

1. Whart. L. Lex. And see 2 Black. Com. 209.

"*Vestimento* is seizin, investiture (from whence the Saxon term 'vest'), a metaphor the feudists took from clothing; by which they meant to intimate 'that the naked possession was clothed with solemnities of the feudal tenure.'" Lord Mansfield in *Taylor v. Horde*, 1 Burr. 109.



# INVESTMENTS.

BY JOSEPH WALKER MAGRATH.

## I. DEFINITION AND SCOPE OF ARTICLE, 425.

1. *Definition*, 425.
2. *Scope of Article*, 425.

## II. THE DUTY TO INVEST, 426.

1. *In General*, 426.
2. *Time Allowed Within Which to Invest*, 427.

## III. DETERMINATION AS TO NATURE OF INVESTMENTS, 428.

1. *Provisions of Instrument Creating Trust*, 428.
  - a. *Express Directions*, 428.
    - (1) *Rule Stated*, 428.
    - (2) *When Directions May Be Departed From*, 429.
  - b. *Authority to Make Certain Investments*, 429.
2. *Statutory Provisions*, 430.
3. *Supervision of Courts*, 431.
  - a. *In General*, 431.
  - b. *Right of Fiduciaries to Apply for Directions*, 432.
  - c. *Whether Fiduciaries Must Apply for Directions*, 432.
  - d. *Protection Afforded by Order of Court*, 433.
4. *Discretion of Fiduciary*, 434.

## IV. REQUIREMENTS OF GOOD FAITH AND SOUND JUDGMENT, 435.

1. *Rule Stated*, 435.
2. *Measure of Diligence Required*, 437.

## V. CONSTRUCTION OF PARTICULAR DIRECTIONS OR POWERS, 438.

1. *To Invest in Government or Public Securities*, 438.
2. *To Invest in Real Estate*, 438.
3. *To Invest in Real Securities*, 439.
4. *To Make Loans on Personal Security*, 440.
5. *To Invest in Corporate Stock or Securities*, 440.
6. *To Continue Established Business*, 441.
7. *To Invest in Names of Fiduciaries*, 441.
8. *To Invest a Specified Amount in a Particular Way*, 441.

## VI. PROPRIETY OF PARTICULAR INVESTMENTS, 441.

1. *Introductory — Scope of Section*, 441.
2. *Government or Public Securities*, 442.
  - a. *A Proper Investment*, 442.
  - b. *Bonds of Confederate States*, 443.
3. *Real Securities*, 445.
  - a. *A Proper Investment*, 445.
  - b. *Care in Selecting Security*, 446.
  - c. *Margin of Security*, 447.
    - (1) *Necessity for*, 447.
    - (2) *English "Two-Thirds Rule,"* 447.
    - (3) *When Excessive Loan May Be Sustained as to Part*, 448.
    - (4) *Depreciation of Property After Loan Is Made Thereon*, 448.
  - d. *Rule as to Junior Mortgages*, 448.
4. *Loans on Personal Security*, 448.
  - a. *Prevailing Doctrine as to Impropriety*, 448.
  - b. *View that Such Loans May Be Made*, 449.



## INVESTMENTS.

5. *Employment in Business or Speculation*, 450.
6. *Corporate Stock*, 450.
  - a. *View that Investment Therein Is Improper*, 450.
  - b. *View that Such Investment Is Not Necessarily Improper*, 451.
7. *Corporate Bonds*, 452.
8. *Deposits in Bank*, 452.
9. *Purchase of Real Estate*, 453.
10. *Loans to Co-Fiduciaries*, 454.
11. *Rule as to Investments Made by Creator of Trust*, 454.

### VII. SITUS OF INVESTMENTS, 454.

### VIII. SEPARATE INVESTMENT OF FUNDS HELD ON DIFFERENT TRUSTS, 455.

### IX. DESIGNATION OF FIDUCIARY CAPACITY IN WHICH INVESTMENTS ARE HELD, 456.

1. *Rule Stated*, 456.
2. *Rule Applies though Fiduciary Acted in Good Faith*, 456.
3. *Proper Form for Investments*, 457.
4. *Extent of Liability for Investments or Deposits in Individual Name*, 457.

### X. INCOME TO BENEFICIARIES, 457.

1. *Duty of Fiduciary to Secure*, 457.
2. *Rate of Interest on Investments*, 457.
  - a. *General Rule*, 457.
  - b. *Circumstances of Cestuis Que Trustent Cannot Prevent Application of Rule*, 458.
  - c. *When Compound Interest Should Be Obtained*, 458.
  - d. *Usurious Loans*, 458.
3. *Rights as Between Life Tenants and Remaindermen*, 458.

### XI. CHANGE OF INVESTMENTS, 459.

1. *General Rule*, 459.
  - a. *Rule Stated*, 459.
  - b. *When Investments May Be Changed*, 459.
    - (1) *When Insecure*, 459.
    - (2) *When Change Is to Advantage of Beneficiary*, 460.
2. *Express Power to Vary Investments*, 460.
  - a. *By Statute*, 460.
  - b. *By Provisions of Trust Instrument*, 460.
3. *When Power to Change Investments Is Implied*, 461.
4. *Rule as to Investments Made by Creator of Trust*, 461.
5. *Where Specific Securities Are Given in Trust*, 461.

### XII. LIABILITIES OF FIDUCIARIES, 462.

1. *For Failure to Invest*, 462.
  - a. *Existence of Liability*, 462.
  - b. *Extent of Liability*, 462.
    - (1) *For Failure to Invest — Generally*, 462.
      - (a) *Losses to Principal*, 462.
      - (b) *Interest*, 462.
    - (2) *For Failure to Make Investments Directed by Trust Instrument*, 463.
2. *For Losses on Investments*, 464.
  - a. *General Rule*, 464.
  - b. *Losses on Unauthorized Investments*, 466.
  - c. *Manner of Enforcing Liability*, 467.
  - d. *Extent of Liability for Loss of Confederate Money*, 468.
  - e. *Loss Caused by Wrong of Cestui Que Trust*, 468.
3. *For Commingling Trust Funds with Individual Funds*, 468.
4. *For Using Trust Funds in Business or Speculation*, 469.
  - a. *Liability to Replace Amounts Used*, 469.
  - b. *Right of Beneficiary to Profits Realized by Fiduciary*, 470.



5. *For Improperly Disposing of Investments*, 471.
6. *For Misconduct of Co-Fiduciaries*, 472.
7. *For Misconduct of Agents*, 472.
8. *Interest*, 472.
  - a. *Liability for*, 472.
  - b. *Rate*, 472.
  - c. *Simple or Compound Interest*, 474.
9. *Option of Beneficiary as to Adopting Improper Investments*, 475.
  - a. *Rule Stated*, 475.
  - b. *Beneficiary Bound by Acceptance of Investment*, 475.
  - c. *Right to Adopt Some Investments and Reject Others*, 475.
10. *Effect of Beneficiary's Consent to or Acquiescence in Improper Investment*, 476.
  - a. *Rule Stated*, 476.
  - b. *Beneficiary Must Have Been Competent to Act*, 476.
  - c. *Beneficiary Must Have Been Fully Informed*, 477.
  - d. *Assent of One of Several Beneficiaries*, 477.
  - e. *Burden of Proof*, 477.
11. *Option of Provision in Trust Instrument Exonerating Fiduciary from Liability for Losses*, 477.
12. *Limitation of Actions*, 478.

### XIII. REMOVAL OF FIDUCIARIES, 478.

#### CROSS-REFERENCES.

*For matters of PROCEDURE, see the following titles in the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE: *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 650; *GUARDIANS*, vol. 9, p. 886; *TRUSTS AND TRUSTEES*.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: AGENCY*, vol. 1, p. 930; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *EXECUTORS AND ADMINISTRATORS*, vol. 11, pp. 741-950; *GUARDIAN AND WARD*, vol. 15, p. 16; *INFANTS*, vol. 16, p. 255; *LEGACIES AND DEVISES*; *POWER OF ATTORNEY*; *POWERS*; *RECEIVERS*; *TRUSTS AND TRUSTEES*; *WILLS*.

**I. DEFINITION AND SCOPE OF ARTICLE — 1. Definition.** — An investment is the loaning or placing of money so as to produce interest or profit.<sup>1</sup> For the purposes of this article, it is the loaning or placing by a fiduciary of money in his hands in such capacity, so as to produce interest or profit for the benefit of the one for whom he holds.<sup>2</sup>

**2. Scope of Article.** — It is the purpose of this article to give a general discussion of the rights, powers, duties, and liabilities of fiduciaries with reference to the investment of such funds.

Investments by Executors and Administrators will be found to have received a thorough treatment in another part of this work,<sup>3</sup> and therefore such invest-

#### 1. Definition. — Abbott's L. Dict.

A sum is "invested" whenever its amount is represented by anything but money. *Parker Mills v. Tax Com'rs*, 23 N. Y. 242.

See further as to the meaning of investments, *Shoemaker v. Smith*, 37 Ind. 122; *Duncan v. Maryland Sav. Inst.*, 10 Gill & J. (Md.) 299; *Drake v. Crane*, 127 Mo. 85; *Una v. Dodd*, 39 N. J. Eq. 173; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Scott v. Depeyster*, 1 Edw. (N. Y.) 513; *Neel v. Beach*, 92 Pa. St. 226.

#### 2. Donation towards Building a Hotel Considered

an Investment. — In *Drake v. Crane*, 127 Mo. 85, it was considered that a donation by trustees for the purpose of inducing the building of a projected hotel in the vicinity of lands belonging to the trust estate in preference to any other location, was, in a sense, an investment, and within the power of the trustees, where the value of the lands referred to was enhanced in consequence of the location of the hotel. The court, however, said: "It has been with much hesitancy that we have arrived at this conclusion."

3. See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 950.



ments will be touched upon here only when necessary to illustrate or elucidate the principles applicable to all fiduciaries.

**II. THE DUTY TO INVEST — 1. In General.** — It is well established as a general rule that a trustee, guardian, or other fiduciary would fail in his duty were he to allow funds in his possession, in his fiduciary capacity, to remain unproductive, where there was no reason why such funds should be kept on hand as cash, as to meet impending liabilities. He must invest the fund in such a manner as to secure, so far as may be possible, the safety of the principal and the production of a reasonable interest thereon.<sup>1</sup> This duty is, in the great majority of instances, emphasized by an express direction to invest contained in the instrument, order of court, or statute from which the fiduciary derives his powers, or by some general statute in relation to fiduciaries.<sup>2</sup>

**1. General Duty to Invest — Alabama.** — *Newman v. Reed*, 50 Ala. 297; *Lee v. Lee*, 55 Ala. 590.

*Georgia.* — *Brown v. Wright*, 39 Ga. 96.

*Illinois.* — *McIntyre v. People*, 103 Ill. 142.

*Kentucky.* — *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

*Missouri.* — *Gates v. Hunter*, 13 Mo. 511.

*New Hampshire.* — *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

*New York.* — *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388; *Otto v. Van Riper*, 31 N. Y. App. Div. 278; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 78; *Matter of Hathaway*, 80 Hun (N. Y.) 186.

*North Carolina.* — *Shipp v. Hettrick*, 63 N. Car. 329; *Burke v. Turner*, 85 N. Car. 500; *Gary v. Cannon*, 3 Ired. Eq. (38 N. Car.) 64; *Sudderth v. McCombs*, 65 N. Car. 186.

*Pennsylvania.* — *Huffer's Appeal*, 2 Grant Cas. (Pa.) 341; *Whitecar's Estate*, 147 Pa. St. 368, affirming 10 Pa. Co. Ct. 448.

*South Carolina.* — *Nance v. Nance*, 1 S. Car. 209; *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456. See also *Brabham v. Crosland*, 25 S. Car. 525, *infra*, this note.

*Texas.* — *Mills v. Swearingen*, 67 Tex. 269.

*Virginia.* — *Leake v. Leake*, 75 Va. 792; *Sharpe v. Rockwood*, 78 Va. 24; *Elliott v. Howell*, 78 Va. 297; *Fultz v. Brightwell*, 77 Va. 742. See also *Crickard v. Crickard*, 25 Gratt. (Va.) 410.

**Guardian Should Invest Surplus Income of Ward Beyond What Is Necessary for His Maintenance.** — *In re Noble*, 26 Pittsb. Leg. J. N. S. (Pa.) 365. See generally the title **GUARDIAN AND WARD**, vol. 15, p. 16.

**Distinction Between Duty of Guardian or Other Like Trustee and of Executor and Administrator.** — See *Brabham v. Crosland*, 25 S. Car. 525.

**Safety and Productiveness Should Be Secured.** — *Drake v. Crane*, 127 Mo. 85, citing *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508.

**Guardian Ad Litem Cannot Invest.** — A guardian *ad litem* has no power, and consequently it is not his duty, to invest the funds of the infants whom he represents. *Dix v. Jarman*, 1 Ch. Chamb. (Ont.) 38. Compare *Haddock v. Planters' Bank*, 66 Ga. 496, in which case an investment directed by the chancellor, upon the recommendation and consent of the guardian *ad litem*, was sustained. See generally the title **GUARDIAN AD LITEM**, vol. 15, p. 2.

**2. Express Direction to Invest — England.** — *Byrchall v. Bradford*, 6 Madd. 235, 23 Rev. Rep. 204; *Cadogan v. Essex*, 18 Jur. 782, 2 Drew. 227, 2 Eq. R. 351, 23 L. J. Ch. 487, 2 W. R. 313; *McKenzie v. Taylor*, 9 L. C. Jur. 113; *Parry v. Warrington*, 6 Madd. 155, 22 Rev. Rep. 264; *Warner v. Torkington*, 4 L. J. Ch. 193; *In re Maberly*, 56 L. J. Ch. 54, 33 Ch. D. 455, 55 L. T. N. S. 164, 34 W. R. 771; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312, 11 L. J. Ch. 158, 6 Jur. 232; *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692; *Vickery v. Evans*, 33 Beav. 376, 3 N. R. 286, 33 L. J. Ch. 261, 10 Jur. N. S. 30, 9 L. T. N. S. 822, 12 W. R. 237; *In re Sewell*, L. R. 11 Eq. 80, 40 L. J. Ch. 135, 23 L. T. N. S. 835; *Tebbs v. Carpenter*, 1 Madd. 290; *In re Kavanagh*, 27 L. R. Ir. 495; *Buckley v. Buckley*, Dr. 375; *Atty.-Gen. v. Higham*, 2 Y. & C. Ch. 634; *Atty.-Gen. v. Fishmongers' Co.*, 1 Keen 492.

*Canada.* — *Spratt v. Wilson*, 19 Ont. 28.

*United States.* — *Barney v. Saunders*, 16 How. (U. S.) 535.

*Alabama.* — *Ashley v. Martin*, 50 Ala. 537; *Foscue v. Lyon*, 55 Ala. 440; *Newman v. Reed*, 50 Ala. 297; *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *Lee v. Lee*, 55 Ala. 590.

*Connecticut.* — *Pinney v. Newton*, 66 Conn. 141.

*Illinois.* — *Hughes v. People*, 111 Ill. 457, affirming 10 Ill. App. 148; *Butler v. Butler*, 164 Ill. 171, affirming 61 Ill. App. 51; *McIntyre v. People*, 103 Ill. 142.

*Kentucky.* — *Hughes v. Smith*, 2 Dana (Ky.) 252; *Higgins v. McClure*, 7 Bush (Ky.) 379.

*Maine.* — *Mattocks v. Moulton*, 84 Me. 545.

*Maryland.* — See *Devecmon v. Shaw*, 70 Md. 219.

*Missouri.* — *Gates v. Hunter*, 13 Mo. 511.

*New Hampshire.* — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

*New York.* — *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388; *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597; *Spencer v. Weber*, 26 N. Y. App. Div. 285; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447.

*North Carolina.* — *Stone v. Hinton*, 1 Ired. Eq. (36 N. Car.) 15.

*Ohio.* — *McIntire v. Zanesville*, 17 Ohio St. 352.

*Pennsylvania.* — *McCauseland's Appeal*, 38



Exceptional Circumstances, such as the impossibility of obtaining the securities authorized by law for investments, or the unsettled condition of the country politically and financially, may, however, sometimes justify a fiduciary in retaining funds in his hands uninvested.<sup>1</sup>

**2. Time Allowed Within Which to Invest.** — The instrument by which the trust is created not infrequently designates some time within which the trust funds must be invested. In the absence of some such designation, the general rule is that investments must be made within a reasonable time.<sup>2</sup>

**What Is a Reasonable Time.** — The circumstances of each particular case must largely govern the decision as to what is a reasonable time in which to find suitable investments.<sup>3</sup> And a delay for a considerable length of time has been

Pa. St. 466; *Dorsey's Estate*, 11 Pa. Co. Ct. 12; *Ihmsen's Appeal*, 43 Pa. St. 431.

*Tennessee.* — *Torbet v. McReynolds*, 4 Humph. (Tenn.) 215; *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676.

*Virginia.* — *Douglass v. Stephenson*, 75 Va. 749. See also *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**A Duty to Invest a Trust Fund Arises by Necessary Implication** from a direction in the will to pay over the interest thereon. *Stambaugh's Estate*, 135 Pa. St. 585, 26 W. N. C. (Pa.) 265.

**Sum So Small as to Make Investment Difficult.** — A trustee is not relieved of a duty imposed by the will creating the trust, to invest unexpended income, merely because the surplus is so small as possibly to make investment thereof difficult. *McCauseland's Appeal*, 38 Pa. St. 466.

But compare *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609, in which the court said that a fiduciary could not be considered guilty of neglect if a sum so small that a prudent person would not seek an investment for it lay idle.

**Full Amount Designated by Terms of Trust Should Be Invested.** — *Gates v. Hunter*, 13 Mo. 511.

**Direction to Invest Money Arising from Sale — Sale on Credit — Interest on Purchase Money to Be Invested.** — *Stone v. Hinton*, 1 Ired. Eq. (36 N. Car.) 15.

**1. Circumstances May Justify a Failure to Invest.** — *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 78; *Whitford v. Foy*, 65 N. Car. 265. See also *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676; *Douglass v. Stephenson*, 75 Va. 749; *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**2. Investments Must Be Made Within a Reasonable Time — England.** — *Johnson v. Newton*, 11 Hare 160; *Parry v. Warrington*, 6 Madd. 156, 22 Rev. Rep. 264; *Lyse v. Kingdon*, 1 Coll. Ch. Cas. 184; *Bate v. Scales*, 12 Ves. Jr. 402; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Traford v. Boehm*, 3 Atk. 440; *Forbes v. Ross*, 2 Cox Ch. 115; *Hughes v. Empson*, 22 Beav. 181; *Johnson v. Prendergast*, 28 Beav. 480; *Flanagan v. Nolan*, 1 Molloy 85; *Moyle v. Moyle*, 2 Russ. & M. 710; *Atty.-Gen. v. Fishmongers' Co.*, 1 Keen 492.

*United States.* — *Barney v. Saunders*, 16 How. (U. S.) 535; *In re Thorp*, 2 Ware (U. S.) 294, 4 N. Y. Leg. Obs. 377, 23 Fed. Cas. No. 14,002.

*Alabama.* — *Owen v. Peebles*, 42 Ala. 338.

*Kentucky.* — *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

*Maryland.* — *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277.

*Massachusetts.* — *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

*New Jersey.* — *Frey v. Demarest*, 17 N. J. Eq. 71.

*New York.* — *Garniss v. Gardiner*, 1 Edw. (N. Y.) 128; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *Cogswell v. Cogswell*, 2 Edw. (N. Y.) 231; *Williamson v. Williamson*, 6 Paige (N. Y.) 298; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313; *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504.

*North Carolina.* — *Shipp v. Hettrick*, 63 N. Car. 329.

*Ohio.* — *Armstrong v. Miller*, 6 Ohio 118.

*Pennsylvania.* — *Witmer's Appeal*, 87 Pa. St. 120; *Pray's Appeals*, 34 Pa. St. 100; *Hemphill's Appeal*, 18 Pa. St. 303; *Aston's Estate*, 5 Whart. (Pa.) 228. See also *Norris's Appeal*, 71 Pa. St. 106.

*South Carolina.* — *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456.

*Virginia.* — *Carter v. Cutting*, 5 Munf. (Va.) 224; *Dromgoole v. Smith*, 78 Va. 665; *Lomax v. Pendleton*, 3 Call (Va.) 538; *Handly v. Snodgrass*, 9 Leigh (Va.) 484. See also *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**3. What Is a Reasonable Time Depends upon the Circumstances of the Case — England.** — *Johnson v. Newton*, 11 Hare 160; *Parry v. Warrington*, 6 Madd. 155, 22 Rev. Rep. 264.

*United States.* — *Barney v. Saunders*, 16 How. (U. S.) 535.

*Alabama.* — *Ashley v. Martin*, 50 Ala. 537.

*Pennsylvania.* — *Witmer's Appeal*, 87 Pa. St. 120; *Lukens's Appeal*, 47 Pa. St. 356; *Hughes's Appeal*, 53 Pa. St. 500.

*Virginia.* — *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**One Year.** — In the following cases one year has been considered a reasonable time within which to invest: *Parry v. Warrington*, 6 Madd. 155, 22 Rev. Rep. 264; *Johnson v. Newton*, 11 Hare 160. See also *Sculthorpe v. Tipper*, L. R. 13 Eq. 232, 41 L. J. Ch. 266, 26 L. T. N. S. 119, 20 W. R. 276; *Wyatt v. Wallis*, 8 Jur. 117, *Coop.* 155, note; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Ogilvie v. Ogilvie*, 1 Bradf. (N. Y.) 356; *Matter of Black*, 6 Dem. (N. Y.) 331; *Cogswell v. Cogswell*, 2 Edw. (N. Y.) 231; *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**Six Months.** — In the following cases six months has been considered a reasonable time to make investments:



permitted in cases where the investment expressly directed by the creator of the trust was not easily procurable,<sup>1</sup> or was unsafe at the time when the investment should otherwise have been made,<sup>2</sup> and also where a considerable discretion was given to the trustees by the trust instrument as to the time of making the investment.<sup>3</sup>

**III. DETERMINATION AS TO NATURE OF INVESTMENTS — 1. Provisions of Instrument Creating Trust — a. EXPRESS DIRECTIONS — (1) Rule Stated.** — The creator of a trust may, of course, insert in the trust instrument whatever directions he deems proper in reference to the investment of the trust funds; and such directions the fiduciary is bound to follow.<sup>4</sup>

*Alabama.* — *Nunn v. Nunn*, 66 Ala. 35.

*Maryland.* — See *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

*New Jersey.* — *Voorhees v. Sloothoff*, 11 N. J. L. 145; *Frey v. Demarest*, 17 N. J. Eq. 72.

*New York.* — *Lent v. Howard*, 89 N. Y. 169; *Dunscomb v. Dunscomb*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; *Halsted v. Hyman*, 3 Bradf. (N. Y.) 426; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 78. See also *Gilman v. Gilman*, 2 Lans. (N. Y.) 1.

*Pennsylvania.* — *Matter of Merrick*, 2 Ashm. (Pa.) 485; *Worrell's Appeal*, 23 Pa. St. 44.

*Virginia.* — *Armstrong v. Walkup*, 12 Gratt. (Va.) 608; *Hooper v. Royster*, 1 Munf. (Va.) 119.

*Canada.* — *McKenzie v. Taylor*, 9 L. C. Jur. 113.

**Three Months.** — In *Barney v. Saunders*, 16 How. (U. S.) 535, the court considered three months not to be an unreasonable time to be allowed for selecting investments, but said that five months had been considered an unreasonable time to keep money on deposit.

**Two Months.** — In *Witmer's Appeal*, 87 Pa. St. 120, an allowance to a trustee of less than two months within which to reinvest moneys received by him from the redemption of state bonds, held by him as trustee, was said not to be an undue indulgence.

**Thirty Days Held a Sufficient Time to Invest in Public Securities.** — *Gilman v. Gilman*, 2 Lans. (N. Y.) 1. But compare *Cogswell v. Cogswell*, 2 Edw. (N. Y.) 231.

**1. Designated Investment Not Procurable.** — *Wyatt v. Wallis*, 8 Jur. 117, Coop. 155, note.

**2. Where Investment Directed Is Unsafe.** — *In re Maberly*, 33 Ch. D. 455, 56 L. J. Ch. 54, 55 L. T. N. S. 164, 34 W. R. 771.

**3. Discretion of Trustees.** — *Warner v. Torkington*, 4 L. J. Ch. 193. But compare *Sculthorpe v. Tipper*, L. R. 13 Eq. 232, 41 L. J. Ch. 266, 26 L. T. N. S. 119, 20 W. R. 276.

**Power to Postpone Sale and Reinvestment — All Trustees Must Concur.** — *Re Roth*, 74 L. T. N. S. 50.

**4. Express Direction of Creator of Trust — England.** — *Wyatt v. Wallis*, 8 Jur. 117, Coop. 155, note; *Cadogan v. Essex*, 18 Jur. 782, 2 Drew. 227, 2 Eq. R. 351, 23 L. J. Ch. 487, 2 W. R. 313; *Byrchall v. Bradford*, 6 Madd. 235, 23 Rev. Rep. 204; *Craven v. Craddock*, 20 L. T. N. S. 638; *In re Sharp*, 45 Ch. D. 286, 60 L. J. Ch. 38, 62 L. T. N. S. 777; *Re Roth*, 74 L. T. N. S. 50; *Burnie v. Getting*, 2 Coll. Ch. Cas. 324, 9 Jur. 937; *Arnould v. Grinstead*, 21 W. R. 155; *Mortimore v. Mortimore*, 4 De G. & J. 472, 28 L. J. Ch. 558, 7 W. R. 601; *Hereford v.*

*Ravenhill*, 5 Beav. 51; *Greenwood v. Wakeford*, 1 Beav. 576; *Mathias v. Mathias*, 3 Smale & G. 552, 3 Jur. N. S. 429; *Hume v. Richardson*, 4 De G. F. & J. 29, 31 L. J. Ch. 713, 8 Jur. N. S. 686, 6 L. T. N. S. 624, 10 W. R. 528; *Bromley v. Kelly*, 39 L. J. Ch. 274; *Harris v. Harris*, 29 Beav. 107; *In re Mansel*, 45 L. T. N. S. 741, 30 W. R. 133; *Bostock v. Blakeney*, 2 Bro. C. C. 653; *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302; *Shepherd v. Moulds*, 4 Hare 500, 14 L. J. Ch. 366, 9 Jur. 506; *Robinson v. Robinson*, 1 De G. M. & G. 247, 21 L. J. Ch. 111, 16 Jur. 255; *Earlom v. Saunders*, Ambl. 241; *Starkey v. Dyson*, 24 W. R. 37; *Pride v. Fooks*, 2 Beav. 430, 9 L. J. Ch. 234, 4 Jur. 213; *Edwards v. Edmunds*, 34 L. T. N. S. 522; *Poulett v. Somerset*, 25 L. T. N. S. 56, 19 W. R. 1048; *Drake v. Trefusis*, L. R. 10 Ch. 364, 33 L. T. N. S. 85, 23 W. R. 762; *In re Venour*, 45 L. J. Ch. 409; *Stair v. Macgill*, 1 Bligh N. S. 662, 1 Dow & Cl. 24; *Boss v. Godsall*, 1 Y. & C. Ch. 617, 11 L. J. Ch. 391, 7 Jur. 146; *Webb v. Shaftsbury*, 6 Madd. 100, 22 Rev. Rep. 249; *Vickery v. Evans*, 33 Beav. 376, 3 N. R. 286, 33 L. J. Ch. 261, 10 Jur. N. S. 30, 9 L. T. N. S. 822, 12 W. R. 237; *Bellot v. Littler*, 30 L. T. N. S. 861, 22 W. R. 836; *Lewis v. Nobbs*, 8 Ch. D. 591, 47 L. J. Ch. 662, 26 W. R. 631. See also *Buckley v. Buckley*, Dr. 375; *Webb v. Jonas*, 39 Ch. D. 660, 57 L. J. Ch. 671, 58 L. T. N. S. 882, 36 W. R. 666; *Thayer v. Gould*, 1 Atk. 615; *Sowerby v. Clayton*, 3 Hare 430, 8 Jur. 597; *Maynwaring v. Maynwaring*, 3 Atk. 414; *In re Newman*, L. R. 9 Ch. 681, 43 L. J. Ch. 702; *Hume v. Lopes*, (1892) A. C. 112, 61 L. J. Ch. 423, 66 L. T. N. S. 425, 40 W. R. 593; *Raby v. Ridehalgh*, 7 De G. M. & G. 104, 3 Eq. R. 901, 24 L. J. Ch. 528, 1 Jur. N. S. 363, 3 W. R. 344; *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692.

*United States.* — *McKenzie v. Anderson*, 2 Woods (U. S.) 357.

*Alabama.* — See *Foscue v. Lyon*, 55 Ala. 440.

*Connecticut.* — See *Pinney v. Newton*, 66 Conn. 141.

*Indiana.* — *Corya v. Corya*, 119 Ind. 593; *Gilbert v. Welsch*, 75 Ind. 557.

*Iowa.* — *MacGregor v. MacGregor*, 9 Iowa 65.

*Kentucky.* — *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

*Maryland.* — *Contee v. Dawson*, 2 Bland (Md.) 264.

*Mississippi.* — *Smyth v. Burns*, 25 Miss. 422.

*Missouri.* — *Gates v. Hunter*, 13 Mo. 511.

*New York.* — *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Spencer v. Weber*, 26 N. Y. App. Div. 285; *Clark v. Clark*, (Supm. Ct. Spec. T.)



**Investments Expressly Forbidden.** — And the converse of this is also true, that a fiduciary cannot make investments expressly forbidden by the instrument creating the trust.<sup>1</sup>

(2) *When Directions May Be Departed From.* — The general rule just stated is subject to some exceptions, as there are a variety of circumstances under which a departure from the directions contained in the trust instrument may be permissible.<sup>2</sup>

**b. AUTHORITY TO MAKE CERTAIN INVESTMENTS.** — A fiduciary may, subject to certain restrictions as to acting in good faith and exercising sound business judgment, which will be noted elsewhere,<sup>3</sup> make investments which are expressly authorized by the instrument from which he derives his powers.<sup>4</sup>

23 Misc. (N. Y.) 272; *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *King v. Talbot*, 40 N. Y. 76; *Clark v. St. Louis, etc., R. Co.*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 21; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597; *Burrill v. Sheil*, 2 Barb. (N. Y.) 457. See also *Lansing v. Lansing*, 45 Barb. (N. Y.) 182.

*North Carolina.* — *Stone v. Hinton*, 1 Ired. Eq. (36 N. Car.) 15.

*Ohio.* — See *McIntire v. Zanesville*, 17 Ohio St. 353.

*Pennsylvania.* — *Rush's Estate*, 12 Pa. St. 375.

*Rhode Island.* — See *Burdick v. Goddard*, 11 R. I. 516.

*South Carolina.* — *Womack v. Austin*, 1 S. Car. 421; *Sanders v. Rogers*, 1 S. Car. 452.

*Virginia.* — *Banister v. McKenzie*, 6 Munf. (Va.) 447. See also *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**Direction by a Testator Mandatory So Long as Compliance Therewith Remains Feasible.** — *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

**What Amounts to a Direction to Make a Certain Investment.** — A marriage settlement which declared that it should be lawful for the trustees, and they were thereby required, with the approbation of the husband and wife, to lay out the money on leaseholds, made it imperative for the trustees so to invest. *Cadogan v. Essex*, 18 Jur. 782, 2 Drew. 227, 2 Eq. R. 351, 23 L. J. Ch. 487, 2 W. R. 313. See also *Beauclerk v. Ashburnham*, 8 Beav. 322, 14 L. J. Ch. 241, 9 Jur. 146.

**Testamentary Direction as to Time of Paying Income to Beneficiary May Control Decision as to Nature of Investment.** — *Caldecott v. Caldecott*, 4 Madd. 189.

**Construction of Direction.** — A testator gave to his executors in trust twelve thousand five hundred pounds four per cent bank annuities. At the time of the making of the will, there was a stock called new four per cents, in which the testator had a small sum, and a stock called four per cents consolidated, of which he was the holder to a very large amount. Before the death of the testator, however, the latter stock was reduced to three and one half per cent, and another four per cent stock was created. It was held that the investment of the legacy should be made in an existing four per cent stock, and not in the stock which had been reduced to three and one half per cent. *Banks v. Sladen*, 1 Russ. & M. 216, Tamlyn 407, 8 L. J. Ch. 101.

See generally, as to construction of particu-

lar directions, *infra*, this title, *Construction of Particular Directions or Powers*.

**1. Investment Expressly Forbidden by Instrument Creating Trust Cannot Be Made.** — *In re Manchester Royal Infirmary*, 43 Ch. D. 420, 59 L. J. Ch. 370, 62 L. T. N. S. 419, 38 W. R. 460; *Hume v. Lopes*, (1892) A. C. 112, 61 L. J. Ch. 423, 66 L. T. N. S. 425, 40 W. R. 593. These cases were decided under the Trust Investment Act of 1889. But the Trustee Act of 1893 (56 & 57 Vict., c. 53) limits the operation of its provisions as to what investments may be made, by the use of the words "unless expressly forbidden by the instrument creating the trust."

**Doctrine under Lord St. Leonards' Act, 1860.** — See *In re Birmingham Blue-Coat School*, L. R. 1 Eq. 632, 35 Beav. 345, 35 L. J. Ch. 837; *In re Wilkinson*, L. R. 9 Eq. 343; *In re Wedderburn*, 9 Ch. D. 112, 47 L. J. Ch. 743, 38 L. T. N. S. 904, 27 W. R. 53; *Jackson v. Tyas*, 52 L. J. Ch. 830.

**2. Where Departure from Directions Is for Benefit of Beneficiaries.** — *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

**Where Conditions Have Changed.** — *Perronneau v. Perronneau*, 1 Desaus. (S. Car.) 521. But compare cases in next paragraph of this note.

**Where Investment Directed Is Not Obtainable.** — *Maynwarding v. Maynwarding*, 3 Atk. 413. See also *McIntire v. Zanesville*, 17 Ohio St. 352; *Lansing v. Lansing*, 45 Barb. (N. Y.) 183.

**Where Investment Directed Is Unsafe.** — *In re Maberly*, 33 Ch. D. 455, 56 L. J. Ch. 54, 55 L. T. N. S. 164, 34 W. R. 771; *McIntire v. Zanesville*, 17 Ohio St. 352. See also *Boss v. Goddard*, 1 Y. & C. Ch. 617, 11 L. J. Ch. 391, 7 Jur. 146; *In re Knowles*, 37 L. J. Ch. 840, 18 L. T. N. S. 809.

**Consent of All Persons Interested a Requisite to Investment Different from That Directed.** — *Burrill v. Sheil*, 2 Barb. (N. Y.) 457. See also *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

**3. See *infra*, this title, *Requirements of Good Faith and Sound Judgment*.**

**4. Investments Expressly Authorized by Instrument from Which Fiduciary Derives His Powers — England.** — *Worman v. Worman*, 43 Ch. D. 296, 61 L. T. N. S. 637, 38 W. R. 442; *In re Morris*, 54 L. J. Ch. 388, 52 L. T. N. S. 462, 33 W. R. 445; *Watts v. Girdlestone*, 6 Beav. 188, 12 L. J. Ch. 363, 7 Jur. 501; *Phillipson v. Gatty*, 2 Hall & T. 459, affirming 7 Hare 516, 13 Jur. 318; *Hale v. Sheldrake*, 60 L. T. N. S. 292; *Stickney v. Sewell*, 1 Myl. & C. 8; *Parker v.*



But he must act strictly within the terms of the authority given.<sup>1</sup>

**Consent of Beneficiary.** — Thus, where the power of fiduciaries to make certain investments is dependent upon the consent of the person or persons for whom they hold the fund, such consent is a prerequisite to their authority to make the investment;<sup>2</sup> and where a written consent is required, a verbal consent is insufficient.<sup>3</sup>

**2. Statutory Provisions.** — In many jurisdictions there are statutes regu-

Bloxam, 20 Beav. 295; *French v. Harrison*, 17 Sim. 111; *In re Salmon*, 42 Ch. D. 351, 62 L. T. N. S. 270, 38 W. R. 150; *In re Peyton*, 38 L. J. Ch. 477, L. R. 7 Eq. 463, 20 L. T. N. S. 728; *Fowler v. Reynal*, 3 Macn. & G. 500, 21 L. J. Ch. 121, 15 Jur. 1019; *In re Chapman*, (1896) 2 Ch. 763, 65 L. J. Ch. 892, 75 L. T. N. S. 196, 45 W. R. 67; *In re Boyd*, 14 Ch. D. 626, 49 L. J. Ch. 808, 43 L. T. N. S. 348; *Leigh v. Leigh*, 56 L. J. Ch. 125, 55 L. T. N. S. 634, 35 W. R. 121; *In re Chennell*, 8 Ch. D. 492, 47 L. J. Ch. 583, 38 L. T. N. S. 494, 26 W. R. 595; *Pince v. Beattie*, 2 N. R. 546, 9 Jur. N. S. 1119, 9 L. T. N. S. 315, 11 W. R. 979; *Macleod v. Annesley*, 16 Beav. 600, 22 L. J. Ch. 633, 17 Jur. 608, 1 W. R. 250; *Johnston v. Lloyd*, 7 Ir. Eq. 252; *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 303; — *v. Walker*, 5 Russ. 7; *Langston v. Ollivant*, Coop. 33, 14 Rev. Rep. 213; *Knox v. Mackinnon*, 13 App. Cas. 753; *Cummins v. Cummins*, 3 J. & La T. 64, 6 Ir. Eq. 723; *Marsh v. Hunter*, 6 Madd. 295; *Mattheys v. Brise*, 6 Beav. 239, 12 L. J. Ch. 263, *affirmed* 15 L. J. Ch. 39, 10 Jur. 105; *In re Langdale*, L. R. 10 Eq. 39; *Consterdine v. Consterdine*, 31 Beav. 330, 31 L. J. Ch. 807, 8 Jur. N. S. 906, 7 L. T. N. S. 122, 10 W. R. 727; *New London, etc., Bank v. Brocklebank*, 21 Ch. D. 302, 51 L. J. Ch. 711; *Harris v. Harris*, 29 Beav. 107, 7 Jur. N. S. 955, 9 W. R. 444; *Edwards v. Thompson*, 38 L. J. Ch. 65; *Elve v. Boynton*, (1891) 1 Ch. 501, 60 L. J. Ch. 383, 64 L. T. N. S. 482; *In re Smith*, (1896) 2 Ch. 590, 65 L. J. Ch. 761, 74 L. T. N. S. 810, 45 W. R. 29; *Fisher v. Gilpin*, 38 L. J. Ch. 230; *Bishop v. Bishop*, 30 L. J. Ch. 624, 40 L. T. N. S. 350, 9 W. R. 549; *Beauclerk v. Ashburnham*, 8 Beav. 322, 14 L. J. Ch. 241, 9 Jur. 146; *Stevens v. Robertson*, 37 L. J. Ch. 499, 18 L. T. N. S. 427, 16 W. R. 724; *Ex p. Hakewill*, 2 Mont. D. & De G. 607, 6 Jur. 787. See also *Price v. Blakemore*, 6 Beav. 507; *Lewis v. Nobbs*, 8 Ch. D. 591, 47 L. J. Ch. 662, 26 W. R. 631; *Messeena v. Carr*, L. R. 9 Eq. 260, 39 L. J. Ch. 216, 22 L. T. N. S. 3, 18 W. R. 415; *Aspland v. Watte*, 25 L. J. Ch. 53, 3 W. R. 526; *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692.

*Canada.* — *Ewart v. Gordon*, 13 Grant Ch. (U. C.) 40.

*Kentucky.* — *Transylvania University v. Clay*, 2 B. Mon. (Ky.) 385; *Calloway v. Calloway*, (Ky. 1897) 39 S. W. Rep. 241.

*Massachusetts.* — *Brown v. French*, 125 Mass. 410, 23 Am. Rep. 254.

*New York.* — *Matter of Wolfe*, 1 Connolly (N. Y.) 102.

*Pennsylvania.* — *Bartol's Estate*, 182 Pa. St. 407, *Worrell's Appeal*, 23 Pa. St. 44.

**Mere Power to Make Specific Investment Need Not Be Exercised.** — *Lee v. Young*, 2 Y. & C. Ch. 532, 12 L. J. Ch. 478, 7 Jur. 761.

**1. Fiduciaries Must Act Strictly Within Au-**

**thority Given** — *England.* — *Cocker v. Quayle*, 1 Russ. & M. 535; *Worman v. Worman*, 43 Ch. D. 296, 61 L. T. N. S. 637, 38 W. R. 442; *In re Smith*, (1896) 2 Ch. 590, 65 L. J. Ch. 761, 74 L. T. N. S. 810, 45 W. R. 29; *Harris v. Harris*, 29 Beav. 107, 7 Jur. N. S. 955, 9 W. R. 444; *In re Langdale*, L. R. 10 Eq. 39; *Cummins v. Cummins*, 3 J. & La T. 64, 6 Ir. Eq. 723; *Langston v. Ollivant*, Coop. 33, 14 Rev. Rep. 213; *Johnston v. Lloyd*, 7 Ir. Eq. 252; *Leigh v. Leigh*, 56 L. J. Ch. 125, 55 L. T. N. S. 634, 35 W. R. 121; *In re Boyd*, 14 Ch. D. 626, 49 L. J. Ch. 808, 43 L. T. N. S. 348; *Fowler v. Reynal*, 13 Jur. 649, 2 De G. & Sm. 749, *affirmed* by 3 Macn. & G. 500, 21 L. J. Ch. 121.

*Canada.* — *Ewart v. Gordon*, 13 Grant Ch. (U. C.) 40.

*Kentucky.* — *Transylvania University v. Clay*, 2 B. Mon. (Ky.) 385.

**Letter of Instructions May Be Disregarded Where Spirit Is Followed.** — *Milligan v. Pleasants*, 74 Md. 8.

**2. Consent Required.** — *Ex p. Hakewill*, 2 Mont. D. & De G. 607, 6 Jur. 787; *Child v. Child*, 20 Beav. 50; *Kellaway v. Johnson*, 5 Beav. 319, 6 Jur. 751; *Patteson v. Horsley*, 29 Gratt. (Va.) 263. See also *Norris v. Wright*, 14 Beav. 291; *Wiles v. Gresham*, 5 De G. M. & G. 770, 3 Eq. R. 116, 24 L. J. Ch. 264, 3 W. R. 87; *Beauclerk v. Ashburnham*, 8 Beav. 322, 14 L. J. Ch. 241, 9 Jur. 146; *Greenwood v. Wakeford*, 1 Beav. 576; *McIntire v. Zanesville*, 17 Ohio St. 352. But compare *Stevens v. Robertson*, 37 L. J. Ch. 499, 18 L. T. N. S. 427, 16 W. R. 724.

**Person Consenting Must Have Full Knowledge of Nature of Investment.** — *In re Massingberd*, 63 L. T. N. S. 296.

**Consent Is Required for Each Particular Investment or Loan**, and a general consent to future loans cannot be given. *Child v. Child*, 20 Beav. 50.

**Requirement of Consent of Life Beneficiary Not Abrogated by Her Waiver of Personal Privileges under the Trust Instrument.** — *Plympton v. Plympton*, 6 Allen (Mass.) 178.

**Consent of Cestui Que Trust Not Alone Sufficient — Trustees Must Use Discretion.** — *Patteson v. Horsley*, 29 Gratt. (Va.) 263. See also *Norris v. Wright*, 14 Beav. 291.

**Consent Required by Trust Instrument May Be Dispensed With When Beneficiary Has Become of Unsound Mind.** — *In re T* — 15 Ch. D. 78, 29 W. R. 42.

**3. Verbal Consent Insufficient Where Written Consent Required.** — *Cocker v. Quayle*, 1 Russ. & M. 535. See also *Ex p. Hakewill*, 2 Mont. D. & De G. 607, 6 Jur. 787; *Patteson v. Horsley*, 29 Gratt. (Va.) 263.

**The Burden of Proof lies on the fiduciary to show that the proper consent in writing was given in the manner required by the trust instrument.** *Norris v. Wright*, 14 Beav. 291.



lating the subject of investments by fiduciaries.<sup>1</sup>

**Statutes Usually Permissive Merely.** — Such statutes are usually permissive rather than mandatory,<sup>2</sup> and while they protect fiduciaries in making the investments which they authorize,<sup>3</sup> they do not, it has been held, make all other investments improper.<sup>4</sup>

**3. Supervision of Courts** — *a.* IN GENERAL. — The courts exercise large powers of supervision over the investment of funds held by fiduciaries,<sup>5</sup> either

**1. Statutory Provisions** — *England.* — *Stuart v. Stuart*, 3 Beav. 430, 10 L. J. Ch. 148, 5 Jur. 3; *Ex p. French*, 7 Sim. 510; *In re Wilkinson*, L. R. 9 Eq. 343; *Ex p. Birmingham Blue-Coat School*, 35 Beav. 345, 35 L. J. Ch. 837, L. R. 1 Eq. 632; *In re Clergy Orphan Corp.*, L. R. 18 Eq. 280, 30 L. T. N. S. 809, 22 W. R. 789; *Jackson v. Tyas*, 52 L. J. Ch. 830; *Ex p. Gartside*, 6 L. J. Ch. 266; *In re National Permanent Mut. Ben. Bldg. Soc.*, 43 Ch. D. 431, 59 L. J. Ch. 403, 62 L. T. N. S. 596, 38 W. R. 475; *In re Othwaite*, (1891) 1 Ch. 494, 60 L. J. Ch. 854, 65 L. T. N. S. 144, 40 W. R. 38; *Hume v. Lopes*, (1892) A. C. 112, 61 L. J. Ch. 423, 66 L. T. N. S. 425, 40 W. R. 593; *In re Manchester Royal Infirmary*, 43 Ch. D. 420, 59 L. J. Ch. 370, 62 L. T. N. S. 419, 38 W. R. 460; *In re Warde*, 2 Johns. & H. 191; *Norris v. Wright*, 14 Beav. 291; *In re Wedderburn*, 9 Ch. D. 112, 47 L. J. Ch. 743, 38 L. T. N. S. 904, 27 W. R. 53; *Ex p. Colne Valley, etc.*, R. Bill, 1 De G. F. & J. 53; *In re Byron*, 23 Ch. D. 171; *Ex p. Castle Bytham*, (1895) 1 Ch. 348; *In re Maberly*, 33 Ch. D. 455, 56 L. J. Ch. 54, 55 L. T. N. S. 164, 34 W. R. 771.

*Alabama.* — *Newman v. Reed*, 50 Ala. 297; *Powell v. Knighton*, 43 Ala. 626; *Ashley v. Martin*, 50 Ala. 537; *Watson v. Stone*, 40 Ala. 451, 91 Am. Dec. 484; *Dockery v. McDowell*, 40 Ala. 476; *Neilson v. Cook*, 40 Ala. 498; *Stewart v. McMurray*, 82 Ala. 269; *Houston v. Deloach*, 43 Ala. 364, 94 Am. Dec. 689.

*Connecticut.* — *Clark v. Beers*, 61 Conn. 87.

*Georgia.* — *Brown v. Wright*, 39 Ga. 96.

*Illinois.* — See *Hughes v. People*, 111 Ill. 457; *McIntyre v. People*, 103 Ill. 142.

*Kentucky.* — *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355; *Stone v. Clay*, (Ky. 1898) 45 S. W. Rep. 80; *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457.

*Maryland.* — *Baltimore United F. Department v. Creamer*, 17 Md. 243.

*Mississippi.* — *Davis v. Harris*, 13 Smed. & M. (Miss.) 9.

*Missouri.* — *Woods v. Boots*, 60 Mo. 546.

*New Jersey.* — *Matter of Craven*, 43 N. J. Eq. 416.

*New York.* — *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

*North Carolina.* — *Smith v. Gilmer*, 64 N. Car. 546; *Watson v. Holton*, 115 N. Car. 36.

*Pennsylvania.* — *Ihmsen's Appeal*, 43 Pa. St. 431.

*Rhode Island.* — See *Post's Petition*, 13 R. I. 495.

And see the various local codes and statutes.

**To What Character of Funds English Trust Investment Act of 1889 Applied.** — See *In re Manchester Royal Infirmary*, 43 Ch. D. 420, 59 L. J. Ch. 370, 62 L. T. N. S. 419, 38 W. R. 460; *In re National Permanent Mut. Ben. Bldg.*

*Soc.*, 43 Ch. D. 431, 59 L. J. Ch. 403, 62 L. T. N. S. 596, 38 W. R. 475.

**Act of 1889 Related to Entire Trust Fund.** — *Hume v. Lopes*, (1892) A. C. 112, 61 L. J. Ch. 423, 66 L. T. N. S. 425, 40 W. R. 593, affirming *In re Dick*, (1891) 1 Ch. 423, and overruling *In re Manchester Royal Infirmary*, 43 Ch. D. 420, 59 L. J. Ch. 370, 62 L. T. N. S. 419, 38 W. R. 460.

**Investment Must Be Shown to Be Within Statute.** — *In re Maberly*, 33 Ch. D. 455, 56 L. J. Ch. 54, 55 L. T. N. S. 164, 34 W. R. 771.

**Statute Retrospective.** — There was some conflict of authority as to whether or not Lord St. Leonards' Act, 22 & 23 Vict., c. 35, with reference to investments by trustees, authorized an investment in the stocks enumerated, of trust funds settled before the passage of the Act. In the cases of *In re Miles*, 5 Jur. N. S. 1236, and *Dodson v. Sammell*, 6 Jur. N. S. 137, 1 Drew. & Sm. 575, it was considered that it did not; while the contrary view was held in *Page v. Bennett*, 2 Giff. 117; *In re Simson*, 1 Johns. & H. 89; and *Mortimer v. Picton*, 4 De G. J. & S. 166.

By the statute 23 & 24 Vict., c. 35, however, the original Act was made retrospective. *Perry on Trusts*, § 455; *Hume v. Richardson*, 4 De G. F. & J. 29, 31 L. J. Ch. 713, 8 Jur. N. S. 686, 6 L. T. N. S. 624, 10 W. R. 528. See also *Sowerby v. Clayton*, 3 Hare 430, 8 Jur. 597.

Section 4 of the English Trustee Act of 1893 (56 & 57 Vict., c. 53), expressly provides that the preceding sections in reference to what investments may be made shall be applicable to trusts created before as well as to trusts created after the passage of the Act.

**Statutory Provisions for Investment in Confederate Securities.** — Questions as to the constitutionality, propriety, and effect of statutory provisions authorizing investments in Confederate securities will be treated, together with other questions relating to such investments, in another part of this article. See *infra*, VI. 2. *b. Bonds of Confederate States.*

**2. Statutes Permissive and Not Mandatory.** — *Clark v. Beers*, 61 Conn. 87; *Brown v. Wright*, 39 Ga. 96.

**3. Fiduciaries Protected in Making Investments Authorized by Statute.** — *Clark v. Beers*, 61 Conn. 87. See also *In re Ogle*, 5 Pa. St. 15; *Worrell's Appeal*, 9 Pa. St. 508; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498.

**4. Other Investments Not Prohibited.** — See *Clark v. Beers*, 61 Conn. 87; *Durrett v. Com.*, 90 Ky. 312; *In re Ogle*, 5 Pa. St. 15; *Worrell's Appeal*, 9 Pa. St. 508; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498.

**Rigid Scrutiny of Investments Not Expressly Authorized by Statute.** — *Clark v. Beers*, 61 Conn. 87.

**5. Supervision of Courts** — *England.* — Cock-



by specific instructions in particular cases,<sup>1</sup> or, in some jurisdictions, by the issuing of a general rule or order regulating such investments.<sup>2</sup> But these powers are always exercised in subordination to statutory provisions limiting them and prescribing what investments may be authorized,<sup>3</sup> and to the directions contained in the instrument creating the trust.<sup>4</sup>

**b. RIGHT OF FIDUCIARIES TO APPLY FOR DIRECTIONS.** — It is in all cases the right and privilege of fiduciaries to apply to the courts for guidance in making investments of the funds held by them.<sup>5</sup>

**c. WHETHER FIDUCIARIES MUST APPLY FOR DIRECTIONS.** — It has been held that in the absence of some express or clearly implied statutory requirement, a fiduciary is not obliged to apply to the courts for directions as to his investments,<sup>6</sup> but in some jurisdictions it is considered his absolute duty to make such application.<sup>7</sup>

*burn v. Peel*, 7 Jur. N. S. 810, 30 L. J. Ch. 575, 4 L. T. N. S. 571, 9 W. R. 725; *Ex p. Colne Valley, etc.*, R. Bill, 1 De G. F. & J. 53; *Hanson v. Murray*, 1 Jur. N. S. 917, 3 Eq. R. 758, 3 W. R. 557; *In re Langford*, 8 Jur. N. S. 114, 2 Johns. & H. 458, 31 L. J. Ch. 334, 5 L. T. N. S. 579, 10 W. R. 121; *Moore v. Walter*, 8 L. T. N. S. 448, 11 W. R. 713; *In re Brackenbury*, 31 L. T. N. S. 79, 22 W. R. 682; *Butler v. Withers*, 1 Johns. & H. 332, 4 L. T. N. S. 736; *Cowley v. Wellesley*, 46 L. J. Ch. 869; *Peillon v. Brooking*, 4 L. T. N. S. 731; *In re Boyce, Ir.* 2 Eq. 255, 15 W. R. 827; *In re Fromow*, 8 W. R. 272; *Ungless v. Tuff*, 30 L. J. Ch. 784, 9 W. R. 729; *In re Ingram*, 8 L. T. N. S. 758, 11 W. R. 980; *Fluid v. Fluid*, 7 L. T. N. S. 590; *Hurd v. Hurd*, 11 W. R. 50; *In re Dunster*, 3 Eq. R. 449, 3 W. R. 267; *Vidler v. Paratt*, 4 N. R. 392, 10 L. T. N. S. 686, 12 W. R. 976; *In re Adam*, 17 L. T. N. S. 641; *Bishop v. Bishop*, 30 L. J. Ch. 624, 4 L. T. N. S. 350, 9 W. R. 549; *De Manneville v. Crompton* 1 Ves. & B. 354. See also *Field v. Moore*, 19 Beav. 176, 24 L. J. Ch. 161, 1 Jur. N. S. 33, 3 Eq. R. 215, 3 W. R. 98.

*Canada.* — *Re Mason*, 3 Ch. Chamb. (Ont.) 426. See also *Spratt v. Wilson*, 19 Ont. 28; *Kingsmill v. Miller*, 15 Grant Ch. (U. C.) 171.

*Alabama.* — See *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703.

*Georgia.* — *Skelton v. Ordinary*, 32 Ga. 266; *Brown v. Wright*, 39 Ga. 96; *Moses v. Moses*, 50 Ga. 9.

*Kentucky.* — *McGinnis v. Peters*, (Ky. 1887) 6 S. W. Rep. 119.

*Maryland.* — *Matter of Stone*, 2 Md. 292; *Milligan v. Pleasants*, 74 Md. 8; *O'Hara v. Shepherd*, 3 Md. Ch. 306; *Latimer v. Hanson*, 1 Bland (Md.) 51; *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. 272. See also *Murray v. Feinour*, 2 Md. Ch. 418; *Gray v. Lynch*, 8 Gill (Md.) 410; *Hammond v. Hammond*, 2 Bland (Md.) 306; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171.

*Mississippi.* — *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449. See also *Smyth v. Burns*, 25 Miss. 422.

*Missouri.* — *Gamble v. Gibson*, 59 Mo. 585.

*New Hampshire.* — *Wheeler v. Perry*, 18 N. H. 307; *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *French v. Currier*, 47 N. H. 88; *Baptist Church, etc., Petition*, 51 N. H. 424; *Goodhue v. Clark*, 37 N. H. 525.

*New Jersey.* — *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Tucker v. Tucker*, 33 N. J. Eq. 235;

*Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Woodruff v. Ward*, 35 N. J. Eq. 467.

*New York.* — *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9, affirmed by 20 Wend. (N. Y.) 570, 32 Am. Dec. 598.

*Pennsylvania.* — *Wherry's Estate*, 19 Pa. Co. Ct. 664.

*South Carolina.* — *Perronneau v. Perronneau*, 1 Desaus. (S. Car.) 521; *Ex p. Calmes*, 1 Hill Eq. (S. Car.) 112.

*Vermont.* — *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

**1. Specific Instructions in Particular Cases.** — *Gamble v. Gibson*, 59 Mo. 585; *Wheeler v. Perry*, 18 N. H. 307. See also *O'Hara v. Shepherd*, 3 Md. Ch. 306; *Quick v. Fisher* 9 N. J. Eq. 802. And see other cases cited throughout this section.

**2. General Rule or Order Regulating Investments.** — *Wheeler v. Perry*, 18 N. H. 307.

**3. Statutory Provisions Limiting Powers and Prescribing Investments.** — *Skelton v. Ordinary*, 32 Ga. 266. See also *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

**Court Cannot Direct Purchase of New Goods to Continue Mercantile Business.** — *Field v. Colton*, 7 Ill. App. 379.

**4. Courts Cannot Abrogate Directions Contained in Trust Instrument.** — *Clark v. St. Louis, etc., R. Co.*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 21.

**Courts May Control Exercise of Discretion Given to Fiduciaries by Trust Instrument.** — *Bethell v. Abraham*, L. R. 17 Eq. 24, 43 L. J. Ch. 180, 29 L. T. N. S. 715, 22 W. R. 179. See also *De Manneville v. Crompton*, 1 Ves. & B. 354, 12 Rev. Rep. 233.

**5. Right to Apply for Directions as to Investments.** — *Durrett v. Com.*, 90 Ky. 312; *Snelling v. McCreary*, 14 Rich. Eq. (S. Car.) 291. See also *Baptist Church, etc., Petition*, 51 N. H. 424; *Wheeler v. Perry*, 18 N. H. 307; *Goodhue v. Clark*, 37 N. H. 525. And see cases cited in next section.

**6. Fiduciary Not Obligated to Apply for Directions.** — *Guardianship of Cardwell*, 55 Cal. 137; *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355; *Durrett v. Com.*, 90 Ky. 312. See also *Richardson v. Knight*, 69 Me. 285.

**7. Duty to Obtain Directions from the Courts.** — *Illinois.* — *McIntyre v. People*, 103 Ill. 142; *Hughes v. People*, 111 Ill. 457, affirming 10 Ill. App. 148. Compare *Smith v. Wilmington Coal Min., etc., Co.*, 83 Ill. 498.

*Iowa.* — *Garner v. Hendry*, 95 Iowa 44; *Bates*



*d. PROTECTION AFFORDED BY ORDER OF COURT.* — A fiduciary who has obtained an order of court directing him to make, or sanctioning, a certain investment, is thereby protected from responsibility in case the investment results disastrously;<sup>1</sup> provided the order was such as the court had power to make,<sup>2</sup> and the fiduciary has not been guilty of bad faith or negligence.<sup>3</sup> But if he acts without such order, he assumes a personal responsibility for the investment being a proper one,<sup>4</sup> and the same is true where he disregards an order of court in reference to investments.<sup>5</sup>

**Order Obtained by Fraud.** — If an order authorizing a guardian to invest money of his wards in a certain way is procured by fraud, it can be impeached col-

*v. Dunham*, 58 Iowa 308. See also *Slusher v. Hammond*, 94 Iowa 512.

*Mississippi.* — *Davis v. Harris*, 13 Smed. & M. (Miss.) 9. See also *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449; *Smyth v. Burns*, 25 Miss. 422.

*Pennsylvania.* — See *McCauseland's Appeal*, 38 Pa. St. 466.

**Separate Application Should Be Made to Court for Each Investment**, and leave will not be granted to propose purchases to the master from time to time without applying to the court. *Harrington v. Flemming*, 1 Bro. C. C. 74.

**1. Protection Afforded by Order of Court** — *England.* — See *Peat v. Crane*, 2 Dick. 499, note.

*Alabama.* — *Bryant v. Craig*, 12 Ala. 354.

*California.* — *Matter of Carver*, 118 Cal. 73; *Guardianship of Cardwell*, 55 Cal. 137. See also *Matter of Curtis*, 121 Cal. 468.

*Georgia.* — *Franklin v. McElroy*, 99 Ga. 123. See also *Haddock v. Planters' Bank*, 66 Ga. 496.

*Indiana.* — *Sherry v. Sansberry*, 3 Ind. 320.

*Kentucky.* — *Durrett v. Com.*, 90 Ky. 312.

*Maryland.* — *O'Hara v. Shepherd*, 3 Md. Ch. 306; *Zimmerman v. Fraley*, 70 Md. 561; *Wayman v. Jones*, 4 Md. Ch. 500; *Lowe v. Protestant Episcopal Church's Convention*, 83 Md. 409. See also *Carlysle v. Carlysle*, 10 Md. 440.

*Missouri.* — See *Matter of Bowie*, 74 Mo. App. 191.

*North Carolina.* — *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284.

*Pennsylvania.* — *Ihmsen's Appeal*, 43 Pa. St. 431; *Hemphill's Appeal*, 18 Pa. St. 303.

**Order Must Be in Writing.** — *Carlysle v. Carlysle*, 10 Md. 440.

**Order for Investment Not Specifying Amount — Reasonably Prudent Expenditure Authorized.** — *Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513.

**2. Investment Directed Pursuant to Unconstitutional Statute.** — An order of court, directing an investment pursuant to an act of the legislature, will not justify the investment, if the statute itself is unconstitutional. *Horn v. Lockhart*, 17 Wall. (U. S.) 570.

**3. Order of Court Does Not Protect from Consequences of Lack of Good Faith.** — *Skelton v. Ordinary*, 32 Ga. 266.

**Loss Resulting from Subsequent Neglect.** — See *Bryant v. Craig*, 12 Ala. 354; *O'Hara v. Shepherd*, 3 Md. Ch. 306.

**4. Responsibility Assumed by Acting Without Order of Court** — *England.* — See *Brown v. Litton*, 10 Mod. 20, 1 P. Wms. 141; *Hancom v. Allen*, 2 Dick. 499, note.

*California.* — *Matter of Carver*, 118 Cal. 73; *Post's Estate*, Myr. Prob. (Cal.) 230; *Guardianship of Cardwell*, 55 Cal. 137. See also *Matter of Curtis*, 121 Cal. 468.

*Georgia.* — *Cornwise v. Bourguin*, Ga. Dec. (pt. ii.) 15; *Haddock v. Planters' Bank*, 66 Ga. 496; *Franklin v. McElroy*, 99 Ga. 123; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389. See also *Venable v. Howard*, 68 Ga. 167.

*Illinois.* — *McIntyre v. People*, 103 Ill. 142; *Smith v. Wilmington Coal Min., etc., Co.*, 83 Ill. 498.

*Indiana.* — *Sherry v. Sansberry*, 3 Ind. 320.

*Maine.* — *Richardson v. Knight*, 69 Me. 285.

*Maryland.* — *Zimmerman v. Fraley*, 70 Md. 561; *Wayman v. Jones*, 4 Md. Ch. 500; *Lowe v. Protestant Episcopal Church's Convention*, 83 Md. 409; *Carlysle v. Carlysle*, 10 Md. 440.

*New York.* — See *Eckford v. De Kay*, 8 Paige (N. Y.) 89.

*North Carolina.* — *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284; *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32.

*Pennsylvania.* — *Hemphill's Appeal*, 18 Pa. St. 303.

See also *West v. West*, 75 Mo. 204.

**A Failure to Apply for Authority to Invest Is Not Evidence of Fraud**, but shows negligence merely. *Bryant v. Craig*, 12 Ala. 354. See also *Lowe v. Protestant Episcopal Church's Convention*, 83 Md. 409.

**Measure of Responsibility.** — The fact that the statute gives a guardian the privilege of getting the direction of the chancellor in regard to investments, and thus protecting himself from liability, should not lead to his being held to a stricter accountability than would otherwise be the case where he had made investments without any order of court. *Durrett v. Com.*, 90 Ky. 312.

**Proper Investment Will Be Sustained**, although made without application to the court. *Gray v. Lynch*, 8 Gill (Md.) 403. See also *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32.

**5. Loss Resulting from Disregard of Order of Court.** — *Snelling v. McCreary*, 14 Rich. Eq. (S. Car.) 291; *Whitehead v. Whitehead*, 85 Va. 870.

**Enforcing Compliance with Order.** — When a trustee appointed by the court fails to invest trust funds as directed by it, he may be proceeded against by rule, with his sureties as codefendants to the rule; and under this proceeding he may be ordered to return the funds to the court, where they will remain in judicial custody till the order relative to the investment is obeyed. *Dickinson v. Trout*, 8 Bush (Ky.) 441.



laterally, and all the acts done by the guardian under it are void.<sup>1</sup>

**4. Discretion of Fiduciary.** — It frequently happens that no restrictions in respect to investments are imposed upon the fiduciary by the instrument creating the trust or by statute, or that he is authorized or directed to invest in any one or more of several kinds of securities named: and in either of these cases he has a considerable discretion in the selection of his investments,<sup>2</sup> subject, however, to certain limitations and requirements which will be set out in the course of this article.<sup>3</sup>

**Whether Discretionary Powers Conferred by Instrument Creating Trust Are Personal or Attach to Office.** — As a rule it is considered that where the creator of a trust has, in the trust instrument, given to the trustees named by him full power to use their own discretion in the selection of investments, such power is personal, and does not pass to trustees appointed by the court after the death or withdrawal of the original trustees.<sup>4</sup>

**1. Order Obtained by Fraud.** — Skelton v. Ordinary, 32 Ga. 266. See also *In re Grandstrand*, 49 Minn. 438.

**2. Discretion of Fiduciaries — England.** — Lewis v. Nobbs, 8 Ch. D. 591, 47 L. J. Ch. 662, 26 W. R. 631; *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692; Aspland v. Watte, 25 L. J. Ch. 53, 3 W. R. 526; *Messeena v. Carr*, L. R. 9 Eq. 260, 39 L. J. Ch. 216, 22 L. T. N. S. 3, 18 W. R. 415; Wyatt v. Sharatt, 3 Beav. 498; *In re Smith*, (1896) 1 Ch. 71, 65 L. J. Ch. 159, 73 L. T. N. S. 604, 44 W. R. 270; *Dickinson v. Player*, Coop. 178, 2 Jur. 870; *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4; *Bethell v. Abraham*, L. R. 17 Eq. 24, 43 L. J. Ch. 180, 29 L. T. N. S. 715, 22 W. R. 179; *Prendergast v. Lushington*, 5 Hare 171, 16 L. J. Ch. 125; *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302; *Prendergast v. Prendergast*, 3 H. L. Cas. 195, 14 Jur. 989. See also *Hancom v. Allen*, 2 Dick. 498; *In re Kavanagh*, 27 L. R. Ir. 495; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312, 11 L. J. Ch. 158, 6 Jur. 232; *De Manneville v. Crompton*, 1 Ves. & B. 354, 12 Rev. Rep. 233; *Lee v. Young*, 2 Y. & C. Ch. 532, 12 L. J. Ch. 478, 7 Jur. 761; *Warner v. Torkington*, 4 L. J. Ch. 193; *Robinson v. Robinson*, Ir. R. 10 Eq. 189.

**Canada.** — *Spratt v. Wilson*, 19 Ont. 28; *Worts v. Worts*, 18 Ont. 332; *Smith v. Smith*, 23 Grant Ch. (U. C.) 114.

**Alabama.** — *Ashley v. Martin*, 50 Ala. 537; *Newman v. Reed*, 50 Ala. 297. See also *Foscue v. Lyon*, 55 Ala. 440.

**Connecticut.** — *Pinney v. Newton*, 66 Conn. 141; *Clark v. Beers*, 61 Conn. 87.

**Illinois.** — *Butler v. Butler*, 164 Ill. 171, affirming 61 Ill. App. 51.

**Kentucky.** — *Citizen's Nat. Bank v. Jefferson*, 88 Ky. 651. See also *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457.

**Maine.** — *Mattocks v. Moulton*, 84 Me. 545.

**Maryland.** — *Gilbert v. Kolb*, 85 Md. 627; *Lowe v. Protestant Episcopal Church's Convention*, 83 Md. 409.

**Massachusetts.** — *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Clark v. Garfield*, 8 Allen (Mass.) 427.

**Michigan.** — *Caspari v. Cutcheon*, 110 Mich. 86.

**New Hampshire.** — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

**New York.** — *Valentine v. Valentine*, 3 Dem.

(N. Y.) 597; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Adair v. Brimmer*, 74 N. Y. 539; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Matter of Petrie*, 5 Dem. (N. Y.) 352; *King v. Talbot*, 40 N. Y. 76; *Matter of Keielias*, 1 Connolly (N. Y.) 468.

**North Carolina.** — *Gary v. Cannon*, 3 Ired. Eq. (38 N. Car.) 64.

**Ohio.** — *Scott v. Marion Tp.*, 39 Ohio St. 153.

**Pennsylvania.** — *Ihmsen's Appeal*, 43 Pa. St. 431; *Barker's Estate*, 2 Pa. Dist. 571; *Pray's Appeal*, 34 Pa. St. 100. See also *Dorsey's Estate*, 11 Pa. Co. Ct. 12.

**Rhode Island.** — *Peckham v. Newton*, 15 R. I. 321; *Bailey v. Burges*, 10 R. I. 422; *Blakely's Petition*, 19 R. I. 324.

**South Carolina.** — *Nance v. Nance*, 1 S. Car. 209; *Womak v. Austin*, 1 S. Car. 421.

**Discretion Must Be Exercised According to Law.** — Where moneys are left by testamentary instrument to be invested at the discretion of the executor or trustee, such discretion can be exercised only according to law and by an investment in such securities as are sanctioned by the court. The power given does not warrant an investment in unauthorized securities. *Spratt v. Wilson*, 19 Ont. 28. Compare *Barker's Estate*, 2 Pa. Dist. 571, *infra*, next note.

**3. Limitations of Discretion.** — See *infra*, this title, *Requirements of Good Faith and Sound Judgment; Propriety of Particular Investments.*

**Direction to Use Best Skill and Judgment.** — Where a trustee is directed by the instrument creating the trust to use his best skill and judgment in making investments, his powers and discretion are not enlarged by the use of those words. *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333. See also *King v. Talbot*, 40 N. Y. 76, 50 Barb. (N. Y.) 453.

**Character of Investments Which Should Be Selected.** — Under a will intrusting the executors with the investment of the estate for the benefit of the heirs, the executors are under a duty, first, to place the amount in a state of security; second, to see to it that it is productive of interest; and third, so to keep the fund that it shall always be subject to future recall for the benefit of the *cestui que trust*. *King v. Talbot*, 40 N. Y. 76, modifying 50 Barb. (N. Y.) 453.

**4. Grant to Trustees of Power to Select Investments at Discretion Personal and Not Incident to Office.** — *Zimmerman v. Fraley*, 70 Md. 561;



## IV. REQUIREMENTS OF GOOD FAITH AND SOUND JUDGMENT — 1. Rule Stated.

— In all cases where a fiduciary has discretionary powers to exercise, it is required that in selecting and managing his investments he shall act in perfect good faith, for what he believes to be the best interests of the owner of the real interest in the fund with which he is intrusted,<sup>1</sup> and exercise sound business judgment and proper care and diligence,<sup>2</sup> with a view to the security of

*Lowe v. Protestant Episcopal Church's Convention*, 83 Md. 409; *Gilbert v. Kolb*, 85 Md. 627; *Bailey v. Burges*, 10 R. I. 422. See also *Doyle v. Atty.-Gen.*, 2 Eq. Cas. Abr. 195, par. 15; *Fordyce v. Bridges*, 2 Phil. 497; *Newman v. Warner*, 1 Sim. N. S. 457; *Cole v. Wade*, 16 Ves. Jr. 44; *Hibbard v. Lamb*, Amb. 309.

**Powers Held Attached to Office.** — In *Blakely's* Petition, 19 R. 324, the court held that certain discretionary powers conferred by the testator on the original trustee were intended by the testator to be annexed to the office rather than personal, because there was nothing in the language of the will creating the trust to show that the powers were conferred on account of any particular confidence reposed by the testator in the person originally named as trustee, and to forbid the exercise of the testamentary powers by the new trustee would have the effect of defeating the object of the trust. See also *Burdick v. Goddard*, 11 R. I. 516; *Bartley v. Bartley*, 3 Drew. 384; *Byam v. Byam*, 19 Beav. 66.

**1. Requirement of Good Faith** — *England*. — In *re Smith*, (1896) 1 Ch. 71, 65 L. J. Ch. 159, 73 L. T. N. S. 604, 44 W. R. 270; *Crampton v. Walker*, 31 L. R. Ir. 437; *Clough v. Bond*, 3 Myl. & C. 490; *Knight v. Plimouth*, 3 Atk. 480. See also *Cockburn v. Peel*, 30 L. J. Ch. 575, 7 Jur. N. S. 810, 4 L. T. N. S. 571, 9 W. R. 725.

*California*. — *Matter of Curtis*, 121 Cal. 468.

*District of Columbia*. — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

*Georgia*. — *Callaway v. Bridges*, 79 Ga. 753. See also *Dorsett v. Frith*, 25 Ga. 537; *Skelton v. Ordinary*, 32 Ga. 266; *Moses v. Moses*, 50 Ga. 9.

*Illinois*. — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271, and citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 814.

*Kentucky*. — *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457. See also *Durrett v. Com.*, 90 Ky. 312.

*Maryland*. — *Zimmerman v. Fraley*, 70 Md. 561; *Wayman v. Jones*, 4 Md. Ch. 500. See also *Gilbert v. Kolb*, 85 Md. 627.

*Massachusetts*. — *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Richardson v. Morey*, 18 Pick. (Mass.) 181; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Bowker v. Pierce*, 130 Mass. 262; *Brown v. French*, 125 Mass. 410, 23 Am. Rep. 254; *Dickinson*, Appellant, 152 Mass. 184; *Hunt*, Appellant, 141 Mass. 515.

*Michigan*. — *Caspari v. Cutcheon*, 110 Mich. 86.

*Missouri*. — *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

*New Hampshire*. — *French v. Currier*, 47 N. H. 88.

*New Jersey*. — See *Perrine v. Vreeland*, 33 N. J. Eq. 102.

*New York*. — *King v. Talbot*, 40 N. Y. 76;

*Lansing v. Lansing*, 45 Barb. (N. Y.) 182; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *In re Stark*, (Surrogate Ct.) 15 N. Y. Supp. 729; *Matter of Butler*, 1 Connolly (N. Y.) 58.

*Ohio*. — *Scott v. Marion Tp.*, 39 Ohio St. 153. *Pennsylvania*. — *Fahnestock's Appeal*, 104 Pa. St. 46; *Lukens's Appeal*, 7 W. & S. (Pa.) 48. See also *Dorsey's Estate*, 11 Pa. Co. Ct. 12.

*South Carolina*. — *Nance v. Nance*, 1 S. Car. 209; *Womack v. Austin*, 1 S. Car. 421.

*Tennessee*. — *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676.

*Vermont*. — *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858; *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820.

*Virginia*. — *Davis v. Harman*, 21 Gratt. (Va.) 194; *Elliott v. Carter*, 9 Gratt. (Va.) 559; *Myers v. Zetelle*, 21 Gratt. (Va.) 758; *Elliott v. Howell*, 78 Va. 297.

**Fiduciary Occupies Position of a Friend.** — *Jennings v. Davis*, 5 Dana (Ky.) 133; *Clay v. Clay*, 3 Met. (Ky.) 548.

**When Presumption of Good Faith Arises.** — Where a trustee, making a change of investment, is interested in a large portion of the fund, he will be regarded in a different light from a naked trustee, and a presumption is raised that he acted in good faith. *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32.

**Receipt of Large Commission or Bribe for Making Investment.** — Honesty is out of the question where a trustee takes a bribe for making a particular investment, as where, in the case at bar, he receives a commission of ten per cent. thereon. In *re Smith*, (1896) 1 Ch. 71, 65 L. J. Ch. 159, 73 L. T. N. S. 604, 44 W. R. 270. But compare *Sherman v. Lanier*, 39 N. J. Eq. 249.

**2. Requirement of Sound Business Judgment and Proper Care** — *England*. — *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4; *Leahey v. Whiteley*, 12 App. Cas. 727, 57 L. J. Ch. 390; *Sutton v. Wilders*, L. R. 12 Eq. 373, 41 L. J. Ch. 30, 25 L. T. N. S. 292, 19 W. R. 1021; *In re Salmon*, 42 Ch. D. 351; *French v. Graham*, 10 Ir. Ch. R. 522; *Hopgood v. Parkin*, L. R. 11 Eq. 74, 22 L. T. N. S. 722, 18 W. R. 908; *Clough v. Bond*, 3 Myl. & C. 490. See also *In re Pearson*, 51 L. T. N. S. 692; *Cockburn v. Peel*, 30 L. J. Ch. 575, 7 Jur. N. S. 810, 4 L. T. N. S. 571, 9 W. R. 725; *In re Medland*, 41 Ch. D. 476, 58 L. J. Ch. 572, 60 L. T. N. S. 781, 37 W. R. 753; *In re Chapman*, (1896) 2 Ch. 763, 75 L. T. N. S. 106, 45 W. R. 67; *Bullock v. Bullock*, 56 L. J. Ch. 221, 55 L. T. N. S. 703; *Hutton v. Annan*, (1898) A. C. 289, 67 L. J. P. C. 49.

*Alabama*. — *Brewer v. Ernest*, 81 Ala. 435.

*California*. — *Matter of Carver*, 118 Cal. 73; *Matter of Curtis*, 121 Cal. 468.

*District of Columbia*. — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

*Illinois*. — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*,



the fund rather than the making of a large profit.<sup>1</sup>

**Loans Without Security.** — It naturally follows that unsecured loans are always improper,<sup>2</sup> even though the borrower is apparently perfectly solvent and able

62 Ill. App. 271, and citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 814. See also *Butler v. Butler*, 164 Ill. 171, affirming 61 Ill. App. 51.

*Kentucky.* — *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457; *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

*Maine.* — See *Mattocks v. Moulton*, 84 Me. 515.

*Maryland.* — *Gilbert v. Kolb*, 85 Md. 627; *Zimmerman v. Fraley*, 70 Md. 561; *Wayman v. Jones*, 4 Md. Ch. 500.

*Massachusetts.* — *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Richardson v. Morey*, 18 Pick. (Mass.) 181; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Dickinson, Appellant*, 152 Mass. 184; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Hunt, Appellant*, 141 Mass. 515; *Bowker v. Pierce*, 130 Mass. 262.

*Michigan.* — *Caspari v. Cutcheon*, 110 Mich. 86.

*Missouri.* — *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

*New Hampshire.* — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *French v. Currier*, 47 N. H. 88.

*New Jersey.* — *Monroe v. Osborne*, 43 N. J. Eq. 248; *Stothoff v. Reed*, 32 N. J. Eq. 213. See also *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508.

*New York.* — *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *Lansing v. Lansing*, 45 Barb. (N. Y.) 182; *In re Stark*, (Surrogate Ct.) 15 N. Y. Supp. 720; *King v. Talbot*, 40 N. Y. 76, 50 Barb. (N. Y.) 453; *Mills v. Hoffman*, 26 Hun (N. Y.) 504; *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844. See also *Matter of Butler*, 1 Connolly (N. Y.) 58; *Matter of Keteltas*, 1 Connolly (N. Y.) 468.

*North Carolina.* — *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284.

*Ohio.* — *Scott v. Marion Tp.*, 39 Ohio St. 153.

*Pennsylvania.* — *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451; *Ihmsen's Appeal*, 43 Pa. St. 431; *Fahnestock's Appeal*, 104 Pa. St. 46. See also *Dorsey's Estate*, 11 Pa. Co. Ct. 12; *Pray's Appeal*, 34 Pa. St. 100; *Worrell's Appeal*, 23 Pa. St. 44.

*Rhode Island.* — *Peckham v. Newton*, 15 R. I. 321.

*South Carolina.* — *Nance v. Nance*, 1 S. Car. 209; *Womack v. Austin*, 1 S. Car. 421; *Singleton v. Lowndes*, 9 S. Car. 465.

*Vermont.* — *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

*West Virginia.* — *Key v. Hughes*, 32 W. Va. 184.

**Examination of Stocks.** — An executor who is directed by will to invest money left to him in trust in "some good, secure, and profitable stocks or other securities," or in some other way "so that the same will be well secured," must make a proper examination of stocks before investing therein. *Ihmsen's Appeal*, 43 Pa. St. 431.

**The Security Selected Must Be Such as the Court Will Approve.** — *Hancorn v. Allen*, 2 Dick. 498; *Peat v. Crane*, 2 Dick. 499, note; *Ward v. Kitchen*, 30 N. J. Eq. 31.

Especially in the case of a trustee appointed by, and acting under the direction of, a court. *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271, and citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 814.

And the test of a negligent breach of trust on the part of trustees who have a discretion in the selection of investments, is whether or not the course they have pursued is such as the court would have taken in reference to moneys in its care, under similar circumstances. *Warner v. Torkington*, 4 L. J. Ch. 193.

**Retention of Bank Stock with Consent of Cestui Que Trust After Expressing Opinion that Investment Was Not Proper.** — Trustees under a will, to whom was given power to retain any stocks which might belong to the testatrix at her decease, consulted with the life tenant of the fund as to whether certain bank stock should be retained, stating it to be their view that bank stock was not a suitable class of stock for trustees to hold. The life tenant, however, expressed her willingness that such stock should be kept, and a certain amount of it was retained. It was held that the retention of this stock did not amount to a breach of trust, there being nothing to show that the trustees did not act in good faith, and that there was not an honest exercise of the discretion given them by the will. *Fraser v. Murdoch*, 6 App. Cas. 855, 45 L. T. N. S. 417, 30 W. R. 162.

**Funds in Court Loaned to Persons of Undoubted Credit Only.** — *Atty.-Gen. v. Alexander*, 3 Ch. Chamb. (Ont.) 101.

**Whether Fiduciary Has Exercised Proper Care a Question for the Jury.** — *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

1. **The Courts Regard Safety as Paramount to Profit.** — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *King v. Talbot*, 40 N. Y. 76; *Lansing v. Lansing*, 45 Barb. (N. Y.) 182; *Peckham v. Newton*, 15 R. I. 321.

But nevertheless, if safety and profit can be combined, neither should be unnecessarily sacrificed. *Peckham v. Newton*, 15 R. I. 321. See also *Emery v. Batchelder*, 78 Me. 233; *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *King v. Talbot*, 40 N. Y. 76.

**Investment in Depreciated Municipal Bonds Improper.** — *Transylvania University v. Clay*, 2 B. Mon. (Ky.) 385.

2. **Loans Without Security Unauthorized** — *England.* — *Fowler v. Reynal*, 13 Jur. 649, 2 De G. & Sm. 749, affirmed by 3 Macn. & G. 500, 21 L. J. Ch. 121. See also *Bacon v. Clark*, 3 Myl. & C. 294.

*Alabama.* — *Lee v. Lee*, 55 Ala. 590.

*California.* — *Matter of Post*, 57 Cal. 273, affirming *Post's Estate*, Myr. Prob. (Cal.) 230.

*Kentucky.* — *Clay v. Clay*, 3 Met. (Ky.) 548.

*Massachusetts.* — *Clark v. Garfield*, 8 Allen (Mass.) 427.

*New York.* — *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, explaining *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281.



to pay,<sup>1</sup> or has promised to give security in the future.<sup>2</sup>

**2. Measure of Diligence Required.** — It is well settled that a fiduciary who has discretionary powers as to investments must, in the exercise thereof, act with the same diligence and prudence that prudent men of discretion and intelligence employ in their own like affairs.<sup>3</sup> This rule is intended to and necessarily does exclude all speculations, all investments for an uncertain and doubtful rise in the market,<sup>4</sup> and, in short, everything which does not take

*North Carolina.* — *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284. See also *Boyett v. Hurst*, 1 Jones Eq. (54 N. Car.) 166.

*South Carolina.* — *Dunn v. Dunn*, 1 S. Car. 350.

**Except in Extreme Cases**, the court will not approve of a loan of trust money on the note of an individual, without either a surety or some security. *Nobles v. Hogg*, 36 S. Car. 322.

**Insufficient Security.** — A guardian violates his duty where he makes a loan of the funds of his ward on security which he knows to be insufficient, or which he has not good reason for believing to be sufficient. *Lee v. Lee*, 55 Ala. 590.

**1. Apparent Solvency of Borrower.** — *Clay v. Clay*, 3 Met. (Ky.) 548; *Lee v. Lee*, 55 Ala. 590. But compare *Pope v. Mathews*, 18 S. Car. 444.

**2. Promise to Give Security in Future.** — *Matter of Post*, 57 Cal. 273, *affirming Post's Estate*, Myr. Prob. (Cal.) 230.

**3. Measure of Diligence Required** — *England*, — *Learoyd v. Whiteley*, 12 App. Cas. 727; *Rae v. Meek*, 14 App. Cas. 558; *In re Salmon*, 42 Ch. D. 351; *Sheffield, etc.*, Permanent Bldg. Soc. v. Aizlewood, 44 Ch. D. 412; *Knox v. Mackinnon*, 13 App. Cas. 753; *Speight v. Gaunt*, 9 App. Cas. 1, *affirming In re Speight*, 22 Ch. D. 727; *In re Whiteley*, 33 Ch. D. 347; *In re Somerset*, (1894) 1 Ch. 231; *In re Godfrey*, 23 Ch. D. 483, 52 L. J. Ch. 820, 48 L. T. N. S. 853, 32 W. R. 23; *Smethurst v. Hastings*, 30 Ch. D. 490, 55 L. J. Ch. 173, 52 L. T. N. S. 567, 33 W. R. 496; *Knight v. Plimouth*, 3 Atk. 480; *Massey v. Banner*, 1 Jac. & W. 241.

*Alabama.* — *Harrison v. Mock*, 10 Ala. 185.

*California.* — See *Matter of Carver*, 118 Cal. 73.

*Indiana.* — *Slauter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106.

*Kentucky.* — *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355; *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651. See also *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457.

*Maine.* — *Emery v. Batchelder*, 78 Me. 233.

*Maryland.* — *Gilbert v. Kolb*, 85 Md. 627.

*Massachusetts.* — *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Kinmonth v. Brigham*, 5 Allen (Mass.) 276; *Bowker v. Pierce*, 130 Mass. 262; *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Dickinson, Appellant*, 152 Mass. 184; *Hunt, Appellant*, 141 Mass. 515; *Clark v. Garfield*, 8 Allen (Mass.) 427. See also *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493.

*New Jersey.* — *Monroe v. Osborne*, 43 N. J. Eq. 248.

*New York.* — *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *King*

*v. Talbot*, 40 N. Y. 76, 50 Barb. (N. Y.) 453; *McCabe v. Fowler*, 84 N. Y. 318; *Ormiston v. Olcott*, 84 N. Y. 343; *Coyne v. Weaver*, 84 N. Y. 391; *Matter of Gray*, 91 N. Y. 511; *In re Stark*, (Surrogate Ct.) 15 N. Y. Supp. 729; *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Lansing v. Lansing*, 45 Barb. (N. Y.) 182; *Matter of Hathaway*, 80 Hun (N. Y.) 186.

*North Carolina.* — *Cummings v. Mebane*, 63 N. Car. 315; *Shipp v. Hettrick*, 63 N. Car. 329; *Patton v. Farmer*, 87 N. Car. 337; *Green v. Rountree*, 88 N. Car. 164.

*Pennsylvania.* — *Witmer's Appeal*, 87 Pa. St. 120; *Eyster's Appeal*, 16 Pa. St. 372; *Fahnestock's Appeal*, 104 Pa. St. 46; *Bartol's Estate*, 182 Pa. St. 407; *Breneman v. Mylin*, 12 Pa. Co. Ct. 324, 2 Pa. Dist. 296. See also *Whitecar's Estate*, 147 Pa. St. 368, *affirming* 10 Pa. Co. Ct. 448.

*Rhode Island.* — *Peckham v. Newton*, 15 R. I. 321.

*South Carolina.* — *Snelling v. McCreary*, 14 Rich. Eq. (S. Car.) 291.

*Virginia.* — *Davis v. Harman*, 21 Gratt. (Va.) 194; *Elliott v. Howell*, 78 Va. 297; *Elliott v. Carter*, 9 Gratt. (Va.) 541; *Myers v. Zetelle*, 21 Gratt. (Va.) 758.

**Mere Good Faith**, while requisite and commendable, is not all that is required of a fiduciary. He must be competent also. He must possess such legal knowledge as is needful to the proper execution of the trust. *Durrett v. Com.*, 90 Ky. 312.

**Criterion for Determining Propriety of Investments.** — What is a sound investment is not a question to be determined wholly by the judgment of the trustees as to the degree of risks attending a particular investment, but is determined, in part at least, in accordance with the rules that are the results of general business experience, to some extent recognized as fixed rules of legal administration. *Singleton v. Lowndes*, 9 S. Car. 465.

**It Is Not Due Diligence to Rely upon the Assertion of a Broker from Whom Securities Are Purchased** that they are perfectly safe. *State v. Washburn*, 67 Conn. 188.

**Power to Invest in Securities Bearing as High Interest as Is Consistent with Safety.** — Trustees under such a power are bound to see, first, that the securities are first-class, and, second, that they are safe. After that has been done, the further duty arises to make due discrimination between the securities falling within the description, with the view of selecting such as bear the highest rate of interest. *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

**4. All Speculations, etc., Excluded.** — *In re Salmon*, 42 Ch. D. 351; *Learoyd v. Whiteley*, 12 App. Cas. 727; *Drake v. Crane*, 127 Mo. 85; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct.



into view the nature and object of the trust<sup>1</sup> and the consequences of a mistake in the selection of the investment to be made.<sup>2</sup>

**V. CONSTRUCTION OF PARTICULAR DIRECTIONS OR POWERS — 1. To Invest in Government or Public Securities.** — A direction or authority to invest in government or public securities has been held not to authorize an investment in municipal debentures,<sup>3</sup> or exchequer bills,<sup>4</sup> and a direction to invest in public funds has been held to preclude loans on mortgages of real estate.<sup>5</sup>

**Municipal Debentures.** — An express power to invest in bonds or debentures "secured on rates or taxes levied under the authority of an Act of Parliament by a municipal corporation" has been held not to authorize a loan to harbor trustees on the security of a bond and assignment of the "rates, duties, and other revenues of the harbor trust."<sup>6</sup>

**Bonds of Quasi-Public Corporations.** — In *England* a power to invest in the securities of any foreign country has been held not to authorize an investment in the bonds of a French railway company the payment of the principal and interest on which was guaranteed by the imperial government.<sup>7</sup> But, on the other hand, a direction to invest in "public securities" has been held in *Pennsylvania* to authorize an investment in the bonds of a quasi-public corporation.<sup>8</sup>

**Government or Parliamentary Stocks or Funds.** — The provision of Lord St. Leonards' Act authorizing investments in "government or parliamentary stocks or funds" has been held to refer to funds which are either managed by Parliament or paid out of the resources of the British government, or at least guaranteed by that government.<sup>9</sup>

**2. To Invest in Real Estate.** — A direction or power to invest in real estate<sup>10</sup> has been held to authorize a purchase of mines and minerals,<sup>11</sup> or dwellings, or even a right of dower;<sup>12</sup> but not the purchase of an equity of redemption.<sup>13</sup>

Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *King v. Talbot*, 40 N. Y. 76, 50 Barb. (N. Y.) 453; *Matter of Blauvelt*, 2 Connoly (N. Y.) 458. See also *Emery v. Batchelder*, 78 Me. 233; *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *Dickinson*, Appellant, 152 Mass. 184; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Peckham v. Newton*, 15 R. I. 321.

**Hazardous Investments to Be Avoided Though of Authorized Character.** — *Learoyd v. Whiteley*, 12 App. Cas. 727.

**1. Rule Excludes Whatever Does Not Take into View the Nature and Object of the Trust.** — *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *King v. Talbot*, 40 N. Y. 76; *Matter of Blauvelt*, 2 Connoly (N. Y.) 458.

**2. Consequences of a Mistake Must Be Considered.** — *King v. Talbot*, 40 N. Y. 76; *Matter of Blauvelt*, 2 Connoly (N. Y.) 458.

**3. Municipal Debentures.** — *Ewart v. Gordon*, 13 Grant Ch. (U. C.) 40.

**4. Exchequer Bills.** — *Ex p. Chaplin*, 3 Y. & C. Exch. 397, 3 Jur. 750.

**5. Loans on Mortgages of Real Estate Precluded by Direction to Invest in Public Funds.** — This is true even though such an investment is now authorized by statute in *England*. The trust instrument governs. *Pride v. Fooks*, 2 Beav. 430; *Waring v. Waring*, 3 Ir. Ch. Rep. 331.

**6. Loan Secured by Revenues of Harbor Trust Not Authorized under Power to Invest in Municipal Debentures.** — *Hutton v. Annan*, (1898) A. C. 289, 67 L. J. P. C. 49.

**7. Investment in Railway Bonds Held Not Authorized.** — *In re Langdale*, L. R. 10 Eq. 39.

**8. Investment in Bonds of Quasi-Public Corporation Held Authorized.** — *Rush's Estate*, 12 Pa. St. 375.

**9. Government or Parliamentary Stocks or Funds.** — *Brown v. Brown*, 4 Kay & J. 704.

**10. "Invest in" Means Purchase as distinguished from mortgage.** *Re Barwick*, 5 Ont. 710 [citing *Winchelsea v. Norcliffe*, 1 Vern. 435; *Awdley v. Awdley*, 2 Vern. 192; *Webb v. Shaftsbury*, 6 Madd. 100; *Ouseley v. Anstruther*, 10 Beav. 458; *Joint Stock Discount Co. v. Brown*, L. R. 3 Eq. 139].

**A Direction to Invest in Real Estate or Other Security has been held to require an investment in land, if such an investment could be made to advantage, in which case other security was not allowable.** *Earlom v. Saunders*, AmbL 241.

**11. Purchase of Mines and Minerals Authorized.** — *Bellot v. Littler*, 30 L. T. N. S. 861, 22 W. R. 836.

**12. Dwellings — Dower Rights.** — *Parsons v. Winslow*, 16 Mass. 361; *Amory v. Green*, 13 Allen (Mass.) 413.

**13. Purchase of Equity of Redemption Not Authorized.** — *Worman v. Worman*, 43 Ch. D. 296, 61 L. T. N. S. 637, 38 W. R. 442.

**Freehold Estate Subject to a Long Term.** — In *Ex p. Gartside*, 6 L. J. Ch. 266, it was held that the purchase of a freehold estate subject to a term of one thousand years, at a fixed rent, was objectionable under a private act directing that certain money should be laid out in the purchase of freehold lands, tenements, or



**New Buildings — Repairs — Improvements.** — Such a power has been held to authorize the application of money in the erection of new buildings on land,<sup>1</sup> but repairs and permanent improvements which do not put new buildings on the ground are not within this principle.<sup>2</sup>

**Investment in Freehold Ground Rents.** — An investment in freehold ground rents has been held proper under a direction to invest "in the purchase of other manors, lands, or hereditaments \* \* \* of a clear and indefeasible estate of inheritance in fee simple in possession."<sup>3</sup>

**3. To Invest in Real Securities.** — A power or direction to invest in real securities gives no authority to invest in railway mortgages or debentures<sup>4</sup> or in mortgages of leasehold estates,<sup>5</sup> or to lend money on the security of a judgment<sup>6</sup> or an assignment of the rates, duties, and other revenues of a harbor trust.<sup>7</sup>

**Partnership Property.** — It has been held that as real property, the title to which is vested in the members of a firm as tenants in common, but which is in fact owned and used by the firm as partnership property, is in law real estate, fiduciaries who have taken a mortgage of the interest of one of the tenants in common in such property have acted within a direction to invest by loan, "well secured by mortgage on real estate."<sup>8</sup>

**Whether Real Estate May Be Purchased.** — As a general rule, a direction to invest in real securities will not justify a purchase of real property.<sup>9</sup>

**Care in Selecting Security, etc.** — There are certain rules as to the care required in selecting the security, the propriety of taking junior mortgages, and the

hereditaments, and the fee simple and inheritance thereof.

**1. Money May Be Expended in Erection of New Buildings.** — *Drake v. Trefusis*, L. R. 10 Ch. 364, 33 L. T. N. S. 85, 23 W. R. 762; *Re Henderson*, 23 Grant Ch. (U. C.) 45. See also *In re Venour*, 45 L. J. Ch. 409; *In re Newman*, L. R. 9 Ch. 681, 43 L. J. Ch. 702.

But compare *Poulett v. Somerset*, 25 L. T. N. S. 56, 19 W. R. 1048, in which it was held that under a direction to invest in land, funds belonging to the estate could not be laid out in building a frame house as a permanent improvement of the settled estate. See also *Hale v. Sheldrake*, 60 L. T. N. S. 202.

**2. Repairs and Improvements Not Permissible.** — *Drake v. Trefusis*, L. R. 10 Ch. 364, 33 L. T. N. S. 85, 23 W. R. 762; *Bostock v. Blakeney*, 2 Bro. C. C. 653. See also *In re Venour*, 45 L. J. Ch. 409; *In re Newman*, L. R. 9 Ch. 681, 43 L. J. Ch. 702. But compare *Cowley v. Wellesley*, 46 L. J. Ch. 869.

**Missouri Doctrine.** — Where a trustee is required by the terms of the trust to invest a specific amount of money in lands, he is not warranted in investing part as directed and expending the balance in improving the lands purchased, unless some peculiar circumstances should require it. *Gates v. Hunter*, 13 Mo. 511. It does not appear in this case what was the nature of the improvements.

**3. Investment in Freehold Ground Rents Authorized.** — *In re Peyton*, L. R. 7 Eq. 463, 38 L. J. Ch. 477, 20 L. T. N. S. 728. But compare *Ex p. Gattside*, 6 L. J. Ch. 266.

**4. Investment in Railway Mortgages or Debentures Not Authorized.** — *Mortimore v. Mortimore*, 4 De G. & J. 472, 28 L. J. Ch. 558, 7 W. R. 601. To the same effect is *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302.

**Turnpike Road Bonds Held a Proper Investment.** — The decisions above cited would seem to be

directly opposed by the case of *Robinson v. Robinson*, 1 De G. M. & G. 247, 21 L. J. Ch. 111, 16 Jur. 255, in which it was held that executors who were directed by the testator to invest in real securities might properly retain an investment made by the testator in turnpike road bonds secured by a mortgage or charge upon the tolls and toll-houses.

**5. Investment in Mortgage of Leasehold Estates Not Authorized.** — *In re Boyd*, 14 Ch. D. 626, 49 L. J. Ch. 808, 43 L. T. N. S. 348; *Leigh v. Leigh*, 56 L. J. Ch. 125, 55 L. T. N. S. 634, 35 W. R. 121; *In re Chennell*, 8 Ch. D. 492, 47 L. J. Ch. 583, 38 L. T. N. S. 494, 26 W. R. 595. See also *Pince v. Beattie*, 9 Jur. N. S. 1119, 2 N. R. 546, 9 L. T. N. S. 315, 11 W. R. 979. But compare *Macleod v. Annesley*, 16 Beav. 600, 22 L. J. Ch. 633, 17 Jur. 608, 1 W. R. 250, in which case it was held that a power to invest trust moneys on real security authorized a loan on leaseholds for lives, perpetually renewable at a head rent.

**6. Loan on the Security of a Judgment Not Authorized.** — *Johnston v. Lloyd*, 7 Ir. Eq. 252.

**7. Loan on Security of Assignment of Revenues of a Harbor Trust Not Authorized.** — *Hutton v. Annan*, (1898) A. C. 289.

**8. Partnership Property.** — *Miller v. Proctor*, 20 Ohio St. 442.

**9. Purchase Not Authorized.** — *Re Barwick*, 5 Ont. 710.

**Purchase of Real Estate Allowed by Court.** — *In Webb v. Shaftsbury*, 6 Madd. 100, 22 Rev. Rep. 249, where a testator directed the surplus income from his estate to be invested on mortgage of real estate, the court ordered real estate contiguous to that of the testator to be purchased, it being shown that such purchase would be very advantageous to the testator's estate; but directed that such real estate was to be considered as personal property.



proportion of the value of the property which may be loaned, which apply with equal force whether the investment is made under an express power or not. These matters are discussed in another part of this article.<sup>1</sup>

**4. To Make Loans on Personal Security.** — While fiduciaries may safely act under an express direction or power to lend the funds intrusted to them on personal security, they must keep clearly within their powers under a strict construction of the trust instrument.<sup>2</sup> Thus, where a testator gives such a power to three executors, it is a breach of trust for two of them to lend to the third.<sup>3</sup>

**Authority to Lend to Specified Firm.** — And where a testator authorizes a loan to a specified firm, a loan cannot properly be continued after there has been a change in the membership of such firm.<sup>4</sup>

**5. To Invest in Corporate Stock or Securities.** — Fiduciaries who are directed or authorized to invest in the stock, shares, or securities of incorporated companies paying dividends, must in all cases make every necessary inquiry and satisfy themselves that the company in which they propose to invest is really a solvent one.<sup>5</sup> They must also confine themselves to such stocks or securities as the trust instrument indicates,<sup>6</sup> and when the power or direction applies only to a certain class of companies, they must confine themselves to that class.<sup>7</sup>

1. See *infra*, this title, *Propriety of Particular Investments — Real Securities*.

2. **Power to Invest on Personal Security.** — *Pickard v. Anderson*, L. R. 13 Eq. 608, 26 L. T. N. S. 725.

**Construction of Powers.** — A will empowered the executors to lend such parts of the trust money as they should think proper to W., the son, and M., the son-in-law, of the testator, and the master of the rolls construed this power as authorizing a loan to W. and M. together, or to either of them separately. *Parker v. Bloxam*, 20 Beav. 295.

A power to lend trust money upon real or personal security does not enable trustees to accommodate a trader with a loan upon his bond. *Langston v. Ollivant*, Coop. 33, 14 Rev. Rep. 213.

A loan cannot be made to two persons only, where the trust instrument requires three. *Earlom v. Saunders*, Ambl. 241; *Hereford v. Ravenhill*, 5 Beav. 51.

A direction to lend on bond does not authorize a loan on a mere promissory note. *Greenwood v. Wakeford*, 1 Beav. 576.

**3. Power Given to Three Executors — Loan by Two to the Third.** — The reason of this is that the testator must be taken to have relied upon the united vigilance of the three executors with respect to the solvency of the borrower, and this object is defeated where two of them lend to the third. — *v. Walker*, 5 Russ. 7. And see *infra*, this title, *Propriety of Particular Investments — Loans to Co-Fiduciaries*.

**4. Authority to Lend to Specified Firm — Change of Membership.** — *In re Tucker*, (1894) 1 Ch. 724, 63 L. J. Ch. 223, 8 Reports 113, 70 L. T. N. S. 127, 42 W. R. 266. See also *Cummins v. Cummins*, 3 J. & La T. 64, 6 Ir. Eq. 723.

**5. Fiduciaries Must Be Satisfied that Company Is Solvent.** — *Consterdine v. Consterdine*, 31 Beav. 330, 31 L. J. Ch. 807, 8 Jur. N. S. 906, 7 L. T. N. S. 122, 10 W. R. 727.

**Character of Stocks Which May Be Purchased.** — If the discretion of a fiduciary under the trust extends to the buying of stocks at all, his pur-

chases should be limited to such as have a value in the market based upon a regular income, or at least upon an income that, upon an average for a considerable period, may fairly be deemed equivalent. *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

**6. When Investment in Preference Stock Is Authorized.** — Trustees who are given, by the will creating the trust, power to invest "upon the stock, shares, or securities" of any incorporated company paying a dividend, are authorized to invest in preference stock of a railway company, bearing a fixed rate of interest. *Consterdine v. Consterdine*, 31 Beav. 330, 31 L. J. Ch. 807, 8 Jur. N. S. 906, 7 L. T. N. S. 122, 10 W. R. 727.

**When Such Investment Is Not Authorized.** — But such an investment is not authorized where the power given is to invest "upon security of the funds of any company" incorporated by Act of Parliament, for the interest on such stock is secured only on the profits of the concern. *Harris v. Harris*, 29 Beav. 107, 7 Jur. N. S. 955, 9 W. R. 444.

**General Direction to Invest in Stocks Does Not Restrict to Existing Stocks.** — *Gray v. Lynch*, 8 Gill (Md.) 403.

**Bank Stock Proper.** — *Gray v. Lynch*, 8 Gill (Md.) 403.

**Second Mortgage Bonds May Be "First Class."** — An authority to invest in "first class mortgage bonds" of railroad companies does not necessarily exclude second mortgage bonds, where the second mortgage is given for the very purpose of raising a fund to pay off the first mortgage, and such second mortgage itself is a very small lien upon the road. *Bartol's Estate*, 182 Pa. St. 407.

**7. "Established Railway in Full Operation."** — A power to invest in "shares of any established railway in full operation" will authorize an investment in shares of a railway within the United Kingdom, established by Act of Parliament. *Edwards v. Thompson*, 38 L. J. Ch. 65.

**"Public Company."** — A power to invest in the



**Power to Retain Fully Paid Up Shares.** — A power given to trustees to retain certain fully paid up shares in a banking company, which are bequeathed to them, ceases where, after the testator's death, the shares are altered in amount and become liable to calls, as the state of the investment is then changed to one not authorized by the will.<sup>1</sup>

**6. To Continue Established Business.** — A direction in a will that the executor shall carry on an established business of the testator authorizes only the employment of the money already employed in such business and does not warrant the investment of more capital therein.<sup>2</sup> And where authority is given to continue funds employed in a partnership, the fiduciary must withdraw them upon the death of a member of the firm, or upon the dissolution of the partnership in any other way.<sup>3</sup>

**7. To Invest in Names of Fiduciaries.** — It is a breach of trust for trustees who are authorized by the trust instrument to invest "in their or his names or name" on real security, to invest on a contributory mortgage.<sup>4</sup>

**8. To Invest a Specified Amount in a Particular Way.** — A fiduciary who is directed by the trust instrument to invest a specified amount in a particular security cannot invest a larger amount therein, unless there is in his hands a portion of the fund as to which there is no direction, and the security is such as the courts generally approve.<sup>5</sup>

**VI. PROPRIETY OF PARTICULAR INVESTMENTS — 1. Introductory — Scope of Section.** — It is proposed to take up in this section the various classes of investments and show to what extent they have been held proper or improper, whether in the exercise of the uncontrolled discretion of the fiduciary or under the statutory provisions of the various jurisdictions, so far as they have been construed by the courts.

**It Must Be Borne in Mind,** however, that the general rules which are about to be set out can apply and govern only in cases where they do not conflict with the directions of the trust instrument or the statute law.

securities of any "railway or other public company" includes securities of companies under the Companies Acts, as such companies are incorporated under the authority of statute, and the instruments constituting them, and the transfers of their shares, are public in their nature. *In re Sharp*, 45 Ch. D. 286, 60 L. J. Ch. 38, 62 L. T. N. S. 777. See also *In re Lysaght*, (1898) 1 Ch. 115.

**Company Incorporated by Act of Parliament.** — A power to invest in the shares or securities of any company incorporated by Act of Parliament will not include shares or securities of companies incorporated under the Act of 1862, as they are only incorporated by registration under the statute. *In re Smith*, (1896) 2 Ch. 590, 65 L. J. Ch. 761, 74 L. T. N. S. 810, 45 W. R. 29.

But such a power will authorize an investment in the stock of a company incorporated by a royal charter granted pursuant to the provisions of an Act of Parliament empowering the Crown to grant charters with rights and privileges which, independent of such Act of Parliament, the Crown could not have granted. *Elve v. Boyton*, (1891) 1 Ch. 501, 60 L. J. Ch. 383, 64 L. T. N. S. 482.

**Railroad Companies "Whose Railroads Are Finished."** — It cannot be said that the road of a railway company is not finished, within a provision of a will authorizing trustees to invest in the bonds of railroad companies "whose railroads are finished," because at one time during the history of the company and after

its original road had been completed, it had decided to build an extension; especially where such extension is also completed, and both the road and the extension are fully equipped, before the investment is made. *Bartol's Estate*, 182 Pa. St. 407.

**1. Power to Retain Fully Paid Up Shares Expires When Such Shares Become Liable to Calls.** — *In re Morris*, 54 L. J. Ch. 388, 52 L. T. N. S. 462, 33 W. R. 445. See also *New London, etc., Bank v. Brocklebank*, 21 Ch. D. 302, 51 L. J. Ch. 711.

**2. Effect of Direction to Continue Established Business.** — *M'Neillie v. Action*, 4 De G. M. & G. 744, 17 Jur. 1041; *Alsop v. Mather*, 8 Conn. 587, 21 Am. Dec. 703. See also the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 976, note 2.

**3. When Funds Authorized to Be Continued in a Partnership Must Be Withdrawn.** — *Cummins v. Cummins*, 6 Ir. Eq. 723.

**4. Power to Invest in Names of Trustees Does Not Authorize Investment on Contributory Mortgage.** — *Webb v. Jonas*, 39 Ch. D. 660, 57 L. J. Ch. 671, 58 L. T. N. S. 382, 36 W. R. 666. See also *In re Massingberd*, 63 L. T. N. S. 296; *In re Walker*, 59 L. J. Ch. 386, 62 L. T. N. S. 449; *Stokes v. France*, (1898) 1 Ch. 212.

**5. Effect of Direction to Invest a Specified Amount in a Particular Way.** — *Payne v. Collier*, 1 Ves. Jr. 170.

**Costs of Investment.** — Where the trust instrument directed that a specified amount should be invested in the purchase of land, it was con-



**2. Government or Public Securities** — *a.* A PROPER INVESTMENT. — It is universally considered that governments are perpetual and their obligations sure, and the courts presume the stability of the authority under which they sit and credit the plighted faith of its promises to pay. For these reasons, as well as on account of the numerous statutes authorizing such investments, it is established as a general rule that fiduciaries are always justified in investing in government or public funds or securities.<sup>1</sup> Indeed, in *England*, before the enactment of statutes authorizing the investment of trust funds in other securities, government securities were considered by the courts to be the only safe and proper ones. And they have often been held to be the only investment which the courts will order in the absence of some other direction of statute or in the trust instrument.<sup>2</sup>

sidered that the costs of the investment should be paid out of such amount. *Gwyther v. Allen*, 1 Hare 505.

**1. Government or Public Funds or Securities a Proper Investment** — *England.* — *Ex p. Ellice*, Jac. 234; *Norbury v. Norbury*, 4 Madd. 191; *Prendergast v. Prendergast*, 3 H. L. Cas. 195, 14 Jur. 989; *Ex p. Great Northern R. Co.*, L. R. 9 Eq. 274; *Franklin v. Frith*, 3 Bro. C. C. 433; *Holmes v. Dring*, 2 Cox Ch. 1; *Darwin v. Darwin*, 17 Jur. 781, 22 L. J. Ch. 1007; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Vigrass v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanst. 1; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Holland v. Hughes*, 16 Ves. Jr. 111; *Tebbs v. Carpenter*, 1 Madd. 290; *Browne v. Cross*, 14 Beav. 105; *Hood v. Clapham*, 19 Beav. 90; *Stewart v. Sanderson*, L. R. 10 Eq. 26. See also *Baud v. Fardell*, 7 De G. M. & G. 628, 25 L. J. Ch. 21, 1 Jur. N. S. 1214, 4 W. R. 40; *Barry v. Marriott*, 2 De G. & Sm. 491, 12 Jur. 1043; *Butler v. Withers*, 1 Johns. & H. 332, 4 L. T. N. S. 736; *Prendergast v. Lushington*, 7 Hare 171, 16 L. J. Ch. 125.

*Canada.* — *Kingsmill v. Miller*, 15 Grant Ch. (U. C.) 171; *Re Cronan*, 6 Ont. Pr. 221.

*United States.* — *Lamar v. Micou*, 112 U. S. 452.

*Alabama.* — *Bryant v. Craig*, 12 Ala. 354.

*Georgia.* — *Brown v. Wright*, 39 Ga. 96; *Moses v. Moses*, 50 Ga. 9.

*Maine.* — *Emery v. Batchelder*, 78 Me. 233.

*New Hampshire.* — *Wheeler v. Perry*, 18 N. H. 307.

*New Jersey.* — *Corlies v. Corlies*, 23 N. J. Eq. 197; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Vreeland v. Schoonmaker*, 16 N. J. Eq. 512; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Woodruff v. Lounsbury*, 40 N. J. Eq. 545; *Woodruff v. Ward*, 35 N. J. Eq. 467; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

*New York.* — *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Ormiston v. Olcott*, 84 N. Y. 339; *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597; *Brown v. Chesterman* (Supm. Ct. Gen. T.) 30 N. Y. St. Rep. 537; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, *affirmed* by 18 Hun (N. Y.) 29, *affirmed* by 79 N. Y. 631; *Matter of Keteltas*, 1 Connolly (N. Y.) 468. See also *Adair v. Brimmer*, 74 N. Y. 539; *Clark v. St. Louis*, etc., R. Co., (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 21; *Matter of Foster*, 15 Hun (N. Y.) 387; *Bates v.*

*Underhill*, 3 Redf. (N. Y.) 365; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *New York L. Ins.*, etc., Co. v. Baker, 38 N. Y. App. Div. 417.

*Pennsylvania.* — *Worrell's Appeal*, 9 Pa. St. 508, 23 Pa. St. 44; *Hemphill's Appeal*, 18 Pa. St. 303; *Ihmsen's Appeal*, 43 Pa. St. 431. See also *Cridland's Estate*, 132 Pa. St. 479.

*West Virginia.* — *Key v. Hughes*, 32 W. Va. 184.

*Wisconsin.* — *Simmons v. Oliver*, 74 Wis. 633.

**Investments in Inscribed Stocks of Colonial Governments Sanctioned.** — *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692.

**Temporary Investment in Exchequer Bills Held Proper.** — *Matthews v. Brise*, 10 Jur. 105, 15 L. J. Ch. 39, *affirming* 6 Beav. 239, 12 L. J. Ch. 263.

**Investment in Municipal Bonds Proper.** — *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

**Water Bonds of a Municipality.** — Investments in the "Boston Water Loan" bonds are proper in *Rhode Island*, there being no statute or rule of court pointing out any particular class of securities for trust investments. *Peckham v. Newton*, 15 R. I. 321. See *infra*, this title, *Situs of Investments*.

**2. Government Securities Considered the Only Proper Investment in the Absence of Other Directions.** — *Vigrass v. Binfield*, 3 Madd. 62; *Tebbs v. Carpenter*, 1 Madd. 290; *Collis v. Collis*, 2 Sim. 365; *Keble v. Thompson*, 3 Bro. C. C. 112; *Pocock v. Reddington*, 5 Ves. Jr. 799; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Holland v. Hughes*, 16 Ves. Jr. 111; *Darke v. Martyn*, 1 Beav. 525; *Watts v. Girdlestone*, 6 Beav. 188; *Fowler v. Reynal*, 3 Macn. & G. 500; *Ex p. Geaves*, 8 De G. M. & G. 291. See also *Ex p. Ellice*, Jac. 234; *Darwin v. Darwin*, 17 Jur. 781, 22 L. J. Ch. 1007; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Brown v. Wright*, 39 Ga. 96. Compare *Re Cronan*, 6 Ont. Pr. 221.

**Extent of Application in United States of English Rule that Fiduciaries Must Invest in Government or Real Securities.** — The rule referred to in the text is not of the common law, and had no applicability to the condition of the United States while a colony of Great Britain, and cannot be said to have been incorporated in our law. So far, and so far only, as it can be said to rest upon fundamental principles of equity, commanding themselves to the conscience, and suited to the condition of our affairs, it is true that it has appropriate appli-



**Consols Most Favored in England.** — Of the various government securities the English courts seem to have regarded consols with the most favor.<sup>1</sup>

**Purchase at a Premium.** — The object of investments by fiduciaries being permanency rather than the securing of a large interest, a purchase of government bonds or other public securities is not objectionable because a premium over the face value is paid,<sup>2</sup> unless the premium is so great that it will involve a very considerable loss when the securities are redeemed, or make the income much less than could be realized by some other safe and proper investment.<sup>3</sup>

**Government Annuity.** — In *England* the court has ordered the investment of the funds of a lunatic in a government annuity for his life, to be applied to his maintenance, it appearing that such investment would be for his benefit.<sup>4</sup>

**Annuities of Which the Government Is Pledged to Pay the Principal.** — And South Sea and bank annuities, the principal of which the government was pledged to pay, have been held good investments, though South Sea or bank stock would not be such.<sup>5</sup>

**b. BONDS OF CONFEDERATE STATES.** — The decisions on the subject of investments by fiduciaries in bonds of the Confederate states are by no means uniform. In some states it has been held that fiduciaries making such investments in good faith and under the authority of statutes making such investments legal, or with the approval of the courts, should be protected.<sup>6</sup> In

cation and force, as a guide to the administration of a trust, in the *United States*, as well as in *England*. *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453.

1. **Consols Most Favored in England.** — See *Prendergast v. Prendergast*, 3 H. L. Cas. 195, 14 Jur. 989; *Baud v. Fardell*, 7 De G. M. & G. 628, 25 L. J. Ch. 21, 1 Jur. N. S. 1214, 4 W. R. 40; *Norbury v. Norbury*, 4 Madd. 191.

2. **Purchase at a Premium.** — In *Emery v. Batchelder*, 78 Me. 233, it was considered that an investment by executors in United States four per cent. bonds at a premium of less than three per cent. was carefully and judiciously made, and was proper, and should not be disturbed although the bonds had appreciated in value.

3. **Where Premium Is Very Great.** — See *Shields's Estate*, 14 Phila. (Pa.) 307, 38 Leg. Int. (Pa.) 261. And see generally *infra*, this title, *Income to Beneficiaries*.

4. **Government Annuity.** — *Ex p. Stonard*, 18 Ves. Jr. 285; *Davies v. Davies*, 2 De G. M. & G. 51, 21 L. J. Ch. 419, 16 Jur. 419; *In re Ward*, 29 L. J. Ch. 784, 6 Jur. N. S. 717, 2 L. T. N. S. 685, 8 W. R. 333. See also *In re Dods-worth*, 10 Hare 16; *Magnus v. Bingley*, 2 W. R. 130.

5. **Annuities of Which the Government Is Pledged to Pay the Principal.** — *Trafford v. Boehm*, 3 Atk. 440.

6. **Investment in Confederate Bonds Authorized** — *Georgia*. — *Brown v. Wright*, 39 Ga. 96; *Nelms v. Summers*, 54 Ga. 605; *McWhorter v. Tarpley*, 54 Ga. 291; *McCook v. Harp*, 81 Ga. 231; *Baldy v. Hunter*, 98 Ga. 170 (see *infra*, this section, for a treatment of *Baldy v. Hunter*, 171 U. S. 388, which, in affirming this case, modified the previous doctrine of the *United States* courts); *Franklin v. McElroy*, 99 Ga. 123; *Venable v. Howard*, 68 Ga. 167; *Moses v. Moses*, 50 Ga. 9. See also *Johnson v. McCul-lough*, 59 Ga. 212.

*North Carolina*. — *Longmire v. Herndon*, 72 N. Car. 629; *Drake v. Drake*, 82 N. Car. 443; *Green v. Rountree*, 88 N. Car. 164. See

also *State v. Engelhard*, 70 N. Car. 377; *Whitford v. Foy*, 65 N. Car. 265.

*South Carolina*. — *Manning v. Manning*, 12 Rich. Eq. (S. Car.) 410; *Hinton v. Kennedy*, 3 S. Car. 459; *West v. Cauthen*, 9 S. Car. 45. See also *Koon v. Munro*, 11 S. Car. 139; *Brabham v. Crosland*, 25 S. Car. 525; *Finch v. Finch*, 28 S. Car. 164, 13 Am. St. Rep. 665; *Waller v. Cresswell*, 4 S. Car. 353.

**Investment Must Have Been under Order of Court.** — *Franklin v. McElroy*, 99 Ga. 123. See also *Baldy v. Hunter*, 98 Ga. 170; *Nelms v. Summers*, 54 Ga. 605, *McCook v. Harp*, 81 Ga. 236.

**Liability Resulting from Improperly Accepting Confederate Notes Which Were Invested.** — In *Purser v. Simpson*, 65 N. Car. 497, a guardian who collected an ante-war debt in Confederate notes, and immediately invested the amount in Confederate bonds, was held liable on the ground that he should not have collected the debt in that currency.

**As to the Liabilities of Fiduciaries for Taking Depreciated Currency**, such as Confederate money, in payment of debts due to the trust estate, see the titles EXECUTORS AND ADMINISTRATORS, vol. II, p. 1001; PAYMENT; TRUSTS AND TRUSTEES.

**Advance by Executor of Confederate Notes Which Are Invested in Confederate Bonds** — Subsequent Collection in Good Money of Amounts Represented by Advances. — To sustain an investment in Confederate securities, it must appear that the money so invested was, at the time, actually in the hands of the trustee — not irregularly or illegally, but "rightfully" there. *Finch v. Finch*, 28 S. Car. 164, 13 Am. St. Rep. 665. See also *Koon v. Munro*, 11 S. Car. 140, 18 S. Car. 374.

Therefore, where an executor sold his testator's property during the late civil war, and two of the purchasers did not pay for their purchases, but the executor advanced the amount to the estate out of his own Confederate money and invested in Confederate bonds, by reason of which the amount was lost, it was held that,



other states all such investments have been considered unauthorized,<sup>1</sup> and the statutes authorizing them have been declared unconstitutional and void.<sup>2</sup>

The Courts of the United States have, until very recently, steadily adhered to the view that such investments were improper under any circumstances.<sup>3</sup>

**Distinction Between Investment of United States and of Confederate Money.**—While it is a fact that in most of the cases which have already been cited in this section the money which was invested in Confederate bonds was in the form of Confederate notes, the courts did not appear to attach any particular importance to this circumstance. There are other cases, however, in which the express reason for holding such investments proper was that the money invested consisted of Confederate notes.<sup>4</sup> The courts of *Virginia* have laid particular stress upon this matter, holding such investments improper when the bonds were purchased with United States money,<sup>5</sup> but permissible when they were paid for in Confederate notes.<sup>6</sup> And this distinction has very

he having collected the amounts due from the purchasers in good money after the war, the investment could not be allowed as to such amounts. *Finch v. Finch*, 28 S. Car. 164, 13 Am. St. Rep. 665.

**1. Investment in Confederate Bonds Unauthorized**—*Alabama*.—*Houston v. Deloach*, 43 Ala. 364, 94 Am. Dec. 689; *Powell v. Boon*, 43 Ala. 459; *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703. *Contra*, *Elston v. Wyley*, 42 Ala. 640, citing *Schible v. Bacho*, in manuscript; *Hoffman v. Stoudemire*, 42 Ala. 593; *Walthall v. Walthall*, 42 Ala. 450; *Watson v. Stone*, 40 Ala. 451, 91 Am. Dec. 484; *Dockery v. McDowell*, 40 Ala. 476; *Neilson v. Cook*, 40 Ala. 498.

*Louisiana*.—See *Sprowl's Succession*, 21 La. Ann. 544.

*Mississippi*.—*Bailey v. Fitz-Gerald*, 56 Miss. 578, overruling *Trotter v. Trotter*, 40 Miss. 704; *Fitz-Gerald v. Bailey*, 58 Miss. 658.

*West Virginia*.—*Copeland v. McCue*, 5 W. Va. 264.

**2. Statutes Authorizing Investments in Confederate Bonds Unconstitutional and Void**—*Alabama*.—*Houston v. Deloach*, 43 Ala. 364, 94 Am. Dec. 689; *Powell v. Knighton*, 43 Ala. 626. See also *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *Powell v. Boon*, 43 Ala. 459.

*Mississippi*.—*Bailey v. Fitz-Gerald*, 56 Miss. 578, overruling *Trotter v. Trotter*, 40 Miss. 704.

In *Houston v. Deloach*, 43 Ala. 364, 94 Am. Dec. 689, the court said: "The decision of this court in the case of *Watson v. Stone*, 40 Ala. 451, 91 Am. Dec. 484, is based solely on the idea that the government which existed in the state during the war was a *de facto* government. This decision on that point has been overruled in the case of *Chisholm v. Coleman* [43 Ala. 204, 94 Am. Dec. 678], decided at the January term, 1869, and in the case of the *State of Texas v. White* [7 Wall. (U. S.) 700], at the last term of the Supreme Court of the United States." This practical overruling of the case of *Watson v. Stone*, 40 Ala. 451, 91 Am. Dec. 484, must result in the overruling also of the cases of *Dockery v. McDowell*, 40 Ala. 476, and *Neilson v. Cook*, 40 Ala. 498, in which it was followed.

The constitutionality of the statute under discussion appears, however, to have received some recognition in the later case of *Stewart v. McMurray*, 82 Ala. 269, wherein *Stone*, C. J., delivering the opinion of the court, used the following language: "It was objected to the

allowance of the credit of three thousand six hundred and fifty dollars claimed by the guardian, that he made the investment [in Confederate bonds] without obtaining the order of the probate court therefor. The statute did not require that an order should be obtained before making such investment. (Acts Ala. 1861, pp. 53, 54.)" This is all that appears in the case in reference to such act.

**3. Doctrine of Federal Courts that All Investments in Confederate Bonds Were Improper.**—*Horn v. Lockhart*, 17 Wall. (U. S.) 570, affirming *Woods* (U. S.) 628; *Head v. Starke*, Chase (U. S.) 312, also reported as *Head v. Talley*, 3 Am. L. T. Rep. 155, 11 Fed. Cas. No. 6,294; *Lamar v. Micou*, 112 U. S. 452; *Glasgow v. Lipse*, 117 U. S. 327; *Opie v. Castleman*, 32 Fed. Rep. 511. But see next paragraph.

**4. Investment of Confederate Money in Confederate Bonds Allowed.**—*Sudderth v. McCombs*, 65 N. Car. 186. See also *Sudderth v. McCombs*, 79 N. Car. 398; *Waller v. Cresswell*, 4 S. Car. 353.

In *Dickie v. Dickie*, 80 Ala. 57, a fiduciary was held not liable for an investment of Confederate notes in Confederate securities.

In *Corbitt v. Carroll*, 50 Ala. 315, however, the sureties on a guardian's bond were held responsible for a loss occurring by reason of his receiving Confederate notes which he invested in Confederate bonds, but the decision appears to rest on the ground that the guardian had no right to receive the Confederate money.

**5. Virginia Doctrine—Investment of United States Money Improper.**—*Sharpe v. Rockwood*, 78 Va. 24; *Leake v. Leake*, 75 Va. 792; *Ferguson v. Epes*, 77 Va. 499; *Carter v. Dulaney*, 30 Gratt. (Va.) 192; *Kirby v. Goodykoontz*, 26 Gratt. (Va.) 298; *Crickard v. Crickard*, 25 Gratt. (Va.) 410. See also *Cole v. Cole*, 28 Gratt. (Va.) 365. And see further *Fultz v. Brightwell*, 77 Va. 742.

**6. Investment of Confederate Notes Permissible.**—*Waller v. Catlett*, 83 Va. 200; *Lingle v. Cook*, 32 Gratt. (Va.) 262; *Mills v. Mills*, 28 Gratt. (Va.) 442; *Myers v. Zetelle*, 21 Gratt. (Va.) 733; *Walker v. Page*, 21 Gratt. (Va.) 636. See also *Jones v. Jones*, 86 Va. 848; *Davis v. Harman*, 21 Gratt. (Va.) 104.

**Circumstances Which Must Have Existed in Order to Authorize Investments in Confederate Bonds.**—See *Campbell v. Campbell*, 22 Gratt. (Va.) 649; *Crickard v. Crickard*, 25 Gratt. (Va.) 410; *Ammon v. Wolfe*, 26 Gratt. (Va.) 621. See also



recently been recognized and acted upon by the Supreme Court of the United States.<sup>1</sup>

3. **Real Securities** — *a.* A PROPER INVESTMENT. — Loans upon real securities, as mortgages or other incumbrances on real estate,<sup>2</sup> constitute another class of investments which has been regarded with much favor.<sup>3</sup>

*Kirby v. Goodykoontz*, 26 Gratt. (Va.) 298; *Coltrane v. Worrell*, 30 Gratt. (Va.) 434.

1. **Investment of Confederate Money in Confederate Bonds Held Not Illegal by United States Supreme Court** — Reasons. — *Baldy v. Hunter*, 171 U. S. 388, *affirming* 98 Ga. 170, and *distinguishing* *Lamar v. Micou*, 112 U. S. 452.

2. The Term "Real Securities" means mortgages or other incumbrances affecting land. *Atty.-Gen. v. Bowles*, 3 Atk. 806.

3. **Loans on Real Securities a Proper Investment** — *England*. — *Stickney v. Sewell*, 1 Myl. & C. 8; *Macleod v. Annesley*, 16 Beav. 600, 22 L. J. Ch. 633, 17 Jur. 608, 1 W. R. 250; *Norris v. Wright*, 14 Beav. 291; *Ryder v. Bickerton*, 3 Swans. 81, note, 2 Eden 149, note; *Drosier v. Brereton*, 15 Beav. 221; *Ingle v. Partridge*, 31 Beav. 411; *Phillipson v. Gatty*, 7 Hare 516; *Farrar v. Barraclough*, 2 Smale & G. 231, 2 W. R. 244; *Jones v. Lewis*, 3 De G. & Sm. 471, 18 L. J. Ch. 430, 13 Jur. 877; *Brown v. Litton*, 1 P. Wms. 141; *Pocock v. Reddington*, 5 Ves. Jr. 800; *Knight v. Plymouth*, 1 Dick. 126; *Lyse v. Kingdon*, 1 Coll. Ch. Cas. 184; *In re Olive*, 34 Ch. D. 70, 55 L. T. N. S. 83, 51 J. P. 38; *Jones v. Julian*, 25 L. R. Ir. 45; *Budge v. Gummow*, L. R. 7 Ch. 719, 42 L. J. Ch. 22, 27 L. T. N. S. 666, 20 W. R. 1022; *Fry v. Tapson*, 28 Ch. D. 263, 54 L. J. Ch. 224, 51 L. T. N. S. 326, 33 W. R. 113; *In re Somerset*, 3 Reports 547, 62 L. J. Ch. 720, 68 L. T. N. S. 613, 41 W. R. 536; *Ex p. Colne Valley, etc.*, R. Bill, 1 De G. F. & J. 53; *Ex p. French*, 7 Sim. 510; *Vickery v. Evans*, 33 Beav. 376, 3 N. R. 286, 33 L. J. Ch. 261, 10 Jur. N. S. 30, 9 L. T. N. S. 822, 12 W. R. 237; *Hoey v. Hoey*, 2 Molloy 278; *Ex v. Johnson*, 1 Molloy 128. See also *In re Medland*, 41 Ch. D. 476, 58 L. J. Ch. 572, 60 L. T. N. S. 781, 37 W. R. 753; *Learoyd v. Whiteley*, 12 App. Cas. 727, 57 L. J. Ch. 390, 58 L. T. N. S. 93, 36 W. R. 721; *Crampton v. Walker*, 31 L. R. Ir. 437; *In re Chapman*, (1896) 2 Ch. 763, 65 L. J. Ch. 892, 75 L. T. N. S. 196, 45 W. R. 67; *In re Godfrey*, 23 Ch. D. 483, 52 L. J. Ch. 820, 48 L. T. N. S. 853, 32 W. R. 23; *In re Walker*, 59 L. J. Ch. 386, 62 L. T. N. S. 449; *Blyth v. Fladgate*, 63 L. T. N. S. 546; *In re Partington*, 57 L. T. N. S. 654; *Walcott v. Lyons*, 54 L. T. N. S. 786, 50 J. P. 772; *In re Turner*, (1897) 1 Ch. 536, 66 L. J. Ch. 282, 76 L. T. N. S. 116, 45 W. R. 495; *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4; *Sutton v. Wilders*, L. R. 12 Eq. 373, 41 L. J. Ch. 30, 25 L. T. N. S. 292, 19 W. R. 1021. *Compare In re Ridgways*, 1 Hog. 309; *Raby v. Ridehalgh*, 7 De G. M. & G. 104, 3 Eq. R. 901, 24 L. J. Ch. 528, 1 Jur. N. S. 363, 3 W. R. 344.

*Canada*. — *Re Cronan*, 6 Ont. Pr. 221. See also *Andrews v. Hempstreet*, 1 Ch. Chamb. (Ont.) 347. *Compare Kingsmill v. Miller*, 15 Grant Ch. (U. C.) 171.

*United States*. — See *Barney v. Saunders*, 16 How. (U. S.) 535.

*Alabama*. — *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *Brewer v. Ernest*, 81 Ala. 435; *New-*

*man v. Reed*, 50 Ala. 297; *Foscue v. Lyon*, 55 Ala. 440.

*California*. — *Cousins's Estate*, 111 Cal. 441.

*Indiana*. — *Slauter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106.

*Kentucky*. — *Clark v. Anderson*, 13 Bush (Ky.) 111.

*Maryland*. — *Gilbert v. Kolb*, 85 Md. 627.

*Missouri*. — *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

*New Jersey*. — *Corlies v. Corlies*, 23 N. J. Eq. 197; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Tucker v. Tucker*, 33 N. J. Eq. 335; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Woodruff v. Ward*, 35 N. J. Eq. 467. See also *Monroe v. Osborne*, 43 N. J. Eq. 248; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

*New York*. — *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Matter of Chapman*, 43 N. Y. App. Div. 231; *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Ormiston v. Olcott*, 84 N. Y. 343; *Matter of Keteltas*, 1 Connolly (N. Y.) 468. See also *Matter of Petrie*, 5 Dem. (N. Y.) 352; *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, *affirmed* by 18 Hun (N. Y.) 29, *affirmed* by 79 N. Y. 631. *Ohio*. — *Scott v. Marion Tp.*, 39 Ohio St. 153.

*Pennsylvania*. — *Rawlings's Estate*, 13 Phila. (Pa.) 337, 37 Leg. Int. (Pa.) 133. See also *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451; *Makin's Estate*, 20 Pa. Co. Ct. 587, 7 Pa. Dist. 126, 14 Montg. Co. Rep. (Pa.) 103.

*South Carolina*. — *Singleton v. Lowndes*, 9 S. Car. 465. See also *Nance v. Nance*, 1 S. Car. 209.

*Wisconsin*. — *Simmons v. Oliver*, 74 Wis. 633.

**Real Security Not Preferable to Government Security**. — See *Barry v. Marriott*, 2 De G. & Sm. 491, 12 Jur. 1043.

**Contributory Mortgage**. — As to the impropriety of an investment on a contributory mortgage, see *supra*, this title, *Construction of Particular Directions or Powers* — *To Invest in Names of Fiduciaries*.

**Judgment**. — A guardian may, in the exercise of his discretion, accept from his predecessor in the guardianship, as an investment, a judgment which is a lien upon real estate of sufficient value to pay such judgment when it matures. *Jack's Appeal*, 94 Pa. St. 367.

**Loans on Real Securities in Ireland**. — Under the third section of the Act 4 & 5 Wm. IV., c. 29, trustees may, by the direction and under the authority of the court of chancery or exchequer, in *England*, make loans of money on real estate securities in Ireland. *Ex p. French*, 7 Sim. 510.

**Difference of Opinion in England Prior to Passage of Lord St. Leonards' Act**. — Prior to the passage of Lord St. Leonards' Act, 23 & 24



**b. CARE IN SELECTING SECURITY.** — The general rules which have been set out in regard to the diligence required of a fiduciary<sup>1</sup> apply with full force to the making of loans upon real estate security.<sup>2</sup> The fiduciary must see that the security is sufficient to cover the loan to be made thereon,<sup>3</sup> taking into consideration the nature and location of the property,<sup>4</sup> and whether it

Vict., c. 38, authorizing investments of trust funds on loans on mortgage of real estate, there was a difference of opinion as to whether such investments were proper. Among the cases holding the affirmative were *Pocock v. Reddington*, 5 Ves. Jr. 800, and *Lyse v. Kingdon*, 1 Coll. Ch. Cas. 188; while among those holding the negative were *Barry v. Marriott*, 2 De G. & Sm. 491, and *Ex p. Franklin*, 1 De G. & Sm. 531.

**Loan on Covenant to Surrender Copyhold Property, etc., Unauthorized.** — *Wyatt v. Sharratt*, 3 Beav. 498.

1. See *supra*, this title, *Requirements of Good Faith and Sound Judgment — Measure of Diligence Required.*

2. **Fiduciary Must Act with Skill and Prudence.** — *Rae v. Meek*, 14 App. Cas. 558; *In re Olive*, 34 Ch. D. 70; *Gilbert v. Kolb*, 85 Md. 627; *Tuttle v. Gilmore*, 36 N. J. Eq. 617. See also *Barwell v. Burwell*, 78 Va. 574.

**Fiduciary Should Require Wife of Mortgagor to Join in Executing Mortgage — Extent of Liability for Negligence in This Respect.** — See *Slauter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106.

**Creation of Lien on Property by Mortgagor After Fiduciary Has Examined Title but Before Mortgage Is Executed.** — In *Slauter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106, a guardian, intending to make a loan on mortgage of real property to a person of good financial standing, examined the title of the land ten days prior to the time the loan was made, and found no incumbrances thereon. And at the time the guardian's mortgage was executed the mortgagor informed him that there was no incumbrance on the land, and the guardian believed that the mortgage executed to him was a first lien. As a matter of fact, however, the mortgagor had, between the time of the guardian's examination of the title and the execution of the mortgage, executed a mortgage on the land in question to secure another loan, which mortgage was a lien superior to the guardian's mortgage. Nevertheless, it was held that the guardian had not been guilty of such negligence as would render him responsible for a loss on the mortgage taken by him.

**Exemption from Taxation Must Be Secured if Possible.** — *Lathrop v. Smalley*, 23 N. J. Eq. 192.

3. **Fiduciary Must See that Security Is Sufficient.** — *MacLeod v. Annesley*, 16 Beav. 600, 22 L. J. Ch. 633, 17 Jur. 608, 1 W. R. 250; *Smethurst v. Hastings*, 30 Ch. D. 490, 55 L. J. Ch. 173, 52 L. T. N. S. 567, 33 W. R. 496; *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453. See also *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

**Trustees Need Not Consult Professional Valuers or Surveyors in respect to the value of the property.** *In re Chapman*, (1896) 2 Ch. 763, 65 L. J. Ch. 892, 75 L. T. N. S. 196, 45 W. R. 67.

**Unless There Is Something Special in the Nature of the Property, as there was in the case of** *Lea-royd v. Whiteley*, 12 App. Cas. 727, 33 Ch. D.

347, 57 L. J. Ch. 390, 58 L. T. N. S. 93, 36 W. R. 721, to render the assistance of an expert necessary for the guidance of a prudent man. *In re Chapman*, (1896) 2 Ch. 763, 65 L. J. Ch. 892, 75 L. T. N. S. 196, 45 W. R. 67.

**Fiduciaries Must Use Their Own Judgment as to the sufficiency of the security offered, and cannot safely rely implicitly upon the opinion of solicitors, valuers, and others in this respect.** *In re Somerset*, 3 Reports 547, 62 L. J. Ch. 720, 68 L. T. N. S. 613, 41 W. R. 536, on appeal (1894) 1 Ch. 231, 63 L. J. Ch. 41, 7 Reports 34, 69 L. T. N. S. 744, 42 W. R. 145; *In re Partington*, 57 L. T. N. S. 654; *Walcott v. Lyons*, 54 L. T. N. S. 786, 50 J. P. 772; *Fry v. Tapson*, 28 Ch. D. 268, 54 L. J. Ch. 224, 51 L. T. N. S. 326, 33 W. R. 113; *Ingle v. Partridge*, 34 Beav. 411; *Gilbert v. Kolb*, 85 Md. 627; *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451. See also *Sutton v. Wilders*, L. R. 12 Eq. 373, 41 L. J. Ch. 30, 25 L. T. N. S. 292, 19 W. R. 1021; *Rae v. Meek*, 14 App. Cas. 558; *Budge v. Gummow*, L. R. 7 Ch. 719, 42 L. J. Ch. 22, 27 L. T. N. S. 666, 20 W. R. 1022; *Learoyd v. Whiteley*, 12 App. Cas. 727, 57 L. J. Ch. 390, 58 L. T. N. S. 93, 36 W. R. 721.

But see the provisions of section 8 of the Trustee Act 1893 (56 & 57 Vict., c. 53), as set out in 12 Encyc. L. of Eng. 347, and of section 4 of the Trustee Act 1888, as set out in *In re Somerset*, (1894) 1 Ch. 237, note 1; and *In re Walker*, 59 L. J. Ch. 386, 62 L. T. N. S. 449, construing the statute last referred to.

**Trustee Cannot Rely Implicitly upon Statements of Co-Trustee.** — *In re Turner*, (1897) 1 Ch. 536.

**Opinion of Mortgagor as to Value.** — A court should not order an investment on real property without the evidence of some disinterested person as to the value thereof, and the mortgagor and his land agent or steward cannot be considered as disinterested persons. *Norris v. Wright*, 14 Beav. 291.

**Fiduciary May Rely upon Information and Opinion of His Solicitor as to the Title to the Property.** — *Gilbert v. Kolb*, 85 Md. 627.

**Burden of Proof.** — The question of the value of the property is one for which the fiduciary is clearly responsible, and the burden of proof lies on him to show that in that respect the investment is a fit and proper one. *Norris v. Wright*, 14 Beav. 291.

4. **Nature and Location of Property Should Be Considered.** — *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302; *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Singleton v. Lowndes*, 9 S. Car. 468.

**Loan on Unfinished Buildings.** — If buildings, on mortgage of which a loan was made, were of the same character as those which previously existed on the same site, and the latter had been constantly let, the mere fact that the new buildings were unfinished at the time of the loan would not be material if due security were taken for their completion. *Rae v. Meek*, 14 App. Cas. 558.



produces a sufficient income to pay the interest on the loan;<sup>1</sup> and should avoid making any loans on property of such a character that the investment would be in any manner hazardous or speculative in its nature.<sup>2</sup> He should also consider the availability of the property for the ultimate realization of the amount loaned thereon,<sup>3</sup> without the additional expense of litigation,<sup>4</sup> or should have inserted in the mortgage some provisions casting such expense, if incurred, upon the mortgagor.<sup>5</sup>

*c. MARGIN OF SECURITY* — (1) *Necessity for.* — Fiduciaries, in making a loan on the security of real property, should see that there is a sufficient margin of security, by which is meant such a difference between the actual value of the property and the amount loaned thereon as will reasonably be sufficient to protect the investment from being lost through any depreciation in such value.<sup>6</sup>

(2) *English "Two-thirds Rule."* — In England the courts at a very early date fixed upon two-thirds of the value of property as the maximum amount which fiduciaries might safely loan thereon.<sup>7</sup> This was, however, considered to be only a general rule, and not a hard and fast one fixing an absolute limit beyond which a fiduciary could never be protected in going,<sup>8</sup> until it was adopted by statute,<sup>9</sup> since which time it would seem that the rule should be adhered to in every case.<sup>10</sup>

1. *Income Produced by Property Should Be Considered.* — *In re Somerset*, 3 Reports 547, 62 L. J. Ch. 720, 68 L. T. N. S. 613, 41 W. R. 536.

2. *Hazardous or Speculative Securities to Be Avoided.* — *Rae v. Meek*, 14 App. Cas. 558; *In re Turner*, (1897) 1 Ch. 536, 66 L. J. Ch. 282, 76 L. T. N. S. 116, 45 W. R. 495; *Phillipson v. Gatty*, 13 Jur. 318, 7 Hare 516, *affirmed* by 2 Hall & T. 459; *Fry v. Tapson*, 28 Ch. D. 268; *Smethurst v. Hastings*, 30 Ch. D. 490, 55 L. J. Ch. 173, 52 L. T. N. S. 567, 33 W. R. 496; *Mara v. Browne*, (1895) 2 Ch. 69; *Hoey v. Green*, W. N. 1884, p. 236. See also *Learoyd v. Whiteley*, 12 App. Cas. 727, 33 Ch. D. 347, 57 L. J. Ch. 390, 58 L. T. N. S. 93, 36 W. R. 721; *Budge v. Gummow*, L. R. 7 Ch. 719, 42 L. J. Ch. 22, 27 L. T. N. S. 666, 20 W. R. 1022; *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4.

3. *Availability of Property for Ultimate Realization of Amount Loaned Should Be Considered.* — *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453.

4. *Chances of Litigation Should Be Considered.* — *Brewer v. Ernest*, 81 Ala. 435. See also *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302.

5. *Provision for Cost of Foreclosure.* — See *Brewer v. Ernest*, 81 Ala. 435.

6. *Necessity for Proper Margin of Security.* — *Norris v. Wright*, 14 Beav. 307; *Drosier v. Brereton*, 15 Beav. 221; *Macleod v. Annesley*, 16 Beav. 600; *Ingle v. Partridge*, 34 Beav. 411; *Stickney v. Sewell*, 1 Myl. & C. 8; *Phillipson v. Gatty*, 7 Hare 516; *Farrar v. Barraclough*, 2 Smale & G. 231; *Jones v. Lewis*, 3 De G. & Sm. 471; *Brown v. Litton*, 1 P. Wms. 141.

*Illustrations of Margins Held Insufficient.* — See the following cases: *In re Salmon*, 42 Ch. D. 357; *In re Olive*, 34 Ch. D. 70; *Gilbert v. Kolb*, 85 Md. 627; *In re Stark*, (Surrogate Ct.) 15 N. Y. Supp. 729.

*Loan Sufficiently Secured.* — An investment of three thousand five hundred and thirty pounds on freehold property, which is let on ground rents amounting to one hundred and seventy-six pounds a year, the interest on the amount

loaned being one hundred and fifty pounds a year, is sufficiently secured; for the houses erected on the land add the value of such buildings to the security for the due payment of the amount. *Vickery v. Evans*, 33 Beav. 376, 3 N. R. 286, 33 L. J. Ch. 261, 10 Jur. N. S. 30, 9 L. T. N. S. 822, 12 W. R. 237.

7. *Two-thirds Rule.* — *Stickney v. Sewell*, 1 Myl. & C. 8; *Stretton v. Ashmall*, 3 Drew. 9; *Macleod v. Annesley*, 16 Beav. 600; *In re Olive*, 34 Ch. D. 70; *Wyatt v. Sharratt*, 3 Beav. 498.

*Distinction Between Agricultural and House Property.* — Some of the cases have drawn a distinction between agricultural and house property, holding that in the case of the latter the amount loaned should not be so much as two-thirds of the value. *Stickney v. Sewell*, 1 Myl. & C. 8; *Stretton v. Ashmall*, 3 Drew. 9; *Macleod v. Annesley*, 16 Beav. 600; *In re Olive*, 34 Ch. D. 70; *Norris v. Wright*, 14 Beav. 291.

And one-half of the value seems to have been recognized as the limit of what might be loaned on such property. *In re Salmon*, 42 Ch. D. 351; *Learoyd v. Whiteley*, 12 App. Cas. 727, *In re Olive*, 34 Ch. D. 70; *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4; *In re Partington*, 57 L. T. N. S. 654.

In Alabama two-thirds of the value of the property has been considered a safe criterion of how much may be loaned thereon. *Foscue v. Lyon*, 55 Ala. 440.

8. *Rule Did Not Fix an Absolute Limit.* — *In re Godfrey*, 23 Ch. D. 483, 52 L. J. Ch. 820, 48 L. T. N. S. 853, 32 W. R. 23; *Smethurst v. Hastings*, 30 Ch. D. 490; *In re Olive*, 34 Ch. D. 70; *Learoyd v. Whiteley*, 12 App. Cas. 727; *In re Salmon*, 42 Ch. D. 351.

*Fiduciaries Not Always Safe in Lending up to Limit.* — *Learoyd v. Whiteley*, 12 App. Cas. 727; *In re Salmon*, 42 Ch. D. 351.

9. *Rule Adopted by Statute.* — *Trustee Act* 1888, § 4; *Trustee Act* 1893 (56 & 57 Vict., c. 53), § 8.

10. *Statutory Rule Should Be Adhered To in Every Case.* — See *Blyth v. Fladgate*, (1891) 1 Ch. 337; *In re Somerset*, (1894) 1 Ch. 231, 63 L. J. Ch.



(3) *When Excessive Loan May Be Sustained as to Part.* — In England it is provided by statute<sup>1</sup> that when a trustee has improperly advanced trust money on a mortgage security which would, at the time of the investment, be a proper investment in all respects for a smaller sum than has actually been advanced thereon,<sup>2</sup> the security shall be deemed an authorized investment for the smaller sum, and the trustees shall be liable only to make good the amount advanced in excess thereof, with interest.<sup>3</sup>

(4) *Depreciation of Property After Loan Is Made Thereon.* — Where the fiduciary has acted in good faith and with due diligence in making a loan on mortgage of real estate, which is at the time of the loan a sufficient security for the amount advanced, or in retaining such an investment made by the creator of the trust, he is not responsible for a loss resulting from a subsequent unexpected depreciation in the value of the property.<sup>4</sup> And it has been held in England that a fiduciary is under no absolute duty to call in a mortgage debt or any portion thereof as soon as the security depreciates so that the amount loaned thereon is more than two-thirds of the value, but must use his discretion in the matter, for one of the reasons of requiring a margin of one-third in such loans is to provide for fluctuations in value of the security.<sup>5</sup>

*d. RULE AS TO JUNIOR MORTGAGES.* — A fiduciary making a loan on the security of real property should see that he obtains a first mortgage or lien thereon, for junior mortgages or loans on property subject to any prior incumbrances are not, as a rule, considered proper investments.<sup>6</sup> Such mortgages are, however, not necessarily improper in all cases,<sup>7</sup> and there may be circumstances in which a fiduciary may take such security without being guilty of any breach of trust.<sup>8</sup> Certainly, where no loss has resulted from the taking of security, there would seem to be no reason for charging the fiduciary with the amount of the investment.<sup>9</sup>

#### 4. Loans on Personal Security — *a.* PREVAILING DOCTRINE AS TO IMPRO-

41, 7 Reports 34, 69 L. T. N. S. 744, 42 W. R. 145; *In re Stuart*, (1897) 2 Ch. 583.

1. *English Statute.* — Trustee Act 1893 (56 & 57 Vict., c. 53), § 9. See 12 Encyc. L. of Eng. 348.

2. *Statute Applies Only Where the Security Is Proper for a Smaller Amount than Is Actually Advanced.* — *In re Turner*, (1897) 1 Ch. 536. See also *Blyth v. Fladgate*, (1891) 1 Ch. 337, 63 L. T. N. S. 546; *In re Walker*, 59 L. J. Ch. 386, 62 L. T. N. S. 449.

3. *Application of Statute.* — See *In re Somerset*, (1894) 1 Ch. 231, 63 L. J. Ch. 41, 7 Reports 34, 69 L. T. N. S. 744, 42 W. R. 145, in which case the court applied the similar provision of section 5 of the Trustee Act 1888.

4. *Depreciation of Property.* — *In re Chapman*, (1896) 2 Ch. 763, 65 L. J. Ch. 892, 75 L. T. N. S. 196, 45 W. R. 67; *Foscue v. Lyon*, 55 Ala. 440; *Matter of Curtis*, 121 Cal. 468; *Clark v. Anderson*, 13 Bush (Ky.) 111; *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526. See also *Jack's Appeal*, 94 Pa. St. 367.

5. *Mortgage Debt Need Not Be Called In as Soon as Security Depreciates.* — *In re Medland*, 41 Ch. D. 476, 58 L. J. Ch. 572, 60 L. T. N. S. 781, 37 W. R. 753.

6. *Investment on Junior Mortgages Improper — England.* — *Robinson v. Robinson*, 11 Beav. 371; *Lockhart v. Reilly*, 1 De G. & J. 476. See also *Norris v. Wright*, 14 Beav. 291; *Drosier v. Brereton*, 15 Beav. 221. Compare *Smethurst v. Hastings*, 30 Ch. D. 490, 55 L. J. Ch. 173, 52 L. T. N. S. 567, 33 W. R. 496; *In re Christ Church, Russ. Eq. Dec.* (Nova Scotia) 465.

*Canada.* — See *Andrews v. Hempstreet*, 1 Ch. Chamb. (Ont.) 347.

*Kentucky.* — See *Clark v. Anderson*, 13 Bush (Ky.) 111.

*Maine.* — *Mattocks v. Moulton*, 84 Me. 545.

*New Jersey.* — *Wilson v. Staats*, 33 N. J. Eq. 524; *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

*New York.* — *Bogart v. Van Velsor*, 4 Edw. (N. Y.) 718; *Matter of Petrie*, 5 Dem. (N. Y.) 352.

*Pennsylvania.* — *Makin's Estate*, 20 Pa. Co. Ct. 587, 7 Pa. Dist. 126, 14 Montg. Co. Rep. (Pa.) 103.

*South Carolina.* — *Singleton v. Lowndes*, 9 S. Car. 465. See also *Nance v. Nance*, 1 S. Car. 209.

7. *Second Mortgages Not Necessarily Improper.* — *Monroe v. Osborne*, 43 N. J. Eq. 248. See also *Gilmore v. Tuttle*, 32 N. J. Eq. 611, 36 N. J. Eq. 617.

8. *Where Part of Property Mortgaged Which Is Free from Liens Is a Sufficient Security.* — *Singleton v. Lowndes*, 9 S. Car. 465.

*Junior Mortgage Taken in Addition to Other Security.* — *Nance v. Nance*, 1 S. Car. 209.

*Aggregate of Liens Considerably Less than Value of Property.* — *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451.

*Belief that Mortgage Is a First Lien.* — *Slaughter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106. This case has been more fully discussed *supra*, *Propriety of Particular Investments — Real Securities — Care in Selecting Security.*

9. *Where No Loss Has Occurred.* — *Sherman v. Lanier*, 39 N. J. Eq. 249.



PRIETY. — The great preponderance of authority is in support of the view that, as a general rule, a loan by a fiduciary on personal security<sup>1</sup> is not a proper investment.<sup>2</sup> Thus a fiduciary should not advance any part of the trust funds on a mere promissory note,<sup>3</sup> though there be several obligors<sup>4</sup> or indorsers.<sup>5</sup>

b. VIEW THAT SUCH LOANS MAY BE MADE. — On the other hand, there are cases holding that loans on personal security are not necessarily improper,<sup>6</sup>

1. Meaning of "Personal Security." — "Evidences of debt which bind the person of the debtor, not real property, are distinguished from such as are liens on land by the name of 'personal securities.'" Black's L. Dict., Personal Security.

Bonds of a Railroad Corporation have been considered personal securities. *Allen v. Gaillard*, 1 S. Car. 279.

But as the rules in reference to investments in corporate bonds are somewhat different from those relating to investments in the obligations of individuals, which are treated in this subsection, the former will receive a separate treatment. See *infra*, this section, *Corporate Bonds*.

2. Loans on Personal Security Not Proper Investments — *England*. — *Pocock v. Reddington*, 5 Ves. Jr. 799; *Wilkes v. Steward*, Coop. 6, 14 Rev. Rep. 211; *Mills v. Osborne*, 7 Sim. 30; *Pickard v. Anderson*, L. R. 13 Eq. 608; *Holmes v. Dring*, 2 Cox Ch. 1; *Adye v. Feuilletau*, 1 Cox Ch. 24, 3 Swanst. 84, note; *Ryder v. Bickerton*, 2 Eden 149, note, 3 Swanst. 80, note; *Powell v. Evans*, 5 Ves. Jr. 841; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Collis v. Collis*, 2 Sim. 365; *Darke v. Martyn*, 1 Beav. 525; *Watts v. Girdlestone*, 6 Beav. 188, 12 L. J. Ch. 363, 7 Jur. 501; *Terry v. Terry*, Prec. Ch. 273; *Ex p. Geaves*, 8 De G. M. & G. 291; *Fowler v. Reynal*, 3 Macn. & G. 500; *Vigrass v. Binfield*, 3 Madd. 62; *Clough v. Bond*, 3 Myl. & C. 406; *Knight v. Plymouth*, 1 Dick. 120, 3 Atk. 480; *In re Speight*, 22 Ch. D. 727; *Ex p. Belchier*, 1 Ken. 38; *Anonymous*, Loft 492; *Keble v. Thompson*, 3 Bro. C. C. 112; *Walker v. Symonds*, 3 Swanst. 1, 19 Rev. Rep. 155. See also *Knox v. Knox*, 1 Hog. 117; *Keays v. Lane*, Ir. R. 3 Eq. 1; *Nail v. Punter*, 5 Sim. 555; *Waller v. Fowler*, Sausse & Sc. 274.

*Canada*. — *Spratt v. Wilson*, 19 Ont. 28.

*California*. — See *Lacoste's Estate*, Myr. Prob. (Cal.) 67.

*Florida*. — *Moore v. Hamilton*, 4 Fla. 112.

*Kentucky*. — *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355. See also *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

*Maine*. — See *Matlocks v. Moulton*, 84 Me. 545.

*Maryland*. — *Bacon v. Howard*, 20 Md. 191.

*Missouri*. — *Garesche v. Priest*, 78 Mo. 126, 9 Mo. App. 270.

*New Jersey*. — *Sherman v. Lanier*, 39 N. J. Eq. 249; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Dufford v. Smith*, 46 N. J. Eq. 216; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

*New York*. — *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Matter of Foster*, 15 Hun (N. Y.) 387; *Clark v. St. Louis, etc., R. Co.*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 21; *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Adair v. Brimmer*, 74 N. Y. 539; *Ormiston v. Olcott*, 84 N. Y. 339; *Ackerman v.*

*Emott*, 4 Barb. (N. Y.) 626; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *King v. Talbot*, 40 N. Y. 76; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Lefever v. Hasbrouck*, 2 Dem. (N. Y.) 567; *Matter of Cant*, 5 Dem. (N. Y.) 269.

*Pennsylvania*. — *Hemphill's Appeal*, 18 Pa. St. 303; *In re Wolgamuth*, 16 Lanc. L. Rev. (Pa.) 229; *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498; *Wills's Appeal*, 22 Pa. St. 330; *Wilson's Appeal*, 115 Pa. St. 95; *Swoyer's Appeal*, 5 Pa. St. 377; *Bradish's Estate*, 8 Pa. Dist. 38; *Johnson's Appeal*, 9 Pa. St. 416; *Cline's Appeal*, 106 Pa. St. 620; *McKesson's Estate*, 142 Pa. St. 538.

*Tennessee*. — *Wynne v. Warren*, 2 Heisk. (Tenn.) 118.

*Wisconsin*. — *Simmons v. Oliver*, 74 Wis. 633.

3. Loan on Promissory Note Unauthorized. — *Johnston v. Maples*, 49 Ill. 101; *Matter of Foster*, 15 Hun (N. Y.) 387; *In re Wolgamuth*, 16 Lanc. L. Rev. (Pa.) 229; *Simmons v. Oliver*, 74 Wis. 633.

A Promissory Note Is No Security for a Debt, but merely evidence thereof. *Ryder v. Bickerton*, 3 Swanst. 80, note.

4. Several Obligors. — *Clark v. Garfield*, 8 Allen (Mass.) 427.

5. Indorsed Note. — *Simmons v. Oliver*, 74 Wis. 633.

6. Loans on Personal Security Not Necessarily Improper — *England*. — *Harden v. Parsons*, 1 Eden 145.

*Georgia*. — See *Walker v. Walker*, 42 Ga. 135.

*Kentucky*. — *Durrett v. Com.*, 90 Ky. 312; *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651. See also *Higgins v. McClure*, 7 Bush (Ky.) 379.

*Massachusetts*. — See *Clark v. Garfield*, 8 Allen (Mass.) 427; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206.

*New Hampshire*. — *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609.

*New York*. — See *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Matter of Cant*, 5 Dem. (N. Y.) 269; *Matter of Keteltas*, 1 Connolly (N. Y.) 468.

*Ohio*. — *Scott v. Marion Tp.*, 39 Ohio St. 153.

*South Carolina*. — *Pope v. Mathews*, 18 S. Car. 444; *Nance v. Nance*, 1 S. Car. 209; *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184. See also *Mulligan v. Wallace*, 3 Rich. Eq. (S. Car.) 111; *Allen v. Gaillard*, 1 S. Car. 279; *Singleton v. Lowndes*, 9 S. Car. 465.

*Vermont*. — *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

In *Alabama* and *North Carolina* loans on good personal security have been expressly authorized by statute. *Lee v. Lee*, 55 Ala.



but may be justified by circumstances.<sup>1</sup>

**Necessity for Sureties.** -- Some of these cases have held that when such a loan is made the fiduciary should require sureties in addition to the personal obligation of the borrower.<sup>2</sup>

**5. Employment in Business or Speculation.** -- A fiduciary should not employ the funds intrusted to him in any business or trading enterprise, nor in speculative ventures, for none of these are strictly investments, and they are of a hazardous nature.<sup>3</sup>

**6. Corporate Stock** -- *a.* **VIEW THAT INVESTMENT THEREIN IS IMPROPER.** -- It has repeatedly been held that fiduciaries should not invest the funds intrusted to them in the stock of a private corporation,<sup>4</sup> especially where the

590; *Newman v. Reed*, 50 Ala. 297; *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *Foscue v. Lyon*, 55 Ala. 440; *Boyett v. Hurst*, 1 Jones Eq. (54 N. Car.) 166; *Watson v. Holton*, 115 N. Car. 36.

*Compare* the statutes in other jurisdictions.

**1. Necessity and Prudence of Investment Must Be Shown.** -- *Matter of Cant*, 5 Dem. (N. Y.) 269; *Matter of Keteltas*, 1 Connolly (N. Y.) 468; *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Nance v. Nance*, 1 S. Car. 209; *Allen v. Gailard*, 1 S. Car. 279; *Singleton v. Lowndes*, 9 S. Car. 465.

**Funds Should Be Called In When Unsafely Invested.** -- Where personal security is permissible, the trustee should call in the fund when it is unsafely invested in such security. *Brazer v. Clark*, 5 Pick. (Mass.) 96. See *Harding v. Larned*, 4 Allen (Mass.) 426; *Clark v. Garfield*, 8 Allen (Mass.) 427.

**2. Necessity for Sureties.** -- *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Nance v. Nance*, 1 S. Car. 209.

**Except in Extreme Cases** the courts will not approve of a loan without a surety. *Nobles v. Hogg*, 36 S. Car. 322.

*An Illustration* of such a case may be found in *Pope v. Mathews*, 18 S. Car. 444, where an executor was held not liable for losses on notes of individuals, which notes had neither surety nor security, where the obligors were men of large estates and undoubted credit, and such unsecured loans were usual, and the loss resulted only from the ruin of the obligors consequent upon the civil war.

**Surety "in Addition to the Borrower."** -- It is the policy of section 1592 of the *North Carolina Code* to require an investment by a fiduciary on personal security to be secured by the bond or note of some person "in addition to the borrower." Therefore, a note signed by a firm as principal debtor, and by one of the members of the firm as surety, does not fulfil the requirement of the law, for in such a case the surety is one of the borrowers. *Boyett v. Hurst*, 1 Jones Eq. (54 N. Car.) 166.

But it is otherwise where a loan is made to one member of a firm for his own private purposes, and, to secure the same, a bond is executed by the borrower and by another member of the firm, for in such case there is a person "in addition to the borrower" who has become responsible for the loan, and the borrower might become insolvent without involving the surety in his ruin. *Watson v. Holton*, 115 N. Car. 36.

**3. Employment in Business or Speculation Improper** -- *England.* -- *Cock v. Goodfellow*, 10

*Mod.* 489; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298; *French v. Hobson*, 9 Ves. Jr. 103; *Ex p. Garland*, 10 Ves. Jr. 110; *Crawshay v. Collins*, 15 Ves. Jr. 218; *Brown v. De Tastet*, Jac. 284; *Cook v. Collingridge*, Jac. 607; *Docker v. Somes*, 2 Myl. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen 722; *Booth v. Booth*, 1 Beav. 125; *Munch v. Cockerell*, 5 Myl. & C. 178. See also *Murray v. Glasse*, 23 L. J. Ch. 126.

*Canada.* -- *Worts v. Worts*, 18 Ont. 332.

*Alabama.* -- *Kyle v. Barnett*, 17 Ala. 306; *Martin v. Raborn*, 42 Ala. 648.

*Connecticut.* -- *Pitkin v. Pitkin*, 1 Conn. 307, 18 Am. Dec. 111; *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703.

*Illinois.* -- *Butler v. Butler*, 164 Ill. 171, *affirming* 61 Ill. App. 51.

*Kentucky.* -- *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

*Louisiana.* -- *Muntz v. Broom*, 11 La. Ann. 472.

*New York.* -- *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *English v. McIntyre*, 29 N. Y. App. Div. 439; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, *affirming* 3 N. Y. Leg. Obs. 337; *Flagg v. Ely*, 1 Edm. Sel. Cas. (N. Y.) 206; *Stedman v. Feidler*, 20 N. Y. 437. See also *Matter of Sharp*, 5 Dem. (N. Y.) 516.

*Ohio.* -- *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Adams v. Nelson*, 31 Cinc. L. Bul. 46.

**As to the Extent of Liability** for employment of trust fund in business or speculation, see *infra*, this title, *Liabilities of Fiduciaries* -- *For Using Trust Funds in Business or Speculation.*

**4. Stock of Private Corporation Not a Proper Investment** -- *England.* -- *Powell v. Cleaver*, 7 Ves. Jr. 142, note *a*; *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Hynes v. Redington*, 1 J. & Lat. 589; *Trafford v. Boehm*, 3 Atk. 440; *Clough v. Bond*, 3 Myl. & C. 496; *Baud v. Fardell*, 7 De G. M. & G. 633; *Emelie v. Emelie*, 7 Bro. P. C. (Toml. ed.) 259; *Mills v. Mills*, 7 Sim. 501; *Hancorn v. Allen*, 2 Dick. 499, note; *Peat v. Crane*, 2 Dick. 499, note. See also *Sculthorpe v. Tipper*, L. R. 13 Eq. 232, 41 L. J. Ch. 266, 26 L. T. N. S. 119, 20 W. R. 276.

*Canada.* -- *Harrison v. Harrison*, 14 Grant Ch. (U. C.) 586.

*Illinois.* -- *White v. Sherman*, 163 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

*Indiana.* -- *Tucker v. State*, 72 Ind. 242. See also *Gilbert v. Welsch*, 75 Ind. 557.

*Kentucky.* -- *Smith v. Smith*, 7 J. J. Marsh.



purposes of the company are speculative,<sup>1</sup> or its works are not finished and its financial success is therefore not assured,<sup>2</sup> or where its stock is of a fluctuating or speculative character,<sup>3</sup> or there are any circumstances connected with its affairs which would indicate that it is not in a prosperous condition.<sup>4</sup>

*b. VIEW THAT SUCH INVESTMENT IS NOT NECESSARILY IMPROPER.* — But there are also many cases in which it has been considered that a fiduciary does not necessarily violate his duty when he invests in corporate stock.<sup>5</sup> He

(Ky.) 238; *Clark v. Anderson*, 13 Bush (Ky.) 111. See also *Citizens Nat. Bank v. Jefferson*, 88 Ky. 651. But see next section.

*Maine.* — *Mattocks v. Moulton*, 84 Me. 545. *New York.* — *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, *affirming* 3 N. Y. Leg. Obs. 337; *Adair v. Brimmer*, 74 N. Y. 539.

*Pennsylvania.* — *Worrell's Appeal*, 23 Pa. St. 44, 9 Pa. St. 508; *Hemphill's Appeal*, 18 Pa. St. 303; *Ihmsen's Appeal*, 43 Pa. St. 431. See also *Bartol's Estate*, 182 Pa. St. 407.

*Consent of Cestui Que Trust.* — Though a trustee has no right to invest in bank stock without authority, this rule does not apply where the *cestui que trust* is of full age and competent in point of law to act for herself, and gives her sanction to such an investment. *Harrison v. Harrison*, 14 Grant Ch. (U. C.) 586.

As to the general effect of the acquiescence of the *cestui que trust* upon the liability of the fiduciary, see *infra*, this title, *Liabilities of Fiduciaries* — *Effect of Beneficiary's Consent to or Acquiescence in Improper Investment*.

*Constitutional Prohibition in Pennsylvania.* — There have been many cases in Pennsylvania, mostly under statutes, in reference to the propriety of investment in corporate stocks; but the question has been finally settled by article 3, section 22 of the Constitution which went into effect January 1, 1874, which provides: "No act of the general assembly shall authorize the investment of trust funds by executors, administrators, guardians, or other trustees, in the bonds or stock of any private corporation; and such acts now existing are avoided, saving investments heretofore made." See *Barker's Estate*, 2 Pa. Dist. 571.

For the course of decisions on the subject of investment in private corporation stocks, *pro* and *con*, mostly in exposition of statutes, see *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498; *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642; *Pray's Appeal*, 34 Pa. St. 100; *In re Ogle*, 5 Pa. St. 15; *Rush's Estate*, 12 Pa. St. 375; *Barton's Estate*, 1 Pars. Eq. Cas. (Pa.) 24; *Worrell's Appeal*, 9 Pa. St. 508, 23 Pa. St. 44; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *Hemphill's Appeal*, 18 Pa. St. 303; *Ihmsen's Appeal*, 43 Pa. St. 431; *Pleasant's Appeal*, 77 Pa. St. 356. These cases were discussed in 25 Am. Law Reg. N. S. 217, in the leading article, and reference made to *McCahan's Appeal*, 7 Pa. St. 56; *Angue's Estate*, 2 Phila. (Pa.) 137, 13 Leg. Int. (Pa.) 221; *Seidler's Estate*, 5 Phila. (Pa.) 85, 10 Leg. Int. (Pa.) 149; *Gaw's Estate*, 34 Leg. Int. (Pa.) 66, 24 Pittsb. Leg. J. (Pa.) 128; *Shields's Estate*, 14 Phila. (Pa.) 307, 38 Leg. Int. (Pa.) 261; *Jack's Appeal*, 94 Pa. St. 367; *Pleasanton's Appeal*, 99 Pa. St. 362; *Eyster's Appeal*, 16 Pa. St. 372; *Fahnestock's Appeal*, 104 Pa. St. 46.

1. *Company Formed for Speculative Purposes.* — *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 53 Am. St. Rep. 64.

2. *Works Not Finished.* — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Pray's Appeal*, 34 Pa. St. 100.

It would generally be held a breach of trust for a trustee to invest in stocks of new corporations or companies, taking the risk attending loans to such untried and adventurous companies, though he acted in good faith. *Ihmsen's Appeal*, 43 Pa. St. 431.

3. *Fluctuating and Speculative Character of Stock.* — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

4. *Investment in Stock of Bank Which Has Suspended Specie Payments Improper.* — *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642.

5. *Investment in Stock of Private Corporation Not Improper* — *England.* — *Ex p. Colne Valley*, etc., R. Bill, 1 De G. F. & J. 53; *Cohen v. Waley*, 7 Jur. N. S. 937, 3 L. T. N. S. 436, 9 W. R. 137; *Peillon v. Brooking*, 4 L. T. N. S. 731.

*Kentucky.* — *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355. See also *Hite v. Hite*, 93 Ky. 257, 40 Am. St. Rep. 189.

*Maryland.* — *Murray v. Fimour*, 2 Md. Ch. 418; *Hammond v. Hammond*, 2 Bland (Md.) 306; *Evans v. Iglehart*, 6 Gill & J. (Md.) 171; *McCoy v. Horwitz*, 62 Md. 183. See also *Gray v. Lynch*, 8 Gill (Md.) 403.

*Massachusetts.* — *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Kinmonth v. Brigham*, 5 Allen (Mass.) 270; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Hunt, Appellant*, 141 Mass. 515; *Dickinson, Appellant*, 152 Mass. 184. See also *Bowker v. Pierce*, 130 Mass. 262; *Daland v. Williams*, 101 Mass. 571; *Poole v. Munday*, 103 Mass. 174.

*New Jersey.* — *Tucker v. Tucker*, 33 N. J. Eq. 235; *Woodruff v. Ward*, 35 N. J. Eq. 467.

*New York.* — *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

*Rhode Island.* — *Peckham v. Newton*, 15 R. I. 321.

*English Rule.* — As to the extent to which investments in corporate stock are allowed in England, see the *Trustee Act of 1893* (56 & 57 Vict., c. 53), set out in 12 Encyc. L. of Eng., p. 335 *et seq.* See also the provisions of Lord St. Leonards' Act (22 & 23 Vict., c. 35) as stated in *Ex p. Colne Valley*, etc., R. Bill, 1 De G. F. & J. 53. And see further *In re Kavanagh*, 27 L. R. Ir. 495; *Edwards v. Edmunds*, 34 L. T. N. S. 522; *Hynes v. Redington*, 1 J. & LaT. 589, 7 Ir. Eq. 409, L. & G. t. Plunk. 33.

As to Investments in South Sea Stock, see *Traford v. Boehm*, 3 Atk. 440; *Trenchard v. Wanley*, 2 P. Wms. 165, 3 Eq. Cas. Abr. 725, par. 2; *Weaver v. Fowler*, 2 P. Wms. 170, note;



should choose, however, the stock of those corporations which have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stock as permanent investments.<sup>1</sup>

**7. Corporate Bonds.** — The preponderance of authority seems to be in favor of the view that fiduciaries may invest the funds in their custody in corporate bonds, provided due care is used in selecting the well-secured bonds of a company which is in good financial standing;<sup>2</sup> though in some cases the propriety of such investments has been denied.<sup>3</sup>

**8. Deposits in Bank.** — It has been asserted that a fiduciary should not place or keep trust funds on deposit in a bank as an investment, or where there are no such recurring demands upon him in his fiduciary capacity as require the money to be kept on hand in this convenient manner for the purpose of meeting them.<sup>4</sup>

*Balsh v. Hyham*, 2 P. Wms. 453, 3 Eq. Cas. Abr. 741, par. 8.

**Shares on Which There Is a Personal Liability — No Loss Resulting from Investment.** — In the case where trustees, having a wide discretion by the will under which they acted, had invested in bank shares on which there was a further liability, and which were afterwards sold at a profit, the court allowed the investment and refused to hold the trustees personally responsible therefor. *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692.

**Loan on Promissory Note Secured by Pledge of Corporate Stock Held Proper.** — *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206.

**1. Character of Stocks in Which Investments May Be Made.** — *Dickinson*, Appellant, 152 Mass. 184. The court in stating this rule applied it to corporate bonds also.

**Distinction in Kentucky.** — The distinction recognized by the court of Kentucky is stated by Pryor, J., delivering the opinion of the court in *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651, as follows: "The case cited [*Luxon v. Wilgus*, 7 Bush (Ky.) 205] has gone too far in determining that the trustee had the right to invest in any kind of property, as we have already seen that to invest in stocks that are constantly fluctuating, and that by reason of their uncertain value might afford an income to the beneficiary one month and render her destitute the next, although the investment was made in good faith and in the exercise of what the trustee supposed was a sound discretion, would be an abuse of the trust. Such stocks as have a fixed value, or that ordinarily furnish a regular income, although the income may be slightly less in one month or year than the next, the trustee may invest in. The test of value is the income the stock affords, and that is free from such hazard as necessarily pertains to stocks whose value must depend upon mere contingencies."

**2. Investments in Corporate Bonds Proper.** — *In re Smith*, (1896) 1 Ch. 71; *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Dickinson*, Appellant, 152 Mass. 184; *Peckham v. Newton*, 15 R. I. 321.

**Character of Bonds Which May Be Purchased.** — See *Dickinson*, Appellant, 152 Mass. 184, *supra*, preceding subsection.

**Investment in Bonds Not Secured by Mortgage Improper.** — *Allen v. Gaillard*, 1 S. Car. 279.

**Kentucky Rule.** — Under the Kentucky Act of April 29, 1890, a fiduciary is prohibited from investing in the bonds or securities of a railroad or other corporation, unless such railroad or other corporation has been in operation more than ten years, and during that time has not defaulted in the payment of principal or interest on its bonded debt. *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355.

**New York Doctrine.** — In *King v. Talbot*, 40 N. Y. 90, Woodruff, J., said that it was not necessary to hold that under no circumstances could an investment in the bonds of a railroad or other corporation, secured by a mortgage upon real estate, be deemed suitable or proper; but that if the real estate was ample to insure the payment of the bonds, they were not necessarily to be regarded as inferior to the bond of an individual, secured by mortgage, but that it would be open of course to all the inquiries which prudence would suggest if the bond and mortgage were those of an individual. The nature, location, and sufficiency of the security, and the terms of the mortgage and its availability for the protection and ultimate realization of the fund, must be taken into consideration. See also *Adair v. Brimmer*, 74 N. Y. 539; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Matter of Keteltas*, 1 Connolly (N. Y.) 468. But see *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, *affirming* 3 N. Y. Leg. Obs. 337.

**3. Bonds of Private Corporations Not a Proper Investment.** — *Clark v. Anderson*, 13 Bush (Ky.) 111.

**The Constitution of Pennsylvania Prohibits Investments in Bonds of Private Corporations.** — Const. Pa. (1874), art. 3, § 22.

In *In re Ogle*, 5 Pa. St. 15, decided before the adoption of the constitutional provision referred to, the court allowed credit for an investment by a guardian in the loan of a corporation owning coal lands and a canal, and chartered to carry on the business of mining, shipping, and carrying coal, where the value of the landed capital of the company, to say nothing of its works, vastly exceeded the amount of its debts, and the income from its coal mines and canal was appropriated to payment of interest on its loans in the first instance; considering that the investment was made in substance, though not in form, in real security.

**4. Deposits in Bank Improper.** — *Moyle v. Moyle*, 2 Russ. & M. 710; *Darke v. Martyn*, 1 Beav. 525; *Spratt v. Wilson*, 19 Ont. 28; *Mat-*



On the Other Hand, however, there are cases in which deposits in bank have been sustained as investments.<sup>1</sup>

**Temporary Deposit.** — And there would certainly seem to be no reason why a fiduciary should not deposit funds in his hands temporarily while he is seeking an investment for them,<sup>2</sup> or while he is awaiting the confirmation of his final accounts,<sup>3</sup> or pending a transaction for the appointment of a new fiduciary in his place.<sup>4</sup>

**9. Purchase of Real Estate.** — The preponderance of authority is in support of the view that fiduciaries are not authorized to lay out the funds in their hands in the purchase of real estate,<sup>5</sup> at any rate without first obtaining the sanction of the court having jurisdiction in the matter of investments.<sup>6</sup> But there are cases in which the expending of trust funds in the purchase or improvement of real estate has been approved or held to be authorized,<sup>7</sup> in many instances on account of the existence of some particular circumstances making such a departure from the general rule advisable.<sup>8</sup>

ter of Knight, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388. See also *Matthews v. Brise*, 6 Beav. 239, 12 L. J. Ch. 263, *affirmed* 10 Jur. 105, 15 L. J. Ch. 39; *Rehden v. Wesley*, 29 Beav. 213; *Drever v. Mawdesley*, 16 Sim. 511, 18 L. J. Ch. 273, 13 Jur. 330; *Anonymous*, Lofft 492; *Barney v. Saunders*, 16 How. (U. S.) 535.

**Keeping Money on Deposit in Bank Not an Investment.** — *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388; *Evans's Estate*, 7 Pa. Super. Ct. 142.

**Keeping on Deposit Money Required to Meet Recurring or Impending Demands Permissible.** — *Johnson v. Newton*, 11 Hare 169.

**Deposit of Current Collections.** — A trustee is not liable for a loss resulting from the failure of a banking firm with which he had deposited current collections, where he acted in good faith and with the advice of counsel in making such deposit, and had no reason to suspect the solvency of the bankers, and the deposits were made within six weeks before the failure of the bankers. *Barney v. Saunders*, 16 How. (U. S.) 535.

**Pennsylvania Doctrine.** — In *Frakenfield's Appeal*, 11 W. N. C. (Pa.) 373, and *Baer's Appeal*, 127 Pa. St. 360, fiduciaries were held liable for losses on deposits in bank, but in both cases the liability was predicated wholly on the fact that the transaction took the character of a loan; and in both cases it was intimated that if the moneys had been simply deposited temporarily, and subject to the check of the depositors, the legal result would have been otherwise. See also *Breneman v. Mylin*, 12 Pa. Co. Ct. 324, 2 Pa. Dist. 296; *Law's Estate*, 144 Pa. St. 499; *Evans's Estate*, 7 Pa. Super. Ct. 142.

**1. Deposits in Bank Sustained as Investments.** — *Mills v. Swearingen*, 67 Tex. 269; *Hunt, Appellant*, 141 Mass. 515. See also *Parsley v. Martin*, 77 Va. 376, 46 Am. Rep. 733; *Wherry's Estate*, 19 Pa. Co. Ct. 664.

**2. Deposit as a Temporary Investment.** — *Wilkins v. Hogg*, 8 Jur. N. S. 25, 31 L. J. Ch. 41, 5 L. T. N. S. 467, 10 W. R. 47.

**3. Deposit Pending Confirmation of Account.** — *Breneman v. Mylin*, 12 Pa. Co. Ct. 324, 2 Pa. Dist. 296.

**4. Deposit Pending Transaction for Appointment of New Fiduciary.** — *Adams v. Claxton*, 6 Ves. Jr. 226.

**5. Purchase of Real Estate Not a Proper Investment** — *Alabama*. — See *Royall v. McKenzie*, 25 Ala. 363.

*Illinois*. — *Butler v. Butler*, 164 Ill. 171, *affirming* 61 Ill. App. 51. See also *Attridge v. Billings*, 57 Ill. 489.

*Missouri*. — *Woods v. Boots*, 60 Mo. 546; *West v. West*, 75 Mo. 204.

*New York*. — *Matter of Bolton*, 159 N. Y. 129, *affirming* 37 N. Y. App. Div. 625, which *affirmed* (Surrogate Ct.) 20 Misc. (N. Y.) 532; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, *affirmed* 18 Hun (N. Y.) 29, *affirmed* by 79 N. Y. 631; *Eckford v. De Kay*, 8 Paige (N. Y.) 89, *affirmed* 26 Wend. (N. Y.) 29.

*Ohio*. — See *Cincinnati Fourth Nat. Bank v. Hopple*, 6 Ohio Dec. 482, 4 Ohio N. P. 345.

*Pennsylvania*. — *Kaufman v. Crawford*, 9 W. & S. (Pa.) 131, 42 Am. Dec. 323. See also *Re Horne*, 28 Pittsb. Leg. J. N. S. (Pa.) 443; *Bonsall's Appeal*, 1 Rawle (Pa.) 266.

*South Carolina*. — *Morton v. Adams*, 1 Strobb. Eq. (S. Car.) 72; *Mathews v. Heyward*, 2 S. Car. 239.

**Freehold Houses.** — The court will not sanction the investment of a fund in court in freehold houses, no matter how eligible they may be. *Moore v. Walter*, 8 L. T. N. S. 448, 11 W. R. 713.

**6. Investment in Real Estate Without Order of Court Therefor Improper.** — *West v. West*, 75 Mo. 204; *Mathews v. Heyward*, 2 S. Car. 239; *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616. See also *Sherry v. Sansberry*, 3 Ind. 320.

**7. Cases Holding Investment in Real Estate Proper.** — *Terry v. Terry*, Prec. Ch. 273, Gilb. 10; *In re Sheffield, etc.*, R. Co., 1 Smale & G. (appendix) iv.; *Re Cronan*, 6 Ont. Pr. 221; *Allen v. Graves*, 3 Bush (Ky.) 491. See also *Robinson v. Robinson*, Ir. R. 10 Eq. 189; *Ashburton v. Ashburton*, 6 Ves. Jr. 6, 5 Rev. Rep. 201; *Ex p. Calmés*, 1 Hill Eq. (S. Car.) 112.

**8. Bona Fide Intention to Benefit Trust Estate.** — *Bonsall's Appeal*, 1 Rawle (Pa.) 266.

**Purchase of Adjoining Land in Order to Benefit Trust Estate.** — *Smith v. Smith*, 23 Grant Ch. (U. C.) 114.

**Erection of House for Residence of Beneficiaries.** — *Smith v. Smith*, 23 Grant Ch. (U. C.) 114. Compare *Re Mason*, 3 Ch. Chamb. (Ont.) 426.

**Money Arising from Condemnation of Real Estate Permitted to Be Used in Improving Other Real Estate.** — *Matthews v. Dellicker*, 39 N. J. Eq. 90.



10. Loans to Co-Fiduciaries. — It is not proper for fiduciaries to make loans to one of their number.<sup>1</sup>

11. Rule as to Investments Made by Creator of Trust. — It has been said that the fact that the creator of the trust has made certain investments commends them for retention so long as there is no doubt of their safety.<sup>2</sup> If, however, any general application can be given to this statement, it must be subject to the qualification that while a fiduciary may, as a rule, in the exercise of his discretion, retain such investments as are proper for fiduciaries to hold,<sup>3</sup> all others he must call in, and invest the proceeds in an authorized manner,<sup>4</sup> especially where a conversion of the securities is directed by the trust instrument.<sup>5</sup>

Time When Investments Should Be Called In. — It is impossible to lay down any general rule as to the particular time within which investments made by the creator of a trust should be called in, but the question depends upon the circumstances of the case and the nature of the property.<sup>6</sup>

VII. SITUS OF INVESTMENTS. — As a general rule, fiduciaries should make their investments in the state or country where the trust arose, and the courts will not sanction any investments which take the trust funds beyond their

Funds Derived from Sale of Real Estate. — The *Missouri* statute (Sess. Acts 1866, p. 84) empowering probate courts to order the investment by guardians in the purchase of real estate with funds of their wards applies only to the case of funds derived from the sale of other real estate, and neither under the statute nor independent of it can the guardian invest funds accruing from other sources in the purchase of real estate, nor can the probate court authorize such a purchase. *Woods v. Boots*, 60 Mo. 546.

1. Loans to Co-Fiduciaries Improper. — *Gleadow v. Atkin*, 2 Cromp. & J. 548; *Matter of Petrie*, 5 Dem. (N. Y.) 352. See also *French v. Hobson*, 9 Ves. Jr. 103.

2. The Fact that Bonds and Stocks Were Bought by a Testator Commends Them for Retention. — *Peckham v. Newton*, 15 R. I. 321. See also *Murray v. Feinour*, 2 Md. Ch. 418.

3. What Investments Made by Creator of Trust May Be Retained. — *England*. — *Baud v. Fardell*, 7 De G. M. & G. 628; *Re Brooks*, 76 L. T. N. S. 771.

*Kentucky*. — *Fidelity Trust, etc., Co. v. Glover*, 90 Ky. 355.

*Massachusetts*. — *Bowker v. Pierce*, 130 Mass. 262.

*Mississippi*. — *Troup v. Rice*, 55 Miss. 278.

*New Jersey*. — *Ward v. Kitchen*, 30 N. J. Eq. 31; *Parker v. Glover*, 42 N. J. Eq. 559; *Green v. Green*, 30 N. J. Eq. 451; *Halsted v. Meeker*, 18 N. J. Eq. 136; *Coddington v. Stone*, 36 N. J. Eq. 362.

*New York*. — *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Shumway v. Graves*, 13 N. Y. Wkly. Dig. 402; *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844.

*North Carolina*. — *Torrence v. Davidson*, 92 N. Car. 437, 53 Am. Rep. 419; *Patterson v. Wadsworth*, 89 N. Car. 407.

*Pennsylvania*. — *M'Nair's Appeal*, 4 Rawle (Pa.) 148; *Stewart's Appeal*, 110 Pa. St. 410.

*Rhode Island*. — *Grinnell v. Baker*, 17 R. I. 41.

*South Carolina*. — *Pope v. Mathews*, 18 S. Car. 453.

*Virginia*. — *Watkins v. Stewart*, 78 Va. 111.

Trustees Are Not Liable for a Failure to Convert Bank Shares Specifically Bequeathed to Them in the absence of a clear direction to convert the same. *Craven v. Craddock*, 20 L. T. N. S. 638.

4. Investments Made by Creator of Trust Should Be Called In When Not Proper for Fiduciaries. — *England*. — *Howe v. Dartmouth*, 7 Ves. Jr. 150; *Bullock v. Wheatley*, 1 Coll. Ch. Cas. 130; *Marsden v. Kent*, 5 Ch. D. 598. See also *Atty.-Gen. v. Higham*, 2 Y. & C. Ch. 634.

*New Jersey*. — *McCullough v. McCullough*, 44 N. J. Eq. 313; *Ward v. Kitchen*, 30 N. J. Eq. 31.

*New York*. — *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Matter of Macdonald*, 4 Redf. (N. Y.) 321; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349; *Barker v. Smith*, 1 Dem. (N. Y.) 291; *Judd v. Warner*, 2 Dem. (N. Y.) 104.

5. Direction to Sell Personal Estate. — Trustees under a will who are directed to sell the personal estate of the testator have no right to retain shares in an unlimited banking company which the testator had, or to accept new shares in the bank which were allotted to the holders of old shares. *Sculthorpe v. Tipper*, L. R. 13 Eq. 232, 41 L. J. Ch. 266, 26 L. T. N. S. 119, 20 W. R. 276.

6. Time When Investments Should Be Called In Depends upon Circumstances. — *Hughes v. Empson*, 22 Beav. 181.

In *Buxton v. Buxton*, 1 Myl. & C. 80, it was held that where an executor had not sold Mexican bonds until a year and a half after the death of the testator, but had kept them in good faith, he ought not to be charged with the loss.

In *Judd v. Warner*, 2 Dem. (N. Y.) 104, it was held that, while executors or administrators who retained investments made by their testator were not chargeable with a loss which occurred within a reasonable time for the administration of estates, or within a reasonable time after the death of the testator, this rule did not apply where the securities were retained for a long time, as, in the case at bar, eleven years, after the testator's death, the personal representatives then holding the fund as trustees.



jurisdiction.<sup>1</sup> But this rule is not so rigid as to admit of no possible exceptions,<sup>2</sup> and relates only to voluntary investments by a fiduciary having the funds in his hands and full opportunity and freedom of choice.<sup>3</sup>

A Power to Invest in Real Securities in England or Wales has been held to authorize such an investment in *Ireland* also.<sup>4</sup>

#### VIII. SEPARATE INVESTMENT OF FUNDS HELD ON DIFFERENT TRUSTS. —

Where a testator has bequeathed to his executors or trustees several sums of money in trust for different persons, the several trust funds must be kept separately invested, and each fund must be kept separate from all the other funds, so that every step in its management may be distinctly traceable in the accounts of the fiduciaries and in the investments they make, and so that it shall not, through investment, be complicated with the rights of strangers to it, or required to share in the losses of other funds.<sup>5</sup>

**1. General Rule as to Situs of Investments —** *England.* — See *Bethell v. Abraham*, L. R. 17 Eq. 24, 43 L. J. Ch. 180, 29 L. T. N. S. 715, 22 W. R. 179; *In re Brackenbury*, 31 L. T. N. S. 79, 22 W. R. 682; *Waller v. Fowler, Sausse & Sc.*, 274. Compare *Lewis v. Nobbs*, 8 Ch. D. 591, 47 L. J. Ch. 662, 26 W. R. 631; *Sadler v. Turner*, 8 Ves. Jr. 617.

*Connecticut.* — *State v. Washburn*, 67 Conn. 188.

*New Jersey.* — *McCullough v. McCullough*, 44 N. J. Eq. 313.

*New York.* — *Ormiston v. Olcott*, 84 N. Y. 339, *affirming* in this respect 22 Hun (N. Y.) 270, though *reversing* judgment therein; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Denton v. Sanford*, 103 N. Y. 607, *affirming* 39 Hun (N. Y.) 487.

*North Carolina.* — *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284. See also *Boyet v. Hurst*, 1 Jones Eq. (54 N. Car.) 166.

*Pennsylvania.* — *Rush's Estate*, 12 Pa. St. 375; *Roberts's Estate*, 22 Pa. Co. Ct. 4.

In a case where trustees, having a wide discretion given them by the will under which they acted, had invested in bonds of foreign countries, the court allowed the investment, saying that the trustees could not be held personally responsible, and that there had been no loss to the trust estate, but saying also that the securities in question ought to be converted. *In re Brown*, 29 Ch. D. 889, 54 L. J. Ch. 1134, 52 L. T. N. S. 853, 33 W. R. 692.

**Reasons of the Rule.** — It would often be unjust to beneficiaries to compel them to accept foreign investments, and would tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents; and legal remedies would have to be sought under the disadvantages of distance, and before different and unfamiliar tribunals. *Ormiston v. Olcott*, 84 N. Y. 339. See also *McCullough v. McCullough*, 44 N. J. Eq. 313.

**Nonresident Trustees.** — Where the trustee is without the territorial jurisdiction, it becomes more important that the funds should be within it, for otherwise the courts would find themselves stripped not only of power to investigate properly the condition of the trust, but also of power to enforce their decrees. In the application of this principle it was held that trustees

appointed in New Jersey and accountable in that state could not invest upon mortgages on lands in Minnesota, in which state they resided. *McCullough v. McCullough*, 44 N. J. Eq. 313.

**2. Rule Subject to Exceptions.** — *Ormiston v. Olcott*, 84 N. Y. 339; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Denton v. Sanford*, 103 N. Y. 607, *affirming* 39 Hun (N. Y.) 487.

**Change from One Foreign Investment to Another Similar One.** — Where the trust estate which came into possession of a guardian consisted in part of stock of banks situated in other states, and, such stock appearing unsafe, the guardian in good faith sold it and invested in stock of another bank in the same state in which one of the banks of which stock had been held was situated, this was held not to be such a removal of the ward's property out of the state as is forbidden by the statutes of *Kentucky*. *Durrett v. Com.*, 90 Ky. 312.

**Where Beneficiary Resides in a Foreign Jurisdiction.** — In *Sanborn v. Sanborn*, 11 Grant Ch. (U. C.) 359, it was held that the court would direct moneys belonging to an infant who resided in a foreign country to be placed at the disposal of a proper court in such country, which would cause them to be invested for the benefit of the infant.

And in *Amory v. Green*, 13 Allen (Mass.) 413, it was held that a trustee had done his duty under a direction to invest in a dwelling house, when he bought one in a foreign jurisdiction where the beneficiary was residing.

See the case of *McCullough v. McCullough*, 44 N. J. Eq. 313, cited in the preceding note, for the course pursued by the court where both the fiduciaries and some of the beneficiaries lived in states other than that in which the trust arose.

**3. Rule Applies Only Where Fiduciary Has Freedom of Choice.** — *Ormiston v. Olcott*, 84 N. Y. 339; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

**4. Power to Invest in Real Securities in England or Wales Authorizes Investment in Ireland.** — *Ex p. Pawlett*, 1 Phil. 570, 14 L. J. Ch. 321.

**5. Separate Investment of Funds Held on Different Trusts.** — *McCullough v. McCullough*, 44 N. J. Eq. 313. See also *Atty.-Gen. v. Fishmonger's Co.*, 1 Keen 492; *Fraser v. Murdoch*, 6 App. Cas. 855, 45 L. T. N. S. 417, 30 W. R. 162.



**IX. DESIGNATION OF FIDUCIARY CAPACITY IN WHICH INVESTMENTS ARE HELD**

-- 1. Rule Stated. — An investment or deposit of trust funds should always bear the impress of the trust; and it is almost universally considered that a fiduciary commits a breach of trust for which he is liable, where he invests or deposits the funds intrusted to him in his own individual name or to his individual credit, with nothing to show that he holds such investment or deposit in a fiduciary capacity.<sup>1</sup>

2. Rule Applies though Fiduciary Acted in Good Faith. — The liability of the fiduciary in such case is generally predicated upon the naked fact that there has been an unauthorized dealing with the trust fund, and the fact that the fiduciary acted with perfect good faith and integrity does not relieve him.<sup>2</sup> But the rule is otherwise in *Virginia*.<sup>3</sup>

1. Investment or Deposit in Individual Name of Fiduciary Improper — *England*. — *Fletcher v. Walker*, 3 Madd. 73; *Pennell v. Deffell*, 23 Eng. L. & Eq. 460; *Macdonnell v. Harding*, 7 Sim. 178; *Massey v. Banner*, 4 Madd. 413, 1 Jac. & W. 248. See also *Wren v. Kirton*, 11 Ves. Jr. 377; *Salway v. Salway*, 2 Russ. & M. 215; *Tebbs v. Carpenter*, 1 Madd. 290; *Mathews v. Brise*, 6 Beav. 239; *Robinson v. Ward*, 2 C. & P. 59, 12 E. C. L. 28, R. & M. 274, 21 E. C. L. 438; *Freeman v. Fairlie*, 3 Meriv. 29; *Hilliard's Case*, 1 Ves. Jr. 89; *Winchelsea v. Norcliffe*, 1 Vern. 435.

*Alabama*. — *De Jarnette v. De Jarnette*, 41 Ala. 708, explaining *Tomkies v. Reynolds*, 17 Ala. 109.

*California*. — *Matter of Bane*, 120 Cal. 533. See also *Lacoste's Estate*, Myr. Prob. (Cal.) 67.

*Georgia*. — See *Gray v. Perry*, 51 Ga. 180.

*Illinois*. — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271, and citing 27 AM. AND ENG. ENCYC. OF LAW (1st ed.) 160-163.

*Indiana*. — *Gilbert v. Welsch*, 75 Ind. 557; *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753; *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Corya v. Corya*, 119 Ind. 593. Compare *Richardson v. State*, 55 Ind. 381, *infra*.

*Kansas*. — *Merket v. Smith*, 33 Kan. 66. See also *Morrill v. Raymond*, 28 Kan. 415; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Ellicott v. Barnes*, 31 Kan. 171.

*Kentucky*. — See *Cartmell v. Allard*, 7 Bush (Ky.) 482.

*Louisiana*. — See *Norris v. Hero*, 22 La. Ann. 605.

*Maine*. — See *Bartlett v. Hamilton*, 46 Me. 435.

*Maryland*. — *Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539.

*Massachusetts*. — See *Brown v. Dunham*, 11 Gray (Mass.) 42, in which case the court said that the mere fact that notes in which a ward's money was invested were made payable to the guardian in his individual name, and negotiable, without any evidence of an appropriation of them or any attempt to appropriate them to his own use, was not sufficient evidence of his conversion of the money and mingling it with his own; but nevertheless held that after the death of the guardian the ward could recover the full value of the notes from his estate, and this in an action of tort for the conversion of the notes.

*New Hampshire*. — *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609.

*New York*. — *Matter of Stafford*, 11 Barb. (N. Y.) 353; *Otto v. Van Riper*, 31 N. Y. App. Div. 278. See also *Baskin v. Baskin*, 4 Lans. (N. Y.) 90; *Roosevelt v. Land, etc., Imp. Co.*, 3 N. Y. App. Div. 563, affirming 11 Misc. (N. Y.) 595.

*North Carolina*. — *Summers v. Reynolds*, 95 N. Car. 404. But compare *Syme v. Badger*, 92 N. Car. 706.

*Pennsylvania*. — *Royer's Appeal*, 11 Pa. St. 36; *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *McAllister v. Com.*, 30 Pa. St. 536; *Com. v. McAllister*, 28 Pa. St. 480; *Lukens's Appeal*, 7 W. & S. (Pa.) 48. See also *Hammon v. Cottle*, 6 S. & R. (Pa.) 290; *Norris's Appeal*, 71 Pa. St. 106. But compare *Bonsall's Appeal*, 1 Rawle (Pa.) 266.

*South Carolina*. — See *Morton v. Adams*, 1 Strobb. Eq. (S. Car.) 72.

*Tennessee*. — *Mason v. Whitthorne*, 2 Coldw. (Tenn.) 242.

*Wisconsin*. — *Booth v. Wilkinson*, 78 Wis. 652, 23 Am. St. Rep. 443; *O'Connor v. Decker*, 95 Wis. 202; *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, overruling *School Dist. v. Zink*, 25 Wis. 636, so far as that case conflicts with the rule stated.

**Note Payable to Predecessor in Trust.** — A guardian has no right to take as money belonging to his ward's estate a promissory note payable to his predecessor individually. And if a note so taken proves to be uncollectible, he is liable to the amount. *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753.

2. **Good Faith of Fiduciary Does Not Relieve from Liability.** — *Matter of Bane*, 120 Cal. 533, distinguishing *Cousins's Estate*, 111 Cal. 441; *Matter of Arguello*, 97 Cal. 196; *Gilbert v. Welsch*, 75 Ind. 557; *Booth v. Wilkinson*, 78 Wis. 652, 23 Am. St. Rep. 443; *O'Connor v. Decker*, 95 Wis. 202. See also *De Jarnette v. De Jarnette*, 41 Ala. 708; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271; *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *McAllister v. Com.*, 30 Pa. St. 536. See generally *infra*, this title, *Liabilities of Fiduciaries — Losses on Unauthorized Investments*.

3. **Virginia Rule.** — In Virginia it is considered that if a fiduciary deposits money in his own name in a bank in which he has no funds of his own, he is answerable only for due diligence in the selection of the depository



3. **Proper Form for Investments.** — As a general rule the fiduciary should make investments or deposits in his name as such fiduciary — that is, he should add to his name the appropriate designation of the capacity in which he acts, as trustee, guardian, executor, etc.;<sup>1</sup> but he may also make such investments directly in the name of the beneficiary or person for whom he holds the fund.<sup>2</sup>

4. **Extent of Liability for Investments or Deposits in Individual Name.** — Where a fiduciary invests or deposits trust money in his individual name, he commits a breach of trust which is practically the same, and subjects him to the same liability, as if there had been a wilful conversion to his own use, or a commingling of the trust funds with his own private funds.<sup>3</sup>

**X. INCOME TO BENEFICIARIES** — 1. **Duty of Fiduciary to Secure.** — As has been seen, it is the duty of a fiduciary so to invest the funds in his hands as to produce an income for the person or persons entitled to receive the benefit of the funds.<sup>4</sup>

2. **Rate of Interest on Investments** — *a.* **GENERAL RULE.** — Fiduciaries should choose investments which will yield as high a rate of interest as is consistent with the safety of the principal of the fund,<sup>5</sup> and, if possible, should obtain

and due vigilance in respect to such depositor's continued solvency. *Gregory v. Parker*, 87 Va. 451, citing *Parsley v. Martin*, 77 Va. 376, 46 Am. Rep. 733, and *Cooper v. Cooper*, 77 Va. 198, and *distinguishing* *Pidgeon v. Williams*, 21 Gratt. (Va.) 255, and *Vaiden v. Stabblefield*, 28 Gratt. (Va.) 153. See also *Davis v. Harman*, 21 Gratt. (Va.) 194.

1. **Addition of Words Indicating Fiduciary Capacity Sufficient.** — *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753; *Otto v. Van Riper*, 31 N. Y. App. Div. 278. See also *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739; *Marquess v. La Baw*, 82 Ind. 550; *Sanders v. State*, 49 Ind. 228; *Bundy v. Monticello*, 84 Ind. 119; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Ammon v. Wolfe*, 26 Gratt. (Va.) 621.

2. **Investment May Be in Name of Beneficiary.** — *Otto v. Van Riper*, 31 N. Y. App. Div. 278.

**A Matter of Form.** — By the *Maryland Acts of 1798*, c. 101; 1816, cc. 154 and 206; and 1819, c. 144, the Orphans' Courts were empowered to direct the guardians of minors to invest the proceeds of the sales of their real, leasehold, or personal estates in public stocks or other permanent funds in the names of their wards. The direction that the securities should be taken in the name of the infant was a matter of form, and, though very proper to be followed, yet could not have the effect of avoiding the security if not pursued. *O'Hara v. Shepherd*, 3 Md. Ch. 306.

3. **Liability the Same as for a Conversion or Commingling** — *Alabama.* — *De Jarnette v. De Jarnette*, 41 Ala. 708.

*California.* — See *Matter of Bane*, 120 Cal. 533.

*Illinois.* — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271.

*Indiana.* — *Gilbert v. Welsch*, 75 Ind. 557; *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61. See also *Corya v. Corya*, 119 Ind. 593.

*Pennsylvania.* — *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642; *Stanley's Appeal*, 8 Pa.

St. 431, 49 Am. Dec. 530; *McAllister v. Com.*, 30 Pa. St. 536.

**For the Rules as to Liability for Conversion**, see *infra*, this title, *Liabilities of Fiduciaries* — *For Commingling Trust Funds with Individual Funds*; and *For Using Trust Funds in Business or Speculation*.

4. **Duty of Fiduciary to Secure Income.** — See *supra*, this title, *The Duty to Invest*.

**Construction of Direction that Money Be Put at Interest.** — A provision in a will that a legacy shall be put at interest is equivalent to a direction that the fund be either loaned at interest or invested in an interest-bearing security, and it cannot be properly said that shares of capital stock in a bank are interest-bearing securities. *Gilbert v. Welsch*, 75 Ind. 557.

**Interest Should Be Received Annually at Least.** — *Newman v. Reed*, 50 Ala. 297; *Hall v. Hall*, 43 Ala. 488, 94 Am. Dec. 703; *Foscue v. Lyon*, 55 Ala. 440; *Huffer's Appeal*, 2 Grant Cas. (Pa.) 341.

**Circumstances Authorizing Loan Without Interest.** — The curator of the estate of a minor who was afflicted with epilepsy and required the constant care and attention of his mother, loaned, by the order of court, a sum of one thousand dollars to the mother so that she might purchase a home and be in a position to care personally for her afflicted son, this loan being without interest. The mother did purchase a home, and the boy was taken there and cared for until he became so violent that he had to be sent to an asylum. It was held that as by this arrangement the ward received an indirect benefit, it would be highly unjust, under the circumstances, to compel the curator to account for interest on the loan. *Matter of Bowie*, 74 Mo. App. 191.

5. **Fiduciaries Should Obtain Highest Rate of Interest Consistent with Safety.** — *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Larkin v. Armstrong*, 9 Grant Ch. (U. C.) 390. See also *King v. Talbot*, 40 N. Y. 76; *Shields's Estate*, 14 Phila. (Pa.) 307, 38 Leg. Int. (Pa.) 261; *Whitecar's Estate*, 147 Pa. St. 368, affirming 10 Pa. Co. Ct. 448; *Peckham v. Newton*, 15 R. I. 321; *Spratt v. Wilson*, 19 Ont. 28.



the highest rate of interest allowed by law.<sup>1</sup> An investment at less than the usual rate of interest may, however, be sometimes justified by the circumstances of the case.<sup>2</sup>

*b. CIRCUMSTANCES OF CESTUIS QUE TRUSTENT CANNOT PREVENT APPLICATION OF RULE.* — While the rule that trustees should obtain as good an interest as possible on the trust funds is especially applicable in a case where the income of the trust estate is not sufficient to maintain the *cestuis que trustent* in the manner of style and life to which they have been accustomed,<sup>3</sup> trustees are not removed out of its operation merely because the *cestui que trust* is not dependent upon the income of the trust fund for a living, and for a time does not complain that the fund is not sufficiently productive.<sup>4</sup>

*c. WHEN COMPOUND INTEREST SHOULD BE OBTAINED.* — In *North Carolina* it has been considered that a guardian should endeavor to invest the funds of his ward so as to yield compound interest.<sup>5</sup>

*d. USURIOUS LOANS.* — On the question whether a fiduciary may or should, when practicable, lend at a higher rate of interest than is allowed by law, there is a dearth of authority, the only reported decision being merely that a refusal to lend the trust fund at usurious interest cannot be deemed a breach of trust.<sup>6</sup> But upon reason and principle it would seem indisputable that such a loan would be highly improper, for, even disregarding the fact that the resulting profit to the beneficiary if the borrower should comply with the terms of his contract could not justify the fiduciary in a positive violation of law, such a loan would be to some extent speculative in its nature,<sup>7</sup> inasmuch as the excess over the interest allowed by law could not be recovered in the courts, and in many jurisdictions the entire interest or even the principal sum lent would be jeopardized on account of the heavy penalties and forfeitures incurred by usurious loans.

**3. Rights as Between Life Tenants and Remaindermen.** — Where, as is frequently the case, fiduciaries hold a fund in trust to pay the income thereof to a certain person for life, with remainder over to another person as to the prin-

As to the rate of interest which may be reserved, see the title *INTEREST*, vol. 16, p. 984.

**At Least Five Per Cent. Should Be Produced.** — *Williamson v. Williamson*, 6 Paige (N. Y.) 298.

**At Least Legal Interest Should Be Obtained.** — *Higgins v. McClure*, 7 Bush (Ky.) 379.

**But Security Is Paramount to Profit.** — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *King v. Talbot*, 40 N. Y. 76; *Peckham v. Newton*, 15 R. I. 321.

**Interest Afforded by Most Secure Investments the Criterion.** — *Nance v. Nance*, 1 S. Car. 209.

**1. Trustees Should Obtain Highest Rate of Interest Allowed by Law if Possible.** — *Lathrop v. Smalley*, 23 N. J. Eq. 192.

**Change in Interest Laws.** — Where trust funds have been invested at the highest rate of interest allowed by law at the time, a subsequent change of the interest law so as to permit of a higher rate does not impose upon the fiduciaries a duty to call in such investment and seek a new investment at the increased rate, the existing investment being well secured. *Smith v. Roe*, 11 Grant Ch. (U. C.) 311; *Cameron v. Bethune*, 15 Grant Ch. (U. C.) 486. See also *Paterson v. Lailey*, 18 Grant Ch. (U. C.) 13.

**2. Investment at Less than Usual Rate of Interest May Be Justified by Circumstances.** — *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, affirming 3 N. Y. Leg. Obs. 337. See also *Wherry's Es-*

*tate*, 19 Pa. Co. Ct. 664; *Matter of Stone*, 2 Md. 292.

**Reduction of Interest.** — In an *Irish* case, where the mortgagor offered to pay off the mortgage unless a reduced rate of interest was accepted, it was ordered that the money should remain at the reduced rate, if, upon a reference which was directed as to the value of the mortgaged property, it should be found that the security was ample. *Hoey v. Hoey*, 2 Molloy 278.

**3. Rule Requiring Investment at Good Interest Especially Applicable When Income Insufficient.** — *Larkin v. Armstrong*, 9 Grant Ch. (U. C.) 390.

**4. Fact that Beneficiary Is Not Dependent for Support upon Trust Fund Does Not Excuse Trustee.** — *Whitecar's Estate*, 147 Pa. St. 368, affirming 10 Pa. Co. Ct. 448.

**5. Guardian Should Endeavor to Make Compound Interest.** — *Gary v. Cannon*, 3 Ired. Eq. (38 N. Car.) 64.

As to the right to charge compound interest, see the title *INTEREST*, vol. 16, p. 984.

**6. Refusal to Loan Trust Fund at Usurious Interest Not a Breach of Trust.** — *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261.

**7. Rule Against Speculation.** — See *supra*, this title, *Requirements of Good Faith and Sound Judgment — Measure of Diligence Required; Propriety of Particular Investments — Employment in Business or Speculation.*



cial, they must choose their investments not only with a view of securing an income for the life tenant, but also of guarding the *corpus* of the fund against loss or depreciation so as to preserve it intact as far as possible for the remainderman.<sup>1</sup> And if they unduly favor the life tenant, they are liable to the remainderman.<sup>2</sup> But, on the other hand, the remainderman is not entitled to have the fund invested at the smallest possible rate of interest, in order that the amount which he will ultimately receive may be as large as possible.<sup>3</sup>

**Investment in Bonds at a Premium.** — In a *Massachusetts* case, where a trust fund, the income of which was given to a tenant for life with remainder over as to the principal, was invested by the trustee in certain bonds which were purchased at a premium, it was held that the trustee was not bound to pay to the life tenant the entire net income, but might make successive deductions therefrom in order to make good the loss of capital which would result when the bonds became due and were redeemed.<sup>4</sup>

**XI. CHANGE OF INVESTMENTS** — 1. **General Rule** — *a.* **RULE STATED.** — Where the funds in the hands of a fiduciary have been invested in an apparently safe and profitable manner, the courts do not, as a general rule, regard with favor any change of investment, even though the fiduciary may have considerable discretionary powers in regard to the management of the funds intrusted to him.<sup>5</sup>

*b.* **WHEN INVESTMENTS MAY BE CHANGED** — (1) *When Insecure.* — It is not to be inferred, however, that a fiduciary must always cling to an existing investment; for, on the contrary, it is not only within his power, but it is his

**1. Rights of Remainderman Must Be Considered** — *England.* — *Cockburn v. Peel*, 7 Jur. N. S. 810, 30 L. J. Ch. 575, 4 L. T. N. S. 571, 9 W. R. 725; *In re Kirkpatrick*, 15 Jur. 941; *Stuart v. Stuart*, 3 Beav. 430, 10 L. J. Ch. 148, 5 Jur. 3; *In re Langford*, 8 Jur. N. S. 114, 2 Johns. & H. 458, 31 L. J. Ch. 334, 5 L. T. N. S. 579, 10 W. R. 121; *Raby v. Ridehalgh*, 7 De G. M. & G. 104; *In re Dick*, (1891) 1 Ch. 423, *affirmed sub nom.* *Hume v. Lopes*, (1892) A. C. 112; *Mara v. Browne*, (1895) 2 Ch. 83; *Caldecott v. Caldecott*, 1 Y. & C. Ch. 312, 11 L. J. Ch. 158, 6 Jur. 232; *Vickery v. Evans*, 33 Beav. 376, 3 N. R. 286, 33 L. J. Ch. 261, 10 Jur. N. S. 30, 9 L. T. N. S. 822, 12 W. R. 237; *Stewart v. Sanderson*, L. R. 10 Eq. 26, 18 W. R. 278. See also *Ex p. Pawlett*, 1 Phil. 570, 14 L. J. Ch. 321; *In re Hotchkin*, 35 Ch. D. 41; *In re Boyces*, 1r. R. 2 Eq. 255, 15 W. R. 827; *Holmes v. Moore*, 2 Molloy 328. *Compare In re Jones*, 1 Jur. N. S. 817, 3 Eq. R. 735, 24 L. J. Ch. 504, 3 W. R. 564; *Mortimer v. Picton*, 4 De G. J. & S. 166, 3 N. R. 338, 33 L. J. Ch. 337, 10 Jur. N. S. 83, 9 L. T. N. S. 795, 12 W. R. 292; *Vidler v. Parratt*, 4 N. R. 392, 10 L. T. N. S. 686.

*Maryland.* — See *Stouffer v. Clagett*, (Md. 1895) 32 Atl. Rep. 284.

*Missouri.* — *Drake v. Crane*, 127 Mo. 85.

*New York.* — *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

*Rhode Island.* — See *Eldredge v. Greene*, 17 R. I. 17.

**Purchase of Annuity for Life Tenant Not Authorized.** — *Eldredge v. Greene*, 17 R. I. 17.

**Where Life Tenant Is Settlor of Fund.** — In *Equitable Ins. Co. v. Fuller*, 7 Jur. N. S. 307, 1 Johns. & H. 379, 30 L. J. Ch. 848, 4 L. T. N. S. 50, 9 W. R. 400, a life tenant under a marriage settlement petitioned that a certain sum of three per cents and new three per cents might be sold and the proceeds invested in East India stock or bank stock. The petitioner was the

settlor of the fund, and the petition was granted, notwithstanding it was urged that considerable damage would result to the capital by the change of investment.

**2. Liability for Improperly Favoring Life Tenant.** — *Raby v. Ridehalgh*, 7 De G. M. & G. 104; *In re Dick*, (1891) 1 Ch. 423, *affirmed sub nom.* *Hume v. Lopes*, (1892) A. C. 112; *Mara v. Browne*, (1895) 2 Ch. 83. See also *In re Hotchkin*, 35 Ch. D. 41.

**3. Remainderman Not Entitled to Have Fund Invested at Smallest Possible Rate of Interest.** — *Vickery v. Evans*, 33 Beav. 376, 3 N. R. 286, 33 L. J. Ch. 261, 10 Jur. N. S. 30, 9 L. T. N. S. 822, 12 W. R. 237.

**4. Trustee May Hold Back Interest on Bonds to Make Good Premium Paid.** — *New England Trust Co. v. Eaton*, 14 Mass. 532, 54 Am. Rep. 493, three judges out of seven dissenting.

**5. Changes of Investment Not Favored** — *England.* — *In re Walker*, 59 L. J. Ch. 386, 62 L. T. N. S. 449; *Witter v. Witter*, 3 P. Wms. 100; *Underwood v. Stevens*, 1 Meriv. 712. See also *In re Massingberd*, 59 L. J. Ch. 107.

*Maine.* — *Hanscom v. Marston*, 82 Me. 288.

*Maryland.* — *Gray v. Lynch*, 8 Gill (Md.) 403. See also *Murray v. Feinour*, 2 Md. Ch. 418.

*Missouri.* — *Seehorn v. American Nat. Bank*, 148 Mo. 256.

*Pennsylvania.* — *Baldwin's Appeal*, 81 Pa. St. 441; *Billington's Estate*, 3 Rawle (Pa.) 55.

*Virginia.* — *Coltrane v. Worrell*, 30 Gratt. (Va.) 434.

But *compare Baldwin v. Hatchett*, 56 Ala. 461.

**If the Fund Invested Should Be Returned,** without default on their part, to trustees who are directed by will to invest the fund, they would have the power and would be bound to provide



duty, to call in any investment which may appear insecure, and to reinvest the fund,<sup>1</sup> even though the security be expressly authorized by the trust deed,<sup>2</sup> or a beneficiary refuse to give the consent which is necessary under the terms of the trust deed to authorize any change of investment.<sup>3</sup>

(2) *When Change Is to Advantage of Beneficiary.* — There are cases in which it has been held that a change of investment might be made when and because it was to the advantage of the beneficiary.<sup>4</sup> But such a doctrine should be accepted with caution,<sup>5</sup> and could certainly not be carried to the extent of considering it the duty of the fiduciary to change an existing investment merely because it becomes possible to make a more profitable one.<sup>6</sup>

2. **Express Power to Vary Investments** — *a.* BY STATUTE. — In some jurisdictions fiduciaries are authorized by statute to vary investments, generally within certain prescribed limits.<sup>7</sup>

*b.* BY PROVISIONS OF TRUST INSTRUMENT. — Sometimes the trust instrument gives a power to the fiduciaries to change the investment of the trust fund<sup>8</sup> from time to time. Under such a power the fiduciary should make such changes as he considers are demanded by the interest of the estate and will be for the advantage of the beneficial owners,<sup>9</sup> and such only;<sup>10</sup> and he

for its reinvestment. *Gray v. Lynch*, 8 Gill (Md.) 403.

1. **Duty to Call In Insecure Investments and Reinvest.** — *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651.

The Courts May Order Changes or Reinvestments when necessary for the safety of the fund. *Allen v. Graves*, 3 Bush (Ky.) 491; *Mason v. Bank of Commerce*, 90 Mo. 452. See also *De Manneville v. Crompton*, 1 Ves. & B. 354.

2. **Rule Applies Though Security Be Expressly Authorized by Trust Deed.** — *Harrison v. Thexton*, 4 Jur. N. S. 550.

3. **Change May Be Made Though Beneficiary Refuse to Consent.** — *Harrison v. Thexton*, 4 Jur. N. S. 550. See also *Costello v. O'Rourke, Jr.* 3 Eq. 172.

4. **Change of Investment for Advantage of Beneficiary.** — *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32. See also *Christman v. Wright*, 3 Ired. Eq. (38 N. Car.) 549; *Inwood v. Twyne*, Amb. 417, 2 Eden 153.

The Courts May Order Changes or Reinvestments when the interests of the beneficiaries require it. *Allen v. Graves*, 3 Bush (Ky.) 491; *Mason v. Bank of Commerce*, 90 Mo. 452.

Advantage of Change Must Be Shown Before Court Should Direct Same. — *Stone v. Clay*, (Kv. 1898) 45 S. W. Rep. 80.

Order of Court Necessary to Protect from Liability. — *Cornwise v. Bourgum*, Ga. Dec. (pt. ii.) 15.

Burden of Proof as to Propriety of Change. — Where a fiduciary changes an investment without an order of court he takes upon himself the onus of proving his entire good faith, and that there was, under the circumstances, reasonable ground for believing that the fund would be benefited. *Washington v. Emery*, 4 Jones Eq. (57 N. Car.) 32.

Right of Life Tenant to Demand Change. — A life tenant has the right to require that unproductive securities should be sold, and the proceeds invested so as to produce an income. *Christian's Estate*, 13 Pa. Co. Ct. 283.

5. **Trustees Are Responsible for a Loss Resulting from an Unauthorized Change of Investment**, although they acted with the *bona fide* inten-

tion of benefiting the *cestui que trust*. *Fyler v. Fyler*, 3 Beav. 550.

6. **Fiduciary Need Not Seek New Investments Merely Because Obtaining Higher Rate of Interest Has Become Possible.** — *Smith v. Roe*, 11 Grant Ch. (U. C.) 311; *Cameron v. Bethune*, 15 Grant Ch. (U. C.) 486.

7. **Statutes Authorizing Changes of Investments.** — *In re Dick*, (1891) 1 Ch. 423, *affirmed sub nom.* *Hume v. Lopes*, (1892) A. C. 112; *In re Clergy Orphan Corp.*, L. R. 18 Eq. 280, 30 L. T. N. S. 809, 22 W. R. 789; *Richardson v. Knight*, 69 Me. 285. See also *In re Tuckett*, 57 L. J. Ch. 760, 58 L. T. N. S. 719, 36 W. R. 542. And see the statutes of the various jurisdictions.

Power in Corporate Charter. — A corporation created for the purpose of relieving disabled firemen and their families was, by supplement to the charter, given power "to invest permanently from time to time" its surplus income. Under such provision the corporation had power to sell, transfer, or alter the investment of the surplus funds. *Baltimore United F. Department v. Creamer*, 17 Md. 243.

8. **Power Not Exhausted by a Single Exercise.** — An express power given to a trustee by the trust deed "to sell, convey, and assign over said property or any part thereof, and to pass a good title to the purchaser, for purpose of reinvestment only upon the written request" of the beneficiary and her husband, is not exhausted by a single exercise, but the property in which the reinvestment is made may be again disposed of. *Hays v. Applegate*, 101 Ky. 22, *distinguishing* *Fritsch v. Klausung*, (Ky. 1890) 13 S. W. Rep. 241.

A Power to Sell Does Not Include the Power to Exchange. — *Columbus Ins., etc., Co. v. Humphries*, 64 Miss. 258. See also *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

9. **Unproductive and Constantly Depreciating Securities Should Be Disposed of.** — *Stephens v. Milnor*, 24 N. J. Eq. 358.

10. **Fiduciaries Should Not Change Permanent for Temporary Investment.** — *Patteson v. Horsley*, 29 Gratt. (Va.) 263.



should not dispose of an existing investment except for the purpose of reinvestment.<sup>1</sup>

**3. When Power to Change Investments Is Implied.** — Where the trustee, by the terms of an instrument creating a trust, is to pay the income of the trust property to a life tenant and hold the capital for a remainderman, he has an implied power to sell perishable property and to convert transient securities into money for the purpose of making permanent investments.<sup>2</sup>

**4. Rule as to Investments Made by Creator of Trust.** — The duty of fiduciaries to call in all investments made by the creator of the trust which are not of a proper character for fiduciaries to hold, and to reinvest the proceeds, has already been treated in this article.<sup>3</sup>

**5. Where Specific Securities Are Given in Trust.** — Where certain specific securities are given in trust to apply the dividends or profits thereon in a particular manner, the fiduciary has, as a general rule, in the absence of some express provision in the trust instrument, no right to convert such securities into money or to change the investment.<sup>4</sup> But the fact that a testator contemplated the continuance of the investment as he had made it originally, and that he did not vest the trustee with the power to change it at discretion, will not, of itself, relieve the trustee from liability if the fund be lost by his negligence.<sup>5</sup> It is his duty to watch the investment with reasonable care and dili-

**1. Funds Can Be Called In Only for Reinvestment.** — *Meyer v. Montriou*, 5 Beav. 146, 11 L. J. Ch. 398.

**Consent of Beneficiary Immaterial.** — Where the deed conveying land in trust for a married woman gives the trustee the right, after first procuring the consent in writing of the *cestui que trust*, to make such changes of investment of the trust estate as he may think proper for the benefit thereof, a sale of such land, though with the consent of the *cestui que trust*, is a breach of trust where such sale was not made for the purpose of reinvestment. This is not affected by the fact that, between the time of the creation of the trust and the sale, a constitutional provision was adopted authorizing the sale of the real and personal property of a married woman by her the same as if she were unmarried. *Rabb v. Flenniken*, 29 S. Car. 278.

**2. Implied Power to Convert Transient Securities for Reinvestment.** — *Mason v. Bank of Commerce*, 16 Mo. App. 275, affirmed by 90 Mo. 452.

**3. See supra**, this title, *Propriety of Particular Investments* — *Rule as to Investments Made by Creator of Trust*.

**4. No Power to Change Investment Where Specific Securities Are Given in Trust.** — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485; *Murray v. Feinour*, 2 Md. Ch. 419; *Ward v. Kitchen*, 30 N. J. Eq. 31. See also *Harrison v. Harrison*, 2 Atk. 121. But compare *Waite v. Littlewood*, 41 L. J. Ch. 636.

**No Implied Power to Sell Securities.** — *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Johns v. Herbert*, 2 App. Cas. (D. C.) 485; *Bayard v. Farmers*, etc., Bank, 52 Pa. St. 232.

**What Amounts to a Bequest of Specific Securities.** — In a case where a testator directed his executors to pay unto or permit his wife to receive, "the interest, dividends, or income of all moneys or stock in which I have any property or claim, and of all other property whatsoever yielding income at my decease," for her use during life, it was held that she was

entitled to the income of the funds as they stood at the death of the testator, and that securities consisting of stock and bonds of railroad companies, Canadian debentures, and consolidated bank annuities need not be converted into consols. *Boys v. Boys*, 28 Beav. 436. See also *Neville v. Fortescue*, 16 Sim. 333.

**Rule in the Case of Mortgage Security.** — A testator directed his executors to invest a certain fund on mortgage and turn over such investment to the trustee, who was directed to control and manage the investment, and to receive, collect, and pay over the interest or principal due or to grow due thereon; and the trust was to continue during the minority of the two children of the testator, one of whom would not attain majority for fifteen years. It was held that the trustee had power to control and manage the investment and to change and vary the security, as he could hardly be expected to invest the legacy upon a mortgage nonpayable for fifteen years, and if he could not be expected to do this, then, in order to carry out the intention of the testator to keep the legacy intact, he would be compelled to invest and reinvest the principal and to change from one mortgage security to another as often as the mortgagors, when their mortgages became due, should elect to pay them off. *Spencer v. Weber*, 26 N. Y. App. Div. 285.

**5. Trustee Must Act Wisely.** — *Ward v. Kitchen*, 30 N. J. Eq. 31.

**Specific Bequest of Depreciated Bonds.** — Where specific bonds have been bequeathed in trust to a trustee, the mere fact that he was requested to sell by the life beneficiary, or that the bonds were paying no interest, is not alone sufficient to make him liable for their depreciation in value, especially where the bonds were in default for several years (in the case at bar, twelve) before the death of the testator, and he held on to them notwithstanding the failure to collect interest. *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.



gence, and to apply to the court promptly for leave to change it whenever his judgment as a prudent man should prompt him thereto.<sup>1</sup>

**XII. LIABILITIES OF FIDUCIARIES — 1. For Failure to Invest — a. EXISTENCE OF LIABILITY.** — It being the duty of a fiduciary to invest the funds which are intrusted to him, within a reasonable time, it follows that he will be chargeable for any default in this respect, whether it consist in an utter failure to invest, or simply in retaining uninvested funds in his hands for a longer period than is reasonable under the circumstances of the case.<sup>2</sup>

**b. EXTENT OF LIABILITY — (1) For Failure to Invest — Generally — (a) Losses to Principal.** — Where the negligence of a fiduciary in failing to invest the fund intrusted to him, within a reasonable time, has resulted in the loss of the whole or any part of the fund, he is liable to make good the amount so lost.<sup>3</sup>

**(b) Interest.** — Even apart from any direct loss, a failure to invest always causes an indirect loss, by reason of the fund remaining unproductive; and for this reason a fiduciary is liable for interest on amounts which he retains in his hands uninvested for an unreasonable length of time.<sup>4</sup>

**1. When Trustees Should Apply for Leave to Change Investment.** — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

**2. Liability for Failure to Invest — England.** — *Shepherd v. Moulds*, 4 Hare 500, 14 L. J. Ch. 366, 9 Jur. 506; *Rees v. Williams*, 1 De G. & Sm. 314. See also *Pride v. Fooks*, 2 Beav. 430, 9 L. J. Ch. 234, 4 Jur. 213; *Atty.-Gen. v. Higham*, 2 Y. & C. Ch. 634.

*New York.* — *Mills v. Hoffman*, 26 Hun (N. Y.) 594.

*South Carolina.* — *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 456.

*Texas.* — *Smythe v. Lumpkin*, 62 Tex. 242.

*Virginia.* — *Elliott v. Howell*, 78 Va. 297.

And see other cases cited throughout this subsection.

**If the Funds Remain Uninvested Only a Short Time** before the happening of the occurrence which resulted in their loss, the fiduciary would probably not be held responsible. See *Barney v. Saunders*, 16 How. (U. S.) 535.

**When Failure to Invest May Be Excused.** — Under Civ. Code *Alabama*, § 2286, providing that a guardian "must, if practicable, lend out all surplus money of the ward on bond and mortgage, or on good personal security," a guardian is required to do only the best he can under the circumstances and upon his own judgment, and will not be chargeable for a failure to invest, where he is not shown to have been guilty of culpable negligence, and the general pecuniary condition of that part of the country where he resides is such as to make safe investments of such a character difficult to obtain. *Ashley v. Martin*, 50 Ala. 537.

**Money Kept on Hand for Current Expenses.** — If a guardian or trustee keeps the funds of his trust separate from his own, and accounts for the interest received, he is not to be charged when the money lies idle, except for his neglect. *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609. But compare *McCauseland's Appeal*, 38 Pa. St. 466.

**3. Liability to Make Good Losses Resulting from Failure to Invest — England.** — *Clough v. Bond*, 3 Myl. & C. 496; *Byrchall v. Bradford*, 6 Madd. 235; *Johnson v. Newton*, 11 Hare 160; *Phillipson v. Gatty*, 7 Hare 516; *Challen v. Shippam*, 4 Hare 555; *Watts v. Girdlestone*, 6 Beav. 188; *Matthews v. Brise*, 6 Beav. 239;

*Byrne v. Norcott*, 13 Beav. 336; *Robinson v. Robinson*, 1 De G. M. & G. 256; *Fletcher v. Walker*, 3 Madd. 73; *Massey v. Banner*, 4 Madd. 419; *Macdonnell v. Harding*, 7 Sim. 178; *Munch v. Cockerell*, 9 Sim. 339; *Lowry v. Fulton*, 9 Sim. 115; *Moyle v. Moyle*, 2 Russ. & M. 710; *Lyse v. Kingdon*, 1 Coll. Ch. Cas. 184; *Trafford v. Boehm*, 3 Atk. 440; *Bate v. Scales*, 12 Ves. Jr. 402; *Ryder v. Bickerton*, 3 Swanst. 80, note.

*United States.* — *In re Thorp*, 2 Ware (U. S.) 294, 4 N. Y. Leg. Obs. 377, 23 Fed. Cas. No. 14,002.

*Alabama.* — *Owen v. Peebles*, 42 Ala. 338.

*Maryland.* — *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277. See also *Lattimer v. Hanson*, 1 Bland (Md.) 51; *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. 272.

*New York.* — *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388; *Garniss v. Gardiner*, 1 Edw. (N. Y.) 128; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507.

*North Carolina.* — *Shipp v. Hettrick*, 63 N. Car. 329; *Burke v. Turner*, 85 N. Car. 500. See also *Sudderth v. McCombs*, 65 N. Car. 186.

*Ohio.* — *Armstrong v. Miller*, 6 Ohio 118.

*Pennsylvania.* — *Aston's Estate*, 5 Whart. (Pa.) 228; *Evans's Estate*, 7 Pa. Super. Ct. 142.

*Virginia.* — *Lomax v. Pendleton*, 3 Call (Va.) 538; *Handly v. Snodgrass*, 9 Leigh (Va.) 484.

**A Fiduciary Who Has Neglected to Invest Confederate Money** coming into his hands is chargeable with its value at the time he received it. *Shipp v. Hettrick*, 63 N. Car. 329; *Burke v. Turner*, 85 N. Car. 500. See also *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389.

**4. Liability for Interest — England.** — *Tebbs v. Carpenter*, 1 Madd. 290; *Brown v. Litton*, 10 Mod. 20, 1 P. Wms. 141; *Browne v. Southhouse*, 3 Bro. C. C. 107; *In re Metropolitan Coal Consumers' Assoc.*, 62 L. T. N. S. 30; *Newton v. Bennet*, 1 Bro. C. C. 359; *London, etc., R. Co. v. South Eastern R. Co.*, (1892) 1 Ch. 120, (1893) A. C. 439; *In re Dracup*, (1894) 1 Ch. 59; *In re Goodenough*, (1895) 2 Ch. 537; *Dornford v. Dornford*, 12 Ves. Jr. 127; *In re Cleveland*, (1895) 2 Ch. 542; *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843; *In re Lambert*, (1897) 2 Ch. 169; *Forbes v. Ross*, 2 Cox Ch.



(2) *For Failure to Make Investments Directed by Trust Instrument.* — Where the neglect of the fiduciary consists in a failure to invest in a particular stock or security as directed by the instrument creating the trust, the beneficiary has the option of either charging him with the principal of the fund and interest thereon, or requiring him to make good the amount of such stock or security which might have been purchased with the fund at the time when the investment should have been made.<sup>1</sup>

*Where Trustee Has Option to Invest in Government or Real Securities.* — In *England* it is considered that where a trustee who has the option at his discretion of investing in either government or real securities, neglects to make either investment, the *cestuis que trustent* are not entitled to recover the amount in consols which might have been purchased, but only the principal of the fund and interest at

115, 2 Bro. C. C. 430; *Hughes v. Empson*, 22 Beav. 181; *Littlehales v. Gascoyne*, 3 Bro. C. C. 73; *Johnson v. Prendergast*, 28 Beav. 480; *Flanagan v. Nolan*, 1 Molloy 85; *Ashburnham v. Thompson*, 13 Ves. Jr. 402; *Moyle v. Moyle*, 2 Russ. & M. 710; *Johnson v. Newton*, 11 Hare 160; *Lyse v. Kingdon*, 1 Coll. Ch. Cas. 184; *Bate v. Scales*, 12 Ves. Jr. 402; *Perkins v. Baynton*, 1 Bro. C. C. 375; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Trafford v. Boehm*, 3 Atk. 440; *Clough v. Bond*, 3 Myl. & C. 496; *Byrchall v. Bradford*, 6 Madd. 235; *Franklin v. Frith*, 3 Bro. C. C. 433; *Phillipson v. Gatty*, 7 Hare 516; *Challen v. Shippam*, 4 Hare 555; *Watts v. Girdlestone*, 6 Beav. 188; *Matthews v. Brise*, 6 Beav. 239; *Raphael v. Boehm*, 11 Ves. Jr. 111; *Byrne v. Norcott*, 13 Beav. 336; *Robinson v. Robinson*, 1 De G. M. & G. 256; *Fletcher v. Walker*, 3 Madd. 73; *Trimleston v. Hamill*, 1 Ball. & B. 385, 12 Rev. Rep. 38; *Massey v. Banner*, 4 Madd. 419; *Macdonnell v. Harding*, 7 Sim. 178; *Munch v. Cockerell*, 9 Sim. 339; *Lowry v. Fulton*, 9 Sim. 115; *Treves v. Townshend*, 1 Bro. C. C. 384; *Rocke v. Hart*, 11 Ves. Jr. 58; *Seers v. Hind*, 1 Ves. Jr. 294; *Piety v. Stace*, 4 Ves. Jr. 620. See also *Dawson v. Massey*, 1 Ball & B. 219. The cases of *Adams v. Gale*, 2 Atk. 106, and *Childs v. Gibson*, 2 Atk. 603, which assert a somewhat different doctrine, are no longer authority. See *Tebbs v. Carpenter*, 1 Madd. 290.

*Canada.* — *Wiard v. Gable*, 8 Grant Ch. (U. C.) 458.

*United States.* — *Barney v. Saunders*, 16 How. (U. S.) 535; *In re Thorp*, 23 Fed. Cas. No. 14,002, 4 N. Y. Leg. Obs. 377, 2 Ware (U. S.) 294.

*Georgia.* — *Brown v. Wright*, 39 Ga. 96.

*Kentucky.* — *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Higgins v. McClure*, 7 Bush (Ky.) 379; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

*Maryland.* — *Latimer v. Hanson*, 1 Bland (Md.) 51; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250. See also *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. 272.

*Massachusetts.* — *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Elliott v. Sparrell*, 114 Mass. 404.

*New Jersey.* — *Lathrop v. Smalley*, 23 N. J. Eq. 192.

*New York.* — *Cogswell v. Cogswell*, 2 Edw. (N. Y.) 231; *Williamson v. Williamson*, 6 Paige (N. Y.) 298; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 78; *Garniss v. Gardiner*, 1 Edw. (N. Y.) 128; *Schieffelin v. Stewart*, 1 Johns. Ch.

(N. Y.) 620, 7 Am. Dec. 507; *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504. See also *Ackerman v. Emott*, 4 Barb. (N. Y.) 628; *Clarkson v. De Peyster*, Hopk. (N. Y.) 426; *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313.

*North Carolina.* — *Sudderth v. McCombs*, 65 N. Car. 186; *Shipp v. Hettrick*, 63 N. Car. 329.

*Pennsylvania.* — *Huffer's Appeal*, 2 Grant. Cas. (Pa.) 341; *McCausland's Appeal*, 38 Pa. St. 466; *In re Noble*, 26 Pittsb. Leg. J. N. S. (Pa.) 365; *Aston's Estate*, 5 Whart. (Pa.) 228; *Norris's Appeal*, 71 Pa. St. 106; *Light's Appeal*, 24 Pa. St. 180.

*Virginia.* — *Lomax v. Pendleton*, 3 Call (Va.) 538; *Handly v. Snodgrass*, 9 Leigh (Va.) 484; *Sharpe v. Rockwood*, 78 Va. 24. See also *Carter v. Cutting*, 5 Munf. (Va.) 223.

In *Mississippi*, a guardian who has neither taken his ward's money at interest, nor loaned it out, nor mingled it with his own, nor used it, is not liable for interest thereon so long as he remains guardian, or so long as his ward remains a minor. *Fitz-Gerald v. Bailey*, 58 Miss. 658; *Reynolds v. Walker*, 29 Miss. 262; *Roach v. Jelks*, 40 Miss. 756; *Crump v. Gerock*, 40 Miss. 768.

But as soon as the ward becomes of age it is the guardian's duty to settle and pay over the money, and he will be liable for interest from that time. *Fitz-Gerald v. Bailey*, 58 Miss. 658; *Garland v. Norman*, 50 Miss. 238.

*This Distinction Does Not Appear to Have Been Recognized Elsewhere*, nor would there seem to be any good reason why a guardian who allows the fund to remain idle during the minority of his ward should not be charged with interest thereon. See *Higgins v. McClure*, 7 Bush (Ky.) 379; *In re Noble*, 26 Pittsb. Leg. J. N. S. (Pa.) 365.

**1. Option of Beneficiary.** — *Robinson v. Robinson*, 1 De G. M. & G. 247, 21 L. J. Ch. 111, 16 Jur. 255; *Perry v. Smoot*, 23 Gratt. (Va.) 241.

**Liability to Make Good Amount of Stock or Security Which Might Have Been Purchased.** — There are cases in which the fiduciary has been merely held liable to make good the amount of the designated stock or security which might have been purchased. *Byrchall v. Bradford*, 6 Madd. 235, 23 Rev. Rep. 204; *Pride v. Fooks*, 2 Beav. 430, 9 L. J. Ch. 234, 4 Jur. 213.

But there is nothing in these cases inconsistent with the statement in the text as to the option to which the beneficiary is entitled.



four per cent., for under such a trust there is no absolute obligation to invest in consols imposed upon the trustee.<sup>1</sup>

**2. For Losses on Investments — a. GENERAL RULE.** — A fiduciary is responsible for any losses to the fund in his hands which are attributable to his negligence, or lack of good faith or sound judgment in selecting or managing investments.<sup>2</sup> And conversely it has been held that he is not responsible

**1. Where Trustee Has Option to Invest in Government or Real Securities.** — *Robinson v. Robinson*, 1 De G. M. & G. 247, 21 L. J. Ch. 111, 16 Jur. 255, *approving* *Marsh v. Hunter*, 6 Madd. 295; *Gale v. Pitt*, unreported; *Shepherd v. Moulds*, 4 Hare 500, 14 L. J. Ch. 366, 9 Jur. 506; *Rees v. Williams*, 1 De G. & Sm. 314; and consequently *disapproving* the cases of *Hockley v. Bantock*, 1 Russ. 141; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379, and *Ouseley v. Anstruther*, 10 Beav. 456, in which the contrary was held.

In *Canada* the case of *Robinson v. Robinson*, 1 De G. M. & G. 247, 21 L. J. Ch. 111, 16 Jur. 255, has been cited as deciding that "where a trustee is authorized to invest in either of two specified modes, and he fails to invest in either mode, the measure of his liability is the loss arising from not having selected the investment which is the less beneficial to the *cestuis que trust*," and this principle has been applied. *Paterson v. Lailey*, 18 Grant Ch. (U. C.) 13.

**Option of Fiduciary as to Manner of Replacing Fund.** — A doctrine has been asserted that where a fiduciary, having such a power as is referred to in the text, makes an improper investment, he has the option of either replacing the actual sum employed, with interest at four per cent., or of paying the sum which would have been produced by an investment in consols. *Fisher v. Gilpin*, 38 L. J. Ch. 230, *distinguishing* *Brown v. Gellatly*, L. R. 2 Ch. 751.

But this doctrine would appear to be objectionable, inasmuch as it gives the fiduciary an undue advantage over the real owner of the trust fund. *Aspland v. Watte*, 20 Beav. 474, 25 L. J. Ch. 53, 3 W. R. 526.

**2. Responsibility for Losses Resulting from Bad Faith, Unsound Judgment, or Negligence — England.** — *Clough v. Bond*, 3 Myl. & C. 490; *Smethurst v. Hastings*, 30 Ch. D. 490, 55 L. J. Ch. 173, 52 L. T. N. S. 567, 33 W. R. 496; *Learoyd v. Whiteley*, 12 App. Cas. 727, 57 L. J. Ch. 390, 58 L. T. N. S. 93, 36 W. R. 721; *In re Partington*, 57 L. T. N. S. 654; *Anonymous*, Lofft 492; *Macleod v. Annesley*, 16 Beav. 600, 22 L. J. Ch. 633, 17 Jur. 608, 1 W. R. 250; *Ingle v. Partridge*, 34 Beav. 411; *Fry v. Tapson*, 28 Ch. D. 268, 54 L. J. Ch. 224, 51 L. T. N. S. 326, 33 W. R. 113; *Walcott v. Lyons*, 54 L. T. N. S. 786, 50 J. P. 772; *Knox v. Mackinnon*, 13 App. Cas. 753; *French v. Graham*, 10 Ir. Ch. 522; *Sutton v. Wilders*, L. R. 12 Eq. 373, 41 L. J. Ch. 30, 25 L. T. N. S. 292, 19 W. R. 1021; *Norris v. Wright*, 14 Beav. 291; *In re Salmon*, 42 Ch. D. 351, 368; *In re Turner*, (1897) 1 Ch. 536. See also *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4; *In re Pearson*, 51 L. T. N. S. 692; *In re Chapman*, (1896) 2 Ch. 763, 75 L. T. N. S. 196, 45 W. R. 67; *In re Medland*, 41 Ch. D. 476, 58 L. J. Ch. 572, 60 L. T. N. S. 781, 37 W. R. 753; *Matthews v. Brise*, 10 Jur. 106, 15 L. J. Ch. 39, *affirming* 6 Beav. 239, 12 L. J. Ch.

263; *Johns v. Herbert*, 2 App. Cas. (D. C.) 485; *In re Smith*, (1896) 1 Ch. 71, 65 L. J. Ch. 159, 73 L. T. N. S. 604, 44 W. R. 270; *Knight v. Plimouth*, 3 Atk. 480; *Crampton v. Walker*, 31 L. R. Ir. 437; *Cockburn v. Peel*, 7 Jur. N. S. 810, 30 L. J. Ch. 575, 4 L. T. N. S. 571, 9 W. R. 725; *Hopgood v. Parkin*, L. R. 11 Eq. 74, 22 L. T. N. S. 722, 18 W. R. 908; *Hancorn v. Allen*, 2 Dick. 498; *Budge v. Gummow*, L. R. 7 Ch. 719, 42 L. J. Ch. 22, 27 L. T. N. S. 666, 20 W. R. 1022.

*Alabama.* — *Harrison v. Mock*, 10 Ala. 185. See also *Brewer v. Ernest*, 51 Ala. 435.

*California.* — See *Matter of Carver*, 118 Cal. 73; *Matter of Curtis*, 121 Cal. 468.

*Georgia.* — *Moses v. Moses*, 50 Ga. 9; *Campbell v. Miller*, 38 Ga. 307, 95 Am. Dec. 389. See also *Callaway v. Bridges*, 79 Ga. 753; *Skelton v. Ordinary*, 32 Ga. 266; *Dorsett v. Frith*, 25 Ga. 537.

*Illinois.* — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271, and *citing* 27 AM. AND ENG. ENCYC. OF LAW (1st ed.) 193, 196. See also *Butler v. Butler*, 164 Ill. 171, *affirming* 61 Ill. App. 51.

*Kentucky.* — *Atkinson v. Wittig*, (Ky. 1897) 40 S. W. Rep. 457. See also *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651; *Durrett v. Com.*, 90 Ky. 312.

*Maine.* — See *Mattocks v. Moulton*, 84 Me. 545.

*Maryland.* — See *Contee v. Dawson*, 2 Bland (Md.) 264; *Zimmerman v. Fraley*, 70 Md. 561; *Wayman v. Jones*, 4 Md. Ch. 500; *Gilbert v. Kolb*, 85 Md. 627.

*Massachusetts.* — See *Dickinson*, Appellant, 152 Mass. 184; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Richardson v. Morey*, 18 Pick. (Mass.) 181; *Harvard College v. Amory*, 9 Pick. (Mass.) 446; *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *Bowker v. Pierce*, 130 Mass. 262; *Hunt*, Appellant, 141 Mass. 515.

*Michigan.* — *Caspari v. Cutcheon*, 110 Mich. 86.

*Missouri.* — See *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

*New Hampshire.* — See *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *French v. Currier*, 47 N. H. 88.

*New Jersey.* — *Stothoff v. Reed*, 32 N. J. Eq. 213. See also *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Monroe v. Osborne*, 43 N. J. Eq. 248; *Perrine v. Vreeland*, 33 N. J. Eq. 102.

*New York.* — *Mills v. Hoffman*, 26 Hun (N. Y.) 594. See also *Matter of Keteltas*, 1 Conolly (N. Y.) 468; *In re Stark*, (Surrogate Ct.) 15 N. Y. Supp. 720; *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844; *King v. Talbot*, 40 N. Y. 76, 50 Barb. (N. Y.) 453; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447.



for losses not in any way the result of negligence, bad faith, or want of judgment on his part;<sup>1</sup> but this statement of the proposition is too broad, and was probably meant and should certainly be taken to apply only in cases where the investment itself is a proper and authorized one;<sup>2</sup> with this modification it may be considered to be as well established as the rule first stated above.<sup>3</sup>

*North Carolina.* — *Whitford v. Foy*, 65 N. Car. 265. See also *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284.

*Ohio.* — See *Scott v. Marion Tp.*, 39 Ohio St. 153.

*Pennsylvania.* — *Chambersburg Sav. Fund Assoc. Appeal*, 76 Pa. St. 203; *Bartol's Estate*, 182 Pa. St. 407; *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451; *Girard Trust Co.'s Appeal*, 13 W. N. C. (Pa.) 367; *In re Wolgamuth*, 16 Lanc. L. Rev. (Pa.) 229; *Ihmsen's Appeal*, 43 Pa. St. 431; *Royer's Appeal*, 11 Pa. St. 36. See also *Pray's Appeal*, 34 Pa. St. 100; *Lukens's Appeal*, 7 W. & S. (Pa.) 48; *Fahnestock's Appeal*, 104 Pa. St. 46; *Dorsey's Estate*, 11 Pa. Co. Ct. 12.

*Rhode Island.* — See *Peckham v. Newton*, 15 R. I. 321.

*South Carolina.* — *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 464; *Bryan v. Mulligan*, 2 Hill Eq. (S. Car.) 364; *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *O'Dell v. Young*, McMull. Eq. (S. Car.) 155. See also *Singleton v. Lowndes*, 9 S. Car. 465; *Nance v. Nance*, 1 S. Car. 209; *Womack v. Austin*, 1 S. Car. 421.

*Tennessee.* — See *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676.

*Vermont.* — See *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820; *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

*Virginia.* — *Burwell v. Burwell*, 78 Va. 574. See also *Elliott v. Carter*, 9 Gratt. (Va.) 559; *Elliott v. Howell*, 78 Va. 297; *Davis v. Harman*, 21 Gratt. (Va.) 194; *Myers v. Zetelle*, 21 Gratt. (Va.) 758.

*West Virginia.* — *Key v. Hughes*, 32 W. Va. 181.

1. No Responsibility for Losses Not Attributable to Bad Faith, Unsound Judgment, or Negligence

— *England.* — *Wilkinson v. Stafford*, 1 Ves. Jr. 32; *Veaz v. Emory*, 5 Ves. Jr. 141; *Cockburn v. Peel*, 7 Jur. N. S. 810, 30 L. J. Ch. 575, 4 L. T. N. S. 571, 9 W. R. 725; *Edmonds v. Peake*, 7 Beav. 239; *Knight v. Plimouth*, 3 Atk. 480, 1 Dick. 120. See also *Jackson v. Jackson*, 1 Atk. 513; *Powell v. Evans*, 5 Ves. Jr. 839; *Trafford v. Boehm*, 3 Atk. 440; *Rowth v. Howell*, 3 Ves. Jr. 565; *Adams v. Claxton*, 6 Ves. Jr. 226; *Ex p. Belchier*, Amb. 218, 1 Ken. 38.

*United States.* — See *Taylor v. Benham*, 5 How. (U. S.) 233; *Burr v. M'Ewen*, Baldw. (U. S.) 162; *Lamar v. Micou*, 112 U. S. 452.

*California.* — *Matter of Curtis*, 121 Cal. 468.

*Georgia.* — See *Moses v. Moses*, 50 Ga. 9; *Dorsett v. Frith*, 25 Ga. 537; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389. *Compare Walker v. Walker*, 42 Ga. 135.

*Indiana.* — *Sanders v. State*, 49 Ind. 228; *Marquess v. La Baw*, 82 Ind. 550; *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739; *Slauter v. Favorite*, 107 Ind. 291, 57 Am. Rep. 106.

*Maryland.* — *Gray v. Lynch*, 8 Gill (Md.) 403.

*Massachusetts.* — *Clark v. Garfield*, 8 Allen (Mass.) 427; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254.

*Missouri.* — *Matter of Bowie*, 74 Mo. App. 191; *State v. Slevin*, 93 Mo. 253, 3 Am. St. Rep. 526.

*New Hampshire.* — *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609.

*New Jersey.* — See *Monroe v. Osborne*, 43 N. J. Eq. 248.

*New York.* — *Franklin v. Osgood*, 14 Johns. (N. Y.) 527; *Matter of Hathaway*, 80 Hun (N. Y.) 186. See also *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62.

*North Carolina.* — See *Collins v. Gooch*, 97 N. Car. 189, 2 Am. St. Rep. 284.

*Pennsylvania.* — *Calhoun's Estate*, 6 Watts (Pa.) 185; *Cridland's Estate*, 132 Pa. St. 479; *Chambersburg Sav. Fund Assoc. Appeal*, 76 Pa. St. 203; *Jones's Appeal*, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282; *Breneman v. Mylin*, 12 Pa. Co. Ct. 324, 2 Pa. Dist. 296; *Jack's Appeal*, 94 Pa. St. 367; *Konigsmacher v. Kimmel*, 1 P. & W. (Pa.) 207; *Zebach v. Smith*, 3 Binn. (Pa.) 69, 5 Am. Dec. 352. See also *Dabney's Appeal*, 120 Pa. St. 344.

*South Carolina.* — *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 464; *Bryan v. Mulligan*, 2 Hill Eq. (S. Car.) 364; *Pope v. Mathews*, 18 S. Car. 444; *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *O'Dell v. Young*, McMull. Eq. (S. Car.) 155.

*Tennessee.* — See *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676.

**Criteria for Determining Whether There Has Been Good Faith and Diligence.** — The conduct of a trustee is to be judged by the situation as it appeared at the time of the alleged misconduct, and not in the light of subsequent events; and while it is true that his conduct in the management of his own funds of a similar character is not the test of his liability, it is a circumstance that may well be looked to as evidence of his good or bad faith, or negligence. *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

2. Investments Must Be Proper and Authorized. — *Ackerman v. Emott*, 4 Barb. (N. Y.) 626, affirming 3 N. Y. Leg. Obs. 337; *Womack v. Austin*, 1 S. Car. 421; *Nance v. Nance*, 1 S. Car. 209, explaining *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408; *Taveau v. Ball*, 1 McCord Eq. (S. Car.) 464; *Bryan v. Mulligan*, 2 Hill Eq. (S. Car.) 364; *Glover v. Glover*, McMull. Eq. (S. Car.) 153; *O'Dell v. Young*, McMull. Eq. (S. Car.) 155. And see cases cited *infra*, this section, *Losses on Unauthorized Investments*.

3. General Rule as to When Fiduciaries Are Not Responsible for Losses — *England.* — *Speight v. Gaunt*, 9 App. Cas. 1; *Learoyd v. Whiteley*, 12 App. Cas. 727, 33 Ch. D. 347; *In re Somerset*, (1894) 1 Ch. 231, 63 L. J. Ch. 41, 7 Reports 34, 69 L. T. N. S. 744, 42 W. R. 145; *In re Chap-*



*b. LOSSES ON UNAUTHORIZED INVESTMENTS.* — If a fiduciary makes or holds an investment which is not authorized or proper, he is liable for any losses thereon, though he may have acted in good faith and under a strong conviction that he was doing what was best for the interests of all concerned.<sup>1</sup>

man, (1896) 2 Ch. 763, 65 L. J. Ch. 892, 75 L. T. N. S. 196, 45 W. R. 67; *Clough v. Bond*, 3 Myl. & C. 490; *Paddon v. Richardson*, 7 De G. M. & G. 563; *In re Smith*, (1896) 1 Ch. 71, 65 L. J. Ch. 159, 73 L. T. N. S. 604, 44 W. R. 270. See also *Darke v. Martyn*, 1 Beav. 525.

*Canada.* — *Smith v. Smith*, 23 Grant Ch. (U. C.) 114.

*Alabama.* — *Baldwin v. Hatchett*, 56 Ala. 461; *Dean v. Rathbone*, 15 Ala. 328; *Gould v. Hayes*, 19 Ala. 438; *Harrison v. Mock*, 10 Ala. 185; *Foscue v. Lyon*, 55 Ala. 440. See also *Newman v. Reed*, 50 Ala. 297.

*California.* — *Cousins's Estate*, 111 Cal. 441.

*Connecticut.* — *Pinney v. Newton*, 66 Conn. 141.

*Georgia.* — *Brown v. Wright*, 39 Ga. 96.

*Kentucky.* — *Durrett v. Com.*, 90 Ky. 312; *Clark v. Anderson*, 13 Bush (Ky.) 111; *Calloway v. Calloway*, (Ky. 1897) 39 S. W. Rep. 241. See also *Higgins v. McClure*, 7 Bush (Ky.) 379.

*Massachusetts.* — *Lovell v. Minot*, 20 Pick. (Mass.) 116, 32 Am. Dec. 206; *Bowker v. Pierce*, 130 Mass. 262. See also *Hunt, Appellant*, 141 Mass. 515; *Harvard College v. Amory*, 9 Pick. (Mass.) 446.

*New Hampshire.* — *French v. Currier*, 47 N. H. 88; *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

*New Jersey.* — *Perrine v. Vreeland*, 33 N. J. Eq. 102.

*New York.* — *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Valentine v. Valentine*, 3 Dem. (N. Y.) 597. See also *Matter of Wolfe*, 1 Connoly (N. Y.) 102; *Matter of Cant*, 5 Dem. (N. Y.) 269.

*Ohio.* — *Miller v. Proctor*, 20 Ohio St. 442.

*Pennsylvania.* — *Pleasants's Appeal*, 77 Pa. St. 356; *In re Ogle*, 5 Pa. St. 15; *Bartol's Estate*, 182 Pa. St. 407; *Fahnestock's Appeal*, 104 Pa. St. 46; *Rush's Estate*, 12 Pa. St. 375; *Rawlings's Estate*, 13 Phila. (Pa.) 337, 37 Leg. Int. (Pa.) 133; *Cridland's Estate*, 132 Pa. St. 479. See also *Dorsey's Estate*, 11 Pa. Co. Ct. 12.

*South Carolina.* — *Nance v. Nance*, 1 S. Car. 209; *Womack v. Austin*, 1 S. Car. 421.

*Vermont.* — *Barney v. Parsons*, 54 Vt. 623, 41 Am. Rep. 858.

*Virginia.* — *Myers v. Zetelle*, 21 Gratt. (Va.) 733; *Elliott v. Howell*, 78 Va. 297; *Douglass v. Stephenson*, 75 Va. 749; *Elliott v. Carter*, 9 Gratt. (Va.) 541; *Davis v. Harman*, 21 Gratt. (Va.) 194; *Lingle v. Cook*, 32 Gratt. (Va.) 262.

**When Fiduciaries Are Not Chargeable with Interest.** — A fiduciary is not chargeable with interest on the amount lost through a proper investment made by him in good faith and managed with reasonable prudence and without negligence. *Cousins's Estate*, 111 Cal. 441. See also *Jack's Appeal*, 94 Pa. St. 371. And see cases cited *supra*, this note.

**Direction to Invest in Securities Acceptable to Beneficiaries — No Expression of Dissatisfaction.** — Where testamentary trustees are directed by the will to turn the whole of the testator's

estate into money and "good securities, such as will be acceptable to the persons entitled thereto by this my will," such persons being those in whose favor a trust is created, the trustees will not be personally liable for a loss caused by the depreciation of a security believed by them to be a safe investment, where there was no expression of dissatisfaction on the part of the persons interested. *Dorsey's Estate*, 11 Pa. Co. Ct. 12.

**1. Absolute Liability for Losses on Improper and Unauthorized Investments — England.** — *Fowler v. Reynal*, 3 Macn. & G. 500, 21 L. J. Ch. 121, *affirming* 13 Jur. 649, 2 De G. & Sm. 749; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232, 41 L. J. Ch. 266, 26 L. T. N. S. 119, 20 W. R. 276; *Edwards v. Edmunds*, 34 L. T. N. S. 522; *In re Tucker*, (1894) 1 Ch. 724, 63 L. J. Ch. 223, 8 Reports 113, 70 L. T. N. S. 127, 42 W. R. 266; *Clough v. Bond*, 3 Myl. & C. 490; *Buckley v. Buckley*, Dr. 375; *Terry v. Terry*, Prec. Ch. 273, Gilb. 10; *Smethurst v. Hastings*, 30 Ch. D. 490, 55 L. J. Ch. 173, 52 L. T. N. S. 567, 33 W. R. 496; *Holmes v. Dring*, 2 Cox Ch. 1; *In re Salmon*, 42 Ch. D. 351; *French v. Hobson*, 9 Ves. Jr. 103. See also *Drever v. Mawdesley*, 16 Sim. 511, 18 L. J. Ch. 273, 13 Jur. 330; *Darke v. Martyn*, 1 Beav. 525; *Wiles v. Gresham*, 5 De G. M. & G. 770, 3 Eq. R. 116, 24 L. J. Ch. 264, 3 W. R. 87; *Kellaway v. Johnson*, 5 Beav. 319, 6 Jur. 751; *Anonymous*, Lofft 492; *Ex p. Hakewill*, 2 Mont. D. & De G. 607, 6 Jur. 787; *Rehden v. Wesley*, 29 Beav. 213.

*Canada.* — *Paterson v. Lailey*, 18 Grant Ch. (U. C.) 15. See also *Spratt v. Wilson*, 19 Ont. 28.

*United States.* — *Head v. Talley*, 3 Am. L. T. Rep. 155, 11 Fed. Cas. No. 6,294.

*Alabama.* — *Lee v. Lee*, 55 Ala. 590; *Houston v. Deloach*, 43 Ala. 364, 94 Am. Dec. 689; *Royall v. McKenzie*, 25 Ala. 363.

*California.* — *Matter of Post*, 57 Cal. 273, *affirming* Myr. Prob. (Cal.) 230; *Matter of Carver*, 118 Cal. 73.

*Illinois.* — *Hughes v. People*, 111 Ill. 457, *affirming* 10 Ill. App. 148; *McIntyre v. People*, 103 Ill. 142; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

*Indiana.* — *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753.

*Iowa.* — *Garner v. Hendry*, 95 Iowa 44.

*Kentucky.* — *Clay v. Clay*, 3 Met. (Ky.) 548; *Smith v. Smith*, 7 J. J. Marsh. (Ky.) 238.

*Maryland.* — *Carlyle v. Carlyle*, 10 Md. 440; *Zimmerman v. Fraley*, 70 Md. 561; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Murray v. Feinour*, 2 Md. Ch. 418; *Gilbert v. Kolb*, 85 Md. 627; *Contee v. Dawson*, 2 Bland (Md.) 264.

*Massachusetts.* — *Clark v. Garfield*, 8 Allen (Mass.) 427.

*New Jersey.* — *Matter of Craven*, 43 N. J. Eq. 416; *Dufford v. Smith*, 46 N. J. Eq. 216; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Quick v. Fisher*, 9 N. J. Eq. 802; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508.



**Liability for Improper Investment of Trust Funds Remains though Individual Funds Were Similarly Invested.** — A fiduciary who has made a manifestly improper investment cannot relieve himself from liability for a loss which results therefrom, by showing that he invested his own private funds in the same enterprise at the same time.<sup>1</sup>

**Fiduciary Not Protected by Creator of Trust Having Made Similar Investments.** — Nor does the fact that a testator has made investments of a certain character, or in a particular security, furnish his testamentary trustee with any protection against liability for losses on similar investments which the latter improperly made.<sup>2</sup>

**c. MANNER OF ENFORCING LIABILITY.** — The manner of enforcing the liability of a fiduciary who has made an improper or improvident investment depends largely upon the circumstances of the particular case; for while in some cases justice will be best done by realizing the security and making him pay the deficiency,<sup>3</sup> in others it may be right to require him to refund at once the sum invested, and let him take the benefit of the security.<sup>4</sup>

*New York.* — *King v. Talbot*, 40 N. Y. 76; *Goodwin v. Howe*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 134; *Mills v. Hoffman*, 26 Hun (N. Y.) 594; *Judd v. Warner*, 2 Dem. (N. Y.) 104; *Matter of Keteltas*, 1 Connolly (N. Y.) 468; *Matter of Foster*, 15 Hun (N. Y.) 387; *Matter of Blauvelt*, 2 Connolly (N. Y.) 458; *Matter of Westerfield*, 32 N. Y. App. Div. 324, 53 N. Y. Supp. 1118; *In re Rogers*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 1113; *Ackelman v. Emott*, 4 Barb. (N. Y.) 626, *affirming* 3 N. Y. Leg. Obs. 337. See also *Gillespie v. Brooks*, 2 Redf. (N. Y.) 349.

*North Carolina.* — *Gary v. Cannon*, 3 Ired. Eq. (38 N. Car.) 64; *Smith v. Gilmer*, 64 N. Car. 546.

*Pennsylvania.* — *Hemphill's Appeal*, 18 Pa. St. 303; *Makin's Estate*, 20 Pa. Co. Ct. 587, 7 Pa. Dist. 126, 14 Montg. Co. Rep. (Pa.) 103; *Ihmsen's Appeal*, 43 Pa. St. 431; *Lechler's Appeal*, (Pa. 1888) 14 Atl. Rep. 451; *Girard Trust Co.'s Appeal*, 13 W. N. C. (Pa.) 367.

*South Carolina.* — See *Waller v. Cresswell*, 4 S. Car. 353.

*Wisconsin.* — *Simmons v. Oliver*, 74 Wis. 633.

**Liability for Interest.** — *In re Tucker*, (1894) 1 Ch. 724, 63 L. J. Ch. 223, 8 Reports 113, 70 L. T. N. S. 127, 42 W. R. 266; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Makin's Estate*, 20 Pa. Co. Ct. 587, 7 Pa. Dist. 126, 14 Montg. Co. Rep. (Pa.) 103.

**Moral Wrong of Trustee Not Necessary.** — *Buckley v. Buckley*, Dr. 375.

**Burden of Proof as to Sufficiency of Security.** — A fiduciary who has made a loan on an irregular security is subject to the burden of proving that such security was sufficient. *Stretton v. Ashmall*, 3 Drew. 9, 24 L. J. Ch. 277, 3 W. R. 4.

**1. Investment of Individual Funds in Same Enterprise Does Not Relieve from Liability for Losses to Trust Fund.** — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Ihmsen's Appeal*, 43 Pa. St. 431. See also *Worrell's Appeal*, 9 Pa. St. 508.

**The Fact that a Fiduciary Has Been Accustomed to Lend His Own Money on Bond**, does not furnish him with any justification for making a loan of funds held by him in his fiduciary capacity on such security. *Adye v. Feuille-*

*teau*, 3 Swanst. 84, note, 1 Cox Ch. 24; *Holmes v. Dering*, 2 Cox Ch. 1.

**2. Similar Investment by Testator Furnishes No Protection.** — *Styles v. Guy*, 1 Macn. & G. 423; *Hemphill's Appeal*, 18 Pa. St. 303.

**3. Security May Be Realized and Fiduciary Required to Make Good the Deficiency.** — *In re Salmon*, 42 Ch. D. 368; *In re Turner*, (1897) 1 Ch. 536.

**Fiduciary Allowed Time to Realize on Unauthorized Investment.** — *Wyatt v. Sharratt*, 3 Beav. 498.

**Allowance to Fiduciaries of Real Value of Improvident Investment.** — Trustees who had a power to invest in real estate purchased a lot for twelve hundred pounds, but upon inquiry before a master it was found that the lot was not worth more than nine hundred pounds. It was held that the trustees should be credited with the value of the land and not charged with the entire twelve hundred pounds. *Larkin v. Armstrong*, 9 Grant Ch. (U. C.) 390.

**Fiduciaries Responsible Only for Ultimate Loss.** — *In Fletcher v. Green*, 33 Beav. 426, trustees took a mortgage as an investment, under such circumstances as to constitute a breach of trust for which they were liable. Upon their realizing upon the security the proceeds were invested in consols. On a subsequent sale of the consols by order of the court, there was a certain gain through consols having risen in value, and it was held that the trustees were entitled to the benefit of this sum in discharging their liability.

**4. Fiduciaries May Be Required to Refund Entire Amount Improperly Invested.** — *In re Salmon*, 42 Ch. D. 368; *In re Turner*, (1897) 1 Ch. 536; *Lockhart v. Reilly*, 25 L. J. Ch. 697, 3 W. R. 227; *Roosevelt v. Roosevelt*, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447. See also *Royall v. McKenzie*, 25 Ala. 363; *Matter of Craven*, 43 N. J. Eq. 416.

**New Trustee Cannot Be Compelled to Accept Doubtful Security.** — *Matter of Craven*, 43 N. J. Eq. 416.

**Right of Fiduciary to Proceeds of Unauthorized Investment.** — A fiduciary who has paid to the beneficiary the amount of an unauthorized investment is entitled to avail himself of the proceeds of such investment, if any, to his own use. *McIntyre v. People*, 103 Ill. 142. See also cases cited *supra*, this note.



But the Fiduciary Is Not Entitled to an Option of taking the security as a prerequisite to his liability to make good the loss.<sup>1</sup>

*d.* EXTENT OF LIABILITY FOR LOSS OF CONFEDERATE MONEY. — It has been considered that where the money invested and lost consisted of Confederate notes, the fiduciary was liable for only the real value of such notes at the time the investment was made.<sup>2</sup>

*e.* LOSS CAUSED BY WRONG OF CESTUI QUE TRUST. — In Canada a solicitor has been held not responsible for a loss occasioned by the wrong of his client.<sup>3</sup>

3. For Commingling Trust Funds with Individual Funds. — The principle is well settled that it is the duty of a fiduciary to keep the trust funds or property entirely separate and distinct from his own,<sup>4</sup> and if he fails in this duty, and in any way commingles trust funds with his own, he is responsible for the entire fund so commingled,<sup>5</sup> and must make good all losses thereto,<sup>6</sup>

**Where Fiduciary Is Unable to Reach Security.** — A fiduciary is liable to make good the entire loss, although the security to which, on doing so, he would become entitled is beyond reach, at least as against a beneficiary who has never assented to the improper investment or done anything to put it out of the power of the fiduciary to obtain the benefit of the security. *Head v. Gould*, (1898) 2 Ch. 250, 67 L. J. Ch. 480, 78 L. T. N. S. 739, 46 W. R. 597.

**Land Bought In on Foreclosure of Unauthorized Mortgage.** — Where a guardian has made an unauthorized loan on mortgage, and on foreclosure has bought in the land in the name of his wards, the property may be treated as belonging to the guardian, subject, however, to sale for the benefit of the wards to enforce their claims for the fund improperly invested. *Reed v. Lane*, 96 Iowa 454.

1. Fiduciary Not Entitled to Option of Taking the Security. — *In re Salmon*, 42 Ch. D. 368; *In re Turner*, (1897) 1 Ch. 536.

2. Extent of Liability for Loss of Confederate Money. — *Waller v. Cresswell*, 4 S. Car. 353. See also *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389.

3. Solicitor Not Responsible for Loss Occasioned by Wrong of Client. — *O'Callaghan v. Bergin*, 11 Ont. App. 594.

4. Trust Funds Should Be Kept Separate from Private Funds of Fiduciary. — *Case v. Abeel*, 1 Paige (N. Y.) 393; *Matter of Stafford*, 11 Barb. (N. Y.) 353; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520.

5. Responsibility for Fund Commingled — *California*. — *Matter of Bane*, 120 Cal. 533; *Matter of Arguello*, 97 Cal. 196; *Cousins's Estate*, 111 Cal. 441; *Matter of Stott*, 52 Cal. 403; *Clark's Estate*, 53 Cal. 359; *Matter of Hilliard*, 83 Cal. 423; *Miller v. Lux*, 100 Cal. 609. See also *Wheeler v. Bolton*, 92 Cal. 159; *Adams v. Lambard*, 80 Cal. 426.

*Indiana*. — *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61.

*Kentucky*. — *Clay v. Clay*, 3 Met. (Ky.) 548; *Jennings v. Davis*, 5 Dana (Ky.) 133.

*New York*. — *Matter of Stafford*, 11 Barb. (N. Y.) 353.

*North Carolina*. — *Burke v. Turner*, 85 N. Car. 500.

*Pennsylvania*. — *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642.

*South Carolina*. — See *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

6. Liability for Losses — *England*. — *Freeman v. Fairlie*, 3 Meriv. 28; *Wren v. Kirton*, 11 Ves. Jr. 377; *Massey v. Banner*, 4 Madd. 413; *Fletcher v. Walker*, 3 Madd. 73; *Rowth v. Howell*, 3 Ves. Jr. 565; *Hilliard's Case*, 1 Ves. Jr. 89; *Rocke v. Hart*, 11 Ves. Jr. 61; *Pennell v. Delfell*, 23 Eng. L. & Eq. 460; *Matthews v. Brise*, 6 Beav. 239; *Macdonnell v. Harding*, 7 Sim. 178; *Robinson v. Ward*, R. & M. 274, 21 E. C. L. 438.

*United States*. — *In re Thorp*, 2 Ware (U. S.) 294, 4 N. Y. Leg. Obs. 377, 23 Fed. Cas. No. 14,002; *McKenzie v. Anderson*, 2 Woods (U. S.) 357.

*Alabama*. — *De Jarnette v. De Jarnette*, 41 Ala. 708; *Kirkman v. Benham*, 28 Ala. 501; *Ditmar v. Bogle*, 53 Ala. 169; *Henderson v. Henderson*, 58 Ala. 582; *Calvert v. Marlow*, 6 Ala. 337.

*California*. — *Matter of Bane*, 120 Cal. 533.

*Indiana*. — *Corya v. Corya*, 119 Ind. 593.

*Maryland*. — *Diffenderfer v. Winder*, 3 Gill & J. (Md.) 342; *State v. Cheston*, 51 Md. 352.

*Mississippi*. — *Kerr v. Laird*, 27 Miss. 544.

*New York*. — *Kellett v. Rathbun*, 4 Paige (N. Y.) 102; *Case v. Abeel*, 1 Paige (N. Y.) 393; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 108; *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1; *Hood's Estate*, Tuck. (N. Y.) 396; *Matter of Stafford*, 11 Barb. (N. Y.) 353; *De Peyster v. Clarkson*, 2 Wend. (N. Y.) 77; *Garniss v. Gardiner*, 1 Edw. (N. Y.) 128; *Spear v. Tinkham*, 2 Barb. Ch. (N. Y.) 211.

*North Carolina*. — *Peyton v. Smith*, 2 Dev. & B. Eq. (22 N. Car.) 325.

*Pennsylvania*. — *Matter of Dyott*, 2 W. & S. (Pa.) 557; *Robinett's Appeal*, 36 Pa. St. 174; *Matter of Merrick*, 2 Ashm. (Pa.) 485; *Gilbert's Appeal*, 78 Pa. St. 266; *Hanbest's Estate*, 12 Phila. (Pa.) 72, 35 Leg. Int. (Pa.) 153; *McAllister v. Com.*, 30 Pa. St. 536; *Com. v. McAlister*, 28 Pa. St. 480; *Royers' Appeal*, 11 Pa. St. 36; *Verner's Estate*, 6 Watts (Pa.) 250; *West Branch Bank v. Fulmer*, 3 Pa. St. 399, 45 Am. Dec. 651; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530.

*South Carolina*. — *Nettles v. McCown*, 5 S. Car. 43.

*Tennessee*. — *Jameson v. Shelby*, 2 Humph. (Tenn.) 198; *Mason v. Whitthorn*, 2 Coldw. (Tenn.) 242.

*Vermont*. — *Perkins v. Hollister*, 59 Vt. 348; *Farwell v. Steen*, 46 Vt. 678; *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770; *Re*



besides paying interest on the amount so misapplied.<sup>1</sup>

4. For Using Trust Funds in Business or Speculation — *a*. LIABILITY TO REPLACE AMOUNTS USED. — It is a breach of trust for a fiduciary to use the funds intrusted to him in his own business or in speculations of any kind;<sup>2</sup> and by so doing he incurs an absolute liability, regardless of the success of his ventures, to replace the amount so used,<sup>3</sup> with interest.<sup>4</sup>

Hodges, 66 Vt. 70, 44 Am. St. Rep. 820, *overruling* Barney v. Parsons, 54 Vt. 624, 41 Am. Rep. 858.

Virginia. — Beverley v. Miller, 6 Munf. (Va.) 99; Leake v. Leake, 75 Va. 794.

West Virginia. — Hedrick v. Tuckwiller, 20 W. Va. 489.

Wisconsin. — Williams v. Williams, 55 Wis. 300, 42 Am. Rep. 708; Shoemaker v. Hinze, 53 Wis. 116.

1. Liability for Interest — United States. — *In re* Thorp, 2 Ware (U. S.) 294, 4 N. Y. Leg. Obs. 377, 23 Fed. Cas. No. 14,002; McKenzie v. Anderson, 2 Woods (U. S.) 357.

Alabama. — Henderson v. Henderson, 58 Ala. 582; Kirkman v. Benham, 28 Ala. 501; Dittmar v. Bogle, 53 Ala. 169; Calvert v. Marlow, 6 Ala. 337.

California. — Clark's Estate, 53 Cal. 359; Matter of Hilliard, 83 Cal. 423; Miller v. Lux, 100 Cal. 609; Cousins's Estate, 111 Cal. 441; Matter of Stott, 52 Cal. 403. See also Wheeler v. Bolton, 92 Cal. 159; Adams v. Lambard, 80 Cal. 426.

Kentucky. — Clay v. Clay, 3 Met. (Ky.) 548; Jennings v. Davis, 5 Dana (Ky.) 133.

Maryland. — State v. Cheston, 51 Md. 352; Diffenderfer v. Winder, 3 Gill & J. (Md.) 311.

Mississippi. — Kerr v. Laird, 27 Miss. 544.

New Hampshire. — Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Gordon v. West, 8 N. H. 455.

New York. — Mumford v. Murray, 6 Johns. Ch. (N. Y.) 1; Spear v. Tinkham, 2 Barb. Ch. (N. Y.) 211; De Peyster v. Clarkson, 2 Wend. (N. Y.) 77; Case v. Abeel, 1 Paige (N. Y.) 393; Kellett v. Rathbun, 4 Paige (N. Y.) 102; Garniss v. Gardiner, 1 Edw. (N. Y.) 128; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520.

North Carolina. — Peyton v. Smith, 2 Dev. & B. Eq. (22 N. Car.) 325.

Pennsylvania. — Robinett's Appeal, 36 Pa. St. 174; Gilbert's Appeal, 78 Pa. St. 266; Matter of Dyott, 2 W. & S. (Pa.) 557; Matter of Merrick, 2 Ashm. (Pa.) 485; Com. v. McAlister, 28 Pa. St. 480; Hanbest's Estate, 12 Phila. (Pa.) 72, 35 Leg. Int. (Pa.) 153; Morris v. Wallace, 3 Pa. St. 319, 45 Am. Dec. 642.

South Carolina. — Nettles v. McCown, 5 S. Car. 43.

Tennessee. — Jameson v. Shelby, 2 Humph. (Tenn.) 198.

Vermont. — *Re* Hodges, 66 Vt. 70, 44 Am. St. Rep. 820; McCloskey v. Gleason, 56 Vt. 264, 48 Am. Rep. 770; Farwell v. Steen, 46 Vt. 678; Perkins v. Hollister, 59 Vt. 343.

Virginia. — Beverley v. Miller, 6 Munf. (Va.) 99; Leake v. Leake, 75 Va. 794.

West Virginia. — Hedrick v. Tuckwiller, 20 W. Va. 489.

2. A Trustee Should Not Use Trust Moneys Himself. — *In re* Wolgamuth, 16 Lanc. L. Rev. (Pa.) 229; *Re* Hodges, 66 Vt. 70, 44 Am. St. Rep. 820.

Circumstances Amounting to Authorized Loan of Trust Funds, as Opposed to Improper Employment in Business of Fiduciary. — In Parker v. Bloxam, 20 Beav. 295, three executors were authorized to lend trust moneys to M. After the testator's death, C., one of the executors, employed part of the trust moneys in his business, and subsequently M. and C. entered into partnership, when M. took upon himself the debt to the trust estate and gave the executors security for the money. The amount, with further advances, was employed in the business, but the whole with interest was fully repaid. After a long delay, the *cestuis que trustent* insisted that they were entitled to a share of the profits made by the employment of the trust funds in trade, but the court held that the transaction amounted to a loan to M. under the power contained in the will.

3. Liability for Amount Used — England. — *Ex p.* Garland, 10 Ves. Jr. 110; Crawshay v. Collins, 15 Ves. Jr. 218; Docker v. Somes, 2 Myl. & K. 655; Cook v. Collingridge, Jac. 67; Booth v. Booth, 1 Beav. 125; Brown v. De Tastet, Jac. 284; Munch v. Cockerell, 5 Myl. & C. 178; Wedderburn v. Wedderburn, 2 Keen 722; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; French v. Hobson, 9 Ves. Jr. 103.

United States. — Barney v. Saunders, 16 How. (U. S.) 535. See also May v. Le Claire, 11 Wall. (U. S.) 236; Oliver v. Piatt, 3 How. (U. S.) 333; Cook v. Tullis, 18 Wall. (U. S.) 341.

Alabama. — Kyle v. Barnett, 17 Ala. 306; Martin v. Raborn, 42 Ala. 648.

Connecticut. — Pitkin v. Pitkin, 1 Conn. 307, 18 Am. Dec. 111; Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703.

Kansas. — Woodrum v. Washington Nat. Bank, 60 Kan. 44.

Kentucky. — Clay v. Clay, 3 Met. (Ky.) 548; Jennings v. Davis, 5 Dana (Ky.) 133.

Louisiana. — Muntz v. Broom, 11 La. Ann. 472.

Maine. — Bangor v. Beal, 85 Me. 129.

New York. — Flagg v. Ely, 1 Edm. Sel. Cas. (N. Y.) 206; King v. Talbot, 40 N. Y. 76; Stedman v. Feidler, 20 N. Y. 437; Case v. Abeel, 1 Paige (N. Y.) 393; Baker v. Disbrow, 3 Redf. (N. Y.) 348, *affirmed* 18 Hun (N. Y.) 29, *affirmed* 79 N. Y. 631.

North Carolina. — Burke v. Turner, 85 N. Car. 500.

Ohio. — Lucht v. Behrens, 28 Ohio St. 231, 22 Am. Rep. 378.

Virginia. — See Burwell v. Burwell, 78 Va. 574; Coleman v. M'Murdo, 5 Rand. (Va.) 90; Miller v. Jeffress, 4 Gratt. (Va.) 477; Hunter v. Lawrence, 11 Gratt. (Va.) 111, 62 Am. Dec. 640; Tabb v. Cabell, 17 Gratt. (Va.) 173; Asberry v. Asberry, 33 Gratt. (Va.) 469.

4. Liability for Interest — England. — Anonymous, 2 Ves. 630.

Kentucky. — Clay v. Clay, 3 Met. (Ky.) 543; Jennings v. Davis, 5 Dana (Ky.) 133.



*b. RIGHT OF BENEFICIARY TO PROFITS REALIZED BY FIDUCIARY.* — In case, however, such ventures have proved successful, the fiduciary is not entitled to the profits over and above the interest which should be paid on proper investments, but the beneficial owner of the fund may, at his election, take the profits which have been made by the wrongful use of his property,<sup>1</sup> for it is an elementary rule that a fiduciary should not be allowed to make any profit for himself out of his trust.<sup>2</sup>

*Limitations.* — The beneficiary is, however, entitled to those profits only

*Maine.* — *Bangor v. Beal*, 85 Me 129.

*New York.* — *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1; *Hood's Estate*, Tuck. (N. Y.) 396; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, *affirmed* 18 Hun (N. Y.) 29, 79 N. Y. 631; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520.

*Pennsylvania.* — *Norris's Appeal*, 71 Pa. St. 106; *Seguin's Appeal*, 103 Pa. St. 139; *Baker's Appeal*, 120 Pa. St. 33.

1. *Right of Beneficiary to Profits — England.* — *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298; *French v. Hobson*, 9 Ves. Jr. 103; *Ex p. Garland*, 10 Ves. Jr. 110; *Crawshay v. Collins*, 15 Ves. Jr. 218; *Brown v. De Tastet*, Jac. 284; *Cook v. Collingridge*, Jac. 607, 1 L. J. Ch. 74, 23 Rev. Rep. 155, 767; *Docker v. Somes*, 2 Myl. & C. 655, 3 L. J. Ch. 200; *Wedderburn v. Wedderburn*, 2 Keen 722; *Heathcote v. Hulme*, 1 Jac. & W. 122, 20 Rev. Rep. 248; *Booth v. Booth*, 1 Beav. 125; *Munch v. Cockerell*, 5 Myl. & C. 178; *Brown v. Litton*, 10 Mod. 20, 1 P. Wms. 141; *Robinson v. Robinson*, 1 De G. M. & G. 247, 21 L. J. Ch. 111, 16 Jur. 255; *Bate v. Scales*, 12 Ves. Jr. 402, 8 Rev. Rep. 345; *Anonymous*, 2 Ves. 630; *Vyse v. Foster*, L. R. 8 Ch. 309, 42 L. J. Ch. 245, 27 L. T. N. S. 774, 21 W. R. 207, *affirmed* L. R. 7 H. L. 318, 44 L. J. Ch. 37, 31 L. T. N. S. 177, 23 W. R. 355; *Rocke v. Hart*, 11 Ves. Jr. 58; *Pocock v. Reddington*, 5 Ves. Jr. 794. See also *Anonymous*, 1 P. Wms. 648; *Bowes v. Toronto City*, 11 Moo. P. C. 463; *Lord v. Wightwick*, 2 Eq. R. 349, 23 L. J. Ch. 235; *In re Hill*, 50 L. J. Ch. 551, 45 L. T. N. S. 126; *In re Norrington*, 13 Ch. D. 654, 28 W. R. 711; *Phayre v. Peree*, 3 Dow. 128, 1 Bligh N. S. 594; *Sugden v. Crossland*, 3 Smale & G. 192, 2 Jur. N. S. 318, 4 W. R. 343; *Williams v. Stevens*, 4 Moo. P. C. N. S. 235, 36 L. J. P. C. 21, L. R. 1 P. C. 352, 12 Jur. N. S. 952, 15 W. R. 409.

*Canada.* — See *Baldwin v. Crawford*, 2 Ch. Chamb. (Ont.) 9.

*United States.* — *Barney v. Saunders*, 16 How. (U. S.) 535.

*Alabama.* — *Kyle v. Barnett*, 17 Ala. 306; *Martin v. Raborn*, 42 Ala. 648.

*California.* — See *Miller v. Lux*, 100 Cal. 609; *Clark's Estate*, 53 Cal. 359; *Cousins's Estate*, 111 Cal. 441; *Wheeler v. Bolton*, 92 Cal. 159; *Matter of Hilliard*, 83 Cal. 423; *Adams v. Lambard*, 80 Cal. 426; *Matter of Stott*, 52 Cal. 403.

*Connecticut.* — *Pitkin v. Pitkin*, 1 Conn. 307, 18 Am. Dec. 111; *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703.

*Kansas.* — *Woodrum v. Washington Nat. Bank*, 60 Kan. 44.

*Louisiana.* — *Muntz v. Broom*, 11 La. Ann. 472.

*New Jersey.* — *McKnight v. Walsh*, 24 N. J. Eq. 498.

*New York.* — *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, *affirmed* 18 Hun (N. Y.) 29, 79 N. Y. 631; *Flagg v. Ely*, 1 Edm. Sel. Cas. (N. Y.) 206; *King v. Talbot*, 40 N. Y. 76; *Stedman v. Feidler*, 20 N. Y. 437; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520.

*Ohio.* — *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378.

*Pennsylvania.* — *Norris's Appeal*, 71 Pa. St. 106; *Seguin's Appeal*, 103 Pa. St. 139; *Baker's Appeal*, 120 Pa. St. 33. See also *Robert's Estate*, 22 Pa. Co. Ct. 4.

*South Carolina.* — *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185.

*Interest on Profits.* — A guardian is chargeable with interest on profits derived from funds of his ward invested in a mercantile concern, from the time they are received. *Kyle v. Barnett*, 17 Ala. 306.

*A Right to Sue a Trustee for Profits Made Out of Trust Funds Is Not Assignable.* — *Hill v. Boyle*, L. R. 4 Eq. 260.

*Circumstances under Which Beneficiary Not Entitled to Profits.* — In an *English* case where executors had committed a technical breach of trust by leaving the funds of the testator with a firm of which he had been a member and of which two of the executors were members, but the executors had acted in perfect good faith, and allowed interest on the capital at the rate of five per cent. per annum with yearly rests, and it could not be ascertained what amount of profit was due to the use of such capital, it was held that the executors should not be required to account for the profits. *Vyse v. Foster*, L. R. 8 Ch. 309, 42 L. J. Ch. 245, 27 L. T. N. S. 774, 21 W. R. 207, *affirmed* L. R. 7 H. L. 318, 44 L. J. Ch. 37, 31 L. T. N. S. 177, 23 W. R. 355.

2. *A Trustee Cannot Make Any Incidental Profits for Himself* in the management of the trust property, nor is he to acquire pecuniary gains from his fiduciary position. *McKnight v. Walsh*, 24 N. J. Eq. 498; *Matter of Harland*, 5 Rawle (Pa.) 323; *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820.

*Fiduciary Cannot Repay Himself Loss on One Improper Investment out of Profit on Another.* — *Robinson v. Robinson*, 11 Beav. 371, 18 L. J. Ch. 73, 12 Jur. 969.

*Use of Trust Funds in Business by Persons Borrowing Same.* — Persons who borrow trust funds, knowing them to be such, and employ them in trade or business or in any other lucrative undertaking they may be engaged in, are not liable to account to the *cestuis que trustent* for a share of the profits of the business, as the trustees would have been if they had carried on the trade with the trust funds for their own benefit. *Stroud v. Gwyer*, 28 Beav. 130, 6 Jur. N. S. 719, 2 L. T. N. S. 400.



which are due to the employment of his capital, and not to the profits which are due to the skill, industry, and labor of the fiduciary,<sup>1</sup> or the extended operations of the firm resulting from its good credit.<sup>2</sup> Similarly, it has been held that where the funds are employed in a partnership business the fiduciary is accountable only for the portion of the proceeds which he received, and not for what he permitted to be taken by his partners, even though they had knowledge of the breach of trust.<sup>3</sup> It has also been held that a fiduciary is not accountable to the beneficiary for profits which he has made by reason of being employed in his professional capacity, though such employment has resulted from certain investments of the trust fund.<sup>4</sup>

**Beneficiary Must Elect.** — The beneficiary must elect whether he will take interest on his money, or the profits which have been made; he is not entitled to both.<sup>5</sup>

**Limitation of Right of Election.** — And if he elects to take the profits, he must take the net profits for the entire period, subject to all losses which have occurred. He cannot take the profits for one period and interest for another.<sup>6</sup>

**5. For Improperly Disposing of Investments.** — A fiduciary who has improperly sold out stocks or securities in which the trust funds were invested is liable to account for the amount realized,<sup>7</sup> with interest;<sup>8</sup> or, at the election of the beneficiary, to replace in the trust fund an amount of the particular stock or security equal to that sold out,<sup>9</sup> and in case this can be done for less

**1. Profits Due to Skill, Industry, and Labor of Fiduciary.** — *Seguin's Appeal*, 103 Pa. St. 139.

**2. Employment of Funds in Business Conducted Partly on Credit.** — In *Kyle v. Barnett*, 17 Ala. 306, it was held that where a guardian invested the funds of his ward in a mercantile concern whose operations were based partly on cash and partly on credit, he was chargeable with that portion of the profits only which accrued upon the cash investment.

**3. Employment in Partnership Business.** — *Seguin's Appeal*, 103 Pa. St. 139. See also *Jones v. Foxall*, 15 Beav. 388.

**Sharing Profits with Manager of Business.** — A guardian who employs his son to take charge of the business in which he has invested funds of his ward, under an agreement, entered into in good faith, to allow him for his services one-half the net profits after paying legal interest on the investment, such compensation not being unreasonable, will not be held responsible for that portion of the profits which may be received by the son. *Kyle v. Barnett*, 17 Ala. 306.

**4. Profits Made by Fiduciary through Professional Employment Resulting from Investment.** — A testamentary trustee ought not to be charged with profits merely because he has lent out some portions of the testator's estate upon mortgage of property which has been used for building purposes, and thus, by means of those building operations, he has been employed as a solicitor and has made some profits. *Whitney v. Smith*, L. R. 4 Ch. 513, 20 L. T. N. S. 468, 17 W. R. 579.

**5. Beneficiary Not Entitled to Both Profits and Interest.** — *Kyle v. Barnett*, 17 Ala. 306.

**6. Limitation of Beneficiary's Right of Election.** — *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, affirmed 18 Hun (N. Y.) 29, 79 N. Y. 631. But compare *Heathcote v. Hulme*, 1 Jac. & W. 122, 20 Rev. Rep. 248.

**Case Distinguished.** — The proposition set out in the text is clearly distinguishable from that asserted in *King v. Talbot*, 40 N. Y. 76, that

where a trustee has divided the fund into parts and made separate investments, the *cestui que trust* may adopt some of such investments and disaffirm others.

**7. Liability to Account for Proceeds of Sale.** — *Bostock v. Blakeney*, 2 Bro. C. C. 653; *Forrest v. Elwes*, 4 Ves. Jr. 492, 4 Rev. Rep. 269; *Harrison v. Harrison*, 2 Atk. 121; *Pocock v. Reddington*, 5 Ves. Jr. 794; *In re Massingberd*, 59 L. J. Ch. 107, 60 L. T. N. S. 620, affirmed 63 L. T. N. S. 296. See also *Ex p. Gurner*, 1 Mont. D. & De G. 497.

**Sale Amounting to Conversion — Fiduciary Charged with Highest Price of Stock.** — *Lamb's Appeal*, 58 Pa. St. 142.

**8. Liability for Interest.** — *Forrest v. Elwes*, 4 Ves. Jr. 492, 4 Rev. Rep. 269; *Pocock v. Reddington*, 5 Ves. Jr. 794; *Lamb's Appeal*, 58 Pa. St. 142. See also *Ex p. Gurner*, 1 Mont. D. & De G. 497.

**9. Right of Beneficiary to Have Stock or Security Replaced.** — *England*. — *Bostock v. Blakeney*, 2 Bro. C. C. 653; *Forrest v. Elwes*, 4 Ves. Jr. 492, 4 Rev. Rep. 269; *Harrison v. Harrison*, 2 Atk. 121; *Powlet v. Herbert*, 1 Ves. Jr. 297; *O'Brien v. O'Brien*, 1 Molloy 533; *Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302; *In re Massingberd*, 59 L. J. Ch. 107, 60 L. T. N. S. 620, affirmed 63 L. T. N. S. 296; *Phillipson v. Gatty*, 2 Hall. & T. 459, affirming 7 Hare 516, 13 Jur. 318; *Pocock v. Reddington*, 5 Ves. Jr. 794. See also *Ex p. Gurner*, 1 Mont. D. & De G. 497.

*District of Columbia*. — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

*Maryland*. — *Murray v. Feinour*, 2 Md. Ch. 419.

*New York*. — *Clarkson v. De Peyster*, Hopk. (N. Y.) 274.

**Case Giving Beneficiary No Option.** — In *O'Brien v. O'Brien*, 1 Molloy 533, a trustee who had sold out stock without any corrupt motive was decreed to replace the same, but no option was given to the *cestui que trust* to have the money produced by the sale invested,



than the sale produced, to invest the surplus in the same manner for the benefit of the *cestui que trust*.<sup>1</sup>

**6. For Misconduct of Co-Fiduciaries.**—All fiduciaries are, as a rule, responsible for an improper investment or a failure to invest, though one only has received the money and been allowed to handle it, for all are bound to obey the directions of the trust, and must be careful to execute it faithfully.<sup>2</sup> But in an *English* case where power was given to two fiduciaries to invest in such securities, etc., as they should think fit, and one of them received a bribe for making a certain investment, but the other knew nothing of such bribe and honestly believed the investment to be a good one, the former was held responsible for a loss, and the latter was exonerated from liability.<sup>3</sup>

**7. For Misconduct of Agents.**—Where fiduciaries, instead of seeing to the investment of the trust fund themselves, delegate that duty to an agent by whom the money is misapplied or lost, the fiduciaries are responsible for the loss.<sup>4</sup> And a fiduciary has also been held responsible for a loss occasioned by the misapplication by a broker of exchequer bills in which the fiduciary had made a proper temporary investment, but which he had left in the hands of such broker;<sup>5</sup> and also for a loss on a mortgage, due to the negligence or fraud of his solicitor.<sup>6</sup>

**8. Interest**—*a.* **LIABILITY FOR.**—In several places throughout this section, reference has been made to the liability of a fiduciary for interest. It remains to discuss some general principles in relation to the extent of this liability.<sup>7</sup>

*b.* **RATE.**—As to the rate of interest which should be charged against a

as there would have been if the trustee had made or sought to make anything by the sale.

**Fiduciary Must Replace at His Own Loss Where Securities Have Risen in Value.**—*Murray v. Feinour*, 2 Md. Ch. 419; *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

**Liability for Dividends Which Would Have Been Received but for the Sale.**—*Mant v. Leith*, 15 Beav. 524, 21 L. J. Ch. 719, 16 Jur. 302.

**1. Investment of Surplus Where Stock or Security Can Be Replaced for Less than Sale Produced.**—*Powlet v. Herbert*, 1 Ves. Jr. 297; *Johns v. Herbert*, 2 App. Cas. (D. C.) 485; *Murray v. Feinour*, 2 Md. Ch. 419.

**2. All Fiduciaries Responsible for Misconduct of One.**—*Thompson v. Finch*, 22 Beav. 316, 25 L. J. Ch. 681; *Wiglesworth v. Wiglesworth*, 16 Beav. 269; *Deaderick v. Cantrell*, 10 Verg. (Tenn.) 263, 81 Am. Dec. 576. See also *Royall v. McKenzie*, 25 Ala. 363; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; *Graham v. Davidson*, 2 Dev. & B. Eq. (22 N. Car.) 165; *Maiter of Evans*, 2 Ashm. (Pa.) 470; *McMurray v. Montgomery*, 2 Swan (Tenn.) 374. See generally the title TRUSTS AND TRUSTEES.

**3. Fiduciary Who Acted Honestly Not Responsible for Loss though Co-Fiduciary Acted Improperly.**—*In re Smith*, (1896) 1 Ch. 71, 65 L. J. Ch. 159, 73 L. T. N. S. 604, 44 W. R. 270. See also *Larkin v. Armstrong*, 9 Grant Ch. (U. C.) 390.

**4. Fiduciaries Responsible for Loss Caused by Agent.**—*Rowland v. Witherden*, 3 Macn. & G. 568, 21 L. J. Ch. 480; *In re Dewar*, 54 L. J. Ch. 830, 52 L. T. N. S. 489, 33 W. R. 497; *Challen v. Shippam*, 4 Hare 555.

**Delegation of Trust by Municipality.**—Where a fund was given to a city in trust, and the city turned over the management of it to a board styled the "trustees of the fund," it was held that the city, as the trustee which had accepted the trust and undertaken its exe-

cution, would be primarily liable for any loss resulting from improper investments. *Bangor v. Beal*, 85 Me. 129.

**Employment of Broker to Purchase Particular Securities.**—It has been held in *England* that when it is proper to make an investment of trust moneys upon securities which are purchased and sold upon the public exchanges, the employment of a broker for the purpose of purchasing these securities, and of doing all things usually done by a broker which may be necessary for such purpose, is legitimate and proper; and if the fiduciary, acting in the usual course of business in such transactions, pays over to the broker money to pay for securities which the latter, in his "advice" or "bought note" alleges he has purchased, the fiduciary is not responsible for the appropriation of the money to his own use by the broker, who in fact never purchased the securities. *Speight v. Gaunt*, 9 App. Cas. 1, affirming *In re Speight*, 22 Ch. D. 727.

**5. Liability for Misapplication by Broker of Securities Left with Him.**—*Matthews v. Brise*, 10 Jur. 106, 15 L. J. Ch. 39, affirming 6 Beav. 239, 12 L. J. Ch. 263.

**6. Responsibility for Negligence of Solicitor in Not Discovering Prior Incumbrances on Property Mortgaged.**—*Hopgood v. Parkin*, L. R. 11 Eq. 74, 22 L. T. N. S. 722, 18 W. R. 908.

**Loss Due to Fraud of Solicitor Who Acted for Both Fiduciary and Mortgagor.**—*Sutton v. Wilders*, L. R. 12 Eq. 373, 41 L. J. Ch. 30, 25 L. T. N. S. 292, 19 W. R. 1021.

**For a General Discussion of the liabilities of fiduciaries arising from the acts or omissions of their agents, see the title TRUSTS AND TRUSTEES.**

And see the title AGENCY, vol. 1, p. 930.

**7. For a Discussion of the Subject of Interest in General, see the title INTEREST, vol. 16, p. 984.**



fiduciary who has failed to invest, or has made improper or improvident investments resulting in a loss, no hard and fast rule can be laid down. The circumstances of the case must govern, and the rate must be such that substantial justice shall be done between the parties.<sup>1</sup> The courts will usually, however, deal more severely with one who has been guilty of wilfulness or bad faith than with one who has been merely negligent.<sup>2</sup>

**1. Circumstances Govern.**—Where the fiduciary has acted in good faith and under an honest mistake, the rate of interest to be charged against him rests in a discretion that permits the consideration of all circumstances which show that substantial justice can be done to the *cestui que trust* by allowing less than the highest rate of interest permitted by law, *King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453.

**Where the Fiduciary Has Made No Profit** the true rule seems to be to exact only such a rate of interest as will clearly equal what would have been made had the fiduciary performed his duties according to law. *Roberts's Estate*, 22 Pa. Co. Ct. 4; *Light's Appeal*, 24 Pa. St. 180; *Robinet's Appeal*, 36 Pa. St. 174. See also *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

**Legal Rate of Interest the Proper Charge.**—*White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271; *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Prescott's Estate*, Tuck. (N. Y.) 430; *Hood's Estate*, Tuck. (N. Y.) 396.

Where a guardian acts in good faith, and does not make any use for himself of the funds which have been improperly invested, and makes no profit to himself, the law does not fix a penalty in the nature of "smart money," but charges him with the statutory rate of interest only. *Guardianship of Cardwell*, 55 Cal. 137.

**Six Per Cent.**—*Adair v. Brimmer*, 74 N. Y. 539; *Wiard v. Gable*, 8 Grant Ch. (U. C.) 458.

**Five Per Cent.**—In *Williamson v. Williamson*, 6 Paige (N. Y.) 298, executors who had failed to invest were charged with five per cent. interest.

And in *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609, it was considered that if a guardian mixed money of his wards with his own and kept no separate account, he must be charged with interest at five per cent. annually at least. See also *Gordon v. West*, 8 N. H. 455.

**English Rule.**—The early English cases seem to have fixed upon four per cent. as the proper rate of interest to be charged against fiduciaries who have failed to invest. *Johnson v. Prendergast*, 28 Beav. 480; *Fletcher v. Green*, 33 Beav. 426; *Forbes v. Ross*, 2 Cox Ch. 113; *Tebbs v. Carpenter*, 1 Madd. 290; *Perkins v. Baynton*, 1 Bro. C. C. 375; *Browne v. Southouse*, 3 Bro. C. C. 107; *Rocke v. Hart*, 11 Ves. Jr. 58; *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843; *In re Emmet*, 17 Ch. D. 142, 50 L. J. Ch. 341, 44 L. T. N. S. 172, 29 W. R. 464; while five per cent. has been allowed when the fiduciary made use of the money, *Burdick v. Garrick*, L. R. 5 Ch. 233, 39 L. J. Ch. 369, 18 W. R. 387; *Atty.-Gen. v. Solly*, 2 Sim. 518; *Berwick v. Murray*, 26 L. J. Ch. 201, 3 Jur. N. S. 847, 5 W. R. 208; *Westover v. Chapman*, 1 Coll. Ch. Cas. 177. See also *Bate v. Scales*, 12 Ves. Jr. 402, 8 Rev. Rep. 345; *Forbes v.*

*Ross*, 2 Cox Ch. 113; *Dobson v. Pattinson*, 5 W. R. 771; *Cook v. Addison*, 38 L. J. Ch. 322, L. R. 7 Eq. 466, 20 L. T. N. S. 212, 17 W. R. 480; or where it was lost through a breach of trust, *Munch v. Cockerell*, 5 Myl. & C. 179, 9 Sim. 339, 9 L. J. Ch. 153, 4 Jur. 140; or through improper investment, *Price v. Price*, 42 L. T. N. S. 626. But *compare* *Hooker v. Platts*, 1 Jur. 473, in which only four per cent. was allowed on an amount lost through an investment on insufficient security.

But in 12 Encyc. L. of Eng. 349, Mr. C. C. M. Dale speaks of the English rule in reference to the rate of interest as follows: "Recently, however, in view of the reduced rate of interest now obtainable on trust investments, it has been thought that the rates to be charged ought to be altered from four per cent. to three, and from five per cent. to four; and in some of the later cases this view has been acted on by the court (see *In re Metropolitan Coal Consumers' Assoc.*, 62 L. T. N. S. 30; *London, etc. R. Co. v. South Eastern R. Co.*, (1892) 1 Ch. 120, (1893) A. C. 439; *In re Dracup*, (1894) 1 Ch. 59; *In re Goodenough*, (1895) 2 Ch. 537; *In re Cleveland*, (1895) 2 Ch. 542). These cases tend to show that the rule of the court has been modified, if not altered, and it may perhaps be best described as being in a state of transition. It may be observed, however, that the four per cent. rate is still charged on debts provable in administration actions. *In re Lambert*, (1897) 2 Ch. 169."

**2. Distinction Between Cases of Bad Faith and of Mere Negligence.**—*Crackelt v. Bethune*, 1 Jac. & W. 566. See also *Forbes v. Ross*, 2 Bro. C. C. 430; *Piety v. Stace*, 4 Ves. Jr. 620; *Pocock v. Reddington*, 5 Ves. Jr. 794; *Rocke v. Hart*, 11 Ves. Jr. 58.

**Highest Legal Interest Should be Charged Against Fiduciary Guilty of Wilfulness or Bad Faith.**—*King v. Talbot*, 40 N. Y. 76, *modifying* 50 Barb. (N. Y.) 453; *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820; *Smith v. Roe*, 11 Grant Ch. (U. C.) 311. See also *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770.

**"At Least Legal Interest."**—A fiduciary, by investing trust funds in his own business or for his own benefit or accommodation, becomes an insurer of the fund and its productiveness, and as a general principle he is accountable at least for legal interest thereon. *Bangor v. Beal*, 85 Me. 129.

**Legal Rate the Limit of Liability, unless Fiduciary Has Made More.**—*Roberts's Estate*, 22 Pa. Co. Ct. 4. To the same effect are *Cousins's Estate*, 111 Cal. 441; *Matter of Stott*, 52 Cal. 403; *Clark's Estate*, 53 Cal. 359; *Matter of Hilliard*, 83 Cal. 423; *Miller v. Lux*, 100 Cal. 609. See also *Wheeler v. Bolton*, 92 Cal. 159; *Adams v. Lambard*, 80 Cal. 426.

**Rate to be Charged Against Fiduciary Who Has Obtained Loan from Trust Estate.**—A testator directed his executors to lay out the residue of



*c. SIMPLE OR COMPOUND INTEREST.* — Very similar principles govern the determination of the question whether the fiduciary shall be charged with simple or compound interest.<sup>1</sup> Thus the general rule is that where there is nothing beyond mere negligence on the part of the fiduciary, he will be charged with simple interest only,<sup>2</sup> though there are cases in which, under such circumstances, compound interest has been allowed.<sup>3</sup> And compound interest is usually charged whenever the fiduciary has used the funds in his own business or in speculation, or his conduct in any way savors of wilfulness or bad faith.<sup>4</sup>

his estate in the purchase of lands, or upon heritable or personal securities, at such rate of interest as they should think reasonable. The executors loaned the fund to R., one of their number, on his bond at four per cent., when five per cent. might have been obtained by investing in heritable or government securities. It was held that R. must pay interest at the rate of five per cent., for, while the discretion given by the will to the executors might have been soundly exercised by their lending money to any other person upon such terms as they thought reasonable, the rule to apply in the present case was that wherever a trustee contracts with himself he cannot spare himself or derive any degree of forbearance or advantage whatever to himself. *Forbes v. Ross*, 2 Cox Ch. 113.

1. Discretion as to Whether Simple or Compound Interest Shall Be Charged. — *Bates v. Underhill*, 3 Redf. (N. Y.) 365.

2. Simple Interest Only Charged Where There Has Been Mere Negligence — *England*. — *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843, 1 Jur. N. S. 361, 3 W. R. 200. See also *Johnson v. Prendergast*, 28 Beav. 480; *Flanagan v. Nolan*, 1 Molloy 85; *Johnson v. Newton*, 11 Hare 160; *Tebbs v. Carpenter*, 1 Madd. 290; *Court v. Roberts*, 6 Cl. & F. 65.

*United States*. — *Barney v. Saunders*, 16 How. (U. S.) 535.

*Alabama*. — See *Bryant v. Craig*, 12 Ala. 354.

*California*. — *Cousins's Estate*, 111 Cal. 441; *Wheeler v. Bolton*, 92 Cal. 159; *Adams v. Lambard*, 80 Cal. 426.

*New York*. — See *Duncomb v. Duncomb*, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; *Lansing v. Lansing*, 45 Barb (N. Y.) 182.

*Pennsylvania*. — *Light's Appeal*, 24 Pa. St. 180; *Lukens's Appeal*, 7 W. & S. (Pa.) 48.

A Trustee Who Is Held Liable for the Defalcation of His Co-trustee should not be charged with compound interest, but merely with simple interest on annual balances. *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576.

Where Amount Involved Is Small. — In an action upon the probate bond of the guardian of a spendthrift, the court allowed simple interest only upon a note, due on demand, from the guardian to the ward, made before he was appointed guardian and afterwards inventoried as part of the ward's estate, the amount of the note being so small that it was not a sufficient object to make new investments with the interest. *Fay v. Howe*, 1 Pick. (Mass.) 527.

Compound Interest Considered Not Chargeable as Such under Pennsylvania Statute. — In the face of the Pennsylvania Act of March 29, 1832, § 17 (Bright. Purd. Dig. 615, pl. 235), providing that "the amount of interest to be paid in all cases by executors, administrators, and

guardians shall be determined by the Orphans' Court under all the circumstances of the case; but shall not in any instance exceed the legal rate of interest for the time being," it would seem difficult to charge compound interest, as such, in *Pennsylvania*. *Norris's Appeal*, 71 Pa. St. 106. But compare *Matter of Harland*, 5 Rawle (Pa.) 323; *Lukens's Appeal*, 7 W. & S. (Pa.) 48.

Even prior to the passage of the statute above referred to, the Supreme Court of *Pennsylvania* had denied that fiduciaries could be charged compound interest. *English v. Harvey*, 2 Rawle (Pa.) 305.

But an accountant may be held to much more than compound interest by a surcharge of profits, when he has used the money of the estate; and he may be punished for misconduct by disallowance of commissions, and in other ways, as the circumstances of the case require. *Norris's Appeal*, 71 Pa. St. 106.

3. Interest Compounded. — The *Kentucky* statute (Stat. 1894, § 2035) provides that a guardian shall be charged with interest from the end of each year on any balance of the ward's funds which may remain in his hands, and which ought to have been invested or loaned out for the benefit of the ward; and that he shall be charged with interest upon interest in biennial rests. *Higgins v. McClure*, 7 Bush (Ky.) 379.

Semi-annual Rests Made Only Where Amounts Are Large. — For mere neglect to invest, simple interest only is generally imposed. Six months rests have been made only where the amounts received were large and such as could be easily and at all times invested. *Barney v. Saunders*, 16 How. (U. S.) 535.

4. Compound Interest Charged in Cases of Wilfulness or Bad Faith — *England*. — *Raphael v. Boehm*, 11 Ves. Jr. 111; *Townend v. Townend*, 1 Giff. 201, 5 Jur. N. S. 506, 7 W. R. 529; *Jones v. Foxall*, 15 Beav. 388, 21 L. J. Ch. 725. See also *Knott v. Cottee*, 16 Beav. 77, 16 Jur. 752.

*United States*. — *Barney v. Saunders*, 16 How. (U. S.) 535.

*California*. — *Adams v. Lambard*, 80 Cal. 426; *Cousins's Estate*, 111 Cal. 441; *Matter of Stott*, 52 Cal. 403; *Clark's Estate*, 53 Cal. 359; *Matter of Hilliard*, 83 Cal. 423; *Miller v. Lux*, 100 Cal. 609. See also *Wheeler v. Bolton*, 92 Cal. 159.

*Illinois*. — *Hughes v. People*, 111 Ill. 457, affirming 10 Ill. App. 148. See also *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271.

*Kentucky*. — *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.



**9. Option of Beneficiary as to Adopting Improper Investments** — *a.* **RULE STATED.** — An application of the same principle which entitles the beneficial owner of a trust fund to claim all profits which the fiduciary has made by the use thereof, gives him the option, when the fiduciary has made an improper investment, of either adopting and accepting such investment if he should deem it for his interest to do so, or rejecting it and charging the fiduciary with the amount misapplied.<sup>1</sup>

*b.* **BENEFICIARY BOUND BY ACCEPTANCE OF INVESTMENT.** — When the beneficiary has once exercised this option and accepted the investment with a full knowledge of all the facts, and without fraud on the part of the fiduciary, he is bound by such acceptance.<sup>2</sup>

*c.* **RIGHT TO ADOPT SOME INVESTMENTS AND REJECT OTHERS.** — It has

*Maryland.* — See *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

*Massachusetts.* — *Elliott v. Sparrell*, 114 Mass. 404; *Boynton v. Dyer*, 18 Pick. (Mass.) 1.

*Mississippi.* — See *Johnson v. Miller*, 33 Miss. 553.

*New Jersey.* — *Lathrop v. Smalley*, 23 N. J. Eq. 192; *McKnight v. Walsh*, 24 N. J. Eq. 498.

*New York.* — See *Adair v. Brimmer*, 74 N. Y. 539; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520.

*Pennsylvania.* — *Lukens's Appeal*, 7 W. & S. (Pa.) 48; *Matter of Harland*, 5 Rawle (Pa.) 323.

*South Carolina.* — *Wright v. Wright*, 2 McCord Eq. (S. Car.) 185. See also *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

**Principle upon Which Compound Interest Is Charged.** — On the subject of charging trustees with compound interest there is not and could not well be any uniform rule which could justly apply to all cases. When the trust to invest has been grossly and wilfully neglected; where the funds have been used by the trustees in their own business, or profits have been made of which they give no word, interest is compounded as a punishment or as a measure of damages for undisclosed profits and in place of them. *Barney v. Saunders*, 16 How. (U. S.) 535. See also *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

**Neglect or Refusal to Comply with Order of Court Directing Investment.** — The court of chancery may order the proceeds of a sale in the hands of a trustee to be invested by him so as to be made productive pending the litigation; and if the trustee fails or refuses to make the investment accordingly, he may be ordered to bring in the whole amount, with compound interest from the date of the order directing the investment. *Latimer v. Hanson*, 1 Bland (Md.) 51. See also *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. 272.

**Negligence So Gross as to Be Evidence of a Corrupt Intention.** — *Bryant v. Craig*, 12 Ala. 354.

**When Simple Interest Only Is Allowed on Funds Employed in Trade.** — In *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520, it was said that in cases where a fiduciary has employed the trust fund in trade, "the principle of the court appears to be to allow simple interest only where it is evident that the profits made by the trustee could not have exceeded that amount."

See also *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

**Circumstances Not Constituting a Use of Trust Funds in Business.** — A payment by a solicitor of funds held by him in trust into the bank account of a firm of which he is a member is not such a use in business as will subject him to the payment of compound interest. *Burdick v. Garrick*, L. R. 5 Ch. 233.

**1. Option of Beneficiary to Adopt or Reject Improper Investment** — *England.* — *Pennell v. Deffell*, 23 Eng. L. & Eq. 460; *Winchelsea v. Norcliffe*, 1 Vern. 435.

*Alabama.* — *De Jarnette v. De Jarnette*, 41 Ala. 708; *Martin v. Raborn*, 42 Ala. 648.

*California.* — *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

*Illinois.* — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271, and citing 27 AM. AND ENG. ENCYC. OF LAW (1st ed.) 160-163; *Breit v. Yeaton*, 101 Ill. 242. See also *Ogden v. Larrabee*, 57 Ill. 408.

*Indiana.* — *Sherry v. Sansberry*, 3 Ind. 320.

*Kansas.* — *Woodrum v. Washington Nat. Bank*, 60 Kan. 44. See also *Bush v. Bush*, 33 Kan. 566; *Merket v. Smith*, 33 Kan. 66; *Morrill v. Raymond*, 28 Kan. 415; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Ellicott v. Barnett*, 31 Kan. 171.

*Kentucky.* — *Clark v. Anderson*, 13 Bush (Ky.) 111.

*Mississippi.* — *Fant v. Dunbar*, 71 Miss. 576.

*New York.* — *King v. Talbot*, 40 N. Y. 76. See also *Eckford v. De Kay*, 8 Paige (N. Y.) 89, affirmed 26 Wend. (N. Y.) 29.

*Pennsylvania.* — *Royer's Appeal*, 11 Pa. St. 36; *Bonsall's Appeal*, 1 Rawle (Pa.) 266; *Kaufman v. Crawford*, 9 W. & S. (Pa.) 131, 42 Am. Dec. 323. See also *Lukens's Appeal*, 7 W. & S. (Pa.) 48.

*South Carolina.* — *Brazel v. Fair*, 26 S. Car. 370.

**Rights of Beneficiary When Mortgaged Property Is Bought In.** — If property on which a mortgage has been taken is bought in by the trust estate, and it turns out that the property is of greater value than the amount of the investment, the *cestuis que trustent* are entitled to the benefit of it. *Sherman v. Lanier*, 39 N. J. Eq. 240.

**The Right of a Cestui Que Trust to Follow Trust Funds as Against Third Persons** will be treated in the article TRUSTS AND TRUSTEES.

**2. Beneficiary Bound by Acceptance of Investment.** — *Sherry v. Sansberry*, 3 Ind. 320.



been considered that where the fiduciary has divided the trust fund into parts and made separate investments, the beneficiary may adopt such as he thinks it for his interest to accept, and reject the others.<sup>1</sup>

10. **Effect of Beneficiary's Consent to or Acquiescence in Improper Investment** —  
*a.* **RULE STATED.** — A fiduciary may be relieved from liability for a loss on an improper investment, where such investment was made at the request or with the assent of the beneficiary,<sup>2</sup> or the latter has acquiesced therein.<sup>3</sup>

*b.* **BENEFICIARY MUST HAVE BEEN COMPETENT TO ACT.** — But this can be true only where the beneficiary was competent to act in the premises, and was under no legal disability such as infancy, lunacy, or coverture.<sup>4</sup>

1. **Right to Accept Some Investments and Reject Others.** — *King v. Talbot*, 40 N. Y. 76. See also *Ogden v. Larrabee*, 57 Ill. 408.

**Case Distinguished.** — The distinction between the principle here asserted and that asserted in *Baker v. Disbrow*, 3 Redf. (N. Y.) 348, affirmed 18 Hun (N. Y.) 29, 79 N. Y. 631, has been already pointed out. See *supra*, this section, *Right of Beneficiary to Profits Realized by Fiduciary*, paragraph *Limitation of Right of Election*.

2. **No Liability for Losses on Investments Made at Request or with Assent of Beneficiary** — *England*. — *Fyler v. Fyler*, 3 Beav. 550; *Walker v. Symonds*, 3 Swanst. 1; *Erice v. Stokes*, 11 Ves. Jr. 319. See also *Langford v. Gascoyne*, 11 Ves. Jr. 333; *Lockhart v. Reilly*, 25 L. J. Ch. 697, 3 W. R. 227.

*Canada*. — *Harrison v. Harrison*, 14 Grant Ch. (U. C.) 586.

*Georgia*. — *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389.

*Maryland*. — *Zimmerman v. Fraley*, 70 Md. 561; *Contee v. Dawson*, 2 Bland (Md.) 264.

*Massachusetts*. — *Poole v. Munday*, 103 Mass. 171.

*Pennsylvania*. — *Clermontel's Estate*, 12 Phila. (Pa.) 139, 35 Leg. Int. (Pa.) 306. But compare *Hemphill's Appeal*, 18 Pa. St. 303.

**Direction to Fiduciary to Use His Own Judgment Not a Consent to His Investments.** — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271.

**Expression of Opinion that Investment Is Safe.** — In *Nyce's Estate*, 5 W. & S. (Pa.) 254, 40 Am. Dec. 498, the court, without inquiring how far the assent or request of a guardian would release executors holding property for the minors, from liability for an improper investment, held that an expression of opinion by the guardian that a contemplated investment was safe, or even his recommendation of such investment, did not amount to an agreement made by him on the part of his wards that the money should be so disposed of. As to the effect of the consent of a guardian see *Spratt v. Wilson*, 19 Ont. 28, *infra*, next subsection.

**Request to Lend on Mortgage Not a Consent to a Breach of Trust.** — A request or consent to a loan on mortgage, this being a proper investment, does not amount to a request or consent to an investment on the property without inquiry, or any other breach of trust. *In re Somerset*, (1894) 1 Ch. 231, 63 L. J. Ch. 41, 7 Reports 34, 69 L. T. N. S. 744, 42 W. R. 145. See also *Rehden v. Wesley*, 29 Beav. 213.

**Errors of Judgment or Negligence.** — There are several *English* cases in which it has been con-

sidered that the consent of the beneficiaries will not relieve the fiduciaries from liability for investing the trust fund or leaving it invested on insufficient security, for as to the sufficiency of the security the judgment and responsibility of the fiduciaries alone is trusted. *Norris v. Wright*, 14 Beav. 291; *Wiles v. Gresham*, 5 De G. M. & G. 770, 3 Eq. R. 116, 24 L. J. Ch. 264, 3 W. R. 87, affirming 2 Drew. 258.

The fact that a *cestui que trust* has consented to a particular investment cannot relieve the trustees for a loss thereon which is attributable to their subsequent mismanagement and neglect. *Lockhart v. Reilly*, 25 L. J. Ch. 697, 3 W. R. 227.

**Investment Made Directly by Cestui Que Trust.** — In *Beale v. Kline*, 183 Pa. St. 149, 41 W. N. C. (Pa.) 265, one K. applied by letter to the *cestui que trust* for a certain loan, which was accordingly made, the money being taken out of the trustee's hands for this purpose, and a note for the amount being given by K. to the trustee. In reference to this transaction the court said that the sum was taken out of the fund by its owner and invested upon his own judgment; it was in no sense the loan or investment of the trustee, and the trustee was not responsible for it.

3. **Acquiescence of Beneficiary May Relieve Fiduciary from Liability.** — *Harden v. Parsons*, 1 Eden 145; *Walker v. Symonds*, 3 Swanst. 1; *Zimmerman v. Fraley*, 70 Md. 561; *Worrell's Appeal*, 23 Pa. St. 44. See also *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Stevens v. Robertson*, 37 L. J. Ch. 499, 18 L. T. N. S. 427, 16 W. R. 724; *Greenwood v. Wakeford*, 1 Beav. 576, 8 L. J. Ch. 333. But compare *Hemphill's Appeal*, 18 Pa. St. 303.

**When Investment Cannot Be Ratified.** — It has been held that when a trustee has loaned on personal security and with the object of favoring the borrower, his illegal act cannot be subsequently ratified by the *cestui que trust* so as to legalize it. *Bateman v. Davis*, 3 Madd. 98, 18 Rev. Rep. 200.

4. **Beneficiary Must Have Been Competent to Act** — *Georgia*. — *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389.

*Illinois*. — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming *Sherman v. White*, 62 Ill. App. 271.

*Maryland*. — *Zimmerman v. Fraley*, 70 Md. 561; *Murray v. Feinour*, 2 Md. Ch. 418; *Contee v. Dawson*, 2 Bland (Md.) 264.

*New York*. — *Matter of Teyn*, 2 Redf. (N. Y.) 306.

*Pennsylvania*. — *Worrell's Appeal*, 23 Pa. St. 44.



**Non-interference Before Interest Has Come into Possession.** — And it has been held that mere knowledge and non-interference by the *cestui que trust* before his interest has come into possession does not always bind him as acquiescing in the breach of trust.<sup>1</sup>

**c. BENEFICIARY MUST HAVE BEEN FULLY INFORMED.** — It is also necessary that the beneficiary should have been fully informed on the subject, and have known of all the facts connected with the transaction, and of his rights in the premises; otherwise his consent or acquiescence cannot relieve the fiduciary from liability.<sup>2</sup>

**d. ASSENT OF ONE OF SEVERAL BENEFICIARIES.** — Where there are several beneficiaries the assent or acquiescence of one bars his remedy against the fiduciary,<sup>3</sup> but cannot have the effect of releasing the latter from liability to the other beneficiaries.<sup>4</sup>

**e. BURDEN OF PROOF.** — It is incumbent upon a fiduciary who seeks to escape liability for an improper investment on the ground that the beneficiary assented thereto or acquiesced therein, to establish such fact by full and satisfactory proof.<sup>5</sup>

**11. Effect of Provision in Trust Instrument Exonerating Fiduciary from Liability for Losses.** — It sometimes happens that the trust instrument contains a provision exonerating the fiduciary from liability for losses on investments.<sup>6</sup> But such a provision will not protect from liability for losses to which it does not clearly apply,<sup>7</sup> or which are caused by a breach of trust on the part of the fiduciary,<sup>8</sup> or result from his negligence.<sup>9</sup>

*Canada.* — *Harrison v. Harrison*, 14 Grant Ch. (U. C.) 586; *Spratt v. Wilson*, 19 Ont. 28.

*Duress.* — In *Whistler v. Newman*, 4 Ves. Jr. 123, trustees under a marriage settlement were held responsible for a loss occasioned by the loan of the fund to the husband, though the wife had been privy thereto, she having been prevailed upon to consent, partly by coaxing and partly by bullying.

**1. Non-interference Before Interest Has Come into Possession.** — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

**2. Beneficiary Must Have Been Fully Informed** — *England.* — See *Adams v. Clifton*, 1 Russ. 297; *Walker v. Symonds*, 3 Swans. 1; *In re Massingberd*, 63 L. T. N. S. 296. But compare *Lockhart v. Reilly*, 25 L. J. Ch. 697, 3 W. R. 227.

*Illinois.* — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

*Maryland.* — *Zimmerman v. Fraley*, 70 Md. 561.

*Pennsylvania.* — *Pray's Appeal*, 34 Pa. St. 100; *Worrell's Appeal*, 23 Pa. St. 44.

*South Carolina.* — *Singleton v. Lowndes*, 9 S. Car. 465.

**Imperfect Information Given by the Fiduciary Will Be Regarded as Equivalent to Concealment.** — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

**3. No Liability to Beneficiary Who Assented or Acquiesced.** — *Brice v. Stokes*, 11 Ves. Jr. 319; *Judd v. Warner*, 2 Dem. (N. Y.) 104.

**Indemnity to Fiduciaries out of Share of Consenting Beneficiaries.** — Where an improper investment by trustees consists in a loan to one *cestui que trust* upon his personal security, which is sanctioned by another of the *cestuis que trustent*, the trustees must be allowed an indemnity

with regard to the sum advanced out of the interest in the trust property of such *cestuis que trustent*. *Phillipson v. Gatty*, 13 Jur. 318, 7 Hare 516, *affirmed* 2 Hall & T. 459. To the same effect is *Booth v. Booth*, 1 Beav. 125.

**4. Fiduciary Liable to Beneficiaries Not Assenting or Acquiescing.** — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271; *Judd v. Warner*, 2 Dem. (N. Y.) 104.

**The Consent of a Life Tenant to a certain investment can at most affect only his life interest in the profits of the fund, and cannot absolve the trustee from liability to restore the corpus of the fund for the benefit of those in remainder.** *Zimmerman v. Fraley*, 70 Md. 561; *Dunn v. Dunn*, 1 S. Car. 350. See also *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271.

**5. Burden of Proof.** — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, *affirming* *Sherman v. White*, 62 Ill. App. 271; *Zimmerman v. Fraley*, 70 Md. 561; *Singleton v. Lowndes*, 9 S. Car. 465.

**6. Fiduciary Protected.** — Trustees who are by will authorized to retain as assets any investments which the testator may have at the time of his death "without liability in case of depreciation or loss" are not liable for a loss resulting from a retention of an investment of the testator. *Bartol's Estate*, 182 Pa. St. 407.

**7. Loss Not Within Provision Exonerating from Liability.** — *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388; *Rehden v. Wesley*, 20 Beav. 213.

**8. Liability for Losses Caused by Breach of Trust.** — *Rae v. Meek*, 14 App. Cas. 558, *reversing* 15 Ct. Sess. Cas. (4th ser.) 1033. See also *Knox v. Mackinnon*, 13 App. Cas. 765; *Seton v. Dawson*, 4 Ct. Sess. Cas. (2d ser.) 310.

**9. Liability for Losses Due to Negligence.** — *Knox v. Mackinnon*, 13 App. Cas. 753; *Dro-*



12. **Limitation of Actions.**—The principles relating to the time of bringing actions against fiduciaries to enforce liabilities arising from breaches of duty in reference to investments, are practically the same as those relating to actions to enforce other liabilities, and will, for that reason, be treated in the general article relating to fiduciaries.<sup>1</sup>

**XIII. REMOVAL OF FIDUCIARIES.**—The questions as to what malfeasance or negligence in the matter of making and managing investments will warrant the removal of the fiduciary, are not within the scope of this title, but fall naturally within others, to which reference is made.<sup>2</sup>

**INVIOULATE.**—Inviolate is defined to mean unhurt; uninjured; unpolluted; unbroken.<sup>3</sup>

**INVITATION—INVITE.**—See note 4.

**INVOICE.** (See also **INVENTORY**, *ante*, p. 419; and see the title **REVENUE LAWS**.)—An invoice is a written account of the particulars of merchandise shipped to a purchaser, factor, or consignee, with the value or prices and charges annexed.<sup>5</sup>

sier v. Brereton, 15 Beav. 221; Sutton v. Wilders, L. R. 12 Eq. 373, 41 L. J. Ch. 30, 25 L. T. N. S. 292, 19 W. R. 1021; Tuttle v. Gilmore, 36 N. J. Eq. 617.

1. **Limitation of Actions.**—See the title **TRUSTS AND TRUSTEES**. See also the title **LIMITATION OF ACTIONS**.

2. **Removal of Fiduciaries.**—See the titles **GUARDIAN AND WARD**, vol. 15, p. 16; **TRUSTS AND TRUSTEES**; and other articles relating to fiduciaries.

3. **Inviolate.**—Flint River Steam Boat Co. v. Roberts, 2 Fla. 114.

As to the constitutional provision that trial by jury shall remain *inviolat*e, see the title **JURY AND JURY TRIAL**.

4. **Invitation—Invite.** (See also the titles **NEGLIGENCE**; **TURNSTABLES**; **STATIONS**; **TRESPASS**.)—In Texas, etc., R. Co. v. Brown, 11 Tex. Civ. App. 503, it was said: "Among the definitions of the verb 'to invite' given by the lexicographer Webster is 'to allure'; 'to attract.' An *invitation*, then, may be said to consist in the act not only of requesting or bidding, but in that of alluring or attracting, or in a situation which in itself is attractive or alluring. In other words, it may be express or implied." Texas, etc., R. Co. v. Brown, 11 Tex. Civ. App. 503.

In Turess v. New York, etc., R. Co., 61 N. J. L. 318, the court said: "I use the word *invitation* as aptly expressing a well-known relation between an owner or occupier of land and one who comes thereon under certain circumstances. The nature and extent of the liability of the inviter are well settled. Phillips v. Library Co., 55 N. J. L. 307. Mr. Justice Depue, in the case last cited, draws attention to a criticism of the master of the rolls in Heaven v. Pender, 11 Q. B. D. 508, on the accuracy of the word *invitation* as commonly used in this connection. But the statement which the learned master of the rolls suggested as more accurately expressing the relation between the parties in such cases seems to be unnecessarily and erroneously broad. *Invitation* is a term whose legal import is known, and there is no reason for not using it to express the relation now under consideration. *Invitation* which creates such

a relation may be express, as when the owner or occupier of land by words *invites* another to come on it, or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. This definition, originally given in Sweeney v. Old Colony, etc., R. Co., 10 Allen (Mass.) 368, was approved and adopted by our Court of Errors." Citing Phillips v. Library Co., 55 N. J. L. 307.

5. **Invoice.**—Pipes v. Norton, 47 Miss. 76. It was here decided that a statement of amounts of *invoices* was not sufficient in a bill of particulars. The court said: "An *invoice* of goods is merely another term for 'bill rendered.'"

"An *invoice* is a list of goods sold and the prices charged for them, or of goods consigned and the value at which the consignee is to receive them." Southern Express Co. v. Hess, 53 Ala. 22. See also Pierce v. Southern Pac. Co., 120 Cal. 167.

**Invoice and Inventory Distinguished.**—In Cramer v. Oppenstein, 16 Colo. 498, it was said: "The statute requires the making of an inventory, not an *invoice*, of the attached property. An *invoice* is an account or catalogue of goods with the value, marks, or particular description thereof annexed; an inventory is a list or catalogue of property merely."

**Invoice Cost.**—A shipper shipped by the defendant's railroad two loads of orange trees grown by him. It was agreed that in case of loss the actual *invoice* cost at time of shipment should be taken as the measure of damages. It was held that by "*invoice* cost" was meant value. Pierce v. Southern Pac. Co., 120 Cal. 156.

**Invoice Price—Marine Insurance.** (See generally the title **MARINE INSURANCE**.)—Evidence is admissible to show the meaning among underwriters of "*invoice* and five per



**INVOLUNTARY.** — See note 1.

**INVOLUNTARY MANSLAUGHTER.** — See the title MURDER AND MANSLAUGHTER.

**INVOLUNTARY PAYMENT.** — See note 2.

**INVOLUNTARY SERVITUDE.** (See also the titles CONSTITUTIONAL LAW, vol. 6, p. 963; SLAVERY.) — See note 3.

cent." in an application for marine insurance. "Literally it means, after supplying the word 'price' or 'cost' as understood, the amount stated as price or cost in the *invoice* of the goods, and would imply the existence of a paper properly called an *invoice*. The word is used, however, to denote other meanings. As is often the case in the use of words, the word *invoice* is sometimes used to designate things of which it is the frequent accompaniment or evidence. An *invoice* accompanies goods and states price or cost. Consequently an *invoice* of goods sometimes means the goods themselves, and *invoice* price or cost sometimes means the prime price or cost of goods although there is no *invoice* in fact. On the trial, therefore, the defendant had a right to show in what particular manner those words were used in the business of underwriting." *Sturm v. Williams*, 38 N. Y. Super. Ct. 342.

In holding that the *invoice* price was not the proper test of value by which to adjust a loss under a marine-insurance policy, *Washington, J.*, said: "Marshall has strangely embarrassed this subject by using as synonymous terms which are substantially different. 'In England,' he observes, 'the loss is estimated according to the prime cost — that is, the *invoice* price.' If they should happen to be the same or must always be so, it was unnecessary to multiply words in order to inform us that either might be taken. If they differ, which they frequently may do, then the two expressions cannot mean the same thing; and he has omitted to state, in such a case, which is to govern." *Carson v. Marine Ins. Co.*, 2 Wash. (U. S.) 471. See also *Mumford v. Broome*, 1 Johns. Cas. (N. Y.) 120; *Le Roy v. United Ins. Co.*, 7 Johns. (N. Y.) 354.

**Same — Contract.** — In an action for commissions upon an agreement to consign goods to be sold upon commissions on the *invoice* price, it is not necessary to produce the *invoice*, and the value of the goods may be proven. The *invoice* may not have been sent, or may have misrepresented the price. *Plank v. Gavila*, 3 C. B. N. S. 807, 91 E. C. L. 807.

**Invoice Value,** in a customs act, means cash value, where cash has been paid. *Arthur v. Goddard*, 96 U. S. 145.

**Evidence — Bill of Sale Distinguished.** (See also the title BILLS OF SALE, vol. 4, p. 555.) — In *Dows v. National Exch. Bank*, 91 U. S. 618, it was said: "An *invoice* is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things *invoiced*, and it is as appropriate to a bailment as it is to a sale. \* \* \* Hence, standing alone, it is never regarded as evidence of title." Quoted in *Sturm v. Boker*, 150 U. S. 328; *Kentucky Refining Co. v. Globe Refining Co.*, (Ky. 1898) 47 S. W. Rep. 605.

In *Rolker v. Great Western Ins. Co.*, 4 Abb.

App. Dec. (N. Y.) 83, it was said: "The *invoice* carries no necessary implication of ownership. It is well understood that an *invoice* usually accompanies goods that are consigned to a factor for sale as well as in the case of a purchaser."

**1. Compulsory and Involuntary.** — Upon the meaning of these terms as used in a bankruptcy statute the court in *Re Wilson*, 2 Lowell (U. S.) 455, said: "It was argued that the words 'compulsory' and *involuntary* describe two classes of cases; one by creditors, and one by partners. But it is plain that the words are used throughout this statute as strict synonyms." See generally the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630.

**Involuntary and Unintentional.** — In *Brown v. Kendall*, 6 Cush. (Mass.) 294, it was said: "The whole case proceeds on the assumption that the damage sustained by the plaintiff from the stick held by the defendant was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term 'unintentional' rather than *involuntary*, because in some of the cases it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act." See also the title TRESPASS.

**2. Involuntary Payment.** (See also the titles EXTORTION, vol. 12, p. 576; PAYMENT. And see VOLUNTARY.) — To constitute an *involuntary* payment which may be recovered back, the payment need not be made under actual violence or physical duress; it is enough that the party pays reluctantly in consequence of an illegal demand and without being able to regain possession of his property except by submitting to the extortion. *Brumagim v. Tillinghast*, 18 Cal. 272; *Cobb v. Charter*, 32 Conn. 358; *Alston v. Durant*, 2 Strobb. L. (S. Car.) 257, 49 Am. Dec. 603; *Parcher v. Marathon County*, 52 Wis. 388.

**3. Involuntary Servitude.** — The Constitution of *Minnesota* prohibited *involuntary servitude* otherwise than in the punishment of crime. In arguing that the violation of a city ordinance was a criminal offense the court said: "But finally, if these are not criminal offenses, and convictions of them convictions of crime, within the meaning of the constitution, then, under article 1, § 2, of that instrument, forbidding '*involuntary servitude* in the state, otherwise than in the punishment of crime whereof the party shall have been duly convicted,' a person convicted of a violation of a municipal ordinance could never be kept at hard labor during the term of his imprisonment, and the police power of municipalities



**INVOLVE — INVOLVED.** — Involved means directly affected.<sup>1</sup>

**I O U.** (See also the titles ABBREVIATIONS, vol. 1, p. 97; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 82.) — A memorandum of debt, consisting of these letters, a sum of money, and the debtor's signature, is termed an I O U, these letters representing the words "I owe you."<sup>2</sup>

would be deprived of what has been from time immemorial its most efficient and salutary means of preserving good order and enforcing obedience to their by-laws, as well as of protecting the health and morals of those convicted of the violation of such laws. There is nothing better settled than that enforced labor is *involuntary servitude* within the meaning of such constitutional provisions." State v. West, 42 Minn. 152.

On the use of the expression *involuntary servitude* in the Thirteenth Amendment to the Constitution of the United States, see the Slaughter-House Cases, 16 Wall. (U. S.) 36.

**Same — Children.** — The service of Italian children brought to the United States with their parents' consent by a man, to earn money for him on the streets, is *involuntary servitude*. The court said: "They were incapable of exercising will or choice affirmatively on the subject. They were cast off by their parents, in violation of the law of Italy, and their being in this country at all with the defendant was, on all the facts, really *involuntary* on their part, although the sham form of their consent was gone through with." U. S. v. Aucarola, 17 Blatchf. (U. S.) 431, 1 Fed. Rep. 676.

**Same — Apprentices.** — In Brown v. State, 23 Md. 508, it was held that the phrase *involuntary servitude* in the Constitution of Maryland embraced the condition of a negro apprentice bound out in compliance with the terms and requirements of the state laws. The court said that those words were "more comprehensive than the term 'slavery,' embracing not only it, but all other modes of servitude imposed upon white or black against the will either of the party subjected or of the person to whom service may be due by such party in any of the relations of life." And see *In re Clark*, 1 Blatchf. (Ind.) 122, where it was held that an indenture for twenty years entered into by a free woman of color was void as *involuntary servitude*.

**1. Involved.** — Williams v. Western Union Tel. Co., (N. Y. Super. Ct. Spec. T.) 1 Civ. Pro. (N. Y.) 194.

A question is *involved* when it arises for decision. Duncan v. Missouri, 152 U. S. 377.

**Amount Involved.** — See 1 ENCYC. OF PL. AND PR. 702, title AMOUNT IN CONTROVERSY.

**Same — In Dispute.** — The terms "amount *involved*" and "amount in dispute" have been held equivalent. Decker v. Williams, 73 Fed. Rep. 310, citing Reynolds v. Burns, 141 U. S. 117.

**Subject-Matter Involved — Additional Allowances.** (See also 1 ENCYC. OF PL. AND PR. 211, title ADDITIONAL ALLOWANCES OF COSTS.) — The New York Code of Civil Procedure provided for extra allowances to the successful party in certain cases, the amount of such allowances not to exceed five per cent. upon the amount recovered or the value of the

subject-matter *involved*. It was held that the term "subject-matter *involved*" referred simply to property or other valuable things the possession, ownership, or title to which was to be determined by the action, and did not include other property, although it might be indirectly or remotely affected by the result. Conaughty v. Saratoga County Bank, 92 N. Y. 401; Burke v. Candee, 63 Barb. (N. Y.) 552; Spofford v. Texas Land Co., 41 N. Y. Super. Ct. 230.

**Involving the Merits.** (See also MERITS.) — A statute provided that orders *involving* the merits should be appealable. In construing this statute in St. John v. West, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 329, the court said that the word *involve* in this connection signified "passed upon" or "determined." See also Chouteau v. Parker, 2 Minn. 121; Megrath v. Van Wyck, 3 Sandf. (N. Y.) 750; Cruger v. Douglass, 8 Barb. (N. Y.) 81; Bedell v. Stickles, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 432; Whitney v. Waterman, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 313.

In Ernst v. The Steamer Brooklyn, 24 Wis. 616, it was held that a motion for the re-taxation of costs did not *involve* the merits of the action within a statute giving a bill when an order *involved* the merits of an action.

**Involving Title to Real Estate.** (See 12 ENCYC. OF PL. AND PR. 664, title JUSTICES OF THE PEACE; 18 ENCYC. OF PL. AND PR. 150, title REMOVAL OF CAUSES.) — In Dunn v. Miller, 96 Mo. 324, the plaintiff had brought an action of ejectment against the defendant. The land in question had been recovered from the plaintiff by one who claimed under a deed from the former owner; this deed was shown to be a forgery, but as the defendant relied upon the former owner's outstanding title, the plaintiff could not show the forgery in an action of ejectment. The plaintiff then brought an equitable action for relief against these former judgments. It was held that this was a case *involving* title to real estate, as that phrase is used in the Missouri Constitution in providing for removal of causes. See also Bennett v. Missouri Pac. R. Co., 105 Mo. 645; Ash v. Independence, 145 Mo. 120; Holman v. Taylor, 31 Cal. 338; Copertini v. Oppermann, 76 Cal. 181.

**2. I O U.** — Abbott's L. Dict.

An acknowledgment written in a memorandum book in the following form: "*I O you* the sum of one hundred and sixty dollars, which I shall pay on demand to you," is a valid acknowledgment of indebtedness, and parol proof is admissible to show the person to whom it is addressed. Kinney v. Flynn, 2 R. I. 319.

B, C, D, and E gave a joint and several promissory note to A for two hundred pounds and interest, as security for a loan to A. On the death of E, B obtained the note from A for the purpose of procuring the signature of an additional party; and to secure its return, B



**IPSO FACTO.** — *Ipsa facto* is defined as, by the very act itself; by the mere fact; by the fact itself. A proceeding *ipso facto* void is one which has not *prima facie* validity, but is void *ab initio*.<sup>1</sup>

**IRON.** — See note 2.

**IRREGULAR — IRREGULARITY.** (See also NULLITY; VOID AND VOIDABLE.) — An irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding. As applied to judicial proceedings it consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or in doing it at an unseasonable time or in an improper manner.<sup>3</sup>

and C signed the following document: "I O Mr. A the sum of two hundred pounds for value received." The note was returned from B to A, with the name of F added, but the I O U was not given up. The alteration was made with the assent of all parties. *Quare*, whether the addition of the fifth name was such a material alteration as to avoid the note? Assuming it to be so, it was held, in an action by A against B, that inasmuch as the note was free from objection at the time when the I O U was given, it was admissible in evidence in support of a count upon an account stated by the I O U. *Gould v. Coombs*, 1 C. B. 543, 50 E. C. L. 543.

In order to support an account stated there must be an admission of a debt due. Therefore, where the defendant verbally agreed to purchase of the plaintiff the lease and good will of his premises, and, on being asked for a deposit, gave an I O U for twenty-five pounds, but afterwards refused to complete the purchase, it was held that the I O U was not evidence of an account stated. *Lemere v. Elliott*, 6 H. & N. 656.

1. *State v. Lansing*, 46 Neb. 514. This case arose upon the construction of a statute providing that if any person elected or appointed to office should neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by the act, his office should thereupon become *ipso facto* vacant. See generally the title PUBLIC OFFICERS.

2. **Iron — Steel.** — A policy of insurance on a ship contained a clause, "warranted no iron or ore or phosphate cargo exceeding the net registered tonnage." It was held that the term *iron* included steel. *Hart v. Standard Marine Ins. Co.*, 22 Q. B. D. 499.

**Iron Ore.** — Upon the question of the meaning of the term "*iron ore*" in a revenue statute the court said: "The evidence shows that water, mechanically mixed, is one of the natural and constant constituents of the *iron ore* of commerce, both domestic and foreign; and that there is no warrant for the conclusion that the *iron ore* of the statute is limited to dry ore, or ore with such mechanically mixed water excluded. A verdict to the contrary would have been entirely unsupported by the evidence." *Earnshaw v. Cadwalader*, 145 U. S. 259. See generally the title REVENUE LAWS.

**Scrap Iron.** — In *Dwight v. Merritt*, 140 U. S. 218, it was said: "The language of the statute is plain and unambiguous in its definition of what shall constitute 'scrap iron' under that schedule. The phrase 'nothing shall be deemed scrap iron except,' etc., clearly shows

that there might be other classes or kinds of scrap *iron* known to the trade than those mentioned as dutiable under that clause of the statute, and therefore clearly indicates that not everything generally known as 'scrap *iron*' was dutiable under that clause. The statute evidently contemplated that 'scrap *iron*,' as known to the trade and in commercial usage, was rather a broad term, embracing several varieties of *iron*;' but it was only certain kinds of it that were dutiable under that clause."

3. **Irregularity — California.** — *Ex p. Gibson*, 31 Cal. 625.

*Michigan.* — *Turrill v. Walker*, 4 Mich. 183; *Jenness v. Lapeer Circuit Judge*, 42 Mich. 469.

*Missouri.* — *Downing v. Still*, 43 Mo. 317; *Jones v. Hart*, 60 Mo. 356.

*Nebraska.* — *In re Betts*, 36 Neb. 285.

*New York.* — *Hall v. Munger*, 5 Lans. (N. Y.) 113; *Bowman v. Tallman*, 2 Robt. (N. Y.) 634, 19 Abb. Pr. (N. Y.) 84; *Prior v. Hall*, (County Ct.) 13 Civ. Pro. (N. Y.) 87; *Corn Exch. Bank v. Blye*, 119 N. Y. 418.

*Oregon.* — *Barton v. Saunders*, 16 Oregon 51.

*South Carolina.* — *Bordeaux v. Treasurers*, 3 McCord L. (S. Car.) 142; *Cosgrove v. Butler*, 1 S. Car. 243.

*Texas.* — *Ex p. Schwartz*, 2 Tex. App. 80; *Ex p. Dickerson*, 30 Tex. App. 449; *Ex p. Boland*, 11 Tex. App. 159; *Ex p. McGill*, 6 Tex. App. 500.

*West Virginia.* — *Ex p. Mooney*, 26 W. Va. 40.

An *irregularity* is defined as a defect in the proceedings only. *Monroe v. Ft. Howard*, 50 Wis. 230.

**Irregularity and Nullity Distinguished.** — *Jenness v. Lapeer Circuit Judge*, 42 Mich. 471; *Clapp v. Graves*, 26 N. Y. 419; *Salter v. Hilgen*, 40 Wis. 365.

In *Holmes v. Russel*, 9 Dowl. 487, *Coleridge, J.*, said: "It is difficult, sometimes, to distinguish between an *irregularity* and a nullity, but I think the safest rule to determine what is an *irregularity* and what is a nullity is to see whether a party can waive the objection. If he can waive it, it amounts to an *irregularity*; if he cannot, it is a nullity."

"It [an *irregularity*] is often waived by the subsequent action of a party, as by an appearance after defective process, so that the judgment would be valid notwithstanding such defect." *Downing v. Still*, 43 Mo. 318.

Advantage of an *irregularity* must be taken at the first opportunity after it is discovered, or it will be considered waived. *Bowman v. Tallman*, 2 Robt. (N. Y.) 634, 19 Abb. Pr. (N. Y.) 84.



**IRREGULAR HEIR.** — An irregular heir, in *Louisiana*, is one who is neither

"No order which a court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. \* \* \* It was a mere error or *irregularity*, which could only be taken advantage of by appeal." Tallman v. McCarty, 11 Wis. 406.

**Irregular Process.** — In Bryan v. Congdon, 86 Fed. Rep. 223, it was said: "*Irregular* process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case." See also Bergman v. Noble, 45 Hun (N. Y.) 136; Fischer v. Langbein, 103 N. Y. 84.

**Irregular, Void, and Erroneous Process Distinguished.** (See also ENCYC. OF PL. AND PR., title SUMMONS AND PROCESS.) — In Fischer v. Langbein, 103 N. Y. 90, it was said: "Void process is such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of noncompliance with a condition subsequent, obedience to which is rendered essential. *Irregular* process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case. In all cases where a court has acquired jurisdiction in an action or proceeding, its order made or judgment rendered therein is valid and enforceable and affords protection to all persons acting under it, although it may be afterward set aside or reversed as erroneous." Citing Simpson v. Hornbeck, 3 Lans. (N. Y.) 53. See also Day v. Bach, 87 N. Y. 56; Hall v. Munger, 5 Lans. (N. Y.) 109; Parsons v. Loyd, 3 Wils. C. Pl. 345.

Sometimes the term "*irregular* process" has been defined to mean process absolutely void, and not merely erroneous and voidable. Woodcock v. Bennet, 1 Cow. (N. Y.) 735; Read v. Markle, 3 Johns. (N. Y.) 523.

In Dixon v. Watkins, 9 Ark. 153, it was said: "The only indication that the process was looked upon as void is from the use of the word *irregular* in the opinion, which word, although in some of the cases it is used synonymously with 'void,' is by no means uniformly used by the courts in this sense, as will abundantly appear by a scrutiny of the cases."

**Irregularity and Illegality Distinguished.** — *Irregularity* is to be distinguished from illegality, which is predicable of radical defects only, and signifies that which is contrary to the principles of the law as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings. That which is illegal or *ultra vires* renders the proceedings void; an *irregularity* renders them voidable only. *Ex p.* Simmons, 62 Ala. 417; *Ex p.* McKivett, 55 Ala. 238; *Ex p.* Gibson, 31 Cal.

625; Barton v. Saunders, 16 Oregon 51; *Ex p.* Schwartz, 2 Tex. App. 80.

"It would be *irregular* to sentence a person to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence. It would be illegal to sentence him to imprisonment for a crime which was punishable by pecuniary fine only." *Ex p.* Mooney, 26 W. Va. 40, citing *Ex p.* Gibson, 31 Cal. 619; Crandall's Petition, 34 Wis. 177.

An illegal distress is not an *irregular* distress within the meaning of a statute providing that *irregularity* shall not make the distrainer a trespasser. Russell v. Buckley, 25 N. Bruns. 264.

**Same — Habeas Corpus.** — In Barton v. Saunders, 16 Oregon 51, it was said: "Errors or *irregularities* which render proceedings voidable merely, the writ of habeas corpus cannot reach, but only such defects in substance as render the process or judgment absolutely void." The court here gave the definition of the text and continued: "On the other hand, illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure."

**False Allegations of Fact.** — The term *irregularities*, as applied to judicial proceedings, does not include false allegations of fact made as the foundation for a suit in which the allegations are to be proved or disproved. This is equally true whether they are falsely made by mistake or by design. Everett v. Henderson, 146 Mass. 89, 4 Am. St. Rep. 284.

**Decision of Court.** — In Silcox v. Lang, 78 Cal. 124, it was said: "The impaneling of a jury is a part of the trial, within the meaning of the code, and any ruling of the court with respect thereto, if erroneous, is an error of law occurring at the trial, and not a mere *irregularity*. The term *irregularity* cannot be applied to a ruling or decision made upon a question of law regularly presented for such decision during the trial. In such case the action is not *irregular*, but the decision rendered is erroneous."

**Irregular Judgments.** (See also the title JUDGMENTS, *post.*) — "A judgment, however erroneous, rendered at one term cannot be set aside at a subsequent term. But a judgment *irregular*, rendered at one term, may be set aside at a subsequent term. \* \* \* An erroneous judgment is one rendered according to the course and practice of the courts, but contrary to law, as where it is for one party when it ought to be for the other, or for too little or too much. An *irregular* judgment is one contrary to the course and practice of the courts, as judgment without service of process." Wolfe v. Davis, 74 N. Car. 599. See also Skinner v. Moore, 2 Dev. & B. L. (19 N. Car.) 156; Corn Exch. Bank v. Blye, 119 N. Y. 414; Salter v. Hilgen, 40 Wis. 365.

It has been held that the failure to order the issuance of execution is but an *irregularity*, and cannot and does not vitiate a judgment, nor impair its force as to finality. *Ex p.* Dickerson, 30 Tex. App. 449. See also *Ex p.* McGill, 6 Tex. App. 500.



the testamentary nor the legal heir, and who has been established by law to take the succession.<sup>1</sup>

**IRRELEVANT.** (See also the title EVIDENCE, vol. 11, p. 501; and see ENCYC. OF PL. AND PR., title SCANDAL AND IMPERTINENCE, vol. 19, p. 181.)

—Irrelevant means impertinent; inapplicable.<sup>2</sup>

**IRREPARABLE.** — See note 3.

**IRREPARABLE INJURY.** — See the title INJUNCTIONS, vol. 16, p. 360.<sup>4</sup>

**Tax Sales.** (See also the title TAX SALES.) — A statute providing for tax sales enacted that no *irregularity*, error, or mistake in the delinquent list or in the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the County Court, or in the recordation of such list or affidavit, should prejudice the sale. An affidavit said: "I am not directly or indirectly interested in the purchase of any of said real estate," instead of "I am not, nor have I at any time been, directly or indirectly interested," etc. This was held to be an *irregularity*. *Winning v. Eakin*, 44 W. Va. 19. Compare *Hays v. Heatherly*, 36 W. Va. 613; *Jackson v. Kittle*, 34 W. Va. 207; *Phillips v. Minear*, 40 W. Va. 58; *Baxter v. Wade*, 39 W. Va. 281.

**Annexation of Territory.** — See *State v. Des Moines*, 96 Iowa 521. See also the titles MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS.

**Order Appointing Guardian Ad Litem.** — See *Emeric v. Alvarado*, 64 Cal. 599; *Keaton v. Banks*, 10 Ired. L. (32 N. Car.) 381.

**Highways.** — A statute provided that applications for highways should be referred by the court to committees, to be heard by them after such notice as the court should order, and that the proceedings might be set aside for "*irregular* or improper conduct." A sitting without notice was held to be *irregular* and improper, although the court failed to order the giving of notice. The appellate court said: "It is true that this was primarily an error of the court, but this error took from the committee their jurisdiction." *Shelton v. Derby*, 27 Conn. 414.

And action of a member of the committee by which one party gains an unfair advantage at the hearing is *irregular* and improper conduct. *Harris v. Woodstock*, 27 Conn. 567.

1. *Bouv. L. Dict.*

In *Fletcher v. Holmes*, 32 Ind. 510, it was said: "The civil law recognizes several kinds of heirs. The relation of the widow, under our statute, as the recipient of real estate by descent from her husband, is very analogous to that of '*irregular* heir' under the Louisiana Code. See *Bouvier's L. Dict.*, title 'Heirs.' The statute confers upon the widow the right of inheritance, and casts upon her property by descent; and if this does not make her an heir in a technical sense, it at least clothes her with the material attributes of one, and places her in that relation."

2. **Irrelevant Pleadings.** — *Irrelevant* matter in a pleading is matter "which has no bearing on the subject-matter of the controversy and cannot affect the decision of the court." *Scofield v. State Nat. Bank*, 9 Neb. 321; *Fabricotti v. Launitz*, 3 Sandf. (N. Y.) 743; *Seward v. Miller*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 313; *Morton v. Jackson*, 2 Minn. 219.

In *Goodman v. Robb*, 41 Hun (N. Y.) 606, it was said. "An *irrelevant* pleading, that is, one which has no substantial relation to the controversy between the parties to the suit, has been characterized as '*insufficient*.'"

**Irrelevant — Frivolous.** (See also ENCYC. OF PL. AND PR., title SHAM AND FRIVOLOUS PLEADINGS.) — In *Colt v. Davis*, 50 Hun (N. Y.) 369, where the *New York* Code of Civil Procedure provided that judgment might be given on a frivolous answer, it was held that one of several defenses could not be stricken out as *irrelevant*. The court said: "There is now no authority for striking out an answer as *irrelevant*. Code, §§ 537, 538. *Irrelevant* is equivalent to '*frivolous*.' A frivolous answer is not stricken out, but judgment is granted thereon."

**Irrelevant, Redundant, and Impertinent.** — The *New York* Code provided that *irrelevant* or redundant matter in a pleading might be stricken out on motion. In construing this statute in *Carpenter v. West*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 55, the court said: "By '*irrelevant* or redundant' in the code I take it is meant what is usually understood as impertinent; for a pleading in equity is impertinent when it is stuffed with long recitals, or long digressions, which are altogether unnecessary and totally immaterial to the matter in hand. *Hoff. Master* 317; 1 *Dan. Pr.* 399; 1 *Barb. Pr.* 41; *Woods v. Morrell*, 1 *Johns. Ch.* (N. Y.) 106; *Story Eq. Pl.*, § 266. It is like surplage at law. According to Webster, '*redundant*' means superfluous, more than is necessary, superabundant; and *irrelevant*, not applicable or pertinent, not serving to support. Both, therefore, may probably come under the head of impertinent."

3. **Irreparable.** — "The word *irreparable* means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured." *Bettman v. Harness*, 42 W. Va. 437.

*Irreparable* means "that which cannot be repaired, retrieved, put back again, atoned for." *Gause v. Perkins*, 3 *Jones Eq.* (56 N. Car.) 177, quoted in *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 414.

4. **Irreparable Injury — Parish Appeal.** — The *Louisiana* Code allowed appeals from orders in a cause before the final determination of the case, where the party complaining would suffer *irreparable* injury if the appeal were not granted. In holding that no appeal would lie from an order to transfer a cause from one District Court to another, the court said: "The general rule on this subject is that wherever the party can be relieved on a final judgment the grievance is not such an *irreparable* one as requires the aid of this court at an earlier period." *Todd v. Andrews*, 3 *Mart. N. S.* (La.) 373.



**IRRESISTIBLE.** — See the title ACT OF GOD, vol. 1, p. 584; and see INEVITABLE ACCIDENT OR CASUALTY, vol. 16, p. 242.

**IRRESISTIBLE IMPULSE.** — See the titles INSANITY, vol. 16, p. 563; MURDER AND MANSLAUGHTER.

**IRRESISTIBLE SUPERHUMAN CAUSE.** (See also the title ACT OF GOD, vol. 1, p. 584; and see INEVITABLE ACCIDENT OR CASUALTY, vol. 16, p. 242.) — See note 1.

**IRRESISTIBLE VIOLENCE.** — Irresistible violence means the same as *vis major*.<sup>2</sup>

**IRRESPECTIVE OF BENEFITS.** — See note 3.

**IRREVOCABLE.** — See note 4.

1. **Irresistible Superhuman Cause.** — The words *irresistible superhuman cause* are equivalent in meaning to the phrase "the act of God," and refer to those natural causes the effect of which cannot be prevented by the exercise of prudence, diligence, and care and the use of those appliances which the situation of the party renders it reasonable that he should employ. A loss arising from an accidental fire is not caused by the act of God, unless the fire was started by lightning or some superhuman agency. *Clay County v. Simonsen*, 1 Dak. 416; *Fay v. Pacific Imp. Co.*, 93 Cal. 261. *Citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 174; *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613. See also *Ryan v. Rogers*, 96 Cal. 353.

2. *Walker v. British Guarantee Assoc.*, 18 Q. B. 286, 83 E. C. L. 286. See also *VIS MAJOR*.

3. **Irrespective of Benefits.** (See also the titles EMINENT DOMAIN, vol. 10, p. 1175; SPECIAL ASSESSMENTS.) — In *Giesy v. Cincinnati, etc., R. Co.*, 4 Ohio St. 308, it was held that a provision of the constitution requiring the making of compensation "without deduction for benefits" where property was appropriated for public use, and another provision for compensation *irrespective of benefits* where property was taken by a corporation for a right of way, were in legal effect identical. *Approved Enoch v. Spokane Falls, etc., R. Co.*, 6 Wash. 400.

4. **Irrevocable Powers.** (See also the title POWERS.) — A power of attorney to sell or lease lands provided that it should be *irrevocable*. In construing the power in *MacGregor v. Gard-*

*ner*, 14 Iowa 341, the court said: "The word *irrevocable* signifies not to be recalled or revoked. Therefore, when used in the above connection it shows that it was the intention of the principal that the authority thereby conferred should not be recalled."

"Generally when it is said that a power is *irrevocable*, we understand that the grantor cannot withdraw nor call back the power. \* \* \* But the word *irrevocable* is frequently used in a somewhat different sense. It may mean a thing or denote a right or power which cannot be annulled or vacated except for a sufficient cause. It may mean unalterable or irreversible. To revoke sometimes denotes the right to annul, rescind, or abolish. (Webster.) Revocation not only means the recalling of the power, but may denote the vacating of the grant for cause. (Bouvier.)" *Houston v. Houston City St. R. Co.*, 83 Tex. 557.

**Same — Dedication.** (See also the title DEDICATION, vol. 9, p. 77.) — Upon the use of this term in the doctrine that the dedication to the public must be *irrevocable*, the court in *Yolo County v. Barney*, 79 Cal. 379, said: "The term *irrevocable*, as it originally came to be used, was ordinarily applied to a private individual who had dedicated land to a public use in such a way that he had reserved no right to reclaim it. But in the case of a county which buys land for a public use and devotes it to that purpose we cannot see any reason to declare that the dedication is incomplete because the county may have the power given by statute afterwards to discontinue the use and apply the land to another public use, or sell it in a statutory and limited way."



# IRRIGATION.

BY JOSEPH R. LONG.

## I. DEFINITION, 487.

## II. IRRIGATION AT COMMON LAW, 487.

1. *Right to Use Water of Natural Stream*, 487.
2. *Use Must Be Reasonable*, 487.
3. *What Constitutes Reasonable Use*, 488.
4. *Use of Water for Irrigation as Natural or Artificial Want*, 489.

## III. IRRIGATION IN ARID STATES — IN GENERAL, 489.

## IV. STATE CONTROL OF IRRIGATION, 490.

1. *Water as Public Property*, 490.
2. *Use of Water for Irrigation as Public Use*, 490.
3. *Use of Water Subject to State Control*, 491.

## V. DOCTRINE OF RIPARIAN RIGHTS, 491.

1. *To What Extent in Force*, 491.
2. *Nature and Extent*, 492.
  - a. *In General*, 492.
  - b. *Measure of Right*, 492.
  - c. *Right Annexed to Soil*, 493.
  - d. *Diversion of Water to Nonriparian Lands*, 493.
  - e. *Return of Surplus Water to Channel*, 493.
  - f. *Right Limited to Natural Flow of Stream*, 493.
  - g. *Grant of Water Right by Riparian Owner*, 494.

## VI. APPROPRIATION OF WATER, 494.

1. *Right of Appropriation*, 494.
2. *Origin of Doctrine of Appropriation*, 494.
3. *To What Lands Applicable*, 495.
4. *What Water May Be Appropriated*, 496.
  - a. *In General*, 496.
  - b. *Percolating Waters and Subsurface Streams*, 496.
5. *Who May Make Appropriation*, 496.
6. *What Constitutes Appropriation*, 497.
  - a. *In General*, 497.
  - b. *Notice of Appropriation*, 497.
  - c. *Diversion of Water*, 498.
    - (1) *Must Be Diverted Within Reasonable Time*, 498.
    - (2) *Diversion Must Be with Intent to Apply to Beneficial Use*, 498.
    - (3) *Mode of Diversion Immaterial*, 499.
    - (4) *Use of Natural Ravine or Channel*, 499.
    - (5) *Use of Ditch Constructed by Another*, 499.
    - (6) *Change of Point or Means of Diversion*, 500.
  - d. *Application of Water to Beneficial Use*, 500.
    - (1) *In General*, 500.
    - (2) *Gradual Application — Increased Area of Cultivation*, 500.
    - (3) *Place of Application*, 501.
  - e. *Doctrine of Relation*, 502.
  - f. *Filing Map and Statement of Ditch*, 502.
7. *Extent of Right*, 502.
  - a. *In General*, 502.
  - b. *Water Must Be Used Reasonably*, 503.



## IRRIGATION.

- c. Appropriation of Entire Flow of Stream, 503.*
- d. Surplus Water, 504.*
- e. Enlargement of Original Use, 504.*
- f. Use of Water at Certain Periods, 504.*
- g. Right to Flow of Tributaries, 505.*
- h. Right to Bed and Banks of Stream, 505.*

### VII. DOCTRINE OF PRIORITY, 505.

- 1. Priority of Right Acquired by Priority of Appropriation, 505.*
- 2. Priority as Between Persons Using Water for Different Purposes, 506.*
- 3. Priorities under Acts of Congress, 506.*
- 4. Adjudication of Priorities and Water Rights, 508.*

### VIII. IRRIGATING DITCHES, 509.

- 1. Right to Construct Ditches, 509.*
  - a. Condemnation of Right of Way, 509.*
    - (1) In General, 509.*
    - (2) Assessment of Damages, 511.*
  - b. Ditches on Public Domain, 511.*
  - c. Right of Entry for Construction or Maintenance of Ditch, 511.*
- 2. Damages from Construction and Maintenance, 512.*
- 3. Use of Same Ditch by Several Appropriators, 513.*
  - a. In General, 513.*
  - b. As Tenants in Common, 513.*
- 4. Ditches as Property, 513.*

### IX. STORAGE OF WATER FOR IRRIGATION PURPOSES, 514.

#### X. WATER RIGHTS CONSIDERED AS PROPERTY, 514.

- 1. In General, 514.*
- 2. Conveyance of Water Rights, 515.*
- 3. Contracts Affecting Water Rights, 516.*
- 4. Abandonment and Nonuser, 516.*
  - a. Water Right May Be Lost by Abandonment, 516.*
  - b. What Constitutes Abandonment, 517.*
  - c. Clear Proof Required, 517.*
  - d. Abandonment of Ditch Without Abandonment of Water Right, 517.*
  - e. Abandonment and Nonuser Distinguished, 518.*
- 5. Adverse User, 518.*
- 6. Loss of Water Right by Estoppel, 519.*
- 7. Taxation, 520.*
- 8. Action for Interference with Water Rights, 520.*
  - a. In General, 520.*
  - b. When and by Whom Action May Be Maintained, 520.*
  - c. Proof of Damages, 521.*

#### XI. IRRIGATION COMPANIES, 521.

- 1. In General, 521.*
- 2. Private Irrigation Companies, 522.*
  - a. In General, 522.*
  - b. Acquisition of Water Rights, 523.*
  - c. By-laws and Regulations, 523.*
  - d. Duty to Furnish Water to Consumers, 523.*
  - e. Contracts for Water, 524.*
  - f. Rates for Use of Water, 525.*
  - g. Transfer of Stock, 526.*
- 3. Irrigation Districts, 527.*

### XII. ARID LAND GRANTS, 528.

#### CROSS-REFERENCES.

*For matters of PROCEDURE, see the* ENCYCLOPEDIA OF PLEADING AND PRACTICE,  
*title* IRRIGATION, vol. 11, p. 589.



For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *DAMS*, vol. 8, p. 699; *DRAINS AND SEWERS*, vol. 10, p. 220; *EASEMENTS*, vol. 10, p. 397; *EMINENT DOMAIN*, vol. 10, p. 1043; *LAKEs AND PONDS*; *SURFACE WATERS*; *WATERS AND WATERCOURSES*.

**I. DEFINITION.** — Irrigation, in the sense used in this article, is the watering of lands for agricultural purposes, by artificial means.<sup>1</sup>

**A Water Right** is the legal right to use water.<sup>2</sup>

**II. IRRIGATION AT COMMON LAW** — 1. **Right to Use Water of Natural Stream.** — The right at common law of a riparian proprietor to make a reasonable use of the waters of a natural stream for irrigation purposes is well settled, both in England and in the United States.<sup>3</sup>

2. **Use Must Be Reasonable.** — But such use of the water by the riparian owner must not greatly interfere with the natural flow of the stream, nor diminish essentially and to the material injury of lower proprietors the quantity of water that flows to them.<sup>4</sup> He must exercise his right with due regard to the right of other riparian owners to use the water for the same or other purposes.<sup>5</sup> He may lawfully divert the water for the irrigation of his land in a reasonable manner, although the land of a lower proprietor is made less productive thereby,<sup>6</sup> but he will not be permitted to deprive the lower proprietor of the use of the water to an unreasonable extent.<sup>7</sup> He must use the water

**1. Definition of Irrigation.** — Rapalje and Lawrence's L. Dict.

Irrigation is "the act of watering or moistening; \* \* \* especially the distribution of water over the surface of land to promote the growth of plants." Century Dict.

The term "irrigation," as understood in *Colorado*, denotes the application of water to lands for the raising of agricultural crops and other products of the soil. *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525. See also *Paxton*, etc., *Irrigating Canal*, etc., *Co. v. Farmers'*, etc., *Irrigation*, etc., *Co.*, 45 Neb. 884, 50 Am. St. Rep. 585.

The term does not mean simply the conveyance of water by means of ditches; the method of obtaining the water has nothing to do with either the process of irrigation or the meaning of the word. *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195.

2. *Smith v. Denniff*, (Mont. 1900) 60 Pac. Rep. 398.

3. **Right of Riparian Owner to Use Water of Stream for Irrigation** — *England*. — *Embrey v. Owen*, 6 Exch. 353; *Norbury v. Kitchin*, 7 L. T. N. S. 685. And see *Strutt v. Bovingdon*, 5 Esp. 56; *Greenslade v. Halliday*, 6 Bing. 379, 19 E. C. L. 106; *Hall v. Swift*, 6 Scott 167.

*Connecticut*. — *Gillett v. Johnson*, 30 Conn. 180.

*Maine*. — *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

*Massachusetts*. — *Weston v. Alden*, 8 Mass. 136; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85.

The case last cited is, because of the valuable opinion of Chief Justice Shaw, covering practically the whole law of irrigation as it then existed, the leading common-law case on the subject.

*New Jersey*. — *Farrell v. Richards*, 30 N. J. Eq. 511.

*Pennsylvania*. — *Randall v. Silverthorn*, 4 Pa.

St. 173; *Miller v. Miller*, 9 Pa. St. 74, 49 Am. Dec. 545; *Messinger's Appeal*, 109 Pa. St. 285.

*Wisconsin*. — See *Case v. Hoffman*, 84 Wis. 438, further reported in 100 Wis. 314.

See also the following cases, in which this right, though not involved in the case, was expressly recognized: *Sandwich v. Great Western R. Co.*, 10 Ch. D. 707; *Miner v. Gilmour*, 12 Moo. P. C. 131; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636; *Garwood v. New York Cent.*, etc., *R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Pugh v. Wheeler*, 2 Dev. & B. L. (19 N. Car.) 50; *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437.

**Both by the Civil and Common Law** the riparian proprietor has the usufruct of the stream as it passes over his land. *Pope v. Kinman*, 54 Cal. 3.

4. *Union Mill*, etc., *Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Union Mill*, etc., *Co. v. Dangberg*, 2 Sawy. (U. S.) 450; *Farrell v. Richards*, 30 N. J. Eq. 511; *Miller v. Miller*, 9 Pa. St. 74, 49 Am. Dec. 545.

5. **Right to Use Water for Irrigation Limited.** — The right of a riparian proprietor to use the water of a stream for irrigation is limited, and can be exercised only with a reasonable regard to similar rights of other proprietors. *Gillett v. Johnson*, 30 Conn. 180.

A riparian proprietor may be enjoined from diverting the water of a stream for irrigation purposes so as to interfere with the right of lower proprietors to use the water for supplying their natural wants and for domestic use. *Mastenbrook v. Alger*, (Mich.) 68 N. W. Rep. 213.

6. *Weston v. Alden*, 8 Mass. 136.

7. **Water May Not Be Unreasonably Used to Injury of Lower Proprietor.** — *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590; *Anthony v. Lapham*, 5 Pick. (Mass.) 175.

**Fact of Actual Damage Immaterial.** — In an action for the unlawful diversion of water for



in such a manner as to do the least possible injury to other proprietors.<sup>1</sup> Thus a riparian proprietor has no right as against a lower mill owner to divert or dam up the water of the stream for irrigation purposes, so as to prevent the running of the mill.<sup>2</sup>

**Return of Surplus Water to Natural Channel.** — A riparian owner who uses the water of a stream for irrigation must return any surplus water diverted but not used by him to its accustomed channel, for the benefit of other proprietors.<sup>3</sup>

**3. What Constitutes Reasonable Use.** — While the authorities are all agreed that a riparian proprietor's use of the water of a stream for irrigation purposes must be reasonable, no precise rule can be laid down as to what constitutes a reasonable use. The reasonableness depends in each case upon all the circumstances, reference being had to the size of the stream, the character of the soil, the number of other proprietors, and the other circumstances and conditions of the particular case.<sup>4</sup> In the *United States* the doctrine as to what constitutes a reasonable use of water for irrigation is more liberal than in *England*.<sup>5</sup>

**Reasonableness of Use as Determined by Quantity of Water Consumed.** — The question whether the use is reasonable is not so much whether the water below is diminished thereby, as whether the lower proprietor is materially injured<sup>6</sup> by the diminution; that is, injured by not receiving the benefit, in due proportion, of the enjoyment to which he and the other proprietors are entitled. Obviously, the use of water for irrigation always involves some loss, and must often result in a clearly perceptible reduction of the quantity in the channel, and yet the use is not on that account necessarily considered unreasonable.<sup>7</sup>

**Total Consumption Unreasonable.** — But the total consumption for irrigation, by one riparian owner, of the water of a stream, so that other proprietors are entirely deprived of the use of the water, is regarded as an unreasonable use.<sup>8</sup>

irrigation, where the use by the defendant is unreasonable and necessarily injurious to the rights of the plaintiff as a riparian proprietor, it is not necessary to show actual damage; the unlawful obstruction of the right being shown, the law will infer damage. *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590; *Embrey v. Owen*, 6 Exch. 353.

1. *Anthony v. Lapham*, 5 Pick. (Mass.) 175.

2. *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208.

3. **Return of Surplus Water.** — *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Anthony v. Lapham*, 5 Pick. (Mass.) 175.

4. **What Is Reasonable Use Dependent upon Circumstances.** — *Embrey v. Owen*, 6 Exch. 353; *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Lux v. Haggin*, 69 Cal. 255; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85; *Miller v. Miller*, 9 Pa. St. 74, 49 Am. Dec. 545.

In an action by a mill owner against an upper riparian proprietor for diverting the water of a stream for irrigation, it was held that the defendant was entitled to a reasonable use of the water, and that its use at intermittent periods, when the stream was full, and without damage to the working of the mill or sensible diminution of the water, was a reasonable use. *Embrey v. Owen*, 6 Exch. 353.

5. See remarks of Parke, B., in *Embrey v. Owen*, 6 Exch. 353.

6. **Material Diminution Not Necessarily Material Injury.** — Chancellor Kent, in his often

quoted statement of the law of riparian rights, said: "Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations" that he do no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water. 3 Kent's Com. 440.

In commenting on this passage, McKinstry, J., in *Lux v. Haggin*, 69 Cal. 396, said: "The words [material injury] seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The passage, as a whole, may be fairly said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietors of water, either for drinking or for agriculture, etc."

7. **Partial Consumption of Water for Irrigation Not Necessarily Unreasonable.** — *Lux v. Haggin*, 69 Cal. 255; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191, 57 Am. Dec. 85. See also *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160.

8. **Total Consumption of Water by One Proprietor Unreasonable.** — *Lux v. Haggin*, 69 Cal. 255; *Gillett v. Johnson*, 30 Conn. 180.



4. **Use of Water for Irrigation as Natural or Artificial Want.** — The wants of a riparian proprietor in respect to the water of a stream are sometimes classified as natural, or ordinary, and artificial, or extraordinary; the former being primary wants, absolutely necessary to be supplied, such as thirst of people and cattle, and the latter being secondary, the supply of which is simply for the comfort, convenience, or prosperity of the proprietor. These latter wants are held to be subservient to the former. The proprietor is in either case entitled to make a reasonable use of the water, but with this important distinction, that he may use it to supply his natural wants without regard to the effect that such use may have upon lower proprietors in case of deficiency, while the effect on those below must be considered in determining the reasonableness of his use in supplying his artificial wants.<sup>1</sup> There has been some conflict of judicial opinion as to whether the use of water for irrigation is to be considered a natural or an artificial want. In *England* and in *Illinois* such use has been regarded as an artificial want,<sup>2</sup> but there are dicta to the effect that it is, at least in a hot and arid climate, a natural want.<sup>3</sup> The correctness of this view has also been denied,<sup>4</sup> though it seems to be in accordance with the effect of the decisions in the arid states, particularly in those in which the doctrine of riparian rights has been repudiated.<sup>5</sup> The attempted distinction seems to be of little practical importance, if not, indeed, altogether impracticable, for the relative importance and necessity of the several uses of the water of a particular stream will generally depend entirely upon the circumstances of each case.<sup>6</sup>

**III. IRRIGATION IN ARID STATES — IN GENERAL.** — As has already been seen, the right to use the water of a natural stream for irrigation is to a certain extent recognized in *England* and in the eastern part of the *United States*. It is only in the western states and territories, comprising what is known as the arid region, that the subject of irrigation becomes of any considerable importance. The remainder of this article will be devoted to the considera-

1. See *Miner v. Gilmour*, 12 Moo. P. C. 131; *Lux v. Haggin*, 69 Cal. 255; *Evans v. Merriweather*, 4 Ill. 402, 38 Am. Dec. 106.

2. *Miner v. Gilmour*, 12 Moo. P. C. 131; *Evans v. Merriweather*, 4 Ill. 406, 38 Am. Dec. 106. See also *Mastenbrook v. Alger*, 110 Mich. 414; *Carwood v. New York Cent., etc., R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452.

3. See *Evans v. Merriweather*, 4 Ill. 496, 38 Am. Dec. 106; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

4. **Doctrine that Water for Irrigation Is Natural Want Denied.** — See *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176, in which Hillyer, J., asserts the existence in *Nevada* of the common-law rule as to the right of a riparian owner to make a reasonable use of the water of the stream, and shows the difference between the necessity of water to quench the thirst of man and beast and its necessity for purposes of irrigation.

It is to be noted that at present in *Nevada* the doctrine of riparian rights is repudiated. *Bliss v. Grayson*, (Nev. 1899) 56 Pac. Rep. 231.

In *Oregon*, where the doctrine of riparian rights is in force, it is said that a diversion of water for irrigation is not an ordinary use, and can only be exercised reasonably and with proper regard to the rights of other proprietors to apply the water to the same purposes. *Low v. Schaffer*, 24 Oregon 239, citing *Gould on Waters*, § 205.

5. See *infra*, this title, *Doctrine of Riparian Rights*.

In *Texas* irrigation in the arid portions of the state is regarded as an ordinary use of the water of a flowing stream, with the right in the proprietor to consume all of the water of the stream reasonably necessary or required for such use, though such use may not be extended so as to deprive lower proprietors of the common-law ordinary uses of water for drinking and for domestic purposes. *Rhodes v. Whitehead*, 27 Tex. 309, 84 Am. Dec. 631; *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170; *Barrett v. Metcalf*, 12 Tex. Civ. App. 247. But see *Fleming v. Davis*, 37 Tex. 173, *overruled* by later decisions just cited.

In *Baker v. Brown*, 55 Tex. 377, the court said that although it may be difficult to always draw with precision the line which may divide these two classes (natural and artificial wants), yet it is abundantly supported by authority that the right to irrigate, when not indispensable, but used simply to increase the products of the soil, would be subordinate to the right of a co-proprietor to supply his natural wants and those of his family, tenants, and stock, as, to quench thirst, and to the right to use the water for necessary domestic purposes.

6. **Arbitrary Classification of Uses of Water Regarded as Impracticable.** — *Lux v. Haggin*, 69 Cal. 255. See, however, *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217; *Smith v. Corbit*, 116 Cal. 587; *Wiggins v. Muscupiabe Land, etc., Co.*, 113 Cal. 182, 54 Am. St. Rep. 337.



tion of the law of irrigation as developed and prevailing in that region. At present, in most of the arid states the subject of irrigation is largely regulated by statute. The statutes are very similar in the several states, and are to a great extent simply declaratory of the principles already established by local customs and the decisions of the courts.

**Different Systems of Irrigation Law.** — But while the law of irrigation is in most respects substantially the same in all the arid states, two entirely distinct doctrines prevail as to the right to use the water of natural streams for this purpose. In *Colorado*, and the states that have followed her lead, the common-law doctrine of riparian rights is repudiated as unsuited to local conditions, and the water of the state is declared to be public property, subject to appropriation by the public generally for irrigation and other purposes.<sup>1</sup> In *California* and the other Pacific states the same doctrine prevails as to the water upon the public domain, where in the nature of the case no riparian rights could attach, but as to all other streams the right to use the water for irrigation is determined by the principles of the common law.

**The Necessity for Irrigation Is a Matter of Common Knowledge** in the arid states, judicial notice of which will be taken by the local courts.<sup>2</sup>

**IV. STATE CONTROL OF IRRIGATION — 1. Water as Public Property.** — By the constitutions of *Colorado*, *North Dakota*, and *Wyoming*, the water of the natural streams within these states is declared to be the property of the state.<sup>3</sup>

**2. Use of Water for Irrigation as Public Use.** — By the constitutions of several of the states the use of water for irrigation, either generally or in certain cases, is declared to be a public use.<sup>4</sup> It is settled that such use of water when distributed through the agency of irrigation companies is a public use.<sup>5</sup> In *Montana* it is held that the constitutional provision in that state includes all use of water for irrigation, whether by a single proprietor or many different proprietors.<sup>6</sup> In *California* the use is public only where the water is appropriated for sale, rental, or distribution to the general public.<sup>7</sup> To constitute the use a public one it is not necessary that the entire public shall enjoy or be capable of enjoying it, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so large a proportion of the entire public as to destroy its character as a private use.<sup>8</sup> Whether the use in a particular case is public is a question of fact<sup>9</sup> depending upon the circumstances of each case.<sup>10</sup>

**1. Water Rights at Common Law and under Colorado Constitution Contrasted.** — *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142.

**2. Necessity for Irrigation Subject of Judicial Notice.** — *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170; *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454. And see the title JUDICIAL NOTICE, *post*.

**3. Water Declared Property of State — Colorado.** — Const., art. 16, § 5.

*North Dakota.* — Const., § 210. It seems that this provision does not impair the property rights of riparian owners in the waters of a natural stream. *Bigelow v. Draper*, 6 N. Dak. 152.

*Wyoming.* — Const., art. 8, § 1.

**4. Constitutional Declarations that Use of Water for Irrigation Is Public Use — California.** — Const., art. 14, § 1; *Merrill v. Southside Irrigation Co.*, 112 Cal. 426.

*Idaho.* — Const., art. 15, § 1.

*Montana.* — Const. art. 3, § 15; *Ellinghouse v. Taylor*, 19 Mont. 462.

*Washington.* — Const., art. 21, § 1.

**5. Distribution by Irrigation Companies.** — *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Atlantic Trust Co. v. Woodbridge Canal,*

*etc., Co.*, 79 Fed. Rep. 39; *Lux v. Haggin*, 69 Cal. 255; *Lindsay Irrigation Co. v. Mehrtens*, 97 Cal. 676; *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers, etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585; *Umatilla Irrigation Co. v. Barnhart*, 22 Oregon 389.

The use of water for irrigation is public only to the extent that an irrigation corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay therefor, and that the rate of compensation shall be fixed by law in case the parties cannot agree. *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164.

**6.** *Ellinghouse v. Taylor*, 19 Mont. 462.

**7.** See *Lorenz v. Jacob*, 63 Cal. 73.

**8.** *Lindsay Irrigation Co. v. Mehrtens*, 97 Cal. 676. See further, as to what is a public use in this connection, *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Oury v. Goodwin*, (Ariz. 1891) 26 Pac. Rep. 376; *Lux v. Haggin*, 69 Cal. 255.

**9.** *Lindsay Irrigation Co. v. Mehrtens*, 97 Cal. 676.

**10.** *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Oury v. Goodwin*, (Ariz. 1891) 26



**3. Use of Water Subject to State Control.**—It would follow necessarily from the public ownership of water and the public character of its use for irrigation that the use of water for irrigation is subject to the regulation and control of the state; and in several states this is expressly declared in their constitutions.<sup>1</sup> In all of the states in which irrigation prevails statutes have been passed regulating the use of water for this purpose. These statutes in some states, as in *Colorado*, provide elaborate systems for state control of irrigation, including provisions for the appointment of various officers whose duty it is to regulate the use of water for irrigation throughout the state.<sup>2</sup>

**V. DOCTRINE OF RIPARIAN RIGHTS — 1. To What Extent in Force.** — As has already been stated, there are in the arid states two different doctrines according to which the water of natural streams may be used for irrigation purposes. The one first to be considered is that known as the doctrine of riparian rights. This doctrine is in force in *California*, *Montana*, *Nebraska*, *North Dakota*, *Oregon*, *Washington*, and in a somewhat modified form in *Texas*.<sup>3</sup> In the other states in which irrigation prevails this doctrine is regarded as unsuited to the condition and necessities of their inhabitants, and has either never been in force, or, as in *Nevada*, though originally in force, has been repudiated, the right to the use of water for irrigation or other purposes depending entirely upon prior appropriation. In several of these states the common-law doctrine has been expressly abrogated by statute.<sup>4</sup>

Pac. Rep. 376; *Lindsay Irrigation Co. v. Mehrrens*, 97 Cal. 676.

**1. Use of Water for Irrigation Subject to State Control** — *California*. — Const., art. 14, § 1.

*Colorado*. — *Larimer County Reservoir Co. v. People*, 8 Colo. 614; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Nichols v. McIntosh*, 19 Colo. 22; *Sterling Irrigation Co. v. Downer*, 19 Colo. 595; *White v. Farmers' Highline Canal, etc., Co.*, 22 Colo. 191.

*Idaho*. — Const., art. 15, § 1.

*Wyoming*. — Const., art. 8, § 2.

See *infra*, this title, *Irrigation Companies*.

**2. See the statutes of the several states.**

**Superintendents of Irrigation** — *Colorado*. — The *Colorado Act of 1887*, providing for the appointment of superintendents of irrigation, is an exercise of the police power of the state, and the power of superintendents appointed under the act is executive, not judicial. *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149.

**3. Doctrine of Riparian Rights** — *California*. — *Lux v. Haggin*, 69 Cal. 255; *Gould v. Eaton*, 117 Cal. 539.

*Montana*. — See *Smith v. Denniff*, (Mont. 1900) 60 Pac. Rep. 398.

*Nebraska*. — *Clark v. Cambridge, etc., Irrigation, etc., Co.*, 45 Neb. 798.

*North Dakota*. — *Bigelow v. Draper*, 6 N. Dak. 152.

*Oregon*. — See *Hayden v. Long*, 8 Oregon 244; *Coffman v. Robbins*, 8 Oregon 278; *North Powder Milling Co. v. Conghanour*, 34 Oregon 9.

*Texas*. — See *Rhodes v. Whitehead*, 27 Tex. 309, 84 Am. Dec. 631; *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Baker v. Brown*, 55 Tex. 377; *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170. The doctrine of riparian rights was to a certain extent recognized in the Act of 1889 authorizing the appropriation of water. *Sayles's Civ. Stat. Tex.*, Supp., art. 3000z. The Texas statute (Rev.

Stat. Tex. 1895, art. 4147) as to locating and surveying lands on navigable and unnavigable streams, and declaring that all streams of an average width of thirty feet shall be considered navigable, does not reserve to the state such a title to the water in designated navigable streams as would deprive the riparian owner of the right to irrigate his land therefrom. *Barrett v. Metcalfe*, 12 Tex. Civ. App. 247.

*Washington*. — While the doctrine of prior appropriation of water on the public lands obtains in this state, yet it in no way interferes with the rule of the common law as to the right of a riparian owner to be protected in the use and enjoyment of the water naturally flowing by or over his land as against subsequent appropriation of the water for irrigation or other purposes. *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912.

See the title RIPARIAN RIGHTS.

**4. Doctrine of Riparian Rights Repudiated** — *Arizona*. — *Clough v. Wing*, (Ariz. 1888) 17 Pac. Rep. 453; *Oury v. Goodwin*, (Ariz. 1891) 26 Pac. Rep. 376; *Austin v. Chandler*, (Ariz. 1895) 42 Pac. Rep. 483. See *Hill v. Lenormand*, (Ariz. 1888) 16 Pac. Rep. 266.

*Colorado*. — *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142. But nothing in the Colorado law relating to irrigation in any way modifies or changes the rules of the common law in respect to the diversion of streams for manufacturing, mining, or mechanical purposes; for such purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel. *Schwab v. Beam*, 86 Fed. Rep. 41.

*Nevada*. — *Bliss v. Grayson*, (Nev. 1899) 56 Pac. Rep. 231. Compare the early case of *Vansickle v. Haines*, 7 Nev. 249.

*Utah*. — *Stowell v. Johnson*, 7 Utah 215.

*Wyoming*. — *Moyer v. Preston*, 6 Wyo. 308.

Consult also the various statutes authorizing the appropriation of water.



2. **Nature and Extent** - *a. IN GENERAL.* — The doctrine of riparian rights, so far as it prevails in the arid states, is substantially the same as at common law, except that it is more liberal as to what constitutes a reasonable use of water for irrigation.<sup>1</sup> It follows, therefore, that the irrigation cases decided in England and the eastern states will generally be found applicable in those jurisdictions of the west in which the doctrine of riparian rights prevails.

**General Statement of Doctrine.** — According to this doctrine each riparian owner is entitled to the entire natural flow of the stream except so far as it may have been diminished by the ordinary and reasonable use of the water by superior proprietors, for irrigation and other purposes; and he may divert and use the water for such purposes in a reasonable manner, provided he returns to its natural channel, so that it may flow upon the lands of the lower proprietor, all the water not necessary for his own use.<sup>2</sup> What is a reasonable use is in all cases a question of fact depending upon the circumstances of the particular case.<sup>3</sup>

**No Ownership in Corpus of Water.** — The rights of a riparian owner are limited to the ordinary and reasonable use of the water which flows in the stream, and do not include a proprietorship in the corpus of the water.<sup>4</sup>

*b. MEASURE OF RIGHT.* — The right of a riparian owner to the use of water for irrigation is not measured by the quantity of water which he actually appropriates or uses.<sup>5</sup> The amount of irrigable land belonging to each owner, rather than the amount under cultivation, is the controlling element in adjusting the respective rights of the several owners.<sup>6</sup> Each riparian owner is entitled to use so much, and only so much, of the water as may be reasonably necessary for the irrigation of all his riparian lands, due regard being had to the rights of other proprietors and all the circumstances of the case.<sup>7</sup> One

1. **Common-law Rule as Affected by Necessity of Irrigation.** — *Bath Gate v. Irvine*, 126 Cal. 135.

The water may be used for the irrigation of riparian land although such use may appreciably diminish the flow down to the lower riparian proprietor. *Harris v. Harrison*, 93 Cal. 676.

2. **Extent of Riparian Owners' Rights.** — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450; *Ferrea v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Lux v. Haggin*, 69 Cal. 255; *Stanford v. Felt*, 71 Cal. 249; *Hargrave v. Cook*, 108 Cal. 72; *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195; *Gould v. Eaton*, 117 Cal. 539; *Vansickle v. Haines*, 7 Nev. 249; *Hayden v. Long*, 8 Oregon 244; *Coffman v. Robbins*, 8 Oregon 278.

In Oregon, where water flows in a well-defined channel through the lands of several persons, each riparian owner has a right to have it continue to flow in its natural course, without diminution except so far as it may be legally used by the others, while passing through their respective premises, for irrigation and other purposes. *Coffman v. Robbins*, 8 Oregon 278; *Hayden v. Long*, 8 Oregon 244.

A Canal Company cannot divert the waters of a natural stream to the injury of a lower riparian owner. *Heilbron v. Centerville, etc., Irrigation Ditch Co.*, 76 Cal. 8; *Heilbron v. Kings River, etc., Canal Co.*, 76 Cal. 11; *Bliss v. Johnson*, 76 Cal. 597.

3. *Lux v. Haggin*, 69 Cal. 255; *Heilbron v. 76 Land, etc., Co.*, 80 Cal. 189.

4. **No Ownership in Corpus of Water of Stream.** — *Vernon Irrigation Co. v. Los Angeles*, 106

Cal. 237; *Hargrave v. Cook*, 108 Cal. 72; *Gould v. Eaton*, 117 Cal. 539; *Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

**When Rule Does Not Apply.** — In a suit to determine the adverse claim of the defendant to a portion of the waters of a stream, and for an injunction restraining him from diverting water in excess of his right, the action not being for the recovery of the value of water claimed by the plaintiff as his personal property, the rule that the appropriator does not become the owner of the corpus of the water until he has acquired the control of it in conduits or reservoirs of his own does not apply. *Riverside Water Co. v. Gage*, 89 Cal. 410.

5. **Right Not Limited to Extent of Actual Appropriation.** — *Van Bibber v. Hilton*, 84 Cal. 585.

6. *Wiggins v. Muscupiabe Land, etc., Co.*, 113 Cal. 182, 54 Am. St. Rep. 337.

A perpetual injunction restraining a riparian proprietor from diverting the water of a stream by means of a canal constructed partly for the purpose of irrigating his lands will not be granted, and the facts that he has not yet used the water on his lands, and that he does not now intend to do so, do not affect his right. *Heilbron v. 76 Land, etc., Co.*, 80 Cal. 189.

7. **Relative Rights of Different Proprietors.** — *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195; *Heilbron v. 76 Land, etc., Co.*, 80 Cal. 189.

**Right to Surplus.** — A riparian proprietor who has made an appropriation of the waters of a stream is not entitled, as such, to have the surplus water in excess of his appropriation flow in the channel. *Low v. Schaffer*, 24 Oregon 239.



riparian proprietor will not be permitted to divert and use the entire flow of the stream to the injury of other proprietors, however necessary this might be for the proper irrigation of his land.<sup>1</sup>

*c. RIGHT ANNEXED TO SOIL.* — The right of the riparian proprietor to the flow of the stream and to make a reasonable use of the water for irrigation is annexed to the soil and passes with it, not as an easement or appurtenance, but as part and parcel of it. It follows that such right is not in any way dependent on user. Use does not create and disuse cannot destroy or suspend it, but such right can be lost only by grant, condemnation, or prescription.<sup>2</sup> It follows also that the right to divert the water of a stream for irrigation purposes may be exercised only by the riparian proprietors and does not extend to one who is not a riparian owner.<sup>3</sup>

*d. DIVERSION OF WATER TO NONRIPARIAN LANDS.* — An upper riparian proprietor has no right to divert to nonriparian lands the water which he would have a right to use on riparian lands, but which, in fact, he does not use.<sup>4</sup> Nor does the fact that the riparian proprietor is the owner of such nonriparian lands authorize such a diversion.<sup>5</sup> Riparian rights do not extend beyond the watershed of the stream, and lands so situated are not to be regarded as riparian.<sup>6</sup>

*Land Lying Above Level of Stream.* — But the fact that the land of a riparian owner lies adjacent to the stream but above the level thereof, so that it cannot be irrigated by ordinary means, does not affect the right of the proprietor to use the water on such land.<sup>7</sup>

*e. RETURN OF SURPLUS WATER TO CHANNEL.* — The riparian proprietor, after having used the water of the stream for his own purposes, is required to return the surplus water diverted by him into its natural channel, for the benefit of lower proprietors, before it leaves his own land.<sup>8</sup> The manner in which the water is so returned before it reaches the land of the lower proprietor is immaterial, so long as the rights of the lower proprietor are not impaired.<sup>9</sup> But the upper proprietor will not be permitted to return the surplus to the stream at a point below his own land if the rights of lower proprietors are thereby injuriously affected.<sup>10</sup>

*f. RIGHT LIMITED TO NATURAL FLOW OF STREAM.* — Riparian rights exist only in respect to natural streams,<sup>11</sup> and extend only to the natural flow of such streams. Riparian owners have no rights as such to water artificially turned into a stream so as to increase its natural flow. The general rule is that one who by his own efforts and expenditures increases the flow of a

1. No Right to Entire Flow of Stream. — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Learned v. Tangeman*, 65 Cal. 334; *Lux v. Haggin*, 69 Cal. 334.

2. Riparian Rights Annexed to Soil. — *Lux v. Haggin*, 69 Cal. 255; *Stanford v. Felt*, 71 Cal. 249; *Heilbron v. 76 Land, etc., Co.*, 80 Cal. 189; *Haggrave v. Cook*, 108 Cal. 72; *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Bathgate v. Irvine*, 126 Cal. 135; *Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

3. *Hayden v. Long*, 8 Oregon 244.

Use of Water by Trespasser. — The use of water by a trespasser on land to which it is appurtenant does not give him such a right thereto as that he may thereafter divert it from the land, or, upon being ejected therefrom, convey to a stranger the legal title to the water. *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am St. Rep. 217.

4. *Chauvet v. Hill*, 93 Cal. 407; *Gould v. Eaton*, 117 Cal. 539; *Bathgate v. Irvine*, 126 Cal. 135.

5. Mere Contiguity Cannot Extend a Riparian

Right which is appurtenant to one tract of land to another, although both are owned by the same person. Thus, where a purchaser of riparian lands subsequently acquires other land contiguous thereto, but not on the stream, and held under a different patent from the original tract, the second tract does not become riparian because contiguous to riparian lands belonging to the same owner. *Boehmer v. Big Rock Irrigation Dist.*, 117 Cal. 19.

6. Land Beyond Watershed Not Riparian. — *Bathgate v. Irvine*, 126 Cal. 135.

7. Land Above Level of Stream. — *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195.

8. *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Stanford v. Felt*, 71 Cal. 249; *Gould v. Stafford*, 77 Cal. 66; *Barrows v. Fox*, 98 Cal. 63.

9. *Gould v. Eaton*, 117 Cal. 539.

10. See *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176.

11. No Riparian Rights in Artificial Stream. — *Green v. Carotta*, 72 Cal. 267.



stream is entitled to the water thus added thereto.<sup>1</sup> Thus, where the owner of a watercourse granted to another the right to use water flowing in the channel, it was held that the grantee acquired by the grant no right to waters afterwards developed artificially and turned into the stream.<sup>2</sup> A lower riparian proprietor is entitled to the flow of only so much water as would reach his land by the natural flow of the stream, and it is immaterial to him whether it is received through the natural channel of the stream or by artificial means. And where a certain portion of the water, in flowing from the land of one proprietor to that of another, is lost by absorption and evaporation before reaching the land of the lower proprietor, the upper proprietor may convey to the land of the lower proprietor, by artificial means, the water that would naturally reach such land, and use for his own purposes so much of the water that would otherwise be lost as he can save by such artificial means.<sup>3</sup>

*g.* GRANT OF WATER RIGHT BY RIPARIAN OWNER. — A riparian owner, as against himself or his grantee, may contract for the diversion of so much of the water of a stream flowing by his land as may be appurtenant thereto, but the rights of lower proprietors will not be affected by such contract.<sup>4</sup>

**VI. APPROPRIATION OF WATER** — 1. *Right of Appropriation.* — In most of the arid states it is provided by statute that the use of the water of natural streams may be acquired by appropriation,<sup>5</sup> and in *Colorado, Idaho, and Wyoming* the right of appropriation is guaranteed by the state constitutions.<sup>6</sup> The right to appropriate water for irrigation purposes exists, however, independently of any express statutory or constitutional provisions, and arises from the absolute necessity of artificial irrigation as a means of cultivating the soil in those regions where the rainfall does not afford sufficient moisture for this purpose.<sup>7</sup> But the doctrine of appropriation is not the doctrine of the common law.<sup>8</sup>

*Right Acquired by Appropriation a Vested Right.* — The right acquired by an appropriation of water is a vested right which the courts will recognize and protect, and the impairment of such rights will not be permitted.<sup>9</sup>

2. *Origin of Doctrine of Appropriation.* — The doctrine that a right to the use of water may be acquired by prior appropriation originated among the miners of California soon after the first discovery of gold in that state. All the land being at that time a part of the public domain, and there being no established system of laws in the community, the miners were free to adopt

1. *Increasing Natural Flow of Stream.* — *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84; *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77.

But where a person, by consent of a riparian owner, makes use of the channel of a stream as a conduit for water to be turned into and taken out of it by him, and for this purpose removes obstructions, whereby the natural flow of the stream to the land of the riparian owner is increased, such increase will inure to the benefit of the riparian owner. *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84.

2. *Mayberry v. Alhambra Addition Water Co.*, 125 Cal. 444.

3. *Wiggins v. Muscupiabe Land, etc., Co.*, 113 Cal. 185; 54 Am. St. Rep. 337.

4. *Grant of Water Right by Riparian Owner.* — *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 7 Am. St. Rep. 183; *Gould v. Stafford*, 91 Cal. 146; *Yocco v. Conroy*, 104 Cal. 468; *Gould v. Eaton*, 117 Cal. 539.

5. *Right of Appropriation Conferred by Statute* — *Arizona.* — *Clough v. Wing*, (Ariz. 1888) 17 Pac. Rep. 453.

*Nevada.* — *Bliss v. Grayson*, (Nev. 1899) 56

Pac. Rep. 231. Compare the early case of *Vansickle v. Haines*, 7 Nev. 249.

*New Mexico.* — *Millheiser v. Long*, (N. Mex. 1900) 61 Pac. Rep. 111.

And see the statutes of the several states.

6. *Constitutional Provisions* — *Colorado.* — Const., art. 16, § 6.

*Idaho.* — Const., art. 15, § 3.

*Wyoming.* — Const., art. 8, § 3.

7. See *Schilling v. Rominger*, 4 Colo. 100; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Munroe v. Ivie*, 2 Utah 535.

The statutes are merely declaratory of the right of appropriation, which arises from the necessity of the case. *Schilling v. Rominger*, 4 Colo. 100. And see *infra*, this section, *Origin of Doctrine of Appropriation.*

8. *Lux v. Haggin*, 69 Cal. 255.

9. *Right Acquired by Appropriation a Vested Right.* — *Broder v. Natoma Water, etc., Co.*, 101 U. S. 274; *Hill v. Lenormand*, (Ariz. 1888) 16 Pac. Rep. 266; *Denver v. Mullen*, 7 Colo. 345.

Where a ditch for irrigation and other purposes was constructed upon public lands which were afterwards included within the limits of a city, it was held that the owner had acquired



any rules for the regulation of their rights in mining claims and in the water necessary for their mining operations that they found suitable to their condition and circumstances. The common-law doctrine of riparian rights was found to be wholly incompatible with any extended use of the water for mining operations, and was accordingly rejected, and the doctrine of appropriation was adopted, by which the right to water was made to depend wholly upon the fact of prior appropriation and use. This doctrine, originating thus in the custom and rules of the mining districts, was soon recognized and confirmed by the state statutes and decisions, and after long silent acquiescence by the Federal Government was confirmed by Act of Congress in 1866. Although originally applied to the use of water for mining purposes, the doctrine was later extended to its use for irrigation and other purposes.<sup>1</sup>

**3. To What Lands Applicable.** — In those jurisdictions in which the doctrine of riparian rights is not in force, the waters of the natural streams may be appropriated for the purpose of irrigating any of the lands of the state, whether public or private, and whether riparian or nonriparian.<sup>2</sup> In the states in which the doctrine of riparian rights obtains, the right of appropriation extends only to public lands, and when such lands cease to be public and become private property, a right to water for irrigation cannot be acquired by prior appropriation.<sup>3</sup> In *California* and *Montana* the doctrine applies also to state lands.<sup>4</sup> In *Texas* the right of appropriation may be exercised only as to the unappropriated water of natural streams within the arid portions of the state.<sup>5</sup> When it does not appear whether the land through which a stream runs from which one claims to have acquired a water right by appropriation was private or public property at the time of such appropriation, such land will not be presumed to have been public, but the burden is upon the appropriator to establish that fact.<sup>6</sup>

a vested right to the use and enjoyment of the ditch which the city, under its police power, could not impair by an ordinance requiring a change in the construction of the ditch. *Platte, etc., Canal, etc., Co. v. Lee*, 2 Colo. App. 184.

1. See generally, as to the history of the origin and development of the doctrine of appropriation, *Atchison v. Peterson*, 20 Wall. (U. S.) 507; *Jennison v. Kirk*, 98 U. S. 453; U. S. v. *Rio Grande Dam, etc., Co.*, 174 U. S. 690; *Hill v. Lenormand*, (Ariz. 1888) 16 Pac. Rep. 266; *Drake v. Earhart*, 2 Idaho 716.

**2. Doctrine of Appropriation Applicable to Lands Generally.** — See *infra*, this section, *What Constitutes Appropriation — Application of Water to Beneficial Use — Place of Application*.

In *Arizona* the doctrine of appropriation applies as against a riparian proprietor. *Hill v. Lenormand*, (Ariz. 1888) 16 Pac. Rep. 266.

In *Colorado* the right to water acquired by priority of appropriation is entitled to protection as well after patent to a third party of the land over which the natural stream flows as when such land is a part of the public domain, and it is immaterial whether or not it is mentioned in the patent and expressly excluded from the grant. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443.

**Water on the Public Lands** is subject to appropriation for irrigation, and the fact that a military reservation has been established below the point of diversion does not affect the right of appropriation except so far as the water may have been appropriated for the uses of the military post. *Krall v. U. S.*, 79 Fed. Rep. 241.

3. *Santa Cruz v. Enright*, 95 Cal. 105; *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912. See also *Offield v. Ish*, 21 Wash. 277; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566; *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572; *Geddis v. Parrish*, 1 Wash. 587.

In *Oregon* the doctrine of the right by prior appropriation to water for mining or irrigating lands has not been adopted or applied except as the parties have acquired their rights under the Act of Congress of 1866. *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727. The act applies only to the public domain. *Curtis v. La Grande Hydraulic Water Co.*, 20 Oregon 34.

**4. Appropriation on State Lands.** — *Lux v. Haggin*, 69 Cal. 355; *Wood v. Etiwanda Water Co.*, 122 Cal. 152.

The *Montana* statute (Civ. Code, § 1880) providing that the right to the use of the running water flowing in the rivers, etc., of the state may be acquired by appropriation applies only to lands owned by the state. *Smith v. Denniff*, (Mont. 1900) 60 Pac. Rep. 398. See generally the discussion in the early case of *Thorpe v. Freed*, 1 Mont. 651.

5. *McGhee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587; *Gen. Laws Tex.* 1889, p. 100. See also *Rev. Stat. Tex.* (1895), arts. 3115, 3117.

The Act of 1889, referred to above, and the amendment of 1893, have been held unconstitutional in so far as they authorize the appropriation of water to the exclusion of other riparian owners without providing compensation therefor. *Barrett v. Metcalfe*, 12 Tex. Civ. App. 247.

6. *Santa Cruz v. Enright*, 95 Cal. 105.



**No Right of Appropriation Against Riparian Owner.** — An appropriator cannot, by any use except under the statute of limitations, acquire any right to the waters of a stream to the prejudice of a riparian owner.<sup>1</sup> And a state legislature has no power to pass an act authorizing the appropriation of water in derogation of the rights of riparian owners.<sup>2</sup>

**Riparian Rights Not Affected by Appropriation Statutes.** — In *California*, *Nebraska*, and *Texas*, the statutes conferring and regulating the right of appropriation expressly provide that the rights of riparian proprietors shall not be affected by the provisions of the statutes.<sup>3</sup> It is held that such a provision protects not only riparian rights existing when the statutes were passed, but also the rights of those acquiring title to public land after the enactment of the statutes and before an appropriation in accordance with the statutory provisions.<sup>4</sup>

**4. What Water May Be Appropriated** — *a. IN GENERAL.* — In general the right of appropriation applies to the waters of any natural stream,<sup>5</sup> by which is meant water flowing naturally and usually, though not necessarily continuously and uninterruptedly, in a definite direction and through a well-defined bed or channel.<sup>6</sup>

*b. PERCOLATING WATERS AND SUB-SURFACE STREAMS.* — Ordinarily, percolating waters have no legal existence distinct from the earth in which they are found, and are not subject to appropriation,<sup>7</sup> but it is otherwise where percolating waters collect or are gathered in a stream running in a defined channel, or where the water flows as a sub-surface stream below the bed of the natural channel, the bed being often dry or nearly so.<sup>8</sup>

**5. Who May Make Appropriation.** — Except where the state statutes limit the right of appropriation to inhabitants of the state, or to persons who hold the title or possessory right to the land upon which the water is to be used, it seems that a valid appropriation of water may be made by any person whatsoever.<sup>9</sup>

1. *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237; *Hargrave v. Cook*, 108 Cal. 72.

One who bases his right solely upon an appropriation of waters flowing over land which at the time of the appropriation was part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream which at the time of the appropriation were held in private ownership. *Hargrave v. Cook*, 108 Cal. 72.

2. *Lux v. Haggin*, 69 Cal. 255; *Barrett v. Metcalfe*, 12 Tex. Civ. App. 247.

The *Nebraska Act of 1889*, as amended in 1893, conferring the right of appropriation to the detriment of the rights of a riparian proprietor, is unconstitutional. *Clark v. Cambridge, etc., Irrigation, etc., Co.*, 45 Neb. 798.

3. See the several statutes.

4. *Lux v. Haggin*, 69 Cal. 255.

5. See the constitutions and statutes of the several arid states.

6. **Watercourse Defined.** — *Lux v. Haggin*, 69 Cal. 255; *Gillett v. Johnson*, 30 Conn. 180; *Barnes v. Sabron*, 10 Nev. 217; *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *Geddis v. Parrish*, 1 Wash. 587; *Case v. Hoffman*, 84 Wis. 438. See generally the title **WATERCOURSES**.

**Water from Springs** on the public lands may be appropriated. *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558; *Ely v. Ferguson*, 91 Cal. 187; *De Necochea v. Curtis*, 80 Cal. 397; *Taylor v. Abbott*, 103 Cal. 421.

Water flowing from springs on public lands may be diverted to other public lands and

there used for irrigation or other necessary purposes, and a right to such water may be acquired as against any one who subsequently obtains title to the lands on which the springs are situated. *Williams v. Harter*, 121 Cal. 47.

**Water in Canon.** — A valid appropriation may be made under *Mills's Annot. Stat. Colo.* (1891), § 2269, from a cañon not a running stream, but supplied with water entirely from the rainfall in the surrounding hills. *Denver, etc., R. Co. v. Dotson*, 20 Colo. 304.

**An Artificial Ditch** by which the waters of a natural stream are diverted is not a watercourse. *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727.

7. **Percolating Waters.** — *Huston v. Leach*, 53 Cal. 262; *Willow Creek Irrigation Co. v. Michaelson*, (Utah 1900) 60 Pac. Rep. 943.

One who constructs a ditch upon his own land for the purpose of procuring water for irrigation, whereby a neighboring spring fed solely by percolating waters is made dry, is not liable to another claiming the waters of such spring by prior appropriation, the water in such spring not being subject to appropriation. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615. See also *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299.

8. *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558; *Vineland Irrigation Dist. v. Azusa Irrigating Co.*, 126 Cal. 486; *McClellan v. Hurdle*, 3 Colo. App. 430; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Keeney v. Carillo*, 2 N. Mex. 480.

9. See the federal and the several state statutes.



**Aliens.** — The federal statutes are silent as to the qualifications of an appropriator on the public domain, and it has been held that it is not essential that the appropriator should own or be competent to acquire title to the land to be irrigated, but that an alien, although incompetent to acquire title to public lands, may make a valid appropriation of water thereon, or may acquire from and transfer to others a right to the use of the water.<sup>1</sup>

**Indians.** — A valid appropriation of water on public lands may be made by an Indian.<sup>2</sup>

**Ownership of Land Not Essential.** — Where land remains a part of the public domain, the appropriation of water thereon is, of course, necessarily made by persons who have no title to the land itself,<sup>3</sup> and the cases holding that aliens and Indians may appropriate water hold by implication, in the case of the former at least, that a valid appropriation may be made by one who is incompetent to acquire title to the land.<sup>4</sup> Nor is ownership of the land necessary to enable one to appropriate water on land belonging to private persons, but such appropriation may be made by any one in rightful possession, as under a contract with the owner,<sup>5</sup> though a trespasser probably cannot make a valid appropriation.<sup>6</sup>

**6. What Constitutes Appropriation — a. IN GENERAL.** — In order to constitute a valid appropriation of water for the purpose of irrigation there must be an actual diversion of the water with the intent to apply it to the beneficial use in question, followed by an actual application of it to such use within a reasonable time.<sup>7</sup>

**b. NOTICE OF APPROPRIATION.** — It is provided by statute in most of the arid states that a person who desires to appropriate water must post a notice in writing in a conspicuous place at the point of the intended diversion, stating therein that he claims a certain quantity of the water, the purpose for which he claims it, the place of intended use, and the means by which the water is to be diverted. It is also required that a copy of this notice be recorded with the proper county officer within a prescribed number of days after the notice is posted.<sup>8</sup> In some states such notices have been required

**1. Alien May Acquire and Hold Water Rights.** — *Santa Paula Water Works v. Peralta*, 113 Cal. 38; *Quigley v. Birdseye*, 11 Mont. 439; *Lavery v. Arnold*, (Oregon 1899) 57 Pac. Rep. 906.

**2. Lobdell v. Hall**, 3 Nev. 516.

**3. Effect of Statute Extending Right of Appropriation to Landowners Only.** — Although the *Washington Territory* statutes of 1873 may not extend the right to appropriate water to any except landowners, they are not intended to restrict the right of prior appropriation as it existed by the local customs and under decisions of the courts, by which it was immaterial whether the appropriator was a landowner or not. *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566.

**4. See Santa Paula Water Works v. Peralta**, 113 Cal. 38.

**5. Smith v. Denniff**, 23 Mont. 65, *reversed* on other points in (Mont. 1900) 60 Pac. Rep. 398.

**6. Trespassers.** — See *Smith v. Logan*, 18 Nev. 149.

**7. What Amounts to Appropriation — In General.** — *McDonald v. Bear River, etc.*, Water, etc., Co., 13 Cal. 220; *Larimer County Reservoir Co. v. People*, 8 Colo. 614; *Ft. Morgan Land, etc., Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259; *Low v. Rizer*, 25 Oregon 551; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777; *Offield v. Ish*, 21 Wash. 277.

**8. Notice of Appropriation — Arizona.** — Acts 1893, p. 119, § 2.

*California.* — Civ. Code, § 1415; *De Necochea v. Curtis*, 80 Cal. 397. As to notice as evidence, see *Wells v. Kreyenhagen*, 117 Cal. 329.

*Idaho.* — Rev. Stat. (1887), § 3160.

*Montana.* — Civ. Code (1895), § 1886; *Murray v. Tingley*, 20 Mont. 260.

*Utah.* — Rev. Stat. (1898), § 1268.

*Washington.* — Ball. Annot. Codes and Stat. (1897), § 4092.

No notice is required in *New Mexico*. *Millheiser v. Long*, (N. Mex. 1900) 61 Pac. Rep. 111.

**The Posting of a Second Notice** is not an abandonment, but is a reassertion of a claim to water where the work of appropriation has been diligently prosecuted from the time of posting the first notice. *Osgood v. El Dorado Water, etc.*, Min. Co., 56 Cal. 571.

**The Record of Notice of Appropriation** is not conclusive as to the date of appropriation as stated therein, and the appropriator is not prevented by the record from showing that the appropriation was made at an earlier date. *Cruse v. McCauley*, 96 Fed. Rep. 369.

**Where There Is No Statute Authorizing the Recording of a Notice of Appropriation of water**, a record of such notice is of no force or validity, imports no notice, and is not a step in the appropriation of the water; a certified copy of



by local customs prior to the enactment of any statute on the subject.<sup>1</sup>

**Notices Construed Liberally.** — The notice should, of course, contain all the recitals called for in the statute,<sup>2</sup> but no particular form is required, and notices are construed liberally in favor of the appropriator.<sup>3</sup> In *Montana* a notice is fatally defective and inadmissible in evidence unless verified as required by statute.<sup>4</sup>

**Rights Acquired by Actual Diversion Without Posting Notice.** — The statutes requiring the posting and recording of a notice are not intended to change the rule as to what constitutes a valid appropriation, but simply, by requiring an appropriator to post and record a notice, to apprise other persons contemplating the diversion of water from the same stream that the appropriator has taken the first step towards securing his rights, and also to preserve the evidence thereof. It is accordingly held that notwithstanding the existence of these statutes, a valid appropriation may be made by an actual diversion and use of the water without posting any notice; and one who fails to comply with the statute requiring notice, but actually diverts and uses the water, acquires a good title in the absence of any conflicting adverse rights, and cannot be deprived thereof by another who complies with the statute at a time subsequent to the former's completed diversion.<sup>5</sup> Thus the failure of an actual appropriator of water upon the public domain to post a notice as required by law does not affect his right to the water as against one subsequently acquiring the land from the government.<sup>6</sup>

**As Between Two Appropriators Neither of Whom Has Complied with the Statute** requiring the posting and recording of the notice of appropriation, the one who has his ditch completed and the water flowing over his land first has the superior right, notwithstanding the other first commenced work on his ditch.<sup>7</sup>

**c. DIVERSION OF WATER.** — (1) *Must Be Diverted Within Reasonable Time.* — It is obviously essential, in order to effect an appropriation, that the water should be actually diverted for the intended use. The appropriator, in order to hold his rights, must begin the actual work of diversion, by survey or otherwise, within a reasonable time after the first assertion of his claim, and must prosecute the work to completion with reasonable diligence.<sup>8</sup> Ill health or lack of pecuniary means will not excuse delay in completing the work within a reasonable time.<sup>9</sup>

(2) *Diversion Must Be with Intent to Apply to Beneficial Use.* — The water must be diverted with the intention of applying it to the use under consideration, then existing or contemplated, such intent to be gathered from the acts of the appropriator, the circumstances surrounding his possession of the water, its actual or contemplated use, and the purposes thereof.<sup>10</sup>

such record is not, therefore, admissible in evidence. *Cruse v. McCauley*, 96 Fed. Rep. 369. Compare *Sweetland v. Olsen*, 11 Mont. 27.

1. **Notice Required by Local Custom.** — See *Dyke v. Caldwell*, (Ariz. 1888) 18 Pac. Rep. 276; *Cole v. Logan*, 24 Oregon 304; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777.

2. *Taylor v. Abbott*, 103 Cal. 421.

3. *Osgood v. El Dorado Water, etc.*, Min. Co., 56 Cal. 571; *Floyd v. Boulder Flume, etc.*, Co., 11 Mont. 435.

4. *Murray v. Tingley*, 20 Mont. 260.

5. **Actual Appropriation Without Notice Valid.** — *Wells v. Mantes*, 99 Cal. 583; *Watterson v. Saldunbehere*, 101 Cal. 107; *Senior v. Anderson*, 115 Cal. 496; *Murray v. Tingley*, 20 Mont. 260.

6. *De Necochea v. Curtis*, 80 Cal. 397; *Burrows v. Burrows*, 82 Cal. 564.

7. *Murray v. Tingley*, 20 Mont. 260.

8. **Water Must Be Diverted Within a Reasonable Time.** — *Cruse v. McCauley*, 96 Fed. Rep. 369; *Osgood v. El Dorado Water, etc.*, Min. Co., 50 Cal. 571; *Taugenbaugh v. Clark*, 6 Colo. App. 235; *Cole v. Logan*, 24 Oregon 304; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777; *Smyth v. Neal*, 31 Oregon 105. See also the various local statutes.

9. **Ill Health or Lack of Means.** — *Keeney v. Carillo*, 2 N. Mex. 480; *Cole v. Logan*, 24 Oregon 304. See also the leading mining case of *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

10. **Intent of Appropriator.** — *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275; *Toohey v. Campbell*, (Mont. 1900) 60 Pac. Rep. 396; *Power v. Switzer*, 21 Mont. 523. In this latter case it was held that a man who diverted more water than he needed for domestic purposes, and permitted the excess to flow over his lands without any intention of



**Change of Use.** — It is not necessary, however, that the water should have been appropriated in the first instance for irrigation purposes, provided it was appropriated for some other beneficial use; for a change in the use to which the water is put does not affect the right of the appropriator, where the rights of others are not injuriously affected thereby. Thus water appropriated for mining or other purposes may be used for irrigation,<sup>1</sup> but an appropriator of water cannot, by changing the use for which the water was appropriated, injuriously affect the rights of other appropriators.<sup>2</sup>

(3) *Mode of Diversion Immaterial.* — The mode of diverting the water is immaterial. It may be by means of ditches, as is usually the case, or otherwise.<sup>3</sup>

**Use of Pumps.** — Thus the water may be raised from the stream by means of pumps.<sup>4</sup>

**Diversion by Dam.** — So also the water may be diverted and distributed by means of a dam when this mode is sufficient.<sup>5</sup>

**A Change in the Mode of Diversion** does not affect rights acquired by the diversion.<sup>6</sup>

(4) *Use of Natural Ravine or Channel.* — Any dry ravine, gulch, or hollow in lands may be used as a part of the ditch for conducting the water appropriated, as well as the lower portion of the same bed or natural channel from which the water is taken.<sup>7</sup> But a prior appropriator has no right to make any such changes in the natural channel of the stream as will injure subsequent appropriators therefrom.<sup>8</sup> One who turns water from another source into a natural channel or stream has the right to divert it again from such natural channel, but this does not give him the right to take from the stream more water than he has turned in, or in any way affect the right of other persons to the natural flow of the stream.<sup>9</sup>

(5) *Use of Ditch Constructed by Another.* — The fact that an appropriator takes the water from the stream by tapping a ditch owned by another does not show an intention not to make an appropriation of the water of the natural stream, or render the appropriation ineffectual. By agreement with the owner the appropriator may use the ditch as a conduit for carrying water from the stream to his own works, and the appropriation thus made is as valid as though made by direct diversion of the water from the natural stream.<sup>10</sup> And where a person, with the owner's permission, enlarges and improves a ditch belonging to another, for the purpose of diverting additional water through it for his own use, he thereby acquires the right to use the ditch so enlarged for that purpose.<sup>11</sup> An appropriator cannot, however, arbitrarily seize and

using such excess for irrigation, acquired no valid right to the excess. See also *supra*, this section, *What Constitutes Appropriation — In General*.

1. **Change of Use.** — *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554; *Meagher v. Hardenbrook*, 11 Mont. 385.

2. **Change of Use Not Permitted When Injurious to Other Appropriators.** — *Cache La Poudre Reservoir Co. v. Water Supply, etc., Co.*, 25 Colo. 161.

3. **Diversion by Means of Ditches and Flumes.** — *Barrows v. Fox*, 98 Cal. 63.

4. **Water May Be Pumped from Stream.** — *Norbury v. Kitchen*, 7 L. T. N. S. 685; *Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195.

5. **Dams.** — *Thomas v. Guiraud*, 6 Colo. 530. See generally the title DAMS, vol. 8, p. 699.

6. **Change in Mode of Diversion.** — *Greer v. Heiser*, 16 Colo. 306.

7. **Use of Natural Channel for Conveying Water.** — *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84; *Simmons v. Winters*, 21 Oregon 35, 28

Am. St. Rep. 727. And see *Parks Canal, etc., Co. v. Hoyt*, 57 Cal. 44.

8. *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537.

9. **Right to Water Turned into Natural Stream.** — *Wilcox v. Hausch*, 64 Cal. 461; *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84; *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727.

10. **Use of Another's Ditch with Consent of Owner.** — *Water Supply, etc., Co. v. Larimer, etc., Irrigation Co.*, 24 Colo. 322.

A canal company may grant to another the right to take water through or from its canal for irrigation, and to construct gates and dams to divert the water. *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 16 Utah 246.

11. **Enlarging Ditch with Owner's Consent.** — *Chicosa Irrigation Ditch Co. v. Elmaro Ditch Co.*, 10 Colo. App. 276.

Where a ditch constructed on public land is enlarged and repaired by others than the



use, for the purpose of conveying the water to his own lands, and without the consent of the owner, an irrigating ditch constructed by another.<sup>1</sup>

**Ditch Constructed on Public Land.** — A person who desires to appropriate the water of a stream upon the public land, and who, finding an irrigating ditch already constructed,<sup>2</sup> takes peaceable possession thereof and appropriates the water by means of it, thereby acquires a right to the water and to the use of the ditch as against all the world except the true owner or those holding under or through him. To the latter the appropriator must account until his possession and user ripens into a title by prescription or adverse user. His right in such case will depend for priority, as against other appropriators from the same stream, upon the date of his possession and appropriation and not upon the date of the construction of the ditch and appropriation by the original owner.<sup>3</sup> So also where a ditch constructed across public land, but which has been abandoned and allowed to go to ruin, is taken possession of by a stranger and reconstructed to a size and capacity less than that of the original ditch, the rights of the new owner as against conflicting claims are limited to the capacity of the ditch as reconstructed, and a subsequent patentee of the land from the government may enjoin the enlargement of the reconstructed ditch to its original capacity.<sup>4</sup>

(6) *Change of Point or Means of Diversion.* — It is well settled that one who has acquired a right to the use of water may change the point of diversion from the stream without losing his priority, where the rights of others are not injuriously affected by the change.<sup>5</sup> But he will not be permitted to make such change if the rights of any subsequent appropriator or landowner are injuriously affected thereby,<sup>6</sup> nor will the change, if made, either increase or diminish the quantity of water which the appropriator is entitled to divert.<sup>7</sup> The appropriator may also change his means of diversion, as by the use of new ditches in place of the old,<sup>8</sup> or by substituting pipes for ditches,<sup>9</sup> without affecting his right to the water.

*d. APPLICATION OF WATER TO BENEFICIAL USE* — (1) *In General* — **Water Must Be Used Within Reasonable Time.** — In order to complete the appropriation and perfect the water right thereby acquired the water must not only be diverted from its natural channel, but must also be applied to the land for the purpose of irrigation within a reasonable time.<sup>10</sup>

original owners, the owners not objecting but permitting such enlargement and repairs to be made, and lands in the vicinity to be taken up on the faith of obtaining water from the ditch to irrigate them, the persons so enlarging the ditch become owners therein and in the water so appropriated without any conveyance from the original owners, who are estopped to deny the right of the newcomers to use the ditch. *Lehi Irrigation Co. v. Moyle*, 4 Utah 327.

1. *McPhail v. Forney*, 4 Wyo. 556.

2. **Ditches Constructed on Public Lands.** — *Lehi Irrigation Co. v. Moyle*, 4 Utah 327.

3. *Utt v. Frey*, 106 Cal. 392.

4. *Jatunn v. O'Brien*, 89 Cal. 57.

5. **Change of Point of Diversion.** — *Smith v. Corbit*, 116 Cal. 587; *San Luis Water Co. v. Estrada*, 117 Cal. 168; *Sieber v. Frink*, 7 Colo. 148; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Nichols v. McIntosh*, 19 Colo. 22.

6. **Point of Diversion Cannot Be Changed to Injury of Another.** — *McGuire v. Brown*, 106 Cal. 660; *Hargrave v. Cook*, 108 Cal. 72; *Cole v. Logan*, 24 Oregon 304; *Hague v. Nephi Irrigation Co.*, 16 Utah 421.

7. *Smith v. Corbit*, 116 Cal. 587.

8. *Nichols v. McIntosh*, 19 Colo. 22.

9. *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598.

10. **Water Must Be Actually Used Within Reasonable Time** — *California.* — *Perego v. McKissick*, 79 Cal. 572.

*Colorado.* — *Sieber v. Frink*, 7 Colo. 148; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 531; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275; *Ft. Morgan Land, etc., Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Cache La Poudre Reservoir Co. v. Water Supply, etc., Co.*, 25 Colo. 161, *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 3 Colo. App. 255; *Cash v. Thornton*, 3 Colo. App. 475; *Colorado Land, etc., Co. v. Rocky Ford Canal, etc., Co.*, 3 Colo. App. 545; *Beaver Brook Reservoir, etc., Co. v. St. Vrain Reservoir, etc., Co.*, 6 Colo. App. 130; *Taugenbaugh v. Clark*, 6 Colo. App. 235.

*Montana.* — *Power v. Switzer*, 21 Mont. 523.

*Oregon.* — *Hindman v. Rizer*, 21 Oregon 112;



**What Constitutes a Reasonable Time** is a question of fact depending upon the circumstances of each particular case.<sup>1</sup>

**Application Delayed by Accident.** — The fact that a prior appropriator's application of the water to the land is delayed by accident, as by the breaking of his ditch, thus enabling a subsequent appropriator to apply the water to his land first, does not affect the former's priority of appropriation.<sup>2</sup>

(2) **Gradual Application — Increased Area of Cultivation.** — The appropriator is not required to make use of all the water diverted by him at once, but may from year to year add to the area of his cultivated land and increase the amount of water applied thereto as his needs may require, until he has put to beneficial use the entire amount of water first diverted by him.<sup>3</sup> But such increase of application must be made with reasonable diligence, or the appropriator will lose his right thereto.<sup>4</sup>

**Increase of Acreage Not Necessarily Increase of Amount of Water.** — Where an irrigator is entitled to and uses a certain quantity of water, the mere fact that he increases the number of acres irrigated by him does not necessarily show that he has increased the quantity of water used; and unless, as a matter of fact, a greater quantity is used than before, other appropriators cannot complain of such enlarged use of the water.<sup>5</sup>

(3) **Place of Application.** — The water right acquired by priority of appropriation is not in any way dependent upon the place of application. Thus water may be carried from one natural stream, by a ditch across an intervening ridge, to be used in the cultivation of lands lying in the valley of another stream.<sup>6</sup>

**Change of Place of Use.** — So also the appropriator may change the place of application, provided the rights of others are not injuriously affected by the change.<sup>7</sup>

**Use on Wrong Land by Mistake.** — The use by a prior appropriator of a portion of the water appropriated by him on land not his own, because of a mistake as to the location of his boundary lines, does not defeat his right to such water, nor confer any right thereto upon one who subsequently acquires title to the land on which it was used.<sup>8</sup>

*Cole v. Logan*, 24 Oregon 304; *Low v. Rizor*, 25 Oregon 551; *Nevada Ditch Co. v. Bennett*, 30 Oregon 59, 60 Am. St. Rep. 777.

*Utah.* — *Hague v. Nephi Irrigation Co.*, 16 Utah 421.

*Washington.* — *Offield v. Ish*, 21 Wash. 277.

**Method of Application Immaterial.** — The true test of appropriation of water is the successful application thereof to the beneficial use designed; the method of diverting or carrying it, or of making such application, is immaterial. *Thomas v. Guiraud*, 6 Colo. 530.

1. **Reasonable Time a Question of Fact.** — *Sieber v. Frink*, 7 Colo. 148; *Beaver Brook Reservoir, etc., Co. v. St. Vrain Reservoir, etc., Co.*, 6 Colo. App. 130; *Taugenbaugh v. Clark*, 6 Colo. App. 235; *Hindman v. Rizor*, 21 Oregon 112; *Low v. Rizor*, 25 Oregon 551.

2. **Application Delayed by Accident.** — *Wells v. Kreyenhagen*, 117 Cal. 320.

3. **Water May Be Applied Gradually to Beneficial Use.** — *Senior v. Anderson*, 115 Cal. 496; *Conant v. Jones*, (Idaho 1893) 32 Pac. Rep. 250; *Kleinschmidt v. Greiser*, 14 Mont. 484, 43 Am. St. Rep. 652; *Barnes v. Sabron*, 10 Nev. 217; *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *Cole v. Logan*, 24 Oregon 304; *Low v. Rizor*, 25 Oregon 551.

4. **Right to Increase Amount of Water Lost by Nonuser.** — *Conkling v. Pacific Imp. Co.*, 87 Cal. 296; *Senior v. Anderson*, 115 Cal. 496;

*Cole v. Logan*, 24 Oregon 304; *Low v. Rizor*, 25 Oregon 551.

**Only Reasonable Diligence Required.** — *Moss v. Rose*, 27 Oregon 595, 50 Am. St. Rep. 743.

The mere fact that the owner of a water right has only a portion of the land capable of being irrigated by his ditches under cultivation is not sufficient to show lack of diligence in making use of the water. *Arnold v. Passavant*, 19 Mont. 575.

5. *Cache La Poudre Irrigation Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144.

6. **Transfer of Water to Valley of Another Stream.** — *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Thomas v. Guiraud*, 6 Colo. 530; *Openlander v. Left Hand Ditch Co.*, 18 Colo. 142.

A valid appropriation of the waters of a stream may be made for the purpose of irrigation, to the exclusion of a riparian owner, although the lands to be irrigated are not located on the banks or in the neighborhood of the stream, but lie along another stream. *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258.

7. **Changing Place of Use.** — *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554; *Knowles v. Clear Creek, etc., Co.*, 18 Colo. 209.

**Change Injurious to Others Not Permitted.** — *Gassert v. Noyes*, 18 Mont. 216.

8. *Mahoney v. Neiswanger*, (Idaho 1899) 59 Pac. Rep. 561.



*c.* DOCTRINE OF RELATION. — The rights of an appropriator of water do not become perfect until the appropriation has been consummated by the actual application of the water to beneficial use, but where the appropriator has pursued the actual work of appropriation with due diligence, and has brought it to completion within a reasonable time, his rights will relate back to the time of the commencement of the work.<sup>1</sup> And where the appropriation is begun by posting a notice at the point of the intended diversion, the right acquired relates back to the time of posting the notice.<sup>2</sup> But one who seeks to avail himself of the doctrine of relation back where notice is required by statute can do so only by a compliance with the statute.<sup>3</sup>

*f.* FILING MAP AND STATEMENT OF DITCH. — In several states the appropriator is required by statute, in order to fix his priority as of the date when the work of diversion was commenced, to file for record within a prescribed time after the commencement of the work, a map and statement giving full information as to his proposed ditch or enlargement of an existing ditch.<sup>4</sup> And on the question of the priority of water rights, certified copies of written declarations of the appropriation and claim of such rights, made and recorded by the appropriators, have been held competent evidence even without a statute requiring the execution and recording of such declarations.<sup>5</sup>

**7. Extent of Right** — *a.* IN GENERAL. — A prior appropriator of water is entitled to the quantity of water which he has lawfully appropriated and no more; that is, the extent of his appropriation is the measure of his right. He is entitled to a sufficient quantity of water, up to the extent of his appropriation, to irrigate all the lands for the benefit of which the appropriation was made,<sup>6</sup> but he cannot claim more than he has actually appropriated,<sup>7</sup> or than

**1. Right of Appropriator Relates Back to Commencement of Work.** — *Osgood v. El Dorado Water, etc., Min. Co., 51 Cal. 571; Sieber v. Frink, 7 Colo. 148; Water Supply, etc., Co. v. Larimer, etc., Irrigation Co., 24 Colo. 322; Colorado Land, etc., Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545; Keeney v. Carillo, 2 N. Mex. 480; Cole v. Logan, 24 Oregon 304; Nevada Ditch Co. v. Bennett, 30 Oregon 59, 60 Am. St. Rep. 777.*

Where a settler on public land diverts and appropriates the water of a stream for irrigation purposes, and afterwards obtains a patent for the land, his title to the water relates back to the time of the settlement. *Faull v. Cooke, 19 Oregon 455, 20 Am. St. Rep. 836; Cole v. Logan, 24 Oregon 304.*

**2. Relation Back to Time of Posting Notice.** — *Murray v. Tingley, 20 Mont. 260.* See also *Cole v. Logan, 24 Oregon 304; Nevada Ditch Co. v. Bennett, 30 Oregon 59, 60 Am. St. Rep. 777.*

**3. Compliance with Statutes.** — *Murray v. Tingley, 20 Mont. 260.*

The statute as to notice is to be construed strictly, and rights can be acquired under it only by strict compliance with its terms. *Umatilla Irrigation Co. v. Umatilla Imp. Co., 22 Oregon 366.*

**4. Filing Map and Statement of Ditch.** — *Mills's Annot. Stat. Colo. (1891), §§ 2265, 2266; Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129; Taughenbaugh v. Clark, 6 Colo. App. 235.* This statute applies only to ditches taking water directly from a natural stream, and not to ditches tapping other ditches. *Water Supply, etc., Co. v. Larimer, etc., Irrigation Co., 24 Colo. 322.* The object of the statute being that of fixing the priority of appropria-

tions, the want of the required record cannot be invoked by one party to justify the destruction of a ditch owned by and in the actual occupation and use of another. *Denver, etc., R. Co. v. Dotson, 20 Colo. 304.* This statute has lately been held unconstitutional on account of the insufficiency of the title under which it was enacted. *Lamar Canal Co. v. Amity Land, etc., Co., (Colo. 1899) 58 Pac. Rep. 600; Rio Grande Land, etc., Co. v. Prairie Ditch Co., (Colo. 1900) 60 Pac. Rep. 726.* See also *Rev. Stat. Tex. (1895), art. 3120.*

Under the *Montana* statute (Civ. Code Mont., 1895, § 1889), requiring a record of the appropriation of water, but containing a proviso that a failure to comply with the requirements of the section shall not work a forfeiture of rights already acquired, an appropriation of water for irrigation purposes made in 1880, before the enactment of the statute, but not recorded until 1891, was held superior to one acquired in 1888, after the statute, and recorded in 1889. *Salazar v. Smart, 12 Mont. 395.*

**5. Sweetland v. Olsen, 11 Mont. 27.** Compare *Cruse v. McCauley, 96 Fed. Rep. 360.*

**6. Appropriator Entitled to Sufficient Water to Irrigate His Land.** — *Hillman v. Hardwick, 2 Idaho 983; Roeder v. Stein, 23 Nev. 92; Cole v. Logan, 24 Oregon 304; Bowman v. Bowman, (Oregon 1899) 57 Pac. Rep. 546.*

**7. Appropriator Limited to Amount of Appropriation.** — *Greer v. Heiser, 16 Colo. 306; Nichols v. McIntosh, 19 Colo. 22; Low v. Schaffer, 24 Oregon 239; Salina Creek Irrigation Co. v. Salina Stock Co., 7 Utah 456; Becker v. Marble Creek Irrigation Co., 15 Utah 225.* See also *Higgins v. Barker, 42 Cal. 233.*



he uses or needs for the proper irrigation of his land.<sup>1</sup> As has already been stated, the appropriator is not limited to the quantity of water actually used at first for the irrigation of his land, where all the land for the irrigation of which the appropriation was made is not immediately brought under cultivation, but he may increase the quantity as his needs may require up to the full amount of water necessary to irrigate his whole tract.<sup>2</sup>

**Carrying Capacity of Ditch as Determining Extent of Right.** — It follows, from the principles just stated and from what has been said as to what constitutes a legal appropriation of water, that the right of an appropriator is not measured by the capacity of his ditch, except in so far as the carrying capacity of the ditch at its smallest point will determine the maximum quantity of water diverted, and hence the quantity which may be claimed by the appropriator provided all of it is used or needed.<sup>3</sup>

**b. WATER MUST BE USED REASONABLY.** — The appropriator is bound to use the water appropriated by him in a reasonable manner,<sup>4</sup> and with due regard to the needs of other landowners.<sup>5</sup> What is a reasonable use will depend upon the circumstances of each particular case.<sup>6</sup>

**c. APPROPRIATION OF ENTIRE FLOW OF STREAM.** — Where the right to the use of water for irrigation is acquired solely by priority of appropriation, the first appropriator may appropriate all the water of the stream if this amount is necessary for the proper irrigation of his lands.<sup>7</sup> But, as has been already seen, this rule does not hold where the doctrine of riparian rights pre-

**1. Appropriator Limited to Amount of Water Actually Used or Necessary for Irrigation of His Land** — *Arizona*. — Clough v. Wing, (Ariz. 1888) 17 Pac. Rep. 453.

*California*. — Barrows v. Fox, 98 Cal. 63; Riverside Water Co. v. Sargent, 112 Cal. 230; Senior v. Anderson, 115 Cal. 496; Smith v. Hawkins, 120 Cal. 86. See also Riverside Land, etc., Co. v. Jansen, 66 Cal. 300.

*Colorado*. — Nichols v. McIntosh, 19 Colo. 22; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357; Colorado Milling, etc., Co. v. Larimer, etc., Irrigation Co., (Colo. 1899) 56 Pac. Rep. 185; Church v. Stillwell, 12 Colo. App. 43.

*Idaho*. — Drake v. Earhart, 2 Idaho, 716.

*Nevada*. — Barnes v. Sabron, 10 Nev. 217; Roeder v. Stein, 23 Nev. 92.

*New Mexico*. — Millheiser v. Long, (N. Mex. 1900) 61 Pac. Rep. 111.

*Oregon*. — Simmons v. Winters, 21 Oregon 35, 28 Am. St. Rep. 727; Hindman v. Rizer, 21 Oregon 112; Nevada Ditch Co. v. Bennett, 30 Oregon 59, 60 Am. St. Rep. 777; Bowman v. Bowman, (Oregon 1899) 57 Pac. Rep. 546.

*Utah*. — Becker v. Marble Creek Irrigation Co., 15 Utah 225; Hague v. Nephi Irrigation Co., 16 Utah 421; Manning v. Fife, 17 Utah 232.

No one is entitled to have a priority adjudged him for more water than he has actually appropriated, nor for more than he actually needs. His priority of right must be limited by each of these considerations. Nichols v. McIntosh, 19 Colo. 22.

A riparian owner cannot restrain the diversion of water which he would not use. Edgar v. Stevenson, 70 Cal. 286; Modoc Land, etc., Co. v. Booth, 102 Cal. 151.

**2. See *supra*, this section, *What Constitutes Appropriation — Application of Water to Beneficial Use — Gradual Application.***

**3. Capacity of Ditch.** — Smith v. Hawkins, 120 Cal. 86; Barnes v. Sabron, 10 Nev. 243; Mill-

heiser v. Long, (N. Mex. 1900) 61 Pac. Rep. 111; Bowman v. Bowman, (Oregon 1899) 57 Pac. Rep. 546. See also Posachane Water Co. v. Standart, 97 Cal. 476.

An instruction that the extent of the appropriation of water is determined by the capacity of the appropriator's headgate and ditches, and the quantity of water required by him for the uses for which it may be appropriated, is not objectionable on the ground that it makes the test the capacity of the headgate and not that of the ditch. Carron v. Wood, 10 Mont. 500.

**4. Water Must Be Used Reasonably.** — Wiggins v. Muscupiabe Land, etc., Co., 113 Cal. 182, 54 Am. St. Rep. 337; Barnes v. Sabron, 10 Nev. 217; Jones v. Adams, 19 Nev. 78, 3 Am. St. Rep. 788; Roeder v. Stein, 23 Nev. 92; Low v. Schaffer, 24 Oregon 239.

**5. One Who Uses Water Wastefully on his land so as to deprive lower proprietors of the use thereof is liable in nominal damages to such lower proprietors.** Shotwell v. Dodge, 8 Wash. 337.

**6. What Is Reasonable Use Dependent upon Circumstances of Each Case.** — Heilbron v. 76 Land, etc., Co., 80 Cal. 189; Wiggins v. Muscupiabe Land, etc., Co., 113 Cal. 182, 54 Am. St. Rep. 337; Barnes v. Sabron, 10 Nev. 217; Low v. Schaffer, 24 Oregon 239.

**7. Appropriator May Use Entire Flow of Stream.** — Hammond v. Rose, 11 Colo. 824, 7 Am. St. Rep. 258; Drake v. Earhart, 2 Idaho 716; Roeder v. Stein, 23 Nev. 92. And see Low v. Schaffer, 24 Oregon 239.

A prior appropriator of water upon public lands may appropriate all the water of the stream, and he does not lose this right by becoming a riparian owner, but by subsequent appropriation or enlargement of his ditch may still take all the water, if at the time there is no other riparian owner, and subsequent riparian owners can acquire no rights as against him. Healy v. Woodruff, 97 Cal. 464.



vails and is applicable.<sup>1</sup> The right of a riparian owner to complain of the total consumption of the water of the stream by upper appropriators may, however, be lost by special contract.<sup>2</sup>

*d. SURPLUS WATER.* — An appropriator of water for irrigation purposes acquires by his appropriation no right to the surplus water remaining after his wants are supplied, but such surplus is subject to appropriation by subsequent appropriators.<sup>3</sup> The appropriator cannot dispose of the surplus water to others, or waste it, but is required to permit it to flow in its natural channel for the benefit of subsequent appropriators.<sup>4</sup> Moreover, the prior appropriator cannot complain of the diversion of surplus water above him by a subsequent appropriator, even though the effect of such diversion is to deprive him of some of the water to which he is entitled, where such deficit may be avoided by perfecting his own means of diversion so as to prevent unnecessary waste.<sup>5</sup>

*Point of Return of Surplus.* — The point at which the water, after being used by an upper appropriator, is returned to the stream is immaterial so far as a lower prior appropriator is concerned, where the latter receives all the water to which he is entitled and is not injuriously affected by the return of the water in the manner adopted.<sup>6</sup>

*Right of Subsequent Appropriator Limited to Surplus Water.* — Although a subsequent appropriator may acquire the right to surplus water permitted by the prior appropriator to flow back into the stream, he cannot, as against the prior appropriator, acquire any right to the water originally appropriated by the latter.<sup>7</sup>

*e. ENLARGEMENT OF ORIGINAL USE.* — An appropriator of water from a stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those in whom prior rights in the same stream are vested cannot extend or enlarge their use of the water to his prejudice, but are limited to their rights as they existed at the time when he acquired his, for in such case each appropriator, with respect to his particular appropriation, is prior in time and exclusive in right.<sup>8</sup>

*f. USE OF WATER AT CERTAIN PERIODS.* — If the first appropriator makes use of the water only at certain periods, others may acquire a right to use it at other times. Thus, if the first appropriator uses the water during certain days in the week, or during a certain number of days in a month, others may appropriate and use it during the other days of the week or month.<sup>9</sup>

1. See *supra*, this title, *Doctrine of Riparian Rights — Nature and Extent — Measure of Right*.

2. *Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68.

3. *Appropriator Acquires No Right to Surplus Water.* — *Saint v. Cuerrero*, 17 Colo. 448, 31 Am. St. Rep. 320; *Creek v. Bozeman Water Works Co.*, 15 Mont. 121; *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *Manning v. Fife*, 17 Utah 232.

An appropriator who has acquired a right to all the water of a stream in its ordinary flow is not entitled to an injunction restraining another from diverting surplus water during times of extraordinary high water or freshets. *Edgar v. Stevenson*, 70 Cal. 286.

*Waste Water from Irrigating Ditches* which is returned to the main stream or its tributaries becomes a part of the waters of the stream as though never diverted, and inures to the benefit of appropriators in the order of their appropriations. *Water Supply, etc., Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 87.

4. *Appropriator Must Permit Surplus to Flow Back to Natural Channel.* — *Creek v. Bozeman*

*Water Works Co.*, 15 Mont. 121; *Manning v. Fife*, 17 Utah 232.

5. *Diversion of Surplus by Upper Appropriator.* — *Natoma Water, etc., Co. v. Hancock*, 101 Cal. 42.

6. *Austin v. Chandler*, (Ariz. 1895) 42 Pac. Rep. 483, wherein it was held that an injunction would not lie in favor of a lower appropriator to restrain an upper appropriator from diverting the water of the stream and returning it into the former's ditch instead of into the natural channel, where the rights of the lower proprietor were not injured.

7. *Brown v. Mullin*, 65 Cal. 89.

8. *Appropriator May Not Enlarge Use of Water to Injury of Subsequent Appropriator.* — *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Cache La Poudre Reservoir Co. v. Water Supply, etc., Co.*, 25 Colo. 161; *Colorado Milling, etc., Co. v. Larimer, etc., Irrigation Co.*, (Colo. 1899) 56 Pac. Rep. 185; *Church v. Stillwell*, 12 Colo. App. 43; *Becker v. Marble Creek Irrigation Co.*, 15 Utah 225.

9. *Water Used at Certain Periods.* — *Santa Paula Water Works v. Peralta*, 113 Cal. 38,



**Apportionment by Periods Between Riparian Owners.** — A court of equity may apportion the flow of water in a stream to the respective riparian owners, by periods of time rather than by a division of the quantity, so that each may have the full flow of the stream during such designated periods, instead of a portion of the flow during all the time, when the circumstances are such that a division in this manner will best conserve the rights of all the riparian owners.<sup>1</sup>

**g. RIGHT TO FLOW OF TRIBUTARIES.** — One who has acquired the right to a certain amount of water from a stream for irrigation purposes is entitled to the uninterrupted flow of the upper tributaries, springs, and other sources of supply of such stream, so far as this may be necessary to insure the amount of his appropriation.<sup>2</sup> So also he is entitled to the flow of lower tributaries as against a later appropriator thereof, where this is necessary to protect him against the claims of lower prior appropriators from the main stream.<sup>3</sup> But a prior appropriator cannot complain of the use by another of the water of one of the forks of the stream so long as he receives all the water to which he is entitled.<sup>4</sup> Nor can he restrain the diversion of the water of a tributary unless such diversion diminishes the quantity which would otherwise naturally reach the main stream, and shortens the period of the natural flow, and then such diversion will be restrained only as to such quantity and period.<sup>5</sup>

**Stream Issuing from Lake.** — Where a prior appropriator has acquired the right to the flow of a stream issuing from a lake, other persons have no right to tap the lake by irrigating ditches so as to deprive the prior appropriator of some of the water to which he is entitled.<sup>6</sup>

**h. RIGHT TO BED AND BANKS OF STREAM.** — An appropriator does not acquire such an exclusive property in the bed and banks of the stream as to entitle him to prevent others from having access thereto for the purpose of appropriating water, so long as they do not interfere with his prior right to the water,<sup>7</sup> but he has the right as against upper proprietors to go upon their lands above his point of diversion for the purpose of removing obstructions from the bed of the stream so that the water to which he is entitled may flow in its natural channel.<sup>8</sup>

**VII. DOCTRINE OF PRIORITY — 1. Priority of Right Acquired by Priority of Appropriation.** — The constitutions or statutes of most of the arid states give appropriators priority of right according to priority of appropriation,<sup>9</sup> but this doctrine of priority, while confirmed or recognized by such constitutional or statutory provisions, existed prior to and independently thereof, and arose

following *Smith v. O'Hara*, 43 Cal. 371; *Cache La Poudre Reservoir Co. v. Water Supply, etc., Co.*, 25 Colo. 161; *Barnes v. Sabron*, 10 Nev. 217; *Stowell v. Johnson*, 7 Utah 215. See also *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447; *Salina Creek Irrigation Co. v. Salina Stock Co.*, 7 Utah 460.

**1. Apportionment by Periods.** — *Harris v. Harrison*, 93 Cal. 676; *Wiggins v. Muscupiabe Land, etc., Co.*, 113 Cal. 182, 54 Am. St. Rep. 337.

**2. Right to Flow of Upper Tributaries.** — *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Bruening v. Dorr*, 23 Colo. 195; *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 378; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Low v. Schaffer*, 24 Oregon 239; *Low v. Rizer*, 25 Oregon 551.

**3. Tributary Entering Stream Below Point of Diversion.** — *Platte Valley Irrigation Co. v. Buckers Irrigation, etc., Co.*, 25 Colo. 77; *Water Supply, etc., Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 87.

**4. Faulkner v. Rondoni**, 104 Cal. 140.

**5. Creighton v. Kaweah Canal, etc., Co.**, 67 Cal. 221.

**6. Stream Issuing from Lake.** — *Baxter v. Gilbert*, 125 Cal. 580.

**7. No Absolute Right to Bed or Banks of Stream.** — *Natoma Water, etc., Co. v. Hancock*, 101 Cal. 42.

**8. Right to Remove Obstructions from Bed of Stream.** — *Ware v. Walker*, 70 Cal. 591.

**9. Constitutional Provisions as to Priority** — *Colorado*. — Const., art. 16, § 6; *Schilling v. Rominger*, 4 Colo. 100; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Thomas v. Guiraud*, 6 Colo. 530; *Sieber v. Frink*, 7 Colo. 148; *Rominger v. Squires*, 9 Colo. 327; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258; *Burnham v. Freeman*, 11 Colo. 601; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Bloom v. West*, 3 Colo. App. 212.

*Idaho*. — Const., art. 15, § 3; *Hillman v. Hardwick*, 2 Idaho 983; *Drake v. Earhart*, 2 Idaho 716; *Kirk v. Bartholomew*, 2 Idaho 1087;



out of the necessity of the case in view of the climatic conditions prevailing in the region in which it obtains.<sup>1</sup>

**2. Priority as Between Persons Using Water for Different Purposes.** — Notwithstanding the importance of water for irrigation in the arid states, it is nevertheless held that its use for that purpose is subordinate to its use for strictly domestic purposes and to furnish drink for man and beast, and that these wants must be supplied before any of the water can be used for irrigation. After these wants have been supplied each owner is entitled to a reasonable use of the remaining water for irrigation.<sup>2</sup>

**3. Priorities under Acts of Congress — Appropriation of Water on Public Lands — Act of Congress of 1866.** — By the Act of Congress of July 26, 1866, the possessors and owners of water rights vested and accrued by priority of possession, and recognized and acknowledged by the local customs, laws, and decisions of courts, are protected in their rights.<sup>3</sup> This enactment does not establish any new right in favor of the prior appropriator, but is simply intended as a recognition of the validity of the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition.<sup>4</sup> This law may be shown by evidence of the local customs, or by the legislation of the state or territory, or by the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority, but in case of conflict between a local custom and a statutory regulation the latter must control.<sup>5</sup>

*Geertson v. Barrack*, 2 Idaho 1066; *Dunniway v. Lawson*, (Idaho 1898) 51 Pac. Rep. 1032.

*Wyoming.* — Const., art. 8, § 3.

**1. Priority of Appropriation Independently of Constitutional and Statutory Provisions — United States.** — *Basey v. Gallagher*, 20 Wall. (U. S.) 670.

*California.* — *Stein Canal Co. v. Kern Island Irrigating Canal Co.*, 53 Cal. 503; *Osgood v. El Dorado Water, etc.*, Min. Co., 56 Cal. 571; *Himes v. Johnson*, 61 Cal. 259; *Brown v. Mullin*, 65 Cal. 89.

*Nevada.* — *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537; *Barnes v. Sabron*, 10 Nev. 217; *Straitt v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788.

*New Mexico.* — *Keeney v. Carillo*, 2 N. Mex. 480; *Millheiser v. Long*, (N. Mex. 1900) 61 Pac. Rep. 111.

*Oregon.* — *Kaler v. Campbell*, 13 Oregon 596.

And see the cases cited in the next preceding note.

**Prorating Statute.** — A statute providing for the prorating of water among several consumers from the same irrigating ditch during times of scarcity is constitutional as to consumers having the same priority, but as to others it must be limited so as not to conflict with the doctrine of priority. *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111.

**2. Priority as to Use for Different Purposes.** — *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217; *Smith v. Corbit*, 116 Cal. 587.

The Constitution of Colorado (art. 16, § 6), expressly declares the rule stated in the text. See also Const. Idaho, art. 15, § 3. This provision is held to be prospective in its operation, and not applicable to water rights acquired before the adoption of the constitution.

*Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Colorado Milling, etc., Co. v. Larimer, etc., Irrigation Co.*, (Colo. 1899) 56 Pac. Rep. 185; *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49.

Neither is such constitutional provision intended to authorize the diversion of water for domestic use from the public stream of the state by means of large canals or pipe lines, but the use protected is such as the riparian owner has at common law, to take water for himself, his family or stock, and the like. *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233; *Broadmoor Dairy, etc., Co. v. Brookside Water, etc., Co.*, 24 Colo. 541.

**3. Act Cong. July 26, 1866.** — Rev. Stat. U. S., § 2339; 14 U. S. Stat. at L. 253, § 9. See also *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Cave v. Crafts*, 53 Cal. 135; *Lux v. Haggins*, 69 Cal. 255; *Natoma Water, etc., Co. v. Hancock*, 101 Cal. 42; *Vansickle v. Haines*, 7 Nev. 249.

**4. Act of Congress Recognition of Pre-existing Rights.** — *Basey v. Gallagher*, 20 Wall. (U. S.) 670; *Jennison v. Kirk*, 98 U. S. 453; *Broder v. Natoma Water, etc., Co.*, 101 U. S. 274; *Krall v. U. S.*, 79 Fed. Rep. 241; *Cave v. Crafts*, 53 Cal. 135; *Osgood v. El Dorado Water, etc.*, Min. Co., 56 Cal. 571; *Ely v. Ferguson*, 91 Cal. 187; *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525; *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788; *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912.

**5. Basey v. Gallagher**, 20 Wall. (U. S.) 670; *Drake v. Earhart*, 2 Idaho 716; *Barnes v. Sabron*, 10 Nev. 217. See also *Himes v. Johnson*, 61 Cal. 259.

In *Clough v. Wing*, (Ariz. 1888) 17 Pac. Rep. 453, it was held that the courts take knowledge of the local customs, laws, and decisions of courts as to the uses of water, as they do of the public laws.



The Act of Congress operates as a grant by the United States of the water appropriated and diverted upon the public lands, and of the right of way for ditches and canals by which the water is conveyed.<sup>1</sup>

The Practical Construction of This Statute has been that as long as land belongs to the United States the waters flowing over it are subject to appropriation for any of the purposes named when such appropriation is recognized by the local customs, laws, or decisions of the courts; but if the water is not so appropriated when it flows over the public domain it is not subject to appropriation after the land has become private property.<sup>2</sup> The act does not confer the right to enter upon lands in the possession of another, for the purpose of securing the water thereon, or of completing an attempted diversion of water, even though the person seeking so to enter had at some previous time manifested his intention to secure a water right upon the land.<sup>3</sup> Nor does it confer the right to enter upon land in the possession of another, for the purpose of materially changing the point of diversion of water already appropriated, nor for the purpose of constructing new ditches where none existed before.<sup>4</sup> It does not grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed.<sup>5</sup>

The Act Is Prospective in its operation, and does not affect the rights of persons who acquired title to public land prior to its enactment.<sup>6</sup>

Patents from United States Subject to Vested Water Rights. — Under the Act of Congress of July 9, 1870, amending the Act of 1866, all patents granted, or pre-emptions or homesteads allowed, are subject to any vested or accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the Act of 1866.<sup>7</sup> This act also is merely declaratory of the law existing before its passage.<sup>8</sup>

1. *Smith v. Hawkins*, 110 Cal. 122; *Wood v. Etiwanda Water Co.*, 122 Cal. 152; *Smith v. Denniff*, (Mont. 1900) 60 Pac. Rep. 398.

2. Act of Congress Applies Only to Public Domain. — *Cruse v. McCauley*, 96 Fed. Rep. 369.

The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as the owner of the land and water, which grant applies only to the public domain of the United States, and therefore when absolute title to riparian land has passed from the United States before any right to the water by prior appropriation has become vested in any person, no such right can be afterwards acquired under the grant of Congress. *Smith v. Denniff*, (Mont. 1900) 60 Pac. Rep. 398.

3. *Taylor v. Abbott*, 103 Cal. 424.

4. *McGuire v. Brown*, 106 Cal. 660.

5. *McGuire v. Brown*, 106 Cal. 660.

6. Act of 1866 Prospective in Its Operation. — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450; *Lux v. Haggin*, 69 Cal. 255; *Beaver Brook Reservoir, etc., Co. v. St. Vrain Reservoir, etc., Co.*, 6 Colo. App. 130.

7. Government Patents Subject to Vested Water Rights. — Rev. Stat. U. S., § 2340; *Cruse v. McCauley*, 96 Fed. Rep. 369; *Hill v. Lenormand*, (Ariz. 1888) 16 Pac. Rep. 266; *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571; *Failey v. Spring Valley Min., etc., Co.*, 58 Cal. 142; *Judkins v. Elliott*, (Cal. 1886) 12 Pac. Rep. 116; *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447; *Ware v. Walker*, 70 Cal. 591; *South Yuba Water, etc., Co. v. Rosa*, 80 Cal. 333; *De Necochea v. Curtis*, 80 Cal. 397; *Faulkner v. Rondon*, 104 Cal. 140; *McGuire v.*

*Brown*, 106 Cal. 660; *Denver, etc., R. Co. v. Dotson*, 20 Colo. 304; *Beaver Brook Reservoir, etc., Co. v. St. Vrain Reservoir, etc., Co.*, 6 Colo. App. 130; *Drake v. Earhart*, 2 Idaho 716; *Barnes v. Sabron*, 10 Nev. 217; *Tolman v. Casey*, 15 Oregon 83; *Scott v. Toomey*, 8 S. Dak. 639; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566.

One who acquires title to public land takes it subject to and with notice of water rights previously acquired by appropriation. *Geddis v. Parrish*, 1 Wash. 587.

So also where one takes possession of unoccupied public land. *Miller v. Douglas*, (Ariz. 1900) 60 Pac. Rep. 722.

If one goes upon the public lands of the United States and appropriates water for irrigation purposes, and is permitted to continue in its adverse use and enjoyment for more than ten years, such appropriation ripens into a title which cannot be disturbed by one succeeding to the rights of the United States. *Tolman v. Casey*, 15 Oregon 83.

An appropriator of water for irrigation upon the public lands, under Rev. Stat. U. S., §§ 2339, 2340, is a licensee of the general government so long as the land continues to be a part of the public domain; but when the land passes into private ownership it is burdened by the easement granted by the United States to the appropriator, who holds his rights against the land under an express grant. *Smith v. Hawkins*, 110 Cal. 122.

8. Act July 9, 1870, Declaratory of Existing Law. — See *Broder v. Natoma Water, etc., Co.*, 101 U. S. 274.

A prior appropriator of the waters of a stream for irrigation acquires a right thereto



**No Rights by Appropriation as Against Prior Grantee of Land.** — But an appropriator can acquire no rights under the Act of Congress as against a grantee of the land from the United States whose right attached before the appropriation was made.<sup>1</sup>

**Acts of Congress Applicable as Between Appropriators Residing in Different States.** — The Acts of Congress afford protection to persons acquiring water rights by priority of appropriation from non-navigable streams as against later appropriators, without reference to the question whether the several appropriators reside in the same state or in different states.<sup>2</sup>

**4. Adjudication of Priorities and Water Rights — Determination of Water Rights by Courts.** — A court of equity may ascertain and determine the respective rights of several appropriators of the water of a natural stream, and may regulate its use between them.<sup>3</sup> In several states the adjudication of priorities is provided for by special statutes.<sup>4</sup>

The Judgment or Decree must be certain and definite, that is, it should state in

as against a riparian owner who obtained a patent from the United States after the appropriation and before the Act of 1870. *Hammond v. Rose*, 11 Colo. 524, 7 Am. St. Rep. 258.

1. *Cruse v. McCauley*, 96 Fed. Rep. 369; *Lux v. Haggin*, 69 Cal. 255.

The rights of a patentee of public land attach by relation so as to cut off any intervening adverse claim to water rights by appropriation at the time of his first act to acquire title, and will be protected as against any subsequent appropriation of the water naturally flowing on the land. *Sturr v. Beck*, 133 U. S. 541, *affirming* 6 Dak. 71; *McGuire v. Brown*, 106 Cal. 660; *Faull v. Cooke*, 19 Oregon 455, 20 Am. St. Rep. 836; *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912. See also *Union Mill, etc., Co. v. Dangberg*, 2 Sawy. (U. S.) 450; *Cruse v. McCauley*, 96 Fed. Rep. 369; *Denver v. Mullen*, 7 Colo. 345; *Scott v. Toomey*, 8 S. Dak. 639. Compare the cases decided before the above-cited case in the United States Supreme Court. *Farley v. Spring Valley Min., etc., Co.*, 58 Cal. 142; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566; *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572. See also *Osgood v. El Dorado Water, etc., Min. Co.*, 56 Cal. 571.

2. **Appropriators in Different States.** — Where a stream flows in two states an appropriator of water for irrigation therefrom in one state may maintain a bill in a federal court to enjoin the diversion of the water to his injury by a later appropriator, although such diversion is made in the other state. *Howell v. Johnson*, 89 Fed. Rep. 556.

3. **Adjudication of Water Rights — Equity Jurisdiction.** — *Frey v. Lowden*, 70 Cal. 550.

Where the respective rights of several claimants of water have been settled by a final judgment, the matter cannot be again litigated between the same parties. *Neil v. Tolman*, 12 Oregon 289.

**Location of Measuring Box.** — A court having jurisdiction over the subject-matter of the suit and of the parties thereto may locate a measuring box in a ditch for the distribution of water in accordance with its decree or order, and the fact that the ditch is located on unsurveyed government land does not affect the power to locate such box. *Elliot v. Whitmore*, 10 Utah 246.

A court has power to prescribe, if necessary, the method which parties decreed to be entitled

to water shall use for its correct measurement. *Tolman v. Casey*, 15 Oregon 83.

4. **Statutory Provisions.** — In *Colorado*, by the Acts of 1879 and 1881 (Mills's Annot. Stat. Colo. (1891), § 2399 *et seq.*), provision is made for settling the priorities of rights to the use of water for irrigation. These acts were intended as a system of procedure for determining such priorities between the owners of ditches, canals, and reservoirs taking water from the same natural stream. *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525. See generally *Union Colony v. Elliott*, 5 Colo. 371; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Greer v. Heiser*, 16 Colo. 306; *Nichols v. McIntosh*, 19 Colo. 22; *Peck Lateral Ditch Co. v. Pella Irrigating Ditch Co.*, 19 Colo. 222; *Sterling Irrigation Co. v. Downer*, 19 Colo. 595; *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357; *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102; *Broadmoor Dairy, etc., Co. v. Brookside Water, etc., Co.*, 24 Colo. 541; *Handy Ditch Co. v. South Side Ditch Co.*, (Colo. 1899) 58 Pac. Rep. 30; *Rio Grande Land, etc., Co. v. Prairie Ditch Co.*, (Colo. 1900) 60 Pac. Rep. 726. As to decrees under these acts, see *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142; *Boulder, etc., Ditch Co. v. Lower Boulder Ditch Co.*, 22 Colo. 115; *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233; *Water Supply, etc., Co. v. Larimer, etc., Irrigation Co.*, 24 Colo. 322; *Water Supply, etc., Co. v. Tenney*, 24 Colo. 344; *X. Y. Irrigating Ditch Co. v. Buffalo Creek Irrigation Co.*, 25 Colo. 529.

The statute invests the court with jurisdiction to establish the rank with relation to each other of the several ditches in the same water district, such establishment being based upon the different dates of appropriation, the quantity appropriated, and the means employed to utilize it, and to award to each the priority to which it may be entitled, but does not authorize inquiry into the relative rights of co-claimants in the same ditch. *Putnam v. Curtis*, 7 Colo. App. 437.

**District Extending into Two or More Counties — Jurisdiction.** — Where, as provided by the statute, an action is brought in the District Court of the proper county to adjudicate pri-



feet, inches, or gallons, the amount of water to which each party is entitled.<sup>1</sup> It has been held that a decree that a party is entitled to a sufficient quantity of water to irrigate a stated number of acres is insufficient,<sup>2</sup> but such decrees have been upheld where, under the circumstances of the case, the quantity of water adjudged by the decree to belong to the party is capable of ascertainment.<sup>3</sup> It has been held that where a party is entitled under a judgment to a constant flow of a certain amount of water for irrigation, he cannot take more than that amount at one time and less at another, so as to maintain an average flow equal to the amount to which he is entitled.<sup>4</sup>

**Elements to Be Considered.** — In determining the amount of water to which several appropriators from the same water supply are respectively entitled, the quantity of land and the character of the soil which the several appropriators have under cultivation, as well as their actual prior appropriations, are to be considered, due regard being had to the principle that the appropriator's right to the use of water depends upon its application to beneficial use, and that no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use.<sup>5</sup> These factors, and not the number of shares of stock or interest which the parties may have in the irrigating ditch, are the important matters to be considered in determining their respective rights.<sup>6</sup> In determining the amount of water necessary to irrigate the land in question, reference should be had to the system of irrigation in vogue in the community, even though the water might be used with less waste by the adoption of another system.<sup>7</sup> On the question of priority of water rights acquired by prior appropriation, the fact that the stream does or does not furnish a sufficiency of water for all the parties is immaterial.<sup>8</sup>

**Measurement of Water.** — While it is not practicable to attain mathematical exactness in measuring the flow of water, a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply.<sup>9</sup>

**VIII. IRRIGATING DITCHES — 1. Right to Construct Ditches — a. CONDEMNATION OF RIGHT OF WAY — (1) In General.** — In the several states in which

orities to the use of water in a district extending into two or more counties, the court in which the action is brought acquires and retains exclusive jurisdiction to adjudicate such priorities. *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102; *Presbyterian College v. Poole*, 25 Colo. 50.

**The Montana Statute** (Civ. Code Mont., 1895, § 1891), providing that in suits for the protection of rights acquired to water all persons who have diverted water from the same stream or source may be made parties, and that the court may in one decree settle the relative priorities and rights of all the parties, contemplates an equitable action, and does not apply to an action at law for damages to crops caused by a wrongful diversion of the water. *Miles v. Du Bey*, 15 Mont. 340.

**1. Decree Must Be Definite and Certain.** — *In re Huntley*, 85 Fed. Rep. 889; *Dougherty v. Haggin*, 56 Cal. 522; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181; *Barrows v. Fox*, 98 Cal. 63; *Riverside Water Co. v. Sargent*, 112 Cal. 230; *Drake v. Earhart*, 2 Idaho 716; *Johnson v. Bielenberg*, 14 Mont. 506; *Smith v. Phillips*, 6 Utah 376; *Holman v. Pleasant Grove City*, 8 Utah 78; *Nephi Irrigation Co. v. Jenkins*, 8 Utah 369; *Nephi Irrigation Co. v. Vickers*, 15 Utah 374.

**2. Decree for Water Sufficient to Irrigate Certain**

**Acreage.** — *Nephi Irrigation Co. v. Vickers*, 15 Utah 374.

**3. Broadmoor Dairy, etc., Co. v. Brookside Water, etc., Co.**, 24 Colo. 541; *McLure v. Koen*, 25 Colo. 284; *Holman v. Pleasant Grove City*, 8 Utah 78.

**4. Average of Amount of Water Taken.** — *Alhambra Addition Water Co. v. Richardson*, 95 Cal. 490, 72 Cal. 598.

**5. Elements to Be Considered in Determining Amount.** — *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275; *Kirk v. Bartholomew*, 2 Idaho 1087.

**6. Amount of Interest in Irrigating Ditch.** — *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275.

**7. System of Irrigation in Vogue.** — *Rodgers v. Pitt*, 89 Fed. Rep. 420.

**8. Sufficiency of Water for All Parties Not Material.** — *Huning v. Porter*, (Ariz. 1898) 54 Pac. Rep. 584.

**9. Flow of Water Must Be Measured with Substantial Accuracy.** — *Union Mill, etc., Co. v. Dangberg*, 81 Fed. Rep. 73; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275. See also *Neil v. Tolman*, 12 Oregon 289.

**On the Question of the Capacity of a Ditch**, a witness who has had many years' experience in mining and in measuring and selling water to



irrigation prevails the condemnation of lands for ditches and reservoirs for irrigation purposes is provided for by statute,<sup>1</sup> and it has been held that such statutes are constitutional, though they contemplate proceedings for the irrigation of a particular tract, because the use of property for irrigation in arid regions is regarded as a public use.<sup>2</sup>

**Right of Condemnation Limited.** — The privilege of condemning a right of way for the construction of ditches across the lands of another should be exercised so as to inflict the least possible inconvenience and injury upon the owner of the servient estate. Thus, in some jurisdictions it is provided that no improved or occupied land shall, without the written consent of the owner, be burdened with two or more irrigating ditches where one will be sufficient, and that the ditch must be constructed along the shortest and most direct route practicable.<sup>3</sup>

**Enlargement of Ditch Already Constructed.** — The *Colorado* statute further provides that no person who has constructed a private ditch across the land of another shall prohibit or prevent others from enlarging or using such ditch in common with him.<sup>4</sup> This statute applies only to strictly private ditches, and not to ditches used for the carriage of water for hire to the general public,<sup>5</sup> though a ditch owned by an incorporated company but used for private purposes solely

miners is competent, although not a scientific expert. *Frey v. Lowden*, 70 Cal. 550.

**1. Condemnation of Right of Way for Irrigating Ditches, Etc.** — *Arizona*. — *Oury v. Goodwin*, (Ariz. 1891) 26 Pac. Rep. 376.

*California*. — *Lindsay Irrigation Co. v. Mehrrens*, 97 Cal. 676; *Rialto Irrigating District v. Brandon*, 103 Cal. 384; *Emigrant Ditch Co. v. Webber*, 108 Cal. 88.

*Colorado*. — *Tunker v. Nichols*, 1 Colo. 551; *Downing v. More*, 12 Colo. 316; *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320; *San Luis Land, etc., Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244.

*Montana*. — *Ellinghouse v. Taylor*, 19 Mont. 462.

*Nebraska*. — *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585.

*Texas*. — *McGee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587.

*Washington*. — *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454.

See also the various local statutes.

The statutes giving the right to condemn property for irrigation purposes do not authorize one person to go on the land of another in order to construct an irrigating ditch, until his right has been duly ascertained by condemnation proceedings. *Emerson v. El Dorado Ditch Co.*, 18 Mont. 247. Compare *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320.

**Incidental Use of Water for Irrigation.** — Private property cannot be condemned for a ditch designed to supply the plaintiff's mining claims, notwithstanding he intends incidentally to supply water to others for mining and irrigation. *Lorenz v. Jacob*, 63 Cal. 73.

In *Colorado* the right of a purely private party to condemn a right of way for a ditch to convey water to his lands for domestic, agricultural, and mining purposes is guaranteed by the constitution, and the manner of exercising the right is regulated by statute. *Tripp v. Overocker*, 7 Colo. 72; *Downing v. More*, 12 Colo. 316.

**Right to Construct Ditch Does Not Include Right**

**of Enlargement.** — It is held that a right acquired by condemnation proceedings to construct a ditch over the land of another does not give the ditch owner the right subsequently to enlarge such ditch, and he will be liable for damages caused to the landowner by an enlargement of the ditch without his consent. *Clear Creek Land, etc., Co. v. Kilkenny*, 5 Wyo. 38.

**2. Right of Condemnation Statutes Constitutional.** — *Oury v. Goodwin*, (Ariz. 1891) 26 Pac. Rep. 376; *Ellinghouse v. Taylor*, 19 Mont. 462; *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585.

**3. Right of Condemnation Limited by Statute** — *Colorado*. — *Mills's Annot. Stat. Colo.* (1891), §§ 2261, 2262; *Tripp v. Overocker*, 7 Colo. 72; *Downing v. More*, 12 Colo. 316; *Sand Creek Lateral Irrigation Co. v. Davis*, 17 Colo. 326.

The statute limiting the number of ditches to be constructed across the lands of others (*Mills's Annot. Stat. Colo.*, 1891, § 2261) does not conflict with the constitutional provisions granting a right of way for the construction of ditches; but, while recognizing the privilege, simply undertakes to regulate the exercise thereof so as to inflict the least possible inconvenience and injury upon the owner of the servient estate. *Tripp v. Overocker*, 7 Colo. 72.

This statute is for the benefit of the landowner and does not confer any rights upon ditch companies. *San Luis Land, etc., Co. v. Kenilworth Canal Co.*, 3 Colo. App. 244.

*Nebraska*. — *Paxton, etc., Irrigating Canal, etc., Co. v. Farmers', etc., Irrigation, etc., Co.*, 45 Neb. 884, 50 Am. St. Rep. 585.

And see the various local statutes.

**4. Enlargement of Ditch by Third Persons** — *Colorado Statute*. — *Mills's Annot. Stat. (Colo. 1891)*, § 2263; *Tripp v. Overocker*, 7 Colo. 72.

As to the jurisdiction of the County Court to entertain condemnation proceedings to enlarge a ditch, see *Sievers v. Garfield County*, 11 Colo. App. 147.

**5. Junction Creek, etc., Domestic, etc., Ditch Co. v. Durango**, 21 Colo. 194.



is subject to its provisions.<sup>1</sup> The statute does not apply to a ditch constructed by a landowner on his own land, for the irrigation thereof.<sup>2</sup>

**Cost of Repairing Enlarged Ditch.** — Where a ditch is enlarged and extended by others than the original owners, the keeping in repair of the headgate and the ditch to its original terminus is the duty of both sets of owners, the expense to be adjusted upon an equitable basis; but repairs upon the new ditch, from the terminus of the old, are not chargeable to the old proprietors.<sup>3</sup>

(2) **Assessment of Damages.** — In condemnation proceedings to secure a right of way for a ditch, damages should be awarded not only for the land or property taken, but also for any injury resulting to land or property not taken, in accordance with the general principles relating to condemnation proceedings.<sup>4</sup> Where a ditch is constructed on public land in the possession of one who has made improvements thereon, but has taken no steps to secure title to the land itself, the occupant is entitled to compensation for all damages or injury to the improvements caused by the construction of the ditch, but not for the taking of the land itself, nor for injury to the land not taken.<sup>5</sup>

**b. DITCHES ON PUBLIC DOMAIN.** — By the Act of Congress of 1866 and the amendment of 1870, a right of way is granted for irrigating ditches upon the public domain, and one who, after the construction of a ditch upon public land, acquires title to the land from the government takes it subject to the easement of the right of way for the ditch.<sup>6</sup> By the Act of March 3, 1891, a right of way through the public lands and reservations is granted to canal and ditch companies formed for the purpose of irrigation, upon compliance by them with certain conditions.<sup>7</sup>

**c. RIGHT OF ENTRY FOR CONSTRUCTION OR MAINTENANCE OF DITCH.** — The right to take water from or across the land of another is an easement, and includes secondary easements, such as the right to enter upon the servient tenement and make repairs or do whatever may be necessary to the full exercise of the right. But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to cause needless increase of the burden upon the servient tenement.<sup>8</sup> Where a landowner permits an appropriator of water for a number of years to enter upon his land for the purpose of constructing and keeping up a dam for diverting water, he will be estopped by such acquiescence from thereafter treating the appropriator as a trespasser and denying his right of entry.<sup>9</sup>

1. Sand Creek Lateral Irrigation Co. v. Davis, 17 Colo. 326.

2. Downing v. More, 12 Colo. 316, *modifying* Tripp v. Overocker, 7 Colo. 72.

3. Repair of Enlarged Ditch. — Patterson v. Brown, etc., Ditch Co., 3 Colo. App. 511.

4. Assessment of Damages. — Denver City Irrigation, etc., Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234; Tripp v. Overocker, 7 Colo. 72; Sand Creek Lateral Irrigation Co. v. Davis, 17 Colo. 326. See generally the title EMINENT DOMAIN, vol. 10, p. 1043.

Injury from Seepage. — Damages likely to result from seepage and leakage from the ditch should be assessed, and if not so assessed there can be no subsequent recovery therefor. Denver City Irrigation, etc., Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234.

5. Occupation of Public Lands. — Knott v. Barclay, 8 Colo. 300.

A Squatter on State School Land who subsequently obtains a patent therefor cannot recover damages for land taken for the right of way for a ditch begun before he filed his declaratory statement under the state statute.

Farmers' High Line Canal, etc., Co. v. Moon, 22 Colo. 560.

6. Ditches on Public Domain. — Rev. Stat. U. S., §§ 2339, 2340; Jennison v. Kirk, 98 U. S. 453; Broder v. Natoma Water, etc., Co., 101 U. S. 274; Tynon v. Despain, 22 Colo. 240. See also Nippel v. Forker, (Colo. 1899) 56 Pac. Rep. 577.

The right of way for an irrigation ditch upon the public lands vests only upon the completion of the ditch and compliance with the local laws, customs, etc., although it attaches as the ditch is constructed. Jarvis v. State Bank, 22 Colo. 309, 55 Am. St. Rep. 129.

A ditch constructed on unoccupied public land is held by grant, and the owner thereof does not forfeit his right thereto by nonuser. Ada County Farmers' Irrigation Co. v. Farmers' Canal Co., (Idaho 1898) 51 Pac. Rep. 990.

7. 26 U. S. Stat. at L. 1101, § 18. See also Nippel v. Forker, (Colo. 1899) 56 Pac. Rep. 577.

8. Secondary Easements. — Ware v. Walker, 70 Cal. 591; Hargrave v. Cook, 108 Cal. 72; Joseph v. Ager, 108 Cal. 517.

9. Estoppel to Deny Right of Entry. — Miller v. Douglas, (Ariz. 1900) 60 Pac. Rep. 722.



**2. Damages from Construction and Maintenance — No Liability for Damage Arising from Mere Existence of Ditch.** — No recovery can be had for damages incident to the construction and maintenance of an irrigating ditch within the scope of the lawful authority under which it was constructed and is maintained; that is, where a ditch exists by lawful authority its owner is not liable for damages resulting from its mere existence.<sup>1</sup>

**Ditch Owner Liable When Negligent.** — But one who constructs or maintains an irrigating ditch along the line of another's land is liable for any damage resulting from the want of proper care in its construction or management,<sup>2</sup> such as his failure to keep the ditch in proper repair,<sup>3</sup> or to dispose of surplus water so as not to injure the property of adjoining landowners.<sup>4</sup>

**No Liability in Absence of Negligence.** — But a ditch owner is not liable for damage caused by his ditch where there has been no negligence on his part. He is bound to exercise reasonable care and skill in its construction, maintenance, and use, and he is liable when, and only when, damage results from his failure to do so.<sup>5</sup>

**The Burden of Proving Negligence** and the amount of damage in an action against a ditch owner is on the plaintiff, the question of negligence being for the jury.<sup>6</sup>

**Bridging Ditches Crossing Public Highways.** — The owners of irrigating ditches crossing public highways are, in several states, required by statute to construct bridges over such ditches.<sup>7</sup> The construction of such bridges is ordinarily the duty of the ditch owner, though it has been held that where a city accepts the dedication of streets already crossed by ditches, the duty to

**1. No Damages Recoverable for Mere Lawful Maintenance of Ditch.** — *Denver v. Mullen*, 7 Colo. 345; *Platte, etc., Ditch Co. v. Anderson*, 8 Colo. 131; *Walley v. Platte, etc., Ditch Co.*, 15 Colo. 579.

**Irrigation Works Not Per Se Nuisances.** — The maintenance of dams or other obstructions for the purpose of diverting waters to be used for irrigation, and the diversion thereof for such purpose, so as materially to diminish the amount or even consume the entire quantity flowing in a stream, is not of itself a nuisance, where it is shown that such dams and obstructions have been maintained, and such diversion made, for a large number of years and under a *bona fide* claim of right. *Bliss v. Grayson*, (Nev. 1899) 56 Pac. Rep. 231.

An irrigating ditch in a city street is not necessarily a nuisance. *Fresno v. Fresno Canal, etc., Co.*, 98 Cal. 179.

**2. Liability for Damage Caused by Negligence in Construction or Maintenance of Ditch.** — *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Parker v. Larsen*, 86 Cal. 236, 21 Am. St. Rep. 30; *Greeley Irrigating Co. v. House*, 14 Colo. 549; *Colorado Consol. Land, etc., Co. v. Morris*, 1 Colo. App. 401; *Catlin Land, etc., Co. v. Best*, 2 Colo. App. 481; *McCarty v. Boise City Canal Co.*, 2 Idaho 225; *Arave v. Idaho Canal Co.*, (Idaho 1896) 46 Pac. Rep. 1024; *Kearney Canal, etc., Co. v. Akeyson*, 45 Neb. 635; *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349; *Bates v. Van Pelt*, 1 Tex. Civ. App. 185; *Jenkins v. Hooper Irrigation Co.*, 13 Utah 100; *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343.

One who constructs a ditch across the land of another without the consent of the latter is liable to him for damages caused by the construction and maintenance of such ditch. *Clear Creek Land, etc., Co. v. Kilkenny*, 5 Wyo. 38.

The ditch owner in such case is bound to make such repairs as may be necessary to prevent injury to the landowner. *Thomas v. Blaisdell*, (Nev. 1899) 58 Pac. Rep. 903.

**Private Ditch Used by City.** — Where a city empowered by its charter to distribute, control, and regulate waters flowing into it uses a ditch constructed by private persons as a part of its irrigating system, such ditch becomes a public ditch, and the city is liable for injury caused by negligence in its use. *Levy v. Salt Lake City*, 5 Utah 302.

**3. Damage Caused by Failure to Keep Ditch in Repair.** — *Catlin Land, etc., Co. v. Best*, 2 Colo. App. 481; *Kearney Canal, etc., Co. v. Akeyson*, 45 Neb. 635; *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349; *Thomas v. Blaisdell*, (Nev. 1899) 58 Pac. Rep. 903.

**4. Neglect to Dispose of Surplus Water.** — *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343.

**Injury by Percolating Water from Ditch.** — One who irrigates his land by means of a ditch supplied by an artesian well is liable to an adjoining landowner for injury caused to his land by percolating water from the ditch where such water might have been drained from the ditch so as to prevent the injury, and the continuance of such injury may be enjoined. *Parker v. Larsen*, 86 Cal. 236, 21 Am. St. Rep. 30.

**5. No Liability in Absence of Negligence.** — *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343.

**Ditch Owner Not an Insurer.** — *King v. Miles City Irrigating Ditch Co.*, 16 Mont. 463, 50 Am. St. Rep. 506.

**6. Burden of Proving Negligence.** — *Greeley Irrigating Co. v. House*, 14 Colo. 549.

**7. Bridging Ditches Crossing Highways.** — *Farmers' High Line Canal, etc., Co. v. Westlake*, 23 Colo. 26. See also the various local statutes.



construct necessary bridges and to keep them in repair devolves on the city and not on the ditch owner.<sup>1</sup>

**Contributory Negligence of Party Injured.** — It is held that the doctrine of contributory negligence does not apply to the case of injury to land from the escape of water from an irrigating ditch where the owner of the ditch had knowledge of its defects and could have prevented the injury. Under these circumstances no duty rests upon the landowner to avoid the consequences of the ditch owner's acts.<sup>2</sup>

**Remedy by Injunction.** — The use of an irrigating ditch will not be enjoined on account of the liability of its banks to break, causing the overflow of the plaintiff's land, where the apprehended damage would not be irreparable, and would be susceptible of pecuniary compensation in an action at law.<sup>3</sup>

**3. Use of Same Ditch by Several Appropriators** — *a.* **IN GENERAL.** — The fact that the same irrigating ditch is used by several persons does not necessarily indicate an identity of interest between them, for the water of the same ditch may be subject to several different priorities among different consumers, whose appropriations do not, perhaps, relate to the same time.<sup>4</sup>

*b.* **AS TENANTS IN COMMON.** — An appropriation may be made by several persons jointly who by their joint acts acquire a common right to the water.<sup>5</sup> When a ditch is so held in common by several persons all the tenants are equally liable for the expense of keeping it in repair, and in the absence of a special agreement changing this rule no rights accrue to an individual tenant by reason of the failure of his cotenants to make repairs.<sup>6</sup> Where a water right is held in common one tenant may preserve the estate for the benefit of his cotenants; and the fact that a particular tenant has not used the water for a period of time does not constitute an abandonment or forfeiture of the right, so long as the other tenants have used the water for a beneficial and necessary purpose.<sup>7</sup> Again, each cotenant may bring an action to restrain a stranger from diverting any of the water held in common.<sup>8</sup>

**4. Ditches as Property.** — An irrigating ditch or an interest therein is real

1. *Denver v. Mullen*, 7 Colo. 345.

2. **Contributory Negligence.** — *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349; *McCarty v. Boise City Canal Co.*, 2 Idaho 225.

3. **Injunction.** — *Garrett v. Bishop*, 27 Oregon 349. See generally the title **INJUNCTIONS**, vol. 16, p. 337.

4. **Different Priorities Among Several Users from Same Ditch.** — *Rominger v. Squires*, 9 Colo. 327; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Nichols v. McIntosh*, 19 Colo. 22; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 3 Colo. App. 255.

A ditch constituting physically but one ditch may be legally two distinct entities that have never merged or become identical. *Patterson v. Brown, etc., Ditch Co.*, 3 Colo. App. 511.

5. **Appropriation by Several Persons in Common.** — *Lytle Creek Water Co. v. Perdw*, 65 Cal. 447; *Schilling v. Rominger*, 4 Colo. 100. See also the cases cited in the notes immediately following.

Where a ditch is constructed by two or more persons under an agreement that each shall be entitled to appropriate his proportionate share of the water diverted for the purpose of irrigating his lands, the parties to the contract become tenants in common of the ditch and water right, and their respective rights and obligations are to be determined by the general rules of law regulating tenancies in common. *Moss v. Rose*, 27 Oregon 595, 50 Am. St. Rep. 743.

By associating together under the Utah irrigation laws of 1876 for the organization of a water district, the associators become tenants in common of the waters of a stream, and each landowner is equally entitled to the use of the water brought into the district, according to his rights by paying his proportionate share of the expense. *Smith v. North Canyon Water Co.*, 16 Utah 194.

6. **Duty of All Cotenants to Make Repairs.** — *Crowder v. McDonnell*, 21 Mont. 367; *Moss v. Rose*, 27 Oregon 595, 50 Am. St. Rep. 743. In the latter case it was held that one tenant has no right to obstruct the ditch to prevent the overflow of his lands in consequence of the failure of his cotenants to keep the ditch in repair.

One of several tenants in common of an irrigating ditch cannot ordinarily recover damages from his cotenants for injuries caused by their failure to keep the ditch in repair, but it is otherwise where they have agreed to make repairs. *Crowder v. McDonnell*, 21 Mont. 367.

7. *Cache La Poudre Irrigating Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144.

Where a ditch is held by several persons as tenants in common the continued use of the water by one is presumed to be in maintenance of the rights of his cotenants. *Moss v. Rose*, 27 Oregon 595, 50 Am. St. Rep. 743.

8. **Actions by Cotenants Against Strangers.** — *Rodgers v. Pitt*, 89 Fed. Rep. 420; *Lytle Creek Water Co. v. Perdw*, 65 Cal. 447.



estate.<sup>1</sup> Physically, of course, a ditch is a part of the land upon which it is dug or constructed, but the ditch and the land on which it is situated may be owned by different persons.<sup>2</sup> So, too, the ownership of a ditch may be entirely distinct from the right to divert the water. One may own an irrigating ditch without owning a water right, and may protect it from injury.<sup>3</sup> The measure of damages for the destruction of an irrigating ditch is the difference in the value of the land without and with the ditch.<sup>4</sup>

**IX. STORAGE OF WATER FOR IRRIGATION PURPOSES.** — In most of the arid states the statutes authorize the construction and maintenance of reservoirs for the storage of such water as is not needed for immediate use. This work is usually undertaken by companies organized for the purpose of supplying water for irrigation. A number of cases have arisen in which the rights of such companies have been adjudicated, but there is very little direct authority as to the extent of such rights in respect to the storage of water specifically. The diversion of water for storage to be ultimately distributed for irrigation or other useful purposes must be governed by the principles already considered in connection with the subject of the appropriation of water.<sup>5</sup>

**Damming Natural Stream.** — The bed and channel of a nonnavigable natural stream upon the public domain may be used as a reservoir for storing, by means of a dam, water that would otherwise run to waste, provided the rights of other persons are not injuriously affected by such use.<sup>6</sup>

**Storage Reservoirs Internal Improvements.** — Public reservoirs for the storage of water are internal improvements within the meaning of a statute providing for the appropriation of money for the purpose of making internal improvements within the state.<sup>7</sup>

**X. WATER RIGHTS CONSIDERED AS PROPERTY** — 1. **In General.** — The right to the use of water acquired by prior appropriation is a property right,<sup>8</sup> the interest in the water right and ditch being regarded as an interest in real estate.<sup>9</sup>

1. **Irrigating Ditches Considered Real Estate.** — *Reed v. Spicer*, 27 Cal. 57. See *infra*, this title, *Water Rights Considered as Property* — *In General*.

2. **Ownership of Ditch Distinct from Ownership of Land.** — *Nelson v. Clerf*, 4 Wash. 405.

3. **Ownership of Ditch Distinct from Right to Water.** — *Clifford v. Larrien*, (Ariz. 1886) 11 Pac. Rep. 397; *McLear v. Hapgood*, 85 Cal. 555; *Stocker v. Kirtley*, (Idaho 1900) 59 Pac. Rep. 891. See *infra*, this title, *Water Rights Considered as Property* — *Conveyance of Water Rights*.

4. **Measure of Damages.** — *Denver, etc., R. Co. v. Dotson*, 20 Colo. 304.

5. **Storage of Water for Irrigation Purposes.** — *Larimer County Reservoir Co. v. People*, 8 Colo. 614; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Water Supply, etc., Co. v. Larimer, etc., Irrigation Co.*, 24 Colo. 322; *Cache La Poudre Reservoir Co. v. Water Supply, etc., Co.*, 25 Colo. 161; *Larimer, etc., Reservoir Co. v. Cache La Poudre Irrigating Co.*, 8 Colo. App. 237; *Colorado Milling, etc., Co. v. Larimer, etc., Irrigation Co.*, (Colo. 1899) 56 Pac. Rep. 185.

Under the *Colorado* statute granting the right to take from the natural streams of the state and store any unappropriated water not needed for immediate use for domestic or irrigating purposes, a reservoir owner can divert water for storage only when not needed for such immediate use, and cannot acquire any priority

to fill his reservoir which will conflict with the right of another to use water for irrigation, even though his right accrued after the construction of the reservoir. *Water Supply, etc., Co. v. Tenney*, 24 Colo. 344.

6. **Damming Natural Streams.** — *Larimer County Reservoir Co. v. People*, 8 Colo. 614.

7. *In re* Senate Resolution, etc., 12 Colo. 287.

8. **Water Rights Considered Property.** — *Union Colony v. Elliott*, 5 Colo. 371; *Ft. Morgan Land, etc., Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259; *Nichols v. McIntosh*, 19 Colo. 22; *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49; *Cash v. Thornton*, 3 Colo. App. 475; *Frank v. Hicks*, 4 Wyo. 502.

A perpetual right to have a certain quantity of water flow through an irrigating ditch is a freehold estate. *Wyatt v. Larimer, etc., Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280.

The right of an irrigating company to have the water flow in the stream to the head of its ditch is an incorporeal hereditament appurtenant to the ditch, and is coextensive with its right to the ditch itself. *Lower Kings River Water Ditch Co. v. Kings River, etc., Canal Co.*, 60 Cal. 408.

9. **Water Rights Considered Real Estate.** — *Parks Canal, etc., Co. v. Hoyt*, 57 Cal. 44; *Lower Kings River Water Ditch Co. v. Kings River, etc., Canal Co.*, 60 Cal. 408; *Lux v. Haggin*, 69 Cal. 255; *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29; *Traveler's Ins. Co. v. Childs*, 25 Colo. 360; *Child v. Whitman*,



**2. Conveyance of Water Rights.** — The right to use water may be sold and transferred like other property,<sup>1</sup> though the purchaser intends to use the water for some purpose other than irrigation.<sup>2</sup>

**Mode of Conveyance.** — As in the case of real estate generally, a sale or transfer of a water right must ordinarily be by deed,<sup>3</sup> and since it may exist as an independent right of property, separately from the ownership of the ditch or the land in connection with which the water right is used or acquired, the water right and the ditch or the land may be conveyed separately from each other.<sup>4</sup> Ordinarily, however, an interest in an irrigating ditch and water right is regarded as an appurtenance to the land upon which the water is used,<sup>5</sup> and as such, unless expressly reserved, will pass by a deed conveying the land.<sup>6</sup> So, too, where the appropriator's right to the land is merely pos-

7 Colo. App. 117; *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co.*, (Idaho 1898) 51 Pac. Rep. 990; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Elliot v. Whitmore*, 10 Utah 238. See also *Quigley v. Birdseye*, 11 Mont. 439.

**1. Water Rights Transferable.** — *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Ft. Morgan Land, etc., Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259; *Larimer, etc., Reservoir Co. v. Cache La Poudre Irrigating Co.*, 8 Colo. App. 237; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Smith v. Denniff*, (Mont. 1900) 60 Pac. Rep. 398; *Frank v. Hicks*, 4 Wyo. 502.

**2. Purchase for Changed Use.** — *Doyle v. San Diego Land, etc., Co.*, 46 Fed. Rep. 709; *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Drake v. Earhart*, 2 Idaho 716; *Springville v. Fullmer*, 7 Utah 450.

A municipal corporation may acquire by purchase, for city purposes, the priority of a farmer to the use of water for agricultural purposes, so as to succeed to the rights of the original proprietor. *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245.

**3. Conveyance of Water Right by Deed.** — *Doyle v. San Diego Land, etc., Co.*, 46 Fed. Rep. 709; *Burnham v. Freeman*, 11 Colo. 601; *Child v. Whitman*, 7 Colo. App. 117. And see *Smith v. O'Hara*, 43 Cal. 371.

**Agreement for Conveyance.** — An estate in a ditch and water right is real property, and an agreement for a conveyance thereof is within the statute of frauds. *Hayes v. Fine*, 91 Cal. 391.

**Construction of Deed.** — Where a deed conveyed an interest in a ditch and water right, it was held to be error to find as a matter of law that certain lateral ditches not mentioned in the deed were included in the transfer as appurtenances, and also to reject oral testimony offered to show that such laterals were not appurtenant to the main ditch. *Carman v. Staudaker*, 20 Mont. 364.

**Unrecorded Deed — Subsequent Purchaser.** — An appropriator of the use of water subsequent to a conveyance of the use of the same water is not a purchaser in the sense of the statute declaring conveyances of real estate, when not recorded, void as to subsequent purchasers of the same real estate whose conveyances shall be first duly recorded. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558.

**4. Ditch or Land and Water Right May Be Separately Conveyed.** — *Strickler v. Colorado*

*Springs*, 16 Colo. 61, 25 Am. St. Rep. 245; *Openlander v. Left Hand Ditch Co.*, 18 Colo. 142; *Arnett v. Linhart*, 21 Colo. 188; *Gelwicks v. Todd*, 24 Colo. 494; *Cache La Poudre Irrigating Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144; *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co.*, (Idaho 1898) 51 Pac. Rep. 990; *McPhail v. Forney*, 4 Wyo. 556.

The conveyance of a ditch does not necessarily carry with it any water right, where the ditch is not connected with the creek from which the water is obtained, or is not constructed with a sufficient fall to carry the water on the land. *Wold v. May*, 10 Wash. 157.

**5. Water Rights Appurtenant to Land.** — *Fitzell v. Leahy*, 72 Cal. 477; *Gelwicks v. Todd*, 24 Colo. 494; *Frank v. Hicks*, 4 Wyo. 502. Compare *Bloom v. West*, 3 Colo. App. 212.

The fact that land upon which water is appropriated is unsurveyed public land does not prevent the water from becoming appurtenant thereto. *Ely v. Ferguson*, 91 Cal. 187.

**Use of Water on Private Land by One Not Owner of Land.** — The use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used. *Smith v. Logan*, 18 Nev. 149, approved in *Alta Land, etc., Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217.

The use of water taken from the public domain by one not the owner of the land on which the water is used, but rightfully in possession thereof under a contract with the owner vests such right in the appropriator and does not constitute it an appurtenance to the land without a conveyance to the owner thereof by the appropriator. *Smith v. Denniff*, (Mont 1900) 60 Pac. Rep. 398, reversing 23 Mont. 65.

**Water in the Pipes of a distributing system for domestic and irrigating purposes is personal property, and not appurtenant to the land.** *Bear Lake, etc., Waterworks, etc., Co. v. Ogden City*, 8 Utah 494.

**6. Water Right Passes by Deed Conveying Land unless Expressly Reserved** — *California*. — *Cave v. Crafts*, 53 Cal. 135; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Coonrad v. Hill*, 79 Cal. 587; *Crooker v. Benton*, 93 Cal. 365; *Clyne v. Benicia Water Co.*, 100 Cal. 310.

*Montana*. — *Tucker v. Jones*, 8 Mont. 225; *Sweetland v. Olsen*, 11 Mont. 27; *Smith v. Denniff*, 23 Mont. 65.

*Oregon*. — *Simmons v. Winters*, 21 Oregon 35, 28 Am. St. Rep. 727; *Coventon v. Seufert*, 23 Oregon 548; *Turner v. Cole*, 31 Oregon 154.



sessory, so that it may be transferred by parol, such a transfer will pass the title to the appurtenant water right also.<sup>1</sup>

**3. Contracts Affecting Water Rights.** — Water rights, like other property, may be the subject of valid contract between the owners and other persons, subject to the general law of contracts.<sup>2</sup>

**Parol Contracts.** — It has been held that a verbal contract for the use of water from an irrigating ditch by the grantor of a right of way for such ditch cannot create a servitude or easement in the ditch property, nor operate as an irrevocable license to divert water from the ditch, such contract being within the statute of frauds.<sup>3</sup> But an oral contract for the use of water for irrigation founded upon a valuable consideration, and performed by both parties, is valid, and rights thereunder may be enforced.<sup>4</sup> So also a parol license to use water for irrigation purposes cannot be revoked after the licensee has expended money or performed labor in making valuable and permanent improvements on real property upon the faith of such license.<sup>5</sup> A mere parol license to divert water, however, in the absence of these elements, is revocable, and vests no estate in the licensee.<sup>6</sup>

**4. Abandonment and Nonuser** — *a.* **WATER RIGHT MAY BE LOST BY ABANDONMENT.** — The right to use water for irrigation, acquired by prior appropriation, may be lost by abandonment or nonuser.<sup>7</sup>

*Utah.* — Rev. Stat. Utah 1898, § 1281; Snyder v. Murdock, (Utah 1899) 59 Pac. Rep. 91; Fisher v. Bountiful City, (Utah 1899) 59 Pac. Rep. 520.

*Wyoming.* — McPhail v. Forney, 4 Wyo. 556. A grant of a part of a tract of land through which a stream flows conveys by implication a right to use the water necessary for the reasonable enjoyment of the part granted, and the rights of the grantor are not paramount to those of the grantee. Smith v. Corbit, 116 Cal. 587.

Where the owner of two adjoining tracts of land constructed a ditch across one tract for the purpose of irrigating the other, and afterwards conveyed the two tracts to different grantees, it was held that an easement was thereby created in the former tract of the right to use the ditch for the purpose of irrigating the latter, and that the grantee of the tract across which the ditch was constructed took it subject to such easement. Quinlan v. Noble, 75 Cal. 250.

**A Conveyance of a Ditch** by means of which water is appropriated for irrigation carries with it the water right as an appurtenance. Williams v. Harter, 121 Cal. 47; Arnett v. Linhart, 21 Colo. 188.

In *Colorado* it is held that whether or not a water right passes in a deed conveying lands without any specific mention of the right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed, and if that is silent, from the presumptions arising from the circumstances surrounding the transaction. Arnett v. Linhart, 21 Colo. 188; Gelwicks v. Todd, 24 Colo. 494; Travelers' Ins. Co. v. Childs, 25 Colo. 360.

In an earlier case than the above the Court of Appeals of *Colorado* held that a conveyance of land without mention of the water right cannot be taken to transfer an interest in a ditch although the water carried may have been used upon the land, but that a technical transfer is essential to vest in the transferee a title to the water. Child v. Whitman, 7 Colo.

App. 117. See also Chamberlain v. Amter, 1 Colo. App. 13.

**1. Verbal Transfer of Water Right with Possessory Title to Land.** — McDonald v. Lannen, 19 Mont. 78; Wood v. Lowney, 20 Mont. 273; Hindman v. Rizor, 21 Oregon 112; Low v. Schaffer, 24 Oregon 239; Geddis v. Parrish, 1 Wash. 587.

**2. Contracts for Water Rights.** — See generally Ferrea v. Chabot, 63 Cal. 564, 121 Cal. 233; Weill v. Baldwin, 64 Cal. 476; Sefton v. Prentice, 103 Cal. 670; Fairbanks v. Rollins, (Cal. 1898) 54 Pac. Rep. 79.

**3. Verbal Contract Held Not to Create Easement.** — Dorris v. Sullivan, 90 Cal. 279.

**4. When Verbal Contract May Be Enforced.** — McLure v. Koen, 25 Colo. 284. See generally the title **STATUTE OF FRAUDS.**

A parol agreement by several riparian owners to divide the water of a stream between them, such agreement having been acted upon by each, will be upheld by a court of equity. Coffman v. Robbins, 8 Oregon 278; Combs v. Slayton, 19 Oregon 99.

**5. Parol License to Use Water Irrevocable When Acted On.** — Smith v. Green, 109 Cal. 228; Curtis v. La Grande Hydraulic Water Co., 20 Oregon 34; McBroom v. Thompson, 25 Oregon 559, 42 Am. St. Rep. 806; Garrett v. Bishop, 27 Oregon 349; North Powder Milling Co. v. Coughanour, 34 Oregon 9; Lavery v. Arnold, (Oregon 1899) 57 Pac. Rep. 906; Bowman v. Bowman, (Oregon 1899) 57 Pac. Rep. 546. See also Tynon v. Despain, 22 Colo. 240.

The license must consist of something more than a mere passive acquiescence on the part of the alleged licensor in such use. Lavery v. Arnold, (Oregon 1899) 57 Pac. Rep. 906.

See generally the title **LICENSE.**

**6. Jensen v. Hunter,** (Cal. 1895) 41 Pac. Rep. 14.

**7. Water Right Lost by Abandonment.** — Hewitt v. Story, 51 Fed. Rep. 101; Davis v. Gale, 32 Cal. 27, 91 Am. Dec. 554; Utt v. Frey, 106 Cal. 392; Smith v. Hawkins, 110 Cal. 122, 120 Cal. 86; Dorr v. Hammond, 7 Colo. 79; New Mer-



**b. WHAT CONSTITUTES ABANDONMENT.**—It is well settled that mere nonuser of water does not amount to abandonment,<sup>1</sup> nor is mere lapse of time alone sufficient to establish abandonment.<sup>2</sup> A failure to use the water for a time, however, is competent evidence of abandonment; and if continued for an unreasonable length of time it may fairly create a presumption of an intention to abandon. But this presumption is not conclusive, and may be overcome by other satisfactory proof.<sup>3</sup>

**Abandonment Question of Intention.**—In all cases abandonment is a question of intention.<sup>4</sup> There must be both relinquishment of possession or nonuser and the intention to abandon. Either alone is not sufficient to constitute an abandonment.<sup>5</sup>

**Abandonment Is a Question of Fact** to be determined by the jury, or by the court sitting as such.<sup>6</sup>

**Transfer Not Abandonment.**—A transfer of a water right, as by a conveyance by a written instrument for a valuable consideration,<sup>7</sup> or by a verbal sale,<sup>8</sup> or gift,<sup>9</sup> is not an abandonment of the right.

**c. CLEAR PROOF REQUIRED.**—The abandonment of a water right will not ordinarily be presumed,<sup>10</sup> but must be established by clear and satisfactory evidence.<sup>11</sup> The burden of proving an abandonment is on the party asserting it,<sup>12</sup> and the question of abandonment is for the jury or the court sitting as such.<sup>13</sup>

**d. ABANDONMENT OF DITCH WITHOUT ABANDONMENT OF WATER RIGHT.**—An irrigating ditch may be abandoned without an abandonment of

cer Ditch Co. *v.* Armstrong, 21 Colo. 357; Hall *v.* Lincoln, 10 Colo. App. 360; Hindman *v.* Rizer, 21 Oregon 112; Cole *v.* Logan, 24 Oregon 304; Low *v.* Rizer, 25 Oregon 551; Morrison *v.* Winn, 17 Utah 484. See also Water Supply, etc., Co. *v.* Larimer, etc., Irrigation Co., 24 Colo. 322.

The right of an appropriator of water upon the public domain depends upon continued use; upon the abandonment of the use of any part of the water, that part is subject to new appropriation. Smith *v.* Green, 109 Cal. 228.

**A Right of Way** for an irrigating ditch may be lost by abandonment. Stalling *v.* Ferrin, 7 Utah 477.

**1. Mere Nonuser Not Abandonment.**—Putnam *v.* Curtis, 7 Colo. App. 437; Ada County Farmers' Irrigation Co. *v.* Farmers' Canal Co., (Idaho 1898) 51 Pac. Rep. 990; Tucker *v.* Jones, 8 Mont. 225; Sloan *v.* Glancy, 19 Mont. 70; Arnold *v.* Passavant, 19 Mont. 575; Turner *v.* Cole, 31 Oregon 154. See also ABANDON, vol. 1, p. 1.

A perpetual right to use water from an irrigating ditch, reserved in a contract, constitutes an easement in the ditch, and cannot be lost or abandoned by nonuser alone, short of the period for the limitation of actions to recover real property. People *v.* Farmers High Line Canal, etc., Co., 25 Colo. 202.

**2. Gassert *v.* Noyes**, 18 Mont. 216.

**3. Nonuser Evidence of Abandonment.**—Utt *v.* Frey, 106 Cal. 392; Davis *v.* Gale, 32 Cal. 27, 91 Am. Dec. 554; Sieber *v.* Frink, 7 Colo. 148.

**4. Abandonment Question of Intention.**—Utt *v.* Frey, 106 Cal. 392; Beaver Brook Reservoir, etc., Co. *v.* St. Vrain Reservoir, etc., Co., 6 Colo. App. 130; Nichols *v.* Lantz, 9 Colo. App. 1; Putnam *v.* Curtis, 7 Colo. App. 437; Hall *v.* Lincoln, 10 Colo. App. 360; Ada County Farmers' Irrigation Co. *v.* Farmers' Canal Co.,

(Idaho 1898) 51 Pac. Rep. 990; Tucker *v.* Jones, 8 Mont. 225; Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558; Gassert *v.* Noyes, 18 Mont. 216; Hindman *v.* Rizer, 21 Oregon 112; Turner *v.* Cole, 31 Oregon 154.

To abandon a water right is to relinquish possession thereof without any present intention to repossess. Utt *v.* Frey, 106 Cal. 392.

An appropriator will not be held to have abandoned his right to water unless there is a manifest intention on his part to abandon it, and this intention must be determined from his declarations and acts in relation thereto. Hindman *v.* Rizer, 21 Oregon 112; Low *v.* Schaffer, 24 Oregon 239.

**5. Nonuser and Intent to Abandon Must Concur.**—Utt *v.* Frey, 106 Cal. 392. See also Nichols *v.* Lantz, 9 Colo. App. 1; Gassert *v.* Noyes, 18 Mont. 216.

**6. Abandonment Question of Fact.**—Utt *v.* Frey, 106 Cal. 392.

**7. Transfer Not an Abandonment.**—Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558; Smith *v.* Denniff, (Mont. 1900) 60 Pac. Rep. 398.

**8. Hindman *v.* Rizer**, 21 Oregon 112, *distinguishing* Smith *v.* O'Hara, 43 Cal. 371. But see Low *v.* Schaffer, 24 Oregon 239.

**9. Wood *v.* Lowney**, 20 Mont. 273.

**10. Abandonment Not Ordinarily Presumed.**—Nichols *v.* McIntosh, 19 Colo. 22.

**11. Clear Proof of Abandonment Required.**—Rominger *v.* Squires, 9 Colo. 327; Beaver Brook Reservoir, etc., Co. *v.* St. Vrain Reservoir, etc., Co., 6 Colo. App. 130; Hall *v.* Lincoln, 10 Colo. App. 360; Ada County Farmers' Irrigation Co. *v.* Farmers' Canal Co., (Idaho 1898) 51 Pac. Rep. 990.

**12. Putnam *v.* Curtis, 7 Colo. App. 437; Hall *v.* Lincoln, 10 Colo. App. 360; Beaver Brook Reservoir, etc., Co. *v.* St. Vrain Reservoir, etc., Co., 6 Colo. App. 130.**

**13. Utt *v.* Frey, 106 Cal. 392.**



the right to use the water, and therefore the mere substitution of new ditches is no abandonment of the water rights.<sup>1</sup>

*e. ABANDONMENT AND NONUSER DISTINGUISHED.* — The distinction between the abandonment of a water right and the loss of it by a nonuser is that in the former case it is immaterial for how long a time the owner has ceased to use the water, because from the moment that the abandonment itself is complete, the right ceases; while in the case of a nonuser, the right is not lost until the nonuser has continued for a prescriptive period, at which time the right becomes extinguished, though the conduct of the owner precludes the idea of the abandonment.<sup>2</sup>

**5. Adverse User.** — A right to the use of water for irrigation purposes may be acquired by adverse user,<sup>3</sup> but such user must be accompanied by all the elements required to make out adverse possession.<sup>4</sup> The water must have been used by the claimant continuously, uninterruptedly, and adversely for the prescriptive period, after which the law will conclusively presume an antecedent grant.<sup>5</sup> The use of the water by sufferance of the owner, who continues to exercise dominion over it, does not constitute adverse user.<sup>6</sup> The use must amount to an actionable invasion of the owner's right.<sup>7</sup> It follows that there can be no adverse user where the water of the stream is sufficient for the use of all parties.<sup>8</sup> Any interruption of the

**1. Abandonment of Ditch Without Abandoning Water Right.** — Greer *v.* Heiser, 16 Colo. 306; Nichols *v.* McIntosh, 19 Colo. 22; New Mercer Ditch Co. *v.* Armstrong, 21 Colo. 357; Kleinschmidt *v.* Greiser, 14 Mont. 484, 43 Am. St. Rep. 652.

**2. Abandonment and Nonuser Distinguished.** — Smith *v.* Hawkins, 110 Cal. 122.

**3. Water Right Acquired by Adverse User.** — Davis *v.* Gale, 32 Cal. 27, 91 Am. Dec. 554; Cox *v.* Clough, 70 Cal. 345; Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598; Coonratt *v.* Hill, 79 Cal. 587; Alta Land, etc., Co. *v.* Hancock, 85 Cal. 219, 20 Am. St. Rep. 217; Spargur *v.* Heard, 90 Cal. 221; Faulkner *v.* Rondoni, 104 Cal. 140; Baker *v.* Brown, 55 Tex. 377; Mud Creek Irrigation, etc., Co. *v.* Vivian, 74 Tex. 170. See also Heinlen *v.* Fresno Canal, etc., Co., 68 Cal. 35.

**Distinction Between Rights Acquired by Appropriation and by Adverse User.** — A right to the use of water acquired by adverse user differs from that acquired by appropriation in two respects. A prescriptive right cannot be acquired against the United States, but only by one claimant against another private individual, while a right by appropriation may be acquired on the public lands. Again, an appropriation, to perfect the rights of the appropriator, does not necessitate use for any given length of time, while time and adverse use are essential elements to the perfection of a prescriptive right. Smith *v.* Hawkins, 110 Cal. 122.

**Statutory Appropriation Is Not Necessary to Prescription,** but it gives to one who seeks to acquire right by prescription an advantage in that it gives to prior claimants notice that his user is adverse and under claim of right, and sets the statute in motion against them. Alta Land, etc., Co. *v.* Hancock, 85 Cal. 219, 20 Am. St. Rep. 217.

**The Prescriptive Period** during which the adverse possession of a water right must continue in order to vest title thereto is by analogy the same as that required to bar the right of

entry to land, which in *Texas* is ten years. Baker *v.* Brown, 55 Tex. 377.

**4. User Must Be Adverse.** — Egan *v.* Estrada, (Ariz. 1899) 56 Pac. Rep. 721; Anaheim Water Co. *v.* Semi-Tropic Water Co., 64 Cal. 185; Cox *v.* Clough, 70 Cal. 345; Oneto *v.* Restano, 78 Cal. 374; Heintzen *v.* Binninger, 79 Cal. 5; Lakeside Ditch Co. *v.* Crane, 80 Cal. 181; Paige *v.* Rocky Ford Canal, etc., Co., 83 Cal. 84; Alta Land, etc., Co. *v.* Hancock, 85 Cal. 219, 20 Am. St. Rep. 217; Last Chance Water Ditch Co. *v.* Heilbron, 86 Cal. 1; Ball *v.* Kehl, 95 Cal. 606; Natoma Water, etc., Co. *v.* Hancock, 101 Cal. 42; Faulkner *v.* Rondoni, 104 Cal. 140; Vernon Irrigation Co. *v.* Los Angeles, 106 Cal. 237; Huston *v.* Bybee, 17 Oregon 140; Smith *v.* North Canyon Water Co., 16 Utah 194. See generally the title ADVERSE POSSESSION, vol. 1, p. 787.

**Notice of Appropriation Evidence of Adverse Claim.** — On the question of the acquisition of a water right by prescription, a notice posted by the claimant at the place of diversion, stating that he claims the water, is competent evidence tending to show the adverse character of the claim. Santa Cruz *v.* Enright, 95 Cal. 105. But see Bathgate *v.* Irvine, 126 Cal. 135.

**5. Smith *v.* Hawkins,** 110 Cal. 122.

**6. Use by Sufferance Not Adverse.** — Crawford *v.* Minnesota Land, etc., Co., 15 Mont. 153. See also Egan *v.* Estrada, (Ariz. 1899) 56 Pac. Rep. 721; Bathgate *v.* Irvine, 126 Cal. 135.

**7. Right of Owner Must Be Invaded.** — Union Mill, etc., Co. *v.* Ferris, 2 Sawy. (U. S.) 176; Anaheim Water Co. *v.* Semi-Tropic Water Co., 64 Cal. 185; Lakeside Ditch Co. *v.* Crane, 80 Cal. 181; Hargrave *v.* Cook, 108 Cal. 72.

No adverse user of water can be initiated until the persons possessing the superior use are deprived of its benefit in such a substantial manner as to notify them that their rights are being invaded. Bowman *v.* Bowman, (Oregon 1899) 57 Pac. Rep. 546.

**8. No Adverse User Where Water Is Sufficient for All Parties.** — Egan *v.* Estrada, (Ariz. 1899) 56 Pac. Rep. 721; Anaheim Water Co. *v.* Semi-



user<sup>1</sup> or acknowledgment of the original owner's right<sup>2</sup> during the prescriptive period will prevent the acquisition of the right by adverse user.

**Prescription as Against Riparian Owner.** — A prescriptive right to the use of the water of a stream may be acquired against a riparian proprietor,<sup>3</sup> but as no right can be acquired by adverse user unless such user amounts to an invasion of the rights of the person against whom the hostile claim is asserted, and since a riparian proprietor has no interest in or claim to the water of a stream after it has flowed past his land, no right by prescription against an upper riparian proprietor can be acquired by a lower proprietor who diverts and uses upon his own land water permitted by the former to pass down from his land to that of the lower owner. Such diversion and use is not adverse in the sense required to give a right by prescription.<sup>4</sup>

**The Adverse User Begins** with the date when the water was applied to the beneficial use, and not with the time of constructing the ditch.<sup>5</sup>

**The Burden of Proving Adverse User** of the water for the prescriptive period rests upon the party asserting it.<sup>6</sup>

**No Adverse User on Public Lands.** — A prescriptive right to divert water cannot be acquired so long as the title to the land remains in the United States,<sup>7</sup> but such right may be acquired by adverse user after the title to the land has vested in a grantee of the United States under an Act of Congress, although a patent therefor may not have been issued. The statute begins to run from the date of the grant, if the water was appropriated before the grant was made, or from the date of the appropriation if it was made after the grant, and not from the date of the patent.<sup>8</sup>

**6. Loss of Water Right by Estoppel.** — The owner of a superior right to the use of water for irrigation may by his conduct estop himself from asserting his right as against another, as where he passively stands by and permits another to use the water of a stream for a long period to irrigate his land, and to expend large sums in permanent improvements, believing that he has a right to the use of the water.<sup>9</sup> But mere acquiescence by the owner of a water

*Tropic Water Co.*, 64 Cal. 185; *Church v. Stillwell*, 12 Colo. App. 43; *North Powder Milling Co. v. Coughanour*, 34 Oregon 9.

**1. Interrupted User.** — *Cave v. Crafts*, 53 Cal. 135; *Cox v. Clough*, 70 Cal. 345; *Baker v. Brown*, 55 Tex. 377.

An appropriator who, for the purpose of obstructing the flow of water in one channel of a stream and increasing it in another, makes incursions upon the land of a riparian owner without the consent of the latter, who destroys the work of the appropriator as often as he discovers it, does not acquire any prescriptive right to the water secured by such incursions, however long they may have continued or however frequently they may have been repeated. *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.

**Water Need Not Be Used Continuously.** — Where a right to an irrigating ditch is claimed by virtue of adverse user, an objection that the user was not continuous because the claimant did not run water in the ditch all the time, but only at such times as he needed it, is not maintainable. *Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10, 17 Am. St. Rep. 209.

**2. Acknowledgment of Superior Right.** — *Jensen v. Hunter*, (Cal. 1895) 41 Pac. Rep. 14; *Ledu v. Jim Yet Wa*, 67 Cal. 346.

**3. Acquisition of Water Right by Prescription as Against Riparian Owners.** — *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598; *Coonrad v. Hill*, 79 Cal. 587; *Alta Land, etc., Co.*

*v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217; *Messinger's Appeal*, 109 Pa. St. 285; *Baker v. Brown*, 55 Tex. 377. See generally the title *PRESCRIPTION*.

**4. Upper Riparian Owners.** — *Hargrave v. Cook*, 108 Cal. 72; *Bathgate v. Irvine*, 126 Cal. 135; *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170.

**5. When Adverse User Begins.** — *Senior v. Anderson*, 115 Cal. 496; *Lavery v. Arnold*, (Oregon 1899) 57 Pac. Rep. 906.

The mere construction of ditches for the purpose of using water, without actual use thereof, does not constitute such adverse user as will set the statute in motion. *Senior v. Anderson*, 115 Cal. 496.

**6. Burden of Proof.** — *Ball v. Kehl*, 95 Cal. 606; *Lavery v. Arnold*, (Oregon 1899) 57 Pac. Rep. 906; *Smith v. North Canyon Water Co.*, 16 Utah 194.

**7. No Adverse User Against United States.** — *Union Mill, etc., Co. v. Ferris*, 2 Sawy. (U. S.) 176; *Mathews v. Ferrea*, 45 Cal. 51; *Wilkins v. McCue*, 46 Cal. 656; *Jatunn v. Smith*, 95 Cal. 154; *Smith v. Hawkins*, 110 Cal. 122; *Wood v. Etiwanda Water Co.*, 122 Cal. 152; *Vansickle v. Haines*, 7 Nev. 249. But see *Tolman v. Casey*, 15 Oregon 83, following *Neil v. Tolman*, 12 Oregon 289.

**8. Jatunn v. Smith**, 95 Cal. 154; *Wood v. Etiwanda Water Co.*, 122 Cal. 152.

**9. Loss of Water Right by Estoppel.** — *Dalton v. Rentaria*, (Ariz. 1887) 15 Pac. Rep. 37;



right in its abridgment by another does not impair the right unless continued for a time sufficient to constitute a bar by adverse user.<sup>1</sup> And the fact that the owner of a water right permits another to use the water does not estop him from afterwards asserting his right thereto.<sup>2</sup>

7. **Taxation — Constitutional Provisions.** — It is provided by the constitutions of some of the states that "ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose."<sup>3</sup> This provision is intended to relieve from separate taxation only those ditches which are exclusively used for irrigating the lands owned by those who own the ditches, either in whole or in part.<sup>4</sup>

8. **Action for Interference with Water Rights — a. IN GENERAL.** — One who owns, either as a riparian proprietor or otherwise, a right to the use of water for irrigation may maintain an action for damages for any injury to or interference with such water right by another, or to enjoin the continuance of such injury.<sup>5</sup>

**b. WHEN AND BY WHOM ACTION MAY BE MAINTAINED.** — In an action for damages for the wrongful diversion of water the plaintiff must show by satisfactory evidence his right to the water, an interference therewith, and consequent injury.<sup>6</sup> The owner of a water right may enjoin the wrongful diversion of the water although the ditch by which the water is conveyed

*Curtis v. La Grande Hydraulic Water Co.*, 20 Oregon 34. But see *Lavery v. Arnold*, (Oregon 1899) 57 Pac. Rep. 906. See generally the title ESTOPPEL, vol. II, p. 385.

One who has abandoned an unsurveyed tract of public land, and has, with full knowledge of the facts, permitted another to enter thereon and make valuable improvements and use water for irrigation, is estopped from afterwards claiming the water as against such user or his successor in interest. *Morrison v. Winn*, 17 Utah 484.

1. **No Estoppel by Mere Acquiescence in Abridgment of Right.** — *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1; *Mayberry v. Alhambra Addition Water Co.*, 125 Cal. 444; *Bathgate v. Irvine*, 126 Cal. 135.

Where a prior appropriator had continuously remained in the enjoyment of his appropriation, to the knowledge of a junior appropriator, it was held that he was not estopped to assert his claim against the latter by the facts that he had attracted the latter's attention to the locality as a favorable place for settlement, had discussed methods of irrigation with him, had knowledge of extensive improvements made by him, had made no objection to the use of water by him, and had stated that he thought the supply was ample for both. *Smyth v. Neal*, 31 Oregon 105.

See generally as to what constitutes estoppel, *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.*, (Colo. 1900) 60 Pac. Rep. 629; *Water Supply, etc., Co. v. Tenney*, 24 Colo. 341.

2. *Feliz v. Los Angeles*, 58 Cal. 73; *Swift v. Goodrich*, 70 Cal. 103; *Lavery v. Arnold*, (Oregon 1899) 57 Pac. Rep. 906.

3. **Taxation — Constitutional Provisions.** — Const. Colo., art. 10, § 3; Const. Utah, art. 13, § 3. See generally the title TAXATION.

**A Statute Exempting from Taxation Water Rights and means for diverting water in all cases where the land or other property upon**

which the water is used is assessable for taxation, does not apply to a water system for supplying the citizens of a town with water for domestic and irrigation purposes. *Bear Lake, etc., Waterworks, etc., Co. v. Ogden City*, 8 Utah 494.

4. **Purpose of Constitutional Provisions.** — *Empire Land, etc., Co. v. Rio Grande County*, 21 Colo. 244, reversing 1 Colo. App. 205.

5. **Action for Interference with or Injury to Water Rights.** — *U. S. Freehold Land, etc., Co. v. Gallegos*, 89 Fed. Rep. 769; *Miller v. Douglas*, (Ariz. 1900) 60 Pac. Rep. 722; *Ellis v. Tone*, 58 Cal. 289; *Barham v. Hostetter*, 67 Cal. 272; *Ronnow v. Delmue*, 23 Nev. 29.

**Diversion by Trespasser.** — A trespasser on public lands cannot defend an action by an appropriator of water to enjoin the diversion thereof, on the ground of his riparian rights. *Silver Creek, etc., Land, etc., Co. v. Hayes*, 113 Cal. 142.

**Pollution of Water of Irrigating Ditch.** — The pollution of the water of an irrigating ditch constitutes a nuisance. *Crane v. Winsor*, 2 Utah 248; *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 16 Utah 246. See also *Cushman v. Highland Ditch Co.*, 3 Colo. App. 437; *People v. Rogers*, 12 Colo. 278.

An appropriator of water for mining purposes cannot interfere with the right of a prior lower appropriator for irrigation by the discharge of tailings or other débris into the stream so as injuriously to affect the water for irrigation; what deterioration in quality will produce this result being a question of fact. *Montana Co. v. Gehring*, 75 Fed. Rep. 384.

6. **Who May Maintain Action.** — *Kleyenstuber v. Robinson*, (Ariz. 1898) 52 Pac. Rep. 1117; *Conkling v. Pacific Imp. Co.*, 87 Cal. 296; *Sharp v. Hoffman*, 79 Cal. 404; *Williams v. Harter*, 121 Cal. 47; *Cash v. Thornton*, 3 Colo. App. 475; *Springville v. Fullmer*, 7 Utah 470.



belongs to another.<sup>1</sup> Where a prior appropriator is not entitled to all the water of the stream, he cannot complain that other persons are diverting the water, so long as he is able to secure the full amount to which he is entitled.<sup>2</sup> Nor can a prior appropriator restrain or recover damages for the diversion of water in the stream above his point of diversion, where, on account of absorption or for other reasons, the water would not in any event reach his point of diversion.<sup>3</sup> In an action for the diversion of water where it is found that the plaintiff is entitled to the water, it is not necessary to the support of a judgment in his favor that there should be a finding that the diversion was made wrongfully or without right.<sup>4</sup> Nor is it any defense to such action that the defendant is wholly dependent upon the same supply of water.<sup>5</sup> But the owner of a water right cannot maintain an action for the diversion of water where he has consented thereto,<sup>6</sup> or for an injury committed before his own rights attached.<sup>7</sup> And to warrant the granting of an injunction there must be some sufficient ground for equitable jurisdiction.<sup>8</sup>

**Diversion of Water on Leased Premises.** — An action for the diversion of the water of a natural stream flowing through leased land may be maintained by either the owner of the land<sup>9</sup> or the tenant in possession.<sup>10</sup>

**c. PROOF OF DAMAGES.** — An Action for Damages for the invasion of a water right cannot be maintained without proof of injury, the measure of the plaintiff's recovery being, not the period during which the right has been invaded, but the real injury done.<sup>11</sup>

**Action for Injunction.** — But a person entitled to a certain amount of water for irrigation may enjoin the diversion or obstruction of the flow of such water without proof of actual damage.<sup>12</sup>

**XI. IRRIGATION COMPANIES — 1. In General.** — In many portions of the arid region, in order to secure a more economical supply of water for irrigation to

1. Clifford *v.* Larrien, (Ariz. 1886) 11 Pac. Rep. 397.

2. Where Plaintiff Is Not Entitled to All Water of Stream. — Saint *v.* Guerrero, 17 Colo. 448, 31 Am. St. Rep. 320.

3. No Action Where Water Diverted Would Not Have Reached Plaintiff's Land. — Larimer, etc., Reservoir Co. *v.* Cache La Poudre Irrigating Co., 8 Colo. App. 237; Mack *v.* Jackson, 9 Colo. 536; Leonard *v.* Shatzer, 11 Mont. 422; Raymond *v.* Wimslette, 12 Mont. 551, 33 Am. St. Rep. 604; West Point Irrigation Co. *v.* Moroni, etc., Irrigation Co., (Utah 1900) 61 Pac. Rep. 16.

4. Williams *v.* Harter, 121 Cal. 47.

5. Defendant's Necessity No Defense. — Where one party has acquired a priority of right to the water of a natural stream by a valid appropriation thereof to a beneficial use, another party cannot justify an interference with such right by merely showing that he is wholly dependent upon the same supply of water; but in an equitable proceeding, for some purposes, even though not a bar to an action on the prior right, it may be proper for the defendant to allege such dependence in connection with other averments of the answer. Roberts *v.* Arthur, 15 Colo. 456.

6. Consent of Owner. — Churchill *v.* Baumann, 104 Cal. 369.

7. Injury Prior to Plaintiff's Appropriation. — Conrad *v.* Arrowhead Hot Springs Hotel Co., 103 Cal. 399.

8. Injunction — Ground for Equitable Jurisdiction Must Exist. — Umatilla Irrigation Co. *v.* Umatilla Imp. Co., 22 Oregon 366.

9. Diversion of Water on Leased Premises. —

Heilbron *v.* Last Chance Water Ditch Co., 75 Cal. 117.

10. Crook *v.* Hewitt, 4 Wash. 749.

A Tenant for Years may enjoin the unlawful diversion of the water of a stream flowing by the land held by him, the injunction becoming inoperative upon the termination of his lease. Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183; Heilbron *v.* Kings River, etc., Canal Co., 76 Cal. 11.

11. Proof of Injury Necessary in Action for Damages. — Carron *v.* Wood, 10 Mont. 500.

12. Injunction Granted Without Proof of Actual Damages. — Sampson *v.* Hoddinott, 1 C. B. N. S. 590, 87 E. C. L. 590; Embrey *v.* Owen, 6 Exch. 353; Moore *v.* Clear Lake Water Works, 68 Cal. 146; Heilbron *v.* Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183; Conkling *v.* Pacific Imp. Co., 87 Cal. 296; Spargur *v.* Heard, 90 Cal. 221; Gould *v.* Eaton, 117 Cal. 539; Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 576.

See generally the title INJUNCTIONS, vol. 16, p. 337.

**Diversion by One Who Is Not a Riparian Owner.** — The right of a riparian proprietor to an injunction restraining the diversion of the water of the stream does not depend upon the amount of injury which he has received. As a riparian owner he has a right to the flow of the entire stream as against any diminution thereof by one who is not a riparian owner, and a claim by the latter of a right to divert a portion of the flow authorizes the riparian owner to invoke the aid of equity in order that this claim may not ripen into a right. Gould *v.* Eaton, 117 Cal. 539.



individual consumers who might otherwise be able to obtain it only at prohibitive expense, the business of constructing ditches and distributing water is carried on by companies or corporations organized for the purpose of supplying water to stockholders or other persons for a compensation.<sup>1</sup> These companies may be either private companies, organized in the same manner as ordinary private companies,<sup>2</sup> or public corporations, organized under special acts by the vote of the landholders, and known as irrigation districts.<sup>3</sup>

**2. Private Irrigation Companies — a. IN GENERAL.** — Irrigation companies organized by private enterprise may have for their object the supplying of water for irrigation purposes either to the public generally, for hire, or to members only, for the irrigation of their own lands. Irrigation companies of the latter class, sometimes called mutual ditch companies, are associations formed by consumers for the purpose of conveying water solely to irrigate their own lands, to be distributed, either upon or without the payment of a fee, to members only. When incorporated, the respective interests of the members are represented by shares of stock.<sup>4</sup> Private irrigation companies are authorized in the several arid states by statutes, conferring upon them certain rights and regulating the relations between them and the consumers under their canals.<sup>5</sup>

**Ditch Companies Public Carriers.** — Ditch companies organized for the purpose of conveying water for hire are regarded as public or *quasi*-public carriers,<sup>6</sup> and are subject to the regulation and control of the state legislature<sup>7</sup> and the general laws regulating the appropriation and use of water for irrigation.<sup>8</sup> Under the *Colorado* system of irrigation law as to the ownership and appropriation of water, irrigation companies have an exceptional status, differing in some particulars from that of an ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted which are dependent for their birth and continued existence upon the use made by the consumer.<sup>9</sup>

**The Relation Between an Irrigation Corporation and Its Members** is one of contract, from which arises a trust with which the corporation is charged to conduct the common business in the interests of the shareholders, the interest of each shareholder in the water carried being in exact proportion to the amount of his stock, and the duty assumed by the corporation being to use reasonable care and diligence in conveying the water, keeping the means of conveyance in

**1. Necessity for Irrigation Companies.** — *Golden Canal Co. v. Bright*, 8 Colo. 144. See also *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603.

**Assessment and Sale of Stock.** — The stock of an irrigation company is subject to assessment for corporation purposes, and may be sold for the purpose of paying such assessments. *Hall v. Eagle Rock, etc., Water Co.*, (Idaho 1897) 51 Pac. Rep. 110.

**Company for Both Irrigation and Drainage.** — Where a canal company is authorized by its charter both to drain and to irrigate lands, the enumeration of these two purposes implies the exclusion of all others, and forbids the use of the canal for drainage to the exclusion of its use for irrigation, and *vice versa*. *North Point Consol. Irrigation Co. v. Utah, etc., Canal Co.*, 16 Utah 246.

**Where an Irrigation Company Succeeds to the Rights of a Former Company** it takes the property of the latter subject to any rights of an individual in the old company's water right not surrendered by him to the new company. *Beck v. Pasadena Lake Vineyard Land, etc., Co.*, (Cal. 1899) 59 Pac. Rep. 387.

**2. See *infra*, this section, *Private Irrigation Companies*.**

**3. See *infra*, this section, *Irrigation Districts*.**

**4. Private Irrigation Companies.** — See *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586; *Rocky Ford Canal, etc., Co. v. Simpson*, 5 Colo. App. 30; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275.

**5. See the statutes of the several states.**

**6. Ditch Companies Public or Quasi-Public Carriers.** — *Atlantic Trust Co. v. Woodbridge Canal, etc., Co.*, 79 Fed. Rep. 39, 501; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Junction Creek, etc., Domestic, etc., Ditch Co. v. Durango*, 21 Colo. 194; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454.

**7. Ditch Company Subject to State Control.** — *Merrill v. Southside Irrigation Co.*, 112 Cal. 426; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454.

**8. Ditch Companies Subject to General Irrigation Laws.** — *Munroe v. Ivie*, 2 Utah 535.

**9. Wheeler v. Northern Colorado Irrigation Co.**, 10 Colo. 582, 3 Am. St. Rep. 603.



repair, and making a ratable distribution.<sup>1</sup>

**Ditch Company May Maintain Action on Behalf of Stockholders.** — A ditch company, as trustee for its stockholders and consumers under its ditch, is the proper party to maintain an action to protect their rights.<sup>2</sup>

**6. ACQUISITION OF WATER RIGHTS.** — An irrigation company may acquire the right to divert water by appropriation,<sup>3</sup> and, where the doctrine of riparian rights prevails, by condemnation proceedings<sup>4</sup> as well as by purchase. While the legislature may confer upon an irrigation company the power to acquire water rights, such authority does not of itself confer the water rights themselves, but these can be acquired only by gift, purchase, or condemnation.<sup>5</sup> A grant by the legislature to an irrigation company of the use of the waters and streams of the state applies only to water on the public lands of the state.<sup>6</sup>

**Title and Interest of Irrigation Companies.** — An irrigation company is not the proprietor of the water diverted by it, at least in those jurisdictions in which the right to the use of the water of all natural streams may be acquired by prior appropriation, but the water and the right to its use belong to the public, the company being an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional or statutory right to the use of water, as well as a private enterprise prosecuted for the benefit of its owners.<sup>7</sup>

**c. BY-LAWS AND REGULATIONS.** — An irrigation company, like other similar organizations, has the right to make reasonable by-laws and rules, subject to statutory provisions, to be observed by itself and the consumer in the sale and distribution of water,<sup>8</sup> but it cannot by any provision or declaration of its by-laws, rules, or regulations exempt itself or its stockholders from the operation of the general laws of the state regulating the appropriation and use of water for irrigation.<sup>9</sup>

**d. DUTY TO FURNISH WATER TO CONSUMERS** — **Ditch Company Bound to Furnish Water to Consumers.** — A ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual *bona fide* consumer making seasonable application therefor and offering proper compensation.<sup>10</sup> The delivery of water in such case may be compelled by mandamus,<sup>11</sup>

**1. Relation Between Irrigation Company and Members.** — *Rocky Ford Canal, etc., Co. v. Simpson*, 5 Colo. App. 30. See also *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586.

**2. Action by Ditch Company on Behalf of Stockholders.** — *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586; *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149; *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566.

**3. Appropriation by Ditch Companies.** — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275. And see *supra*, this title, *Appropriation of Water*.

**4. Condemnation of Water Rights.** — *Lux v. Haggin*, 69 Cal. 255; *Umatilla Irrigation Co. v. Barnhart*, 22 Oregon 389; *McGee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587. And see *supra*, this title, *Irrigating Ditches — Condemnation of Right of Way*.

**5. Grant of Authority to Acquire Water Rights — Effect.** — *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170.

**6. Grant of Use of Waters of State.** — *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170.

**7. Canal Company Not Proprietor of Water Diverted by It.** — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 111; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275; *Wyatt v. Larimer, etc., Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, *reversing* 1 Colo. App. 482.

**8. Right to Make Reasonable By-laws.** — *Golden Canal Co. v. Bright*, 8 Colo. 144. And see generally the title BY-LAWS, vol. 5, p. 86, and the titles there referred to.

**9. By-laws Contrary to Laws of State.** — *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275. Compare *McFadden v. Los Angeles County*, 74 Cal. 571.

**10. Duty of Irrigation Company to Furnish Water to Consumers.** — *Mandell v. San Diego Land, etc., Co.*, 89 Fed. Rep. 295; *Price v. Riverside Land, etc., Co.*, 56 Cal. 431; *Merrill v. Southside Irrigation Co.*, 112 Cal. 426; *Golden Canal Co. v. Bright*, 8 Colo. 144; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275; *Western Irrigation, etc., Co. v. Chapman*, 8 Kan. App. 778.

**11. Mandamus to Compel Delivery of Water.** — *Price v. Riverside Land, etc., Co.*, 56 Cal. 431; *Merrill v. Southside Irrigation Co.*, 112 Cal. 426; *Golden Canal Co. v. Bright*, 8 Colo. 144;



and damages may be recovered from the company for injury resulting from its failure to furnish water.<sup>1</sup>

**Insufficiency of Water Supply as Defense to Action to Compel Delivery.** — It has been held that it is no defense to an action to compel an irrigation company to furnish water to a customer, that the defendant has not sufficient water to supply the plaintiff and all the other lands needing water that lie under the flow of the ditch, where others than the plaintiff have not demanded or purchased water; nor is it a defense that the defendant is likely to be deprived of its water supply in the future.<sup>2</sup> Nor is the scarcity of water a defense where the defendant has not employed proper measures to save and utilize the water.<sup>3</sup> But inasmuch as a contract to furnish water beyond the capacity of the company's ditch is illegal,<sup>4</sup> it would seem that the fact that the company is already furnishing water to the limit of its carrying capacity would be a good defense to an action to compel a further delivery of water.

**Delay in Making Application for Water.** — Although a prior purchaser of water from a ditch company may not have made his application for water within the time prescribed by the rules of the company, yet if he does so afterwards, and while the ditch company is free from conflicting obligations and is able to grant his request, his statutory right to the water is not forfeited.<sup>5</sup> But an irrigation company is not bound to furnish water until after demand made upon it and tender of the price, and is not liable for the loss of crops due to its failure to furnish water before such demand and tender.<sup>6</sup>

**e. CONTRACTS FOR WATER.** — The right to use water from a ditch owned by an irrigation company is usually acquired by written contract with the company, the validity of which contracts has been repeatedly recognized by the courts.<sup>7</sup> These contracts are to be construed according to the general principles governing the construction of contracts, subject to the general laws of irrigation.<sup>8</sup> A contract on the part of a ditch company to dispose

Wheeler v. Northern Colorado Irrigation Co., 10 Colo. 582, 3 Am. St. Rep. 603; Townsend v. Fulton Irrigating Ditch Co., 17 Colo. 142; Combs v. Agricultural Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275; People v. Farmers High Line Canal, etc., Co., 25 Colo. 202. See also Bright v. Farmers' High Line Canal, etc., Co., 3 Colo. App. 170; Farmers' Independent Ditch Co. v. Maxwell, 4 Colo. App. 477.

Mandamus is not an appropriate remedy to secure a perpetual right to the use of water for irrigation. Townsend v. Fulton Irrigating Ditch Co., 17 Colo. 142.

A mandatory injunction to compel the delivery of water under a contract should not be made perpetual, but should be limited in its operation to the life of the contract. Fulton Irrigation Ditch Co. v. Twombly, 6 Colo. App. 554.

**1. Damages for Failure to Furnish Water.** — Hewitt v. San Jacinto, etc., Irrigation Dist., 124 Cal. 186.

The measure of damages for partial failure of crops caused by the failure of an irrigation company to furnish water is the difference between the value of the crops actually raised and that of the crop that would have been raised had the water been furnished, less the cost of raising, harvesting, and marketing the product. Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450.

In estimating damages in an action to recover for failure to furnish water for irrigation, the loss of trees, seeds, and labor may be considered, but not the cost of permanent improvements nor the depreciation in the value

of live stock and farming implements. Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450.

In such action the rental value of the land should not be made the measure of damages unless the owner has been deprived of the entire use thereof, and from this value should be deducted the cost of cultivation. Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450.

**Damages for Preventing Use of Water from Ditch.** — In an action for damages for the loss of crops caused by an injunction restraining the plaintiff from using the water from an irrigating ditch, the plaintiff cannot recover a greater sum than it would have cost him to procure the water from another source from which he might have obtained it. Mack v. Jackson, 9 Colo. 536.

**2. Insufficiency of Water as a Defense.** — Merrill v. Southside Irrigation Co., 112 Cal. 426.

**3. Pawnee Land, etc., Co. v. Jenkins,** 1 Colo. App. 425.

**4. See *infra*, this section, *Contracts for Water*.**

**5. Golden Canal Co. v. Bright,** 8 Colo. 144.

**6. Western Irrigation, etc., Co. v. Chapman,** 8 Kan. App. 778.

**7. Contracts for Water.** — See San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, and cases cited in notes immediately following.

**8. Contracts with Irrigation Company — Construction and Effect.** — Consolidated Canal Co. v. Peters, (Ariz. 1896) 46 Pac. Rep. 74; San Diego Flume Co. v. Chase, 87 Cal. 561; Hewitt v. San Jacinto, etc., Irrigation Dist., 124 Cal.



of water in excess of its ability to furnish water is illegal.<sup>1</sup> So also a contract providing that in case of a refusal of the company at any time to furnish water to a consumer the latter may take for himself all the water to which he is entitled, is void as being contrary to public policy.<sup>2</sup> And a provision in a contract between an irrigation company appropriating water for sale and distribution and a consumer, limiting the time during which the company shall be required to furnish water to the consumer, is void. A consumer whose land is situated within the flow of the company's distributing system, and who has by means of water thereby supplied to him made valuable improvements on his own land, cannot be thereafter lawfully deprived of such water in order that the distributor may supply later comers, even though, by reason of more favorable conditions, a larger area may thus be brought under cultivation.<sup>3</sup>

*f. RATES FOR USE OF WATER.* — In the absence of any constitutional or statutory provision as to the amount of the charge made by an irrigation company for supplying water to its customers, and the time and manner of the collection thereof, it seems that the demand in these respects must be reasonable; and upon common-law principles the company, being engaged in a *quasi*-public business, must be held to have submitted itself to a reasonable judicial control in the matter of regulations and charges.<sup>4</sup>

*Regulation of Water Rates by State Statutes.* — In some states the regulation of water rates is provided for by the constitution and statutes, the duty of fixing rates being intrusted to the boards of county commissioners upon proper application by the interested parties.<sup>5</sup> Where the state constitution provides that the legislature shall fix the manner in which reasonable maximum rates may be established, it is the duty of the legislature to provide by law the

186; *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521; *Fresno Canal, etc., Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112; *Wyatt v. Larimer, etc., Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280; *Rockwell v. Highland Ditch Co.*, 1 Colo. App. 396; *La Junta, etc., Canal Co. v. Hess*, 6 Colo. App. 497; *Brighton, etc., Irrigation Co. v. Little*, 14 Utah 42. And see generally the title INTERPRETATION AND CONSTRUCTION, *ante*, p. 1.

*Option to Take Water.* — An agreement by a ditch company to furnish water to a consumer year after year so long as he shall pay the annual rental therefor constitutes a mere option which may be terminated by the consumer at the end of any year, and an application to the county commissioners to fix the water rate and refusal to pay more than such rate is a termination of the contract. *South Boulder, etc., Ditch Co. v. Marfell*, 15 Colo. 302.

*1. Contracts to Furnish Water Beyond Capacity of Ditch Void.* — *Lanning v. Osborne*, 76 Fed. Rep. 319; *Wyatt v. Larimer, etc., Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280.

*Capacity of Ditch Defined.* — Where a contract between an irrigating company and its consumers provided that the company was to turn its canal over to the water-rights owners when the number of water rights sold and owned should equal the estimated capacity of the canal to furnish water, it was held that this provision had reference to the water supply as well as to the physical capacity of the ditch. *Larimer, etc., Irrigation Co. v. Wyatt*, 23 Colo. 480.

*2. White v. Farmers' High Line Canal, etc., Co.*, 22 Colo. 191, *affirming* 5 Colo. App. 1.

*3. Limiting Time for Supplying Water.* — *Man-*

*dell v. San Diego Land, etc., Co.*, 89 Fed. Rep. 295.

*4. Rates for Supplying Water.* — *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603. See also *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164.

*5. Regulation of Water Rates by County Commissioners.* — See *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79; *Lanning v. Osborne*, 76 Fed. Rep. 319; *San Diego Land, etc., Co. v. Jasper*, 89 Fed. Rep. 274; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Golden Canal Co. v. Bright*, 8 Colo. 144; *Wilson v. Perrault*, (Idaho 1898) 54 Pac. Rep. 617.

In *Colorado* the law does not require that all consumers using or seeking water from the same carrier shall join in the petition to have the commissioners establish a maximum rate, but such application may be made by "any party or parties interested in procuring water," etc.; and it is not necessary that such parties should previously have been consumers from the ditch if the carrier's diversion has not been exhausted. *South Boulder, etc., Ditch Co. v. Marfell*, 15 Colo. 302.

*No Power to Fix Rates Where Water Is Furnished to Stockholders Only.* — The board of county supervisors has no authority, under the constitution of *California*, art. 14, § 1, or the Act of March 12, 1885, to fix the rates at which a water company shall furnish water, where the company is organized for the purpose of supplying water to stockholders only. *McFadden v. Los Angeles County*, 74 Cal. 571.

*As to the Jurisdiction of the Federal Courts in a suit by the receiver of a water company to establish his right to fix water rates*, see *Lanning*



manner of establishing such rates, and a statute arbitrarily fixing a maximum rate is unconstitutional.<sup>1</sup>

**Rates Fixed by Law Must Be Reasonable.** — While an irrigation company is subject to reasonable regulations as to the rates it shall charge for the distribution of water, it is not subject to such unreasonable regulations as would prevent it from earning a fair profit on its investment, thereby amounting substantially to a taking of property without due process of law, and a denial to the corporation of the equal protection of the laws.<sup>2</sup> While the presumptions of law are always in favor of the rates established by the regularly constituted authorities, yet when they are shown to be manifestly unreasonable, they must always be annulled as unjust at the suit of the aggrieved party.<sup>3</sup>

**Exaction of Royalty.** — An irrigation company will not be permitted to exact a royalty or bonus in addition to the annual rates which it is authorized to charge, as a condition precedent to furnishing water to consumers under its ditch.<sup>4</sup>

**g. TRANSFER OF STOCK.** — Where the owners of an irrigating ditch and water right organize a mutual ditch company and transfer their individual interests in the ditch and water to the company, which issues to the several owners capital stock representing ownership in the ditch and the quantity of water which they are entitled to use, a transfer of such stock operates as a transfer of both the interest in the ditch and the priority to the use of water represented by such stock.<sup>5</sup> But the ownership of a prior right to the use of water is essentially different from the ownership of stock in an irrigating company. The ownership of stock, like the title to other property, may be acquired by descent or purchase, while the ownership of the prior right can be acquired and retained only by the application of the water to a beneficial use. A stockholder in an irrigation company organized as a public carrier of water who makes an actual application of water from the company's ditch may, by means of such use, acquire a prior right to the water, but his title to the stock without such use gives him no title to the priority. He may transfer his stock to whom he will, such transfer carrying only an interest in the ditch, but he may transfer his priority only to some one who will continue to use the water.<sup>6</sup>

*v. Osborne*, 79 Fed. Rep. 657; *Ward v. San Diego Land, etc., Co.*, 79 Fed. Rep. 665.

**1. Mode of Fixing Rates.** — *Wilson v. Perrault*, (Idaho 1898) 54 Pac. Rep. 617.

**2. Rates Fixed Must Be Reasonable.** — *San Joaquin, etc., Canal, etc., Co. v. Stanislaus County*, 90 Fed. Rep. 516; *San Diego Land, etc., Co. v. Jasper*, 89 Fed. Rep. 274.

**3. Annulling Unreasonable Rates.** — *San Diego Land, etc., Co. v. Jasper*, 89 Fed. Rep. 274.

**4. Exaction of Royalty.** — *San Diego Land, etc., Co. v. National City*, 74 Fed. Rep. 79; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Mandell v. San Diego Land, etc., Co.*, 89 Fed. Rep. 295; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603; *Northern Colorado Irrigation Co. v. Richards*, 22 Colo. 450.

**5. Transfer of Stock.** — *Cache La Poudre Irrigating Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144.

**Purchaser of Delinquent Stock.** — Where the articles of incorporation and the by-laws of an irrigation company provided that water should be furnished only to purchasers of stock, and that such stock should be transferable only with the land for which it was issued, it was held that a purchaser of delinquent stock sold for nonpayment of assessments, who acquired no interest in the land for which the stock was

issued, but who showed that he was the owner of land of the requisite quantity, location, and character upon which to locate the stock, was entitled to have it located thereon and to be furnished with water for irrigation. *Spurgeon v. Santa Ana Valley Irrigation Co.*, 120 Cal. 71.

**Purchase of Stock under Void Amendment of Articles of Incorporation.** — The stockholders of a corporation organized solely for the purpose of supplying the stockholders with water may maintain an action to restrain the corporation from supplying water to other persons purchasing stock under an amendment of the articles of incorporation which is void because it was not adopted according to law. *McDermont v. Anaheim Union Water Co.*, 124 Cal. 112.

**6. Distinction Between Ownership of Stock and Ownership of Water Right.** — *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275.

In *Cache La Poudre Irrigating Co. v. Larimer, etc., Reservoir Co.*, 25 Colo. 144, the court said: "A ditch company organized merely as a carrier of water to those owning the appropriation may, as a corporation, own the physical or tangible ditch. Its stock may be in the hands of A and B, and the consumers of water may be C and D, and the transfer of the capital stock of the company



**Stock Not Appurtenant to Land.** — Shares of stock in an irrigation corporation are not appurtenant to the land belonging to the owner of the shares, even though the land be irrigated by water from a canal owned by the corporation, and such shares do not pass to a purchaser of the land at execution sale.<sup>1</sup>

**3. Irrigation Districts.** — In several states statutes, generally modeled upon the *California* Act of March 7, 1887, known as the "Wright Act," have been enacted providing for the organization and government of irrigation districts whenever a prescribed number or a majority of the landowners in the community embraced by the proposed district so desire.<sup>2</sup> Such statutes have repeatedly been held constitutional.<sup>3</sup>

**Irrigation Districts Public Corporations.** — An irrigation district, though not a municipal corporation,<sup>4</sup> is a public corporation, having for its object the promotion of the public welfare, and its officers are public officers of the state.<sup>5</sup> The validity of its organization cannot be collaterally attacked,<sup>6</sup> and

may carry only an interest in the ditch." See also, as to transfer of water rights by transfer of stock, *Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142.

**1. Stock Not Appurtenant to Land.** — *Wells v. Price*, (Idaho 1899) 56 Pac. Rep. 266.

**Water Stock Personal Property.** — Water stock in an incorporated irrigation company is personal property which may be transferred by assignment in writing and by delivery of the certificate of stock under Laws Utah 1896, c. 87, p. 304. *Snyder v. Murdock*, (Utah 1899) 59 Pac. Rep. 91.

**2. Irrigation Districts.** — See the statutes of *California, Nebraska, Nevada, Utah, and Washington*.

As to the organization of irrigation districts under the statute, see *Central Irrigation Dist. v. De Lappe*, 79 Cal. 351; *Modesto Irrigation Dist. v. Tregua*, 88 Cal. 334, *affirmed* in 164 U. S. 179; *Cullen v. Glendora Water Co.*, 113 Cal. 503; *Matter of Central Irrigation Dist.*, 117 Cal. 382.

**Confirmation Act — Issue of Bonds.** — On March 16, 1889, an act known as the "Confirmation Act" was approved, providing for the examination, approval, and confirmation of proceedings for the issue and sale of bonds issued under the Wright Act. Stat. 1889, p. 212; *Deering's Annot. Codes Cal., Supp.*, p. 299. See also *Crall v. Poso Irrigation Dist.*, 87 Cal. 140; *Modesto Irrigation Dist. v. Tregua*, 88 Cal. 334, *affirmed* in 164 U. S. 179; *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106; *Fallbrook Irrigation Dist. v. Abila*, 106 Cal. 355; *Cullen v. Glendora Water Co.*, 113 Cal. 503; *Matter of Central Irrigation Dist.*, 117 Cal. 382. As to action on such bonds, see *Shepard v. Tulare Irrigation Dist.*, 94 Fed. Rep. 1; *Herring v. Modesto Irrigation Dist.*, 95 Fed. Rep. 705.

**Assessments.** — As to assessments by an irrigation district, see *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Tregua v. Owens*, 94 Cal. 317; *Quint v. Hoffman*, 103 Cal. 506; *Woodruff v. Perry*, 103 Cal. 611; *San Diego v. Linda Vista Irrigation Dist.*, 108 Cal. 189; *Cooper v. Miller*, 113 Cal. 238; *Lahman v. Hatch*, 124 Cal. 1. As to assessments against irrigation districts, see *State v. Brown*, 19 Wash. 383.

**Salaries of Officers.** — As to the payment of salaries of officers of irrigation districts, see *Mitchell v. Patterson*, 120 Cal. 286.

**The Superintendent of Irrigation** elected by the voters of irrigation districts organized in certain portions of a county, the functions of whose office are to be exercised only in such portions of the county, is an officer of such districts and not of the county. *Knox v. Los Angeles County*, 58 Cal. 59.

**3. Acts Providing for Irrigation Districts Constitutional.** — *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Herring v. Modesto Irrigation Dist.*, 95 Fed. Rep. 705; *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360; *Central Irrigation Dist. v. De Lappe*, 79 Cal. 351; *Crall v. Poso Irrigation Dist.*, 87 Cal. 140; *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106; *Matter of Central Irrigation Dist.*, 117 Cal. 382.

The *Nebraska* act, passed March 26, 1895, known as the District Irrigation Law, and copied in all essential respects from the *California* act, is constitutional, and the construction applied to the *California* act is adopted as its proper interpretation. *Alfalfa Irrigation Dist. v. Collins*, 46 Neb. 411.

**4. Irrigation District Not Municipal Corporation.** — *Middle Kittitas Irrigation Dist. v. Peterson*, 4 Wash. 147. But in *Herring v. Modesto Irrigation Dist.*, 95 Fed. Rep. 705, an irrigation district was declared to be "a public municipal corporation known to the law, and is therefore a *de facto* corporation, and its officers *de facto* officers."

**5. Irrigation Districts Public Corporations.** — *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112; *Herring v. Modesto Irrigation Dist.*, 95 Fed. Rep. 705; *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360; *Central Irrigation Dist. v. De Lappe*, 79 Cal. 351; *Crall v. Poso Irrigation Dist.*, 87 Cal. 140; *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106; *People v. Turnbull*, 93 Cal. 630; *People v. Selma Irrigation Dist.*, 98 Cal. 206; *Quint v. Hoffman*, 103 Cal. 506; *Boehmer v. Big Rock Irrigation Dist.*, 117 Cal. 19.

**6. Organization of Irrigation District Not Subject to Collateral Attack.** — *Miller v. Perris Irrigation Dist.*, 85 Fed. Rep. 693, 92 Fed. Rep. 263; *Quint v. Hoffman*, 103 Cal. 506; *People v. Linda Vista Irrigation Dist.*, (Cal. 1900) 61 Pac. Rep. 86.

The decrees of the state court having jurisdiction, approving the organization of an irrigation district, are conclusive against any attack upon the validity of the organization.



an irrigation district cannot plead the illegality of its organization as a defense to an action on bonds issued by it.<sup>1</sup> Nor can such a corporation be dissolved by the courts for a misuser or nonuser of its corporate powers in the absence of a law specially conferring such power upon the courts.<sup>2</sup>

**Liability of District to Be Sued.**—By the provisions of the statute an irrigation district may sue and be sued.<sup>3</sup>

**XII. ARID LAND GRANTS.**—By the Act of Congress of March 3, 1877, as amended March 3, 1891, provision was made for the entry upon and patenting of desert lands belonging to the United States upon condition of reclaiming them by irrigation.<sup>4</sup> By what is known as the Carey Act, approved Aug. 18, 1894, and amended June 11, 1896, the secretary of the interior, with the approval of the President, is authorized and empowered, upon proper application of the state, to grant to the states of the arid region free of cost such desert lands, not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, and occupied, upon the terms provided for by the act. Under this act, upon acceptance of a grant of desert land by a state, by act of its legislature,<sup>5</sup> the state by its acceptance becomes the agent of the United States to make effective the offer of the latter to part with its desert lands to the state or its assigns, provided the state can reclaim them and induce the actual settlement and cultivation thereof. The conditions precedent to the right of the state to obtain patents, namely reclamation, settlement, and cultivation, include those which will thereafter divest the state of its title. The state holds the legal title only for the benefit of the real owners, actual settlers, irrigating and cultivating the land.<sup>6</sup>

### IS. — See note 7.

Miller *v.* Perris Irrigation Dist., 85 Fed. Rep. 693; Crall *v.* Poso Irrigation Dist., 87 Cal. 140; Rialto Irrigation Dist. *v.* Brandon, 103 Cal. 384. See also Matter of Central Irrigation Dist., 117 Cal. 382.

And the decisions of the state court are binding upon the federal courts. Miller *v.* Perris Irrigation Dist., 85 Fed. Rep. 693.

1. Herring *v.* Modesto Irrigation Dist., 95 Fed. Rep. 705.

2. People *v.* Selma Irrigation Dist., 98 Cal. 206.

3. Boehmer *v.* Big Rock Irrigation Dist., 117 Cal. 19; Hewitt *v.* San Jacinto, etc., Irrigation Dist., 124 Cal. 186. See also Miller *v.* Perris Irrigation Dist., 85 Fed. Rep. 693.

4. 19 U. S. Stat. at L. 377, c. 107; 26 U. S. Stat. at L. 1096, § 2 *et seq.* And see generally the title PUBLIC LANDS.

5. **Montana Statutes.**—In Montana statutes have been passed accepting the offer of the United States by the Carey Act, and appointing a state arid land grant commission for the purpose of carrying the acceptance into effect. See as to the powers of such commission, State *v.* Wright, 17 Mont. 565; State *v.* Marshall, 20 Mont. 510.

6. State *v.* Wright, 17 Mont. 565.

7. **At the Present Time.**—On the hearing of an exception to the final account of an executor for a failure to account for a debt due to the estate, the executor testified that the debtor "*is* insolvent." It was held that, no effort having been made by the exceptors to elucidate this testimony by further examination of the executor, it was proper to conclude that such debtor had been insolvent ever since the death of the testator. Stone *v.* Morgan, 65 Miss. 247.

But in Hilgendorf *v.* Ostrom, 46 Ill. App. 470, it was held that the certificate of the clerk of court, dated July 19, 1838, that one Barroll *is* a commissioner duly authorized to take proof and acknowledgment of deeds did not show that upon the 18th of July, 1838, he was such commissioner.

And in Fisher *v.* Ford, 12 Ad. & El. 654, 40 E. C. L. 150, the declaration alleged in excuse of proferat that the indenture "being in possession of the defendant," the plaintiff could not produce it. To this the defendant pleaded that the indenture "*is* not in the possession" of the defendant. This was held bad on special demurrer, as referring to the time when the pleading was pleaded, and not to the time pointed to in the declaration.

Under the *Missouri* statute (Laws 1866, p. 72, c. 24, § 1) providing that "the board of county commissioners of any county to, into, through, from, or near which \* \* \* any railroad *is* or may be located, may subscribe to the capital stock of any such railroad corporation, \* \* \* but no such bonds shall be issued until the question be submitted to a vote," etc., an existing corporation must be named as the recipient of the proposed subscription and bonds. Lewis *v.* Bourbon County, 12 Kan. 206; Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 230.

In Bridges *v.* Shallcross, 6 W. Va. 593, it was held that the use of the present indicative *is* in a statute was not intended as a limitation to provisions then made and existing.

**Is of Full Age.**—An English statute provided that every man should be entitled to register as a voter who was qualified as follows: "(1) *is* of full age and not subject to any legal



incapacity, and (2) *is* on the last day of July in any year, and has during the twelve months immediately preceding been, the occupier" of real property. It was held that "*is* of full age" meant being of full age at or before the end of the year of qualification. Coleridge, C. J., said: "It seems to me that, in order to give a sensible construction to the second subsection of that clause, *is* must be read 'was,' seeing that by the provisions of the Registration Acts the lists must be made up several weeks before the revision takes place." *Hargreaves v. Hopper*, 1 C. P. D. 199.

**Is and Shall Be.** — In *Hammond v. Buchanan*, 68 Ga. 731, it was said: "The only difference between the two acts is that in one the words 'there shall be a controversy' are used, and in the other the words 'there *is* a controversy.' But the verb 'shall be,' as well as the present tense of the same verb *is*, refers to controversy and not to citizenship. They mean the same thing, because *is* applies in the Act of 1867 to suits hereafter brought, as well as to pending suits, and when applied to the former it must be equivalent to 'shall be.'"

**Already in Existence.** — A statute provided that if a railroad company should neglect to run its trains for the space of ten days, a receiver might be appointed; but excepted from this provision "any railroad company whose road *is* constructed at any seaside resort, not exceeding four miles in length and which was built and intended," etc. It was held that this exception applied to the appellant's road, although it was built before the passage of the law. *Delaware Bay, etc., R. Co. v. Markley*, 45 N. J. Eq. 149.

17 C. of L.—34

**Is Obtained.** — A statute provided that when any judgment *is* obtained in the Court for the Trial of Small Causes, and execution shall issue thereon and be returned unsatisfied, and if the person against whom such execution shall have been issued should reside in or be possessed of any goods and chattels in any other county of the state, then an *alias* or *pluries* execution may issue, directed to the constable of the latter county. It was held that the expression "when any judgment *is* obtained" meant "when any judgment *is* hereafter obtained." *McGovern v. Connell*, 43 N. J. L. 108. See also the title STATUTES.

**Imperative.** — A testator named his wife as the sole heir of all his property, with a proviso that "she *is* not to divest herself of what I may leave her until after her death." In construing this will the court said: "According to the idiom of our language, there can be no doubt that the expression 'she *is* not to divest herself,' etc., is an imperative prohibition, and means that she shall not divest herself, or that power is withheld from her to divest herself, etc." *Jaureche v. Proctor*, 48 Pa. St. 470.

**Omission.** — In *Buchanan v. Sterling*, 63 Ga. 227, it was held that where the affidavit for attachment obviously means that the defendant is indebted to the plaintiff in the amount named, a clerical omission of the word *is* will not vitiate it.

**Is Found.** — In *Blackburn v. Selma, etc., R. Co.*, 2 Flipp. (U. S.) 525, 3 Fed. Cas. No. 1,467, it was held that a corporation "*is* found" within a district where it is sued, whenever it does business there by authority of law.

Volume XVII.



# ISLANDS.

BY WALTER CARRINGTON.

## I. DEFINITION, 530.

## II. TITLE TO ISLANDS, 530.

1. *In Navigable Waters*, 530.
  - a. *Rule Stated*, 530.
  - b. *What Waters Are Navigable*, 531.
  - c. *Islands in Large Lakes*, 532.
2. *In Unnavigable Waters*, 532.

## III. HOW TITLE IS ACQUIRED, 533.

1. *By Discovery*, 533.
2. *By Grant*, 533.
  - a. *In General*, 533.
  - b. *Grants by State*, 534.
3. *By Adverse Possession*, 535.
4. *No Title Acquired by Temporary Occupancy for Hunting or Fishing*, 535.

## IV. RIGHTS PERTAINING TO OWNERSHIP OF ISLANDS, 536.

1. *Riparian Rights*, 536.
  - a. *Pertaining to Islands in Navigable Rivers*, 536.
  - b. *Pertaining to Islands in Great Lakes*, 536.
  - c. *Pertaining to Islands in Unnavigable Rivers*, 536.
2. *Right to Accretions*, 536.

## CROSS-REFERENCES.

For other matters relating to this topic, see the titles *ACCRETION*, vol. 1, p. 467; *BOUNDARIES*, vol. 4, p. 756; *NAVIGABLE WATERS*; *TITLE (REAL PROPERTY)*.

**I. DEFINITION.** — An island is a body of land surrounded by water.<sup>1</sup>

**II. TITLE TO ISLANDS** — 1. **In Navigable Waters** — a. **RULE STATED.** — The title to islands follows the title to the soil on which they are formed. In *England* the title to the soil under navigable waters and to the islands therein is *prima facie* in the crown.<sup>2</sup> In the United States such title within the territorial limits of any state is *prima facie* in the state.<sup>3</sup> But where by grant or

1. **Island Defined.** — *Webber v. Père Marquette Boom Co.*, 62 Mich. 626.

An island is a body of land surrounded by water in its flow in an ordinary stage, although at some periods of the year the water may not pass. *Stover v. Jack*, 60 Pa. St. 339, 100 Am. Dec. 566.

In *Nevada* it has been held that a body of land which divides a river into two channels, in one of which water ceases to flow at low water, is an island. *Shoemaker v. Hatch*, 13 Nev. 261. See also *Goff v. Cougle*, 118 Mich. 307.

A **Submerged Fen** is not an island. *Webber v. Père Marquette Boom Co.*, 62 Mich. 626.

A **Sandbar or Place of Shallow Water**, exposed only when the wind is favorable or the water low, is not an island. *Watson v. Peters*, 26 Mich. 508.

A **Mussel Bed over Which the Water Flows at Every Tide** is not an island. Such a formation is a flat. *King v. Young*, 76 Me. 76, 49 Am. Rep. 596.

2. *England.* — *Hale's De Jure Maris*, par. 1, c. 6 (Harg. L. T. 36).

*United States.* — *Packer v. Bird*, 137 U. S. 666, 32 Cent. L. J. 294.

*Connecticut.* — *Middletown v. Sage*, 8 Conn. 228.

*Delaware.* — *Morris v. Brooke*, 53 Am. Rep. 215, note, (Del. 1815) 25 Alb. L. J. 90.

*Massachusetts.* — *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 547.

*New York.* — *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206.

3. **Rule in United States** — *United States.* — *Hardin v. Jordan*, 140 U. S. 380; *Packer v. Bird*, 137 U. S. 666, 32 Cent. L. J. 294.



prescription an individual has acquired title to the soil under navigable waters, new islands arising thereon belong to him and not to the state.<sup>1</sup>

*b. WHAT WATERS ARE NAVIGABLE.* — Most of the litigation involving the title to islands has resulted from the confusion which exists as to what are navigable waters. At common law those waters were considered navigable, and only those, in which the tide ebbed and flowed. This is still the rule in England and in some of the United States.<sup>2</sup> But in many of the United States it has been held that the tidal test of navigability is unsuited to the great inland waterways, and that actual navigability is the proper test;<sup>3</sup> that is, susceptibility to use in their ordinary condition as highways for commerce, over which trade and travel may be conducted in the customary mode of trade and travel on water.<sup>4</sup>

*Arkansas.* — *St. Louis, etc., R. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195.

*Connecticut.* — *Middletown v. Sage*, 8 Conn. 222; *Tracy v. Norwich, etc., R. Co.*, 39 Conn. 382.

*Delaware.* — *Morris v. Brooke*, 53 Am. Rep. 215, note, (Del. 1815) 25 Alb. L. J. 90.

*Missouri.* — *Benson v. Morrow*, 61 Mo. 345; *McBaine v. Johnson*, (Mo. 1900) 55 S. W. Rep. 1034; *Moore v. Farmer*, (Mo. 1900) 56 S. W. Rep. 493.

*Nevada.* — *Shoemaker v. Hatch*, 13 Nev. 261.

*Pennsylvania.* — *Johns v. Davidson*, 16 Pa. St. 521; *Wainwright v. McCullough*, 63 Pa. St. 66; *Stover v. Jack*, 60 Pa. St. 339, 100 Am. Dec. 566.

*Tennessee.* — *Stuart v. Clark*, 2 Swan (Tenn.) 9, 58 Am. Dec. 49.

"Whenever the United States was original owner, the right passed to the state on its admission to the Union, with all other rights pertaining to the eminent domain." Judge Cooley in 13 Cent. L. J. 2. See also *Hardin v. Jordan*, 140 U. S. 380.

**1. Islands Arising on Soil Owned by Individual** — *England.* — *Hale's De Jure Maris*, par. 1, c. 6 (Harg. L. T. 36).

*United States.* — *St. Louis v. Rutz*, 138 U. S. 247.

*Connecticut.* — *Middletown v. Sage*, 8 Conn. 228.

*Delaware.* — *Morris v. Brooke*, 53 Am. Rep. 215, note, (Del. 1815) 25 Alb. L. J. 90.

*Massachusetts.* — *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 547.

*New York.* — *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206.

Where an island in navigable waters owned by an individual is washed away, the soil on which it stood remains the property of such individual, and if by natural or artificial means a new island is formed upon such soil, it will belong to him. *Morris v. Brooke*, 53 Am. Rep. 215, note, (Del. 1815) 25 Alb. L. J. 90.

**2. Common-law Rule as to Navigability** — *United States.* — *St. Louis v. Rutz*, 138 U. S. 242.

*Illinois.* — *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388.

*Kentucky.* — *Berry v. Snyder*, 3 Bush (Ky.) 266, 96 Am. Dec. 219.

*Maine.* — *Granger v. Avery*, 64 Me. 292.

*Massachusetts.* — *Lunt v. Holland*, 14 Mass. 149.

*Minnesota.* — *St. Paul, etc., R. Co. v. First Division of St. Paul, etc., R. Co.*, 26 Minn. 32.

*New Hampshire.* — *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88.

*Ohio.* — *Walker v. Board of Public Works*, 16 Ohio 544.

*Wisconsin.* — *Chandos v. Mack*, 77 Wis. 573, 20 Am. St. Rep. 139.

See further the title NAVIGABLE WATERS.

**In New York**, though the cases have been somewhat conflicting, the general rule seems to be that only those streams are navigable in which the tide ebbs and flows. *Walton v. Tift*, 14 Barb. (N. Y.) 219; *Luce v. Carley*, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206. But the rights of riparian owners upon the Hudson (aside from its tidal character) and the Mohawk rivers are affected by the doctrines of the civil law prevailing in the Netherlands, from whose government they were derived; and it would seem, therefore, that islands in these rivers, so far as they are navigable, belong to the state and not to the riparian owners. *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, *distinguishing* *Gould v. Hudson River R. Co.*, 6 N. Y. 522, and *People v. Tibbetts*, 19 N. Y. 527, and *distinguishing* and *limiting* *People v. Canal Appraisers*, 33 N. Y. 461.

**3. Actual Navigability Test in Some States** — *United States.* — *Packer v. Bird*, 137 U. S. 666, 32 Cent. L. J. 294.

*Arkansas.* — *St. Louis, etc., R. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195.

*Indiana.* — *Bonewits v. Wygant*, 75 Ind. 44.

*Missouri.* — *Moore v. Farmer*, (Mo. 1900) 56 S. W. Rep. 497; *Cooley v. Golden*, 117 Mo. 33.

*Pennsylvania.* — *Johns v. Davidson*, 16 Pa. St. 521.

See further the title NAVIGABLE WATERS.

**4. Packer v. Bird**, 137 U. S. 666, 32 Cent. L. J. 294.

**In Tennessee** the criterion of a navigable river is not the flow and reflow of the tide, but simply the fact whether the river in the ordinary state of water is capable of and suited to the usual purposes of navigation. A river may be navigable in the ordinary acceptance of the term, and yet not navigable in the legal sense; and such is a river or stream of sufficient natural depth for valuable floatage, such as rafts, flatboats, and small vessels of lighter draft than ordinary. *Stuart v. Clark*, 2 Swan (Tenn.) 9, 58 Am. Dec. 49; *Holbert v. Edens*, 5 Lea (Tenn.) 207, 40 Am. Rep. 26.



**How Title to Islands Determined in Federal Courts.** — In determining in whom the title to islands lies, the federal courts are guided by the law of the state in which the islands are situated, and the common-law test of navigability or that of actual capacity for navigation will be applied, as the case may be.<sup>1</sup>

**c. ISLANDS IN LARGE LAKES.** — The tidal test of navigability has never been applied to the Great Lakes. They have always been held to be navigable waters;<sup>2</sup> consequently the soil under them and the islands therein belong to the state.<sup>3</sup> And this seems generally to have been adopted in the United States as the rule in reference to islands in all large fresh-water lakes.<sup>4</sup>

**2. In Unnavigable Waters.** — *Prima Facie* the title to the bed of an unnavigable stream to the thread thereof, and to islands between the mainland and such thread,<sup>5</sup> is in the owner of the adjacent mainland.<sup>6</sup> Where the lands on both sides of the stream belong to the same person, the entire bed of the stream and all the islands therein belong between such lands belong to him.<sup>7</sup>

**Island Covering Middle of Stream.** — If an island be so situated that it is partly on one side and partly on the other of the thread of the stream, it will be divided by such line and held in severalty by the adjacent proprietors.<sup>8</sup>

**1. How Title Determined in Federal Courts.** — *Packer v. Bird*, 137 U. S. 661, 32 Cent. L. J. 294; *St. Louis v. Rutz*, 138 U. S. 242; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87; *Hardin v. Jordan*, 140 U. S. 380; *Moore v. Farmer*, (Mo. 1900) 56 S. W. Rep. 498.

**2. See the title NAVIGABLE WATERS.**

**3. Islands in Great Lakes.** — *People v. Warner*, 116 Mich. 228; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

**4. Thus in New Hampshire** it has been held that islands in a lake or other large body of standing water do not belong to the riparian proprietors thereon. *State v. Gilmanton*, 9 N. H. 461.

**The New York Case of Canal Com'rs v. People**, 5 Wend. (N. Y.) 423, is to the same effect.

**5. The Thread of a Stream** is the middle line between the shores, irrespective of the depth of the channel, when the water is in its natural and ordinary stage at a medium height, neither swollen by freshets nor shrunk by drought. *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Branham v. Bledsoe Creek Turnpike Co.*, 1 Lea (Tenn.) 704, 27 Am. Rep. 789.

**In South Carolina** it has been held that the *filum aquæ* is ascertained by measurement across from ordinary low-water mark on the one side to the same on the other side without regard to the channel or depth of water. *McCullough v. Wall*, 4 Rich. L. (S. Car.) 68, 53 Am. Dec. 715.

**6. Title to Islands in Unnavigable Waters — United States.** — *St. Paul, etc., R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Jones v. Soulard*, 24 How. (U. S.) 41; *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87.

**Delaware.** — *Morris v. Brooke*, 53 Am. Rep. 215, note, (Del. 1815) 25 Alb. L. J. 90.

**Georgia.** — *Stanford v. Mangin*, 30 Ga. 355.

**Illinois.** — *Stolp v. Hoyt*, 44 Ill. 220; *Braxon v. Bressler*, 64 Ill. 490; *Kaskaskia v. McClure*, 167 Ill. 23; *Houck v. Yates*, 82 Ill. 179; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112.

**Indiana.** — *Bonewits v. Wygant*, 75 Ind. 44.

**Kentucky.** — *Berry v. Snyder*, 3 Bush (Ky.) 266, 96 Am. Dec. 219.

**Maryland.** — *Ridgely v. Johnson*, 1 Bland (Md.) 316, note.

**Massachusetts.** — *Lunt v. Holland*, 14 Mass. 149; *Deerfield v. Arms*, 17 Pick. (Mass.) 43, 28 Am. Dec. 276; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 547.

**Michigan.** — *Butler v. Grand Rapids, etc., R. Co.*, 85 Mich. 246, 24 Am. St. Rep. 84; *Goff v. Cogle*, 118 Mich. 304.

**New Hampshire.** — *Greenleaf v. Kilton*, 11 N. H. 530; *State v. Gilmanton*, 9 N. H. 461; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Nichols v. Suncook Mfg. Co.*, 34 N. H. 349; *Kimball v. Schoff*, 40 N. H. 194.

**New York.** — *Walton v. Tift*, 14 Barb. (N. Y.) 219; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393.

**Ohio.** — *Walker v. Board of Public Works*, 16 Ohio 544.

**Pennsylvania.** — *Johns v. Davidson*, 16 Pa. St. 521.

**South Carolina.** — *McCullough v. Wall*, 4 Rich. L. (S. Car.) 68, 53 Am. Dec. 715.

**Tennessee.** — *Branham v. Bledsoe Creek Turnpike Co.*, 1 Lea (Tenn.) 706, 27 Am. Rep. 789; *Holbert v. Edens*, 5 Lea (Tenn.) 204, 40 Am. Rep. 26.

**Virginia.** — *Hayes v. Bowman*, 1 Rand. (Va.) 417.

**Wisconsin.** — *Chandos v. Mack*, 77 Wis. 573, 20 Am. St. Rep. 139.

**Island Made by Change of Stream.** — If the course of a stream changes, and cuts off a point of land on one side, making an island, such island still belongs to the original owner. *Bonewits v. Wygant*, 75 Ind. 44; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544.

**7. Where Both Banks Belong to Same Person.** — *Granger v. Avery*, 64 Me. 292; *Penobscot Tribe of Indians v. Veazie*, 58 Me. 402; *Walker v. Board of Public Works*, 16 Ohio 544.

**8. Island in Centre of Stream — Illinois.** — *Stolp v. Hoyt*, 44 Ill. 220.

**Indiana.** — *Bonewits v. Wygant*, 75 Ind. 44.

**Massachusetts.** — *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 544; *Deerfield v. Arms*, 17 Pick. (Mass.) 43, 28 Am. Dec. 276.



**III. HOW TITLE IS ACQUIRED — 1. By Discovery.** — A state may acquire title to islands by discovery. Islands newly discovered by its citizens belong to the United States, and all the citizens of the United States possess equal rights to go there; and if, before exclusive rights have been acquired in an island so discovered, by statute or otherwise, any citizen places property upon it or takes products from it, such property or products will be entitled to protection.<sup>1</sup>

**Guano Islands.** — By Act of Congress of August 18, 1856, whenever a citizen of the United States discovered a deposit of guano on any island not within the lawful jurisdiction of any other government, he might be allowed, at the pleasure of Congress, to have the exclusive right to occupy such island for the purpose of obtaining guano. This act gave no right except to the first discoverer. One who took the first actual possession of a guano island discovered by another, acting upon information of the existence of the island obtained from the discoverer, could not claim an exclusive title as discoverer under the act, even against third persons.<sup>2</sup>

**2. By Grant — a. IN GENERAL — Title to Islands May Be Acquired by Grant.** — The islands may be granted in express terms, as by metes and bounds, or they may pass by implication.

**Construction of Grants.** — Many of the peculiar provisions of grants conveying, or that it was claimed conveyed islands, have received the interpretation of the courts.<sup>3</sup>

**A Grant of Lands Bounding on a River Not Navigable**<sup>4</sup> includes the islands between the mainland and the thread or centre of the river, unless there is an express reservation to the contrary or the terms of the grant are such as to show a

*Tennessee.* — *Branham v. Bledsoe Creek Turnpike Co.*, 1 Lea (Tenn.) 704, 27 Am. Rep. 789.

And see 3 Kent's Com. 428.

**1. Title by Discovery.** — *American Guano Co. v. U. S. Guano Co.*, 44 Barb. (N. Y.) 23, holding that where the plaintiffs, before any exclusive rights had been acquired in a newly discovered island, went upon it and expended money in erecting works, making improvements, and mining guano, they were entitled to be protected by injunction in the enjoyment of such property and in the possession of the guano so mined.

**2. Right of Discoverer of Guano — Statute Constructed.** — *American Guano Co. v. U. S. Guano Co.*, 44 Barb. (N. Y.) 23.

**3. A Grant of "All That Tract or Upper Island of Land Called Eden,"** giving the courses and distances of the lines thereof, was held to pass the whole of the island called Eden, though subsequently, on resurvey, the courses and distances given were found to exclude part of the island. *Lodge v. Lee*, 6 Cranch (U. S.) 237.

**Grant Purporting to Convey as an Island Land Not Strictly Such.** — A grant which purported to convey an "island \* \* \* commonly called and known by the name of the Green Flats" was held to pass title to the land called Green Flats where there was no other land answering the description in the grant, although such land was usually covered with water, and therefore was not strictly an island. *Brink v. Richtmyer*, 14 Johns. (N. Y.) 255.

**Grant of Island with Small Islands Connected Therewith at "Low Water."** — By a grant of an island "with all the contiguous small islands that are joined to or connected with the said

island by a beach or shoal dry at low water," an island that is connected with the principal one by a shoal which is dry only at extraordinary tides will not pass. "Low water" means low water at ordinary tides. *Doe v. Hill*, 7 N. Bruns. 587.

**In the Conveyance of Land on a Creek, a Call for One Half the Creek, or for a line down the centre of the creek with its meanders, carries title to the middle of the main branch if the stream is divided by an island into two unequal branches.**

**Patent Conveying Minerals under River Held Not to Include Minerals under Island.** — *Pennsylvania Coal Co. v. Winchester*, 109 Pa. St. 572, 58 Am. Rep. 740.

**Grant Held Not to Include Island in Navigable River.** — *Middletown v. Sage*, 8 Conn. 221.

**As to What Boundaries in Particular Grants Include Islands,** see *St. Louis v. Rutz*, 138 U. S. 226; *Miller v. Mann*, 55 Vt. 475.

**For the Construction of Grants of Islands and Rights Appertaining Thereto,** see also the following cases:

*Maine.* — *Penobscot Tribe of Indians v. Veazie*, 58 Me. 402.

*Massachusetts.* — *Lunt v. Holland*, 14 Mass. 149.

*New Hampshire.* — *Greenleaf v. Kilton*, 11 N. H. 530; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88.

*New York.* — *Coleman v. Manhattan Beach Imp. Co.*, 94 N. Y. 229; *Dexter v. Jefferson Paper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 389.

*North Carolina.* — *Clarke v. Wagner*, 74 N. Car. 791, 76 N. Car. 463.

**4. As to what rivers are navigable, see *supra*, this title, *What Waters Are Navigable*.**



clear intention to exclude such islands.<sup>1</sup> If lands on both sides of a stream are conveyed all the islands in the stream between such lands will pass.<sup>2</sup>

But a Grant of Land Bounded upon Navigable Waters<sup>3</sup> does not include the islands in such waters.<sup>4</sup>

**b. GRANTS BY STATE.** — What has been said with respect to grants of land upon unnavigable and upon navigable waters applies as well to grants by the state as to grants by individuals.<sup>5</sup>

Grants by the Federal Government will be construed as to their effect according to the law of the state in which the lands lie. In states where the common-law rule as to navigable waters prevails, a grant by the general government of land bounded by a fresh-water stream, whether navigable in fact or not, carries

**1. Grant of Lands on Unnavigable River Includes Islands Therein.** — *United States.* — Jones v. Souldard, 24 How. (U. S.) 65.

*Georgia.* — Stanford v. Mangin, 30 Ga. 355.

*Illinois.* — Stolp v. Hoyt, 44 Ill. 220; Rockwell v. Baldwin, 53 Ill. 19; Braxon v. Bressler, 64 Ill. 400; Middleton v. Pritchard, 4 Ill. 510, 5 Am. Dec. 112.

*Kentucky.* — Berry v. Snyder, 3 Bush (Ky.) 266, 96 Am. Dec. 219.

*Massachusetts.* — Lunt v. Holland, 14 Mass. 149.

*New Hampshire.* — Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88; Nichols v. Suncook Mfg. Co., 34 N. H. 349; Greenleaf v. Kilton, 11 N. H. 530; State v. Gilmanton, 9 N. H. 461; Kimball v. Schoff, 40 N. H. 194.

*New York.* — Walton v. Tift, 14 Barb. (N. Y.) 219; Luce v. Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637.

*South Carolina.* — McCullough v. Wall, 4 Rich. L. (S. Car.) 68, 53 Am. Dec. 715.

*Tennessee.* — Stuart v. Clark, 2 Swan (Tenn.) 12, 58 Am. Dec. 49.

*Vermont.* — Miller v. Mann, 55 Vt. 475.

*Virginia.* — Hayes v. Bowman, 1 Rand. (Va.) 420.

If the Grant Is Bounded Along the Stream, or on the Margin Thereof, or if any other words of similar import are used, it legally extends to the middle or thread of the stream and includes islands between the bank and such thread. Walton v. Tift, 14 Barb. (N. Y.) 219; Stuart v. Clark, 2 Swan (Tenn.) 12, 58 Am. Dec. 49. See also Rockwell v. Baldwin, 53 Ill. 19; Kimball v. Schoff, 40 N. H. 194. And see the title BOUNDARIES, vol. 4, p. 831.

**Grant Bounded by Bank.** — It has been held that if the grant is bounded by the "bank" of the stream it will not include the stream or the islands therein. Rockwell v. Baldwin, 53 Ill. 19; Hatfield v. Dwight, 17 Mass. 289, 9 Am. Dec. 145; Halsey v. McCormick, 13 N. Y. 296. See also Dunlap v. Stetson, 4 Mason (U. S.) 349; Paeker v. Bird, 137 U. S. 661, 32 Cent. L. J. 201.

**Land Bounded by the Shore of a River** limits the grantee to it, and does not extend his right to the centre of the river. Lincoln v. Wilder, 29 Me. 169; Child v. Starr, 4 Hill (N. Y.) 369, reversing 20 Wend. (N. Y.) 149.

**Words Held Not to Exclude Island.** — A deed of land upon a stream described it by the number of the lot, and added: "Being the farm on which the said K. now lives." An island in the stream, opposite to and nearest to the farm, was not occupied by K. It was held that the words were not restrictive, and

the island passed. Kimball v. Schoff, 40 N. H. 190.

**2. Penobscot Tribe of Indians v. Veazie,** 58 Me. 402.

**3.** As to what are navigable waters, see *supra*, this title, *What Waters Are Navigable*.

**4. Grant of Land on Navigable Waters Does Not Include Islands Therein.** — Berry v. Snyder, 3 Bush (Ky.) 266, 96 Am. Dec. 219; Walton v. Tift, 14 Barb. (N. Y.) 218.

**Where a Grant Runs to and Is Bounded upon a Lake** or other large body of standing water, the grant extends only to the water's edge, and does not include islands in such body of water. State v. Gilmanton, 9 N. H. 461.

**5. Grants by State.** — *United States.* — St. Paul, etc., R. Co. v. Schurmeir, 7 Wall. (U. S.) 272; Grand Rapids, etc., R. Co. v. Butler, 159 U. S. 87.

*Illinois.* — Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112.

*Maine.* — Granger v. Avery, 64 Me. 292.

*Michigan.* — Goff v. Cogle, 118 Mich. 307; Butler v. Grand Rapids, etc., R. Co., 85 Mich. 246, 24 Am. St. Rep. 84.

*Virginia.* — Hayes v. Bowman, 1 Rand. (Va.) 420.

**Grant by French Province of Louisiana.** — Under the custom of Paris, which was founded on the civil law, and which by the terms of its charter was the law of the province of Louisiana, islands formed in a river between the mainland and the thread of the stream were the property of the riparian proprietor. Therefore, by a grant confirmed by Governor Vaudreuil of Louisiana in 1743 to the inhabitants of the parish of Kaskaskia, in the dependency of Illinois, of lands bordering on the Mississippi river, the inchoate right to an island situated between such lands and the thread of the river passed to the inhabitants of the parish. Kaskaskia v. McClure, 167 Ill. 23.

**In Pennsylvania Islands in Navigable Streams Are Excepted from the General Laws for the sale and settlement of vacant lands.** They are granted under laws specially applicable to themselves. Stover v. Jack, 60 Pa. St. 339, 100 Am. Dec. 566.

For statutory provisions relating to the sale of islands in the Susquehanna river and its branches, see Johns v. Davidson, 16 Pa. St. 512.

**As to the Power of the Governor of California** to grant islands near the coast under authority conferred by the president of Mexico, see U. S. v. Osio, 23 How. (U. S.) 273, reversing Hoffm. Land Cas. (U. S.) 100; U. S. v. Castillero, 23 How. (U. S.) 404.



with it, in the absence of any reservation or restriction in the grant, the bed of the stream and all the islands therein to the thread thereof.<sup>1</sup> But in those states where the navigability of a stream is determined by its actual capacity for navigation, a grant of land on a stream navigable in fact will not include the bed of the stream or the islands therein.<sup>2</sup>

**Surveying or Platting Islands in a Stream Not Navigable**, before granting lands along the adjacent bank, shows an intention in the government to reserve such islands; consequently, in such a case, the title to the islands will not pass.<sup>3</sup>

**The Meander Lines of Governmental Subdivisions** bordering on unnavigable streams do not limit the grant in a patent or prevent the grantee from acquiring title to islands in the stream to the thread thereof.<sup>4</sup>

**3. By Adverse Possession.** — Title to islands may be acquired by prescription or adverse possession.<sup>5</sup> But such a title can be acquired only by an exclusive uninterrupted and adverse possession for twenty years, or for the period of time, whatever it may be, prescribed by the statute of limitations for the right of entry upon land.<sup>6</sup>

**Title Acquired by Adverse Possession of Lands on Adjacent Bank.** — Adverse possession for twenty years of a tract of land upon a river not navigable gives title to the thread of the stream, including the islands between the bank and such thread.<sup>7</sup>

**4. No Title Acquired by Temporary Occupancy for Hunting or Fishing.** — Persons in the casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, and who do not occupy the land for purposes of

**1. Federal Grants in States Where Common-law Rule Prevails.** — *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87; *Hardin v. Jordan*, 140 U. S. 380; *Houck v. Yates*, 82 Ill. 179; *Kaskaskia v. McClure*, 167 Ill. 23; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Chandos v. Mack*, 77 Wis. 573, 20 Am. St. Rep. 139.

**2. Federal Grants in States Where Test Is Navigability in Fact.** — *Hardin v. Jordan*, 140 U. S. 380; *Packer v. Bird*, 137 U. S. 669, 32 Cent. L. J. 294, *affirming* 71 Cal. 134; *Cooley v. Golden*, 117 Mo. 51; *Moore v. Farmer*, (Mo. 1900) 56 S. W. Rep. 498.

**Title Cannot Be Divested by Subsequent Survey and Grant.** — One who had acquired title to islands in an unnavigable river by a grant from the government of lands on the banks of such river cannot be divested of such title by a subsequent survey and grant of the islands. *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87.

**Facts Held to Rebut the Presumption** that the government, by a grant of lands on a stream, intended to relinquish title to unsurveyed islands in the stream, are set out in *Harding v. Minneapolis Northern R. Co.*, 55 U. S. App. 257; *Steinbuechel v. Lane*, 59 Kan. 7.

**A Grant by the United States to a State of Swamp Lands** was held to include partly submerged islands. *People v. Warner*, 116 Mich. 228.

**Confirmation of Mexican Grant — Held to Include Island.** — *De Guyer v. Banning*, 91 Cal. 400.

**3. Islands Previously Surveyed or Platted Will Not Pass.** — *Grand Rapids, etc., R. Co. v. Butler*, 159 U. S. 87; *Harding v. Minneapolis Northern R. Co.*, 55 U. S. App. 257; *Butler v. Grand Rapids, etc., R. Co.*, 85 Mich. 246, 24 Am. St. Rep. 84.

**Where There Were Separate Contemporaneous Surveys and Purchases**, as distinct tracts, by different parties, of the two banks of a river

and the island lying therein, and the purchases were entered at the government land office on the same day, it was held that the purchasers of the banks could not claim the island, but that two *fila aquæ* were established, one on either side of the island. *Stolp v. Hoyt*, 44 Ill. 219.

**4. Meander Lines — United States.** — *Harding v. Minneapolis Northern R. Co.*, 55 U. S. App. 257; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178; *St. Paul, etc., R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272; *Forsyth v. Smale*, 7 Biss. (U. S.) 201; *Hardin v. Jordan*, 140 U. S. 371.

**Illinois.** — *Illinois, etc., Canal v. Haven*, 10 Ill. 558; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Houck v. Yates*, 82 Ill. 179; *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388.

**Indiana.** — *Ridgway v. Ludlow*, 58 Ind. 248.

**Iowa.** — *Kraut v. Crawford*, 18 Iowa 549, 87 Am. Dec. 414; *Musser v. Hershey*, 42 Iowa 356.

**Michigan.** — *Clute v. Fisher*, 65 Mich. 48; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403.

**Minnesota.** — *St. Paul, etc., R. Co. v. First Division of St. Paul, etc., R. Co.*, 26 Minn. 32.

**Wisconsin.** — *Boorman v. Sunnuchs*, 42 Wis. 233.

**5. Title May Be Acquired by Adverse Possession.** — *Penobscot Tribe of Indians v. Veazie*, 58 Me. 402.

For the difference between prescription and adverse possession, see the title **PRESCRIPTION**.

**6. Requisites of Title by Adverse Possession.** — *Tracy v. Norwich, etc., R. Co.*, 39 Conn. 382; *Bonewits v. Wygant*, 75 Ind. 41; *People v. Warner*, 116 Mich. 228. See also the title **ADVERSE POSSESSION**, vol. I, p. 787.

**7. Nichols v. Suncook Mfg. Co.**, 34 N. H. 345.



husbandry, residence, or commerce, are not in such possession of the island as to entitle them to exclude others who desire to occupy it for a like purpose, or to justify them in resisting by force others who attempt to land upon it to engage in the same pursuit.<sup>1</sup>

**IV. RIGHTS PERTAINING TO OWNERSHIP OF ISLANDS — 1. Riparian Rights — a. PERTAINING TO ISLANDS IN NAVIGABLE RIVERS.** — In those states where actual navigability is the test of a navigable river the owner of an island in a stream navigable in fact has an absolute title only to ordinary high-water mark. But he has a qualified property in the shore between ordinary high-water and ordinary low-water marks, subject to the public right of navigation.<sup>2</sup>

**b. PERTAINING TO ISLANDS IN GREAT LAKES.** — The ownership by an individual of an island in one of the Great Lakes carries with it no right beyond the water line.<sup>3</sup>

**c. PERTAINING TO ISLANDS IN UNNAVIGABLE RIVERS.** — Where an island in an unnavigable river<sup>4</sup> is owned by one person and the lands on the banks are owned by another or by other persons, the title of the owner of the island extends to the thread or centre of the stream on either side of the island.<sup>5</sup> But in states where the tidal test of navigability prevails the right of the owner of an island in a stream navigable in fact to use the waters thereof is subservient to the public right of navigation.<sup>6</sup>

**Prescriptive Title to Use Water Pertaining to Shore of Island.** — The right to use the water pertaining to the shore of an island in an unnavigable stream may be acquired by prescription; but only by a continuous, open, notorious, and adverse use of such water under a claim of right for more than the prescriptive period. The acquisition of such right cannot be predicated upon the nonuser of the owner, no matter how long continued.<sup>7</sup>

**2. Right to Accretions.** — Land formed by gradual imperceptible accretions to an island belongs to the owner of the island.<sup>8</sup> So if, by such accretion, an

**1. Temporary Occupancy for Hunting or Fishing Gives No Title.** — *People v. Batchelder*, 27 Cal. 70, 85 Am. Dec. 231.

**2. Riparian Rights Pertaining to Islands in Navigable Rivers.** — *Wainwright v. McCullough*, 63 Pa. St. 66; *Hartley v. Crawford*, 81\* Pa. St. 478. And see the title **WATERS AND WATERCOURSES**.

In Pennsylvania it has been held that a grant of an island in a navigable river includes the surface of the island and all beneath the surface as far as low-water mark, subject to the right of the public to use as a highway the water between high-water and low-water marks. *Pennsylvania Coal Co. v. Winchester*, 109 Pa. St. 572, 58 Am. Rep. 740.

But in Iowa it has been held that the owner of an island in a navigable river has not a title to the land between high-water and low-water marks so as to enable him to maintain trespass for taking sand therefrom. The court said: "This opinion need not preclude the idea that the adjacent owner may have some rights between high and low water which are even peculiar to himself, and not common. Nor does it necessarily determine the question of the right to make wharves or structures for the convenience of navigation and commerce, and other questions of a similar nature." *McManus v. Carmichael*, 3 Iowa 57.

**3.** *People v. Warner*, 116 Mich. 228.

**4.** As to what rivers are navigable, see *supra*, this title, *What Waters Are Navigable*, and see the title **NAVIGABLE WATERS**.

**5. Riparian Rights Pertaining to Islands in Unnavigable Rivers** — *Illinois*. — *Stolp v. Hoyt*,

44 Ill. 219; *Griffin v. Johnson*, 161 Ill. 377; *Griffin v. Kirk*, 47 Ill. App. 258.

*Massachusetts*. — *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 547.

*Michigan*. — *Hall v. Alford*, 114 Mich. 165.

*Tennessee*. — *Branham v. Bledsoe Creek Turnpike Co.*, 1 Lea (Tenn.) 706, 27 Am. Rep. 789.

*Vermont*. — *Miller v. Mann*, 55 Vt. 475.

**6. Water Rights Subservient to Public Right of Navigation.** — *Hall v. Alford*, 114 Mich. 165.

But the public right to navigate does not justify persons in anchoring boats in a marsh situated between an island owned by an individual and the thread of the stream, and shooting wild fowl therefrom. *Hall v. Alford*, 114 Mich. 165.

**7.** *Dexter v. Jefferson Paper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 389.

**The Right Acquired by Prescription to Abut a Dam on an Island in a nonnavigable stream** does not carry with it the right to use the water pertaining to the shore of the island. *Dexter v. Jefferson Paper Co.*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 389.

**8. Title to Accretions** — *United States*. — *Saulet v. Shepherd*, 4 Wall. (U. S.) 502.

*California*. — *Fillmore v. Jennings*, 78 Cal. 634.

*Delaware*. — *Morris v. Brooke*, 53 Am. Rep. 215, note, (Del. 1815) 25 Alb. L. J. 90.

*Illinois*. — *Griffin v. Johnson*, 161 Ill. 377; *Griffin v. Kirk*, 47 Ill. App. 258.

*Michigan*. — *People v. Warner*, 116 Mich. 228.

*Missouri*. — *Naylor v. Cox*, 114 Mo. 232; Volume XVII.



island has become enlarged until it has come in contact with another island, or with the mainland, the whole of the alluvion thus formed will belong to the owner of the island to which it has attached, and not to the owner of the other island or the mainland with which it has finally come in contact.<sup>1</sup>

**Riparian Proprietors Cannot Be Excluded from Access to River.** — The right of accretion to an island in a river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors.<sup>2</sup>

**ISSUABLE.** — See note 3.

**ISSUE.** — I. An issue arises when a fact or conclusion of law is maintained by one party and is controverted by the other in the pleadings.<sup>4</sup>

*Buse v. Russell*, 86 Mo. 209; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *Benson v. Morrow*, 61 Mo. 345; *Moore v. Farmer*, (Mo. 1900) 56 S. W. Rep. 497.

See also the title ACCRETION, vol. I, p. 475.

**To a Mere Moving Mass of Alluvial Deposits**, traveling for more than a mile and from one state to another, the law of title by accretion can have no application, for its progress is not imperceptible in a legal sense. *St. Louis v. Rutz*, 138 U. S. 251.

**Accretion in One State to Island in Another State.** — The owner of an island which is situated on the west side of the middle of the Mississippi river, and in the state of Missouri, cannot extend his ownership, by mere accretion, to land situated on the east side of the middle of the river in the state of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land on the east side of the river. *St. Louis v. Rutz*, 138 U. S. 250.

**1. Where Accretions Come in Contact with Another Island or with Mainland.** — *People v. Warner*, 116 Mich. 228; *Benson v. Morrow*, 61 Mo. 345; *Moore v. Farmer*, (Mo. 1900) 56 S. W. Rep. 497.

Where an arm of a river running between an island and the mainland is gradually filled up so as to connect the island with the mainland, the adjacent owners of such island and mainland are entitled to the accretions to their respective lands. But if the arm of the river simply fills up from the bottom, or by deposits within its bed, and accretions do not form on the one side or the other, the centre of the arm as it was before the water deserted it is the boundary between the island and the mainland. *Buse v. Russell*, 86 Mo. 209.

**2.** *St. Louis v. Rutz*, 138 U. S. 250.

**3. Issuable Pleas.** — A statute provided that in suits upon contracts, if the defendant was a resident of the county, *issuable* pleas might be sworn to by the attorney. In construing this statute in *Colquitt v. Mercer*, 44 Ga. 433, the court said: "It is a settled rule in the construction of statutes that technical words are to be understood in their technical sense. The phrase '*issuable* defense' is a technical phrase. In the books upon pleading it means a plea to the merits properly setting forth a legal defense. It is specially contradistinguished from a plea in abatement or any plea going only to delay the case. And by using the words 'contract' and '*issuable* de-

fense' the implication clearly is defense to the contract or to the merits."

In *Welsh v. Blackwell*, 14 N. J. L. 346, it was said: "The stipulation in this case was at least tantamount to a rule or agreement to plead *issuably*; and though a general demurrer may be an *issuable* plea, within the usual terms of such a rule, yet a special demurrer is not, at least if it does not go to the merits of the case."

**4.** *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 404; *Judah v. Vincennes University*, 23 Ind. 283; *Columbus, etc., R. Co. v. Thurstin*, 44 Ohio St. 528. See also *Marshall v. Haney*, 9 Gill (Md.) 258; *Eberhardt v. Sanger*, 51 Wis. 76; *Judah v. Vincennes University*, 23 Ind. 283.

**Issue** is defined to be a single, certain, and material point, arising out of the allegations or pleas of the plaintiff and defendant, consisting regularly of an affirmative and a negative, to be tried by twelve men. *Simonton v. Winter*, 5 Pet. (U. S.) 149; *Wooster v. Clarke*, 2 Ark. 104.

**Matter in Issue.** — The matter in *issue* has been defined as that matter which the plaintiff proceeds upon by his action and the defendant controverts by his pleading. *Smith v. Ontario*, 4 Fed. Rep. 390; *Kitson v. Farwell*, 132 Ill. 329; *King v. Chase*, 15 N. H. 9.

**Issue of Law.** — In *Beem v. Palmer*, 97 Mich. 491, it was held that the *issue* of law referred to in the provision of a statute giving an increased attorney fee for the trial of *issues* of fact and law when tried at the same time or term, was an *issue* framed upon the record.

**Issue in Fact and Issue of Fact.** — In *Bias v. Vickers*, 27 W. Va. 463, it was said: "The words '*issue* in fact' are not necessarily the same as the phrase '*issue* of fact.' An *issue* in fact may be either an *issue* of law raised by a demurrer or of fact raised by a plea; but an *issue* of fact can only be on a plea presenting an *issue* to be decided by a jury or the court."

**Action and Issue.** — Where it was stipulated between parties to an action that a temporary injunction awarded therein should be vacated, that the *issues* should be referred to a referee named, and that if finally determined in favor of the plaintiff certain action should be taken by the defendant, it was held that there was no final determination of the *issues* until the judgment of the court on appeal was rendered. *Lane v. Rochester R. Co.*, 81 Hun (N. Y.) 348.

**Default.** — In *Deane v. Willamette Bridge Co.*, 22 Oregon 176, it was said: "Nor does the



## II. "Issues" is equivalent to "rents and profits" as used in the phrase

amended statute, subdivision 2, § 249, in authorizing the court to act without a jury upon default in the assessment of damages, conflict with the constitutional guaranty by depriving the plaintiff of a trial by jury in a civil case. Upon default, as we have shown, there is made by the pleadings of the parties no *issue* of fact to be tried by a jury." See also the title CONSTITUTIONAL LAW, vol. 6, p. 983.

**Plea of Justification.** — In *Seller v. Jenkins*, 97 Ind. 438, it was said: "In technical strictness, the term *issue*, when used with reference to pleadings, signifies the disputed point or question. Stephen Pl. 25. In a case like this, where there is a plea of justification, averring the truth of the charge, there is but a single *issue*, and to the *issue* thus joined the evidence must be relevant."

**Questions Arising on Motion.** — In *Harper v. Hildreth*, 99 Cal. 270, it was said: "A new trial is defined by section 656 of the Code of Civil Procedure to be 'a re-examination of an *issue* of fact in the same court, after a trial and decision;' and this *issue* of fact is defined by section 590 of the Code of Civil Procedure to be that arising upon the pleadings." And it was held that there was no authority for the new trial of a motion.

In *Foushee v. Pattershall*, 67 N. Car. 454, it was said: "The jurisdiction which is given to this court by the constitution is appellate, upon any matter of law or legal inference. It says that no *issues* of fact shall be tried before it. Art. IV., § 10. In *Heilig v. Stokes*, 63 N. Car. 612, this court held that the phrase '*issues* of fact' was a technical one, and must be understood in its legal, technical sense, as including only such *issues* as were joined on the pleadings, and did not forbid the court to decide questions of fact which arose incidentally upon motions; at least, not in cases where the decision, though final for the purposes of the motion, did not conclude the rights of the parties, as on motions to grant or vacate injunctions."

**Relevant to the Issue.** — In *Churchill v. Ricker*, 109 Mass. 211, it was said: "The practice act provides that when one party to an action files interrogatories, to be answered on oath by the adverse party, for the discovery of material facts and documents, 'the party interrogated may introduce into his answer any matter relevant to the *issue* to which the interrogatory relates,' and 'may require that the whole of the answers upon any one subject-matter inquired of shall be read, if a part of them is read.' Gen. Stat., c. 129, §§ 51, 74. The *issue* and 'subject-matter' thus described is not the particular fact covered by any one or more interrogatories, but the matter put in *issue* by the pleadings and thus inquired of. *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.) 320; *Williams v. Cheney*, 3 Gray (Mass.) 215, 220."

**At Issue.** — By consent of counsel, an answer was filed in which was reserved the right to file an amended answer. Subsequently the defendant gave notice to the plaintiff that he should not file an amended answer. It was held that the parties were then "at *issue*" within the statute of 1874, c. 248, § 1, and the 16th rule of the Superior Court, requiring a party desiring a jury trial to file a notice to

that effect within ten days after the parties are "at *issue*," and that the plaintiff, by not filing a notice within the time required, had waived a right to a trial by jury. *Bailey v. Joy*, 132 Mass. 356.

**Same — Reference.** — In *Manufacturers', etc., Ins. Co. v. Atwood*, 7 Ont. Pr. 13, it was held that the words "at *issue*," in the twenty-fourth section of the Administration of Justice Act of 1873, had a technical meaning, and that when the cause had been referred before *issue* joined an examination of the defendant could not be had under that section.

In *Cerriby v. Wells*, 7 Ont. Pr. 331, it was said: "I do not think that the words 'at *issue*,' used in the statute, were intended to have any technical meaning; they were merely intended to mark the stage of the proceedings at which the order should be granted — *i. e.*, when the question which would be in *issue* at the trial should be known."

**Contract in Issue.** — A statute disqualified as a witness a party having an interest in the contract in *issue*. In *Hollister v. Young*, 42 Vt. 408, it was said: "The words 'contract in *issue*,' as used in the statute, mean the same as 'contract in dispute,' or 'in question,' and relate as well to the substantial issues made by the evidence as to the merely formal issues made by the pleadings." See also *Pember v. Congdon*, 55 Vt. 59.

**Writing.** — In *Avon Mfg. Co. v. Andrews*, 30 Conn. 488, it was said: "The judge seems to have proceeded on the assumption that an *issue* in pleading may be formed partly in writing and partly by parol. But an *issue* is defined by Chitty (1 Chitty Pl. 652) to be 'a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant.' It cannot be formed by a mere parol denial by one party of an allegation of the other."

**Joinder of Issue.** — In *Carl v. Com.*, 9 S. & R. (Pa.) 67, it was said: "Another error assigned is that there is no *issue* joined; this is not true in point of fact. To the replication assigning the breaches there is certainly no formal rejoinder or taking of *issue*; but the word *issue* is entered on the docket at the close of the short minute of the pleadings; and this we have always held to be a memorandum for the clerk to join the *issue* formally, the want of which, under such circumstances, is a clerical slip and amendable."

A statute provided that civil actions in which *issue* had been joined and judgment rendered might be once reviewed. In construing this statute in *Solomons v. Chesley*, 57 N. H. 164, the court said: "By '*issue* joined,' as used in the statute, is meant an *issue* of fact reached by the parties, as distinguished from cases where the defendant does not plead or appear, and thus no *issue* is raised."

It has been held that the phrase "*issue* joined" might embrace various distinct grounds of defense. *Pointer v. Rust*, 7 Humph. (Tenn.) 532.

In *Topliff v. Topliff*, 4 Ohio Cir. Dec. 312, it was held that if the court, a jury being waived, finds the *issues* joined with the defendant, this means all the *issues*, and the plaintiff cannot



"rents, issues, and profits." <sup>1</sup>

III. To issue means, "to send out; to deliver by authority; as, \* \* \* to issue a writ or precept." <sup>2</sup> In a popular sense, a corporation engaged in organization is said to issue stock when it obtains subscriptions for it. <sup>3</sup>

show by parol that the court was in fact governed by one alternative.

**General Issue.** — See GENERAL ISSUE, vol. 14, p. 1001.

**Informal Issue.** — In *Garrard v. Willett*, 4 J. J. Marsh. (Ky.) 629, it was said: "An immaterial *issue* is where that which is materially alleged by the pleadings is not traversed, but an *issue* taken on such a point as will not determine the case; an informal *issue* is when such allegation is not traversed in a proper manner."

**Immaterial Issue.** — See IMMATERIAL, vol. 15, p. 1009.

**Feigned Issue.** — See the title ISSUES TO THE JURY, 11 ENCYC. OF PL. AND PR. 605.

**Abiding the Issue.** (See also the title ABIDING THE EVENT, 1 ENCYC. OF PL. AND PR. 53.) — In *Niagara F. Ins. Co. v. Scammon*, 35 Ill. App. 586, it was said: "The stipulation that the present case should 'abide by the *issue*' of that, meant and means that it should abide 'the ultimate result or end' of No. 17. In no other of the many senses in which the substantive *issue* is used could it be appropriate here. Webster's Dictionary, word *issue*."

1. **Rents and Profits.** — "The word *issues* is an apt term to indicate the rents and profits derived from realty." *Perot's Appeal*, 102 Pa. St. 256. See also PROFIT; RENT.

2. *Burton v. Deleplain*, 25 Mo. App. 376. See also *Folks v. Yost*, 54 Mo. App. 59; *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389.

3. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389.

**Issue or Put in Circulation.** — A *New York* banking act provided that no banking association should *issue* or put in circulation any bills or notes, etc., without complying with certain conditions. In construing this statute in *Curtis v. Leavitt*, 17 Barb. (N. Y.) 341, the court said: "The result is that the terms '*issue* or put in circulation,' when used in reference to banking in this state, have a restricted, special, and almost technical meaning relating exclusively to the moneyed currency of the country, or, in the language of the general banking law, to 'circulating notes in the similitude of bank-notes.'"

**Issue in the Sense of Proceed.** — A statute provided that in all cases where execution should *issue* illegally, the sheriff should return it to the next term of court. In construing this statute the court said: "The word *issue*, in this section, has always, to the best of the knowledge and information of this court, been considered and treated as having the sense of the word 'proceed.' That is the sense which the word is assumed to have by the rule of court which has reference to the affidavit of illegality, for the only case which that rule provides for is a case in which the illegality consists, not in the execution's having *issued* illegally, but in its proceeding illegally though it was *issued* legally. It is the case in which, notwithstanding that a payment has been

made on the execution, the execution is proceeding as if no payment had been made on it." *Robison v. Banks*, 17 Ga. 213.

**Fraud.** — A clerk in the account department of the appellants, by fraudulently representing to them that work had been done on their account by B., induced them to draw checks payable to the order of B. in payment for the pretended work. There was in fact no such person as B. The checks were signed by the appellants and were sent by them to the account department for postage. The clerk obtained possession of the checks, indorsed them in B.'s name, and negotiated them with the respondents, who gave value for them in good faith. The checks were paid to the respondents by the appellants' bankers. The appellants, having discovered the fraud, brought an action against the respondents to recover the amount of the checks as money paid under a mistake of fact. It was held that the checks were *issued* within the meaning of the English Bills of Exchange Act, 1882, § 2. *Clutton v. Attenborough*, (1897) A. C. 90.

**Issue of Shares.** — A statute provided that every share in any company should be deemed and taken to have been *issued* and to be held subject to the payment of the whole amount thereof in cash, unless it should have been otherwise determined by a contract duly made in writing and filed with the registrar at or before the *issue* of such shares. It was held that *issue* as thus used meant putting the shareholder in complete possession of his shares, and was not limited to a mere allotment or delivery of the share certificates. *In re Heaton's Steel, etc., Co.*, 4 Ch. D. 140; *In re Ambrose Lake Tin, etc., Co.*, 8 Ch. D. 635; *In re Tunnel Min. Co.*, 35 Ch. D. 579.

**Bank Bills.** — In *Wray v. Tuskegee Ins. Co.*, 34 Ala. 64, it was said: "The word *issue*, when used in reference to bank bills, is the antithesis of 'circulation.' Chief Justice Marshall, in his decision in the case of *Craig v. Missouri*, 4 Pet. (U. S.) 410, treats 'emit' in that article of the Constitution which prohibits a state 'to emit bills of credit,' as synonymous with *issue*. Then to *issue* bills to circulate as money is to 'emit' them — to send them out."

In *Atty.-Gen. v. Birkbeck*, 12 Q. B. D. 605, Coleridge, C. J., said that *issue* in this connection meant "the delivery of the notes to persons who are willing to receive them in exchange for value in gold, in bills, or otherwise, the person who delivers them being prepared to take them up when they are presented for payment." See also *Baring v. Inland Revenue Com'rs*, (1898) 1 Q. B. 90.

**Bonds.** — In *Grenfell v. Inland Revenue Com'rs*, 1 Ex. D. 249, Pollock, B., said: "If I understand the word *issue*, not giving to it any technical meaning, the *issue* of a bond is its first creation by the company, who give thereby a right of action in favor of some person to whom that bond is given."

**Issue of Process.** — In *Wheeler, etc., Mfg. Co. v. Teetzlaff*, 53 Wis. 216, it was said: "Before



#### IV. As to issue in the sense of descendants, children, etc., see the title ISSUE (DESCENDANTS), *post*.

the Code and prior to the Revised Statutes of New York, an action was held to be commenced by the *issuing* of the process. The process was *issued* or 'sued out' when it was delivered or sent to the proper officer with the *bona fide*, absolute, and unequivocal intention of having it served. *Wiggin v. Orser*, 5 Duer (N. Y.) 118; *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 145; *Ross v. Luther*, 4 Cow. (N. Y.) 161; *Visscher v. Gansevoort*, 18 Johns. (N. Y.) 496; *Lowry v. Lawrence*, 1 Cal. (N. Y.) 69; *Burdick v. Green*, 18 Johns. (N. Y.) 14; *Bronson v. Earl*, 17 Johns. (N. Y.) 63; *Graham's Pr.* (2d ed.) 103, 113, (ed. of 1832) 86, 87. This was true, likewise, of actions in justices' courts, and the same meaning is given to the word *issue*. *Lowry v. Lawrence*, 1 Cal. (N. Y.) 69; *Boyce v. Morgan*, 3 Cal. (N. Y.) 133; *Douglas v. Hoag*, 1 Johns. (N. Y.) 283; *Koon v. Greenman*, 7 Wend. (N. Y.) 124; *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 145; 1 Cowen's Tr. 495."

**Issue Distinguished from Levy.**—See *Green v. Wood*, 7 Q. B. 178, 53 E. C. L. 178.

**Acceptance and Delivery.**—In *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565 it was held that an allegation that "the plaintiff procured to be *issued* to her a policy of insurance" imported a delivery and acceptance of such policy by the plaintiff.

**Delivery.**—A statute provided that the register of deeds should not *issue* a marriage license where one of the parties was under eighteen years of age, until the consent in writing of the person under whose charge the minor was should be delivered to the register. Where the register delivered a license complete in form, with instructions not to give it to the parties until the mother's consent in writing was given, it was held that he had *issued* it. *Coley v. Lewis*, 91 N. Car. 24.

But in *Maggett v. Roberts*, 112 N. Car. 71, it was held that a marriage license was not *issued* until delivered to the person who was to use it, although signed and filled up.

**Same — Tax Bills.**—In *Folks v. Yost*, 54 Mo. App. 55, it was held that to *issue* tax bills is ordinarily understood to imply a delivery to some one.

**Same — County Warrants.**—In *State v. Pierce*, 52 Kan. 528, it was said: "To *issue* county warrants or orders means 'to send out; to deliver; to put forth; to put into circulation; to emit; as, to issue banknotes, bonds, scrip, etc. A county warrant or order is *issued* when made out and placed in the hands of a person authorized to receive it, or actually delivered or taken away. So long as a county warrant or order is not delivered or put into circulation, it is not *issued*.'"

**Same — Executions.** (See also the title EXECUTIONS, vol. II, p. 610.)—In *Burton v. Deleplain*, 25 Mo. App. 376, it was held that a writ of execution lying in the clerk's office, not in the hands of any officer who could enforce it, had not been issued within the statute of limitations. See also the title LIMITATION OF ACTIONS.

In *Pease v. Ritchie*, 132 Ill. 638, it was held that an execution which had not been delivered

to the sheriff had not been *issued*, although made out by the clerk and placed on the files. This was within a statute providing a limitation for judgment liens. See also *Mauch Chunk First Nat. Bank v. Dwight*, 83 Mich. 189; *Mauch Chunk Second Nat. Bank v. Dwight*, 83 Mich. 192.

But in *Mollison v. Eaton*, 16 Minn. 426, it was said: "Section 13, c. 64, Gen. Stat., requires an execution to be 'dated on the day on which it *issued*.' The defendant says that the execution under which plaintiff claims was void, because not dated on the day of its delivery to the sheriff, which is claimed to be the day of its *issue* in the meaning of the statute. We think, however, that the day on which the execution was taken out of the clerk's office was the day 'on which it *issued*' in the intent of the statute."\*

A statute provided that an attachment might be served when a summons was *issued* in an action. It was held that the word *issued* could not be construed to mean the same as delivered to the sheriff. *Mills v. Corbett*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 502.

**Same — Policy of Insurance.**—An applicant for life insurance stated that he had never applied for insurance which had not been *issued*. In fact, the applicant had applied to another company for a policy, which the company had written out and sent to its representative to be delivered to the applicant, but such policy was never delivered, because of a difficulty between the company and its agent. It was held that this did not constitute a breach of warranty, as delivery is no part of *issuance*. *Kansas Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 73.

**Same — Municipal Bonds.**—In holding that where municipal bonds were executed, certified, and registered by the comptroller they were *issued*, though not sold, the court, after commenting upon the cases of *Anthony v. Jasper County*, 101 U. S. 693, and *Young v. Clarendon Tp.*, 132 U. S. 340, said: "The case of *Brownell v. Greenwich*, 114 N. Y. 518, is more nearly in point, but the conclusion of the court is reached in the following guarded language: 'Under the circumstances, we think that the delivery of the bonds to the plaintiff determines the date when the bonds were *issued*.' It is true that no obligation is created upon the bond until it has been sold and delivered; but *issued*, as it is used in the enabling acts, is a relative term. It may mean 'executed' under some circumstances, and 'delivered' under others. The case of *Yesler v. Seattle*, 1 Wash. 322, recognizes two phases of meaning. The court say: 'In financial parlance, the term *issue* has two phases of meaning. "Date of *issue*," when applied to notes, bonds, etc., of a series, usually means the arbitrary date fixed as the beginning of the time for which they run, without reference to the precise time when convenience or state of the market may permit of their sale or delivery; and we see no reason why the Act of March 26, 1890, should not have that interpretation. When the bonds are delivered to the purchaser, they will be *issued* to him, which is the other



meaning of the term.' Our conclusion is that the bonds had been *issued*, within the meaning of the law, when the Act of 1899 went into effect, and the fact that the proposition to *issue* them was not submitted to the property taxpayers does not render them invalid." *Moller v. Galveston*, (Tex. Civ. App. 1900) 57 S. W. Rep. 1120.

In *Anthony v. Jasper County*, 101 U. S. 697, the court referred the date of issuance to the date of execution. See also *Young v. Clarendon Tp.*, 132 U. S. 340, and the title MUNICIPAL SECURITIES.

**Registration.** — Municipal bonds are not duly *issued*, under the laws of *Missouri*, unless they have been duly registered in the office of the

state auditor. *Douglass v. Lincoln County*, 2 McCrary (U. S.) 449.

An English Bills of Sale Act provided that nothing in the act should apply to any debentures *issued* by any mortgage loan or other incorporated company and secured upon the capital stock or goods, chattels, or effects of such company. In *Levy v. Abercorris Slate, etc., Co.*, 37 Ch. D. 264, Chitty, J., in construing this statute, said: "It must be *issued*, but *issued* is not a technical term, it is a mercantile term well understood; *issue* here means the delivery over by the company to the person who has the charge." See also *Edmonds v. Blaina Furnaces Co.*, 36 Ch. D. 215.



## ISSUE (DESCENDANTS).

### I. DEFINITION, 543.

### II. ISSUE CONSTRUED CHILDREN, 545.

1. *In General, Issue Explained by Children; Form of Peculiar Expressions*, 545.
2. *Issue Correlative with Parent*, 547.

### III. WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION, 548.

1. *In Deeds and Marriage Articles*, 548.
2. *In Wills*, 548.
  - a. *General Principle — Issue Compared with Heirs of the Body*, 548.
  - b. *Limitation to A. and His Issue — When No Gift Over*, 549.
  - c. *Limitation to A. for Life, and After His Decease to His Issue — When No Gift Over*, 551.
    - (1) *As to Realty*, 551.
    - (2) *As to Personality*, 554.
    - (3) *Effect of Cy Pres Doctrine*, 554.

### IV. DYING WITHOUT ISSUE — WHEN REFERRED TO PRIOR OBJECTS, 555.

1. *In Default of Such Issue*, 555.
2. *In Default of Issue*, 556.
  - a. *As to Personality*, 556.
  - b. *As to Realty*, 556.

### V. DYING WITHOUT ISSUE — DEFINITE AND INDEFINITE FAILURE OF ISSUE, 558.

1. *General Rule*, 558.
2. *Without Having Issue — Before He Has Any Issue — Without Children — Issue Alive, Surviving, or Who Shall Attain Twenty-one*, 561.
3. *Without Leaving Issue — Without Leaving Issue Behind Him*, 563.
4. *Without Leaving Issue Living at Time of Death*, 564.
5. *Gift Over Expressly Limited to Take Effect On, At, or After Decease of First Taker*, 565.
6. *Effect of the Word "Then,"* 565.
7. *Die Under Twenty-one and Without Issue — Unmarried, or Before Marriage, and Without Issue*, 566.
8. *Gift Over if A. Survives B. and Dies Without Issue, or in Case the Issue Die Under Age*, 568.
9. *Dying Without Issue in Lifetime of Person Living at Testator's Decease, or Before Possession or Period of Distribution*, 568.
10. *Gift Over to Survivors or to Persons "Then Living,"* 568.
11. *Gift Over to Person Named*, 570.
12. *Direction to Pay Money*, 570.
13. *Personal Trust*, 570.
14. *Gift Over for Life*, 571.
15. *Bequest of Perishable Goods — Original Estate Devised Pur Autre Vie*, 571.
16. *Effect of Power of Appointment*, 571.
17. *Failure of Testator's Own Issue*, 571.
18. *Effect of Alternative Limitations — Failure of Issue. Confined to Period of Distribution or Possession*, 572.
19. *Statutory Changes*, 572.

### VI. DYING WITHOUT ISSUE REFERRED TO DEATH IN LIFETIME OF TESTATOR, 573.

### VII. EFFECT OF LIMITATION OVER UPON PRECEDING LIMITATION, 574.

1. *Where Failure of Issue Is Indefinite*, 574.
2. *Where Failure of Issue Is Definite*, 572.



## CROSS-REFERENCES.

See the titles *CHILD—CHILDREN*, vol. 5, p. 1082; *HEIR, HEIRS, AND THE LIKE*, vol. 15, p. 318; *LEGACIES AND DEVISES; PERPETUITIES; REMAINDERS AND EXECUTORY INTERESTS; SHELLEY'S CASE; SUCCESSION; WILLS*.

**I. DEFINITION** — When a Word of Limitation. — “Issue,” when a word of limitation, means lineal descendants indefinitely, and hence heirs of the body.<sup>1</sup>

**When a Word of Purchase.** — The word “issue” in a deed or will, where used as a word of purchase, and where its meaning is not defined by the context, and there is no indication that it was used in any other than its legal sense, comprehends all lineal descendants in being at a specified time.<sup>2</sup> Thus the term

1. 2 Jarman on Wills (5th Am. ed.) \*411; and see *infra*, III. 2. a. *General Principle—Issue Compared with Heirs of the Body*. Den v. Emans, 3 N. J. L. 522; Hertz v. Abrahams, (Ga. 1900) 36 S. E. Rep. 411, following 11 AM. AND ENG. ENCYC. OF LAW, p. 869; Weybright v. Powell, 86 Md. 578, citing 11 AM. AND ENG. ENCYC. OF LAW 869; Ridley v. McPherson, 100 Tenn. 402, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 899, and notes.

2. *Issue as a Word of Purchase Co-extensive with Descendants—England.* — Wythe v. Thurlston, Amb. 555; Bradshaw v. Melling, 19 Beav. 417; Ross v. Ross, 20 Beav. 649; Waldron v. Boulter, 22 Beav. 284; Robinson v. Sykes, 23 Beav. 40; *In re Jones*, 23 Beav. 242; Maddock v. Legg, 25 Beav. 531; *Re Corrie*, 32 Beav. 426; Weldon v. Hoyland, 4 De G. F. & J. 564; Haydon v. Wilshire, 3 T. R. 372; Dodsworth v. Addy, 11 L. J. Ch. 382; Hill v. Nalder, 22 L. J. Ch. 242, 17 Jur. 224; South v. Searle, 2 Jur. N. S. 390, 4 W. R. 470; Donoghue v. Brooke, Ir. 9 Eq. 489; Denis's Trusts, Ir. R. Eq. 86; *In re Corlass*, 1 Ch. D. 460, 45 L. J. Ch. 118, 24 W. R. 204, 33 L. T. N. S. 630; Ralph v. Carrick, 11 Ch. D. 883, 885; *In re Warren*, 26 Ch. D. 208; Hobgen v. Neale, L. R. 11 Eq. 48, 40 L. J. Ch. 36; Martin v. Holgate, L. R. 1 H. L. 175; Morgan v. Thomas, 9 Q. B. D. 646; Hampson v. Brandwood, 1 Madd. 381; Slater v. Dangerfield, 15 M. & W. 263; Bernard v. Mountague, 1 Meriv. 434; Clay v. Pennington, 7 Sim. 370; Cook v. Cook, 2 Vern. 545; Wyth v. Blackman, 1 Ves. 200; Hockley v. Mawley, 1 Ves. Jr. 150; Davenport v. Hanbury, 3 Ves. Jr. 257; Leigh v. Norbury, 13 Ves. Jr. 340, 344; *Re Howard*, 7 Ir. Ch. 344; Hobbs v. Tuthill, (1895) 1 Ir. R. 115; Harrison v. Symons, 14 W. R. 959.

*Canada.* — Lazier v. Robertson, 30 Ont. 529.

*Alabama.* — Edwards v. Bibb, 43 Ala. 666.

*California.* — *Matter of Cavarly*, 119 Cal. 406.

*Compare Matter of Newman*, 75 Cal. 213.

*Maryland.* — McPherson v. Snowden, 19 Md. 197; Goldsborough v. Martin, 41 Md. 488, 501; Backus v. Presbyterian Assoc., 17 Md. 58.

*Massachusetts.* — Holland v. Adams, 3 Gray (Mass.) 188, 193; Houghton v. Kendall, 7 Allen (Mass.) 76; Bigelow v. Morong, 103 Mass. 287; Hall v. Hall, 140 Mass. 267; Jackson v. Jackson, 153 Mass. 374; Hills v. Barnard, 152 Mass. 67; Dexter v. Inches, 147 Mass. 324.

*New Jersey.* — Price v. Sisson, 13 N. J. Eq. 168, 177; Weehawken Ferry Co. v. Sisson, 17 N. J. Eq. 475, 485; Rodman v. Smith, 2 N. J. L. 3; Price v. Sisson, 13 N. J. Eq. 168.

*New York.* — Tier v. Pennell, 1 Edw. (N. Y.) 354; Chwatal v. Schreiner, (Supm. Ct. Spec.

T.) 3 Misc. (N. Y.) 192, affirmed 77 Hun (N. Y.) 611, 148 N. Y. 683; Soper v. Brown, 65 Hun (N. Y.) 157, affirmed 136 N. Y. 244; Bodine v. Brown, 12 N. Y. App. Div. 338; Drake v. Drake, 134 N. Y. 224; New York L. Ins., etc., Co. v. Viele, 161 N. Y. 19. See also *Matter of Cornell*, 5 Dem. (N. Y.) 88. *Compare Taft v. Taft*, 3 Dem. (N. Y.) 86; *Palmer v. Horn*, 84 N. Y. 516; *Murray v. Bronson*, 1 Dem. (N. Y.) 218.

*North Carolina.* — Ward v. Stow, 2 Dev. Eq. (17 N. Car.) 509.

*Ohio.* — Moon v. Hepford, 3 Ohio Dec. 508.

*Pennsylvania.* — Barry's Appeal, (Pa. 1887) 8 Cent. Rep. 131; Miller's Appeal, 52 Pa. St. 113; Kleppner v. Laverty, 70 Pa. St. 70; Robins v. Quinliven, 79 Pa. St. 333; Smith v. Coyle, 83 Pa. St. 242; Wistar v. Scott, 105 Pa. St. 200, 214, 51 Am. Rep. 197.

*Rhode Island.* — Pearce v. Rickard, 18 R. I. 142, citing 11 AM. AND ENG. ENCYC. OF LAW 870; Gammell v. Ernst, 19 R. I. 292; Hartwell v. Tefitt, 19 R. I. 644.

*South Carolina.* — Bradford v. Griffin, 40 S. Car. 468; Ferril v. Talbot, Riley Eq. (S. Car.) 247; Beckam v. De Saussure, 9 Rich. L. (S. Car.) 546; Burleson v. Bowman, 1 Rich. Eq. (S. Car.) 111; Glenn v. Glenn, 21 S. Car. 311.

*Vermont.* — Stanley v. Chandler, 53 Vt. 624. See also *Gaines v. Strong*, 40 Vt. 354.

*In Mendenhall v. Mower*, 16 S. Car. 311, it is said: “The word ‘issue’ is susceptible of three meanings: 1. It may describe a class of persons who are to take as joint-tenants with the parties named. 2. It may be descriptive of a class who are to take at a definite and fixed time as purchasers; and, 3. It may denote an indefinite succession of lineal descendants who are to take by inheritance. Whenever this word is used, either in a deed or will, it must be used in one of these senses.”

**Child En Ventre Sa Mere.** — A devise was made to A. for life, and upon her death to B. “for her absolute use and benefit in case she has issue living at the death of A., but in case she has no issue then living,” then over. At the time of the death of A., who survived the testator, B. was *en ventre*, and the following day was delivered of a living child. It was held that B. took absolutely. *In re Burrows*, (1895) 2 Ch. 497. See also *Roper v. Roper*, L. R. 3 C. P. 32, 35. *Compare Cleveland v. Spilman*, 25 Ind. 95.

**Descendants and Issue Compared.** — See DESCENDANTS, vol. 9, p. 399.

**The Words “Issue Male” have been held to mean descendants that are males.** Beckam



includes children<sup>1</sup> and grandchildren.<sup>2</sup>

**Per Capita or Per Stirpes.** — And under a devise or bequest to the issue of A., all lineal descendants in being at the time when the gift takes effect are entitled *per capita*;<sup>3</sup> unless the gift to the issue is substitutional, when they take *per stirpes*.<sup>4</sup>

**Bastards, Adopted Children, Stepchildren.** — As a general rule, the term "issue" in a deed, will, or statute does not include illegitimates<sup>5</sup> nor adopted children.<sup>6</sup>

*v. De Saussure*, 9 Rich. L. (S. Car.) 546. See also *Wistar v. Scott*, 105 Pa. St. 200, 51 Am. Rep. 197.

**Issue male** means sons, or sons of sons. *Lambert v. Peyton*, 8 H. L. Cas. 1; *Crozier v. Crozier*, 3 Dr. & War. 373.

In *Blackwell v. Hale*, 1 Ir. C. L. 612, issue male was read heirs male.

**Issue Female.** — Issue female means daughters. *Sussex v. Temple*, 1 Ld. Raym. 310.

**Issue Does Not Include a Connection by Marriage.** — *Barnes v. Greenzebach*, 1 Edw. (N. Y.) 41.

**1. Issue Held to Include Children.** — *Bigelow v. Morong*, 103 Mass. 287; *Kimball v. Penhallow*, 60 N. H. 451; *Backus v. Presbyterian Assoc.*, 77 Md. 58; *Kimball v. Penhallow*, 60 N. H. 451; *Pearce v. Rickard*, 18 R. I. 142. See also *Soper v. Brown*, 136 N. Y. 244; *Kingsland v. Rapelye*, 3 Edw. (N. Y.) 1; *Chwatal v. Schrenier*, 143 N. Y. 683. And see cases in preceding note.

**2. Grandchildren.** — *Dalzell v. Welch*, 2 Sim. 320; *Adams v. Law*, 17 How. (U. S.) 417; *Ingraham v. Meade*, 3 Wall. Jr. (C. C.) 32; *Backus v. Presbyterian Assoc.*, 77 Md. 58; *Kimball v. Penhallow*, 60 N. H. 451; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 476; *Soper v. Brown*, 65 Hun (N. Y.) 155, *affirmed* 136 N. Y. 244; *Moon v. Hepford*, 3 Ohio Dec. 503; *Wistar v. Scott*, 105 Pa. St. 214; *Pearce v. Rickard*, 18 R. I. 148; *Glenn v. Glenn*, 21 S. Car. 311. And see cases cited *supra*, this section.

**3. Issue Take Per Capita.** — *Leigh v. Norbury*, 13 Ves. Jr. 340; *Freeman v. Parsley*, 3 Ves. Jr. 421; *Morgan v. Thomas*, 9 Q. B. D. 646; *Denios's Trusts*, Ir. R. Eq. 86; *Ralph v. Carrick*, 11 Ch. D. 883; *Louis v. Louis*, 9 Jur. N. S. 244; *Re Corrie*, 32 Beav. 426; *Price v. Sisson*, 13 N. J. Eq. 178; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 486; *Bodine v. Brown*, 12 N. Y. App. Div. 335, *affirmed* 154 N. Y. 778; *Wistar v. Scott*, 105 Pa. St. 214; *Barry's Appeal*, (Pa. 1887) 18 Cent. Rep. 131; *Pearce v. Rickard*, 18 R. I. 142; *Ridley v. McPherson*, 100 Tenn. 402.

**4. When Issue Take Per Stirpes — Substitutional Gifts.** — *Minchell v. Lee*, 17 Jur. 727. See *Attwood v. Alford*, 14 W. R. 956, L. R. 2 Eq. 479; *Rowland v. Gorsuch*, 2 Cox Ch. 189; *Stevenson v. Abingdon*, 31 Beav. 305; *Horsepool v. Watson*, 3 Ves. Jr. 383; *Davenport v. Hanbury*, 3 Ves. Jr. 258; *In re Yates*, (1891) 3 Ch. 53; *Hobgen v. Neale*, 40 L. J. Ch. 36; *Stonor v. Curwen*, 5 Sim. 264; *In re Jones*, 47 L. J. Ch. 775; *Madison v. Larmon*, 170 Ill. 65; *Hills v. Barnard*, 152 Mass. 67; *Jackson v. Jackson*, 153 Mass. 374; *O'Rourke v. Beard*, 151 Mass. 9; *Hall v. Hall*, 140 Mass. 270; *Lee v. Welch*, 163 Mass. 312; *Dexter v. Inches*, 147 Mass. 324; *Pearce v. Rickard*, 18 R. I. 148.

**A Gift to Issue Is Substitutional** when the share which the issue are to take is by a prior clause expressed to be given to the parent of such

issue; and a gift to issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given by the parent of such issue." *Kindersley, V. C.*, in *Lamphier v. Buck*, 2 Dr. & Sm. 484. See *In re Turner*, 2 Dr. & Sm. 501. See further, as to the distinction, *In re Merricks*, L. R. 1 Eq. 551; *Hurry v. Hurry*, L. R. 10 Eq. 346; *In re Woolrich*, 11 Ch. D. 663, 48 L. J. Ch. 321; *Coulthurst v. Carter*, 15 Beav. 421; *Cort v. Winder*, 1 Coll. Ch. Cas. 320; *Heasman v. Pearse*, L. R. 7 Ch. 660; *Mitchison v. Buckton*, 23 W. R. 480; *Humfrey v. Humfrey*, 8 Jur. N. S. 500, 2 Dr. & Sm. 49; *In re Hutchinson*, 55 L. J. Ch. 574; *Joseph v. Utitz*, 34 N. J. Eq. 1; *Acken v. Osborn*, 45 N. J. Eq. 377; *McPherson v. Snowden*, 19 Md. 197; *Dexter v. Inches*, 147 Mass. 324. See also the title LEGACIES AND DEVISES. And see the cases cited *supra*, this note.

**Issue Take Jointly.** — At common law a gift to the issue of A., *simpliciter*, creates a joint tenancy. *Davenport v. Hanbury*, 3 Ves. Jr. 258.

**Life Estates.** — In *Cook v. Cook*, 2 Vern. 545, it was held that under a devise to the issue of J. S., children and grandchildren took concurrently an estate for life.

**Title of Issue under Statutes to Prevent Lapse.** — See the title LEGACIES AND DEVISES.

**5. Illegitimates Excluded.** — *Cartwright v. Vawdry*, 5 Ves. Jr. 530; *Shearman v. Angel*, *Bailey Eq.* (S. Car.) 351; *Wilkinson v. Adams*, 1 Ves. & B. 422; *Warner v. Warner*, 15 Jur. 141; *Harris v. Lloyd*, T. & R. 310; *Bagley v. Mollard*, 1 Russ. & M. 581; *Flora v. Anderson*, 67 Fed. Rep. 182; *Brower v. Bowers*, 1 Abb. App. Dec. (N. Y.) 226; *U. S. Trust Co. v. Maxwell*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 276; *Gibson v. McNeely*, 11 Ohio St. 131; *Hawkins v. Jones*, 19 Ohio St. 22.

**Illegitimates Included.** — Otherwise where an illegitimate daughter was legitimated by special Act of Assembly and made "capable to inherit and transmit any estate as fully as if born in lawful wedlock," and the gift over was to take effect on death "without an heir." *McGunnigle v. McKee*, 77 Pa. St. 81. See also *Miller's Appeal*, 52 Pa. St. 113.

For a case where illegitimates were held to be included where by statute they were capable of inheriting, see *Drain v. Violet*, 2 Bush (Ky.) 157.

But in *Black v. Cartmell*, 10 B. Mon. (Ky.) 188, it was held that although illegitimate children may inherit from the mother, they are not such "lawful issue" of the mother as will take a remainder in an estate given to her for life, then to her "lawful issue."

The term "issue" may include illegitimates where such appears to have been the intent of the testator. *In re Walker*, (1897) 2 Ch. 241.

**6. Adopted Children.** — *Phillips v. McConica*,



**II. ISSUE CONSTRUED CHILDREN — 1. In General, Issue Explained by Children; Form of Peculiar Expressions.** — As has been seen, the word "issue" as a word of purchase, in the absence of any indication of intention to the contrary, includes in its meaning descendants generally.<sup>1</sup> But when it is apparent from extrinsic circumstances proper to be considered, or from the provisions of the will or other instrument, that the testator or maker intended to use "issue" in the sense of children, its meaning will be so limited.<sup>2</sup> It does not follow, how-

59 Ohio St. 1; New York L. Ins., etc., Co. v. Viele, 22 N. Y. App. Div. 80, *affirmed* 161 N. Y. 11; Stanley v. Chandler, 53 Vt. 624. See also Morrison v. Sessions, 70 Mich. 297; Jenkins v. Jenkins, 64 N. H. 407; Schafer v. Eneu, 54 Pa. St. 304; Keegan v. Geraghty, 101 Ill. 26; Sewall v. Roberts, 115 Mass. 276.

"Bodily Heirs." — In *Clarkson v. Hatton*, 143 Mo. 47, an adopted child was held not to be within the term "bodily heirs."

**Adopted Children Included in the Term "Issue."** — A Massachusetts statute provided that if a husband died intestate, leaving no issue, his widow should take a certain amount of his real estate in fee. It was held that within this statute a child by adoption was issue. *Buckley v. Frasier*, 153 Mass. 527. To the same effect see *Matter of Newman*, 75 Cal. 213; *Johnson's Appeal*, 88 Pa. St. 346; *Warren v. Prescott*, 84 Me. 483. But see *Phillips v. McConica*, 59 Ohio St. 1.

In *Hartwell v. Tefft*, 19 R. I. 644, it was held that the word "issue" includes all descendants, and that as the Rhode Island statutes give an adopted child the status of a descendant, an adopted daughter would take under a bequest to the lawful issue of her adopted parent. See also *Pearce v. Rickard*, 18 R. I. 142.

**Stepchildren.** — "The legal signification and meaning of the term 'issue,' children or grand-children, and every word of the like kind, when used in a will as descriptive of persons who are to take as devisees or legatees, applies to those only who are of the blood of the testator or person named as the parent, and does not comprehend those who may have acquired the name or character of children by marriage." But the rule will yield where there is a clear or manifest intention to the contrary expressed in the will. *Barnes v. Greenzabach*, 1 Edw. (N. Y.) 41; *Hussey v. Berkeley*, 2 Eden 194; *sub nom. Hussey v. Dillon*, Amb. 603. See *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252.

1. See *supra*, Definition.

**2. Issue Construed Children — English.** — In *re* Heath, 23 Beav. 193; *Marshall v. Baker*, 31 Beav. 608; *Farrant v. Nichols*, 9 Beav. 327; *Edwards v. Edwards*, 12 Beav. 97; *Re Meade*, 7 L. R. Ir. 51; *Williams v. Jekyl*, 2 Ves. 681; *Hampson v. Brandwood*, 1 Madd. 381, 388; *Fitzherbert v. Heathcote*, cited in *Bayley v. Morris*, 4 Ves. Jr. 794; *Sussex v. Temple*, 1 Ld. Raym. 310; *Peel v. Catlow*, 9 Sim. 372; *Jennings v. Newman*, 10 Sim. 219; *Goldie v. Greaves*, 14 Sim. 348; *Benn v. Dixon*, 16 Sim. 21; *Bryan v. Mansion*, 5 De G. & Sm. 737; *Barker v. Barker*, 5 De G. & Sm. 753; *Grove v. Marshall*, W. N. (72) 43; *Buckingham v. Sellick*, W. N. (72) 136; *Morgan v. Thomas*, 9 Q. B. D. 643; *Lamphier v. Buck*, 34 L. J. Ch. 650; *In re Hopkins*, 47 L. J. Ch. 672; *In re Smith*,

58 L. J. Ch. 661; *In re Lowman*, (1895) 2 Ch. 348; *Re Mullis*, 27 S. J. 585; *Re Handcock*, 23 L. R. Ir. 34; *Cursham v. Newland*, 4 M. & W. 101.

*Ireland.* — In *re* Denis, Ir. R. 10 Eq. 81.

*United States.* — *Adams v. Law*, 17 How. (U. S.) 417; *Daniel v. Whartenby*, 17 Wall. (U. S.) 643.

*Georgia.* — *Carswell v. Schley*, 56 Ga. 108; *Gaboury v. McGovern*, 74 Ga. 144.

*Illinois.* — *Strain v. Sweeney*, 163 Ill. 603; *Carpenter v. Van Olinder*, 127 Ill. 42; *Butler v. Huestis*, 68 Ill. 594; *Summers v. Smith*, 127 Ill. 645; *Arnold v. Alden*, 173 Ill. 229.

*Indiana.* — *Granger v. Granger*, 147 Ind. 95.

*Maryland.* — *McPherson v. Snowden*, 19 Md. 229; *Thomas v. Safe Deposit, etc., Co.*, 73 Md. 458.

*Massachusetts.* — *Buckley v. Frasier*, 153 Mass. 527.

*New Jersey.* — *Ballentine v. De Camp*, 39 N. J. Eq. 89.

*New York.* — *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Chwatal v. Schreiner*, 148 N. Y. 683; *Palmer v. Dunham*, 125 N. Y. 68.

*North Carolina.* — *Gibson v. Gibson*, 4 Jones L. (49 N. Car.) 425.

*Pennsylvania.* — *Taylor v. Taylor*, 63 Pa. St. 481; *Robins v. Quinliven*, 79 Pa. St. 336; *Shalters v. Ladd*, 141 Pa. St. 349; *Parkhurst v. Harrower*, 142 Pa. St. 435; *Peirce v. Hubbard*, 152 Pa. St. 21; *Nes v. Ramsay*, 155 Pa. St. 632; *O'Rourke v. Sherwin*, 156 Pa. St. 292; *Shearer v. Miller*, 185 Pa. St. 149.

*Rhode Island.* — *Gammell v. Ernst*, 19 R. I. 296.

*South Carolina.* — *Duncan v. Harper*, 4 S. Car. 76.

See also *Moore v. Moore*, 12 B. Mon. (Ky.) 655.

**Issue of the Body Construed Children.** — *Daniel v. Whartenby*, 17 Wall. (U. S.) 640; *Carpenter v. Van Olinder*, 127 Ill. 42.

**Leaving Issue.** — In *Gerhard's Estate*, 160 Pa. St. 255, it is said: "Where the expressions 'leaving issue' or 'leaving bodily issue' have been used by a testator in a bequest, they have universally been held to denote children." See *infra*, V. *Dying Without Issue*. And see LEAVING.

**Issue, in Marriage Settlements, Held to Be Used as Synonym of Children.** — *Re Dixon*, Ir. R. 4 Eq. 12. *Contra*, *Hobbs v. Tuthill*, (1895) 1 R. R. 115.

**Children of Issue.** — A devise was to A. for life, and after her decease to her lawful issue then living, and the children of such of them as should then be dead. It was held that "issue" was used in the sense of children. *Fairfield v. Bushell*, 32 Beav. 161. See *infra*, this section, 2. *Issue Correlative with Parent*.

**Issue or Issues of Her Children.** — A testator directed that certain of his real estate should



ever, that because "issue" is used in the sense of children in one clause, it must necessarily receive the same meaning when used in another clause and surrounded by a different context. In other words, the term may have both the limited meaning of children and the more extensive meaning of descendants generally, in the same instrument, if such appears to have been the intention of the maker;<sup>1</sup> though, of course, there is a strong presumption that the term was used in the same sense throughout.<sup>2</sup>

**Issue Explained by Children.** — When the word "issue" in one part of the limitation is explained by the word "children" in another part, as when there is a gift over in case the "issue or children" die under twenty-one, the inference seems irresistible that the testator intends the word "issue" throughout to denote children.<sup>3</sup>

be sold and the proceeds invested in mortgages, etc., the interest to be regularly paid to his daughter "free from control, liabilities, and debts of her husband, and in case of her death without issue or issues of her children, then reversible to my right consanguinary heirs." It was held that the daughter took a life estate only, the word "issue" being equivalent to children. *Peirce v. Hubbard*, 152 Pa. St. 18.

**Issue of Issue.** — Where a gift is made to issue, and the testator proceeds to speak of "issue" of such former mentioned issue, it is clear that he did not in the first instance use the word "issue" in its most comprehensive sense; and if he has also called the first "parents" of the second, the sense to which the word is limited must be that of children. *Pope v. Pope*, 14 Beav. 593; *Williams v. Teale*, 6 Hare 239.

Nor does it seem to be absolutely essential to such construction that the testator should have referred to the first mentioned "issue" as parents of the second. See *Maule, J.*, in *Doe v. Rucastle*, 8 C. B. 880, 65 E. C. L. 880.

**"Issue or Descendants of Such."** — In *Shearer v. Miller*, 185 Pa. St. 149, it is said: "The phrase 'issue or descendants of such' is significant. If the word 'issue' were used to denote an unbroken and indefinite succession, there would be no sense in adding 'or descendants of such,' for all would be covered by 'issue.' The addition of these words, which may mean heirs (*Huston v. Read*, 32 N. J. Eq. 591, 599), and may mean children (*Schmaunz v. Goss*, 132 Mass. 141, 144), would seem to indicate that Weaver Shearer's issue means simply his children, and that they were regarded as taking, if or when they should take, as a new stock by way of substitution and as purchasers." But see *Barry's Appeal*, (Pa. 1887) 10 Atl. Rep. 126, where in the phrase "issue or descendants" issue was not construed children.

**1. Different Meanings in Same Instrument.** — *Dalzell v. Welck*, 2 Sim. 320; *In re Birks*, (1899) 1 Ch. 703; *Carter v. Bentall*, 2 Beav. 551; *Hedges v. Harpur*, 9 Beav. 479; *Re Corrie*, 32 Beav. 426; *Caulfield v. Maguire*, 2 J. & La. T. 176; *Louis v. Louis*, 9 Jur. N. S. 244; *Head v. Randall*, 2 Y. & C. Ch. 231; *Williams v. Teale*, 6 Hare 239; *Drake v. Drake*, 134 N. Y. 220. See the principle applied to marriage settlements. *In re Warren*, 26 Ch. D. 208, 53 L. J. Ch. 787; *In re Biron*, 1 L. R. Ir. 258. Still less can issue be restricted to children merely to make two different bequests correspond. *Waldron v. Boulter*, 22 Beav. 284.

**2.** See the succeeding note. *Ridgway v. Munkittrick*, 1 Dr. & War. 84, *per* Sugden, L. C.; *Peel v. Catlow*, 9 Sim. 372, 376, 377; *In re Birks*, (1900) 1 Ch. 417, *reversing* (1899) 1 Ch. 703.

**Children Construed Issue.** — See the title CHILDREN, vol. 5, pp. 1085, 1808, 1089. And see *Gale v. Bennet*, Ambl. 681. *Compare* *Swift v. Swift*, 8 Sim. 168; *Orford v. Churchill*, 3 Ves. & B. 68.

**Offspring.** — As to when this word will be construed issue and *vice versa*, see *Lister v. Tidd*, 29 Beav. 618; *Thompson v. Beasley*, 3 Drew. 7; *Seekright v. Billups*, 4 Leigh (Va.) 90; *Allen v. Markle*, 36 Pa. St. 117. See also OFFSPRING.

**3. Issue Explained by Children** — *England.* — *Carter v. Bentall*, 2 Beav. 551; *Bradshaw v. Melling*, 19 Beav. 417; *Baker v. Bayldon*, 31 Beav. 209; *Morgan v. Thomas*, 9 Q. B. D. 643, 646; *Cutsham v. Newland*, 2 Bing. N. Cas. 58, 29 E. C. L. 254; *Walker v. Petchell*, 1 C. B. 652, 50 E. C. L. 652; *Macnamara v. Whitworth*, Coop. & Eld. 241; *Hedges v. Harpur*, 3 De G. & J. 129; *Bryan v. Mansion*, 5 De G. & Sm. 737; *Smith v. Chapman*, 1 Hen. & M. (Va.) 292; *In re Hopkins*, 9 Ch. D. 131; *Bradley v. Cartwright*, L. R. 2 C. P. 511; *In re Wyndham*, L. R. 1 Eq. 290; *Eastwood v. Avison*, 38 L. J. Exch. 74, L. R. 4 Exch. 141; *Morgan v. Thomas*, 9 Q. B. D. 645; *Hampson v. Brandwood*, 1 Madd. 381; *Dalzell v. Welch*, 2 Sim. 320; *Machell v. Weeding*, 8 Sim. 4; *Swift v. Swift*, 8 Sim. 168; *Goldie v. Greaves*, 14 Sim. 348; *Bristow v. Warde*, 2 Ves. Jr. 336; *Horsepool v. Watson*, 3 Ves. Jr. 383; *Orford v. Churchill*, 3 Ves. & B. 59; *Livesay v. Walpole*, 23 W. R. 825; *Mandeville v. Lackey*, 3 Ridg. P. C. 352; *Ryan v. Cowley*, Ll. & G. t. Sugd. 7; *Adams v. Law*, 17 How. (U. S.) 421.

*Alabama.* — *Edwards v. Bibb*, 43 Ala. 666.

*Georgia.* — *O'Byrne v. Feeley*, 61 Ga. 83;

*Gaboury v. McGovern*, 74 Ga. 144.

*Illinois.* — *Arnold v. Alden*, 173 Ill. 229.

*Maryland.* — *Thomas v. Safe Deposit, etc.*,

Co., 73 Md. 451, 459.

*Massachusetts.* — *King v. Savage*, 121 Mass.

303.

*New Jersey.* — *Price v. Sisson*, 13 N. J. Eq. 162, 177.

*New York.* — *Daly v. Greenberg*, 69 Hun (N. Y.) 228.

*Ohio.* — *Moore v. Hepford*, 3 Ohio Dec. 510.

*Pennsylvania.* — *Riehl's Appeal*, 54 Pa. St.

97; *Walker v. Milligan*, 45 Pa. St. 178, 180;

*Lippencott v. Warder*, 14 S. & R. (Pa.) 115;

*Taylor v. Taylor*, 63 Pa. St. 481; *Walker v.*



**2. Issue Correlative with Parent.** — When the word "issue" in a deed or will is used in reference to the parent of that issue, as where the issue are to take the share of the deceased parent, it must mean his children, that is, the word "parent" confines the word "issue" to the children of the taker.<sup>1</sup>

Milligan, 45 Pa. St. 180; Hill v. Hill, 74 Pa. St. 173; Shalters v. Ladd, 141 Pa. St. 349; Parkhurst v. Harrower, 142 Pa. St. 432; Peirce v. Hubbard, 152 Pa. St. 18.

*Rhode Island.* — Arnold v. Brown, 7 R. I. 188, 195.

*South Carolina.* — Burleson v. Bowman, 1 Rich. Eq. (S. Car.) 111; Reeder v. Spearman, 6 Rich. Eq. (S. Car.) 88.

*Tennessee.* — Aydtlett v. Swope, (Tenn. 1875) 17 S. W. Rep. 209.

*Texas.* — Chace v. Gregg, (Tex. Civ. App. 1895) 31 S. W. Rep. 76.

**Marriage Settlements.** — Under the word "issue," in marriage articles, explained by the subsequent use of the word "children," grandchildren cannot take. Adams v. Law, 17 How. (U. S.) 417.

**Issue Male and Female.** — For a case in which "issue male and female" was construed sons and daughters, see Crozier v. Crozier, 3 Dr. & War. 373. See also Murray v. Addenbrook, 4 Russ. 497; Lambert v. Peyton, 8 H. L. Cas. 1. And see *supra*, I. *Definition*, paragraph *When a Word of Purchase*, notes thereto.

**Lawfully Begotten by A.** — These words are not *per se* enough to limit a bequest to the issue of A., to his children. Evans v. Jones, 2 Coll. Ch. Cas. 516; Caulfield v. Maguire, 2 J. & La. T. 176; Haydon v. Wilshire, 3 T. R. 372. Compare Hampson v. Brandwood, 1 Madd. 381. Gordon v. Hope, 3 De G. & Sm. 351.

**1. Issue Correlative with Parents — English.** — Carter v. Bentall, 2 Beav. 551; Edwards v. Edwards, 12 Beav. 97; Bradshaw v. Melling, 19 Beav. 417; Ross v. Ross, 20 Beav. 645, 647; Smith v. Horsfall, 25 Beav. 628; Maynard v. Wright, 26 Beav. 285; Rhodes v. Rhodes, 27 Beav. 413; Tatham v. Vernon, 29 Beav. 604; Baker v. Bayldon, 31 Beav. 209; Stevenson v. Abingdon, 31 Beav. 305; Fairfield v. Bushell, 32 Beav. 158; Buckle v. Fawcett, 4 Hare 536; Heasman v. Pearce, L. R. 7 Ch. 282; *In re* Smith, 7 Ch. D. 665; Ralph v. Carrick, 11 Ch. D. 873; *In re* Orton, L. R. 3 Eq. 375; Bryden v. Willett, L. R. 7 Eq. 472; Martin v. Holgate, L. R. 1 H. L. 175; Pruen v. Osborne, 11 Sim. 132; Reeves v. Brymer, 4 Ves. Jr. 692; Sibley v. Perry, 7 Ves. Jr. 522; Ridgway v. Munkittrick, 1 Dr. & War. 84; Crozier v. Crozier, 3 Dr. & War. 386; Anderson v. St. Vincent, 4 W. R. 304; Martin v. Holgate, L. R. 1 H. L. 184; Barraclough v. Shillio, 53 L. J. Ch. 841.

*United States.* — Adams v. Law, 17 How. (U. S.) 417; De Vaughn v. Hutchinson, 165 U. S. 566.

*Connecticut.* — Austin v. Bristol, 40 Conn. 120.

*Georgia.* — Doe v. Roe, 30 Ga. 453.

*Illinois.* — Madison v. Larmon, 170 Ill. 65; Arnold v. Alden, 173 Ill. 239, *quoting* 11 AM. AND ENG. ENCYC. OF LAW 875.

*Maryland.* — Shreve v. Shreve, 43 Md. 382.

*Massachusetts.* — Jackson v. Jackson, 153 Mass. 377; King v. Savage, 121 Mass. 303; Hills v. Barnard, 152 Mass. 72.

*New York.* — Barstow v. Goodwin, 2 Bradf.

(N. Y.) 416; Murray v. Bronson, 1 Dem. (N. Y.) 217; Mowatt v. Carow, 7 Paige (N. Y.) 328; Palmer v. Horn, 84 N. Y. 516.

*Pennsylvania.* — Taylor v. Taylor, 63 Pa. St. 481; Parkhurst v. Harrower, 142 Pa. St. 432; Nes v. Ramsay, 155 Pa. St. 628; O'Rourke v. Sherwin, 156 Pa. St. 292.

*Rhode Island.* — Gammell v. Ernst, 19 R. I. 296, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 875.

*South Carolina.* — Brown v. McCall, 44 S. Car. 523, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 875.

**Case of Sibley v. Perry.** — In Sibley v. Perry, 7 Ves. Jr. 522, on which the principle is founded, a testator having bequeathed a sum of stock to A and B, with a direction that if either died before him, her lawful issue were to take the share to which their parents would have been entitled, and another sum of stock "to C and his lawful issue, if he, the parent, shall then be dead," bequeathed £140 stock to each of the lawful issue of D, E, and F, who should be alive at the time of his death. D, E, and F were dead at the time the will was made. Each of their descendants living at the testator's death claimed the sum of £140. Lord Eldon held that the occurrence of the word "parent" in the former bequests showed that the issue there spoken of were children only, and the word being thus once used in a restricted sense, should receive the same interpretation in the subsequent bequests.

**Exception — Ross v. Ross.** — In Ross v. Ross, 20 Beav. 645, the testator bequeathed personality upon trust for his niece C. R. for life, with remainder to the children of C. R. who should be living at her decease, equally, and the "issue, if any, then living, of such of her children as may have died in her lifetime, each of her surviving children to take an equal share, and the issue, if more than one, of such of her children as may have died in her lifetime to take equally amongst them the part or share which their parent would have been entitled to if he or she had survived the said C. R., and if but one, then to take a child's share." There was a gift over to residue on death of all the testator's nieces without leaving a child or issue. One of C. R.'s children predeceased her, leaving no children, but only a grandchild, who survived C. R. It was held that such grandchild took a child's share with C. R.'s children. Assuming that upon the death of C. R. there was only a great-grandchild of C. R. alive, that great-grandchild, according to the construction contended for, could not take. See also Pope v. Pope, 14 Beav. 591, 594; Amson v. Harris, 19 Beav. 270; Robinson v. Sykes, 23 Beav. 40; Rhodes v. Rhodes, 27 Beav. 413; King v. Savage, 121 Mass. 303.

**Sibley v. Perry Not Followed.** — In Jackson v. Jackson, 153 Mass. 374, it is said: "We think that, as a matter of verbal construction, it would be as easy and natural to say that, where the words 'parents' and 'issue' are used in connection with each other, the word



III. WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION — 1. In Deeds and Marriage Articles. — As in a deed no word except "heirs" will pass an estate of inheritance, the word "issue," when used in a deed or marriage settlement, is necessarily a word of purchase; and accordingly under a limitation of real estate to issue, the issue take only an estate for life,<sup>1</sup> and if there is a limitation to A. and his issue, there being no issue alive at the date of the deed, A. takes a life estate and his issue nothing.<sup>2</sup>

2. In Wills — a. GENERAL PRINCIPLE — ISSUE COMPARED WITH HEIRS OF THE BODY. — The word "issue" in a will *prima facie* means the same thing as "heirs of the body," and in general is to be construed as a word of limitation.<sup>3</sup>

'parents' means ancestors, as that the word 'issue' means children, and in the construction of any instrument it is always necessary to look beyond the literal meaning of words." To the same effect see *U. S. Trust Co. v. Tobias*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 392.

Many Cases Have Criticised the rule in *Sibley v. Perry*. See *Ralph v. Carrick*, 11 Ch. D. 873; *Pruen v. Osborne*, 11 Sim. 132; *Ross v. Ross*, 20 Beav. 645; *Robinson v. Sykes*, 23 Beav. 40; *King v. Savage*, 121 Mass. 303; *Hills v. Barnard*, 152 Mass. 67; *Jackson v. Jackson*, 153 Mass. 374; *Dexter v. Inches*, 147 Mass. 324; *Drake v. Drake*, 134 N. Y. 225; *Parkhurst v. Harrower*, 142 Pa. St. 432.

1. Issue a Word of Purchase in Deed — *England*. — *Bayley v. Morris*, 4 Ves. Jr. 794; *Bagshaw v. Spencer*, 2 Atk. 582; *Doe v. Collis*, 4 T. R. 299; *Bowles's Case*, 11 Coke 79 b; *Tud. L. C. Real Prop.* 37; *Rochfort v. Fitzmaurice*, 2 Dr. & War. 17; *Williams v. Jekyl*, 2 Ves. 681.

*Ireland*. — *Barron v. Barron*, 8 Ir. Ch. 366.

*Indiana*. — *McIlhinny v. McIlhinny*, 137 Ind. 411.

*Maryland*. — *Horne v. Lyeth*, 4 Har. & J. (Md.) 439; *Chelton v. Henderson*, 9 Gill (Md.) 432; *McPherson v. Snowden*, 19 Md. 197; *Thomas v. Higgins*, 47 Md. 439.

*New Jersey*. — *Price v. Sisson*, 13 N. J. Eq. 168.

*Pennsylvania*. — *Powell v. Board of Domestic Missions*, 49 Pa. St. 53; *Taylor v. Taylor*, 63 Pa. St. 481.

*Tennessee*. — *Ridley v. McPherson*, 100 Tenn. 405, following 11 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 876.

*Texas*. — *Hancock v. Butler*, 21 Tex. 804.

2. Limitation to A. and His Issue. — *Makepeace v. Fletcher*, 2 Comyns 457; *Wheeler v. Duke*, 1 Crompt. & M. 210; *Dawson v. Dawson*, 13 Ir. L. 472. See also *Rochfort v. Fitzmaurice*, 2 Dr. & War. 17; *Barron v. Barron*, 8 Ir. Ch. 366; *Fitzherbert v. Heathcote*, cited in *Bayley v. Morris*, 4 Ves. Jr. 794.

In *Bradford v. Griffin*, 40 S. Car. 468, it was held that a deed to A. and after his death to the issue of his body did not convey to A. a fee tail, but a life estate only with a life estate in his issue after his death.

If there are issue at the date of the deed, such issue take *per capita* and jointly. *Leigh v. Norbury*, 13 Ves. Jr. 344; *Davenport v. Hanbury*, 3 Ves. Jr. 257.

Heirs of the Body and Issue. — The grantor conveyed certain lands to A and B respectively during the natural life of each of them, remainder to the heirs of the body of the said A

and B respectively, and in default of such issue living at the time of the death of the said A and B respectively, over. It was held that "issue" here must be given the same meaning as heirs of the body. *Thomas v. Higgins*, 47 Md. 451. See also *Simpers v. Simpers*, 15 Md. 187.

3. Prima Facie a Word of Limitation — *England*. — *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Doe v. Rucastle*, 8 C. B. 876, 65 E. C. L. 876; *Allgood v. Blake*, L. R. 7 Exch. 339; *Roe v. Grew*, 2 Wils. C. Pl. 322, *Wilmot* 272; *Bradley v. Cartwright*, L. R. 2 C. P. 511; *Whitelaw v. Whitelaw*, 5 L. R. Ir. 120; *Sandes v. Cooke*, 21 L. R. Ir. 445; *Bowen v. Lewis*, 9 App. Cas. 890; *Smith v. Chapman*, 1 Hen. & M. (Va.) 291; *Doe v. Applin*, 4 T. R. 82; *Slater v. Dangerfield*, 15 M. & W. 263; *Woodhouse v. Herrick*, 1 Kay & J. 352.

*Canada*. — *King v. Evans*, 24 Can. Sup. Ct. 356.

*Alabama*. — *Ewing v. Standefer*, 18 Ala. 403.

*Georgia*. — *O'Byrne v. Feeley*, 61 Ga. 77;

*Gaboury v. McGovern*, 74 Ga. 144.

*Indiana*. — *Granger v. Granger*, 147 Ind. 95; *Allen v. Craft*, 109 Ind. 476.

*Maryland*. — *Thomas v. Higgins*, 47 Md. 439; *Chelton v. Henderson*, 9 Gill (Md.) 439.

*Massachusetts*. — *Holland v. Adams*, 3 Gray (Mass.) 103; *King v. Savage*, 121 Mass. 303. *Hall v. Hall*, 140 Mass. 269.

*New Jersey*. — *Rodman v. Smith*, 2 N. J. L. 5; *Den v. Emans*, 3 N. J. L. 526; *Den v. Howell*, 20 N. J. L. 418.

*New York*. — *Cochrane v. Kip*, 19 N. Y. App. Div. 272, affirmed 157 N. Y. 716; *Kingsland v. Rapelye*, 3 Edw. (N. Y.) 1; *Drake v. Drake*, 134 N. Y. 225.

*Ohio*. — *Harkness v. Corning*, 24 Ohio St. 425.

*Pennsylvania*. — *Guthrie's Appeal*, 37 Pa. St. 9; *Angle v. Brosius*, 43 Pa. St. 189; *Taylor v. Taylor*, 63 Pa. St. 481; *Ogden's Appeal*, 70 Pa. St. 501; *Kleppner v. Laverty*, 70 Pa. St. 72; *Middleswarth v. Blackmore*, 74 Pa. St. 414; *Robins v. Quinliven*, 79 Pa. St. 333; *Wistar v. Scott*, 105 Pa. St. 200; *Carroll v. Burns*, 108 Pa. St. 386; *Reinoehl v. Shirk*, 119 Pa. St. 108; *Parkhurst v. Harrower*, 142 Pa. St. 432; *Peirce v. Hubbard*, 152 Pa. St. 21; *Shalters v. Ladd*, 141 Pa. St. 349; *Barry's Appeal*, (Pa. 1887) 10 Atl. Rep. 126; *Nes v. Ramsay*, 155 Pa. St. 628; *Robinson's Estate*, 149 Pa. St. 418; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399.

*South Carolina*. — *Bethea v. Bethea*, 48 S. Car. 440.

*Virginia*. — *Birthright v. Hall*, 3 Munf. (Va.) 544; *Tinsley v. Jones*, 13 Gratt. (Va.) 292.



**Word of Purchase.** — But while primarily a word of limitation, it is readily construed as a word of purchase to effectuate the intention of the testator, and in this respect it is more flexible than the more technical term "heirs of the body."<sup>1</sup>

*b. LIMITATION TO A. AND HIS ISSUE — WHEN NO GIFT OVER.* — A devise to A. and his issue will, in the absence of a context clearly showing a different intent, give to A. an estate tail, there being no issue *in esse* at the time when the gift is to take effect.<sup>2</sup> A bequest of personalty to one and his issue carries

**1. A Word of Purchase — England.** — Wythe *v. Thurlston*, Amb. 555; Bradshaw *v. Melling*, 19 Beav. 417; Ross *v. Ross*, 20 Beav. 645; Haydon *v. Wilshire*, 3 T. R. 372; Doe *v. Collis*, 4 T. R. 294; Matter of Wynch, 5 De G. M. & G. 188, 27 Eng. L. & Eq. 375; Bradley *v. Cartwright*, L. R. 2 C. P. 511; Cook *v. Cook*, 2 Vern. 545; Davenport *v. Hanbury*, 3 Ves. Jr. 257; Freeman *v. Parsley*, 3 Ves. Jr. 421; Hockley *v. Mawbey*, 1 Ves. Jr. 150; Leigh *v. Norbury*, 13 Ves. Jr. 340; Lees *v. Mosley*, 1 Y. & C. Exch. 606; Ryan *v. Cowley*, Ll. & G. t. Sugd. 7; Kavanagh *v. Morland*, Kay 24, 1 Kay & J. 362. Compare Doe *v. Goldsmith*, 7 Taunt. 209, 2 Marsh. 517, 2 E. C. L. 209; Mandeville *v. Lackey*, 3 Ridg. P. C. 352; Ginger *v. White*, Willes 351.

*California.* — McDonnell's Estate, Myr. Prob. (Cal.) 94.

*Georgia.* — O'Byrne *v. Feeley*, 61 Ga. 77.

*Indiana.* — Allen *v. Craft*, 109 Ind. 482; McIllinny *v. McIllinny*, 137 Ind. 411.

*Kentucky.* — Moore *v. Howe*, 4 T. B. Mon. (Ky.) 205.

*Maryland.* — Chelton *v. Henderson*, 9 Gill (Md.) 436; Horne *v. Lyeth*, 4 Har. & J. (Md.) 439; Lyles *v. Digges*, 6 Har. & J. (Md.) 364, 14 Am. Dec. 281; Ware *v. Richardson*, 3 Md. 545; McPherson *v. Snowden*, 19 Md. 197, 228.

*Massachusetts.* — King *v. Savage*, 121 Mass. 393.

*New York.* — Palmer *v. Horn*, 84 N. Y. 519.

*Pennsylvania.* — Kleppner *v. Laverty*, 70 Pa. St. 72; Angle *v. Brosius*, 43 Pa. St. 187; Powell *v. Board of Domestic Missions*, 49 Pa. St. 53; Taylor *v. Taylor*, 63 Pa. St. 481; Yarnall's Appeal, 70 Pa. St. 335; Middleswarth *v. Blackmore*, 74 Pa. St. 414; Robins *v. Quinliven*, 79 Pa. St. 333; Wistar *v. Scott*, 105 Pa. St. 200, 215; Carroll *v. Burns*, 108 Pa. St. 386; Reinoehl *v. Shirk*, 119 Pa. St. 108; Everitt's Estate, 195 Pa. St. 455; Parkhurst *v. Harrower*, 142 Pa. St. 432; O'Rourke *v. Sherwin*, 156 Pa. St. 285; Nes *v. Ramsay*, 155 Pa. St. 628.

*South Carolina.* — Mangum *v. Piester*, 16 S. Car. 324; Mims *v. Machlin*, 53 S. Car. 6.

*Tennessee.* — Aydtlett *v. Swope*, (Tenn. 1875) 17 S. W. Rep. 208; Ridley *v. McPherson*, (Tenn. 1897) 43 S. W. Rep. 772, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 877.

*Virginia.* — Atkinson *v. McCormick*, 76 Va. 799.

See also *supra*, this title, *Issue Construed Children*. And see the title HEIRS, vol. 15, p. 318.

In some cases the word is said to be ambiguous. Orford *v. Churchill*, 3 Ves. & B. 67; Lyon *v. Mitchell*, 1 Madd. 473; Tate *v. Clarke*, 1 Beav. 105; Doe *v. Gallini*, 3 Ad. & El. 340, 30 E. C. L. 112.

Compare the limitations in Doe *v. Burnsall*,

6 T. R. 30; Lees *v. Moseley*, 1 Y. & C. Exch. 589; Merest *v. James*, 1 Brod. & B. 484, 5 E. C. L. 156, with those in Doe *v. Goff*, 11 East 668, so severely criticised by both Lord Eldon and Lord Redesdale in Jesson *v. Wright*, 2 Bligh 1.

**More Flexible than Heirs of the Body.** — In Daniel *v. Whartenby*, 17 Wall. (U. S.) 639, the court said: "The words 'issue of his body' are more flexible than the words 'heirs of his body,' and the courts more readily interpret the former as a synonym of children and a mere *descriptio personarum*, than the latter." See also Strain *v. Sweeny*, 163 Ill. 603; Carpenter *v. Van Olinder*, 127 Ill. 42; Sewall *v. Roberts*, 115 Mass. 277; Taylor *v. Taylor*, 63 Pa. St. 483. And see the title HEIRS, vol. 15, p. 320.

**2. Estate Tail — England.** — Wylde's Case, 6 Coke 16; *In re Buckmaster*, 47 L. T. N. S. 514; Roddy *v. Fitzgerald*, 6 H. L. Cas. 823; Bowen *v. Lewis*, 9 App. Cas. 890; Sandes *v. Cooke*, 21 L. R. Ir. 445; Woodhouse *v. Herrick*, 1 Kay & J. 352; Whitelaw *v. Whitelaw*, 5 L. R. Ir. 120; Hockley *v. Mawbey*, 1 Ves. Jr. 149; Seale *v. Barter*, 2 B. & P. 485; Davie *v. Stevens*, 1 Dougl. 321; Broadhurst *v. Morris*, 2 B. & Ad. 1, 22 E. C. L. 11; Cook *v. Cook*, 2 Vern. 545; King *v. Melling*, 1 Vent. 229; Tate *v. Clarke*, 1 Beav. 100; Lyon *v. Mitchell*, 1 Madd. 473.

*United States.* — Parkman *v. Bowdoin*, 1 Sumn. (U. S.) 359.

*Alabama.* — McCroan *v. Pope*, 17 Ala. 612; Mimmo *v. Stewart*, 21 Ala. 682; Vanzant *v. Morris*, 25 Ala. 285.

*Georgia.* — Miller *v. Hurt*, 12 Ga. 359; Jackson *v. Coggin*, 29 Ga. 403; Hoyle *v. Jones*, 35 Ga. 40.

*Indiana.* — Biggs *v. McCarty*, 86 Ind. 352, 357.

*Iowa.* — Pierson *v. Lane*, 60 Iowa 60.

*Massachusetts.* — Wheatland *v. Dodge*, 10 Met. (Mass.) 502; Nightingale *v. Burrell*, 15 Pick. (Mass.) 104.

*New York.* — Rogers *v. Rogers*, 3 Wend. (N. Y.) 503; Chrystie *v. Phyfe*, 19 N. Y. 344, 354.

*Pennsylvania.* — Guthrie's Appeal, 37 Pa. St. 9, 21; Haldeman *v. Haldeman*, 40 Pa. St. 29; Angle *v. Brosius*, 43 Pa. St. 187.

*South Carolina.* — Shearman *v. Angel*, Bailey Eq. (S. Car.) 351.

*Virginia.* — Moon *v. Stone*, 19 Gratt. (Va.) 130; Atkinson *v. McCormick*, 76 Va. 791.

See also the titles CHILD — CHILDREN, vol. 5, p. 1092; SHELLEY'S CASE.

**Lend.** — A testator provided, "For the natural love and affection I entertain for my son \* \* \* I do at my death lend to him and the lawful issues of his body a tract of land." It was held that this created an estate tail. Wynne *v. Wynne*, 9 Heisk. (Tenn.) 308.



an absolute interest where there are no issue *in esse*.<sup>1</sup>

**Issue in Esse.** — Under a devise or bequest to A. and his issue, the issue take concurrently with A. as purchasers if there are issue *in esse*.<sup>2</sup> That a gift to A. and his issue, or a gift to A. and his children, confers a joint interest, has never been doubted, where the word used was "children," whether the gift is of realty or personalty.<sup>3</sup> It has, however, been maintained that in a gift to A. and his issue, the word "issue" is always a word of limitation, whether

**Devise to A. in Trust for the Issue of His Body.** — A devise to A. "in trust for the issue of his body, \* \* \* to have and to hold in trust for the issue of his body," has been held to pass the fee to the issue. *Mims v. Machlin*, 53 S. Car. 6.

**Vested Interest.** — A testator devised and bequeathed all his real and personal estate to B. for life, and after her decease to P. for life subject to a forfeiture in a certain event, and the will proceeded: "And from and after the decease of the said P., \* \* \* I give and bequeath the property so given or belonging to her the said P. for life to my ward E., \* \* \* and to any lawful issue she may have, such issue taking a vested interest in my said property upon attaining the age of twenty-one years." The testator died possessed of real and personal estate. E. survived the testator and died intestate without having been married. It was held (1) that the direction that the issue should take vested interests was inconsistent with the use of the word "issue" as a term of limitation, and that consequently E.'s issue took as purchaser, and that her heir-at-law was entitled to the real estate; (2) that as to the personal estate E. and her issue (had she had any) would have taken concurrently as joint tenants, and that consequently her legal personal representative was entitled to the personalty. *Re Wilmot*, 76 L. T. N. S. 415.

**Executory Trusts.** — The rule which construes "issue" as a word of limitation in devises and executed trusts does not apply so strictly to a direction to settle lands by way of executory trusts. *Meure v. Meure*, 2 Atk. 265; *Glenorchy v. Bosville*, Cas. 4. Talb. 3; *Parker v. Bolton*, 5 L. J. Ch. 93; *Hadwen v. Hadwen*, 23 Beav. 551. See observations of Pearson, J., in *In re Warren*, 26 Ch. D. 217. Compare *Christian, L. J.*, in *Re Dixon*, Ir. R. 4 Eq. 12; *Smith Ex. Int.*, § 506. See also the titles MARRIAGE SETTLEMENTS; REMAINDERS AND EXECUTORY INTERESTS.

**Child en Ventre Sa Mere.** — The fact that there is, at the time of the devise, a child of the devisee *en ventre sa mere*, does not take the case out of the rule. *Roper v. Roper*, L. R. 3 C. P. 32; *In re Barrows*, (1895) 2 Ch. 497. But see *Cleveland v. Spilman*, 25 Ind. 95.

**1. Personalty.** — Prior on Issue, § 43; *Wms. on Exrs.*, \*1110; *Houston v. Ives*, 2 Eden 216; *Gawler v. Cadby*, Jac. 346; *Chandess v. Price*, 3 Ves. Jr. 99; *Donn v. Penny*, 19 Ves. Jr. 547; *Crawford v. Trotter*, 4 Madd. 361; *Parkin v. Knight*, 15 Sim. 83; *Martin v. Swannell*, 2 Beav. 249; *Beaver v. Nowell*, 25 Beav. 551; *Stokes v. Heron*, 12 Cl. & F. 161; *Lyon v. Mitchell*, 1 Madd. 467; *Gibbs v. Tait*, 8 Sim. 132; *Turner v. Capel*, 9 Sim. 158; *Butter v. Ommaney*, 4 Russ. 70; *Pearson v. Stephen*, 2 Dow. & Cl. 328, 5 Bligh N. S. 203; *Tate v.*

*Clarke*, 1 Beav. 100; *Dick v. Lacy*, 8 Beav. 214; *Hedges v. Harpur*, 9 Beav. 479, 3 De G. & J. 129; *Prentice v. Brooke*, 5 L. R. Ir. 435, 453; *Re Stanhope*, 27 Beav. 201; *Vanzant v. Morris*, 25 Ala. 285; *Merryman v. Merryman*, 5 Munf. (Va.) 440; *Moon v. Stone*, 19 Gratt. (Va.) 130; *Henry v. Archer*, Bailey Eq. (S. Car.) 535, 545. See *Ferril v. Talbot*, Riley Eq. (S. Car.) 247. Compare *Myers's Appeal*, 49 Pa. St. 111.

**Limitation to A. and His Issue — Absolute Estate in A. Where Real Property Is Directed to Be Sold and Divided.** — *Bonnell v. Bonnell*, 47 N. J. Eq. 544.

**Ex Parte Wynch.** — The position in the text is not affected by *Matter of Wynch*, 5 De G. M. & G. 188, approving *Knight v. Ellis*, 2 Bro. C. C. 570, unless there is something to show that the word "issue" was intended as a word of purchase, or to confine the first taker to an estate for life. See *infra*, this section, subdiv. *As to Personalty*. Still less can it be considered inconsistent with *Audsley v. Horn*, 1 De G. F. & J. 226, since in that case the bequest was to A. and her children. 1 Y. & C. Exch. 589. Compare *Myers's Appeal*, 49 Pa. St. 111; *Smith's Appeal*, 23 Pa. St. 9; *Potts's Appeal*, 30 Pa. St. 168. See also *Lord Chelmsford in Williams v. Lewis*, 6 H. L. Cas. \*1013; *Prentice v. Brooke*, 5 L. R. Ir. 435, 453.

**2. Issue in Esse.** — *Wylde's Case*, 6 Coke 16; *Clay v. Pennington*, 7 Sim. 370. See *Mimmo v. Stewart*, 21 Ala. 682; *Vanzant v. Morris*, 25 Ala. 285; *Jackson v. Coggin*, 29 Ga. 403; *Hoyle v. Jones*, 35 Ga. 40; *Cleveland v. Spilman*, 25 Ind. 95; *Biggs v. McCarty*, 86 Ind. 352, 357; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Hathaway v. Leary*, 2 Jones Eq. (55 N. Car.) 264; *Shearman v. Angel*, Bailey Eq. (S. Car.) 351; *Johnson v. Johnson*, McMull. Eq. (S. Car.) 345.

**3. Children — England.** — *Alcock v. Ellen*, Freem. Ch. 186; *Buffar v. Bradford*, 2 Atk. 220; *De Witte v. De Witte*, 11 Sim. 41; *Paine v. Wagner*, 12 Sim. 184; *Beales v. Crisford*, 13 Sim. 592; *Lord Cottenham in Crockett v. Crockett*, 2 Phil. 555; *Gordon v. Whieldon*, 11 Beav. 170; *Atcheson v. Atcheson*, 11 Beav. 485; *Mason v. Clarke*, 17 Beav. 130; *Cunningham v. Murray*, 1 De G. & Sm. 366; *Combe v. Hughes*, L. R. 14 Eq. 415; *Newitt v. Newell*, L. R. 12 Eq. 432, L. R. 7 Ch. 253; *Roper v. Roper*, L. R. 3 C. P. 35.

*Alabama.* — *Vanzant v. Morris*, 25 Ala. 285. *Georgia.* — *Jackson v. Coggin*, 29 Ga. 403; *Hoyle v. Jones*, 35 Ga. 40.

*Indiana.* — *Biggs v. McCarty*, 86 Ind. 352, 357.

*Massachusetts.* — *Parker v. Converse*, 5 Gray (Mass.) 336, 339; *Annabell v. Patch*, 3 Pick. (Mass.) 360.

*North Carolina.* — *Hathaway v. Leary*, 2 Jones Eq. (55 N. Car.) 264.



there be any issue or not, and therefore under any circumstances A. takes an estate tail in realty and an absolute interest in personalty.<sup>1</sup>

**Words of Distribution and Limitation.** — If there are issue *in esse* at the time the will takes effect, superadded words of limitation and distribution annexed to the interest of both parents and issue merely denote the quantity and quality of the estate devised.<sup>2</sup> Superadded words of distribution and limitation annexed to the interest of the issue alone, there being issue *in esse*, confer upon the ancestor an estate for life with remainder to the issue.<sup>3</sup> If there are no issue, neither words of distribution<sup>4</sup> nor of limitation annexed to the interest of the issue will prevent an estate tail vesting in the ancestor,<sup>5</sup> but words of distribution and limitation together may have such effect.<sup>6</sup>

**c. LIMITATION TO A. FOR LIFE, AND AFTER HIS DECEASE TO HIS ISSUE — WHEN NO GIFT OVER — (1) As to Realty.** — Where an estate is limited

*South Carolina.* — *Shearman v. Angel*, Bailey Eq. (S. Car.) 351; *Johnson v. Johnson*, McMull. Eq. (S. Car.) 345.

But see *Audsley v. Horn*, 1 De G. F. & J. 226.

It is otherwise, of course, where the word "children" has been explained by a preceding limitation to the testator's "living heirs." *McKee's Appeal*, 104 Pa. St. 571.

**1. Issue Held a Word of Limitation.** — 2 Jarman on Wills (5th Am. ed.) 411; Lord Hardwicke in *Lamley v. Blower*, 3 Atk. 397. See also *Harvey v. Towell*, 7 Hare 231; *Lyon v. Mitchell*, 1 Madd. 475.

**Gift Over upon Indefinite Failure of Issue — Substitution.** — Cases like *Goodright v. Wright*, 1 P. Wms. 397 (better reported 1 Stra. 25); *Ward v. Bevil*, 1 Y. & J. 525; and *Pearson v. Stephen*, 2 Dow. & Cl. 328, 5 Bligh. N. S. 203, can generally be referred to the effect of a gift over upon indefinite failure of issue or explained upon the principle of substitution. See *infra*, VII. 1. *Where Failure of Issue Is Indefinite.*

To this principle may be referred *Gibbs v. Tait*, 8 Sim. 132; *Donn v. Penny*, 19 Ves. Jr. 545; *Dick v. Lacy*, 8 Beav. 214; *Hedges v. Harpur*, 3 De G. & J. 129, 9 Beav. 479; *Butter v. Ommaney*, 4 Russ. 70; *Prentice v. Brooke*, 5 L. R. Ir. 435. See *Re Stanhope*, 27 Beav. 201; *Lamley v. Blower*, 3 Atk. 397.

To justify such a construction there must be something in the will to show that the issue were meant to take by substitution for their parents. As to what circumstances will be held sufficient for that purpose, each case must stand much upon its own footing. Prior on Issue, §§ 77, 78; *Re Stanhope*, 27 Beav. 201, 204; *Bebb v. Beckwith*, 2 Beav. 308; *Slade v. Fooks*, 9 Sim. 386; *Prentice v. Brooke*, 5 L. R. Ir. 435. For further discussion see the title LEGACIES AND DEVISES.

**A Gift to the Survivors of a Class and the Issue of Such Survivor**, such issue to take their parents' share only, is a gift to the parents for life with remainder to their children, and not in substitution. *Parsons v. Coke*, 4 Drew. 296.

**Gift Over.** — If there is a gift over in the event of A.'s dying without issue living at his death, the issue will take as purchasers in remainder after the death of A. *Henry v. Stewart*, 2 Hill L. (S. Car.) 328; *Cleveland v. Havens*, 13 N. J. Eq. 101.

**Time When Existence or Nonexistence of Issue Is Important.** — Under the rule in *Wylde's Case*, 6 Coke 16, the existence or nonexistence

of issue or children at the time the devise or bequest takes effect, and not merely at the time it is made, is important as affecting the construction of the instrument.

**Devise to A. and His Issue Living at His Death** creates an estate tail in A. *University of Oxford v. Chilton*, 1 Eden 473; *Jenkins v. Hughes*, 8 H. L. Cas. 571.

**2. Words of Distribution and Limitation.** — This is undoubtedly the case where the word used is "children." Co. Litt. 9a; *Oates v. Jackson*, 2 Stra. 1172.

**Superadded Words Annexed to Interest of Parent Alone.** — Words importing tenancy in common annexed to the interest of the parent alone rebut the presumption that the issue take as purchasers. *Lyon v. Mitchell*, 1 Madd. 467. See *supra*, this subdivision. See also *Hawkins on Wills*, \*194; *Smith Ex. Int.*, § 529; *Frior on Issue*, §§ 54, 57.

**3.** See *Jeffery v. Honywood*, 4 Madd. 398. See also the following subdivision.

**Superadded Words of Distribution Alone**, unless the fee or absolute interest were vested in the issue, would probably be insufficient. See *Ogden's Appeal*, 70 Pa. St. 501, 509; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823.

**4. Words of Distribution When There Are No Issue in Esse.** — *Tate v. Clarke*, 1 Beav. 100; *Ogden's Appeal*, 70 Pa. St. 501, 509. See Lord Cranworth's comment upon *Tate v. Clarke*, in *Matter of Wynch*, 5 De G. M. & G. 210.

**5. Words of Limitation When There Are No Issue in Esse.** — *Franklin v. Lay*, 6 Madd. 258, 2 Bligh 59, note. See *Smith Ex. Int.*, § 516; *Lord Talbot*, in *Glenorchy v. Bosville*, Cas. t. Talb. 3.

**6. Words of Limitation and Distribution When There Are No Issue in Esse.** — *Doe v. Burnsall*, 6 T. R. 30; *Burnsall v. Davy*, 1 B. & P. 215; *Doe v. Elvey*, 4 East 313.

See *Powell v. Board of Domestic Missions*, 49 Pa. St. 46, 53. Under such a limitation the ancestor takes for life only, and the issue a remainder in fee, which will be vested or contingent according to the nature of the ulterior limitations.

**Effect of Expressing an Implied Condition.** — A limitation to A. and his issue, if he should leave any issue, will not of itself create a contingent interest in favor of the issue by purchase, and prevent the ancestor from taking an estate tail, because the condition is necessarily implied. *Smith Ex. Int.*, § 518; *Shaw v. Weigh*, 2 Stra. 798, 1 Eq. Cas. Abr. 184, par. 28.



expressly to the first taker for life, and after his death to his issue, the word "issue" is a word of limitation and not a word of purchase, and under the rule in Shelley's Case the devise vests in the first taker an estate tail.<sup>1</sup>

**Words Both of Distribution and Limitation.** — Where an estate to one for life with remainder to the issue is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life; and that whether the estate is given in fee to the issue by the usual technical words "heirs" or "heirs of the body," or by implication. Thus, where there is a devise to one for life with remainder to his issue, as tenants in common, with a limitation to the heirs general of the issue, the issue takes as purchasers in fee.<sup>2</sup>

**1. Estate Tail — England.** — Jarman on Wills, \*335; Hawk. on Wills, \*190; Fearne 181-184, 193; Frank v. Stovin, 3 East 548; Mogg v. Mogg, 1 Meriv. 654; Doe v. Racastle, 8 C. B. 876, 65 E. C. L. 876; Denn v. Puckey, 5 T. R. 299; Hodgson v. Merest, 9 Price 556; Harrison v. Harrison, 7 M. & G. 938, 49 E. C. L. 938; Lees v. Mosley, 1 Y. & C. Exch. 610; King v. Melling, 1 Vent. 229; Roddy v. Fitzgerald, 6 H. L. Cas. 823; Franks v. Price, 6 Scott 710, 5 Bing. N. Cas. 37, 35 E. C. L. 23, 3 Beav. 182; Goodright v. Wright, 1 Stra. 25; Shaw v. Weigh, 2 Stra. 798.

*New York.* — Kingsland v. Rapelye, 3 Edw. (N. Y.) 6. Compare Cushney v. Henry, 4 Paige (N. Y.) 345.

*Pennsylvania.* — Evans v. Davis, 1 Yeates (Pa.) 332; Paxson v. Lefferts, 3 Rawle (Pa.) 59, 75; Rancel v. Creswell, 30 Pa. St. 158; Angle v. Brosius, 43 Pa. St. 189; Robins v. Quinliven, 79 Pa. St. 333; Carroll v. Burns, 108 Pa. St. 386.

*South Carolina.* — Buist v. Dawes, 4 Strobb. Eq. (S. Car.) 37; Moore v. Paul, 7 Rich. Eq. (S. Car.) 362; Duncan v. Harper, 4 S. Car. 76; Whitworth v. Stuckey, 1 Rich. Eq. (S. Car.) 404.

*Virginia.* — Seekright v. Billups, 4 Leigh (Va.) 90; Hood v. Haden, 82 Va. 588.

See also the title SHELLEY'S CASE.

**Legal and Equitable Estates.** — The fact that the first taker is given an equitable life estate with a legal remainder will not be enough to rebut the *prima facie* meaning of issue, and the estates will vest as soon as the trust is executed, or if it is held not to be enforceable. Kay v. Scates, 37 Pa. St. 31. See also Ogden's Appeal, 70 Pa. St. 501; Dodson v. Ball, 60 Pa. St. 492; Yarnall's Appeal, 70 Pa. St. 335. And see the title SHELLEY'S CASE.

**Issue or Heirs.** — In Bodine v. Brown, 12 N. Y. App. Div. 335, affirmed 154 N. Y. 778, it was held that where a testator gave certain real property to his children, and further provided, "upon the death of either of my said children, I do give and devise the fourth part of such real estate to the issue or heirs of such child in fee, to be equally divided between them," by the use of the word "issue" or "heirs" of such child the testator intended to give to the issue of a child dying, if issue there were surviving, the share of the child; but where a child died without issue, that the share of such child should go to the child's heirs at law at the time of the child's death, to be divided among them *per capita* and not *per stirpes*.

**Effect of Power of Appointment.** — The mere fact that the limitation to the issue is by power

of appointment, as in a gift to A. for life, with a power of appointment among any of the issue of his body, and in default of appointment, to such issue, with a gift over on death without having issue, does not prevent the operation of the rule. Kay v. Scates, 37 Pa. St. 31, 39.

Otherwise where the gift to the issue is "to be divided between and amongst them in such manner, shares, and proportions as A. should by will appoint." Crozier v. Crozier, 3 Dr. & War. 373.

**Exception.** — In Shalters v. Ladd, 141 Pa. St. 349, where it appeared from the will that the testator, who had given land to his daughter, and on her death to her lawful issue intended to exclude the husband from curtesy, it was held that this afforded strong proof that the provision for the issue of his daughter was merely a *designatio personarum* for new inheritance at her death, and that the devise in this form evidenced the testator's intent not to create an estate to which curtesy was incident.

**Word of Purchase.** — But in Whiting v. Whiting, 42 Minn. 550, it is said: "Ignoring this attempted trust, and treating it as executed under the statute, the will, reduced to its lowest denomination, according to its legal effect amounts simply to a devise of the land to appellant in fee, with a conditional limitation in case of his death within the ten years, upon the happening of which event his estate should terminate, and the land go to his issue. The rule in Shelley's Case having been abolished, the word 'issue' is one of purchase, and not of limitation."

**Same — Issue in the Sense of Children.** — Where a testator devises his property to his daughters for life, and at the death of said daughters, or any of them, her share to pass to her "issue, children, or descendants," the children of a deceased daughter take an absolute estate in her share, to the exclusion of her grandchildren. Thomas v. Safe Deposit, etc., Co., 73 Md. 452. See also *supra*, this title, *Issue Construed Children*.

**2. Words Both of Distribution and Limitation.** — Fearne 154; Smith Ex. Int., § 488; Jarman on Wills (5th Am. ed.) 438, 439; Montgomery v. Montgomery, 3 J. & La T. 47; Slater v. Dangerfield, 15 M. & W. 273; Greenwood v. Rothwell, 5 M. & G. 628, 44 E. C. L. 330, 6 Beav. 492; Lees v. Mosley, 1 Y. & C. Exch. 589; Parker v. Clarke, 3 Smale & G. 161, 6 De G. M. & G. 104; Roddy v. Fitzgerald, 6 H. L. Cas. 823; Clifford v. Koe, 5 App. Cas. 447; Kavanagh v. Morland, Kay 16; Doe v. Elvey, 4 East 313; Golder v. Cropp, 5 Jur. N. S. 562;



**Words of Distribution Alone.** — Words of distribution alone annexed to a gift to the issue will convert "issue" into a word of purchase, if under the devise the issue taking by purchase could take the fee.<sup>1</sup>

**Words of Limitation Alone.** — Superadded words of limitation which do not enlarge the course of descent, as a devise to A. for life, with remainder to his issue and the heirs of their bodies, or to his issue male and the heirs male of their bodies, annexed to the gift to the issue, unaccompanied by words of distribution, afford no ground for excluding the rule, and the ancestor takes an estate tail.<sup>2</sup> But a devise to A. for life with remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. Thus, a devise to A., and after his decease to his issue and their heirs or the heirs of such issue, will vest the fee in the issue as purchasers.<sup>3</sup>

*Bradley v. Cartwright*, L. R. 2 C. P. 511, 15 W. R. 922; *Colclough v. Colclough*, 4 Ir. R. Eq. 263; *Moore v. Parker*, 12 Ired. L. (34 N. Car.) 123; *Abbott v. Jenkins*, 10 S. & R. (Pa.) 296; *Powell v. Board of Domestic Missions*, 49 Pa. St. 46, 54; *Guthrie's Appeal*, 37 Pa. St. 12; *Robins v. Quinliven*, 79 Pa. St. 333. See also *Cockin's Appeal*, 111 Pa. St. 26. *Contra*, *Kingsland v. Rapelye*, 3 Edw. (N. Y.) 1.

**A Provision that the Issue Shall Take in Fee Simple** has been held to convert the word "issue" into a word of purchase. *King v. Evans*, 24 Can. Supm. Ct. 360.

Where there was a gift of trust premises to A., and after her decease to her issue, equally to be divided between and among them, if more than one, in fee simple, it was held that the issue took as purchasers. *Heard v. Read*, 169 Mass. 221.

**Contingent Remainder.** — A testator, after a limitation to his wife for life, provides as follows: "At the death of my said wife, the said plantation, with all its rights and interests, I bequeath and devise to our seven sons [naming them], or such of them as may be living at their mother's death, and to their heirs share and share alike; and if any one or more of our said sons should be dead, leaving lawful issue, said issue shall take the deceased father's share in each and every such case." It was held that the limitation to each of the sons was a contingent remainder upon a contingency with a double aspect, vesting on the mother's death in case of his survival, but, in case of his death before his mother, never vesting in him, but by substitution vesting in his issue, who took nothing from their father, but directly from the deviser as purchasers. *Whitesides v. Cooper*, 115 N. Car. 570.

**1. Words of Distribution.** — *Montgomery v. Montgomery*, 3 J. & La T. 47; *Crozier v. Crozier*, 3 Dr. & War. 373; *Hawkins on Wills*, \*193; *Kavanagh v. Morland*, Kay 16; *Bradley v. Cartwright*, L. R. 2 C. P. 521; *Hockley v. Mawbey*, 1 Ves. Jr. 143. See also 4 Kent \*221, \*229, \*430; *Myers v. Anderson*, 1 Strobh. Eq. (S. Car.) 344; *Heather v. Winder*, 5 L. J. Ch. 41; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823.

Where property was devised to A. for life, and should she die leaving her surviving any issue of her body, then to such issue, to be divided share and share alike, it was held that A. took a life estate, with remainder to the issue living at the time of her death as

purchasers. *McDonnell's Estate*, Myr. Prob. (Cal.) 94.

**Heirs of the Body.** — Since "heirs of the body" is more strongly a term of limitation than "issue" (*Lees v. Mosley*, 1 Y. & C. Exch. 589, and see *supra*, this section, 2. a. *Issue Compared with Heirs of the Body*), wherever words of distribution have been held sufficient to control the former, *a fortiori* will they control the latter; and in some instances they have been held sufficient to control even the technical meaning of "heirs of the body." *Miles v. Allen*, 6 Ired. L. (28 N. Car.) 88; *Myers v. Anderson*, 1 Strobh. Eq. (S. Car.) 344.

**Words of Distribution Referred to First Takers.** — "Where the devise is not to one, but to several, as tenants in common for life, with remainder to their issue 'as tenants in common,' or 'equally to be divided,' the words of distribution may be referred to the first takers, so as to import distribution among the issue *per stirpes* only, and thus the first takers may be to take estates tail as tenants in common, although the issue might be capable of taking the fee as purchasers." *Hawkins on Wills*, \*194, citing *Tate v. Clarke*, 1 Beav. 100; *Harrison v. Harrison*, 7 M. & G. 938, 49 E. C. L. 938; *Smith Ex. Int.*, § 529. See also *Lyon v. Mitchell*, 1 Madd. 467.

**2. Course of Descent Not Enlarged.** — *Roe v. Grew*, 2 Wils. C. Pl. 322, *Wilmot* 272. See also *Hodgson v. Merest*, 9 Price 556; *Hamilton v. West*, 10 Ir. Eq. 75; *Parker v. Clarke*, 3 Smale & G. 161.

**Gift Over.** — A devise to A. for life, with remainder to his issue and their heirs, or heirs and assigns, followed by a gift over on failure of issue of A., vests in A. an estate tail; the limitation to the heirs general of the issue being restrained to heirs of the body by force of the gift over, so as to reduce the devise to one to A. for life, with remainder to his issue and the heirs of their bodies. *Hawkins on Wills*, \*195. See *Frank v. Stovin*, 3 East 548; *Denn v. Puckey*, 5 T. R. 299; *Franklin v. Lay*, 6 Madd 258. See also *Paxson v. Lefferts*, 3 Rawle (Pa.) 59; *Taylor v. Taylor*, 63 Pa. St. 484. See also *infra*, this title, V. and VII.

**3. Word of Purchase.** — *Montgomery v. Montgomery*, 3 J. & La T. 47; *Doe v. Collis*, 4 T. R. 294; *Greenwood v. Rothwell*, 6 Scott N. R. 670; *Luddington v. Kime*, 1 Ld. Raym. 203; *Golder v. Cropp*, 5 Jur. N. S. 562; *Bradley v. Cartwright*, L. R. 2 C. P. 511; *Hamilton v. West*, 10 Ir. Eq. 75; *Dodds v. Dodds*, 11 Ir.



(2) *As to Personality.* — Under a bequest of personal estate or chattels real to A. for life, and after his decease to his issue, A. takes for life only, and the issue take in remainder as purchasers.<sup>1</sup>

(3) *Effect of Cy Près Doctrine.* — Where a testator, by the frame of the original limitation, clearly expresses an intention that all the descendants of a certain party shall take, and that all or some generations of the issue shall take for life only, and the intention is frustrated by the rule against perpetuities, the court, considering the paramount intention to be that all the descendants shall take, and the intention to give life estates only as subordinate thereto, confers estates for life upon as many of the parties designated (whether they constitute an entire generation of issue or certain members of a generation) as are born or *en ventre sa mere* in the testator's lifetime, and estates tail on their children and the unborn members of the same generation.<sup>2</sup> The doctrine

Ch. 476; *Morgan v. Thomas*, 51 L. J. Q. B. 289; *Daniel v. Whartenby*, 17 Wall. (U. S.) 639; *De Vaughn v. Hutchinson*, 165 U. S. 566; *Shreve v. Shreve*, 43 Md. 382; *Horne v. Lyeth*, 4 Har. & J. (Md.) 435. See also *Timanus v. Dugan*, 46 Md. 418; *Ward v. Jones*, 5 Ired. Eq. (40 N. Car.) 405; *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344; *McLure v. Young*, 3 Rich. Eq. (S. Car.) 559; *Buist v. Dawes*, 4 Rich. Eq. (S. Car.) 423.

In *Zabriskie v. Wood*, 23 N. J. Eq. 541, where the devise was to the testator's son for life, and to such lawful issue of his body as he may have by an after-marriage, their heirs and assigns forever, it was held that the addition of the limitation to the heirs general of the issue did not prevent the word "issue" from operating to raise an estate tail.

The doctrine of the text, however, has been adversely commented upon. See *Theobald on Wills* (4th ed.), p. 355; *Parker v. Clarke*, 6 De G. M. & G. 109.

And the tendency of *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, and later cases, to put "issue" on the same plane with "heirs of the body," so far as reconcilable with *Lees v. Mosley*, 1 Y. & C. Exch. 589, appears to favor this position.

1. *Personality.* — *Knight v. Ellis*, 2 Bro. C. C. 570; *Matter of Wynch*, 5 De G. M. & G. 188; *Jackson v. Calvert*, 1 J. & H. 235; *Goldney v. Crabb*, 19 Beav. 338; *Edelen v. Middleton*, 9 Gill (Md.) 161; *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Flanagan v. Staples*, 28 N. Y. App. Div. 319; *Howland v. Clendening*, 134 N. Y. 305; *Myers's Appeal*, 49 Pa. St. 111; *Sheets's Estate*, 52 Pa. St. 268.

*Contra.* — *Moore v. Paul*, 7 Rich. Eq. (S. Car.) 358. In this last case Chancellor Dargan considered *Knight v. Ellis*, 2 Bro. C. C. 570, overruled by Atty.-Gen. v. Bright, 2 Keen 57. This, however, is denied in *Matter of Wynch*, 5 De G. M. & G. 188.

Even in *South Carolina*, however, under a bequest to a son for life, and after his death to be equally divided between his two daughters during their lives, and after their deaths to be the absolute property of their issue, the daughters, after the son's death, take only a life estate, and on their deaths their issue take as purchasers. *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344, 47 Am. Dec. 537.

*Examples.* — Where a testamentary gift was in trust for S. during her life, and at her death the trust fund was to be paid, transferred, and delivered "to the lawful issue of the said S.

then alive," it was held that the trust fund was to be distributed *per capita* among the children and grandchildren of S. who were alive at the death of S. *Pearce v. Rickard*, 18 R. I. 142.

In *Phelps v. Robbins*, 40 Conn. 250, 267, there was a bequest to the testator's two children, "and if either of my said children shall die leaving issue" his portion was to go to such issue in equal shares; the court held that such language generally creates an estate tail, but that the whole will showed a different intent; that is, in case either child died before the testator leaving issue, to give its portion to such grandchildren and so prevent a failure of the devise to their injury.

2. *Cy Pres Doctrine.* (See also the title PERPETUITIES.) — Prior on Issue, § 84. See also *Humberston v. Humberston*, 2 Vern. 737, 1 P. Wms. 332, Prec. Ch. 455, Gilb. Eq. 128, 1 Eq. Cas. Abr. 207, par. 8; *Wollen v. Andrews*, 2 Bing. 126, 9 E. C. L. 342; *Mortimer v. West*, 2 Sim. 274; *Goodtitle v. Wodhull*, Willes 592; *Monkhouse v. Monkhouse*, 3 Sim. 119.

In order that the *cy près* doctrine may be applied to the devise, the testator must show that he intended all generations of the issue to take. Prior on Issue, § 87; *Seaward v. Willock*, 5 East 198; *Bennett v. Lowe*, 7 Bing. 535, 20 E. C. L. 229; *Bristow v. Warde*, 2 Ves. Jr. 336. See also *Pitt v. Jackson*, 2 Bro. C. C. 51; *Nicholl v. Nicholl*, 2 W. Bl. 1159.

On the authority of *Routledge v. Dorril*, 2 Ves. Jr. 357, the doctrine is said not to apply to personal estate. Prior on Issue, § 96.

*Where the Gift Is of Realty and Personality Combined,* a construction which will give an analogous effect to the devise of each may be thought to be warranted by *Mogg v. Mogg*, 1 Merw. 654, in which freehold and leasehold estates were devised in trust for the children of S. M., and after their decease to their lawful issue as tenants in common, and in default of such issue, over. S. M. survived the testator, and it was held that her children took absolute interests in the leaseholds. No reason is given for the decision, but the argument in favor of the children's taking an absolute interest proceeded to a great extent on the *cy près* doctrine, and the only way in which the case can be reconciled with *Knight v. Ellis*, 2 Bro. C. C. 570, is that it was impossible to give the issue an estate by purchase, as was done in the latter case, on account of the rule against perpetuities. Prior on Issue, §§ 96, 314. Compare



does not extend to limitations in a deed.<sup>1</sup>

**IV. DYING WITHOUT ISSUE — WHEN REFERRED TO PRIOR OBJECTS — 1. In Default of Such Issue.** — Where the expression is "dying without such issue" or "in default of such issue," the terms will import a definite or indefinite failure of issue, according to the antecedent expression to which the term "such issue" refers. If the antecedent expression is broad enough to comprehend issue in general, the words "such issue" refer to an indefinite failure of issue, but if the antecedent expression comprises some only of the issue in general, the words refer then to the failure of the particular issue before spoken of.<sup>2</sup>

**Real Property.** — Where there is a devise to a particular class of issue, such as sons, children, or daughters, and a gift over for want of such issue, this will be construed to mean in default of such children, sons, etc., and in no way affects the prior estate, and this whether the objects of the preceding devise took estates for life or inheritance.<sup>3</sup>

**Personalty.** — So where there is a bequest to children, sons, or daughters, and a gift over in default of such issue, the words "in default of such issue" are construed to mean in default of such children, sons, or daughters.<sup>4</sup>

Matter of Wynch, 5 De G. M. & G. 188, 204, 209.

1. *Adams v. Adams*, 2 Cowp. 651, Brudenell v. Elwes, 1 East 442, 7 Ves. Jr. 382.

2. "**Such Issue.**" — *Smith Ex. Int.*, § 543; *Goodright v. Jones*, 4 M. & S. 88; *Foster v. Romney*, 11 East 594; *Lewis v. Waters*, 6 East 337; *Rex v. Stafford*, 7 East 521; *Heasman v. Pearce*, L. R. 7 Ch. 275; *Roper v. Doe*, 8 T. R. 112; *Hay v. Coventry*, 3 T. R. 83; *Walker v. Petchell*, 1 C. B. 652, 50 E. C. L. 652; *Wellford v. Snyder*, 137 U. S. 527; *Smith v. Folwell*, 1 Binn. (Pa.) 546.

**Children.** — Where the word "issue" occurring in an express devise or bequest to issue is therein explained to mean children, the words "in default" or "for want of such issue," immediately following, are construed "in default of such children." *Ryan v. Cowley*, 1 Ll. & G. t. Sugd. 7. See *Gawler v. Cadby*, Jac. 346, 348; *Bryan v. Mansion*, 5 De G. & Sm. 737. See *supra*, II. *Issue Construed Children*.

3. **Real Property — England.** — *Jarman on Wills*, (5th Am. ed.) 454; *Walker v. Petchell*, 1 C. B. 652, 50 E. C. L. 652; *Allgood v. Blake*, L. R. 8 Exch. 160, 21 W. R. 599, 29 L. T. N. S. 331; *Matter of Pollard*, 3 De G. J. & S. 541; *Re Arnold*, 33 Beav. 163; *Farrant v. Nichols*, 9 Beav. 327, 330, 331; *Bevan v. White*, 7 Ir. Eq. 473; *Bridger v. Ramsey*, 10 Hare 320; *Parr v. Swindels*, 4 Russ. 283; *Wight v. Leigh*, 15 Ves. Jr. 564; *Goodtitle v. Herring*, 1 East 264; *Rex v. Stafford*, 7 East 521; *Foster v. Romney*, 11 East 594; *Doe v. Perryn*, 3 T. R. 484; *Hay v. Coventry*, 3 T. R. 83; *Doe v. Mulgrave*, 5 T. R. 320; *Denne v. Page*, 11 East 603, note, 3 T. R. 87, note; *Letheullier v. Tracey*, Ambl. 204, 220; *Doe v. Gunnis*, 4 Taunt. 313; *Ashley v. Ashley*, 6 Sim. 358; *Doe v. Vaughan*, 1 Dowl. & R. 52, 5 B. & Ald. 464, 7 E. C. L. 160; *Goodright v. Jones*, 4 M. & S. 88; *Purcell v. Purcell*, 2 Dr. & War. 217; *Ryan v. Cowley*, Ll. & G. t. Sugd. 7.

**Maryland.** — *Torrance v. Torrance*, 4 Md. 11; *Tongue v. Nutwell*, 13 Md. 415; *Edelen v. Middleton*, 9 Gill (Md.) 161.

**Pennsylvania.** — *Nebinger v. Upp*, 13 S. & R. (Pa.) 65; *George v. Morgan*, 16 Pa. St. 95; *Walker v. Milligan*, 45 Pa. St. 178.

**Prior Limitations.** — This is clearly the case

where the prior limitations are in tail. *Doe v. Mulgrave*, 5 T. R. 320.

So, where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. *Doe v. Perryn*, 3 T. R. 484; *Rex v. Stafford*, 7 East 521.

**Same — Limitation to Children.** — Even though the limitation be to children simply, so that they could only take for life, a gift over in default of such issue will be construed referentially. *Hay v. Coventry*, 3 T. R. 83; *Den v. Page*, 3 T. R. 87, note, 11 East 603, note; *Ashley v. Ashley*, 6 Sim. 358; *Bridger v. Ramsey*, 10 Hare 320; *Re Arnold*, 33 Beav. 163.

So, where the prior devise embraces a single child only, the words "for want of such issue" are construed "for want of such child," and do not have the effect of conferring an estate tail on the parent of that child. *Doe v. Charlton*, 1 Scott N. R. 290, 1 M. & G. 429, 39 E. C. L. 513. See *Food v. Food*, 3 Bro. P. C. (Tomb. ed.) 124.

**Same — Estate Tail.** — "On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the court will lay hold of small circumstances to give the first son also an estate tail. Thus, in *Evans v. Astley*, 3 Burr. 1570, there was the circumstance that the testator referred to the earlier limitations as including the 'parent and his descendants.' In *Clements v. Paske*, 3 Dougl. 384, 26 E. C. L. 155, the limitation to the first son was referred by the word 'likewise' to other limitations in fee." *Theobald on Wills* (4th ed.) 578. Compare *Doe v. Taylor*, 10 Q. B. 718, 59 E. C. L. 718; *Barnacle v. Nightingale*, 14 Sim. 456; *Galley v. Barrington*, 2 Bing. 387, 9 E. C. L. 441; *In re Denny*, 1 Ir. R. 8 Eq. 426.

"**Lawful Issue as Aforesaid**" can only mean such issue as by the clause immediately preceding were to enjoy and inherit "their mother's right" — of course, children. *Taylor v. Taylor*, 63 Pa. St. 484.

4. *Heasman v. Pearce*, L. R. 7 Ch. 275; *Maddox v. Staines*, 2 P. Wms. 421; *Stanley v. Leigh*, 2 P. Wms. 686.

If the Prior Gift Is Confined to Children Who Survive their parent, a gift over in default of



2. In Default of Issue — *a.* AS TO PERSONALTY. — Where personal property is limited to children, and is limited over on the event of the first taker dying without issue generally, the word "issue" is taken to denote the sort of issue before described; that is to say, children.<sup>1</sup> So where the prior gift is expressly to the issue, but it appears by the context that issue is restricted to issue of a particular class, or existing at a particular time, the words importing a failure of issue will be referred to such prior objects.<sup>2</sup> But this latter proposition has been denied.<sup>3</sup>

*b.* AS TO REALTY. — The question whether, in a devise of realty with a gift over in case of default of issue, issue is to be given referential con-

such issue, or (which is the same) in default of issue becoming entitled, means in default of children who survive their parent. *In re Hopkins*, 9 Ch. D. 131.

**Issue Living at Death.** — In *Waller v. Ward*, 2 Spears L. (S. Car.) 786, it is said: "Where a direct bequest to the first taker and his issue living at his death has been made, and a subsequent clause provides a limitation over, in case the first taker die without issue, it is clear that the generality of the phrase 'die without issue' receives such restrictive aid from the previous definition of issue, that the limitation, which of itself would have been held too remote, is by such aid made good."

1. **Referential Construction.** — Jarman on Wills (5th Am. ed.) 448; Roper on Legacies 1554.

*England.* — *Pleydell v. Pleydell*, 1 P. Wms. 748; *Maddox v. Staines*, 2 P. Wms. 421; *Vandergrucht v. Blake*, 2 Ves. Jr. 534; *Farthing v. Allen*, 2 Madd. 310; *In re Mercer*, 4 Ch. D. 182, 35 L. T. N. S. 701; *Tucker v. Harris*, 5 Sim. 538; *Robinson v. Hunt*, 4 Beav. 450; *Cormack v. Copous*, 17 Beav. 397; *Bryan v. Mansion*, 5 De G. & Sm. 737; *Malcolm v. Taylor*, 2 Russ. & M. 416, 421; *In re Sanders*, L. R. 1 Eq. 675; *Bradshaw v. Skilbeck*, 2 Bing. N. Cas. 182, 29 E. C. L. 300; *In re Wyndham*, L. R. 1 Eq. 290; *Trickey v. Trickey*, 3 Myl. & K. 560; *Ellicombe v. Gompertz*, 3 Myl. & C. 127; *Walker v. Petchell*, 1 C. B. 652, 50 E. C. L. 652; *Leeming v. Sherratt*, 2 Hare 14; *Minter v. Wraith*, 13 Sim. 52; *Doe v. Lyde*, 1 T. R. 596; *Salkeld v. Vernon*, 1 Eden 64.

*Missouri.* — *Chism v. Williams*, 29 Mo. 288.

*South Carolina.* — *Henry v. Archer*, Bailey Eq. (S. Car.) 551.

Compare observations of Lord Cottenham in *Ellicombe v. Gompertz*, 3 Myl. & C. 127; *Turner, L. J.*, in *Pride v. Fooks*, 4 Jur. N. S. 678, 3 De G. & J. 252; *Key v. Key*, 4 De G. M. & G. 88.

In *Duffy's Estate*, 4 Pa. Dist. 148, it is said: "The word 'issue' appears to be used in the sense of 'children,' the gift to whom the expression 'die without issue' immediately follows — showing that the meaning is 'such' issue."

**Child's Interest Not Vested.** — But where the prior gifts to the children are not vested, so that there may be issue who may not take under them — for instance, children of children who die before the time of vesting — it is less easy to admit the referential construction, and it seems that without some further indications to be collected from the will, it will not be adopted. *Pride v. Fooks*, 3 De G. & J. 252; *Walker v. Mower*, 16 Beav. 365.

**Contingent Gift.** — And the same is the case where the gifts to the children are only to arise upon a contingency, as, for instance, if the legatee marries. *Andree v. Ward*, 1 Russ. 260; *Campbell v. Harding*, 2 Russ. & M. 390; 2 Cl. & F. 421, 8 Bligh. N. S. 469.

"The referential construction will not be adopted where the bequest is in joint tenancy to A. and her children, with a gift over in default of issue. In this case the whole is already disposed of, whether children are born or not, and in the absence of some further indication of intention there can be no reason for attempting to make the gift over valid in order to divest absolute interests. *Fisher v. Webster*, L. R. 14 Eq. 283." *Theobald on Wills* (4th ed.) 582.

2. **Restriction to Issue of a Particular Class.** — Jarman on Wills (5th Am. ed.) 450; *Leeming v. Sherratt*, 6 Jur. 663; *Gawler v. Cadby*, Jac. 346; *Bryan v. Mansion*, 5 De G. & Sm. 737; *Ellicombe v. Gompertz*, 3 Myl. & C. 127.

3. *Campbell v. Harding*, 2 Russ. & M. 390; *Andree v. Ward*, 1 Russ. 260; *Candy v. Campbell*, 8 Bligh N. S. 469. See also *Pye v. Linwood*, 6 Jur. 618; *Fisher v. Webster*, L. R. 14 Eq. 283; *Allanson v. Clitherow*, 1 Ves. 24.

**When Failure of Issue Is Restricted to Failure at Ancestor's Death.** — "The ground on which the court has used violence with the words, and interpolated the word 'such,' is this, that if there were no restriction on the generality of the words 'dying without issue,' the limitation over would be void. \* \* \* But when the dying without issue is either in terms or by the proper construction limited to dying without issue living at the death, there is no reason for interpreting the words as meaning 'such issue as before mentioned.' \* \* \* Such a construction might in fact wholly defeat the testator's intention; for \* \* \* the tenant for life might have an only child, who might attain twenty-one, marry, and have children, and die before the tenant for life, and then the child and issue of that child would be excluded." *Kindersley, V. C.*, in *Westwood v. Southey*, 2 Sim. N. S. 192, 202. See also *Walker v. Mower*, 16 Beav. 365; *Madden v. Ikin*, 2 Drew. & Sm. 207; *Parker, V. C.*, in *Bryan v. Mansion*, 5 De G. & Sm. 737; *In re Biron*, 1 L. R. Ir. 258. See *infra*, IV. *Dying Without Issue — When Referred to Prior Objects.* But in *Pride v. Fooks*, 4 Jur. N. S. 678, 3 De G. & J. 252, *Turner, L. J.*, declined to express any opinion upon *Westwood v. Southey*. Mr. Theobald considers this principle applicable to devises of realty. See note to next paragraph.



struction, has been frequently before the courts, and the cases will be found tabulated in the note below.<sup>1</sup>

1. Mr. Jarman (2 Jarman on Wills, 3d Am. ed. \*398, 5th Am. ed. \*483, 6th Am. ed. 1307, 1311) has formulated the following rules:

**Devise to Children in Fee or in Tail.** — That the words "in default of issue," or expressions of a similar import, following a devise to children in tail or in fee simple, mean in default of children. This is free from all doubt. *Goodright v. Dunham*, 1 Dougl. 264. See also *Ginger v. White*, Willes 348; *Malcolm v. Taylor*, 2 Russ. & M. 416; *Pride v. Fooks*, 3 De G. & J. 280; *Doe v. Selby*, 2 B. & C. 926, 9 E. C. L. 277; *Doe v. Duesbury*, 8 M. & W. 514; *In re Wyndham*, L. R. 1 Eq. 293; *Baker v. Tucker*, 3 H. L. Cas. 106, 14 Jur. 771; *Daley v. Koons*, 90 Pa. St. 246; *Berg v. Anderson*, 72 Pa. St. 87, 91; *Nicholson v. Bettle*, 57 Pa. St. 384, 387; *Henry v. Archer*, Bailey Eq. (S. Car.) 551; *Smith Ex. Int.*, §§ 541, 581, 582, 583.

**Same — Issue Living at Death.** — A devise of real estate was to B. for life, and after her death to the lawful issue of her body begotten who should be living at the time of her death, equally to be divided among them as tenants in common, but subject to a perpetual annuity, and if B. should die without issue, then to J., his heirs and assigns forever. It was held that the failure of issue was definite. *Smith v. Coyle*, 83 Pa. St. 242.

**Same — Leaving.** — Mr. Jarman is of opinion that the introduction of the word "leaving" would not vary the construction, since the words "without issue" and "without leaving issue" are indistinguishable in regard to their importing an indefinite failure of issue in reference to real estate. 2 Jarman on Wills (5th Am. ed.) 462.

**Same — Shelley's Case.** — Where the devise is to A. and his lawful heirs, with a gift over in case of death without issue, it has been held that the limitation over did not take the devise out of the rule in Shelley's Case. *Silva v. Hopkinson*, 158 Ill. 389.

**Devise to All the Sons Successively.** — That these words following a devise to all the sons successively in tail male, and daughters concurrently in tail general, are also to be construed as signifying such issue, even in the case of an executory trust. *Blackborn v. Edgley*, 1 P. Wms. 600; *Morse v. Ormonde*, 5 Madd. 99, 1 Russ. 382; *Peyton v. Lambert*, 8 Ir. C. L. 485.

**Same — Failure of Issue Male.** — That words devising over the property on a failure of issue male, following a devise to the whole line of sons successively in tail male, are also referential to those objects. *Bamfield v. Popham*, 1 P. Wms. 54, 1 Eq. Cas. Abr. 183, par. 24, 2 Vern. 427, 449. But not where such sons take for life only, in which case the words in question raise an implied estate tail in the parent. 2 Jarman on Wills (3d ed.) 398; *Wight v. Leigh*, 15 Ves. Jr. 564. Later cases establish that the estate tail in the parent is subject to the children's life estate. *Theobald on Wills* (2d ed.) 539; 2 Jarman on Wills (2d ed.) 539, (5th Am. ed.) 483; *Doe v. Gallini*, 3 Ad. & El. 340, 30 E. C. L. 112; *Parr v. Swindels*, 4 Russ. 283; *Lord Kingsdown*, in *Towns v. Wentworth*, 11 Moo. P. C. 526.

**Devise to Definite Number of Sons Only in Tail Male** — That where there is a prior devise to a definite number of sons only in tail male, with a limitation over in case of default of issue, or issue male of the parent, an estate tail will be implied in the parent in order to give a chance of succession to the other sons. *Langley v. Baldwin*, 1 Eq. Cas. Abr. 185, par. 29, cited in 1 P. Wms. 759, 1 Ves. 26; *Atty.-Gen. v. Sutton*, 1 P. Wms. 754, 3 Bro. P. C. (Toml. ed.) 75.

**Executory Trusts.** — That in the case of executory trusts, words importing a dying without issue, following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent in tail general in remainder expectant on those estates. *Allanson v. Clithero*, 1 Ves. 24.

**Devise to Eldest Son in Tail.** — That such words (whether they refer to issue or issue male) succeeding a devise to the eldest son in tail are not referable to such son exclusively, but create in the parent an implied estate tail. *Stanley v. Lennard*, 1 Eden 87; *Key v. Key*, 4 De G. M. & G. 73. This rule applies whether the eldest son takes for life or in tail. 2 Jarman on Wills (5th Am. ed.) 483. In remainder expectant on the estate tail of the son. *Doe v. Halley*, 8 T. R. 5. So where the eldest son takes for life only. 2 Jarman on Wills (5th Am. ed.) 483. And this rule also, it seems, applies where the children take estates tail. *Doe v. Gallini*, 5 B. & Ad. 621, 27 E. C. L. 138, 3 Ad. & El. 340, 30 E. C. L. 112.

**Contingency.** — That the circumstance of the preceding devise to children, etc., being subject to a contingency, is rather unfavorable to the construction which reads words importing a failure of issue to refer to a failure of the objects of such preceding limitation. *Doe v. Lucraft*, 1 Moo. & S. 573; *Franks v. Price*, 6 Scott 710, 5 Bing. N. Cas. 37, 35 E. C. L. 23, 3 Beav. 182; *Alexander v. Alexander*, 16 C. B. 59, 81 E. C. L. 59; *Doe v. Gallini*, 5 B. & Ad. 621, 27 E. C. L. 138, 3 Ad. & El. 340, 30 E. C. L. 112. See *Lord Cranworth*, in *Jenkins v. Hughes*, 8 H. L. Cas. 593.

**Theobald's Classification.** — "(1) If the devise is to A. for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A., over, issue means the issue before mentioned, and A.'s estate will not be enlarged. *Foster v. Hayes*, 2 El. & Bl. 27, 75 E. C. L. 27, 4 El. & Bl. 717, 82 E. C. L. 717; *Towns v. Wentworth*, 11 Moo. P. C. 526; *Smyth v. Power*, Ir. R. 10 Eq. 192. See *Bowen v. Lewis*, 9 App. Cas. 890. And this is the case though the children included under the prior limitations may be sons only, and not daughters, and though the prior estates may be in tail male. *Turke v. Frencham*, 2 Dyer 171a; *Baker v. Tucker*, 11 Ir. Eq. 104, 3 H. L. Cas. 106. *Quare* whether it makes any difference in the construction of the gift over in default of issue, that the ancestor has children living at the date of the devise. See *Doe v. Duesbury*, 8 M. & W. 514, commented on in *Foster v. Hayes*, 4 El. & Bl. 730, 82 E. C. L. 730.

"(2) If, however, the prior limitations include less than the whole number of sons, the



**Devise of Reversion.** — Where a testator, having a reversion in fee expectant on estates tail in the sons or other partial issue of some person other than the testator himself, devises the estates in the event of that person dying without issue, the question arises whether these words refer to the determination of the subsisting estates, so that the testator shall be considered as devising his reversion, or to an indefinite failure of issue, rendering the limitation over void for remoteness.<sup>1</sup> In such cases it appears to be a sound rule of construction that whenever it may be collected from the general context of the will that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposition will not be defeated by his neglect to adapt his language with precision to the events upon which the reversion will fall into possession.

#### V. DYING WITHOUT ISSUE — DEFINITE AND INDEFINITE FAILURE OF ISSUE —

**1. General Rule.** — Words referring to the death of a person without issue, such as, "if he die without issue," "if he have no issue," or "for want" or "in default of issue," standing alone, import a general indefinite failure of issue and not a failure at the death of the first taker simply;<sup>2</sup> *i. e.*, they

referential construction will not be adopted. *Langly v. Baldwin*, 1 Eq. Cas. Abr. 185, par. 29; *Atty. Gen. v. Sutton*, 1 P. Wms. 754, 3 Bro. P. C. (Toml. ed.) 75; *Stanley v. Lennard*, Amb. 355, 1 Eden 87; *Key v. Key*, 4 De G. M. & G. 73. The referential construction is, however, more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. *Sanders v. Ashford*, 28 Beav. 609.

"(3) If the failure of issue is restricted to failure at the death of the parent, the referential construction will not be adopted, as it might have the effect of divesting the interests of children who had died before the tenant for life leaving children. *Westwood v. Southey*, 2 Sim. N. S. 192; *Ex p. Hooper*, 1 Drew. 264; *In re Tookey*, 21 L. J. Ch. 402; *In re Biron*, 1 L. R. Ir. 258.

"(4) If the gift is to A. for life, then to such issue as he should appoint by will, and if A. dies without issue over, issue in the gift over is held to refer to the issue before mentioned; that is to say, issue living at the death of A. *Target v. Gaunt*, 1 P. Wms. 432; *Hockley v. Mawbey*, 1 Ves. Jr. 143, 3 Bro. C. C. 82; *Leeming v. Sherratt*, 2 Hare 14; *Hanan v. Drew*, 10 Ir. Eq. 333; *Eastwood v. Avison*, L. R. 4 Exch. 141.

"(5) When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. *Doe v. Lucraft*, 1 Moo. & S. 573, 8 Bing. 386, 21 E. C. L. 330; *Franks v. Price*, 6 Scott 710, 5 Bing. N. Cas. 37, 35 E. C. L. 23, 3 Beav. 182.

"(6) In wills, before the Wills Act, where the devise to children is without words of limitation, so that they only take estates for life, the referential construction will not be adopted, but the parent will take an estate tail in remainder after the life estates. *Parr v. Swindels*, 4 Russ. 283. *Bennett v. Lowe*, 5 M. & P. 485, 7 Bing. 535, 20 E. C. L. 229, is not inconsistent with this rule, since the gift over was not upon an indefinite failure of issue. And *Wight v. Leigh*, 15 Ves. Jr. 564, which conflicts with the latter branch of this rule, would probably not now be followed." *Theobald on Wills* (4th ed.) 579, 580.

1. 2 *Jarman on Wills* (5th Am. ed.) \*489; *Theobald on Wills* (2d ed.) 546, 547; *Sugd. Law of Prop.* \*351 (Law Lib., vol. 64); *Eno v. Eno*, 6 Hare 171. See *Shadwell, V. C.*, in *Egerton v. Jones*, 3 Sim. 409; *Jones v. Morgan*, 3 Bro. P. C. (Toml. ed.) 323; *Trafford v. Boehm*, 3 Atk. 442; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Lewis v. Temple*, 33 Beav. 625. Compare *Lanesborough v. Fox*, Cas. t. Talb. 262; *Bankes v. Holme*, 1 Russ. 395, note a; *Bristow v. Boothby*, 2 Sim. & St. 465.

2. **Indefinite Failure of Issue** — *England.* — *Everest v. Gell*, 1 Ves. Jr. 286; *Chandless v. Price*, 3 Ves. Jr. 99; *Rawlins v. Goldfrap*, 5 Ves. Jr. 440; *Crooke v. De Vandes*, 9 Ves. Jr. 197; *Boehm v. Clarke*, 9 Ves. Jr. 580; *Barlow v. Salter*, 17 Ves. Jr. 479; *King v. Rumball*, Cro. Jac. 448; *Pells v. Brown*, Cro. Jac. 590; *Denn v. Slater*, 5 T. R. 335; *Poole v. Poole*, 3 B. & P. 620; *In re Bence*, (1891) 3 Ch. 249; *Doe v. Ellis*, 9 East 382; *Holmes v. Meynel*, T. Raym. 452; *Donn v. Penny*, 1 Meriv. 20; *Fisher v. Webster*, L. R. 14 Eq. 283; *Burley v. Evelyn*, 16 Sim. 290; *Doe v. Owens*, 1 B. & Ad. 318, 20 E. C. L. 393; *Carne v. Roch*, 7 Bing. 226, 20 E. C. L. 111; *Lepine v. Ferard*, 2 Russ. & M. 378; *Campbell v. Harding*, 2 Russ. & M. 390; *Caulfield v. Maguire*, 2 J. & La T. 176; *Lee's Case*, 1 Leon 285.

*United States.* — *Lillibridge v. Adie*, 1 Mason (U. S.) 224; *Osborne v. Shrieve*, 3 Mason (U. S.) 391; *Parkman v. Bowdoin*, 1 Sumn. (U. S.) 359; *Williamson v. Daniel*, 12 Wheat. (U. S.) 568; *Willis v. Bucher*, 3 Wash. (U. S.) 369; *Barber v. Pittsburgh*, etc., R. Co., 166 U. S. 83.

*Alabama.* — *Darden v. Burns*, 6 Ala. 365.

*Arkansas.* — *Moody v. Walker*, 3 Ark. 147; *Watkins v. Quarles*, 23 Ark. 179; *Slaughter v. Slaughter*, 23 Ark. 356; *Robinson v. Bishop*, 23 Ark. 378; *Myar v. Snow*, 49 Ark. 125.

*Connecticut.* — *Dart v. Dart*, 7 Conn. 251.

*Delaware.* — *Hollett v. Pope*, 3 Harr. (Del.) 542.

*Georgia.* — *Robinson v. McDonald*, 2 Ga. 116; *Carlton v. Price*, 10 Ga. 495; *Lillibridge v. Ross*, 31 Ga. 730; *Hertz v. Abrahams*, (Ga. 1900) 36 S. E. Rep. 411, following 11 AM. & ENG. ENCYC. OF LAW (1st ed.), p. 899.

*Illinois.* — *Vois v. Sloan*, 68 Ill. 588.

*Indiana.* — *Huxford v. Milligan*, 50 Ind. 542.

*Maine.* — *Riggs v. Sally*, 15 Me. 408; *Fisk v.*



Keene, 35 Me. 349; *Richardson v. Richardson*, 80 Me. 592.

*Maryland*. — *Torrance v. Torrance*, 4 Md. 11; *Tongue v. Nutwell*, 13 Md. 426; *Woollen v. Frick*, 38 Md. 437; *Mason v. Johnson*, 47 Md. 347; *Dickson v. Satterfield*, 53 Md. 317; *Pennington v. Pennington*, 75 Md. 418; *Jackson v. Dashiell*, 3 Md. Ch. 257; *Dallam v. Dallam*, 7 Har. & J. (Md.) 220; *Newton v. Griffith*, 1 Har. & G. (Md.) 111.

*Massachusetts*. — *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Hall v. Priest*, 6 Gray (Mass.) 18; *Hayward v. Howe*, 12 Gray (Mass.) 49; *Richardson v. Noyes*, 2 Mass. 56; *Ide v. Ide*, 5 Mass. 500; *Allen v. Ashley School Fund*, 102 Mass. 262, 264; *Whitcomb v. Taylor*, 122 Mass. 245; *Schmaunz v. Goss*, 132 Mass. 145; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323.

*Mississippi*. — *Powell v. Brandon*, 24 Miss. 350.

*Missouri*. — *Chism v. Williams*, 29 Mo. 288; *Rothwell v. Jamison*, 147 Mo. 615.

*New Hampshire*. — *Hall v. Chaffee*, 14 N. H. 219; *Downing v. Wherrin*, 19 N. H. 84; *Ladd v. Harvey*, 21 N. H. 514, 526; *Pinkham v. Blair*, 57 N. H. 227.

*New Jersey*. — *Kent v. Armstrong*, 6 N. J. Eq. 638; *Wilson v. Wilson*, 46 N. J. Eq. 321; *Hall v. Eddy*, 14 N. J. L. 169; *Den v. Snitcher*, 14 N. J. L. 59; *Chetwood v. Winston*, 40 N. J. L. 337; *Rowe v. White*, 16 N. J. Eq. 411, 84 Am. Dec. 169; *Condict v. King*, 13 N. J. Eq. 375; *Den v. Small*, 20 N. J. L. 151; *Den v. Allaire*, 20 N. J. L. 6; *Den v. Taylor*, 5 N. J. L. 475; *Moore v. Rake*, 26 N. J. L. 574.

*New York*. — *Guernsey v. Guernsey*, 36 N. Y. 267, 271; *Anderson v. Jackson*, 16 Johns. (N. Y.) 382; *Pinckney v. Pinckney*, 1 Bradf. (N. Y.) 269, 274; *Tator v. Tator*, 4 Barb. (N. Y.) 431; *Ferris v. Gibson*, 4 Edw. (N. Y.) 707; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Jackson v. Billinger*, 18 Johns. (N. Y.) 368; *Patterson v. Ellis*, 11 Wend. (N. Y.) 259; *Miller v. Macomb*, 26 Wend. (N. Y.) 229; *Coe v. DeWitt*, 22 Hun (N. Y.) 428.

*North Carolina*. — *Davis v. Abbott*, 3 Ired. L. (25 N. Car.) 137; *Rice v. Satterwhite*, 1 Dev. & B. Eq. (21 N. Car.) 69; *Bailey v. Davis*, 2 Hawks (9 N. Car.) 108; *Matthews v. Daniel*, 1 Murph. (5 N. Car.) 42; *Brantley v. Whitaker*, 5 Ired. L. (27 N. Car.) 225; *Moye v. Moye*, 5 Jones Eq. (58 N. Car.) 359.

*Pennsylvania*. — *George v. Morgan*, 16 Pa. St. 95; *Vaughan v. Dickes*, 20 Pa. St. 514; *Price v. Taylor*, 28 Pa. St. 107; *Kay v. Scates*, 37 Pa. St. 31; *Wynn v. Story*, 38 Pa. St. 166; *Covert v. Robinson*, 46 Pa. St. 274; *Allen v. Henderson*, 49 Pa. St. 333; *Mengel's Appeal*, 61 Pa. St. 248; *Gast v. Baer*, 62 Pa. St. 35; *Taylor v. Taylor*, 63 Pa. St. 481; *Kleppner v. Laverty*, 70 Pa. St. 70; *Ogden's Appeal*, 70 Pa. St. 501; *Greenawalt v. Greenawalt*, 71 Pa. St. 483; *Middlewarth v. Blackmore*, 74 Pa. St. 419; *Ingersoll's Appeal*, 86 Pa. St. 240; *Carroll v. Burns*, 108 Pa. St. 386; *Reinoehl v. Shirk*, 119 Pa. St. 113; *Cochran v. Cochran*, 127 Pa. St. 487; *Hackney v. Tracy*, 137 Pa. St. 53; *Parkhurst v. Harrower*, 142 Pa. St. 432; *Miller's Estate*, 145 Pa. St. 565; *Ray v. Alexander*, 146 Pa. St. 242; *Sugden v. McKenna*, 147 Pa. St. 55; *Hoff's Estate*, 147 Pa. St. 643;

*Robinson's Estate*, 149 Pa. St. 418; *Peirce v. Hubbard*, 152 Pa. St. 21; *Nes v. Ramsay*, 155 Pa. St. 628; *Armstrong v. Michener*, 160 Pa. St. 21; *Cameron v. Coy*, 165 Pa. St. 291; *Keating v. McAdoo*, 180 Pa. St. 5; *Clark v. Baker*, 3 S. & R. (Pa.) 470; *Amelong v. Dorneyer*, 16 S. & R. (Pa.) 323; *Irwin v. Dunwoody*, 17 S. & R. (Pa.) 61; *Heffner v. Knepper*, 6 Watts (Pa.) 18; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Haines v. Witmer*, 2 Yeates (Pa.) 400; *Paxson v. Lefferts*, 3 Rawle (Pa.) 59; *Taylor v. Taylor*, 63 Pa. St. 481; *Stone v. McMullen*, 10 W. N. C. (Pa.) 541; *Seybert v. Hibbert*, 5 Pa. Super. Ct. 538; *Criley v. Chamberlain*, 30 Pa. St. 161.

*Rhode Island*. — *Burrough v. Foster*, 6 R. I. 534; *Arnold v. Brown*, 7 R. I. 188; *Whitford v. Armstrong*, 9 R. I. 395; *Bailey v. Hawkins*, 18 R. I. 573; *Cooke v. Bucklin*, 18 R. I. 666.

*South Carolina*. — *Mendenhall v. Mower*, 16 S. Car. 312; *Mangum v. Piester*, 16 S. Car. 321; *Selman v. Robertson*, 46 S. Car. 265; *Bethea v. Bethea*, 48 S. Car. 440; *Postell v. Postell*, *Bailey Eq. (S. Car.)* 390; *Mazyck v. Vanderhorst*, *Bailey Eq. (S. Car.)* 48; *Cruger v. Heyward*, 2 Desaus. (S. Car.) 94; *Norton v. Fripp*, 1 Spears L. (S. Car.) 250; *Cox v. Buck*, 5 Rich. L. (S. Car.) 604; *McCorkle v. Black*, 7 Rich. Eq. (S. Car.) 407; *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105; *Lyon v. Walker*, 8 Rich. L. (S. Car.) 307; *Curry v. Sims*, 11 Rich. L. (S. Car.) 489; *Carson v. Kennerly*, 8 Rich. Eq. (S. Car.) 267.

*Tennessee*. — *Bramlet v. Bates*, 1 Sneed (Tenn.) 554; *Randolph v. Wendel*, 4 Sneed (Tenn.) 647; *Kirk v. Furgerson*, 6 Coldw. (Tenn.) 479; *Williams v. Williams*, 10 Heisk. (Tenn.) 571; *Bowman v. Tucker*, 3 Humph. (Tenn.) 650; *Booker v. Bocker*, 5 Humph. (Tenn.) 508; *Polk v. Faris*, 9 Yerg. (Tenn.) 209; *Williams v. Turner*, 10 Yerg. (Tenn.) 289; *Boyd v. Robinson*, 93 Tenn. 36; *Armstrong v. Douglass*, 89 Tenn. 223; *Muldoon v. Trewhitt*, (Tenn. Ch. 1896) 38 S. W. Rep. 109.

*Vermont*. — *Brattleboro v. Mead*, 43 Vt. 556.

*Virginia*. — *Bells v. Gillespie*, 5 Rand. (Va.) 273; *Smith v. Chapman*, 1 Hen. & M. (Va.) 300; *Hood v. Haden*, 82 Va. 597; *Callis v. Kemp*, 11 Gratt. (Va.) 78; *Tinsley v. Jones*, 13 Gratt. (Va.) 289; *Sydnor v. Sydnor*, 2 Munf. (Va.) 263; *Royall v. Eppes*, 2 Munf. (Va.) 479; *Williamson v. Ledbetter*, 2 Munf. (Va.) 521; *Carter v. Tyler*, 1 Call (Va.) 165; *Tate v. Tally*, 3 Call (Va.) 354; *Hill v. Burrow*, 3 Call (Va.) 342; *Seekright v. Billups*, 4 Leigh (Va.) 90; *Thomason v. Anderson*, 4 Leigh (Va.) 118; *Wright v. Cohoon*, 12 Leigh (Va.) 374.

In *Ohio* and *Kentucky* such expressions as "die without issue," "die without children," "without leaving issue," and words of similar import have been construed as referring to failure of issue at the time of the person's death, unless a contrary intent is shown. *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320; *Collins v. Collins*, 40 Ohio St. 355; *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 269; *Daniel v. Thompson*, 14 B. Mon. (Ky.) 533; *Brashear v. Macey*, 3 J. J. Marsh. (Ky.) 89; *Sale v. Crutchfield*, 8 Bush (Ky.) 636; *Brown v. Brown*, 1 Dana (Ky.) 42. See also *Birney v. Richardson*, 5 Dana (Ky.) 424; *Deboe v. Lowen*, 8 B. Mon. (Ky.) 616; *Cooksey v. Hill*, (Ky. 1899) 50 S. W. Rep. 238;



import a failure at the death of the first taker, or any time thereafter.<sup>1</sup>

**Intention Prevails.** — While the words "die without issue" presumably refer to an indefinite failure of issue, this presumption will yield to a contrary intent apparent from examination of the whole will,<sup>2</sup> and the courts have seized with avidity on any circumstance, however trivial, denoting an intention to fix the contingency at the time of death.<sup>3</sup>

*Thackston v. Watson*, 84 Ky. 209; *Moore v. Moore*, 12 B. Mon. (Ky.) 655; *Pool v. Benning*, 9 B. Mon. (Ky.) 625.

**Connecticut.** — In *Clarke v. Terry*, 34 Conn. 177, the court said: "This court has repeatedly held that the expression 'dying without issue,' and like expressions, have reference to the time of the death of the party, and not to an indefinite failure of issue. *Holms v. Williams*, 1 Root (Conn.) 332; *Morgan v. Morgan*, 5 Day (Conn.) 517; *Hudson v. Wadsworth*, 8 Conn. 348; *Langworthy v. Chadwick*, 13 Conn. 42; *Bullock v. Seymour*, 33 Conn. 289." See also *Williams v. Dickerson*, 2 Root (Conn.) 191; *St. John v. Dann*, 66 Conn. 407.

In *Turrill v. Northrop*, 51 Conn. 33, the gift was to the testator's adopted son, and if he "shall die without issue who can inherit," then to the testator's brothers and sisters; and the court held that "without issue who can inherit" was equivalent to "heirs of his body lawfully begotten;" and that the son did not take a fee simple defeasible upon death without issue and infeasible on birth of a child, but did take an estate in fee tail. The court distinguished *Bullock v. Seymour*, 33 Conn. 289. See also *Dart v. Dart*, 7 Conn. 250. Compare *St. John v. Dann*, 66 Conn. 401.

**New Hampshire.** — It is doubtful whether the rule is recognized in this state. See *Pinkham v. Blair*, 57 N. H. 239; *Hall v. Chaffee*, 14 N. H. 215. Compare the New Hampshire cases cited *supra*, this note.

**Georgia.** — In this state the tendency is to reject the rule and lay hold of slight circumstances to exclude its operation. *Harris v. Smith*, 16 Ga. 548; *Griswold v. Greer*, 18 Ga. 550; *Doe v. Roe*, 30 Ga. 453; *Lillibridge v. Ross*, 31 Ga. 730, 735.

But in *Hertz v. Abrahams*, (Ga. 1900) 36 S. E. Rep. 409, it was held that a devise to A. for her separate use, and in case she has no issue, to B., before the Act of 1854, is a devise limited upon an indefinite failure of issue, which, under the English rules of interpretation, created an estate tail by implication under the statute *de donis*, and is, therefore, enlarged into a fee simple estate by the Georgia Act of December 21, 1821. An executory devise which was limited upon words importing an indefinite failure of issue of the first taker under the law when the will in this case took effect, was uniformly held to be void for remoteness.

**Exceptions.** — In the case of *Eichelberger v. Barnitz*, 9 Watts (Pa.) 450, the leading case in *Pennsylvania* declaring the general rule in cases of real estate, the exceptions to it were also stated as follows: "The exceptions to the application of the general laws are either in cases of personal estate in which the construction is more liberal in favor of executory devises; or when the time at which the devise over is to take effect is expressly or impliedly limited to a particular period within a life or

lives in being and twenty-one years after; as where the contingency is, if the first taker die without issue before arriving at twenty-one, or if he die unmarried and without issue, or if he die without leaving issue behind him, or living at the time of his decease, or if the devise over be of a life estate, which implies necessarily that such devise over may outlive the first estate; in all these cases the testator has been considered as meaning a failure of issue within a fixed period, and not an indefinite failure of issue." And see *infra*, the succeeding subsections.

**Offspring.** — In *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, it was held that a devise in the event of a married woman dying without offspring by her husband, was equivalent to a devise in the event of her dying without issue. See also OFFSPRING.

**Absence.** — Where there is a limitation over of personal property, dependent upon the death without issue of a prior legatee, an absence of twenty-five years is sufficient to give rise to a presumption of death without issue. *Duffy's Estate*, 4 Pa. Dist. 147; *Miller v. Beates*, 3 S. & R. (Pa.) 490.

**Statutes Abolishing Estates Tail.** — As to the effect of the statute abolishing estates tail upon the practical application of the rule, see *Blair v. Vanblarcum*, 71 Ill. 290; *Moore v. Moore*, 12 B. Mon. (Ky.) 651, 660; *Goodell v. Hibbard*, 32 Mich. 47; *Eaton v. Straw*, 18 N. H. 321; *Dennett v. Dennett*, 43 N. H. 499, 501; *Den v. Allaire*, 20 N. J. L. 6, 27; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Parish v. Ferris*, 6 Ohio St. 563, 578.

**1. Definite and Indefinite Failure of Issue Distinguished.** — See *Downing v. Wherrin*, 19 N. H. 84; *Hall v. Chaffee*, 14 N. H. 220; *Vaughan v. Dickes*, 20 Pa. St. 509, 513; *Watkins v. Quarles*, 23 Ark. 192.

**2. Intent.** — *Leeming v. Sherratt*, 2 Hare 14; *Sheffield v. Orrery*, 3 Atk. 283; *Doe v. Collis*, 4 T. R. 294; *Smith v. Kimbell*, 153 Ill. 368; *Strain v. Sweeny*, 163 Ill. 603; *Timanus v. Dugan*, 46 Md. 402; *Whitcomb v. Taylor*, 122 Mass. 249; *Drake v. Drake*, 134 N. Y. 225; *Cameron v. Coy*, 165 Pa. St. 297; *Reck's Appeal*, 78 Pa. St. 432; *Woelpeper's Appeal*, 126 Pa. St. 562; *Armstrong v. Douglass*, 89 Tenn. 223; *Lucas v. Duffield*, 6 Gratt. (Va.) 456.

**3. Definite Failure Favored.** — *Pells v. Brown*, Cro. Jac. 590; *Hall v. Chaffee*, 14 N. H. 222; *Miller's Estate*, 145 Pa. St. 565; *Wallace v. Denig*, 152 Pa. St. 251; *Selman v. Robertson*, 46 S. Car. 265; *Bramlet v. Bates*, 1 Sneed (Tenn.) 573; *Muldoon v. Trewbitt*, (Tenn. Ch. 1896) 38 S. W. Rep. 114; *Booker v. Booker*, 5 Humph. (Tenn.) 507. See also *Burney v. Arnold*, 15 R. I. 80. And see also the succeeding subsections.

"**Shall Die Without Lawful Issue Living**" Held Equivalent to "Without Having Had Lawful Issue." — *Chaplin v. Doty*, 60 Vt. 712.



**Personal Property.** — The rule has been held to apply to both real and personal property,<sup>1</sup> but there has been a tendency to construe "dying without issue" not so strictly when applied to personalty, and it is more readily held to import a definite failure of issue.<sup>2</sup>

**2. Without Having Issue—Before He Has Any Issue—Without Children—Issue Alive, Surviving, or Who Shall Attain Twenty-one.** — Many cases hold that where the gift over is on the death of A. without issue alive,<sup>3</sup> or surviving,<sup>4</sup>

**1. Personal Property—Indefinite Failure.** — Hawkins on Wills 206; 2 Jarman on Wills (5th Am. ed.) 498.

*England.* — *Beauclerk v. Dormer*, 2 Atk. 313; *Candy v. Campbell*, 2 Cl. & F. 421.

*Alabama.* — *M'Graw v. Davenport*, 6 Port. (Ala.) 319.

*Arkansas.* — *Moody v. Walker*, 3 Ark. 147.

*Maryland.* — *Usilton v. Usilton*, 3 Md. Ch. 36; *Davidge v. Chaney*, 4 Har. & M. (Md.) 393; *Edelen v. Middleton*, 9 Gill (Md.) 168.

*Massachusetts.* — *Hall v. Priest*, 6 Gray (Mass.) 22.

*Mississippi.* — *Powell v. Brandon*, 24 Miss. 350.

*Missouri.* — *Chism v. Williams*, 29 Mo. 299.

*New Jersey.* — *Condict v. King*, 13 N. J. Eq. 375; *Fairchild v. Crane*, 13 N. J. Eq. 105.

*New York.* — *Moffat v. Strong*, 10 Johns. (N. Y.) 14.

*Rhode Island.* — *Cooke v. Bucklin*, 18 R. I. 666.

*South Carolina.* — *Cox v. Buck*, 5 Rich. L. (S. Car.) 604.

*Tennessee.* — *Bowman v. Tucker*, 3 Humph. (Tenn.) 648; *Booker v. Booker*, 5 Humph. (Tenn.) 508; *Polk v. Faris*, 9 Yerg. (Tenn.) 209; *Williams v. Turner*, 10 Yerg. (Tenn.) 289; *Randolph v. Wendel*, 4 Sneed (Tenn.) 646.

In North Carolina, since the Act of 1784 abolishing entails, executory limitations of land and chattels are to be construed alike upon the presumption that the intention of the testator is that in each case the estate should go over on the same event. Hence a devise over of land upon the death of the first taker "without leaving issue," or a limitation to survivors, will be good. *Jones v. Spaight*, 1 Law Repos. (4 N. Car.) 544; *Zollicoffer v. Zollicoffer*, 4 Dev. & B. L. (20 N. Car.) 438, 441. See *Clapp v. Fogleman*, 1 Dev. & B. Eq. (21 N. Car.) 468.

*Pennsylvania.* — In *Moorhead's Estate*, 180 Pa. St. 122, it is said: "There has been much learning expended upon the meaning of the words 'dying without issue' and whether they import a definite or indefinite failure of issue; but it now seems to be settled, that when applied to personal property it means issue living at the death of the person to whom the personality is given in the first instance. *Myers's Appeal*, 49 Pa. St. 111; *Francis's Estate*, 4 Pa. Dist. 694; *McCoy's Estate*, 16 W. N. C. (Pa.) 243; *Duffy's Estate*, 36 W. N. C. (Pa.) 199, and *Eachus's Appeal*, 91 Pa. St. 105." See also *Pennock's Estate*, 11 Phila. (Pa.) 623, 33 Leg. Int. (Pa.) 290.

**2. Gift Not So Strictly Bound by the Rule** — *England.* — *Poole v. Poole*, 3 B. & P. 620; *Pinbury v. Elkin*, 1 P. Wms. 563.

*Maryland.* — *Woodland v. Wallis*, 6 Md. 151; *Budd v. State*, 22 Md. 48; *Wallis v. Woodland*, 32 Md. 101; *Allender v. Sussan*, 33 Md.

11; *Biscoe v. Biscoe*, 6 Gill & J. (Md.) 232; *Gable v. Ellender*, 53 Md. 314; *Clagett v. Worthington*, 3 Gill (Md.) 83; *Edelen v. Middleton*, 9 Gill (Md.) 161; *Davidge v. Chaney*, 4 Har. & M. (Md.) 393; *Usilton v. Usilton*, 3 Md. Ch. 36; *Newton v. Griffith*, 1 Har. & G. (Md.) 111.

*New Hampshire.* — *Downing v. Wherrin*, 19 N. H. 89; *Kimball v. Penhallow*, 60 N. H. 448; *Hall v. Chaffee*, 14 N. H. 215; *Pinkham v. Blair*, 57 N. H. 226.

*New Jersey.* — *Morehouse v. Cotheal*, 22 N. J. L. 430.

*North Carolina.* — *Porter v. Ross*, 2 Jones Eq. (55 N. Car.) 196.

*Pennsylvania.* — *Miller's Estate*, 145 Pa. St. 561; *Gerhard's Estate*, 160 Pa. St. 265; *Seibert v. Butz*, 9 Watts (Pa.) 490; *Clark v. Baker*, 3 S. & R. (Pa.) 477; *Eachus's Appeal*, 91 Pa. St. 108.

*South Carolina.* — *Brummet v. Barber*, 2 Hill L. (S. Car.) 543; *DeTreville v. Ellis*, *Bailey Eq. (S. Car.)* 40; *Cudworth v. Thompson*, 3 Desaus. (S. Car.) 256; *Clifton v. Haig*, 4 Desaus. (S. Car.) 330.

*Tennessee.* — *Williams v. Turner*, 10 Yerg. (Tenn.) 289.

*Virginia.* — *Tinsley v. Jones*, 13 Gratt. (Va.) 292.

**3. Issue Alive.** — *Varble v. Philips*, (Ky. 1892) 20 S. W. Rep. 306; *Den v. Schenck*, 8 N. J. L. 39; *Nicholson v. Bettie*, 57 Pa. St. 386; *Kleppner v. Laverty*, 70 Pa. St. 70; *Pearce v. Rickard*, 18 R. I. 142; *Henry v. Archer*, *Bailey Eq. (S. Car.)* 535.

**4. Issue Surviving.** — *Porter v. Bradley*, 3 T. R. 143; *Miller v. Simpson*, (Ky. 1886) 2 S. W. Rep. 171; *Welch v. Brimmer*, 169 Mass. 211; *Peirsol v. Roop*, 56 N. J. Eq. 746; *Nes v. Ramsay*, 155 Pa. St. 636; *DeWolf v. Middleton*, 18 R. I. 813.

Where the devise to one is over in case he dies without surviving issue or without leaving issue surviving, it has been held that a definite failure of issue was meant. *Friedman v. Steiner*, 107 Ill. 125; *Koehler v. Koehler*, 185 Ill. 361; *Nicholson v. Bettie*, 57 Pa. St. 386; *Hill v. Hill*, 74 Pa. St. 173; *Clapp v. Fogleman*, 1 Dev. & B. Eq. (21 N. Car.) 466.

"There is a marked difference between a gift over on the first taker dying without leaving issue, and a gift over on his dying without leaving lawful issue surviving. The latter, if it means anything, must mean lawful issue living beyond the death of the first taker; it is much more expressive than the phrase 'leaving no issue behind him,' which in *Porter v. Bradley*, 3 T. R. 143, was held to denote a definite failure of issue." *Nes v. Ramsay*, 155 Pa. St. 632. See also *Nicholson v. Bettie*, 57 Pa. St. 384; *Kleppner v. Laverty*, 70 Pa. St. 70.

In *Burrough v. Foster*, 6 R. I. 534, 540, "leav-



or living,<sup>1</sup> or who shall attain the age of twenty-one,<sup>2</sup> a definite failure of issue is meant. But if the gift over is on the death of the first taker without having issue, or before he has any issue, these terms import an indefinite failure of issue.<sup>3</sup>

**Children.** — Where the gift over is upon death without children, and it appears that "children" was used in the sense of issue, an indefinite failure of issue is imported.<sup>4</sup> In general, however, the terms "child" or "children" have not the technical force of the word "issue" in a limitation over, and "dying without children" generally refers to the time of death of the first taker.<sup>5</sup>

ing no surviving issue," in a devise, was held to import an indefinite failure of issue. But see *DeWolf v. Middleton*, 18 R. I. 810, 26 Atl. Rep. 44, and *Whitford v. Armstrong*, 9 R. I. 395, which support the position of the text.

**1. Issue Living.** — *Pells v. Brown*, Cro. Jac. 590; *Backus v. Presbyterian Assoc.*, 77 Md. 58; *Gable v. Ellender*, 53 Md. 311; *Hall v. Chaffee*, 14 N. H. 221; *Arnold v. Brown*, 7 R. I. 188; *Whitford v. Armstrong*, 9 R. I. 395; *Brown v. Brown*, 86 Tenn. 277; *Jiggetts v. Davis*, 1 Leigh (Va.) 368.

**Without Issue Living — Definite Failure of Issue.** — *Phinizz v. Foster*, 90 Ala. 262.

In *Doe v. Reason*, cited in 3 Wils. C. Pl. 242, the devise was to A. for life, and on her decease to such issue of her body as shall then be living, and "in case my said niece shall die without issue of her body then living," then over; it was held to create an estate for life in A.

In *Plunket v. Holmes*, Sid. 47, 1 Lev. 11, there was a devise to A. for life, and if he die without issue living at his death, remainder in fee. This was held to be an estate for life with contingent remainder over.

**Living Issue.** — The testator devised and bequeathed his estate, real and personal, to his daughter and the heirs of her body, "provided if my said daughter S. B. should happen to die without living issue of her body, then, and in that case, all of my said estate, both personal and real, to return to the nearest heirs of my body by my mother's lineage." It was held that in the personality S. B. took an absolute estate, and there was no valid limitation to her issue as purchasers. *Hay v. Hay*, 4 Rich. Eq. (S. Car.) 378.

**2. Dying Without Issue Who Shall Attain the Age of Twenty-one.** — *Westenberger v. Reist*, 13 Pa. St. 594; *Booker v. Booker*, 5 Humph. (Tenn.) 505. See also *Manice v. Manice*, 43 N. Y. 303.

**3. Without Having Issue — Before He Has Any Issue.** — *Cole v. Goble*, 13 C. B. 445, 76 E. C. L. 445, 20 Eng. L. & Eq. 237; *Eastwood v. Lockwood*, L. R. 3 Eq. 487; *Newton v. Barnardine*, Moo. 127, 275; *Forth v. Chapman*, 1 P. Wms. 663; *Doe v. Ewart*, 7 Ad. & El. 636, 34 E. C. L. 187, 3 N. & P. 197; *Doe v. Duesbury*, 8 M. & W. 530; *Bamford v. Lord*, 14 C. B. 708, 78 E. C. L. 708; *Biss v. Smith*, 2 H. & N. 105; *Feakes v. Standley*, 24 Beav. 485; *Newton v. Griffith*, 1 Har. & G. (Md.) 111; *Downing v. Wherrin*, 19 N. H. 86; *Davidson v. Davidson*, 1 Hawks (8 N. Car.) 163; *Vaughan v. Dickes*, 20 Pa. St. 509; *Arnold v. Brown*, 7 R. I. 188, 197.

But where there is a devise to A. for life, and if he has issue to A. in fee, but if he die

without issue then to B., the restricted construction has been adopted. *Shriver v. Lynn*, 2 How. (U. S.) 43; *Clagett v. Worthington*, 3 Gill (Md.) 83; *Doe v. Roe*, 30 Ga. 453. Compare *Waddell v. Rattew*, 5 Rawle (Pa.) 231; *Arnold v. Brown*, 7 R. I. 188; *Callis v. Kemp*, 11 Gratt. (Va.) 78. So as to personality, where the gift is to A. indefinitely. *Badger v. Harden*, 6 Rich. Eq. (S. Car.) 147.

**Die Without Having Had Any Issue.** — In some cases the words "die before having issue" are read "die without having had any issue," and the estate becomes absolute on the birth of issue. *Sadler v. Wilson*, 5 Ired. Eq. (40 N. Car.) 296; *Marshall v. Rives*, 8 Rich. L. (S. Car.) 88; *Dashiell v. Dashiell*, 2 Har. & G. (Md.) 127; *Ray v. Enslin*, 2 Mass. 562.

**4. Children.** — *Raggett v. Beatty*, 5 Bing. 243, 15 E. C. L. 434; *Doe v. Webber*, 1 B. & Ald. 713; *Parker v. Birks*, 1 Kay & J. 156. See also *Doe v. Simpson*, 5 Scott 770, 4 Bing. N. Cas. 333, 33 E. C. L. 373, 3 M. & G. 929, 42 E. C. L. 483; *Bacon v. Cosby*, 4 De G. & Sm. 261; *Egan v. Morris*, Ll. & G. t. Plunk. 297; *Addison v. Addison*, 9 Rich. Eq. (S. Car.) 58.

Under a devise to A. and her heirs if she has any child, and if not, after the death of herself and her husband, over, it has been held that A. took an estate tail. *Doe v. Bannister*, 7 M. & W. 292; *Goodtitle v. Wodhull*, Willes 592. See the title CHILD — CHILDREN, vol. 5, p. 1082. And see *supra*, this title, *Issue Constructed Children*.

**5. Definite Failure.** — *Stone v. Maule*, 2 Sim. 490; *Doe v. Webber*, 1 B. & Ald. 713; *Parker v. Birks*, 1 Kay & J. 156; *Morgan v. Morgan*, 5 Day (Conn.) 517; *Smith v. Hunter*, 23 Ind. 580; *Richardson v. Noyes*, 2 Mass. 56, 61; *Hull v. Eddy*, 14 N. J. L. 169, 175; *Barney v. Arnold*, 1 N. Eng. Rep. 138; *Sherman v. Sherman*, 3 Barb. (N. Y.) 385, 387; *Bedford's Appeal*, 40 Pa. St. 18, 22; *Brummet v. Barber*, 2 Hill L. (S. Car.) 543; *Mathis v. Hammond*, 6 Rich. Eq. (S. Car.) 399. See also *Peirce v. Hubbard*, 152 Pa. St. 18. Compare *Bullock v. Seymour*, 33 Conn. 289.

Words which would restrain the meaning of "dying without issue" to a dying at the death, *a fortiori* have such restraining effect upon the phrase "dying without children." Thus, under a devise to A. to hold "to her and her children forever," with a limitation over if she should die leaving no children, the children take by purchase. *Hannan v. Osborn*, 4 Paige (N. Y.) 336.

Thus the words "die without leaving issue or children," in bequests of personality, in the absence of controlling context, have been held to import a definite failure of issue. *Clapp v. Fogleman*, 1 Dev. & B. Eq.



**3. Without Leaving Issue — Without Leaving Issue Behind Him.** — In regard to the phrases "leaving no issue," "without leaving issue," a distinction has been taken between real and personal property; in a bequest of personality these terms import a definite failure of issue,<sup>1</sup> whereas in a devise of real property they are generally held to import an indefinite failure of issue,<sup>2</sup> although

(21 N. Car.) 466; *Boone v. Barnes*, Rich. Eq. Cas. (S. Car.) 357.

**Children then Living.** — Where the devise over is to such children as should then be living, a definite failure of issue is meant. *Gable v. Ellender*, 53 Md. 311.

**Devise to A. and Her Children.** (See also the title *WILLS*.) — Under a devise to A. and her children, "the children taking their mother's share." *Smith's Estate*, 9 Phila. (Pa.) 348, 31 Leg. Int. (Pa.) 76. Compare II. 2. *Issue Correlative with Parent*. Or to A. and such of her children as shall at her death be living and attain the age of twenty-one. *Taylor v. Gould*, 10 Barb. (N. Y.) 388. Or simply "then living." *Huber's Appeal*, 80 Pa. St. 348. Or "if she leaves any at her death." *Dougherty v. Dougherty*, 2 Strobb. Eq. (S. Car.) 63. Or at her death to be equally divided between her children, share and share alike. *Boal v. Mix*, 17 Wend. (N. Y.) 119; *Moon v. Stone*, 19 Gratt. (Va.) 130; *Bowers v. Bowers*, 4 Heisk. (Tenn.) 293; *Stubbs v. Stubbs*, 11 Humph. (Tenn.) 43; *Williams v. Sneed*, 3 Coldw. (Tenn.) 533. Or as tenants in common. *Chew's Appeal*, 37 Pa. St. 23.

**Limitation Over of a Moiety.** — Where the whole of a fund is given to the same persons, and the limitation over of one moiety is thus explained to be intended to take effect on failure of children, instead of an indefinite failure of issue, but the limitation over of the other moiety on failure of issue of the prior taker, or on his decease without issue, is not so explained, the limitation over of the latter moiety will be construed to be intended to take effect on an indefinite failure of issue, though there may appear to be no reason for supposing but that both were intended to go over in the same event. *Smith Ext. Int.*, § 548; *Carter v. Bental*, 2 Beav. 351; *Kirkpatrick v. Kilpatrick*, 13 Ves. Jr. 476.

**1. Personal Property — Leaving No Issue — Definite Failure of Issue — England.** — Roper on Legacies 551; *Forth v. Chapman*, 1 P. Wms. 663; *Atkinson v. Hutchinson*, 3 P. Wms. 258; *Sabbarton v. Sabbarton*, Cas. t. Talb. 55, 245; *Mansell v. Grove*, 2 Y. & C. Ch. 484; *Read v. Snell*, 2 Atk. 642; *Sheppard v. Lessingham*, A. ubl. 122; *Goodtitle v. Pegden*, 2 T. R. 720; *Porter v. Bradley*, 3 T. R. 146; *Dainty v. Dainty*, 6 T. R. 307; *Martin v. Long*, Prec. Ch. 15; *Crooke v. Vandes*, 9 Ves. Jr. 197, 203; *Southby v. Stonehouse*, 2 Ves. 616; *Elton v. Eason*, 19 Ves. Jr. 77; *Stafford v. Buckley*, 2 Ves. 180; *Gordon v. Adolphus*, 3 Bro. P. C. (Foml. ed.) 306; *Lamley v. Blower*, 3 Atk. 396; *Sheffield v. Orrery*, 3 Atk. 288; *Taylor v. Clarke*, 2 Eden 202; *Bamford v. Chadwick*, 2 W. R. 530; *Hawkins v. Hamerton*, 16 Sim. 421; *Heather v. Winder*, 5 L. J. Ch. 41; *Daniel v. Warren*, 2 Y. & C. Ch. 290; *Mansell v. Grove*, 2 Y. & C. Ch. 484; *Radford v. Radford*, 1 Keen 486; *Bamford v. Lord*, 14 C. B. 708, 78 E. C. L. 708; *Pinbury v. Elkin*, 1 P. Wms. 563.

*Alabama*. — *Flinn v. Davis*, 18 Ala. 132; *Bethea v. Smith*, 40 Ala. 415.

*Georgia*. — *Robert v. West*, 15 Ga. 123.

*Kentucky*. — *Moore v. Howe*, 4 T. B. Mon. (Ky.) 205.

*Maryland*. — *Usilton v. Usilton*, 3 Md. Ch. 36; *Biscoe v. Biscoe*, 6 Gill & J. (Md.) 232; *Edelen v. Middleton*, 9 Gill (Md.) 161; *Allender v. Sussan*, 33 Md. 11.

*Massachusetts*. — *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Hall v. Priest*, 6 Gray (Mass.) 18; *Jackson v. Jackson*, 153 Mass. 374.

*New Hampshire*. — *Ladd v. Harvey*, 21 N. H. 514, 527; *Downing v. Wherrin*, 19 N. H. 9. *New York*. — *Theological Seminary v. Kellogg*, 16 N. Y. 83; *Rathbone v. Dyckman*, 3 Paige (N. Y.) 9.

*North Carolina*. — *Newnan v. Miller*, 7 Jones L. (52 N. Car.) 516; *Robards v. Jones*, 4 Ired. L. (26 N. Car.) 53; *Miller v. Williams*, 2 Dev. B. & L. (19 N. Car.) 500.

*Pennsylvania*. — *Still v. Spear*, 3 Grant Cas. (Pa.) 306; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Bedford's Appeal*, 40 Pa. St. 18; *Nicholson v. Bettie*, 57 Pa. St. 386; *Smith's Appeal*, 23 Pa. St. 9; *Gerhard's Estate*, 160 Pa. St. 255; *Clark v. Baker*, 3 S. & R. (Pa.) 477; *Train v. Fisher*, 15 S. & R. (Pa.) 148.

*Rhode Island*. — *Whitford v. Armstrong*, 9 R. I. 394.

*South Carolina*. — *Carr v. Green*, 2 McCord L. (S. Car.) 75; *Henry v. Archer*, *Bailey Eq.* (S. Car.) 535; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202; *Mazyck v. Vanderhorst*, *Bailey Eq.* (S. Car.) 48.

*Virginia*. — *Tinsley v. Jones*, 13 Gratt. (Va.) 292; *Dunn v. Bray*, 1 Call (Va.) 338; *Hill v. Burrow*, 3 Call (Va.) 342.

**Real Estate Directed to Be Converted** is for the purpose of this distinction regarded as personality. 2 *Jarman on Wills* (5th Am. ed.) \*498. See *Farthing v. Allen*, 2 Madd. 310; *Hawkins v. Hamerton*, 16 Sim. 410.

**2. Die Without Issue — Leaving No Issue — Real Property — Indefinite Failure of Issue — Georgia.** — *Wiley v. Smith*, 3 Ga. 563.

*Maryland*. — *Newton v. Griffith*, 1 Har. & G. (Md.) 111; *Tongue v. Nutwell*, 13 Md. 415; *Biscoe v. Biscoe*, 6 Gill & J. (Md.) 236.

*Massachusetts*. — *Allen v. Ashley School Fund*, 102 Mass. 262; *Kelley v. Meins*, 135 Mass. 231; *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472; *Hawley v. Northampton*, 8 Mass. 38.

*New Jersey*. — *Morehouse v. Cotheal*, 22 N. J. L. 430; *Chetwood v. Winston*, 40 N. J. L. 337.

*New York*. — *Ferris v. Gibson*, 4 Edw. (N. Y.) 707; *Foley v. Foley*, 17 Hun (N. Y.) 235; *Miller v. Macomb*, 26 Wend. (N. Y.) 229.

*Pennsylvania*. — *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Kay v. Scates*, 37 Pa. St. 31; *Wynn v. Story*, 38 Pa. St. 166; *Haldeman v. Haldeman*, 40 Pa. St. 29; *Middleworth v. Blackmore*, 74 Pa. St. 414, 419; *Reinoehl v. Shirk*, 119 Pa. St. 108; *Grimes v. Shirk*, 169



not always.<sup>1</sup>

**Words Applied to Both Descriptions of Property in Same Will.** — Where the words "dying without leaving issue," or "leaving no issue," are applied in the same will, and even in the same sentence, to both real and personal property, the distinction above made still exists, and the terms in regard to real property will be construed as importing an indefinite failure of issue while as to personalty a definite failure of issue.<sup>2</sup>

**Supplying the Word "Leaving."** — And where the testator in one part of the will used the phrase "without leaving issue," and in another "without issue," the latter expression will be construed to correspond with the former where the general plan of the will seems to authorize it.<sup>3</sup>

**Die Without Leaving Issue Behind Him.** — The words "die without leaving issue behind him," or "leaving no issue behind him," as applied to either realty or personalty, import a definite failure of issue.<sup>4</sup>

**4. Without Leaving Issue Living at Time of Death.** — If the gift over is upon the death of the first devisee without leaving issue living at the time of his death, or without leaving issue at the time of his death, a definite failure of issue is meant whether the gift is of personalty or realty.<sup>5</sup>

Pa. St. 74; Hackney v. Tracy, 137 Pa. St. 53; Ray v. Alexander, 146 Pa. St. 242; Cochran v. Cochran, 127 Pa. St. 487; Mickley's Appeal, 92 Pa. St. 514.

**Indefinite Failure — Fee Tail.** — In Price v. Taylor, 28 Pa. St. 95, the gift was to the testator's granddaughter for life, provided she should not leave issue at her death and if she should leave issue at her death then in fee simple to her heirs forever; if she should not leave issue living at her death, then over. This was held to create a fee tail in the first taker.

**1. Real Property — Definite Failure of Issue — England.** — Cole v. Goble, 20 Eng. L. & Eq. 237.

*Alabama.* — Flinn v. Davis, 18 Ala. 132; Edwards v. Bibb, 43 Ala. 666, 675.

*Georgia.* — Griswold v. Greer, 18 Ga. 550; Harris v. Smith, 16 Ga. 545.

*Michigan.* — Goodell v. Hibbard, 32 Mich. 47. *New Hampshire.* — Downing v. Wherrin, 19 N. H. 86; Eaton v. Straw, 18 N. H. 320.

*North Carolina.* — Robards v. Jones, 4 Ired. L. (26 N. Car.) 53; Jones v. Spaight, 1 Law Repos. (4 N. Car.) 544.

*Pennsylvania.* — Shiver's Estate, 9 Phila. (Pa.) 354, 31 Leg. Int. (Pa.) 148; Bentley v. Kaufman, 3 W. N. C. (Pa.) 352; Middleswarth v. Blackmore, 74 Pa. St. 414.

*South Carolina.* — Whitworth v. Stuckey, 1 Rich. Eq. (S. Car.) 404; Perry v. Logan, 5 Rich. Eq. (S. Car.) 202; Carr v. Jeannerett, 2 McCord L. (S. Car.) 66; Cudworth v. Thompson, 3 DeSaus. (S. Car.) 256.

*Virginia.* — Dunn v. Bray, 1 Call (Va.) 338.

In Addison v. Addison, 9 Rich. Eq. (S. Car.) 58, 61, Wardlaw, Ch., said: "Yet when used in connection with other words naturally meaning descendants of the first generation, and other issue representing children, or by the statute of distributions, 'leave' would retain its proper signification and be adequate as to any estate to restrict the failure of issue without the recognized limits of entailment."

**Leaving Lawful Issue, Surviving Children, etc.** — Thus the words "die without leaving lawful issue surviving," or "leaving no issue or child," have been held to create a definite fail-

ure. Friedman v. Steiner, 107 Ill. 125; Koeffler v. Koeffler, 185 Ill. 261; Nicholson v. Bettie, 57 Pa. St. 386; Hill v. Hill, 74 Pa. St. 173; Clapp v. Fogleman, 1 Dev. & E. Eq. (21 N. Car.) 466. So "if he should leave no children." Wight v. Baur, 7 Cush. (Mass.) 105; Van Dyke v. Vanderpool, 14 N. J. Eq. 198; Fairchild v. Crane, 13 N. J. Eq. 105; Hull v. Eddy, 14 N. J. L. 169. Or, "leaving no lawful issue surviving then living." Manice v. Manice, 43 N. Y. 303. See Westenberger v. Reist, 13 Pa. St. 594; Covington First Nat. Bank v. De Pauw, 75 Fed. Rep. 777.

**2. Forth v. Chapman, 1 P. Wms. 663; Crooke v. De Vandes, 9 Ves. Jr. 203; Doe v. Ewart, 7 Ad. & El. 636, 34 E. C. L. 187; Radford v. Radford, 1 Keen 486; Mazyck v. Vanderhorst, Bailey Eq. (S. Car.) 48.**

In *Alabama* it seems that the words "without leaving issue" in a gift of realty and personalty together will be construed to import a definite failure of issue. Edwards v. Bibb, 43 Ala. 666. See also Clapp v. Fogleman, 1 Dev. & B. Eq. (21 N. Car.) 466; Jenkins v. Jenkins, 64 N. H. 407, 408.

**3. 1 Jarman on Wills (5th Am. ed.) 487, 531, 532; 2 Jarman on Wills (5th Am. ed.) 500; Sheppard v. Lessingham, Ambl. 122; Radford v. Radford, 1 Keen 486. See also Albee v. Carpenter, 12 Cush. (Mass.) 382; Dumond v. Stringham, 26 Barb. (N. Y.) 104; Norris v. Beyea, 13 N. Y. 273; Hopkins v. Jones, 2 Pa. St. 71; Arnold v. Brown, 7 R. I. 188; Greenway v. Greenway, 2 De G. F. & J. 128.**

But if there is anything in the limitations of the will to indicate that the testator intended each expression to have its individual force, the word "leaving" will not be supplied. Particularly will this be so where the effect of supplying the word is to divest the interest of a child who happened not to survive its parent. Pye v. Linwood, 6 Jur. 618.

**4. Behind Him.** — Porter v. Bradley, 3 T. R. 143; Sheffield v. Orrery, 3 Atk. 283; Hall v. Chaffee, 14 N. H. 221; Nes v. Ramsay, 155 Pa. St. 628; Eichelberger v. Barnitz, 9 Watts (Pa.) 447; Nicholson v. Bettie, 57 Pa. St. 384.

**5. Definite Failure of Issue at Time of Death.** — Doe v. Wetton, 2 B. & P. 324; Plunket v.



**5. Gift Over Expressly Limited to Take Effect On, At, or After Decease of First Taker.** — Where the subject-matter disposed of by will is personal estate, and the gift over if the first taker dies without issue is expressly limited to take effect on, at, or after his decease, there seems to be no doubt entertained that the words "on, at, or after" the decease of the devisee, restrain the failure of issue to the time of his death.<sup>1</sup> In regard to real property and where the words are "at or on," the rule is the same, and the presumption of an indefinite failure of issue is rebutted.<sup>2</sup> In regard to the term "after," it would seem that in case of realty, the words "after his decease" would *prima facie* mean immediately after and point to a definite failure of issue;<sup>3</sup> but the term does not seem as strong as "at or on."<sup>4</sup> And it is immaterial whether A. takes a fee or only a life estate, owing to the absence of words of limitation.<sup>5</sup>

**6. Effect of the Word "Then."** — The word "then" in a gift to A. and if A. dies without issue then to B., has been held, in many cases, to be a particle of reference connecting the consequent with the premises, meaning in that event, or if that happens; and not to prevent the words "dying without issue" from referring to an indefinite failure of issue.<sup>6</sup> On the other hand, in

Holmes, Sid. 47, 1 Lev. 11; Covington First Nat. Bank v. De Pauw, 75 Fed. Rep. 777; Varble v. Philips, (Ky. 1892) 20 S. W. Rep. 306; Bell v. Scammon, 15 N. H. 381; O'Brien v. O'Leary, 64 N. H. 332; Parkhurst v. Harrower, 142 Pa. St. 432; Arnold v. Brown, 7 R. I. 197; Gadsden v. Desportes, 39 S. Car. 131; Markley v. Singletary, 11 Rich. Eq. (S. Car.) 393; Randall v. Josselyn, 59 Vt. 557. See also Verulam v. Bathurst, 13 Sim. 374; Cleveland v. Havens, 13 N. J. Eq. 101; Woodward, J., in Vaughan v. Dickes, 20 Pa. St. 513; Henry v. Stewart, 2 Hill L. (S. Car.) 328.

**1. Personal Property — On, At, or After — Definite Failure of Issue.** — Smith Ex. Int., § 557; Roper on Legacies 1549; Fearn C. R. (10th ed.) 471; Nichols v. Hooper, 1 P. Wms. 198; Pinbury v. Elkin, 1 P. Wms. 563; Trotter v. Oswald, 1 Cox Ch. 317; Wilkinson v. South, 7 T. R. 551; Rackstraw v. Vile, 1 Sim. & St. 604; Beauclerk v. Dormer, 2 Atk. 309; Dunk v. Fenner, 2 Russ. & M. 557; Stratford v. Powell, 1 Ball & B. 1; Gawler v. Cadby, Jac. 346; Moore v. Howe, 4 T. B. Mon. (Ky.) 221; Downing v. Wherrin, 19 N. H. 88; Den v. Snitcher, 14 N. J. L. 59; De Wolf v. Middleton, 18 R. I. 813.

**After.** — See also Atwell v. Barney, Dudley (Ga.) 207; Swinburne's Petition, 16 R. I. 210.

**"Immediately After"** is stronger than "after," on account of the greater definiteness of the expression. 2 Jarman on Wills (5th Am. ed.) \*523, 525; Stratton v. Payne, 3 Bro. P. C. (Toml. ed.) 99, cited in Read v. Snell, 2 Atk. 647.

**At Any Time.** — Where the bequest was to H., and if he should at any time die without issue, "I then give and bequeath over," it was held that a definite failure of issue was intended. Snyder's Appeal, 95 Pa. St. 174; Gormley's Estate, 154 Pa. St. 378; Miller's Estate, 145 Pa. St. 561.

**2. Parker v. Birks, 1 Kay & J. 156; Doe v. Frost, 3 B. & Ald. 546, 5 E. C. L. 373; Doe v. Webber, 1 B. & Ald. 713; Coltsmann v. Coltsmann, L. R. 3 H. L. 121; Matter of Wills, etc., R. Co., 2 Sim. N. S. 114; Jones v. Jones, 20 Ga. 701; Moore v. Howe, 4 T. B. Mon. (Ky.) 221; Den v. Snitcher, 14 N. J. L. 59; Heard v. Horton, 1 Den. (N. Y.) 105; De Wolf v. Mid-**

dleton, 18 R. I. 813. See also Blinston v. Warburton, 2 Kay & J. 400.

The context may of course show that the recognized construction of "on or at" was not intended. Peyton v. Lambert, 8 Ir. C. L. 485.

**"Upon the Happening of the Event,"** — See Tinsley v. Jones, 13 Gratt. (Va.) 289.

**3. After — Definite Failure of Issue.** — Trotter v. Oswald, 1 Cox Ch. 317; Atwell v. Barney, Dudley (Ga.) 207; Downing v. Wherrin, 19 N. H. 9; Theological Seminary v. Kellogg, 16 N. Y. 84. See also Wilson v. Wilson, 46 N. J. Eq. 323.

**4. "After" Not So Strong as "At" or "On."** — Parker v. Birks, 1 Kay & J. 156; Walter v. Drew, 1 Comyns 373; Doe v. Cooper, 1 East 229; Jones v. Ryan, 9 Ir. Eq. 249; Donn v. Penny, 19 Ves. Jr. 545. Compare Matter of Wills, etc., R. Co., 2 Sim. N. S. 114; Olivant v. Wright, 24 W. R. 84; Whitford v. Armstrong, 9 R. I. 394.

**5. Fee or Life Estate.** — Theobald on Wills (2d ed.) 543, (4th ed.) 583; Coltsmann v. Coltsmann, L. R. 3 H. L. 121. Compare 2 Jarman on Wills (5th Am. ed.) 519, 520, 521; Prior on Issues, § 104; Blinston v. Warburton, 2 Kay & J. 400, 405; Simmons v. Simmons, 8 Sim. 22; Wyld v. Lewis, 1 Atk. 432, West Ch. 311; Butt v. Thomas, 11 Exch. 235, 1 H. & N. 109; Riggs v. Sally, 15 Me. 408; Hellem v. Severs, 24 Grant Ch. (U. C.) 320. In this last case Coltsmann v. Coltsmann, L. R. 3 H. L. 121, is not referred to.

**6. Then — Indefinite Failure of Issue.** — England. — Cooper v. Macdonald, L. R. 16 Eq. 271; Beauclerk v. Dormer, 2 Atk. 308; Peyton v. Lambert, 8 Ir. C. L. 485; Pye v. Linwood, 6 Jur. 619; Stanley v. Lennard, 1 Eden 87; Lord Brougham, in Campbell v. Harding, 2 Russ. & M. 411; Gill v. Barrett, 29 Beav. 372.

Georgia. — Harris v. Smith, 16 Ga. 545; Sanford v. Sanford, 58 Ga. 260; Griswold v. Greer, 18 Ga. 550.

Maryland. — State v. Mann, 3 Har. & J. (Md.) 238.

Missouri. — Chism v. Williams, 29 Mo. 288.

North Carolina. — Matthews v. Daniel, 1 Murph. (5 N. Car.) 42; Bryson v. Davidson, 1 Murph. (5 N. Car.) 143; Porter v. Ross, 2 Jones Eq. (55 N. Car.) 196.

South Carolina. — Clifton v. Haig, 4 Desaus.



a number of cases the word "then" has been held to be an adverb of time, restricting the failure of issue to failure at the death of the first taker.<sup>1</sup>

**7. Die Under Twenty-one and Without Issue — Unmarried, or Before Marriage, and Without Issue.** — Where the gift over is if A. dies under twenty-one and without issue, the dying without issue does not refer to an indefinite failure of issue, but to a failure of issue upon the death of A. under twenty-one and leaving no issue surviving him.<sup>2</sup> So where the dying without issue is com-

(S. Car.) 330; *Mangum v. Piester*, 16 S. Car. 317.

*Virginia*. — *Royall v. Eppes*, 2 Munf. (Va.) 479.

**Then After.** — The phrase "then after his decease," "then upon his death," has a restraining effect when uncontrolled by the context, by reason of the "on" or "after," rather than the word "then." *Wilkinson v. South*, 7 T. R. 551; *Peyton v. Lambert*, 8 Ir. C. L. 485.

**1. Definite Failure of Issue.** — *Moore v. Howe*, 4 T. B. Mon. (Ky.) 221; *Strain v. Sweeny*, 163 Ill. 603; *Wilson v. Wilson*, 46 N. J. Eq. 321; *Den v. Snitcher*, 14 N. J. L. 53; *Deihl v. King*, 6 S. & R. (Pa.) 29; *Lawrence v. Lawrence*, 105 Pa. St. 335; *Snyder's Appeal*, 95 Pa. St. 174; *Miller's Estate*, 145 Pa. St. 505; *Arnold v. Brown*, 7 R. I. 197; *DeWolf v. Middleton*, 18 R. I. 813. See also *Josetti v. McGregor*, 49 Md. 202; *Timberlake v. Graves*, 6 Munf. (Va.) 174; *Royall v. Eppes*, 2 Munf. (Va.) 479. See also *Pinbury v. Elkin*, 1 P. Wms. 563; *Harris v. Smith*, 16 Ga. 545; *Griswold v. Greer*, 18 Ga. 545.

**Examples.** — "In case of decease of my said son without issue, \* \* \* then at my said son's death," etc., was held to import a definite failure of issue. *Welch v. Brimmer*, 169 Mass. 211.

In *Snyder's Appeal*, 95 Pa. St. 174, where the bequest was to H., and if he should at any time die without issue "I then give and bequeath over," it was held that the use of the words "at any time," and "then," imported a definite failure of issue.

**2. Die Under Twenty-one Without Issue — Definite Failure of Issue — England.** — 2 Jarman on Wills (5th Am. ed.) 506, 507; *Hawkins on Wills*, 212; *Smith Ex. Int.*, §§ 549, 551, 552; *Glover v. Monckton*, 3 Bing. 13, 15, 11 E. C. L. 9; *Beachcroft v. Broome*, 4 T. R. 441; *Morris v. Morris*, 17 Beav. 198; *Gwynne v. Berry*, Ir. R. 9 C. L. 494; *Doe v. Johnson*, 8 Exch. 81; *Hinde v. Lyon*, 3 Leon 64; *Price v. Hunt*, Pollex. 645; *Right v. Day*, 16 East 67; *Toovey v. Basset*, 10 East 460; *Eastman v. Baker*, 1 Taunt. 174; *Anonymous*, 2 Dyer 124a, 3 Dyer 354a; *Hanbury v. Cockerill*, 8 Vin. Abr. 210; *Brownswold v. Edwards*, 2 Ves. 243; *Walsh v. Peterson*, 3 Atk. 193; *Frammingham v. Brand*, 1 Wils. C. Pl. 140.

*United States*. — *Arnold v. Buffum*, 2 Mason (U. S.) 208.

*Georgia*. — *Tennell v. Ford*, 30 Ga. 707; *Hertz v. Abrahams*, (Ga. 1900) 36 S. E. Rep. 416.

*Maryland*. — *Brogden v. Walker*, 2 Har. & J. (Md.) 285; *Chew v. Weems*, 1 Har. & M. (Md.) 463; *Dallam v. Dallam*, 7 Har. & J. (Md.) 220; *Watkins v. Sears*, 3 Gill (Md.) 492; *Neal v. Cosden*, 34 Md. 421; *Woollen v. Frick*, 38 Md. 444; *Carpenter v. Boulden*, 48 Md. 122.

*Massachusetts*. — *Ray v. Enslin*, 2 Mass. 554; *Parker v. Parker*, 5 Met. (Mass.) 134.

*New Hampshire*. — *Bell v. Scammon*, 15 N. H. 381; *Downing v. Wherrin*, 19 N. H. 9, 49 Am. Dec. 139.

*New Jersey*. — *Holcomb v. Lake*, 25 N. J. L. 605; *Shimer v. Shimer*, 50 N. J. Eq. 300; *Keepers v. Fidelity Title, etc., Co.*, 56 N. J. L. 302.

*New York*. — *Matter of Miller*, 11 N. Y. App. Div. 337, affirmed 161 N. Y. 71; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292; *Norris v. Beyea*, 13 N. Y. 273; *Colby v. Doty*, 158 N. Y. 323.

*Pennsylvania*. — *Hauer v. Sheetz*, 2 Binn. (Pa.) 532, 23 Yeates (Pa.) 205; *Holmes v. Holmes*, 5 Binn. (Pa.) 253; *Welsh v. Elliott*, 13 S. & R. (Pa.) 205; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Thornton v. Krepps*, 37 Pa. St. 391; *Doebler's Appeal*, 64 Pa. St. 9; *Berg v. Anderson*, 72 Pa. St. 87; *Beltzhoover v. Costen*, 7 Pa. St. 13.

*South Carolina*. — *Munro v. Holmes*, 1 Brev. (S. Car.) 319; *Adams v. Chaplin*, 1 Hill Eq. (S. Car.) 265; *Rivers v. Fripp*, 4 Rich. Eq. (S. Car.) 276; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202; *Carr v. Jeanneret*, 2 McCord L. (S. Car.) 66.

*Tennessee*. — *Massie v. Jordan*, 1 Lea (Tenn.) 646.

A devise to J., the son, and if he "die before he arrives at the age of twenty-one, or without issue," then to C., etc., was construed to mean a failure of issue at the time of the son's death, and held to be a good limitation, in *Brown v. Brown*, 1 Dana (Ky.) 40.

A devise to the testator's wife "during her life, remainder to issue of her body by me begotten, provided also that such issue live to lawful age, and on failure thereof" remainder over, it was held not to fall within the rule in *Shelley's Case*, but the wife took an estate for life with contingent remainder over in event of the death of issue during minority. *Helm v. Frisbie*, 59 Ind. 526.

**Occurrence of Both Contingencies.** — Where the gift over is to take effect in case the first taker "die under twenty-one and without issue," or "in his minority and without issue," or "under twenty-one or without issue" (or being read *and*), both contingencies must occur to enable the gift over to take effect. *Hauer v. Shitz*, 3 Yeates (Pa.) 205; *Holmes v. Holmes*, 5 Binn. (Pa.) 253; *Welsh v. Elliott*, 13 S. & R. (Pa.) 205; *Beltzhoover v. Costen*, 7 Pa. St. 13; *Thornton v. Krepps*, 37 Pa. St. 391; *Neal v. Cosden*, 34 Md. 421. See also *Waller v. Ward*, 2 Spears L. (S. Car.) 786.

If the first taker dies without issue after having attained twenty-one, his estate is not defeated. *Grimball v. Patton*, 70 Ala. 626; *Williams v. Dickerson*, 2 Root (Conn.) 191; *Neal v. Cosden*, 34 Md. 421; *Harkness v. Corning*, 24 Ohio St. 416.

**Afterwards Die Without Issue.** — Where the gift over was to take effect in case the testator's



bined with some other event personal to the devisee, as where the gift over is in case he should die without issue and unmarried, or before marriage, or without leaving a husband or wife, the indefinite meaning of the words "dying without issue" is restricted to dying without issue surviving before marriage, or without leaving a husband or wife.<sup>1</sup>

**Unmarried.** — In this connection the word "unmarried" means without leaving a husband or wife at the time of death.<sup>2</sup>

**Personalty.** — The restrictive construction applies with even greater force to bequests of personalty.<sup>3</sup>

**"Or" Construed "And."** — If the gift over be in case A. die under twenty-one "or" without issue, "or" will be read "and" to avoid passing over the issue of A. in case he should die under twenty-one leaving issue.<sup>4</sup>

son should not live to attain twenty-one, or in case he should live to attain such age, but should afterwards die without lawful issue, and the son attained twenty-one, it was held that he took a fee with an executory devise over, in the event of his dying without having issue living at his death. *Glover v. Monckton*, 3 Bing. 13, 11 E. C. L. 9.

So, where the words were, "if he die without issue, either before or after coming of age." *Booker v. Booker*, 5 Humph. (Tenn.) 508.

**When He Shall Arrive at Twenty-one Years of Age.** — In the case of a bequest to A. "when he shall arrive at twenty-one years of age," and "if he should die without issue," over, it was held that if A. should attain his majority, receive the estate, and then die without issue, the limitation over would be good. *Sims v. Conger*, 39 Miss. 231, 77 Am. Dec. 671.

**Trust During Minority.** — Under a devise by a testator to his son and only child, who was at the date of the will only a few months old, the estate devised "consisting of lands, slaves, cash or cash notes, to be placed in the hands of his trustees and guardians for his benefit," with the provision that if the son should die leaving no issue, then the estate bequeathed to him should be divided among the testator's brothers and sisters, it was held that the son took the fee subject to be defeated only in the event of dying without issue before reaching his majority, and not subject to be defeated upon his dying at any time without issue. *Jones v. Moore*, 96 Ky. 273.

**Where Devise to First Taker Is in Tail.** — Where the devise to the first taker is an estate tail, a gift over, if such first devisee dies under age and without issue, takes effect as a contingent remainder dependent upon the double contingency of the first taker dying under the specified age and without issue. *Grey v. Pearson*, 6 H. L. Cas. 61. See *Marshall v. Grime*, 28 Beav. 375.

**1. Dying Without Issue and Unmarried — Definite Failure of Issue.** — 2 Jarman on Wills (5th Am. ed.) 507; *Doe v. Johnson*, 8 Exch. 81; *Doe v. Cooke*, 7 East 269; *Doe v. Rawding*, 2 B. & Ald. 441; *Maberly v. Strode*, 3 Ves. Jr. 450; *Bell v. Phyn*, 7 Ves. Jr. 453; *Wilson v. Bayly*, 3 Bro. P. C. (Tomi. ed.) 195; *Mackenzie v. King*, 17 L. J. Ch. 448; *Seccombe v. Edwards*, 28 Beav. 440; *Grey v. Pearson*, 6 H. L. Cas. 61; *Jones v. Sothoron*, 10 Gill & J. (Md.) 187; *Downing v. Wherrin*, 19 N. H. 9; *Peirsol v. Roop*, 56 N. J. Eq. 746; *Garland v. Watt*, 4 Ired. L. (26 N. Car.) 287; *Schultz v. Schultz*, 10

*Gratt. (Va.)* 358. See also *Framingham v. Brand*, 1 Wils. C. Pl. 140, 3 Atk. 390.

**Contra.** — *O'Donohoe v. King*, 8 Ir. Eq. 185.

In Pennsylvania the words "unmarried and without issue" were said to be sufficient to create a definite failure of issue. *Sergeant, J.*, in *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447. See also *Mitchell v. Pittsburg, etc.*, R. Co., 165 Pa. St. 645; *Deihl v. King*, 6 S. & R. (Pa.) 32; *Rapp v. Rapp*, 6 Pa. St. 49.

But in *Barber v. Pittsburgh, etc.*, R. Co., 166 U. S. 106, it is said: "It has also long been regarded as established law in Pennsylvania that such words as 'in case of his death unmarried or without issue,' in this connection, are equivalent to simply 'dying without issue,' unless there is something else in the case to warrant and require a different construction of the will. *Vaughan v. Dicks*, 20 Pa. St. 509, 513; *Matlack v. Roberts*, 54 Pa. St. 148, 150; *McCullough v. Fenton*, 65 Pa. St. 478, 426."

**2. Unmarried.** (See also UNMARRIED; and the titles LEGACIES AND DEVISES; WILLS.) — 1 Jarman on Wills (5th Am. ed.) 521; 2 Jarman on Wills (5th Am. ed.) 507. See also *Wilson v. Bayly*, 3 Bro. P. C. (Tomi. ed.) 195; *Hepworth v. Taylor*, 1 Cox Ch. 112; *Maberly v. Strode*, 3 Ves. Jr. 450; *Bell v. Phyn*, 7 Ves. Jr. 459; *Mackenzie v. King*, 12 Jur. 787, 17 L. J. Ch. 448.

**3. Martin v. Long**, 2 Vern. 151; *Pawlet v. Dogget*, 2 Vern. 86; *Bradshaw v. Skilbeck*, 2 Bing. N. Cas. 182, 29 E. C. L. 300; *Morris v. Morris*, 17 Beav. 198; *Grimball v. Patton*, 70 Ala. 626; *Sims v. Conger*, 39 Miss. 231, 77 Am. Dec. 671; *Peirsol v. Roop*, 56 N. J. Eq. 746; *Deihl v. King*, 6 S. & R. (Pa.) 29; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447; *Rapp v. Rapp*, 6 Pa. St. 45.

**4. See AND**, vol. 2, p. 332 *et seq.*

**Devisees of Full Age.** — The fact that the devisees were of full age at the time the will was made does not affect the construction. *Beltzhoover v. Costen*, 7 Pa. St. 13.

**Estate Tail in First Taker.** — But if the devise to the first taker, instead of being to A. and his heirs forever, or to A. for life and after his death to his heirs (which confers a fee under the rule in *Shelley's Case*), is to A. and the heirs of his body, or in any other words which vest an estate tail in the first taker, "or" will retain its natural construction. *Mortimer v. Hartley*, 6 Exch. 47, 60, 62. See *Grey v. Pearson*, 6 H. L. Cas. 61. **Contra**, *Waller v. Ward*, 2 Spears L. (S. Car.) 786.



"And" Construed "Or." — Where the limitation over was to take effect in case the legatees or devisees die unmarried and without issue, the clause has been sometimes construed in the disjunctive, and the gift over held to take effect on the death of one married but without leaving issue.<sup>1</sup>

8. Gift Over if A. Survives B. and Dies Without Issue, or in Case the Issue Die Under Age. — If the event with which the dying without issue is associated is not personal to the devisee, as where the gift over is to take effect if A. survives B. (a preceding devisee) and dies without issue,<sup>2</sup> or if A. should die without issue, or such issue should die under the age of twenty-one years,<sup>3</sup> the preceding principle has no application, and A. takes an estate tail.

9. Dying Without Issue in Lifetime of Person Living at Testator's Decease, or Before Possession or Period of Distribution. — Where the gift over is to take effect in case the devisee should die without issue in the lifetime of a person living at the testator's decease, a definite failure of issue is meant,<sup>4</sup> or if the dying without issue is restricted to some other definite period collateral to the devisee, as where the will points to a period of distribution of the estate, the words "dying without issue" are to be restricted to death without issue prior to the termination of such period.<sup>5</sup>

10. Gift Over to Survivors or to Persons "Then Living." — Where a prior gift of personalty is to two or more persons, and there is a gift over after the death of one of them without issue to the survivor or survivors, the presumption that dying without issue imports an indefinite failure of issue is rebutted.<sup>6</sup>

1. See *AND*, vol. 2, p. 332.

2. *Feakes v. Standley*, 24 Beav. 485.

3. 2 *Jarman on Wills* (5th Am. ed.) \*508; *Shadwell, V. C.*, in *Grimshawe v. Pickup*, 9 Sim. 596.

**Definite Failure.** — The testator provided as follows: "Should any of my children die without coming to maturity, or die without issue either before or after coming of age, or should leave issue which issue should die before coming of age; in either of these events, such portion of my estate so bequeathed to such child or children is to be equally divided between my surviving children." The contingency upon which this limitation is to take effect must happen in the lifetime of some of the testator's children, and it is therefore valid in accordance with the above rule. *Booker v. Booker*, 5 Humph. (Tenn.) 505. See also *Brown v. Hunt*, 12 Heisk. (Tenn.) 407.

4. **Dying Without Issue in Lifetime of Person Living at Testator's Decease — Definite Failure of Issue.** — *Hawkins on Wills*, 211, 213; 2 *Jarman on Wills* (5th Am. ed.) 508; *Jarman v. Vye*, L. R. 2 Eq. 784; *Pells v. Brown*, Cro. Jac. 590; *Middlewarth v. Blackmore*, 74 Pa. St. 419; *Winebrenner's Estate*, 3 Pa. Dist. 556, *affirmed* 173 Pa. St. 440; *Eby v. Eby*, 5 Pa. St. 461; *Jessup v. Smuck*, 16 Pa. St. 327; *Williams v. Turner*, 10 Verg. (Tenn.) 289. See also *Doe v. Chaffey*, 16 M. & W. 656; *Moseby v. Corbin*, 3 A. K. Marsh. (Ky.) 290; *Goldsbrough v. Martin*, 41 Md. 488; *Patterson v. Madden*, 54 N. J. Eq. 714; *Toman v. Dunlop*, 18 Pa. St. 72; *Daley v. Koons*, 90 Pa. St. 246; *Ingersoll's Appeal*, 86 Pa. St. 246; *Taylor v. Taylor*, 63 Pa. St. 481; *Lesly v. Collier*, 3 Rich. Eq. (S. Car.) 125.

A direction that upon the falling back of the property the estate is to be sold by "the said executor," has been held inconsistent with the idea that the time of reversion is designed to be postponed to an indefinite period. *Middle-*

*swarth v. Blackmore*, 74 Pa. St. 414; *Shearer v. Miller*, 185 Pa. St. 149.

5. **Dying Without Issue Prior to a Period of Distribution — Definite Failure of Issue.** (See *infra*, 12. *Direction to Pay Money.*) — *England.* — *Lewin v. Killey*, 13 App. Cas. 783; *Edwards v. Edwards*, 15 Beav. 363; *Olivant v. Wright*, 1 Ch. D. 346; *Besant v. Cox*, 6 Ch. D. 604; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Ingram v. Soutten*, L. R. 7 H. L. 408; *Crowder v. Stone*, 3 Russ. 217; *Pendleton v. Bowler*, 27 Cinc. L. Bul. 313, 11 Ohio Dec. (Reprint) 551; *Bennett v. Lowe*, 7 Bing. 535, 20 E. C. L. 229; *In re Bate*, 11 W. R. 417, 1 N. R. 470.

*Kentucky.* — *Lee v. Mumford*, (Ky. 1898) 44 S. W. Rep. 91; *Birney v. Richardson*, 5 Dana (Ky.) 424; *Ferguson v. Thomason*, 87 Ky. 519; *Jones v. Moore*, 96 Ky. 273.

*North Carolina.* — *Trexler v. Holler*, 107 N. Car. 617.

*Pennsylvania.* — *Taylor v. Taylor*, 63 Pa. St. 481; *Middlewarth v. Blackmore*, 74 Pa. St. 420; *McCormick v. McElligott*, 127 Pa. St. 230; *Moorhead's Estate*, 180 Pa. St. 119; *Wallace v. Denig*, 152 Pa. St. 251. See also *Wilson v. Denig*, 166 Pa. St. 29.

6. **Gift of Personalty to Survivor — Definite Failure of Issue.** — *Hughes v. Sayer*, 1 P. Wms. 534; *Massey v. Hudson*, 2 Meriv. 133; *Ranelagh v. Ranelagh*, 2 Myl. & K. 441; *Turner v. Frampton*, 2 Coll. Ch. Cas. 331; *Westwood v. Southey*, 2 Sim. N. S. 192; *Kimball v. Penhalow*, 60 N. H. 448; *Noble's Estate*, 182 Pa. St. 188; *Carson v. Kennerly*, 8 Rich. Eq. (S. Car.) 267. But see *Gray v. Shawne*, 1 Eden 153.

If the word "survivor" means, not the person surviving the failure of issue but the longest liver of the legatees, so that one legatee surviving another would take a transmissible interest before the failure of issue, the reason of the rule does not exist and the failure of issue will not be restricted. *Theobald on Wills* (2d ed.) 545; *Chadock v. Cowley*, Cro. Jac. 695.



In regard to realty, in *England* and in some cases in the *United States*, it has been held that a gift over to survivors upon the death of one of the first devisees without issue does not restrain the words "dying without issue" to a definite failure of issue.<sup>1</sup> But in by far the larger number of cases in the *United States* a gift over to survivors whether of real or personal property has been held to import a definite failure of issue.<sup>2</sup> Where the gift over of either real or per-

"Where words of inheritance or succession are superadded to the limitation in favor of survivors, who are to take after a general failure of the issue of the first taker, such issue cannot take as purchasers. The ulterior limitation over in such a case would itself fail for remoteness, and therefore cannot import such restrictive modification to the words heirs of the body or issue living at the death of the first taker." *Dargan, Ch., in Barksdale v. Gamage*, 3 Rich. Eq. (S. Car.) 271; *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 108. Compare *Threadgill v. Ingram*, 1 Ired. L. (23 N. Car.) 577.

1. **Realty — Indefinite Failure of Issue — England.** — *Hawkins on Wills* 210; *Chadock v. Cowley*, Cro. Jac. 695; *Roe v. Scott*, *Fearne C. R.* 473, note; *Taylor v. Walker*, 13 W. R. 986; *Leadbeater's Assignees*, Ir. R. 8 Eq. 422; *M'Clenaghan v. Bankhead*, Ir. R. 8 C. L. 195; *Greenwood v. Verdon*, 1 Kay & J. 74.

*Connecticut.* — *Dart v. Dart*, 7 Conn. 250; *Clarke v. Terry*, 34 Conn. 176; *Morgan v. Morgan*, 5 Day (Conn.) 517.

*Georgia.* — *Forman v. Troup*, 30 Ga. 496, 499; *Burton v. Black*, 30 Ga. 638; *Mayer v. Wiltberger*, Ga. Dec. (pt. ii.) 27.

*Maryland.* — *Jackson v. Dashiell*, 3 Md. Ch. 257; *Hoxton v. Archer*, 3 Gill & J. (Md.) 199; *Newton v. Griffith*, 1 Har. & G. (Md.) 111.

*Rhode Island.* — *Burrough v. Foster*, 6 R. I. 534; *Morris v. Potter*, 10 R. I. 58, 69.

*Virginia.* — *Nowlin v. Winfree*, 8 Gratt. (Va.) 348; *Tinsley v. Jones*, 13 Gratt. (Va.) 289; *Bells v. Gillespie*, 5 Rand. (Va.) 273; *Broaddus v. Turner*, 5 Rand. (Va.) 308.

2. **Gift Over to Survivor — Definite Failure of Issue Whether of Real or Personal Property — United States.** — *Lippett v. Hopkins*, 1 Gall. (U. S.) 460; *Abbott v. Essex Co.*, 18 How. (U. S.) 202, 215, 217; *Jackson v. Chew*, 12 Wheat. (U. S.) 153.

*Alabama.* — *Williams v. Graves*, 17 Ala. 62; *M'Graw v. Davenport*, 6 Port. (Ala.) 319.

*Arkansas.* — *Moody v. Walker*, 3 Ark. 147.

*Georgia.* — *Forman v. Troup*, 30 Ga. 499.

*Illinois.* — *Summers v. Smith*, 127 Ill. 650.

*Indiana.* — *Cooper v. Hayes*, 96 Ind. 386.

*Kentucky.* — *Hart v. Thompson*, 3 B. Mon. (Ky.) 487; *Deboe v. Lowen*, 8 B. Mon. (Ky.) 616; *Birney v. Richardson*, 5 Dana (Ky.) 427.

*Mississippi.* — *Gray v. Bridgeforth*, 33 Miss. 512; *Rucker v. Lambdin*, 12 Smed. & M. (Miss.) 231.

*New Hampshire.* — *Pinkham v. Blair*, 57 N. H. 240; *Kimball v. Penhallow*, 60 N. H. 448; *O'Brien v. O'Leary*, 64 N. H. 332.

*New Jersey.* — *Groves v. Cox*, 40 N. J. L. 44; *Fairchild v. Crane*, 13 N. J. Eq. 108; *Den v. Schenck*, 8 N. J. L. 29; *Seddel v. Wills*, 20 N. J. L. 223.

*New York.* — *Norris v. Beyea*, 13 N. Y. 275; *Chrystie v. Phylfe*, 19 N. Y. 345; *Tyson v. Blake*, 22 N. Y. 558; *Dumond v. Stringham*,

26 Barb. (N. Y.) 104; *Pinckney v. Pinckney*, 1 Bradf. (N. Y.) 269; *Wilkes v. Lion*, 2 Cow. (N. Y.) 385; *Lion v. Burtis*, 5 Cow. (N. Y.) 408; *Fosdick v. Cornell*, 1 Johns. (N. Y.) 440; *Anderson v. Jackson*, 16 Johns. (N. Y.) 382; *Moffat v. Strong*, 10 Johns. (N. Y.) 12; *Cutter v. Doughty*, 23 Wend. (N. Y.) 513.

*North Carolina.* — *Hilliard v. Kearney*, Busb. Eq. (45 N. Car.) 221; *Southerland v. Cox*, 3 Dev. L. (14 N. Car.) 395; *Threadgill v. Ingram*, 1 Ired. L. (23 N. Car.) 577; *Zollicoffer v. Zollicoffer*, 4 Dev. & B. L. (20 N. Car.) 438; *Porter v. Ross*, 2 Jones Eq. (55 N. Car.) 196.

*South Carolina.* — *Williams v. Kibler*, 10 S. Car. 426; *Mendenhall v. Mower*, 16 S. Car. 313; *Gorden v. Gorden*, 32 S. Car. 563; *Selman v. Robertson*, 46 S. Car. 265; *De Treville v. Ellis*, Bailey Eq. (S. Car.) 40; *Stevens v. Paterson*, Bailey Eq. (S. Car.) 42; *Cordes v. Adrian*, 1 Hills Eq. (S. Car.) 154; *Lowry v. O'Bryan*, 4 Rich. Eq. (S. Car.) 262; *Reeder v. Spearman*, 6 Rich. Eq. (S. Car.) 88; *McCorkle v. Black*, 7 Rich. Eq. (S. Car.) 407; *Carson v. Kennerly*, 8 Rich. Eq. (S. Car.) 259; *Gillam v. Caldwell*, 11 Rich. Eq. (S. Car.) 73. But compare *Guery v. Vernon*, 1 Nott & M. (S. Car.) 69; *Cox v. Buck*, 5 Rich. L. (S. Car.) 604; *Selman v. Robertson*, 46 S. Car. 265; *Adams v. Farley*, (Miss. 1895) 18 So. Rep. 392 (construing a South Carolina will).

*Tennessee.* — *Armstrong v. Douglass*, 89 Tenn. 225; *Turner v. Ivie*, 5 Heisk. (Tenn.) 222; *Booker v. Booker*, 5 Humph. (Tenn.) 505; *Lewis v. Claiborne*, 5 Yerg. (Tenn.) 369, 26 Am. Dec. 270; *Williams v. Turner*, 10 Yerg. (Tenn.) 289.

*Massachusetts.* — *Hall v. Priest*, 6 Gray (Mass.) 18, follows the English authorities; but later authorities favor the restricted construction, even as regards devises of realty. *Richardson v. Noyes*, 2 Mass. 62; *Brightman v. Brightman*, 100 Mass. 238; *Allen v. Ashley School Fund*, 102 Mass. 262; *Hooper v. Bradbury*, 133 Mass. 303; *Abbott v. Essex Co.*, 2 Curt. (U. S.) 126, 18 How. (U. S.) 203.

*Maine.* — As to Maine, see *Richardson v. Richardson*, 80 Me. 585, where it is held that an indefinite failure is implied.

*Pennsylvania.* — In *Pennsylvania* the restrictive force of a gift to survivors has been recognized in bequests of personalty. *Mifflin v. Neal*, 6 S. & R. (Pa.) 460; *Rapp v. Rapp*, 6 Pa. St. 49; *Bedford's Appeal*, 40 Pa. St. 22; *Noble's Estate*, 182 Pa. St. 188.

Also in blended dispositions of real and personal estate. *Ingersoll's Appeal*, 86 Pa. St. 240. But see *Smith's Appeal*, 23 Pa. St. 9. But not always in devises of realty alone. *Caskey v. Brewer*, 17 S. & R. (Pa.) 441; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Wall v. Maguire*, 24 Pa. St. 248; *Matlack v. Roberts*, 54 Pa. St. 148; *Sugden v. McKenna*, 147 Pa. St. 55; *Hoff's Estate*, 147 Pa. St. 640. *Contra*, *Johnson v. Currin*, 10 Pa. St. 498; *Cameron v. Coy*, 165



sonal property is to persons then living or persons then surviving, a definite failure of issue is meant.<sup>1</sup>

**11. Gift Over to Person Named.** — It is firmly established that a devise or bequest over to named living persons upon the failure of the issue of the first taker does not import a definite failure of issue.<sup>2</sup>

**12. Direction to Pay Money.** — A direction in the will for the payment of a sum of money upon the decease of the person upon the failure of whose issue the gift over is to take effect, or within a short time afterwards, imports a definite failure of issue. This applies both to real and personal property.<sup>3</sup>

**13. Personal Trust.** — A personal trust created by the gift over stands on

Pa. St. 291; *Morrison v. Truby*, 145 Pa. St. 540; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Anderson v. Anderson*, 164 Pa. St. 338. See *Clark v. Baker*, 3 S. & R. (Pa.) 470; *Haines v. Witmer*, 2 Yeates (Pa.) 400.

**Rest — Remainder — Others.** — The words "rest," "remainder," or "others," are not equivalent to "survivor," and afford no presumption that a definite failure of issue was intended. See *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105, 62 Am. Dec. 396. See also *Smith Ex. Int.*, §§ 553, 555. So where "survivor" is construed "other," *Richardson v. Richardson*, 80 Me. 585; *Allen v. Ashley School Fund*, 102 Mass. 262. See *Clark v. Baker*, 3 S. & R. (Pa.) 470; *Haines v. Witmer*, 2 Yeates (Pa.) 400; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Smith v. Osborne*, 6 H. L. Cas. 375; 2 Redfield Wills (2d ed.) \*374. But see *Cooper v. Hayes*, 96 Ind. 386.

1. 2 Jarman on Wills 512, 528; *Campbell v. Harding*, 2 Russ. & M. 390; *Greenwood v. Verdon*, 1 Kay & J. 74; *Murray v. Addenbrook*, 4 Russ. 407; *Langley v. Heald*, 7 W. & S. (Pa.) 96; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Morrison v. Truby*, 145 Pa. St. 540.

**Unborn Persons.** — The gift over, however, must not embrace an indefinite range of unborn persons, and where the class to whom the property is given would include persons coming into being at any time before the failure of issue takes place, there is no reason for adopting the restrictive construction. *Webster v. Parr*, 26 Beav. 236; *Prior on Issue*, p. 85; *Destouches v. Walker*, 2 Eden 261; *Candy v. Campbell*, 8 Bligh N. S. 469.

When, however, it is once ascertained by the description of the ulterior legatees as living at the period of failure, that failure at the death of the party is meant, an alternative gift to take effect if none of those legatees are then living, to others not so described, must also be valid. *Jones v. Cullimore*, 3 Jur. N. S. 404; *Gee v. Liddell*, L. R. 2 Eq. 341.

**Surviving Person Whose Failure of Issue Is Referred to.** — See 2 Jarman on Wills (5th Am. ed.) \*528; *Garratt v. Cockerell*, 1 Y. & C. Ch. 494.

**Surviving Sons.** — Where a testator devises distinct tracts of land to each of his three sons and adds, "and it is my will, in case either of my sons before named should die without issue, that his share be equally divided betwixt my surviving sons;" the limitation over is upon a definite failure of issue, the estate devised is a fee simple with limitation over by way of executory devise, and each son takes an estate in fee, defeasible in the event of his

death without issue then living. *Den v. Allaire*, 20 N. J. L. 6.

**2. Gift Over to Person Named — Indefinite Failure of Issue.** — *Fearne C. R.* 481; *Beauclerk v. Dormer*, 2 Atk. 308; *Barlow v. Salter*, 17 Ves. Jr. 479; *Barber v. Pittsburgh, etc.*, R. Co., 166 U. S. 106; *Usilton v. Usilton*, 3 Md. Ch. 36; *Hackney v. Tracy*, 137 Pa. St. 53; *Hoff's Estate*, 147 Pa. St. 639; *Ray v. Alexander*, 146 Pa. St. 242; *Nes v. Ramsay*, 155 Pa. St. 628; *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105; *Mangum v. Piester*, 16 S. Car. 317; *Guery v. Vernon*, 1 Nott & M. (S. Car.) 69.

In some cases where a gift over is made to certain persons in being, without words of limitation, it has been considered as intended as a personal benefit to those persons, and the gift will be construed to take effect on the death of the first legatees without issue during the lives of the ultimate legatees. *Eichelberger v. Barnett*, 17 S. & R. (Pa.) 293. See also *Middle-swarth v. Blackmore*, 74 Pa. St. 414; *Powell v. Board of Domestic Missions*, 49 Pa. St. 59; *Deihl v. King*, 6 S. & R. (Pa.) 33; *Timberlake v. Graves*, 6 Munf. (Va.) 175; *Biscoe v. Biscoe*, 6 Gill & J. (Md.) 232; *Woodland v. Wallis*, 6 Md. 151; *Budd v. State*, 22 Md. 48; *Clifton v. Haig*, 4 Desaus. (S. Car.) 330.

A devise of an estate to one "for life and to his lawful issue forever, if he should die leaving any such issue," but in case he shall decease without leaving such issue, then to certain other persons named, gives to such person a life estate only, under *Massachusetts Public Statutes*, c. 126, § 4, and upon his decease his widow has no power right therein. *Trumbull v. Trumbull*, 149 Mass. 200.

**3. Direction to Pay Money.** (See *supra*, 9. *Dying Without Issue in Lifetime of Person Living at Testator's Decease, or Before Possession or Period of Distribution.*) — *Theobald on Wills* (2d ed.) 543; *Nichols v. Hooper*, 1 P. Wms. 198, 2 Vern. 686; *Doe v. Webber*, 1 B. & Ald. 713; *Doe v. Frost*, 3 B. & Ald. 546, 5 E. C. L. 373; *Blinston v. Warburton*, *Fearne C. R.* 471. 2 Kay & J. 400. See *Goodwin v. Clarke*, 1 Lev. 35; *In re Rye*, 10 Hare 106; *Hill v. Hill*, 4 Barb. (N. Y.) 419; *Eaton v. Straw*, 18 N. H. 329; *Buchanan's Appeal*, 72 Pa. St. 448; *Hauci v. Shitz*, 3 Yeates (Pa.) 205; *Taylor v. Taylor*, 63 Pa. St. 485; *Smith v. Coyle*, 83 Pa. St. 243; *Shearer v. Miller*, 185 Pa. St. 149; *Middle-swarth v. Blackmore*, 74 Pa. St. 414. Compare *James's Claim*, 1 Dall. (Pa.) 47; *Evans v. Davis*, 1 Yeates (Pa.) 332; *Criley v. Chamberlain*, 30 Pa. St. 161; *Pennington v. Pennington*, 70 Md. 418; *Barber v. Pittsburgh, etc.*, R. Co., 166 U. S. 83; *Feakes v. Standley*, 24 Beav. 485.



the same footing as a personal interest, and imports a definite failure.<sup>1</sup>

**14. Gift Over for Life.** — If the devise over after the failure of issue be of a life estate, this necessarily implies a definite failure of issue, because it is not likely in such a case that the testator was contemplating an indefinite failure of issue, as that might and most probably would not happen until many years after the death of the object of the ulterior limitations.<sup>2</sup> Where, however, only one of several who are to take over is confined to a life interest, the rule is otherwise.<sup>3</sup>

**15. Bequest of Perishable Goods — Original Estate Devised Pur Autre Vie.** — It seems to be the better opinion that the mere fact that the subject matter of the bequest consists of perishable goods, and cannot survive an indefinite failure of issue, in itself affords no ground for restraining the failure of issue to the death of the first taker.<sup>4</sup>

**16. Effect of Power of Appointment.** — Where the preceding gift to the issue is implied in a power of appointment, as where the gift is to A. for life, and after his death to such of his issue as he should appoint, and in case he should die without issue, over, the failure of issue will be restrained to the death of the first taker, since such issue must be intended as A. should, or at least might, appoint, which must be intended issue then living. The principle applies to both real and personal estate.<sup>5</sup>

**17. Failure of Testator's Own Issue.** — Where a testator, having no issue, devises or bequeaths property in default or on failure of issue of himself, and there are found amongst the ulterior limitations provisions which could not reasonably be meant to take effect upon an indefinite failure of issue, such as

**1. Personal Trust.** — 2 Jarman on Wills (5th Am. ed.) \*526; *Re Chisholm*, 17 Grant Ch. (U. C.) 403, 18 Grant Ch. (U. C.) 467; *Carradice v. Scott*, 22 Grant Ch. (U. C.) 426. Compare *Bigge v. Bensley*, 1 Bro. C. C. 187.

**Devise Over in Trust for Payment of Debts.** — When on failure of issue the property is devised in trust for the payment of debts, a definite failure of issue is presumed, because it could not be supposed that the testator would provide for the payment of debts on an indefinite failure of issue. *Smith Ex. Int.* 559; *French v. Caddell*, 6 Bro. P. C. 58; *Wellington v. Wellington*, 4 Burr. 2165; *Taylor v. Taylor*, 63 Pa. St. 485.

**2. Gift Over for Life — Definite Failure of Issue.** — Jarman on Wills (5th Am. ed.) 514, 515; *Theobald on Wills* (2d ed.) 546; *Smith Ex. Int.*, § 559; *Roper on Legacies*, 1550; *Roe v. Jeffery*, 7 T. R. 589; *Trafford v. Boehm*, 3 Atk. 449; *Drury v. Grace*, 2 Har. & J. (Md.) 356; *Whitcomb v. Taylor*, 122 Mass. 249; *Ide v. Ide*, 5 Mass. 502; *State v. Tolson*, 73 Mo. 326; *Wilson v. Wilson*, 32 Barb. (N. Y.) 328; *Taylor v. Taylor*, 63 Pa. St. 485; *Findlay v. Riddle*, 3 Binn. (Pa.) 139; *Barney v. Arnold*, 15 R. I. 80.

**Contra.** — *Hawkins on Wills* 210; *In re Rye*, 10 Hare 106-111; *Dale v. McGuinn*, 15 Grant Ch. (U. C.) 101; *Pennington v. Pennington*, 70 Md. 438; *Watkins v. Sears*, 3 Gill (Md.) 496; *Newton v. Griffith*, 1 Har. & G. (Md.) 111; *Stevenson v. Jacobs*, 3 Murph. (7 N. Car.) 558.

**Gifts of Slaves.** — In some cases the principle has been applied to a bequest of slaves. *Royall v. Eppes*, 2 Munf. (Va.) 479; *Biscoe v. Biscoe*, 6 Gill & J. (Md.) 232; *Woodland v. Wallis*, 6 Md. 151.

**Where the Original Estate Devised Is Pur Autre Vie.** — Where the estate devised is *pur autre vie*, a limitation over in default of issue is

good, since it cannot be held to mean a failure, which might take place after the determination of the estate. *Theobald on Wills* (2d ed.) 546. See *Croly v. Croly*, *Batty* 1; *Manning v. Moore*, Alc. & Nap. 96; *Lee v. Flinn*, Alc. & Nap. 418.

**3. Barlow v. Salter**, 17 Ves. Jr. 479. See also *Doe v. Owens*, 1 B. & Ad. 318, 20 E. C. L. 393; *Peyton v. Lambert*, 8 Ir. L. 485; *Boehm v. Clarke*, 9 Ves. Jr. 580.

**4. Bequest of Perishable Goods.** — *Target v. Gaunt*, 1 P. Wms. 432, 10 Mod. 402; *Gilb. Eq.* 149; *Atkinson v. Hutchinson*, 3 P. Wms. 258; *Hockley v. Mawbey*, 1 Ves. Jr. 143, 3 Bro. C. C. 82; *Leeming v. Sherratt*, 2 Hare 14; *Keating v. Keating*, Ll. & G. t. Plunk. 291; *Balguy v. Hamilton*, Mosely 186. The authority of *Target v. Gaunt*, 1 P. Wms. 432, may be considered shaken by *Simmons v. Simmons*, 8 Sim. 22, but was acknowledged in *Eastwood v. Arison*, L. R. 4 Exch. 141. But compare *Martin v. Swannell*, 2 Beav. 249; *Crozier v. Crozier*, 2 Con. & Law. 294, 3 Dr. & War. 373. See also *Torrance v. Torrance*, 4 Md. 11; *Newnan v. Miller*, 7 Jones L. (52 N. Car.) 518; *Woodley v. Findlay*, 9 Ala. 716.

Mr. Jarman is of opinion that where there is an express limitation to the issue in default of appointment, such limitation will not be confined by implication to issue living at the death on the ground that the power embraces such objects only. 2 Jarman on Wills (5th Am. ed.) \*531. See *Smith v. Death*, 5 Madd. 371; *Seale v. Barter*, 2 B. & P. 485; *Davidson v. Proctor*, 19 L. J. Ch. 396, 14 Jur. 32; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Jesson v. Wright*, 2 Bligh 1.

**5. 2 Jarman on Wills** (5th Am. ed.) \*530; *Eastwood v. Avison*, L. R. 4 Exch. 141. But see *Jesson v. Wright*, 2 Bligh 1.



directions for the payment of debts, the limitation over is contingent on the event of his leaving no issue surviving him, and the contingency determined at his death.<sup>1</sup>

**18. Effect of Alternative Limitations — Failure of Issue Confined to Period of Distribution or Possession.** — If real estate be devised to A. and his heirs, with a gift over if A. die leaving issue, and a gift over if A. die without issue, the words "die without issue" may be restrained to the event of A. dying without issue before the period of possession or distribution (whether the devise be immediate or in remainder), in order to avoid an absolute inconsistency with the prior devise in fee to A.<sup>2</sup>

**19. Statutory Changes.** — In a number of jurisdictions it has been enacted that when a remainder shall be limited to take effect on the death of any person without heirs or heirs of his body, or without issue, or without leaving issue, or having no issue, etc., the word "heirs" or "issue" shall be construed, unless a contrary intent is clear, to mean heirs or issue living at the death of the person named as ancestor; in other words, that "dying without issue" shall not import an indefinite failure of issue as at common law, but a definite failure of issue.<sup>3</sup>

1. *French v. Caddell*, 3 Bro. P. C. (Toml. ed.) 257; *Wellington v. Wellington*, 4 Burr. 2165, 1 W. Bl. 645; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Sanford v. Irby*, 3 B. & Ald. 654, 5 E. C. L. 414; *In re Rye*, 10 Hare 106. See also *Doe v. Lucraft*, 1 Moo. & S. 573, 8 Bing. 386, 21 E. C. L. 330.

It seems that the mere fact that the gift over is dependent upon the failure of the testator's own issue, unassisted by the context, is not sufficient to create a definite failure. *Bagot v. Legge*, 12 W. R. 1097, 4 N. R. 492.

2. *Hawkins on Wills* 213; *Gee v. Manchester*, 17 Q. B. 737, 79 E. C. L. 737; *Clayton v. Lowe*, 5 B. & Ald. 636, 7 E. C. L. 218. See also *Fisher v. Webster*, L. R. 14 Eq. 283; *Olivant v. Wright*, 24 W. R. 84; *Richardson v. Richardson*, 80 Me. 585; *Allen v. Ashley School Fund*, 102 Mass. 262; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323; *Ladd v. Harvey*, 21 N. H. 515; *Ingersoll's Appeal*, 86 Pa. St. 240; *Arnold v. Brown*, 7 R. I. 185, 197.

3. **England.** — See 1 Vict., c. 26, § 29. See also *Green v. Green*, 3 G. & Sm. 480; *In re O'Bierne*, 1 J. & La T. 352; *Meredith v. Treffry*, 12 Ch. D. 172.

*In re Edwards*, (1894) 3 Ch. 644, it was held that the Act applied to the case of a gift over on a death without male issue. See also *Upton v. Hardman*, 1r. R. 9 Eq. 157.

The Act does not apply where the words are "die without heirs of the body," as in that case there is no ambiguity. *Harris v. Davis*, 1 Coll. Ch. Cas. 416; *Dawson v. Small*, L. R. 9 Ch. 651. See also 2 *Jarman on Wills* (5th Am. ed.) \*534; *Morris v. Morris*, 17 Beav. 198; *Jarman v. Vye*, L. R. 2 Eq. 784.

See, for exceptions, *In re Bence*, (1891) 3 Ch. 249.

**Georgia.** — See Code of 1882, § 2251; *Worrill v. Wright*, 25 Ga. 659; *Gibson v. Hardaway*, 68 Ga. 370; *Daniel v. Daniel*, 102 Ga. 181; *Stone v. Franklin*, 89 Ga. 195. Compare *Harris v. Smith*, 16 Ga. 545; *Griswold v. Greer*, 18 Ga. 550.

**Indiana.** — See *Moore v. Gary*, 149 Ind. 51.

**Kentucky.** See *Louisville Trust Co. v. Maddox*, (Ky. 1898) 44 S. W. Rep. 632; *Moore*

*v. Moore*, 12 B. Mon. (Ky.) 655, 660; *Sale v. Crutchfield*, 8 Bush (Ky.) 636, 648; *Rev. Stat. Ky.* 1877, p. 586.

**Maryland.** — See *Rev. Code of Md.* 1878, art. 49, § 9; *Mason v. Johnson*, 47 Md. 356; *Lednum v. Cecil*, 76 Md. 149; *Hutchins v. Pearce*, 80 Md. 434; *Weybright v. Powell*, 86 Md. 573; *Combs v. Combs*, 67 Md. 11.

If the words "heirs," or "heirs of the body" are used in the sense of issue, the statute, even in *Maryland*, applies, although these terms were not used in the statute. *Gambrill v. Forest Grove Lodge No. 4*, 66 Md. 17.

**Michigan.** — See *How. Ann. Stat.* 1882, § 5538; *Goodell v. Hibbard*, 32 Mich. 48; *Mullreed v. Clark*, 110 Mich. 229.

**Mississippi.** — See *Rev. Code* 1880, § 1203; *Powell v. Brandon*, 24 Miss. 343; *Jordan v. Roach*, 32 Miss. 481, 604; *Kirby v. Calhoun*, 8 Smed. & M. (Miss.) 462; *Sims v. Conger*, 39 Miss. 313.

**Missouri.** — See *Rev. Stat.* 1879, § 3942; *Faust v. Birner*, 30 Mo. 414; *State v. Tolson*, 73 Mo. 320; *Naylor v. Gardener*, 109 Mo. 550.

**New Jersey.** — See *Rev. Stat.* 1877, p. 1248; *Condict v. King*, 13 N. J. Eq. 375; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Peirsol v. Roop*, 56 N. J. Eq. 746; *Patterson v. Madden*, 54 N. J. Eq. 714.

**New York.** — See 2 *Rev. Stat.* part 2, c. 1, § 22; *Matter of Moore*, 152 N. Y. 609; *Sherman v. Sherman*, 3 Barb. (N. Y.) 385; *Norris v. Beyea*, 13 N. Y. 275; *Tyson v. Blake*, 22 N. Y. 558.

**North Carolina.** — *Bat. Rev. Stat.*, c. 42, § 3; *Garland v. Watt*, 4 Ired. L. (26 N. Car.) 287, 42 Am. Dec. 120; *Spruill v. Moore*, 5 Ired. Eq. (40 N. Car.) 284, 49 Am. Dec. 428; *Wright v. Brown*, 116 N. Car. 26.

**South Carolina.** — *Gen. Stat.* 1882, § 1862; *Selman v. Robertson*, 46 S. Car. 265; *Gadsden v. Desportes*, 39 S. Car. 131; *Bethea v. Bethea*, 48 S. Car. 440.

**Tennessee.** — *Comp. Stat.* 1871, § 2009; *Williams v. Williams*, 10 Heisk. (Tenn.) 571; *Brown v. Hunt*, 12 Heisk. (Tenn.) 407; *Muldoon v. Trewhitt*, (Tenn. Ch. 1896) 38 S. W. Rep. 114; *Armstrong v. Douglass*, 89 Tenn. 219.

**Virginia.** — *Code* 1873, tit. 33, c. 112, § 10;



**VI. DYING WITHOUT ISSUE REFERRED TO DEATH IN LIFETIME OF TESTATOR.—**

Where real estate is devised in terms denoting an intention that the primary devisee should take a fee on the death of the testator, coupled with a devise over in case of his dying without issue, the words refer to a death without issue during the lifetime of the testator, and the primary devisee surviving the testator takes an absolute estate in fee simple.<sup>1</sup> Where it appears from

*Schultz v. Schultz*, 10 Gratt. (Va.) 358; *Wine v. Markwood*, 31 Gratt. (Va.) 43; *Randolph v. Wright*, 81 Va. 613. See also 5 Va. Law Register, p. 67.

*West Virginia*.—See Rev. Stat. 1879, c. 82; § 10; *Liston v. Jenkins*, 2 W. Va. 65.

There are also statutes of this kind in other states, but no cases have arisen construing them.

**1. Dying Without Issue Referred to Death in Lifetime of Testator—England.**—*Boraston's Case*, 3 Coke 19; *Goodtitle v. Whitby*, 1 Burr. 228; *Rose v. Hill*, 3 Burr. 1881; *Cooper v. Williams*, Prec. Ch. 71; *Cambridge v. Rous*, 8 Ves. Jr. 12; *Clarke v. Lubbock*, 1 V. & C. Ch. 492; *Crigan v. Baines*, 7 Sim. 40; *Howard v. Howard*, 21 Beav. 550; *Clayton v. Lowe*, 5 B. & Ald. 636, 7 E. C. L. 218; *Doe v. Sparrow*, 13 East 359; *Gee v. Manchester*, 17 Q. B. 737, 79 E. C. L. 737; *Woodburne v. Woodburne*, 23 L. J. Ch. 336.

*United States*.—*Covington First Nat. Bank v. De Pauw*, 86 Fed. Rep. 724.

*Connecticut*.—*Austin v. Bristol*, 40 Conn. 120; *Coe v. James*, 54 Conn. 511; *White v. White*, 52 Conn. 518; *Phelps v. Phelps*, 55 Conn. 359; *St. John v. Dann*, 66 Conn. 409; *Lawlor v. Holohan*, 70 Conn. 90.

*Delaware*.—*Lynch v. Martin*, 6 Houst. (Del.) 487.

*Illinois*.—*Arnold v. Alden*, 173 Ill. 229.

*Maryland*.—*Branson v. Hill*, 31 Md. 181.

*Massachusetts*.—*Briggs v. Shaw*, 9 Allen (Mass.) 516.

*New Hampshire*.—*Whitney v. Whitney*, 45 N. H. 311; *Clough v. Clough*, 64 N. H. 509.

*New Jersey*.—*Yawger v. Yawger*, 37 N. J. Eq. 219; *Burdge v. Walling*, 45 N. J. Eq. 10; *Barrell v. Barrell*, 38 N. J. Eq. 60, 63.

*New York*.—*Matter of Baer*, 147 N. Y. 348; *Becker v. Becker*, 22 N. Y. App. Div. 237; *Benson v. Corbin*, 78 Hun (N. Y.) 202, affirmed 145 N. Y. 351; *Kerr v. Bryan*, 32 Hun (N. Y.) 51; *Leonard v. Kingsland*, (C. Pl. Gen. T.) 67 How. Pr. (N. Y.) 431; *Moore v. Lyons*, 25 Wend. (N. Y.) 119, 125; *Converse v. Kellogg*, 7 Barb. (N. Y.) 590; *In re Tienken*, 60 Hun (N. Y.) 417, affirmed 131 N. Y. 391; *Matter of Corlies*, (Surrogate Ct.) 11 Misc. (N. Y.) 670; *Livingston v. Greene*, 52 N. Y. 118, 124; *Kelly v. Kelly*, 61 N. Y. 47; *Embury v. Sheldon*, 68 N. Y. 227, 233; *Roseboom v. Roseboom*, 81 N. Y. 356; *Nellis v. Nellis*, 99 N. Y. 505; *Quackenbos v. Kingsland*, 102 N. Y. 128, 55 Am. Rep. 771, 778; *Byrnes v. Stilwell*, 103 N. Y. 453; *Vanderzee v. Slingerland*, 103 N. Y. 55; *Matter of New York, etc.*, R. Co., 105 N. Y. 89; *Stokes v. Weston*, 142 N. Y. 433; *Washbon v. Cope*, 144 N. Y. 287; *Benson v. Corbin*, 145 N. Y. 351.

*Pennsylvania*.—*Caldwell v. Skilton*, 13 Pa. St. 152; *Biddle's Estate*, 28 Pa. St. 59; *Shiver's Estate*, 9 Phila. (Pa.) 354, 31 Leg. Int. (Pa.) 148; *Schoonmaker v. Stockton*, 37 Pa. St. 461;

*Umstead's Appeal*, 60 Pa. St. 365; *Shutt v. Rambo*, 57 Pa. St. 149; *Peter's Estate*, 7 Pa. Dist. 52; *Fährney v. Holsinger*, 65 Pa. St. 388; *Waugh's Appeal*, 78 Pa. St. 436; *Mickley's Appeal*, 92 Pa. St. 514, 13 Phila. (Pa.) 281, 36 Leg. Int. (Pa.) 450; *Mitchell v. Pittsburg, etc.*, R. Co., 165 Pa. St. 645; *Robinson's Estate*, 149 Pa. St. 418; *Morrison v. Truby*, 145 Pa. St. 546; *Hancock's Estate*, 13 Phila. (Pa.) 283, 36 Leg. Int. (Pa.) 450. See also *Stevenson v. Fox*, 125 Pa. St. 568; *Flick v. Foust Oil Co.*, 188 Pa. St. 317; *Coles v. Ayres*, 156 Pa. St. 200; *King v. Frick*, 135 Pa. St. 575; *Bell's Estate*, 5 Pa. Dist. 422.

*Wisconsin*.—*Lovass v. Olson*, 92 Wis. 616.

*Vermont*.—*Chaplin v. Doty*, 60 Vt. 712.

See also *Edwards v. Bibb*, 43 Ala. 666, 54 Ala. 475; *Harris v. Smith*, 16 Ga. 545; *Griswold v. Greer*, 18 Ga. 545; *Thockston v. Watson*, 84 Ky. 206; *Crozier v. Cundall*, 99 Ky. 202; *Birney v. Richardson*, 5 Dana (Ky.) 424; *Trabue v. Terry*, (Ky. 1888) 9 S. W. Rep. 161; *Pool v. Benning*, 9 B. Mon. (Ky.) 623; *Denise v. Denise*, 37 N. J. Eq. 163, 169; *Baldwin v. Taylor*, 37 N. J. Eq. 78; *Wurts v. Page*, 19 N. J. Eq. 365.

See *Cooksey v. Hill*, (Ky. 1899) 50 S. W. Rep. 238, where the will under consideration was held to contain controlling language indicating a different intent.

**Indiana—Issue Living at Time of Death.**—Where real estate is devised in fee simple with a devise over that the first taker should die without issue living at the time of his death, the words refer to death without issue during the lifetime of the testator, unless the contrary appears. *Moore v. Gary*, 149 Ind. 51. See also *Covington First Nat. Bank v. De Pauw*, 86 Fed. Rep. 724; *Harris v. Carpenter*, 109 Ind. 540; *O'Boyle v. Thomas*, 116 Ind. 243; *Hoover v. Hoover*, 116 Ind. 498; *Heilman v. Heilman*, 129 Ind. 59; *Wright v. Charley*, 129 Ind. 257; *Borgner v. Brown*, 133 Ind. 391; *Fowler v. Duhme*, 143 Ind. 248; *Tindall v. Miller*, 143 Ind. 337; *Moores v. Hare*, 144 Ind. 573; *Antioch College v. Branson*, 145 Ind. 312.

**Survivorship—Surviving.**—Where a will, after devising a remainder to specific persons and not to a class, provides that in case of the death of one of them leaving no issue the share of such one shall be divided equally among those surviving, the words of survivorship relate to the time of the testator's death, and not to the termination of the intermediate estate. *Arnold v. Alden*, 173 Ill. 229. See also *Cross v. Coltart*, W. N. 1884, p. 123; *Buckle v. Fawcett*, 4 Hare 536; *Giles v. Giles*, 8 Sim. 360; *Waugh v. Waugh*, 2 Myl. & K. 41; *Elliott v. Smith*, 22 Ch. D. 236; *Hulburt v. Emerson*, 16 Mass. 244; *Williamson v. Chamberlain*, 10 N. J. Eq. 373; *Wurts v. Page*, 19 N. J. Eq. 365; *Moore v. Lyons*, 25 Wend. (N. Y.) 119, 150; *Tier v. Pennel*, 1 Edw. (N. Y.) 354; *Hilliard v. Kearney*, Busb. Eq. (45



the language and provisions of the instrument that the testator referred to death, either before or after his own, his intention will prevail.<sup>1</sup> In *England* the tendency seems to be more strongly against the referring of death without issue, to death in the lifetime of the testator.<sup>2</sup>

**VII. EFFECT OF LIMITATION OVER UPON PRECEDING LIMITATION — 1. Where Failure of Issue Is Indefinite.** — Where the issue are not mentioned in the preceding limitation, a devise in fee to the first taker will be restrained, or a devise for life enlarged, to an estate tail by a gift over on an indefinite failure of issue. Where there is interposed between the prior devise to the ancestor and the subsequent devise over on an indefinite failure of his issue, a devise to the issue *eo nomine*, and the word "issue" in the intermediate devise would be construed a word of limitation if there were no such devise over, the devise over does not prevent the word "issue" from being construed as a word of limitation, but operates in aid of that construction, and the ancestor takes

N. Car.) 221; *Drayton v. Drayton*, 1 Desaus. (S. Car.) 324; *Ruff v. Rutherford*, Bailey Eq. (S. Car.) 7; *Hansford v. Elliott*, 9 Leigh (Va.) 79.

In *Hubbert's Estate*, 6 Pa. Dist. 96, it is held that the general rule is established in *Pennsylvania* that the word "surviving" in a gift, following a life estate, means surviving at the death of the testator, and shall be so construed unless it clearly appears that the testator meant to refer to a different period. See also *Woelpper's Appeal*, 126 Pa. St. 562; *Millers' Estate*, 4 Pa. Dist. 764; *Lapsley v. Lapsley*, 9 Pa. St. 130; *Robinson's Estate*, 149 Pa. St. 418. See also *SURVIVING*, and see the title *WILLS*.

**1. Not Referred to Death in Lifetime of Testator** — *United States*. — *Britton v. Thornton*, 112 U. S. 526, 533.

*Indiana*. — *Greer v. Wilson*, 108 Ind. 322.

*Massachusetts*. — *Kelley v. Meins*, 135 Mass. 231.

*North Carolina*. — *Buchanan v. Buchanan*, 99 N. Car. 308; *Williams v. Lewis*, 100 N. Car. 142.

*New York*. — *Chapman v. Moulton*, 8 N. Y. App. Div. 64; *Becker v. Becker*, 22 N. Y. App. Div. 234; *Stokes v. Weston*, 69 Hun (N. Y.) 608, *affirmed* 141 N. Y. 558; *Chapman v. Moulton*, 8 N. Y. App. Div. 64; *Matter of New York, etc., R. Co.*, 105 N. Y. 89; *Vanderzee v. Slingerland*, 103 N. Y. 47; *Avery v. Everett*, 110 N. Y. 317; *Mead v. Maben*, 131 N. Y. 255; *Washbon v. Cope*, 144 N. Y. 297.

*Pennsylvania*. — *Mickley's Appeal*, 92 Pa. St. 514.

See also *Suydam v. Thayer*, 94 Mo. 49; *Price v. Johnson*, 90 N. Car. 592; *Fields v. Whitfield*, 101 N. Car. 305.

And such intention may be inferred from slight circumstances. *Washbon v. Cope*, 144 N. Y. 297; *Nellis v. Nellis*, 99 N. Y. 505; *Mead v. Maben*, (Surrogate Ct.) 12 N. Y. Supp. 5, *affirmed* 131 N. Y. 255; *Buel v. Southwick*, 70 N. Y. 581; *Hennessy v. Patterson*, 85 N. Y. 91, 92; *Tyson v. Blake*, 22 N. Y. 558.

For further discussion see the titles *LEGACIES AND DEVISES*; see also *WILLS*.

Where the devise was to the testator's nieces, and in case either of them died without issue of her body, the portion of such one dying to be equally divided between the survivors, it was held that the words did not refer to death in the testator's lifetime. *Collins v. Thompson*, (Ky. 1897) 43 S. W. Rep. 227.

**Prior Estate for Life.** — The rule of construction by which a devise to A. in fee, followed by a provision that if he die without issue the lands are to go to B., is commonly taken to refer to the death of A. during the testator's life, has no application where the prior estate is one for life in the first taker, with a vested remainder in his children. *Hollister v. Butterworth*, 71 Conn. 57; *Mullarky v. Sullivan*, 136 N. Y. 227; *Galway v. Bryce*, (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 257.

**Other Contingency.** — The rule that where there is a bequest to one person absolutely, and in case of his death without issue to another, the contingency referred to is a death in the lifetime of the testator, does not apply when a point of time other than the death of the testator is mentioned, to which the contingency can be referred, or to a case where a life estate intervenes, or where the language of the will evinces a contrary intent. *Matter of Denton*, 137 N. Y. 428. See also *Smith v. Kimbell*, 153 Ill. 377; *Jones v. Moore*, 96 Ky. 273; *Budge v. Walling*, 45 N. J. Eq. 10; *McCarthy v. Dawson*, 1 Whart. (Pa.) 4; *Cowan v. Allen*, 26 Can. Sup. Ct. 292.

**Property to Revert to Estate.** — A testatrix left certain property to one L. H., her sister, with provision that, should she die without lawful issue, the property so devised and bequeathed to her should revert back to her estate. It was held that L. H. took a fee simple estate, defeasible upon dying without issue, and that the testatrix contemplated the happening of such contingency after her own death. *Trexler v. Holler*, 107 N. Car. 621.

**2. England.** — 2 Jarman on Wills (5th Am. ed.) 783; *Smith v. Stewart*, 4 De G. & Sm. 253; *Farthing v. Allen*, 2 Madd. 310; 2 Jarman on Wills (5th Am. ed.) 783; *Edwards v. Edwards*, 15 Beav. 357; *Johnston v. Antrobus*, 21 Beav. 556; *Gosling v. Townshend*, 17 Beav. 245, 2 W. R. 23; *Gawler v. Cadby*, Jac. 346; *Child v. Giblett*, 3 Myl. & K. 71; *Randfield v. Randfield*, 8 H. L. Cas. 225, 236; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; *Bowers v. Bowers*, L. R. 5 Ch. 244; *Re Heathcote*, 22 W. R. 42, 29 L. T. N. S. 445; *Olivant v. Wright*, 24 W. R. 84; *Parry v. Daggs*, 26 W. R. 353; *Rogers v. Rogers*, 7 W. R. 541; *Ware v. Watson*, 7 De G. M. & G. 248; *Lewin v. Killey*, 13 App. Cas. 783; *Cooper v. Cooper*, 1 Kay & J. 658; *Rogers v. Waterhouse*, 4 Drew. 329. See *Britton v. Thornton*, 112 U. S. 526, 533.



an estate tail. The construction is the same whether the prior limitation is in words which would pass a fee or indefinite or expressly for life.<sup>1</sup> Thus a devise to A. and his heirs, and if A. dies without issue, over, creates an estate tail.<sup>2</sup> So a devise to A. for life, and if he dies without issue, over, will

**1. Where the Failure of Issue Is Indefinite —**  
*England.* — Smith Ex. Int., §§ 564, 568; Prior on Issue, §§ 184, 185; Shadwell, V. C., in *Macheil v. Weeding*, 8 Sim. 4; Doe v. Davies, 4 B. & Ad. 43, 24 E. C. L. 20; Doe v. Owens, 1 B. & Ad. 318, 20 E. C. L. 393; *Morgan v. Morgan*, L. R. 10 Eq. 99; *Chapman v. Scholes*, 2 Chit. 643, 18 E. C. L. 439; *Denn v. Slater*, 5 T. R. 335; Doe v. Rivers, 7 T. R. 272; Doe v. Applin, 4 T. R. 82; Doe v. Ellis, 9 East 382; *Tenny v. Agar*, 12 East 253; Doe v. Cooper, 1 East 229; *Romilly v. James*, 6 Taunt. 263, 1 E. C. L. 379; *Dansey v. Griffiths*, 4 M. & S. 61; Doe v. Ewart, 7 Ad. & El. 636, 34 E. C. L. 187; *Parker v. Tootal*, 11 H. L. Cas. 143; *Daintry v. Daintry*, 6 T. R. 307; *Ward v. Bevil*, 1 Y. & J. 512; Doe v. Simpson, 4 Bing. N. Cas. 333, 33 E. C. L. 373; 4 Kent Com. 276 *et seq.*

*United States.* — *Willis v. Bucher*, 3 Wash. (U. S.) 369.

*Connecticut.* — *Turrill v. Northrop*, 51 Conn. 33.

*Delaware.* — *Roach v. Martin*, 1 Harr. (Del.) 548; *Waples v. Harman*, 1 Harr. (Del.) 223.

*Georgia.* — *Hertz v. Abrahams*, (Ga. 1900) 36 S. E. Rep. 409.

*Maine.* — *Fisk v. Keene*, 35 Me. 349; *Richardson v. Richardson*, 80 Me. 592.

*Maryland.* — *Hoxton v. Archer*, 3 Gill & J. (Md.) 199.

*Massachusetts.* — *Williams v. Hichborn*, 4 Mass. 189; *Hawley v. Northampton*, 8 Mass. 3; *Allen v. Ashley School Fund*, 102 Mass. 262; *Simonds v. Simonds*, 112 Mass. 157; *Whitcomb v. Taylor*, 122 Mass. 249; *Brown v. Addison Gibert Hospital*, 155 Mass. 323; *Dorr v. Johnson*, 170 Mass. 542; *Parker v. Parker*, 5 Met. (Mass.) 134; *Wheatland v. Dodge*, 10 Met. (Mass.) 502; *Hall v. Priest*, 6 Gray (Mass.) 18; *Hayward v. Howe*, 12 Gray (Mass.) 49; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472.

*Michigan.* — *Goodell v. Hibbard*, 32 Mich. 47.

*New Jersey.* — *Condict v. King*, 13 N. J. Eq. 375.

*New York.* — *Jackson v. Bellinger*, 18 Johns. (N. Y.) 368.

*North Carolina.* — *Beasley v. Whitehurst*, 2 Hawks. (9 N. Car.) 437.

*Pennsylvania.* — *Lapsley v. Lapsley*, 9 Pa. St. 130; *George v. Morgan*, 16 Pa. St. 95; *Hansell v. Hubbell*, 24 Pa. St. 244; *Doyle v. Mullady*, 33 Pa. St. 264; *Kay v. Scates*, 37 Pa. St. 31; *Haldeman v. Haldeman*, 40 Pa. St. 29; *Taylor v. Taylor*, 63 Pa. St. 481; *Kleppner v. Laverty*, 70 Pa. St. 70; *Odgen's Appeal*, 70 Pa. St. 501; *Greenawalt v. Greenawalt*, 71 Pa. St. 483; *Middleswarth v. Blackmore*, 74 Pa. St. 414; *Lawrence v. Lawrence*, 105 Pa. St. 335; *Cochran v. Cochran*, 127 Pa. St. 487; *Hackney v. Tracy*, 137 Pa. St. 53; *Ray v. Alexander*, 146 Pa. St. 242; *Nes v. Ramsay*, 155 Pa. St. 632; *Keating v. McAdoo*, 180 Pa. St. 10; *Shoofstall v. Powell*, 1 Grant Cas. (Pa.) 19; *Shoemaker v. Huffnagle*, 4 W. & S. (Pa.) 437; *Paxon v. Lefferts*, 3 Rawle (Pa.) 59; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447.

*Rhode Island.* — *Manchester v. Durfee*, 5 R. I. 549; *Arnold v. Brown*, 7 R. I. 188; *Jillson v. Wilcox*, 7 R. I. 515; *Whitford v. Armstrong*, 9 R. I. 394; *Sutton v. Miles*, 10 R. I. 348; *Bailey v. Hawkins*, 18 R. I. 573; *Cooke v. Bucklin*, 18 R. I. 666; *Holden v. Wells*, 18 R. I. 802.

*South Carolina.* — *Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.) 404.

*Tennessee.* — *Kirk v. Furgerson*, 6 Coldw. (Tenn.) 479.

*Virginia.* — *Jiggetts v. Davis*, 1 Leigh (Va.) 368; Doe v. Anderson, 4 Leigh (Va.) 118; *Wright v. Cohoon*, 12 Leigh (Va.) 370; *Tate v. Tally*, 3 Call (Va.) 354; *Goodrich v. Harding*, 3 Rand. (Va.) 280.

**2. Devise to A. and His Heirs —**  
*England.* — *Brice v. Smith*, Willes 1; *Tenny v. Agar*, 12 East 253; *Dansey v. Griffiths*, 4 M. & S. 61. See also *Goodnight v. Goodnight*, Willes 369, 7 Mod. 453; *Daintry v. Daintry*, 6 T. R. 307; *Romilly v. James*, 6 Taunt. 263, 1 E. C. L. 379, 1 Marsh 592. Compare *Gardiner v. Shelton*, Vaugh. 259, 1 Eq. Cas. Abr. 197, par. 6.

*Arkansas.* — *Myar v. Snow*, 49 Ark. 125.

*Maine.* — *Richardson v. Richardson*, 80 Me. 592.

*Massachusetts.* — *Albee v. Carpenter*, 12 Cush. (Mass.) 382; *Allen v. Ashley School Fund*, 102 Mass. 262.

*New Jersey.* — *Cleveland v. Havens*, 13 N. J. Eq. 101; 78 Am. Dec. 90; *Rowe v. White*, 16 N. J. Eq. 411; 84 Am. Dec. 169; *Wilson v. Wilson*, 46 N. J. Eq. 321; *Chetwood v. Winston*, 40 N. J. L. 337; *Moore v. Rake*, 26 N. J. L. 574; *Morehouse v. Coheal*, 21 N. J. L. 480; *Patterson v. Madden*, 54 N. J. Eq. 723.

*Pennsylvania.* — *Taylor v. Taylor*, 63 Pa. St. 481; *Ray v. Alexander*, 146 Pa. St. 242; *Nes v. Ramsay*, 155 Pa. St. 632; *Keating v. McAdoo*, 180 Pa. St. 10; *Eichelberger v. Barnitz*, 9 Watts (Pa.) 447.

*Rhode Island.* — *Burrough v. Foster*, 6 R. I. 540; *De Wolf v. Middleton*, 18 R. I. 813; *Holden v. Wells*, 18 R. I. 802; *Bailey v. Hawkins*, 18 R. I. 573.

*Tennessee.* — *Kirk v. Furgerson*, 6 Coldw. (Tenn.) 479.

*Virginia.* — *Jiggetts v. Davis*, 1 Leigh (Va.) 368.

But in *Deboe v. Lowen*, 8 B. Mon. (Ky.) 616, it is said that in no case of a will made since the abolition of entails had the court inferred the intention to create an estate tail, or construed the devise as creating one contrary to the intention, because the words "dying without issue" were used. *Cooksey v. Hill*, (Ky. 1899) 50 S. W. Rep. 238. Compare *Hood v. Dawson*, 98 Ky. 285.

**Fee Simple Statute.** — Where the will gave the first taker a fee simple and afterwards contained a devise over in case of his death without issue, it was held that he took an absolute estate, as either the death without issue referred to his death in the lifetime of the testator, or to an indefinite failure of issue, in which case he took a fee tail which the Act of April 27, 1855, enlarged to a fee simple. *Robinson's*



also create an estate tail.<sup>1</sup>

**Gift to Issue by Way of Remainder.** — Where the prior limitation is to A. for life, and after his decease to his issue, an estate tail would be created without<sup>2</sup> the limitation over upon A. dying without issue, *a fortiori* with it; and so A. takes an estate tail where the limitation is to A. for life and after his decease to the issue of his body and the heirs of the body of such issue, or where the remainder is to his issue, their heirs or heirs and assigns, or where the remainder is to his issue, share and share alike, as tenants in common, where there is a limitation over upon failure of issue.<sup>3</sup>

**Personalty.** — A bequest to A. if he die without issue over confers an absolute interest on A. whether the preceding bequest is to A. absolutely, or for life.<sup>4</sup>

Estate, 149 Pa. St. 418. See also *Palethorp v. Palethorp*, 194 Pa. St. 408.

**Fee Conditional.** — In *Bethea v. Bethea*, 48 S. Car. 440, it was held that where a devise was to one and the lawful issue of his body, and over if he should die without issue, the first taker took the fee conditionally at common law, and that such a limitation did not create a remainder to the issue as purchasers, and this though the *South Carolina* statute had provided that dying without issue should be taken to mean a definite failure of issue.

**1. Devise to A. for Life** — *England*. — *Lee's Case*, 1 Leon, 285; *Brice v. Smith*, Willes 3; *Blackburn v. Edgley*, 1 P. Wms. 605; *Doe v. Holmes*, 3 Wils. C. Pl. 246; *Medlycott v. Jortin*, 2 Brod. & B. 632, 6 E. C. L. 306; *Doe v. Gallini*, 3 Ad. & El. 340, 30 E. C. L. 112.

*Massachusetts*. — *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472.

*New Jersey*. — *Den v. McMurtrie*, 15 N. J. L. 276.

*Pennsylvania*. — *Price v. Taylor*, 28 Pa. St. 95; *George v. Morgan*, 16 Pa. St. 95; *Kay v. Scates*, 37 Pa. St. 31; *Haldeman v. Haldeman*, 40 Pa. St. 29; *Taylor v. Taylor*, 63 Pa. St. 481; *Kleppner v. Laverty*, 70 Pa. St. 70; *Ogden's Appeal*, 70 Pa. St. 501; *Cochran v. Cochran*, 127 Pa. St. 486; *Hackney v. Tracy*, 137 Pa. St. 53; *Nes v. Ramsay*, 155 Pa. St. 632; *Paxson v. Lefferts*, 3 Rawle (Pa.) 69.

*Rhode Island*. — *Bailey v. Hawkins*, 18 R. I. 573.

*Virginia*. — *Tinsley v. Jones*, 13 Gratt. (Va.) 289; *Jiggetts v. Davis*, 1 Leigh (Va.) 368.

**2. See supra, III. 2. c. Limitation to A. for Life, and After His Decease to His Issue — When No Gift Over.**

**3. Gift to Issue by Way of Remainder — Estate Tail** — *England*. — *Hayes' Inquiry* 302; *Hawkins' Wills* 190; *Shaw v. Weigh*, 3 Bro. P. C. (Toml. ed.) 120; *Hodgson v. Merest*, 9 Price 556; *Franklin v. Lay*, 6 Madd. 258; *Roe v. Grew*, 2 Wils. C. Pl. 322, *Wilmot* 272; *Lodding-ton v. Kime*, 1 Salk. 224, 1 Ld. Raym. 203; *Carter v. Barnardiston*, 3 Bro. P. C. (Toml. ed.) 63; *Doe v. Applin*, 4 T. R. 82; *Doe v. Cooper*, 1 East 229; *Ward v. Bevil*, 1 Y. & J. 513; *Murthwaite v. Jenkinson*, 2 B. & C. 358, 9 E. C. L. 106; *Kavanagh v. Morland*, *Kay* 16; *Woodhouse v. Herrick*, 1 Kay & J. 353; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, 859; *Doe v. Rucastle*, 8 C. B. 876, 65 E. C. L. 876; *Slater v. Dangerfield*, 15 M. & W. 275; *Jackson v. Calvert*, 1 Johns. & H. 235; *Parker v. Clarke*, 6 De G. M. & G. 109; *Phillips v. James*, 4 Dr. & Sm. 406, 3 De G. J. & S. 72; *Williams v. Williams*, 33 W. R. 118; *Frank v. Stovin*, 3

East 548; *Denn v. Puckey*, 5 T. R. 299; *Montgomery v. Montgomery*, 3 J. & La. T. 47.

*Indiana*. — *Gonzales v. Barton*, 45 Ind. 295.

*North Carolina*. — *Ward v. Jones*, 5 Ired. Eq. (40 N. Car.) 400.

*Pennsylvania*. — *Ogden's Appeal*, 70 Pa. St. 501; *Carroll v. Burns*, 15 W. N. C. (Pa.) 553; *Grimes v. Shirk*, 169 Pa. St. 74; *Paxson v. Lefferts*, 3 Rawle (Pa.) 59; *Taylor v. Taylor*, 63 Pa. St. 484, *Kleppner v. Laverty*, 70 Pa. St. 70.

*Rhode Island*. — *Jillson v. Wilcox*, 7 R. I. 515.

*South Carolina*. — *Myers v. Anderson*, 1 Strobb. Eq. (S. Car.) 344; *McLure v. Young*, Rich. Eq. (S. Car.) 559.

**In Case of a Deed to a Trustee in Trust to A. for life**, then to H. (the husband of A.) for life, then to the issue of A. and H., and in default of such issue, then to such persons as H. should appoint by will, and in default of such appointment, then to the right heirs of H., it was held that the estates limited to H. and his heirs being both equitable, the rule in *Shelley's Case* applied, and H. took a fee simple. The only effect of the power of appointment was to make the fee of H. subject to be divested by the exercise of power. *Brown v. Renshaw*, 57 Md. 67.

**Purchasers — Life Estate in Ancestor, Remainder to Issue.** — Where, in each instance of the mention of a devise of lands to a daughter in a will, it was stated to be "subject to conditions" to follow, such conditions were subsequently expressed to be that, should said daughter leave issue, "the remainder shall pass and be vested in such issue," or, should said daughter die without issue "all the remainder of said property should at once pass and be vested in L. and his heirs," etc., it was held that only a life estate vested in the daughter, and that the remainder was "devised over," notwithstanding the original words of gift were broad enough to vest a fee. *Healy v. Eastlake*, 152 Ill. 425.

**4. Personalty** — *England*. — Prior on Issue, § 186; *Fearne C. R.* 486; *Roper on Legacies* 1526; *Coms. Exrs.* 1110; *Re Andrew*, 27 Beav. 608; *Love v. Windham*, 1 Lev. 290; *Atty.-Gen. v. Bayley*, 2 Bro. C. C. 558; *Knight v. Ellis*, 2 Bro. C. C. 578; *Brooks v. Lake*, 10 Jur. 485; *Bradshaw v. Skilbeck*, 2 Bing. N. Cas. 188, 29 E. C. L. 303; *Lepine v. Ferard*, 2 Russ. & M. 378; *Mogg v. Mogg*, 1 Meriv. 654; *Williams v. Lewis*, 6 H. L. Cas. 1020; *Byng v. Stafford*, 5 Beav. 558; *Bennett v. Bennett*, 2 Dr. & Sm. 266; *Everest v. Gell*, 1 Ves. Jr. 286; *Chandless v. Price*, 3 Ves. Jr. 99; *Ward v. Bevil*, 1 Y. & J. 513; *Henderson*



But if the preceding bequest is to A. for life, and after his decease to his issue, with a gift over if he die without issue, the issue take in remainder as purchasers under the preceding bequest, and the gift over being construed referentially, a definite failure is created.<sup>1</sup>

**2. Where Failure of Issue Is Definite.** — A gift over upon a definite failure of issue will in no wise alter the construction of the preceding limitation. Its only effect will be to engraft upon it an executory devise or contingent remainder to operate upon the happening of the events specified.<sup>2</sup>

**IT.** — See note 3.

**ITEM.** (See ALSO, vol. 2, p. 177.) — Item means also; moreover; besides; in addition to.<sup>4</sup>

*v. Cross*, 7 Jur. N. S. 177, 9 W. R. 263. *Compare Target v. Gaunt*, 1 P. Wms. 433; *Boehm v. Clarke*, 9 Ves. Jr. 580; *Barlow v. Salter*, 17 Ves. Jr. 479.

*Arkansas.* — *Moody v. Walker*, 3 Ark. 147.

*Maryland.* — *Usilton v. Usilton*, 3 Md. Ch. 36.

*Pennsylvania.* — *Smith's Appeal*, 23 Pa. St. 9; *Mengel's Appeal*, 61 Pa. St. 248; *Pott's Appeal*, 30 Pa. St. 168; *Seibert v. Butz*, 9 Watts (Pa.) 494; *Hoff's Estate*, 147 Pa. St. 636.

*Rhode Island.* — *Cooke v. Bucklin*, 18 R. I. 666; *Hartwell v. Tefft*, 19 R. I. 644.

*South Carolina.* — *Shephard v. Shephard*, 2 Rich. Eq. (S. Car.) 142, 46 Am. Dec. 41; *Addison v. Addison*, 9 Rich. Eq. (S. Car.) 58.

*Tennessee.* — *Bowman v. Tucker*, 3 Humph. (Tenn.) 648.

*Virginia.* — *Schultz v. Schultz*, 10 Gratt. (Va.) 358.

**1.** Prior on Issue, §§ 244, 257, 301, 316; *Hawkins on Wills*, \*197; *Knight v. Ellis*, 2 Bro. C. C. 570; *Atkinson v. Paice*, 1 Bro. C. C. 91; *Matter of Wynch*, 5 De G. M. & G. 188; *Goldney v. Crabb*, 19 Beav. 338; *Parker v. Clarke*, 6 De G. M. & G. 104; *Hedges v. Harpur*, 3 De G. & J. 129; *Stewart v. Jones*, 3 De G. & J. 532; *McGarry v. Thompson*, 29 Grant Ch. (U. C.) 287. But see *Pott's Appeal*, 30 Pa. St. 168. *Compare Myers's Appeal*, 49 Pa. St. 111. See ante III. 2. c. (2) *As to Personality*; IV. 2. *In Default of Issue*.

Otherwise where the bequest is to A. for life and after his decease to his heirs male. *Williams v. Lewis*, 6 H. L. Cas. 1013, 1020.

The principle in the text applies also to a devise of chattels real. *Hawkins on Wills* \*197.

**Limitation to A. and His Issue.** — Under a limitation to A. and his issue, with a gift over on an indefinite failure of issue, A. takes an estate tail in realty and an absolute interest in personality whether there are issue in being at the time the will takes effect or not. Prior on Issue, § 189 *et seq.*; *Seale v. Barter*, 2 B. & P. 485; *Broadhurst v. Morris*, 2 B. & Ad. 1, 22 E. C. L. 11; *Goodright v. Wright*, 1 P. Wms. 397, 1 Stra. 25; *Franklin v. Lay*, 2 Bligh 59, note; *Doe v. Elvey*, 4 East 313. See ante, III. 2. b. *Limitation to A. and His Issue — When No Gift Over*.

**2. Definite Failure.** — Prior on Issue, § 173; *Smith Ex. Int.*, § 584; *Greene v. Ward*, 1 Russ. 262; *Doe v. Selby*, 2 B. & C. 926, 9 E. C. L. 277; *Smith v. Horlock*, 7 Taunt. 129, 2 F. C. L. 129; *Bennett v. Lowe*, 7 Bing. 535, 20 E. C. L. 229; *Murthwaite v. Jenkinson*, 2 B. & C. 358,

9 E. C. L. 106; *Kavanagh v. Morland*, Kay 16; *Glover v. Condell*, 163 Ill. 586, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 924. See also *Doe v. Wetton*, 2 B. & P. 324; *Plunket v. Holmes*, 1 Lev. 11; *Healy v. Eastlake*, 152 Ill. 424; *Taylor v. Taylor*, 63 Pa. St. 485; *De Wolf v. Middleton*, 18 R. I. 810; *Morrison v. Truby*, 145 Pa. St. 540; *Jiggetts v. Davis*, 1 Leigh (Va.) 368. *Compare Parr v. Swindels*, 4 Russ. 283; *Franks v. Price*, 5 Bing. N. Cas. 37, 35 E. C. L. 23; *Hockley v. Mawbey*, 1 Ves. Jr. 143, and *Leeming v. Sherratt*, 2 Hare 14; *Lyon v. Mitchell*, 1 Madd. 467; *Hutchinson v. Stephens*, 1 Keen 240; *Broadhurst v. Morris*, 2 B. & Ad. 1, 22 E. C. L. 11.

**3. It — Will.** — A testator having provided that money should be loaned out during the life of his wife and that at her death it should be divided between his children, the court held that the pronoun *it* was to be treated as referring to both principal and interest. *Willett v. Rutter*, 84 Ky. 317.

**Arson.** (See also the title ARSON, vol. 2, pp. 919, 924.) — An arson statute provided that the burning of a building under circumstances showing beyond a reasonable doubt that there was no intent to destroy it should not be arson. In *People v. Fanshawe*, 65 Hun (N. Y.) 77, 8 N. Y. Crim. 326, it was held that the word *it* as used in this statute must be construed to mean not only the entire building, but any part of it.

**Its — Declaration.** — Where the defendant corporation, after being named in the declaration by its corporate name, was subsequently referred to by the words *its* and "*its depot*," it was held that the declaration might reasonably be construed to allege that the defendant was an incorporated railroad company. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 348.

**It Shall Be Lawful.** — See LAWFUL.

**4. Wills.** (See also the title WILLS.) — *Item* does not mean "in like manner." It is used to show that what follows is intended to be in addition to what precedes, or it is made use of only to distinguish the clauses in the will. *Evans v. Knorr*, 4 Rawle (Pa.) 69.

"*Item* is an usual word in a will to introduce new distinct matter; therefore a clause thus introduced is not influenced by nor to influence a precedent or subsequent sentence unless it be of itself imperfect and insensible without reference." *Hopewell v. Ackland*, 1 Salk. 239. See also *Horwitz v. Norris*, 60 Pa. St. 282; *Hoxton v. Gardiner*, 1 Har. & M. (Md.) 437.



**ITEMIZED ACCOUNT.** (See also the title ACCOUNTS, vol. 1, p. 433.)—See note 1.

**ITINERANT.** (See also the titles COMMERCIAL TRAVELERS OR DRUMMERS, vol. 6, p. 223; HAWKERS AND PEDDLERS, vol. 15, p. 290; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.)—See note 2.

**JACK.**—See note 3.

**JACTITATION OF MARRIAGE.** (See also the title MARRIAGE.)—Jactitation of marriage is the boasting or giving out by a party that he or she is married to some other, whereby a common reputation of their matrimony may ensue. To defeat that result, the person may be put to a proof of the actual marriage, failing which proof she or he is put to silence about it.

**JAIL.** (See also the titles ESCAPE, vol. 11, p. 258; PRISONS.)—See note 4.

"The word *item* is used to mark and distinguish the different clauses in a will." Edelen v. Smoot, 2 Har. & G. (Md.) 289.

"The terms *item*, 'further,' 'moreover,' are commonly used in the beginning of a new devise or bequest, without indicating any particular intention in the disposition of the property." Burr v. Sim, 1 Whart. (Pa.) 264.

In Doe v. Westley, 4 B. & C. 669, 10 E. C. L. 440, it is said: "It is an old observation that the introduction of the word *item* shows that the testator is dealing with a new subject, and that the words following apply to that only, and not to the preceding matter, unless the intention that they should do so is plain."

**Construed Conjunctively.**—It is, however, sometimes construed conjunctively in the sense of "and" or "also," and need not necessarily be construed as independent of the preceding clause. Cheeseman v. Partridge, 1 Atk. 438; Castledon v. Turner, 3 Atk. 259.

1. **Itemized Account.**—In State v. Smith, 89 Mo. 408, it was held that an account "for current expenses of the police department, two hundred dollars," was not an *itemized account*. The court said: "An *itemized account* is one which states the items making up the aggregate of the demand."

2. **Itinerant Dealer.**—Upon an indictment for carrying on the business of an *itinerant* dealer without a license the court said: "It would be competent to prove that the defendant had in person made sales in other counties, and had gone from one county to another, in this state, dealing in goods, wares, and merchandise. This would be relevant for the purpose of showing that he was a transient or *itinerant* dealer—that he traveled from place to place while engaged in his business of selling. It would, in other words, show the *itinerant* nature of such business, and that his motive in pursuing it was for a profit, or as a means of livelihood, which is a necessary element of engaging in any business, occupation, or profession. Harris v. Slate, 50 Ala. 127; Weil v. State, 52 Ala. 19." Shiff v. State, 84 Ala. 457.

**Itinerant Musicians—Salvation Army.**—It has been held that within an ordinance regulating the licensing of *itinerant* musicians, the general term "*itinerant* musicians" included a person who took part in a procession or parade of the Salvation Army, so called, and engaged in playing upon a cornet. Com. v. Plaisted, 148 Mass. 375, 23 Am. & Eng. Corp. Cas. 101.

**Itinerant Salesmen—Sale by Sample.**—A statute imposed a license tax on "*itinerant* salesmen." The defendant, while in the employment of another, with a wagon and team and a sample range, exhibited his sample and solicited an order for a range similar to the sample, to be delivered in thirty days, the exhibition not being made either in the street or in a house temporarily rented for the purpose of exposing to sale goods, wares, and merchandise. It was held that he was not an "*itinerant* salesman" within the meaning of the statute. State v. Gibbs, 115 N. Car. 700.

**Itinerant Vendor.**—In Com. v. Crowell, 156 Mass. 215, it was held, where an agent opened a store in a town, for the purpose of selling his stock already on hand, intending to remain only until such stock was disposed of, that he was an *itinerant* vendor, and the fact that his principal carried on business permanently in another place made no difference.

**Same—Proprietary Medicine.**—A dealer in patent medicines had a permanent place of business where he sold his goods during part of the time, but also traveled to fairs and different parts of the state selling his nostrums to all persons whom he could induce to purchase. It was held that he was an *itinerant* vendor. Snyder v. Closson, 84 Iowa 184.

**Itinerant Steamers.**—A statute authorized a tax upon *itinerant* or transient merchant steamboats or other vessels remaining in a municipal corporation less than a year. It was held that this was intended to subject to taxation steamboats which had a temporary situs within the city not continuing for a year, yet distinguishable from the casual transitory presence of such vessels within the city in the mere course of navigation and trade. Mobile v. Baldwin, 57 Ala. 61.

**Residence in State.**—In Bohon v. Brown, (Ky. 1899) 49 S. W. Rep. 450, it was held that one was an "*itinerant* person," although a resident of the state, where he traveled from county to county selling patent rights.

3. **Jack.**—A contract of carriage provided that the carrier should not be liable in case of loss or injury, in excess of one hundred dollars for each horse or mule. It was held that the word "horse" in this contract did not include a *jack*. Richardson v. Chicago & Alton R. Co., 149 Mo. 323.

4. **Jail.**—Upon a conviction of defacing and damaging the *jail*, the appellate court said: "Now it is manifest that the words 'other house or building,' in the last recited clause,



**JAIL LIBERTIES.**— See the titles *ESCAPE*, vol. 11, p. 269; *PRISONS*.

**JANITOR.**— A janitor is understood to be a person employed to take charge of rooms or buildings, and see that they are kept clean and in order, to lock and unlock them, and generally to care for them.<sup>1</sup>

**JAPANESE.**— See note 2.

**JAS.** (See generally the title *ABBREVIATIONS*, vol. 1, p. 97.)— *Jas.* is frequently written as an abbreviation of *James*.<sup>3</sup>

**JEALOUS EYE.**— See note 4.

**JEOFAILS.**— An oversight in pleading; a mistake, or error; strictly, the acknowledgment of an error.<sup>5</sup>

embrace a *jail*, a jailhouse or building. The term *jail* implies a house or building used for the purposes of a public prison, or where persons under arrest are kept." *State v. Bryan*, 89 N. Car. 533.

A *jail* has been defined by the *Texas* Penal Code as any place of confinement used for detaining a prisoner. It was held that this definition included a space between the jailhouse proper and the walls surrounding, where the walls were used as a means for the safe keeping of a prisoner. *Welch v. State*, 25 Tex. App. 580.

1. *Fagan v. New York*, 84 N. Y. 352. This case arose upon the power of the common council of New York to appoint *janitors* for buildings in which the Supreme Court sat. It was held that such power belonged to the commissioners of public works. See generally the title *PUBLIC OFFICERS*.

2. *Japanese.*— A *Japanese* is not entitled to naturalization in the United States. *In re Saito*, 62 Fed. Rep. 126. See also the title *CITIZENSHIP*, vol. 6, p. 20.

3. *Jas.*— *Robbins v. Governor*, 6 Ala. 841, where the court said: "It must be intended that James W. Yarborough was one of the obligors in the bond, and that '*Jas.* W. Yar-

borough,' the name by which he executed it, was a mere contraction of his Christian name; for it is too well known not to be a matter of judicial recognition that *Jas.* is frequently written as an abbreviation of *James*." In *Converse v. Wead*, 142 Ill. 132, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 15, parol evidence was admitted to show that "*Jas.* S. Allen" meant "James S. Allen."

4. *Jealous Eye.*— In *Coffman v. Hedrick*, 32 W. Va. 132, it was said: "It is, however, assigned as error in this cause that the court below corrected the second instruction asked for by the contestants by striking out the words *jealous eye* and inserting 'careful scrutiny;' but the words taken in connection with the language used in the instruction are so nearly synonymous that either expression might have been used without creating a different impression on the minds of the jury. I do not therefore regard the correction as material. See *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, sixth point of syllabus."

5. *Burr. L. Dict.*; 3 Black. Com. 407. *J'ai faillé* or *jeo faile* was the expression in which the ancient pleader acknowledged his error. Statutes of jeofails are statutes of amendments.



# JEOPARDY.

BY WALTER CARRINGTON.

- I. DEFINITION, 581.
- II. NATURE AND HISTORY OF THE DOCTRINE OF FORMER JEOPARDY, 581.
- III. FEDERAL CONSTITUTIONAL PROVISION NOT BINDING ON THE STATES, 582.
- IV. TO WHAT CLASSES OF OFFENSES THE DOCTRINE IS APPLIED, 582.
  1. *In General*, 582.
  2. *Applicability to Actions for the Recovery of Statutory Penalties*, 582.
  3. *Not Applicable to Proceedings for Surety of the Peace*, 583.
  4. *Not Applicable to Proceedings in Rem to Forfeit a Thing*, 583.
  5. *Not Applicable to Civil Proceedings to Remove Public Officers*, 583.
  6. *Not Applicable to Provisions for Cumulative Punishment*, 583.
  7. *Exemplary Damages as Affected by Doctrine*, 583.
- V. EFFECT OF JEOPARDY ATTACHING, 583.
  1. *In General*, 583.
  2. *The State Cannot Secure a New Trial*, 584.
- VI. WHAT CONSTITUTES A JEOPARDY, 584.
  1. *General Rule Stated*, 584.
  2. *Essential Elements under the Rule*, 586.
    - a. *A Court of Competent Jurisdiction*, 586.
    - b. *A Valid Indictment or Information*, 588.
    - c. *Issue Joined*, 591.
    - d. *A Legally Constituted Jury Impaneled and Sworn*, 592.
  3. *Explanations and Qualifications of the Rule*, 593.
    - a. *Determination of Preliminary or Collateral Questions*, 593.
    - b. *Unforeseen Occurrence Making Impossible the Rendition of a Valid Verdict*, 593.
    - c. *Acquittal or Conviction Fraudulently Procured*, 593.
      - (1) *Acquittal* 593.
      - (2) *Conviction*. 593.
  4. *Discharge under Statute Limiting the Time Within Which an Accused May Be Tried*, 594.
  5. *Statutes Not Unconstitutional as Putting Twice in Jeopardy*, 594.
    - a. *Statute Authorizing Resentence After Reversal for Error Subsequent to Verdict*, 594.
    - b. *Statute Providing for the Enforcement of an Existing Judgment*, 595.
  6. *Effect of a Nolle Prosequi*, 595.
- VII. IDENTITY OF OFFENSES, 596.
  1. *In General*, 596.
  2. *Test of Identity*, 597.
  3. *Where One Crime Includes Another*, 598.
    - a. *Prosecution for Higher as Bar to Prosecution for Lower*, 598.
    - b. *Prosecution for Lower as Bar to Prosecution for Higher*, 599.
    - c. *Conviction of Lower on Prosecution for Higher*, 601.
    - d. *Where Higher Crime Is a Felony and Lower a Misdemeanor*, 601.
  4. *Where One Act Includes Several Crimes*, 602.
  5. *Several Prosecutions for Single Crime Prohibited*, 603.
    - a. *Rule Stated*, 603.
    - b. *Rule Applied to Continuing Offenses*, 603.
  6. *Jeopardy of a Codefendant*, 604.



7. *One Act Constituting Distinct Crimes Against Different Sovereignities*, 604.
8. *One Act Violating Both a State Law and a Municipal Ordinance*, 605.
9. *One Act Violating Both a Military and a General Law*, 605.

#### VIII. WAIVER OF OBJECTION TO A SECOND JEOPARDY, 605.

1. *In General*, 605.
2. *Motion to Quash Indictment*, 605.
3. *Acquittal Directed at Defendant's Request for Defect in Indictment*, 605.
4. *Withdrawal of Plea of Guilty*, 605.
5. *Discharge of Jury with Defendant's Consent*, 605.
6. *Failure to Have Defective Verdict Perfected*, 605.
7. *Waiver After Verdict*, 606.
  - a. *In General*, 606.
  - b. *Effect of Arrest of Judgment*, 607.
    - (1) *In Jurisdictions Where the Judgment of Arrest May Be Reversed*, 607.
    - (2) *In Jurisdictions Where the Judgment Cannot Be Reversed*, 608.
  - c. *Limitation of the Waiver*, 608.
    - (1) *In General*, 608.
    - (2) *Where Verdict Acquits in Part and Convicts in Part*, 608.
    - (3) *Where Verdict Is Silent as to Part of Offenses Charged*, 608.

#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *FORMER CONVICTION OR ACQUITTAL* in the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 9, p. 630.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONSTITUTIONAL LAW*, vol. 6, p. 882; *JURISDICTION*, *post*; *JURY AND JURY TRIAL*, *post*; *JUSTICE OF THE PEACE*; *RES JUDICATA*.

**I. DEFINITION.** — In law the term "jeopardy" is used to designate the danger of conviction and punishment which the defendant in a criminal action incurs when a valid indictment has been found and a petit jury has been impaneled and sworn to try the case and give a verdict.<sup>1</sup> But according to the theory adhered to by some jurists a person accused of crime is not put in jeopardy until he has been tried and a verdict of guilty or not guilty rendered.<sup>2</sup>

**II. NATURE AND HISTORY OF THE DOCTRINE OF FORMER JEOPARDY.** — That no one shall be twice put in jeopardy for the same offense is an ancient and well-established doctrine. It is a part of the universal law of reason, justice, and conscience.<sup>3</sup> It is embodied in a maxim of the civil law,<sup>4</sup> and is embedded in the very elements of the common law,<sup>5</sup> and expressed in several of its maxims.<sup>6</sup> This universal doctrine was incorporated into the Constitution of the United States, which provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb,"<sup>7</sup> and the constitu-

1. *Jeopardy Defined.* — Black's Law Dict. 649. See also *Com. v. Hiland*, 1 Pa. Co. Ct. 532.

2. See *infra*, this title, *What Constitutes a Jeopardy* — *Essential Elements under the Rule*.

3. *Nature and History of Doctrine.* — U. S. v. Keen, 1 McLean (U. S.) 429; *State v. Benham*, 7 Conn. 414; *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542; *State v. Norvell*, 2 Verg. (Tenn.) 24, 24 Am. Dec. 458.

4. *Non Bis In Idem.* — 2 Bouv. Law Dict. 505.

5. Mr Justice Story, in *U. S. v. Gibert*, 2 Sumn. (U. S.) 42.

6. Thus in the maxim, "No man is to be brought into jeopardy of his life more than

once for the same offense." *Kohlheimer v. State*, 39 Miss. 552, 77 Am. Dec. 689; *State v. Shirer*, 20 S. Car. 404; 4 Bl. Com. 335.

The principle also finds expression in the following maxims of the common law: *Nemo debet bis vexari pro una et eadem causa*, applicable to civil cases — no man shall be twice vexed for one and the same cause; and in these maxims applicable to the criminal law, *Nemo bis punitur pro eodem delicto*, *Nemo debet bis puniri pro uno delicto*, — no one can be twice punished for the same crime or misdemeanor. *Ex p. Lange*, 18 Wall. (U. S.) 168; *Williams v. Com.*, 78 Ky. 97.

7. Const. U. S., Amendments, art. v.



tions of nearly all the states contain a similar provision.<sup>1</sup>

**III. FEDERAL CONSTITUTIONAL PROVISION NOT BINDING ON THE STATES.** — It is now well settled that the provision of the Constitution of the United States prohibiting a second jeopardy does not bind the states, but applies only to offenses against and trials under the laws of the United States.<sup>2</sup> A contrary opinion, however, was expressed in some of the earlier cases.<sup>3</sup> But whether or not it binds the states is but of slight practical importance in view of the similar provisions, with sometimes slight variations in phraseology, in the constitutions of most of the states.

**IV. TO WHAT CLASSES OF OFFENSES THE DOCTRINE IS APPLIED** — 1. **In General.** — Though in strictness the constitutional provisions apply only to felonies,<sup>4</sup> the courts have generally been guided by the spirit rather than the letter of the law, and have applied the doctrine to all indictable offenses including misdemeanors;<sup>5</sup> but in some jurisdictions the doctrine has been held to have a narrower scope.<sup>6</sup>

2. **Applicability to Actions for the Recovery of Statutory Penalties.** — If, as has been held by the federal courts, an action to recover a statutory penalty though civil in form is a criminal case,<sup>7</sup> there would seem to be no doubt of the applicability to it of the doctrine of former jeopardy. And even regarding such an action as a civil case, as the broad construction that has been given the guaranty has held it applicable to misdemeanors, it would seem to require no very forced construction to extend it a little further and hold that actions for the recovery of statutory penalties are also within its purview. And this is the view taken by the best considered cases.<sup>8</sup> But in most jurisdictions such actions have been held not to be within the constitutional guaranty.<sup>9</sup>

1. See Stimson's Am. Stat. Law, § 137, and the constitutions of the several states.

2. **States Not Bound by the Provision of the Federal Constitution** — *United States*. — *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Fox v. Ohio*, 5 How. (U. S.) 410; *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *U. S. v. Gibert*, 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15,204; *U. S. v. Keen*, 1 McLean (U. S.) 429, 26 Fed. Cas. No. 15,510; *U. S. v. Barnhart*, 22 Fed. Rep. 285.

*Connecticut*. — *Colt v. Eves*, 12 Conn. 243.

*Louisiana*. — *State v. Cheevers*, 7 La. Ann. 40.

*New York*. — *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

*Ohio*. — *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388.

*Rhode Island*. — *State v. Flynn*, 16 R. I. 10.

*South Carolina*. — *State v. Shirer*, 20 S. Car. 392; *State v. Briggs*, 27 S. Car. 84.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 961.

3. **Early Cases Expressing a Contrary Opinion.** — *State v. Moor*, Walk. (Miss.) 134, 12 Am. Dec. 541; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203. See also *State v. Adams*, 14 Ala. 486; *State v. Seay*, 3 Stew. (Ala.) 123, 20 Am. Dec. 66.

4. **In Strictness the Constitutional Provisions Only Applicable to Felonies.** — *Ex p. Lange*, 18 Wall. (U. S.) 163; *U. S. v. Gibert*, 2 Sumn. (U. S.) 19; *Brink v. State*, 18 Tex. App. 344, 51 Am. Rep. 317.

The expression "jeopardy of limb" was used in reference to the nature of the offense, and not to designate the punishment for an offense. It is to be understood as referring to offenses which, in former ages, were punishable by dismemberment, and as intending to comprise the crimes denominated in the law

felonies. *People v. Goodwin*, 18 Johns. (N. Y.) 200, 9 Am. Dec. 203.

5. **Doctrine Generally Held Applicable to All Indictable Offenses.** — *Ex p. Lange*, 18 Wall. (U. S.) 163; *Berkowitz v. U. S.*, 93 Fed. Rep. 452, 35 C. C. A. 379; *Williams v. Com.*, 78 Ky. 97; *State v. Cheevers*, 7 La. Ann. 40; *Brink v. State*, 18 Tex. App. 344, 51 Am. Rep. 317.

6. **In an Early Case in the Federal Courts** it was held that the doctrine only applies to capital felonies. *U. S. v. Gibert*, 2 Sumn. (U. S.) 42.

**In Arkansas** it has been held that the doctrine of former jeopardy does not apply to misdemeanors punishable by fine alone. *Warwick v. State*, 47 Ark. 568.

**In Missouri** also this would seem to be the rule. *State v. Spear*, 6 Mo. 644.

7. **Action Criminal Though Civil in Form.** — *Lees v. U. S.*, 150 U. S. 476; *Boyd v. U. S.*, 116 U. S. 616; *U. S. v. Shapleigh*, 12 U. S. App. 26.

8. **Actions for the Recovery of Statutory Penalties Within the Guaranty.** — *Coffey v. U. S.*, 116 U. S. 436; *U. S. v. McKee*, 4 Dill. (U. S.) 128, 5 Rep. 7, 26 Fed. Cas. No. 15,688; *U. S. v. Shapleigh*, 12 U. S. App. 26. Compare *Stone v. U. S.*, 167 U. S. 178, affirming 64 Fed. Rep. 667; *U. S. v. Three Copper Stills*, etc., 47 Fed. Rep. 495; *Matter of Leszynsky*, 16 Blachf. (U. S.) 9, 7 Rep. 358, 15 Fed. Cas. No. 8,279; *U. S. v. Halberstadt*, Gilp. (U. S.) 262. These cases are mainly to be distinguished on the facts.

9. **Doctrine Not Applicable to Actions for the Recovery of Statutory Penalties** — *England*. — *Wilson v. Rastall*, 4 T. R. 753; *Calcraft v. Gibbs*, 5 T. R. 681.

*Connecticut*. — *Pruden v. Northrup*, 1 Root (Conn.) 93.



**3. Not Applicable to Proceedings for Surety of the Peace.** — The doctrine does not apply to proceedings for surety of the peace, as such a proceeding is not a prosecution for a crime or offense committed, but a proceeding to prevent the commission of a crime.<sup>1</sup>

**4. Not Applicable to Proceedings in Rem to Forfeit a Thing.** — The doctrine does not apply to a proceeding *in rem* to forfeit a thing because of its status, use, or location, without regard to the guilt or innocence of any particular person.<sup>2</sup>

**5. Not Applicable to Civil Proceedings to Remove Public Officers.** — A determination made in a civil proceeding to remove a public officer for neglect or malfeasance in office is not a conviction of such officer of a crime and is not a bar to a criminal proceeding against him for any malfeasance or criminal violation of the law committed while in office.<sup>3</sup>

**6. Not Applicable to Provisions for Cumulative Punishment.** — The doctrine of former jeopardy is not applicable to provisions for cumulative punishment, that is, to the case of a second conviction under statutes which provide that the second conviction of the same or a kindred offense shall be punished more severely than a first conviction for that or a kindred offense.<sup>4</sup>

**7. Exemplary Damages as Affected by Doctrine.** — The recovery of exemplary or punitive damages is sometimes held not to be in conflict with the provision against a person's being twice put in jeopardy, contained in the federal and state constitutions.<sup>5</sup> But in several states the doctrine of jeopardy is held to prohibit the award of punitive damages in cases where the act complained of is punishable as a crime.<sup>6</sup>

## V. EFFECT OF JEOPARDY ATTACHING — 1. In General. — Where the defendant

*Indiana.* — *Durham v. State*, 117 Ind. 477; *Indiana Cent. R. Co. v. Potts*, 7 Ind. 681.

*Nebraska.* — *Mitchell v. State*, 12 Neb. 538.

*New York.* — *People v. Stevens*, 13 Wend. (N. Y.) 341; *People v. Meakin*, 133 N. Y. 214, 8 N. Y. Crim. 404. See also *Rollins v. Breed*, 54 Hun (N. Y.) 485.

*Wisconsin.* — *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

In Massachusetts it has been held that the pendency of a *qui tam* action will abate an indictment for the same cause, and this though the plaintiff in the *qui tam* action is nonsuited after the filing of the plea in abatement to the indictment. But the rule is otherwise where the *qui tam* action is collusively brought. *Com. v. Churchill*, 5 Mass. 174.

In Indiana it has been held that the constitutional guaranty against a second jeopardy does not prohibit the legislature from declaring an act a crime and prescribing a penalty therefor, and at the same time fixing or limiting the civil liability for the same act, *State v. Stevens*, 103 Ind. 55; but that the legislature is prohibited by such constitutional provision from authorizing in addition to the penalty for the crime the recovery in a civil action of unrestricted exemplary damages, *State v. Stevens*, 103 Ind. 55; *Taber v. Hutson*, 5 Ind. 322; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Schafer v. Smith*, 63 Ind. 226.

1. *State v. Vankirk*, 27 Ind. 121.

**Conviction of Crime and Discharge on Giving Security for Good Behavior.** — A person who has been convicted of an assault by a court of summary jurisdiction, but has been discharged without any sentence of fine or imprisonment,

on giving security to be of good behavior, cannot afterwards be convicted on an indictment for the same assault. *Reg. v. Miles*, 24 Q. B. D. 423, 17 Cox C. C. 9.

**Misdemeanor, Civil Suit, and Injunction.** — A statute which makes an act a misdemeanor, and also authorizes a civil suit against a person violating its provisions, and an injunction to restrain such violation, is not in contravention of the constitutional provision against putting a person twice in jeopardy for the same offense, and this though in case of a violation of an injunction under the civil remedy part of the act the court might punish the defendant for contempt for disobeying the order of injunction. *State v. Roby*, 142 Ind. 168.

**2. Proceedings in Rem.** — *The Palmyra*, 12 Wheat. (U. S.) 14; *U. S. v. Three Copper Stills*, etc., 47 Fed. Rep. 495; *U. S. v. Olsen*, 57 Fed. Rep. 579; *Sanders v. State*, 2 Iowa 230; *State v. Barrels of Liquor*, 47 N. H. 369. Compare *Coffey v. U. S.*, 116 U. S. 436; *U. S. v. One Distillery*, 43 Fed. Rep. 846. See also the title REVENUE LAWS.

3. *People v. Meakim*, 133 N. Y. 214, 8 N. Y. Crim. 404, affirming 61 Hun (N. Y.) 327, 8 N. Y. Crim. 308.

4. **Cumulative Punishment.** — *Moore v. Missouri*, 159 U. S. 673. See also the title CUMULATIVE PUNISHMENT, vol. 8, p. 481.

5. **Punitive Damages.** — *Chiles v. Drake*, 2 Met. (Ky.) 151, 74 Am. Dec. 406. For full discussion, see the title EXEMPLARY DAMAGES, vol. 12, p. 8.

6. *Austin v. Wilson*, 4 Cush. (Mass.) 273, 50 Am. Dec. 766. See the title EXEMPLARY DAMAGES, vol. 12, p. 10, where the authorities are collected.



has once been placed in jeopardy, unless <sup>1</sup> he waives his right not to be put in jeopardy a second time, as by asking a new trial, any other prosecution for the same offense is barred.<sup>2</sup> So if, after jeopardy has attached,<sup>3</sup> the trial is interrupted by an improper discharge of the jury,<sup>4</sup> or for other cause which is legally insufficient, the defendant cannot be tried again.<sup>5</sup>

**2. The State Cannot Secure a New Trial.** — After jeopardy has attached, and a verdict of acquittal has been rendered, such verdict cannot, on the application of the state, be set aside and a new trial granted, no matter by what errors on the part of the court, jury, or prosecution the acquittal was obtained,<sup>6</sup> and a statute which authorizes a new trial under such circumstances on the application of the state is in violation of the constitutional prohibition against a second jeopardy.<sup>7</sup>

**Acquittal Before Justice as Bar to a New Trial on Appeal.** — When a defendant has been tried and acquitted before a justice of the peace for an offense within the jurisdiction of that officer, the state cannot, upon appeal, compel him to stand a second trial.<sup>8</sup>

But in Civil Actions for the Recovery of Penalties, and in some cases where the form of proceeding is criminal, if the object is only to establish a civil right, as in cases of quo warranto, etc., new trials may be granted on the application of the prosecutor.<sup>9</sup>

**VI. WHAT CONSTITUTES A JEOPARDY** — **1. General Rule Stated.** — The general rule established by the preponderance of judicial opinion and by the best considered cases is that when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and has pleaded, and a jury has been impaneled and sworn, he is in jeopardy, but until these things have been done jeopardy does not attach.<sup>10</sup> But in some

1. See *infra*, this title, *Waiver of Objection to a Second Jeopardy*.

2. **Effect of the Attaching of Jeopardy.** — *Wemyss v. Hopkins*, L. R. 10 Q. B. 381; *O'Brian v. Com.*, 9 Bush (Ky.) 333, 15 Am. Rep. 715.

3. For the rules as to when a jeopardy attaches, see *infra*, this title, *What Constitutes a Jeopardy*.

4. See the title JURY AND JURY TRIAL, XI. *Discharge of Jury and Jurors, passim*. If the discharge is for a legally sufficient cause, there has been no jeopardy. See the title JURY AND JURY TRIAL, *ut supra*; also *infra* this title, VI. 3. b.

5. *Bell v. State*, 44 Ala. 393; *Scott v. State*, 110 Ala. 48; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Morgan v. State*, 13 Ind. 215; *Boswell v. State*, 111 Ind. 49.

6. **State Cannot Secure a New Trial After Jeopardy Has Attached.** — *People v. Webb*, 38 Cal. 467; *People v. Horn*, 70 Cal. 17; *State v. Brown*, 16 Conn. 54; *Black v. State*, 36 Ga. 447, 91 Am. Dec. 772; *State v. Davis*, 4 Blackf. (Ind.) 345; *Stevens v. Fassett*, 27 Me. 282; *Com. v. Green*, 17 Mass. 515; *People v. Cook*, 10 Mich. 164; *State v. Hall*, 3 Nev. 172; *State v. Herrick*, 3 Nev. 259; *State v. Lee*, 10 R. I. 494. Compare *State v. White*, 8 Wash. 230.

So, although the court may have improperly prevented the state from entering a *nolle prosequi*, or have misdirected the jury, or have admitted illegal or rejected legal evidence, or the verdict may be against the evidence, the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive, and the defendant cannot be again put in jeopardy for the same offense. *State v. Davis*, 4 Blackf. (Ind.) 345.

But the Plea of Former Jeopardy not being of matter which goes to the question of the innocence of the accused, a hearing upon it is not a jeopardy, and an order sustaining it and discharging the defendant may be appealed by the state as a question reserved, and, in the event of a reversal of such order on the state's appeal, the defendant may be rearrested and held for trial. *State v. Hager*, 61 Kan. 504.

7. *State v. Van Horton*, 26 Iowa 402.

Contra. — *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202.

The California statute allowing the state an appeal is held to apply only to proceedings before jeopardy attaches. *People v. Webb*, 38 Cal. 467.

In Arkansas it has been held that under the statutes of that state, where a defendant has been acquitted of a misdemeanor punishable by fine only, such acquittal may, on motion of the state, if there are sufficient grounds, be set aside and a new trial granted, without any violation of the constitutional prohibition against a second jeopardy. *Jones v. State*, 15 Ark. 261; *Taylor v. State*, 36 Ark. 84. See also *State v. Graham*, 1 Ark. 434.

But the rule is otherwise where the defendant is acquitted of a crime punishable by imprisonment. *State v. Hand*, 6 Ark. 169, 42 Am. Dec. 689.

8. *State v. Van Horton*, 26 Iowa 402.

9. *State v. Brown*, 16 Conn. 54.

**10. When Jeopardy Attaches — General Rule** — *United States*. — U. S. v. Van Vliet, 23 Fed. Rep. 35; U. S. v. Shoemaker, 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279.

*Alabama*. — *Grogan v. State*, 44 Ala. 9; *Bell v. State*, 44 Ala. 394; *Foster v. State*, 88 Ala. 184; *Scott v. State*, 110 Ala. 48, citing 11 AM.



jurisdictions it is held that jeopardy does not attach until a valid verdict either of acquittal or conviction has been rendered.<sup>1</sup>

AND ENG. ENCYC. OF LAW (1st ed.) 933; *State v. Kreps*, 8 Ala. 951; *Lyman v. State*, 47 Ala. 686; *Hayes v. State*, 107 Ala. 1; *Jackson v. State*, 102 Ala. 76. But see *Ned v. State*, 7 Port. (Ala.) 187; *State v. Abram*, 4 Ala. 272.

*Arkansas*. — *McKenzie v. State*, 26 Ark. 334; *Whitmore v. State*, 43 Ark. 271; *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213; *Harp v. State*, 59 Ark. 113; *Atkins v. State*, 16 Ark. 568; *Williams v. State*, 42 Ark. 35; *State v. Cheek*, 25 Ark. 208.

*California*. — *People v. Roberts*, 114 Cal. 67; *Patterson v. Conlan*, 123 Cal. 453; *Ex p. Clarke*, 54 Cal. 412; *People v. Higgins*, 59 Cal. 358; *People v. Webb*, 38 Cal. 467; *Ex p. Fenton*, 77 Cal. 183; *People v. Ammerman*, 118 Cal. 23; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

*Georgia*. — *Jackson v. State*, 76 Ga. 551; *Bell v. State*, 103 Ga. 397; *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281; *Franklin v. State*, 85 Ga. 570; *Newsom v. State*, 2 Ga. 60; *Reynolds v. State*, 3 Ga. 53.

*Indiana*. — *Boswell v. State*, 111 Ind. 47; *Shideler v. State*, 129 Ind. 527, 28 Am. St. Rep. 206; *Sanders v. State*, 85 Ind. 319, 4 Crim. L. Mag. 359; *Halloran v. State*, 80 Ind. 589; *Joy v. State*, 14 Ind. 139; *Morgan v. State*, 13 Ind. 215.

*Iowa*. — *State v. Tatman*, 59 Iowa 473; *State v. Redman*, 17 Iowa 329; *State v. Smith*, 88 Iowa 183, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 930.

*Kentucky*. — *Huff v. Com.*, (Ky. 1897) 42 S. W. Rep. 907; *Williams v. Com.*, 78 Ky. 93; *Gaskins v. Com.*, 97 Ky. 494; *O'Brian v. Com.*, 9 Bush (Ky.) 333, 15 Am. Rep. 715, *overruling* 6 Bush (Ky.) 503, and *Com. v. Olds*, 5 Litt. (Ky.) 137, and in effect, *Wilson v. Com.*, 3 Bush (Ky.) 105.

*Louisiana*. — *State v. Robinson*, 46 La. Ann. 772, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 933.

*Massachusetts*. — *Com. v. Hart*, 149 Mass. 7.

*Michigan*. — *People v. Taylor*, 117 Mich. 583.

*Minnesota*. — *State v. Sommers*, 60 Minn. 90.

*Mississippi*. — *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Finch v. State*, 53 Miss. 363; *Helm v. State*, 66 Miss. 537, *limiting* *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195. The *State v. Moor, Walk*, (Miss.) 134, 12 Am. Dec. 541, is practically *overruled* by the above cases.

*Missouri*. — *Ex p. Snyder*, 29 Mo. App. 256; *State v. Snyder*, 98 Mo. 555; *State v. Wiseback*, 139 Mo. 214.

*Nebraska*. — *Murphy v. State*, 25 Neb. 807.

*Nevada*. — *Ex p. Maxwell*, 11 Nev. 428.

*Oklahoma*. — *Matter of McClaskey*, 2 Okla. 568.

*Oregon*. — *Ex p. Tice*, 32 Oregon 179; *State v. Reinhart*, 26 Oregon 466.

*Pennsylvania*. — *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Hester v. Com.*, 85 Pa. St. 139; *Alexander v. Com.*, 105 Pa. St. 1.

*Tennessee*. — *State v. Connor*, 5 Coldw. (Tenn.) 311.

*Texas*. — *Yerger v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 621; *Anderson v. State*, 24 Tex. App. 705. It was formerly held in this state that jeopardy does not attach until the verdict

is rendered. *Taylor v. State*, 35 Tex. 97; *Brill v. State*, 1 Tex. App. 152.

*Vermont*. — *State v. Whipple*, 57 Vt. 637.

*Virginia*. — *Dulin v. Lillard*, 91 Va. 718.

*Washington*. — *State v. Hubbell*, 18 Wash. 482.

*Wisconsin*. — *McDonald v. State*, 79 Wis. 651, 24 Am. St. Rep. 740.

**Proceeding Held Not to Constitute a Jeopardy.** — Where a warrant was issued and read to the defendant, but she was not taken into custody, and did not give a bond for her appearance, and did not appear in court, but a judgment to pay a fine was entered against her as by confession, upon a plea of guilty entered by the marshal, it was held that she had not been placed in jeopardy. *Ballowe v. Com.*, (Ky. 1898) 44 S. W. Rep. 646. See also *Bradley v. State*, 32 Ark. 722.

**1. Rendition of Valid Verdict Essential to a Jeopardy** — *United States*. — *U. S. v. Gibert*, 2 Sumn. (U. S.) 60; *U. S. v. Haskell*, 4 Wash. (U. S.) 402.

*Louisiana*. — *State v. Ritchie*, 3 La. Ann. 715; *State v. Brown*, 8 Rob. (La.) 566; *State v. Hornsby*, 8 Rob. (La.) 583, 41 Am. Dec. 314; *State v. Walters*, 16 La. Ann. 400; *State v. Taylor*, 34 La. Ann. 981. But see *State v. Washington*, 33 La. Ann. 1473.

*Maine*. — *State v. Elden*, 41 Me. 165; *Saco v. Wentworth*, 37 Me. 175, 58 Am. Dec. 786.

*Maryland*. — *Hoffman v. State*, 20 Md. 425; *Anderson v. State*, 86 Md. 479; *Foid v. State*, 12 Md. 514.

*New York*. — *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203, (Supm. Ct.) 1; *Wheel. Crim.* (N. Y.) 470; *Canter v. People*, 1 Abb. App. Dec. (N. Y.) 305; *Croft v. People*, 15 Hun (N. Y.) 484; *People v. Meakim*, 61 Hun (N. Y.) 327.

The verdict must be a valid one not subject to be set aside. *State v. Walters*, 16 La. Ann. 400; *State v. Ritchie*, 3 La. Ann. 715.

**New Jersey and South Carolina.** — Under the constitutions of these states a second trial is not interdicted unless the first trial resulted in an acquittal. *Smith v. State*, 41 N. J. L. 598; *State v. Shirer*, 20 S. Car. 392; *State v. Briggs*, 27 S. Car. 80; *State v. Wyse*, 33 S. Car. 582. See also *State v. Spurgin*, 1 McCord L. (S. Car.) 252. But see *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499.

**Acquittal Before Justice a Bar Though Not Entered of Record.** — *Wright v. Fansler*, 50 Ind. 492.

**A Verdict of Acquittal Though Received on Sunday and the order of discharge made on that day is a bar to a subsequent prosecution for the same offense.** *U. S. v. Ball*, 163 U. S. 662.

**A Court Cannot Modify Its Sentence** after it has been pronounced, so as to impose imprisonment simply, where by mistake fine and imprisonment were imposed, when the statute read "fine or imprisonment." *Ex p. Lange*, 18 Wall (U. S.) 163.

**Law Repealed and Ex Post Facto Law Substituted After Conviction.** — Where a prisoner is convicted of a crime, and subsequently the existing law inflicting the punishment is repealed



Where a Warrant of Arrest Is Void a prosecution based on it does not put the defendant in jeopardy and is no bar to a subsequent indictment for the same offense.<sup>1</sup>

A Preliminary Examination Before a Committing Magistrate does not constitute a jeopardy, and the order of the magistrate upon such examination will not bar a subsequent prosecution for the same offense.<sup>2</sup>

Where Magistrate May Either Try or Commit. — Where a justice has jurisdiction either to try a person for an offense with which he is charged or merely to examine him with reference to ordering him to recognize for his appearance before a higher court, and he exercises only the latter jurisdiction, his judgment cannot be pleaded in bar to a subsequent indictment for the same offense.<sup>3</sup>

Order upon Preliminary Examination No Bar to a Second Preliminary Examination. — An order of a magistrate upon a preliminary examination, either committing or discharging the accused, will not bar a second preliminary examination.<sup>4</sup>

A Return of Ignoramus by the Grand Jury is not a bar to a subsequent indictment for the same offense.<sup>5</sup>

Nor Is the Pendency of One Indictment a bar to another indictment for the same offense.<sup>6</sup>

Recommittal of Defective Verdict for Amendment Not a Second Jeopardy. — The returning to a jury before they are discharged a defective verdict with instructions to correct it does not constitute a second jeopardy.<sup>7</sup>

2. Essential Elements under the Rule — *a.* A COURT OF COMPETENT JURISDICTION. — No matter how far the proceedings may go there is no jeopardy

by another law without any saving clause, and he has a final adjudication in his favor that the substituted law is *ex post facto*, this is equivalent to an acquittal, and a bar to a second trial for the same offense. *Hartung v. People*, 26 N. Y. 167, 28 N. Y. 400, 25 How. Pr. (N. Y.) 221. See also *Kuckler v. People*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 212; *Shepherd v. People*, 25 N. Y. 406.

Discharge Without Trial of One Accused of Felony — Statute Construed. — If a defendant has been held to answer by a justice of the peace for a felony, and the grand jury then recommend that it be referred to the next grand jury, and the county court then order that the defendant be discharged from custody, the order is not a bar to another prosecution of the defendant for the same offense, under a statute which provides that an order for the dismissal of an action is a bar to any other prosecution for the same offense if it is a misdemeanor, but that it is not a bar if the offense is a felony. *Ex p. Cahill*, 52 Cal. 463.

Discharge of a Codefendant for the Purpose of Using Him as State's Witness amounts to an acquittal. *People v. Bruzzo*, 24 Cal. 41.

1. Prosecution Based on a Void Warrant of Arrest. — *Johnson v. State*, 82 Ala. 29. But see *Jones v. Morris*, 97 Va. 43.

2. Preliminary Examination Before Committing Magistrate — *Alabama*. — *Nicholson v. State*, 72 Ala. 176; *Ex p. Robinson*, 108 Ala. 161; *State v. Vaughan*, 121 Ala. 41.

*Arkansas*. — *Fluty v. State*, 45 Ark. 97.

*Indiana*. — *State v. Hattabough*, 66 Ind. 223; *Stoner v. State*, 7 Ind. App. 620.

*Kansas*. — *State v. Jones*, 16 Kan. 608.

*Kentucky*. — *Com. v. Weber*, (Ky. 1896) 33 S. W. Rep. 821.

*Michigan*. — *Gaffney v. Aldrich*, 85 Mich.

138. *Compare Morrissey v. People*, 11 Mich. 327.

*Texas*. — *Donaldson v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 826.

*Virginia*. — *Com. v. Myers*, 1 Va. Cas. 188; *Bailey's Case*, 1 Va. Cas. 258. See also *McCann v. Com.*, 14 Gratt. (Va.) 570.

3. Where Justice Has Jurisdiction Either to Try or to Commit the Accused. — *Com. v. Harris*, 8 Gray (Mass.) 470; *Com. v. Boyle*, 14 Gray (Mass.) 3; *Com. v. Golding*, 14 Gray (Mass.) 49; *Com. v. Many*, 14 Gray (Mass.) 82; *Com. v. Hamilton*, 129 Mass. 479; *Com. v. Sullivan*, 156 Mass. 487; *Wolverton v. Com.*, 75 Va. 909. See also *Brown v. State*, 105 Ala. 117.

Discharge Without Examination at Instance of Prosecuting Attorney does not bar his subsequent arrest and prosecution for the same offense. *Jambor v. State*, 75 Wis. 664. *Compare State v. Braun*, 31 Wis. 600.

4. One Preliminary Examination No Bar to Another. — *Ex p. Crawlin*, 92 Ala. 101; *Ex p. Robinson*, 108 Ala. 161; *Ex p. Fenton*, 77 Cal. 183; *State v. Jones*, 16 Kan. 608; *Gaffney v. Aldrich*, 85 Mich. 138; *Matter of Garst*, 10 Neb. 78.

After being bailed by a magistrate, a person may again be examined and held without bail, or admitted to bail in other amount, or discharged. *Ex p. Robinson*, 108 Ala. 161; *State v. Vaughan*, 121 Ala. 41. See also *Ex p. Walsh*, 39 Cal. 705.

5. Failure of Grand Jury to Indict. — *Com. v. Miller*, 2 Ashm. (Pa.) 61.

6. Pendency of One Indictment No Bar to Another. — *State v. Curtis*, 29 Kan. 384; *Bailey v. State*, 11 Tex. App. 140; *Stuart v. Com.*, 28 Gratt. (Va.) 966.

7. Recommittal of Defective Verdict for Amendment. — *Pehlman v. State*, 115 Ind. 131.



unless the court has jurisdiction to try the offense.<sup>1</sup>

**Justice of the Peace or Police Court.** — Therefore a person is not put in jeopardy by an acquittal or conviction by a justice of the peace,<sup>2</sup> or a police court<sup>3</sup> having no jurisdiction over the offense.

**An Acquittal or Conviction in a Court of the United States,** of a defendant who is there indicted for an offense of which that court has no jurisdiction, is no bar to an indictment against him for the same offense in a state court.<sup>4</sup>

**Where the Statute Creating or Conferring Jurisdiction upon a Court Is Unconstitutional,** a conviction by it is absolutely void and is no bar to another prosecution for the same offense.<sup>5</sup>

**So Where the Term Which a Court Is Holding Is Unauthorized** its proceedings are void and do not put the defendant in jeopardy.<sup>6</sup>

**Incompetency of Judge.** — If a judge sitting at the trial of a cause is incompetent to try it, the court is without jurisdiction and the defendant is not put in jeopardy.<sup>7</sup>

**1. No Jeopardy Unless Court Has Jurisdiction of Offense** — *England.* — *Wemyss v. Hopkins*, L. R. 10 Q. B. 378.

*United States.* — *Ex p. Lange*, 18 Wall. (U. S.) 163; *U. S. v. Ball*, 163 U. S. 662.

*Alabama.* — *Nicholson v. State*, 72 Ala. 176.  
*Arkansas.* — *Bradley v. State*, 32 Ark. 722; *State v. Nichols*, 38 Ark. 550; *State v. Cheek*, 25 Ark. 206; *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213; *Harp v. State*, 59 Ark. 113.

*California.* — *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *People v. Woods*, 84 Cal. 441; *People v. Hamberg*, 84 Cal. 468.

*Colorado.* — *Packer v. People*, 8 Colo. 361.

*Georgia.* — *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265; *Small v. State*, 63 Ga. 386.

*Illinois.* — *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621.

*Indiana.* — *Joy v. State*, 14 Ind. 139.

*Iowa.* — *State v. Jamison*, 104 Iowa 343.

*Kentucky.* — *Blyew v. Com.*, 91 Ky. 200; *Williams v. Com.*, 78 Ky. 93; *Huff v. Com.* (Ky. 1897) 42 S. W. Rep. 907.

*Louisiana.* — *State v. Brown*, 8 Rob. (La.) 566.

*Massachusetts.* — *Com. v. Hardy*, 2 Mass. 303; *Com. v. Peters*, 12 Met. (Mass.) 387.

*Mississippi.* — *Kohlheimer v. State*, 39 Miss. 548, 77 Am. Dec. 689; *Helm v. State*, 66 Miss. 537; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Montross v. State*, 61 Miss. 429; *Cook v. State* (Miss. 1900) 27 So. Rep. 605.

*Nebraska.* — *Thompson v. State*, 6 Neb. 102.

*New Hampshire.* — *State v. Hodgkins*, 42 N. H. 474.

*New Jersey.* — *Duffy v. Britton*, 48 N. J. L. 371, 7 Atl. Rep. 679.

*New York.* — *Canter v. People*, (Ct. App.) 38 How. Pr. (N. Y.) 91.

*North Carolina.* — *State v. Tisdale*, 2 Dev. & B. L. (19 N. Car.) 159.

*Rhode Island.* — *State v. Watson*, 20 R. I. 354.

*Texas.* — *Burdett v. State*, 9 Tex. 43; *Sinco v. State*, 9 Tex. App. 338; *Anderson v. State*, 24 Tex. App. 705; *McLain v. State*, 31 Tex. Crim. 558.

*Vermont.* — *State v. Wakefield*, 60 Vt. 618; *State v. Bruce*, 68 Vt. 183.

*Virginia.* — *Bailey's Case*, 1 Va. Cas. 258; *Day v. Com.*, 23 Gratt. (Va.) 915; *Marshall v. Com.*, 20 Gratt. (Va.) 845.

*Washington.* — *State v. Hubbell*, 18 Wash. 482.

*West Virginia.* — *State v. Cross*, 44 W. Va. 315.

**Error in Discretion of Court.** — The judgment of a court having jurisdiction is a bar to a subsequent prosecution for the same offense, though the court erred in exercising a discretion vested in it. *State v. Bowen*, 45 Minn. 145.

**2. Justice of the Peace** — *Alabama.* — *Nicholson v. State*, 72 Ala. 176; *Brown v. State*, 120 Ala. 378; *Carter v. State*, 107 Ala. 146.

*Arkansas.* — *Fluty v. State*, 45 Ark. 97.

*Florida.* — *Aldford v. State*, 25 Fla. 852.

*Indiana.* — *State v. Morgan*, 62 Ind. 35; *O'Brian v. State*, 12 Ind. 369; *State v. O'Dell*, 4 Blackf. (Ind.) 156; *State v. George*, 53 Ind. 437.

*Massachusetts.* — *Com. v. Goddard*, 13 Mass. 455.

*Missouri.* — *State v. Payne*, 4 Mo. 376.

*North Carolina.* — *State v. Shelly*, 98 N. Car. 673; *State v. Phillips*, 104 N. Car. 786.

*Tennessee.* — *Hodges v. State*, 5 Coldw. (Tenn.) 7.

*Texas.* — *Flournoy v. State*, 16 Tex. 30; *Norton v. State*, 14 Tex. 387.

*Vermont.* — *State v. Bruce*, 68 Vt. 183; *State v. Wakefield*, 60 Vt. 618.

A conviction or acquittal of a felony, or a misdemeanor included in the felony, by a justice of the peace who has no jurisdiction of such felony, will not bar a prosecution for the felony before a higher court having jurisdiction of it. *State v. Nichols*, 38 Ark. 550; *Cook v. State*, (Miss. 1900) 27 So. Rep. 605. See also *Siebert v. State*, 95 Ind. 471; *White v. State*, 9 Tex. App. 387.

**3. Police Court.** — *Thompson v. State*, 6 Neb. 102; *McNeil v. State*, 29 Tex. App. 48.

**4. Where Federal Court Has No Jurisdiction of Offense.** — *Blyew v. Com.*, 91 Ky. 200; *Com. v. Peters*, 12 Met. (Mass.) 387.

**5. Where Statute Creating or Conferring Jurisdiction upon Court Is Unconstitutional.** — *Rector v. State*, 6 Ark. 187. But see the *dictum* of *McKenney, J.*, in *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

**6. Unauthorized Term.** — *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Matter of McClaskey*, 2 Okla. 568.

**7. Judge Incompetent by Reason of Relationship to Defendant.** — *People v. Connor*, 142 N. Y. 130, *affirming* 65 Hun (N. Y.) 392, 8 N. Y. Crim. 439.



**Acquittal to Bar Prosecution Must Be in the County in Which the Offense Was Committed.** — At common law and generally under the constitutions and laws of the United States the local jurisdiction of all offenses is in the county where the offense is committed. Therefore the trial and acquittal in one county, of one charged with a criminal offense, is no bar to an indictment for the same offense in a different county unless it shall appear that the offense was committed in the county in which the acquittal was had.<sup>1</sup>

The Crime of Larceny is, however, an exception to this rule. One charged with that offense may be tried in any county to which he carries the stolen property, or where it may be found, as well as in the county in which the property was first taken, and a trial and acquittal in either of such counties will bar an indictment in any other.<sup>2</sup>

**Concurrent Jurisdiction.** — Where two courts have concurrent jurisdiction of an offense an acquittal or conviction in one will bar a prosecution in the other.<sup>3</sup>

**b. A VALID INDICTMENT OR INFORMATION.** — Jeopardy does not attach unless there is a valid indictment or information.<sup>4</sup>

Where the Grand Jury finding the indictment is illegally organized, or some of its members are incompetent, the indictment is invalid, and consequently a trial based on it will not bar a subsequent prosecution for the same offense.<sup>5</sup>

**Indictment or Information Defective in Form or Substance.** — So where the indictment or information is so defective in form or substance that it will not support a

**Unauthorized Selection of a Special Judge.** — *Glasgow v. State*, 9 Baxt. (Tenn.) 485.

**1. Acquittal to Wrong County.** — *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621.

**2 Larceny.** — *Tippins v. State*, 14 Ga. 422; *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621.

**3. Courts of Concurrent Jurisdiction** — *United States*. — *Houston v. Moore*, 5 Wheat. (U. S.) 29.

*Georgia*. — *Mize v. State*, 49 Ga. 375.

*Indiana*. — *Bruce v. State*, 9 Ind. 206; *Trittipio v. State*, 13 Ind. 360; *Bryant v. State*, 72 Ind. 400.

*Kentucky*. — *Com. v. Miller*, 5 Dana (Ky.) 320.

*Massachusetts*. — *Com. v. Goddard*, 13 Mass. 455.

*North Carolina*. — *State v. Tisdale*, 2 Dev. & B. L. (19 N. Car.) 159; *State v. Roberts*, 93 N. Car. 756; *State v. Bowers*, 94 N. Car. 910.

*Tennessee*. — *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697; *State v. Layne*, 96 Tenn. 668.

*Texas*. — *Handley v. State*, 16 Tex. App. 444; *Dunn v. State*, 6 Tex. 542.

In *Georgia* and *North Carolina* it has been held that a conviction in a court having jurisdiction of the offense is a bar to a prosecution in another court having concurrent jurisdiction, even though the indictment in the latter court was found before the indictment in the former. *Mize v. State*, 49 Ga. 375; *State v. Tisdale*, 2 Dev. & B. L. (19 N. Car.) 159; *State v. Casey*, Busb. L. (44 N. Car.) 209; *State v. Williford*, 91 N. Car. 529; *State v. Bowers*, 94 N. Car. 910; *State v. Roberts*, 98 N. Car. 756.

In *Texas* the contrary rule was formerly held to prevail. *Burdett v. State*, 9 Tex. 43. But as to the rule under the code subsequently adopted in that state, see *Schindler v. State*, 15 Tex. App. 394; *Williams v. State*, 20 Tex. App. 357.

**4. Valid Indictment or Information Essential to Jeopardy** — *England*. — *Vaux's Case*, 4 Coke 45.

*United States*. — *U. S. v. Jones*, 31 Fed. Rep. 725.

*Alabama*. — *Weston v. State*, 63 Ala. 155; *State v. Kreps*, 8 Ala. 951; *Lyman v. State*, 47 Ala. 686; *Robinson v. State*, 52 Ala. 587.

*Arkansas*. — *Atkins v. State*, 16 Ark. 568.

*California*. — *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *People v. Ammerman*, 118 Cal. 26.

*Georgia*. — *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281; *Conley v. State*, 85 Ga. 361.

*Hawaii*. — *Reg. v. Poor*, 9 Hawaii 297, citing II AM. AND ENG. ENCYC. OF LAW (1st ed.) 926, 930, 933.

*Iowa*. — *State v. Smith*, 88 Iowa 183, citing II AM. AND ENG. ENCYC. OF LAW (1st ed.) 930.

*Kentucky*. — *Huff v. Com.*, (Ky. 1897) 42 S. W. Rep. 907.

*Maine*. — *State v. Elden*, 41 Me. 165.

*Maryland*. — *Kearney v. State*, 48 Md. 16; *State v. Williams*, 5 Md. 82.

*Minnesota*. — *State v. Sommers*, 60 Minn. 90.

*Mississippi*. — *Helm v. State*, 66 Miss. 537; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708.

*Missouri*. — *State v. Primm*, 61 Mo. 166; *State v. Wiseback*, 139 Mo. 214.

*New York*. — *Canter v. People*, (Cl. App.) 38 How. Pr. (N. Y.) 93.

*Pennsylvania*. — *Heikes v. Com.*, 26 Pa. St. 513.

*Texas*. — *Taylor v. State*, 35 Tex. 97; *Mixon v. State*, 35 Tex. Crim. 460; *Williams v. State*, 20 Tex. App. 357; *Timon v. State*, 34 Tex. Crim. 363.

*Vermont*. — *State v. Whipple*, 57 Vt. 637.

**A Conviction Before a Justice of the Peace Without a Charge Preferred** is void and is no bar to a subsequent indictment. *Bigham v. State*, 59 Miss. 529. See also *Wilson v. State*, 16 Tex. 246.

**5. Incompetent Grand Jury.** — *Finley v. State*, 61 Ala. 201; *Weston v. State*, 63 Ala. 155; *Brown v. State*, 10 Ark. 607; *Joy v. State*, 14 Ind. 139; *State v. Scott*, 99 Iowa 36; *Kohlheimer v. State*, 39 Miss. 548, 77 Am. Dec. 689.



valid judgment, it cannot form the basis of proceedings which will put the defendant in jeopardy and bar another prosecution.<sup>1</sup>

**Indictment Describing No Offense Known to the Law.**—Thus, a second trial may be had without violating the doctrine of former jeopardy, where the indictment or information which formed the basis of the first trial described no offense known to the law.<sup>2</sup>

**Variance.**—And there has been no jeopardy where there was a material variance between the proof and the allegations of the indictment or information.<sup>3</sup> But the rule is otherwise where the variance is immaterial.<sup>4</sup>

**Quashal or Dismissal of Indictment.**—A defendant is not in jeopardy where an invalid indictment or information is quashed or dismissed at any stage of the trial, and he may be again prosecuted for the same offense.<sup>5</sup> But if the

**1. Fatal Defect in Form or Substance.**—*England.*—*Rex v. Phillips*, 1 Jur. 427.

*United States.*—*U. S. v. Jones*, 31 Fed. Rep. 728; *U. S. v. Olsen*, 57 Fed. Rep. 579.

*Alabama.*—*Weston v. State*, 63 Ala. 155; *Robinson v. State*, 52 Ala. 587.

*Arkansas.*—*Stewart v. State*, 13 Ark. 720; *Harp v. State*, 59 Ark. 113.

*California.*—*People v. Ammerman*, 118 Cal. 23; *People v. Schmidt*, 64 Cal. 260; *People v. Wickham*, 116 Cal. 384.

*Georgia.*—*Conley v. State*, 85 Ga. 361; *Black v. State*, 36 Ga. 449, 91 Am. Dec. 772.

*Indiana.*—*Joy v. State*, 14 Ind. 146.

*Kentucky.*—*Huff v. Com.*, (Ky. 1897) 42 S. W. Rep. 907.

*Louisiana.*—*State v. Brown*, 8 Rob. (La.) 566.

*Maine.*—*State v. Elden*, 41 Me. 165.

*Maryland.*—*State v. Williams*, 5 Md. 84; *Kearney v. State*, 48 Md. 27; *State v. Reed*, 12 Md. 263.

*Mississippi.*—*Munford v. State*, 39 Miss. 558; *Kohlheimer v. State*, 39 Miss. 552, 77 Am. Dec. 689; *State v. McGraw*, Walk. (Miss.) 208.

*New York.*—*Canter v. People*, (Ct. App.) 38 How. Pr. (N. Y.) 93; *People v. Barrett*, 1 Johns. (N. Y.) 66.

*Oklahoma.*—*Matter of McClaskey*, 2 Okla. 568.

*South Carolina.*—*State v. Ray*, Rice L. (S. Car.) 1, 33 Am. Dec. 90.

*Tennessee.*—*Thurston v. State*, 3 Coldw. (Tenn.) 117; *State v. Thurston*, 3 Heisk. (Tenn.) 67.

*Texas.*—*Timon v. State*, 34 Tex. Crim. 363; *McNeill v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 977.

**2. Where Indictment Describes No Offense Known to the Law.**—*United States.*—*Ex p. Lange*, 18 Wall. (U. S.) 163.

*Arkansas.*—*Stewart v. State*, 13 Ark. 720.

*California.*—*People v. Clark*, 67 Cal. 99.

*Georgia.*—*Simmons v. State*, 106 Ga. 355.

*Indiana.*—*Shepler v. State*, 114 Ind. 194; *Davidson v. State*, 99 Ind. 366.

*Minnesota.*—*State v. Oleson*, 26 Minn. 507.

*Pennsylvania.*—*Com. v. Zepp*, 5 Pa. L. J. 256, 3 Pa. L. J. Rep. 311.

*Texas.*—*McNeill v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 977.

*Washington.*—*State v. Hubbell*, 18 Wash. 482.

**3. Material Variances.**—*England.*—*Reg. v. Green*, Dears. & B. 113, 7 Cox C. C. 186. And see *Reg. v. Austin*, 2 Cox C. C. 59.

*Arkansas.*—*Williams v. State*, 42 Ark. 39.

*California.*—*People v. McNealy*, 17 Cal. 332; *People v. Hughes*, 41 Cal. 234; *People v. Oreilleus*, 79 Cal. 178. But see *People v. Goldstein*, 32 Cal. 432.

*Connecticut.*—*State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223.

*Kentucky.*—*Riffe v. Com.*, (Ky. 1900) 56 S. W. Rep. 265.

*Massachusetts.*—*Com. v. Farrell*, 105 Mass. 189; *Com. v. Gould*, 12 Gray (Mass.) 171; *Com. v. Chesley*, 107 Mass. 223.

*Mississippi.*—*Sims v. State*, 66 Miss. 33.

*Montana.*—*State v. Sullivan*, 9 Mont. 490.

*New York.*—*Hughes's Case*, 4 City Hall Rec. (N. Y.) 132; *Canter v. People*, (Ct. App.) 38 How. Pr. (N. Y.) 91, 1 Abb. App. Dec. (N. Y.) 305.

*North Carolina.*—*State v. Sherrill*, 82 N. Car. 694; *State v. Revels*, Busb. L. (44 N. Car.) 200.

*Pennsylvania.*—*State v. Huffman*, Add. (Pa.) 140.

*South Carolina.*—*State v. Brown*, 33 S. Car. 151; *State v. Jenkins*, 20 S. Car. 351; *State v. Ray*, Rice L. (S. Car.) 1, 33 Am. Dec. 90.

*Virginia.*—*Com. v. Mortimer*, 2 Va. Cas. 325; *Burress v. Com.*, 27 Gratt. (Va.) 934. See also *Robinson v. Com.*, 32 Gratt. (Va.) 866.

But in *Alabama* it has been held that if an indictment charges that two defendants committed one and the same offense at the same time, they cannot be convicted on proof showing that each committed the offense charged, at different times. And when this is developed by evidence on the trial, each defendant has been placed in legal jeopardy on the charge laid in the indictment, and is entitled to a verdict of acquittal of that offense, and cannot be again prosecuted for it. *McGehee v. State*, 58 Ala. 360.

**4. Immaterial Variance.**—*People v. Hughes*, 41 Cal. 234.

**The Accused Is Estopped to Maintain that Variance Was Immaterial** where upon the first trial he insisted upon the existence of such a variance. *People v. Meakin*, 61 Hun (N. Y.) 327, 8 N. Y. Crim. 308, affirmed in 131 N. Y. 667.

**5. Quashal or Dismissal of Invalid Indictment.**—*Alabama.*—*Weston v. State*, 63 Ala. 155; *Faulk v. State*, 52 Ala. 415.

*Arkansas.*—*Brown v. State*, 10 Ark. 607; *Williams v. State*, 42 Ark. 39.

*California.*—*People v. March*, 6 Cal. 543; *People v. Varnum*, 53 Cal. 630; *Kalloch v.*



indictment or information is valid and is dismissed without the defendant's consent, after jeopardy has attached, he cannot again be prosecuted for the same offense.<sup>1</sup>

**Nolle Prosequi.** — If an indictment is bad a *nolle prosequi* entered after the jury is impaneled and sworn will not bar another prosecution for the same offense.<sup>2</sup> The rule is otherwise where the indictment is good.<sup>3</sup>

Where a Demurrer to an Indictment Is Sustained the defendant is not put in jeopardy, but may be tried again for the same offense.<sup>4</sup>

**Conviction or Acquittal on Defective Indictment.** — A conviction<sup>5</sup> or acquittal<sup>6</sup> on a

San Francisco, 56 Cal. 229; *People v. McNealy*, 17 Cal. 332.

*Indiana.* — *Joy v. State*, 14 Ind. 146.

*Iowa.* — *State v. Scott*, 99 Iowa 36.

*Kentucky.* — *Little v. Com.*, 3 Bush (Ky.) 22.

*Massachusetts.* — *Com. v. Farrell*, 105 Mass.

189; *Com. v. Gould*, 12 Gray (Mass.) 171.

*Nebraska.* — *State v. Priebnow*, 16 Neb. 131.

*New York.* — *People v. Loomis*, (Supm. Ct. Gen. T.) 30 How. Pr. (N. Y.) 323.

*South Carolina.* — *State v. Jenkins*, 20 S. Car. 351; *State v. Ray*, Rice L. (S. Car.) 1, 33 Am. Dec. 90.

*Tennessee.* — *Pritchett v. State*, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468.

*Virginia.* — *Souther v. Com.*, 7 Gratt. (Va.) 673.

1. **Dismissal of Valid Indictment Without Defendant's Consent.** — *Williams v. State*, 42 Ark. 35; *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611; *Williams v. Com.*, 78 Ky. 93; *Com. v. Hart*, 149 Mass. 7; *Com. v. Cawley*, 7 Kulp (Pa.) 539, 16 Pa. Co. Ct. 259, 4 Pa. Dist. 69; *People v. Taylor*, 117 Mich. 583. And see *Gaskins v. Com.*, 97 Ky. 494. But compare *People v. March*, 6 Cal. 543.

As to the effect of quashal on defendant's motion see *infra*, this title. *Waiver of Objection to a Second Jeopardy—Motion to Quash Indictment.*

2. **Entry of Nolle Prosequi.** — *U. S. v. Shoemaker*, 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279; *Martha v. State*, 26 Ala. 72; *State v. Crutch*, 1 Houst. Crim. Cas. (Del.) 204; *Joy v. State*, 14 Ind. 146; *Com. v. Wheeler*, 2 Mass. 173; *State v. Shirer*, 20 S. Car. 392; *Walton v. State*, 3 Sneed (Tenn.) 687; *Ex p. Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654; *Branch v. State*, 20 Tex. App. 599; *Longley v. State*, 43 Tex. 490; *Jackson v. State*, 37 Tex. Crim. 128.

A statute which authorizes a *nolle prosequi* to be entered and another indictment to be preferred, in case of a material variance, is not unconstitutional as putting the defendant twice in jeopardy. *State v. Kreps*, 8 Ala. 951.

**Nolle Prosequi Entered upon an Indictment Sufficient at Common Law but Insufficient Under Statute law or subsequent prosecution.** *Fletcher v. U. S.*, 1 Hayw. & H. (D. C.) 186, 9 Fed. Cas. No. 4,868, 1 Hayw. & H. (D. C.) 200, 9 Fed. Cas. No. 4,869.

3. See *infra*, this section, *Effect of Nolle Prosequi.*

4. **Demurrer to Indictment Sustained.** — *U. S. v. Van Vliet*, 23 Fed. Rep. 35; *State v. Gill*, 33 Ark. 129; *Cochrane v. State*, 6 Md. 400; *Com. v. Gould*, 12 Gray (Mass.) 171; *Ex p. Job*, 17 Nev. 184. See also *Com. v. Anthony*, 2 Met. (Ky.) 399, for the *Kentucky* statute.

And see *supra*, this title, *What Constitutes a Jeopardy—General Rule Stated.*

**Under Statutes in Several States**, if a demurrer to an information is sustained there cannot be a second prosecution for the same offense unless the court direct the case to be resubmitted to the grand jury. *People v. Jordan*, 63 Cal. 219; *Ex p. Williams*, 116 Cal. 512; *People v. O'Leary*, 77 Cal. 30; *People v. Ammerman*, 118 Cal. 23; *Ex p. Job*, 17 Nev. 184; *State v. Crook*, 16 Utah 212.

5. **Conviction on Defective Indictment—England.** — *Vaux's Case*, 4 Coke 45; *Rex v. Phillips*, 1 Jur. 427; *Rex v. Taylor*, 3 B. & C. 502, 10 E. C. L. 166.

*United States.* — *U. S. v. Jones*, 31 Fed. Rep. 725.

*California.* — *People v. Clark*, 67 Cal. 99; *People v. Schmidt*, 64 Cal. 260; *People v. Wickham*, 116 Cal. 384.

*Connecticut.* — *State v. Benhams*, 7 Conn. 414.

*District of Columbia.* — *U. S. v. Barber*, 21 D. C. 456.

*Indiana.* — *Davidson v. State*, 99 Ind. 366.

*Kentucky.* — *Mount v. Com.*, 2 Duv. (Ky.) 93.

*Louisiana.* — *State v. Victor*, 36 La. Ann. 978.

*Maryland.* — *State v. Williams*, 5 Md. 84; *Kearney v. State*, 48 Md. 27.

*Massachusetts.* — *Com. v. Curtis*, Thach. Crim. Cas. (Mass.) 202.

*Mississippi.* — *Munford v. State*, 39 Miss. 558.

*North Carolina.* — *State v. Lee*, 114 N. Car. 844.

*Texas.* — *Simco v. State*, 9 Tex. App. 338; *McNeill v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 977.

*Washington.* — *State v. Freidrich*, 4 Wash. 204.

6. **Acquittal on Defective Indictment—England.** — *Vaux's Case*, 4 Coke 45; 2 Hale P. C. 248, 394; 2 Hawk. P. C., c. 35, § 8; *Reg. v. Green*, 37 Eng. L. & Eq. 597; *Reg. v. Green*, Dears. & B. 113, 26 L. J. M. C. 17, 2 Jur. N. S. 1146, 5 W. R. 52, 7 Cox C. C. 186; *Rex v. Taylor*, 3 B. & C. 502, 10 E. C. L. 166.

*California.* — *People v. McNealy*, 17 Cal. 332; *People v. Hughes*, 41 Cal. 234; *People v. Oreileus*, 79 Cal. 178.

*Connecticut.* — *State v. Benham*, 7 Conn. 414; *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223.

*Georgia.* — *Simmons v. State*, 106 Ga. 355; *Black v. State*, 36 Ga. 449, 91 Am. Dec. 772.

*Indiana.* — *Shepler v. State*, 114 Ind. 194.

*Kentucky.* — *Com. v. Olds*, 5 Litt. (Ky.) 140; *Riffe v. Com.*, (Ky. 1900) 56 S. W. Rep. 265.

*Massachusetts.* — *Com. v. Chesley*, 107 Mass. 223.

*Mississippi.* — *State v. McGraw*, Walk. (Miss.) 208; *Kohlheimer v. State*, 39 Miss. 552, 77 Am. Dec. 689; *Sims v. State*, 66 Miss. 33.

*New York.* — *People v. Barrett*, 1 Johns.



defective indictment, upon which any judgment would be reversible for error, will not put the defendant in jeopardy or bar another prosecution.<sup>1</sup>

**Acquittal under Erroneous Decision that the Indictment Is Defective.** — But where the indictment is in fact sufficient to sustain a conviction, and a verdict of acquittal is rendered under an erroneous decision of the court that it is not sufficient, such acquittal will bar another prosecution for the same offense.<sup>2</sup>

**Acquittal or Verdict and Judgment a Bar Regardless of Validity of Indictment.** — By constitutional provision and statute in some of the United States an acquittal<sup>3</sup> or a verdict and judgment<sup>4</sup> will bar any subsequent prosecution for the same offense, regardless of the validity of the indictment upon which it is based.

**Arrest of Judgment for Defect in Indictment.** — When a judgment on an indictment or information is arrested for a defect therein, the accused has not thereby been put in jeopardy, but may be indicted again for the same offense.<sup>5</sup>

**But if Judgment Is Rendered upon a Verdict of Guilty** found upon an invalid indictment the defendant cannot again be prosecuted for the same offense while the judgment remains unreversed. For such a judgment is not void but merely voidable, and while it stands has the same effect as a valid one.<sup>6</sup>

**Penalty Inflicted in Full.** — Where a person is convicted under a void indictment and the penalty inflicted in full, he cannot be again prosecuted for the same offense.<sup>7</sup>

**But a Partial Endurance of Punishment** will not bar another prosecution where the proceedings are reversed on the defendant's motion. In such a case he waives his jeopardy.<sup>8</sup>

**c. ISSUE JOINED.** — There must be an issue joined before jeopardy can

(N. Y.) 66; *Hughes's Case*, 4 City Hall Rec. (N. Y.) 132.

*North Carolina.* — *State v. Revels*, Busb. L. (44 N. Car.) 200.

*Pennsylvania.* — *Com. v. Bass*, 3 Lanc. L. Rev. 279; *Com. v. Zepp*, 5 Pa. L. J. 256, 3 Pa. L. J. Rep. 311.

*South Carolina.* — *State v. Ray*, Rice L. (S. Car.) I, 33 Am. Dec. 90; *State v. Brown*, 33 S. Car. 151.

*Texas.* — *Anderson v. State*, 24 Tex. App. 705.

*Virginia.* — *Burress v. Com.*, 27 Gratt. (Va.) 934; *Com. v. Mortimer*, 2 Va. Cas. 325.

1. But the Supreme Court of the United States has held that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing. *U. S. v. Ball*, 163 U. S. 669.

See *supra*, this section and subsection, as to *Variance*.

Where the Defects in an Indictment Are Such as a Statute Requires to Be Demurred to, and the defendant without demurring proceeds to trial and is acquitted on account of the defective indictment, he has been put in jeopardy. *State v. Reed*, 12 Md. 263.

2. *State v. Gooch*, 60 Ark. 218; *Black v. State*, 36 Ga. 447, 91 Am. Dec. 772; *Gaskins v. Com.*, 97 Ky. 494.

3. *Acquittal.* — *Tufts v. State*, (Fla. 1899) 27 So. Rep. 218; *Hurt v. State*, 25 Miss. 378, 59 Am. Dec. 225; *Mixon v. State*, 35 Tex. Crim. 458; *Anderson v. State*, 24 Tex. App. 705. See also *Croft v. People*, 15 Hun (N. Y.) 484.

Under the Mississippi Statute it was held that an acquittal on the merits under a voidable in-

dictment would bar a subsequent prosecution for the same offense. *Hurt v. State*, 25 Miss. 378, 59 Am. Dec. 225. But that an acquittal under an indictment void on the face of the record would not bar a subsequent prosecution. *Kohlheimer v. State*, 39 Miss. 557, 77 Am. Dec. 689. See also in *Oregon State v. Littschke*, 27 Oregon 189.

4. **Verdict and Judgment.** — *Harp v. State*, 59 Ark. 113; *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213.

5. **Arrest of Judgment.** — *People v. Eppinger*, 109 Cal. 294; *State v. Owens*, 28 La. Ann. 5; *Com. v. Gould*, 12 Gray (Mass.) 171; *State v. Owen*, 78 Mo. 367; *State v. Sherburne*, 58 N. H. 535; *State v. Huffman*, Add. (Pa.) 140; *State v. Watson*, 20 R. I. 354.

As to waiver of jeopardy by motion in arrest of judgment, see *infra*, this title, *Waiver of Objection to a Second Jeopardy* — *Waiver After Verdict*.

6. **Judgment upon a Verdict of Guilty.** — *Vaux's Case*, 4 Coke 45; *Murphy v. Massachusetts*, 177 U. S. 155, affirming 174 Mass. 369; *U. S. v. Ball*, 163 U. S. 670; *U. S. v. Olsen*, 57 Fed. Rep. 580; *State v. George*, 53 Ind. 438; *Kohlheimer v. State*, 39 Miss. 553, 77 Am. Dec. 689.

7. **Where Penalty Has Been Inflicted in Full.** — *U. S. v. Jones*, 31 Fed. Rep. 725; *Com. v. Goddard*, 13 Mass. 455; *Com. v. Loud*, 3 Met. (Mass.) 328, 37 Am. Dec. 139; *Davis v. State*, 37 Tex. Crim. 359. See also *State v. Snyder*, 98 Mo. 555.

8. **Partial Endurance of Punishment No Bar Where Proceedings Reversed on Defendant's Motion.** — *Jeffries v. State*, 40 Ala. 381; *Cochrane v. State*, 6 Md. 400; *State v. Watson*, 20 R. I. 354.

See *infra*, this title, *Waiver of Objection to a Second Jeopardy* — *Waiver After Verdict*.



attach;<sup>1</sup> therefore, until the defendant has been arraigned and has pleaded he is not in jeopardy,<sup>2</sup> and this is so though the jury has been impaneled and sworn<sup>3</sup> and witnesses examined,<sup>4</sup> and even though a verdict of guilty has been rendered.<sup>5</sup>

**Erroneous Record of Plea.** — Jeopardy will not attach because through an error in the record it is erroneously stated that the defendant did plead.<sup>6</sup>

**Plea of Guilty Extorted by Duress.** — Nor will it attach where a plea of guilty has been extorted by duress.<sup>7</sup>

**A Plea of Former Jeopardy** not being of matter which goes to the question of the innocence of the accused, a hearing upon it is not a jeopardy.<sup>8</sup>

**d. A LEGALLY CONSTITUTED JURY IMPANELED AND SWORN.** — Jeopardy does not attach until a legally constituted jury<sup>9</sup> has been charged with the deliverance of the accused. A jury is said to be thus charged when it has been impaneled and sworn.<sup>10</sup> But a defendant may be put in jeopardy by a trial before a competent court without a jury in cases where he has no legal right to demand a trial by jury,<sup>11</sup> and even where the defendant is entitled to demand a jury trial a plea of guilty will constitute a waiver of the right, and a conviction upon such plea will bar another prosecution for the same offense.<sup>12</sup>

**1. Issue Must Be Joined Before Jeopardy Can Attach.** — *State v. Heard*, 49 La. Ann. 375; *Murphey v. State*, 25 Neb. 807; *Yerger v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 621.

**2. Must Be Arraigned and Plead** — *United States*. — *U. S. v. Riley*, 5 Blatchf. (U. S.) 204. *Alabama*. — *Scott v. State*, 110 Ala. 48, 113 Ala. 64.

*Illinois*. — *Phillips v. People*, 88 Ill. 160.

*Indiana*. — *Harbin v. State*, 133 Ind. 698; *Ledgerwood v. State*, 134 Ind. 81; *Joy v. State*, 14 Ind. 139.

*Kentucky*. — *Disney v. Com.*, (Ky. 1887) 5 S. W. Rep. 360.

*Louisiana*. — *State v. Heard*, 49 La. Ann. 375.

*New York*. — *People v. Cignarale*, 110 N. Y. 23.

*North Dakota*. — *State v. Bronkol*, 5 N. Dak. 507.

*Texas*. — *Yerger v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 621.

*West Virginia*. — *State v. Conkle*, 16 W. Va. 736.

**3. U. S. v. Riley, 5 Blatchf. (U. S.) 204; *State v. Heard*, 49 La. Ann. 375; *Yerger v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 621. See also *Disney v. Com.*, (Ky. 1887) 5 S. W. Rep. 360.**

**4. Disney v. Com., (Ky. 1887) 5 S. W. Rep. 360; *State v. Bronkol*, 5 N. Dak. 507.**

**5. Link v. State, 3 Heisk. (Tenn.) 252.**

**6. Erroneous Record.** — *Phillips v. People*, 88 Ill. 160.

**7. Plea Extorted.** — *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29, 4 Crim. L. Mag. 359.

**8. State v. Hager, 61 Kan. 504.**

**9. Legally Constituted Jury.** — *State v. Robinson*, 46 La. Ann. 772, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 933; *Helm v. State*, 66 Miss. 537; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *State v. Hubbell*, 18 Wash. 482.

**10. Jury Impaneled and Sworn** — *United States*. — *U. S. v. Van Vliet*, 23 Fed. Rep. 35.

*Alabama*. — *Lyman v. State*, 47 Ala. 686; *Scott v. State*, 110 Ala. 48, 113 Ala. 64.

*Arkansas*. — *Williams v. State*, 42 Ark. 35; *Harp v. State*, 59 Ark. 113.

*California*. — *Ex p. Fenton*, 77 Cal. 183.

*Georgia*. — *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281.

*Hawaii*. — *Reg. v. Poor*, 9 Hawaii 297, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 926, 930, 933.

*Indiana*. — *Joy v. State*, 14 Ind. 139.

*Kentucky*. — *Gaskins v. Com.*, 97 Ky. 494; *Huff v. Com.*, (Ky. 1897) 42 S. W. Rep. 907; *Williams v. Com.*, 78 Ky. 93.

*Louisiana*. — *State v. Robinson*, 46 La. Ann. 772, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 933.

*Minnesota*. — *State v. Sommers*, 60 Minn. 90.

*Missouri*. — *State v. Wiseback*, 139 Mo. 214.

*Nebraska*. — *Murphy v. State*, 25 Neb. 807.

*Oklahoma*. — *Matter of McClaskey*, 2 Okla. 568.

*Oregon*. — *Ex p. Tice*, 32 Oregon 179.

*Pennsylvania*. — *Alexander v. Com.*, 105 Pa. St. 1; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308.

*Texas*. — *Anderson v. State*, 24 Tex. App. 705.

*Vermont*. — *State v. Whipple*, 57 Vt. 637.

*Washington*. — *State v. Hubbell*, 18 Wash. 482.

**11. Conviction or Acquittal Before a Justice of the Peace.** — *Bruce v. State*, 9 Ind. 206; *Trittip v. State*, 13 Ind. 360; *Bryant v. State*, 72 Ind. 400; *Com. v. Miller*, 5 Dana (Ky.) 320; *Stevens v. Fassett*, 27 Me. 266; *Com. v. Cunningham*, 13 Mass. 245; *State v. Layne*, 96 Tenn. 668; *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

**Where a Conviction Is by a Court of Competent Jurisdiction**, it matters not whether such conviction is by a summary proceeding before justices whose jurisdiction is created by statute, or by trial before a jury. *Wemyss v. Hopkins*, L. R. 10 Q. B. 381.

**12. Plea of Guilty.** — *Trittip v. State*, 13 Ind. 360; *State v. Layne*, 96 Tenn. 668; *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

A plea of guilty entered of record by the court may be pleaded as a former conviction to a second indictment for the same offense although no judgment was pronounced by the court upon such plea. *People v. Goldstein*, 32 Cal. 432; *Boswell v. State*, 111 Ind. 47.



3. **Explanations and Qualifications of the Rule**—*a.* DETERMINATION OF PRELIMINARY OR COLLATERAL QUESTIONS. — Jeopardy does not attach where the question submitted for the consideration of the court or jury is one which is merely preliminary or collateral to the question of the guilt or innocence of the accused.<sup>1</sup>

*b.* UNFORESEEN OCCURRENCE MAKING IMPOSSIBLE THE RENDITION OF A VALID VERDICT. — Though in general jeopardy begins when the jury has been impaneled and sworn, yet, if afterwards and before a verdict has been reached, some unforeseen circumstance arises which renders it impossible for the trial to proceed to a verdict or for a valid verdict to be rendered, the jury may be discharged, the facts of the case having been adjudged and the judgment recorded, and the defendant may be again put on trial for the same offense.<sup>2</sup> This exception was formerly put on the ground of necessity which required a modification of the doctrine of jeopardy in the interest of public justice;<sup>3</sup> sometimes it is put on the ground that the supervening facts show that no jeopardy ever existed;<sup>4</sup> and sometimes, and this seems the correct doctrine, on the ground that though jeopardy has attached it is never ended.<sup>5</sup>

*c.* ACQUITTAL OR CONVICTION FRAUDULENTLY PROCURED — (1) *Acquittal*. — A verdict of acquittal procured by fraud is a nullity and does not put him in jeopardy, consequently it is no bar to a second trial for the same offense.<sup>6</sup>

(2) *Conviction*. — A conviction of a criminal offense, procured fraudulently or by collusion by the offender, for the purpose of protecting himself from further prosecution and adequate punishment, is no bar to a subsequent prosecution for the same offense.<sup>7</sup>

1. Where a Coroner's Jury returned a verdict of accidental death, a defendant who was afterwards indicted for the homicide was held not to be entitled to plead *autrefois acquit* on the strength of the verdict of the coroner's jury. *Reg. v. Labelle*, 2 Quebec Q. B. 289.

**Submission to Jury of the Question of Capacity to Commit Crime.** — The submission to the jury under the orders of the court, of the question of the capacity of a person to commit a crime with which he is charged, and a resulting verdict that such person is of unsound mind, will not bar a subsequent prosecution for the crime. *Chase v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 833. But see *Rex v. Dyson*, R. & R. C. C. 523; *Rex v. Pritchard*, 7 C. & P. 303, 32 E. C. L. 517; *State v. Harris*, 8 Jones L. (53 N. Car.) 136, 78 Am. Dec. 272.

**A Judgment Rendered on a Recognizance for Failing to Appear** is no bar to another prosecution for the same offense. *Com. v. Thompson*, 3 Litt. (Ky.) 284.

The defendant's payment of costs in a criminal prosecution, by order of court, as a prerequisite to the removal of his default, is not a bar to the further prosecution of the case. *Com. v. Taylor*, 113 Mass. 4.

**As to Whether a Discharge under Habeas Corpus Proceedings** amounts to a jeopardy, see the title HABEAS CORPUS, vol. 15, p. 212.

2. Thus, in case of the sickness of the judge, *Nugent v. State* 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; or of a juror, *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499; or the inability of the jury to agree, *State v. Moor*, Walk. (Miss.) 134, 12 Am. Dec. 541; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203. See for a full consideration of the whole

subject the title JURY AND JURY TRIAL, *post*, XI. *Discharge of Jury and Jurors*.

When the jury is wrongfully discharged the defendant is entitled to an acquittal, *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499. See also *supra*, this title, *Effect of Jeopardy Attaching — In General*; also the title JURY AND JURY TRIAL, *post*, XI. *Discharge of Jury and Jurors*.

**Where a Criminal Case Is Submitted to the Court for Trial**, and the judge, after hearing the evidence, takes the case under advisement, but dies without a finding, the defendant is not thereby discharged, but may be tried again. *Bescher v. State*, 32 Ind. 480.

3. *Nugent v. State*, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203.

4. 1 Bishop's Crim. Law, § 1031; *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695. This view is criticised in 4 Crim. L. Mag. 488.

5. 4 Crim. L. Mag. 488; Wharton's Crim. Pl. & Pr., § 508.

6. **Acquittal Procured by Fraud.** — *Rex v. Fraser*, Say. 90; *Rex v. Davis*, 12 Mod. 9; *Rex v. Bear*, 2 Salk. 646; *State v. Brown*, 16 Conn. 54; *State v. Reed*, 26 Conn. 208; *State v. Lee*, 65 Conn. 265, 48 Am. St. Rep. 202; *State v. Jones*, 17 Ga. 422; *State v. Davis*, 4 Blackf. (Ind.) 345; *State v. Wright*, Treadw. (S. Car.) 517. See also *People v. Woods*, 84 Cal. 441.

In *State v. Swepson*, 79 N. Car. 632, Rodman, J., says that the precedents for this doctrine apply only to misdemeanors, and do not apply to capital offenses, and perhaps not to felonies.

7. **No Jeopardy from Conviction Fraudulently Procured** — *Arkansas*. — *Bradley v. State*, 32 Ark. 722.



**Where Full Penalty Is Inflicted.**—But the rule is otherwise where the penalty prescribed for the offense is an ascertained and certain one and the defendant has borne it in full.<sup>1</sup>

**Fraudulent Procurement of Discharge on Insufficient Bail.**—Where a person who is accused of having committed a criminal offense has, by collusion and contrivance of the witnesses, the complainant and a justice of the peace, been arrested and discharged on insufficient bail, he may be again arrested by a warrant issued by another justice of the peace, and required to give bail in a larger amount, for the same offense.<sup>2</sup>

**4. Discharge under Statute Limiting the Time Within Which an Accused May Be Tried.**—In several states there are statutes limiting the time within which persons charged with crime shall be brought to trial, and declaring that if they are not brought to trial within that time they shall be discharged of the crime charged in the indictment. A discharge under such a statute amounts to an acquittal of the offense charged, and is a complete defense to a subsequent indictment for such offense.<sup>3</sup>

**5. Statutes Not Unconstitutional as Putting Twice in Jeopardy**—*a. STATUTE AUTHORIZING RESENTENCE AFTER REVERSAL FOR ERROR SUBSEQUENT TO VERDICT.*—A statute which authorizes the resentence of a defendant in a criminal case after reversal for error in the proceedings subsequent to the

*Indiana.*—*Watkins v. State*, 68 Ind. 427, 34 Am. Rep. 273; *De Haven v. State*, 2 Ind. App. 376; *Halloran v. State*, 80 Ind. 590; *Shideler v. State*, 129 Ind. 526, 28 Am. St. Rep. 206. See also *State v. George*, 53 Ind. 434.

*Iowa.*—*State v. Green*, 16 Iowa 239.

*Massachusetts.*—*Com. v. Alderman*, 4 Mass. 477; *Com. v. Dascom*, 111 Mass. 404.

*Minnesota.*—*State v. Simpson*, 28 Minn. 66, 41 Am. Rep. 269.

*Missouri.*—*State v. Cole*, 48 Mo. 70.

*New Hampshire.*—*State v. Little*, 1 N. H. 257.

*Tennessee.*—*State v. Lowry*, 1 Swan (Tenn.) 34; *State v. Atkinson*, 9 Humph. (Tenn.) 677.

*Texas.*—*Watson v. State*, 5 Tex. App. 271; *Warriner v. State*, 3 Tex. App. 104, 30 Am. Rep. 124.

*Vermont.*—*State v. Wakefield*, 60 Vt. 618; *Hamilton v. Williams*, 1 Tyler (Vt.) 15.

*Virginia.*—*Com. v. Jackson*, 2 Va. Cas. 501.

The most frequent application of this principle is where a person guilty of assault and battery secures his conviction therefor before a justice of the peace either by fraud or collusion, either personally, *State v. Simpson*, 28 Minn. 66, 41 Am. Rep. 269, or by agent, *State v. Little*, 1 N. H. 257, in the hope of warding off adequate punishment.

**But in North Carolina**, where an indictment was found in the superior court against the defendant, and pending the same, after his knowledge thereof, and before his arrest, he procured himself to be indicted for the same offense in the county court, and there voluntarily submitted and was fined, it was held that the conviction in the county court was a good defense to the indictment in the superior court. *State v. Casey*, Busb. L. (44 N. Car.) 209. See *State v. Roberts*, 98 N. Car. 756.

**In Indiana** it has been held that where the state is represented throughout by its sworn officer,—the prosecuting attorney,—a conviction is not void because the prosecutor was corrupted during the pendency of the proceeding, and

while unreversed it will bar another prosecution for the same offense. *Shideler v. State*, 129 Ind. 528, 28 Am. St. Rep. 206.

**A Defendant Must Be a Party to the Fraud**, and a conviction secured fraudulently by the state's officers cannot be avoided by the state, where the defendant was not a party to the fraud. *State v. Reed*, 26 Conn. 202.

**1. Where Penalty Is Certain and Is Inflicted in Full.**—*Watkins v. State*, 68 Ind. 427, 34 Am. Rep. 273; *Hamilton v. Williams*, 1 Tyler (Vt.) 15; *McFarland v. State*, 68 Wis. 400, 60 Am. Rep. 867. Compare *State v. Wakefield*, 60 Vt. 622.

**2. Bulson v. People**, 31 Ill. 409.

**3. Discharge under Statute Limiting the Time for Bringing Accused to Trial**—*Georgia.*—*Denny v. State*, 6 Ga. 491; *Durham v. State*, 9 Ga. 306; *Kerese v. State*, 10 Ga. 95; *Jordan v. State*, 18 Ga. 532; *Holt v. State*, 38 Ga. 187; *Brown v. State*, 85 Ga. 713.

*Indiana.*—*McGuire v. Wallace*, 109 Ind. 284.

*Missouri.*—*State v. Wear*, 145 Mo. 162.

*Ohio.*—*Ex p. McGehan*, 22 Ohio St. 442; *Erwin v. State*, 29 Ohio St. 186; *Johnson v. State*, 42 Ohio St. 207.

*Virginia.*—*Com. v. Adcock*, 8 Gratt. (Va.) 681; *Nicholas v. Com.*, 91 Va. 741; *Benton v. Com.*, 91 Va. 786.

Compare *State v. Garthwaite*, 23 N. J. L. 143; *In re Garvey*, 7 Colo. 502; *Hester v. Com.*, 85 Pa. St. 139.

See also, as to delay in bringing indictments to trial, the title HABEAS CORPUS, vol. 15, p. 164.

**But in Mississippi**, under a statute providing that if a prisoner "be not prosecuted by indictment and trial, at the second stated term, or some special term prior thereto, of the court where the offense is properly cognizable, he or she shall be discharged from further imprisonment," it was held that such discharge was no bar to a subsequent prosecution for the same offense. *Byrd v. State*, 1 How. (Miss.) 163.



verdict, is not unconstitutional as putting the defendant twice in jeopardy. To put him twice in jeopardy he must again be put upon his trial before a jury impaneled and sworn and charged with his deliverance.<sup>1</sup>

*b. STATUTE PROVIDING FOR THE ENFORCEMENT OF AN EXISTING JUDGMENT.* — A statute providing for the enforcement of an existing judgment of conviction does not create a second jeopardy.<sup>2</sup>

**6. Effect of a Nolle Prosequi.** — The entry by the prosecuting officer of a *nolle prosequi* at any time before jeopardy attaches, that is, under the generally prevailing rule, before the jury is impaneled and sworn,<sup>3</sup> will not bar a subsequent prosecution for the same offense;<sup>4</sup> but as a general rule its entry at any later stage of the proceedings without the consent of the defendant will bar such a prosecution,<sup>5</sup> provided, of course, that the indictment is good and the

1. McDonald v. State, 79 Wis. 651, 24 Am. St. Rep. 740.

2. Dinckerlocker v. Marsh, 75 Ind. 548.

3. See *supra*, this title, *What Constitutes a Jeopardy* — *General Rule Stated*.

4. **Entry of Nolle Prosequi Before Jeopardy Attaches** — *United States*. — U. S. v. Shoemaker, 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279.

*Alabama*. — O'Brien v. State, 91 Ala. 25.

*Connecticut*. — State v. Benham 7 Conn. 414;

*State v. Main*, 31 Conn. 572.

*Delaware*. — State v. Tindal, 5 Harr. (Del.)

488.

*Georgia*. — Bird v. State, 53 Ga. 602; Doyal v. State, 70 Ga. 134; Jackson v. State, 76 Ga. 551; Reynolds v. State, 3 Ga. 53.

*Indiana*. — Dye v. State, 130 Ind. 87; Halloran v. State, 80 Ind. 589.

*Kentucky*. — Wilson v. Com., 3 Bush (Ky.) 105; Dilger v. Com., 88 Ky. 550.

*Louisiana*. — State v. Byrd, 31 La. Ann. 419; State v. Hornsby, 8 Rob. (La.) 584, 41 Am. Dec. 314.

*Maine*. — State v. Smith, 67 Me. 328.

*Massachusetts*. — Com. v. Wheeler, 2 Mass. 172; Com. v. Cutler, 9 Allen (Mass.) 486; Com. v. Galligan, 156 Mass. 270.

*Michigan*. — People v. Kuhn, 67 Mich. 463.

*Missouri*. — *Ex p.* Donaldson, 44 Mo. 149; State v. Lopez, 19 Mo. 254; State v. Balch, 136 Mo. 103.

*New Hampshire*. — State v. Dover, 46 N. H. 452.

*New York*. — People v. Loomis, (Supm. Ct. Gen. T.) 30 How. Pr. (N. Y.) 323; Gardiner v. People, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 155.

*North Carolina*. — State v. Thornton, 13 Ired. L. (35 N. Car.) 256; State v. McNeill, 3 Hawks (10 N. Car.) 183; State v. Tisdale, 2 Dev. & B. L. (19 N. Car.) 159; State v. Casey, Busb. L. (44 N. Car.) 209.

*Oregon*. — State v. Reinhart, 26 Oregon 466.

*Pennsylvania*. — Zink v. Schuylkill County, 1 Leg. Chron. (Pa.) 191; Hester v. Com., 85 Pa. St. 139.

*South Carolina*. — State v. Haskett, Riley L. (S. Car.) 97, 3 Hill L. (S. Car.) 95, 3 Hill L. (S. Car.) 95; State v. M'Kee, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499; State v. Richardson, 47 S. Car. 171, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 949.

*Texas*. — Vinters v. State, 18 Tex. App. 198.

*Virginia*. — Lindsay v. Com., 2 Va. Cas. 345; Wortham v. Com., 5 Rand (Va.) 669.

**Nolle Prosequi of One of Two Counts in an In-**

**dictment.** — Where there are two counts in an indictment a *nolle prosequi* of the first does not bar a prosecution on the second. State v. Byrd, 31 La. Ann. 419; Com. v. Dunster, 145 Mass. 101.

**5. Entry of Nolle Prosequi After Jeopardy Attaches** — *United States*. — U. S. v. Shoemaker, 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279; U. S. v. Farring, 4 Cranch (C. C.) 465, 25 Fed. Cas. No. 15,075.

*Alabama*. — Grogan v. State, 44 Ala. 9; State v. Kreps, 8 Ala. 956; McGehee v. State, 58 Ala. 360.

*Colorado*. — Roland v. People, 23 Colo. 283.

*Georgia*. — Reynolds v. State, 3 Ga. 53; Jackson v. State, 76 Ga. 551; Jones v. State, 55 Ga. 625; Franklin v. State, 85 Ga. 570; Doyal v. State, 70 Ga. 134.

*Indiana*. — Boswell v. State, 111 Ind. 40; Joy v. State, 14 Ind. 139; Harker v. State, 8 Blackf. (Ind.) 540; Halloran v. State, 80 Ind. 589.

*Kentucky*. — Harris v. Tiffany, 8 B. Mon. (Ky.) 225; Huff v. Com., (Ky. 1897) 42 S. W. Rep. 907.

*Louisiana*. — State v. Washington, 33 La. Ann. 1473. But see State v. Brown, 8 Rob. (La.) 566.

*Massachusetts*. — Com. v. Hart, 149 Mass. 7.

*Missouri*. — State v. Patterson, 116 Mo. 505; *Ex p.* Snyder, 29 Mo. App. 256.

*Nebraska*. — Murphy v. State, 25 Neb. 807.

*Ohio*. — Baker v. State, 12 Ohio St. 214; Mount v. State, 14 Ohio 295, 45 Am. Dec. 542.

*South Carolina*. — State v. Richardson, 47 S. Car. 172, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 949.

*Tennessee*. — State v. Connor, 5 Coldw. (Tenn.) 311.

*Texas*. — Elehash v. State, 35 Tex. Crim. 599.

**Entry of Nolle Prosequi Because of Insufficient Evidence.** — The entry by the prosecuting attorney of a *nolle prosequi* after the jury are impaneled and witnesses sworn, because the evidence is insufficient to convict, is equivalent to an acquittal and will bar a subsequent prosecution for the same offense. U. S. v. Shoemaker, 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279; Mount v. State, 14 Ohio 295, 45 Am. Dec. 542; State v. Connor, 5 Coldw. (Tenn.) 311.

**If a Nolle Prosequi Is Entered After Verdict,** and the indictment is sufficient, the defendant cannot be again indicted for the same offense. State v. Smith, 67 Me. 328.

**Where, After Conviction and Before Sentence, the**



other preliminary things of record are perfected; <sup>1</sup> and this, even though such *nolle prosequi* is entered with the consent of the court.<sup>2</sup>

**Nolle Prosequi After Disagreement and Discharge of Jury.** — But a *nolle prosequi* entered after a disagreement and discharge of the jury will not bar another prosecution for the same offense.<sup>3</sup>

**Discontinuance Resulting from a Continuance Nisi.** — A discontinuance of a prosecution which is the result of a continuance *nisi* is not a bar to a new complaint for the same offense.<sup>4</sup>

**VII. IDENTITY OF OFFENSES -- 1. In General.** — The prohibition of the common law and of the Constitution is against a second jeopardy for the same "offense," that is, the same identical act and crime;<sup>5</sup> or, as expressed in a number of cases, to entitle a defendant to plead successfully former jeopardy the offenses charged in the two prosecutions must be the same in law and in fact.<sup>6</sup>

**Indictment Was Stolen from the files, and a *nolle prosequi* was entered, it was held that the defendant could not be again prosecuted for the same offense.** *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542, reversing 1 Ohio Dec. (Reprint) 89, 2 West. L. J. 81.

As, under the Constitution of South Carolina, a person cannot plead former jeopardy unless he has been acquitted by a jury, a *nolle prosequi* entered before such an acquittal will not bar another prosecution. *State v. Shirer*, 20 S. Car. 392. Formerly in this state the entry of a *nolle prosequi* after the jury was charged was a bar to a subsequent prosecution. *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499.

1. See *supra*, this title, *What Constitutes a Jeopardy — General Rule Stated.*

2. *Joy v. State*, 14 Ind. 139; *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542; *State v. Connor*, 5 Coldw. (Tenn.) 311; *Elehash v. State*, 35 Tex. Crim. 599.

But in Vermont it has been held that a *nolle prosequi* entered at any stage of a trial before verdict, by order of the court, is not a bar to another indictment for the same offense. *State v. Champeau*, 52 Vt. 313, 36 Am. Rep. 754.

And under the Established Practice in Connecticut, if a criminal trial has been commenced, and the public prosecutor, under the advice of the court, enters a *nolle prosequi*, and the prisoner does not claim a verdict, but waives his right to insist upon it, the proceeding is no bar to a subsequent trial for the same offense. *State v. Garvey*, 42 Conn. 232, See *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223.

3. Entry of Nolle Prosequi After Disagreement and Discharge of Jury. — *People v. Pline*, 61 Mich. 247; *State v. Shirer*, 20 S. Car. 392. See the title JURIES.

4. *Com. v. Galligan*, 156 Mass. 270.

5. Both Act and Crime Must Be Identical — *Canada*. — *Reg. v. Magrath*, 26 U. C. Q. B. 385. *United States*. — *U. S. v. Houston*, 4 Cranch (C. C.) 266; *U. S. v. Randenbush*, 8 Pet. (U. S.) 288.

*Alabama*. — *Hawkins v. State*, 1 Port. (Ala.) 475, 27 Am. Dec. 641; *Brewer v. State*, 59 Ala. 101.

*California*. — *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295.

*Florida*. — *Wallace v. State*, (Fla. 1899) 26 So. Rep. 713.

*Georgia*. — *Taylor v. State*, (Ga. 1900) 35 S. E. Rep. 161.

*Iowa*. — *State v. Derichs*, 42 Iowa 196.

*Kentucky*. — *Smith v. Com.*, (Ky. 1895) 32 S. W. Rep. 137.

*Louisiana*. — *State v. Hornsby*, 8 Rob. (La.) 583, 41 Am. Dec. 314; *State v. Malone*, 28 La. Ann. 80.

*Maine*. — *State v. Elden*, 41 Me. 170.

*Massachusetts*. — *Com. v. Fredericks*, 155 Mass. 455; *Com. v. Goodenough*, Thach. Crim. Cas. (Mass.) 132; *Com. v. Dillane*, 11 Gray (Mass.) 67; *Com. v. Bakeman*, 105 Mass. 53.

*Mississippi*. — *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Ball v. State*, 67 Miss. 358.

*Missouri*. — *State v. Burlingame*, 146 Mo. 207.

*New Jersey*. — *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490.

*New York*. — *Burns v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 182; *People v. Saunders*, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196; *People v. Warren*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 338.

*North Carolina*. — *State v. Morgan*, 95 N. Car. 641.

*Oregon*. — *State v. Stewart*, 11 Oregon 52, 238; *State v. Howe*, 27 Oregon 138.

*South Carolina*. — *State v. Copeland*, 46 S. Car. 13.

*Tennessee*. — *State v. Cameron*, 3 Heisk. (Tenn.) 78; *Hite v. State*, 9 Verg. (Tenn.) 357; *State v. Ross*, 4 Lea (Tenn.) 442.

*Texas*. — *Morgan v. State*, 34 Tex. 677; *Inman v. State*, 35 Tex. Crim. 36; *Swancoat v. State*, 4 Tex. App. 105; *Fehr v. State*, 36 Tex. Crim. 93; *Collins v. State*, 39 Tex. Crim. 30; *Burks v. State*, 24 Tex. App. 326; *Sims v. State*, 21 Tex. App. 649; *Williams v. State*, 13 Tex. App. 285; *Bogges v. State*, 43 Tex. 347; *Swindel v. State*, 32 Tex. 102; *Wright v. State*, 17 Tex. App. 152.

*Virginia*. — *Day v. Com.*, 23 Gratt. (Va.) 915; *Page v. Com.*, 27 Gratt. (Va.) 954; *Com. v. Somerville*, 1 Va. Cas. 164, 5 Am. Dec. 514; *Vaughan v. Com.*, 2 Va. Cas. 273.

*Washington*. — *State v. Robinson*, 12 Wash. 491.

6. Same in Law and Fact. — *People v. Helbing*, 61 Cal. 620; *Com. v. Roby*, 12 Pick. (Mass.) 496; *State v. Magone*, 33 Oregon 570; *People v. Saunders*, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196; *Burns v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 182; *People v. Burch*, (Buffalo Super. Ct. Gen. T.) 1 N. Y. St. Rep. 751; *Winn v. State*, 82 Wis. 571.

The plea will be vicious if the offenses



**Gambling and Keeping a Gambling House Distinct Crimes.** — Thus an acquittal or conviction on a prosecution for keeping a gambling house will not bar a prosecution for gambling or for being a common gambler,<sup>1</sup> nor will a conviction on a prosecution for gambling bar a prosecution for keeping a gambling house.<sup>2</sup>

**2. Test of Identity.** — It is perhaps impossible to lay down an infallible test for determining the identity of offenses in all cases. But a test which is of almost universal application is whether the facts required to support the second indictment would have been sufficient if proved to have procured a conviction under the first indictment. If they would be, the offenses are identical.<sup>3</sup>

charged in the two indictments are perfectly distinct in point of law, however nearly they may be connected in fact. *Com. v. Roby*, 12 Pick. (Mass.) 503.

**1. Gaming and Keeping Gaming House.** — *Tuberson v. State*, 26 Fla. 472; *De Haven v. State*, 2 Ind. App. 376.

**2. State v. Mosby, 53 Mo. App. 571; *Tutt v. State*, (Tex. Crim. 1895) 29 S. W. Rep. 268. See also *State v. Maxcy*, 1 McMull. L. (S. Car.) 501.**

**3. Usual Test of Identity — England.** — *Rex v. Emden*, 9 East 437; *Wemyss v. Hopkins*, L. R. 10 Q. B. 381; *Rex v. Vandercomb*, 2 Leach C. C. 708; *Rex v. Taylor*, 3 B. & C. 502, 10 E. C. L. 166; *Rex v. Sheen*, 2 C. & P. 634 12 E. C. L. 295.

*Canada.* — *Reg. v. Magrath*, 26 U. C. Q. B. 385.

*United States.* — *U. S. v. Flecke*, 2 Ben. (U. S.) 456, 25 Fed. Cas. No. 15,120; *Stone v. U. S.*, 64 Fed. Rep. 667; *U. S. v. Houston*, 4 Cranch (C. C.) 266; *U. S. v. Nickerson*, 17 How. (U. S.) 204.

*Alabama.* — *State v. Johnson*, 12 Ala. 840, 46 Am. Dec. 283; *Monroe v. State*, 111 Ala. 15.

*Arkansas.* — *State v. McMinn*, 34 Ark. 160; *Williams v. State*, 42 Ark. 35; *McCoy v. State*, 46 Ark. 141.

*California.* — *People v. Cummings*, 123 Cal. 269.

*Colorado.* — *Davis v. People*, 22 Colo. 1; *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254.

*Connecticut.* — *Wilson v. State*, 24 Conn. 57.

*Georgia.* — *Maher v. State*, 53 Ga. 448, 21 Am. Rep. 269.

*Illinois.* — *Guedel v. People*, 43 Ill. 226; *People v. McCoy*, 30 Ill. App. 273; *Durham v. People*, 5 Ill. 172, 39 Am. Dec. 407.

*Indiana.* — *State v. Hattabough*, 66 Ind. 223; *Smith v. State*, 85 Ind. 553; *Freeman v. State*, 119 Ind. 501; *De Haven v. State*, 2 Ind. App. 379.

*Iowa.* — *State v. Zimmerman*, 78 Iowa 614; *State v. Waterman*, 87 Iowa 255.

*Kentucky.* — *Colliver v. Com.*, 90 Ky. 262; *Turner v. Com.*, (Ky. 1897) 42 S. W. Rep. 1129; *Riffe v. Com.*, (Ky. 1900) 56 S. W. Rep. 265. But see *Chesapeake, etc., R. Co. v. Com.*, 88 Ky. 368.

*Louisiana.* — *State v. Vines*, 34 La. Ann. 1079; *State v. Williams*, 45 La. Ann. 936; *State v. Keogh*, 13 La. Ann. 243.

*Maine.* — *State v. Brownrigg*, 87 Me. 500.

*Massachusetts.* — *Com. v. Clair*, 7 Allen (Mass.) 525; *Com. v. Robinson*, 126 Mass. 259, 30 Am. Rep. 674; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Morey v. Com.*, 108 Mass. 433; *Com. v. Goodenough*, Thach. Crim. Cas. (Mass.) 132; *Com. v. Wade*, 17 Pick. (Mass.) 395.

*Michigan.* — *People v. Handley*, 93 Mich. 46.

*Mississippi.* — *Rocco v. State*, 37 Miss. 357.

*Montana.* — *State v. English*, 14 Mont. 399; *Territory v. Willard*, 8 Mont. 328.

*New York.* — *People v. Warren*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 338; *People v. Saunders* (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196; *Burns v. People* (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 182; *People v. Burch*, (Buffalo Super. Ct. Gen. T.) 1 N. Y. St. Rep. 751; *People v. White*, 55 Barb. (N. Y.) 606; *People v. Allen*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 445.

*North Carolina.* — *State v. Jesse*, 3 Dev. & B. L. (20 N. Car.) 98; *State v. Birmingham*, Busb. L. (44 N. Car.) 120.

*Ohio.* — *Price v. State*, 19 Ohio St. 423.

*Oregon.* — *State v. Stewart*, 11 Oregon 52. But see *State v. Howe*, 27 Oregon 143.

*Pennsylvania.* — *Com. v. Morgan*, 9 Kulp (Pa.) 573; *Com. v. Trimmer*, 84 Pa. St. 65; *Com. v. Maher*, 16 Phila. (Pa.) 451, 40 Leg. Int. (Pa.) 100; *Com. v. Schench*, 8 Kulp (Pa.) 487; *Com. v. Hiland*, 1 Pa. Co. Ct. 532; *Com. v. Tadrick*, 1 Pa. Super. Ct. 555, 38 W. N. C. (Pa.) 215.

*South Carolina.* — *State v. Jenkins*, 20 S. Car. 352; *State v. Shirer*, 20 S. Car. 404; *State v. Risher*, 1 Rich. L. (S. Car.) 219.

*Tennessee.* — *Hite v. State*, 9 Yerg. (Tenn.) 357.

*Texas.* — *Ex p. Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654; *Swindel v. State*, 32 Tex. 102; *Morgan v. State*, 34 Tex. 677; *Thomas v. State*, 40 Tex. 36; *Wright v. State*, 17 Tex. App. 152; *Simco v. State*, 9 Tex. App. 338; *Nance v. State*, 17 Tex. App. 385; *Parchman v. State*, 2 Tex. App. 228, 28 Am. Rep. 435.

*Washington.* — *State v. Robinson*, 12 Wash. 491.

*Wisconsin.* — *Winn v. State*, 82 Wis. 571.

In *Georgia* there is much confusion on this point, and the cases are hard to reconcile. They perhaps sanction the following rule. When the two indictments are for the same transaction and for a crime of the same nature a prosecution under one will bar a prosecution under the other, although evidence sufficient to support the second would not have produced a conviction under the first. *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *Buhler v. State*, 64 Ga. 504; *Goode v. State*, 70 Ga. 752; *Knox v. State*, 89 Ga. 259; *Blair v. State*, 81 Ga. 629; *Holt v. State*, 38 Ga. 187; *Jones v. State*, 55 Ga. 625; *Copenhagen v. State*, 15 Ga. 264. See also *Knight v. State*, 73 Ga. 804.

In *Texas* it has been held that an acquittal is a bar to a subsequent prosecution only in cases where the transaction is the same and the two indictments are susceptible of, and must be sustained by, the same proof; but that a con-



That Evidence Tending to Establish the Guilt of the Accused was properly admitted under a previous indictment against him for another offense, constitutes no bar to his indictment.<sup>1</sup>

**Forging and Uttering the Forged Instrument.** — To illustrate, an acquittal on a prosecution for forging an instrument is no bar to a prosecution for uttering a forged instrument, although the instrument in both cases is the same,<sup>2</sup> and *e converso* an acquittal or conviction for uttering is no bar to a prosecution for forging.<sup>3</sup>

**Effect of Variance in the Facts Alleged in the Two Indictments.** — Under the test given it is evident that a prosecution under one indictment will bar a prosecution under another for the same offense, notwithstanding a variance in the facts alleged in the two indictments, if it is not essential to a conviction under either indictment to prove the fact upon which the variance hinges, or if notwithstanding the variance the facts charged in the second indictment would, if proved, have procured a conviction under the first indictment.<sup>4</sup> The rule is otherwise where the variance is a material one and would have precluded a conviction on the first indictment upon proof of the facts charged in the second.<sup>5</sup>

**Indictments Similar but Facts Different.** — Though the indictments are precisely similar in language, if in fact it appears that each is for a separate and distinct offense a prosecution under one will not bar a prosecution under the other.<sup>6</sup>

**3. Where One Crime Includes Another** — *a*. **PROSECUTION FOR HIGHER AS BAR TO PROSECUTION FOR LOWER.** — The rule that the doctrine only applies where the two prosecutions are for the same crime must be taken with this qualification, that where one crime is included in and forms a necessary part of another and is but a different degree of the same offense, and where on a prosecution for the higher crime a conviction may be had for the lower, then a conviction or acquittal for the higher will bar a prosecution for the lower.<sup>7</sup>

viction, to be a bar, only requires that the transaction or the facts constituting it be the same. *Simco v. State*, 9 Tex. App. 338; *Wright v. State*, 17 Tex. App. 152; *Irvin v. State*, 7 Tex. App. 78; *McElmurray v. State*, 21 Tex. App. 691; *Fenton v. State*, 33 Tex. Crim. 633. But see *Parchman v. State*, 2 Tex. App. 228, 28 Am. Rep. 435.

**Acquittal of Crime No Bar to Prosecution for Alleged Perjury in Denying Its Commission.** — *U. S. v. Butler*, 38 Fed. Rep. 498; *State v. Caywood*, 96 Iowa 367.

**1. Criminating Evidence at Trial for Another Offense.** — *U. S. v. Randenbush*, 8 Pet. (U. S.) 288; *Van Houton's Case*, 2 City H. Rec. (N. Y.) 73; *State v. Magone*, 33 Oregon 570; *Smith v. Com.*, 7 Gratt. (Va.) 593; *State v. Robinson*, 12 Wash. 491. See also *Com. v. Maher*, 16 Phila. (Pa.) 451, 40 Leg. Int. (Pa.) 100.

It is not sufficient to make a judgment on one indictment a bar to another, that evidence of the facts alleged in the first would also be evidence of the facts alleged in the latter. *Com. v. Clair*, 7 Allen (Mass.) 525; *State v. Jesse*, 3 Dev. & B. L. (20 N. Car.) 98.

**Some Further Proof of the Identity of the Offense Is Necessary** beyond the fact that the goods described as received in the second indictment are such that the averments of the first indictment might describe them. *Com. v. Sutherland*, 109 Mass. 342.

**2. Acquittal for Forging No Bar to Prosecution for Uttering.** — *Harrison v. State*, 36 Ala. 248; *Beyerline v. State*, 147 Ind. 125; *State v. Williams*, 152 Mo. 115; *Hooper v. State*, 30 Tex. App. 412, 28 Am. St. Rep. 926; *Reddick v.*

*State*, 31 Tex. Crim. 587; *Preston v. State*, 40 Tex. Crim. 72; *Preston v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 127. See also the title *FORGERY*, vol. 13, p. 1102.

**3. Prosecution for Uttering No Bar to Prosecution for Forging.** — *State v. Williams*, 152 Mo. 115; *Green v. State*, 36 Tex. Crim. 100.

**4. When Former Prosecution Will Bar Notwithstanding Variance.** — *Reg. v. Magrath*, 26 U. C. Q. B. 385; *Durham v. People*, 5 Ill. 172, 39 Am. Dec. 407; *State v. Pujo*, 41 La. Ann. 346; *State v. Moore*, 66 Mo. 372; *State v. Copeland*, 46 S. Car. 13; *State v. Cameron*, 3 Heisk. (Tenn.) 78. See also *State v. Lawson*, 123 N. Car. 740.

**5. When Variance Will Prevent Former Prosecution from Being a Bar.** — *Reg. v. Magrath*, 26 U. C. Q. B. 385; *State v. Williams*, 45 La. Ann. 936; *Com. v. Wade*, 17 Pick. (Mass.) 395; *Com. v. Clair*, 7 Allen (Mass.) 525; *People v. Handley*, 93 Mich. 46; *State v. Risher*, 1 Rich. L. (S. Car.) 219; *Morgan v. State*, 34 Tex. 677; *Parchman v. State*, 2 Tex. App. 228, 28 Am. Rep. 435; *Swindel v. State*, 32 Tex. 102; *Nance v. State*, 17 Tex. App. 385.

**6. Page v. Com.**, 27 Gratt. (Va.) 954.

**7. Prosecution for Higher Degree Bars Prosecution for Lower** — *United States*. — *U. S. v. Houston*, 4 Cranch (C. C.) 267.

*Alabama*. — *State v. Standifer*, 5 Port. (Ala.) 523; *Gunter v. State*, 111 Ala. 25, 56 Am. St. Rep. 17.

*Delaware*. — *State v. Townsend*, 2 Harr. (Del.) 543.

*Georgia*. — *Franklin v. State*, 85 Ga. 570.

*Indiana*. — *State v. Hattabough*, 66 Ind. 223;



or for any crime of which the lower is an essential ingredient.<sup>1</sup>

**Murder and Manslaughter.** — Thus an acquittal or conviction upon an indictment for murder is a bar to an indictment for manslaughter.<sup>2</sup>

**Murder and Assault.** — So where upon an indictment for murder or manslaughter a defendant can be convicted of an assault, an acquittal upon such indictment will bar a prosecution for the assault,<sup>3</sup> but the rule is otherwise where a conviction for the assault cannot be had upon an indictment for the higher crime.<sup>4</sup>

**There Are Some Cases** that go even farther than is sanctioned by the above rule and hold that where one crime is a mere incident of another a conviction for the greater crime will bar a prosecution for the less, although on the trial for the greater the defendant could not have been convicted of the less.<sup>5</sup> This last doctrine cannot be reconciled with the test previously stated.<sup>6</sup>

**b. PROSECUTION FOR LOWER AS BAR TO PROSECUTION FOR HIGHER.** — It is also the almost universally accepted doctrine that an acquittal or conviction for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater the defendant could be convicted of the less.<sup>7</sup> This is undoubtedly the proper rule, for upon the second prose-

Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; De Haven v. State, 2 Ind. App. 379.

*Massachusetts.* — Com. v. Roby, 12 Pick. (Mass.) 503; Morey v. Com., 108 Mass. 433.

*Missouri.* — State v. Wightman, 26 Mo. 515.  
*New Jersey.* — State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490.

*New York.* — People v. Saunders, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196.

*Oregon.* — State v. Magone, 33 Oregon 570; State v. Howe, 27 Oregon 140.

*Pennsylvania.* — Dinkey v. Com., 17 Pa. St. 126, 55 Am. Dec. 542; Com. v. Meeley, 2 Chest. Co. Rep. (Pa.) 191; Com. v. Bass, 3 Lanc. L. Rev. 279.

*South Carolina.* — State v. Taylor, 2 Bailey L. (S. Car.) 50.

*Texas.* — Thomas v. State, 40 Tex. 39.

*Vermont.* — State v. Smith, 43 Vt. 324.

**Georgia.** — Acquittal of Crime Bars an Indictment for Attempt to Commit It. — Franklin v. State, 85 Ga. 570. See further ATTEMPTS TO COMMIT CRIME, vol. 3, p. 265.

**1. Prosecution for Higher Bars Prosecution for a Crime Including Lower.** — Fox v. State, 50 Ark. 528.

In England it has been held that if a party charged with the crime of murder, committed in the perpetration of a burglary, is generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence. Reg. v. Gould, 9 C. & P. 364, 38. E. C. L. 156.

**2. Prosecution for Murder Bars Indictment for Manslaughter.** — U. S. v. Houston, 4 Cranch (C. C.) 267; State v. Standifer, 5 Port. (Ala.) 523; Com. v. Roby, 12 Pick. (Mass.) 503; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; Thomas v. State, 40 Tex. 39.

In Pennsylvania one indicted for a felony cannot be convicted of a misdemeanor, and involuntary manslaughter being a misdemeanor a person cannot be convicted of it on an indictment for murder, consequently an acquittal or conviction for murder is not a bar to a subsequent prosecution for involuntary man-

slaughter. Com. v. Werbine, 12 Lanc. Bar (Pa.) 79; Com. v. Hiland, 1 Pa. Co. Ct. 532; Hilands v. Com., 114 Pa. St. 372; Com. v. Skeels, 13 Pa. Co. Ct. 174, 2 Pa. Dist. 761. See *infra*, this section, *Where Higher Crime Is a Felony and Lower a Misdemeanor*.

**3. Acquittal for Murder as Bar to Prosecution for Assault.** — Carson v. People, 4 Colo. App. 463.

4. Reg. v. Bird, T. & M. 374, 2 Den. C. C. 94, 20 L. J. M. C. 70, 15 Jur. 193, 5 Cox C. C. 20; Reg. v. Smith, 34 U. C. Q. B. 552; Moore v. State, 59 Miss. 25; Burns v. People, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 186.

See *infra*, this section, *Where Higher Crime Is a Felony and Lower a Misdemeanor*.

**5. Prosecution for Crime Bar to Prosecution for Incidental Crime.** — Nielsen, Petitioner, 131 U. S. 176; Copenhagen v. State, 15 Ga. 264; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490. See also Triplett v. Com., 84 Ky. 193.

In North Carolina it has been held that if the acts alleged in the second indictment are embraced in the charge contained in the first, and have been given in evidence to procure the first conviction and increase the punishment, the first conviction is a bar to any second prosecution for those acts. State v. Lindsay, Phil. L. (61 N. Car.) 468.

6. See *supra*, this section, *Test of Identity*.

**7. Prosecution for Lower, Bar to Prosecution for Higher** — Alabama. — Powell v. State, 89 Ala. 172. See also Aaron v. State, 39 Ala. 75.

Arkansas. — Southworth v. State, 42 Ark. 270; State v. Smith, 53 Ark. 24.

California. — People v. Defoor, 100 Cal. 150.

Georgia. — Franklin v. State, 85 Ga. 570; Jones v. State, 55 Ga. 625; Bell v. State, 103 Ga. 397.

Indiana. — Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22.

Kentucky. — Williams v. Com., (Ky. 1897) 43 S. W. Rep. 455; Com. v. Foster, 3 Met. (Ky.) 1; Com. v. McChord, 2 Dana (Ky.) 242.

Louisiana. — State v. Cheevers, 7 La. Ann. 40.

Massachusetts. — Com. v. Squire, 1 Met. (Mass.) 258; Morey v. Com., 108 Mass. 433.

New York. — People v. Saunders, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196. See also



cution the defendant would be liable to conviction for identically the same offense for which he was previously put in jeopardy. But in *Iowa* the contrary rule prevails.<sup>1</sup>

**Manslaughter and Murder.** — Thus an acquittal or conviction on an indictment for manslaughter is a bar to a prosecution for murder.<sup>2</sup>

**Assault and Higher Offenses Comprehending It.** — So an acquittal or conviction on a prosecution for an assault is a bar to a prosecution for assault and battery,<sup>3</sup> and an acquittal or conviction on an indictment for an assault or an assault and battery is a bar to a prosecution for a felonious or aggravated assault,<sup>4</sup> or for mayhem.<sup>5</sup>

**Conviction for Assault, Death Supervening, No Bar to Prosecution for Murder or Manslaughter.** — But if a defendant is convicted of an assault and subsequently the person assaulted dies from the injuries inflicted, the defendant may be prosecuted for murder or manslaughter. For, while the act upon which the two prosecutions are based is the same, the character of the crimes is different; the death of the person assaulted being an essential element of the higher offense.<sup>6</sup> This is a well-recognized exception to the rule previously stated for determining the identity of the offenses.<sup>7</sup>

**Principal and Accessory.** — As being principal in a felony and being an accessory before or after the fact to it are distinct and different crimes, and not different degrees of the same crime, an acquittal of one indicted as principal is no bar to a subsequent indictment against him as accessory before or after the fact, and *vice versa* an acquittal as such an accessory is no bar to an indictment as principal.<sup>8</sup>

**Accessory Before and Accessory After the Fact.** — So an acquittal as accessory before

*Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340.

*Oregon.* — *State v. Magone*, 33 Oregon 570.

*Pennsylvania.* — *Com. v. Neeley*, 2 Chest. Co. Rep. (Pa.) 191; *Com. v. Morgan*, 9 Kulp (Pa.) 573.

*Tennessee.* — *State v. Chaffin*, 2 Swan (Tenn.) 493. See also *Fiddler v. State*, 7 Humph. (Tenn.) 508.

*Texas.* — *Thomas v. State*, 40 Tex. 39; *Mason v. State*, 29 Tex. App. 24. But see *Allen v. State*, 7 Tex. App. 298.

*Vermont.* — *State v. Smith*, 43 Vt. 324.

See also *Reg. v. Tancock*, 34 L. T. N. S. 455, 13 Cox C. C. 217.

In *New Jersey* it has been held that a conviction of arson for burning a dwelling house is a bar to a subsequent indictment for murder in destroying the life of a human being by the burning of such house. *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490.

1. *Rule in Iowa.* — *Scott v. U. S.*, 1 Morr. (Iowa) 142; *State v. Foster*, 33 Iowa 525.

2. *Prosecution for Manslaughter, Bar to Prosecution for Murder.* — *Com. v. Roby*, 12 Pick. (Mass.) 503; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *Com. v. Neeley*, 2 Chest. Co. Rep. (Pa.) 191; *Thomas v. State*, 40 Tex. 39.

3. *Prosecution for Assault in Lower Degree Bars Prosecution for Assault in Higher Degree.* — *Com. v. Neeley*, 2 Chest. Co. Rep. (Pa.) 191; *State v. Chaffin*, 2 Swan (Tenn.) 493.

4. *Aggravated Assault.* — *Reg. v. Walker*, 2 M. & Rob. 446; *Moore v. State*, 71 Ala. 307; *Bell v. State*, 103 Ga. 397; *Franklin v. State*, 85 Ga. 570; *De Haven v. State*, 2 Ind. App. 379; *State v. Hatcher*, 136 Mo. 641. *Contra in Iowa*, *State v. Foster*, 33 Iowa 525.

*Conviction of Aggravated Assault a Bar to In-*

*dictment for Assault with Intent to Kill.* — *State v. Smith*, 53 Ark. 24.

**Assault and Robbery.** — A prosecution for assault with intent to rob will bar a prosecution for robbery. *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22. But see *State v. Nathan*, 5 Rich. L. (S. Car.) 219.

5. **Assault and Mayhem.** — *State v. Cheevers*, 7 La. Ann. 40; *Com. v. Morgan*, 9 Kulp (Pa.) 573.

6. *Prosecution for Murder or Manslaughter After Conviction for Assault and Death of Injured Person* — *England.* — *Reg. v. Friel*, 17 Cox C. C. 325; *Reg. v. Morris*, L. R. 1 C. C. 90; *Reg. v. Salvi*, 10 Cox C. C. 481, note.

*Maine.* — *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335.

*Massachusetts.* — *Com. v. Roby*, 12 Pick. (Mass.) 504; *Com. v. Cutler*, 9 Allen (Mass.) 486.

*New York.* — *Burns v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 185.

*Ohio.* — *State v. Ross*, 4 Ohio Dec. 5.

*Texas.* — *Johnson v. State*, 19 Tex. App. 453, 53 Am. Rep. 385; *Curtis v. State*, 22 Tex. App. 227, 58 Am. Rep. 635.

*Wisconsin.* — *Winn v. State*, 82 Wis. 576.

7. *Hopkins v. U. S.*, 4 App. Cas. (D. C.) 430; *State v. Howe*, 27 Oregon 143.

See *supra*, this section, *Test of Identity*.

8. **Acquittal as Principal No Bar to Prosecution as Accessory, and Vice Versa.** — *Rex v. Plant*, 7 C. & P. 575, 32 E. C. L. 637; *Reynolds v. People*, 83 Ill. 479, 25 Am. Rep. 410; *Com. v. Roby*, 12 Pick. (Mass.) 503; *State v. Larkin*, 49 N. H. 36, 6 Am. Rep. 456; *State v. Buzzell*, 58 N. H. 257, 42 Am. Rep. 586; *Morrow v. State*, 14 Lea (Tenn.) 475. See the title ACCESSORY, vol. 1, p. 263.



the fact is no bar to an indictment as accessory after the fact.<sup>1</sup>

**Commission of Crime and Conspiracy to Commit It.** — For the same reason an acquittal or conviction upon an indictment for a conspiracy to commit a crime will not bar a prosecution for the commission of the crime itself,<sup>2</sup> and *e converso* conviction of a crime will not bar a prosecution for a conspiracy to commit it.<sup>3</sup>

**c. CONVICTION OF LOWER ON PROSECUTION FOR HIGHER.** — A conviction of the lesser offense on an indictment for the greater is in legal effect an acquittal of the greater and will bar a subsequent prosecution for it.<sup>4</sup>

Thus a Conviction for Manslaughter on an Indictment for Murder will bar a subsequent prosecution for murder.<sup>5</sup>

So a Conviction of Murder in the Second Degree on an indictment for murder in the first degree will bar a subsequent prosecution for murder in the first degree.<sup>6</sup>

**d. WHERE HIGHER CRIME IS A FELONY AND LOWER A MISDEMEANOR.** — In jurisdictions where upon a prosecution for a felony there can be no conviction for a misdemeanor<sup>7</sup> though the evidence sufficient to convict one of the felony would necessarily show him guilty of the misdemeanor, an acquittal upon an indictment for a felony will not bar an indictment for a misdemeanor,<sup>8</sup> and *e converso* an acquittal or conviction upon an indictment for a misdemeanor will not bar a prosecution for a felony.<sup>9</sup> But the rule is otherwise in those jurisdictions where upon a prosecution for a felony a conviction

1. *State v. Larkin*, 49 N. H. 36, 6 Am. Rep. 456.

2. **Prosecution for Conspiracy to Commit Crime No Bar to Prosecution for Commission of Crime — United States.** — *Berkowitz v. U. S.*, 93 Fed. Rep. 452, 35 C. C. A. 379.

*Florida.* — *Wallace v. State*, (Fla. 1899) 26 So. Rep. 713.

See also *Reg. v. Button*, 11 Q. B. 929, 63 E. C. L. 929.

3. **Conviction of Crime No Bar to Prosecution for Conspiracy to Commit It.** — *Whitford v. State*, 24 Tex. App. 489, 5 Am. St. Rep. 896. See also *State v. Sias*, 17 N. H. 558.

4. **Conviction of Lesser Offense on Prosecution for Higher — United States.** — *In re Bennett*, 84 Fed. Rep. 324.

*California.* — *People v. Gordon*, 99 Cal. 227; *People v. Apgar*, 35 Cal. 389.

*Missouri.* — *State v. Brannon*, 55 Mo. 63, 17 Am. Rep. 643; *State v. Pitts*, 57 Mo. 85.

*New York.* — *People v. Cignarale*, 110 N. Y. 31.

*Texas.* — *Mixon v. State*, 35 Tex. Crim. 460; *Huff v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 903; *Robinson v. State*, 21 Tex. App. 160; *Tribble v. State*, 2 Tex. App. 424.

*Virginia.* — *Stuart v. Com.*, 28 Gratt. (Va.) 970.

*Wisconsin.* — *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567.

5. **Conviction of Manslaughter on Indictment for Murder — California.** — *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620.

*Iowa.* — *State v. Tweedy*, 11 Iowa 350.

*Louisiana.* — *State v. Hornsby*, 8 Rob. (La.) 583, 41 Am. Dec. 314; *State v. Desmond*, 5 La. Ann. 398; *State v. Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599; *State v. Joseph*, 40 La. Ann. 5; *State v. Byrd*, 31 La. Ann. 419; *State v. Dennison*, 31 La. Ann. 847; *State v. Victor*, 36 La. Ann. 978.

*Mississippi.* — *Hurt v. State*, 25 Miss. 378, 59 Am. Dec. 225; *Rolls v. State*, 52 Miss. 391.

*Oregon.* — *State v. Steeves*, 29 Oregon 85.

*Tennessee.* — *State v. Norvell*, 2 Verg. (Tenn.) 27, 24 Am. Dec. 458.

*Texas.* — *Mixon v. State*, 35 Tex. Crim. 458.

*West Virginia.* — *State v. Cross*, 44 W. Va. 315.

6. **Conviction of Murder in the Second Degree on an Indictment for Murder in the First Degree — Alabama.** — *Lewis v. State*, 51 Ala. 1; *Fields v. State*, 52 Ala. 348; *Mitchell v. State*, 60 Ala. 26; *Berry v. State*, 65 Ala. 117; *Smith v. State*, 68 Ala. 424; *De Arman v. State*, 71 Ala. 351; *Sylvester v. State*, 72 Ala. 201.

*Arkansas.* — *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154.

*Florida.* — *Johnson v. State*, 27 Fla. 245; *Golding v. State*, 31 Fla. 262. See also *Mann v. State*, 23 Fla. 610.

*Iowa.* — *State v. Helm*, 92 Iowa 540.

*Missouri.* — *State v. Ross*, 29 Mo. 32.

*Pennsylvania.* — *Com. v. Winters*, 1 Pa. Co. Ct. 537.

*Texas.* — *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Parker v. State*, 22 Tex. App. 105; *Smith v. State*, 22 Tex. App. 316.

*Washington.* — *State v. Murphy*, 13 Wash. 229.

*Wisconsin.* — *State v. Belden*, 33 Wis. 120, 14 Am. Rep. 748.

7. See the title MERGER.

8. **Effect of the Doctrine of Merger.** — *Reg. v. Gilmore*, 15 Cox C. C. 85; *State v. Wightman*, 26 Mo. 516; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *People v. Saunders*, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196; *Com. v. Werbine*, 12 Lanc. Bar (Pa.) 79; *Com. v. Hiland*, 1 Pa. Co. Ct. 532; *Com. v. Skeels*, 13 Pa. Co. Ct. 174, 2 Pa. Dist. 761; *Hilands v. Com.*, 114 Pa. St. 372.

9. *State v. Hattabough*, 66 Ind. 226; *Com. v. Roby*, 12 Pick. (Mass.) 496; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *Burns v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 182; *People v. Saunders*, (Oyer & T. Ct.) 4 Park. Crim. R. (N. Y.) 196; *In re Donahue* 6 Ohio Dec. 389, 4 Ohio N. P. 296.



may be had for a misdemeanor.<sup>1</sup>

**4. Where One Act Includes Several Crimes.** — Where the same act combines the requisite ingredients of two or more distinct offenses, the difference not being one of degree merely, it has generally been held that a prosecution for one will not bar a prosecution for the other.<sup>2</sup> But the contrary doctrine prevails in some jurisdictions.<sup>3</sup>

**Riot and Other Offenses.** — It has generally been held that a man who in company with at least two others commits an assault and battery, or any other illegal act, in a violent or tumultuous manner, may be twice punished, once as a rioter and again as if he had committed the unlawful act alone.<sup>4</sup> But the contrary rule prevails in some jurisdictions.<sup>5</sup>

**Assault and Contempt.** — Where a person commits an assault and battery in the presence of a court, he may be punished for the contempt and also prosecuted for the assault and battery.<sup>6</sup>

**1. Prosecution for Felony — Conviction for Misdemeanor.** — *State v. Nichols*, 38 Ark. 550; *State v. Smith*, 43 Vt. 324. See also *State v. Hattabough*, 66 Ind. 229; *Lohman v. People*, 1 N. Y. 379, 49 Am. Dec. 340.

**2. Prosecution for a Crime No Bar to Prosecution for Another Crime Embraced in Same Act — *United States*.** — *U. S. v. Harmison*, 3 Sawy. (U. S.) 556, 26 Fed. Cas. No. 15,308; *U. S. v. Hood*, 2 Cranch (C. C.) 133, 26 Fed. Cas. No. 15,385.

*Arkansas*. — *Fox v. State*, 50 Ark. 528.

*California*. — *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, (Cal. 1884) 2 Pac. Rep. 744. But see *People v. Stephens*, 79 Cal. 428.

*Indiana*. — *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69; *De Haven v. State*, 2 Ind. App. 380. But see *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369.

*Kansas*. — *State v. Horneman*, 16 Kan. 452.

*Louisiana*. — *State v. Faulkner*, 39 La. Ann. 811.

*Maine*. — *State v. Inness*, 53 Me. 536.

*Massachusetts*. — *Com. v. Andrews*, 2 Mass. 409; *Com. v. Bakeman*, 105 Mass. 53; *Morey v. Com.*, 108 Mass. 433; *Com. v. Harrison*, 11 Gray (Mass.) 308.

*New York*. — *People v. Warren*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 338.

*Oregon*. — *State v. Stewart*, 11 Oregon 52; *State v. Howe*, 27 Oregon 144; *State v. Magone*, 33 Oregon 570.

*South Carolina*. — *State v. Williams*, 11 S. Car. 288; *State v. Taylor*, 2 Bailey L. (S. Car.) 50; *State v. Glasgow*, Dudley L. (S. Car.) 40; *State v. Sonnerkalb*, 2 Nott & M. (S. Car.) 280.

*Virginia*. — *Vaughan v. Com.*, 2 Va. Cas. 273.

**Retailing Without a License and Trading with a Negro.** — A conviction for retailing without a license was held not to bar a prosecution for trading with a negro, although both offenses were consummated by the same act, to wit, the sale of spirituous liquors for corn. *State v. Sonnerkalb*, 2 Nott & M. (S. Car.) 280; *State v. Glasgow*, Dudley L. (S. Car.) 40.

**Trading with a Negro and Receiving Stolen Goods.** — So, in the same state, the act of buying goods of a negro, knowing them to be stolen, was held to subject the purchaser to two punishments, one for trading with a negro, and one for receiving stolen goods. *State v. Taylor*, 2 Bailey L. (S. Car.) 40.

**Where by the Same Act Two Persons Are Killed**, a conviction or acquittal for the murder of one

will not bar an indictment for the murder of the other. *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, (Cal. 1884) 2 Pac. Rep. 744; *Vaughan v. Com.*, 2 Va. Cas. 273. See also *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708.

**Contra.** — *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *State v. Damon*, 2 Tyler (Vt.) 387.

A trial and acquittal on an indictment charging the defendant with having mixed arsenic with flour and having caused it to be administered to A. with intent to kill her, are no bar to a subsequent indictment charging the same defendant with the same act in mixing the arsenic and causing it to be administered to B. with intent to kill him. *People v. Warren*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 338.

**Physician Acquitted of Abortion May Be Deprived of the Right to Practice His Profession.** — The acquittal of a physician under an indictment for producing an abortion is no bar to proceedings founded on the same act, for the purpose of depriving him of his right to practice his profession. *Matter of Smith*, 10 Wend. (N. Y.) 449.

**Keeping a Tippling Shop and Being a Common Seller.** — As to whether a prosecution for keeping a drinking house or tippling shop will bar a prosecution for being a "common seller" of intoxicating liquors, see the title INTOXICATING LIQUORS, *ante*, p. 379.

**3. Prosecution for a Crime Bars Prosecution for Another Crime Embraced in Same Act.** — *Hurst v. State*, 86 Ala. 604, 11 Am. St. Rep. 79; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17; *Sadberry v. State*, 39 Tex. Crim. 466; *State v. Damon*, 2 Tyler (Vt.) 387. But see *Irvin v. State*, 7 Tex. App. 78.

**4. Riot and Other Offenses.** — *U. S. v. Peaco*, 4 Cranch (C. C.) 601, 27 Fed. Cas. No. 16,018; *Hurd v. State*, 2 Root (Conn.) 186; *Freeland v. People*, 16 Ill. 380; *Skidmore v. Bricker*, 77 Ill. 164; *Scott v. U. S.*, 1 Morris (Iowa) 142; *State v. Inness*, 53 Me. 536.

**5. Winner v. State**, 13 Ind. 540; *Com. v. Reed*, 4 Lanc. L. Rev. 89. And see *State v. Lindsay*, Phil. L. (61 N. Car.) 468; *Com. v. Kinney*, 2 Va. Cas. 139.

**6. Punishment for Contempt No Bar to Prosecution for Assault and Battery.** — *U. S. v. Cashiel*, 1 Hughes (U. S.) 560; *State v. Yancy*, 1 Law Repos. (4 N. Car.) 519, 6 Am. Dec. 553; *State v. Gardner*, 72 N. Car. 379.

**Assault and Breach of Privilege.** — A conviction and sentence by the House of Representatives



**Acts Closely Connected in Point of Time.** — A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for one of them first had.<sup>1</sup>

**5. Several Prosecutions for Single Crime Prohibited** — *a.* **RULE STATED.** — But though where one act constitutes several crimes there may be a separate prosecution for each crime, the state cannot split up a single crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.<sup>2</sup>

*b.* **RULE APPLIED TO CONTINUING OFFENSES.** — A prosecution for an offense which is a continuing one is a bar to a subsequent prosecution for the same offense charged to have been committed at any time previous to institution of the first prosecution.<sup>3</sup>

**Continuous Keeping of a Gaming or Disorderly House.** — So a prosecution for the keeping of a gaming house,<sup>4</sup> or a disorderly house,<sup>5</sup> or house of ill fame,<sup>6</sup> will bar any other prosecution for the keeping of the same house prior and up to the

of the United States, of one not a member of the house, for a breach of privilege by an assault and battery upon a member of the house because of words spoken by such member in the course of debate in the house, will not bar a subsequent indictment for the assault and battery. *U. S. v. Houston*, 4 Cranch (C. C.) 261, 26 Fed. Cas. No. 15,398. See also *Coffin v. Coffin*, 4 Mass. 34.

**1. Acts Closely Connected in Point of Time.** — *McCoy v. State*, 46 Ark. 141; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Augustine v. State*, (Tex. Crim. 1899) 52 S. W. Rep. 77; *Smith v. Com.*, 7 Gratt. (Va.) 593; *Winn v. State*, 82 Wis. 571.

A valid conviction of a defendant for an assault and battery upon one person is no bar to a prosecution for an assault and battery committed by the defendant upon another person, at the same time and place, during the continuance of a fight in which the defendant and others had engaged. *Greenwood v. State*, 64 Ind. 250; *Jones v. State*, 66 Miss. 380, 14 Am. St. Rep. 570. See also *State v. Nash*, 86 N. Car. 650, 41 Am. Rep. 472; *Ashton v. State*, 31 Tex. Crim. 482.

If in the same affray one shoots and kills one person and by a second shot wounds another, an acquittal on trial of the first offense is no defense to a prosecution for the second. *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17; *State v. Standifer*, 5 Port. (Ala.) 523.

**Burglary and Larceny.** — As to whether a prosecution for burglary under an indictment charging the burglary to have been committed by breaking and entering with intent to steal will bar a prosecution for the actual theft, or whether a prosecution for the larceny will bar a prosecution for the burglary, see the title **LARCENY**.

**2. Single Crime Cannot Be Prosecuted in Parts** — *United States*. — *U. S. v. Miner*, 11 Blatchf. (U. S.) 511, 26 Fed. Cas. No. 15,780.

*Alabama*. — *Hurst v. State*, 86 Ala. 604, 11 Am. St. Rep. 79; *Gunter v. State*, 111 Ala. 23, 56 Am. St. Rep. 17.

*California*. — *People v. Stephens*, 79 Cal. 428.

*Connecticut*. — *State v. Benham*, 7 Conn. 414.

*Indiana*. — *State v. Elder*, 65 Ind. 282, 32 Am. Rep. 69.

*Iowa*. — *State v. Eggesht*, 41 Iowa 574, 20 Am. Rep. 612.

*Kansas*. — *State v. Colgate*, 31 Kan. 511, 47 Am. Rep. 507.

*Kentucky*. — *Triplett v. Com.*, 84 Ky. 193.

*New York*. — *People v. Van Keuren*, (N. Y. Gen. Sess.) 5 Park. Crim. (N. Y.) 66.

*North Carolina*. — *State v. Fayetteville*, 2 Murph. (6 N. Car.) 371.

*Texas*. — *Wright v. State*, 17 Tex. App. 152.

*Vermont*. — *State v. Matthews*, 42 Vt. 542.

*Wisconsin*. — *Clifford v. State*, 29 Wis. 327.

**For Illustrations of These Rules in Connection with Larceny**, see the title **LARCENY** in this work.

**3. Continuing Offenses** — *United States*. — *In re Snow*, 120 U. S. 274, reversing 4 Utah 295, 313; *Nielsen, Petitioner*, 131 U. S. 176; *U. S. v. Burch*, 1 Cranch (C. C.) 36, 24 Fed. Cas. No. 14,683; *Dixon v. Washington*, 4 Cranch (C. C.) 114, 7 Fed. Cas. No. 3,935.

*Alabama*. — *Smith v. State*, 79 Ala. 257.

*Georgia*. — *McWilliams v. State*, (Ga. 1900) 34 S. E. Rep. 1016.

*Indiana*. — *Freeman v. State*, 119 Ind. 502.

*Michigan*. — *People v. Cox*, 107 Mich. 435, distinguishing *People v. Gault*, 104 Mich. 575.

*Vermont*. — *State v. Smith*, 22 Vt. 74; *State v. Nutt*, 28 Vt. 598.

See also *State v. Ingraham*, 96 Iowa 278.

**Sale of Intoxicating Liquors.** — As to whether a conviction or acquittal of being a "common seller" of intoxicating liquors will bar a prosecution for making a single sale, see the title **INTOXICATING LIQUORS**, *ante*, p. 379.

**4. Gaming House.** — *Dixon v. Washington*, 4 Cranch (C. C.) 114, 7 Fed. Cas. No. 3,935; *State v. Lindley*, 14 Ind. 430.

**5. Disorderly House.** — *U. S. v. Burch*, 1 Cranch (C. C.) 36, 24 Fed. Cas. No. 14,683; *People v. Cox*, 107 Mich. 435, distinguishing *People v. Gault*, 104 Mich. 575; *Huffman v. State*, 23 Tex. App. 491.

**6. House of Ill Fame.** — *Freeman v. State*, 119 Ind. 501. See also *State v. Judge*, 43 La. Ann. 1119.



institution of the first prosecution, where such keeping has been continuous and uninterrupted.

**A Conviction for Making a Sale on Sunday** in contravention of a statute prohibiting sales on that day is a bar to a subsequent prosecution for making other sales on the same day.<sup>1</sup>

**Desertion.** — A conviction of a husband for the desertion of his wife is a bar to a subsequent prosecution for the same continuous desertion.<sup>2</sup>

**Indictment Charging Commission of Offenses Between Specified Dates.** — A prosecution under an indictment charging the commission of a continuous offense between specified dates will bar a subsequent prosecution for the same offense, where the time of the commission of the offense as charged in the later indictment includes any part of the time between the dates specified in the first indictment.<sup>3</sup> But where the periods covered by the two indictments are entirely separate and distinct, a prosecution under one will not bar a prosecution under the other.<sup>4</sup>

**6. Jeopardy of a Codefendant.** — As a general rule the acquittal of one, jointly charged with another with the commission of a crime, is no bar to the prosecution of the other.<sup>5</sup> But the rule is otherwise where the co-operation of both, as well in the criminal intent as in the physical act, is essential to the commission of the crime.<sup>6</sup>

**7. One Act Constituting Distinct Crimes Against Different Sovereignities.** — When an act is a violation of the criminal law of two different governments, jeopardy or punishment under the law of one government will not bar a prosecution and punishment under the law of the other. In such case the one act creates two separate and distinct crimes. It follows that in the United States if the same act is a transgression of the laws of two states, or of a state and the United States, a trial in one jurisdiction for a violation of its law will not prevent a

1. **Making Sales on Sunday.** — *Crepps v. Durden*, 2 Cowp. 640; *People v. Cox*, 107 Mich. 439; *Com. v. Moses*, 3 Lack. Jur. (Pa.) 335, 15 Pa. Co. Ct. 224.

2. **Conviction for Desertion Bar to Subsequent Prosecution for Same Desertion.** — *State v. Dunston*, 78 N. Car. 418; *Com. v. Bowman*, 6 Kulp (Pa.) 176; *Com. v. Cawley*, 7 Kulp (Pa.) 539; *Com. v. Markley*, 17 Pa. Co. Ct. 254, 5 Pa. Dist. 134. But see *People v. Hodgson*, 126 N. Y. 647, 37 N. Y. St. Rep. 132.

3. **Where the Periods Are Coincident or Lap.** — *State v. Brownrigg*, 87 Me. 502; *Com. v. Robinson*, 126 Mass. 259, 30 Am. Rep. 674; *Com. v. Dunster*, 145 Mass. 101; *Com. v. Goulet*, 160 Mass. 276; *Com. v. Cunningham*, (Mass. 1887) 13 N. E. Rep. 352; *Fleming v. State*, 28 Tex. App. 234.

4. **Where the Periods Are Entirely Separate.** — *Com. v. Keefe*, 7 Gray (Mass.) 332; *Com. v. Cain*, 14 Gray (Mass.) 9; *Com. v. Connors*, 116 Mass. 35; *Gornley v. State*, 37 Ohio St. 120; *Fleming v. State*, 28 Tex. App. 234. See also *Rex v. Taylor*, 5 Dowl. & R. 422, 3 B. & C. 502, 10 E. C. L. 166, 3 L. J. K. B. 68; *Com. v. Respass*, (Ky. 1899) 50 S. W. Rep. 549.

5. **Jeopardy of Codefendant — Rule Stated.** — *State v. McClintock*, 1 Greene (Iowa) 392; *State v. Orr*, 64 Mo. 343; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207; *Ledbetter v. State*, 21 Tex. App. 344; *Goforth v. State*, 22 Tex. App. 405. See also *Williams v. Com.*, 85 Va. 607.

6. *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *Delany v. People*, 10 Mich. 241.

One prosecuted for adultery, *Alonzo v. State*,

15 Tex. App. 378, 49 Am. Rep. 207; or fornication, *Ledbetter v. State*, 21 Tex. App. 344; *State v. Caldwell*, 8 Baxt. (Tenn.) 576, cannot plead in bar the former acquittal of his codefendant. See also the title FORNICATION, vol. 13, p. 1127.

But in a prosecution for incest under a statute which makes it essential to the existence of the crime that both parties shall have knowledge of the relationship existing between them, it has been held that the acquittal of one may be pleaded in bar to a prosecution against the other. *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691. See also *Delany v. People*, 10 Mich. 241.

**Conviction of Codefendant of a Lesser Crime.** — The conviction of one of two persons, jointly indicted for murder in the first degree, of murder in the second degree, will not bar the trial of the other for murder in the first degree. *State v. Lee*, 91 Iowa 499.

**Acquittal of Joint Offense No Bar to a Several Prosecution.** — A judgment acquitting several defendants, charged with committing an offense jointly, will not bar prosecution against each one charged with part of the same offense separately committed by him. *Com. v. McChord*, 2 Dana (Ky.) 243. But see *Rex v. Daun*, 1 Moody 424; *McGehee v. State*, 58 Ala. 360.

**Trial of Plea of Former Jeopardy Set Up by One Codefendant.** — Where two are indicted for an affray, and one pleads former jeopardy, which plea is tried before the plea of not guilty, the other defendant has never been in jeopardy, and may be tried for the offense. *State v. Weaver*, 93 N. Car. 595.



prosecution in the other jurisdiction for the act regarded as a violation of the law of the latter.<sup>1</sup>

**8. One Act Violating Both a State Law and a Municipal Ordinance.** — So it is the almost universally accepted doctrine that where an act violates both a municipal ordinance and a state law a prosecution under one will not bar a prosecution under the other.<sup>2</sup>

**9. One Act Violating Both a Military and a General Law.** — An act criminal both by military and general law is subject to be tried either by a military or civil court, and a conviction or acquittal in the one court cannot be pleaded as a bar to a prosecution in the other.<sup>3</sup>

**VIII. WAIVER OF OBJECTION TO A SECOND JEOPARDY** — **1. In General.** — The right to object to a second jeopardy may be waived. Such waiver need not be express, and in fact is generally implied.<sup>4</sup>

**2. Motion to Quash Indictment.** — Waiver of the right to plead former jeopardy will be implied where the defendant after jeopardy has attached moves to quash or dismiss the indictment; and when upon such motion the indictment is quashed, the defendant may be prosecuted anew, and this whether the indictment was good or bad.<sup>5</sup>

**3. Acquittal Directed at Defendant's Request for Defect in Indictment.** — So where a verdict of acquittal is directed at the request of the defendant, upon the ground that the indictment is fatally defective, the defendant cannot on again being prosecuted claim that the former indictment was in fact good and that he has been in jeopardy under it.<sup>6</sup>

**4. Withdrawal of Plea of Guilty.** — The withdrawal of a plea of guilty, after jeopardy has attached, is a waiver of the right to object to another prosecution for the same offense.<sup>7</sup>

**5. Discharge of Jury with Defendant's Consent.** — If during the trial the jury is discharged with the defendant's consent, he waives by consenting the right to object to being tried anew.<sup>8</sup>

**6. Failure to Have Defective Verdict Perfected.** — Where a verdict is so defective that no judgment can be entered upon it, the defendant, who might have had it perfected when rendered, is considered as consenting to it, and as

**1. One Act Violating the Laws of Two Governments.** — *Moore v. Illinois*, 14 How. (U. S.) 13; *Marshall v. State*, 6 Neb. 120, 29 Am. Rep. 363. For a full treatment of this subject see the title *PRIVATE INTERNATIONAL LAW*.

**2. State v. Fourcade**, 45 La. Ann. 717, 40 Am. St. Rep. 249. On this subject see the title *ORDINANCES*.

**3. Act Criminal Both by Military and General Law.** — *Steiner's Case*, 6 Op. Atty.-Gen. 413; *U. S. v. Cashiel*, 1 Hughes (U. S.) 552, 25 Fed. Cas. No. 14,744; *U. S. v. Clark*, 31 Fed. Rep. 710; *In re Fair*, 100 Fed. Rep. 149; *State v. Rankin*, 4 Coldw. (Tenn.) 145.

**4. Consent to Try Before Inferior Court — Act Regulating Such Trials Binding.** — Where the defendant accused of assault and battery waives indictment by a grand jury, and elects trial by a jury in a court having jurisdiction of misdemeanors only, he does so subject to the provisions of the act which gives him these rights, and if the judge in accordance with the said act, in the midst of the trial, being persuaded that the crime is assault with intent to murder, stops the trial and binds him over to answer before a higher court having jurisdiction of felonies, he cannot before such higher court plead former jeopardy, even though he protested against the action of the lower court in stopping the trial. *Cunningham v. State*,

80 Ga. 4. See also *Bell v. State*, 103 Ga. 397. And see the title *JURY AND JURY TRIAL*, *post* XI. 4. *Effect of Consent*.

**5. Waiver Implied from Motion to Quash Indictment.** — *Joy v. State*, 14 Ind. 139; *Von Rueden v. State*, 96 Wis. 671. See also *Grand Rapids v. Braudy*, 105 Mich. 670, 55 Am. St. Rep. 472. But see *People v. Taylor*, 117 Mich. 583.

**Quashal After Overruling the Defendant's Demurrer** has been held to amount to a waiver. *Brown v. State*, 109 Ga. 570.

**6. Acquittal Directed at Defendant's Request.** — *State v. Meekins*, 41 La. Ann. 543; *People v. Meakim*, 61 Hun (N. Y.) 327, *affirmed* 131 N. Y. 667; *People v. Meakim*, (Supm. Ct. Gen. T.) 8 N. Y. Crim. 308, *affirmed* 133 N. Y. 214, 8 N. Y. Crim. 404.

**7. Waiver by Withdrawal of Plea of Guilty.** — The withdrawal of the plea has precisely the effect of moving to set aside a verdict of guilty and for a new trial, where there had been a trial and verdict of guilty. *Harbin v. State*, 133 Ind. 698; *Ledgerwood v. State*, 134 Ind. 81. See also *People v. Cignarale*, 110 N. Y. 23.

**8. Upon this subject see the title JURY AND JURY TRIAL**, XI. 4. *Effect of Consent*. See also the same title, XI. 2. *d. Absence of Defendant*, upon the question of the legal effect of the defendant's absenting himself from court when the verdict is rendered.



waiving any objections to being again put on trial.<sup>1</sup>

7. **Waiver After Verdict** — *a.* IN GENERAL. — If on the defendant's motion the verdict is set aside, the judgment arrested or vacated, or a new trial granted, or on his appeal the judgment is reversed, a waiver of objection to being again put in jeopardy will be implied, and he may as a rule be tried anew,<sup>2</sup> and this is so though the defendant at the time of the reversal has

1. **Waiver Implied from Failure to Have Defective Verdict Perfected.** — *Carpenter v. State*, 62 Ark. 286; *Allen v. State*, 26 Ark. 333; *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; *Fitts v. State*, 102 Tenn. 141; *State v. Ragsdale*, 10 Lea (Tenn.) 671; *Murphy v. State*, 7 Coldw. (Tenn.) 516.

And see the following cases apparently holding that in such case an actual jeopardy does not exist. *Lovett v. State*, 33 Fla. 389; *State v. Redman*, 17 Iowa 335; *State v. Ritchie*, 3 La. Ann. 715; *Alston v. State*, 41 Tex. 39; *Com. v. Hatton*, 3 Gratt. (Va.) 593; *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

2. **When a Waiver Will Be Implied After Verdict** — *United States*. — *Ex p. Lange*, 18 Wall. (U. S.) 163; *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *McElvaine v. Brush*, 142 U. S. 155; *U. S. v. Ball*, 163 U. S. 672; *Murphy v. Massachusetts*, 177 U. S. 155, *affirming* 174 Mass. 369; *U. S. v. Jones*, 31 Fed. Rep. 725; *U. S. v. Keen*, 1 McLean (U. S.) 435; *U. S. v. Harding*, 1 Wall. Jr. (C. C.) 127, 26 Fed. Cas. No. 15,301. See also *U. S. v. Woodruff*, 68 Fed. Rep. 536.

*Alabama*. — *Kendall v. State*, 65 Ala. 492; *Cobia v. State*, 16 Ala. 781; *Gunter v. State*, 83 Ala. 96; *Waller v. State*, 40 Ala. 325; *Morrisette v. State*, 77 Ala. 71; *State v. Hughes*, 2 Ala. 102, 36 Am. Dec. 411; *May v. State*, 55 Ala. 164; *Turner v. State*, 40 Ala. 21; *Dover v. State*, 75 Ala. 40; *State v. Slack*, 6 Ala. 676; *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40; *State v. Abram*, 4 Ala. 272; *Jeffries v. State*, 40 Ala. 381; *State v. Phil*, 1 Stew. (Ala.) 31.

*Arizona*. — *Territory v. Dorman*, 1 Ariz. 56. *Arkansas*. — *Stewart v. State*, 13 Ark. 720; *Carpenter v. State*, 62 Ark. 286; *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154; *State v. Clark*, 32 Ark. 231.

*California*. — *People v. Bannister*, (Cal. 1893) 34 Pac. Rep. 710; *People v. Travers*, 73 Cal. 580; *People v. Lee Yune Chong*, 94 Cal. 379; *People v. March*, 6 Cal. 543; *People v. Barric*, 49 Cal. 342; *People v. Hradisson*, 61 Cal. 378; *People v. Travers*, 77 Cal. 176; *People v. Webb*, 38 Cal. 467; *People v. Ammerman*, 118 Cal. 26; *People v. Helbing*, 61 Cal. 620; *People v. Schmidt*, 64 Cal. 260; *People v. Wickham*, 116 Cal. 384. See also *Ex p. Hartman*, 44 Cal. 32.

*Florida*. — *Gibson v. State*, 26 Fla. 109; *Green v. State*, 17 Fla. 669.

*Georgia*. — *McGee v. State*, 97 Ga. 360; *Small v. State*, 63 Ga. 386. See also *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281.

*Illinois*. — *Phillips v. People*, 88 Ill. 160; *Gerard v. People*, 4 Ill. 362; *Lane v. People*, 10 Ill. 305; *Hudson v. People*, 29 Ill. App. 454; *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147; *Logg v. People*, 8 Ill. App. 103; *Bedee v. People*, 73 Ill. 320.

*Indiana*. — *Joy v. State*, 14 Ind. 152; *Patterson v. State*, 70 Ind. 341; *Veatch v. State*, 60 Ind. 291; *Ex p. Bradley*, 48 Ind. 548; *Sanders v. State*, 85 Ind. 332; *Weinzorpfen v. State*, 7

*Blackf. (Ind.)* 186; *State v. Arnold*, 144 Ind. 659, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 960, 961.

*Indian Territory*. — *Brown v. U. S.*, (Indian Ter. 1899) 52 S. W. Rep. 56.

*Iowa*. — *State v. Severson*, 79 Iowa 750; *State v. Knouse*, 33 Iowa 365; *State v. Tatman*, 59 Iowa 471; *State v. Clark*, 69 Iowa 196.

*Kansas*. — *State v. McNaught*, 36 Kan. 624; *State v. Terres*, 56 Kan. 126; *State v. Hart*, 33 Kan. 218.

*Kentucky*. — *Com. v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114; *Haskins v. Com.*, (Ky. 1886) 1 S. W. Rep. 730; *Wells v. Com.*, (Ky. 1887) 6 S. W. Rep. 150.

*Louisiana*. — *State v. Hornsby*, 8 Rob. (La.) 583, 41 Am. Dec. 314; *State v. Oliver*, 39 La. Ann. 470; *State v. Owens*, 28 La. Ann. 5; *State v. Byrd*, 31 La. Ann. 419; *State v. Victor*, 36 La. Ann. 978; *State v. St. Clair*, 42 La. Ann. 755; *State v. Benjamin*, (La. 1893) 14 So. Rep. 71.

*Maryland*. — *Cochrane v. State*, 6 Md. 400.

*Massachusetts*. — *Com. v. Green*, 17 Mass. 515.

*Michigan*. — *People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294.

*Minnesota*. — *State v. Brecht*, 41 Minn. 50.

*Mississippi*. — *Morris v. State*, 8 Smed. & M. (Miss.) 762.

*Missouri*. — *State v. Kattlemann*, 35 Mo. 105; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Gannon*, 11 Mo. App. 502.

*Montana*. — *State v. Thompson*, 10 Mont. 549.

*Nebraska*. — *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617.

*New Hampshire*. — *State v. Blaisdell*, 59 N. H. 328; *State v. Sherburne*, 58 N. H. 535.

*New Jersey*. — *Smith v. State*, 41 N. J. L. 598.

*New York*. — *People v. Dowling*, 84 N. Y. 478; *Guenther v. People*, 24 N. Y. 100; *People v. M'Kay*, 18 Johns. (N. Y.) 212; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; *People v. Casborus*, 13 Johns. (N. Y.) 351; *People v. Ruloff*, (Supm. Ct. Spec. T.) 5 Park. Crim. (N. Y.) 77; *People v. Cignarale*, 110 N. Y. 31; *People v. Trezza*, 128 N. Y. 529.

*North Carolina*. — *State v. Rhodes*, 112 N. Car. 857; *State v. Lee*, 114 N. Car. 844.

*Ohio*. — *Lesslie v. State*, 18 Ohio St. 391; *Jarvis v. State*, 19 Ohio St. 585; *Sutcliffe v. State*, 18 Ohio St. 469, 51 Am. Dec. 459.

*Pennsylvania*. — *State v. Huffman*, Add. (Pa.) 140.

*South Carolina*. — *State v. Stephens*, 13 S. Car. 285; *State v. Cross Roads Com'rs*, 3 Hill L. (S. Car.) 239; *Riley L. (S. Car.)* 273.

*South Dakota*. — *State v. Reddington*, 8 S. Dak. 315.

*Tennessee*. — *Esmon v. State*, 1 Swan (Tenn.) 14; *Major v. State*, 4 Sneed (Tenn.) 597; *Campbell v. State*, 9 Verg. (Tenn.) 333, 30 Am. Dec. 417; *State v. Thurston*, 3 Heisk. (Tenn.) 67.

*Texas*. — *Maines v. State*, 37 Tex. Crim. 617,



served out a part of his sentence.<sup>1</sup>

But Where the Court on Its Own Motion sets aside a valid verdict, rendered by a jury regularly obtained and impaneled, upon a sufficient indictment, the defendant will be protected from a subsequent prosecution for the same offense.<sup>2</sup>

A Motion to Correct an Invalid Judgment is tantamount to a motion to set it aside and is a waiver of objection to another jeopardy.<sup>3</sup>

English Rule. — But in England in cases of felony a new trial will not be granted on the defendant's motion after a verdict of conviction, on a valid indictment, delivered by a competent jury before a competent tribunal in due form of law. Where a conviction takes place upon insufficient evidence or because of a misdirection of the judge at the trial, the common practice is to respite the sentence to enable the defendant to apply for a pardon.<sup>4</sup> But after a conviction on a trial for misdemeanor a new trial may be granted on the defendant's motion for any error of the judge at the trial, or because the jury has found the defendant guilty contrary to the evidence.<sup>5</sup>

*b. EFFECT OF ARREST OF JUDGMENT* — (1) *In Jurisdictions Where the Judgment of Arrest May Be Reversed.* — Where a conviction is had under a valid indictment, but the court, under the erroneous belief that it is not good, on the defendant's motion arrests judgment, the defendant cannot be prosecuted anew in a state where the judgment of arrest may be reversed on the motion of the prosecutor, because the defendant is still in jeopardy under the

citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 960, and notes; *Simco v. State*, 9 Tex. App. 338; *Thompson v. State*, 9 Tex. App. 649; *Sterling v. State*, 25 Tex. App. 716, 8 Am. St. Rep. 452; *Dubose v. State*, 13 Tex. App. 418; *Lewis v. State*, 1 Tex. App. 323; *Robinson v. State*, 23 Tex. App. 315.

*Virginia.* — *Com. v. Hatton*, 3 Gratt. (Va.) 593; *Stuart v. Com.*, 23 Gratt. (Va.) 966; *Lithgow v. Com.*, 2 Va. Cas. 297; *Jones v. Com.*, 20 Gratt. (Va.) 848; *Briggs v. Com.*, 82 Va. 554; *Benton v. Com.*, 91 Va. 782.

*Washington.* — *State v. Freidrich*, 4 Wash. 204.

*West Virginia.* — *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791.

*Wisconsin.* — *State v. Hill*, 30 Wis. 416; *In re Keenan*, 7 Wis. 695.

In Mississippi, where the defendant was indicted in one indictment for the murder of G., and in another for the murder of W., and was arraigned and put on trial upon the first indictment, but by accident during the trial the second indictment supplanted the first, was taken out by the jury, and on it they brought in a verdict of guilty, so that while the arraignment and earlier entries of the trial were on the indictment for the murder of G., the judgment and later entries were on the one for the murder of W., it was held, the conviction having been set aside on the defendant's appeal and both indictments quashed, that the defendant had been legally acquitted of the murder of G., and could not again be placed on trial therefor on a new indictment found. *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708.

Under the California Penal Code, § 1188, an arrest of judgment operates as an acquittal only when no evidence has been shown sufficient to charge the defendant with any offense. *People v. Eppinger*, 109 Cal. 294.

Appeal from Magistrate's Courts. — It has been

held that a defendant by appealing from a conviction before a magistrate to the Superior Court vacates the decision and sentence of the magistrate and cannot plead it in bar to a trial in the Superior Court. *State v. Curtis*, 29 Kan. 384; *Com. v. Downing*, 150 Mass. 197.

Pendency of Appeal. — Where judgment has been delivered the mere pendency of an appeal will not deprive the defendant of the protection of such judgment as a bar to another prosecution. *U. S. v. Olsen*, 57 Fed. Rep. 580. But see *U. S. v. Martin*, 28 Fed. Rep. 812.

1. Waiver Not Affected by Partial Service of Sentence. — *Murphy v. Massachusetts*, 177 U. S. 155, affirming 174 Mass. 369; *Jeffries v. State*, 40 Ala. 381; *Cochrane v. State*, 6 Md. 400; *State v. Watson*, 20 R. I. 354. See also *People v. Trezza*, 128 N. Y. 529; *McElvaine v. Brush*, 142 U. S. 155.

2. Court Acting of Its Own Motion. — *Ex p. Snyder*, 29 Mo. App. 256; *State v. Snyder*, 98 Mo. 555.

3. Motion to Correct. — *Sterling v. State*, 25 Tex. App. 716, 8 Am. St. Rep. 452.

4. English Rule in Cases of Felony. — *Rex v. Mawbey*, 6 T. R. 619; *Reg. v. Frost*, 2 Moody 140; *Reg. v. Bertram*, L. R. 1 P. C. 520 (not following *Reg. v. Scaife*, 2 Den. C. C. 281, 17 Q. B. 238, 79 E. C. L. 238); *Reg. v. Murphy*, L. R. 2 P. C. 535; *U. S. v. Gibert*, 2 Sumn. (U. S.) 46; *Stewart v. State*, 13 Ark. 747; *State v. Hornsby*, 8 Rob. (La.) 586, 41 Am. Dec. 314.

5. English Rule in Cases of Misdemeanor. — *Rex v. Mawbey*, 6 T. R. 638; *Rex v. Read*, 1 Lev. 9.

American Cases Following the English Rule. — Although the American cases are now practically unanimous in supporting the general rule stated in the text, there are two early cases which followed the English rule in regard to felonies. *U. S. v. Gibert*, 2 Sumn. (U. S.) 57; *People v. Comstock*, 8 Wend. (N. Y.) 549.



first indictment, which is liable to be revived by the reversal of the judgment of arrest.<sup>1</sup>

(2) *In Jurisdictions Where the Judgment Cannot Be Reversed.* — But in those jurisdictions where the prosecutor cannot obtain a reversal of the judgment of arrest, the defendant may be indicted and tried anew though the first indictment was good.<sup>2</sup>

c. LIMITATION OF THE WAIVER — (1) *In General.* — An application for a new trial is only a waiver of objection to a second jeopardy to the extent that relief is sought.<sup>3</sup>

(2) *Where Verdict Acquits in Part and Convicts in Part* — Conviction under Some Counts and Acquittal under Others. — Thus where an indictment contains several counts charging different offenses, and the defendant is acquitted under some counts and convicted under others, and a new trial is granted on his application, he cannot be again put on trial for the offenses charged in the counts on which an acquittal was had.<sup>4</sup>

Conviction and Acquittal of Offenses in the Same Count. — So where, under a statute permitting it, a person is charged in the same count with two separate offenses, and is convicted of one and acquitted of the other, he cannot, upon a new trial, upon the same indictment, be convicted of the crime of which he had been acquitted.<sup>5</sup>

And Where a Defendant Indicted for the Larceny of Several Articles is convicted as to a part of the articles and acquitted as to others, he cannot, on a new trial being granted on his application, be tried again for the larceny of the articles he was acquitted of stealing.<sup>6</sup>

(3) *Where Verdict Is Silent as to Part of Offenses Charged.* — A verdict which finds the defendant guilty as to some of the offenses charged in the indictment and is silent as to others has generally been held to constitute an acquittal of the offenses as to which it is silent; consequently, on a new trial being granted, the defendant cannot be put on trial for the offenses as to which the verdict was silent;<sup>7</sup> so it has generally been held that on a new trial being

1. Effect of Arrest in Jurisdictions Where the Judgment of Arrest May Be Reversed. — *State v. Norvell*, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458. See also *People v. Meakim*, 61 Hun (N. Y.) 327, affirmed 131 N. Y. 667.

2. Effect of Arrest in Jurisdictions Where the Judgment Cannot Be Reversed. — *Gibson v. State*, 26 Fla. 109; *Gerard v. People*, 4 Ill. 362; *Joy v. State*, 14 Ind. 148; *People v. Casborus*, 13 Johns. (N. Y.) 351. See also *People v. Meakim*, 61 Hun (N. Y.) 327, affirmed 131 N. Y. 667.

3. *People v. Dowling*, 84 N. Y. 484.

4. Conviction on Some Counts and Acquittal on Others. — *People v. Dowling*, 84 N. Y. 484; *Campbell v. State*, 9 Yerg. (Tenn.) 333, 30 Am. Dec. 417; *Lithgow v. Com.*, 2 Va. Cas. 297; *Stuart v. Com.*, 28 Gratt. (Va.) 950. But see *Briggs v. Com.*, 82 Va. 554; *Benton v. Com.*, 91 Va. 782.

5. Same Offense Charged in Several Counts. — But where an indictment is for but one offense, though charged in several counts in different ways, and the defendant is convicted upon some of the counts and acquitted upon others, the granting of a new trial upon his motion opens the case for retrial upon the counts on which he was acquitted as well as those on which he was convicted. *Brown v. U. S.*, (Indian Ter. 1899) 52 S. W. Rep. 56; *Lesslie v. State*, 18 Ohio St. 391; *Jarvis v. State*, 19 Ohio St. 585.

6. *State v. Bruffey*, 75 Mo. 389.

7. *State v. Clark*, 32 Ark. 231.

7. Guilty of Some Offenses and Silent as to Residue — *Alabama*. — *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40; *May v. State*, 55 Ala. 164.

*Florida*. — *Green v. State*, 17 Fla. 669.

*Illinois*. — *Logg v. People*, 8 Ill. App. 99.

*Indiana*. — *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186.

*Indian Territory*. — *Brown v. U. S.*, (Indian Ter. 1899) 52 S. W. Rep. 56.

*Iowa*. — *State v. Severson*, 79 Iowa 750.

*Kansas*. — *State v. McNaught*, 36 Kan. 624.

*Mississippi*. — *Morris v. State*, 8 Smed. & M. (Miss.) 762.

*Missouri*. — *State v. Gannon*, 11 Mo. App. 502; *State v. Kattlemann*, 35 Mo. 105.

*New York*. — *People v. Dowling*, 84 N. Y. 478; *Guenther v. People*, 24 N. Y. 100; *People v. Cignarale*, 110 N. Y. 31.

*Virginia*. — *Stuart v. Com.*, 28 Gratt. (Va.) 950.

*Wisconsin*. — *State v. Hill*, 30 Wis. 416.

But in Maryland it has been held that a verdict which finds the defendant guilty on one of two counts, with no finding as to the other, is a nullity, and does not put the defendant in jeopardy. *State v. Sutton*, 4 Gill (Md.) 494.

In South Carolina it has been held that a defendant who obtains a new trial waives objection to a second jeopardy as to all the offenses charged in the indictment on which the first trial was had, and therefore may be tried for



granted a defendant, he cannot be again tried for a higher grade of the same offense of which he was convicted on the first trial.<sup>1</sup>

**JET.** — See note 2.

**JETSAM.** (See also the titles JETTISON, *post*, p. 610; WRECK.) — Goods cast on the sea to lighten the ship, and which sink and remain under water.<sup>3</sup>

those offenses as to which the verdict in the first trial was silent, as well as for those as to which he was found guilty. *State v. Cross Roads Com'rs*, 3 Hill L. (S. Car.) 239, Riley L. (S. Car.) 273.

**Where Several Counts State the Same Offense.** — When the different counts of an indictment are simply formal variations in stating the same offense, then the granting of a new trial opens the whole case, and the defendant may be put upon his trial and convicted on any of the counts. *Brown v. U. S.*, (Indian Ter. 1899) 52 S. W. Rep. 56.

1. *State v. Hornsby*, 8 Rob. (La.) 584, 41 Am. Dec. 314; *People v. Cignarale*, 110 N. Y. 31; *Stuart v. Com.*, 28 Gratt. (Va.) 950.

**In Indiana and Kentucky** it has been held that the legislature has the right to prescribe the terms upon which one who has been convicted of crime may have a new trial, and therefore that a statute which provides that "the granting of a new trial places the parties in the same position as if no trial had been had" is not unconstitutional, and under it one who upon an indictment for murder in the first degree has been convicted of murder in the second degree, or manslaughter, may, on having a new trial granted him, be again tried for murder in the first degree. *Ex p. Bradley*, 48 Ind. 548; *Veatch v. State*, 60 Ind. 291; *Patterson v. State*, 70 Ind. 341; *Com. v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114.

**In Virginia**, on reversal on the defendant's

appeal, he may be tried for any offense charged in the indictment, for which the punishment is no severer than for the offense of which he was found guilty on the first trial; and where a person charged in the same court with two offenses, each subject to the same penalty, was convicted as to one, the verdict being silent as to the other, on a new trial awarded he was held liable to conviction of either of the offenses charged. *Benton v. Com.*, 91 Va. 782. Compare *Briggs v. Com.*, 82 Va. 554.

2. **Jet — Revenue Laws.** (See also the title REVENUE LAWS.) — A United States statute imposed a certain rate of tariff upon "manufactures of *jet*." It was held that the term "manufactures of *jet*," as thus used, did not include beads and trimmings called *jet* millinery, but made of glass, although there was evidence that the black glass, before it was manufactured into ornaments, was called *jet*. *Goldberg v. U. S.*, 61 Fed. Rep. 92.

3. 1 Black. Com. 292; *Legge v. Boyd*, 1 C. B. 93, 50 E. C. L. 93.

**Jetsam.** (See also FLOTSAM, vol. 13, p. 724.) — In *The Cargo ex Schiller*, 2 P. D. 148, it was said: "Flotsam is when a ship is sunk or otherwise perished, and the goods float on the sea. *Jetsam* is when a ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish." See also *Constable's Case*, 5 Coke 106; *The Gas Float Whitton No. 2*, (1896) P. 51.



# JETTISON.

- I. DEFINITION, 610.
- II. WHO MAY JETTISON, 610.
- III. WHEN JUSTIFIABLE, 611.
- IV. GENERAL-AVERAGE ADJUSTMENT, 611.
- V. JETTISON RENDERED NECESSARY THROUGH NEGLIGENCE OF MASTER, 613.
- VI. INSURER'S LIABILITY FOR GOODS JETTISONED, 613.
- VII. TITLE TO PROPERTY NOT LOST BY JETTISON, 613.

## CROSS-REFERENCES.

*For a full treatment of the subject in its connection with general average, see the title GENERAL AVERAGE, vol. 14, p. 952.*

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE), vol. 1, p. 4; BARRATRY, vol. 3, p. 859; CARRIERS OF GOODS, vol. 5, p. 154; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 156; MARINE INSURANCE; MASTERS OF VESSELS.*

**I. DEFINITION.** — Jettison is "the throwing overboard a part of the cargo, or any article on board of a ship, or the cutting and casting away of masts, spars, rigging, sails, or other furniture, for the purpose of lightening or relieving the ship in case of necessity or emergency."<sup>1</sup> It also signifies the thing or things so cast away.<sup>2</sup> In its largest sense jettison signifies any throwing overboard, but in its ordinary sense it means a throwing overboard for the preservation of the ship and cargo.<sup>3</sup>

**II. WHO MAY JETTISON — Master.** — The relation which the master of the vessel bears to the shippers and the passengers is such that he is clothed with power to determine whether a jettison is necessary<sup>4</sup> and the order in which the goods should be jettisoned. Generally he should and does decide that the heaviest and least valuable articles should be jettisoned first.<sup>5</sup>

**Consultation Not Necessary.** — The legal responsibility for the necessity of a jettison resting thus on the master, it is unnecessary that he consult the members of the crew before ordering the jettison;<sup>6</sup> though on account of the custom to

1. Definition. — Phillips on Insurance (5th ed.), § 1278. See also *The Enrique*, 7 Fed. Rep. 490.

Derivation. — The word "jettison" is derived from the French word *jetter*, to throw out, which in turn was probably taken from the Latin *jactus*. Burr. L. Dict.

2. Bouv. L. Dict.

3. Abbott, C. J., in *Butler v. Wildman*, 3 B. & Ald. 398, 5 E. C. L. 324. See also *Hallett v. Wigram*, 9 C. B. 580, 67 E. C. L. 580.

4. Master Decides on Necessity of Jettison. — *The Gratitude*, 3 C. Rob. 240; *Ralli v. Troop*, 157 U. S. 386; *Dupont de Nemours v. Vance*, 19 How. (U. S.) 162; *Patten v. Darling*, 1 Cliff. (U. S.) 254. See also the titles GENERAL AVERAGE, vol. 14, p. 960; MASTERS OF VESSELS.

In the vast majority of cases cited throughout this article the jettison was done by the direction of the master.

**The Crew Is Not Authorized to Make a Jettison,** in case of distress, of any part of the cargo, without the order of the master. *The Nimrod*, 1 Ware (U. S.) 9.

5. Heaviest and Least Valuable Articles Jettisoned First. — *The Gratitude*, 3 C. Rob. 240; *Slater v. Hayward Rubber Co.*, 26 Conn. 128.

6. Consultation. — *Ralli v. Troop*, 157 U. S. 386.

**Custom Founded on Precedent, Not on Necessity.** — In *Birkley v. Presgrave*, 1 East 220, Lord Kenyon, C. J., said that "the rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence in order to avoid dispute than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation." For instances where a consultation was held, see *Lawrence v. Minturn*, 17 How. (U. S.) 100; *The Nimrod*,



hold a consultation under circumstances where quick action is not demanded, some of the early writers seem to have been of the opinion that a consultation was requisite, and some of the older codes make consultation a necessary prerequisite.<sup>1</sup>

Passengers, it would appear, may sometimes jettison.<sup>2</sup>

**III. WHEN JUSTIFIABLE — To Save Life.** — It seems that a jettison merely for the purpose of saving life in a case of necessity is justified in the sense that the owner of the goods jettisoned cannot recover against the owner of the ship unless the ship was overloaded,<sup>3</sup> but that the shipper is not entitled to contribution from the other interests.<sup>4</sup>

**For Benefit of Ship and Cargo.** — Where goods are jettisoned or a part of the ship's furniture is cast away in time of peril for the common safety of the adventure, the jettison is a general average act, for which the associated interests contribute.<sup>5</sup>

Where the Property Jettisoned Is Valueless or Doomed to Destruction from Its Own Condition it is not a subject of general average.<sup>6</sup> In such cases the shipper cannot recover from the shipowner as carrier,<sup>7</sup> unless the carrier's own act, as by improper stowage, has brought about the necessity.<sup>8</sup>

**IV. GENERAL-AVERAGE ADJUSTMENT.** — Jettison is said to form the earliest and simplest instance of a general-average act. The requisites for a general average are treated elsewhere in this work.<sup>9</sup>

**Contribution for Deck Cargo.** — If goods carried on deck without the consent of

1 Ware (U. S.) 9; Patten v. Darling, 1 Cliff. (U. S.) 266; Bentley v. Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

But the master is not bound by the vote of a majority even in case he holds a consultation. The Nimrod, 1 Ware (U. S.) 9.

1. "In former times, when merchants voyaged with their wares, their consent was held necessary to a jettison; and the captain was also required to consult with his officers, or with some of his crew, then, perhaps, more nearly his equals than in later times. But even then the final decision rested with the captain." Gray, J., in Ralli v. Troop, 157 U. S. 399. For the old laws, see Laws of Oleron, arts. 8, 9; Laws of Wisbuy, arts. 20, 21, 38; Marine Ordinance of Louis XIV., title 8, §§ 1-3.

2. **Passengers May Jettison.** — From an old English case it seems that under certain circumstances a passenger may make a jettison upon a sudden storm arising, and that when a passenger in a ferryboat or barge has made such a jettison the owner of the goods can recover nothing against the ferryman or barge-man, the loss having happened through the act of God and for the safety of the lives of men. But if the jettison was rendered necessary because the ferryman overloaded the barge, the owner may hold him liable. The loss in the first case is likened to the pulling down a house (see the title DAMNUM ABSQUE INJURIA, vol. 8, p. 698, note 2), to prevent the spread of fire. Mouse's Case, 12 Coke 63. See also Le Case de Gravesend Barge, 1 Rolle 79; and the same case stated by Coke in Bird v. Astcock, 2 Bulst. 280.

3. **Jettison to Save Life.** — See Mouse's Case, 12 Coke 63, set out in last note *supra*.

4. In Abbott on Shipping (5th Am. ed., Story and Perkins's notes), p. 589, the American annotator says, that in Whitteridge v. Norris, 6 Mass. 125, a point in the case was whether the jettison could be considered to be

done exclusively for the preservation of the lives of the crew. "That, however," it was said, "seems to resolve itself rather into a question of fact, than of law. The jettison was doubtless to preserve the lives of the crew; and so in all cases it is, where the ship is in danger of foundering. But if it does also necessarily conduce to the preservation of the cargo, does this not furnish a case for contribution, although that was not the primary object of the parties?" This passage suggests why the question has not more often arisen. Persons whose lives are saved by jettison do not contribute; see the title GENERAL AVERAGE, vol. 14, p. 988.

In Dabney v. New England Mut. Marine Ins. Co., 14 Allen (Mass.) 300, it was held that there could be no recovery in general average for cargo jettisoned from a ship in no immediate danger, where the sole purpose of the jettison was to enable the ship to take on passengers and crew from a vessel in distress.

5. See the title GENERAL AVERAGE, vol. 14, p. 952, *passim*.

6. **Property Doomed to Destruction.** — See the title GENERAL AVERAGE, vol. 14, p. 964.

7. See the titles CARRIERS OF GOODS, vol. 5, p. 242; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 203.

8. See the titles CARRIERS OF GOODS, vol. 5, p. 366; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, pp. 204, 223.

9. **As Basis of General Average.** — See the title GENERAL AVERAGE, vol. 14, p. 952, and especially p. 967. See also Hallett v. Bousfield, 18 Ves. Jr. 187, 11 Rev. Rep. 184; Cameron v. Domville, 17 N. Bruns. 647; The Margarethe Blanca, 12 Fed. Rep. 728; The Allianca, 64 Fed. Rep. 871; Gillett v. Ellis, 11 Ill. 579; Tudor v. Macomber, 14 Pick. (Mass.) 34; Rossiter v. Chester, 1 Dougl. (Mich.) 154; Saltus v. Ocean Ins. Co., 14 Johns (N. Y.) 138; Magrath v. Church, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173.



the shipper are jettisoned, there can, subject to the exceptions given below, be no contribution in general average,<sup>1</sup> but the shipowner is liable, as carrier, for the whole amount of the goods jettisoned.<sup>2</sup> Where goods are carried on deck in consequence of a recognized custom to stow them in that situation, or where the vessel is a steamship, it appears that a jettison of such goods gives rise to a case for general average to which all the parties in interest must contribute.<sup>3</sup> Where the deck cargo is justified by the special consent of the shipper, the shipowner is not under ordinary circumstances liable as carrier,<sup>4</sup> but he is liable to contribute to the shipper on the principles of general average,<sup>5</sup> and all other parties who consent to the deck cargo are bound by such consent and are parties to the general-average adjustment.<sup>6</sup>

Deck Cargo Contributes in General Average though not itself entitled to contribution.<sup>7</sup>

1. **Deck Cargo.** — See the title GENERAL AVERAGE, vol. 14, p. 968, note.

**Jettison as Barratry.** — Whether stowage of goods on deck is an act of barratry under the policy of insurance is a question of fact in the particular case. *Atkinson v. Great Western Ins. Co.*, 65 N. Y. 531. See generally the title BARRATRY, vol. 3, p. 859.

The Universal Rule Was that There Should Be No Contribution in General Average for deck cargo, whether carried with or without the owner's consent, or although such carriage was justified by custom, until the year 1837, when *Gould v. Oliver*, 4 Bing. N. Cas. 134, 33 E. C. L. 301, was decided. From that date the exceptions mentioned in the text began to be recognized, but American cases were for a time still decided without reference to the later English decisions. See upon the history of these exceptions *Wood v. Phoenix Ins. Co.*, 1 Fed. Rep. 235; *Goddefroy v. The Live Yankee*, Hoffm. Opin. 433, 10 Fed. Cas. No. 5,496; *Meaher v. Lufkin*, 21 Tex. 383.

2. **Goods on Deck Without Shipper's Consent — Liability of Carrier — England.** — *Royal Exch. Shipping Co. v. Dixon*, 12 App. Cas. 11; *Stephens v. Australasian Ins. Co.*, L. R. 8 C. P. 18; *Gould v. Oliver*, 2 M. & G. 208, 40 E. C. L. 335; *Wright v. Marwood*, 7 Q. B. D. 67.

*Canada.* — *Paterson v. Black*, 5 U. C. Q. B. 481. See also *Johnston v. Crane*, 3 N. Bruns. 356.

*United States.* — *The Delaware*, 14 Wall. (U. S.) 579; *The Peytona*, 2 Curt. (U. S.) 21; *The Paragon*, 1 Ware (U. S.) 322; *The Rebecca*, 1 Ware (U. S.) 188; *The Wellington*, 1 Biss. (U. S.) 279; *The Waldo*, 2 Ware (U. S.) 165, 28 Fed. Cas. No. 17,056; *Stinson v. Wyman*, 2 Ware (U. S.) 176, 23 Fed. Cas. No. 13,460; *The Hettie Ellis*, 20 Fed. Rep. 393, 22 Fed. Rep. 350.

*Alabama.* — *Waring v. Morse*, 7 Ala. 343.

*Connecticut.* — *Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149.

*Louisiana.* — *Dorsey v. Smith*, 4 La. 211.

*New York.* — *Creery v. Holly*, 14 Wend. (N. Y.) 26; *Atkinson v. Great Western Ins. Co.*, 65 N. Y. 539.

*North Carolina.* — *Gardner v. Smallwood*, 2 Hayw. (3 N. Car.) 349.

See also the title GENERAL AVERAGE, vol. 14, p. 968.

3. **Deck Cargo by Custom or on Steam Vessel.** — *Phillips on Insurance* (5th ed.) § 1282; *Cameron v. Domville*, 17 N. Bruns. 647 (deckload justified by custom); *Harris v. Moody*, 4 Bosw. (N.

Y.) 210, affirmed 30 N. Y. 266, 86 Am. Dec. 375 (steamer); *Gillett v. Ellis*, 11 Ill. 579 (steamer). And see the title GENERAL AVERAGE, vol. 14, p. 969.

Though this appears to be the better doctrine in such cases, it seems not well settled whether only the shipowner and the other consenting parties contribute, or whether the shippers of underdeck cargo are brought into the general average. See *Strang v. Scott*, 14 App. Cas. 609; *Gould v. Oliver*, 4 Bing. N. Cas. 134, 33 E. C. L. 301; *Grouselle v. Ferrie*, 6 U. C. Q. B. O. S. 454; *Gibb v. McDonell*, 7 U. C. Q. B. 356; *The William Gillum*, 2 Lowell (U. S.) 158; *Meaher v. Lufkin*, 21 Tex. 383; and the title GENERAL AVERAGE, vol. 14, p. 969, note 2.

As to the method of adjustment where the innocent underdeck cargo owners make no contribution, see *The William Gillum*, 2 Lowell (U. S.) 158.

4. **Deck Cargo by Special Consent.** — *Lawrence v. Minturn*, 17 How. (U. S.) 100; *The Watchful*, Brown Adm. 469; *Shackleford v. Wilcox*, 9 La. 33. See also the title GENERAL AVERAGE, vol. 14, p. 968.

The burden is on the shipowner to prove that the shipper agreed that his property might be carried on deck. *The Peytona*, 2 Curt. (U. S.) 21.

5. **Contribution from Shipper.** — *Johnson v. Chapman*, 19 C. B. N. S. 563, 115 E. C. L. 563. *The Watchful*, Brown Adm. 469. See also the title GENERAL AVERAGE, vol. 14, p. 969.

**Where Deck Cargo Is Taken at a Reduced Freight** it has been held that the shipper, in case of jettison, has no right to a contribution in general average. *Goddefroy v. The Live Yankee*, Hoffm. Opin. 433, 10 Fed. Cas. No. 5,496. The court's reasoning appears to apply only to the justice of allowing a contribution as against the other shippers, but it is well established now that there can be an adjustment on the principles of general average between the shipper and the shipowner alone. See *The Watchful*, Brown Adm. 469, 29 Fed. Cas. No. 17,250. To the effect that the rate of freight does not bear on the question of contribution, see article by Mr. Phillips in 3 Hunt Merch. Mag. 432.

6. **Contribution from All Consenting Parties.** — *Strang v. Scott*, 14 App. Cas. 609; *The Watchful*, Brown Adm. 469, quoting Lowndes on General Average 43; *Wood v. Phoenix Ins. Co.*, 1 Fed. Rep. 238, quoting the same authority.

7. See the title GENERAL AVERAGE, vol. 14, p. 986, note.



**V. JETTISON RENDERED NECESSARY THROUGH NEGLIGENCE OF MASTER.**—When a jettison is rendered necessary through the negligence, omission to observe proper care, or improper conduct of the master, the loss falls upon the shipowner,<sup>1</sup> but the owner of the goods may claim a general contribution. Under these circumstances, however, the shipowner cannot claim contribution from the other parties in the adventure.<sup>2</sup>

**VI. INSURER'S LIABILITY FOR GOODS JETTISONED.**—For jettison of underdeck cargo, where this is properly a general-average act, the insurers are liable.<sup>3</sup> When goods are stored on deck, the insurer is liable if a custom to carry in this way is established of which the insurer may be presumed to have knowledge, either by the description of the voyage or by the character of the goods.<sup>4</sup> In the absence of such custom, where the policy is a general one upon "cargo" or "goods and merchandise" there can be no recovery in case of jettison.<sup>5</sup>

**VII. TITLE TO PROPERTY NOT LOST BY JETTISON.**—If goods jettisoned are saved, they belong to the owner at the time when they were thrown overboard.<sup>6</sup>

### JEWEL—JEWELRY.—See note 7.

**1. Liability of Vessel as Carrier Where Jettison Occasioned by Negligence of Master—England.**—*Mouse's Case*, 12 Coke 63; *Gregson v. Gilbert*, 3 Doug. 232, 26 E. C. L. 90; *Schloss v. Heriot*, 14 C. B. N. S. 59, 108 E. C. L. 59; *Royal Exch. Shipping Co. v. Dixon*, 12 App. Cas. 11; *Stephens v. Australasian Ins. Co.*, L. R. 8 C. P. 18; *Wright v. Marwood*, 7 Q. B. D. 67.

*Canada.*—*Paterson v. Black*, 5 U. C. Q. B. 481.

*United States.*—*The Delaware*, 14 Wall. (U. S.) 579; *The Peytona*, 2 Curt. (U. S.) 21; *The Paragon*, 1 Ware (U. S.) 322; *The Wellington*, 1 Biss. (U. S.) 279; *The Waldo*, 2 Ware (U. S.) 165, 28 Fed. Cas. No. 17,056; *Stinson v. Wyman*, 2 Ware (U. S.) 176, 23 Fed. Cas. No. 13,460.

*Alabama.*—*Waring v. Morse*, 7 Ala. 343.

*Connecticut.*—*Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149.

*Kentucky.*—*Bentley v. Bustard*, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

*New York.*—*Creery v. Holly*, 14 Wend. (N. Y.) 26; *Atkinson v. Great Western Ins. Co.*, 65 N. Y. 539.

*North Carolina.*—*Gardner v. Smallwood*, 2 Hayw. (3 N. Car.) 349.

See also the titles **CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES**, vol. 7, p. 202 *et seq.*; **GENERAL AVERAGE**, vol. 14, p. 961.

**Evidence Not Showing Negligent Navigation.**—Where a vessel approached a harbor in the afternoon, there being indications of an impending storm, and the captain, unable to obtain a pilot, followed a pilot boat up the harbor, and in doing so the vessel was stranded, it was held that such grounding was not due to the negligence, fault, or misconduct of the captain. Neither he nor the vessel was liable for a jettison made under such circumstances. *Van Syckel v. The Schooner Thomas Ewing, Crabbe* (U. S.) 705.

**2. Contribution as to Owner of Goods, Not as to Shipowner.**—*Strang v. Scott*, 14 App. Cas. 601; *Pacific Mail Steamship Co. v. New York, etc.*, Min. Co., 69 Fed. Rep. 414, on appeal 45 U. S. App. 1. See also the title **GENERAL AVERAGE**, vol. 14, p. 961.

**3. Insurer's Liability—Underdeck Cargo.**—

See the title **GENERAL AVERAGE**, vol. 14, p. 994 *et seq.*

**4. Deck Cargo—Custom.**—See the title **GENERAL AVERAGE**, vol. 14, p. 995; *Phillips on Insurance* (5th ed.), § 460.

**An Express Undertaking** on the part of the insurer for goods on deck will of course render him liable. *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108.

**A Custom that Insurers Are Not Liable for Jettison of Deck Cargo** has been held good. *Miller v. Tetherington*, 6 H. & N. 278, *affirmed* 7 H. & N. 954.

**5. General Policy—No Custom.**—See *Smith v. Mississippi M. & F. Ins. Co.*, 11 La. 142, 30 Am. Dec. 714; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108. See also *Phillips on Insurance* (5th ed.), § 460, and the title **MARINE INSURANCE**.

Though the policy especially includes goods on deck, it has been held that if they are jettisoned they cannot constitute a general-average claim, and consequently the insurers are not liable in general average, but only for a partial loss. *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 178.

**6. Jettison Does Not Divest Title.**—*Caze v. Reilly*, 3 Wash. (U. S.) 302.

**7. A Watch and Chain** are not *jewels* within a statute relieving hotel keepers from liability for loss of "money, jewels, or ornaments" of guests when they have provided a safe for the deposit of such. *Ramaley v. Leland*, 43 N. Y. 539, 6 Robt. (N. Y.) 358.

The same was held in *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. 276, where Webster's definition of *jewel*, "an ornament of dress in which the precious stones form a principal part," was quoted with approval.

So it was said in *Gile v. Libby*, 36 Barb. (N. Y.) 77: "The watch and pen and pencil case are certainly valuables, and perhaps might be called *jewels*, but I think should be considered a part of the traveler's personal clothing or apparel. The legislature certainly did not expect the traveler, after retiring, to send down his



**JOB.**—The whole of a thing which is to be done.<sup>1</sup>

**JOBBER.**—A jobber is defined to be a merchant who purchases goods from importers and sells to retailers.<sup>2</sup>

**JOCKEY.**—See note 3.

**JOIN.**—To join in a conveyance has a well-understood meaning, viz., to unite as a party in the execution of it.<sup>4</sup>

ordinary clothing or apparel to be deposited in the safe." See generally on this statute Hyatt v. Taylor, 42 N. Y. 258.

Under a statute of similar purport, but whose language was "money, *jewelry*, and articles of gold and silver manufacture," a gold watch was held to be included as an article of gold manufacture. Stewart v. Parsons, 24 Wis. 241.

See also the title INNS AND INNKEEPERS, vol. 16, p. 527.

**Jeweler and Watchmaker.**—As to the distinction between a jeweler and a watchmaker, within a statute exempting tools of trade, see Howard v. Williams, 2 Pick. (Mass.) 80.

**Earrings.**—Under an indictment for peddling *jewelry*, it was held that plain gold earrings and knobs were comprehended in the signification of the term *jewelry*. Com. v. Stephens, 14 Pick. (Mass.) 373.

**Revenue Laws.**—In Robbins v. Robertson, 33 Fed. Rep. 710, it was said: "The word *jewelry* is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. A belt of cowry shells, a necklace of bears' claws, a head ornament of sharks' teeth, though possessing no value in themselves, are esteemed valuable in the communities where they are worn, and we therefore constantly find them referred to in books written in the English language—books of travel, standard works, encyclopædias, and scientific dissertations upon sociology—we find those articles described in those books as *jewelry*. The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals—gold and silver, to which, I think, platina is now generally added—and what are known as precious stones—the diamond, sapphire, ruby, etc. Articles manufactured from those for the purpose of personal adornment are known, as the witnesses on the stand told you, as articles of *jewelry*, and such testimony is accordant with your own knowledge as to what is the ordinary use of the term *jewelry*." This was upon the construction of the tariff laws. See also the title REVENUE LAWS.

**Gems and Jewels.**—In holding that ornaments of the person did not pass by a bequest of a cabinet of curiosities even though sometimes shown with it, a distinction was drawn between gems and *jewels*. It was said that the latter meant stones set and prepared for wear, and that the former applied to stones kept for curiosity only. Cavendish v. Cavendish, 1 Bro. C. C. 468.

**Will.** (See also the title WILLS.)—As to what will pass by a bequest of *jewels*, see Northumberland's Case, Owen 124; Bac. Abr., tit. Legacies, B. 3; Atty.-Gen. v. Harley, 5 Russ. 173.

In Sudbury v. Brown, 4 W. R. 736, a bequest of *jewelry* was held not to carry a bag of coins.

In Brooke v. Warwick, 2 De G. & Sm. 425, 12 Jur. 912, gold ornaments of Masonic orders were held to be *jewels*.

**Same—Plate.**—In Conner v. Ogle, 4 Md. Ch. 454, it was held that *jewels* could not be deemed plate under a provision by a testatrix that the rest of her plate should be divided among the children of her daughter.

1. Bouv. L. Dict.; Dixon v. Cory, 3 N. J. L. 594.

**Job Work.**—In an action before a justice of the peace on account the principal item in the plaintiff's account was for lump work. Upon motion to reverse the judgment the court said: "The phrase 'lump work' is well understood in the country, and is the same as *job* work. But it is too indefinite. The work done by the *job* should be set out—such as building a house, finishing a room, or whatever the work done was," Dixon v. Cory, 3 N. J. L. 595.

2. **Jobber.**—Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587. And in that case it was held that where a lease of a store contained a clause that it should be occupied for the regular dry-goods jobbing business and for no other, the lessee could not carry on in the store the business of an auctioneer.

In Mollett v. Robinson, L. R. 7 C. P. 104, Blackburn, J., defined a jobber as one who buys at a fraction below the market price and sells at a fraction above that price.

In Boulton v. Gzowski, 29 Can. Sup. Ct. 71, it was said: "Upon the London Stock Exchange there is a certain class of persons called *jobbers*, who purchase shares on change for speculation, and who are allowed to pass their contract through various hands before ever any person is found to accept and become the actual purchaser of such shares; a day is fixed which is called the name day, by which the *jobber* must name a person who shall accept and hold the shares so dealt with."

3. **Jockey.**—Where one of the conditions of a race was that the riders should be "gentlemen, farmers, or tradesmen, being persons never having ridden as regular *jockeys* or paid riders," it was held that one who had been in the habit of riding in races, but had never been paid for so doing, though he had received his expenses, was not a regular *jockey* or paid rider, which evidently means one who follows the business of a *jockey* for a livelihood. Walmsley v. Mathews, 3 M. & G. 133, 42 E. C. L. 77.

4. **Join.**—Gregg v. Owens, 37 Minn. 61.

To *join* in a deed or mortgage means to join in the execution which includes the making of the instrument. Collins v. Cornwell, 131 Ind. 20.

**Husband and Wife.**—In Gregg v. Owens, 37 Minn. 61, it was held that the mere consent by the husband to the execution by the wife of her sole conveyance was not a *joining* of the husband and wife in the conveyance, nor was



**JOINDER.**— See the title **JOINDER**, 11 ENCYC. OF PL. AND PR. 757.

**JOINT — JOINTLY.**— See note 1.

**JOINT ADVENTURES.**— See the title **PARTNERSHIP**.

**JOINT AND SEVERAL.**— See the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 110; **BONDS**, vol. 4, pp. 638, 654; **CONTRACTS**, vol. 7, p. 101; **COVENANTS**, vol. 8, pp. 52, 83.

**JOINT CREDITORS AND DEBTORS.**— See the title **CONTRIBUTION AND EXONERATION**, vol. 7, p. 325.

**JOINT DEBTORS' ACTS.**— See the title **SERVICE OF PROCESS AND PAPERS**, 19 ENCYC. OF PL. AND PR. 632 *et seq.*

the execution of the sole conveyance of the wife by her husband as her agent *joining* with her in the conveyance.

**Railroads.**— Where a statute authorized a railroad company to *join* and unite its railroad with any other railroad constructed in an adjoining state, at any point on the state line, it was held that this did not authorize a sale or lease. *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, 52 Am. & Eng. R. Cas. 68; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290.

**1. Jointly and Severally.**— An action was brought by R. against G. upon the following promissory note: "For value received, we *jointly* and severally promise to pay R., him or his order, the sum of one hundred dollars, borrowed money, on demand, with interest. P. & J., for G." It was held that P. was a competent witness to prove that he and J. were authorized to execute such note as agents of G.; and that, such authority being proved, the note must be construed to be the promise of G. *Rice v. Gove*, 22 Pick. (Mass.) 161. Compare *Bradlee v. Boston Glass Manufactory*, 16 Pick. (Mass.) 347.

**Joint Interest.**— A statute provided for opening of ditches where it was to the *joint* interest of several landowners to drain a swamp. It was held that to constitute *joint* interest it was not necessary that the land occupied should consist of contiguous lots. *In re Roberts*, 5 Ont. Pr. 346.

A statute authorized a court of chancery to decree a sale of land where an infant had a *joint* interest therein, and it should appear to the court that such sale would be for the *joint* interest of the parties. In construing this statute in *Billingslea v. Baldwin*, 23 Md. 115, the court said: "The words '*joint* interest' are not to be construed technically as meaning only an estate in *joint* tenancy, but include estates in coparcenary; they are interests held *jointly* with other persons, within the meaning of the statute."

**Joint Property.**— In *Whitmore v. Shiverick*, 3 Nev. 288, copartnership property and assets were held to be *joint* property within the meaning of a practice act.

**Joint Session.**— In *Snow v. Hudson*, 56 Kan.

386, the court said: "The term '*joint* session,' in our view, has a well-recognized meaning, and implies the meeting together and commingling of the two houses, which, when so met and commingled, act as one body. Each member of that body, when it has been once properly and lawfully convened, has equal rights, and his vote has equal weight with that of any other member; and it is beyond the power of the legislature to say that, in a session which the constitution says shall be *joint*, the vote of a senator shall have greater weight than the vote of a member of the house. The framers of the constitutional provision and the people who voted for its adoption are presumed not only to have understood the meaning of the words they selected, but also the customs of *joint* conventions which meet in all the states for the election of United States senators, and in many of them for other purposes. Our understanding of the very purpose of making a session *joint* is to remove the check which each house holds on the other, and to permit the two houses combined to vote and act as a single body." See generally the title **STATUTES**.

**Joint Debtors.**— The sureties on the bond of an assignee for the benefit of creditors, when he has failed to pay the money in his hands to his successor in trust, are "*joint* debtors," within Bates' Annot. Stat. Ohio (1897), § 3166, so that a compromise with and release of one surety will not discharge the other for the balance due. *Walsh v. Miller*, 51 Ohio St. 462.

**Joint Lives.**— Where a gift is to two or more for their "*joint* lives," and then over, it has been held that this means "for their *joint* lives and the lives or life of the survivors or survivor of them" and then over. *Stroud's Jud. Dict., citing Townley v. Bolton*, 2 L. J. Ch. 25, 1 Myl. & K. 148; *Smith v. Oakes*, 14 Sim. 122; *Moffatt v. Burnie*, 23 L. J. Ch. 591; *Grant v. Winbolt*, 23 L. J. Ch. 282.

**Joint Captors.**— "For the purposes of booty, *joint* captors are those who, not being the actual captors, have assisted or are taken to have assisted the actual captors, by conveying either encouragement to them or intimidation to the enemy." *Stroud's Jud. Dict., citing Banda, etc., Booty Case*, 35 L. J. Adm. 17.



# JOINT EXECUTORS AND ADMINISTRATORS.

BY CHARLES PORTERFIELD.

- I. APPOINTMENT, 617.
  - 1. *Joint Executors*, 617.
  - 2. *Joint Administrators*, 617.
- II. GENERAL PRINCIPLES, 617.
  - 1. *Unity of Person*, 617.
  - 2. *Unity of Estate*, 618.
- III. BONDS, 619.
  - 1. *Joint Bonds*, 619.
    - a. *When Allowable*, 619.
    - b. *Effect of Joint Bond*, 619.
  - 2. *Separate Bonds*, 620.
- IV. POWERS AND LIABILITIES, 620.
  - 1. *Administrative Acts in General*, 620.
  - 2. *Confession of Judgments*, 623.
  - 3. *Presentation of Claims Against Estate*, 623.
  - 4. *Sale of Real Estate under Order of Court*, 623.
  - 5. *Execution of Powers under Will*, 624.
  - 6. *Waiver of Statute of Limitations*, 624.
    - a. *In General*, 624.
    - b. *Payment of Barred Debts*, 624.
    - c. *Acknowledgment of or Promise to Pay Debts*, 624.
      - (1) *Rule in England*, 624.
      - (2) *Rule in United States*, 624.
  - 7. *Admissions and Promises*, 625.
  - 8. *Liability of One for Acts of Others*, 625.
    - a. *General Rule*, 625.
    - b. *Exceptions to General Rule*, 626.
      - (1) *Putting Corepresentative in Possession of Assets*, 626.
      - (2) *Acquiescence in or Negligence Contributing to Breach of Trust*, 629.
      - (3) *Effect of Giving Joint Receipts*, 629.
      - (4) *Effect of Making Joint Inventory*, 630.
      - (5) *Effect of Giving Joint Bond*, 630.
    - c. *Joint Acts*, 630.
    - d. *Release of One Where All Are Liable*, 630.
    - e. *Remedy of Representative Charged with Another's Default*, 630.
  - 9. *Actions*, 630.
    - a. *Actions By and Against Third Persons*, 630.
      - (1) *At Law*, 630.
      - (2) *In Equity*, 631.
    - b. *Actions Inter Se*, 632.
  - 10. *Special Proceedings*, 632.
  - 11. *Removal*, 633.
- V. COMPENSATION, 633.
- VI. ACCOUNTING, 634.

## CROSS-REFERENCES.

*For matters of PROCEDURE, see the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, titles CITATIONS IN PROBATE PROCEEDINGS, vol. 4, p. 537; EXECUTORS AND ADMINISTRATORS, vol. 8, p. 650; LEGATEES AND DISTRIBUTEES, vol. 13, p. 1; PROBATE AND CONTEST OF



WILLS, vol. 16, p. 991; SETTLEMENT OF DECEDENTS' ESTATES, vol. 19, p. 819; WILLS.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see, in this work, the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720, and references there given.

**I. APPOINTMENT — 1. Joint Executors.** — A testator may, at his option, appoint two or more executors of his will,<sup>1</sup> and this may be done by successive wills, if the several instruments are not inconsistent with each other.<sup>2</sup>

The Marriage of an Executrix will, at common law, constitute her husband a coexecutor with her.<sup>3</sup>

**2. Joint Administrators.** — The power to appoint joint administrators, or coadministrators, was given by the earliest of the statutes which authorized the granting of administration,<sup>4</sup> and the modern statutes on the subject, probably without exception, expressly provide for the appointment of one or more administrators.<sup>5</sup> The court is not obliged, however, to appoint more than one person, though there are several who are equally entitled.<sup>6</sup> And it has been said that joint letters of administration ought not to be granted if one of the parties thereto objects.<sup>7</sup>

**Contemporaneous Appointment Not Necessary.** — In order to constitute joint administrators, it is not necessary that all should be appointed at the same time. An additional administrator may be appointed after administration has been regularly granted in the ordinary course,<sup>8</sup> and it has been held that such additional appointment may be made, even against the consent of the incumbent.<sup>9</sup>

The Marriage of an Administratrix has been held to constitute her husband coadministrator with her, unless by statute in the particular jurisdiction the authority of an administratrix is revoked by marriage.<sup>10</sup>

**II. GENERAL PRINCIPLES — 1. Unity of Person.** — One of the fundamental principles of the subject under consideration is that joint executors and joint administrators, however numerous they may be in fact, are, for most purposes, regarded as constituting but one person in law representing their testator or intestate, so that the act of one is generally deemed to be the act of all.<sup>11</sup>

**1. Right to Appoint Joint Executors.** — 1 Wms. Exrs. (7th Am. ed.), p. 285.

**A Testator May Appoint Different Executors in different countries in which his effects may lie, or different executors as to different parts of his estate in the same country.** Hunter v. Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313.

**Though a Testator May Appoint Separate Executors of Distinct Parts of His Property, and may divide their authority, yet quoad creditors they are all executors, and as one executor.** Rose v. Bartlett, Cro. Car. 293.

**2. Joint Executors Appointed by Successive Wills.** — Goods of Leese, 2 Sw. & Tr. 442. See also Nelson's Estate, 147 Pa. St. 160.

**3. Marriage of Executrix.** — Wood v. Chetwood, 27 N. J. Eq. 311; Lindsay v. Lindsay, 1 Desaus. (S. Car.) 150. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 814.

**As to the Marriage of an Administratrix, see infra, this section, Joint Administrators.**

**4. Joint Administrators — Early Statutes.** — See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 766.

**5. Modern Statutes Authorizing Appointment of Joint Administrators.** — In re Stewart, 18 Mont. 597, reciting the Montana statute. And see the various local statutes.

**Under the New York statute it is held that a person entitled to letters of administration may have joined with him in the administra-**

**tion, if he so desires it, a person who is not entitled to letters.** Matter of Moehring (Surrogate Ct.) 24 Misc. (N. Y.) 418; Quintard v. Morgan, 4 Dem. (N. Y.) 168.

**6. Appointment of Joint Administrators Not Obligatory.** — Gaines's Succession, 42 La. Ann. 699.

**7. Objection to Joint Letters.** — Brubaker's Appeal, 98 Pa. St. 21. But see the next following note but one.

**8. Additional Administrator.** — See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 808.

**9. Additional Appointment Against Consent of Incumbent.** — Read v. Howe, 13 Iowa 50. But see contra, Brubaker's Appeal, 98 Pa. St. 21.

**10. Marriage of Administratrix.** — Adair v. Shaw, 1 Sch. & Lef. 243; Dowty v. Hall, 83 Ala. 165; Barber v. Bush, 7 Mass. 510. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 81, 814.

**As to the Marriage of an Executrix, see supra, this section, Joint Executors.**

**11. Joint Representatives Constitute but One Person in Law — England.** — Hovey v. Blakeman, 4 Ves. Jr. 596; Brice v. Stokes, 11 Ves. Jr. 319; Ex p. Rigby, 19 Ves. Jr. 463; Sadler v. Hobbs, 2 Bro. C. C. 114; Crosse v. Smith, 7 East 246.

**United States.** — Edmonds v. Crenshaw, 14 Pet. (U. S.) 166.



**No Distinction Between Joint Executors and Joint Administrators.** — Though it was at one time said that the doctrine of unity of person was not applicable to the case of joint administrators,<sup>1</sup> it is now well settled that one of several administrators stands on the same footing with executors and possesses the same authority.<sup>2</sup>

**2. Unity of Estate.** — Another important principle affecting joint executors and administrators is that they have a joint and entire interest in and authority over all the goods of the decedent, including his chattels real.<sup>3</sup>

According to the principle just stated, the title, right, and authority of one of several executors or administrators pass to the others on the termination of his representative character, either by death,<sup>4</sup> renunciation,<sup>5</sup> resignation.<sup>6</sup>

*Alabama.* — *Stewart v. Conner*, 9 Ala. 803; *Scruggs v. Driver*, 31 Ala. 274.

*Florida.* — *Sullivan v. McMillan*, 26 Fla. 543.

*Georgia.* — *Cameron v. Justices*, 1 Ga. 36, 44 Am. Dec. 636; *Wilkerson v. Wootten*, 28 Ga. 563.

*Illinois.* — *Dwight v. Newell*, 15 Ill. 333.

*Indiana.* — *Herald v. Harper*, 8 Blackf. (Ind.) 170.

*Kansas.* — *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 216.

*Kentucky.* — *Saunders v. Saunders*, 2 Litt. (Ky.) 314.

*Maine.* — *Shaw v. Berry*, 35 Me. 279, 58 Am. Dec. 702; *Gilman v. Healy*, 55 Me. 120.

*Massachusetts.* — *Ames v. Armstrong*, 106 Mass. 15.

*Missouri.* — *Greene v. Holt*, 76 Mo. 677.

*New York.* — *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Matter of Delaplaine*, (Surrogate Ct.) 19 Abb. N. Cas. (N. Y.) 418; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436; *Bogert v. Hertell*, 4 Hill (N. Y.) 492, reversing 9 Paige (N. Y.) 52; *Boughton v. Flint*, 13 Hun (N. Y.) 208; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151.

*Pennsylvania.* — *Sterrett's Appeal*, 2 P. & W. (Pa.) 419; *Beltzhoover v. Darragh*, 16 S. & R. (Pa.) 329; *Reber v. Gilson*, 1 Pa. St. 54; *Hall v. Boyd*, 6 Pa. St. 267; *De Haven v. Williams*, 80 Pa. St. 480, 21 Am. Rep. 107; *Wilson's Appeal*, 115 Pa. St. 95; *Allegheny First Nat. Bank v. Farmers Deposit Nat. Bank*, (Pa. 1886) 5 Cent. Rep. 509.

*South Carolina.* — *Rosborough v. McAliley*, 10 S. Car. 146.

**When a Demand on Executors Is Necessary**, it need not be made on all, it is said, in order to support an action on a contract of the testator, but a demand on one is insufficient to cast any new or personal liability on another executor. *Provisional Corp. v. Cromar*, 22 U. C. Q. B. 321.

**A Tax Assessment** made against one of several executors is valid. *People v. Coleman*, 42 Hun (N. Y.) 581.

**Notice of Protest** given to one of several executors of a deceased indorser, is sufficient. *Dodson v. Taylor*, 56 N. J. L. 11.

1. Bac. Abr., tit. Executors and Administrators, D. 1; *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108.

2. **No Distinction Between Executors and Administrators.** — *Jacomb v. Harwood*, 2 Ves. 265;

*Herald v. Harper*, 8 Blackf. (Ind.) 170; *Douglas v. Satterlee*, 11 Johns. (N. Y.) 16; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; *Beltzhoover v. Darragh*, 16 S. & R. (Pa.) 329.

3. **Unity of Estate.** — *Nation v. Tozer*, 1 C. M. & R. 172; *Ely v. Dix*, 118 Ill. 477; *Com. Dig.*, title Administrator, B. 11; *Bacon's Abr.*, title Executors and Administrators, D. 1.

**Each Executor Is Equally Entitled to Participate in the Profits of the Executorship**, and no one has the right to seize and appropriate the whole of the assets to the exclusion of the others. *Roberts v. Thomas*, 32 Ga. 31.

**A Debt Due from One Executor to the estate** is assets in his hands, and his coexecutor cannot sue him therefor. *Beall v. Hilliary*, 1 Md. 186, 54 Am. Dec. 649; *Whiting v. Whiting*, 64 Md. 157.

**Probate by One Executor Enures to All.** — Since the executor's title is derived, not from the probate of the will, but from the will itself, probate granted to one of several executors will enure to the others. *Webster v. Spencer*, 3 B. & Ald. 360, 5 E. C. L. 316; *Scott v. Briant*, 6 N. & M. 381, 36 E. C. L. 438; *Walters v. Pfeil*, M. & M. 362, 22 E. C. L. 334; *Watkins v. Brent*, 7 Sim. 512, affirmed 1 Myl. & C. 97; *Hanschell v. Swan*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 304; *Heron v. Hoffner*, 3 Rawle (Pa.) 393.

4. **Doctrine of Survivorship — Death of Corepresentative** — *England.* — *Flanders v. Clarke*, 3 Atk. 509; *Hudson v. Hudson*, 1 Atk. 460.

*United States.* — *Veach v. Rice*, 131 U. S. 293.

*Alabama.* — *Hendricks v. Thornton*, 45 Ala. 299.

*Georgia.* — *Burks v. Beall*, 77 Ga. 271.

*Mississippi.* — *Grinstead v. Fonte*, 32 Miss. 120.

*New York.* — *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677; *Matter of Kreischer*, 30 N. Y. App. Div. 313; *Matter of Steencken*, 51 N. Y. App. Div. 417.

5. **Renunciation by Coexecutor.** — *Bonifant v. Greenfield*, Cro. Eliz. 80; *Shelton v. Homer*, 5 Met. (Mass.) 462; *Leggett v. Hunter*, 19 N. Y. 445.

As to renunciation by executors, see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 754 *et seq.*

6. **Resignation of Corepresentative.** — *Hendricks v. Thornton*, 45 Ala. 299; *Grinstead v. Fonte*, 32 Miss. 120; *Columbus Ins., etc., Co. v. Humphries*, 64 Miss. 258.

As to resignations generally, see the title



removal,<sup>1</sup> or otherwise.<sup>2</sup>

**III. BONDS — 1. Joint Bonds — a. WHEN ALLOWABLE.** — Unless separate bonds are required by statute, joint executors or administrators may give a joint bond,<sup>3</sup> and sometimes it is expressly provided by statute that a joint bond or separate bonds may be given.<sup>4</sup>

**b. EFFECT OF JOINT BOND.** — In case a joint bond is given, when that may lawfully be done, each of the executors or administrators becomes the surety of the others, and thereby renders himself liable for any devastavit committed by them,<sup>5</sup> unless the bond itself shows that the parties did not intend to incur such liability;<sup>6</sup> and conversely, an executor or administrator who gives a separate bond is not liable for a loss caused, without negligence on his part, by the default of his coexecutor or coadministrator.<sup>7</sup>

**Even After the Death of One of the Parties** it is held that the suretyship continues in force as to subsequent acts of the survivor,<sup>8</sup> as in other cases of suretyship.<sup>9</sup>

**Relation to Sureties.** — Though executors or administrators who give a joint bond are liable thereon as sureties for each other, they are all principals as to the real sureties.<sup>10</sup>

EXECUTORS AND ADMINISTRATORS, vol. II, p. 811.

**1. Removal of Corepresentative.** — *Hendricks v. Thornton*, 45 Ala. 299; *Matter of Bull*, 45 Barb. (N. Y.) 334.

As to the removal of personal representatives, see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 815.

**2. Executor Enjoined from Acting.** — Where an executor has misappropriated the assets of his testator and become a bankrupt, and the court has enjoined him from further acting as executor or interfering with the testator's estate, all the powers of the office may be performed by the coexecutor. *Bowen v. Phillips*, (1897) 1 Ch. 174, 66 L. J. Ch. 165, 75 L. T. N. S. 628, 45 W. R. 286.

**3. Right to Give Joint Bonds.** — *Elliott v. Mayfield*, 4 Ala. 417; *Turner v. Wilkins*, 56 Ala. 173; *Hinson v. Williamson*, 74 Ala. 180; *Albro v. Robinson*, 93 Ky. 195, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 216

The practice of giving joint bonds is also recognized by all the cases cited *infra*, this section, *Effect of Joint Bond*.

**Even Where the Statute Requires Separate Bonds**, a joint bond may be given; but in regard to the rights and liabilities of the parties, it will be treated as the separate bond of each of the executors or administrators. *State v. Wyant*, 67 Ind. 25.

**4. Joint or Separate Bonds Authorized.** — See for instance *Rev. Stat. Del.* 1893, p. 672, § 14.

**5. Joint Bond — Parties Liable as Sureties for Each Other — United States.** — *Green v. Hanberry*, 2 Brock. (U. S.) 403.

*Alabama.* — *Little v. Knox*, 15 Ala. 576, 50 Am. Dec. 145; *Little v. Heard*, 16 Ala. 358; *Kavanaugh v. Thompson*, 16 Ala. 817; *Williams v. Harrison*, 19 Ala. 277; *Pearson v. Darrington*, 32 Ala. 227; *Jones v. Jones*, 42 Ala. 218; *Turner v. Wilkins*, 56 Ala. 173; *Hinson v. Williamson*, 74 Ala. 180.

*Connecticut.* — *Babcock v. Hubbard*, 2 Conn. 536.

*Illinois.* — *Marsh v. People*, 15 Ill. 284.

*Kansas.* — *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 216.

*Kentucky.* — *Collins v. Carlisle*, 7 B. Mon.

(Ky.) 13; *Albro v. Robinson*, 93 Ky. 195, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 216.

*Maryland.* — *Clarke v. State*, 6 Gill & J. (Md.) 288, 26 Am. Dec. 576.

*Massachusetts.* — *Brazer v. Clark*, 5 Pick. (Mass.) 96; *Ames v. Armstrong*, 106 Mass. 15.

*Missouri.* — *Dobyns v. McGovern*, 15 Mo. 662.

*New York.* — *Nanz v. Oakley*, 120 N. Y. 84, reversing 37 Hun (N. Y.) 495; *McCoun v. Sperb*, 53 Hun (N. Y.) 165; *Matter of Adams*, (Surrogate Ct.) 30 Misc. (N. Y.) 184.

*Pennsylvania.* — *Boyd v. Boyd*, 1 Watts (Pa.) 365; *Beckley's Appeal*, 3 Pa. St. 425.

*South Carolina.* — *Gayden v. Gayden*, Mc-Mull. Eq. (S. Car.) 435.

*Tennessee.* — *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453; *Jamison v. Lillard*, 12 Lea (Tenn.) 690; *Fulton v. Davidson*, 3 Heisk. (Tenn.) 629.

*Texas.* — *Keowne v. Love*, 65 Tex. 152.

*Vermont.* — *Sparhawk v. Buell*, 9 Vt. 41; *Marsh v. Harrington*, 18 Vt. 150.

*Virginia.* — *Morrow v. Peyton*, 8 Leigh (Va.) 54; *McCormick v. Wright*, 79 Va. 524.

*West Virginia.* — *Hooper v. Hooper*, 29 W. Va. 276.

Under the *Indiana* statute it is held that giving a joint bond does not make each executor or administrator liable for the devastavit of the others. *State v. Wyant*, 67 Ind. 25.

**6. Liability Affected by Terms of Bond.** — *Williams v. Harrison*, 19 Ala. 277; *Pearson v. Darrington*, 32 Ala. 227; *Stephens v. Taylor*, 62 Ala. 269.

**7. Not Liable for Each Other's Defaults in Case of Separate Bonds.** — *McKim v. Aulbach*, 130 Mass. 481, 39 Am. Rep. 470. See also *infra*, this title, *Powers and Liabilities — Liability of One for Acts of Others*.

**8. Death of One Party Held Not to Discharge Suretyship.** — *Stephens v. Taylor*, 62 Ala. 269; *Lancaster v. Lewis*, 93 Ga. 727, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 216, 217; *Dobyns v. McGovern*, 15 Mo. 662. See also *State v. Boon*, 44 Mo. 254. But see *contra*, *Towne v. Ammidown*, 20 Pick. (Mass.) 535; *Brazer v. Clark*, 5 Pick. (Mass.) 96.

**9. See the title SURETYSHIP.**

**10. Relation to Sureties.** — *Eckert v. Myers*, 45 Ohio St. 525.



2. **Separate Bonds.** — In some jurisdictions the statutes provide that every person appointed executor or administrator shall execute a separate bond,<sup>1</sup> and it is held that separate bonds may be given, though the statute does not expressly authorize or require them;<sup>2</sup> but the liabilities of the parties will be governed by the same rules as if separate bonds had been given.<sup>3</sup>

**IV. POWERS AND LIABILITIES — 1. Administrative Acts in General.** — Since joint executors and joint administrators are regarded in law as constituting but one person, and the title of each extends to the entire personal estate of the testator or intestate, each one has, for most purposes, as full and ample power over the estate as if he were the sole representative,<sup>4</sup> unless it is provided otherwise by statute.<sup>5</sup> Therefore one may collect the assets of the

1. **Separate Bonds Required by Statute.** — *Matter of Sanderson*, 74 Cal. 199; *Code Civ. Pro. Cal.*, § 1391; *State v. Wyant*, 67 Ind. 25; *Horne's Annot. Stat. Ind.* 1896, § 2242. And see the various local statutes.

2. **Separate Bonds Allowable Though Not Expressly Authorized by Statute.** — *Insley v. Shire*, 54 Kan. 793, 45 Am. St. Rep. 308, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 216.

3. **Effect of Giving Joint Bond Instead of Separate Bonds.** — Though the *Indiana* statute requires separate bonds, it has been held that where two persons, as administrators, execute a single bond jointly, with sureties, such bond must be construed as if each of the principal obligors therein had thereby executed a separate bond in the same penalty, with the same sureties, and subject to the same condition; and in such case, after the resignation of his trust by one of such administrators, the other may sue him and his sureties, on such bond, for breaches committed by him alone, as on his separate bond. *State v. Wyant*, 67 Ind. 25, *overruling* *Braxton v. State*, 25 Ind. 83, *Prichard v. State*, 34 Ind. 137, and *Moore v. State*, 49 Ind. 558.

4. **Each Representative Has Full Power Over Estate — England.** — *Jacomb v. Harwood*, 2 Ves. 265; *Williams v. Nixon*, 2 Beav. 472; *Charlton v. Durham*, L. R. 4 Ch. 433.

*United States.* — *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166.

*Georgia.* — *Hall v. Carter*, 8 Ga. 388.

*Kentucky.* — *Saunders v. Saunders*, 2 Litt. (Ky.) 314.

*Massachusetts.* — *Ames v. Armstrong*, 106 Mass. 15.

*Mississippi.* — *Port Gibson Bank v. Baugh*, 9 Smed. & M. (Miss.) 290; *Bodley v. McKinney*, 9 Smed. & M. (Miss.) 339; *Gaultney v. Nolan*, 33 Miss. 569; *Columbus Ins., etc., Co. v. Humphries*, 64 Miss. 258.

*New Jersey.* — *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417.

*New York.* — *Wood v. Brown*, 34 N. Y. 337.

*Pennsylvania.* — *Allegheny First Nat. Bank v. Farmers Deposit Nat. Bank*, (Pa. 1886) 5 Cent. Rep. 505; *Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694; *Beltzhoover v. Darragh*, 16 S. & R. (Pa.) 329.

*Rhode Island.* — *Stone v. Union Sav. Bank*, 13 R. I. 25.

*South Carolina.* — *Hyatt v. McBurney*, 18 S. Car. 199.

**Assets in Foreign Jurisdiction.** — The general rule that one of several executors may perform an act of administration within the jurisdiction of the court will not permit two coexecutors to

draw from a bank succession funds within another jurisdiction, against the protest of the third executor. *Allen v. Louisiana Nat. Bank*, 50 La. Ann. 366.

**Specific Performance of Contracts.** — In *Sneesby v. Thorne*, 7 De G. M. & G. 399, it was held that specific performance of a contract by one executor to sell a leasehold would not be decreed where the contracting executor supposed that he was acting with the authority of the other, and the other refused to assent to the contract, because decreeing specific performance in such case would be to enforce a contract different from that into which the party intended to enter. The question whether specific performance of the contract for sale by one executor apart from his coexecutor could be decreed in any case, was not decided.

**Excluding Corepresentatives from Inspection of Papers.** — A representative of a decedent's estate has no right to exclude corepresentatives from inspecting the papers belonging to the estate, and if he does so it is a ground for his removal. *Chew's Estate*, 2 Pars. Eq. Cas. (Pa.) 153.

**Executors Have No Authority to Divide the Management of the Estate between themselves,** after they have entered on the duties of the trust, even though the testator in his lifetime had intrusted them, as agents, with the management of different portions of his property, and if they do make such a division, each becomes liable for the defaults of the other in respect to the part of the estate managed by him. *Birmingham v. Wilcox*, 120 Cal. 467; *Wilson v. Lineberger*, 94 N. Car. 641, 55 Am. Rep. 628.

5. **Statutory Provisions.** — In *New York* it is provided by statute that where there is a disagreement between two or more executors of an estate respecting the custody of the money or property, the surrogate, on the application of one or more of such executors, "may, in his discretion, make an order directing that any property of the estate be deposited in a safe place in the joint custody of the executors, or subject to their joint order, or that the money of the estate be deposited in a specified safe bank or trust company to their joint credit, to be drawn out upon their joint order." *Code Civ. Pro. N. Y.*, § 2602; *Chambers v. Cruikshank*, 5 Dem. (N. Y.) 414.

Before this statute was passed it was held that the court would compel one executor, who had been guilty of fraudulent conduct, to place the assets of the estate in such custody as would enable the coexecutors to have access thereto. *Wood v. Brown*, 34 N. Y. 337.



estate and give acquittances to debtors; <sup>1</sup> compound or compromise and release debts due or causes of action belonging to the estate; <sup>2</sup> discharge mortgages; <sup>3</sup> pledge or mortgage the estate to secure advances of money necessary for administrative purposes; <sup>4</sup> sell or otherwise dispose of the assets of the estate, including notes and other choses in action; <sup>5</sup> submit matters to

But in a later case it was held that this could be done only when the executor in possession had been guilty of misconduct, etc. *Burt v. Burt*, 41 N. Y. 46.

And these decisions are said to have suggested the statute recited *supra*, this note. *Chambers v. Cruikshank*, 5 Dem. (N. Y.) 414.

**1. Collection of Assets.** — *Williams v. Nixon*, 2 Beav. 472; *Smith v. Everett*, 27 Beav. 446; *Herbert v. Pigott*, 2 Crompt. & M. 384; *James v. Hackley*, 16 Johns. (N. Y.) 273; *People v. Miner*, 37 Barb. (N. Y.) 466; *Devling v. Little*, 26 Pa. St. 502.

In *Ewart v. Dryden*, 13 Grant Ch. (U. C.) 50, five executors took an assignment of a mortgage to two of their number, which described them as executors under the will, but contained no further reference to the will. The agent for the five then gave notice to the mortgagor that the assignment had been made to the executors, and it was held that the mortgagor was justified in assuming that the assignment was made to the executors as such, so that payments to one of them *bona fide* were valid.

**The Price of Goods Sold by All** may be collected by either. *Tompkins v. Tompkins*, 18 S. Car. 1; *Packer v. Owens*, 164 Pa. St. 185, 35 W. N. C. (Pa.) 423.

**2. Compositions** — *England*. — *Herbert v. Pigott*, 2 Crompt. & M. 384; *Smith v. Everett*, 27 Beav. 446.

*Maine*. — *Gilman v. Healy*, 55 Me. 120.

*Mississippi*. — *Gulledge v. Berry*, 31 Miss. 346.

*New York*. — *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *People v. Miner*, 37 Barb. (N. Y.) 466.

*Pennsylvania*. — *Grace v. Sutton*, 5 Watts (Pa.) 540.

*Wisconsin*. — *Weir v. Mosher*, 19 Wis. 311.

As to the power in general of an executor or administrator to compound claims, see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 927 *et seq.*

**Release, etc., of Debts and Causes of Action** — *England*. — *Hudson v. Hudson*, 1 Atk. 460; *Jacomb v. Harwood*, 2 Ves. 267; *Herbert v. Pigott*, 2 Crompt. & M. 384.

*United States*. — *Boudreau v. Montgomery*, 4 Wash. (U. S.) 186, 3 Fed. Cas. No. 1,694.

*Indiana*. — *Herald v. Harper*, 8 Blackf. (Ind.) 170.

*Maine*. — *Shaw v. Berry*, 35 Me. 279, 58 Am. Dec. 702; *Gilman v. Healy*, 55 Me. 120.

*Kentucky*. — *Bryan v. Thompson*, 7 J. J. Marsh. (Ky.) 586.

*New Jersey*. — *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417.

*New York*. — *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537.

*North Carolina*. — *Hoke v. Fleming*, 10 Ired. L. (32 N. Car.) 263.

*Pennsylvania*. — *Devling v. Little*, 26 Pa. St. 502.

*South Carolina*. — *Gage v. Johnson*, 1 McCord L. (S. Car.) 492; *Hyatt v. McBurney*, 18 S. Car. 199.

But he cannot, merely by directing a debtor not to pay the other executors, prevent them from recovering the debt by action. *Strever v. Feltman*, 1 Thomp. & C. (N. Y.) 277. See also, in regard to giving away assets, *infra*, this division of this section, note, *Power to Dispose of Assets*.

**3. Discharge of Mortgages** — *Massachusetts*. — *George v. Baker*, 3 Allen (Mass.) 326, note.

*New York*. — *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *People v. Miner*, 37 Barb. (N. Y.) 466.

*Pennsylvania*. — *Beltzhoover v. Darragh*, 16 S. & R. (Pa.) 329; *Devling v. Little*, 26 Pa. St. 502; *Packer v. Owens*, 164 Pa. St. 185; *D'Invilliers v. Abbott*, 12 Phila. (Pa.) 462, 34 Leg. Int. (Pa.) 158.

*Wisconsin*. — *Weir v. Mosher*, 19 Wis. 311. See also *Soens v. Racine*, 10 Wis. 271; *Beaver Dam v. Frings*, 17 Wis. 400.

**A Mortgage Given by an Executor to His Co-executor** to secure a debt due from the mortgagor to the testator cannot be discharged by the mortgagor acting as sole surviving executor, because, as between the parties to the mortgage, the debt was the individual debt of the mortgagor to the mortgagee. *Beatty v. Shaw*, 14 Ont. App. 600, *affirming* 13 Ont. 21.

**A Mortgage Given to Two Executors Jointly** may be discharged by either on payment to him of the mortgage debt. *People v. Keyser*, 28 N. Y. 226, 84 Am. Dec. 338.

**4. Pledge or Mortgage of Estate to Secure Advances.** — *Child v. Thorley*, 16 Ch. D. 151; *Cumming v. Landed Banking, etc., Co.*, 19 Ont. App. 447, *reversing* 19 Ont. 426, 20 Ont. 382; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34.

**Pledge to Secure Individual Debts.** — The power of one of a decedent's personal representatives to pledge the assets of the estate without the concurrence of the corepresentative, is subject to the same limitations as affect the power of a sole representative so to deal with the assets; that is, he cannot make a valid pledge for his individual purposes, if the pledgee had notice of the breach of trust. *Le Baron v. Long Island Bank*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 286.

**As to the Power in General of an executor or administrator to pledge or mortgage the estate, and the validity of its exercise, see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1031 *et seq.***

**5. Power to Dispose of Assets** — *England*. — *Kelsock v. Nicholson*, Cro. Eliz. 478; *Jacomb v. Harwood*, 2 Ves. 265; *Murrell v. Cox*, 2 Vern. 570; *Mead v. Orrery*, 3 Atk. 235.

*Canada*. — *Cumming v. Landed Banking, etc., Co.*, 19 Ont. App. 447, *reversing* 19 Ont. 426, 20 Ont. 382.



arbitration;<sup>1</sup> or assent to legacies.<sup>2</sup>

**Distinction Between Assets Derived Directly from Decedent and Assets Converted by Representatives.** — Some authorities make a distinction between assets which come to joint executors or administrators directly from the decedent and such as come to them through a sale or conversion, as where they take a note or mortgage in their own names, though in their representative capacity, for a debt due the decedent, or where they receive the proceeds of property of the decedent sold by them, or collect and deposit funds in their joint names. In respect to the latter class, these authorities hold that one representative has no power of disposal independently of the others, because they hold by moieties.<sup>3</sup> On the other hand, there are authorities of great weight which hold that no such distinction exists, because assets of a decedent's estate do not lose their character as assets when converted into another form by the personal representatives.<sup>4</sup>

**Distinction Between Executors and Administrators.** — At one time a distinction was attempted between executors and administrators in respect to the power of one to act independently of the others, and the reason given for this was that each executor is considered as entirely representing the testator from whom all derive their power and interest, while the power of an administrator is derived from the ordinary, and is not an interest, but only a private office of trust.<sup>5</sup> It

*United States.* — *Boudereau v. Montgomery*, 4 Wash. (U. S.) 186, 3 Fed. Cas. No. 1,694.

*Connecticut.* — *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 583.

*Illinois.* — *Dwight v. Newell*, 15 Ill. 333.

*Kentucky.* — *Sanders v. Blain*, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86.

*Massachusetts.* — *Gardiner v. Callender*, 12 Pick. (Mass.) 376; *George v. Baker*, 3 Allen (Mass.) 326, note; *Cronin v. Hazletine*, 3 Allen (Mass.) 324.

*New York.* — *Geyer v. Snyder*, 140 N. Y. 394; *People v. Miner*, 37 Barb. (N. Y.) 466; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Schermerhorn v. Barhydt*, 9 Paige (N. Y.) 31; *Bogert v. Hertell*, 4 Hill (N. Y.) 492.

*Pennsylvania.* — *Beltzhoover v. Darragh*, 16 S. & R. (Pa.) 329; *Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694.

*Rhode Island.* — *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881.

*South Carolina.* — *Mosely v. Graydon*, 4 Strobb. L. (S. Car.) 7; *Chapman v. Charleston*, 30 S. Car. 549.

*Wisconsin.* — *Weir v. Mosher*, 19 Wis. 311.

See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 175, note 2.

**As to the Power in General of an executor or administrator to transfer the assets of the estate**, see the title **EXECUTORS AND ADMINISTRATORS**, vol. II, p. 1005 *et seq.*

**Sale to Coexecutor.** — The power of one executor to dispose of the assets independently of his coexecutors, does not authorize him to sell to a coexecutor. *Case v. Abeel*, 1 Paige (N. Y.) 393.

**As to the disqualification of an executor or administrator to purchase property of the estate**, see the title **EXECUTORS AND ADMINISTRATORS**, vol. II, p. 1020 *et seq.*

**Surrender of Lease.** — One of several administrators of a lessee may, without the concurrence of the others, surrender the lease, if he thinks that course beneficial to the estate. *Reber v. Gilson*, 1 Pa. St. 54.

**A Mortgage Given to the Decedent** may be assigned by one executor or administrator,

without the concurrence of the others. *Cronin v. Hazletine*, 3 Allen (Mass.) 324; *George v. Baker*, 3 Allen (Mass.) 326, note.

**A Deed Executed by One Executor Only**, though it purports to be the act of both and to convey the testator's whole interest in a chattel real owned by the testator, conveys such whole interest to the grantee, because the executors have each the entirety of the estate and are not entitled in moiety or parts. *Simpson v. Gutteridge*, 1 Madd. 616.

**Power to Give Away Goods of Estate.** — In *Hargthorpe v. Milforth*, Cro. Eliz. 318, it was said that one executor may give away the goods of the testator, and the coexecutor is bound thereby. But see *contra*, the title **EXECUTORS AND ADMINISTRATORS**, vol. II, p. 1006, note, *Giving Away Assets*.

**1. Power to Submit to Arbitration.** — *Lank v. Kinder*, 4 Harr. (Del.) 457; *Grace v. Sutton*, 5 Watts (Pa.) 540. But see *M'Intire v. Morris*, 14 Wend. (N. Y.) 90, where the appearance of one coexecutor before an arbitrator, and his implied assent to the award, were held *prima facie* evidence against both.

**2. Assent to Legacies.** — *Cole v. Miles*, 10 Hare 179; *State v. Bates*, 38 S. Car. 326.

**3. Notes, etc., Payable to Joint Representatives Held to Be Subject to Joint Authority Only.** — *Clark v. Gramling*, 54 Ark. 525; *Sanders v. Blain*, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86; *Smith v. Whiting*, 9 Mass. 334; *Johnson v. Mangum*, 65 N. Car. 146; *De Haven v. Williams*, 80 Pa. St. 480, 21 Am. Rep. 107. See also 1 Dan. Neg. Inst. (4th ed.), § 266; *Tied. Com. Pap.*, § 148.

**4. Distinction Denied.** — *Rogert v. Hertell*, 4 Hill (N. Y.) 492, *reversing Hertell v. Van Buren*, 3 Edw. (N. Y.) 20, 9 Paige (N. Y.) 52; *Fesmire v. Shannon*, 143 Pa. St. 201, *distinguishing De Haven v. Williams*, 80 Pa. St. 480, 21 Am. Rep. 107; *D'Inwilliers v. Abbott*, 4 W. N. C. (Pa.) 124; *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881.

**5. Attempted Distinction Between Executors and Administrators.** — *Hudson v. Hudson*, 1 Atk. 460.



is now well settled, however, that no such distinction exists.<sup>1</sup>

**Distinction Between Acts Done as Executor and Those Done as Trustee.** — The authority of a coexecutor or a coadministrator to act alone relates only to such acts as may be done by him as executor or administrator, and does not extend to such as may be done by him as trustee.<sup>2</sup>

**2. Confession of Judgments.** — It was held at one time that one of several executors or administrators could bind the others by a confession of judgment,<sup>3</sup> but the rule in this particular seems now to be well settled to the contrary.<sup>4</sup>

**3. Presentation of Claims Against Estate.** — According to the theory that joint representatives of a decedent are regarded in law as one person, the presentation to one of them of a claim against the estate has the same effect as if it had been presented to all.<sup>5</sup>

**4. Sale of Real Estate under Order of Court.** — It seems to have been generally held that the statutory power given to executors and administrators to sell real estate under an order of court requires joint action where there are two or more representatives, but in each case in which this question was involved the decision was based on the terms of the local statute,<sup>6</sup> and in some jurisdictions it has been held that one may act without the others, or at least that a sale so made will withstand collateral attack.<sup>7</sup>

**1. Distinction Not Recognized — England.** — *Jacomb v. Harwood*, 2 Ves. 265.

*Indiana.* — *Herald v. Harper*, 8 Blackf. (Ind.) 170.

*New York.* — *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; *James v. Hackley*, 16 Johns. (N. Y.) 273; *Jeroms v. Jeroms*, 18 Barb. (N. Y.) 24.

*North Carolina.* — *Gordon v. Finlay*, 3 Hawks (10 N. Car.) 239; *Jordan v. Spiers*, 113 N. Car. 344.

*South Carolina.* — *O'Neill v. Herbert*, Mc-Mull. Eq. (S. Car.) 495; *Gage v. Johnson*, 1 McCord L. (S. Car.) 492.

*Texas.* — *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108.

See also Schouler Exrs. and Admsrs. (2d ed.), § 404.

**2. Distinction Between Acts Done as Executor and Those Done as Trustee.** — *Denne v. Judge*, 11 East 288. As to the powers of co-trustees, see the title TRUSTS AND TRUSTEES.

**3. Confession of Judgment Held Binding on Estate.** — *Hargthorpe v. Milforth*, Cro. Eliz. 318; *Simpson v. Gutteridge*, 1 Madd. 616; *Lepard v. Vernon*, 2 Ves. & B. 51.

**4. Confession of Judgment Held Not Binding on Estate — England.** — *Lepard v. Vernon*, 2 Ves. & B. 54; *Elwell v. Quash*, 1 Stra. 20.

*Canada.* — *Commercial Bank v. Woodruff*, 21 U. C. Q. B. 602.

*New York.* — *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241.

*Pennsylvania.* — *Hall v. Boyd*, 6 Pa. St. 267; *Heisler v. Knipe*, 1 Browne (Pa.) 319; *Karl v. Black*, 2 Pittsb. (Pa.) 19.

*Vermont.* — See *Mason v. Smalley*, 8 Vt. 118.

**5. Presentation of Claims.** — *Acre v. Ross*, 3 Stew. (Ala.) 288; *Mardis v. Shackleford*, 4 Ala. 493; *McHardy v. McHardy*, 7 Fla. 301; *Barnes v. Scott*, 29 Fla. 285; *Clark v. Parkville*, etc., R. Co., 5 Kan. 654; *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108.

As to presentation of claims in general, see the title DEBTS OF DECEDENTS, vol. 8, p. 1062.

**Independent Executors.** — Where the executors

are made independent of the court of probate under the *Texas* statute, they must unite in allowing claims against the estate. *McLane v. Belvin*, 47 Tex. 493.

**6. Sales under Orders of Court — Joint Action Required — California.** — *Gregory v. McPherson*, 13 Cal. 562 (dictum of Terry, C. J.).

*Massachusetts.* — *Hannum v. Day*, 105 Mass. 33; *Cobb v. Kempton*, 154 Mass. 266.

*Michigan.* — *Osman v. Traphagen*, 23 Mich. 80.

*Missouri.* — *Littleton v. Addington*, 59 Mo. 275; *Greene v. Holt*, 76 Mo. 677, *distinguishing* *Grayson v. Weddle*, 63 Mo. 523.

*New Jersey.* — *Personette v. Johnson*, 40 N. J. Eq. 173, *explaining* *Wortman v. Skinner*, 12 N. J. Eq. 358.

*New York.* — *Sanford v. Granger*, 12 Barb. (N. Y.) 392; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Fitch v. Witbeck*, 2 Barb. Ch. (N. Y.) 161. But see the *New York* cases cited in the next following note.

*North Carolina.* — See *Blythe v. Hoots*, 72 N. Car. 575.

*Texas.* — See *Wells v. Mills*, 22 Tex. 302.

If the application is not made by all, the reason therefor should appear on the record. *Personette v. Johnson*, 40 N. J. Eq. 173; *Fitch v. Witbeck*, 2 Barb. Ch. (N. Y.) 161.

**Deed Made by One Only.** — Where an order of sale was procured and the sale made by both administrators, the fact that the deed was executed by one only is not fatal. The court will compel the other to execute the deed. *Thorp v. McCullum*, 6 Ill. 614. See also *Wortman v. Skinner*, 12 N. J. Eq. 358.

**Independent Executors.** — Where a will authorizes the executors to administer the estate without control of the court of probate, a conveyance of land by one of them is inoperative. *Hart v. Rust*, 46 Tex. 556; *McLaughlin v. McManigle*, 63 Tex. 558.

**7. Joint Action Held Not Necessary.** — *Osman v. Traphagen*, 23 Mich. 80; *Stowe v. Banks*, 123 Mo. 672; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436; *Code Civ. Proc. N. Y.*, § 2750; *Blythe v. Hoots*, 72 N. Car. 575; *Melms v.*



5. **Execution of Powers under Will.** — The questions relating to the execution of powers given by the will to joint executors will be treated in another part of this work.<sup>1</sup>

6. **Waiver of Statute of Limitations** — *a. IN GENERAL.* — The question whether an executor or administrator may waive the statute of limitations so as to bind the estate represented by him has been considered in another part of this work.<sup>2</sup>

*b. PAYMENT OF BARRED DEBTS.* — Applying the rule that each of several executors or administrators may do, independently of the others, any of the administrative acts which pertain to the office,<sup>3</sup> it would seem, in those jurisdictions where executors and administrators are authorized to pay debts which are barred by the statute of limitations, that payments with such effect may be made by one of several representatives.<sup>4</sup>

*c. ACKNOWLEDGMENT OF OR PROMISE TO PAY DEBTS* — (1) *Rule in England.* — Formerly it was held in *England* that an acknowledgment of or promise to pay a debt by one of several executors or administrators did not bind the others,<sup>5</sup> though the opposite view was several times expressed.<sup>6</sup> At present, however, the matter is regulated by a statute which makes an acknowledgment or promise in writing by one of several executors or administrators binding on the estate, though it does not impose any personal liability on the other executors or administrators.<sup>7</sup>

(2) *Rule in United States.* — In the United States this point is ruled differently in different jurisdictions. One line of authorities following the leading English case<sup>8</sup> decided before the passage of the statute above referred to (Lord Tenterden's Act) holds that a promise by one of several executors or administrators will not stop the running of the statute of limitations or remove the bar thereof as to the others;<sup>9</sup> but if one of several executors or administra-

Pfister, 59 Wis. 186. See also *De Bardelaben v. Stoudenmire*, 48 Ala. 643; *Snyder v. Snyder*, 6 Binn. (Pa.) 483, 6 Am. Dec. 493; *Corley v. Anderson*, 5 Tex. Civ. App. 213.

1. See the title POWERS.

2. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 919 *et seq.* And see generally the title LIMITATION OF ACTIONS.

3. See *supra*, this section, *Administrative Acts in General*.

4. **Payment of Barred Debtor.** — See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 919.

5. **Rule in England — Acknowledgment, etc., by One Formerly Held Not Binding on Others.** — *Tullock v. Dunn*, R. & M. 416, 21 E. C. L. 478. See also *Fordham v. Wallis*, 10 Hare 217, 22 L. J. Ch. 548; *Putnam v. Bates*, 3 Russ. 188.

The Weight of Authority was said to lean towards the statement in the text. *In re Macdonald*, (1897) 2 Ch. 181, 66 L. J. Ch. 630, 76 L. T. N. S. 713, 45 W. R. 628, reviewing numerous decisions.

6. **View that Promise by One Binds Others.** — In *Scholey v. Walton*, 12 M. & W. 510, it was said, but not decided, that one executor cannot be bound by the express promise of another so as to take the case out of the statute of limitations, even if the one promising binds himself in the character of executor. See also *Atkins v. Tredgold*, 2 B. & C. 23, 9 E. C. L. 12, 3 Dowl. & R. 200; *M'Culloch v. Dawes*, 9 Dowl. & R. 40, 22 E. C. L. 385.

7. **Effect of Promise, etc., by One Executor or Administrator Regulated by Statute.** — *In re Macdonald*, 66 L. J. Ch. 630, (1897) 2 Ch. 181,

76 L. T. N. S. 713, 45 W. R. 628, construing Lord Tenterden's Act, (9 Geo. IV., c. 14) 31. See also *Astbury v. Astbury*, 67 L. J. Ch. 471, (1898) 2 Ch. 111, 78 L. T. N. S. 494, 46 W. R. 536.

8. *Tullock v. Dunn*, R. & M. 416, 21 E. C. L. 478.

9. **Rule in United States — Promise by One Held Not Binding on Others** — *Alabama.* — *Caruthers v. Mardis*, 3 Ala. 599; *Pitts v. Wooten*, 24 Ala. 474.

*Connecticut.* — *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92.

*Delaware.* — *Conoway v. Spicer*, 5 Harr. (Del.) 425.

*Indiana.* — *Weston v. Murnan*, 4 Ind. 271.

*Pennsylvania.* — *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *Reynolds v. Hamilton*, 7 Watts (Pa.) 420; *Hall v. Boyd*, 6 Pa. St. 267; *Matter of M'Williams*, 3 Pa. L. J. Rep. 321, 5 Pa. L. J. 265; *Forney v. Benedict*, 5 Pa. St. 225; *Clark v. Maguire*, 35 Pa. St. 259.

In *New York*, the question does not seem to have been actually decided, but the rule stated in the text has been intimated and the contrary rule has been several times questioned. *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Cayuga County Bank v. Bennett*, 5 Hill (N. Y.) 236; *Hammon v. Huntley*, 4 Cow. (N. Y.) 494.

In *Heath v. Grenell*, 61 Barb. (N. Y.) 190, it was said that it seems that one of the several administrators cannot revive or restore a stale demand by a promise or part payment. See also *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241; *M'Intire v. Morris*, 14 Wend. (N. Y.) 90.



tors promises to pay a debt of the decedent, and he afterwards becomes the sole representative, the assets are then bound by the promise the same as if the promisor had been the sole representative at the time the promise was made.<sup>1</sup> In other jurisdictions it is held that a promise or acknowledgment by one is effective as to all, that is, it binds the estate.<sup>2</sup>

**7. Admissions and Promises.** — An executor or administrator, by admitting the existence of, or promising to pay, a claim against the decedent's estate, may incur a personal liability,<sup>3</sup> but he cannot thereby impose any such liability on a coexecutor or coadministrator,<sup>4</sup> nor will such promise or acknowledgment operate to create a debt against the estate where none existed before.<sup>5</sup>

**8. Liability of One for Acts of Others** — *a. GENERAL RULE.* — The general rule is that since one of several executors or administrators may do any of the ordinary administrative acts without the concurrence, and even against the dissent, of the corepresentatives, one does not incur any liability in respect to the acts or omissions of the others.<sup>6</sup> It has accordingly been held that if an executor

**1. Promise by One Afterwards Becoming Sole Representative.** — *Hall v. Darrington*, 9 Ala. 502.

**2. Promise by One Held Binding on Others** — *Kentucky*. — *Hord v. Lee*, 4 T. B. Mon. (Ky.) 36; *Northcut v. Wilkinson*, 12 B. Mon. (Ky.) 408; *Head v. Manners*, 5 J. J. Marsh. (Ky.) 257. *Massachusetts*. — *Emerson v. Thompson*, 16 Mass. 431.

*New Jersey*. — *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417.

In Maryland this question has been raised several times though it does not seem to have been actually decided. See *Kent v. Wilkinson*, 5 Gill & J. (Md.) 498; *Quynn v. Carroll*, 10 Md. 197. But more recently the court, after noticing the conflict of authority, expressed the opinion that a promise or acknowledgment by one of several executors or administrators would operate to remove the bar of the statute of limitations, especially if made before the statute had run against the claim. *McCann v. Sloan*, 25 Md. 575.

**3. Admission of or Promise to Pay Claims — Personal Liability.** — See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 914 *et seq.*

**4. Admissions Not Binding on Coexecutors or Coadministrators.** — *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417; *James v. Hackley*, 16 Johns. (N. Y.) 273. And see the title ADMISSIONS, vol. I, p. 670.

**Borrowing Money.** — One of several coexecutors has no power to bind the others by borrowing money, though it is for the benefit of the estate. *Bryan v. Stewart*, 83 N. Y. 270. See also *Guthmann v. Meyer*, (N. Y. City Ct. Gen. T.) 63 N. Y. Supp. 971.

**5. Debts Not Created by Promise, etc., of Representative** — *Alabama*. — *Scruggs v. Driver*, 31 Ala. 274.

*Georgia*. — *Wilkerson v. Wootten*, 28 Ga. 568. *New York*. — *James v. Hackley*, 16 Johns. (N. Y.) 273; *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558, 21 Am. Dec. 241; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Bailey v. Spofford*, 14 Hun (N. Y.) 86. See also *M'intire v. Morris*, 14 Wend. (N. Y.) 90.

*Pennsylvania*. — *Hall v. Boyd*, 6 Pa. St. 267. **A Coexecutor May Borrow Money for the purpose of administering the estate, and the estate will be liable for it.** *Child v. Thorley*, 16 Ch. D. 151.

**6. One Not Ordinarily Liable for Acts or Omissions of Others** — *England*. — *Hensloe's Case*, 9 Coke 37; *Hargthorpe v. Milford*, Cro. Eliz. 318; *James v. Frearson*, 1 Y. & C. Ch. 370; *Littlehales v. Gascoyne*, 3 Bro. C. C. 73; *Williams v. Nixon*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 409; *Toplis v. Hurrell*, 19 Beav. 428; *Fox v. Waters*, 12 Ad. & El. 43, 40 E. C. L. 18; *Nation v. Tozer*, 1 C. M. & R. 172; *In re Gasquoine*, (1894) 1 Ch. 470.

*Canada*. — *Darling v. Brown*, 2 Can. Sup. Ct. 26, 21 L. C. Jur. 125; *Bacon v. Shier*, 16 Grant Ch. (U. C.) 485; *Re Crowther*, 10 Ont. 159; *Miller v. Coleman*, 25 L. C. Jur. 196.

*United States*. — *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166.

*Alabama*. — *Taylor v. Roberts*, 3 Ala. 83; *Royall v. McKenzie*, 25 Ala. 363; *Knight v. Haynie*, 74 Ala. 542; *Hinson v. Williamson*, 74 Ala. 180.

*Delaware*. — *Conner v. McIlvaine*, 4 Del. Ch. 30; *State v. Belin*, 5 Harr. (Del.) 400.

*Georgia*. — *Cameron v. Justices*, 1 Ga. 36, 44 Am. Dec. 636; *Hall v. Carter*, 8 Ga. 388; *Kerr v. Waters*, 19 Ga. 136; *Roberts v. Thomas*, 32 Ga. 31.

*Indiana*. — *Call v. Ewing*, 1 Blackf. (Ind.) 301; *Ray v. Doughty*, 4 Blackf. (Ind.) 115; *Davis v. Walford*, 2 Ind. 88.

*Iowa*. — See *Nettman v. Schramm*, 23 Iowa 521.

*Kentucky*. — *Lawrence v. Lawrence*, Litt. Sel. Cas. (Ky.) 123; *Roach v. Hubbard*, Litt. Sel. Cas. (Ky.) 235; *Moore v. Tandy*, 3 Bibb (Ky.) 97; *Heath v. Allin*, 1 A. K. Marsh. (Ky.) 442; *Young v. Wickliffe*, 7 Dana (Ky.) 447; *Walker v. Walker*, 88 Ky. 625.

*Maryland*. — *Latrobe v. Tiernan*, 2 Md. Ch. 474.

*Massachusetts*. — *Brazer v. Clark*, 5 Pick. (Mass.) 104; *Newcomb v. Williams*, 9 Met. (Mass.) 525; *Ames v. Armstrong*, 106 Mass. 18.

*Mississippi*. — *Noland v. Calvitt*, 12 Smed. & M. (Miss.) 273; *Fonte v. Horton*, 36 Miss. 350; *Gaultney v. Nolan*, 33 Miss. 569.

*New Jersey*. — *Fennimore v. Fennimore*, 3 N. J. Eq. 292; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Duncan v. Davison*, 40 N. J. Eq. 535; *English v. Newell*, 42 N. J. Eq. 76, *affirmed* 43 N. J. Eq. 295; *Tichenor v. Tichenor*, 43 N. J. Eq. 163; *Bechtold v. Read*, 49 N. J. Eq. 111.



never did or attempted to do any act as such, and never received any of the funds of the estate, and was not cognizant of or consulted in respect to the management of the estate, he is not liable for devastavits committed by the acting executor.<sup>1</sup>

*b. EXCEPTIONS TO GENERAL RULE — (1) Putting Corepresentative in Possession of Assets.* — The rule of non-liability for each other's acts presupposes, however, entirely independent action on the part of the representative in default, and his corepresentatives are liable for his devastavits, if they in any way contributed thereto, whether intentionally or otherwise, as by voluntarily and unnecessarily paying over or delivering assets of the estate to him (the representative in default) or enabling him in any way to obtain possession of assets;<sup>2</sup> though a distinction has been made in this respect between creditors

See also *Young v. Schelly*, (N. J. 1891) 21 Atl. Rep. 1049.

*New York.* — *Wood v. Brown*, 34 N. Y. 337; *Nanz v. Oakley*, 120 N. Y. 84; *Matter of Blauvelt*, 131 N. Y. 249; *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99; *Williams v. Holden*, 4 Wend. (N. Y.) 223; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; *Douglass v. Satterlee*, 11 Johns. (N. Y.) 16; *Manahan v. Gibbons*, 19 Johns. (N. Y.) 427; *Mesick v. Mesick*, 7 Barb. (N. Y.) 120; *White v. Bullock*, 20 Barb. (N. Y.) 91, reversed on other points, 4 Abb. App. Dec. (N. Y.) 578, 15 How. Pr. (N. Y.) 102; *Lacey v. Davis*, 5 Redf. (N. Y.) 301; *Matter of Demarest*, 1 Connolly (N. Y.) 200; *Matter of Goetschius*, (Surrogate Ct.) 2 Misc. (N. Y.) 278; *In re Adams*, (Supm. Ct. App. Div.) 64 N. Y. Supp. 591, modifying (Surrogate Ct.) 30 Misc. (N. Y.) 184. See also *Daly's Estate*, Tuck. (N. Y.) 95.

*North Carolina.* — *Ochiltree v. Wright*, 1 Dev. & B. Eq. (21 N. Car.) 336; *Worth v. M'Aden*, 1 Dev. & B. Eq. (21 N. Car.) 199; *Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51; *Broten v. Bateman*, 2 Dev. Eq. (17 N. Car.) 115, 22 Am. Dec. 732; *Williams v. Maitland*, 1 Ired. Eq. (36 N. Car.) 92; *Kerr v. Kirkpatrick*, 8 Ired. Eq. (43 N. Car.) 137.

*Pennsylvania.* — *Boyd v. Boyd*, 1 Watts (Pa.) 365; *Hall v. Boyd*, 6 Pa. St. 267; *Stell's Appeal*, 10 Pa. St. 149; *Irwin's Appeal*, 35 Pa. St. 294; *Maffet's Estate*, 7 Kulp (Pa.) 153; *Graham's Estate*, 8 Pa. Dist. 479; *Wilson's Appeal*, 115 Pa. St. 95; *Swift's Estate*, 6 Northam. Co. Rep. (Pa.) 105.

*South Carolina.* — *Lenoir v. Winn*, 4 Desaus. (S. Car.) 65, 6 Am. Dec. 597; *Knox v. Pickett*, 4 Desaus. (S. Car.) 199; *Gayden v. Gayden*, McMull. Eq. (S. Car.) 435; *O'Neill v. Herbert*, McMull. Eq. (S. Car.) 495; *Massey v. Cureton*, Cheves Eq. (S. Car.) 181; *Atchison v. Robertson*, 3 Rich. Eq. (S. Car.) 132, 55 Am. Dec. 634; *Clarke v. Jenkins*, 3 Rich. Eq. (S. Car.) 318; *Bailey v. Boyce*, 5 Rich. Eq. (S. Car.) 187; *Gates v. Whetstone*, 8 S. Car. 244, 28 Am. Rep. 284; *Anderson v. Earle*, 9 S. Car. 460; *Tompkins v. Tompkins*, 18 S. Car. 1.

*Tennessee.* — *Hays v. Hays*, 3 Tenn. Ch. 88, See *Allen v. Shanks*, 90 Tenn. 359.

*Vermont.* — *Sparhawk v. Buell*, 9 Vt. 41.

*Virginia.* — *Boyd v. Boyd*, 3 Gratt. (Va.) 113; *McCormick v. Wright*, 79 Va. 524.

*West Virginia.* — *Hart v. Hart*, 31 W. Va. 688.

*Effect of Inventory.* — Where an inventory de-

scribes the effects on a farm with which the executor was acquainted, it may be *prima facie* evidence, but it is rebutted if it appears that no effects actually came to the executor's hands though his coexecutor had, with his knowledge, intermeddled with the property. *Stearn v. Mills*, 4 B. & Ad. 657, 24 E. C. L. 133.

*Concealing Existence of Superior Debts.* — The circumstance that one of two executors had notice of the existence of a debt of superior degree, which he concealed from his coexecutor, did not affect the coexecutor so as to make him guilty of a devastavit by paying an inferior debt. *Hawkins v. Day*, Ambl. 162. But in the absence of evidence to the contrary it will be presumed that notice of a superior debt to one executor was communicated by him to his coexecutor. *Townsend v. Barber*, 1 Dick. 356; *Macpherson v. Macpherson*, 1 Macq. H. L. 243. But see *Davis v. Spurling*, 1 Russ. & M. 66.

*Torts.* — An executor is not personally liable for a misrepresentation made by his coexecutor in selling the estate. *Heath v. Allin*, 1 A. K. Marsh. (Ky.) 442.

*Executors Who Are Also Trustees.* — The rule stated in the text applies, in *New York*, where the trustees are also executors. *Ormiston v. Olcott*, 84 N. Y. 339, reversing 22 Hun (N. Y.) 270, and overruling *Bates v. Underhill*, 3 Redf. (N. Y.) 365. See also *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99; *Kip v. Deniston*, 4 Johns. (N. Y.) 23; *Kirby v. Turner*, Hopk. (N. Y.) 330. Compare *Bates v. Underhill*, 3 Redf. (N. Y.) 365, in which the decision is based on the more stringent rule adopted in *England* in cases where executors are also trustees. *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.) 130.

*1. Executor Not Acting as Such.* — *Cocks v. Barlow*, 5 Redf. (N. Y.) 406.

*2. Contributing to Devastavits — Enabling Representative in Default to Obtain Possession of Assets — England.* — *Langford v. Gascoyne*, 11 Ves. Jr. 335; *Shipbrook v. Hinchinbrook*, 11 Ves. Jr. 254; *Townsend v. Barber*, 1 Dick. 356; *Macpherson v. Macpherson*, 1 Macq. H. L. 243; *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Mendes v. Guedalla*, 2 Johns. & H. 259; *Crosse v. Smith*, 7 East 246; *Stearn v. Mills*, 4 B. & Ad. 657, 24 E. C. L. 133; *Williams v. Nixon*, 2 Beav. 472; *Candler v. Tillett*, 22 Beav. 257; *Gibbins v. Taylor*, 22 Beav. 344; *Cowell v. Gatcombe*, 27 Beav. 568; *Doyle v. Blake*, 2 Sch. & Lef. 237; *Broadhurst v. Balguy*, 1 Y. & C. Ch. 16; *Phillipson v. Gatty*, 7 Hare 516; *Garner v. Moore*,



and legatees.<sup>1</sup>

If Good Reasons Exist for turning over assets to a corepresentative, and the party so turning them over acted in good faith, with reasonable prudence and discretion, and without notice of any purpose of the corepresentative to misapply the assets, he is not liable for such misapplication.<sup>2</sup>

**Acts Not Unnecessarily Done.** — The converse of the rule that one executor or administrator who voluntarily and unnecessarily turns over to another assets of the estate is liable for the waste thereof by such other, is that he is not liable if his act was not unnecessary.<sup>3</sup> And so, too, he is not liable if the cir-

3 Drew. 277; *Lander v. Weston*, 3 Drew. 389; *Selby v. Bowie*, 4 Giff. 300; *Riky v. Kemmis*, 1 Ll. & G. t. Sugd. 101.

*United States.* — *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Edmonds v. Crenshaw*, 14 Pet. (U. S.) 166.

*Alabama.* — *Knight v. Haynie*, 74 Ala. 542. *Georgia.* — *Hall v. Carter*, 8 Ga. 388; *Head v. Bridges*, 67 Ga. 227; *Whiddon v. Williams*, 98 Ga. 310.

*Indiana.* — *Ray v. Doughty*, 4 Blackf. (Ind.) 115.

*Maryland.* — *Wayman v. Jones*, 4 Md. Ch. 500.

*Mississippi.* — *Gaultney v. Nolan*, 33 Miss. 567.

*New Jersey.* — *Schenck v. Schenck*, 16 N. J. Eq. 174; *Fisher v. Skillman*, 18 N. J. Eq. 229; *English v. Newell*, 42 N. J. Eq. 76, *affirmed* in *English v. Hendrickson*, 43 N. J. Eq. 295; *Bechtold v. Read*, 49 N. J. Eq. 111.

*New York.* — *Adair v. Brimmer*, 74 N. Y. 539; *Croft v. Williams*, 88 N. Y. 384, *modifying* 23 Hun (N. Y.) 102; *Clark v. Clark*, 8 Paige (N. Y.) 153, 35 Am. Dec. 676; *Mesick v. Mesick*, 7 Barb. (N. Y.) 120; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; *Sutherland v. Brush*, 7 Johns. Ch. (N. Y.) 17, 11 Am. Dec. 383; *Douglass v. Satterlee*, 11 Johns. (N. Y.) 16; *Lacey v. Davis*, 5 Redf. (N. Y.) 301; *Dixon v. Storm*, 5 Redf. (N. Y.) 419, *distinguishing* *Adair v. Brimmer*, 74 N. Y. 539; *Wyckoff v. Van Siclen*, 3 Dem. (N. Y.) 75; *Croft v. Williams*, 23 Hun (N. Y.) 104; *Matter of Storm*, 28 Hun (N. Y.) 499; *Matter of Deyo*, (N. Y. 1886) 3 Cent. Rep. 657.

*North Carolina.* — *Williams v. Maitland*, 1 Ired. Eq. (36 N. Car.) 92. See also *Hauser v. Lehman*, 2 Ired. Eq. (37 N. Car.) 594.

*Pennsylvania.* — *Matter of Evans*, 2 Ashm. (Pa.) 470.

*South Carolina.* — *Gates v. Whetstone*, 8 S. Car. 244, 28 Am. Rep. 284.

*Tennessee.* — *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 506.

A loan to a Coexecutor or Coadministrator without proper security is a breach of trust. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 963, note 1.

**Appointment of One to Act for All.** — Where several persons take out administration, and afterwards appoint one of them to be the acting administrator, and direct the creditors to pay their debts to him, and he becomes insolvent, the others are responsible for his receipts. *Lees v. Sanderson*, 4 Sim. 28.

**Executor de Son Tort.** — The liability of one executor *de son tort* for the acts of another executor *de son tort* is not limited to the extent to which there has been an actual personal re-

ceipt of goods or money by the first-named wrongful executor; but one executor *de son tort* may be liable for the acts of another when such acts have been authorized and directed by him. *Kenny v. Ryan*, (1897) 1 Ir. R. 513.

**1. Giving Assets to Coexecutor — No Liability to Legatees.** — *Brown's Appeal*, 1 Dall. (Pa.) 311; *Verner's Estate*, 6 Watts (Pa.) 250.

**2. Good Reasons for Turning Over Assets.** — *Matter of Osborn*, 87 Cal. 1.

**3. Unnecessarily Enabling Corepresentative to Obtain Possession of Assets.** — *In re Gasquoine*, (1894) 1 Ch. 470, holding that the act of an executor in enabling his coexecutor to obtain possession of assets is not unnecessary, if it is done in the regular course of business in administering property. See also *Hovey v. Blake-man*, 4 Ves. Jr. 608; *Shipbrook v. Hinchinbrook*, 11 Ves. Jr. 252.

Thus one executor is safe in joining in the sale of stock or other property and permitting another executor to receive the proceeds if the sale was necessary for the payment of debts or legacies. *Terrell v. Matthews*, 1 Macn. & G. 434, note; *Hovey v. Blakeman*, 4 Ves. Jr. 596; *Paulding v. Sharkey*, 88 N. Y. 432, *affirming* 21 Hun (N. Y.) 276.

But if the executor joins in such sales when the money is not required for such purposes, he is liable for the money so received by his coexecutor. *Aplyn v. Brewer*, Prec. Ch. 173; *Chambers v. Minchin*, 7 Ves. Jr. 193; *Shipbrook v. Hinchinbrook*, 11 Ves. Jr. 252, 16 Ves. Jr. 477; *Brice v. Stokes*, 11 Ves. Jr. 319; *Underwood v. Stevens*, 1 Meriv. 712; *Terrell v. Matthews*, 1 Macn. & G. 434, note.

**Inability to Act** by reason of sickness, imprisonment, etc., is a circumstance which will render it not only appropriate, but necessary, to make a transfer of the assets of an estate by an executor to his coexecutor in good circumstances and credit. *Matter of Osborn*, 87 Cal. 1; *Sterrett's Appeal*, 2 P. & W. (Pa.) 419.

**Payment of Debt Due from Executor to Estate.** — It has been held that where an executor pays to his coexecutors a debt which he owed the estate individually, he is not liable for a waste thereof by the coexecutors. *Matter of Demarest*, 1 Connolly (N. Y.) 200.

The payment of money by one executor into the hands of his coexecutor on notes given by himself to the other, for the purchase of property belonging to the estate sold by the coexecutor, is not such an act as will of itself charge such executor with the subsequent waste or misapplication of the funds of the estate by the other executor. *Mosley v. Floyd*, 31 Ga. 564. See also *Swift's Estate*, 6 Northam. Co. Rep. (Pa.) 105.



circumstances are such as would justify the placing of the assets in the hands of an agent to be applied in the administration of the estate.<sup>1</sup>

**Acts Done under Authority of Will.**—Another case in which no liability is incurred by reason of turning over assets to a coexecutor is where the will authorized the coexecutor to take exclusive possession of the estate,<sup>2</sup> or provided that no liability should attach because of payments by an executor to a coexecutor.<sup>3</sup>

**Merely Passive Conduct** of a personal representative in permitting property of the estate to get into the possession of a corepresentative will not render him liable for the waste thereof by the corepresentative. Some positive act is generally necessary, because each representative has the right to the possession of the assets.<sup>4</sup>

**Representative Not Assuming to Act.**—It has been held that if the representative sought to be charged had not undertaken any of the duties or assumed any of the powers of the office, he is not liable for assets delivered to the acting representative.<sup>5</sup>

**Liability Dependent on Particular Circumstances.**—The liability of an executor who has intrusted to his coexecutor the fund for which he was himself primarily responsible, depends on the circumstances of each case. Good faith alone will

**1. Circumstances Authorizing Employment of Agents.**—See *Chambers v. Minchin*, 7 Ves. Jr. 198; *Home v. Pringle*, 8 Cl. & F. 264; *Re Crowter*, 10 Ont. 159; *Daly's Estate*, Tuck. (N. Y.) 95.

In *Davis v. Spurling*, 1 Russ. & M. 64, it was held that where an executor was employed by his coexecutor as agent to sell an estate which under the will of the testator the coexecutor alone had power to sell, and the executor handed over the price of the estate to the coexecutor, he was not accountable for the misapplication of that price by the coexecutor, because he had no legal right to retain it, though by the will of the testator the price of the estate was to be considered as part of his personal estate.

In *Bacon v. Bacon*, 5 Ves. Jr. 331, an executor was held not liable for money placed by him in the hands of his coexecutor for the purpose of paying the testator's debts in the part of the country where the coexecutor resided. See also *Joy v. Campbell*, 1 Sch. & Lef. 341; *Castle v. Warland*, 32 Beav. 660; *Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51.

But in *Moses v. Levi*, 3 Y. & C. Exch. 359, the executors, having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which each was to pay the residuary legatees in his own part of the country, and the residuary funds were apportioned between them for that purpose. One of the executors made default in payment of a legacy, and it was held that the other executor was responsible for the default.

**2. Possession by One Executor Authorized by Will.**—Thus where the will directed that the testator's widow, who was also an executrix, should remain in the full possession and enjoyment of all his testator's estate, real and personal, it was held that her coexecutors were not responsible for the waste of the estate by her. *Vanpelt v. Veghte*, 14 N. J. L. 207.

But in *Newcomb v. Williams*, 9 Met. (Mass.) 525, it was held that where the estate passed

into the joint possession of both executors, and they rendered a joint account, but the residue of the estate, after the payment of debts, remained in the hands of one of them, they remained jointly liable, though the will provided that the executor by whom the residue was retained should take immediate possession of the estate as trustee for the legatees.

**3. Exemption from Liability by Will.**—In *Wilkins v. Hogg*, 3 Giff. 116, the will provided that any trustee who should pay to his co-trustee or enable him to receive moneys for the general purposes of the will, should not be obliged to see to the due application thereof, or be responsible by express or implied notice of the misapplication, and it was held that this was a good answer to a bill against two or three trustees to make good trust money which they had allowed their co-trustee to receive. See also *Pass v. Dundas*, 43 L. T. N. S. 665, 29 W. R. 332; *King v. Hilton*, 29 Grant Ch. (U. C.) 381. Compare *McCarter v. McCarter*, 7 Ont. 243.

**4. Merely Passive Conduct.**—*Langford v. Gascoyne*, 11 Ves. Jr. 333; *Croft v. Williams*, 88 N. Y. 384, *modifying* 23 Hun (N. Y.) 102; *Wilmerding v. McKesson*, 103 N. Y. 329; *Cocks v. Haviland*, 124 N. Y. 426, *distinguishing* *Earle v. Earle*, 93 N. Y. 104; *Remington v. Walker*, 99 N. Y. 626; *Matter of Cocks*, 1 Connoly (N. Y.) 347; *Worth v. M'Aden*, 1 Dev. & B. Eq. (21 N. Car.) 199; *Sterrett's Appeal*, 2 P. & W. (Pa.) 419.

**5. Representative Not Assuming to Act.**—In *Balchen v. Scott*, 2 Ves. Jr. 678, it was held that an executor who proved the will but had never acted, was not chargeable by reason of the mere circumstance that he received a letter by post from a debtor of the estate, inclosing a bill of exchange on account of his debt, and immediately sent the bill to the acting executor, who afterwards became insolvent.

An executor who does not prove the will, but acts, is answerable only for what he actually received. *Lowry v. Fulton*, 9 Sim. 115. See also *MacDonald v. Hanna*, 100 Mich. 412.



not save him from liability, nor will bad faith on the part of his coexecutor subject him to it.<sup>1</sup>

(2) *Acquiescence in or Negligence Contributing to Breach of Trust.* — It is also a ground for charging one representative with the devastavits of a corepresentative, that he was cognizant of the breach of trust by such corepresentative and acquiesced in it, or that he was negligent in not taking steps to prevent the loss.<sup>2</sup>

(3) *Effect of Giving Joint Receipts.* — The rule was laid down in some early *English* cases, and was long adhered to, that where executors or administrators join in giving a receipt for money, though only one of them receives it, all are answerable for such money, because there is no necessity for them to join in the receipt,<sup>3</sup> in which respect joint executors or administrators have been said to

1. *Liability Dependent on Circumstances.* — Matter of Osborn, 87 Cal. 1; *In re Sanderson*, 74 Cal. 199; *Noland v. Calvit*, 12 Smed. & M. (Miss.) 273; *Fonte v. Horton*, 36 Miss. 350; *Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51.

2. *Acquiescence in or Negligence Respecting Conduct of Corepresentative* — *England.* — Booth v. Booth, 1 Beav. 125; *Williams v. Nixon*, 2 Beav. 472; *Lincoln v. Wright*, 4 Beav. 427; *Horton v. Brocklehurst*, 29 Beav. 504; *Egbert v. Butter*, 21 Beav. 560; *Style v. Guy*, 1 Macn. & G. 422; *Mendes v. Guedolla*, 2 Johns. & H. 259.

*Canada.* — *Archer v. Severn*, 13 Ont. 316, *distinguishing Re Crowter*, 10 Ont. 159; *Sovereign v. Sovereign*, 15 Grant Ch. (U. C.) 559; *McPhadden v. Bacon*, 13 Grant Ch. (U. C.) 591.

*United States.* — See *Hiller v. Ladd*, 85 Fed. Rep. 703.

*Alabama.* — *Hinson v. Williamson*, 74 Ala. 180.

*California.* — Matter of Osborn, 87 Cal. 1; *Birmingham v. Wilcox*, 120 Cal. 467.

*Georgia.* — *Whiddon v. Williams*, 98 Ga. 310; *Head v. Bridges*, 67 Ga. 227.

*Kentucky.* — *Heath v. Allin*, 1 A. K. Marsh. (Ky.) 442; *Walker v. Walker*, 88 Ky. 615; *Grundy v. Drye*, (Ky. 1899) 49 S. W. Rep. 469, 20 Ky. L. Rep. 1337, *affirming* on rehearing (Ky. 1898) 48 S. W. Rep. 155, 20 Ky. L. Rep. 970.

*Maryland.* — *Wayman v. Jones*, 4 Md. Ch. 500.

*Massachusetts.* — *Blake v. Pegram*, 109 Mass. 541.

*Mississippi.* — *Fonte v. Horton*, 36 Miss. 350.

*New Jersey.* — *Holcombe v. Holcombe*, 13 N. J. Eq. 413; *Smith v. Pettigrew*, 34 N. J. Eq. 216; *Bechtold v. Read*, 49 N. J. Eq. 111.

*New York.* — *Wood v. Brown*, 34 N. Y. 337; *Adair v. Brimmer*, 74 N. Y. 539; *Croft v. Williams*, 88 N. Y. 384, *modifying* 23 Hun (N. Y.) 102; *Earle v. Earle*, 93 N. Y. 104; *Wilmerding v. McKesson*, 103 N. Y. 339; *Matter of Niles*, 113 N. Y. 547; *Thompson v. Hicks*, 1 N. Y. App. Div. 275; *Matter of Peck*, 31 N. Y. App. Div. 407, *appeal dismissed* 161 N. Y. 655; *Brown's Accounting*, (Surrogate Ct.) 16 Abb. Pr. (N. Y.) 457; *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Clark v. Clark*, 8 Paige (N. Y.) 152, 35 Am. Dec. 676; *Johnson v. Corbett*, 11 Paige (N. Y.) 265; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Matter of Cozzens*, 2 Connolly (N. Y.) 622.

*North Carolina.* — *Hauser v. Lehman*, 2 Ired. Eq. (37 N. Car.) 594; *Brotten v. Bateman*, 2

Dev. Eq. (17 N. Car.) 115, 22 Am. Dec. 732; *Kincade v. Conley*, 64 N. Car. 387. See *Worth v. M'Aden*, 1 Dev. & B. Eq. (21 N. Car.) 199.

*Pennsylvania.* — *Irwin's Appeal*, 35 Pa. St. 294; *Stong's Estate*, 160 Pa. St. 13; *Weigand's Appeal*, 28 Pa. St. 471; *Weldy's Appeal*, 102 Pa. St. 454; *Hengst's Appeal*, 24 Pa. St. 413; *Cressman's Estate*, 2 Phila. (Pa.) 76, 13 Leg. Int. (Pa.) 85; *Power's Estate*, 15 Phila. (Pa.) 539, 39 Leg. Int. (Pa.) 129; *Lobinger v. Mechling*, 2 Am. L. J. (Pa.) 256; *Hess's Estate*, 2 Phila. (Pa.) 243, 14 Leg. Int. (Pa.) 86; *Brown's Estate*, 11 Phila. (Pa.) 127, 33 Leg. Int. (Pa.) 148; *Gilbert's Appeal*, 78 Pa. St. 266.

*South Carolina.* — *McDowall v. McDowall*, *Bailey Eq. (S. Car.)* 324; *Williams v. Mower*, 29 S. Car. 332.

*Tennessee.* — *Hays v. Hays*, 3 Tenn. Ch. 88; *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 400.

*Virginia.* — *Caskie v. Harrison*, 76 Va. 85; *McCormick v. Wright*, 79 Va. 524; *Carter v. Cutting*, 5 Munf. (Va.) 223.

*Negligence Is Not Chargeable* where the executor made inquiries of his coexecutor, who was reputed to be wealthy, as to whether the fund in the hands of the coexecutor had been invested, as directed by the will, and was informed that it had been so invested. *Matter of Cocks*, 1 Connolly (N. Y.) 347.

*Failure to Enforce Payment of a Coexecutor's Debt* to the estate, is not such negligence as will charge the other executor where the coexecutor was insolvent at the time he qualified and during the whole period of administration. *Brown v. Harshman*, 2 Ohio Dec. 19, 9 Ohio Cir. Ct. 1, 6 Ohio Cir. Dec. 10. See also *Clarke v. Cotton*, 2 Dev. Eq. (17 N. Car.) 51, where the coexecutor became insolvent after the probate of the will. Compare *Weigand's Appeal*, 28 Pa. St. 471.

*Use of Funds in Executor's Business.* — Where two executors use funds of the estate in their partnership business, they are both liable for the whole amount thereof, and not merely each for his *pro rata* share. *In re Goetschius*, (Surrogate Ct.) 2 Misc. (N. Y.) 278.

3. *Joint Receipt Held to Impose Joint Liability.* — *Fellows v. Mitchell*, 1 P. Wms. 83; *Churchill v. Hobson*, 1 P. Wms. 241, 1 Salk. 318; *Leigh v. Barry*, 3 Atk. 583; *Murrell v. Cox*, 2 Vern. 570; *Chambers v. Minchin*, 7 Ves. Jr. 186; *Brice v. Stokes*, 11 Ves. Jr. 319, *Shipbrook v. Hinchinbrook*, 11 Ves. Jr. 252, 16 Ves. Jr. 477; *Langford v. Gascoyne*, 11 Ves. Jr. 333; *Sadler v. Hobbs*, 2 Bro. C. C. 117; *Brice v. Stokes*, 11 Ves. Jr. 324; *Walker v.*



be distinguishable from joint trustees.<sup>1</sup> But it is now settled, both in *England* and in the *United States*, that a joint receipt imposes on the parties to it only a *prima facie* liability, which any one of them may avoid by showing that he joined in the receipt merely as a matter of conformity, and that the money was not actually in his possession, or in any way under his control.<sup>2</sup>

(4) *Effect of Making Joint Inventory.*—A joint inventory made and returned by several executors or administrators has practically the same effect as giving joint receipts, that is, each becomes liable for what appears in the inventory unless he shows that it came into the hands of the other or others alone.<sup>3</sup>

(5) *Effect of Giving Joint Bond.*—The effect of giving a joint bond as imposing liability on each for the acts of the others has already been considered.<sup>4</sup>

c. JOINT ACTS.—Joint representatives are each liable, of course, for acts done by them jointly, and so too if, by agreement, one acts in the joint names of all, they are all liable.<sup>5</sup>

d. RELEASE OF ONE WHERE ALL ARE LIABLE.—Where joint executors or administrators are all liable for a devastavit by one, the release of one or more of them will not affect the liability of the other or others.<sup>6</sup>

e. REMEDY OF REPRESENTATIVE CHARGED WITH ANOTHER'S DEFAULT.—Where a personal representative of a decedent has been held liable for the default of a corepresentative, he is entitled to be subrogated to the rights of the estate against such corepresentative.<sup>7</sup>

9. Actions—a. ACTIONS BY AND AGAINST THIRD PERSONS—(1) *At Law.*—One of several executors or administrators may sue alone on a cause of

Symonds, 3 Swanst. 64; Doyle v. Blake, 2 Sch. & Lef. 242; Underwood v. Stevens, 1 Meriv. 712.

Liability to Creditors and to Legatees Distinguished.—In *Churchill v. Hobson*, 1 P. Wms. 241, 1 Salk. 318, it was held that where two executors joined in a receipt, and only one of them actually received the money, both were chargeable to creditors, but not to legatees. But see *contra*, *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277.

1. Distinction Between Joint Executors and Joint Trustees.—*Ex p. Belchier*, Ambl. 219. But see *M'Nair's Appeal*, 4 Rawle (Pa.) 148. And see generally the title TRUSTS AND TRUSTEES.

2. Present Rule as to Joint Receipts—*Prima Facie* Liability—*England.*—*Westly v. Clarke*, 1 Dick. 329, 1 Eden 356; *Hovey v. Blakeman*, 4 Ves. Jr. 596; *Scurfield v. Howes*, 3 Bro. C. C. 94.

*Alabama.*—*Stewart v. Conner*, 9 Ala. 803.

*Georgia.*—See *Hall v. Carter*, 8 Ga. 388.

*Massachusetts.*—*McKim v. Aulbach*, 130 Mass. 481, 39 Am. Rep. 470.

*New York.*—*Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298.

*North Carolina.*—*Ochiltree v. Wright*, 1 Dev. & B. Eq. (21 N. Car.) 336.

*Pennsylvania.*—*Wilson's Appeal*, 115 Pa. St. 95.

In *Joy v. Campbell*, 1 Sch. & Lef. 341, Lord Redesdale said that the distinction with respect to mere signing seems to be that if the receipt be given as a matter of form only, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money though not actually received by both executors was under the control of both, such receipt shall charge, and the

true question in all those cases seems to have been whether the money was under the control of both executors.

Lord Eldon's Opinion was that the modification of the early rule was "very ill founded," because, he said, the rule that if the executors joined in a receipt they were all liable, was a plain general rule which might easily be understood, and it was imposing an unnecessary hardship on executors to leave the question of their liability to the circumstances of each case. *Chambers v. Minchin*, 7 Ves. Jr. 186.

3. Joint Inventory.—*Graham v. Davidson*, 2 Dev. & B. Eq. (22 N. Car.) 155.

4. See *supra*, this title, Bonds—*Effect of Joint Bond.*

5. Joint Liability for Joint Acts.—*Bruen v. Gillet*, 115 N. Y. 10, 12 Am. St. Rep. 764; *Croft v. Williams*, 88 N. Y. 384; *Adair v. Brimmer*, 74 N. Y. 539; *Brotten v. Bateman*, 2 Dev. Eq. (17 N. Car.) 115, 22 Am. Dec. 732.

In *Hauser v. Lehman*, 2 Ired. Eq. (37 N. Car.) 594, two joint executors sold property belonging to their testator, and it was agreed between them and the purchaser that any debts due from either of the executors to the purchaser should be deducted from the purchase money. The whole amount of the purchase money was exhausted by the debts of one of the executors. It was held that both executors were liable.

Acts of One Done by Agreement in Names of All.—*Fonte v. Horton*, 36 Miss. 350.

6. Release of One—Effect as to Others.—*Matter of Sanderson*, 74 Cal. 199.

7. Subrogation to Rights of Estate.—*Drake v. Paige*, 127 N. Y. 562. See also *Marsh v. Harrington*, 18 Vt. 156. And see generally the title SUBROGATION.



action arising out of a separate act of administration by him, as for the recovery of the price of property of the estate sold by him personally, etc.<sup>1</sup> In other cases, the rule at law is that the action must be brought in the names of all whom the will named as executors or who were appointed administrators, though some have renounced or refused to administer,<sup>2</sup> but if any are unwilling that the action should be prosecuted in their names, the one who instituted it may have a severance and proceed to judgment alone.<sup>3</sup> In some jurisdictions, however, the common-law rule has been relaxed by statute, so as to dispense with joining as a plaintiff an executor who has not qualified and received letters testamentary.<sup>4</sup>

Where the Action Is Against Executors or Administrators, all who proved the will or administered must be made defendants,<sup>5</sup> but an executor who did not prove the will need not be joined.<sup>6</sup>

(2) *In Equity*. — In equity the general rule is that all the executors or administrators, when there are several, must sue jointly,<sup>7</sup> though an executor who renounced need not be joined as a plaintiff.<sup>8</sup> In suits against them, they

1. **Action by One for Price of Goods Sold by Him.** — *Brassington v. Ault*, 2 Bing. 177, 9 E. C. L. 369; *Heath v. Chilton*, 12 M. & W. 632; *Martin v. Nall*, 22 Ala. 610; *Aiken v. Bridgman*, 37 Vt. 249.

**Action for Money Loaned.** — *Thornton v. Smiley*, 1 Ill. 34.

Where a Note is Given to One Executor for money due the estate he may sue for it, without joining his coexecutor. *Footo v. Noland*, 5 Cranch (C. C.) 399, 9 Fed. Cas. No. 4,915.

2. **Actions Generally Required to be Brought in Names of All** — *England*. — *Henslow's Case*, 9 Coke 37; *Brookes v. Stroud*, 1 Salk. 3; *Walters v. Pfeil*, M. & M. 362, 22 E. C. L. 334; *Webster v. Spencer*, 3 B. & Ald. 360, 5 E. C. L. 316; *Kilby v. Stanton*, 2 Y. & J. 77; *Scott v. Briant*, 6 N. & M. 381, 36 E. C. L. 438; *Cabell v. Vaughan*, 1 Saund. 291, note 1.

*Alabama*. — *Cleveland v. Chandler*, 3 Stew. (Ala.) 489; *Williams v. Sims*, 8 Port. (Ala.) 579. *Kentucky*. — *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 623.

*Maryland*. — *Ratrie v. Wheeler*, 6 Har. & J. (Md.) 94.

*New Hampshire*. — *Smith v. Smith*, 11 N. H. 459.

*New Jersey*. — *Cole v. Smalley*, 25 N. J. L. 374.

*New York*. — *Tooker v. Oakley*, 10 Paige (N. Y.) 288; *Bodle v. Hulse*, 5 Wend. (N. Y.) 313; *Moore v. Willett*, 2 Hilt. (N. Y.) 522; *Scrantom v. Farmers, etc.*, Bank, 33 Barb. (N. Y.) 527, affirmed 24 N. Y. 424.

*Pennsylvania*. — *Heron v. Hoffner*, 3 Rawle (Pa.) 393.

*Compare* *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788, holding that one executor may sue, though three were appointed, if the other two did not qualify.

3. **Severance as to Representatives Unwilling to Act.** — *Tooker v. Oakley*, 10 Paige (N. Y.) 288; *Bodle v. Hulse*, 5 Wend. (N. Y.) 313. *Compare* *Green v. Foley*, 2 Stew. & P. (Ala.) 441; *Cole v. Smalley*, 25 N. J. L. 374; *Hunt v. Kearney*, 3 N. J. L. 292; *Alston v. Alston*, 3 Ired. L. (25 N. Car.) 447; *Burrow v. Sellers*, 1 Hayw. (2 N. Car.) 502.

4. **Statutory Relaxation of Common-law Rule.** — *Scrantom v. Farmers, etc.*, Bank, 33 Barb.

(N. Y.) 527, affirmed 24 N. Y. 424; *Alston v. Alston*, 3 Ired. L. (25 N. Car.) 447; *Burrow v. Sellers*, 1 Hayw. (2 N. Car.) 501.

5. **Actions Against Executors, etc. — Rule Requiring All to Be Made Defendants** — *Alabama*. — *Williams v. Sims*, 8 Port. (Ala.) 583.

*New Jersey*. — *Ryerson v. Ryerson*, 4 N. J. L. 416; *Dickerson v. Robinson*, 6 N. J. L. 195, 10 Am. Dec. 396.

*Ohio*. — *Negley v. Gard*, 20 Ohio 310.

*Tennessee*. — *Bledsoe v. Huddleston*, 5 Yerg. (Tenn.) 295.

6. **Executor Not Proving.** — *Gray v. White*, 5 Ala. 490; *Mitchell v. Rice*, 6 J. J. Marsh. (Ky.) 623; *Cole v. Smalley*, 25 N. J. L. 374; *Moore v. Willett*, 2 Hilt. (N. Y.) 522.

7. **Rule in Equity — All Must Join in Suits** — *England*. — *Davies v. Williams*, 1 Sim. 5; *Kilby v. Stanton*, 2 Y. & J. 77; *Cramer v. Morton*, 2 Molloy 108.

*Connecticut*. — *Smith v. Chapman*, 5 Conn. 27.

*Maine*. — *Gilman v. Gilman*, 54 Me. 453.

*New Jersey*. — *Rinehart v. Rinehart*, 15 N. J. Eq. 44; *Morse v. Oliver*, 14 N. J. Eq. 262.

*New York*. — *Thompson v. Graham*, 1 Paige (N. Y.) 384.

**Refusal to Join as Plaintiff.** — If an executor who is a necessary party plaintiff refuses to join in the suit, he may be made a party defendant. *Finch v. Winchelsea*, 1 Eq. Cas. Abr. 2, par. 7; *Tooker v. Oakley*, 10 Paige (N. Y.) 288. See also *Davies v. Williams*, 1 Sim. 5; *Saeger v. Runk*, 148 Pa. St. 77.

8. **Renouncing Executor Not Required to Join as Plaintiff in Equity** — *England*. — *Davies v. Williams*, 1 Sim. 5; *Kilby v. Stanton*, 2 Y. & J. 77.

*United States*. — *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788.

*Massachusetts*. — *McKim v. Aulbach*, 130 Mass. 484, 39 Am. Rep. 473.

*New Jersey*. — *Newark Sav. Inst. v. Jones*, 35 N. J. Eq. 406; *Rinehart v. Rinehart*, 15 N. J. Eq. 44.

*New York*. — *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; *Manahan v. Gibbons*, 19 Johns. (N. Y.) 427; *Thompson v. Graham*, 1 Paige (N. Y.) 384.

*Tennessee*. — *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 270, 31 Am. Dec. 578.



must all be made defendants,<sup>1</sup> unless, for special reasons, it is not necessary that they should all be defendants.<sup>2</sup>

*b. ACTIONS INTER SE.* — At Law one of several executors or administrators cannot sue the other or others as a general rule.<sup>3</sup> This general rule, however, is applicable only while the joint administration continues, and to causes of action which belong to the representatives jointly. Therefore, on the renunciation, resignation, or removal of an executor or administrator, either one may sue the other, as if they had never been joined in the administration.<sup>4</sup> And where one executor, being indebted to the estate, makes an express promise to pay the coexecutor, the latter may sue him on such promise.<sup>5</sup>

In Equity one executor or administrator may sue the other when the interference of a court of equity is necessary for the protection of the parties in interest.<sup>6</sup>

10. Special Proceedings. — The general rule is that joint executors or administrators must all unite in a special proceeding, unless a sufficient reason is shown for not doing so.<sup>7</sup>

1. Rule that Joint Representatives Must Be Sued Jointly. — *Clements v. Kellogg*, 1 Ala. 330; *Myrick v. Adams*, 4 Munf. (Va.) 366.

2. Special Circumstances — Character of Relief Sought. — In *Footman v. Pray*, R. M. Charl. (Ga.) 291, it was held that, where a bill seeks discovery and relief against the acts of only one of the executors, the other need not be made a party in the first instance, but he might be made a party during the progress of the suit, if it should prove to be expedient or necessary. See also *Shorter v. Hargroves*, 11 Ga. 658.

3. Cannot Ordinarily Sue Each Other at Law — *Arkansas*. — *Clark v. Gramling*, 54 Ark. 525.

*Kansas*. — *Taylor v. Minton*, 45 Kan. 17.

*Kentucky*. — *Quinn v. Stockton*, 2 Litt. (Ky.) 343.

*Missouri*. — *Martin v. Martin*, 13 Mo. 36.

*New Jersey*. — *Morse v. Oliver*, 14 N. J. Eq. 259.

*New York*. — *Whitney v. Coapman*, 39 Barb. (N. Y.) 482; *Smith v. Lawrence*, 11 Paige (N. Y.) 206.

*Pennsylvania*. — *McDivitt v. McDivitt*, 4 Watts (Pa.) 384; *Simon v. Albright*, 12 S. & R. (Pa.) 429; *Steinman v. Saunderson*, 14 S. & R. (Pa.) 357.

*South Carolina*. — *McDowall v. McDowall*, Bailey Eq. (S. Car.) 324.

Note Payable to Joint Administrators. — When a note is made payable to two joint administrators, and one of the administrators is also one of the makers of the note the other administrator may sue all the makers except the coadministrator. *Clark v. Gramling*, 54 Ark. 525.

Executor Not Proving Will. — The rule at common law that an executor could not sue his coexecutor, even though the coexecutor did not prove the will, is said not to be founded on very satisfactory reasons. *Morse v. Oliver*, 14 N. J. Eq. 259.

4. Termination of Joint Administration. — *Dorchester v. Webb*, W. Jones 345; *Hendricks v. Thornton*, 45 Ala. 299; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631; *Hood v. Hayward*, 48 Hun (N. Y.) 330.

Action by One Against Other on Joint Bond. — In *New York* an administrator may sue on the joint bond given by himself and his coadmin-

istrator, whose letters have been revoked, to recover money found by the surrogate to be in the coadministrator's hands and decreed to be paid over by him. *Sperb v. McCoun*, 110 N. Y. 605.

Death of Both Executors — Action by Executor of Survivor. — Where both of two joint executors have died, the executor of the one last surviving may sue the executor of the other at law to recover a bond belonging to the estate of the first testator. *Lancaster v. McBryde*, 5 Ired. L. (27 N. Car.) 421.

Where Only One Executor Acts the coexecutor who took no part in the administration may sue the acting executor for a debt due him from the testator. *Pringle v. Pringle*, 130 Pa. St. 565, 25 W. N. C. (Pa.) 297.

5. Express Promise to Pay Coexecutor. — *Phillips v. Phillips*, 1 Stew. (Ala.) 71, approved in *Faulkner v. Faulkner*, 73 Mo. 327; *Gardner v. Miller*, 19 Johns. (N. Y.) 188; *Berry v. Tart*, 1 Hill L. (S. Car.) 4. But see *Cole v. Wooden*, 18 N. J. L. 15, in which it was said that one administrator cannot maintain an action for goods sold and delivered, or for money lent by him to his coadministrator, nor for work and labor done and materials furnished by him for the other.

6. One May Sue Other in Equity — *England*. — *Allen v. Story*, Tothill 150; *Peake v. Ledger*, 8 Hare 313; *Lucas v. Seale*, 2 Atk. 56. See also *Glen v. Webster*, 2 Lee Ecc. 31; *Paul v. Nettleford*, 2 Add. Ecc. 237.

*Georgia*. — *Sheehan v. Kennelly*, 32 Ga. 145.

*New Jersey*. — *Ransom v. Geer*, 30 N. J. Eq. 249; *Petty v. Young*, 43 N. J. Eq. 654; *Matthews v. Hoagland*, 48 N. J. Eq. 455.

*New York*. — *McGregor v. McGregor*, 35 N. Y. 218; *Wurts v. Jenkins*, 11 Barb. (N. Y.) 546; *Elmendorf v. Lansing*, 4 Johns. Ch. (N. Y.) 562; *Decker v. Miller*, 2 Paige (N. Y.) 150; *Smith v. Lawrence*, 11 Paige (N. Y.) 206. See also *Paff v. Kinney*, 1 Bradf. (N. Y.) 1.

*Texas*. — *State v. Snyder*, 66 Tex. 687.

7. Special Proceedings by Joint Representatives. — *Hutchinson v. Newbold*, 45 N. J. Eq. 698) proceeding to have the estate declared insolvent). See also *Hattersley v. Bissett*, 52 N. J. Eq. 693; *Matter of Richardson*, 2 Connolly (N. Y.) 276; and *supra*, this section, *Sale of Real Estate under Order of Court*.



**11. Removal.** — The general subject of the removal of executors and administrators from office is fully discussed elsewhere.<sup>1</sup> The power to remove one or more of several is not questioned,<sup>2</sup> and it may be exercised on the application of one of them.<sup>3</sup>

**V. COMPENSATION.** — The right of executors and administrators to compensation, and other matters concerning the subject in general, have been fully treated in another part of this work.<sup>4</sup> In the case of a joint administration, if the statute prescribes a special mode of compensation, such as a *per diem* allowance for the time actually occupied in attending to the affairs of the estate, it is evident that each party is entitled to the statutory allowance for his actual services.<sup>5</sup>

**Special Compensation for Extra Services.** — When special compensation is allowed for extra services rendered by an executor or administrator, as may be done in some jurisdictions,<sup>6</sup> the amount belongs, of course, to the representative by whom the extra services were rendered, and to whom the allowance was made; but the mere fact that on a joint settlement the allowance was made to one of the representatives "for extra services rendered by him," is not conclusive against the right of the other to a share of the amount allowed.<sup>7</sup>

**Division of Commissions.** — When the compensation is made in the form of commissions on the value or amount of the estate,<sup>8</sup> the rate of the commissions is not ordinarily affected by the number of the executors or administrators,<sup>9</sup> but the amount which may be allowed will be divided among them, and, as a general rule, an equal division will be made.<sup>10</sup> There is, however, no rule of law or equity which declares that corepresentatives, without regard to the time spent, responsibility assumed, or service rendered, are entitled to an equal *pro rata* share of the statutory fees.<sup>11</sup> On the contrary, it has often been held that if their services are unequal the court of probate will give to each a share

1. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 815 *et seq.*

2. **Removal of One or More of Several.** — For cases recognizing the power to make such removals see *supra*, this section, *Actions*.

3. **Application by One for Removal of Other.** — *Hesson v. Hesson*, 14 Md. 8.

4. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1277 *et seq.*

5. **Per Diem Allowance.** — See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1300. See also the various local codes and statutes.

6. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1306.

7. **Allowance of Special Compensation to One Not Conclusive Against Right of Other.** — *Oakley v. Oakley*, 111 Ala. 506, *citing* 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 441. In this case it is said that where the subject-matter of the proceeding was the accounting of the joint representatives with the distributees, a judicial determination as between them of the manner in which the representatives had administered their trust, and the transfer to and distribution of the assets remaining among the distributees, there could be no possible issue or antagonism between the representatives, of which the court of probate could take cognizance, but that the allowance for the extra services was the adjudication of an issue between the representatives on one side and the distributees on the other.

8. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1287 *et seq.*

9. **Rate of Commissions Not Affected by Number of Executors or Administrators.** — *Matter of*

*McAlpine*, 126 N. Y. 285, *reversing* 59 Hun (N. Y.) 616; *Matter of Clinton*, (Surrogate Ct.) 16 Misc. (N. Y.) 199; *Matter of Kenworthy*, 63 Hun (N. Y.) 165; *Matter of Newland*, (Surrogate Ct.) 7 Misc. (N. Y.) 728; *Matter of Blakey*, 1 Connolly (N. Y.) 128, 23 Abb. N. Cas. (N. Y.) 32; *Matter of Hayden*, 1 Connolly (N. Y.) 454; *Welling v. Welling*, 3 Dem. (N. Y.) 511; Code Civ. Proc. N. Y., § 2736; *Walker's Estate*, 9 S. & R. (Pa.) 223.

10. **Division of Commissions—General Rule.** — *Brown v. Stewart*, 4 Md. Ch. 368; *Richardson v. Stansbury*, 4 Har. & J. (Md.) 275; *Squier v. Squier*, 30 N. J. Eq. 627; *Pomeroy v. Mills*, 40 N. J. Eq. 517; *Re Fleming*, 11 Ont. Pr. 426.

**Even Though One Executor Did All the Work of administering the estate, the other is entitled to half of the commissions, where he was always on hand when necessary, and was willing to do his part.** *Garr v. Roy*, (Ky. 1899) 50 S. W. Rep. 25. See also *Brown v. Stewart*, 4 Md. Ch. 368; *Squier v. Squier*, 30 N. J. Eq. 627.

**One Executor Compensated by Legacy.** — Where one of two executors is not entitled to his commission, because he is a legatee, the other executor should receive only his half of the commissions. *Edward's Succession*, 34 La. Ann. 216.

As to the effect of a bequest to an executor as depriving him of his right to commissions, see generally the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1301.

11. **No Absolute Right to Equal Division of Commissions.** — *Speirs v. Wisner*, 88 Mich. 614, 26 Am. St. Rep. 306.



of the commissions in proportion to the services rendered by him,<sup>1</sup> but such apportionment cannot, it seems, be made by a court of law in an action by one executor or administrator against another to recover a share of the commissions.<sup>2</sup> The parties may also, by agreement, arrange with one another as to the duties and compensation of each.<sup>3</sup>

**VI. ACCOUNTING.** — The General Principles in regard to the accounts of joint executors and administrators, such as the items of debit, credit, etc., are necessarily the same as in the case of a sole executor or administrator.<sup>4</sup>

**Separate Accounts.** — Since a personal representative of a decedent is not ordinarily liable for the assets which came into the hands of a corepresentative, it is generally held that each may settle a separate account of the assets administered by himself,<sup>5</sup> but the corepresentatives have a right to appear and object to the account presented for settlement.<sup>6</sup>

**Joint Accounts.** — Joint representatives are not required to account separately. They have the right to render a joint account,<sup>7</sup> and it has been held that they must settle in this form, if they took individual possession of the estate.<sup>8</sup> It is not always advisable, however, to settle a joint account, because the effect of it is to charge all the representatives with the assets embraced in it, and to make each liable for the devastavits of the other,<sup>9</sup> though in some jurisdic-

**1. Commissions Apportioned According to Services.** — *Andress v. Andress*, 46 N. J. Eq. 528; *Hill v. Nelson*, 1 Dem. (N. Y.) 357; *Matter of Harris*, 4 Dem. (N. Y.) 463; *Waddill v. Martin*, 3 Ired. Eq. (38 N. Car.) 562; *Grand v. Pride*, 1 Dev. Eq. (16 N. Car.) 269; *Hodge v. Hawkins*, 1 Dev. & B. Eq. (21 N. Car.) 564; *Walker's Estate*, 9 S. & R. (Pa.) 223; *Stevenson's Estate*, 1 Pars. Eq. Cas. (Pa.) 19. See also *Mount v. Slack*, 39 N. J. Eq. 233, 45 N. J. Eq. 129.

**Where One Administrator Died** almost at the beginning of the administration, and the survivor did substantially all the work of settling the estate, it was held that he was entitled to the entire commissions, to the exclusion of the representative of the deceased administrator. *Martin v. Jones*, 87 Md. 43, *distinguishing* *Richardson v. Stansbury*, 4 Har. & J. (Md.) 275.

**2. Apportionment Not to Be Made by Court of Law.** — *White v. Bullock*, 4 Abb. App. Dec. (N. Y.) 578.

**3. Agreement as to Division of Duties and Compensation.** — *Brown v. Stewart*, 4 Md. Ch. 368; *Bassett v. Miller*, 8 Md. 548; *White v. Bullock*, 4 Abb. App. Dec. (N. Y.) 578.

**4. For the Matter of Accounting Generally**, see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1181 *et seq.*

**5. Separate Accounts.** — *Mercer v. Glass*, (Ky. 1894), 25 S. W. Rep. 114, 15 Ky. L. Rep. 710; *Bellerjeau v. Kotts*, 4 N. J. L. 410; *Mead v. Willoughby*, 4 Dem. (N. Y.) 364; *Patterson's Estate*, 1 W. & S. (Pa.) 291; *Metz's Appeal*, 11 S. & R. (Pa.) 204; *Barclay v. Morrison*, 16 S. & R. (Pa.) 120; *Heyer's Appeal*, 34 Pa. St. 183; *Steinman v. Saunderson*, 14 S. & R. (Pa.) 357; *In re Ripple*, 9 Kulp (Pa.) 66. See also *Davis's Appeal*, 23 Pa. St. 206.

**Effect of Separate Account.** — An executor who has filed a separate account and has not been negligent, is not liable for assets received by the coexecutor. *Irwin's Appeal*, 35 Pa. St. 294. See also *Evangelical Association's Appeal*, 35 Pa. St. 316.

**Effect as to Corepresentative.** — It has been held that an executor is bound to take notice

of an account rendered to the Court of Probate by his coexecutor, and he is chargeable with a knowledge of the misapplication of the trust funds therein disclosed. *Fonte v. Horton*, 36 Miss. 350. See also *In re Bath*, 12 Nova Scotia 604.

**Where the Coadministrator Is Dead** it is erroneous for the survivor to settle a joint account. *Stephens's Appeal*, 56 Pa. St. 409.

**6. Contest by Corepresentatives.** — *Mead v. Willoughby*, 4 Dem. (N. Y.) 364; *Matter of Rich*, 3 Redf. (N. Y.) 177; *Buchan v. Rintoul*, 10 Hun (N. Y.) 183, *affirmed* 70 N. Y. 1.

**7. Joint Accounting Allowed.** — *Conner v. McIlvaine*, 4 Del. Ch. 30.

**8. Joint Account Required — Undivided Possession of Estate.** — *Hoffman v. Pfeiffer*, 7 Quebec 125.

**9. Effect of Joint Account — Each Party Liable for Others — England.** — *Murrell v. Cox*, 2 Vern. 570.

*New Jersey.* — *Fennimore v. Fennimore*, 3 N. J. Eq. 292; *Wilson v. Fisher*, 5 N. J. Eq. 493; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Laroe v. Douglass*, 13 N. J. Eq. 308; *Suydam v. Bastedo*, 40 N. J. Eq. 433; *Tehan v. Maloy*, 45 N. J. Eq. 68; *Weyman v. Thompson*, 50 N. J. Eq. 8; *Bellerjeau v. Kotts*, 4 N. J. L. 410.

*New York.* — *Glacius v. Fogel*, 88 N. Y. 434. *Compare* *Taylor v. Shuit*, 4 Dem. (N. Y.) 528.

*Pennsylvania.* — *Haage's Appeal*, 17 Pa. St. 181; *Ducommun's Appeal*, 17 Pa. St. 268; *Bunting's Appeal*, 4 W. & S. (Pa.) 469. See also *Metz's Appeal*, 11 S. & R. (Pa.) 204; *McCoy v. Porter*, 15 S. & R. (Pa.) 57. *Compare* *Doebler v. Snively*, 5 Watts (Pa.) 225; *Young's Appeal*, 99 Pa. St. 74; *Hengst's Appeal*, 24 Pa. St. 413.

In *Ducommun's Appeal*, 17 Pa. St. 268, the court said that the principle of joint liability was plain in that they were not called on to reconcile the somewhat inconsistent cases of *Brown's Appeal*, 1 Dall. (Pa.) 311; *M'Nair's Appeal*, 4 Rawle (Pa.) 154, and *Sterrett's Appeal*, 2 P. & W. (Pa.) 419.

**Effect of Joint Account as to Uncollected Assets.** — *Lightcap's Appeal*, 95 Pa. St. 456. See



tions the joint liability is *prima facie* only, and subject to be rebutted by a proper showing.<sup>1</sup> While an account may purport to be a joint account, it may in fact be only a separate one, and in that case it does not create a joint liability in equity.<sup>2</sup>

**Right to Call Each Other to Account.**—One executor or administrator has no right to call a coexecutor or coadministrator to account,<sup>3</sup> unless such right is given by statute,<sup>4</sup> or the party who calls for a settlement is also a creditor or a legatee under the will,<sup>5</sup> or the coexecutor or coadministrator has resigned or been removed from office.<sup>6</sup> But if one of the joint representatives was the agent of the decedent, the other representative may require him to account in that capacity.<sup>7</sup>

**JOINT JUDGMENT.**—See the title JUDGMENTS AND DECREES, *post*.

**JOINT NEGLIGENCE.**—See the title NEGLIGENCE.

**JOINT PARTIES.**—See the title PARTIES TO ACTIONS, 15 ENCYC. OF PL. AND PR. 456.

**JOINT RESOLUTIONS.**—See the title STATUTES.

also *Beatty v. Cory Universalist Soc.*, 41 N. J. Eq. 563; *Beckley's Appeal*, 3 Pa. St. 425.

**1. Rule of Prima Facie Liability—*Delaware.***  
—*Conner v. McIlvaine*, 4 Del. Ch. 30.  
*Mississippi.*—*Gaultney v. Nolan*, 33 Miss. 569.

*New York.*—*Taylor v. Shuit*, 4 Dem. (N. Y.) 528.

*Pennsylvania.*—*Ducommun's Appeal*, 17 Pa. St. 268; *Cassel's Estate*, 180 Pa. St. 252, 40 W. N. C. (Pa.) 195; *Hess's Estate*, 2 Phila. (Pa.) 243, 14 Leg. Int. (Pa.) 86; *Hengst's Appeal*, 24 Pa. St. 413; *Swift's Estate*, 6 Northam. Co. Rep. (Pa.) 105. See also *McCoy v. Porter*, 15 S. & R. (Pa.) 57; *McNeal v. Holbrook*, 25 Pa. St. 189. Compare *Lightcap's Appeal*, 95 Pa. St. 455.

In an *Iowa* case, where two executors gave a joint receipt for money in bank, directed the bank to place one-half the sum to the credit of one executor and the other half to the credit of the other, and then filed a joint account charging each one with all the money in the bank, it was held, under a statute of the state, that each executor was responsible only for himself. *Nettman v. Schramm*, 23 Iowa 521.

**2. Account Joint in Form Only.**—*English v. Newell*, 42 N. J. Eq. 76, *affirmed* 43 N. J. Eq. 295; *Tehan v. Maloy*, 45 N. J. Eq. 68. See also *Fennimore v. Fennimore*, 3 N. J. Eq. 292;

*Beatty v. Cory Universalist Soc.*, 41 N. J. Eq. 563.

**3. Representatives Not Accountable to Each Other.**—*Chandler v. Shehan*, 7 Ala. 251; *Hendricks v. Thornton*, 45 Ala. 299. See also *Fay v. Fay*, (N. J. 1886) 4 Cent. Rep. 241. Compare *Smith v. Lawrence*, 11 Paige (N. Y.) 206. But see *Stiver v. Stiver*, 8 Ohio 217.

**In Equity** an executor may require the co-executor to account. *Chew's Appeal*, 3 Grant Cas. (Pa.) 294.

**4. Representatives Accountable to Each Other by Statute.**—*Beach v. Norton*, 9 Conn. 182; *Case's Appeal*, 35 Conn. 115.

**Jurisdiction.**—Under the *Connecticut* statute authorizing an executor to call his coexecutor to account in the Probate Court, a bill in chancery for such purpose will not lie unless some ground for equitable interference exists. *Beach v. Norton*, 9 Conn. 182.

**5. Joint Executor Who Is Creditor of Estate.**—*King v. Shackelford*, 13 Ala. 435.

**Joint Executor Who Is a Legatee.**—*Matter of Pruyn*, 141 N. Y. 544, *affirming* 76 Hun (N. Y.) 128.

**6. Resignation or Removal.**—*Veach v. Rice*, 131 U. S. 293.

**7. Corepresentative Who Was Agent of Decedent.**—*Chamberlain v. Chamberlain*, (Ky. 1891) 16 S. W. Rep. 456, 13 Ky. L. Rep. 151.



# JOINT-STOCK COMPANIES.

BY W. H. MICHAEL.

## I. DEFINITION, GENERAL NATURE, AND DISTINCTIONS, 636.

1. *Definition and General Nature*, 636.
2. *Distinguished from Ordinary Partnerships*, 637.
3. *Distinguished from Corporations*, 638.
  - a. *In General*, 638.
  - b. *Articles of Association and Charter*, 639.
  - c. *For Purposes of Taxation*, 639.
  - d. *Citizenship — Jurisdiction of Federal Courts*, 639.
4. *Dividends*, 640.

## II. STATUTORY REGULATION, 640.

1. *In England*, 640.
2. *In United States*, 641.

## III. POWERS, RIGHTS, AND LIABILITIES OF MEMBERS, 641.

1. *As to Public*, 641.
2. *As Between Themselves*, 642.

## IV. POWER TO TAKE AND CONVEY REAL PROPERTY, 642.

## V. ACTIONS BY AND AGAINST JOINT-STOCK COMPANIES, 643.

1. *In Local Jurisdiction*, 643.
2. *In Foreign Jurisdictions*, 644.

## VI. DISSOLUTION, 645.

1. *By Mutual Consent*, 645.
2. *By Equitable Proceedings*, 645.
3. *By Terms of Articles of Association*, 645.
4. *By Single Ownership of All the Shares — Sale of Property*, 645.

### CROSS-REFERENCES.

*As to matters of PROCEDURE, see the references in II ENCYCLOPEDIA OF PLEADING AND PRACTICE 757.*

*As to all matters connected with the Contract of Subscription, Transfer of Shares, Powers, etc., of Officers and Agents, see in this work the titles, STOCK-HOLDERS; STOCK; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS), respectively.*

*For other matters see the title CORPORATIONS (PRIVATE), vol. 7, p. 631, and the references there given.*

**I. DEFINITION, GENERAL NATURE, AND DISTINCTIONS — 1. Definition and General Nature.** — A joint-stock company is an association of individuals for purposes of profit, possessing a common capital, which is divided into shares, of which each member possesses one or more, and which are transferable by the owner.<sup>1</sup> These associations formed for business purposes were at common

**1. Definition.** — Shelford's Law of Joint Stock Companies 1.

They have also been defined as "partnerships with a capital or joint stock divisible into transferable shares," Lindley on Partnership (Wentworth's ed.) 845; "partnerships with transferable shares," Phillips v. Blatchford, 137 Mass. 510; and see Atty.-Gen. v. Mercantile Marine Ins. Co., 121 Mass. 524; Hedge's

Appeal, 63 Pa. St. 273; quasi corporations, Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147.

The words "joint-stock company" as used in Massachusetts statutes refer to companies organized under general laws as corporations. Atty.-Gen. v. Mercantile Marine Ins. Co., 121 Mass. 524.

In the Pennsylvania Act of June 2, 1874, the association is treated as a partnership. Eliot



law and as a general rule still are considered merely as partnerships, and their rights and liabilities are in the main governed by the same rules and principles which regulate commercial partnerships.<sup>1</sup>

2. **Distinguished from Ordinary Partnerships.**—In an ordinary partnership the death or withdrawal of a member works a dissolution of the firm. In joint-stock companies, however, the death of a member or the withdrawal or transfer of his interest does not involve a dissolution of the company. In such companies there is no *delectus personarum*.<sup>2</sup> The death, bankruptcy, or retirement of a shareholder dissolves his connection with the company,<sup>3</sup> but does not dissolve the bond by which the remaining shareholders are held to each other.<sup>4</sup> In the absence of legislation to the contrary, the members of

*v. Himrod*, 108 Pa. St. 569; *In re Disston*, etc., File Co., 8 W. N. C. (Pa.) 58. See also *Logan v. McNaugher*, 88 Pa. St. 103; *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. St. 630.

"Their real organization and character must in each case be determined by reference to the laws and articles of agreement under which they are formed; whether they are to be called copartnerships or joint stock companies or corporations is solely a question of definition." *Morawetz on Private Corporations* (2d ed.), § 6. See also *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.*, 103 U. S. 707.

"A partnership or a joint-stock company is not necessarily the result of an abortive attempt to organize a corporation." *Blanchard v. Kaull*, 44 Cal. 440.

1. **Generally Considered as Partnerships**—*England*.—*Matter of Mexican, etc., Co.*, 4 De G. & J. 544; *Griffith v. Paget*, 6 Ch. D. 515.

*United States*.—*Clagett v. Kilbourne*, 1 Black (U. S.) 346.

*California*.—*Bullard v. Kinney*, 10 Cal. 60. *Illinois*.—*Robbins v. Butler*, 24 Ill. 387; *Wadsworth v. Duncan*, 164 Ill. 362; *Pettis v. Atkins*, 60 Ill. 454; *Hodgson v. Baldwin*, 65 Ill. 532.

*Indiana*.—*Manning v. Gasharie*, 27 Ind. 399; *Kenyon v. Williams*, 19 Ind. 44.

*Louisiana*.—*Vigers v. Sainet*, 13 La. 300; *English v. Wall*, 12 Rob. (La.) 132.

*Maine*.—*McGreary v. Chandler*, 58 Me. 537; *Frost v. Walker*, 60 Me. 463; *Beaman v. Whitney*, 20 Me. 413. Compare *Cox v. Bodfish*, 35 Me. 302.

*Massachusetts*.—*Tappan v. Bailey*, 4 Met. (Mass.) 520; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Edwards v. Warren Linoine, etc.*, Works, 168 Mass. 566; *Whitman v. Porter*, 107 Mass. 522; *Gott v. Dinsmore*, 111 Mass. 45; *Bodwell v. Eastman*, 106 Mass. 525; *Taft v. Ward*, 106 Mass. 518, 111 Mass. 518; *Boston, etc., R. Co. v. Pearson*, 128 Mass. 445.

*Michigan*.—*Butterfield v. Beardsley*, 28 Mich. 412.

*Minnesota*.—*Pennsylvania Ins. Co. v. Murphy*, 5 Minn. 36.

*Missouri*.—*Hunnewell v. Willow Springs Canning Co.*, 53 Mo. App. 245.

*Nebraska*.—See *Batty v. Adams County*, 16 Neb. 44.

*New Hampshire*.—*Dow v. Sayward*, 12 N. H. 271; *Farnum v. Patch*, 60 N. H. 294, 49 Am. Rep. 313.

*New York*.—*Woods v. De Figanieri*, 1 Robt. (N. Y.) 660; *Wells v. Gates*, 18 Barb. (N. Y.) 554; *Moore v. Brink*, 4 Hun (N. Y.) 402; *Lafond v. Deems*, (Supm. Ct. Spec. T.) 52 How.

Pr. (N. Y.) 41; *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517; *Snyder v. Lindsey*, 92 Hun (N. Y.) 432; *Townsend v. Goewey*, 19 Wend. (N. Y.) 424; *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

*North Carolina*.—*Bain v. Clinton Loan Assoc.*, 112 N. Car. 248.

*Pennsylvania*.—*Hedge's Appeal*, 63 Pa. St. 273; *Kramer v. Arthurs*, 7 Pa. St. 165; *Matter of Fry*, 4 Phila. (Pa.) 129, 17 Leg. Int. (Pa.) 156; *Babb v. Reed*, 5 Rawle (Pa.) 151; *Hess v. Werts*, 4 S. & R. (Pa.) 356. See also *Witmer v. Schlatter*, 2 Rawle (Pa.) 359.

*Tennessee*.—*Carter v. McClure*, 98 Tenn. 115, 60 Am. St. Rep. 842.

*Vermont*.—*Tenney v. New England Protective Union*, 37 Vt. 64; *Henry v. Jackson*, 37 Vt. 431.

2. **Distinguished from Partnerships.**—There is nothing inconsistent with an association's being a partnership, in the fact that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership.

*England*.—*In re Russell Institution*, (1898) 2 Ch. 80, 67 L. J. Ch. 411, 78 L. J. N. S. 588.

*United States*.—*Chapman v. Barney*, 129 U. S. 677; *School Dist. No. 56 v. St. Joseph's F. & M. Ins. Co.*, 103 U. S. 707.

*California*.—*Jones v. Clark*, 42 Cal. 180; *Taylor v. Castle*, 42 Cal. 367.

*Massachusetts*.—*Edwards v. Warren Linoine, etc.*, Works, 168 Mass. 567; *Phillips v. Blatchford*, 137 Mass. 510; *Taft v. Ward*, 106 Mass. 518; *Bodwell v. Eastman*, 106 Mass. 525; *Boston, etc., R. Co. v. Pearson*, 128 Mass. 445; *Hoadley v. Essex County*, 105 Mass. 526; *Atty.-Gen. v. Mercantile Marine Ins. Co.*, 121 Mass. 524; *Machinists' Nat. Bank v. Dean*, 124 Mass. 81; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

*Pennsylvania*.—*Oak Ridge Coal Co. v. Rogers*, 108 Pa. St. 147; *Eliot v. Himrod*, 108 Pa. St. 569; *In re Disston, etc.*, File Co., 8 W. N. C. (Pa.) 58; *Logan v. McNaugher*, 88 Pa. St. 103; *Tide Water Pipe Co. v. Kitchenman*, 108 Pa. St. 630.

*Tennessee*.—*Carter v. McClure*, 98 Tenn. 109, 60 Am. St. Rep. 842.

*Vermont*.—*Walker v. Wait*, 50 Vt. 668; *McNeish v. U. S. Hullless Oat Co.*, 57 Vt. 316; *Tenney v. New England Protective Union*, 37 Vt. 64.

3. *Jefferys v. Smith*, 3 Russ. 158; *Greenshield's Case*, 5 De G. & Sm. 599.

4. *Thomas v. Wells*, 16 C. B. N. S. 508, 111 E. C. L. 508.



a joint-stock company, like the members of a partnership, are liable for all the debts of the association; and in other essential respects such companies are similar to ordinary partnerships.<sup>1</sup> Although a joint-stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities, from a partnership constituted between a few individuals who carry on business jointly, with equal powers and without transferable shares. All who have dealings with a joint-stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose it is wholly immaterial whether the company is incorporated or unincorporated.<sup>2</sup> Under the *Pennsylvania* statute the members are liable to a common-law action as general partners if their certificate of organization is defective.<sup>3</sup>

**3. Distinguished from Corporations — a. IN GENERAL.** — In respect to their formation, there is a broad distinction between a corporation, technically so called, which always owes its existence to the sovereign power of the state,<sup>4</sup> and a joint-stock company, which, being essentially a partnership, is brought into being by the contract of its members *inter sese*.<sup>5</sup> But, however clear the distinction may be in that regard, many of these companies have, under existing legislation, nearly all the essential characteristics of a corporation, such as perpetual existence; an artificial name in which they can make contracts; a right to sue and be sued in such artificial name or in the name of an officer; transferable shares of stock; and, in some cases, a limitation of the personal liability of shareholders, and the right to have and use a common seal. In such cases the courts have not gone the length of deciding that they are corporations in the strict sense of the word, but it has been said that it may not be improper to call them *quasi* corporations.<sup>6</sup> The legislature may, by the

**1. Every Member of a Joint Stock Association Is Personally Liable** for all its debts unless he has shifted his liability in the very manner pointed out by the articles of association.

*England.* — Keasley *v.* Codd, 2 C. & P. 408, 12 E. C. L. 193.

*Illinois.* — Robbins *v.* Butler, 24 Ill. 387; Wadsworth *v.* Duncan, 164 Ill. 362.

*Iowa.* — Pipe *v.* Bateman, 1 Iowa 369; Lewis *v.* Tilton, 64 Iowa 220, 52 Am. Rep. 436.

*Maine.* — Frost *v.* Walker, 60 Me. 468.

*Massachusetts.* — Tappan *v.* Bailey, 4 Met. (Mass.) 535; Tyrrell *v.* Washburn, 6 Allen (Mass.) 466.

*Missouri.* — Hunnewell *v.* Willow Springs Canning Co., 53 Mo. App. 245.

*New Hampshire.* — Farnum *v.* Patch, 60 N. H. 324, 49 Am. Rep. 313.

*New York.* — Moore *v.* Brink, 4 Hun (N. Y.) 402; Wells *v.* Gates, 18 Barb. (N. Y.) 554; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 542; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

*North Carolina.* — Bain *v.* Clinton Loan Assoc., 112 N. Car. 248.

*Texas.* — Cameron *v.* Decatur First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. Rep. 178.

**Consequently a Shareholder of an Insolvent Association Who Is Also a Creditor** thereof is not entitled to any dividend on his claim until the outside creditors are paid in full. Bain *v.* Clinton Loan Assoc., 112 N. Car. 248; Babb *v.* Reed, 5 Rawle (Pa.) 151.

**A Joint-stock Company to Trade in Land** is an ordinary partnership. Clagett *v.* Kilbourne, 1 Black (U. S.) 346; Kramer *v.* Arthurs, 7 Pa.

St. 165; Matter of Fry, 4 Phila. (Pa.) 129, 17 Leg. Int. (Pa.) 156.

**In Mining Partnerships** there is usually no *delectus personæ*, and as a consequence such a partnership is not dissolved by the death of a partner or a sale of an interest by a partner to a stranger. Taylor *v.* Castle, 42 Cal. 367; Skillman *v.* Lachman, 23 Cal. 199, 83 Am. Dec. 96; Duryea *v.* Burt, 28 Cal. 569; Jones *v.* Clark, 42 Cal. 180; Dougherty *v.* Creary, 30 Cal. 290, 89 Am. Dec. 116. See also Bradley *v.* Harkness, 26 Cal. 69; Abel *v.* Love, 17 Cal. 233; Settembre *v.* Putnam, 30 Cal. 490; Rich *v.* Davis, 6 Cal. 163; Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231.

**2. Per Lord Campbell** in Burnes *v.* Pennell, 2 H. L. Cas. 521.

**3. Vanhorn *v.* Corcoran**, 127 Pa. St. 255.

But to charge the members as general partners they must be sued as such. Brown *v.* Benner Syphon Trap Co., 18 W. N. C. (Pa.) 114.

And they will not be held liable as general partners if they have in good faith substantially complied with the provisions of the statute. Samuel *v.* Swanger, 7 Del. Co. Rep. (Pa.) 446.

**4. See the title CORPORATIONS (PRIVATE)**, vol. 7, p. 639.

**5. See *supra***, this section, *Definition and General Nature; Distinguished from Ordinary Partnerships*.

**6. Distinguished from Corporations.** — Youngstown Coke Co. *v.* Andrews Bros. Co., 79 Fed. Rep. 669; Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157; Oak Ridge Coal Co. *v.* Rogers, 108 Pa. St. 150; Hill *v.*



bestowal of a corporate franchise, create a corporation without explicitly declaring it to be such.<sup>1</sup> But in considering the converging lines of distinction between corporations and joint-stock companies this fundamental difference must be borne in mind: that the act of creating a corporation completely obliterates the individual liability of its members unless some part of that liability is expressly saved from destruction, but the organization of a joint-stock company leaves unimpaired the individual liability of its members as general partners, unless that liability is expressly limited.<sup>2</sup>

*b.* ARTICLES OF ASSOCIATION AND CHARTER. — The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company; they regulate the duties of the officers and the duties and obligations of the members among themselves.<sup>3</sup>

*c.* FOR PURPOSES OF TAXATION. — In the *United States* it has been held that a foreign joint-stock association which by its deed of settlement under certain Acts of Parliament possesses (1) a distinctive artificial name by which it can make contracts; (2) a statutory authority to sue and be sued in the name of its officers as representing the association; (3) a statutory recognition of the association as an entity distinct from its members, by allowing them to sue it and be sued by it; and (4) a provision for its perpetuity by transfers of its shares, so as to secure succession of membership, is a corporation for the purpose of taxation within the meaning of a legislative act taxing corporations *eo nomine*, inasmuch as the individual responsibility of the shareholder for the debts of the association is no longer incompatible with the corporate idea.<sup>4</sup> But a joint-stock association is not liable to taxation on its shares under a law imposing a tax on the capital stock of all companies incorporated or doing business in the state.<sup>5</sup> If, however, the statute in terms imposes a tax upon the franchise or business of every corporation, joint-stock company, or association whatever, incorporated, organized, or formed under the laws of the state or of any other state or country, and doing business in the state, a joint-stock company cannot escape taxation on the ground that it is not a corporation.<sup>6</sup> And shares in a joint-stock association are not taxable as stocks in a moneyed corporation at the place of residence of the holder. The personal property of such association is taxable where its business is carried on.<sup>7</sup>

*d.* CITIZENSHIP — JURISDICTION OF FEDERAL COURTS. — It has been held that a joint-stock association having the privilege of perpetual succession

Stetler, 127 Pa. St. 145; MacGeorge v. Chemical Mfg. Co., 141 Pa. St. 575; Stevens v. Philadelphia Ball-Club, 142 Pa. St. 52; Laffin v. Steytler, 146 Pa. St. 439; Whitney v. Backus, 149 Pa. St. 29.

A joint-stock company is a partnership with some of the powers of a corporation. Van Aernam v. Bleistein, 102 N. Y. 360; People v. Coleman, 133 N. Y. 279. See also Waterbury v. Merchants' Union Express Co., 50 Barb. (N. Y.) 157.

1. Thomas v. Dakin, 22 Wend. (N. Y.) 9; Watertown Bank v. Watertown, 25 Wend. (N. Y.) 686; People v. Niagara County, 4 Hill (N. Y.) 20; People v. Coleman, 133 N. Y. 282.

A Joint-stock Association Is Liable in Trespass for removing coal, under an act imposing a penalty therefor upon "any person or corporation." Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147.

2. Atty.-Gen. v. Mercantile Marine Ins. Co., 121 Mass. 524; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Thomas v. Dakin, 22 Wend. (N. Y.) 104.

3. Articles of Association. — Bray v. Farwell, 81 N. Y. 600; White v. Brownell, (C. Pl. Gen. T.) 4 Abb. Pr. N. S. (N. Y.) 162. See also

Hyde v. Woods, 2 Sawy. (U. S.) 655, affirmed 94 U. S. 523; Ashbury R. Carriage, etc., Co. v. Riche, 44 L. J. Exch. 185, L. R. 7 H. L. 668; Guinness v. Land Corp., 52 L. J. Ch. 177, 22 Ch. D. 376; Small v. Smith, 10 App. Cas. 138.

The purchaser of shares is bound by the by-laws and usages of the company. Logan v. McNaugher, 88 Pa. St. 103.

4. Taxation. — Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, affirming Oliver v. Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531.

5. Gregg v. Sanford, 65 Fed. Rep. 151; People v. Coleman, 133 N. Y. 279.

The contrary was decided in Sandford v. New York, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 172, but the Court of Appeals has since settled the law as stated in the text. See People v. Coleman, 133 N. Y. 279.

6. It was so held under the *New York Laws* of 1880, c. 542, § 3. People v. Wemple, 117 N. Y. 136.

7. Hoadley v. Essex County, 105 Mass. 519. A statute imposing such a tax without regard to the value of the property owned by the association was held unconstitutional in *Massachusetts*. Gleason v. McKay, 134 Mass. 419.



and the right to make contracts in its artificial name and to sue and be sued in the name of its president or treasurer is to be deemed a citizen of the state under whose laws it was organized, in the same sense that corporations are so considered, and that it may sue and be sued in the name of such officer in the federal courts, as a citizen of that state, without regard to the citizenship of its shareholders.<sup>1</sup> But it seems to be the better opinion that the creation of artificial citizens by legal fiction for the purpose of giving jurisdiction to the courts should be confined strictly to technical corporations;<sup>2</sup> and it has been expressly decided by the Supreme Court of the United States that an allegation that the plaintiff, a joint-stock company, is a citizen of a state different from that of which the defendant is a citizen will not give jurisdiction to the court on the ground of citizenship;<sup>3</sup> and in a recent case it has also been decided by the same court that it is necessary to set out the citizenship of the individual members of a limited partnership organized under the laws of the state of *Pennsylvania*, in order to bring it within the jurisdictional requirement of diverse citizenship.<sup>4</sup>

4. **Dividends.** — It is not of the essence of a joint-stock company that it should provide for the payment of a dividend or bonus among its members.<sup>5</sup> A literary and scientific institution in the property of which the proprietors are interested in proportion to the number of their shares which are transferable is in the nature of a joint-stock company.<sup>6</sup>

II. **STATUTORY REGULATION** — 1. **In England.** — At Common Law every association formed for the purpose of sharing profits was either a partnership or a corporation; a company which was neither was a thing unknown to the law.<sup>7</sup> And, though it was illegal and even punishable for a voluntary association of persons to attempt to arrogate to themselves the privileges of a body corporate,<sup>8</sup> it was held that a joint-stock company with transferable shares was not illegal and could not be regarded as a common nuisance.<sup>9</sup>

**Statutes** — **The Bubble Act.** — As these companies grew in numbers and commercial importance, however, the inconvenience of making all the members parties and the difficulty of adjusting disputes between the members led the legislative mind to regard them as nuisances, and the result was the passage of an act, commonly called the Bubble Act,<sup>10</sup> designed to put them out of

1. **Citizenship.** — *Maltz v. American Express Co.*, 1 Flipp. (U. S.) 611; *Fargo v. Louisville, etc.*, R. Co., 6 Fed. Rep. 787, 10 Biss. (U. S.) 273; *Baltimore, etc.*, R. Co. *v. Adams Express Co.*, 22 Fed. Rep. 404; *Youngstown Coke Co. v. Andrews Bros. Co.*, 79 Fed. Rep. 669; *Bushnell v. Park*, 46 Fed. Rep. 209; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. Rep. 585.

2. *Carnegie v. Hulbert*, 53 Fed. Rep. 10, 10 U. S. App. 454; *Imperial Refining Co. v. Wyman*, 38 Fed. Rep. 574.

3. *Chapman v. Barney*, 129 U. S. 677. See also *Dinsmore v. Philadelphia, etc.*, R. Co., 11 Phila. (Pa.) 483, 32 Leg. Int. (Pa.) 388. See also *Dinsmore v. Railroad Co.*, 3 Chicago Leg. N. 157.

4. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, *disapproving Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. Rep. 585, 58 U. S. App. 444.

5. **Dividends.** — *In re Russell Institution*, (1898) 2 Ch. 80, 67 L. J. Ch. 411, 78 L. T. N. S. 588.

6. *In re Russell Institution*, (1898) 2 Ch. 72, 67 L. J. Ch. 411, 78 L. T. N. S. 588.

7. **At Common Law.** — 1 *Lindley on Partnership* (4th ed.) 5; *Macintyre v. Connell*, 1 Sim. N. S. 233.

8. *Duvergier v. Fellows*, 5 Bing. 248, 15 E. C. L. 436; *Josephs v. Pebrer*, 5 Dowl. & R. 542, 3 B. & C. 639, 10 E. C. L. 209; *Kinder v. Taylor*, 3 L. J. Ch. 69; *Blundell v. Winsor*, 8 Sim. 601.

9. *Garrard v. Hardey*, 5 M. & G. 471, 6 Scott N. R. 450, 44 E. C. L. 251, 12 L. J. C. Pl. 205; *Harrison v. Heathorn*, 6 M. & G. 81, 6 Scott N. R. 735, 46 E. C. L. 81, 12 L. J. C. Pl. 282; *Ex p. Grisewood*, 28 L. J. Ch. 769; *Walburn v. Ingilby*, 1 Myl. & K. 76. See also *Re Mexican, etc.*, Co., 27 Beav. 474, 5 Jur. N. S. 615, 7 W. R. 509; *In re General Co. for Promotion of Land Credit*, 39 L. J. Ch. 737, L. R. 5 Ch. 363, 22 L. T. N. S. 454; *Womersley v. Merritt*, L. R. 4 Eq. 695.

10. **English Bubble Act.** — Stat. 6 Geo. I., c. 18.

**Building and Loan Associations** were not within the inhibition of this act. *Pratt v. Hutchinson*, 15 East 511; *Nockels v. Crosby*, 5 Dowl. & R. 751, 3 B. & C. 814, 10 E. C. L. 237.

**Bubble Act in Massachusetts.** — In Massachusetts joint-stock companies have been held legal at common law. In *Phillips v. Blatchford*, 137 Mass. 510, *Holmes, J.*, said: "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. They have been recognized as lawful by the court from *Alvord v. Smith*, 5 Pick.



existence altogether; but the act proved simply futile, and joint-stock companies continued to increase in both number and importance.<sup>1</sup> In the year 1825 the Bubble Act was repealed,<sup>2</sup> and the legislature turned its attention to amending the law, by a series of acts, most of which have been since repealed,<sup>3</sup> so as to give free scope to combinations of capital and at the same time protect the rights of all parties. This effort culminated in the Companies Act of 1862<sup>4</sup> and its subsequent amendments,<sup>5</sup> constituting a comprehensive code of law applicable to trading joint-stock companies,<sup>6</sup> which is not confined to *England* alone, but extends as well to *Scotland* and *Ireland*.<sup>7</sup>

**2. In United States.** — In many of the United States statutes have been passed regulating the organization, government, and management of joint-stock companies. Such statutes usually fix the minimum number of members, authorize the company to sue or be sued in its own name or that of an officer of the company, provide for the management of the business, and establish the extent of the liability of the members. These statutes also usually require that the organizers of the company shall record articles of association containing the names of the members, the amount of capital, the name of the company, and the character and location of the business.<sup>8</sup>

**III. POWERS, RIGHTS, AND LIABILITIES OF MEMBERS — 1. As to Public.** — As has been already stated, unless the liability of members is limited by statute, every member is liable individually for all the debts of the company.<sup>9</sup> But as to what facts are sufficient to show membership so as to create such liability the authorities are not in accord.<sup>10</sup>

(Mass.) 232, to *Gleason v. McKay*, 134 Mass. 419. Even if the question were a new one we should come to the same result." In the same case it was decided that the Bubble Act had never been in force in Massachusetts.

1. 1 Lindley on Partnership (4th ed.) 6.

2. Stat. 6 Geo. IV., c. 91. The second section of it had already been repealed by the statute 5 Geo. IV., c. 114.

3. A historical review of this legislation may be found in 1 Lindley on Partnership (4th ed.) 6 *et seq.*

4. 25 & 26 Vict., c. 89.

5. Amended by 30 & 31 Vict., c. 47, c. 131; 33 & 34 Vict., c. 104; 40 & 41 Vict., c. 26.

6. *Oakes v. Turquand*, 36 L. J. Ch. 949, L. R. 2 H. L. 374, 16 L. T. N. S. 808.

"The act was intended \* \* \* to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed." James, L. J., in *Smith v. Anderson*, 50 L. J. Ch. 39, 15 Ch. D. 273, 43 L. T. N. S. 329.

7. In *re International Pulp, etc., Co.*, 45 L. J. Ch. 446, 3 Ch. D. 597, 35 L. T. N. S. 229.

8. See for Examples of These Statutes:

*New York.* — Birds. Rev. Stat. (1896), p. 1716 *et seq.*, the Joint-stock Association Law, being chapter 45 of the General Laws of New York.

*Ohio.* — Bates's Annot. Stat. (1897), § 3141 *et seq.*

*Pennsylvania.* — Bright. Purd. Dig. Laws Pa. (1894), p. 1086 *et seq.*

*Virginia.* — Code Va. (1887), § 1106 *et seq.*

*Wisconsin.* — Stat. Wis. (1898), § 3210 *et seq.*

In some of the states there are acts providing for the incorporation of companies under the general laws and at the same time making

the stockholders to some extent individually liable for the debts of the company. Such companies in many respects resemble joint-stock companies organized under modern legislation. See the general corporation laws of the states.

**9. Liability of Members to the Public.** — See *supra*, this title, *Definition, General Nature, and Distinctions — Distinguished from Ordinary Partnerships.*

In *Bank of Topeka v. Eaton*, 100 Fed. Rep. 8, the property of the association was vested in trustees, and the articles authorized them to borrow money in certain cases and declared that "any debt for money so borrowed shall be and remain, until paid, a lien upon all funds," etc., of the association; and that "the trustees shall have no power to bind the shareholders personally." A bank loaned money to the trustees, taking their note and certain securities as collateral, the former containing a stipulation that it was given under the association's articles. It was held that there was no personal liability on the part of the shareholders.

The members of a voluntary association organized for educational purposes, employing a teacher, are personally liable for her wages, in the absence of any agreement in the contract to the contrary. *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505. See also *Lewis v. Tilton*, 64 Iowa 220, 52 Am. Rep. 436.

The liability of individual members of an unincorporated joint-stock company formed in *Canada* must be judged by the laws of *Canada*, where the association was formed and the business conducted, but a bill of exchange drawn by it may be governed by the laws of the place where the bill is made payable. *Cutler v. Thomas*, 25 Vt. 73.

**10. What Necessary to Establish Liability.** — In *New York* the mere fact of subscribing to the



2. **As Between Themselves.** — As between members of joint-stock companies, apart from special agreement, the general law of partnership prevails. Thus one member cannot maintain an action against his fellow members for a debt due to him by the company; nor can a member claim compensation for special services rendered by him to the company where there was no express agreement that he should be paid for them.<sup>1</sup>

**IV. POWER TO TAKE AND CONVEY REAL PROPERTY.** — In *New York* a joint-stock association may, in the name of the president as such, purchase, take, hold, and convey such real property only as may be necessary for its immedi-

stock of an incorporated company has been held to constitute the subscriber a stockholder where the rights of third parties are concerned. *Spear v. Crawford*, 14 Wend. (N. Y.) 20. See also *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517.

But in *West Point Foundry Assoc. v. Brown*, 3 Edw. (N. Y.) 284, it was held that persons who subscribe for shares and pay deposits, but do not comply with the full conditions of the association and never become entitled to profits, are not liable for debts, unless they are active in contracting them or hold themselves out as partners.

In *Maine* it was held that persons whose names are signed to the subscription papers, and who pay without objection assessments for the number of shares set opposite their respective names, are members, though it be not shown by whom their names were so subscribed. *Frost v. Walker*, 60 Me. 468.

In *Massachusetts* one who signs a subscription paper containing a contract to take stock in an association already formed, and pays the percentage required, becomes a partner in the enterprise and is liable as such for the debts of the company although he has not signed the articles of association. *Boston, etc., R. Co. v. Pearson*, 128 Mass. 445. See also *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

In *Pennsylvania* it has been held that an application for shares and payment of the first deposit are not sufficient; but that if the subscriber acts as a member or director, attends meetings, or otherwise holds himself out as a member, he will make himself liable as such, though there may be some want of the necessary formalities or acts of a party to make him legally a member. *Hedge's Appeal*, 63 Pa. St. 273.

The rule in *Missouri* has been stated thus: Where it appears that the company organized actually engaged in the proposed business, each subscriber or contributor to the funds of the company who becomes such with intent to participate in the profits, becomes chargeable as a partner; and an unexplained subscription or contribution is evidence of such intent; also, acting as a member of the board of directors or participating in the meetings of the company will make one liable as a partner without proof of ownership of shares. *Hunnell v. Willow Springs Canning Co.*, 53 Mo. App. 245.

In *England*, where a person has acted and has been treated as a shareholder he will be treated as a contributor, notwithstanding the nonobservance of those formalities which, according to the strict letter of the deed of settlement, must be complied with before a person is entitled to share profits or enjoy the other rights and privileges of a shareholder. *Ma-*

*guire's Case*, 3 De G. & Sm. 31; *Henderson v. Sanderson*, 3 De G. & Sm. 66, 3 H. L. Cas. 698; *Gordon's Case*, 3 De G. & Sm. 249; *Walter's Case*, 3 De G. & Sm. 149, 19 L. J. Ch. 501; *Matter of Pennant, etc.*, Consol. Lead Min. Co., 5 De G. M. & G. 837; *Matter of North of England Joint-stock Banking Co.*, 1 De G. M. & G. 576; *Heward v. Wheatley*, 3 De G. M. & G. 628; *Ex p. Robinson*, 15 Jur. 438, 2 De G. M. & G. 517, 6 De G. M. & G. 572; *In re Northumberland, etc., Banking Co.*, 1 De G. F. & J. 533; *Matter of Electric Tel. Co.*, 2 De G. F. & J. 275; *Matter of Royal Bank of Australia*, 2 De G. M. & G. 522; *Bernard's Case*, 5 De G. & Sm. 283; *Ex p. Barton*, 5 Jur. N. S. 420; *Ex p. Hitchcock*, 3 De G. & Sm. 92; *Richmond's Case*, 4 Ky. & J. 325; *Barclay's Case*, 26 Beav. 177; *Ex p. Worth*, 4 Drew. 529; *In re Newcastle-upon-Tyne Marine Ins. Co.*, 19 Beav. 97; *In re Cameron's Coalbrook, etc., R. Co.*, 18 Beav. 339; *Owen v. Van Uster*, 10 C. B. 318, 70 E. C. L. 318; *Beech v. Eyre*, 6 Scott, N. R. 327; *Holmes v. Higgins*, 1 B. & C. 74, 8 E. C. L. 33; *Lawler v. Kershaw*, M. & M. 93, 22 E. C. L. 261; *Braithwaite v. Skofield*, 9 B. & C. 401, 17 E. C. L. 404; *Doubleday v. Muskett*, 4 M. & P. 750.

1. **Relations of Members as Between Themselves.** — See *supra*, this title, *Definition, etc.* — *Distinguished from Ordinary Partnerships.*

Where there is nothing in the constitution of a joint-stock company which regulates the remedies of the shareholders as between themselves, the general law of partnership must govern them. *Bullard v. Kinney*, 10 Cal. 60; *Robbins v. Butler*, 24 Ill. 387; *Moore v. Brink*, 4 Hun (N. Y.) 402. See also *Wilson v. Curzon*, 15 M. & W. 532; *Perring v. Hone*, 4 Bing. 28, 13 E. C. L. 328; *Holmes v. Higgins*, 1 B. & C. 74, 8 E. C. L. 33; *Kellogg Bridge Co. v. Motion*, 15 Ct. Cl. 111; *Walker v. Ogden*, 1 Biss. (U. S.) 287; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466; *Lake v. Mumford*, 4 Smed. & M. (Miss.) 312; *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Secor v. Lord*, 3 Keyes (N. Y.) 525; *Morrissey v. Weed*, 12 Hun (N. Y.) 491; *Bailey v. Bancker*, 3 Hill (N. Y.) 188, 38 Am. Dec. 625; *Crater v. Bininger*, 45 N. Y. 545; *Moss's Appeal*, 43 Pa. St. 23; *Matter of Fry*, 4 Phila. (Pa.) 129, 17 Leg. Int. (Pa.) 156; *Babb v. Reed*, 5 Rawle (Pa.) 151.

But the deed of settlement will control so far as its provisions are consistent with the law. *Ness v. Angas*, 3 Exch. 805; *Ex p. Wood*, 17 Eng. L. & Eq. 236; *Fox v. Clifton*, 9 Bing. 115, 23 E. C. L. 273; *Alvord v. Smith*, 5 Pick. (Mass.) 232; *Kingman v. Scurr*, 7 Pick. (Mass.) 235; *Cochran v. Perry*, 8 W. & S. (Pa.) 262; *Stimson v. Lewis*, 36 Vt. 91; *Henry v. Jackson*, 37 Vt. 431.



ate accommodation in the convenient transaction of its business, such as may be mortgaged to it in good faith by way of security for loans made by or money due to it, and such as it may purchase at sales under judgments, decrees, or mortgages held by it; <sup>1</sup> and similar provisions are to be found in the statutes of other states. <sup>2</sup>

**V. ACTIONS BY AND AGAINST JOINT-STOCK COMPANIES — 1. In Local Jurisdiction.** — In the Case of an Ordinary Partnership, one member cannot bring an action against himself and his associates in a court of law. This is largely owing to a technical rule that he cannot at once be plaintiff and defendant. His remedy is a suit in equity, in which an account can be taken and the interests of the respective partners can be accurately ascertained and protected. <sup>3</sup>

**Statutes.** — The inconvenience of this rule, as applied to large unincorporated companies, has long been seriously felt; and under modern legislation it is usually avoided by the institution of a public officer to sue and be sued on behalf of the members of the association. Where care is taken to render such officer the representative of the company as distinct from the individuals which compose it, legal proceedings between him as such and those individuals or any of them are theoretically as unobjectionable as are proceedings between incorporated companies and their shareholders. <sup>4</sup> But such officer must be created or pointed out by law, since the partners or associates cannot by their own act empower one of their officers for the time being to represent the firm and sue and be sued on its behalf. Such a person would not be a representative like a corporation sole, and could have no standing as such in court. <sup>5</sup>

The fact that the purchaser of a certificate has never subscribed the articles of association is of no consequence so far as his right to a ratable share of the company's property is concerned. *Butterfield v. Beardsley*, 28 Mich. 412.

**1. Powers as to Real Estate.** — Joint-stock Association Law, § 6; *Birds. Rev. Stat. N. Y.* (1896), p. 1717, § 6.

The *New York Act* of 1867, c. 289, as to joint-stock companies, may be construed as a restraint upon the right of a joint-stock association to purchase and hold the real estate not needed for its immediate use. If this statute be violated, it is the province of the state to see to its enforcement. *Howell v. Earp*, 21 Hun (N. Y.) 393, *citing* *Rainey v. Laing*, 58 Barb. (N. Y.) 489.

**2.** See the statutes of the several states.

A deed of land to a voluntary unincorporated association which is well known and the members of which may be ascertained, but which is not authorized to hold real estate under the statute, may be construed as a grant to those who are properly described by the title used in the deed, who will hold as tenants in common. *Byam v. Bickford*, 140 Mass. 31. See also *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Hamblett v. Bennett*, 6 Allen (Mass.) 140.

In *Pratt v. California Min. Co.*, 24 Fed. Rep. 869, land was conveyed to an association of persons without naming them all. It was held to be competent for the court to inquire and determine who composed the association at the date of the deed, and the interest to which each would be entitled in the land.

**3. Actions in Local Jurisdiction.** — See the title PARTNERSHIP. See also *Bailey v. Bancker*, 3 Hill (N. Y.) 188, 38 Am. Dec. 625.

**4. England.** — *Chapman v. Milvain*, 5 Exch. 61; *Lawrence v. Wynn*, 5 M. & W. 355; *Wills v. Sutherland*, 4 Exch. 211; *Reddish v. Pin-*

*nock*, 10 Exch. 213; *Smith v. Goldsworthy*, 42 B. 430, 45 E. C. L. 430; *Skinner v. Lambert*, 4 M. & G. 477, 43 E. C. L. 249; *Ex p. Hall*, 3 Deac. 405; *Harrison v. Brown*, 5 De G. & Sm. 728.

*New York.* — *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Fargo v. McVicker*, 55 Barb. (N. Y.) 437; *Olerly v. Brown*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 92; *Sander v. Edling*, 13 Daly (N. Y.) 238; *Bridenbaker v. Hoard*, (Supm. Ct. Gen. T.) 32 How. Pr. (N. Y.) 289; *De Witt v. Chandler*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 459; *Bray v. Farwell*, 3 Lans. (N. Y.) 495; *Saltsman v. Shults*, 14 Hun (N. Y.) 256. See also *People v. Wemple*, 117 N. Y. 147.

**For the Purpose of Prosecuting and Defending Actions**, such officer stands in a relation to the members similar to that of the artificial corporate entity to the stockholders of a corporation, and for this purpose he is to be regarded substantially as a corporation sole. *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Cross v. Jackson*, 5 Hill (N. Y.) 478; *Van Aernam v. Bleistein*, 102 N. Y. 355 (*affirming* *Van Aernam v. McCune*, 32 Hun (N. Y.) 316); *McGuffin v. Dinsmore*, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 241. See also *Maltz v. American Express Co.*, 1 Flipp. (U. S.) 611; *Fargo v. Louisville, etc., R. Co.*, 6 Fed. Rep. 787; *Baltimore, etc., R. Co. v. Adams Express Co.*, 22 Fed. Rep. 404; *De Witt v. Chandler*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 459; *Tibbetts v. Blood*, 21 Barb. (N. Y.) 650; *National Bank v. Van Derwerker*, 74 N. Y. 234.

**Fire Companies.** — The *New York Acts* of 1849 and 1851 do not include the fire companies of the city of New York. *Masterson v. Botts*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 130.

**5.** *Hybart v. Parker*, 4 C. B. N. S. 209, 93 E.



The Intent of Such Statutes is to obviate the inconvenience of joining all the shareholders as parties;<sup>1</sup> to facilitate an existing right of action, and not to create a new one. Consequently no action which might not previously have been maintained by the shareholders can be maintained in the name of such officer.<sup>2</sup>

**Personal Judgment.** — A statute providing that a joint-stock company may sue or be sued in the name of an officer does not authorize a personal judgment and execution against such officer or other members of the company<sup>3</sup> unless the statute expressly provides that execution may issue against a member of the company upon a judgment so obtained.<sup>4</sup>

**An Action Against the Members Is Regarded as Supplementary** to an action prosecuted against the company, and cannot be maintained until an execution is issued against the company and returned unsatisfied;<sup>5</sup> but in *New York* this rule now applies only in cases where an action has been brought against an officer of the company or a counterclaim has been made in an action brought by him. If no other action for the same cause is pending, an action may, at the option of the plaintiff, be brought by or against all the members of the association.<sup>6</sup>

**Libel.** — An action for libel is maintainable against a joint-stock company which publishes a newspaper in which the libel appears.<sup>7</sup>

**2. In Foreign Jurisdictions.** — The rule above stated rests on the construction and application of local statutes; but by a familiar rule, the laws of one state which have reference solely to the mode of pursuing a remedy are not binding in another state, and the personal liability of the individual members of joint-stock companies may be enforced in accordance with the laws of the forum.<sup>8</sup>

**Service of Process.** — A joint-stock company organized in a foreign jurisdiction and having substantially the power and character of a corporation may be served with process in the same manner as foreign corporations are served.<sup>9</sup>

C. L. 209; *Westcott v. Fargo*, 61 N. Y. 548, 19 Am. Rep. 300; *Tibbetts v. Blood*, 21 Barb. (N. Y.) 650; *Habicht v. Pemberton*, 4 Sandf. (N. Y.) 657. See also *Ewing v. Medlock*, 5 Port. (Ala.) 82.

**1. Intent of the Statutes.** — In *New York*, prior to 1849, all the members of an unincorporated joint-stock company were necessary parties to an action by or against such company, whatever the number of its members might be. Such an association could not sue or be sued in the name of any officer of the company or in the name of its trustees. *Van Aernam v. Bleistein*, 102 N. Y. 358; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Corning v. Greene*, 23 Barb. (N. Y.) 33; *De Witt v. Chandler*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 459.

**2.** *Corning v. Greene*, 23 Barb. (N. Y.) 33, affirmed 28 How. Pr. (N. Y.) 581, 26 N. Y. 472, note.

**3. Personal Judgment Against Members.** — *Wormwell v. Hailstone*, 6 Bing. 668, 19 E. C. L. 198; *Harrison v. Timmins*, 4 M. & W. 510; *Taft v. Ward*, 106 Mass. 518; *McCabe v. Goodfellow*, 133 N. Y. 92; *National Bank v. Van Derwerker*, 74 N. Y. 234.

**4.** *Bartlett v. Pentland*, 1 B. & Ad. 704, 20 E. C. L. 475; *Bodey v. Cooper*, 82 Md. 625. Compare *Nixon v. Green*, 11 Exch. 550; *Bradley v. Eyre*, 11 M. & W. 432; *Bank of Australasia v. Nias*, 16 Q. B. 717, 71 E. C. L. 717; *Powis v. Harding*, 1 C. B. N. S. 533, 87 E. C. L. 533; *Henderson v. Royal British Bank*, 7 El. & Bl.

356, 90 E. C. L. 356; *Daniell v. Royal British Bank*, 1 H. & N. 681.

**5.** *Taft v. Ward*, 106 Mass. 518; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Robbins v. Wells*, 1 Robt. (N. Y.) 666, 18 Abb. Pr. (N. Y.) 191; *McCabe v. Goodfellow*, 133 N. Y. 92; *Flagg v. Swift*, 25 Hun (N. Y.) 624; *Witherhead v. Allen*, 3 Keyes (N. Y.) 562; *Kingsland v. Braisted*, 2 Lans. (N. Y.) 17; *Green Bay First Nat. Bank v. Goff*, 31 Wis. 77. See also *Nixon v. Brownlow*, 1 H. & M. 405; *Shrimpton v. Sidmouth R. Co.*, L. R. 3 C. P. 80; *Lee v. Bude, etc.*, *Junction R. Co.*, 40 L. J. C. Pl. 285, L. R. 6 C. P. 576; *Bradley v. Warburg*, 11 M. & W. 452, *Bradley v. Urquhart*, 11 M. & W. 583; *Marson v. Lund*, 16 Q. B. 344, 71 E. C. L. 344; *Allen v. Clark*, 65 Barb. (N. Y.) 563.

**6.** Joint-stock Association Law, § 17, 2 Birds. Rev. Stat. N. Y. (1896), p. 1719, § 17; *Schwartz v. Wechler*, (C. Pl. Gen. T.) 29 Abb. N. Cas. (N. Y.) 332, 23 Civ. Pro. (N. Y.) 21, 2 Misc. (N. Y.) 67.

**7.** *Van Aernam v. McCune*, 32 Hun (N. Y.) 316, affirmed *sub nom.* *Van Aernam v. Bleistein*, 102 N. Y. 355.

**8. Actions in Foreign Jurisdictions.** — *Gott v. Dinsmore*, 111 Mass. 45; *Taft v. Ward*, 106 Mass. 518; *Boston, etc., R. Co. v. Pearson*, 128 Mass. 446; *Tappan v. Bailey*, 4 Met. (Mass.) 529; *Bodwell v. Eastman*, 106 Mass. 525. See also *Allen v. Sewall*, 2 Wend. (N. Y.) 327.

**9. Process.** — *State v. Adams Express Co.*, 66 Minn. 271; *Express Co. v. State*, 55 Ohio St. 69.



The classification of a company by the statutes of the jurisdiction in which it was organized is not conclusive in other jurisdictions.<sup>1</sup>

**VI. DISSOLUTION — 1. By Mutual Consent.** — As in the case of ordinary partnerships, joint-stock companies may be dissolved and their business wound up by the mutual consent of all the members.<sup>2</sup>

**2. By Equitable Proceedings.** — A court of equity may decree a dissolution of a joint-stock company for good cause shown,<sup>3</sup> and one or more of the members may at any time institute proceedings for its dissolution.<sup>4</sup>

**3. By Terms of Articles of Association.** — A voluntary association may be dissolved pursuant to its articles.<sup>5</sup> Where the articles of association fix a definite term for the continuance of the association, the members cannot sooner dissolve it except by unanimous consent.<sup>6</sup> But when such term expires, the life of the association can be prolonged only by unanimous consent. Any shareholder has a right to insist that the affairs of the company shall be wound up in accordance with the terms of the written agreement.<sup>7</sup>

**4. By Single Ownership of All the Shares — Sale of Property.** — Such a partnership may also be dissolved by one member becoming the owner of all the shares.<sup>8</sup> And in *Maine* it was considered that a sale by a member of the property represented by his shares was a dissolution of the association.<sup>9</sup>

1. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566 [*affirming* *Oliver v. Liverpool*, etc., L., etc., Ins. Co., 100 Mass. 531]; *State v. U. S. Express Co.*, 1 Ohio N. P. 259, 2 Ohio Dec. 257.

2. *Dissolution by Mutual Consent.* — *Griffith v. Paget*, 6 Ch. D. 511.

*Confession of Judgment.* — After the passage of a resolution to wind up, the company has no power to confess a judgment. *Crowther v. Upland Industrial Co-operation Assoc.*, 1 Del. Co. Rep. (Pa.) 264.

*Duty of Trustees as to Assets.* — Upon the dissolution of a joint-stock company, it is the duty of the trustees to convert the assets into money and distribute the proceeds among the stockholders. They have no right, without the consent of all the stockholders, to exchange the assets, or any portion thereof, of the old association for the corporate stock of any corporation. A stockholder not consenting to such exchange may recover the value of his stock so wrongfully disposed of. *Frothingham v. Barney*, 6 Hun (N. Y.) 366; *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362.

3. *By Decree in Equity.* — *Pearce v. Piper*, 17 Ves. Jr. 1; *Ellison v. Bignold*, 2 Jac. & W. 511; *In re Electric Telegraph*, 22 Beav. 471; *Gorman v. Russell*, 14 Cal. 531, *affirmed* 18 Cal. 688; *Von Schmidt v. Huntington*, 1 Cal. 55.

4. *Snyder v. Lindsey*, 92 Hun (N. Y.) 432.

The court will not appoint a receiver for an unincorporated joint-stock company, to sell the property and divide the proceeds among the members, on a bill brought by a minority of the company, in absence of equity sufficient to require it. *Hinkley v. Blethen*, 78 Me. 221.

5. *Terms of Articles.* — Thus, where the articles provide that upon certain conditions the directors may dissolve the association if a majority in interest of the shareholders do not object, the court will not, where the conditions have been complied with and ninety-five per

cent. in value of the stockholders have agreed to dissolution, restrain the officers as liquidators, at the instance of a single small shareholder, from dissolving the association and consummating a sale of its business and assets to a similar foreign corporation at a fair price. *Francis v. Taylor*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 187.

6. *Von Schmidt v. Huntington*, 1 Cal. 55. Compare *Blatchford v. Ross*, 54 Barb. (N. Y.) 42.

7. *Mann v. Butler*, 2 Barb. Ch. (N. Y.) 362. See also *Lake v. Munford*, 4 Smed. & M. (Miss.) 312; *Penfield v. Skinner*, 11 Vt. 296.

An unincorporated joint-stock company may always be dissolved in the manner and under the circumstances provided for in its deed of settlement. *Lyon v. Haynes*, 5 M. & G. 504, 44 E. C. L. 268.

8. *Farnum v. Patch*, 60 N. H. 326, 49 Am. Rep. 313.

9. *Sale of Property by Member.* — In *Smith v. Virgin*, 33 Me. 148, the articles of agreement provided that the capital stock should be divided into shares, that the shares should be transferable, that trustees should be appointed to manage the affairs, and that all the property should be vested in such trustees. In accordance with these articles, trustees were appointed who bought real and personal estate and conducted the business of the association. By transferred shares from time to time, twenty-nine fortieths of them became vested in one man. On a sale by him, not of his shares, but of twenty-nine fortieths of all the land and property of the company, it was held that the association was dissolved, and that the parties who held shares at the time of such dissolution were entitled, in proportion to the number of their shares, to all the assets of the company, and were liable to contribute to the debts of the company in the same proportion.



# JOINT TENANTS AND TENANTS IN COMMON.

BY JOSEPH R. LONG.

## I. DEFINITIONS, 648.

## II. NATURE AND INCIDENTS OF ESTATES IN COTENANCY, 649.

1. *Joint Tenancy*, 649.
  - a. *In General*, 649.
  - b. *Right of Survivorship*, 649.
    - (1) *In General*, 649.
    - (2) *Doctrine of Survivorship Abolished by Statute*, 650.
2. *Tenancy in Common*, 651.
  - a. *In General*, 651.
  - b. *Equality of Interest*, 651.

## III. ESTATES IN COTENANCY DISTINGUISHED FROM EACH OTHER AND FROM SIMILAR ESTATES, 652.

1. *From Each Other*, 652.
2. *From Estates in Parcenary*, 652.
3. *From Tenancies by Entireties*, 652.
4. *From Partnerships*, 652.

## IV. CREATION OF ESTATES IN COTENANCY, 653.

1. *At Common Law*, 653.
  - a. *General Rule of Construction*, 653.
  - b. *Joint Tenancy*, 654.
    - (1) *In General*, 654.
    - (2) *By Deed or Will*, 654.
    - (3) *By Disseizin*, 655.
  - c. *Tenancy in Common*, 655.
    - (1) *In General — By Deed or Will*, 655.
    - (2) *By Destruction of Joint Estates*, 656.
2. *Under Modern Practice and Statutes*, 657.
  - a. *In General*, 657.
  - b. *Constitutionality of Statutes*, 657.
  - c. *Joint Tenancy*, 658.
    - (1) *Creation by Express Terms*, 658.
    - (2) *Conveyance to Cotrustees*, 659.
    - (3) *Of Personal Property*, 659.
    - (4) *Of Life-insurance Policy*, 659.
  - d. *Tenancy in Common*, 660.
    - (1) *In General*, 660.
    - (2) *By Descent*, 661.
    - (3) *Certain Cases Considered*, 661.
      - (a) *Purchase of Undivided Interest in Property*, 661.
      - (b) *Production of Property on Shares*, 663.
      - (c) *Confusion of Goods*, 664.
      - (d) *Between Partners*, 664.
      - (e) *Between Shipowners*, 665.
      - (f) *Between Widow and Heirs at Law*, 665.
      - (g) *Miscellaneous Cases*, 665.
3. *Lapse of Devise or Legacy*, 666.
  - a. *Where Beneficiaries Are Joint Tenants*, 666.
  - b. *Where Beneficiaries Are Tenants in Common*, 667.



## JOINT TENANTS AND TENANTS IN COMMON.

### V. WHO MAY BE COTENANTS, 667.

1. *In General*, 667.
2. *Corporations*, 667.
3. *Partners*, 668.
4. *Husband and Wife*, 668.

### VI. WHAT PROPERTY MAY BE HELD IN COTENANCY, 668.

### VII. RIGHTS, POWERS, DUTIES, AND LIABILITIES OF COTENANTS INTER SE, 668.

1. *In General*, 668.
2. *Rights and Powers*, 669.
  - a. *As to Use and Enjoyment of Common Property*, 669.
  - b. *As to Care and Management of Common Property*, 671.
  - c. *Contracts Respecting Common Property*, 672.
    - (1) *With Each Other*, 672.
    - (2) *With Third Persons*, 672.
      - (a) *In General*, 672.
      - (b) *Leasing Common Property*, 673.
      - (c) *Licensing Acts on Common Property*, 674.
  - d. *Purchase of Outstanding Title or Incumbrance*, 674.
    - (1) *General Rule — Purchase by One Inures to Benefit of All*, 674.
    - (2) *Purchase of Property at Forced Sale*, 676.
      - (a) *At Judicial Sale*, 676.
      - (b) *At Tax Sale*, 676.
    - (3) *Purchase of Tax Title*, 677.
    - (4) *Purchase by Husband or Widow of Cotenant*, 678.
    - (5) *Purchase by Cotenant Holding Adversely*, 678.
    - (6) *Rule Limited to Purchase of Hostile Interests*, 678.
    - (7) *Rule Applies Only During Existence of Cotenancy*, 678.
    - (8) *Contribution by Cotenants*, 679.
  - e. *Assailing Common Title*, 680.
  - f. *Sale or Conveyance of Common Property*, 680.
    - (1) *Of Whole Property*, 680.
    - (2) *Of One's Own Interest*, 681.
      - (a) *As Undivided Share*, 681.
      - (b) *By Metes and Bounds*, 682.
    - (3) *Grant of Specific Right or Easement*, 684.
3. *Duties and Liabilities*, 685.
  - a. *As to Liens and Incumbrances*, 685.
    - (1) *In General*, 685.
    - (2) *On Account of Purchase Money*, 685.
  - b. *As to Expenses for Care and Management*, 686.
    - (1) *In General*, 686.
    - (2) *Taxes*, 686.
    - (3) *Expense of Litigation*, 687.
    - (4) *Repairs*, 687.
    - (5) *Improvements*, 687.
    - (6) *Personal Services*, 688.
  - c. *As to Rents and Profits*, 688.
    - (1) *In General*, 688.
    - (2) *Where Premises Are Occupied by One Cotenant*, 690.
      - (a) *Where There Is No Agreement to Pay Rent*, 690.
      - (b) *Where There Is an Agreement to Pay Rent*, 693.
    - (3) *Where Premises Are Leased to Stranger*, 693.
    - (4) *Where Cotenant Has Been Ousted*, 694.
    - (5) *Measure of Accountability*, 695.
    - (6) *Set-off and Counterclaim*, 696.
    - (7) *Statute of Limitations — Interest*, 696.
    - (8) *Lien for Rents and Profits*, 697.
  - d. *As to Loss, Injury, or Destruction of Property*, 697.



(1) *In General*, 697.

(2) *Waste*, 698.

### VIII. ACTIONS BETWEEN COTENANTS, 699.

1. *Actions at Law*, 699.
  - a. *In General*, 699.
  - b. *Ejectment*, 700.
  - c. *Forcible Entry and Detainer*, 700.
  - d. *Replevin*, 700.
  - e. *Trespass Quare Clausum*, 700.
  - f. *Trover*, 700.
  - g. *Action on Case*, 703.
  - h. *Trespass to Try Title*, 704.
  - i. *Assumpsit*, 704.
2. *Suits in Equity*, 704.

### IX. RIGHTS AND LIABILITIES OF COTENANTS AND THIRD PERSONS, 706.

1. *Rights of Cotenants Against Strangers*, 706.
2. *Liabilities of Cotenants to Strangers*, 706.
  - a. *In General*, 706.
  - b. *Execution and Attachment of Interest of Cotenant*, 707.

### X. SEVERANCE OF COTENANCY, 708.

1. *Joint Tenancy*, 708.
  - a. *By Act of Joint Tenant*, 708.
  - b. *By Agreement of Cotenants*, 709.
  - c. *By Course of Dealing Between Cotenants*, 709.
  - d. *By Judicial Alienation of Share of Cotenant*, 710.
  - e. *Partial Severance*, 710.
  - f. *Tenancy in Common Created by Severance of Joint Tenancy*, 710.
2. *Tenancy in Common*, 711.
3. *Partition Between Cotenants*, 712.

### CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *JOINT TENANTS AND TENANTS IN COMMON*, vol. 11, p. 757.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADVERSE POSSESSION*, vol. 1, p. 801; *CONFUSION OF GOODS*, vol. 6, p. 592; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *CROPS*, vol. 8, p. 301; *EJECTMENT*, vol. 10, p. 467; *FIXTURES*, vol. 13, p. 673; *HOMESTEAD*, vol. 15, pp. 566, 567, 697; *HUSBAND AND WIFE*, vol. 15, p. 846; *IMPROVEMENTS*, vol. 16, p. 111; *MINES AND MINING*; *PARCENARY (ESTATES IN)*; *PARTITION*.

**I. DEFINITIONS** — *Joint Tenants*. — Joint tenants are two or more persons who by purchase hold any property jointly between themselves in equal shares, the estate thus held being known as an estate in joint tenancy.<sup>1</sup>

1. Littleton Defines Joint Tenants as follows: "Joyntenants are as if a man be seised of certaine lands or tenements, etc., and infeoffeth two, three, four, or more, to have and to hold to them for terme of there lives, or for terme of another's life, by force of which feoffment or lease they are seised, these are joyntenants." Litt. 180a.

Coke, in his commentary on Littleton (180b), referring to the above, says: "There be also joyntenants by other conveyances than Littleton here mentioneth, as by fine, recoverie, bargain and sale, release, confirmation, etc. So there be divers other limitations than

Littleton here speaketh of; as if a rent charge of ten pounds be granted to A and B to have and to hold to them two, viz., to A untill he be married, and to B untill he be advanced to a benefice, they be joyntenants in the meane time notwithstanding the severall limitations, and if A die before marriage, the rent shall survive; but if A had married, the rent should have ceased for a moiety; *et sic è converso* on the other side."

Chancellor Kent's Definition is as follows: "Joint tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly



**Tenants in Common.** — Tenants in common are two or more persons who hold property by several and distinct titles, their estate being called an estate in common.<sup>1</sup> This definition contemplates a tenancy in common in the sense in which such an estate was originally understood, as distinguished from an estate in joint tenancy. In view of the fact that at present all estates which formerly would have been estates in joint tenancy are in most states held or declared by statute to be estates in common, it seems that this definition in such states is too narrow, and that where the law has been so changed, tenants in common may more properly be defined to be two or more persons who hold any property, other than as coparceners or partners, by undivided shares.<sup>2</sup>

**Cotenant — Cotenancy.** — The term "cotenant" is used indifferently to denote one who is either a joint tenant or a tenant in common with another or others. Cotenancy is the state of being a cotenant or cotenants, and an estate in cotenancy is an estate held by two or more persons as cotenants.<sup>3</sup>

## II. NATURE AND INCIDENTS OF ESTATES IN COTENANCY — 1. Joint Tenancy —

**a. IN GENERAL.** — The great characteristic of an estate in joint tenancy, from which its properties and incidents are derived, is the fourfold unity of the estate created. There must be in such estate unity of interest, unity of title, unity of time, and unity of possession; that is to say, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.<sup>4</sup> These unities will now be defined.

**Unity of Interest.** — By unity of interest is meant that the estate of the tenants must be alike; one cannot be entitled to an estate different in duration or quantity of interest from the other. Thus one cannot be tenant for life and the other for years, one in fee and the other in tail, etc.

**Unity of Title** means that the estate of the joint tenants must be created by one and the same act, whether legal as by grant, or illegal as by disseizin.

**Unity of Time.** — The estate must vest at one and the same period.

**Unity of Possession.** — By unity of possession is meant that joint tenants are seized *per my et per tout*, by the half or moiety and by all; that is, each has the entire possession as well of every part as of the whole. Neither can be exclusively seized of any particular part of the property, and his cotenant of the other, but each has an undivided moiety of the whole, and not the whole of an undivided moiety.<sup>5</sup>

**b. RIGHT OF SURVIVORSHIP — (1) In General.** — The great incident of estates in joint tenancy is the right of survivorship, or *jus accrescendi*, by which, upon the death of any one of the joint tenants, the entire tenancy remains to the survivor or survivors, in whom the whole estate becomes imme-

by purchase." 4 Kent's Com. 357. See also *Simons v. McLain*, 51 Kan. 153. And see *infra*, this title, *Nature and Incidents of Estates in Cotenancy*.

1. **Definition of Tenants in Common.** — See 2 Black. Com. 191; Co. Litt. 188b. See also *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176; *Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253.

2. **Tenants in Common — In Modern Law.** — Consult the statutes of the various states on the subject of cotenancy.

"Tenants in common are persons who hold by unity of possession; and they may hold by several and distinct titles, or by title derived at the same time, by the same deed or descent. In this respect the American law differs from the English common law." *Crook v. Vandervoort*, 13 Neb. 505, *citing* 4 Kent's Com. 363.

Two Persons, Each Owning a Half Interest in notes and mortgages, are tenants in common

thereof notwithstanding they are taken in the name of only one of the two. *Grigsby v. Day*, 9 S. Dak. 585.

3. Cent. Dict.

4. **Nature of Joint Tenancy.** — 2 Black. Com. 181; *Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253, *citing* 6 Am. AND ENG. ENCYC. OF LAW (1st ed.) 891; *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162.

5. 2 Black. Com. 181, 182; *Marryat v. Townly*, 1 Ves. 102.

**The True Interpretation of the Phrase "Per My et Per Tout,"** "by the moiety (or half) and by all," as to joint tenants is that they were seized of the entire property for the purpose of tenure and survivorship, while for the purpose of immediate alienation each had only a particular part or interest. *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162. See the learned note by William Green in Wythe (Va.), 2d ed., appendix 391.



diately vested.<sup>1</sup> By reason of the right of survivorship the interest of a joint tenant is not descendible, and cannot be devised by will.<sup>2</sup> But the right of survivorship may be defeated by a conveyance by a joint tenant of his undivided interest to a stranger.<sup>3</sup>

(2) *Doctrine of Survivorship Abolished by Statute.* — The doctrine of survivorship has always been regarded with disfavor in the *United States*,<sup>4</sup> and in *Connecticut* it has been repudiated from the first.<sup>5</sup> In most of the states it has been abolished by constitution or statute, either expressly<sup>6</sup> or by force of the statute converting joint tenancies into tenancies in common.<sup>7</sup>

*Statutes Constitutional.* — An act abolishing survivorship in joint tenancies, although affecting estates in joint tenancy already in existence, is not unconstitutional as impairing vested rights.<sup>8</sup>

*Joint Tenancies Not Necessarily Abolished.* — A statute abolishing the right of survivorship as an incident to joint tenancies does not necessarily abolish joint tenancies.<sup>9</sup> Moreover, although the right as an incident to such tenancies be abolished by statute, it may nevertheless be given by will or deed, either expressly or by necessary implication.<sup>10</sup> Nor does such a statute prohibit contracts making the rights of the parties dependent upon survivorship.<sup>11</sup>

*Survivorship in Choses in Action.* — A statute abolishing survivorship relates only to estates in joint tenancy, and does not have the effect to abolish survivorship in choses in action; and upon the death of one of several payees or obligees of a note or bond, or the like, the right of action survives to the others, notwithstanding the statute.<sup>12</sup>

*Statutes Not Applicable to Estates by Entireties.* — A statute abolishing survivorship

1. *Right of Survivorship.* — 2 Black. Com. 183; *Wright v. Dorset*, 3 Ch. Rep. 66; *Aston v. Smallman*, 2 Vern. 556; *Rowney's Case*, 2 Vern. 322; *Pritchard v. Walker*, 22 Ill. App. 286, affirmed 121 Ill. 221; *Simons v. McLain*, 51 Kan. 153; *Barclay v. Hendrick*, 3 Dana (Ky.) 378; *Morris v. McCarty*, 158 Mass. 11; *Ball v. Deas*, 2 Strobb. Eq. (S. Car.) 24, 49 Am. Dec. 651; *Haughabaugh v. Honald*, *Treadw. (S. Car.)* 90. See also *Pope v. Anderson*, 13 La. Ann. 538.

*Crops.* — Where two persons are joint tenants of land with the right of survivorship such right does not extend to growing or harvested crops. *Pritchard v. Walker*, 22 Ill. App. 286, affirmed 121 Ill. 221.

*If Joint Tenants Die at the Same Time* the estate remains in the same nature to the heirs. *Bradshaw v. Toulmin*, 2 Dick. 633.

*Tenants in Common* may vest each other with the right of survivorship by deeds *inter partes*, but they cannot thereby convert their estate into a technical joint tenancy. *Truesdell v. White*, 13 Bush (Ky.) 616.

2. *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162; *Duncan v. Farrer*, 6 Binn. (Pa.) 193.

3. *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162.

4. See *infra*, this title, *Creation of Estates in Cotenancy* — *At Common Law* — *General Rule of Construction*.

5. *Phelps v. Jepson*, 1 Root (Conn.) 48, 1 Am. Dec. 33.

6. *Doctrine of Survivorship Abolished.* — Consult the statutes of the several states, and see the following cases: *Lowe v. Brooks*, 23 Ga. 325; *Mette v. Felten*, (Ill. 1891) 27 N. E. Rep. 911; *Truesdell v. White*, 13 Bush (Ky.) 616; *Nichols v. Denny*, 37 Miss. 59; *Day v. Davis*,

64 Miss. 253; *Varn v. Varn*, 32 S. Car. 77; *Telfair v. Howe*, 3 Rich. Eq. (S. Car.) 235; 55 Am. Dec. 637. See also *Herbemont v. Thomas*, *Cheves Eq. (S. Car.)* 21.

7. See *infra*, this title, *Creation of Estates in Cotenancy* — *Under Modern Practice and Statutes*.

8. *Bambaugh v. Bambaugh*, 11 S. & R. (Pa.) 191. And see *infra*, this title, *Creation of Estates in Cotenancy* — *Under Modern Practice and Statutes* — *Constitutionality of Statutes*.

9. *Joint Tenancies Not Abolished by Statutes Abolishing Survivorship.* — *Telfair v. Howe*, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; *Lockhart v. Vandyke*, 97 Va. 356.

*The North Carolina Act of 1784* providing that "in all estates, real or personal, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors or administrators, or assigns of the tenant so dying, in the same manner as estates by tenancy in common," does not abolish joint tenancies, and has no application to joint tenants for life, but only takes away the right of survivorship from joint tenancies in fee. *Powell v. Allen*, 75 N. Car. 450; *Vass v. Freeman*, 3 Jones Eq. (56 N. Car.) 221, 69 Am. Dec. 734. And see *Rowland v. Rowland*, 93 N. Car. 214. See also as to this act *Weir v. Tate*, 4 Ired. Eq. (39 N. Car.) 264.

10. *Right of Survivorship Given by Express Terms of Conveyance.* — *Pritchard v. Walker*, 22 Ill. App. 286; *Arnold v. Jack*, 24 Pa. St. 57; *Jones v. Cable*, 114 Pa. St. 586; *Lentz v. Lentz*, 2 Phila. (Pa.) 117, 13 Leg. Int. (Pa.) 148; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254.

11. *Taylor v. Smith*, 116 N. Car. 531.

12. *Choses in Action.* — *Trammell v. Harrell*, 4 Ark. 602; *Sessions v. Peay*, 19 Ark. 267.



between joint tenants does not apply to estates held by husband and wife by entireties.<sup>1</sup>

**2. Tenancy in Common — a. IN GENERAL.** — In a tenancy in common the cotenants hold by one and the same undivided possession, and this unity of possession is the only unity required to constitute such a cotenancy. The extent of the respective interests of the cotenants, their sources of title, the times at which their interests become vested, and the periods of duration may all be different,<sup>2</sup> and at common law a difference in one or more of these particulars was necessary in order to constitute the estate an estate in common as distinguished from a joint tenancy. In the *United States*, by the force of statutes converting joint tenancies into tenancies in common, an estate in common may also be held by the fourfold unity characterizing a joint tenancy, the only difference in such case between such estate and a joint tenancy at common law being that there exists between tenants in common no right of survivorship. As just stated, in order to constitute several owners of the same property tenants in common, it is not necessary that there should be a unity of interest, title, or time in the several owners; they may be possessed of different interests, and their estates may be created by different acts and at different times. Unity of possession is all that is required,<sup>3</sup> but this is an essential attribute of a tenancy in common.<sup>4</sup> From this it follows necessarily that where the interests of several persons in the same property are distinct and separable the persons are not tenants in common.<sup>5</sup>

**b. EQUALITY OF INTEREST.** — As has already been stated, the several interests of tenants in common in the common property need not necessarily be equal,<sup>6</sup> and it has been declared that ordinarily there is no presumption that such is the case.<sup>7</sup> The prevailing doctrine, however, is that in the absence of any evidence on the subject the shares of the several tenants in common are presumed to be equal.<sup>8</sup>

**1. Estates by Entireties.** — *Doe v. Garrison*, 1 Dana (Ky.) 35; *Rogers v. Grider*, 1 Dana (Ky.) 242; *Motley v. Whitmore*, 2 Dev. & B. L. (19 N. Car.) 537; *Woodford v. Higly*, 1 Winst. L. (60 N. Car.) 237; *Harrison v. Ray*, 108 N. Car. 215, 23 Am. St. Rep. 57; *Robb v. Beaver*, 8 W. & S. (Pa.) 111; *Diver v. Diver*, 56 Pa. St. 107; *McCurdy v. Canning*, 64 Pa. St. 39; *Thornton v. Thornton*, 3 Rand. (Va.) 179.

**2. Nature of Tenancy in Common.** — 2 Black. Com. 191; *Attree v. Scutt*, 6 East 476; *Fenton v. Miller*, 94 Mich. 204; *Chittenden v. Gates*, 18 N. Y. App. Div. 169; *Dexter v. Lathrop*, 136 Pa. St. 565; *Spencer v. Austin*, 38 Vt. 258; *Davis v. Settle*, 43 W. Va. 17.

**3. Putnam v. Ritchie**, 6 Paige (N. Y.) 390; *Downer v. Smith*, 38 Vt. 464.

Tenants in common may hold by different tenures. *Putnam v. Ritchie*, 6 Paige (N. Y.) 390. See cases cited in the first note to this subsection, *supra*. See also *Currie v. Tibbs*, 5 T. B. Mon. (Ky.) 440; *Overton v. Lacy*, 6 T. B. Mon. (Ky.) 13, 17 Am. Dec. 111.

**4. Thompson v. Mawhinney**, 17 Ala. 362, 52 Am. Dec. 176; *Knox v. Siloway*, 10 Me. 201; *Blessing v. House*, 3 Gill & J. (Md.) 290.

**5. Parties Owning Distinct Interests in Same Property Not Tenants in Common.** — *Wheeler v. Ladd*, 40 Ark. 108; *Wiggin v. Wiggin*, 43 N. H. 561; *Lockwood v. Mills*, 3 Ohio 21; *Fleming v. Kerr*, 10 Watts (Pa.) 444.

Parties seized of different rooms of the same house are not tenants in common of the house. *Wiggin v. Wiggin*, 43 N. H. 561.

**Owner of Right or Privilege in Land of Another.** — A privilege in a dwelling house reserved to a person for a particular purpose and for a limited time does not constitute him tenant in common of the estate. *Abbott v. Wood*, 13 Me. 115.

**House on Another's Land.** — If the owner of land builds a house partly on his own land and partly on land adjoining, under an agreement between the owners that he shall repay to himself the cost of the rent, they are not tenants in common of the house, but the title follows the title to the land. *M'Adam v. Orr*, 4 W. & S. (Pa.) 550.

If it is agreed that one of two persons shall furnish land upon which certain works shall be erected, to be owned by them in common, both do not thereby become tenants in common of the land. *Hurd v. Cushing*, 7 Pick. (Mass.) 169.

**6. Shares of Tenants in Common May Be Unequal but not uncertain.** *Marlborough v. Godolphin*, 2 Ves. 74.

**7. Campau v. Campau**, 44 Mich. 31.

**8. Interests of Tenants in Common Prima Facie Equal.** — *Liddard v. Liddard*, 28 Beav. 266; *Nippel v. Hammond*, 4 Colo. 211; *Shiels v. Stark*, 14 Ga. 429; *Baker v. Shepherd*, 37 Ga. 12; *Dashiel v. Collier*, 4 J. I. Marsh. (Ky.) 601; *Campau v. Campau*, 44 Mich. 31; *Keables v. Christie*, 47 Mich. 594; *Baumann v. Guion*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 120; *Edwards v. Edwards*, 39 Pa. St. 369; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 75; *Jarrett v. Johnson*, 11 Gratt. (Va.) 327. See also



**III. ESTATES IN COTENANCY DISTINGUISHED FROM EACH OTHER AND FROM SIMILAR ESTATES** — 1. **From Each Other.** — Joint tenancies and tenancies in common are alike in that in both cases the cotenants hold by unity of possession, but differ in that this unity is the only unity necessary in the case of a tenancy in common, while in a joint tenancy there must also be the unities of title, interest, and time. In their incidents, so far as these arise from the unity of possession, the two estates are alike; but the incidents of a joint tenancy which arise from the privity of title or the union and entirety of interest do not, of course, attend a tenancy in common. Thus the right of survivorship, which exists between joint tenants on account of the union and entirety of their interest, cannot exist between tenants in common, since they hold by several and distinct titles and have no entirety of interest.<sup>1</sup>

2. **From Estates in Parcenary.** — Joint tenancies and estates in parcenary are alike in that both have the same unities of interest, title, and possession, but an estate in parcenary differs from a joint tenancy and resembles a tenancy in common in that no unity of time is necessary to create the estate, and the parceners have no entirety of interest, and there is no right of survivorship between them. Estates of parcenary arise by descent and never by purchase, differing in this respect from a joint tenancy.<sup>2</sup>

3. **From Tenancies by Entireties.** — A tenancy by entireties created by a conveyance to husband and wife resembles in some respects a joint tenancy. In both tenancies the title and estate are joint, and both have the quality of survivorship. But the estate of joint tenants is divisible, while that of tenants by entireties is indivisible. The former are seized *per my et per tout*, while the latter, as one person in law, are seized *per tout et non per my*. Hence in a joint tenancy either tenant may convey his share to a cotenant or to a stranger, while neither tenant by entireties can convey his or her interest so as to affect the cotenants' joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the cotenants. There may be partition between joint tenants, while there can be none between tenants by entireties.<sup>3</sup>

4. **From Partnerships.** — In respect to their creation cotenancies differ from partnerships in that while the latter are always the result of agreement or contract between the parties, the former need not, and perhaps in a majority of cases do not, so arise. Partnerships and cotenancies are alike in that in each case the parties have undivided interests in the whole property held by them in co-ownership, but they differ in respect to the power of disposing of the property. A joint tenant or tenant in common may sell or otherwise dispose of or contract with reference to his own undivided interest at pleasure, but he cannot dispose of or affect the interest of his cotenant. Partners, on the other hand, may each dispose of the entire property in the name of the partnership, but neither can dispose of his individual interest without effecting a dissolution of the partnership. Partnerships differ further from joint tenancies in that there is no right of survivorship between the partners. Partnerships and cotenancies differ also in respect to the dissolution or termination of the relationship.<sup>4</sup> Cotenancies by agreement or course of dealing between the parties may in effect become partnerships, the general rule being that although an

Shoemaker v. Smith, 11 Humph. (Tenn.) 81.

But this presumption may be rebutted by oral evidence. Walker v. Barrow, 43 La. Ann. 863.

1. 2 Black. Com. 180 *et seq.*, 191 *et seq.* See also *supra*, this title, *Nature and Incidents of Estates in Cotenancy*.

2. See the title PARCENARY.

3. Cotenancies Distinguished from Tenancies by Entireties. — Bevens v. Cline, 21 Ind. 37; Chandler v. Cheney, 37 Ind. 391; Rogers v.

Grider, 1 Dana (Ky.) 242; Wentworth v. Remick, 47 N. H. 226, 90 Am. Dec. 573; Den v. Hardenbergh, 10 N. J. L. 42, 18 Am. Dec. 371; Hiles v. Fisher, 144 N. Y. 312, 43 Am. St. Rep. 762; Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553; Stuckey v. Keefe, 26 Pa. St. 397. See the title HUSBAND AND WIFE, vol. 15, p. 847.

4. Difference Between Partnership and Cotenancy. — Story on Partnership (7th ed.). § 90; Bradley v. Harkness, 26 Cal. 69; Sims v.



agreement between cotenants for the use of the common property for the purpose of making a profit or income may not, strictly speaking, constitute the parties partners, yet after the undertaking has been commenced, the rights and liabilities of the parties are to be determined upon the same principles as are applicable to partnership transactions.<sup>1</sup>

**IV. CREATION OF ESTATES IN COTENANCY — 1. At Common Law — a. GENERAL RULE OF CONSTRUCTION — Joint Tenancies Favored by Early Common Law.** — By the early common law in *England* joint tenancies were regarded with favor, and words in a conveyance were construed to create an estate in joint tenancy rather than an estate in common, because the former was considered as more beneficial to the cotenants, who accordingly took as joint tenants rather than as tenants in common unless the contrary intention was shown by the words of the conveyance.<sup>2</sup>

**The Reason of This Rule** is said to be that on account of the right of survivorship, title by joint tenancy, as was supposed, tended to combine and unite the feudal services, consolidate tenures, and strengthen the feudal connection.<sup>3</sup> With the abolition of feudal tenures the reason of the policy favoring joint tenancies of course ceased, and in *England* such tenancies have long been regarded with disfavor, the common-law rule having been reversed, while in the *United States* joint tenancies have never been favored in law.<sup>4</sup> In equity tenancies in common have always been favored rather than joint tenancies.<sup>5</sup>

**Present Doctrine — Intention.** — The general rule of construction both at common law and in equity now is that a joint tenancy will not be inferred in opposition to expressions in the deed or devise indicating a contrary intent. Nevertheless, in the absence of a statute providing otherwise, words whose ordinary signification imports an intent to create a joint tenancy will be construed to have that effect.<sup>6</sup> But the tendency of the courts in modern times, particularly courts of equity, has been to avail themselves of any strong equitable circumstances, or of any words employed by the testator in his will that will imply a severance, to give such a construction as will make the estate a tenancy in common, and not a joint tenancy. The question is always one of construction, the object being to get at the intention of the testator, and if it

Dame, 113 Ind. 127; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309. And see the title PARTNERSHIP.

At common law, although partners are in the nature of joint tenants, there is no survivorship between them, yet partnership contracts, being in form joint, produce only a joint obligation attaching exclusively upon the survivor. Devaynes v. Noble, 1 Meriv. 529.

For illustrative cases in which the parties were held to be cotenants and not partners, see Cowles v. Garrett, 30 Ala. 341; Powell v. Jones, 72 Ala. 392; La Société Française, etc., v. Weidmann, 97 Cal. 507; Goell v. Morse, 126 Mass. 480; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; St. John v. Coates, 63 Hun (N. Y.) 460; Farrand v. Gleason, 56 Vt. 633; Hungerford v. Cushing, 8 Wis. 332.

**1. Cotenants Dealing as Partners.** — Matter of Lucy, (Surrogate Ct.) 4 Misc. (N. Y.) 349. And see Baker v. Wheeler, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66.

**2. Joint Tenancies Formerly Favored at Common Law.** — 2 Black. Com. 193; Hoffman v. Stigers, 28 Iowa 302; Gilbert v. Richards, 7 Vt. 203.

**3. Reason of Rule.** — Fisher v. Wigg, 1 P. Wms. 14, 1 Salk. 391; Martin v. Smith, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; Hoffman v. Stigers, 28 Vt. 302.

**4. Joint Tenancies Not Favored in Modern Law — England.** — Haws v. Haws, 3 Atk. 524, 1 Ves. 13, Binning v. Binning, 13 Reports 654. *Arkansas.* — Trammell v. Harrell, 4 Ark. 602.

*California.* — Bowen v. May, 12 Cal. 348.

*Indiana.* — Case v. Owen, 139 Ind. 22, 47 Am. St. Rep. 253.

*Iowa.* — Hoffman v. Stigers, 28 Iowa 302.

*Kansas.* — Noble v. Teeple, 58 Kan. 398.

*New York.* — Matter of Lent, (Surrogate Ct.) 1 Misc. (N. Y.) 264.

*Pennsylvania.* — McPherson v. McPherson, Add. (Pa.) 327; Galbraith v. Galbraith, 3 S. & R. (Pa.) 392; Bambaugh v. Bambaugh, 11 S. & R. (Pa.) 191; Martin v. Smith, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; Caines v. Grant, 5 Binn. (Pa.) 119.

*South Carolina.* — Telfair v. Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; Herbeumont v. Thomas, Cheves Eq. (S. Car.) 21.

**5. Joint Tenancies Never Favored in Equity.** — York v. Stone, 1 Eq. Cas. Abr. 293, par. 1; Stones v. Heurtly, 1 Ves. 165; Rigden v. Vallier, 2 Ves. 252; Campbell v. Campbell, 4 Bro. C. C. 15; Haws v. Haws, 3 Atk. 524, 1 Ves. 13, 1 Wils. C. Pl. 165.

**6. Seitz v. Seitz, 11 App. Cas. (D. C.) 358; Noble v. Teeple, 58 Kan. 398; Herbeumont v. Thomas, Cheves Eq. (S. Car.) 21.**



appears from the will, either expressly or by implication, that it was the intention of the testator not to create a joint tenancy, the court will carry that intention into effect.<sup>1</sup>

**Statutes.** — Notwithstanding the disfavor with which joint tenancies have been regarded in the United States, in most of the states the common law concerning such estates continued until abolished by statute,<sup>2</sup> though in *Ohio* joint tenancies have never existed.<sup>3</sup>

**b. JOINT TENANCY** — (1) *In General.* — An estate in joint tenancy can arise only by purchase<sup>4</sup> or grant; that is, by the act of the parties, and never by the mere act of the law, as by descent. The creation of such an estate will therefore depend upon the wording of the deed or devise by which the tenants claim title.<sup>5</sup>

(2) *By Deed or Will.* — An estate in joint tenancy will ordinarily be created by deed or will; and except where the rule is changed by modern statutes or decisions, a grant or devise of an estate to two or more persons, without any restrictive, exclusive, or explanatory words showing an intention to sever the respective interests, as to two persons and their heirs, will vest in them an estate in fee as joint tenants.<sup>6</sup> A gift by a testator with remainder over creates a joint tenancy in such remaindermen after the termination of the life estate.<sup>7</sup> So, also, a deed or devise to one and his children, where the person named has children living at the time, constitutes the parent and children joint tenants of the estate.<sup>8</sup>

1. *Telfair v. Howe*, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637.

2. In *Kansas* joint tenancies existed until abolished by the Act of 1891. *Simons v. McLain*, 51 Kan. 153; *Noble v. Teeple*, 58 Kan. 398; *Wilson v. Johnson*, 4 Kan. App. 747.

3. *Sergeant v. Steinberger*, 2 Ohio 305, 15 Am. Dec. 553; *Miles v. Fisher*, 10 Ohio 1, 36 Am. Dec. 61; *Wilson v. Fleming*, 13 Ohio 68, 36 Am. Dec. 61.

4. The Term "Purchase" includes every method of coming to an estate other than by inheritance. 2 Black. Com. 241; *Greer v. Blanchard*, 40 Cal. 194.

5. 2 Black. Com. 180.

6. **Joint Tenancy Created Where There Is No Intention to Sever.** — 2 Black. Com. 180; *Davenport v. Hanbury*, 3 Ves. Jr. 257; *Morley v. Bird*, 3 Ves. Jr. 629; *Stuart v. Bruce*, 3 Ves. Jr. 632; *Crooke v. De Vandes*, 11 Ves. Jr. 330; *Stratton v. Best*, 2 Bro. C. C. 233; *Campbell v. Campbell*, 4 Bro. C. C. 15; *Kew v. Reuse*, 1 Vern. 353; *Doe v. Ironmonger*, 3 East 533; *Robinson v. Preston*, 4 Kay & J. 505; *Cookson v. Bingham*, 17 Beav. 262; *Lucas v. Brandreth*, 28 Beav. 274; *Walker v. Camden*, 16 Sim. 329; *Greer v. Blanchard*, 40 Cal. 194; *Seitz v. Seitz*, 11 App. Cas. (D. C.) 358; *Ewing v. Savary*, 3 Bibb (Ky.) 235; *Davidson v. Heydon*, 2 Yeates (Pa.) 459; *Martin v. Smith*, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; *Telfair v. Howe*, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; *Dott v. Willson*, 1 Bay (S. Car.) 457; *Lockhart v. Vandyke*, 97 Va. 356. Compare *Gibbons v. Riley*, 7 Gill (Md.) 82.

Where several persons purchase land with a view to expending money on it for improvements for the purposes of trade or speculation, equity will consider the parties as tenants in common without survivorship rather than as joint tenants. *Lake v. Craddock*, 3 P. Wms. 158; *Lyster v. Dollard*, 1 Ves. Jr. 431; *Lake v. Gibson*, 1 Eq. Cas. Abr. 290, par. 3; *Duncan*

*v. Forrer*, 6 Binn. (Pa.) 193. See also *Jeffereys v. Small*, 1 Vern. 217; *Elliot v. Brown*, 3 Swanst. 489.

For other cases in which it was held that the parties took as joint tenants see *Harris v. Ferguson*, 16 Sim. 308; *Jones v. Hall*, 16 Sim. 500; *Shore v. Billingsly*, 1 Vern. 482; *Cock v. Burish*, 1 Vern. 425; *Eames v. Godwin*, 31 Beav. 25; *Leak v. Macdowall*, 32 Beav. 28; *Jackson v. Jackson*, 7 Ves. Jr. 535, 9 Ves. Jr. 591; *Stratton v. Best*, 2 Bro. C. C. 233; *Berens v. Fellowes*, 56 L. T. N. S. 391, 35 W. R. 356; *In re Laverick*, 18 Jur. 304.

7. **Gift with Remainder Over.** — *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Hobgen v. Neale*, L. R. 11 Eq. 48; *Newill v. Newill*, L. R. 12 Eq. 432; *Eagles v. Le Breton*, L. R. 15 Eq. 148.

A devise to A. for life and after her death to the heirs of her body and their heirs and assigns creates a joint tenancy and not an estate tail. *Dott v. Willson*, 1 Bay (S. Car.) 457.

8. **A Gift in Trust** for the testator's daughter during her life, and after her death in trust for "all and every her child and children, and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit," was held to create a joint tenancy. *Morgan v. Britten*, L. R. 13 Eq. 28.

8. **Gift to One and His Children.** — *Oates v. Jackson*, 2 Stra. 1172; *Bustard v. Saunders*, 7 Beav. 92; *Mason v. Clarke*, 17 Beav. 126; *De Witte v. De Witte*, 11 Sim. 41; *Sutton v. Torre*, 11 L. J. Ch. 254; *Jackson v. Coggin*, 29 Ga. 403; *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Noble v. Teeple*, 58 Kan. 398.

At common law a devise to one and his children carries an estate in joint tenancy when the person named has children living at the time of the devise; but when no such children exist such devise creates an estate tail in the devisee. *Moore v. Gary*, 149 Ind. 51.



(3) *By Disseizin.* — A joint tenancy may be created by disseizin as well as by deed or devise, and if two or more persons disseize another of lands or tenements to their own use they become joint tenants thereof.<sup>1</sup> So also, where two or more persons in the lawful possession of property under a title which comes to an end remain in possession without any title, upon such wrongful possession they become joint tenants of the property.<sup>2</sup>

*c. TENANCY IN COMMON* — (1) *In General* — *By Deed or Will.* — At Common Law a tenancy in common may be created either by the destruction of an estate in joint tenancy or coparcenary, by which the unity of title or interest, but not the unity of possession, is severed; or by special limitation in a deed, where property is conveyed to two or more persons in such a manner as not to make them joint tenants. On account of the preference of the early common law for joint tenancies, and the uncertainty attending less particular words of limitation, it was safer and customary, where a tenancy in common was intended, expressly to limit the estate to the grantees as tenants in common and not as joint tenants.<sup>3</sup>

*Intention Governs.* — Nevertheless, when an estate is given to two or more persons by deed or will, and it appears either from the words of the instrument creating the estate or from the nature of the case that it was the intention that the estate should be divided, and that the parties should take separate interests, the estate is a tenancy in common and not a joint tenancy.<sup>4</sup>

*In the Case of Wills.* — This principle has frequently been applied to the case of a devise or bequest of property to several persons to be divided "equally," "share and share alike," or otherwise, between or among them, in which case

**After-born Children.** — In *Powell v. Powell*, 5 Bush (Ky.) 619, 96 Am. Dec. 372, it was held that where land is conveyed to a married woman and her child or children thereafter to be born, a child afterwards born *eo instanti* becomes a joint tenant with the mother. Compare *Davis v. Hardin*, 80 Ky. 672.

**Qualified Gift to Wife and Children.** — Where a testator directed that all his property should be "at the disposal of" his wife for herself and children, it was held that no joint tenancy between the wife and children was created, but that the wife, though not absolute owner, had a personal interest in the property, and was either a trustee for or had a power in favor of the children subject to a life interest in herself. *Crockett v. Crockett*, 2 Phil. 553.

**1. Joint Tenancy Created by Disseizin.** — *Putney v. Dresser*, 2 Met. (Mass.) 583.

If one of two disseizors in possession of land as tenants in common abandons the land, the abandonment does not inure to the benefit of the disseizee, but the cotenant holds the land against the disseizor in the same manner as if he had been sole disseizor. *Allen v. Holton*, 20 Pick. (Mass.) 458.

**2. Ward v. Ward**, L. R. 6 Ch. 789.

**3. Creation of Tenancy in Common at Common Law.** — 2 Black. Com. 193, 194.

**Deed Conveying Unequal Interests.** — A deed conveying land to two persons by a common boundary, but discriminating with regard to the interest conveyed to each respectively, vests in the grantees distinct though undivided interests, and constitutes them tenants in common and not joint tenants. *Craig v. Taylor*, 6 B. Mon. (Ky.) 457.

**Titles Vesting at Different Times.** — A bequest to A. and after her death to her children when they arrive at the age of twenty-one creates in

the children when they arrive at such age a tenancy in common, since their interests vest at different times. *Woodgate v. Unwin*, 4 Sim. 129.

**Interest Held under Different Titles.** — Where one person held a spring as tenant for years under an unrecorded lease, and another purchased half the land upon which the spring was, without notice, and subsequently the other half of the land with notice of the lessee's title, it was held that the purchaser and lessee were tenants in common of the spring during the continuance of the lease. *Herbert v. Odlin*, 40 N. H. 268.

**A Tenant of Land Claiming under a Tenant in Common** adversely to other tenants in common will, in respect to rents and profits, be treated as a tenant in common with the latter. *Ruffner v. Lewis*, 7 Leigh (Va.) 720, 30 Am. Dec. 513.

**A Conveyance of a Specific Portion of a tract of land** does not make the grantee a tenant in common of the whole. *Clapp v. Beardsley*, 1 Vt. 151.

**4. Tenancy in Common Created by Instrument Showing Intention to Sever Interests of Cotenants.** — *Perkins v. Baynton*, 1 Bro. C. C. 118; *Campbell v. Campbell*, 4 Bro. C. C. 15; *Ive v. King*, 16 Beav. 46; *Reade v. Reade*, 5 Ves. Jr. 744; *Casterton v. Sutherland*, 9 Ves. Jr. 445; *Robertson v. Fraser*, L. R. 6 Ch. 696; *McPherson v. McPherson*, Add. (Pa.) 327; *Galbraith v. Galbraith*, 3 S. & R. (Pa.) 392; *Bambaugh v. Bambaugh*, 11 S. & R. (Pa.) 191; *Martin v. Smith*, 5 Binn. (Pa.) 16, 6 Am. Dec. 395. To the same effect see *Delafeld v. Shipman*, 103 N. Y. 463; *Tompkins v. Verplanck*, 10 N. Y. App. Div. 572; *McPherson v. McPherson*, Add. (Pa.) 327. And see cases cited in the note immediately following.



it is held that the property passes to the beneficiaries as tenants in common,<sup>1</sup> unless there be other express provisions in the will showing a clear intention on the part of the testator that they shall hold as joint tenants, or that the survivor shall take the whole.<sup>2</sup>

**Deeds of Conveyance.** — Originally it was supposed in *England* that while the principle just stated was well settled where the estate in question was created by will, it did not apply in the case of a conveyance by deed;<sup>3</sup> but it has now been long settled that the general rule applies to a conveyance by deed as well as to a conveyance by will.<sup>4</sup>

**No Precise Words Are Necessary** to create a tenancy in common,<sup>5</sup> and in construing a particular instrument as creating an estate in common or in joint tenancy, as has been already stated, in *England* courts of equity from the first, and courts of law for a long time, have favored tenancies in common rather than joint tenancies; and this has always been the rule in the *United States*.<sup>6</sup>

(2) *By Destruction of Joint Estates.* — A tenancy in common, as already

**1. Devise to Several Persons to Be Divided Between Them Creates Tenancy in Common** — *England*. — Perkins v. Baynton, 1 Bro. C. C. 118; Jolliffe v. East, 3 Bro. C. C. 25; Campbell v. Campbell, 4 Bro. C. C. 15; Cooper v. Jones, 3 B. & Ald. 425, 5 E. C. L. 333; Denn v. Gaskin, 2 Cowp. 657; Stones v. Heurtly, 1 Ves. 165; Russell v. Long, 4 Ves. Jr. 551; Cormack v. Copous, 17 Beav. 397; Prince v. Heylin, 1 Atk. 493; Owen v. Owen, 1 Atk. 494; Heathe v. Heathe, 2 Atk. 121; Haws v. Haws, 3 Atk. 524, 1 Ves. 13.

*Connecticut.* — Griswold v. Johnson, 5 Conn. 363.

*Florida.* — See Watts v. Clardy, 2 Fla. 369.

*Kentucky.* — Harrison v. Boats, 4 Bibb (Ky.) 420; Briscoe v. McGee, 2 J. J. Marsh. (Ky.) 370.

*Maryland.* — Partridge v. Colegate, 3 Har. & M. (Md.) 339; Maddox v. State, 4 Har. & J. (Md.) 539; Gilpin v. Hollingsworth, 3 Md. 190, 56 Am. Dec. 737; Brittain v. Carson, 46 Md. 186.

*Massachusetts.* — Walker v. Dewing, 8 Pick. (Mass.) 520; Emerson v. Cutler, 14 Pick. (Mass.) 108; Shattuck v. Wall, 174 Mass. 167.

*Mississippi.* — Wise v. Hyatt, 68 Miss. 714.

*New Jersey.* — Mason v. Methodist Episcopal Church, 27 N. J. Eq. 47.

*New York.* — Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Hornberger v. Miller, 28 N. Y. App. Div. 199; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Stevenson v. Lesley, 70 N. Y. 512.

*North Carolina.* — Den v. Hardison, 3 Murph. (7 N. Car.) 164; Weir v. Tate, 4 Ired. Eq. (39 N. Car.) 264; Pruden v. Paxton, 79 N. Car. 446, 28 Am. Rep. 333; Midgett v. Midgett, 117 N. Car. 8. See also Parker v. Vick, 2 Dev. & B. Eq. (22 N. Car.) 195.

*Pennsylvania.* — Irwin v. Dunwoody, 17 S. & R. (Pa.) 61; Allison v. Kurtz, 2 Watts (Pa.) 185; Sturn v. Sawyer, 2 Pa. Super. Ct. 254.

*South Carolina.* — Bunch v. Hurst, 3 Desaus. (S. Car.) 273, 5 Am. Dec. 551.

*Virginia.* — McCamant v. Nuckolls, 85 Va. 331.

A devise to A and B "between them" creates a tenancy in common. Lashbrook v. Cock, 2 Meriv. 70. So also where the words "jointly and between them" are used, Perkins v. Baynton, 1 Bro. C. C. 118; or the word

"among" or "amongst," Campbell v. Campbell, 4 Bro. C. C. 15; Ackerman v. Burrows, 3 Ves. & B. 54.

But a devise to "all and every" the children of A does not show an intention to sever, and creates a joint tenancy. Binning v. Binning, 13 Reports 654.

Where a testator directed that his estate should be divided into three equal parts, and one-third should be given "unto and amongst" the children of A, and another third similarly to the children of B, and the remaining third "unto" the children of C, it was held that the children of A and B took their respective thirds as tenants in common, and the children of C as joint tenants. Campbell v. Campbell, 4 Bro. C. C. 15.

**Devise of Income of Land.** — By a devise of the income of one-third part of a farm, the devisee becomes a tenant in common of that portion of the land itself. Andrews v. Boyd, 5 Me. 199.

**2. Words Indicating Severance Controlled by General Intent of Testator.** — Although the use of the word "equally" by a testator may determine the character of the estate created as a tenancy in common, this is always with reference to other parts of the gift; the general intent of the testator will overrule the word "equally," rather than that word the general intent of the testator. Frewen v. Relfe, 2 Bro. C. C. 220.

**Words of Survivorship** in a will do not defeat the effect of words importing a tenancy in common, but will be referred to some time, as the death of the tenant for life, or even of the testator. Russell v. Long, 4 Ves. Jr. 551.

But in Clerk v. Clerk, 2 Vern. 323, it was held that a devise to two equally to be divided and to the survivor of them creates a joint tenancy, the latter words controlling the former. See also Barker v. Giles, 9 Mod. 157.

**3.** Lord Holt, C. J., so held in Ward v. Everard, 1 Salk. 390, 1 Ld. Raym. 422, and in a dissenting opinion in Fisher v. Wigg, 1 P. Wms. 14.

**4.** Fisher v. Wigg, 1 P. Wms. 14; Rigden v. Vallier, 3 Atk. 731, 2 Ves. 252; Goodtitle v. Stokes, 1 Wils. C. Pl. 341.

**5.** Fisher v. Wigg, 1 P. Wms. 14.

**6.** See *supra*, this section, *General Rule of Construction*.



stated, may be created by any such destruction of an estate in joint tenancy or coparcenary as severs the unity of title or interest without affecting the unity of possession. The most familiar instance arises where one joint tenant or coparcener alienates his interest, in which case the alienee and the other joint tenant or coparcener become tenants in common, because they hold by different titles.<sup>1</sup>

**2. Under Modern Practice and Statutes — a. IN GENERAL.** — In England, as has been already stated, the former rule of the common law favoring joint tenancies has been changed, and at present the courts will construe an instrument creating an estate in several persons so as to make the estate a tenancy in common rather than a joint tenancy, wherever this is possible; but beyond favoring tenancies in common rather than joint tenancies, the courts adhere to the common-law rules, and will hold an estate to be a joint tenancy unless the words of the creating instrument import an intention to sever.<sup>2</sup> There are no statutes by which the case is controlled.<sup>3</sup>

In the United States the rule of the common law favoring joint tenancies has never obtained, but the courts and legislatures have uniformly leaned the other way, and joint tenancies, with the right of survivorship, have been looked upon with disfavor. In most, if not all, of the states statutes have been enacted whose effect has been almost entirely to abolish estates in joint tenancy except in certain cases. In some states joint tenancies are in terms abolished; in others the right of survivorship is taken away. In the majority of cases it is provided that all gifts, grants, conveyances, devises, etc., of real estate, and in some cases of personalty also, to two or more persons shall be construed to pass estates in common, and not in joint tenancy, unless it shall plainly appear from the language of the instrument that it was intended to create an estate in joint tenancy and not an estate in common.<sup>4</sup>

**b. CONSTITUTIONALITY OF STATUTES.** — In some cases the statutes converting joint tenancies to tenancies in common have no retroactive effect and do not apply to estates created before their passage.<sup>5</sup> In other cases the statutes by their terms may operate retrospectively,<sup>6</sup> and some question as to their constitutionality has been raised.<sup>7</sup> It has been held, however, that the statutes are not on this account unconstitutional, as their effect is to make the estate more valuable to the tenants, a certain inheritance of a part being considered of more value than an uncertain inheritance of the whole.<sup>8</sup> Moreover, it has been held that a statute changing existing joint tenancies created by deed into tenancies in common is not unconstitutional as acting retrospectively or impairing the obligation of contracts, the estate of each tenant in the share of his cotenant being regarded not as a vested estate but as an

1. 2 Black. Com. 192.

Where four sisters seized of land in coparcenary conveyed their respective shares in fee, but the deed of one was ineffectual to convey more than at most mere color of title, it was held that she and the vendee held the land as tenants in common. *Cloud v. Webb*, 3 Dev. L. (14 N. Car.) 317.

2. See *In re Gray*, (1896) 2 Ch. 802.

3. See observations on this subject by Wood, V. C., in *Williams v. Hensman*, 1 Johns. & H. 546.

4. **Common Law as to Joint Tenancies and Tenancies in Common Changed by Statute.** — Consult the statutes. And see *Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253; *Spencer v. Austin*, 38 Vt. 258.

5. **Statutes Not Retroactive.** — The *California* Act of 1855, providing that "every interest in real estate granted or devised to two or more persons other than executors and trustees, as

such, shall be a tenancy in common, unless," etc., contains nothing showing that it was intended to have a retrospective operation, and does not convert existing joint tenancies into tenancies in common. *Greer v. Blanchard*, 40 Cal. 194. So also of similar statutes in other states. *Gresham v. King*, 65 Miss. 387; *Den v. Van Riper*, 16 N. J. L. 7.

6. *Annable v. Patch*, 3 Pick. (Mass.) 360; *Miller v. Miller*, 16 Mass. 59.

7. In *Greer v. Blanchard*, 40 Cal. 194, the court, in holding that the *California* statute was not intended to act retrospectively, said that if such were the intention the legislature had not competent authority to give such an effect to the statute as would deprive joint tenants of the right of survivorship, one of the essential elements of their tenure. See also *Gresham v. King*, 65 Miss. 387.

8. *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Miller v. Miller*, 16 Mass. 59.



estate in expectancy, and the contract by which the joint estate was created being in no way altered or impaired by the statute.<sup>1</sup>

c. **JOINT TENANCY** — (1) *Creation by Express Terms*. — Notwithstanding the statutes by which the right of survivorship is abolished or joint tenancies are converted into tenancies in common, in the latter case by express provision of the statutes, an estate in joint tenancy may still be created by apt terms in the will or conveyance indicating such intention on the part of the testator or grantor.<sup>2</sup>

**Such Intention Must Be Clearly Shown** by the terms of the instrument creating the estate, either expressly or by necessary implication. Otherwise, under the statute, the estate will be considered an estate in common.<sup>3</sup> The intention cannot be gathered from extraneous circumstances.<sup>4</sup> Nor is it sufficient that the words used would, but for the statute, have been construed as creating a joint tenancy.<sup>5</sup>

**Illustrations.** — It therefore becomes important to inquire what words will be sufficient to bring a particular case within the exception of the statutes and create a joint tenancy. In construing particular words the general rule should always be borne in mind that unless the contrary intent is clearly shown the estate created will be considered a tenancy in common rather than a joint tenancy. The particular phraseology employed in the conveyance is immaterial where it plainly appears from the terms of the instrument that the intention was to create an estate in joint tenancy and not an estate in common.<sup>6</sup> A conveyance to two or more persons "not as tenants in common, but as joint tenants," is clearly sufficient.<sup>7</sup> And where the statute provides that no estate in joint tenancy shall be held or claimed unless it be expressly declared in the conveyance to be passed "not in tenancy in common, but in joint tenancy," it is sufficient to create an estate in joint tenancy that the conveyance expressly declares the estate granted to be such, without further declaring that it is not an estate in common.<sup>8</sup> A deed conveying property to two persons "jointly" creates in the grantees a joint tenancy,<sup>9</sup> but merely describing the property as "joint property" will not create a joint tenancy where there is no express declaration that such is the intention.<sup>10</sup> The words "joint tenancy" need not be used in order to create the estate; any other words clearly importing such an intent are sufficient.<sup>11</sup> It seems that at common law a devise to two persons to hold "jointly and severally" creates a joint tenancy.<sup>12</sup> It has been held, however, that such words in a deed, although not inconsistent with the creation of a joint estate, do not necessarily

1. *Miller v. Dennett*, 6 N. H. 109; *Stevenson v. Cofferin*, 20 N. H. 150. See also *Gilman v. Morrill*, 8 Vt. 74.

2. **Joint Tenancies Created by Express Terms.** — *Pritchard v. Walker*, 22 Ill. App. 286, affirmed 121 Ill. 221; *Rodney v. Landau*, 104 Mo. 251. See also *Mack v. Mechanics, etc.*, Sav. Bank, 50 Hun (N. Y.) 477; *De Puy v. Stevens*, 37 N. Y. App. Div. 289; *Matter of Lent*, (Surrogate Ct.) 1 Misc. (N. Y.) 264.

**The Renting of a Safe-deposit Box** in the name of "A or B" does not constitute such persons joint tenants of the property placed therein. *Mercantile Safe Deposit Co. v. Huntington*, 89 Hun (N. Y.) 465.

3. **Intention to Create Joint Tenancy Must Be Clear.** — *Bowen v. May*, 12 Cal. 348; *Chandler v. Cheney*, 37 Ind. 391; *Nicholson v. Caress*, 45 Ind. 479; *Purdy v. Purdy*, 3 Md. Ch. 547; *Rodney v. Landau*, 104 Mo. 251; *Gilman v. Morrill*, 8 Vt. 74.

4. *Nicholson v. Caress*, 45 Ind. 479.

5. *Purdy v. Purdy*, 3 Md. Ch. 547.

6. **Language Requisite to Create Joint Tenancy.** — *Slater v. Gruger*, 165 Ill. 329; *Coster v. Lorillard*, 14 Wend. (N. Y.) 265.

7. *Mette v. Feltgen*, 148 Ill. 357. To the same effect is *Jooss v. Fey*, 129 N. Y. 17.

A conveyance of land to two persons described in the deed as husband and wife though not in fact such, "as tenants by the entirety, and not as tenants in common," creates in the grantees a joint tenancy, they being incompetent to take as tenants by entirety, and this estate being an estate in joint tenancy, but with the limitation that during their joint lives neither of the grantees can destroy the right of survivorship without the assent of the other. *Morris v. McCarty*, 158 Mass. 11.

8. *Slater v. Gruger*, 165 Ill. 329.

9. *Davis v. Smith*, 4 Harr. (Del.) 68; *Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253.

10. *Rodney v. Landau*, 104 Mo. 251.

11. *Coster v. Lorillard*, 14 Wend. (N. Y.) 265, reversed as to construction of particular words 5 Paige (N. Y.) 172.

12. 2 Black. Com. 193.



import an intention to create such an estate any more than a tenancy in common, and hence are not sufficient to take the case out of the operation of the statutes.<sup>1</sup> So also, in the case of a grant of land to two persons "jointly, and equally to be divided between them," a tenancy in common and not a joint tenancy is created.<sup>2</sup> But a conveyance to two or more persons "as joint tenants, and to the survivors or survivor of them, and the heirs of said survivor,"<sup>3</sup> or "as joint tenants and not as tenants in common, the survivor of them," etc.,<sup>4</sup> creates a joint tenancy. So also of a devise to several persons and the survivor or survivors of them.<sup>5</sup>

(2) *Conveyance to Cotrustees.* — A conveyance of property to two or more persons as cotrustees will ordinarily constitute them joint tenants of the trust estate, and upon the death of one of them the survivor or survivors will succeed to all the rights and remedies to which all of them were before jointly entitled.<sup>6</sup>

*Effect of Statutes Abolishing Jus Accrescendi.* — It has been held that the statutes abolishing the right of survivorship and limiting estates in joint tenancy to those expressly declared to be such in the instruments creating them apply to grants or conveyances to trustees.<sup>7</sup> The contrary has been held by some courts, and it would seem with better reason, for the right of survivorship, instead of being a disadvantage, as it is conceived to be in the case of estates held by several persons in their own right, would, in the case of trust estates, be an advantage in the care and management of the estate; and for this reason courts are inclined to hold that trustees are joint tenants rather than tenants in common.<sup>8</sup> In some cases conveyances to trustees are expressly excepted from the operation of the statutes.<sup>9</sup>

(3) *Of Personal Property.* — A statute converting joint tenancies into tenancies in common in the case of real estate does not affect personal property, and words which at common law would create a joint tenancy will have the same effect notwithstanding the statute.<sup>10</sup> In some states the statutes in terms include personal as well as real property.<sup>11</sup>

(4) *Of Life-insurance Policy.* — It has been held that where a life-insurance policy is made payable to two or more persons, this creates in the beneficiaries a joint tenancy with the right of survivorship.<sup>12</sup>

1. *Miller v. Miller*, 16 Mass. 59.

2. *Burghardt v. Turner*, 12 Pick. (Mass.) 534.

3. *Arnold v. Jack*, 24 Pa. St. 57.

4. *Fladung v. Rose*, 58 Md. 13.

5. *Apgar v. Christophers*, 33 Fed. Rep. 201; *Stimpson v. Batterman*, 5 Cush. (Mass.) 153.

6. *Cotrustees Joint Tenants.* — *Parsons v. Boyd*, 20 Ala. 112; *Gray v. Lynch*, 8 Gill (Md.) 403; *Webster v. Vandeventer*, 6 Gray (Mass.) 428; *Stewart v. Pettus*, 10 Mo. 755; *Everitt v. Everitt*, 29 N. Y. 39; *Philadelphia, etc., R. Co. v. Lehigh Coal, etc., Co.*, 36 Pa. St. 204; *Franklin Institution for Savings v. People's Sav. Bank*, 14 R. I. 632. But see *Robison v. Codman*, 1 Sumn. (U. S.) 121.

A condition in a conveyance of land to several persons that the grantees shall pay all the grantor's debts or the deed shall be void does not create a trust estate so as to bring the case within the exception in the case of trust estates of the statute converting joint tenancies to tenancies in common, and the grantees take as tenants in common. *Lamb v. Clark*, 29 Vt. 273.

7. *Effect of Statutes Abolishing Right of Survivorship.* — *Sanders v. Morrison*, 7 T. B. Mon. (Ky.) 54, 18 Am. Dec. 161; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394. In *New Jersey* trust estates are now excepted by statute. *Gen. Stat. N. J.* (1895), p. 3685, par. 7.

8. *Parsons v. Boyd*, 20 Ala. 112; *Franklin Institution for Savings v. People's Sav. Bank*, 14 R. I. 632.

9. Consult the statutes. See also *Boyer v. Sims*, (Kan. 1900) 60 Pac. Rep. 309; *Philadelphia, etc., R. Co. v. Lehigh Coal, etc., Co.*, 36 Pa. St. 204.

10. *Joint Tenancy of Personal Property.* — *Emerson v. Cutler*, 14 Pick. (Mass.) 108; *Gilbert v. Richards*, 7 Vt. 203; *Decamp v. Hall*, 42 Vt. 483; *Farr v. Grand Lodge, etc.*, 83 Wis. 446, 35 Am. St. Rep. 73.

11. Consult the statutes.

In *Mississippi* survivorship is abolished as to personal as well as real property. *Nichols v. Denny*, 37 Miss. 59.

The *New York* statute (1 Rev. Stat. 727, § 44) provides that "every estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy." It has been held that this statute applies to personal as well as real estate. *Everitt v. Everitt*, 29 N. Y. 39; *Bliven v. Seymour*, 88 N. Y. 409; *Mills v. Husson*, 140 N. Y. 99; *Matter of Kimberly*, 150 N. Y. 90; *Baumann v. Guion*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 120. Compare *Putnam v. Putnam*, 4 Bradf. (N. Y.) 308.

12. *Joint Tenancy in Life-insurance Policy.* — See



*d. TENANCY IN COMMON — (1) In General.* — By the force of the statutes already considered the common-law rule that a conveyance or devise to two or more persons without more creates a joint tenancy, and that a tenancy in common will arise only where it plainly appears that such a tenancy and not a joint tenancy was intended, is reversed; and in the United States the general rule is that every conveyance, devise, etc., of property to two or more persons in their own right creates a tenancy in common unless it plainly appears from the instrument creating the estate that a joint tenancy and not a tenancy in common was intended, and this although the words used would at common law have created a joint tenancy.<sup>1</sup> It is to be observed that the statutes converting joint tenancies into tenancies in common can, in the nature of things, apply or be effective only in cases where the estate created would at common law be an estate in joint tenancy — that is, only where the cotenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. But many cases may arise in which the cotenants, although holding by the same undivided possession, may have different interests, acquired by different conveyances or commencing at different times. Estates so characterized, even at common law, are tenancies in common, and hence no legislation is required to make them such.<sup>2</sup>

*Conveyance of Several Interests.* — A conveyance or devise of property to two or more persons to be divided into distinct parts, one to each person, as designated in the instrument, does not create a tenancy in common in the entire property, but an estate in severalty in the several grantees or devisees in respect to the parcels designated.<sup>3</sup> But where it appears from the instrument

the title *BENEFICIARIES (IN INSURANCE)*, vol. 3, p. 1014. See also *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208; *Farr v. Grand Lodge*, etc., 82 Wis. 446, 35 Am. St. Rep. 73.

1. *Conveyances, etc., to Several Persons Create Tenancies in Common.* — *California.* — *Matter of Utz*, 43 Cal. 200.

*Georgia.* — *New England Mortg. Security Co. v. Gordon*, 95 Ga. 781; *Huie v. McDaniel*, 105 Ga. 319; *Harrison v. Harrison*, 105 Ga. 517. See also *McCord v. Whitehead*, 98 Ga. 381.

*Illinois.* — *Mette v. Feltgen*, 148 Ill. 357.

*Indiana.* — See *Fountain County Coal*, etc., *Co. v. Beckleheimer*, 102 Ind. 76, 52 Am. Rep. 645.

*Massachusetts.* — *Holbrook v. Finney*, 4 Mass. 566, 3 Am. Dec. 243; *Burghardt v. Turner*, 12 Pick. (Mass.) 534.

*Mississippi.* — *Brabham v. Day*, 75 Miss. 923, citing 29 AM. AND ENG. ENCYC. OF LAW (1st ed.) 508, 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 232; *Hawkins v. Hawkins*, 72 Miss. 749.

*Missouri.* — *Rodney v. Landau*, 104 Mo. 251.

*New York.* — *Lorillard v. Coster*, 5 Paige (N. Y.) 172, reversing 14 Wend. (N. Y.) 265; *Everitt v. Everitt*, 29 N. Y. 39; *Bliven v. Seymour*, 88 N. Y. 469; *Purdy v. Hayt*, 92 N. Y. 446; *Van Brunt v. Van Brunt*, 111 N. Y. 178; *Dana v. Murray*, 122 N. Y. 604; *Matter of Kimberly*, 150 N. Y. 90; *Matter of Munter*, (Surrogate Ct.) 19 Misc. (N. Y.) 201.

*North Carolina.* — *Harvey v. Harvey*, 72 N. Car. 570. See also *Wright v. Harris*, 116 N. Car. 462.

*Vermont.* — *Gilman v. Morrill*, 8 Vt. 74.

*Grantees Described as "Executors."* — A deed to several persons creates in them an estate in common although the grantees are described

in the deed as "executors," where there is nothing in the deed to show that it was intended to grant the estate to them as trustees. *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 529, 49 Am. Dec. 189.

*A Conveyance to A. in Trust* for herself and her children and their heirs and assigns, creates in A. and her children then living a tenancy in common in fee. *Shirlock v. Shirlock*, 5 Pa. St. 367.

*Purchase under Conditional Sale.* — Where a husband and wife purchase property under conditional sale they hold as tenants in common, and title vests in them as such on payment of the purchase price. *Baumann v. Guion*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 120.

2. See generally *supra*, this title, *Nature and Incidents of Estates in Cotenancy — Joint Tenancy — In General*.

3. *Conveyance of Distinct Interests.* — *Partidge v. Colegate*, 3 Har. & M. (Md.) 339; *Blessing v. House*, 3 Gill & J. (Md.) 290; *Mitchell v. Hoggard*, 108 N. Car. 353; *Lockwood v. Mills*, 3 Ohio 21; *Fleming v. Kerr*, 10 Watts (Pa.) 444.

A sale by the owner of land of all the standing timber on the land does not constitute the vendor and vendee tenants in common of the land or timber, but land and timber are held in severalty by vendor and vendee respectively. *Dexter v. Lathrop*, 136 Pa. St. 565, *explaining and distinguishing* *Wheeler v. Carpenter*, 107 Pa. St. 271, and *Shiffer v. Broadhead*, 126 Pa. St. 260.

*Where Two Warrants to Different Persons Are Surveyed Together*, and a general diagram of surveys is returned without a division line or anything to designate each tract, the grantees



that it was the intention of the grantor not to create an estate in severalty, but simply to indicate the mode in which the property should be allotted upon a future division thereof, the mere designation of a particular part as an individual share does not make the estate one in severalty.<sup>1</sup> So, also, a conveyance by separate deeds of a designated number of acres of a tract of land to each, covering the whole tract, there being nothing to indicate an intention to sever, creates in the grantees a tenancy in common of the whole.<sup>2</sup>

(2) *By Descent*. — An estate in common may arise by descent, and upon the death of an intestate his property vests in his heirs as tenants in common<sup>3</sup> or as coparceners.<sup>4</sup> Where one of several cotenants dies intestate his interest descends to his heirs as tenants in common with each other and the other cotenants.<sup>5</sup> Thus where a wife owning property as tenant in common with her husband dies, her share descends to her children or other heirs at law, who become tenants in common with the husband.<sup>6</sup>

(3) *Certain Cases Considered* — (a) *Purchase of Undivided Interest in Property*. — A conveyance of an undivided interest in property creates a tenancy in common between the grantor and the grantee.<sup>7</sup> So, also, where a stranger purchases or otherwise acquires from one joint tenant or tenant in common his undivided interest in the common property he becomes a tenant in common with the other cotenants.<sup>8</sup> This rule applies not only to the case of a sale by

are not tenants in common, but their rights as between themselves are suspended until the subject of the grant to each shall be specifically designated by the proper officer or by themselves; and when that is done the title of each relates back to the commencement of the grant. *Ross v. McJunkin*, 14 S. & R. (Pa.) 364.

1. *Designation of Particular Part as Individual Share*. — *Griswold v. Johnson*, 5 Conn. 363; *Dallagher v. Dallagher*, 171 Mass. 503. See also *Walker v. Dewing*, 8 Pick. (Mass.) 520. *Compare Nye v. Drake*, 9 Pick. (Mass.) 35, where there were no words signifying an intention that the property should be divided equally, and it was held that the devise created estates in severalty and not a tenancy in common.

2. *Preston v. Robinson*, 24 Vt. 583, *distinguishing Clapp v. Beardsley*, 1 Vt. 151.

3. *Creation of Tenancy in Common by Descent*. — *Comer v. Comer*, 119 Ill. 170; *Kotz v. Belz*, 178 Ill. 434; *Fenton v. Miller*, 94 Mich. 204; *Malcom v. Rogers*, 5 Cow. (N. Y.) 188, 15 Am. Dec. 464; *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Keller v. Auble*, 58 Pa. St. 410, 98 Am. Dec. 297. See also *Clements v. Cates*, 49 Ark. 242; *Montague v. Selb*, 106 Ill. 49.

In *Mississippi*, by statute, all property exempted from sale under execution or attachment, on the death of an intestate, descends to his widow and children as tenants in common. *Falkner v. Thurmond*, (Miss. 1898) 23 So. Rep. 584.

In *New Hampshire* joint heirs are made tenants in common by a statute which embraces estates existing at the time of its passage as well as those acquired by descent afterwards cast. *Stevenson v. Cofferin*, 20 N. H. 150.

*Community Property — Mexican Law*. — Under the Mexican law formerly in force in *California*, community property held by husband and wife vested immediately upon the death of the husband in the widow and children,

without administration, as tenants in common. *Lataillade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219.

4. See the title PARCENARY.

5. *Inglis v. Webb*, 117 Ala. 387.

6. *Death of Wife Holding as Cotenant with Her Husband*. — *Sergeant v. Steinberger*, 2 Ohio 305, 15 Am. Dec. 553; *Penn v. Cox*, 16 Ohio 30.

Where a woman owning a tract of land with her husband died leaving children, and the husband subsequently married again and died leaving a widow and children of the second marriage, it was held that the children of the first marriage inheriting from their mother were tenants in common with the widow and children of the second marriage. *McDougal v. Bradford*, 80 Tex. 558.

7. *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151.

*By the Assignment of an Interest in a chattel mortgage the assignor and assignee become tenants in common of the mortgaged property*. *Earl v. Stumpf*, 56 Wis. 50.

*Grant of Interest in Mining Land*. — A grant of an undivided interest in mining land limited to a mining right therein does not make the grantee a tenant in common of the land with the grantor. *Smith v. Cooley*, 65 Cal. 46.

8. *Purchaser of Undivided Interest Tenant in Common with Other Cotenants — California*. — *Ewald v. Corbett*, 32 Cal. 493.

*Colorado*. — *Gillett v. Gaffney*, 3 Colo. 351.

*Connecticut*. — *Young v. Williams*, 17 Conn. 393.

*Georgia*. — *Coleman v. Lane*, 26 Ga. 515; *Sewell v. Holland*, 61 Ga. 608.

*Illinois*. — *Bracken v. Cooper*, 80 Ill. 221; *Montague v. Selb*, 106 Ill. 49.

*Indiana*. — *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; *Sims v. Dame*, 113 Ind. 127.

*Iowa*. — *Conn v. Conn*, 58 Iowa 747; *Rogers v. Turpin*, 105 Iowa 183.

*Kansas*. — See *Scantlin v. Allison*, 32 Kan. 376.



the tenant himself, but also to a sale under legal process, as where a sheriff under attachment against a tenant in common sells the undivided interest of the debtor,<sup>1</sup> or where a tenant in common mortgages his interest and the mortgage is foreclosed and the property sold.<sup>2</sup> In all such cases the purchaser at the sale becomes a tenant in common with the other cotenants. So, also, where a tenant in common makes an assignment for the benefit of creditors, the assignee succeeding to his interest in the common property becomes a tenant in common with the other cotenants.<sup>3</sup> So, also, where a stranger leases the interest of a tenant in common.<sup>4</sup> It has been held, however, that a mortgagee of the undivided interest of one cotenant does not become a tenant in common with the other cotenants.<sup>5</sup>

**Purchaser Occupies Position of Original Owner.** — The purchaser of an undivided interest in property succeeds to all the rights and obligations of the original owner, and occupies the same position in respect to the property and the other cotenants as that formerly held by him.<sup>6</sup> He is not entitled to the occupation of any particular part of the property, but becomes a tenant in common with the other cotenant or cotenants of the whole.<sup>7</sup>

**Delivery of Possession.** — Where a tenant in common who sells his undivided interest has possession of the property he may deliver possession to the vendee;<sup>8</sup> but where he is not in actual possession, the purchaser succeeds to all his rights without actual delivery of possession, and becomes tenant in

*Kentucky.* — Sneed v. Waring, 2 B. Mon. (Ky.) 522.

*Maine.* — Kilgore v. Wood, 56 Me. 150, 96 Am. Dec. 440.

*Maryland.* — Ferrall v. Kent, 4 Gill (Md.) 209.

*Massachusetts.* — Liscomb v. Root, 8 Pick. (Mass.) 375.

*Missouri.* — Benoist v. Rothschild, 145 Mo. 399; Spooner v. Ross, 24 Mo. App. 599.

*Montana.* — Crowder v. McDonnell, 21 Mont. 367.

*Pennsylvania.* — Watson's Appeal, 90 Pa. St. 426; McGowan v. Bailey, 179 Pa. St. 470.

*Texas.* — See Mahon v. Barnett, (Tex. Civ. App. 1897) 45 S. W. Rep. 24.

*Vermont.* — House v. Fuller, 13 Vt. 165, 37 Am. Dec. 588; Aiken v. Smith, 21 Vt. 172; Spencer v. Austin, 38 Vt. 258; Kane v. Garfield, 60 Vt. 79.

*Virginia.* — Ruffner v. Lewis, 7 Leigh (Va.) 720, 30 Am. Dec. 513; Cox v. McMullin, 14 Gratt. (Va.) 82; Buchanan v. King, 22 Gratt. (Va.) 414.

*Washington.* — Vermont L. & T. Co. v. Cardin, 19 Wash. 304.

And see cases cited in notes immediately following.

Where two tenants in common of land by separate conveyances convey to different persons a ditch crossing the land, their respective grantees are tenants in common of the ditch. Reed v. Spicer, 27 Cal. 57.

**The Purchaser of Land Subject to a Homestead** is tenant in common with the homesteader. O'Bryan v. Brown, (Tenn. Ch. 1898) 48 S. W. Rep. 315.

**1. Purchase at Execution Sale.** — Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147.

**2.** Conn v. Conn, 58 Iowa 747.

**3.** Baldwin v. Whiting, 13 Mass. 57; Chittenden v. Gates, 18 N. Y. App. Div. 169; Baumann v. Guion, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 120.

**4.** Barnum v. Landon, 25 Conn. 137. To the same effect see Badger v. Holmes, 6 Gray (Mass.) 118; Hoopes v. Meyer, 1 Nev. 433; Austin v. Ahearne, 61 N. Y. 6.

**5.** Barteau v. Merriam, 52 Minn. 222.

**6. Purchaser of Undivided Share Succeeds to Right, etc., of Vendor.** — Fischer v. Eslaman 68 Ill. 78; Markoe v. Wakeman, 107 Ill. 251; Sims v. Dame, 113 Ind. 127; Austin v. Barrett, 44 Iowa 488; Russell v. Merchants' Bank, 47 Minn. 286, 28 Am. St. Rep. 368; Benoist v. Rothschild, 145 Mo. 399; Austin v. Ahearne, 61 N. Y. 6; Browning v. Cover, 108 Pa. St. 595; Cotton v. Rand, (Tex. Civ. App. 1898) 51 S. W. Rep. 55.

A purchaser of the interest of a tenant in common of an equity of redemption succeeds to the interest of his vendor, and the effect of a redemption by him is the same as if it had been by the vendor. Calkins v. Steinbach, 66 Cal. 117.

The purchaser at a sheriff's sale of the interest of one joint tenant does not acquire a title superior to that of the other cotenant, nor can the latter's title by lapse of time become superior to that of such purchaser. Wilson v. Peelle, 78 Ind. 384.

**Purchase by Stranger Holding Inferior Title.** — A person out of possession holding an inferior paper title of property held in common cannot buy out a cotenant in actual possession to the detriment of the other cotenants, and then claim to enter under his inferior title adversely to them; but he will be held to have entered into and hold under the cotenancy possession. Davis v. Settle, 43 W. Va. 17.

**7. Purchaser Holds by Undivided Share.** — Coleman v. Lane, 26 Ga. 515; Mast v. Tibbles, 60 Tex. 301. See *infra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se — Sale or Conveyance of Common Property — Of One's Own Interest — By Metes and Bounds.*

**8.** Browning v. Cover, 108 Pa. St. 595.



common with the other cotenant, whose possession is constructively the possession of the purchaser.<sup>1</sup>

**Conveyance by Acreage.** — Where a conveyance is made of a certain number of acres of a tract of land, not described by metes and bounds, the grantee becomes a tenant in common with the grantor or the other owners, where the land is held in common, of the entire property, the extent of his interest being determined by the proportion which the number of acres conveyed bears to the number of acres in the entire tract.<sup>2</sup> But if the part conveyed is so described that it could be set off by a surveyor by metes and bounds, the grantee does not become a tenant in common, but takes in severalty.<sup>3</sup>

**Conveyance of Interest in Land to Be Selected by Grantee.** — Where a certain interest in land designated as so many acres or otherwise is conveyed to a grantee subject to selection by him from the entire tract, the exercise of the right of selection by him is not a condition precedent to the vesting of the estate, and until selection is made the grantee holds as tenant in common of the entire tract.<sup>4</sup>

**Reservation of Interest in Deed.** — A reservation in a deed of an interest or right in the property conveyed operates to render the grantor a tenant in common with the grantee.<sup>5</sup>

(b) **Production of Property on Shares.** — Where two persons enter into an agreement for the production by manufacture or otherwise of any kind of property to be shared between them, each party contributing to the expense of production either in labor, materials, or otherwise, they become tenants in common of the product of their labor, capital, or expenditure.<sup>6</sup> The same is true where one employs another to save the cargo from a wrecked vessel for a percentage of the property saved,<sup>7</sup> or where an attorney at law recovers property for a client in consideration of receiving a part interest therein.<sup>8</sup>

**Raising Crops on Shares.** — Where land owned by one person is cultivated by another under an arrangement known as cultivation on shares, by which the landowner and the cultivator are each to have a specific portion of the crop raised, the parties are tenants in common of the crop until a division is made.<sup>9</sup>

1. *Brown v. Graham*, 24 Ill. 628.

The assignee of a tenant in common succeeds to all the interest, rights, and privileges of his assignor, and it is not necessary for him to make an entry on the land to give validity to the assignment. *Baldwin v. Whiting*, 13 Mass. 57.

2. **Conveyance of Undivided Interest by Acreage.** — *Gratz v. Land, etc., Imp. Co.*, 82 Fed. Rep. 381; *Schenk v. Evoy*, 24 Cal. 104; *Wallace v. Miller*, 52 Cal. 655; *Gibbs v. Swift*, 12 Cush. (Mass.) 393; *Jewett v. Foster*, 14 Gray (Mass.) 495; *Battel v. Smith*, 14 Gray (Mass.) 497; *Small v. Jenkins*, 16 Gray (Mass.) 155; *Pipkin v. Allen*, 29 Mo. 229; *Jackson v. Livingston*, 7 Wend. (N. Y.) 136; *Dohoney v. Womack*, 1 Tex. Civ. App. 354; *Sheafe v. Wait*, 30 Vt. 735.

3. *Wheeler v. Ladd*, 40 Ark. 108.

4. *Brown v. Bailey*, 1 Met. (Mass.) 254; *Dohoney v. Womack*, 1 Tex. Civ. App. 354.

5. *Payne v. Parker*, 10 Me. 178, 22 Am. Dec. 221; *Wheeler v. Carpenter*, 107 Pa. St. 271.

6. **Property Produced on Shares.** — *Beaumont v. Crane*, 14 Mass. 400; *White v. Brooks*, 43 N. H. 402; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161. See also *Jackson v. Paxson*, 25 Ga. 35.

7. *Boylston Ins. Co. v. Davis*, 68 N. Car. 17, 12 Am. Rep. 624.

8. *Thomas v. Morrison*, (Tex. Civ. App. 1898) 46 S. W. Rep. 46.

9. See the title **CROPS**, vol. 8, p. 325.

**Production of Milk on Shares.** — Where one person leases his farm and cows to another to be managed by the latter for a share of the milk, the two are tenants in common of the milk. *Willard v. Wing*, 70 Vt. 123.

**Production of Wool.** — Where the owner of sheep leases them, the lessee to deliver the wool to the lessor, who is to sell it, paying one-half the proceeds to the lessee, they are tenants in common of the wool. *Hewlett v. Owens*, 50 Cal. 474; *Dear v. Reed*, 37 Hun (N. Y.) 594; *Beezley v. Crossen*, 14 Oregon 473.

**Contract of Hiring.** — Where the relation between the parties is that of master and servant, the share of the cropper being merely compensation for his labor, the parties are not tenants in common of the crop before division. *Porter v. Chandler*, 27 Minn. 301, 38 Am. Rep. 293; *Tanner v. Hills*, 48 N. Y. 662; *Cole v. Hester*, 9 Ired. L. (31 N. Car.) 23, following *State v. Jones*, 2 Dev. & B. L. (19 N. Car.) 544.

**Lien.** — The provisions of the *Alabama* statute (Code 1876, §§ 3474, 3475; Civ. Code 1896, §§ 2711, 2712), giving to persons farming on shares each a lien on the share of the other in the crops jointly raised, do not abolish the relation of tenants in common in such cases. *Collier v. Faulk*, 69 Ala. 58; *Holcombe v. State*, 69 Ala. 218; *McCall v. State*, 69 Ala. 227.



The principle is the same whether the division is to be of the crop itself or of the proceeds or value thereof.<sup>1</sup> So, also, where land belonging to a third person is cultivated by two persons under an agreement that they shall share the crop, they become tenants in common of the crop.<sup>2</sup>

(c) *Confusion of Goods.* — Where by accident,<sup>3</sup> mistake,<sup>4</sup> or the act of a stranger,<sup>5</sup> goods belonging to different owners become so intermixed that the particular goods of each cannot be separated or distinguished, the several owners become tenants in common of the whole mixture in proportion to their respective interests. So, also, where the confusion takes place by the consent of the owners, they become tenants in common if such is the intention and agreement of the parties.<sup>6</sup> But a tenancy in common cannot be created by a confusion of goods where such confusion is the wrongful act of one of the parties.<sup>7</sup>

(d) *Between Partners.* — The members of a firm are tenants in common of the real property owned by the firm,<sup>8</sup> and each may convey or encumber his undivided interest.<sup>9</sup> Where partners purchase property with partnership funds for partnership purposes, but take a deed thereto to themselves as tenants in common, as to third persons, they hold as tenants in common, the character of their estate being fixed by the deed, and it is not competent to show by parol evidence that the property is partnership property.<sup>10</sup> But as between the partners themselves in such case the property is held as partnership property.<sup>11</sup>

*Dissolution of Partnership.* — The dissolution of a partnership does not *ipso facto* destroy the joint tenancy of the partners in the partnership property and create a tenancy in common, but the partnership, with all the incidents belonging to that relation, continues for the purpose of settling up the firm's business.<sup>12</sup> But the dissolution of a partnership by the bankruptcy of one of the partners creates in his assignee and the other partners a tenancy in common of the partnership property.<sup>13</sup> And it has been held that upon the death of one member of a partnership his share or interest in the real estate held and owned by the partnership as a part of the joint stock or fund is cast by descent upon his heirs at law, who become tenants in common with the surviving partner, and hold the property in the same manner, and subject to the same trust as respects the partnership business, as their ancestor.<sup>14</sup>

1. *Connell v. Richmond*, 55 Conn. 401; *Tanner v. Hills*, 44 Barb. (N. Y.) 428.

2. *Sims v. Dame*, 113 Ind. 127; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

3. *Goods Confused by Accident.* — *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427.

4. *Confusion by Mistake.* — *Hesseltine v. Stockwell*, 30 Me. 242, 50 Am. Dec. 627; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298.

5. *Confusion by Stranger.* — *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648.

6. *Confusion by Agreement.* — *Sexton v. Graham*, 53 Iowa 181.

7. *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235.

For a Full Discussion of the creation of a tenancy in common by confusion of goods, see the title *CONFUSION OF GOODS*, vol. 6, p. 592.

8. *As Between Partners.* — *Deloney v. Hutcheson*, 2 Rand. (Va.) 183, and cases cited in the note immediately following. But see *Baird v. Baird*, 1 Dev. & B. Eq. (21 N. Car.) 524, 31 Am. Dec. 399.

9. *Jackson v. Stanford*, 19 Ga. 14; *Sutlive v. Jones*, 61 Ga. 676; *Coles v. Coles*, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231.

Property conveyed to a firm or to partners in trust for a firm is held by them as tenants in common, and neither partner can convey more

than his undivided interest. *Anderson v. Tompkins*, 1 Brock. (U. S.) 456.

10. *Purchase of Property by Partnership.* — *Hale v. Henrie*, 2 Watts (Pa.) 143, 27 Am. Dec. 289; *McDermet v. Laurence*, 7 S. & R. (Pa.) 438, 10 Am. Dec. 468; *Lancaster Bank v. Myley*, 13 Pa. St. 544; *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586; *Ebbert's Appeal*, 70 Pa. St. 79; *Titusville Second Nat. Bank's Appeal*, 83 Pa. St. 203. See also *Kramer v. Arthurs*, 7 Pa. St. 165.

Where property is purchased by one member of a firm with the firm's money and for the business of the partnership, but the title is taken by the purchaser in his own name, the property belongs to the partners as such, and not as tenants in common. *Erwin's Appeal*, 39 Pa. St. 535, 80 Am. Dec. 542.

11. *Loubat v. Nourse*, 5 Fla. 350; *Dyer v. Clark*, 5 Met. (Mass.) 562, 39 Am. Dec. 697; *Abbott's Appeal*, 50 Pa. St. 234.

12. *Dissolution of Partnership.* — *Murray v. Mumford*, 6 Cow. (N. Y.) 441.

13. *Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745; *Murray v. Mumford*, 6 Cow. (N. Y.) 441.

14. *Loubat v. Nourse*, 5 Fla. 350. See generally the title *PARTNERSHIP*.



(e) **Between Shipowners.** — As a general rule, where a ship is owned by several persons they hold their respective interests as tenants in common, and not as partners,<sup>1</sup> and the same rule applies to the cargo.<sup>2</sup> To this rule there may be exceptions, either growing out of the express agreement of the parties or to be implied from the nature and character of the business or adventure in which they are about to engage.<sup>3</sup>

(f) **Between Widow and Heirs at Law.** — At common law a widow entitled to dower is not a tenant in common with the heirs of the deceased owner of the property until dower is assigned.<sup>4</sup> This rule has been changed in some states by the force of statutes giving to the widow the right of immediate entry upon the death of her husband.<sup>5</sup> In *Indiana* it has been held that the widow is tenant in common with the heirs until objection is made by them.<sup>6</sup> The possession of a widow as dowress and as guardian in socage of the minor heirs is as tenant in common with all the heirs.<sup>7</sup> A widow entitled to unassigned dower and homestead in premises occupied by herself and children, the heirs at law, is tenant in common with them.<sup>8</sup> Where a widow elects under a statute to take in lieu of dower a share in the estate of which her husband died seized, she becomes a tenant in common of the property with the heirs or devisees.<sup>9</sup> So, also, where a widow and her children inherit property from her husband she holds as tenant in common with them.<sup>10</sup>

(g) **Miscellaneous Cases.** — Where Land Is Redeemed by Several Persons they become tenants in common, the interest of each being in proportion to the amount of redemption money paid by him.<sup>11</sup>

**Execution by Two Creditors.** — Where executions are levied upon property by two creditors at the same time, each creditor acquires an undivided moiety of the property, and they take as tenants in common.<sup>12</sup>

**Where Land Is Patented to Two or More Persons** they hold as tenants in common of the whole tract.<sup>13</sup> So, also, where two or more persons acquire title to land

1. **Joint Owners of Ship Tenants in Common Rather than Partners** — *England*. — *Exp.* Young, 2 Ves. & B. 242, *overruling* *Doddington v. Hallet*, 1 Ves. 497.

*United States*. — *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 193; *De Wolf v. Howland*, 2 Paine (U. S.) 356.

*Florida*. — *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198.

*Maine*. — *Harding v. Foxcroft*, 6 Me. 76.

*Massachusetts*. — *French v. Price*, 24 Pick. (Mass.) 13. See also *Merrill v. Bartlett*, 6 Pick. (Mass.) 46.

*New York*. — *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522, 20 Johns. (N. Y.) 611.

*Pennsylvania*. — *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139.

See generally the title SHIPS AND SHIPPING.

2. *De Wolf v. Howland*, 2 Paine (U. S.) 356; *Jackson v. Robinson*, 3 Mason (U. S.) 138; *Harding v. Foxcroft*, 6 Me. 76; *French v. Price*, 24 Pick. (Mass.) 13.

Property given to two as owners of a ship belongs to them as tenants in common, and not as partners. *Thorndike v. De Wolf*, 6 Pick. (Mass.) 120.

3. *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Phillips v. Purington*, 15 Me. 425; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611.

4. **Dowress Not Tenant in Common with Heirs.** — *Exp.* *Burgess*, 1 Del. Ch. 233; *Grossman v. Lauber*, 29 Ind. 618; *Grubbs v. Leyendecker*, 153 Ind. 348; *Jackson v. O'Donaghy*, 7 Johns. (N. Y.) 247; *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414.

5. *Stedman v. Fortune*, 5 Conn. 462; *Wooster v. Hunts Lyman Iron Co.*, 38 Conn. 256. See *McGowan v. Bailey*, 179 Pa. St. 470.

6. *Centreville, etc., Turnpike Co. v. Jarrett*, 4 Ind. 213.

7. *Knolls v. Barnhart*, 71 N. Y. 474. See also *Otis v. Thompson*, Hill & D. Supp. (N. Y.) 131.

8. *Goralski v. Kostuski*, 179 Ill. 177.

Where a man dies in the possession of premises claimed as a homestead, but exceeding in value the homestead estate, his widow and the heirs at law in possession hold the premises, until the homestead is set off, as tenants in common, and upon a sale of the interest of the heirs for the payment of debts the purchaser becomes tenant in common with the widow. *Montague v. Selb*, 106 Ill. 49. To the same effect see *Silloway v. Brown*, 12 Allen (Mass.) 30.

9. *Matney v. Graham*, 50 Mo. 559; *Wigley v. Beauchamp*, 51 Mo. 544; *Matter of Tyler*, 40 Mo. App. 378.

10. *Kidwell v. Kidwell*, 84 Ind. 224.

11. **Redemption of Land.** — *Hoffman v. Lyons*, 5 Lea (Tenn.) 377.

Tenants in common of a mortgage term joining in the purchase of the equity of redemption become tenants in common of the inheritance. *Aveling v. Knipe*, 19 Ves. Jr. 441.

12. *Shove v. Dow*, 13 Mass. 529; *Wiswall v. Wilkins*, 5 Vt. 87. See also *Cutting v. Rockwood*, 2 Pick. (Mass.) 443.

13. *Markoe v. Wakeman*, 107 Ill. 251. See *Jones v. Jones*, 1 Call (Va.) 458.



or other property from the state.<sup>1</sup>

**Grant or Conveyance of Same Property to Several Persons.** — And where the same land is granted to two persons at the same time by separate grants, they take as tenants in common.<sup>2</sup> This rule holds also in the case of simultaneous conveyances of the same property to two or more persons.<sup>3</sup>

**Joint Owners of Patent Rights.** — Where a patent right is granted to two persons, the joint patentees are tenants in common.<sup>4</sup>

**Mortgage Made to Two or More Persons.** — Where a mortgage is given to two or more persons to secure debts due to them severally, they take as tenants in common and not as joint tenants.<sup>5</sup> But the contrary has been held where the mortgage is given to secure a debt due to the mortgagees jointly,<sup>6</sup> though after foreclosure, even in this case, the mortgagees hold as tenants in common.<sup>7</sup> If the debts secured are equal in amount, the mortgagees will have an equal interest in the mortgaged estate, and in case of foreclosure will hold it in equal proportions. But if the debts are unequal, the shares of the tenants will be in exact proportion to the amounts of their respective debts.<sup>8</sup> Where money belonging to several persons as tenants in common is advanced by them on a mortgage taken in their names as joint tenants, the mortgagees are nevertheless entitled to such money as tenants in common.<sup>9</sup>

**3. Lapse of Devise or Legacy** — *a.* **WHERE BENEFICIARIES ARE JOINT TENANTS.** — The rule of the common law is that where property is devised or bequeathed to two or more persons as joint tenants, and one or more of them die before the testator,<sup>10</sup> or are not capable of taking or decline to take their

**1. Grant of Property by State.** — *Higbee v. Rice*, 5 Mass. 344.

An act of a state legislature granting to certain persons, their heirs and assigns, the right to run a ferry, with certain other privileges, makes them tenants in common both of these franchises and of boats, tackle, etc., owned by them. *Haven v. Mehlgarten*, 19 Ill. 91.

Persons occupying vacant land in mixed possession prior to the *Delaware* Act of 1843 became tenants in common under that act. *Tubbs v. Lynch*, 4 Harr. (Del.) 521.

In the case of the lands in *Vermont* held under the New Hampshire charters, so called, the rights in such lands, reserved by the charters to the governor of New Hampshire, are holden in severalty, and not in common with the charter proprietors. *Doe v. Strong*, 1 Tyler (Vt.) 191.

Where two or more persons take out a warrant to survey land, pay the purchase price, and obtain the survey, they hold the land as tenants in common, unless the contrary is set forth, and either may require that the patent be so made. *Caines v. Grant*, 5 Binn. (Pa.) 119.

**2. Grants of Same Land to Two Persons.** — *Young v. De Bruhl*, 11 Rich. L. (S. Car.) 638, 73 Am. Dec. 127; *Challefoux v. Ducharme*, 4 Wis. 554.

**3. Howard v. Chase**, 104 Mass. 249; *Welch v. Sackett*, 12 Wis. 243. See *Wright v. Wright*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 176.

**Separate Devises of Same Property to Two Persons.** — Where a testator devised to one child a tract of land and afterwards to another child a larger tract including the former, it was held that the two devisees took the smaller tract as tenants in common. *Seckel v. Engle*, 2 Rawle (Pa.) 68.

**4. In re Horsley**, L. R. 8 Eq. 475; *Pitts v.*

*Hall*, 3 Blatchf. (U. S.) 201; *Lalance, etc., Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. Rep. 197.

See the title **PATENTS**.

**5. Mortgage to Secure Several Debts.** — *Rigden v. Vallier*, 3 Atk. 731; *Petty v. Styward*, 1 Ch. Rep. 57; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Burnett v. Pratt*, 22 Pick. (Mass.) 556. See also *Hubby v. Hubby*, 5 Cush. (Mass.) 516, 52 Am. Dec. 742.

The fact that two persons join in a mortgage of lands does not raise a presumption that the estate conveyed is joint property. *Bowen v. May*, 12 Cal. 348.

**Where a Chattel Mortgage Is Made to Two Persons Jointly** to secure the payment of two notes, one held by each of the mortgagees, in case of default in payment of the note the mortgagees become tenants in common of the property. *Ashland Lodge No. 63 v. Williams*, 100 Wis. 223; *Farwell v. Warren*, 76 Wis. 27.

**6. Appleton v. Boyd**, 7 Mass. 131; *Goodwin v. Richardson*, 11 Mass. 469; *Blake v. Sanborn*, 8 Gray (Mass.) 154. But see *Randall v. Phillips*, 3 Mason (U. S.) 378.

**7. Goodwin v. Richardson**, 11 Mass. 469.

**8. Donnels v. Edwards**, 2 Pick. (Mass.) 617; *Burnett v. Pratt*, 22 Pick. (Mass.) 556.

**9. In re Jackson**, 34 Ch. D. 732.

**10. Share of Joint Tenant Dying Before Testator Not Subject to Lapse** — *England*. — *Buffar v. Bradford*, 2 Atk. 220; *Frewen v. Relfe*, 2 Bro. C. C. 220; *Willing v. Baine*, 3 P. Wms. 113; *Miller v. Warren*, 2 Vern. 207; *Ledsome v. Hickman*, 2 Vern. 611; *Barker v. Giles*, 9 Mod. 157.

*New York*. — *Gardner v. Printup*, 2 Barb. (N. Y.) 83; *Putnam v. Putnam*, 4 Bradf. (N. Y.) 308.

*South Carolina*. — *Telfair v. Howe*, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; *Herbemont v. Thomas, Cheves Eq.* (S. Car.) 21; *Ball v.*



respective interests,<sup>1</sup> the devise or bequest does not lapse, but the entire property will go to the other beneficiaries. The common-law rule is not changed by the statutes abolishing survivorship in joint tenancies, for the doctrine of survivorship applies only where the estate in joint tenancy has been created and has vested, which is not until the death of the testator, and hence the statute cannot affect the common-law rule with respect to the death of one or more devisees during the testator's lifetime.<sup>2</sup>

*b.* WHERE BENEFICIARIES ARE TENANTS IN COMMON. — Where property is given by will to several persons so as to make them tenants in common, and one of the beneficiaries dies before the testator, his share lapses, and the testator is deemed to have died intestate as to that portion of his property.<sup>3</sup> So, also, where a devise or bequest is revoked as to one, his share does not go to the others.<sup>4</sup>

**Principles of Lapse Applied to Grants and Conveyances.** — The doctrine of the lapsing of devises and bequests to several as cotenants applies also where the cotenancy is created by grant or conveyance. Thus, where land is granted by the state to two persons as joint tenants, and one of them dies before the patent is issued, the surviving grantee takes the whole in severalty;<sup>5</sup> but where the grant in such case is to the two as tenants in common, the survivor takes only a moiety, the other moiety remaining in the state.<sup>6</sup>

**V. WHO MAY BE COTENANTS — 1. In General.** — As a general rule, all natural persons capable of holding property may be joint tenants or tenants in common. For a proposition so obvious any citation of authority would seem to be superfluous. The capacity of artificial persons or of natural persons occupying peculiar relations calls for more particular examination.

**2. Corporations.** — As has been seen, the distinguishing incident of a joint tenancy is the right of survivorship, by which, upon the death of one tenant, the survivor or survivors succeed to his share. It follows necessarily that two or more corporations cannot hold property as joint tenants, for, each being perpetual, there can be no survivorship between them. Nor can a corporation be a joint tenant with a natural person, for there is no reciprocity of survivorship between them.<sup>7</sup> But corporations may be tenants in common either with other corporations<sup>8</sup> or with natural persons.<sup>9</sup>

Members of an unincorporated association not authorized by law to take or

Deas, 2 Strobb. Eq. (S. Car.) 24, 49 Am. Dec. 651.

*Vermont.* — Gilbert v. Richards, 7 Vt. 203.

*Virginia.* — Lockhart v. Vandyke, 97 Va. 356. See also Hoke v. Hoke, 12 W. Va. 427.

**Revocation as to One Cotenant.** — Where a devise to A and B is revoked as to A, B takes the whole. Humphrey v. Tayleur, Ambl. 136.

1. Humphrey v. Tayleur, Ambl. 136; Dowset v. Sweet, Ambl. 175; Alexander v. Alexander, 2 Ves. 640; Jones v. Moffet, 5 S. & R. (Pa.) 523.

2. Herbemont v. Thomas, Cheves Eq. (S. Car.) 21; Telfair v. Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; Lockhart v. Vandyke, 97 Va. 356. See also Hoke v. Hoke, 12 W. Va. 427.

3. **Lapse of Share of Tenant in Common.** — Bagwell v. Dry, 1 P. Wms. 700; Sperling v. Toll, 1 Ves. 70; Peat v. Chapman, 1 Ves. 542; Jackson v. Kelly, 2 Ves. 285; Ackroyd v. Smithson, 1 Bro. C. C. 503, appendix; Digby v. Legard, 3 P. Wms. 22, note 1; Page v. Page, 2 P. Wms. 489; Owen v. Owen, 1 Atk. 494; Norman v. Frazer, 3 Hare 84; Bain v. Lescher, 11 Sim. 397; Easum v. Appleford, 5 Myl. & C. 56; Goodright v. Opie, 8 Mod. 123;

Ackerman v. Burrows, 3 Ves. & B. 54; Robertson v. Fraser, L. R. 6 Ch. 696; Matter of Kimberly, 150 N. Y. 90; Com. v. Nase, 1 Ashm. (Pa.) 242; Telfair v. Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637; Frazier v. Frazier, 2 Leigh (Va.) 642.

**Devise to a Class.** — Where a devise is to several tenants in common as a class, and one dies before the testator, there is no lapse, but the share goes to the survivor. Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Page v. Gilbert, 32 Hun (N. Y.) 301.

4. Cresswell v. Cheslyn, 2 Eden 123. See generally the title LEGACIES AND DEVISES. And see Wythe (Va.) 2d ed., appendix 361.

5. Overton v. Lacy, 6 T. B. Mon. (Ky.) 13, 17 Am. Dec. 111.

6. Currie v. Tibbs, 5 T. B. Mon. (Ky.) 443.

7. **Corporations as Cotenants.** — Co. Litt., § 296; Bennet v. Holbech, 2 Saund. 319; De Witt v. San Francisco, 2 Cal. 290; Telfair v. Howe, 3 Rich. Eq. (S. Car.) 235, 55 Am. Dec. 637.

8. De Witt v. San Francisco, 2 Cal. 290. See also New York, etc., Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.

9. Estell v. University of the South, 12 Lea (Tenn.) 476.



hold property as a corporation are tenants in common of property belonging to the association.<sup>1</sup> And it has been held that the mere incorporation of tenants in common of land to enable them to carry on more conveniently a common object does not vest in the corporation a title to the land previously used by the individuals for the same purpose, but such title must be conveyed by proper deeds from the individuals to the corporation; and where such conveyance has not been made, a deed of a share in the corporation conveys no title to the land, but only the grantor's incorporeal right in the corporation.<sup>2</sup> An association of individuals may acquire and hold property in common for their mutual benefit.<sup>3</sup>

3. **Partners.** — Partners may be cotenants with each other.<sup>4</sup>

4. **Husband and Wife.** — The law on this topic has already been presented under other titles in this work.<sup>5</sup>

**VI. WHAT PROPERTY MAY BE HELD IN COTENANCY.** — In general, all property that may be held in severalty may also be held in joint tenancy and in common. Thus there may be joint tenancies or tenancies in common not only of real estate,<sup>6</sup> but also of personal property.<sup>7</sup>

**Mining and Water Rights** may be held in common.<sup>8</sup>

**Cotenancy in Appurtenances.** — Several persons may be tenants in common of appurtenances to their several estates. Thus a private alley established for their common use and benefit by the owners of abutting lots, to each of which lots such alley is appurtenant, belongs to all the lot-owners as tenants in common.<sup>9</sup> So, also, on partition by two tenants in common of land one may grant appurtenant rights in his own portion to the other to be held by them in common.<sup>10</sup>

**Equitable Estate.** — An equitable as well as a legal estate may be the subject of a joint tenancy or tenancy in common. Thus, property may be conveyed or devised to one in trust so as to create in the *cestuis que trustent* a cotenancy of the trust estate.<sup>11</sup>

**VII. RIGHTS, POWERS, DUTIES, AND LIABILITIES OF COTENANTS INTER SE — 1. In General.** — The great incident of all cotenancies, whether joint or in common,

1. *Byam v. Bickford*, 140 Mass. 31.

In *Livingston v. Lynch*, 4 Johns. Ch. (N. Y.) 573, it was held that the stockholders of an unincorporated steamboat company were tenants in common of the property and franchises of the company, and not copartners. But see *Townsend v. Goewey*, 19 Wend. (N. Y.) 424.

2. *Leffingwell v. Elliott*, 8 Pick. (Mass.) 455, 19 Am. Dec. 343.

3. *Michenor v. Reinach*, 49 La. Ann. 360.

4. See *supra*, this title, *Creation of Estates in Cotenancy — Under Modern Practice and Statutes — Tenancy in Common — Between Partners*.

5. See the titles **HUSBAND AND WIFE**, vol. 15, p. 846; **HOMESTEAD**, vol. 15, p. 527.

6. See numerous cases cited in this title.

7. 2 Black. Com. 399; *Trammell v. Harrell*, 4 Ark. 602. And see numerous cases relating to cotenancies of personal property cited in this title.

**A Legacy** may be the subject of a joint tenancy, although this was at one time doubted. *Campbell v. Campbell*, 4 Bro. C. C. 15; *Crooke v. De Vandes*, 9 Ves. Jr. 204; *Martin v. Smith*, 5 Binn. (Pa.) 16, 6 Am. Dec. 395.

8. **Mining and Water Rights.** — See the titles **IRRIGATION**, *ante*, p. 485; **MINES AND MINING**; **WATERS AND WATERCOURSES**.

Where two persons purchase an interest in a mining location they become tenants in common thereof. *Mills v. Hart*, 24 Colo. 505.

Several persons, by appropriating the water of a stream for irrigation, may become tenants in common thereof, and any one may maintain an action against a stranger for diverting the water. *Lytle Creek Water Co. v. Perdue*, 65 Cal. 447.

Persons owning together real estate including coal banks may allot the real estate among themselves, leaving the coal banks undivided and still held in common. *Coleman's Appeal*, 62 Pa. St. 252. See also *Marsh v. Holley*, 42 Conn. 453.

9. *Goralski v. Kostuski*, 179 Ill. 177.

10. *Hall v. Lawrence*, 2 R. I. 218.

11. **Cotenancy in Equitable Estates.** — *Morgan v. Britten*, L. R. 13 Eq. 28; *Greer v. Blanchar*, 40 Cal. 194.

Where land was purchased with a fund in which a widow had a life estate and her children the remainder, the legal title being taken in the name of the widow, it was held that she held the title in trust for the children, subject to her life estate, and the children were tenants in common of the equitable estate in proportion to their respective interests in the purchase money, and upon the termination of the life estate were tenants in common of the complete equitable title and entitled to have it partitioned among them. *Roberts v. Remy*, 56 Ohio St. 249.

Where one person had the possession of



is the unity of possession by which the tenants hold. Each is entitled, equally with all the others, to the entire possession of the whole property and of every part of it, and no one has the exclusive right to the whole or to any particular part. Towards each other the cotenants, by virtue of this unity of interest, sustain a sort of fiduciary relation, and the acts of any one in relation to the common estate, so far as beneficial thereto, will be presumed to be for and will inure to the benefit of all, while no one will be permitted to deal with the property to the prejudice in any way of his cotenants.<sup>1</sup>

**Entry and Possession of One for Benefit of All.** — The entry and possession of one joint tenant or tenant in common is regarded in law as the entry and possession of all the cotenants, and will inure to the benefit of all.<sup>2</sup> Upon these general principles rest the mutual rights, powers, duties, and liabilities of the cotenants. In the nature of things any discussion of the rights and powers of the cotenants involves to a certain extent the consideration of the correlative liabilities and duties also, but for convenience of treatment these subjects will be considered separately.

**2. Rights and Powers** — *a.* **AS TO USE AND ENJOYMENT OF COMMON PROPERTY.** — Where property is held by several persons as joint tenants or tenants

land and another only an equity therein, it was held that the two were to be considered as tenants in common. *M'Clanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388.

**1.** *Northrup v. Phillips*, 99 Ill. 449; *Baker v. Whiting*, 3 Sumn. (U. S.) 475. See generally the sections immediately following this.

**Patent Secured by One Cotenant.** — Where one tenant in common of unpatented mineral land secures a patent therefor in his own name, such patent will inure to the benefit of all the cotenants, and the patentee holds the title in trust for the others. *Turner v. Sawyer*, 150 U. S. 578; *Mills v. Hart*, 24 Colo. 505.

**A Recovery of the Common Property by One Tenant in Common** on the ground of the common title is a recovery for the benefit of all the cotenants. *Barnett v. French*, 1 Conn. 354, 6 Am. Dec. 241. See also *Newman v. State Bank*, 80 Cal. 368, 13 Am. St. Rep. 169.

**A Recovery of Damages** by one cotenant in an action against a stranger for an injury to the common property inures to the benefit of the other cotenant. *Becnel v. Waguespack*, 40 La. Ann. 109.

**Proceeds from Property.** — Where one tenant in common receives all or more than his share of the proceeds of the common property derived from a sale or otherwise, he holds the excess above his share for the benefit of his cotenants, who may recover it from him. See *infra*, this title, *Actions Between Cotenants — Actions at Law — Assumpsit*.

**Profits Made in Dealing with or Concerning Common Property.** — Where one tenant in common engages in transactions affecting the common property, as by purchasing an outstanding interest or claim at less than an understood or agreed rate, the profit so made inures to the benefit of all the cotenants. *Phelps v. Reeder*, 39 Ill. 172; *Anderson v. Clanch*, (Tex. 1887) 6 S. W. Rep. 760.

So, also, where one cotenant fraudulently makes a profit in a sale of the property as agent of all. *Garr v. Boswell*, (Ky. 1897) 38 S. W. Rep. 513.

**The Renewal of a Lease** owned by several as tenants in common, by one of the cotenants in his own name, will inure to the benefit of the

cotenants. *Palmer v. Young*, 1 Vern. 276; *Burrell v. Bull*, 3 Sandf. Ch. (N. Y.) 16.

**Refunded Assessments.** — Where a tenant in common who had paid municipal assessments for himself and cotenant, and had been reimbursed by the latter for his share, afterwards received back the amount from the city, it was held that he was not entitled to the whole, but could take only his proportionate share of the money refunded. *Clark v. Platt*, (Supm. Ct. App. Div.) 58 N. Y. Supp. 361.

**Alteration or Injury of Property.** — One tenant in common has no right to alter or change the property to the injury of the other without his assent. *Woods v. Early*, 95 Va. 307. See *infra*, this section, *Duties and Liabilities — As to Loss, Injury, or Destruction of Property*.

**2. Entry and Possession of One Cotenant That of All** — *England.* — *Ex p. Machell*, 2 Ves. & B. 216, 1 Rose 447.

*United States.* — *Thomas v. Hatch*, 3 Sumn. (U. S.) 170.

*California.* — *Waring v. Crew*, 11 Cal. 366.

*Illinois.* — *Brown v. Graham*, 24 Ill. 628.

*Indiana.* — *Wilson v. Peelle*, 78 Ind. 384.

*Kentucky.* — *Taylor v. Cox*, 2 B. Mon. (Ky.) 429; *Poage v. Chinn*, 4 Dana (Ky.) 50; *Chiles v. Jones*, 7 Dana (Ky.) 528.

*Maine.* — *Loomis v. Pingree*, 43 Me. 299; *Vaughan v. Bacon*, 15 Me. 455, 33 Am. Dec. 628.

*Massachusetts.* — *Barnard v. Pope*, 14 Mass. 434, 7 Am. Dec. 225; *Brown v. Wood*, 17 Mass. 68.

*Minnesota.* — *Strong v. Colter*, 13 Minn. 82.

*Missouri.* — *Bernecker v. Miller*, 40 Mo. 473, 93 Am. Dec. 309; *Davis v. Givens*, 71 Mo. 94.

*New York.* — *Wood v. Phillips*, 43 N. Y. 152.

*Tennessee.* — *Cunningham v. Roberson*, 1 Swan (Tenn.) 138.

*Texas.* — *Terrell v. Martin*, 64 Tex. 121.

*Vermont.* — *Wiswall v. Wilkins*, 5 Vt. 87.

*Virginia.* — *Buchanan v. King*, 22 Gratt. (Va.) 414.

Where the husband of one of several tenants in common enters upon the common property, his entry and possession will inure to the benefit of all the cotenants. *Young v. Adams*, 14 B. Mon. (Ky.) 102.



in common, each has an equal right with his cotenants to the entry and possession of the entire estate, and the possession of one is not unlawful so long as he does not exclude his cotenant.<sup>1</sup> It follows that one tenant cannot eject or dispossess another whose possession is lawful and not inconsistent with his own;<sup>2</sup> nor can one tenant recover the exclusive possession of the property as against his cotenant.<sup>3</sup> Where one tenant in common is debarred by his cotenants from the enjoyment of the premises owned in common, he may take peaceable possession thereof, and his possession will be lawful although acquired by stealth, provided it be acquired in a peaceable manner, without tumult or breach of the peace.<sup>4</sup> So, also, he may recover possession by appropriate legal proceedings.<sup>5</sup>

**Personal Property.**—In the case of personal property held in common the tenant in actual possession has a right to maintain his possession against his cotenants, and there is no means by which he may be compelled to deliver possession to them. The only mode by which one tenant in common of a chattel can obtain the possession of it from another, except by consent of the latter, is by taking possession when he finds a fit opportunity to do so.<sup>6</sup> The principle which prevails in regard to real estate owned by several persons, that when one ousts another the latter may be restored to the possession of his part by a proper action for that purpose, is not applicable to personal property.<sup>7</sup>

**1. Cotenants Equally Entitled to Possession of Entire Property.**—*Knox v. Silloway*, 10 Me. 201; *Rising v. Stannard*, 17 Mass. 282; *Mumford v. Brown*, 1 Wend. (N. Y.) 52, 19 Am. Dec. 461; *McKay v. Mumford*, 10 Wend. (N. Y.) 352; *McGarrell v. Murphy*, 1 Hilt. (N. Y.) 133; *McGowan v. Bailey*, 179 Pa. St. 470. See also *Woods v. Burke*, 67 Mich. 674. And see *supra*, this title, *Nature and Incidents of Estates in Cotenancy*.

For an extended discussion of the rights of tenants in common to hold the common property as against their cotenants, see the opinion of Mullin, J., in *King v. Phillips*, 1 Lans. (N. Y.) 421.

**A Cotenant Claiming a Homestead in the common property may set up exclusive possession as against the claims of creditors, but not as against the demands of his cotenants to be let into joint possession.** *Hertz v. Buchmann*, 177 Ill. 553.

**One Tenant in Common of an Oyster Bed cannot deprive his cotenants of the right to take natural oysters therefrom, by scattering a few seed oysters over the premises in such a manner as to render it impossible to remove the natural oysters without disturbing those planted.** *Mott v. Underwood*, 148 N. Y. 463, 51 Am. St. Rep. 711, *affirming* 73 Hun (N. Y.) 509.

**2. No Lawful Ouster Between Cotenants.**—*Gower v. Quinlan*, 40 Mich. 572; *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *Wood v. Phillips*, 43 N. Y. 152.

If one tenant in common forcibly remove his cotenant from the common property, he is liable for an assault and battery. *Wood v. Phillips*, 43 N. Y. 152.

**3. No One Cotenant Entitled to Exclusive Possession.**—*Jamison v. Graham*, 57 Ill. 94.

Where, pending the trial of an action by a tenant in common of land to compel a stranger, a railroad company, to remove its tracks, etc., from the land, the defendant purchased the title of the plaintiff's cotenants, thereby becoming a cotenant with the plaintiff, and as such equally entitled to possession, it was held

that a judgment for the plaintiff was error. *Archibald v. New York Cent., etc., R. Co.*, 1 N. Y. App. Div. 251.

**4. Wood v. Phillips**, 43 N. Y. 152, *reversing* *King v. Phillips*, 1 Lans. (N. Y.) 421.

**5. All the Tenants in Common of Real Estate May Possess and Improve at the Same Time**, and hence the rule does not apply as in personal property, that one may occupy exclusively and deprive the others of the right of occupation without legal cause of complaint or legal redress. In this case the law affords a remedy of *ejectione firma*, assize upon a disseizin, ejectment, or other appropriate remedy according to the time, place, and country in which the remedy is sought. *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604.

**6. Possession of Personal Property.**—*Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72.

One tenant in common of personal property has no right to take the property from his cotenant by force, but if he can get possession without a resort to force he may then hold it and protect his possession by force. *Tallman v. Barnes*, 54 Wis. 181, *citing* Co. Litt. 199b.

**Possession of Documents.**—One tenant in common cannot sue another to recover possession of documents relating to their common estate, to the possession of which both are equally entitled. *Clowes v. Hawley*, 12 Johns. (N. Y.) 484. But he may compel his cotenant to deliver to the recording officer, to be recorded, the deed under which both claim. *Smith v. Cole*, 39 Hun (N. Y.) 248.

**Larceny by Tenant in Common.**—At common law a tenant in common of personal property cannot be guilty of larceny by taking or appropriating to his own use the whole or any part of the joint property, however fraudulent or felonious in fact may be his intent, unless he takes it from the custody of a bailee with intent to charge the latter with pecuniary liability. *Kirksey v. Fike*, 29 Ala. 206; *Holcombe v. State*, 69 Ala. 218. See the title LARCENY.

**7. Southworth v. Smith**, 27 Conn. 355, 71 Am. Dec. 72.



**Use and Enjoyment by Stranger Claiming under Cotenant.** — The right of a tenant in common to the use and enjoyment of the common property exists not only in favor of the tenant himself, but also in favor of a stranger claiming under him as lessee, licensee, or otherwise, so long as such possession and use do not interfere with the rights of the other cotenants.<sup>1</sup>

**What Is Lawful Use and Enjoyment.** — Perhaps no more specific rule as to what is a legitimate use and enjoyment of the common property may be laid down than that each cotenant may use and enjoy the common property in a reasonable manner to the extent of his own interest, but cannot in any way impair or interfere with the equal right of his cotenants to a similar use and enjoyment. What is a reasonable use will obviously depend upon the nature of the property. The fact that some of the property is consumed or its value is impaired by the use does not necessarily render the use unlawful, where such is the natural result of the usual and legitimate exercise of the right of enjoyment, as in the case of timber or mineral lands held in common.<sup>2</sup> Where one tenant in common has used the property unlawfully or to the exclusion of his cotenant, he may become liable to the latter, either in an action of tort, or for an accounting, or for possession, or otherwise as the case may be. The question as to when the use becomes unlawful so as to give a right of action in each case will be discussed in other sections of this title.<sup>3</sup>

**b. AS TO CARE AND MANAGEMENT OF COMMON PROPERTY.** — In general, the tenant in possession may use and manage the common property in any way he chooses, provided he does not injure his cotenants.<sup>4</sup> And he may make necessary repairs and improvements at his own expense without rendering himself liable in trespass to his cotenants.<sup>5</sup> But one tenant in common will be liable to his cotenants for an injury to the common property. Thus he will be liable in trespass for flooding the common property without the consent of his cotenants, by means of a dam erected on land of which he is sole owner.<sup>6</sup> The occupying tenant may pay the taxes on the property<sup>7</sup> or redeem the property from a tax or other forced sale.<sup>8</sup> So, also, where an equity of redemption is held in common, any tenant may redeem or bring a suit to enforce the equity for the benefit of all the cotenants without express authority from the others.<sup>9</sup> In general, all acts done by one tenant for the protection or preservation of the common property will inure to the benefit of all the cotenants, who in a proper case may be called upon for contribution for the expense incurred in proportion to their respective interests.<sup>10</sup>

**Insurance of Separate Interest.** — A tenant in common may insure his individual interest in the common property, and in case of loss may recover and retain

1. See *infra*, this section, *Contracts Respecting Common Property — With Third Persons — Leasing Common Property, and Licensing Acts on Common Property.*

It is trespass for a tenant in common to eject a person who is on the premises by the permission of the cotenant. *McGarrell v. Murphy*, 1 Hilt. (N. Y.) 132.

2. See generally *McCord v. Oakland Quick-silver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686; *Ballou v. Wood*, 8 Cush. (Mass.) 48; *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Alford v. Bradeen*, 1 Nev. 228; *Dodd v. Watson*, 4 Jones Eq. (57 N. Car.) 48, 72 Am. Dec. 577; *Harman v. Gartman*, Harp. L. (S. Car.) 430, 18 Am. Dec. 656.

3. See *infra*, this section, *Duties and Liabilities — As to Rents and Profits, and As to Loss, Injury, or Destruction of Property; infra*, this title, *Actions Between Cotenants.*

4. *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Peabody v.*

*Minot*, 24 Pick. (Mass.) 329.

5. **Tenant in Possession May Make Repairs and Improvements.** — *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211, 2 M. & R. 267; *Newton v. Newton*, 17 Pick. (Mass.) 201; *Johnson v. Conant*, 64 N. H. 109.

6. *Hutchinson v. Chase*, 39 Me. 508, 63 Am. Dec. 645; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Great Falls Co. v. Worster*, 15 N. H. 412.

7. See *infra*, this section, *Duties and Liabilities — As to Expenses for Care and Management — Taxes.*

8. See *infra*, this section, *Purchase of Outstanding Title or Incumbrance*, and appropriate subsections.

9. *Gentry v. Gentry*, 1 Sneed (Tenn.) 87. And see the title EQUITY OF REDEMPTION, vol. 11, p. 217.

10. See notes and references immediately preceding. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 353 *et seq.*



the insurance money, his cotenants having no interest therein.<sup>1</sup>

c. **CONTRACTS RESPECTING COMMON PROPERTY** — (1) *With Each Other*. — Tenants in common may contract with each other concerning the use of the common property, and an action at law will lie in favor of the parties injured for a violation of such an agreement.<sup>2</sup> Thus, one tenant may make a valid agreement with his cotenants to pay them for the use of the common property for his own exclusive benefit.<sup>3</sup> Or the cotenants may agree that each may have the exclusive use of the property for a certain period of time,<sup>4</sup> or that each may have the exclusive use of a particular part of the property.<sup>5</sup> Again, the cotenants may enter into an enforceable agreement that one of them shall manage or sell the common property for a compensation.<sup>6</sup>

**Good Faith Required Between Cotenants**. — It seems that in respect to contracts between cotenants for the use or employment of the common property the parties are deemed to stand in a relation of mutual trust and confidence towards each other, and that each is bound in his dealings with the other to communicate all the information of facts within his knowledge which may affect the case; but in the case of a purchase and sale of the property between themselves they may deal with each other in the same manner as owners of separate property. Thus it has been held that a tenant in common of a vessel, in contracting with a cotenant for the purchase of the latter's share at a certain price, is under no legal obligation to disclose that a third person has previously agreed with him to purchase the whole vessel at a higher rate; but efforts on the part of such tenant in common to prevent his cotenant from coming to a knowledge of the truth, or any false representations on his part, will invalidate the transaction.<sup>7</sup>

(2) *With Third Persons* — (a) **In General**. — Cotenants may, of course, render themselves jointly liable to third persons by contracting jointly in respect to the common property.<sup>8</sup> But one tenant in common cannot bind his cotenant personally<sup>9</sup> nor by any unauthorized agreement or act in respect to the common property. There is no relationship existing between cotenants, as between partners, which will render the acts of one cotenant respecting the common property binding on the others.<sup>10</sup> No action of one or more of several

1. *Lawrence v. Van Horne*, 1 Cai. (N. Y.) 276; *Turner v. Burrows*, 5 Wend. (N. Y.) 541, 8 Wend. (N. Y.) 144; *Harvey v. Cherry*, 76 N. Y. 436; *Annely v. De Saussure*, 26 S. Car. 497, 4 Am. St. Rep. 725. See also *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302.

2. **Cotenants May Contract with Each Other Concerning Common Property**. — *Bond v. Hilton*, Busb. L. (44 N. Car.) 308, 59 Am. Dec. 552. See also *Penouilh v. Abraham*, 42 La. Ann. 326.

One tenant in common of lumber lands may agree that if his cotenants will furnish all the supplies for the manufacture of the lumber they shall have the exclusive control of the sale of it, and this will give to them the right to exclusive possession for the purpose of sale. *Corbett v. Lewis*, 53 Pa. St. 322.

As to the construction of particular agreements by tenants in common relating to the use and ownership of the common property, see *Goldsborough v. Martin*, 86 Md. 413.

**Invalid Oral Agreement**. — Under a statute providing that a mortgage can be created, renewed, or extinguished only by writing, it was held that an oral agreement between two tenants in common of land subject to a mortgage, that the share of one should be relieved from the mortgage and that of the other bear the whole burden, was void. *Porter v. Muller*, 65 Cal. 512.

3. **Tenant May Contract with Cotenant for Exclusive Use of Property**. — *Davies v. Skinner*, 58 Wis. 638, 46 Am. Rep. 665.

A tenant in common who has leased to his cotenant may distrain for the rent. *Snelgar v. Heuston*, Cro. Jac. 611; *Luther v. Arnold*, 8 Rich. L. (S. Car.) 24, 62 Am. Dec. 422.

4. **Apportionment of Exclusive Use by Periods**. — *Curtis v. Swearingen*, 1 Ill. 207; *Kidder v. Rixford*, 16 Vt. 169, 42 Am. Dec. 504.

5. **If by Agreement Tenants in Common Occupy Separate Parts of the Common Property**, trespass will lie by one of them against another who removes the property of the former from his portion of the property against his will. *Keay v. Goodwin*, 16 Mass. 1.

6. *Thompson v. Salmon*, 18 Cal. 632. See also *McCreery v. Green*, 38 Mich. 172.

7. *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

If a part owner of a mine fraudulently conceals from his co-owner his discovery of rich ore and buys his cotenant's interest in the mine at much less than its value, the sale will be set aside. *Daniel v. Brown*, 33 Fed. Rep. 849. See also *Gruber v. Baker*, 20 Nev. 453.

8. *Clifford v. Meyer*, 6 Ind. App. 633; *Matter of Robinson*, 40 N. Y. App. Div. 23.

9. *Brooks v. Harris*, 12 Ala. 555.

10. **Acts of One Tenant in Common Not Binding on Cotenants** — *California*. — *Pearis v. Covillaud*, 6 Cal. 617, 65 Am. Dec. 543.



tenants in common can impair the rights of the other cotenants.<sup>1</sup> Either cotenant may charge his separate interest, or may convey or mortgage it, or become personally liable upon an undertaking respecting it;<sup>2</sup> but one tenant in common cannot by a sale or incumbrance of his interest defeat any antecedent right growing out of the cotenancy which could have been enforced in favor of his cotenant in a proceeding for an equitable partition or for the specific performance of a contract.<sup>3</sup>

(b) *Leasing Common Property.* — A lease by one tenant of the common property, made without the knowledge or consent of his cotenants, is not binding on them.<sup>4</sup> But where a lease executed by one of the tenants is acquiesced in and adopted by his cotenants, his authority to make the lease is thereby recognized.<sup>5</sup> Tenants in common may, of course, join in making a valid lease of the common property.<sup>6</sup> And any cotenant may make a valid lease of his own

*Colorado.* — Rico Reduction, etc., Co. v. Musgrave, 14 Colo. 79.

*District of Columbia.* — Lipscomb v. Watrous, 3 App. Cas. (D. C.) 1.

*Georgia.* — Maddox v. Bramlett, 84 Ga. 84.

*Illinois.* — Stookey v. Carter, 92 Ill. 129; Baker v. Pratt, 15 Ill. 568; Williams v. Vandervilt, 145 Ill. 238, 36 Am. St. Rep. 486.

*Indiana.* — Edmunds v. Mounsey, 15 Ind. App. 399.

*Maine.* — Morrison v. Clark, 89 Me. 103, 56 Am. St. Rep. 395.

*Massachusetts.* — Merrill v. Berkshire, 11 Pick. (Mass.) 269.

*Missouri.* — St. Louis v. Laclede Gas Light Co., 96 Mo. 197, 9 Am. St. Rep. 334; Van Riper v. Morton, 61 Mo. App. 440.

*New York.* — St. Paul's Church v. Ford, 34 Barb. (N. Y.) 16; Corning v. Troy Iron, etc., Factory, 39 Barb. (N. Y.) 311; Jackson v. Moore, 6 Cow. (N. Y.) 706; Dobson v. Kuhnla, 66 Hun (N. Y.) 627, 20 N. Y. Supp. 771.

*Pennsylvania.* — Heeter v. Lyon, 5 Pa. Super. Ct. 260.

*Rhode Island.* — Dexter Lime-Rock Co. v. Dexter, 6 R. I. 353.

*Tennessee.* — Scott v. State, 1 Sneed (Tenn.) 629.

*Texas.* — Keen v. Casey, 22 Tex. 412; Hanks v. Enloe, 33 Tex. 624.

See also Fisher v. Seymour, 23 Colo. 542; Ronnebaum v. Mt. Auburn Cable R. Co., 29 Cinc. L. Bul. 338, 11 Ohio Dec. (Reprint) 787; Kirby v. Estill, 75 Tex. 484, 78 Tex. 426, (Tex. Civ. App. 1898) 48 S. W. Rep. 8.

*Release of Claim by One Cotenant.* — The general rule is laid down that where a claim against a stranger on account of the common property is one in which the cotenants must join as plaintiffs, a release by one cotenant is binding on all. Austin v. Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376. In this case it was so held in an action for a trespass. To the same effect see Bradley v. Boynton, 22 Me. 287, 39 Am. Dec. 582; Hodges v. Heal, 80 Me. 281, 6 Am. St. Rep. 199.

But where no joinder is necessary a release by one cotenant does not bind another. Wilston v. Gamble, 9 N. H. 74; Decker v. Livingston, 15 Johns. (N. Y.) 479; Gock v. Keneda, 29 Barb. (N. Y.) 120.

One tenant in common of a patent right cannot by a release destroy the right of his cotenant to recover for an infringement. Lalance, etc., Mfg. Co. v. Haberman Mfg. Co., 93 Fed. Rep. 197. See also *In re Horsley*, L. R. 8 Eq. 475.

*Payment to One Tenant in Common* for the use and occupation of the common property and for waste committed thereon is a good defense to an action by the other cotenants for such use and occupation and waste. Grossman v. Lauber, 29 Ind. 618.

1. *One Tenant in Common Cannot Impair Rights of Cotenants.* — Mahoney v. Van Winkle, 21 Cal. 552; Murray v. Haverty, 70 Ill. 318.

One joint tenant of a patent right cannot sell or otherwise affect the right of his cotenant. *In re Horsley*, L. R. 8 Eq. 475.

The acts of some of the grantees, tenants in common, in locating land under a deed will not affect the other cotenants, unless it appears that these acts were sanctioned by them. Jackson v. Moore, 6 Cow. (N. Y.) 706.

2. *St. Paul's Church v. Ford*, 34 Barb. (N. Y.) 16. See also *infra*, this section, *Sale or Conveyance of Common Property — Of One's Own Interest.*

One tenant in common may mortgage his interest in the common property to secure his individual indebtedness, unless such property was purchased by the cotenants with partnership funds for partnership purposes. *Ruppe v. Steinbach*, 48 Mich. 465. But it is otherwise where by agreement and use the property is considered as partnership property. See *Cavander v. Buiteel*, L. R. 9 Ch. 79.

3. *Sale or Incumbrance of Individual Interest of One Cotenant Cannot Affect Rights of Others.* — Foltz v. Wert, 103 Ind. 404; Peck v. Williams, 113 Ind. 256; Beck v. Kallmeyer, 42 Mo. App. 563.

One tenant in common of mortgaged property cannot, by conveying to a stranger his entire interest in the property, charge the whole debt primarily on the share of his cotenant, but the whole property remains as before liable for the entire debt. *Walker v. Sarven*, (Fla. 1899) 25 So. Rep. 885; *Southworth v. Parker*, 41 Mich. 198.

4. *Lease of Entire Property by One Cotenant Not Binding on Others.* — Moreland v. Strong, 115 Mich. 211, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1094; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; McKinley v. Peters, 111 Pa. St. 283; Vaughan v. Cravens, 1 Head (Tenn.) 108, 73 Am. Dec. 163. See also *Godfrey v. Cartwright*, 4 Dev. L. (15 N. Car.) 487.

5. *Valentine v. Healey*, 158 N. Y. 369. See also *Austin v. Ahearne*, 61 N. Y. 6.

6. *Joint Lease by Cotenants.* — *Martens v. O'Connor*, 101 Wis. 18. See generally as to rights of cotenants under a joint lease, *Innis*



interest, and his lessee acquires under such lease the same right of possession as against the other cotenant that his lessor had.<sup>1</sup> So a lease of the common property executed by one of the tenants in common without the consent of his cotenants, but not interfered with by the latter, is binding on the parties to the lease.<sup>2</sup> Where tenants in common lease the common property without the consent or concurrence of a cotenant, the latter may repudiate the lease and assert his rights as a cotenant against the lessee, or he may ratify and affirm the lease, and will then be entitled to his proper share of the benefits derived under it.<sup>3</sup>

(c) *Licensing Acts on Common Property.* — The general principles as to the power of one tenant in common to contract with strangers in respect to the common property apply to the case of the grant of a license by one cotenant. One tenant in common may license a stranger to use the property in such manner as would be permissible in himself, but such license will not affect the interest or rights of the other cotenants.<sup>4</sup> Thus a license to dig ore in a mine given by one tenant in common of the mine extends only to his interest therein, and is not binding on the other cotenants.<sup>5</sup> But where the relationship between the cotenants is such that one may be presumed to have authority to act for the others, a license granted by one will be binding on all.<sup>6</sup> One tenant in common may not grant a license to perform any act upon or about the common property which will be detrimental to the interests of his cotenants, as to commit waste.<sup>7</sup>

d. *PURCHASE OF OUTSTANDING TITLE OR INCUMBRANCE* — (1) *General Rule* — *Purchase by One Inures to Benefit of All.* — In the *United States* the general rule is well settled that one cotenant cannot purchase an outstanding title or incumbrance affecting the common estate for his own exclusive benefit, and assert such right against the other cotenants; but such purchase will inure

*v. Crawford*, 4 Bibb (Ky.) 241; *Harrison v. Botts*, 4 Bibb (Ky.) 420; *Nixon v. Potts*, 1 Hawks (8 N. Car.) 469; *Hoyle v. Stowe*, 2 Dev. L. (13 N. Car.) 318.

Upon a joint lease by tenants in common the survivor may sue for the whole rent although the reservation be to the lessors according to their respective interests. *Wallace v. McLaren*, 1 M. & R. 516, 17 E. C. L. 273. See also *Codman v. Hall*, 9 Allen (Mass.) 335.

Where, in a lease by two tenants in common, the rent is reserved to them jointly, it is nevertheless payable to them only in proportion to their respective interests. *Stark's Estate*, 9 Kulp (Pa.) 120.

**Tenants in Common May Maintain a Joint Action to Recover Rent** when there is an agreement to pay the entire rent to the lessors; and a memorandum annexed to and forming part of the lease, by which it is agreed that one-half of the rent to be paid to the two lessors jointly shall be paid to each of them separately, does not make the lease several, but simply regulates the mode of payment. *Wall v. Hinds*, 4 Gray (Mass.) 256, 64 Am. Dec. 64.

1. **Lease by Cotenant of His Own Interest.** — *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593; *Barnum v. Landon*, 25 Conn. 137; *Harms v. McCormick*, 132 Ill. 104; *Keay v. Goodwin*, 16 Mass. 1; *Rising v. Stannard*, 17 Mass. 282; *Harman v. Gartman*, Harp. L. (S. Car.) 430, 18 Am. Dec. 656.

One tenant in common cannot seize to his own use ores mined by a lessee of his cotenant. *Blewett v. Coleman*, 40 Pa. St. 45.

See generally *infra*, this section, *Sale or Conveyance of Common Property*.

2. *Colorado Fuel, etc., Co. v. Pryor*, 25 Colo. 540.

3. *Starks v. Sikes*, 8 Gray (Mass.) 609, 69 Am. Dec. 270. To the same effect see *Enterprise Oil, etc., Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746.

4. **License to Stranger by Cotenant.** — *Menzies v. Macdonald*, 36 Eng. L. & Eq. 24; *Alford v. Bradeen*, 1 Nev. 228; *Shepherd v. Young*, 2 La. Ann. 238.

**Entry under License of One.** — An entry upon common land under a license from one of the cotenants will be presumed not to be unlawful or adverse to the other tenants. *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243; *Bucknam v. Bucknam*, 30 Me. 494.

5. *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Tipping v. Robbins*, 64 Wis. 546. See also *Grubb v. Grubb*, 74 Pa. St. 25.

6. **License Where Cotenants Are Also Partners.** — A license by one of two tenants in common of land who are also partners in the lumber business, to a third person, to cut timber from the common land from which the cotenants procure timber in their business, is good and confers title to the timber cut thereunder by the licensee. *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66.

7. *Murray v. Havery*, 70 Ill. 318; *Richey v. Brown*, 58 Mich. 435.

One tenant in common has no authority as such without the consent of his cotenants to grant to a stranger the right to cut timber on the common property, but such authority may be inferred from circumstances. *Baker v. Whiting*, 3 Sumn. (U. S.) 475.



to the benefit of all, the purchaser being entitled to contribution from the other cotenants for their proportionate share of the purchase price.<sup>1</sup>

**Rule Qualified as to Tenants in Common.**—It is held by some courts that the general rule does not apply to the case of tenants in common except where their interests have accrued under the same instrument, or act of the parties or of the law, and that persons acquiring unconnected interests in the same property are not bound to any greater protection of each other's interests than would be required of strangers.<sup>2</sup> This distinction has been expressly repudi-

**1. Purchase of Outstanding Title by One Cotenant Inures to Benefit of All.**—*United States.*—*Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Rothwell v. Dewees*, 2 Black. (U. S.) 613; *Turner v. Sawyer*, 150 U. S. 578; *Myers v. Reed*, 17 Fed. Rep. 401.

*Alabama.*—*Inglis v. Webb*, 117 Ala. 387, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1078, 1082.

*Arkansas.*—*Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Clements v. Cates*, 49 Ark. 242.

*California.*—*Olney v. Sawyer*, 54 Cal. 379.

*Colorado.*—*Gillett v. Gaffney*, 3 Colo. 351; *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118; *Hodgson v. Fowler*, 24 Colo. 278, reversing 7 Colo. App. 378.

*Illinois.*—*Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Bracken v. Cooper*, 80 Ill. 221; *Smith v. Osborne*, 86 Ill. 606; *Montague v. Selb*, 106 Ill. 49; *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227; *Boyd v. Boyd*, 176 Ill. 40.

*Indiana.*—*McPheeters v. Wright*, 124 Ind. 560, quoting 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1082; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422.

*Iowa.*—*Leach v. Hall*, 95 Iowa 611.

*Kentucky.*—*Venable v. Beauchamp*, 3 Dana (Ky.) 321, 28 Am. Dec. 74; *Sneed v. Atherton*, 6 Dana (Ky.) 276, 32 Am. Dec. 70. See *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723.

*Michigan.*—See *Retan v. Sherwood*, (Mich. 1899) 79 N. W. Rep. 692.

*Minnesota.*—*Oliver v. Hedderly*, 32 Minn. 455; *Holterhoff v. Mead*, 36 Minn. 42.

*Missouri.*—*Jones v. Stanton*, 11 Mo. 433; *Picot v. Page*, 26 Mo. 398; *Dillinger v. Kelley*, 84 Mo. 561; *Hinters v. Hinters*, 114 Mo. 26.

*Nebraska.*—*Brown v. Homan*, 1 Neb. 448; *Carson v. Broady*, 56 Neb. 648, citing 7 AM. AND ENG. ENCYC. OF LAW (2d ed.) 354.

*Nevada.*—*Boskowitz v. Davis*, 12 Nev. 446.

*New York.*—*Van Horn v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Knolls v. Barnhart*, 71 N. Y. 474; *Carpenter v. Carpenter*, 131 N. Y. 101, 27 Am. St. Rep. 569; *Collins v. Collins*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 28, affirmed 131 N. Y. 648. To the same effect is *Swinburne v. Swinburne*, 28 N. Y. 567.

*Oregon.*—*Dray v. Dray*, 21 Oregon 59; *Wheeler v. Taylor*, 32 Oregon 421.

*Pennsylvania.*—*Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Keller v. Auble*, 58 Pa. St. 470, 98 Am. Dec. 297; *Duff v. Wilson*, 72 Pa. St. 442; *Dickey's Appeal*, 73 Pa. St. 218; *McGranighan v. McGranighan*, 19 Pa. Co. Ct. 75, 6 Pa. Dist. 33; *Hite v. Hite*, 21 Pa. Co. Ct. 97.

*Tennessee.*—*Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775. See also *Lafferty v. Turley*, 3 Sneed (Tenn.) 158.

*Texas.*—*Thomas v. Morrison*, (Tex. Civ. App. 1898) 46 S. W. Rep. 46.

*Vermont.*—See *Braintree v. Battles*, 6 Vt. 395, *House v. Fuller*, 13 Vt. 165, 37 Am. Dec. 588.

*Virginia.*—*Buchanan v. King*, 22 Gratt. (Va.) 414; *Forrer v. Forrer*, 29 Gratt. (Va.) 135. See also *Hall v. Caldwell*, 97 Va. 311.

*West Virginia.*—*Bowers v. Dickinson*, 30 W. Va. 709; *Gilchrist v. Beswick*, 33 W. Va. 168.

*Wisconsin.*—*Rountree v. Denson*, 59 Wis. 522.

See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 353 *et seq.*

**Cotenants of Public Lands.**—The general rule does not apply to the case of co-occupants of the public lands, where one acquires title from the United States, in the absence of fraud or special contract. *Sullivan v. McLennans*, 2 Iowa 437, 65 Am. Dec. 780; *Gillett v. Gaffney*, 3 Colo. 351.

**Purchase of Outstanding Mortgage.**—It has been held that the general rule does not apply to the purchase of an outstanding mortgage on the common property by one tenant in common. Such a title may temporarily inure to the benefit of the purchaser, but it leaves his cotenant in the full enjoyment of the right of redemption that he previously enjoyed. The acquisition of the mortgage title by assignment by one of the cotenants operates as a merger as to his interest in the property, but leaves the mortgage in full force as to the other shares of the estate. *Blodgett v. Hildreth*, 8 Allen (Mass.) 186.

**Purchase to Protect Possession.**—A person in possession of land claiming title may purchase an outstanding title to protect that possession. *Jackson v. Smith*, 13 Johns. (N. Y.) 406.

**2. Rule Qualified as to Tenants in Common.**—*Myers v. Reed*, 17 Fed. Rep. 401; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Elston v. Piggott*, 94 Ind. 14; *Moon v. Jennings*, 119 Ind. 130, 12 Am. St. Rep. 383; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; *King v. Rowan*, 10 Heisk. (Tenn.) 675; *Roberts v. Thorn*, 25 Tex. 728, 38 Am. Dec. 552; *Ripetoe v. Dwyer*, 49 Tex. 498, 72 Tex. 520; *Fielding v. White*, (Tex. Civ. App. 1895) 32 S. W. Rep. 1054; *Wright v. Sperry*, 21 Wis. 331; *Frentz v. Klotsch*, 28 Wis. 312. See also *Burr v. Mueller*, 65 Ill. 258; *Smith v. Washington*, 11 Mo. App. 519; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; *Cecil v. Clark*, 44 W. Va. 659.

In *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 338, Chancellor Kent intimated that there may be cases in which one tenant in common may



ated in several cases.<sup>1</sup>

**Purchase Made Through or in Name of Third Person.** — The fact that the purchase of the outstanding claim or title is made through or in the name of a third person does not change the general rule that such purchase will inure to the benefit of all the cotenants.<sup>2</sup>

**English Rule.** — The question as to the right of one tenant in common to acquire and hold for his exclusive benefit an outstanding title to or incumbrance on the common property does not appear to have been often raised in England, but in a recent case it was held that there is no fiduciary relation existing between tenants in common as such, and that a tenant in common of mortgaged property who purchased the property at the mortgage sale was entitled to hold it for his sole benefit.<sup>3</sup>

(2) *Purchase of Property at Forced Sale* — (a) **At Judicial Sale.** — The general rule applies to the purchase by one tenant of the property at a judicial sale, and such purchase will inure to the benefit of his cotenants.<sup>4</sup> There is no rule of law, however, forbidding one tenant in common to purchase the interest of his cotenant at such sale, this not being the purchase of a hostile or adverse title.<sup>5</sup>

(b) **At Tax Sale.** — Thus the rule applies to a purchase of the common property by one of the cotenants at a tax sale, and the title thus acquired inures to the benefit of the other cotenants.<sup>6</sup> This rule is sustained upon the general ground of the existence of a confidential relation between the cotenants,<sup>7</sup> or, according to some courts, on the ground that since the sale is occasioned by the default of the purchaser as well as that of his cotenants in failing to pay the taxes, it would be inequitable to permit him to take advantage of his own default to acquire the title of his cotenants.<sup>8</sup>

purchase an outstanding title for his exclusive benefit. The qualification of the general rule seems to derive its authority from Kent's suggestion, and particularly from a note to *Keech v. Sandford*, 1 Hare & W. Lead. Cas. 36, in which it was said: "But tenants in common, probably, are subject to this mutual obligation only when their interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another; for persons acquiring unconnected interests in the same subject, by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests than would be required between strangers." The only authority cited for this position is *Matthews v. Bliss*, 22 Pick. (Mass.) 48.

1. **Qualification of Rule Repudiated.** — *Bracken v. Cooper*, 80 Ill. 221; *Montague v. Selb*, 106 Ill. 49; *Boyd v. Boyd*, 176 Ill. 40. See also *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118.

2. *Miller v. Mills*, 4 Neb. 362; *Duff v. Wilson*, 72 Pa. St. 442; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678. See also *Bracken v. Cooper*, 80 Ill. 221.

3. *Kennedy v. De Trafford*, (1897) A. C. 180, commenting on *Van Horn v. Fonda*, 5 Johns. Ch. (N. Y.) 388.

4. **Purchase of Property by One Cotenant at Judicial Sale.** — *Gibson v. Winslow*, 46 Pa. St. 380, 84 Am. Dec. 552; *McGranighan v. McGranighan*, 185 Pa. St. 340; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775.

5. **Purchase of Cotenant's Interest at Judicial Sale.** — *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Gunter v. Laffan*, 7 Cal. 588; *Burr*

*v. Mueller*, 65 Ill. 258; *Elston v. Piggott*, 94 Ind. 14; *Baird v. Baird*, 1 Dev. & B. Eq. (21 N. Car.) 524, 31 Am. Dec. 399. See also *Threadgill v. Redwine*, 97 N. Car. 241.

6. **Purchase by One Cotenant at Tax Sale** — *Alabama*. — *Johns v. Johns*, 93 Ala. 239.

*Arkansas*. — *Moore v. Woodall*, 40 Ark. 42; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28.

*Illinois*. — *Lewis v. Ward*, 99 Ill. 525.

*Iowa*. — *Weare v. Van Meter*, 42 Iowa 128, 20 Am. Rep. 616; *Austin v. Barrett*, 44 Iowa 488; *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164; *Van Ormer v. Harley*, 102 Iowa 150. See also *Sheean v. Shaw*, 47 Iowa 411.

*Kansas*. — *Delashmutt v. Parrent*, 39 Kan. 548.

*Maine*. — *Williams v. Gray*, 3 Me. 207, 14 Am. Dec. 234.

*Michigan*. — *Page v. Webster*, 8 Mich. 263, 77 Am. Dec. 446; *Butler v. Porter*, 13 Mich. 292; *Dubois v. Campau*, 24 Mich. 360.

*Mississippi*. — *Wise v. Hyatt*, 68 Miss. 714.

*Ohio*. — *Clark v. Lindsey*, 47 Ohio St. 437.

*Pennsylvania*. — *Davis v. King*, 87 Pa. St. 261; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678.

*South Dakota*. — *Johnson v. Brauch*, 9 S. Dak. 116.

*Vermont*. — *Downer v. Smith*, 38 Vt. 464.

It is a fraud for one tenant in common to permit the sale of the common property for taxes, he himself becoming the purchaser for his own exclusive benefit. *Brown v. Hogle*, 30 Ill. 119.

7. *Davis v. King*, 87 Pa. St. 261; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678. See *Downer v. Smith*, 38 Vt. 464.

8. *Delashmutt v. Parrent*, 39 Kan. 548; *Page*



(3) *Purchase of Tax Title.* — Where property owned in common is sold for taxes it may be redeemed by any one of the cotenants,<sup>1</sup> but one tenant in common cannot acquire a tax title to the prejudice of his cotenants, and the redemption in such case will inure to the benefit of all.<sup>2</sup> But the tenant redeeming the property is entitled to contribution from his cotenants.<sup>3</sup> And it has been held that the tenant who has redeemed the whole property has a lien on the share of his cotenants for reimbursement, though he has no right of action to enforce it. But until such reimbursement has been made or tendered, a delinquent cotenant cannot maintain an action for the recovery of the property.<sup>4</sup>

*Purchase of Tax Title by Grantee of One Cotenant.* — The rule applies not only to the purchase of a tax title by a tenant in common himself, but also to a purchase by his grantee, who acquires merely his grantor's interest, and is charged with the same duties and obligations towards the other cotenants, and can do no act to divest their interests that his grantor could not do.<sup>5</sup>

*Purchase After Expiration of Period of Redemption.* — Where property held in common is sold for taxes or at other forced sale, one of the cotenants may purchase the title to the whole property from the purchaser at such sale after the period of redemption has expired, and may hold it for his own benefit.<sup>6</sup> But the rule is otherwise where the period of redemption has been permitted to

*v. Webster*, 8 Mich. 263, 77 Am. Dec. 446; *Butler v. Porter*, 13 Mich. 292; *Dubois v. Campau*, 24 Mich. 360. See also *Emeric v. Alvarado*, 90 Cal. 444; *Austin v. Barrett*, 44 Iowa 488.

1. *One Cotenant May Redeem Common Property Sold for Taxes.* — *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637; *Loomis v. Pingree*, 43 Me. 299; *Hurley v. Hurley*, 148 Mass. 444; *Halsey v. Blood*, 39 Pa. St. 319.

One tenant in common may redeem for himself and his cotenant. *Halsey v. Blood*, 29 Pa. St. 319.

2. *Purchase of Tax Title by One Cotenant Enures to Benefit of All* — *Alabama.* — *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1082-1086.

*California.* — *Emeric v. Alvarado*, 90 Cal. 444.

*Illinois.* — *McChesney v. White*, 140 Ill. 330; *Lomax v. Gindele*, 117 Ill. 527; *Goralski v. Kostuski*, 179 Ill. 177.

*Indiana.* — *Bender v. Stewart*, 75 Ind. 88.

*Iowa.* — *Weare v. Van Meter*, 42 Iowa 128, 20 Am. Rep. 616; *Flinn v. McKinley*, 44 Iowa 68; *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164; *Shell v. Walker*, 54 Iowa 386; *Conn v. Conn*, 58 Iowa 747; *Tice v. Derby*, 59 Iowa 312; *Smith v. Smith*, 68 Iowa 608; *Clark v. Brown*, 70 Iowa 130; *Phillips v. Wilmarth*, 98 Iowa 32; *Funson v. Bradt*, 105 Iowa 471.

*Kansas.* — *Muthersbaugh v. Burke*, 33 Kan. 260.

*Maine.* — *Williams v. Gray*, 3 Me. 207, 14 Am. Dec. 234.

*Michigan.* — *Dubois v. Campau*, 24 Mich. 360; *Richards v. Richards*, 75 Mich. 408.

*Minnesota.* — *Easton v. Scofield*, 66 Minn. 425.

*Mississippi.* — *Allen v. Poole*, 54 Miss. 323; *Harrison v. Harrison*, 56 Miss. 174; *Fox v. Coon*, 64 Miss. 465; *Hardy v. Gregg*, (Miss. 1887) 2 So. Rep. 358; *Falkner v. Thurmond*, (Miss. 1898) 23 So. Rep. 584.

*New Hampshire.* — *Barker v. Jones*, 62 N. H. 497.

*Oregon.* — *Minter v. Durham*, 13 Oregon 470.

*Pennsylvania.* — *In re Brown*, 2 Pa. St. 463.

*South Dakota.* — *Johnson v. Brauch*, 9 S. Dak. 116.

*Tennessee.* — See *Hall v. Calvert*, (Tenn. Ch. 1897) 46 S. W. Rep. 1120.

*West Virginia.* — *Battin v. Woods*, 27 W. Va. 58; *Cecil v. Clark*, 44 W. Va. 659; *Parker v. Brast*, 45 W. Va. 399.

*Wisconsin.* — *Frentz v. Klotsch*, 28 Wis. 312.

*Purchase by Trustee of Cotenants.* — One who holds property as trustee for several cotenants cannot, either alone or in conjunction with a stranger, acquire a tax title to the property to himself as against the cotenants. *Sorenson v. Davis*, 83 Iowa 405.

3. *Weare v. Van Meter*, 42 Iowa 128, 20 Am. Rep. 616; *Williams v. Gray*, 3 Me. 207, 14 Am. Dec. 234. See also the cases cited in the note immediately preceding.

4. *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637, *distinguishing* *Williams v. Gray*, 3 Me. 207, 14 Am. Dec. 234.

Where one tenant in common has redeemed the common property from a tax sale, the tax lien continues for his benefit to secure contribution from his cotenants, and until payment the cotenants have no right to the possession of any part of the land; and the fact that the purchasing tenant has not taken the steps prescribed by Pub. Stat. Mass. (1882), c. 12, §§ 63-65, to assert and preserve his lien, does not affect his rights, since that statute applies only to payment in the first instance. *Hurley v. Hurley*, 148 Mass. 444.

5. *Austin v. Barrett*, 44 Iowa 488.

6. *Purchase After Expiration of Period for Redemption.* — *Lewis v. Robinson*, 10 Watts (Pa.) 354; *Kirkpatrick v. Mahiot*, 4 W. & S. (Pa.) 251; *Reimboth v. Zerbe Run Imp. Co.*, 29 Pa. St. 139; *Keele v. Cunningham*, 2 Heisk. (Tenn.) 288. This doctrine is also recognized in *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637.



expire through the fraud of the purchasing cotenant.<sup>1</sup>

(4) *Purchase by Husband or Widow of Cotenant.* — The reason of the rule applies as forcibly to the husband of a tenant in common as to one of the immediate cotenants, and hence a purchase by such husband of an outstanding title will inure to the benefit of his wife's cotenants.<sup>2</sup> The general rule applies also to the case of a purchase by a widow of one of two cotenants having a dower interest in the estate of her deceased husband.<sup>3</sup>

(5) *Purchase by Cotenant Holding Adversely.* — It has been stated that the general rule applies to all cases of the purchase of an outstanding title by one of several cotenants, although the purchaser may claim to be the sole owner of the property, and, it seems, although he has ousted his cotenants.<sup>4</sup> It has been held, however, in several cases that where a tenant in common enters under a title adverse to that of the other cotenants, and not as a tenant in common with them, he is under no obligation to protect their interests, and may, as against them, purchase for his own exclusive benefit an outstanding title or incumbrance.<sup>5</sup>

(6) *Rule Limited to Purchase of Hostile Interests.* — The rule that one tenant in common cannot acquire an outstanding title or incumbrance for his own exclusive benefit is limited in its application to the acquisition of hostile interests, and does not apply to the acquisition of interests not antagonistic or adverse to those of the other cotenants. Thus, where several persons are tenants in common of a leasehold estate, one of them may purchase the fee from the common landlord for his own exclusive benefit, acquiring thereby, however, only such rights as his grantor had.<sup>6</sup> So, also, the rule does not apply to a purchase by one cotenant of the interest of another, and such title, not being hostile to the other cotenants, may be so purchased without consulting them.<sup>7</sup>

(7) *Rule Applies Only During Existence of Cotenancy* — *Purchase of Outstanding Title After Termination of Cotenancy.* — The general rule applies only during the continuance of the cotenancy, while the parties have a continuing community of interest in the property affected by the outstanding claim. Neither the doctrine nor the reason thereof has any application where the cotenancy has terminated.<sup>8</sup> Thus, where tenants in common of encumbered property become

1. *Purchase by Tenant Guilty of Fraud.* — *Dray v. Dray*, 21 Oregon 59.

Where, without the consent of his cotenants, a tenant in common of mortgaged property agreed with the holder of the mortgage that the latter should foreclose, bid in the property, and after the expiration of the time for redemption should convey it to such tenant on being paid the amount of the mortgage debt and costs of foreclosure, and this agreement was carried out, it was held that the other cotenants were entitled to share in the benefits of the transaction on making contribution to the expense. *Oliver v. Hedderly*, 32 Minn. 455.

2. *Purchase by Husband of Cotenant.* — *Rothwell v. Dewees*, 2 Black (U. S.) 613; *Busch v. Huston*, 75 Ill. 343; *Lee v. Fox*, 6 Dana (Ky.) 176; *Perkins v. Smith*, (Ky. 1896) 37 S. W. Rep. 72; *Robinson v. Lewis*, 68 Miss. 69, 24 Am. St. Rep. 254.

3. *Enyard v. Enyard*, 190 Pa. St. 114, following *Weaver v. Wible*, 25 Pa. St. 270.

4. *Cecil v. Clark*, 44 W. Va. 659.

5. *Purchase of Outstanding Title by Cotenant Claiming Adversely.* — *Sands v. Davis*, 40 Mich. 14; *Hilton v. Bender*, 2 Hun (N. Y.) 1, reversed on another point 69 N. Y. 75; *Burhans v. Van Zandt*, 7 Barb. (N. Y.) 91; *Wheeler v. Taylor*,

32 Oregon 421. See also *Larman v. Huey*, 13 B. Mon. (Ky.) 436.

A tenant in common of land holding by title adverse to that of his cotenant may acquire title to the whole property good against his cotenant by purchase of an outstanding tax deed covering the whole. *Wright v. Sperry*, 21 Wis. 331. See also *Miller v. Donahue*, 96 Wis. 498.

6. *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227.

7. *Purchase of Interest of Cotenant.* — *Bissell v. Foss*, 114 U. S. 252; *Snell v. Harrison*, 104 Mo. 158; *Mace v. Mace*, 24 N. Y. App. Div. 291; *Catlin v. Kidder*, 7 Vt. 12. See also *supra*, this section, *Purchase of Property at Forced Sale — At Judicial Sale*.

The executor of the will of one tenant in common may purchase the interest of another cotenant and hold it for his own benefit. *Alexander v. Kennedy*, 3 Grant Cas. (Pa.) 379.

8. *Purchase After Termination of Cotenancy.* — See cases cited in notes immediately following.

A tenant in common may acquire a tax title to the common property after he has ceased to be such, and may hold such title against his former cotenants. *Jonas v. Flanniken*, 69 Miss. 577; *Davis v. Cass*, 72 Miss. 985.



involved in litigation among themselves, and their joint interests are sold by order of court to a stranger, one of the former cotenants may purchase the outstanding incumbrance for his own exclusive benefit.<sup>1</sup> So, after an eviction of the tenants in common by a paramount title, either may purchase such title for his own exclusive benefit.<sup>2</sup> So, also, where the title under which the cotenants hold proves to be void so that the cotenancy never had any lawful existence.<sup>3</sup>

**Purchase Before Cotenancy Began.** — A purchase of an outstanding title by one not at the time a tenant in common of the property, but who afterwards becomes such, is valid.<sup>4</sup> This is not the case, however, if the purchase, though begun before the purchaser became a cotenant, is not completed until after the cotenancy arises. Thus the purchase of a tax certificate before the period of redemption has expired, by one who is not a tenant in common of the property at the time, but who becomes such before he gets the tax deed, will inure to the benefit of the other cotenants.<sup>5</sup>

(8) *Contribution by Cotenants.* — The doctrine that an outstanding title bought in by one joint tenant or tenant in common inures to the benefit of his cotenants is one of equitable cognizance, and courts of equity will mould and apply it so as to do justice among the cotenants.<sup>6</sup> And if one cotenant desires to avail himself of the purchase of an outstanding title by another, he must contribute his proper proportion of the purchase price.<sup>7</sup>

**He Has a Reasonable Time** in which to make his election to claim the benefit and contribute to the expense incurred, but he is required to exercise reasonable diligence in making such election. Unless he makes his election to participate within a reasonable time, and contributes or offers to contribute his proportion of the consideration paid, he will be deemed to have repudiated the transaction and abandoned its benefits.<sup>8</sup>

**Notice.** — But before a cotenant will be considered to have forfeited his right to participation by his delay, it must appear that he had notice not only of the purchase of the outstanding title by his cotenant, but also of the exclusive claim set up by the latter. He may reasonably presume that the purchase was made in support of the common title, and may act upon that presumption, considering the outlay simply as a joint charge to be settled and accounted for as any other necessary expense incurred in protecting the joint estate.<sup>9</sup>

One tenant in common may purchase the common property at a partition sale. *Carpenter v. Carpenter*, 131 N. Y. 101, 27 Am. St. Rep. 569.

1. *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312, *affirming* 13 Barb. (N. Y.) 561.

2. **Where Cotenancy Is Destroyed by Adverse Claim by Stranger.** — *Coleman v. Coleman*, 3 Dana (Ky.) 398, 28 Am. Dec. 86. To the same effect see *Alexander v. Sully*, 50 Iowa 192; *Mice v. Mace*, 24 N. Y. App. Div. 291.

3. **Cotenants Holding under Void Grants.** — *Smiley v. Dixon*, 1 P. & W. (Pa.) 439.

4. *Sneed v. Atherton*, 6 Dana (Ky.) 276, 32 Am. Dec. 70; *Carson v. Broady*, 56 Neb. 648.

5. *Flinn v. McKinley*, 44 Iowa 68; *Tice v. Derby*, 59 Iowa 312.

6. *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251.

7. See cases cited under the several subdivisions of this section. And see generally the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

8. **Cotenant Must Elect to Take Advantage of Purchase Within Reasonable Time.** — *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Mandeville v. Solomon*, 39 Cal. 125; *Burr v. Mueller*, 65 Ill. 258; *Stevens v. Reynolds*, 143 Ind. 467,

52 Am. St. Rep. 422; *Potter v. Herring*, 57 Mo. 184; *Reed v. Reed*, (Mich. 1899) 80 N. W. Rep. 996, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1083; *McFarlin v. Leaman*, (Tex. Civ. App. 1895) 29 S. W. Rep. 44; *Buchanan v. King*, 22 Gratt. (Va.) 414; *Cecil v. Clark*, 44 W. Va. 659; *Morris v. Roseberry*, (W. Va. 1899) 32 S. E. Rep. 1019.

**Right of Election Personal.** — This right of election is a personal option and not a right attaching to the estate, and cannot be exercised by a mortgagee of such tenant in common. *Burr v. Mueller*, 65 Ill. 258.

9. **Cotenant Must Have Notice of Claim for Contribution.** — *Buchanan v. King*, 22 Gratt. (Va.) 414; *Cecil v. Clark*, 44 W. Va. 659.

The principle that where one tenant in common purchases an outstanding title for the benefit of his cotenants the latter must within a reasonable time contribute or offer to contribute their proportion of the purchase money applies only where the purchasing cotenant wishes to be paid and conducts himself accordingly. If he does not desire to be paid by his cotenants, or conveys to them the idea that they need not pay until convenient, the principle does not apply. *Boskowitz v. Davis*, 12 Nev. 446.



The Burden is upon the purchasing tenant to show that his cotenant had notice of the purchase and of the exclusive claim set up by him.<sup>1</sup>

*e. ASSAILING COMMON TITLE.* — One tenant in common claiming a right to the possession of property as such will not be permitted to assail the common title or call its validity in question.<sup>2</sup> But the rule appears to be otherwise where the tenant assailing the common title denies or does not acknowledge the existence of the cotenancy, but is regarded as being a tenant in common merely by operation of law.<sup>3</sup> So, also, it seems that a tenant in common who acquires his interest from a source entirely independent of and disconnected from that from which his cotenants derive title may dispute the validity of their title.<sup>4</sup> Nor does the rule apply to the case of a tenant in common disputing the right of his cotenant on the ground that such right has been lost by adverse possession.<sup>5</sup>

*f. SALE OR CONVEYANCE OF COMMON PROPERTY* — (1) *Of Whole Property.* — A sale by a joint tenant or tenant in common of the whole of the common property passes only his own interest therein, and does not affect the interest of his cotenants,<sup>6</sup> unless such transfer has been duly authorized<sup>7</sup> or ratified<sup>8</sup> by them. But such a sale will pass the seller's own title, and his vendee will take just such interest and title in the property as the seller himself had, and will become a tenant in common with the other original

1. *Buchanan v. King*, 22 Gratt. (Va.) 414.

2. *Bornheimer v. Baldwin*, 42 Cal. 27; *Olney v. Sawyer*, 54 Cal. 379; *Millis v. Roof*, 121 Ind. 360; *Carlyle v. Patterson*, 3 Bibb (Ky.) 93.

3. *Denial of Common Title by One Denying Existence of Cotenancy.* — See *Olney v. Sawyer*, 54 Cal. 379; *Vasquez v. Ewing*, 24 Mo. 31, 66 Am. Dec. 694.

4. *Millis v. Roof*, 121 Ind. 360.

5. See *Phelan v. Kelley*, 25 Wend. (N. Y.) 389.

6. *Sale of Entire Property by One Tenant Void as to Other Tenants* — *United States*. — *Pitts v. Hall*, 3 Blatchf. (U. S.) 201.

*California.* — *People v. Marshall*, 8 Cal. 51; *Hager v. Spect*, 52 Cal. 579.

*Georgia.* — *Sewell v. Holland*, 61 Ga. 608; *McRea v. Dutton*, 95 Ga. 267; *New England Mortg. Security Co. v. Gordon*, 95 Ga. 781.

*Indiana.* — *Sims v. Dame*, 113 Ind. 127.

*Kentucky.* — *Carlyle v. Patterson*, 3 Bibb (Ky.) 93. See also *Sneed v. Waring*, 2 B. Mon. (Ky.) 522.

*Michigan.* — *Petit v. Flint, etc.*, R. Co., 114 Mich. 362.

*Missouri.* — *Allen v. Claybrook*, 58 Mo. 124.

*New Hampshire.* — *White v. Brooks*, 43 N. H. 402.

*New York.* — *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Russell v. Allen*, 13 N. Y. 173. See also *Earnshaw v. Myers*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 901.

*North Carolina.* — *Locke v. Alexander*, 2 Hawks (9 N. Car.) 155, 11 Am. Dec. 750.

*Ohio.* — *Lesslie v. Worthington, Wright* (Ohio) 628.

*Pennsylvania.* — *Browning v. Cover*, 108 Pa. St. 595.

*Vermont.* — *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264.

*Wisconsin.* — *Ashland Lodge No. 63 v. Williams*, 100 Wis. 223.

See also *Woods v. Early*, 95 Va. 307.

The Sale of a Chattel by one tenant in common thereof does not vest in the vendee the title

of the other cotenant, who, however, may elect to sue the vendor in trover. *Wheeler v. Wheeler*, 33 Me. 347.

*Sale by One Cotenant of Grass on Common Property* — *Defense to Action for Price.* — Where a tenant in common in the sole possession of the common land sells the standing grass thereon to a stranger it is no defense to an action to recover the purchase price that after the grass was cut and removed the other cotenant forbade the purchaser to pay for it. *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330.

7. *Sale by Authority.* — *Sewell v. Holland*, 61 Ga. 608; *Lesslie v. Worthington, Wright* (Ohio) 628; *McWhinne v. Martin*, 77 Wis. 182. See also *Jackson v. Paxson*, 25 Ga. 35.

Authority to a cotenant to sell the common property does not ordinarily include authority to mortgage it. *Salem Nat. Bank v. White*, 159 Ill. 139.

*Mere Authority to Sell the Joint Property* given by one tenant in common to another does not divest the former of his interest. *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176.

*Authority to Execute and Deliver Deed.* — The authority of one tenant in common to execute a deed conveying his cotenant's interest in land must be under seal. *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121.

Where a tenant in common authorized to deliver the joint deed of himself and cotenant to a purchaser of the common property upon payment of the purchase price delivers the deed without receiving the money, taking instead a bond and mortgage payable to himself alone, he is liable to his cotenant for the latter's share of the purchase price. *Knope v. Nunn*, 151 N. Y. 506, 56 Am. St. Rep. 642, *affirming* 81 Hun (N. Y.) 349.

8. *Ratification of Sale.* — *Johnston v. Jones*, 85 Ala. 286; *Sewell v. Holland*, 61 Ga. 608; *Musser v. Hill*, 17 Mo. App. 169; *Lyons v. Wait*, 51 N. J. Eq. 60; *Browning v. Cover*, 108 Pa. St. 595; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654.



cotenants.<sup>1</sup> Where the subject of the cotenancy is personal property the authorities are not harmonious as to what is the effect of a sale thereof by one tenant under a claim of exclusive ownership. Most courts treat such a sale as a conversion of the property rendering the seller liable to the other cotenants in trover,<sup>2</sup> while other authorities hold that such a sale is not necessarily a conversion, unless the property is actually or virtually destroyed, but that the other cotenants may elect either to affirm the sale and recover from the seller their share of the price paid, or to repudiate the sale so far as their interest is concerned and hold the property as tenants in common with the purchaser.<sup>3</sup>

(2) *Of One's Own Interest*—(a) *As Undivided Share*.—One of several joint tenants or tenants in common may convey his undivided interest in the common property either to a cotenant<sup>4</sup> or to a stranger,<sup>5</sup> and the conveyance may be of his undivided interest either in the whole property<sup>6</sup> or in a distinct and separate parcel thereof.<sup>7</sup>

There Is No Distinction Between a Joint Tenancy and a Tenancy in Common so far as the right of one tenant to convey or encumber his undivided interest is concerned, provided such conveyance is to take effect during the life of the joint tenant. And a conveyance of his interest by a joint tenant to a stranger will defeat the right

1. Sale of Entire Property by One Cotenant Valid as Against Him. — *Hager v. Spect*, 52 Cal. 579; *Emeric v. Alvarado*, 90 Cal. 444; *Sewell v. Holland*, 61 Ga. 608; *Sims v. Dame*, 113 Ind. 127; *White v. Sayre*, 2 Ohio 110; *Vandike's Appeal*, 57 Pa. St. 9; *Browning v. Cover*, 108 Pa. St. 595. See also cases cited in the first note to this subdivision, *supra*.

2. See *infra*, this title, *Actions Between Cotenants* — *Actions at Law* — *Trover*.

3. *Perry v. Granger*, 21 Neb. 579; *Van Doren v. Balty*, 11 Hun (N. Y.) 239; *Rodermund v. Clark*, 46 N. Y. 354; *Browning v. Cover*, 108 Pa. St. 595; *Welch v. Clark*, 12 Vt. 681, 36 Am. Dec. 368; *Ashland Lodge No. 63 v. Williams*, 100 Wis. 223. See also *infra*, this title, *Actions Between Cotenants* — *Actions at Law* — *Trover*.

4. Conveyance of Undivided Interest to Cotenant. — See *Burr v. Mueller*, 65 Ill. 258; *Forrest Milling Co. v. Cedar Falls Mill Co.*, 103 Iowa 619.

A Deed by One Joint Tenant to Another upon a Consideration of Love and Affection will not be canceled after the lapse of several years, in the absence of fraud. *Warner v. Jackson*, 7 App. Cas. (D. C.) 211.

No Implied Warranty of Title. — The law does not imply a warranty of title to personal property in sales by one joint owner to another, where the parties are in joint possession and have equal knowledge of the legal status of the title. *Garley v. Dickason*, 19 Tex. Civ. App. 203.

Conveyances Between Cotenants. — At common law conveyances between tenants in common cannot operate by way of release, but must contain words of perpetuity to pass a fee. If one tenant in common conveys to another by a deed with warranty containing no such words, the warranty becomes extinct by the death of the grantee, and any after-acquired title of the grantor does not, by virtue of it, inure to the heirs of the grantee. *Rector v. Waugh*, 17 Mo. 13, 57 Am. Dec. 251.

A tenant in common in possession cannot pass his title to his cotenant in possession by parol, because there cannot be in such a case

that distinct transfer of possession which equity regards as equivalent to a written contract. The possession taken necessary to withdraw a parol contract from the operation of the statute of frauds must not only be notorious and distinct, but it must be exclusive of the vendor. *McCormick's Appeal*, 57 Pa. St. 54, 98 Am. Dec. 191; *Workman v. Guthrie*, 29 Pa. St. 495, 72 Am. Dec. 654.

Deed with Reservation of Privilege. — Where one tenant in common of land used for a steamboat landing executed to his cotenant a quitclaim deed of all his interest therein, with a reservation of the use and privilege of the landing so long as it should remain a steamboat landing, it was held that a title in fee passed to the grantee, so that he could maintain ejectment, subject to the reservation contained in the deed. *Jones v. De Lassus*, 84 Mo. 541.

5. Conveyance of Undivided Interest to Stranger. — *Menzies v. Macdonald*, 2 Macq. H. L. 463, 2 Jur. N. S. 575; *Coleman v. Lane*, 26 Ga. 515; *Neuforth v. Hall*, 6 Kan. App. 902; *Reinicker v. Smith*, 2 Harr. & J. (Md.) 421; *Robinson v. Robinson*, 173 Mass. 233; *Jooss v. Fey*, 129 N. Y. 17; *Hoyt v. Day*, 32 Ohio St. 101; *Browning v. Cover*, 108 Pa. St. 595; *Spencer v. Austin*, 38 Vt. 258; *Worthington v. Staunton*, 16 W. Va. 208. See also *supra*, this title, *Creation of Estates in Cotenancy* — *Under Modern Practice and Statutes* — *Tenancy in Common* — *Certain Cases Considered*.

Conveyance to Secure Loan. — A tenant in common may convey his undivided interest in the common property in trust to secure a loan, reserving the right of possession until default in making payment, and upon default the grantee is entitled to immediate possession, and this notwithstanding the grantor has conveyed his interest in the premises to his cotenant and put him in possession. *Walker v. Teal*, 7 Sawy. (U. S.) 39.

6. See cases cited in the notes immediately preceding.

7. *Reinicker v. Smith*, 2 Harr. & J. (Md.) 421. See *infra*, this subsection, *By Metes and Bounds*.



of survivorship<sup>1</sup> and operate as a severance of the cotenancy.<sup>2</sup> The grantee in such case will become a tenant in common and not a joint tenant with the other joint tenant or joint tenants, since they hold by different titles.<sup>3</sup>

**Interest of Joint Tenant Not Devisable.** — By reason of the right of survivorship, which becomes a vested right in the cotenant immediately upon the death of a joint tenant, the interest of a joint tenant cannot be conveyed by will, which takes effect only after the death of the testator,<sup>4</sup> and the fact that the cotenancy has been severed by partition made after the will and before the death of the testator does not give validity to the devise.<sup>5</sup>

**Conveyance by Tenant Not in Possession.** — Since the possession of one cotenant is the possession of all, a conveyance by a tenant of his undivided interest in the common property, the property being not in his actual possession, but in the possession of a cotenant, is valid, and not within the rule of law that a conveyance of land held adversely is void as against the person in possession.<sup>6</sup> But where the occupying tenant holds adversely to his cotenant a conveyance by the latter is champertous.<sup>7</sup>

(b) **By Metes and Bounds — No Power to Convey by Metes and Bounds.** — One joint tenant or tenant in common cannot convey a specific part of the common property by metes and bounds to the prejudice of his cotenants,<sup>8</sup> and it is

1. **Conveyance by Joint Tenant.** — *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1092.

**Conveyance to Cotenant.** — Where one joint tenant, by a deed reciting that the joint property was held by himself and his cotenant in fee simple, conveyed his interest to his cotenant with the expressed intention of immediately vesting the whole estate in such cotenant, who died before the grantor, it was held that in the absence of fraud or intervening rights of creditors the conveyance was effectual to pass the grantor's title in fee subsequently acquired by survivorship. *Appgar v. Christophers*, 33 Fed. Rep. 201.

2. *Simpson v. Ammons*, 1 Binn. (Pa.) 175, 2 Am. Dec. 425. In this case it was held that a mortgage by some of the joint tenants was a severance.

3. See *infra*, this title, *Severance of Cotenancy — Joint Tenancy — By Act of Joint Tenant*.

4. *Swift v. Roberts*, 3 Burr. 1488; *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162; *Duncan v. Forrer*, 6 Binn. (Pa.) 193.

5. *Swift v. Roberts*, 3 Burr. 1488.

6. **Conveyance by Cotenant Not in Possession.** — *Patterson v. Nixon*, 79 Ind. 251; *Elliott v. Frakes*, 90 Ind. 389; *Hemmingway v. Cohen*, (Ky. 1898) 46 S. W. Rep. 495. See also the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 841.

7. **Sale by Tenant Champertous Where Cotenant Holds Adversely.** — In *Kentucky* it is held that the champerty act applies to conveyances made by tenants in common of land adversely held by their cotenants, where the ouster and adverse possession are clearly proved. *Wall v. Wayland*, 2 Met. (Ky.) 155; *Barret v. Coburn*, 3 Met. (Ky.) 510. See also *Thruston v. Masterson*, 9 Dana (Ky.) 234. See generally as to the validity of such conveyances the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 834 *et seq.*

8. **One Tenant Cannot Convey Specific Part of Common Property to Prejudice of Cotenants — California.** — *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

*Connecticut.* — *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Griswold v. Johnson*, 5 Conn. 363; *Hartford, etc., Ore Co. v. Miller*, 41 Conn. 112.

*Illinois.* — *Markoe v. Wakeman*, 107 Ill. 251.

*Indiana.* — *Mattox v. Hightshue*, 39 Ind. 95.

*Iowa.* — *Forrest Milling Co. v. Cedar Falls Mill Co.*, 103 Iowa 619. See also *Farr v. Reilly*, 58 Iowa 399.

*Maine.* — *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Soutter v. Porter*, 27 Me. 405; *Soutter v. Atwood*, 34 Me. 153, 56 Am. Dec. 647.

*Maryland.* — *Carroll v. Norwood*, 1 Har. & J. (Md.) 100.

*Massachusetts.* — *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87; *Blossom v. Brightman*, 21 Pick. (Mass.) 285; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Marks v. Sewall*, 120 Mass. 174; *Frost v. Courtis*, 172 Mass. 401.

*New Hampshire.* — *Jeffers v. Radcliff*, 10 N. H. 242; *Great Falls Co. v. Worster*, 15 N. H. 412; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163.

*New Jersey.* — *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

*Tennessee.* — *Jewett v. Stockton*, 3 Yerg. (Tenn.) 492.

*Texas.* — *Stuart v. Baker*, 17 Tex. 417; *McKey v. Welch*, 22 Tex. 390; *Dorn v. Dunham*, 24 Tex. 366; *Good v. Coombs*, 28 Tex. 34; *Arnold v. Cauble*, 49 Tex. 527; *Talkin v. Anderson*, (Tex. 1892) 19 S. W. Rep. 350.

*Virginia.* — *Robinett v. Preston*, 2 Rob. (Va.) 273; *Cox v. McMullin*, 14 Gratt. (Va.) 82.

*West Virginia.* — *Bogges v. Meredith*, 16 W. Va. 1; *Worthington v. Staunton*, 16 W. Va. 208.

*Wisconsin.* — *Shepardson v. Rowland*, 28 Wis. 108.

In *Missouri*, where partition is not necessarily made in kind, it is held that a conveyance by one tenant in common of a part of the common lands by metes and bounds is valid even



immaterial whether such conveyance be by deed or by the levy of an execution.<sup>1</sup> The same principle applies to a devise by will of specific parts of the common property.<sup>2</sup>

**The Reason of This Rule** is that if such a conveyance were sustained it might compel the cotenant to take on partition a share in each of such several parcels of the common property as the conveying tenant might choose to designate, instead of a share of the whole as is his right as tenant in common.<sup>3</sup>

**Conveyance by Metes and Bounds Good Against Grantor.** — But while one tenant cannot convey a specific part of the common property by metes and bounds to the prejudice of his cotenant, it does not necessarily follow that all such conveyances are wholly void. As against the grantor and those claiming under him such conveyances will be sustained upon principles of estoppel, and if upon a subsequent partition of the property the part conveyed falls to the grantor so that the rights of his cotenants are not prejudiced by the conveyance, the grantee takes a good title. In any case the grantee as against his grantor acquires title to the land conveyed subject to the contingency of loss thereof in case on partition that part of the common estate should not be allotted to his grantor.<sup>4</sup> So also such conveyances are good as against strangers.<sup>5</sup>

as against cotenants not concurring therein. *Barnhart v. Campbell*, 50 Mo. 597.

In *Ohio* the rule is that a conveyance by one tenant in common of his interest by metes and bounds makes the grantee a tenant in common with the other cotenants in that portion of the common property, his interest being the proportionate interest of his grantor, but that such conveyance will not, as against the other cotenants, work a division of the common property. *White v. Sayre*, 2 Ohio 112; *Treon v. Emerick*, 6 Ohio 391; *Matter of Prentiss*, 7 Ohio (pt. ii.) 129, 30 Am. Dec. 203; *Dennison v. Foster*, 9 Ohio 126, 34 Am. Dec. 429.

**Rule Not Applicable in Condemnation Proceedings.** — The principle that a tenant in common cannot convey his interest in a portion of the common property by metes and bounds without the consent of his cotenants does not apply to a case of proceedings *in rem* to condemn land for a public use. *Stevens v. Battell*, 49 Conn. 156.

**1. Conveyance by Levy of Execution.** — *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268; *Hinman v. Leavenworth*, 2 Conn. 244, note; *Stanford v. Fullerton*, 18 Me. 229; *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Baldwin v. Whiting*, 13 Mass. 57; *Brown v. Bailey*, 1 Met. (Mass.) 254; *Cutting v. Rockwood*, 2 Pick. (Mass.) 443; *Blossom v. Brightman*, 21 Pick. (Mass.) 283; *Peabody v. Minot*, 24 Pick. (Mass.) 329; *French v. Lund*, 1 N. H. 42, 8 Am. Dec. 31; *Thompson v. Barber*, 12 N. H. 563; *Smith v. Knight*, 20 N. H. 9; *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614.

**2. Whitton v. Whitton**, 38 N. H. 127, 75 Am. Dec. 163.

**3. Reason of Rule.** — *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 361; *Primm v. Walker*, 38 Mo. 94; *Great Falls Co. v. Worster*, 15 N. H. 412; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Jewett v. Stockton*, 3 Verg. (Tenn.) 492; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614.

**4. Conveyance by Metes and Bounds Good Against Grantor — California.** — *Stark v. Barrett*, 15 Cal. 362; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Emeric v. Alvarado*, 90 Cal. 444. See also to the same effect *Reed v. Spicer*, 27 Cal. 58.

*Maine.* — *Soutter v. Porter*, 27 Me. 405.

*Massachusetts.* — *Varnum v. Abbot*, 12 Mass. 474, 7 Am. Dec. 87; *De Witt v. Harvey*, 4 Gray (Mass.) 486; *Brown v. Bailey*, 1 Met. (Mass.) 254; *Nichols v. Smith*, 22 Pick. (Mass.) 316; *Frost v. Courtis*, 172 Mass. 401; *Kimball v. Commonwealth Ave. St. R. Co.*, 173 Mass. 152. See also *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76.

*Nebraska.* — *Crook v. Vandevoort*, 13 Neb. 505.

*New Hampshire.* — *Great Falls Co. v. Worster*, 15 N. H. 412; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163.

*New Jersey.* — *Holcomb v. Coryell*, 11 N. J. Eq. 548.

*Ohio.* — *White v. Sayre*, 2 Ohio 112; *Treon v. Emerick*, 6 Ohio 391; *Dennison v. Foster*, 9 Ohio 126, 34 Am. Dec. 429.

*Rhode Island.* — *Crocker v. Tiffany*, 9 R. I. 505; *Hogan v. Bickerton*, 17 R. I. 483.

*Texas.* — *March v. Huyter*, 50 Tex. 243; *Rutherford v. Stamper*, 60 Tex. 447; *Talkin v. Anderson*, (Tex. 1892) 19 S. W. Rep. 350; *Wells v. Heddenberg*, 11 Tex. Civ. App. 3; *McAllen v. Raphael*, 11 Tex. Civ. App. 116.

*Virginia.* — *Robinett v. Preston*, 2 Rob. (Va.) 278; *Cox v. McMullin*, 14 Gratt. (Va.) 82.

*West Virginia.* — *Bogges v. Meredith*, 16 W. Va. 1.

**A Lease by One Tenant** in common to a stranger of a portion of the joint estate, though voidable by the cotenants who do not join therein, is valid between the parties and against all persons unless so avoided. *De Witt v. Harvey*, 4 Gray (Mass.) 486; *Cunningham v. Pattee*, 99 Mass. 248; *Tainter v. Cole*, 120 Mass. 162; *Rising v. Stannard*, 17 Mass. 282. See also *Keay v. Goodwin*, 16 Mass. 1.

**5. Fitch v. Boyer**, 51 Tex. 336.



**How Far Good Against Other Cotenants.** — There is some looseness of expression on the part of some of the courts as to whether such conveyances are void or merely voidable as against cotenants. Thus it has been declared that a conveyance by one tenant of a specific part of the property is void as against his cotenant, and is not valid until the latter elects to avoid it.<sup>1</sup> The true doctrine as deduced from actual decisions seems to be that such conveyances are absolutely void as against cotenants whose rights are prejudiced thereby, and who have not consented to them or ratified them, but that when confirmed<sup>2</sup> or assented to<sup>3</sup> by the other cotenants such conveyances are valid as against all parties. The assent of the cotenant in such case need not necessarily be by deed, but may be inferred from long acquiescence in the grantee's title.<sup>4</sup> In any case it seems that a tenant cannot complain of a conveyance of a specific part of the common estate by a cotenant where his own rights are not injuriously affected thereby.<sup>5</sup> And a court of equity will respect the rights of the grantee so far as this can be done consistently with the rights of the other cotenants, and wherever practicable will confirm the title of the grantee by allotting to his grantor that portion of the land conveyed.<sup>6</sup>

**Separate Conveyances of Part of Property by All Tenants.** — In accordance with the principle that a conveyance by one tenant of a part of the common property is valid as against him, it is held that if at different times all the tenants convey their respective interests in the same portion of the common estate by metes and bounds to the same person, the grantee derives a good title as against all.<sup>7</sup>

**Conveyance of Interest in Distinct Parcel of Common Estate.** — Where the estate held in common consists of several distinct tracts or parcels, one tenant may convey his interest in any one or more of the several properties, or it may be sold on execution against him, so as to pass to the purchaser a title valid as against the other cotenants.<sup>8</sup>

(3) *Grant of Specific Right or Easement.* — The general principle that one tenant in common of land cannot convey any title to a specific part of the land as against his cotenants is applied also to the grant of any specific right or easement in the common property. One tenant in common, or any number of the tenants less than all, cannot create or convey an easement in the property held in common.<sup>9</sup> This rule has been several times applied to grants of min-

1. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

The cotenant is not bound to assert his title by an objection to the unlawful conveyance. *Great Falls Co. v. Worster*, 15 N. H. 412.

2. *Hartford, etc., Ore Co. v. Miller*, 41 Conn. 112.

3. *Goodwin v. Keney*, 49 Conn. 563.

A Release to a Tenant in Common from his cotenants of their interests in a specific part of the land held in common confirms a conveyance previously made by him of that part of the land. *Johnson v. Stevens*, 7 Cush. (Mass.) 431.

4. *Goodwin v. Keney*, 49 Conn. 563.

5. *Holcomb v. Coryell*, 11 N. J. Eq. 548.

6. *Arnold v. Cauble*, 49 Tex. 527; *Camoron v. Thurmond*, 56 Tex. 22; *Furrr v. Winston*, 66 Tex. 521; *Worthington v. Staunton*, 16 W. Va. 208.

Where there is but one person holding under a tenant in common, or where there are several holding small portions, so that it is practicable to do so, equity will require that the partition be made so as to leave the grantee or grantees in possession of the land conveyed to them, especially where they have made improvements thereon, by setting apart that portion of

the land to their grantor. *Arnold v. Cauble*, 49 Tex. 527.

7. *Stevens v. Norfolk*, 46 Conn. 227. In this case the principle of the text was held to apply in the case of successive takings of the respective interests of the several cotenants under condemnation proceedings, such proceedings being regarded as compulsory conveyances in each case.

8. **Conveyance of District in Distinct Parcel of Common Property.** — *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50; *Carroll v. Norwood*, 1 Har. & J. (Md.) 100; *Reinicker v. Smith*, 2 Har. & J. (Md.) 421; *Peabody v. Minot*, 24 Pick. (Mass.) 329; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Primm v. Walker*, 38 Mo. 94; *White v. Sayre*, 2 Ohio 110; *Matter of Prentiss*, 7 Ohio (pt. ii.) 129, 30 Am. Dec. 203; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466. See also *Markoe v. Wakeman*, 107 Ill. 251. Compare *Peabody v. Minot*, 24 Pick. (Mass.) 329; *Thompson v. Barber*, 12 N. H. 563. And see *Marks v. Sewall*, 120 Mass. 174.

9. **Grant by One Tenant of Specific Right or Easement in Common Property Void as Against Cotenants.** — *Pfeiffer v. State University*, 74 Cal. 156; *Collins v. Prentice*, 15 Conn. 423;



eral rights in common lands, and it is held that one tenant in common of land and the mineral rights therein cannot as against his cotenants separately convey his mineral rights, or grant to a stranger the right to dig ore or other mineral from the land.<sup>1</sup> But where a cotenancy exists only as to the mineral rights in land, and does not extend to the land itself, one cotenant may convey his undivided interest in the ore estate.<sup>2</sup>

**Conveyance of Undivided Share with Reservation of Specific Interest.** — One tenant in common cannot convey his undivided interest in the common property with a reservation to himself of a specific right or interest therein, for this would be in effect an attempt to create in his grantee a special estate open to the objections just considered. Thus it is held that a reservation, in a conveyance by one tenant in common of his undivided interest in land, of a right of way over such land is void.<sup>3</sup> So also a reservation of his interest in the mines in and upon the land granted is void.<sup>4</sup>

**3. Duties and Liabilities** — *a.* AS TO LIENS AND INCUMBRANCES — (1) *In General.* — Cotenants are all liable for the payment of liens and incumbrances existing against the common estate in proportion to their respective interests, but such payment may be made by any one of them, and when so made will inure to the benefit of all the others, the tenant paying off the lien or incumbrance being entitled to contribution from his cotenants in proportion to their respective interests.<sup>5</sup> As between the cotenants and the holders of the outstanding incumbrances, it seems that each cotenant is liable for the whole amount of the incumbrance,<sup>6</sup> but as between the cotenants themselves, they are liable only in proportion to their respective interests, each being surety for the others.<sup>7</sup>

(2) *On Account of Purchase Money.* — Where by a joint purchase two or more persons become tenants in common of property, they are of course all liable for the purchase money in proportion to their respective interests, and if one pays all, or more than his share, he is entitled to contribution from his

Marshall v. Trumbull, 28 Conn. 183, 73 Am. Dec. 667; Forrest Milling Co. v. Cedar Falls Mill Co., 103 Iowa 619; Hallett v. Parker, 68 N. H. 598; Crippen v. Morss, 49 N. Y. 63; Palmer v. Palmer, 150 N. Y. 139, 55 Am. St. Rep. 653. See also Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543. And see Rush v. Burlington, etc., R. Co., 57 Iowa 201; Hutchinson v. Chase, 39 Me. 508, 63 Am. Dec. 645.

**Grant of Water Right.** — The rule that a tenant in common cannot convey a several right in the common property does not apply to the use of water held in common, and a grant of a right to use the water when the grantors who have a right to its use are not using it, is not void on the ground that it impairs the rights of cotenants. Adams v. Manning, 51 Conn. 5.

**1. Conveyance of Mineral Rights.** — Hartford, etc., Ore Co. v. Miller, 41 Conn. 112; Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394.

**2. Conveyance of Undivided Interest in Ore in Land.** — Where in the distribution of an estate the several distributees became owners in severalty of the land, but tenants in common of all the ore therein, it was held that one of the tenants might, with the consent of his cotenants, convey his undivided interest in the ore estate in a part of the land. Marsh v. Holley, 42 Conn. 453.

**3.** Marshall v. Trumbull, 28 Conn. 183, 73 Am. Dec. 667.

**4.** Adam v. Briggs Iron Co., 7 Cush. (Mass.) 361.

**5.** Calkins v. Steinbach, 66 Cal. 117. See

the title CONTRIBUTION AND EXONERATION, vol. 7, p. 353.

**6. Cotenants Severally Liable for Entire Debt.** — Schoenewald v. Dieden, 8 Ill. App. 389; Crafts v. Crafts, 13 Gray (Mass.) 360; Watson's Appeal, 90 Pa. St. 426. But see Southworth v. Parker, 41 Mich. 198.

A tenant in common of an equity of redemption redeeming the common property by paying the general incumbrance cannot redeem merely his share of the land by paying his share of the incumbrance, but can redeem only by paying the whole incumbrance. Lyon v. Robbins, 45 Conn. 513.

**Mechanic's Lien on Building Constructed by Cotenants.** — Where several tenants in common of land enter into a contract for the construction of a building thereon, each subscribing for this purpose in proportion to his interest, and being bound separately only for the payment of the amount subscribed by him, a statutory mechanic's and materialman's lien does not attach to the entire property for the whole amount remaining unpaid, but a distinct lien is created upon the undivided interest of each subscriber for the amount for which he is personally liable. Hines v. Chicago Bldg., etc., Co., 115 Ala. 637.

**7. Cotenants Surety for Each Other.** — Oliver v. Lansing, 57 Neb. 352, quoting 24 AM. AND ENG. ENCYC. OF LAW (1st ed.) 236; Gearhart v. Jordan, 11 Pa. St. 325; Watson's Appeal, 90 Pa. St. 426. See also Cornell v. Prescott, 2 Barb. (N. Y.) 16.



cotenant or cotenants for their respective proportions, and he has a lien upon the property to secure the payment thereof.<sup>1</sup>

*b. AS TO EXPENSES FOR CARE AND MANAGEMENT*—(1) *In General*.—The general rule is that all the cotenants are liable in proportion to their respective interests for the necessary expenses connected with the protection and preservation of the common property, and where one tenant has borne the whole or more than his proper share of such expense, his cotenants are liable to him for contribution;<sup>2</sup> but one tenant cannot incur expenses on account of the common property and charge his cotenants therewith, without the consent of the latter, unless such expense is necessary for the protection or preservation of the property.<sup>3</sup>

(2) *Taxes*.—All the tenants in common are under obligation, at least to the extent of their respective interests, to pay the taxes on the common property;<sup>4</sup> and it seems that one tenant may protect his own interest by the payment of only his proportionate share of the taxes,<sup>5</sup> but it is his privilege,<sup>6</sup> and in some cases it may be his duty,<sup>7</sup> to pay the taxes assessed against the entire estate, and such payment by him will inure to the benefit of all.<sup>8</sup>

*Cotenant Paying Taxes Entitled to Contribution*.—But where one tenant, for the protection of the property, has paid the whole or more than his share of the taxes, he is entitled to contribution from his cotenants for the amount paid<sup>9</sup> and for reasonable expenses in making payment,<sup>10</sup> with interest from the date of payment;<sup>11</sup> and he will have a lien on the property to secure such reimbursement.<sup>12</sup> A claim for taxes paid may be set off against a claim for rents

1. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 355.

2. A tenant in common of land has a right to charge his cotenant with a just proportion of expenses incurred in relation to the common estate. *Peyton v. Smith*, 2 Dev. & B. Eq. (22 N. Car.) 325. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 353 *et seq.*

3. *Paine v. Slocum*, 56 Vt. 504.

4. Each Cotenant Is Equally Bound to keep the taxes on the common property paid, and one who pays all can claim no advantage over the other on that account, but can claim only to be reimbursed with interest. *Morgan v. Herrick*, 21 Ill. 481.

5. *Payment of Taxes on Individual Interest*.—*Eads v. Retherford*, 114 Ind. 273, 5 Am. St. Rep. 611.

Where one tenant in common has paid all the purchase money of the common property, and is in the exclusive enjoyment of the property, no duty is imposed upon him to pay taxes assessed upon the undivided interest of his cotenant. *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177.

*Sale of Interest of Delinquent Cotenant*.—Where property held by two persons is assessed for taxes by undivided moieties, and one of the cotenants has paid his share of the tax, the interest of the other may be sold for the balance. *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349.

Where one tenant in common of land has paid the taxes on his share of the common property, and a certain number of acres of the undivided tract is sold to pay the taxes on the shares of the cotenants, the share of the tenant who has paid his own taxes in the whole tract will not be diminished by such sale, but the relative number of acres of the other cotenants will be ratably diminished thereby. *Braker v. Devereaux*, 8 Paige (N. Y.) 513.

6. *One Tenant May Pay Taxes on Entire Property*.—*Chickering v. Faile*, 38 Ill. 342.

Although one tenant in common may perhaps elect to pay the taxes on his undivided interest, he is not bound to pursue this course, but may pay all the taxes and prevent the sale of any part of the land. *Eads v. Retherford*, 114 Ind. 273, 5 Am. St. Rep. 611. In such case he may be regarded as the agent of his cotenant to the extent of the latter's interest. *Downer v. Smith*, 38 Vt. 464.

7. *Duty to Make Such Payment*.—*Downer v. Smith*, 38 Vt. 464.

Where one tenant occupies and uses the whole of the common property, it is his duty to pay the taxes thereon. *Dubois v. Campau*, 24 Mich. 360. But see *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, set out in the second note *supra*.

8. *Chickering v. Faile*, 38 Ill. 342; *McConnel v. Konepel*, 46 Ill. 519. See cases cited in the note immediately following this.

9. *Cotenants Must Contribute towards Payment of Taxes*.—*Chickering v. Faile*, 38 Ill. 342; *Sears v. Sellaw*, 28 Iowa 501; *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164; *Dewing v. Dewing*, 165 Mass. 230; *Devlin's Estate*, 17 Pa. Co. Ct. 433, 5 Pa. Dist. 125; *Paine v. Slocum*, 56 Vt. 504. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 355.

10. *Paine v. Slocum*, 56 Vt. 504.

11. *Oliver v. Montgomery*, 39 Iowa 601.

12. *Reimbursement for Taxes Secured by Lien*.—*Moore v. Woodall*, 40 Ark. 42; *Eads v. Retherford*, 114 Ind. 273, 5 Am. St. Rep. 611; *Oliver v. Montgomery*, 42 Iowa 36; *Davidson v. Wallace*, 53 Miss. 475; *Thiele v. Thiele*, 57 N. J. Eq. 98; *Holt v. Couch*, 125 N. Car. 456, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1109. Compare *Preston v. Wright*, 81 Me. 306, 10 Am. St. Rep. 257, *distinguishing* *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637.

In *Sturgis v. Holliday*, *MacArthur & M. (D.*



and profits.<sup>1</sup>

**Taxes Must Have Been Paid in Interest of Other Cotenants.** — But in order to render one tenant in common liable to his cotenant for contribution for taxes paid by the latter, it must appear that such taxes were paid in the interest of the former. Thus where one of two cotenants of property subject to a life estate paid taxes thereon during the lifetime of and as an accommodation and loan to the life tenant, it was held that his cotenant was not chargeable with the amount so advanced.<sup>2</sup> So also a purchaser of the undivided interest of one of two cotenants is not liable to the other for back taxes paid by him on the whole property, where at the time of the purchase he had no notice or knowledge that any claim would be made against him or the property for such taxes.<sup>3</sup> Again, where the taxes on the whole estate are assessed against one of the tenants upon the supposition that he is the sole owner, payment by him does not entitle him to contribution from his cotenants.<sup>4</sup>

(3) *Expense of Litigation.* — One tenant cannot charge his cotenant with a share of the expenses of litigation on account of the common property, where such litigation is not necessary for the preservation of the property, unless the suit or action is brought with the consent or concurrence of the cotenant.<sup>5</sup> But where expense is incurred by one tenant in prosecuting or defending suits necessary for the preservation or protection of the common property, he will clearly be entitled to contribution from his cotenants. Thus, on an accounting between tenants in common all disbursements by either for the recovery, defense, or protection of the joint estate should be considered, though not the expenses of any adverse suits between the tenants themselves.<sup>6</sup> The failure of a tenant in common to furnish money to his cotenant in possession of the common property, to defend a suit affecting the title brought against such cotenant, does not amount to an abandonment of his title by the noncontributing tenant.<sup>7</sup>

(4) *Repairs.* — The rights and liabilities of cotenants of property in reference to repairs have already been fully considered.<sup>8</sup>

(5) *Improvements.* — The questions of a cotenant's right to reimbursement for improvements and the allowance for improvements on partition have already been discussed.<sup>9</sup>

C.) 385, it was held that a claim for reimbursement for taxes paid on the common property is a mere personal claim, and barred by the statute of limitations.

1. *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458; *Hannan v. Osborn*, 4 Paige (N. Y.) 336.

2. *Zapp v. Miller*, 109 N. Y. 51.

3. *Stover v. Cory*, 53 Iowa 708.

4. *O'Hara v. Quinn*, 20 R. I. 176.

5. *Expense of Litigation.* — *Paine v. Slocum*, 56 Vt. 504.

A Contract by some of several tenants in common with a cotenant, to reimburse him for the expense of partition, constitutes a personal charge on the parties, and does not create a lien on the property, nor is it binding on any of the tenants not parties thereto. *Hume v. Howard*, (Tex. Civ. App. 1898) 48 S. W. Rep. 202.

**Disbursements After Death of Cotenant.** — Where two tenants in common brought an action to foreclose a mortgage securing a debt due to them, and pending the action one died, and the other afterwards made disbursements on account of such action without the knowledge or consent of the representatives of the deceased cotenant, it was held that he could not enforce contribution from them on account

of such disbursements. *Preston v. Fitch*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 849.

6. *Gosselin v. Smith*, 154 Ill. 74; *Lewis's Appeal*, 67 Pa. St. 153.

7. *Gosselin v. Smith*, 154 Ill. 74.

8. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 356.

A tenant in common who has made repairs on the common property cannot assert a lien therefor against an attaching creditor of his cotenant. *Galusha v. Sinclear*, 3 Vt. 394.

9. See the titles CONTRIBUTION AND EXONERATION, vol. 7, p. 357; IMPROVEMENTS, vol. 16, p. III.

The North Carolina Statute (Code N. Car. 1883, § 473), providing for allowance for improvements, is for the protection of a purchaser of land who makes improvements under the belief that he has a good title, and has no application to tenants in common. *Holt v. Couch*, 125 N. Car. 456.

**Improvements Made in Repairing Property.** — A tenant in common cannot, in repairing the common property, for which he may compel contribution from his cotenant, make permanent improvements and charge the cotenant with a part of the expense. *Middlebury Electric Co. v. Tupper*, 70 Vt. 603.



**Lien for Improvements.** — In *New York* it has been held that a claim for contribution for improvements made on the common property gives no lien upon the share of the cotenant liable, in the absence of an express contract securing such lien, and the tenant making the improvements has only the personal security of his cotenant for contribution.<sup>1</sup> But in other states it is held that such lien exists independently of any agreement therefor.<sup>2</sup> A lien may clearly be secured by express agreement, and such lien will be recognized and enforced by a court of equity,<sup>3</sup> though it has been held that it will not be valid against a creditor of the noncontributing tenant who has secured a legal lien on the property by an attachment levied thereon, whether he has or has not notice of the previous equitable lien.<sup>4</sup>

(6) **Personal Services.** — Joint tenants or tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property, in the absence of a special agreement or mutual understanding to that effect.<sup>5</sup> The right to compensation may, however, be acquired by special agreement;<sup>6</sup> and in such case the other tenant cannot set off against the amount of compensation agreed upon, a charge for the use and occupation of the property, where there is no agreement to pay rent.<sup>7</sup>

c. **AS TO RENTS AND PROFITS** — (1) *In General.* — By the Common Law of England, if one tenant in common or joint tenant occupied the common property and received the entire profits of the estate, the other tenant had no remedy against him while the tenancy in common continued, unless he was put out of possession, in which case he might maintain an action of ejectment, or unless he had appointed the occupying tenant bailiff of his interest, when an action of account would lie against him as such.<sup>8</sup>

**Statutory Liability Between Cotenants.** — By the statute of 4 & 5 Anne, c. 16, § 27, the common-law rule was changed, and an action of account was given to one joint tenant or tenant in common against the other as bailiff who had received more than his proportionate share of the profits. This statute has

**Improvements by Lessee under Void Lease.** — Where land owned in common is leased by one of the cotenants without the consent of the others, who are accordingly not bound by the lease, and the lessee makes improvements on the property, he cannot recover therefor from the tenants not joining in the lease. *McKinley v. Peters*, 111 Pa. St. 283; *Vaughan v. Cravens*, 1 Head (Tenn.) 108, 73 Am. Dec. 163.

1. *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582. But see *Prentice v. Janssen*, 79 N. Y. 478.

2. **Lien for Improvements.** — *Baird v. Jackson*, 98 Ill. 78; *Salem Nat. Bank v. White*, 159 Ill. 136; *Davidson v. Wallace*, 53 Miss. 475; *Torrey v. Martin*, (Tex. 1887) 4 S. W. Rep. 642; *Curtis v. Poland*, 66 Tex. 511.

Where improvements are made with the consent of the cotenants they are personally bound, and the demand is a lien on their shares. *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

Where a husband, with the knowledge and consent of his wife, has improvements made on property owned by them in common, the wife's interest in the land is subject to a mechanic's lien for the work done, but she is not personally liable therefor. *Smith v. O'Donnell*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 98.

3. *Houston v. McCluney*, 8 W. Va. 135. See also *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582.

4. *Houston v. McCluney*, 8 W. Va. 135.

5. **No Allowance for Services in Care and Management of Property.** — *Fuller v. Fuller*, 23 Fla.

236; *Harry v. Harry*, 127 Ind. 91; *Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724; *Ranstead v. Ranstead*, 74 Md. 378, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1111; *Franklin v. Robinson*, 1 Johns. Ch. (N. Y.) 157; *Thompson v. Newton*, (Pa. 1886) 7 Atl. Rep. 64; *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889.

6. **Compensation for Services by Agreement.** — *Sears v. Munson*, 23 Iowa 380; *Ranstead v. Ranstead*, 74 Md. 378.

Where tenants in common have agreed to pay to one of their number a salary for his services in connection with the common property, such agreement is not terminated by a sale by one of the cotenants of his interest, but the purchaser takes such interest subject to such contract although he purchased without notice thereof. *Cotton v. Rand*, (Tex. Civ. App. 1898) 51 S. W. Rep. 55.

Where the Amount of Compensation Is Not Settled by the agreement, the cotenant who has performed the services in pursuance of the agreement is entitled to a reasonable compensation. *Ranstead v. Ranstead*, 74 Md. 378.

7. *Anderson v. Clanch*, (Tex. 1887) 6 S. W. Rep. 760.

8. **No Action for Rents and Profits at Common Law Between Cotenants.** — *Wheeler v. Horne*, Willes 208; *Anonymous*, Cary 21; *Henderson v. Eason*, 17 Q. B. 701, 79 E. C. L. 701; *Chambers v. Chambers*, 3 Hawks (10 N. Car.) 232, 14 Am. Dec. 585.



been substantially re-enacted in many of the states of the Union, and exists in other states as a part of the common law of the United States.<sup>1</sup> In *Alabama* and *North Carolina* it has been held that the statute of Anne is not in force.<sup>2</sup>

**Difference Between Liability as Bailiff at Common Law and under Statutes.** — There is a material difference between the liability of a bailiff at common law and that of a tenant in common who is a bailiff under the statute. The former is a fiduciary, bound to manage the estate to the best advantage, to make all the profit he can for the owners, and to keep and render to them a full account of his transactions, and he is liable not only for rents and profits actually received, but also for such as might have been received without his default; while the latter is accountable only for rents and profits actually received more than his just share and proportion.<sup>3</sup>

**No Liability Where Tenant Has Received Only His Just Share.** — One tenant in common is not liable to his cotenant for the rents and profits of the common property unless he has received more than his just share thereof.<sup>4</sup> Circumstances may arise, however, in which an accounting will lie between cotenants where one has received any profits whatever, as where one tenant in common of an ore bed mines the ore, in which case his proportionate share of the entire body of ore cannot be ascertained, and he will be liable to his cotenant for the latter's share of any ore mined.<sup>5</sup>

**Crops Grown upon the Common Property by One Tenant in Common** belong to him, and his cotenants have no interest therein.<sup>6</sup>

**1. Tenant in Common Liable to Cotenant under Statutes.** — Consult the several state statutes, and see the following cases:

*Georgia.* — *Shiels v. Stark*, 14 Ga. 429; *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487.

*Kentucky.* — *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

*Maine.* — *Moses v. Ross*, 41 Me. 360, 66 Am. Dec. 250.

*Massachusetts.* — *Robinson v. Robinson*, 173 Mass. 233.

*Pennsylvania.* — *Keisel v. Earnest*, 21 Pa. St. 90; *Harrington v. Florence Oil Co.*, 178 Pa. St. 444; *In re Heft*, 9 Kulp (Pa.) 337; *Jevons v. Kline*, 9 Kulp (Pa.) 370.

*South Carolina.* — *Puckett v. Smith*, 5 Strobb. L. (S. Car.) 26, 53 Am. Dec. 686.

*Tennessee.* — *O'Bryan v. Brown*, (Tenn. Ch. 1898) 48 S. W. Rep. 315.

*Vermont.* — *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372.

See also cases cited in the notes immediately following.

The statute of Anne is in force in *Maryland*. *Flack v. Gosnell*, 76 Md. 88, 35 Am. St. Rep. 413. See also *Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724.

Under the statute of Anne, which is a part of the law of *Massachusetts*, in order to render one tenant in common liable to his cotenant it is necessary only to allege and prove that he has received more than his just share of the rents. *Munroe v. Luke*, 1 Met. (Mass.) 459; *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330. See also *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, 9 Mass. 540, note.

**Coparceners.** — The statute providing for an action of account between joint tenants and tenants in common does not apply to coparceners. *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

**2. Alabama.** — The common law as to the liability of cotenants to each other for rents and profits prevails in Alabama, no statute on the subject having been enacted, and the statute of Anne not being applicable because enacted after the settlement of the United States. *Gayle v. Johnston*, 80 Ala. 395.

*North Carolina.* — *Chambers v. Chambers*, 3 Hawks (10 N. Car.) 232, 14 Am. Dec. 585.

**3. Tenant Who Has Received No Rents and Profits Not Liable to Cotenant.** — *Wheeler v. Horne*, Willes 208; *Sturton v. Richardson*, 13 M. & W. 17; *Henderson v. Eason*, 17 Q. B. 701, 79 E. C. L. 701; *Gowen v. Shaw*, 40 Me. 56; *Hall v. Fisher*, 20 Barb. (N. Y.) 441; *Irvine v. Hanlin*, 10 S. & R. (Pa.) 219; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372; *Early v. Friend*, 16 Gratt. (Va.) 21, 78 Am. Dec. 649.

**4. Tenant Not Liable for Rents, etc., unless He Has Received More than His Just Share.** — *Sturton v. Richardson*, 13 M. & W. 17; *Shepard v. Richards*, 2 Gray (Mass.) 424, 61 Am. Dec. 473; *Peck v. Carpenter*, 7 Gray (Mass.) 283, 66 Am. Dec. 477; *Berry v. Whidden*, 62 N. H. 473; *McPherson v. McPherson*, 11 Ired. L. (33 N. Car.) 391, 53 Am. Dec. 416; *Roberts v. Roberts*, 2 Jones Eq. (55 N. Car.) 128; *Enterprise Oil, etc., Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746; *Almy v. Daniels*, 15 R. I. 312; *Graham v. Pierce*, 19 Gratt. (Va.) 28, 100 Am. Dec. 658; *Dodson v. Hays*, 29 W. Va. 577.

Where one tenant in common claims and receives rents and profits from his proper share of the common property alone, and does not prevent his cotenant from occupying the property or receiving or enjoying his proportionate share of the rents and profits, the former is not liable to the latter for rents and profits. *Scantlin v. Allison*, 32 Kan. 376.

**5. Barnum v. Landon**, 25 Conn. 137.

**6. Crops Grown by One Cotenant.** — *Bird v.*



**No Liability for Rent Where Property Is Unoccupied.** — One tenant in common is not liable to the other for rent where the property stands unoccupied through the fault of both tenants or neither.<sup>1</sup> So also a tenant in common is entitled to an account of rents and profits as against those of his cotenants who have been in possession of the common property, but not as against those who have not been in possession and have received no part of the rents.<sup>2</sup>

(2) *Where Premises Are Occupied by One Cotenant* — (a) **Where There Is No Agreement to Pay Rent.** — The statute of Anne, as construed in England and by some of the American courts, applies only to cases where one tenant in common receives from a third person money or something else to which all the cotenants are entitled by reason of their cotenancy, and retains more than his just share according to the proportion of his interest. It does not include cases in which one tenant occupies and uses the property for his own benefit.<sup>3</sup>

**The Prevailing Doctrine in England and in the United States** is that where one tenant in common uses and occupies the whole of the common property without excluding his cotenants and without any demand from them for possession and refusal on his part, in the absence of an agreement to pay rent he is not liable to his cotenants for the mere use and occupation of the property.<sup>4</sup>

*Bird*, 15 Fla. 424, 21 Am. Rep. 296. See also *Keisel v. Earnest*, 21 Pa. St. 90.

Where, in the due course of husbandry, a tenant in common occupying the common property without excluding his cotenants severs the crops raised from the land, he becomes the sole owner thereof, and his cotenants, by taking them away, become liable to him in conversion for their value. *Le Barron v. Babcock*, 122 N. Y. 153, 19 Am. St. Rep. 458.

The rule that a tenant in common in possession of the common property by consent of his cotenant cannot be required to account to his cotenant for a share of the profits arising from his use of the premises cannot be carried so far as to permit the cotenant in possession to have the exclusive use of the premises after entry or demand of possession until the crop then growing shall mature. As to such crops the other cotenant may be permitted to share the proceeds upon an accounting in equity on a bill for partition, if justice requires it, the cost of production being first deducted for the protection of the cropper. *Moreland v. Strong*, 115 Mich. 211.

**A Purchaser of Farm Products** grown on land owned in common, from one of the cotenants in possession and claiming adversely to the other cotenant, is not liable to account to the latter for the value of such products. *Morgan v. Long*, 73 Miss. 406, 55 Am. St. Rep. 541.

1. *Farrand v. Gleason*, 56 Vt. 633.

**Refusal to Occupy.** — Where a father voluntarily conveyed to a daughter a half interest in a house, reserving for himself the possession and control, and providing that she might live in the house, and on his remarriage she refused to live there, it was held that she could not charge him rent for one-half the house while he lived there and she would not. *Crockett v. Crockett*, 75 Ga. 202.

2. *Swallow v. Swallow*, 31 N. J. Eq. 390.

**3. Statutes Not Applicable Where Tenant Occupies Premises for His Own Benefit** — *England.* — *Henderson v. Eason*, 17 Q. B. 701, 79 E. C. L. 701, reversing 12 Q. B. 986, 64 E. C. L. 986; *McMahon v. Burchell*, 2 Phil. 127, 5 Hare 322.

*Florida.* — *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296.

*Indiana.* — *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493; *Humphries v. Davis*, 100 Ind. 369; *Carver v. Fennimore*, 116 Ind. 236.

*Massachusetts.* — *Sargent v. Parsons*, 12 Mass. 149; *Peck v. Carpenter*, 7 Gray (Mass.) 283, 66 Am. Dec. 477.

*Minnesota.* — *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458.

*New York.* — *Woolever v. Knapp*, 18 Barb. (N. Y.) 265; *Dresser v. Dresser*, 40 Barb. (N. Y.) 300; *Wilcox v. Wilcox*, 48 Barb. (N. Y.) 327; *Scott v. Guernsey*, 60 Barb. (N. Y.) 163, affirmed in 48 N. Y. 124; *Joslyn v. Joslyn*, 9 Hun (N. Y.) 388; *Roseboom v. Roseboom*, 15 Hun (N. Y.) 309; *Rich v. Rich*, 50 Hun (N. Y.) 199; *Le Barron v. Babcock*, 122 N. Y. 153, 19 Am. St. Rep. 488, reversing 46 Hun (N. Y.) 598.

And see cases cited in the note immediately following.

**4. Tenant in Possession Not Liable for Occupation Rent** — *Alabama.* — *Newbold v. Smart*, 67 Ala. 326; *Terrell v. Cunningham*, 70 Ala. 100; *Fielder v. Childs*, 73 Ala. 567; *Wilkinson v. Stuart*, 74 Ala. 198; *Gayle v. Johnston*, 80 Ala. 395; *McCaw v. Barker*, 115 Ala. 543.

*Arkansas.* — *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218.

*California.* — *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550.

*Indiana.* — *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493.

*Iowa.* — *Reynolds v. Wilmeth*, 45 Iowa 693; *Varnum v. Leek*, 65 Iowa 71; *Belknap v. Belknap*, 77 Iowa 71; *Van Ormer v. Harley*, 102 Iowa 150.

*Kentucky.* — *Hixon v. Bridges*, (Ky. 1897) 38 S. W. Rep. 1046.

*Louisiana.* — *Becnell v. Becnell*, 23 La. Ann. 150; *Balfour v. Balfour*, 33 La. Ann. 297.

*Maine.* — *Gowen v. Shaw*, 40 Me. 56; *Moses v. Ross*, 41 Me. 360, 66 Am. Dec. 250.

*Maryland.* — *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571.

*Massachusetts.* — *Badger v. Holmes*, 6 Gray (Mass.) 118. See also *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330.



**The Reason of This Rule** is that, each tenant being entitled to the occupation of the premises, neither can exclude the other, and if the sole occupation of one cotenant could render him liable to the other it would be in the power of the latter, by voluntarily remaining out of possession, to keep out his cotenant also except upon the condition of the payment of rent.<sup>1</sup>

**Occupying Tenant Accountable for Use and Occupation.** — In other cases it is held that one joint tenant or tenant in common in the possession and sole enjoyment of the common property is accountable to his cotenants for receiving more than his proportionate share of the rents and profits of the common property, whether received from a stranger or from his own use and occupancy.<sup>2</sup> In several states it is so provided by statute.<sup>3</sup>

*Michigan.* — *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169.

*Minnesota.* — *Holmes v. Williams*, 16 Minn. 164; *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458; *Hause v. Hause*, 29 Minn. 252.

*Missouri.* — *Ragan v. McCoy*, 29 Mo. 356; *Hunton v. Powers*, 38 Mo. 353; *Matter of Tyler*, 40 Mo. App. 378.

*Pennsylvania.* — *Kline v. Jacobs*, 68 Pa. St. 57.

*Tennessee.* — *Tyner v. Fenner*, 4 Lea (Tenn.) 469; *Schneider v. Taylor*, 16 Lea (Tenn.) 304. See also *O'Bryan v. Brown*, (Tenn. Ch. 1898) 48 S. W. Rep. 315.

*Texas.* — *Neil v. Shackelford*, 45 Tex. 119; *Akin v. Jefferson*, 65 Tex. 137; *Thompson v. Jones*, 77 Tex. 629; *Anderson v. Clanch*, (Tex. 1887) 6 S. W. Rep. 760; *Mahon v. Barnett*, (Tex. Civ. App. 1897) 45 S. W. Rep. 24. See also *Baylor v. Hopf*, 81 Tex. 637.

And see cases cited in the note immediately preceding.

1. **Reason of Rule.** — *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218; *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550; *Ragan v. McCoy*, 29 Mo. 356; *Tyner v. Fenner*, 4 Lea (Tenn.) 469.

2. **Occupying Tenant Held Liable for Use and Occupation** — *Georgia.* — A tenant in common who occupies the common property, although with the consent of his cotenant, is liable to the latter for occupation rent. *Shiels v. Stark*, 14 Ga. 429.

*Mississippi.* — A bill for partition may claim an account for rents received by a cotenant in possession of the common property; but only where he has occupied more than his rightful share of the estate, and then only for the rent of the excess. *Medford v. Frazier*, 58 Miss. 241.

*New Hampshire.* — *Gage v. Gage*, 66 N. H. 282. But see *Webster v. Calef*, 47 N. H. 289; *Berry v. Whidden*, 62 N. H. 473.

*New Jersey.* — The law in this state is that where one of several tenants occupies the common property simply as tenant in common, and not to the exclusion of the others, he is not liable to account; but where he has prevented his cotenants from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and thereby made a profit, he must account to his cotenants for the rental value of the premises or the profits. *Izard v. Bodine*, 11 N. J. Eq. 403, 69 Am. Dec. 595; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Barrell v. Barrell*, 25 N. J. Eq. 173; *Buckelew v. Snedeker*, 27 N. J. Eq. 82; *Edsall v. Merrill*,

37 N. J. Eq. 114. See also *Sailer v. Sailer*, 41 N. J. Eq. 398.

*North Carolina.* — *McPherson v. McPherson*, 11 Ired. L. (33 N. Car.) 391, 53 Am. Dec. 416; *Roberts v. Roberts*, 2 Jones Eq. (55 N. Car.) 128.

*South Carolina.* — *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 75; *Holt v. Robertson*, McMull. Eq. (S. Car.) 475; *Volentine v. Johnson*, 1 Hill Eq. (S. Car.) 49; *Lyles v. Lyles*, 1 Hill Eq. (S. Car.) 76; *Jones v. Massey*, 9 S. Car. 376, 14 S. Car. 292; *Scaife v. Thomson*, 15 S. Car. 337; *Pearson v. Carlton*, 18 S. Car. 47; *Cain v. Cain*, 53 S. Car. 350.

*Tennessee.* — *Tyner v. Fenner*, 4 Lea (Tenn.) 469. See also *Blanton v. Van Zant*, 2 Swan (Tenn.) 276.

*Vermont.* — *Wiswall v. Wilkins*, 5 Vt. 87; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372.

*Virginia.* — *Early v. Friend*, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. (Va.) 28, 100 Am. Dec. 658; *White v. Stuart*, 76 Va. 546.

*West Virginia.* — *Rust v. Rust*, 17 W. Va. 901; *Dodson v. Hays*, 29 W. Va. 577.

3. **Statutory Liability of Cotenant for Use and Occupation** — *Delaware.* — *Journey's Estate*, 7 Del. Ch. 1.

*Illinois.* — Under the statute of this state, based upon the statute of Anne, though broader in its terms, it has been held that one tenant in common who appropriates the entire use of the common property to himself is liable to his cotenants for their shares of a reasonable rental value of the property. *Woolley v. Schrader*, 116 Ill. 29. In several cases, however, it has been held that in order to render one cotenant liable to another for rent for use and occupation there must be something more than an occupancy of the estate by one and forbearance to occupy by the other. *Chapin v. Foss*, 75 Ill. 280; *Boley v. Barutio*, 120 Ill. 192, affirming 24 Ill. App. 515; *Sconce v. Sconce*, 15 Ill. App. 169.

*Maine.* — *Cutler v. Currier*, 54 Me. 81; *Richardson v. Richardson*, 72 Me. 403. Under the Maine statute, if one tenant in common takes the whole income of the common property, or more than his share thereof, without the consent of his cotenant, an action of assumpsit will lie against him after demand, but such action cannot be maintained where he takes the income of a specific portion of the property with the consent of his cotenant. *Dyer v. Wilbur*, 48 Me. 287. The statute does not apply to the case of a disseisor receiving rents



**Occupying Tenant Not Liable for Profits Arising Solely from His Own Expenditure.** — This rule is limited, however, so as not to work a hardship on the occupying tenant, and he is held accountable only for the income of the property in the condition in which it was at the time when it went into his possession, and his cotenants are not entitled to the benefit of the issues and profits arising from the increased productiveness of the premises due to the application of the skill, labor, or capital of the occupying tenant.<sup>1</sup> On the other hand, on a bill for partition a court of equity, in ordering an account for rents and profits, may also decree compensation to the cotenant, as for waste, for the deterioration of the land by cultivation.<sup>2</sup> The rule that the other cotenants are not entitled to share in the profits of the common property when these are due solely to the efforts or expenditures of the occupying cotenant applies also to a cotenancy of personal property. Thus it has been held that one owner in common of a copyright who at his own expense prints, publishes, and sells the book copyrighted is not liable to account to his cotenants in the absence of an agreement with them.<sup>3</sup>

**General Rule Applicable to Lessee of Cotenant.** — The principles governing the liability of cotenants to each other for the rents and profits of the common property apply also as between the lessee of one cotenant and the other cotenants. Thus it has been held that the lessee of the interest of one tenant in common who occupies the whole estate without excluding the other cotenant therefrom is not liable to the latter for the use and occupation of the property.<sup>4</sup> Similarly a tenant in common who takes possession of the common property which has been leased to a stranger by his cotenants is not liable to the lessee for such possession, and the lessee consequently is not liable to his lessor for the rent of the premises so occupied by the cotenant.<sup>5</sup> But a lessee of a tenant in common is liable to account to the other cotenant for rents and profits where his lessor would have been so liable, and the fact that he has already accounted to his lessor does not relieve him from such liability.<sup>6</sup>

**Where Occupying Tenant Sustains Relation of Trust towards Cotenant.** — The general rule that one tenant in common is not liable to his cotenant for the mere use and occupation of the common property has been held inapplicable where the occupying tenant is in a position of trust toward his cotenant in respect of the common property. Thus where a guardian is tenant in common with his ward, it being his duty as guardian so to rent out or manage his ward's estate that it will yield an income to the ward, if he neglects to do this, and enjoys

under an adverse claim known to his cotenant. *Richardson v. Richardson*, 72 Me. 403.

*Ohio.* — *West v. Weyer*, 46 Ohio St. 66, 15 Am. St. Rep. 552. See *Conard v. Conard*, 38 Ohio St. 467.

*Rhode Island.* — *Almy v. Daniels*, 15 R. I. 312; *Hazard v. Albro*, 17 R. I. 181. The Rhode Island statute is not confined in its application to actual receipts by one tenant of a greater share of the profits than the other, but where one tenant uses the property for the conduct of his own business operations, the other tenant is entitled to a fair rental for his share of the estate, irrespective of the profits or losses of the business. *Knowles v. Harris*, 5 R. I. 402, 73 Am. Dec. 77.

**1. Occupying Tenant Not Liable for Rents and Profits Produced by His Own Expenditures.** — *Early v. Friend*, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; *White v. Stuart*, 76 Va. 546.

The occupying tenant is not liable for rent for that part of the common property which he has himself rendered capable of producing an

income. *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 75; *Holt v. Robertson*, McMull. Eq. (S. Car.) 475; *Volentine v. Johnson*, 1 Hill Eq. (S. Car.) 49; *Annelly v. De Saussure*, 26 S. Car. 497, 4 Am. St. Rep. 725.

Where an estate held in cotenancy yields no rent or profit, and one of the tenants enters, and by improving the estate renders it productive, his cotenant who expends neither money nor labor cannot come in and claim a share of the profits. *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

**2.** *Backler v. Farrow*, 2 Hill Eq. (S. Car.) 111.

**3.** *Carter v. Bailey*, 64 Me. 458, 18 Am. Rep. 273.

**4.** *Badger v. Holmes*, 6 Gray (Mass.) 118; *Austin v. Ahearne*, 61 N. Y. 6. See also *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593.

**5.** *Hoopes v. Meyer*, 1 Nev. 433.

**6.** *Barnum v. Landon*, 25 Conn. 137.



the full use of the estate himself, he is accountable on final settlement to his ward for a reasonable rental value of the latter's interest.<sup>1</sup>

(b) *Where There Is an Agreement to Pay Rent.* — In the absence of an agreement to pay rent, the relation of landlord and tenant does not exist between cotenants, but each occupies in his own right, and there is no implied promise to pay rent for the use of any part of the common property.<sup>2</sup> But where there is an express agreement that one tenant shall occupy the premises and pay his cotenant for the occupation of his share of the property, the latter can recover for such use and occupation,<sup>3</sup> and damages for breach of such an agreement may be awarded by a court of law.<sup>4</sup>

*Relationship of Landlord and Tenant Not Presumed.* — One tenant in common in possession is not presumed to be the lessee of his cotenants, but the fact of such relationship must be established by the evidence. Nor does the mere permission by the cotenants for him to enter upon the common property, no terms being fixed, constitute him a lessee of their respective interests. He is at most a tenant at will.<sup>5</sup> But one cotenant may be liable to another without an express agreement to pay rent. An agreement to pay rent may be implied from the conduct of the parties as well where they are tenants in common as in any other case, the only difference being that the relation of landlord and tenant will not be so readily inferred from occupation in the case of a cotenant as in the case of a stranger.<sup>6</sup>

*Lessee Holding Over.* — Where one tenant in common takes from his cotenant a lease of the latter's share of the common property for a term at a specified rent, and takes possession under the lease, and continues in possession after the expiration of his term, it is held by some courts that he will not be considered, as in ordinary cases, as holding over under the lease, but will be presumed to be in possession under his own title, in the absence of evidence to the contrary.<sup>7</sup> This presumption may be rebutted by evidence showing that the tenant holds over as lessee, as where he permits his cotenant to apply to the rent moneys belonging to both which have been collected by such cotenant.<sup>8</sup> In England and in some states of the Union the contrary rule to the one stated above has been adopted, and it is held that the lessee continuing in possession after the expiration of the term holds as tenant under an implied renewal of the lease, and is liable to his lessor for the use and occupation.<sup>9</sup>

(3) *Where Premises Are Leased to Stranger.* — It is well settled by all the authorities that where one tenant leases the common property to a third person and receives the rents he is liable to account to his cotenants for their

1. *Matter of Tyler*, 40 Mo. App. 378.

2. *Hamby v. Wall*, 48 Ark. 135, 3 Am. St. Rep. 218.

3. *Cotenant Liable for Occupation Rent by Agreement.* — *Chapin v. Foss*, 75 Ill. 280; *Elliott v. Knight*, 64 Ill. App. 87; *Kites v. Church*, 142 Mass. 586; *Cahoon v. Kinen*, 42 Ohio St. 190; *Davies v. Skinner*, 58 Wis. 638, 46 Am. Rep. 665.

*Agreement by Agent.* — A tenant in common of land, who makes an agreement with the wife of his cotenant that the cotenant shall have the sole occupation of the land and pay to him a certain sum therefor, cannot maintain an action for such occupation if he does not prove that the cotenant had actual knowledge of such agreement or that he authorized his wife to make it. *Wilbur v. Wilbur*, 13 Met. (Mass.) 404.

*Restoration of Possession.* — Where one tenant in common has exclusive possession of the common property under an agreement to pay rent therefor he is bound to restore possession

as fully as he received it, and if he has sublet the premises he cannot terminate his liability for rent by an unaccepted offer to surrender his lease leaving his subtenants in possession. *Clayton v. McCay*, 143 Pa. St. 225.

4. *Lockard v. Lockard*, 16 Ala. 423.

5. *Keisel v. Earnest*, 21 Pa. St. 90.

6. *Boley v. Barntio*, 120 Ill. 192.

7. *Cotenant Not Ordinarily Presumed to Hold Over under Lease.* — *Mumford v. Brown*, 1 Wend. (N. Y.) 53, 19 Am. Dec. 461; *McCay v. Mumford*, 10 Wend. (N. Y.) 351; *Dresser v. Dresser*, 40 Barb. (N. Y.) 300; *Valentine v. Healey*, 158 N. Y. 369; *Rockwell v. Luck*, 32 Wis. 70.

8. *Cotenant Presumed to Hold Over in Certain Cases.* — *Rockwell v. Luck*, 32 Wis. 70. See also *Carson v. Broady*, 56 Neb. 648.

9. *Leigh v. Dickeson*, 15 Q. B. D. 60; *Chapin v. Foss*, 75 Ill. 280; *Harry v. Harry*, 127 Ind. 91; *O'Connor v. Delaney*, 53 Minn. 247, 39 Am. St. Rep. 601; *Carson v. Broady*, 56 Neb. 648.



proportionate share.<sup>1</sup> And it has been held that he is not entitled to any allowance for his services in renting the property and collecting the rents,<sup>2</sup> though a proper allowance may be made for expenses necessarily incurred on account of the property.<sup>3</sup>

Where Several Cotenants Unite in Leasing the common property, agreeing that each is to collect his proportionate share of the rent, or that one is to collect the whole rent for the benefit of all, the cotenant receiving more than his proper share of the rent is liable to the others for their respective shares.<sup>4</sup>

(4) *Where Cotenant Has Been Ousted.* — Where one tenant in common ousts his cotenant he may be held to account to the latter for his proportionate share of the rents and profits of the estate;<sup>5</sup> and where the ouster, the disseizor's possession, and the value of the rents and profits are shown, it is immaterial whether the disseizor did or did not actually collect any rents or receive any profits,<sup>6</sup> or whether the premises were occupied by himself or leased to a stranger,<sup>7</sup> or that without improvements made by the occupying cotenant the land would have had no rental value.<sup>8</sup> Nor is the disseizor entitled to any allowance for the cost of production.<sup>9</sup>

Ouster Need Not Be Complete. — It is not necessary, in order to entitle an ousted cotenant to an account, that he should have been ousted from the entire property. Being entitled to the use and occupancy of the entire estate in common with the other tenant, irrespective of the proportion of his interest, he is

1. **Tenant in Common Liable to Cotenant for Rent Received from Stranger.** — *Pope v. Harkins*, 16 Ala. 321; *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296; *Gayle v. Johnston*, 80 Ala. 395; *McCaw v. Barker*, 115 Ala. 543; *Howard v. Throckmorton*, 59 Cal. 79; *Schissel v. Dickson*, 129 Ind. 139; *Bridgford v. Barbour*, 80 Ky. 529; *Buck v. Spofford*, 31 Me. 34; *Gedney v. Gedney*, 160 N. Y. 471; *Joslyn v. Joslyn*, 9 Hun (N. Y.) 388; *Myers v. Bolton*, 89 Hun (N. Y.) 342; *Gillis v. M'Kinney*, 6 W. & S. (Pa.) 78; *Linch v. Broad*, 70 Tex. 92; *Holmes v. Best*, 58 Vt. 547. In this case it was held that one tenant in common must account to the other for one-half of the rent received from a lessee of the whole property, although the lessee did not use it to exceed one-half of its capacity.

**A Tenant in Common of a Water Ditch** may recover from his cotenant in possession his proportionate share of the rents and profits of the ditch collected by the latter. *Abel v. Love*, 17 Cal. 233, *distinguishing* *Pico v. Columbet*, 12 Cal. 420, 73 Am. Dec. 550.

**Recovery from Heirs of Cotenant.** — A tenant in common may maintain an action against the heirs of his cotenant for an accounting of rents collected by them after the cotenant's death, but not of the rents collected by such cotenant. *Brittinum v. Jones*, 56 Ark. 624.

**Recovery from Trespasser.** — Where the common property is occupied by a trespasser, one cotenant cannot as against his cotenant recover from the occupant all the rents and profits, but only in accordance with his own interest. *Muller v. Boggs*, 25 Cal. 175.

2. *Howard v. Throckmorton*, 59 Cal. 79. See *supra*, this section, *As to Expenses for Care and Management — Personal Services*.

3. **Allowance for Expenses.** — *Gayle v. Johnston*, 80 Ala. 395. See also *infra*, this section, *Set-off and Counterclaim*.

4. *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593; *Miner v. Lorman*, 70 Mich. 173; *Gedney*

*v. Gedney*, 19 N. Y. App. Div. 407; *Gillis v. M'Kinney*, 6 W. & S. (Pa.) 78.

5. **Tenant in Common Who Has Ousted Cotenant Liable for Rents and Profits** — *England*. — *Pascoe v. Swan*, 27 Beav. 508.

*Indiana*. — *Carver v. Coffinan*, 109 Ind. 547; *Carver v. Fennimore*, 116 Ind. 236; *Bowen v. Swander*, 121 Ind. 164.

*Iowa*. — *Sears v. Sellow*, 28 Iowa 501; *Austin v. Barrett*, 44 Iowa 488; *Dodge v. Davis*, 85 Iowa 77; *Leach v. Hall*, 95 Iowa 611; *Van Ormer v. Harley*, 102 Iowa 150.

*Kansas*. — *Scantlin v. Allison*, 32 Kan. 376.

*Missouri*. — *Bates v. Hamilton*, 144 Mo. 1.

*New Hampshire*. — *Berry v. Whidden*, 62 N. H. 473.

*New Jersey*. — *Edsall v. Merrill*, 37 N. J. Eq. 114.

*New York*. — *Muldowney v. Morris*, etc., R. Co., 42 Hun (N. Y.) 444; *Stephenson v. Cotter*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 749; *Zapp v. Miller*, 109 N. Y. 51.

*Texas*. — *Osborn v. Osborn*, 62 Tex. 495; *Stephens v. Taylor*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1083.

6. **Fact that No Rents or Profits Were Received Immaterial.** — *Pascoe v. Swan*, 27 Beav. 508; *Sears v. Sellow*, 28 Iowa 501; *Austin v. Barrett*, 44 Iowa 488; *Leach v. Hall*, 95 Iowa 611; *Lyles v. Lyles*, 1 Hill Eq. (S. Car.) 76.

7. See generally cases cited in the second note *supra*.

A tenant in common who ousts his cotenant is chargeable with occupation rent. See *Zapp v. Miller*, 109 N. Y. 51.

8. *Stephens v. Taylor*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1083.

9. **Allowance for Cost of Production.** — Where one tenant in common of an oil lease fraudulently dispossessed his cotenant it was held, in an action by the latter to recover for the value of the oil produced and sold by the defendant, that he could not deduct from the proceeds of the plaintiff's share of the oil, the cost of



entitled to an account against his cotenant who has ousted him from any part of the property, and it is immaterial whether his use and occupation of the rest of the property were or were not equal in value to the use of his proper share of the whole.<sup>1</sup>

**Interest.** — The ousting tenant is liable to his cotenants for interest on their respective proportions of the rents collected.<sup>2</sup>

(5) *Measure of Accountability.* — The General Rule of liability between cotenants for rents and profits received from the common property, as deduced from the statutes and decided cases, is that a tenant in common or joint tenant who has received the whole or more than his proper share of the rents and profits of the common estate is liable to his cotenants for the amount of the excess received by him above his just proportion, each cotenant being entitled to a share of the rents and profits in proportion to his interest in the common property.<sup>3</sup>

**Express Agreement.** — Where one tenant occupies and uses the common property to the exclusion of his cotenants, or occupies and uses more than his just share or proportion, and such occupation and use are in pursuance of an agreement between the parties providing for the payment of rent by the occupying tenant, the measure of his liability will of course be determined by the terms of the agreement.<sup>4</sup>

**Where There Is No Agreement** between the parties, and the liability of the occupying tenant is recognized at all, as a general rule the measure of his accountability to his cotenants is their share or proportion of a fair rent of the property occupied and used by him.<sup>5</sup>

**Account of Profits, etc.** — Under the peculiar circumstances of particular cases, however, it may be proper to resort to an account of issues, profits, etc., as a mode of adjustment between the cotenants.<sup>6</sup> And, as has been already stated, a tenant in common chargeable with occupation rent is liable only for the rent of the premises in the condition in which they were when he took possession, and not for the increased rental value due to his own expenditures and improvements.<sup>7</sup>

**Occupation under Claim of Exclusive Ownership.** — The same principle holds in the case of an exclusive occupation by one of the cotenants under a *bona fide* claim of right as sole owner. It is held that an action by one cotenant against another for an accounting for rents is a liberal and equitable action, and equitable defenses may be made; and if the excluded tenant receives actual compensation for the damages sustained, he has no just ground for complaint. In the absence, therefore, of some peculiar circumstances making a different rule applicable, the owner of an undivided interest in land who occupies the whole estate in good faith, under claim and color of title to the whole, and has made permanent and valuable improvements under the mistaken belief that he is the owner of the whole estate, is accountable only for the fair rental value of the property in the condition in which it was when it went into his possession. The excluded tenant is not, under ordinary circumstances, entitled to the enhanced rental value resulting from the improvements made with the capital of the *bona fide* occupant or his grantor.<sup>8</sup>

production. *Foster v. Weaver*, 118 Pa. St. 42. See also *Duff v. Bindley*, 16 Fed. Rep. 178.

1. *Almy v. Daniels*, 15 R. I. 312.

2. *Bates v. Hamilton*, 144 Mo. 1.

3. Consult the statutes and decisions already cited in this section.

4. See *Clayton v. McCay*, 143 Pa. St. 225.

5. **Occupying Tenant Liable for Fair Rental Value of Property.** — *Shiels v. Stark*, 14 Ga. 429; *Thompson v. Bostick*, *McMull. Eq. (S. Car.)* 75; *Early v. Friend*, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. (Va.) 28, 100 Am. Dec. 658.

6. **Determination of Liability by Accounting in Equity.** — *Early v. Friend*, 16 Gratt. (Va.) 21, 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. (Va.) 28, 100 Am. Dec. 658; *Newman v. Newman*, 27 Gratt. (Va.) 714. See *Scantlin v. Allison*, 32 Kan. 376; *Ruffner v. Lewis*, 7 Leigh (Va.) 720, 30 Am. Dec. 513. See also *infra*, this section, *Set-off and Counterclaim*.

7. See *supra*, this section, *Where Premises Are Occupied by One Cotenant—Where There Is No Agreement to Pay Rent*.

8. *Carver v. Fennimore*, 116 Ind. 236; *Hannah v. Carver*, 121 Ind. 278.



**Share of Natural Products Sold.** — Where the action is to recover a share of the natural products of the common estate removed and sold by the defendant, it seems that the value of such products in their natural state is to be taken as the basis for determining the liability of the defendant.<sup>1</sup>

(6) *Set-off and Counterclaim.* — In order to entitle one tenant in common to recover against his cotenant for receiving more than his just share of the rents and profits of the common property, there must, on an accounting, be a balance due to the plaintiff at the commencement of his action, in the hands of the defendant as a result of a final settlement of the account between the parties relating to the common estate.<sup>2</sup> The defendant may set off against the plaintiff's claim all charges for which the latter is properly liable, as for advances made by the defendant on account of purchase money<sup>3</sup> or for taxes or assessments upon the property,<sup>4</sup> or for ordinary repairs<sup>5</sup> or improvements,<sup>6</sup> or for other expenses incurred for the protection or preservation of the common property or in rendering it productive.<sup>7</sup> A claim for insurance has been held to be not a proper subject for allowance when it does not appear that the insurance was procured for the plaintiff or in his interest or with his knowledge, or that he ever received any benefit from it.<sup>8</sup>

(7) *Statute of Limitations — Interest.* — Since the statute of Anne the relation between a tenant in common in the possession and sole enjoyment of the common property and his cotenants has been regarded as that of agent and principal, and hence such tenant is not protected by the statute of limitations

**1. Accounting for Timber.** — In an account between tenants in common of land used for getting timber, the value of the timber while growing is to be taken as the rule of valuation. *Walling v. Burroughs*, 8 Ired. Eq. (43 N. Car.) 60.

**Accounting Between Cotenants of Mineral Lands — Pennsylvania.** — By the Pennsylvania Act of April 25, 1850, P. L. 533, tenants in common of mineral lands are made accountable to their cotenants for minerals taken out, the measure of accountability being the market value of the mineral in place. *Coleman's Appeal*, 62 Pa. St. 252; *Fulmer's Appeal*, 128 Pa. St. 24, 15 Am. St. Rep. 662; *McGowan v. Bailey*, 179 Pa. St. 470.

**A Tenant in Common of Oil Lands** who operates the lands without the co-operation of his cotenants is liable to them for the usual royalty paid to the owners of such lands. *Schreiber v. National Transit Co.*, 21 Pa. Co. Ct. 657. See also *Enterprise Oil, etc., Co. v. National Transit Co.*, 172 Pa. St. 421, 51 Am. St. Rep. 746.

**2. Set-off.** — *Shepard v. Richards*, 2 Gray (Mass.) 424, 61 Am. Dec. 473.

**3. Purchase Money.** — *Volentine v. Johnson*, 1 Hill Eq. (S. Car.) 49.

**4. Taxes, etc.** — *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Anderson v. Greble*, 1 Ashm. (Pa.) 136.

**5. Repairs.** — *Davis v. Chapman*, 36 Fed. Rep. 42; *Williams v. Coombs*, 88 Me. 183; *Pickering v. Pickering*, 63 N. H. 468; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Hannan v. Osborn*, 4 Paige (N. Y.) 336; *Anderson v. Greble*, 1 Ashm. (Pa.) 136; *Dech's Appeal*, 57 Pa. St. 467. But see *Kline v. Jacobs*, 68 Pa. St. 57.

**6. Improvements.** — *Journey's Estate*, 7 Del. Ch. 1; *Tyner v. Fenner*, 4 Lea (Tenn.) 469; *Ruffners v. Lewis*, 7 Leigh (Va.) 720, 30 Am. Dec. 513. Compare *Cockley v. Mahar*, 36 Hun

(N. Y.) 157. See also the title *IMPROVEMENTS*, vol. 16, p. 116.

In *South Carolina* the established rule is that in an equitable accounting for rents and profits the occupying tenant may be allowed as a set-off against rents and profits received, not the cost of the improvements made by him, but the increased value of the premises resulting from such improvements, provided such allowance can be equitably made. *Johnson v. Harrelson*, 18 S. Car. 604; *Buck v. Martin*, 21 S. Car. 592; *Johnson v. Pelot*, 24 S. Car. 264; *Sutton v. Sutton*, 26 S. Car. 33; *Tribble v. Poore*, 28 S. Car. 565; *Cain v. Cain*, 53 S. Car. 350.

**7.** See *Dewing v. Dewing*, 165 Mass. 230; *Holt v. Couch*, 125 N. Car. 456; *Lewis's Appeal*, 67 Pa. St. 153; *Newman v. Newman*, 27 Gratt. (Va.) 714.

**Allowance for Expenses in Working Property.** — On an accounting between tenants in common for rents and profits the occupying tenants are entitled to credit for their expenses and actual services in rendering the property productive, not only where these have been profitably incurred or rendered, but also where they have resulted unprofitably, when the parties have acted in good faith; the cotenants, claiming the benefits of the working of the common estate, must share also in the burdens and losses. *Ruffner v. Lewis*, 7 Leigh (Va.) 720, 30 Am. Dec. 513.

But in *Hawley v. Burd*, 6 Ill. App. 454, it was held that the *Illinois* statute providing for an accounting by a cotenant who has taken or used the profits, etc., in greater proportion than his interest, means the gross and not the net profits.

**Expense of Collecting Rents.** — On an accounting between cotenants credit should be allowed to the defendant for money paid by him to an agent for collecting rents. *Collins v. Collins*, 8 N. Y. App. Div. 502.

**8.** *Pickering v. Pickering*, 63 N. H. 468.



from accounting with his cotenants for rents and profits. The statute does not begin to run in his favor until the relationship existing between the parties terminates, as upon partition, ouster, or demand and refusal to account.<sup>1</sup> So also the occupying tenant is chargeable with interest<sup>2</sup> only from the date of demand or suit brought.<sup>3</sup>

(8) *Lien for Rents and Profits.* — The general rule seems to be that rents and profits received by one cotenant previous to partition constitute merely a personal charge against him and give to the other cotenant no lien on the property.<sup>4</sup> In *New York* and *Missouri* a contrary rule has been laid down, and it is held that a tenant in common has a lien upon the share of his cotenant for any rents or profits that may be due to him from such cotenant.<sup>5</sup>

*d. AS TO LOSS, INJURY, OR DESTRUCTION OF PROPERTY* — (1) *In General.* — As a general rule, where property held by two or more persons as tenants in common is lost, injured, or destroyed without the fault of either or any of the cotenants, the loss falls upon all.<sup>6</sup> And it has been held that this is the case even where the loss is occasioned by the fault of one of the cotenants who has entire control of the property.<sup>7</sup> The prevailing doctrine, however, in such case seems to be that the tenant in fault is liable to his cotenants

1. *Statute of Limitations Does Not Run as Between Cotenants.* — *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487; *Crapo v. Cameron*, 61 Iowa 447; *Robinson v. Robinson*, 173 Mass. 233; *Northcott v. Casper*, 6 Ired. Eq. (41 N. Car.) 303 [overruling *Wagstaff v. Smith*, 4 Ired. Eq. (39 N. Car.) 1, and approving an earlier decision of the same case in 2 Dev. Eq. (17 N. Car.) 264]; *Jolly v. Bryan*, 86 N. Car. 457; *McGowan v. Bailey*, 179 Pa. St. 470; *Almy v. Daniels*, 15 R. I. 312. And see *Corbett v. Laurens*, 5 Rich. Eq. (S. Car.) 301.

2. *Interest.* — As to liability for interest see *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487.

Interest is to be paid upon the rents found due from the tenant in common in possession to his cotenants. *Dodson v. Hays*, 29 W. Va. 577.

3. *Wagstaff v. Smith*, 4 Ired. Eq. (39 N. Car.) 1; *Jolly v. Bryan*, 86 N. Car. 457; *West v. Weyer*, 46 Ohio St. 66, 15 Am. St. Rep. 552; *Tyner v. Fenner*, 4 Lea (Tenn.) 469.

Where no demand has been made upon a tenant in possession, either for possession of the premises or for the value of their use, he is not liable to his cotenants for interest upon the amount found due for such use. *West v. Weyer*, 46 Ohio St. 66, 15 Am. St. Rep. 552.

But in *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296, it was held that when one tenant in common receives rents under an implied trust for his cotenants, he is chargeable with interest on the amount found in his hands from the time of its receipt. See also *Scott v. Guernsey*, 60 Barb. (N. Y.) 163; *McGowan v. Bailey*, 179 Pa. St. 470.

4. *No Lien for Rents and Profits.* — *Newbold v. Smart*, 67 Ala. 326; *Clark v. Hershy*, 52 Ark. 473; *Brittinum v. Jones*, 56 Ark. 624; *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296; *Burch v. Burch*, 82 Ky. 622; *Flack v. Gosnell*, 76 Md. 88, 35 Am. St. Rep. 413, following *Devries v. Hiss*, 72 Md. 560.

The interest of a cotenant in the common property is not subject, as against a *bona fide* purchaser thereof, to a lien in favor of the other cotenants for rents and profits received by such cotenant beyond his just share.

*Burns v. Dreyfus*, 69 Miss. 211, 30 Am. St. Rep. 539.

5. *Lien for Rents and Profits* — *New York.* — *Wright v. Wright*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 176; *Scott v. Guernsey*, 48 N. Y. 106; *Hannan v. Osborn*, 4 Paige (N. Y.) 336.

*Missouri.* — In *Missouri* it has been held that the lien of a tenant in common for rents received by his cotenant takes priority over a mortgage by such cotenant of his interest, whether the rents were collected before or after the mortgage, and although the mortgagee did not know that his mortgagor was liable for any rents collected by him. *Beck v. Kallmeyer*, 42 Mo. App. 563.

6. *Loss of Common Property Falls on All Cotenants.* — Where a third person acquires title by adverse possession to a portion of a tract of land held in common, the loss thus suffered by the common estate is distributed between the cotenants according to their respective interests. *Pipkin v. Allen*, 29 Mo. 229.

Where one of two tenants in common of an oil lease contracted with the other to drill a well, and, owing to the delay of the other to furnish necessary casing, the well caved in and had to be abandoned, it was held that the loss fell on both in proportion to their respective interests. *Harrington v. Florence Oil Co.*, 178 Pa. St. 444.

7. *Loss or Injury Where Property Is in Charge of One Cotenant.* — *Moody v. Buck*, 1 Sandf. (N. Y.) 304; *Hall v. Fisher*, 20 Barb. (N. Y.) 441.

Where a cotenant claims an equality of benefit he must submit to an equality of burden; and if loss results from error of judgment or carelessness of the tenant in charge of the property, it will still fall on all equally. If, however, the loss is caused by positive wrong or a nuisance, then the wrongdoer must bear the loss. *Holt v. Couch*, 125 N. Car. 456, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1107.

Where one of three joint owners of a ship refused to navigate, and the other two navigated the ship without his consent, and the ship was lost in the voyage, it was held that



for loss or injury resulting from his own negligence or misconduct.<sup>1</sup> In an action by one tenant in common against another to recover damages for injury to the common property, where the defendant's possession is not exclusive, it is incumbent on the plaintiff to show that the injury was caused by the negligence of the defendant.<sup>2</sup>

(2) *Waste*. — By the common law one tenant in common could not be guilty of committing waste, and the same acts which if committed by a tenant for life or years would constitute waste would not be waste when committed by a tenant in common.<sup>3</sup> This rule was changed at an early day in *England* by statute, and a right of action was given to one tenant against his cotenant for waste committed by him;<sup>4</sup> and by statute in many jurisdictions of the *United States* a tenant in common is liable to his cotenant for waste.<sup>5</sup> The right to sue for waste given by statute includes also the right to restrain its commission.<sup>6</sup>

**What Constitutes Waste.** — The question whether any particular act or acts of a joint tenant or tenant in common on or about the common property constitute waste, as in the case of waste by any other person, can be determined only with reference to the facts and circumstances of each case, the word "waste" not being an arbitrary term to be applied inflexibly without regard to circumstances.<sup>7</sup>

**Cutting Timber.** — Thus, cutting timber, when injurious to the interests of

the nonconsenting owner must bear his proportion of the loss, for he would have been entitled to an account of the profits. *Strelly v. Winson*, 1 Vern. 297. But see *Graves v. Sawcer*, T. Raym. 15.

1. See *infra*, this title, *Actions Between Cotenants — Actions at Law — Trover; Action on Case*.

2. *Moore v. Goedel*, 34 N. Y. 527.

3. *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447.

4. Statute of Westminster II., c. 22.

5. **Statutory Liability of Tenants in Common for Waste — California.** — *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 687.

*Georgia.* — *Shiels v. Stark*, 14 Ga. 429.

*Illinois.* — *Murray v. Havery*, 70 Ill. 318.

*Kentucky.* — *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387.

*Maine.* — *Hubbard v. Hubbard*, 15 Me. 198; *Moody v. Moody*, 15 Me. 205; *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657.

*Massachusetts.* — *Byam v. Bickford*, 140 Mass. 31; *Jenkins v. Wood*, 145 Mass. 494.

*Michigan.* — *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589.

*Missouri.* — *Childs v. Kansas City, etc., R. Co.*, (Mo. 1891) 17 S. W. Rep. 954.

*New York.* — *Elwell v. Burnside*, 44 Barb. (N. Y.) 447.

*North Carolina.* — *Smith v. Sharpe*, Busb. L. (44 N. Car.) 91, 57 Am. Dec. 574; *Hinson v. Hinson*, 120 N. Car. 400. And see *Darden v. Cowper*, 7 Jones L. (52 N. Car.) 210, 75 Am. Dec. 461.

*West Virginia.* — *Williamson v. Jones*, 43 W. Va. 562.

In *South Carolina* a tenant in common is liable for waste irrespective of any statutory provision. *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 75; *Johnson v.*

*Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

**Waste Committed by Cotenant Thinking He Is Sole Owner.** — No action can be maintained under the *Massachusetts* statute (Pub. Stat. 1882, c. 179, §§ 6, 7), against a tenant in common who commits waste on the common property thinking he is sole owner; the object of the statute is to enforce a penalty against tenants in common or joint tenants who knowingly encroach upon the rights of their cotenants. *Jenkins v. Wood*, 145 Mass. 494.

**Waste by Licensee of Cotenant.** — Since a tenant in common cannot himself lawfully commit waste or destroy the common property, he cannot license a stranger to do so. *Murray v. Havery*, 70 Ill. 318.

**Treble Damages.** — Under the *Maine* statute of 1821 a tenant in common guilty of waste was liable in treble damages to his cotenant. *Prescott v. Nevers*, 4 Mason (U. S.) 326; *Moody v. Moody*, 15 Me. 205; *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Mills v. Richardson*, 44 Me. 79; *Richardson v. Richardson*, 64 Me. 62; *Hazen v. Wight*, 87 Me. 233.

**Proof as to Who Cotenants Are.** — In an action for cutting timber brought by a tenant in common against a cotenant under the *Maine* statute of 1821, to prevent tenants in common, etc., from committing waste, it was not necessary for the plaintiff to prove who the other cotenants were. *Hubbard v. Hubbard*, 15 Me. 198.

**The Statutory Action for Rents and Profits** where one cotenant has received more than his proper share does not apply to a case of waste by a cotenant. *Williamson v. Jones*, 43 W. Va. 562; *Cecil v. Clark*, (W. Va. 1900) 35 S. E. Rep. 11.

6. *Morrison v. Morrison*, 122 N. Car. 598.

7. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686. See this case for an extensive review of the authorities. See generally the title **WASTE**.



the other cotenants or not necessary to the enjoyment of the property, will ordinarily constitute waste.<sup>1</sup> But cutting timber in the ordinary or reasonable use of the property is not waste, though the party so cutting it may be liable to his cotenants in a proper action for their share of the value of the timber cut.<sup>2</sup>

**Removal of Ore or Other Mineral.** — It has been held that the digging and carrying off of coal from the common property is waste.<sup>3</sup> The better doctrine would seem to be that laid down in a leading case, that where one tenant in common of a mine works the mine in the usual way and extracts the ore or other mineral therefrom without excluding his cotenants, he is not guilty of waste, though perhaps he may become liable to his cotenants on an accounting for profits.<sup>4</sup> It is waste for one tenant in common of oil land to bore new wells and take the oil, though not to take the oil from wells already bored.<sup>5</sup>

**Beneficial Act.** — An action for waste will not lie in favor of one cotenant against another, where the acts complained of have improved rather than injured the common property.<sup>6</sup>

### VIII. ACTIONS BETWEEN COTENANTS — 1. Actions at Law — a. IN GENERAL.

— Since the possession of one joint tenant or tenant in common is the possession of all, and all are equally entitled to the use and enjoyment of the property, it follows as a general rule that one tenant cannot maintain an action at law against his cotenant in respect of the common property unless he has been disseized or ousted therefrom, or unless the property has been actually converted or destroyed.<sup>7</sup>

**1. Cutting of Timber Waste.** — *Hole v. Thomas*, 7 Ves. Jr. 589; *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Bradley v. Reed*, 2 Pittsb. (Pa.) 519; *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72; *McDodrill v. Pardee*, etc., *Lumber Co.*, 40 W. Va. 564. See also *Dodge v. Davis*, 85 Iowa 77; *State v. Judge*, 52 La. Ann. 103; *Clow v. Plummer*, 85 Mich. 550; *Blake v. Milliken*, 14 N. H. 213.

In *Pennsylvania* it is made unlawful by statute for the owner of any undivided interest in timber land to cut or remove timber trees from such land without the written consent of all the cotenants. Act Pa. May 4, 1869, §§ 1-3; *Bright, Purd. Dig. Laws Pa.* (1894), p. 2082; *Hensal v. Wright*, 10 Pa. Co. Ct. 416.

It is further provided that no sale of any timber cut or removed from such undivided lands before or without such consent shall pass any title thereto, and that the parties injured shall have every remedy to the recovery of the timber and lumber and other articles manufactured therefrom which they would have against an entire stranger to the title. Act May 4, 1869, § 2; *Wheeler v. Carpenter*, 107 Pa. St. 271; *Bush v. Gamble*, 127 Pa. St. 43; *Duff v. Bindley*, 16 Fed. Rep. 178.

**The Clearing of the Common Land** may constitute waste, but if the value of the premises be thereby improved, the other cotenant can recover only nominal damages at law. *Thompson v. Bostick*, *McMull. Eq.* (S. Car.) 75; *Hancock v. Day*, *McMull. Eq.* (S. Car.) 69, 36 Am. Dec. 293.

**2. Cutting Timber Not Necessarily Waste.** — *Martyn v. Knowllys*, 8 T. R. 145; *Hilm v. Peck*, 18 Cal. 640; *Arthur v. Lamb*, 2 Dr. & Sm. 428; *Patureau v. Wilbert*, 44 La. Ann. 355; *Darden v. Cowper*, 7 Jones L. (52 N. Car.) 210, 75 Am. Dec. 461; *Dodd v. Watson*, 4

*Jones Eq.* (57 N. Car.) 48, 72 Am. Dec. 577. See also *Alford v. Bradeen*, 1 Nev. 228.

Trees cut by one cotenant of land without the consent of the other belong, after being cut, to both; and if the one cutting them sells them as his own without the consent of the other, the latter may maintain an action for the conversion. *Shepard v. Pettit*, 30 Minn. 119.

**3. Removal of Coal or Other Mineral.** — *Murray v. Haverly*, 70 Ill. 318; *Childs v. Kansas City, etc., R. Co.*, (Mo. 1891) 17 S. W. Rep. 954; *Cecil v. Clark*, (W. Va. 1900) 35 S. E. Rep. 11.

**The Digging of Clay** and manufacture of brick on the common property by the cotenant in possession is not waste where a plant for this purpose has already been constructed and the work is merely being continued in the customary way. *Russell v. Merchants' Bank*, 47 Minn. 286, 28 Am. St. Rep. 368.

But it is waste to dig clay for making brick from a building lot. *Dougall v. Foster*, 4 Grant Ch. (U. C.) 319.

**4. McCord v. Oakland Quicksilver Min. Co.**, 64 Cal. 134, 49 Am. Rep. 686.

**A Tenant in Common Who Quarries and Sells Rock** from the common property is liable to account to his cotenants for their proportionate share after deducting expenses. *Cosgriff v. Dewey*, 21 N. Y. App. Div. 129. But an equitable action solely for an accounting cannot be maintained in such case. *Abbey v. Wheeler*, 85 Hun (N. Y.) 226.

**5. Williamson v. Jones**, 43 W. Va. 562.

**6. Smith v. Sharpe**, *Busb. L.* (44 N. Car.) 91, 57 Am. Dec. 574.

**7. No Actions at Law Between Cotenants as General Rule.** — *Bishop v. Blair*, 36 Ala. 80; *Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383; *Strong v. Colter*, 13 Minn. 82; *Halford v. Tetherow*, 2 Jones L. (47 N. Car.) 393; *Jones v. Cohen*, 82 N. Car. 75.



*b.* EJECTMENT. — The law on this subject has already been presented.<sup>1</sup>

*c.* FORCIBLE ENTRY AND DETAINER. — One tenant in common may maintain an action of forcible entry and detainer against his cotenant.<sup>2</sup>

*d.* REPLEVIN. — A joint tenant or tenant in common of a chattel cannot maintain replevin or other action for the recovery of the chattel or his interest therein against his cotenant.<sup>3</sup>

*e.* TRESPASS QUARE CLAUSUM. — Ordinarily one tenant in common of real property cannot maintain trespass *quare clausum fregit* against his cotenant;<sup>4</sup> but it is otherwise where the act complained of amounts to an injury to or destruction of the common property, or to the expulsion of the plaintiff from the property or an interference with his enjoyment thereof.<sup>5</sup> In respect to the rights of one tenant where the common property has been destroyed or his enjoyment of it prevented by his cotenant, real and personal property stand on the same footing.<sup>6</sup>

*f.* TROVER — General Rule. — Since tenants in common are all equally entitled to the possession and use of the common property, and it is often impossible in the case of personal property that more than one should have possession at the same time, it follows that trover will not lie in favor of one joint tenant or tenant in common of a chattel against his cotenant for the mere detention or exclusive use of the common property.<sup>7</sup>

1. See the title EJECTMENT, vol. 10, p. 467.

2. See the title FORCIBLE ENTRY AND DETAINER, vol. 13, p. 742.

3. One Cotenant Cannot Maintain Replevin Against Another. — *Hewlett v. Owens*, 50 Cal. 474; *Balch v. Jones*, 61 Cal. 234; *Ellis v. Culver*, 2 Harr. (Del.) 129; *Bowen v. Roach*, 78 Ind. 361; *Ferrall v. Kent*, 4 Gill (Md.) 209; *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Spooner v. Ross*, 24 Mo. App. 599; *Kelley v. Vandiver*, 75 Mo. App. 435; *Russell v. Allen*, 13 N. Y. 173; *Bonner v. Latham*, 1 Ired. L. (23 N. Car.) 271; *Strauss v. Crawford*, 89 N. Car. 149; *Ashland Lodge No. 63 v. Williams*, 100 Wis. 223.

But a tenant in common of crops may maintain replevin against his cotenant in possession for his share after demand and refusal. *Sutherland v. Carter*, 52 Mich. 471.

See also the title REPLEVIN.

4. Tenant in Common Cannot Maintain Trespass Quare Clausum Against Cotenant — *Delaware*. — *M'Call v. Reybold*, 1 Harr. (Del.) 146.

*Kentucky*. — *Roberts v. McGraw*, 11 Bush (Ky.) 26; *Wright v. Chandler*, 4 Bibb (Ky.) 422.

*Maine*. — *Porter v. Hooper*, 13 Me. 25, 29 Am. Dec. 480.

*Massachusetts*. — *Silloway v. Brown*, 12 Allen (Mass.) 30; *Todd v. Lunt*, 148 Mass. 322.

*New York*. — *Otis v. Thompson*, Hill & D. Supp. (N. Y.) 131.

*North Carolina*. — *McPherson v. Seguire*, 3 Dev. L. (14 N. Car.) 153; *Anders v. Meredith*, 4 Dev. & B. L. (20 N. Car.) 199, 34 Am. Dec. 376.

*Pennsylvania*. — *Filbert v. Hoff*, 42 Pa. St. 97, 82 Am. Dec. 493; *Norris v. Gould*, 15 W. N. C. (Pa.) 187.

*South Carolina*. — *Harman v. Gartman*, Harp. L. (S. Car.) 430, 18 Am. Dec. 656.

*Vermont*. — *Wilkins v. Burton*, 5 Vt. 76; *Booth v. Adams*, 11 Vt. 156, 34 Am. Dec. 680; *Owen v. Foster*, 13 Vt. 263; *Kane v. Garfield*, 60 Vt. 79; *Wait v. Richardson*, 33 Vt. 190, 78 Am. Dec. 622.

5. Rule Otherwise in Case of Ouster or Destruction

of Property. — *Murray v. Hall*, 7 C. B. 441, 62 E. C. L. 441; *Stedman v. Smith*, 8 El. & Bl. 6, 92 E. C. L. 6; *Wilkinson v. Haygarth*, 12 Q. B. 837, 64 E. C. L. 835, 11 Jur. 104; *Porter v. Hooper*, 13 Me. 25, 29 Am. Dec. 480; *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Mills v. Richardson*, 44 Me. 79; *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553; *Hazen v. Wight*, 87 Me. 233; *Silloway v. Brown*, 12 Allen (Mass.) 30; *McClure v. Thorpe*, 68 Mich. 33; *Erwin v. Olmsted*, 7 Cow. (N. Y.) 229; *McGill v. Ash*, 7 Pa. St. 397; *Tranger v. Sassaman*, 14 Pa. St. 514.

As to the removal of fixtures, see the title FIXTURES, vol. 13, p. 673.

6. See *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604.

7. No Action of Trover Against Cotenant for Exclusive Appropriation of Property — *England*. — *Fennings v. Grenville*, 1 Taunt. 241.

*Alabama*. — *Allen v. Harper*, 26 Ala. 686; *Williams v. Nolen*, 34 Ala. 167; *Moore v. Walker*, (Ala. 1899) 26 So. Rep. 984.

*California*. — *Balch v. Jones*, 61 Cal. 234.

*Connecticut*. — *Webb v. Danforth*, 1 Day (Conn.) 301.

*Delaware*. — *Egbers v. Logan*, 1 Harr. (Del.) 342.

*Georgia*. — *Leonard v. Scarborough*, 2 Ga. 73; *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235.

*Kentucky*. — *Fightmaster v. Beasley*, 7 J. J. Marsh. (Ky.) 410.

*Maine*. — *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585; *Kilgore v. Wood*, 56 Me. 150, 96 Am. Dec. 440.

*Michigan*. — *McElroy v. O'Callaghan*, 112 Mich. 124.

*Mississippi*. — *Hinds v. Terry*, Walk. (Miss.) 80.

*New Hampshire*. — *Carr v. Dodge*, 40 N. H. 403; *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438.

*New York*. — *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449, 22 Am. Dec. 592; *Farr v. Smith*, 9 Wend. (N. Y.) 338, 24 Am. Dec. 162; *Mersereau*



**Enjoyment of Common Property Rendered Impossible.** — But the rule is otherwise where the tenant in possession has lost or destroyed the property, or so converted or appropriated it to his own use as to render any further enjoyment by his cotenant impossible. In such case an action of trover or of tort in the nature of trover<sup>1</sup> may be maintained by his cotenant against him.<sup>2</sup>

**Particular Acts Considered.** — Just what acts on the part of the tenant in pos-

*v. Norton*, 15 Johns. (N. Y.) 179; *Dear v. Reed*, 37 Hun (N. Y.) 594; *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Osborn v. Schenck*, 83 N. Y. 201.

*North Carolina.* — *Moye v. —*, 2 Hayw. (3 N. Car.) 186; *Campbell v. Campbell*, 2 Murph. (6 N. Car.) 65; *Hill v. Robison*, 3 Jones L. (48 N. Car.) 501; *Rooks v. Moore*, Busb. L. (44 N. Car.) 1, 57 Am. Dec. 569; *Powell v. Hill*, 64 N. Car. 169; *Grim v. Wicker*, 80 N. Car. 343.

*Pennsylvania.* — *Keisel v. Earnest*, 21 Pa. St. 99; *Heller v. Hufsmith*, 102 Pa. St. 533.

*Tennessee.* — *Cheek v. Wheatley*, 3 Sneed (Tenn.) 484.

*Vermont.* — *Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570.

And see cases cited in the note immediately following.

In *Illinois* the common-law rule is modified by statute so as to allow one tenant in common to maintain trover against a cotenant who assumes exclusive control over the common property. *Benjamin v. Stremple*, 13 Ill. 466.

1. Either trespass or trover may be maintained by one cotenant against another for a conversion of the common property. *Warren v. Aller*, 1 Pin. (Wis.) 479, 44 Am. Dec. 406. See the titles TRESPASS; TROVER AND CONVERSION.

2. **Cotenant Liable for Conversion of Property** — *England.* — *Barnardiston v. Chapman*, 1 Buller N. P. 34, cited in *Heath v. Hubbard*, 4 East 121.

*Alabama.* — *Russell v. Russell*, 62 Ala. 48; *Sullivan v. Lawler*, 72 Ala. 74.

*California.* — See *Balch v. Jones*, 61 Cal. 234.

*Kentucky.* — *Bell v. Layman*, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83.

*Massachusetts.* — *Daniels v. Daniels*, 7 Mass. 135; *Burbank v. Coker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470; *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *Needham v. Hill*, 127 Mass. 133. See also *Warner v. Abbey*, 112 Mass. 355.

*Michigan.* — *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161; *Clow v. Plummer*, 85 Mich. 550.

*Missouri.* — *Sheffer v. Mudd*, 71 Mo. App. 78, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1125.

*Nebraska.* — *Perry v. Granger*, 21 Neb. 579. *New Hampshire.* — *Redington v. Chase*, 44 N. H. 36, 82 Am. Dec. 189.

*New York.* — *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Farr v. Smith*, 9 Wend. (N. Y.) 338, 24 Am. Dec. 162; *Burns v. Winchell*, 44 Hun (N. Y.) 261; *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Benedict v. Howard*, 31 Barb. (N. Y.) 569; *Green v. Edick*, 66 Barb.

(N. Y.) 564; *Osborn v. Schenck*, 83 N. Y. 201; *Flint v. Frantzman*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 523; *Harris v. Gregg*, 17 N. Y. App. Div. 210; *Patten v. Neal*, (County Ct.) 62 How. Pr. (N. Y.) 158.

*North Carolina.* — *Bond v. Hilton*, 1 Busb. L. (44 N. Car.) 308, 59 Am. Dec. 552; *Lowthorp v. Smith*, 1 Hayw. (2 N. Car.) 255; *Lucas v. Wasson*, 3 Dev. L. (14 N. Car.) 398, 24 Am. Dec. 266; *Guyther v. Pettijohn*, 6 Ired. L. (28 N. Car.) 388, 45 Am. Dec. 499; *Waller v. Bowling*, 108 N. Car. 289.

*Oregon.* — *Yamhill Bridge Co. v. Newby*, 1 Oregon 173.

*Pennsylvania.* — *Agnew v. Johnson*, 17 Pa. St. 373, 55 Am. Dec. 565; *Given v. Kelly*, 85 Pa. St. 309.

*South Dakota.* — *Wood v. Steinau*, 9 S. Dak. 110; *Grigsby v. Day*, 9 S. Dak. 585, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 114.

*Vermont.* — *Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570; *Lewis v. Clark*, 59 Vt. 363.

*Virginia.* — *Lowe v. Miller*, 3 Gratt. (Va.) 196.

*Wisconsin.* — *Earl v. Stumpf*, 56 Wis. 50.

**Merely Changing the Form of a Chattel owned in common**, as by reducing whale blubber to oil, is not a conversion so as to entitle a cotenant to bring trover. *Fennings v. Grenville*, 1 Taunt. 241.

**Turning Out Stock.** — Where hogs are delivered by the owner to another to be fattened on shares, the parties become tenants in common of the hogs, and if the person in possession turns them loose in the street this is *prima facie* evidence of a destruction which will entitle the other cotenant to maintain trover. *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161.

**Cutting Timber.** — One tenant in common may maintain trover against his cotenant for the value of timber cut by the latter from the common property and manufactured into lumber, and the fact that the timber was liable to destruction by fire is not a sufficient reason to authorize the defendant to cut and manufacture it. *Clow v. Plummer*, 85 Mich. 550.

**Exclusive Possession and Denial of Cotenants' Right.** — In *Michigan* it is held that where one tenant in common takes exclusive possession of the common property and denies the right or title of his cotenant thereto, he is guilty of a conversion. *Webb v. Mann*, 3 Mich. 139; *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161; *Williams v. Rogers*, 110 Mich. 418. But a refusal to surrender exclusive possession or buy the other cotenant's interest is not a conversion. *McElroy v. O'Callaghan*, 112 Mich. 124.

**Demand.** — No demand is necessary before bringing an action for the conversion of the common property by a cotenant. *Williams v. Rogers*, 110 Mich. 418; *Guyther v. Pettijohn*, 6 Ired. L. (28 N. Car.) 388, 45 Am. Dec. 499.



session will amount to such conversion as will sustain trover in favor of the cotenant, is a question upon which the courts have not been entirely harmonious.<sup>1</sup> It is well settled that trover will lie where there has been an actual or virtual destruction of the plaintiff's interest in the property,<sup>2</sup> and by some courts it is held that the action may be maintained only in such case.<sup>3</sup>

**Sale of Property as Conversion.** — The question has arisen most frequently in the case of the sale of the property by one tenant. The prevailing doctrine is that a sale of the whole property which ignores and denies the right of the cotenant amounts to a conversion for which trover will lie.<sup>4</sup> But in *England* and in some jurisdictions in the *United States* it is held that a sale of the property does not amount to a conversion unless it operates altogether to deprive the cotenant of his interest therein.<sup>5</sup> A sale of the common property not

1. See generally the title TROVER AND CONVERSION.

2. Trover in Case of Destruction of Property. — See the cases cited in the note immediately preceding.

Trover lies by one tenant in common of a personal chattel against his cotenant for the appropriation of the chattel to his exclusive use, where the chattel is of such a nature as to be necessarily destroyed by the use thereof. *Lowe v. Miller*, 3 Gratt. (Va.) 196.

3. Action of Trover Only Where Property Has Been Destroyed — *England*. — *Mayhew v. Herricks*, 7 C. B. 229, 62 E. C. L. 229; *Jacobs v. Seward*, L. R. 5 H. L. 464; *Fennings v. Grenville*, 1 Taunt. 241. See also *Wickham v. Wickham*, 2 Kay & J. 496.

*Alabama*. — *Allen v. Harper*, 26 Ala. 687.

*Connecticut*. — *Oviatt v. Sage*, 7 Conn. 95.

*Kentucky*. — *Bell v. Layman*, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83; *Fightmaster v. Beasley*, 7 J. J. Marsh. (Ky.) 410.

*Minnesota*. — *Strong v. Colter*, 13 Minn. 82.

*New Hampshire*. — *Carr v. Dodge*, 40 N. H. 403.

*North Carolina*. — *Rooks v. Moore*, Busb. L. (44 N. Car.) 1, 57 Am. Dec. 569; *Weeks v. Weeks*, 5 Ired. Eq. (40 N. Car.) 111, 47 Am. Dec. 358; *Shearin v. Riggsbee*, 97 N. Car. 216.

*Pennsylvania*. — *Trout v. Kennedy*, 47 Pa. St. 387.

*Texas*. — *Tignor v. Toney*, 13 Tex. Civ. App. 518.

*Vermont*. — *Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570; *Hurd v. Darling*, 14 Vt. 214.

*Wisconsin*. — *Alderson v. Schultze*, 64 Wis. 460.

A Removal of the Property openly to a place known to the other cotenant, or which could be ascertained by him by inquiry, is not such a destruction as amounts to a conversion. *Sheffler v. Mudd*, 71 Mo. App. 78.

4. Sale of Property by One Cotenant Constitutes Conversion — *Alabama*. — *Penninter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Cowles v. Garrett*, 30 Ala. 341; *Arthur v. Gayle*, 38 Ala. 259; *Neilson v. Slade*, 49 Ala. 253; *Courts v. Happle*, 49 Ala. 254; *Sullivan v. Lawler*, 72 Ala. 74; *Steiner v. Trnum*, 98 Ala. 315.

*Maine*. — *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585; *Wheeler v. Wheeler*, 33 Me. 347.

*Massachusetts*. — *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Burbank v. Crooker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470; *Goell v. Morse*, 126 Mass. 480.

*Minnesota*. — *Person v. Wilson*, 25 Minn. 189; *Shepard v. Pettit*, 30 Minn. 119.

*New Hampshire*. — *White v. Brooks*, 43 N. H. 402.

*New York*. — *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Mumford v. McKay*, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Van Doren v. Balty*, 11 Hun (N. Y.) 239; *White v. Osborn*, 21 Wend. (N. Y.) 75; *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Dyckman v. Valiente*, 42 N. Y. 549; *Osborn v. Schenck*, 83 N. Y. 201.

*Pennsylvania*. — *Coursin's Appeal*, 79 Pa. St. 220. But see *Trout v. Kennedy*, 47 Pa. St. 387.

*Tennessee*. — *Rains v. McNairy*, 4 Humph. (Tenn.) 356, 40 Am. Dec. 651; *Cheek v. Wheatley*, 3 Sneed (Tenn.) 484. See also *Cunningham v. Wood*, 4 Humph. (Tenn.) 417.

*Wisconsin*. — *Warren v. Aller*, 1 Pin. (Wis.) 479, 44 Am. Dec. 406; *Earl v. Stumpf*, 56 Wis. 50.

An Assignment by a tenant in common of the common property, consisting of notes and mortgages taken in his name, is a conversion thereof for which he is liable to his cotenant. *Grigsby v. Day*, 9 S. Dak. 585, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 114.

A Mortgage of the common property is a conversion, and the mortgagee and purchaser on foreclosure are liable to the other cotenant. *Balletine v. Joplin*, (Ky. 1898) 48 S. W. Rep. 417.

Renting the Common Property to a stranger is not such a destruction thereof as will amount to conversion. *Hayes v. Kerr*, 40 N. Y. App. Div. 348.

5. Sale of Property Held Not Conversion — *England*. — *Mayhew v. Herrick*, 7 C. B. 229, 62 E. C. L. 229; *Brady v. Arnold*, 19 U. C. C. P. 46; *Rathwell v. Rathwell*, 26 U. C. Q. B. 179. See also *Heath v. Hubbard*, 4 East 110.

*Connecticut*. — *Oviatt v. Sage*, 7 Conn. 95.

*Kentucky*. — *Bell v. Layman*, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83. But see *Balletine v. Joplin*, (Ky. 1898) 48 S. W. Rep. 417.

*North Carolina*. — *Pitt v. Petway*, 12 Ired. L. (34 N. Car.) 69.

*Vermont*. — *Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570; *Welch v. Clark*, 12 Vt. 681, 36 Am. Dec. 368; *Sanborn v. Morrill*, 15 Vt. 700, 40 Am. Dec. 701; *Barton v. Burton*, 27 Vt. 93; *Bates v. Marsh*, 33 Vt. 122. Compare *Lewis v. Clark*, 59 Vt. 363.

One tenant in common of a chattel cannot sue another for a conversion unless the com-



made in denial of the cotenant's interest, but made for the purpose of division or settlement between the parties, is not a conversion.<sup>1</sup>

**Action Against Purchaser from Cotenant.** — Since one tenant in common cannot maintain trover against his cotenant while the latter remains in possession of the property, and since a purchaser from one tenant in common is deemed a tenant in common with the other cotenant, it is held that a tenant in common cannot maintain trover against a purchaser of the property from the original cotenant so long as he continues in possession, though he may maintain such action against the original cotenant, or against his vendee if he has sold the property to a second vendee.<sup>2</sup>

**Rule Where Property Is Severable in Nature.** — Where the property is in its nature severable as to quality and quantity, so that it is possible for both cotenants to enjoy their respective shares at the same time, a refusal by the cotenant in possession to deliver up to his cotenant or his grantee his proper share on demand is a conversion for which an action will lie.<sup>3</sup> It is otherwise where the refusal is based on the ground that an immediate division would be injurious to the property.<sup>4</sup> To maintain an action for the conversion by detention of personal property on the ground that the property is severable, the burden is upon the plaintiff to establish that fact so as to bring the case within the exception to the general rule.<sup>5</sup>

**Measure of Recovery.** — The measure of the plaintiff's recovery in an action of trover between cotenants is the value of his interest in the property sued for, after an apportionment of the whole joint property, where this consists of different articles, the defendant being allowed to take the value of his interest in any portion of the joint property which may be in the possession of the plaintiff.<sup>6</sup>

**g. ACTION ON CASE.** — One tenant in common may maintain an action on the case against his cotenant for the loss or destruction of the common property through the negligence or misfeasance of the cotenant.<sup>7</sup> Illustrative examples will be found in the notes.<sup>8</sup>

mon property is destroyed, carried beyond the limits of the state, or, when perishable, so disposed of as to prevent the other from recovering it. *Grim v. Wicker*, 80 N. Car. 343.

1. *Brown v. Burnap*, 17 N. Y. App. Div. 129.

2. *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585; *Kilgore v. Wood*, 56 Me. 150, 96 Am. Dec. 440; *Osborn v. Schenck*, 83 N. Y. 201.

3. **Conversion of Divisible Property.** — *Piazzek v. White*, 23 Kan. 621, 33 Am. Rep. 211; *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Erwin v. Clark*, 13 Mich. 10; *Loomis v. O'Neal*, 73 Mich. 582; *Pickering v. Moore*, 67 N. H. 533, *overruling Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Lobdell v. Stowell*, (County Ct.) 37 How. Pr. (N. Y.) 88, *affirmed* 51 N. Y. 70; *Stall v. Wilbur*, 77 N. Y. 158; *Burns v. Winchell*, 44 Hun (N. Y.) 261. See also *Thomas v. Williams*, 32 Hun (N. Y.) 257. And see the title **WAREHOUSES**. But see cases in which the doctrine of the text was not applied. *Hill v. Robison*, 3 Jones L. (48 N. Car.) 501; *Powell v. Hill*, 64 N. Car. 169; *Shearin v. Riggsbee*, 97 N. Car. 216.

It is provided by statute in *Wisconsin* that when personal property is divisible and is owned by tenants in common, and one of them shall claim and hold possession of more than his share, his cotenant, after making demand in writing, may sue for and recover his share or the value thereof. Stat. Wis. (1898), § 4257; *Wood v. Noack*, 84 Wis. 398.

4. *Shearin v. Riggsbee*, 97 N. Car. 216. In this case the court stated that the distinction made in the text as to the nature of the property is not recognized in *North Carolina*.

5. **Burden of Proof.** — *Dear v. Reed*, 37 Hun (N. Y.) 594. In this case it was held that the exception could not be extended to the case of wool taken from a flock of sheep unless it should be made to appear that the several fleeces corresponded completely in grade, quality, condition, and value.

6. *Roddy v. Cox*, 29 Ga. 298, 74 Am. Dec. 64.

7. **Action for Negligent Loss or Destruction of Common Property.** — *Guillot v. Dossat*, 4 Mart. (La.) 203, 6 Am. Dec. 702; *Ralston v. Barclay*, 6 Mart. (La.) 649, 12 Am. Dec. 483; *Herrin v. Eaton*, 13 Me. 193, 29 Am. Dec. 499; *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Daniels v. Daniels*, 7 Mass. 135; *Chesley v. Thompson*, 3 N. H. 9, 14 Am. Dec. 324; *Odiorne v. Lyford*, 9 N. H. 511, 32 Am. Dec. 387; *Beach v. Child*, 13 Wend. (N. Y.) 343, 22 Wend. (N. Y.) 558; *Lowthorp v. Smith*, 1 Hayw. (2 N. Car.) 255; *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139; *McLellan v. Jenness*, 43 Vt. 183, 5 Am. Rep. 270. Compare *Moody v. Buck*, 1 Sandf. (N. Y.) 304; *Hall v. Fisher*, 20 Barb. (N. Y.) 441. See also *supra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se — Duties and Liabilities — As to Loss, Injury, or Destruction of Property*.

8. **Abuse of Property.** — An action on the case may be brought by one tenant in common



*h. TRESPASS TO TRY TITLE.* — It is held that one tenant in common cannot maintain an action of trespass to try title against his cotenant unless there has been an ouster of the plaintiff.<sup>1</sup>

*i. ASSUMPSIT.* — One tenant in common may maintain an action of assumpsit against his cotenant to recover his share of the rents and profits of the common property where the latter has received the whole or more than his just proportion thereof.<sup>2</sup> Such action may also be maintained where one tenant has received more than his proper share of the proceeds of the estate derived from a sale or otherwise.<sup>3</sup> So also where one tenant has expended more than his proper share of money on account of the common property,<sup>4</sup> as for repairs or improvements<sup>5</sup> or for the removal of an incumbrance,<sup>6</sup> he may recover the excess from his cotenant in an action of assumpsit. So also assumpsit will lie to recover a balance due to one cotenant from another upon a termination of the cotenancy and a settlement of accounts.<sup>7</sup> In *Michigan* it is held that one tenant in common may maintain assumpsit against his cotenant for a conversion of the property.<sup>8</sup> It has been held elsewhere, however, that assumpsit will not lie in such case for a mere conversion of the property without a sale of it.<sup>9</sup>

## 2. Suits in Equity. — At Common Law one joint tenant or tenant in common

against another for an abuse of the common property whereby its value is impaired. *Bond v. Hilton*, Busb. L. (44 N. Car.) 308, 59 Am. Dec. 552.

**Infringement of Patent Right.** — One tenant in common of a patent right may maintain an action on the case against his cotenant for an infringement. *Pitts v. Hall*, 3 Blatchf. (U. S.) 201.

**Damage by Animals.** — The remedy of one tenant in common against another for allowing animals to run at large and damage crops is by an action on the case and not by trespass *quare clausum fregit*. *McGehee v. Peterson*, 57 Ala. 333.

**Diversion of Water.** — A tenant in common of a mill may maintain an action against his cotenant for diverting the water from the mill for his separate use. *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

**Destruction of Property.** — One tenant in common may maintain trespass against his cotenant for a total destruction of the common property. *Bennet v. Bullock*, 35 Pa. St. 364; *Critchfield v. Humbert*, 39 Pa. St. 427, 80 Am. Dec. 533.

**1. Trespass to Try Title.** — *Harvin v. Hodge*, Dudley L. (S. Car.) 23; *Martin v. Quattlebam*, 3 McCord L. (S. Car.) 205; *Taylor v. Stockdale*, 3 McCord L. (S. Car.) 302. See also *Lord v. Tyler*, 14 Pick. (Mass.) 156.

But in *California* it was held in *Ross v. Heintzen*, 36 Cal. 313, that one tenant in common of real estate in the actual possession thereof might maintain an action under section 254 of the Practice Act to determine the validity of a cotenant's adverse claim of title.

**2. See *supra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se — Duties and Liabilities — As to Rents and Profits.***

**3. Assumpsit to Recover Proceeds of Property Sold.** — *Cowles v. Garrett*, 30 Ala. 341; *Richmond v. Connell*, 55 Conn. 403; *Gardiner Mfg. Co. v. Heald*, 5 Me. 381, 17 Am. Dec. 248; *Dickinson v. Williams*, 11 Cush. (Mass.) 258, 59 Am. Dec. 142; *Miller v. Miller*, 7 Pick. (Mass.) 133, 19 Am. Dec. 264, 9 Pick. (Mass.) 34; *Haven v. Foster*, 9 Pick. (Mass.) 112, 19

Am. Dec. 353; *Brinckerhoff v. Wemple*, 1 Wend. (N. Y.) 470; *Coles v. Coles*, 15 Johns. (N. Y.) 159, 8 Am. Dec. 231; *Burrows v. Turner*, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622; *Bruce v. Hastings*, 41 Vt. 380, 98 Am. Dec. 592.

In *Williams v. Chadbourne*, 6 Cal. 559, it was held that where one tenant in common appropriates the proceeds of the property to his own use, the remedy is by an action of trover, or by an action for money had and received, and that a declaration for goods sold and delivered will not support a judgment in such a case.

**4. Assumpsit for Money Advanced.** — Assumpsit will lie in favor of one tenant in common against his cotenant to recover contribution for money or its equivalent advanced by the former for the benefit of both, pursuant to an agreement between them. *Strother v. Butler*, 17 Ala. 733.

**5. Advances for Repairs and Improvements.** — *Haven v. Mehlgarten*, 19 Ill. 91; *Gwineth v. Thompson*, 9 Pick. (Mass.) 31, 19 Am. Dec. 350.

In *Connecticut*, prior to the adoption of the Practice Act, assumpsit would have lain for his share where a tenant in common had made necessary repairs upon the common property, and a recovery can now be had in an ordinary civil action under that act. *Fowler v. Fowler*, 50 Conn. 256.

**6. Advances for Removal of Incumbrances.** — *Dickinson v. Williams*, 11 Cush. (Mass.) 258, 59 Am. Dec. 142; *Fisher v. Kinaston*, 18 Vt. 489.

**7. *Fanning v. Chadwick*, 3 Pick. (Mass.) 420, 15 Am. Dec. 233.**

**8. *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Loomis v. O'Neal*, 73 Mich. 582; *Williams v. Rogers*, 110 Mich. 418. Compare *Bulger v. Woods*, 3 Pin. (Wis.) 460.**

The right in such case rests upon the fact that the parties sustain contractual relations, and the question whether the property is divisible by weight or measure is not involved. *Williams v. Rogers*, 110 Mich. 418.

**9. *Strother v. Butler*, 17 Ala. 733.**



could not maintain an action *ex contractu* against his cotenant, unless as bailiff, his only remedy being by bill in equity.

**Modern Statutes.** — Though under the modern practice, particularly as influenced by statutes, this rule has been changed, and one tenant may now very generally maintain against his cotenant *assumpsit* or other appropriate legal action,<sup>1</sup> this change in the rule has not deprived a court of equity of jurisdiction over controversies between cotenants in a proper case, and where the several interests of the cotenants are complicated, and their rights are incapable of adjustment in an action at law, a court of equity will entertain jurisdiction and settle the rights of the parties by a single decree.<sup>2</sup>

**Bill for Accounting.** — Thus a bill in equity for an accounting may be maintained by one tenant against his cotenant where the latter has received more than his proper share of the rents and profits of the common property; and formerly the only remedy in such case was by the statutory action of account or by a bill in equity.<sup>3</sup> Moreover, the action of account is in its nature equitable, and, although given by statute, is a matter of equitable cognizance.<sup>4</sup> But where the account is simple and can be readily adjusted by a judgment in an action at law, a court of equity will ordinarily not assume jurisdiction.<sup>5</sup>

**Relief from Fraud.** — A court of equity will grant relief to one tenant in common against the fraud of his cotenant.<sup>6</sup>

**Injunction.** — In some cases a court of equity will grant an injunction in favor of one cotenant against another to prevent waste, but this jurisdiction is sparingly exercised, and the court will grant an injunction only where the waste complained of is malicious or destructive or attended with peculiar circumstances warranting such relief.<sup>7</sup> An injunction may be granted also in other proper cases of injury to the common property or of interference with its use and enjoyment.<sup>8</sup> The insolvency of the defendant is an important

1. See *supra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se* — *Duties and Liabilities* — *As to Rents and Profits*; and *supra*, this section, *Actions at Law*.

2. **Equitable Jurisdiction Where Remedy at Law Is Inadequate.** — *Sanders v. Robertson*, 57 Ala. 465; *Smith v. King*, 50 Ga. 192; *Lowe v. Burke*, 79 Ga. 164; *Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724; *Scott v. Guernsey*, 48 N. Y. 106; *Wright v. Wright*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 176.

Notwithstanding a statute authorizing an action at law between cotenants, a court of chancery has jurisdiction to take an account between them in regard to expenditures on account of the common property, where one of the cotenants is a married woman. *Paine v. Slocum*, 56 Vt. 504.

Equity has concurrent jurisdiction with courts of law over matters of account between tenants in common, and when asserted, a court of chancery will hold and exercise it for the purpose of settling all the equities between the cotenants growing out of the cotenancy. *Andrews v. Murphy*, 12 Ga. 431.

3. See the title **JOINT TENANTS AND TENANTS IN COMMON**, 11 ENCYC. OF PL. AND PR. 757.

4. *Smith v. King*, 50 Ga. 192; *Wright v. Wright*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 176.

5. **No Equity Jurisdiction Where Remedy at Law Is Adequate and Complete.** — *Nelms v. McGraw*, 93 Ala. 245; *McCaw v. Barker*, 115 Ala. 543, *quoting* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1134; *Carter v. Bailey*, 64 Me. 458, 18 Am. Rep. 273; *Adams v. Palmer*, 6 Gray (Mass.)

336; *Blood v. Blood*, 110 Mass. 545; *Gloninger v. Hazard*, 42 Pa. St. 389.

In *Vermont* courts of chancery have concurrent jurisdiction with courts of law in the matter of accounts between cotenants. *Leach v. Beattie*, 33 Vt. 195.

6. See *Sires v. Sires*, 43 S. Car. 266.

7. **Injunction Restraining Waste.** — *Hole v. Thomas*, 7 Ves. Jr. 589; *Twort v. Twort*, 16 Ves. Jr. 128; *Smallman v. Onions*, 3 Bro. C. C. 621; *Arthur v. Lamb*, 2 Dr. & Sm. 428; *Bailey v. Hobson*, L. R. 5 Ch. 180; *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 49 Am. Rep. 686; *Stout v. Curry*, 110 Ind. 514; *Russell v. Merchants' Bank*, 47 Minn. 286, 28 Am. St. Rep. 368; *Obert v. Obert*, 5 N. J. Eq. 397; *Coffin v. Loper*, 25 N. J. Eq. 443; *Mott v. Underwood*, 148 N. Y. 463, 51 Am. St. Rep. 711; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Atkinson v. Hewitt*, 51 Wis. 275. See also *Durham*, etc., R. Co. v. *Wawn*, 3 Beav. 119, 4 Jur. 764; *Adams v. Palmer*, 6 Gray (Mass.) 336; *Weise v. Welsh*, 30 N. J. Eq. 431.

One tenant in common of a lot valuable for building purposes may be restrained at the suit of his cotenant from digging earth on the lot for making bricks. *Dougall v. Foster*, 4 Grant Ch. (U. C.) 319. But it is otherwise where the digging of clay and the manufacture of brick are in accordance with the regular and customary use of the property. *Russell v. Merchants' Bank*, 47 Minn. 286, 28 Am. St. Rep. 368.

8. **Relief by Injunction — Illustrations — Continuing and Permanent Injury.** — A tenant in common may resort to a court of equity for an



element to be considered on the question of granting an injunction in a suit between cotenants, and in some cases an injunction will be granted only where the defendant is insolvent.<sup>1</sup>

**Appointment of Receiver.** — A court of equity may appoint a receiver at the instance of one tenant in common against his insolvent cotenants who are in possession of the common property, receiving the whole of the rents and profits and excluding the other from the receipt of any portion thereof.<sup>2</sup>

**Partition.** — A court of equity has jurisdiction over partition proceedings between cotenants, and upon such proceedings may afford complete relief to all the parties by making the allotments, compelling contribution in a proper case, and adjusting all claims and equities between the several cotenants.<sup>3</sup>

**IX. RIGHTS AND LIABILITIES OF COTENANTS AND THIRD PERSONS** — 1. **Rights of Cotenants Against Strangers.** — Tenants in common as property owners have, of course, the same general rights against third persons in respect of the common property as property owners generally, and the only question arising from the relationship of the cotenants to be considered is whether a particular right of action is joint or several, and hence whether the cotenants should sue separately or be joined as plaintiffs. As a matter of procedure this branch of the subject is foreign to the scope of the present work.<sup>4</sup>

2. **Liabilities of Cotenants to Strangers** — *a.* **IN GENERAL** — **Liability on Contract.** — The general liability of cotenants to third persons on account of the common estate has already been considered incidentally in connection with their powers, duties, and liabilities *inter se*. They are jointly liable on their contracts made with third persons when jointly executed, or when executed by one of the cotenants with authority from the others, but unauthorized acts or contracts done or entered into by any of the cotenants, though binding on them, are not binding on their cotenants not parties thereto.<sup>5</sup> As to liens and incumbrances on the common property, it seems that each cotenant for himself and as surety for the others is liable for the whole debt, though as

injunction to restrain the commission of a continuing and permanent injury, as where one tenant in common of a building erects a wall in the hallway thereof so as to interfere with the free enjoyment of the building. *Woods v. Early*, 95 Va. 307. And see *Weinmiester v. Ingersoll*, 47 Mich. 31.

In *Montana*, by Code Civ. Pro. (1895), § 592, a tenant in common of a mining claim has a right to an injunction against a cotenant who assumes and exercises exclusive ownership over, or destroys, lessens in value, or otherwise injures the common property, whenever he would have such right as against a stranger. *Anaconda Copper Min. Co. v. Butte, etc.*, Min. Co., 17 Mont. 519; *Red Mountain Consol. Min. Co. v. Esler*, 18 Mont. 174; *Connole v. Boston, etc.*, Consol. Copper, etc., Min. Co., 20 Mont. 523; *Harrigan v. Lynch*, 21 Mont. 36.

**Trees Growing on the Boundary Line** between the property of adjoining landowners belong to them as tenants in common, and one of the cotenants may enjoin the injury of such trees by the other. *Musch v. Burkhart*, 83 Iowa 301, 32 Am. St. Rep. 305. See the title **TREES**.

**Interfering with Use.** — Where tenants in common have agreed that each shall have the exclusive use of the common property at alternate times, one of the parties may be enjoined from using the property during the other's turn. *Bliss v. Rice*, 17 Pick. (Mass.) 23.

For other examples, see *Kennedy v. Scovil*,

12 Conn. 317; *Arnett v. Munnerlyn*, 71 Ga. 14; *Ballou v. Wood*, 8 Cush. (Mass.) 48.

1. **Insolvency** — **Injunction.** — *Smallman v. Onions*, 3 Bro. C. C. 621; *Hihn v. Peck*, 18 Cal. 640; *McLendon v. Hooks*, 15 Ga. 533; *Stout v. Curry*, 110 Ind. 514; *Atkinson v. Hewitt*, 51 Wis. 275.

See generally the title **INJUNCTIONS**, vol. 16, p. 337.

2. *Williams v. Jenkins*, 11 Ga. 595.

3. See the title **PARTITION**.

4. See the title **JOINT TENANTS AND TENANTS IN COMMON**, 11 ENCYC. OF PL. AND PR. 757.

As to the right of one cotenant to maintain forcible entry and detainer, replevin, trespass, trover, etc., against strangers, see the appropriate titles in this work.

**Recovery for Injury to Possession by Tenants in Common of Life Estate.** — Tenants in common for life are liable to the remainderman or reversioner for an injury to the inheritance by a stranger or some of the cotenants, and having made satisfaction for such injury, they may recover over against the wrongdoer the amount they have been compelled to pay; but until they have made such satisfaction they can recover only for the injury to their possession. *Wood v. Griffin*, 46 N. H. 230.

5. See *supra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se* — *Rights and Powers* — *Contracts Respecting Common Property* — *With Third Persons*; and *Sale or Conveyance of Common Property*.



between themselves each is liable only in proportion to his own interest.<sup>1</sup>

**Liability in Tort.** — For damages caused to strangers in connection with the use and enjoyment of the common property, only the cotenant actually guilty of the negligence or malfeasance resulting in the injury is liable,<sup>2</sup> unless he was acting as agent of his cotenant, in which case all are equally liable.<sup>3</sup>

**b. EXECUTION AND ATTACHMENT OF INTEREST OF COTENANT — General Rule.** — The undivided interest of a joint tenant or tenant in common is liable for the payment of his individual debts, and is subject to levy and sale under execution<sup>4</sup> or attachment<sup>5</sup> against him.

**A Sale of the Undivided Interest of a tenant in common under execution does not work a severance of the cotenancy, but the purchaser, by acquiring the undivided interest of the execution debtor, becomes a tenant in common with the other cotenant or cotenants.**<sup>6</sup>

**Manner of Levy.** — In the case of personal property the sheriff, in levying the execution or attachment, should not attempt to divide the property and take only the debtor's share, but is required to take it all. He may take the whole property into his possession for the purpose of making a sale, and may deliver it to the purchaser of the debtor's undivided interest.<sup>7</sup> And it has been held that a sale made when the property is not present at the time of the levy and sale, or in some way under the control of the sheriff, is void.<sup>8</sup>

**Sale of Undivided Share Only.** — The same general rules governing the sale of his interest by the cotenant himself apply to a sale of such interest under execution or attachment. Thus, while the sheriff may take the whole property into his possession for the purpose of selling the debtor's share, he may sell only such undivided share, and a sale of the whole property as the property of the debtor cannot affect the interests of the other cotenants.<sup>9</sup>

1. See *supra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se — Duties and Liabilities — As to Liens and Incumbrances*.

2. **Tenant in Common Not Liable for Torts of Cotenant.** — Thus if one of two tenants in common of a mill uses it to the nuisance of a stranger, the other owner, not actually participating in the wrong, is not liable. *Simpson v. Seavey*, 8 Me. 138, 22 Am. Dec. 228.

So also where an animal owned in common, but in the sole possession of one of the cotenants, escapes, the other cotenant is not liable for an injury inflicted by it. *Marsh v. Hand*, 40 Hun (N. Y.) 339.

3. **Trespass Committed by One Tenant Acting for All.** — Where one of two tenants in common, with the assent of his cotenant, employed a surveyor to run the boundaries of their land, and in doing so, accompanied by the surveying party, committed a trespass on adjoining land, it was held that both cotenants were equally liable for such trespass. *Elliott v. McKay*, 4 Jones L. (49 N. Car.) 59.

4. **Interest of Cotenant Subject to Execution — Alabama.** — *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176.

*Georgia.* — *Baker v. Shepherd*, 37 Ga. 12.

*Illinois.* — *Fischer v. Eslaman*, 68 Ill. 78.

*Michigan.* — *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Midgley v. Walker*, 101 Mich. 583, 45 Am. St. Rep. 431.

*Missouri.* — *Wigley v. Beauchamp*, 51 Mo. 544; *Lloyd v. Tracy*, 53 Mo. App. 175.

*New Hampshire.* — *Smith v. Knight*, 20 N. H. 9.

*New York.* — *Dinehart v. Wilson*, 15 Barb. (N. Y.) 595.

*North Carolina.* — *Blevins v. Baker*, 11 Ired. L. (33 N. Car.) 291; *Boylston Ins. Co. v. Davis*, 68 N. Car. 17, 12 Am. Rep. 624.

*Ohio.* — *Treon v. Emerick*, 6 Ohio 391.

*Rhode Island.* — *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466.

*Tennessee.* — *Earles v. Meaders*, 1 Baxt. (Tenn.) 248.

*Texas.* — *Aycocke v. Kimbrough*, 61 Tex. 543; *Brown v. Renfro*, 63 Tex. 600.

*Vermont.* — *Galusha v. Sinclear*, 3 Vt. 395; *Whitney v. Ladd*, 10 Vt. 165; *Bigelow v. Topliff*, 25 Vt. 274, 60 Am. Dec. 264.

And see cases cited in the notes following.

5. *King v. Wilson*, 54 N. J. Eq. 247. See also the title ATTACHMENT, vol. 3, pp. 210, 211.

6. *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Leonard v. Scarborough*, 2 Ga. 73; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179. See also *Macauley v. Fulton*, 44 Cal. 355.

7. **Sheriff May Take Possession of Whole Property.** — *Waldman v. Broder*, 10 Cal. 378; *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Caldwell v. Auger*, 4 Minn. 217, 77 Am. Dec. 515; *Laurence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179; *Whitney v. Ladd*, 10 Vt. 165; *Welch v. Clark*, 12 Vt. 681, 36 Am. Dec. 368; *Heald v. Sargeant*, 15 Vt. 506, 40 Am. Dec. 694.

8. *Brown v. Lane*, 19 Tex. 203. See also *Whitney v. Ladd*, 10 Vt. 165.

9. **Share of Debtor Only May Be Sold.** — *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Neary v. Cahill*, 20 Ill. 214; *Laurence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Mersereau v. Norton*, 15 Johns. (N. Y.) 179; *Dinehart v.*



**Sale of Entire Property by Sheriff as Conversion.** — In regard to the effect as a conversion of a sale by the sheriff of the entire property as belonging solely to one cotenant, the decisions present the same want of harmony as in the case of such sales by the cotenant himself.<sup>1</sup> Thus it is held in some cases that such a sale is a conversion rendering the officer liable to the other cotenants in trespass or trover,<sup>2</sup> while other cases maintain the contrary view and hold that such sales are simply nugatory as to the interests of the other cotenants, although sufficient to pass the interest of the debtor.<sup>3</sup>

**Levy and Sale by Metes and Bounds.** — A levy and sale of the debtor's undivided interest in land by metes and bounds is void as to the other cotenants<sup>4</sup> though good against the debtor.<sup>5</sup> And the whole interest of the debtor in a separate and distinct parcel of the common property may be levied on and sold independently of the rest of the property.<sup>6</sup>

**A Creditor Having Two Executions** against a debtor owning undivided interests in several tracts of land may at the same time levy one execution on the whole of the debtor's interest in one tract and the other execution on the debtor's interest in all the other tracts, since neither the debtor nor the other cotenants will be injured thereby.<sup>7</sup> But a single execution cannot be spread over two distinct tracts in which the debtor holds an undivided interest; the whole interest in one must be taken first, and then, if this is insufficient, the other may be resorted to.<sup>8</sup>

**X. SEVERANCE OF COTENANCY — 1. Joint Tenancy — a. BY ACT OF JOINT TENANT — General Rule.** — A joint tenancy may be severed by the act of one of the joint tenants,<sup>9</sup> but in order to amount to a severance such act must be such as to preclude the joint tenant from claiming by survivorship any interest in the subject-matter of the joint tenancy.<sup>10</sup>

**The Alienation of His Interest** by one of the joint tenants will sever the joint tenancy.<sup>11</sup> But there must be an actual alienation; the declaration of one of the cotenants that the cotenancy shall be severed is not sufficient unless it amounts to an actual agreement.<sup>12</sup>

Wilson, 15 Barb. (N. Y.) 595; Ladd v. Hill, 4 Vt. 164. See also Andrews v. Murphy, 12 Ga. 431.

1. See *supra*, this title, *Actions Between Cotenants — Actions at Law — Trover*.

2. **Liability of Officer for Wrongfully Selling Entire Property.** — Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Dinehart v. Wilson 15 Barb. (N. Y.) 595.

One tenant in common of personal property may maintain trover against an officer for his undivided moiety of the property when the officer has sold the whole property upon execution against the cotenant. White v. Morton, 22 Vt. 15, 52 Am. Dec. 75.

Where the owner of an undivided half of a stock of goods mortgaged the whole, and the goods were seized and sold under the mortgage, it was held that the persons so selling them were liable in trespass to the other cotenant, who was damaged by the conversion to the extent of his interest, not being bound to take back any of the goods remaining unsold. Keables v. Christie, 47 Mich. 594.

3. Welch v. Clark, 12 Vt. 681, 36 Am. Dec. 368; Heald v. Sargeant, 15 Vt. 506, 40 Am. Dec. 694. See also Fiero v. Betts, 2 Barb. (N. Y.) 633.

4. See *supra*, this title, *Rights, Powers, Duties, and Liabilities of Cotenants Inter Se — Rights and Powers — Sale or Conveyance of Common Property — Of One's Own Interest — By Metes and Bounds*.

5. Brown v. Bailey, 1 Met. (Mass.) 254; Treon v. Emerick, 6 Ohio 391. See also Campau v. Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

6. Butler v. Roys, 25 Mich. 53, 12 Am. Rep. 218; Peabody v. Minot, 24 Pick. (Mass.) 329.

7. Martin v. Colleston, 38 N. H. 455.

8. Starr v. Leavitt, 2 Conn. 243, 7 Am. Dec. 268.

9. Edwards v. Champion, 3 De G. M. & G. 202, 21 Eng. L. & Eq. 230.

See also cases cited in the notes immediately following.

10. **Incomplete Severance.** — *In re Wilks*, (1891) 3 Ch. 59.

An assignment by joint tenants of the joint property to a third person in trust, but without a declaration of trust, does not sever the joint tenancy. Rex v. Williams, 3 Eq. Cas. Abr. 538, par. 4.

11. **Severance by Alienation of Interest.** — Robison v. Codman, 1 Sumn. (U. S.) 121.

A joint tenancy may be severed by an assignment of his interest by a joint tenant to a trustee to pay his debts. Davidson v. Heydon, 2 Yeates (Pa.) 459.

A void grant by one of the joint tenants does not sever a joint tenancy. Moyse v. Gyles, 2 Vern. 385.

12. Partriche v. Powlet, 2 Atk. 54.

**An Agreement by One Joint Tenant to Sell** his interest does not bind the survivor. Musgrave v. Dashwood, 2 Vern. 63.



A Mortgage of his interest by one of the joint tenants severs the joint tenancy.<sup>1</sup>

So Also of a Demise,<sup>2</sup> although the lease is not to commence until after the death of the lessor.<sup>3</sup>

By Will. — Since the interest of a joint tenant cannot be conveyed by will, the joint tenancy cannot be severed in this manner,<sup>4</sup> although a severance may be effected by mutual wills executed by joint tenants in pursuance of an agreement to sever.<sup>5</sup>

A Covenant by a Joint Tenant to Sell, though it does not sever the joint tenancy at law, will do so in equity.<sup>6</sup>

Severance by Marriage of Female Joint Tenant. — The assignment of the interest of a joint tenant which will sever the joint tenancy may be either by deed or by operation of law, as where on the marriage of a female joint tenant her interest vests in the husband. The rule is that where the joint property is of such a nature that the wife's interest vests in the husband during coverture, the marriage operates as a severance of the cotenancy, but it is otherwise where the wife's interest does not so vest in the husband. Thus in general, where the joint property is chattels real, the joint tenancy is not severed by the marriage, because the property does not vest in the husband; but in case of chattels personal the cotenancy is severed, because the wife's interest becomes immediately vested in the husband.<sup>7</sup> The joint tenancy in such case may also be severed by marriage settlements between the parties.<sup>8</sup>

b. BY AGREEMENT OF COTENANTS. — A joint tenancy may be severed by agreement between the parties,<sup>9</sup> but the agreement should be express.<sup>10</sup> It is not necessary that the agreement should be actually executed during the life of the joint tenants to effect a severance. The bare agreement has the force of actual severance, and the severance is held to be executed though there exists only an agreement which is as yet unperformed.<sup>11</sup>

c. BY COURSE OF DEALING BETWEEN COTENANTS. — A joint tenancy may be severed by such a course of dealing by the cotenants as indicates that the interests of all were mutually treated as being several and not joint.<sup>12</sup> But the course of dealing, to effect a severance, must be one by which the shares of all the parties are affected, and not simply an intention to sever with

1. *York v. Stone*, 1 Salk. 158, 1 Eq. Cas. Abr. 293, par. 1; *Simpson v. Ammons*, 1 Binn. (Pa.) 177, 2 Am. Dec. 425.

2. *Clerk v. Clerk*, 2 Vern. 323; *Roe v. Lonsdale*, 12 East 39; *Doe v. Read*, 12 East 57.

3. *Clerk v. Clerk*, 2 Vern. 323.

4. *Cotenancy Not Severable by Will*. — *Moyse v. Gyles*, 2 Vern. 385; *Duncan v. Forrer*, 6 Binn. (Pa.) 193.

Where a joint tenant devised his moiety, and before his death the joint tenancy was dissolved, it was held that nothing passed by the will. *Swift v. Roberts*, Amb. 617, 1 W. Bl. 476, 3 Burr. 1488.

5. *In re Wilford*, 11 Ch. D. 267.

6. *Brown v. Raindle*, 3 Ves. Jr. 256. See also *Burnett v. Kinaston*, 2 Freem. Ch. 239.

A deed between two cotenants providing that each shall have the rents of certain lots held in common, exclusive of the other, is merely an agreement to convey, and does not operate as a severance of the cotenancy. *Burton v. Morris*, 3 Harr. (Del.) 269.

7. *Marriage of Female Cotenant*. — *Bracebridge v. Cook*, Plowd. 416; *In re Barton*, 10 Hare 12; *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Baillie v. Treharne*, 17 Ch. D. 388; *In re Butler*, 38 Ch. D. 286.

8. *Caldwell v. Fellowes*, L. R. 9 Eq. 410; *Baillie v. Treharne*, 17 Ch. D. 388; *Burnaby v. Equitable Reversionary Interest Soc.*, 28 Ch. D. 416, 33 W. R. 639. See also *Partriche v. Powlet*, 2 Atk. 54.

9. *Severance by Agreement*. — *Frewen v. Relfe*, 2 Bro. C. C. 220; *Gould v. Kemp*, 2 Myl. & K. 310; *Overton v. Lacy*, 6 T. B. Mon. (Ky.) 13, 17 Am. Dec. 111.

Where by mutual agreement two joint tenants made wills bequeathing the joint property to each other for life with remainder over to their nieces after the death of the survivor, it was held that this was a severance of the joint tenancy. *In re Wilford*, 11 Ch. D. 267, 48 L. J. Ch. 243, 27 W. R. 455.

10. *Frewen v. Relfe*, 2 Bro. C. C. 220.

11. *Gould v. Kemp*, 2 Myl. & K. 310. In this case, where A and B were joint tenants, and A wrote a letter to B engaging, should he outlive B, to secure to the latter's family in any way he might desire by his will a moiety of the joint property, and B died two days after the date of the letter and before A, it was held that the joint tenancy was severed.

12. *Effect of Course of Dealing Between Cotenants*. — *Leak v. Macdowall*, 32 Beav. 30. And see cases cited in the notes immediately following.



respect to a particular share unknown to the other cotenants.<sup>1</sup> But where in their conduct joint tenants treat their interests as several, the joint tenancy is severed although they may not have been aware that their interests were originally joint.<sup>2</sup> It is not necessary in order to establish a severance to show a specific act of division of each part of the property, if there has been a general dealing sufficient to manifest an intention to divide the whole;<sup>3</sup> but it has been held that the several receipts by joint tenants of a portion of a trust fund do not destroy the joint tenancy as to the remainder of the fund.<sup>4</sup>

**Purchase of Property for Trade or Speculation.** — Where two or more persons invest money in property for the purpose of trade or speculation or of improving it, although upon such terms as would create a joint tenancy, a severance will ordinarily be inferred, and it will not be presumed, in such case, that the parties made such investments subject to the right of survivorship.<sup>5</sup>

**Burden of Proof.** — Whether there has been a severance is a matter of evidence,<sup>6</sup> the burden of proof resting upon the party alleging it.<sup>7</sup>

*d.* **By JUDICIAL ALIENATION OF SHARE OF COTENANT.** — In addition to the modes already considered, severance may be effected by the alienation of the interest of one of the cotenants by judicial proceedings. Thus it has been held that a fine and recovery by one joint tenant severed the joint tenancy and operated on his share.<sup>8</sup> So also a judgment and execution had against a joint tenant and levied on his interest in his lifetime works a severance of the joint tenancy.<sup>9</sup> Again, where one joint tenant recovers the property from his cotenant, the cotenancy is thereby severed.<sup>10</sup>

*e.* **PARTIAL SEVERANCE.** — A joint tenancy may be severed in part. Thus if one of three joint tenants aliens his share, the two remaining tenants still hold their shares as joint tenants; so also if he releases his share to one of his cotenants, though the joint tenancy is destroyed as to that share, the other shares are still held jointly.<sup>11</sup> Again, where there are a number of joint tenants, several of them may jointly effect a severance as to the other cotenants, who, as well as the severing cotenants, will still remain joint tenants among themselves of their respective portions of the estate so divided.<sup>12</sup>

*f.* **TENANCY IN COMMON CREATED BY SEVERANCE OF JOINT TENANCY.** — It is to be noted that where a joint tenancy is severed by the destruction of one or more of its constituent unities, leaving, however, the unity of possession unaffected — as where one of two joint tenants sells his undivided share to a stranger — while the joint tenancy is destroyed, the property is still held in cotenancy, the other original joint tenant and the purchaser holding as tenants in common.<sup>13</sup>

1. Williams v. Hensman, 1 Johns. & H. 546.

2. Jackson v. Jackson, 9 Ves. Jr. 591; Williams v. Hensman, 1 Johns. & H. 546.

3. Crooke v. De Vandes, 11 Ves. Jr. 330.

4. Leak v. Macdowall, 32 Beav. 30.

**A Joint Tenancy in Income** is severed as to each instalment as it becomes payable, without actual payment. Walmsley v. Foxhall, 40 L. J. Ch. 28.

5. **Property Purchased for Trade or Speculation.** — Lyster v. Dolland, 1 Ves. Jr. 431; Lake v. Gibson, 1 Eq. Cas. Abr. 290, par. 3; Jackson v. Jackson, 9 Ves. Jr. 591; Lake v. Craddock, 3 P. Wms. 158; Jeffereys v. Small, 1 Vern. 217; Elliott v. Brown, 3 Swanst. 489; Duncan v. Farrer, 6 Binn. (Pa.) 193.

6. Crooke v. De Vandes, 11 Ves. Jr. 330.

7. Leak v. Macdowall, 32 Beav. 30.

8. **Judicial Alienation.** — Moody v. Moody, Amb. 649; Ford v. Grey, 6 Mod. 44, 1 Salk. 285. See also Church v. Edwards, 2 Bro. C. C. 180.

9. Davidson v. Heydon, 2 Yeates (Pa.) 459. See also Hair v. Avery, 28 Ala. 267.

10. **A Recovery in Trover by One Joint Tenant** against another is a severance of the joint tenancy; and where the joint property consists of several different articles, some of which are in the possession of each joint tenant, exclusive of the other, such recovery is a severance of the cotenancy as to all the property, and not simply as to the property in the possession of the defendant; and in order to a recovery the plaintiff will be required to submit to such severance as to the property in his own possession also. Roddy v. Cox, 29 Ga. 298, 74 Am. Dec. 64.

11. 2 Black. Com. 186.

12. Williams v. Hensman, 1 Johns. & H. 546.

13. 2 Black. Com. 185. See *supra*, this title, *Creation of Estates in Cotenancy — At Common Law — Tenancy in Common — By Destruction of Joint Estates.*



**2. Tenancy in Common.** — A tenancy in common may be dissolved either by uniting all the titles and interests by purchase or otherwise, which brings the whole to one severalty, or by making partition between the several tenants in common, which gives to them all respective severalties.<sup>1</sup> Unity of possession being the only unity essential to such a cotenancy, anything that operates to destroy this unity will of course dissolve the cotenancy,<sup>2</sup> but the destruction of other unities, if they exist, will not, as in the case of a joint tenancy, work a severance. Thus, as has heretofore been seen, a conveyance of his interest by one tenant in common to a stranger does not dissolve the cotenancy, except as to the grantor, but constitutes the grantee a tenant in common in the place of his grantor.<sup>3</sup> But a sale of the property by all the cotenants and the determination of the share of each of the proceeds is a severance of the cotenancy.<sup>4</sup>

**Severance of Cotenancy of Severable Property by Agreement.** — Tenants in common of personal property capable of exact division by quantity and quality, such as grain and the like, may by agreement apportion the property among themselves, and this will operate as a severance of the cotenancy. Each cotenant has then a right to his proper share as his own separate property, although not actually separated from the residue. After such severance the cotenant in possession of the property holds the shares of the other cotenants simply as bailee, and a refusal by him to deliver up such shares on demand is a conversion for which an action will lie.<sup>5</sup> But though such an apportionment without actual division may amount to a severance so far as the rights of the cotenants among themselves are concerned, it has been held in a case involving the rights of cotenants against a stranger that the cotenants in such case remain such until the cotenancy is severed by an actual division made between themselves.<sup>6</sup>

1. 2 Black. Com. 194; *Sullivan v. McLenans*, 2 Iowa 437, 65 Am. Dec. 780. See also *Hinds v. Terry*, Walk. (Miss.) 80.

**Conveyance of Part of Common Land to Cotenant.** — A conveyance by a tenant in common by metes and bounds, of half of the land held in common, to his cotenant, destroys the cotenancy as to that half, but leaves the parties tenants in common of the remaining half. *Earles v. Meaders*, 1 Baxt. (Tenn.) 248.

**Severance of Cotenancy in Draft.** — Where two tenants in common of a draft agreed that it should be delivered to a third person to collect and divide the proceeds, and on the faith of such agreement one of them indorsed the draft, it was held that such agreement and delivery probably worked a severance of the cotenancy, and that a wrongful appropriation of the draft so indorsed by the other cotenant as his own exclusive property was a conversion. *Lawatsch v. Cooney*, 86 Hun (N. Y.) 546.

**Occupation by One Cotenant of Particular Part of Common Property.** — Where one tenant in common occupies a particular part of the common property by the agreement of the other tenants in common, it is so far a severance in fact as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger, even though the length of such occupation would be insufficient to mature an absolute legal title in severalty. *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653.

**An Agreement Between Heirs** that one of them shall procure an outstanding title to the common property and convey it to their mother severs the cotenancy. *Howe v. Howe*, 90 Iowa 582.

2. *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176.

3. See *supra*, this title, *Creation of Estates in Cotenancy — Under Modern Practice and Statutes — Tenancy in Common — Purchase of Undivided Interest in Property*.

A sale of his interest by one tenant in common does not dissolve the relation between the remaining tenants. *Robinson v. Robinson*, 173 Mass. 233.

But in *Van Doren v. Balty*, 11 Hun (N. Y.) 239, it was held that a wrongful sale of the whole property by one tenant in common terminated the cotenancy.

4. *Palmer v. Stryker*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 737.

5. **Severance of Cotenancy of Severable Property.** — *Lobdell v. Stowell*, 51 N. Y. 70. See also *Erwin v. Clark*, 13 Mich. 10.

Where two of three tenants in common of a cargo of salt sold their share to a stranger with the assent and on the advice of their cotenant, it was held that this was a valid sale and severed the tenancy in common, and that the purchaser might maintain trover against the third cotenant for the share bought by him. *Seldon v. Hickock*, 2 Cai. (N. Y.) 166.

**Tenants in Common of a Growing Crop** may make a partial severance as the crop is gathered, and as the division is made each holds in severalty the share allotted to him, while they remain tenants in common of the part of the crop not divided. *Gafford v. Stearns*, 51 Ala. 434. See also *McKeithen v. Pratt*, 53 Ala. 116.

6. *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273.



**Severance by One Cotenant.** — It seems that the right of one tenant in common of severable personal property to sever his own share has always existed at common law. Where such property is held in common each cotenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and may sell or destroy it without being liable to his cotenants for a conversion of the common property. And where one tenant in common takes from the common property, in such case, if he does not take more than his proper share, he will be presumed in law to have severed and taken his own merely.<sup>1</sup> In like manner a creditor of one of the cotenants may lawfully seize and sever his debtor's share, or so much thereof as is not exempt by law from seizure.<sup>2</sup> This rule should, of course, be confined to property readily divisible and commonly divided by weight, tale, or measure, into portions absolutely alike in quality and value, as grain in bulk, money, and the like. It could not reasonably be applied in principle or in practice to things in their nature so far indivisible that the share of one cannot be distinguished from that of another, and where each article or item has a distinct identity, plainly distinguishable from the others and of a different value.<sup>3</sup>

**Termination of Cotenancy by Recovery of Property by Stranger.** — The recovery of the property held in common by a stranger claiming under title adverse to that of the cotenants terminates the cotenancy.<sup>4</sup>

**3. Partition Between Cotenants.** — The ordinary mode by which a cotenancy is dissolved is by partition or the division of the joint or common property between the several cotenants, so that they shall thereafter hold their respective shares in severalty. Partition may be effected either by act of the parties or by judicial proceedings. A full discussion of this branch of the subject will be found elsewhere in this work.<sup>5</sup>

**JOINT TORTFEASORS.** — See the titles CONTRIBUTION AND EXONERATION, vol. 7, p. 364; RELEASE; TRESPASS; TORTFEASORS.

**JOINT TRESPASS.** — See the title TRESPASS.

**JOINTURE.** (See also the title DOWER, vol. 10, p. 207.) — Jointure is defined as a competent livelihood of freehold for the wife, of lands or tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least.<sup>6</sup>

1. *Severance by One Cotenant.*—Tripp v. Riley, 15 Barb. (N. Y.) 333; Fobes v. Shattuck, 22 Barb. (N. Y.) 568; Channon v. Lusk, 2 Lans. (N. Y.) 211; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Newton v. Howe, 29 Wis. 531, 9 Am. Rep. 616. See also Clark v. Griffith, 24 N. Y. 595.

2. Newton v. Howe, 29 Wis. 531, 9 Am. Rep. 616.

3. Per Johnson, P. J., in Channon v. Lusk, 2 Lans. (N. Y.) 211.

A tenant in common of hogs delivered to him by the owner to be fattened on shares cannot, without the consent of his cotenant, divide the herd, appropriate half to himself, and assign the other half to his cotenant. Sheldon v. Skinner, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161.

4. Vasquez v. Ewing, 24 Mo. 31, 66 Am. Dec. 694.

5. See the title PARTITION.

6. *Jointure.* — Grider v. Eubanks, 12 Bush (Ky.) 513; Grogan v. Garrison, 27 Ohio St. 60.

*Jointure* must be a freehold estate in land or tenements, secured to the wife to take effect upon the decease of her husband and to continue during her life at the least, unless she be her-

self the cause of the termination. Vance v. Vance, 21 Me. 364.

Upon the construction of a statute providing that *jointure* settled on the woman before marriage should bar dower, the court in Fellers v. Fellers, 54 Neb. 698, said: "The word *jointure*, as it is employed in the above quotation, signifies 'an estate or property settled on a woman in consideration of marriage, and to be enjoyed by her after her husband's decease.' Cent. Dict., tit. *Jointure*. To the same effect is the definition of this word in Anderson's Dictionary of Law, Black's Law Dictionary, and Rapalje and Lawrence's Law Dictionary, as such word is used in the sections above quoted."

See also *In re De Hoghton*, (1896) 2 Ch. 392; *Murphy v. Murphy*, 12 Ohio St. 410.

**Before or After Death of Husband.** — The term *jointure* may mean the estate to the wife to commence either before or after the death of her husband. *In re De Hoghton*, (1896) 2 Ch. 393; *Jamieson v. Trevelyan*, 10 Exch. 269. *Prima facie*, a *jointure* is an estate to the wife for life, to take effect on the death of her husband. *In re De Hoghton*, (1896) 2 Ch. 385.

**In Lieu of Dower.** — A statute provided that



**JOURNAL.** — See note 1.

**JOURNEY.** — See note 2.

**JOURNEYS ACCOUNT.** — A new writ which the plaintiff was formerly permitted to sue out within a reasonable time after the abatement, without his fault, of the first writ. This time was computed with reference to the number of days which the plaintiff must spend in journeying to reach the court; hence the name of journeys account, that is, journeys *acomptes* or counted. This mode of procedure has fallen into disuse, the practice now being to permit the quashal of the writ and the suing out of another.<sup>3</sup>

**J. P.** — An abbreviation for justice of the peace.<sup>4</sup>

**JR.** (See also JUNIOR, *post.*) — Jr. is an abbreviation of junior.

**JUBILEE.** — See note 5.

**JUDEX.** — See note 6.

**JUDG.** — See note 7.

*jointure* might be a bar to dower. The court said: "The term *jointure*, as above used, means such an estate as may be conveyed or devised to the wife in lieu of dower. It must be in satisfaction of it; and if transferred to her without any intention or purpose that it shall be so, it does not operate to bar her claim. If, however, the grantor or deviser intends the estate conveyed or devised as in lieu of dower, then it is a *jointure*, and so operates. The bar arises not by operation of law, but from the express or implied intention of the husband." *Pepper v. Thomas*, 85 Ky. 544, citing *Yancy v. Smith*, 2 Met. (Ky.) 408; *Tervis v. McCreary*, 3 Met. (Ky.) 151; *Bac. Abr.*, tit. Dower and Jointure, G. 4.

In *Chase v. Alley*, 82 Me. 238, it was said: "To constitute a *jointure* by deed 'it must be made and expressed in the deed to be in full satisfaction of her dower' (1 Wash. R. P. 299), 'or such intention must appear by necessary implication from the contents of the instrument.' 1 Greenl. Cr. 225." See also *Bubier v. Roberts*, 49 Me. 460.

**Indemnity.** — A statute provided that where the wife was lawfully deprived of her *jointure* or any part thereof, and not by her own act, she should have indemnity therefor by way of dower or damages out of her husband's estate. In construing this statute the court said: "The term *jointure*, as used in the Revised Statutes, was obviously intended to designate such estate, whether created by conveyance or devise, as may be settled upon or transferred to the wife in lieu of dower." *Tervis v. McCreary*, 3 Met. (Ky.) 153. See also *Yancy v. Smith*, 2 Met. (Ky.) 410; *Worsley v. Worsley*, 16 B. Mon. (Ky.) 469.

**1. Journal.** (See also the title STATUTES.) — In *Oakland Paving Co. v. Hilton*, 69 Cal. 494, it was said: "The *journals* required by law to be kept are a record of the proceedings of the houses of the legislature, and so intended. They are, to all intents and purposes, records made in *perpetuam memoriam rei*, there entered. The official record of what is 'done and past' in a legislative assembly is called 'the *journal*.' Cushing's Law and Practice of Legislative Assemblies, par. 415."

**2. Journey.** (See also the title CARRYING WEAPONS, vol. 5, p. 729.) — A statute prohibited the carrying of weapons, but excepted from its operation "all persons when upon a *journey*." In construing this statute in *Hathcote v. State*, 55 Ark. 183, the court said: "In

its original acceptation a *journey* was a day's travel, but in use it has attained a broader though less definite meaning. As generally understood it signifies travel to a distance from home, and it is not used in reference to travel in one's neighborhood or among one's immediate acquaintances." And it was accordingly held that it could not be laid down as a matter of law that a mail carrier, whose route was thirty miles daily, was not on a *journey* while traveling his route.

In *Alexander v. State*, 3 Heisk. (Tenn.) 513, it was said: "Whatever be the literal sense of the term, it was surely not intended that the word *journey*, in the sense of this statute, should embrace a mere ramble in one's own neighborhood across the lines of contiguous counties. If so, a very wise and salutary statute has emasculated itself, and is deprived of half its efficiency for good."

**3.** *Spencer's Case*, 6 Coke 10; *Kinsey v. Heyward*, 1 Ld. Raym. 432; *Davies v. Lowndes*, 7 M. & G. 762, 49 E. C. L. 762; *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.) 84; *Bouv. L. Dict.*

**4. J. P.** — "Two justices then were authorized to take bail in the present case. The persons approving of the recognizance respectively affixed to their signatures the letters *J. P.* These characters are understood to be an abbreviation of the term 'justice of the peace,' one in common use and clearly indicating that that office is intended. It sufficiently appears that the bond was entered into before and approved by two justices." *Shattuck v. People*, 5 Ill. 481. See also the title ABBREVIATIONS, vol. 1, p. 99.

**5.** It has been held that *jubilee* cannot be registered as a trademark under the English statutes on the subject. *Twogood v. Pirie*, 56 L. T. N. S. 394, 35 W. R. 729. See generally the title TRADEMARKS.

**6. Juxes.** — In *People v. New York*, 25 Wend. (N. Y.) 63, it was said: "Blackstone says a court is defined to be a place wherein justice is judicially administered, and that in every court there must be at least three constituent parts, the *actor*, *reus*, and *juxes*; and the latter term he defines to be 'the judicial power.'"

**7.** In *Cassidy v. Holbrook*, 81 Me. 591, it was said: "This abbreviated expression *judg.* cannot be accepted for the word 'judgment.' It may stand for other words as well as for that. See generally the title ABBREVIATIONS, vol. 1, p. 97.



# JUDGE.

By S. B. FISHER.

## I. DEFINITION, 716.

## II. POWERS AND DUTIES IN GENERAL, 717.

1. *Nature*, 717.
2. *Legislative Authority over Powers and Duties*, 717.
  - a. *Power to Impose Nonjudicial Duties*, 717.
  - b. *Power to Grant Judicial Functions to Other than Regular Judges*, 718.
  - c. *Right to Require Opinions of Judges*, 718.
3. *Power to Review Decisions of Other Judges of Co-ordinate Jurisdiction*, 718.

## III. POWERS AND DUTIES IN MATTERS OF PRACTICE, 718.

1. *Powers and Duties During Trial*, 718.
  - a. *In General*, 718.
  - b. *Attendance on Trials*, 719.
    - (1) *Duty of Presiding Judge to Be Present*, 719.
    - (2) *Effect of Absence*, 720.
      - (a) *In Criminal Trials*, 720.
      - (b) *In Trials for Misdemeanor*, 720.
      - (c) *In Civil Trials*, 720.
        - aa. *Absence Without Consent as Ground for New Trial*, 720.
        - bb. *New Trial Granted Notwithstanding Consent of Aggrieved Party*, 721.
    - (3) *Change of Judges During Trial*, 721.
  - c. *Right to Question Witnesses*, 721.
  - d. *Duty to Restrain Misrepresentations of Counsel*, 721.
  - e. *Duty to Instruct Jury*, 721.
2. *Duty with Regard to Opinions, Decisions, etc.*, 721.
  - a. *Necessity for Written Opinions*, 721.
  - b. *Duty to Syllabize Opinions*, 721.
3. *Duty with Regard to Bills of Exceptions and Statements of Fact on Appeal*, 722.
  - a. *Settlement and Signature of Bills of Exceptions*, 722.
  - b. *Statement of Fact on Appeal*, 723.
4. *Duty to Hear Motion for New Trial*, 723.
5. *Power of Adjournment*, 723.

## IV. POWERS AT CHAMBERS, 723.

1. *In General*, 723.
2. *Jurisdiction Incidental to Jurisdiction of Court*, 723.
  - a. *In General*, 723.
  - b. *Jurisdiction Limited by That of Court to Which Judge Belongs*, 724.
3. *Powers Regulated by Statute*, 724.
4. *Authority of Judge over Jury After Adjournment of Court*, 724.

## V. JUDGES AS WITNESSES, 724.

1. *When Essential Members of Court*, 724.
2. *When Not Essential to Composition of Court*, 725.
3. *Cases in Which Judge May Be Witness*, 725.



**VI. LIABILITY OF JUDGES FOR ACTS AND OPINIONS, 725.**

1. *Judicial Acts and Opinions, 725.*
  - a. *Acts and Opinions Within Jurisdiction, 725.*
    - (1) *General Rule, 725.*
    - (2) *Reason for Rule, 727.*
    - (3) *To What Judges Rule Applicable, 727.*
    - (4) *What Are Judicial Acts Within Rule, 728.*
  - b. *Acts and Opinions Not Within Jurisdiction, 728.*
    - (1) *Judges of Courts of Superior or General Jurisdiction, 728.*
      - (a) *Acts in Excess of Jurisdiction, 728.*
      - (b) *Acts in Absence of Jurisdiction, 729.*
    - (2) *Judges of Inferior Courts, 729.*
      - (a) *View that Judges Are Liable for Acts in Absence or Excess of Jurisdiction, 729.*
        - aa. *Statement of Rule, 729.*
        - bb. *Application of Rule, 730.*
      - (b) *View that Judges Are Not Liable for Acts in Excess of Jurisdiction, 731.*
      - (c) *Mistake of Fact, 731.*
  2. *Ministerial Acts, 731.*
    - a. *General Rule, 731.*
    - b. *Ministerial Acts Within Meaning of Rule, 732.*

**VII. DISQUALIFICATION OF JUDGES, 732.**

1. *General Principle, 732.*
2. *Grounds of Disqualification, 733.*
  - a. *At Common Law, 733.*
    - (1) *General Rule, 733.*
    - (2) *Nature of Interest, 733.*
  - b. *Statutory Provisions, 733.*
    - (1) *In General, 733.*
    - (2) *Illustrations, 734.*
      - (a) *Provision as to Interest, 734.*
        - aa. *In General, 734.*
        - bb. *Disqualification by Reason of Interest as Stockholder, 734.*
        - cc. *Interest in Decedents' Estates, 735.*
        - dd. *Disqualification as Resident or Taxpayer, 735.*
      - (b) *Where Judge Is a Party, 736.*
      - (c) *Disqualification by Reason of Relationship, 736.*
        - aa. *In General, 736.*
        - bb. *Degree of Relationship Necessary to Disqualify, 737.*
        - cc. *Construction of Term "Party," 737.*
        - dd. *Disqualification for Affinity Removed by Death, 738.*
      - (d) *Disqualification for Prejudice, 738.*
      - (e) *Exhibition of Partisan Feeling or Unnecessary Expression of Opinion, 738.*
      - (f) *Disqualification as Former Counsel, 739.*
        - aa. *General Rule, 739.*
        - bb. *Reason of Rule, 739.*
        - cc. *Application of Rule, 740.*
        - dd. *Extent of Disqualification, 740.*
      - (g) *Disqualification as Judge in Court Below, 740.*
    - (3) *Constitutional or Statutory Grounds Exclusive, 740.*
  3. *Degree and Nature of Disqualifying Interest, 740.*
    - a. *Degree of Interest Immaterial, 740.*
    - b. *Nature of Disqualifying Interest, 741.*
  4. *Effect of Judgment by Disqualified Judge, 742.*
    - a. *At Common Law, 742.*



b. *Under Statutes*, 742.

- (1) *General Rule*, 742.
- (2) *Such Judgment Voidable Only*, 743.
- (3) *Waiver of Objection*, 743.
5. *Collateral Attack on Such Judgment*, 743.
6. *Powers of Disqualified Judge*, 744.
  - a. *Power to Make Formal Orders, etc.*, 744.
  - b. *Necessity Authorizing Judge to Act*, 744.
7. *Right of Disqualified Judge to Retire of His Own Motion*, 745.
8. *Mandamus to Compel Transfer of Cause*, 745.
9. *Mandamus to Judge Improperly Recusing Himself*, 745.

## VIII. DE FACTO JUDGES, 745.

## IX. SPECIAL OR SUBSTITUTE JUDGES, 745.

1. *Definition*, 745.
2. *Constitutional Provisions*, 746.
3. *When Special Judges Can Act*, 747.
4. *When Special Judges Cannot Act*, 747.
5. *Oath of Special Judge*, 748.
6. *Powers*, 748.
7. *Proof of Authority*, 750.

## CROSS-REFERENCES.

For matters of *PROCEDURE* see the title *JUDGES*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 11, p. 780.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the title *COURTS* in this work, vol. 8, p. 21, and the references there given.

**I. DEFINITION.** — A judge, strictly speaking, is "a public officer whose function is to declare the law, to administer justice in a court of law, to conduct the trial of causes between litigants according to legal forms and methods."<sup>1</sup> The appellation of judge has, however, been extended to include all officers appointed to decide litigated questions, while acting in that capacity.<sup>2</sup>

The Term "Justice" is often used interchangeably with "judge."<sup>3</sup>

**1. Definition.** — *And. L. Dict.*; *Bouv. L. Dict.*  
**Judges Incident to Courts.** — Under a power to establish courts, the legislature cannot maintain the office of judge except as incident to some court. Upon abolition of a court under valid statute, the judge's powers and functions and his right to future salary cease. *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 633.

**2. Title Applied to Those Appointed to Decide Litigation.** — *Bouv. L. Dict.*

**Members of Courts Martial Sit as Judges.** — In *Vanderheyden v. Young*, 11 Johns. (N. Y.) 158, Spencer, J., in holding that the members of a court martial sit as judges, said: "It is a general and sound principle that whenever the law vests any person with a power to do an act and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is vested with discretion, and is, *quoad hoc*, a judge."

**Canal Commissioners who hear evidence and argument, assess damages, etc., constitute a court.** *Reg. v. Aberdare Canal Co.*, 14 Q. B.

854, 68 E. C. L. 854; *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759.

**Court Commissioners.** — In *Clark v. Berghenthal*, 52 Wis. 103, it was held that the word "judge" as used in *Rev. Stat. Wis.*, § 3036, must be construed to include a county judge or court commissioner.

**The Surrogate in New York Is Not a "Judge"** within the seventy-year age limit in the New York Constitution. *People v. Carr*, 100 N. Y. 236, 53 Am. Rep. 161.

**A Highway Commissioner Is Not a Judge**, and is not disqualified from acting in a cause wherein he is interested, under a statute prohibiting judges from so acting. *Foot v. Stiles*, 57 N. Y. 399.

**3. Terms "Judge" and "Justice" Used Interchangeably.** — See *And. L. Dict.*, titles *Judge*, *Justice*; *Vin. Abr.*, tit. *Judges*; *Com. Dig.*, tit. *Courts*, B. 4; *Strauss v. Maddox*, 109 Ga. 223; *Low v. Cheney*, (*Supm. Ct. Spec. T.*) 3 How. Pr. (N. Y.) 287.

**Senior Judge or Justice.** — The senior judge is he who has served the longest under his present commission, rather than another judge who may have been longest in continuous service. See *State v. Hueston*, 44 Ohio St. 1.



"Judge" and "Court" Used Synonymously. — In numerous decisions the terms "judge" and "court" are used as synonymous.<sup>1</sup>

**II. POWERS AND DUTIES IN GENERAL — 1. Nature — Judicial Functions Personal and Not to Be Delegated.** — The powers and duties of a judge are strictly personal in their nature and are to be performed by such officer alone.<sup>2</sup> He cannot delegate his authority to another<sup>3</sup> except where, as in the case of special judges, a delegation of power is authorized by special statute, not in violation of the constitution.<sup>4</sup>

**2. Legislative Authority over Powers and Duties — a. POWER TO IMPOSE NONJUDICIAL DUTIES — View that Only Judicial Functions Can Be Imposed.** — With regard to the power of state legislatures to impose upon judges duties and functions other than those of a judicial nature, the decisions are apparently in irreconcilable conflict, and decisions even in the same state are in some instances far from uniform. Thus, according to many authorities, no functions except those of a judicial nature can be imposed upon a judge,<sup>5</sup> on the ground that to do so would be an encroachment upon the functions of other co-ordinate branches of government.<sup>6</sup> In some of these decisions it is expressly held that the legislature cannot bring under the judicial power a matter which from its nature is not a subject for judicial determination.<sup>7</sup>

**View that Ministerial or Executive Duties May Be Imposed.** — According to other decisions, however, ministerial or executive duties may be, and have been, imposed upon judges.<sup>8</sup> Numerous instances of the imposition upon them of such nonjudicial duties will be found in the notes.<sup>9</sup>

**1. Term "Court" Used Synonymously with "Judge."** — *Von Schmidt v. Widber*, 99 Cal. 511. See also *Wilson v. His Creditors*, 32 Cal. 406; *Luse v. Des Moines*, 22 Iowa 594; *State v. Smith*, 107 Iowa 480; *Borthwick v. Howe*, 27 Hun (N. Y.) 505; *McBride v. Union Pac. R. Co.*, 3 Wyo. 257; and the title **COURTS**, vol. 8, pp. 22, 23.

**2. Judicial Powers and Duties Personal.** — *Hards v. Burton*, 79 Ill. 504; *Vandercook v. Williams*, 106 Ind. 345; *Wilkins v. State*, 113 Ind. 514; *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143; *Britton v. Fox*, 39 Ind. 369; *Campbell v. Monroe County*, 118 Ind. 119; *McClure v. State*, 77 Ind. 287; *Chandler v. Nash*, 5 Mich. 410; *State v. Jefferson*, 66 N. Car. 309; *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.*, 39 Wis. 390.

**3. May Not Delegate Power.** — *Cargar v. Fee*, 119 Ind. 536; *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143; *Petty v. Duvall*, 4 Greene (Iowa) 120; *Winchester v. Ayres*, 4 Greene (Iowa) 104; *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.*, 39 Wis. 390. See also the title **AGENCY**, vol. 1, p. 974.

**The Reception of a Verdict Being a Judicial Act**, authority to receive it cannot be delegated. *Britton v. Fox*, 39 Ind. 369. See also *McClure v. State*, 77 Ind. 287.

**4. Cargar v. Fee**, 119 Ind. 536. See *infra*, this title, *Special or Substitute Judges*.

**5. Legislature May Not Impose Nonjudicial Functions — United States.** — *Hayburn's Case*, 2 Dall. (U. S.) 409, note; *U. S. v. Ferreira*, 13 How. (U. S.) 40; *Rees v. Watertown*, 19 Wall. (U. S.) 107.

*California.* — *Burgoyne v. San Francisco County*, 5 Cal. 9; *People v. Nevada*, 6 Cal. 143; *Hardenburgh v. Kidd*, 10 Cal. 402; *Chard v. Harrison*, 37 Cal. 113; *People v. Sanderson*, 30 Cal. 160; *Smith v. Strother*, 68 Cal. 194.

*Indiana.* — *Ex p. Griffiths*, 118 Ind. 83, 10 Am. St. Rep. 107; *Griffin v. State*, 119 Ind. 520.

*Kansas.* — *State Auditor v. Atchison, etc.*, R. Co., 6 Kan. 500, 7 Am. Rep. 575; *Coleman v. Newby*, 7 Kan. 82.

*Kentucky.* — *McLean County v. Deposit Bank*, 81 Ky. 254.

*Minnesota.* — *State v. Young*, 29 Minn. 474.

*West Virginia.* — *Shepherd v. Wheeling*, 30 W. Va. 479.

**The Valuation of Property for Purposes of Taxation** is an incident to the taxing power, and therefore not such judicial power as can be conferred upon the Supreme Court. *State Auditor v. Atchison, etc.*, R. Co., 6 Kan. 500, 7 Am. Rep. 575. See also *Kansas Pac. R. Co. v. Ellis County*, 19 Kan. 587.

**Power to Grant Ferry Licenses.** — In *Chard v. Harrison*, 7 Cal. 113, the power to grant ferry licenses was held to be not judicial but political.

**Further Illustrations** will be found under the title **CONSTITUTIONAL LAW**, vol. 6, p. 1060.

**6. Burgoyne v. San Francisco County**, 5 Cal. 9; *U. S. v. Todd*, 13 How. (U. S.) 52, note. See also *Ex p. Gans*, 17 Fed. Rep. 471; *Supervisors of Election Case*, 114 Mass. 247, 19 Am. Rep. 341; and the title **CONSTITUTIONAL LAW**, vol. 6, p. 1066.

**7. Legislature Cannot Make Nonjudicial Matter Judicial.** — *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 284; *Coleman v. Newby*, 7 Kan. 94, citing *State Auditor v. Atchison, etc.*, R. Co., 6 Kan. 500, 7 Am. Rep. 575. And see the title **CONSTITUTIONAL LAW**, vol. 6, p. 1060 *et seq.*

**8.** See the title **CONSTITUTIONAL LAW**, vol. 6, p. 1060. See also the next note *infra*.

**9. Imposition of Ministerial Duties.** — *County Courts* in some states might authorize the erection of toll bridges and license ferries, *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. (Ala.) 296, 27 Am. Dec. 652; *Brander v. Chesterfield Justices*, 5 Call (Va.) 548; might act in the demise of a county house, *Buell v. Cook*, 4 Conn. 238;



*b. POWER TO GRANT JUDICIAL FUNCTIONS TO OTHER THAN REGULAR JUDGES.* — It has been held that judicial functions of a subordinate nature may be granted to officers other than the regularly elected judge, subject, of course, to his supervisory control.<sup>1</sup>

*c. RIGHT TO REQUIRE OPINIONS OF JUDGES.* — The right of the other co-ordinate departments to require advisory opinions of judges has been fully considered elsewhere.<sup>2</sup>

**3. Power to Review Decisions of Other Judges of Co-ordinate Jurisdiction — General Rule.** — As a general rule, a judge has no power to review and reverse the action of another judge of co-ordinate jurisdiction.<sup>3</sup> If there has been error in the action of the first judge the remedy is by appeal or writ of error.<sup>4</sup>

**When Rule Does Not Apply.** — It has been held that the rule that a party cannot appeal from one judge to another of co-ordinate jurisdiction by motion for relief from an order or judgment against him does not apply where the court was without jurisdiction and the order of judgment was void. He is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times.<sup>5</sup>

**III. POWERS AND DUTIES IN MATTERS OF PRACTICE — 1. Powers and Duties During Trial — a. IN GENERAL.** — Generally speaking, the province of a judge at the trial of a cause is to decide such questions of law as may arise in the progress of such trial.<sup>6</sup> His decisions upon these points are not final, and if they are erroneous the party has his remedy by bill of exceptions and appeal.<sup>7</sup>

might settle and allow claims, and levy a tax, *Madison County Ct. v. Alexander*, Walk. (Miss.) 523 (see also *County Levy Case*, 5 Call (Va.) 139); or approve school contracts, *Caviel v. Coleman*, 72 Tex. 550.

Courts of Sessions were authorized to establish ferries, *Fay, Petitioner*, 15 Pick. (Mass.) 243; might lay out and maintain roads, *Emerson v. Washington County*, 9 Me. 92; and might represent the county in financial matters, etc., *Hampshire County v. Franklin County*, 16 Mass. 76. See also *Com. v. Hampden County*, 2 Pick. (Mass.) 415.

Justices of the Peace were entitled to levy a tax in *Kentucky*. *Gilbert v. Huston*, Litt. Sel. Cas. (Ky.) 223.

A County Judge in *Oregon* might allow arms to the militia out of the county funds. *Vincent v. Umatilla County*, 14 Oregon 375.

Probate Courts have been allowed to exercise various quasi-judicial and ministerial functions. *In re Johnson*, 12 Kan. 102; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284; *State v. Brown*, 35 Kan. 167; *Hartman v. Smith*, 6 Mont. 295. See also the title PROBATE COURTS.

**Effect of Failure to Perform.** — *State v. Brown*, 35 Kan. 167, holding that the failure of a probate judge to examine funds of the county treasurer did not afford ground for removing him from the office of judge, although it might perhaps furnish a reason for divesting him of such distinct nonjudicial authority. See also *State v. Loughton*, 19 Nev. 202, to the effect that where a person holds two offices forfeiture of one does not forfeit the other.

**Constitutional Provision that Judges May Transact Other Business.** — Where a state constitution, after enumerating certain powers and duties of judges of certain courts, provides in addition that they may transact such other business as may be provided by law, it has been held that such provision clearly includes the performance of such duties pertaining to

judicial business as the legislature may deem it necessary for the judges to perform, with a view to the efficient administration of justice or for the protection of the rights of litigants and others who are to be affected by legal proceedings. *State v. Tolle*, 71 Mo. 645.

**1. Grant of Judicial Functions to Other than Regular Judge.** — *Young v. Ledrick*, 14 Kan. 92, in which case it was held that "while it may be that \* \* \* it is impossible for the legislature to provide for more than one judge of a District Court, and while it may be that no legislation could be upheld which excluded such single judge from a supervisory control of all the proceedings of that court, yet within this limit we think it competent for the legislature to provide that other persons may exercise some judicial functions in cases pending therein."

**2.** See the title CONSTITUTIONAL LAW, vol. 6, p. 1065 *et seq.*

**3. May Not Review Action of Judge of Co-ordinate Jurisdiction.** — *Fisher v. Hepburn*, 48 N. Y. 41; *People v. National Trust Co.*, 31 Hun (N. Y.) 20; *Kamp v. Kamp*, 59 N. Y. 212; *Warren v. Simon*, 16 S. Car. 362; *State v. Price*, 35 S. Car. 273.

**Exception as to Provisional Remedies.** — In *New York* it has been held that the only class of cases in which, by the code, one justice of the court is authorized to vacate or modify the orders made by another is that provided in section 772 of the Code of Civil Procedure, and those relating to provisional remedies. *People v. National Trust Co.*, 31 Hun (N. Y.) 20.

**4. Remedy by Appeal or Writ of Error.** — *Warren v. Simon*, 16 S. Car. 362. See also to the same effect *Kamp v. Kamp*, 59 N. Y. 212.

**5. No Application Where Court Without Jurisdiction.** — *Kamp v. Kamp*, 59 N. Y. 212 (two judges dissenting).

**6.** See the title QUESTIONS OF LAW AND FACT.

**7. Province of Judge at Trial.** — *McCauley v. Weller*, 12 Cal. 500.



*b. ATTENDANCE ON TRIALS — (1) Duty of Presiding Judge to Be Present — General Rule.* — It is improper for a presiding judge to absent himself from the court room during the trial of a case before him, without suspending the trial during his absence.<sup>1</sup>

*Reason of Rule.* — This rule as to the necessity for the presence of the judge is based upon the idea that the judge is an essential element of the court, and there can be no court in the legal sense in his absence.<sup>2</sup>

*Application of Rule Where Court Consists of Several Judges.* — This rule applies not only in the case of a single presiding judge, but also where the court consists of several judges, if the absence of one of them works a disorganization of the court.<sup>3</sup>

*Disqualification by Absence.* — Where one of the judges of a court before which a criminal case was being tried absented himself for a day, during which the trial proceeded, and upon his return took part in the subsequent proceedings, it was held that such judge by his absence disqualified himself from further sitting, and that his subsequent participation was error.<sup>4</sup>

*Application to Presence During Argument.* — The presence of the presiding judge is as essential during the argument as at any other stage of the trial.<sup>5</sup> It is essential that the judge should hear all that is said in the trial, in order that he may intelligently review the proceedings upon a motion for a new trial.<sup>6</sup>

*Presence Construed.* — In requiring the presence of the judge during the progress of the argument in a trial before him, it is not meant that he must actually listen to every word of the counsel while addressing the jury,<sup>7</sup> nor that he may not change his position in the court room or temporarily engage in conversation, reading or writing, etc.,<sup>8</sup> but that he must remain within hearing of counsel, so as to be able instantly to assert his authority if demanded by anything that may occur.<sup>9</sup> Where this requirement is complied

**1. Duty of Judge to Be Present — California.** — *People v. Eckert*, 16 Cal. 111.

*Colorado.* — *O'Brien v. People*, 17 Colo. 561; *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574.

*Connecticut.* — *State v. Smith*, 49 Conn. 383.

*Georgia.* — *Pritchett v. State*, 92 Ga. 65; *O'Shields v. State*, 81 Ga. 301; *Hayes v. State*, 58 Ga. 35; *Horne v. Rodgers*, (Ga. 1900) 49 L. R. A. 176.

*Illinois.* — *Meredeth v. People*, 84 Ill. 479; *Thompson v. People*, 144 Ill. 378.

*Indiana.* — *Britton v. Fox*, 39 Ind. 369.

*Iowa.* — *State v. Carnagy*, 106 Iowa 483.

*Kansas.* — *State v. Beuerman*, 59 Kan. 586.

*Mississippi.* — *Foster v. State*, 70 Miss. 756; *Turbeville v. State*, 56 Miss. 793; *Ellerbe v. State*, 75 Miss. 522.

*Missouri.* — *State v. Claudius*, 1 Mo. App. 551.

*Nebraska.* — *Palin v. State*, 38 Neb. 867.

*New York.* — *Shaw v. People*, 3 Hun (N. Y.) 272; *People v. Shaw*, 63 N. Y. 38; *Hinman v. People*, 13 Hun (N. Y.) 266; *Blend v. People*, 41 N. Y. 604.

*North Carolina.* — *State v. Jefferson*, 66 N. Car. 309.

*Virginia.* — *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447.

*Wisconsin.* — *Smith v. Sherwood*, 95 Wis. 558; *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.*, 39 Wis. 390, 20 Am. Rep. 50.

**2. Judge Essential to Constitute Court.** — *O'Brien v. People*, 17 Colo. 561; *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211; *State v.*

*Beuerman*, 59 Kan. 586; *Turbeville v. State*, 56 Miss. 798; *Ellerbe v. State*, 75 Miss. 522. See also *Wight v. Wallbaum*, 39 Ill. 554.

**3. Application of Rule Where Court Consists of Several Judges.** — *Tuttle v. People*, 36 N. Y. 431; *Blend v. People*, 41 N. Y. 604; *People v. Shaw*, 63 N. Y. 36; *Morss v. Morss*, 11 Barb. (N. Y.) 510; *People v. Reagle*, 60 Barb. (N. Y.) 527; *Hinman v. People*, 13 Hun (N. Y.) 266.

**4. Disqualification by Absence.** — *People v. Shaw*, 63 N. Y. 36; *Shaw v. People*, 3 Hun (N. Y.) 272.

**5. Duty to Be Present During Argument.** — *O'Brien v. People*, 17 Colo. 561; *Horne v. Rodgers*, (Ga. 1900) 49 L. R. A. 176; *Thompson v. People*, 144 Ill. 378; *Meredeth v. People*, 84 Ill. 479; *State v. Beuerman*, 59 Kan. 586; *Turbeville v. State*, 56 Miss. 798; *Ellerbe v. State*, 75 Miss. 522; *Brownlee v. Hewitt*, 1 Mo. App. 360; *State v. Claudius*, 1 Mo. App. 551; *Palin v. State*, 38 Neb. 867.

**6. Must Hear Proceedings in Order to Review Same on Motion for New Trial.** — *State v. Beuerman*, 59 Kan. 586.

**7. Requirement Construed.** — *Turbeville v. State*, 56 Miss. 798; *Ellerbe v. State*, 75 Miss. 522.

**8. Right to Change Seat in Court Room.** — *State v. Carnagy*, 106 Iowa 483; *Turbeville v. State*, 56 Miss. 798; *Ellerbe v. State*, 75 Miss. 522. See also *Tuttle v. People*, 36 N. Y. 431; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349.

**9. Judge Must Be in a Position to Respond to Call for Exercise of His Authority.** — *Meredeth v. People*, 84 Ill. 479; *State v. Carnagy*, 106 Iowa 483; *State v. Beuerman*, 59 Kan. 586; *Turbe-*



with, the fact that the judge is in another room will not be held to constitute absence within the meaning of the rule.<sup>1</sup>

(2) *Effect of Absence* — (a) *In Criminal Trials* — *View that Objection May Be Waived.* — According to some decisions it would seem that in criminal, as in civil trials, the mere absence of the judge during the progress of the trial when no objection is made will not necessarily require the granting of a new trial when the absence is only for a few moments and for a necessary purpose,<sup>2</sup> and that in order for such absence to become reversible error, it must appear not only that objection was made to the judge's failure to suspend trial, but that his absence resulted in some harm to the losing party.<sup>3</sup>

*View that Objection May Not Be Waived.* — According to the weight of authority, however, in the prosecution of felonies, the presence of the judge at all stages of the trial is absolutely essential to its validity, and the absence of the judge from the trial without suspending the same, for any length of time or for any purpose, will vitiate the whole proceeding, and a judgment of conviction will be reversed whether objection be made or not,<sup>4</sup> and if consent be given, it will not be binding on the accused.<sup>5</sup> According to these decisions the relinquishment by the judge, even though temporary, of control of his court and conduct of the trial will work, as to the particular case, a dissolution of the court.<sup>6</sup>

(b) *In Trials for Misdemeanor* — *Right to Give Place to Another Judge.* — In prosecutions for misdemeanor it has been held that the presiding judge may give place to another by consent, and if he does so without objection in advance, consent will perhaps be presumed.<sup>7</sup>

(c) *In Civil Trials* — *aa. ABSENCE WITHOUT CONSENT AS GROUND FOR NEW TRIAL* — *Absence a Material Error.* — With regard to the effect of the absence of the judge during the trial of a civil case without the consent of the parties thereto, the decisions differ. Thus, according to some, such absence during the trial or the arguments to the jury without the consent of the parties is a material error for which the judgment will be reversed and a new trial granted.<sup>8</sup>

*Absence Not Ground for New Trial Where No Objection Made.* — It has been held, however, that the mere absence of the judge during the trial of a civil cause without suspending the same, when no objection is made, will not necessarily require the granting of a new trial when the absence is only for a few moments and for a necessary purpose, and in order for such absence to become reversible error, it must appear not only that objection was made to the failure to suspend the trial, but that the judge's absence resulted in harm to the losing party.<sup>9</sup>

ville v. State, 56 Miss. 798; Ellerbe v. State, 75 Miss. 522; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Blend v. People, 41 N. Y. 606; People v. White, 24 Wend. (N. Y.) 528; Shaw v. People, 3 Hun (N. Y.) 272.

1. *That Judge Is in Adjoining Room Does Not Necessarily Constitute Absence Within Meaning of Rule.* — State v. Smith, 49 Conn. 378; Thompson v. People, 144 Ill. 378; State v. Carnagy, 106 Iowa 483; State v. Beuerman, 59 Kan. 586; Turbeville v. State, 56 Miss. 793.

2. *Harmless Error Where No Objection Made.* — Pritchett v. State, 92 Ga. 65; O'Shields v. State, 81 Ga. 301. See also Horne v. Rodgers, (Ga. 1900) 49 L. R. A. 176, following but disapproving the above cases.

3. *It Must Be Shown that Injury Resulted to Losing Party.* — Pritchett v. State, 92 Ga. 65. And see Horne v. Rodgers, (Ga. 1900) 49 L. R. A. 176.

4. *Objection May Not Be Waived by Counsel.* — O'Brien v. People, 17 Colo. 561; Cobb v. People, 84 Ill. 511; Thompson v. People, 144

Ill. 378; Meredith v. People, 84 Ill. 479; Ellerbe v. State, 75 Miss. 522; Turbeville v. State, 56 Miss. 793. See Horne v. Rodgers, (Ga. 1900) 49 L. R. A. 176.

5. *Consent Not Binding on Accused.* — O'Brien v. People, 17 Colo. 561; Ellerbe v. State, 75 Miss. 522; Turbeville v. State, 56 Miss. 798; Hinman v. People, 13 Hun (N. Y.) 266.

6. *Relinquishment of Control Works Dissolution of Court as to Particular Case.* — Ellerbe v. State, 75 Miss. 522; Turbeville v. State, 56 Miss. 798; Blend v. People, 41 N. Y. 606; Shaw v. People, 3 Hun (N. Y.) 279; People v. White, 24 Wend. (N. Y.) 528.

7. *In Trials for Misdemeanor.* — Ellerbe v. State, 75 Miss. 522; Turbeville v. State, 56 Miss. 798.

8. *Absence a Material Error and Ground for Reversal.* — Smith v. Sherwood, 95 Wis. 558.

9. *Objection Must Have Been Made and Harm Resulted to Losing Party.* — Horne v. Rodgers, (Ga. 1900) 49 L. R. A. 176, reluctantly following the rule as laid down in Hayes v. State, 58



**Right to Give Place to Another by Consent.** — In civil trials, as in trials for misdemeanor, it has been held that the presiding judge may give place to another by consent, and such consent may, under some circumstances, be presumed.<sup>1</sup>

**Discretion of Judge as to Constant Attendance at Trial.** — According to some decisions it has been held that in the case of civil trials something must be trusted to the judge's discretion as to whether he can safely absent himself for a time during the argument.<sup>2</sup>

*bb. NEW TRIAL GRANTED NOTWITHSTANDING CONSENT OF AGGRIEVED PARTY.* — In *Mis-souri* it has been held that where counsel are sent out of the court room to argue the cause to the jury out of the presence of the judge before whom the cause was tried, if improper remarks are made to the jury on either side calculated to prejudice the jury, a new trial should be granted on the application of the party aggrieved, unless it clearly appears that no evil result was produced by these remarks;<sup>3</sup> and the fact that the party aggrieved, consented to argue the cause out of the court's presence when requested to do so by the judge trying the cause, does not constitute a waiver of his right to have the argument of the cause conducted in the presence of the court, his consent being practically extorted in such case.<sup>4</sup>

(3) *Change of Judges During Trial.* — Where the judge at a trial becomes sick and unable to proceed after the evidence is all in and the instructions have been given to the jury, it has been held that the trial should proceed under a special judge before the same jury and without rehearing the testimony.<sup>5</sup>

*c. RIGHT TO QUESTION WITNESSES — General Rule.* — A judge presiding at a trial is not a mere moderator between contending parties, but has active duties to perform in maintaining justice and in seeing that the truth is developed; and he may for such purpose put proper questions to a witness.<sup>6</sup>

**Right to Put Leading Questions.** — It has been held to be within the discretion of the judge to put leading questions to a witness.<sup>7</sup>

*d. DUTY TO RESTRAIN MISREPRESENTATIONS OF COUNSEL.* — It is the imperative duty of the judge of a trial court to interpose for the purpose of restraining everything in the course of the trial that tends to mislead the jurors and to divert their minds from the strict line of inquiry with which they are charged, and counsel should never be allowed to argue to the jury against the instruction of the court.<sup>8</sup>

*e. DUTY TO INSTRUCT JURY.* — In cases of trial by jury it is the duty of the trial judge to instruct the jury upon the law applicable to the case.<sup>9</sup>

**2. Duty with Regard to Opinions, Decisions, etc.** — *a. NECESSITY FOR WRITTEN OPINIONS.* — According to some decisions it has been held that a legislature cannot require a judge to give in writing the reasons for a decision, and that his constitutional duty is discharged by the rendition of such decision.<sup>10</sup>

*b. DUTY TO SYLLABIZE OPINIONS.* — In some jurisdictions it has been held

Ga. 35; *O'Shields v. State*, 81 Ga. 301, and *Pritchett v. State*, 92 Ga. 65. See also *State v. Carnagy*, 106 Iowa 483.

1. *May Give Place to Another by Consent.* — *Ellerbe v. State*, 75 Miss. 522; *Turbeville v. State*, 56 Miss. 793.

2. *Judge May Use Discretion as to Propriety of Absenting Himself.* — *Baxter v. Ray*, 62 Iowa 336; *Oakley v. Aspinwall*, 3 N. Y. 547, cited in *Duplex Printing Press Co. v. Journal Printing Co.*, 1 Penn. (Del.) 566.

3. *New Trial Notwithstanding Consent of Aggrieved Party to Argument Out of Judge's Presence.* — *Brownlee v. Hewitt*, 1 Mo. App. 360. See also *State v. Claudius*, 1 Mo. App. 551.

4. *Consent No Waiver.* — *Brownlee v. Hewitt*,

1 Mo. App. 360; *State v. Claudius*, 1 Mo. App. 551.

5. *Change During Trial.* — *Bullock v. Neal*, 42 Ark. 278.

6. *Judge May Question Witness.* — *Lefever v. Johnson*, 79 Ind. 554; *Long v. State*, 95 Ind. 481; *Huffman v. Cauble*, 86 Ind. 591.

7. *Right to Put Leading Questions.* — *Huffman v. Cauble*, 86 Ind. 591.

8. *Duty to Restrain Misrepresentations of Counsel.* — *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362.

9. See the title INSTRUCTIONS, 11 ENCYC. OF PL. AND PR. 47.

10. *Reasons Need Not Be Given in Writing.* — *Vaughn v. Harp*, 49 Ark. 160; *Houston v.*



that under the constitution the legislature cannot require a judge to prepare syllabi of his decisions.<sup>1</sup>

3. Duty with Regard to Bills of Exceptions and Statements of Fact on Appeal — *a.* SETTLEMENT AND SIGNATURE OF BILLS OF EXCEPTIONS — *Settlement.* — It is the duty of the trial judge to settle bills of exceptions,<sup>2</sup> and the appellate court is not allowed to do so except by statute.<sup>3</sup> It has even been held that if the party seeking a new trial has not been guilty of laches, the Supreme Court will, *ex debito justitiæ*, order a new trial if the judge who tried the case has gone out of office without having settled the bill.<sup>4</sup> A similar decision was made in the United States Circuit Court,<sup>5</sup> and this would seem to accord with the English practice.<sup>6</sup>

*Signature.* — As a general rule, the judge to whose rulings exceptions were taken must sign the bill of exceptions,<sup>7</sup> and a judge of the appellate court

Williams, 13 Cal. 24. See also in this connection Speight v. People, 87 Ill. 595.

1. May Not Require Syllabi of Decisions. — *Exp. Griffiths*, 118 Ind. 83, 10 Am. St. Rep. 107. See also Griffin v. State, 119 Ind. 520.

2. Duty to Settle Bills of Exceptions. — Hyde v. Thornton, 83 Cal. 83; Gunderson v. Sirborn, 31 Ill. App. 612; People v. Anthony, 25 Ill. App. 532.

*Signature by Judge Who Has Gone to Another Circuit.* — It has been held that a bill of exceptions must and can be signed by the judge who tries the case, although he has gone to another circuit. *Ex p. Nelson*, 62 Ala. 377. Here the same term was still open, being held by another judge. See also Bacon v. State, 22 Fla. 46; Bowden v. Wilson, 21 Fla. 165.

In *Wisconsin* it seems to have been held that the trial judge shall settle the bill even after he has retired from office. *Oliver v. Town*, 24 Wis. 512; *Fellows v. Tait*, 14 Wis. 156; *Davis v. Menasha*, 20 Wis. 194; *Hale v. Haselton*, 21 Wis. 320.

For Full Treatment of this question, see the title BILL OF EXCEPTIONS, 3 ENCYC. PL. AND PR. 374.

3. Appellate Court May Not Act Except Under Statute. — Hyde v. Thornton, 83 Cal. 83; Hyde v. Boyle, 86 Cal. 352.

4. New Trial Ordered for Failure to Settle. — Isler v. Haddock, 72 N. Car. 119; State v. O'Kelly, 88 N. Car. 609.

5. U. S. v. Harding, 1 Wall. Jr. (C. C.) 127. 6. Newton v. Boodle, 3 C. B. 795, 54 E. C. L. 795.

7. Judge Whose Rulings Excepted to Must Sign — *United States.* — *Ex p. Bradstreet*, 4 Pet. (U. S.) 102; *Sire v. Ellithorpe Air Brake Co.*, 137 U. S. 579; *Mussina v. Cavazos*, 6 Wall. (U. S.) 355; *Young v. Martin*, 8 Wall. (U. S.) 355; *Levering v. Dayton*, 4 Wash. (U. S.) 698; *Origet v. U. S.*, 125 U. S. 240.

*Alabama.* — *Ex p. Nelson*, 62 Ala. 376.

*Arkansas.* — *McMinn v. Shultz*, 34 Ark. 627; *Turner v. Collier*, 37 Ark. 529; *Bullock v. Neal*, 42 Ark. 280; *Watkins v. State*, 37 Ark. 370; *Cowall v. Altchul*, 40 Ark. 174.

*California.* — *People v. Lee*, 14 Cal. 510; *De Johnson v. Sepulbeda*, 5 Cal. 149; *Gee v. Terrio*, 55 Cal. 381.

*Colorado.* — *Fechheimer v. Trounstiene*, 12 Colo. 283; *Gumm v. Metz*, 9 Colo. 580.

*Florida.* — *Robinson v. Matthews*, 16 Fla. 319; *Proctor v. Hart*, 5 Fla. 470; *Tompkins v. Eason*, 8 Fla. 15.

*Illinois.* — *Cline v. Toledo, etc., R. Co.*, 41 Ill. App. 516; *Chicago, etc., R. Co. v. Marseilles*, 107 Ill. 313; *David v. Bradley*, 79 Ill. 316; *Fielden v. People*, 128 Ill. 595; *Chicago, etc., R. Co. v. Johnson*, 34 Ill. App. 351.

*Indiana.* — *Finch v. Travellers' Ins. Co.*, 87 Ind. 302; *Ludlow v. Walker*, 67 Ind. 353; *Reeder v. English*, 62 Ind. 78; *Toledo, etc., R. Co. v. Rogers*, 48 Ind. 427; *Eastes v. Daubenspeck*, 4 Ind. 617; *Patterson v. State*, 10 Ind. 551; *Fromm v. Lawrence*, 16 Ind. 384; *Warren County v. Saunders*, 16 Ind. 405; *Halstead v. Brown*, 17 Ind. 202; *Everhart v. Hollingsworth*, 19 Ind. 138; *Stewart v. State*, 24 Ind. 142; *Ex p. Gwartney*, 27 Ind. 189; *Albaugh v. James*, 29 Ind. 398; *Vanness v. Bradley*, 29 Ind. 388; *Stewart v. Rankin*, 39 Ind. 161; *Kennedy v. State*, 37 Ind. 355; *Kesler v. Myers*, 41 Ind. 543; *Haddon v. Haddon*, 42 Ind. 378; *Travellers' Ins. Co. v. Leeds*, 38 Ind. 444; *Longworth v. Higham*, 89 Ind. 352.

*Iowa.* — Independent Dist. v. Farmer, 74 Iowa 744.

*Kentucky.* — *Stanaford v. Parker*, (Ky. 1891) 15 S. W. Rep. 784.

*Louisiana.* — *State v. Harris*, 39 La. Ann. 228.

*Missouri.* — *Garth v. Caldwell*, 72 Mo. 622; *Perkins v. Bakrow*, 39 Mo. App. 331; *Connelley v. Leslie*, 28 Mo. App. 551; *Klotz v. Perteet*, 101 Mo. 215; *State v. Greenwade*, 72 Mo. 298; *Puller v. Thomas*, 36 Mo. App. 105.

*Nevada.* — *State v. Huff*, 11 Nev. 17; *People v. Gleason*, 1 Nev. 173.

*New York.* — *Morse v. Evans*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 445; *Zabriskie v. Smith*, 11 N. Y. 480; *Law v. Jackson*, 8 Cow. (N. Y.) 746; *Clark v. Dutcher*, 19 Johns. (N. Y.) 246.

*North Carolina.* — *Isler v. Haddock*, 72 N. Car. 119.

*Ohio.* — *Labold v. Wilson*, 4 Ohio Cir. Ct. 345, 2 Ohio Cir. Dec. 586, *distinguishing* *Wilson v. Giddings*, 28 Ohio St. 561.

*Oregon.* — *Thompson v. Backenstos*, 1 Oregon 17.

*Tennessee.* — *Garrett v. Rogers*, 1 Heisk. (Tenn.) 321.

*Texas.* — *Hill v. State*, 10 Tex. App. 673, 35 Tex. 348.

*Vermont.* — *Hancock v. Worcester*, 62 Vt. 106.

*West Virginia.* — *Com. v. Hall*, 8 W. Va. 259.

*Wisconsin.* — *Merwins v. O'Day*, 9 Wis. 156; *Conger v. Chamberlain*, 11 Wis. 187; *Davis v.*



cannot as such sign without express statutory authority.<sup>1</sup>

**6. STATEMENT OF FACT ON APPEAL.** — In the absence of statutory provision a statement of fact must be approved or settled by the trial judge in order to be available on appeal.<sup>2</sup>

**4. Duty to Hear Motion for New Trial.** — If possible, the judge who tried the cause must decide a motion for a new trial, he having heard the evidence and being better prepared to pass upon questions of fact.<sup>3</sup>

**5. Power of Adjournment — In General.** — In accordance with the general rule that the power to make all such reasonable orders as are necessary to the transaction of its business is inherent in every court,<sup>4</sup> it would seem to be well settled that a judge may adjourn his court from day to day, and that he may do this for rest and refreshment, no public or private necessity requiring it.<sup>5</sup>

**Power of Judge to Reopen Court Adjourned by Officers.** — Where a court has been regularly adjourned until the next term by one of its officers on account of the nonappearance of the judge, such judge cannot reopen and hold the lapsed term.<sup>6</sup>

**IV. POWERS AT CHAMBERS — 1. In General — Chambers Defined.** — The term "chambers" has been defined as "the office or private rooms of a judge, where parties are heard and orders made in matters not requiring to be brought before the full court, and where costs are taxed, judgments signed, and similar business transacted."<sup>7</sup> When a judge decides some interlocutory matter which has arisen in the course of the cause out of court, he is said to make such decision at his chambers.<sup>8</sup>

**2. Jurisdiction Incidental to Jurisdiction of Court — a. IN GENERAL.** — Jurisdiction at chambers is incidental to and grows out of the jurisdiction of the court itself.<sup>9</sup> It is the power to hear and determine, out of court, such questions arising between the parties to a controversy as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session.<sup>10</sup>

Menasha, 20 Wis. 194; Riker v. Scofield, 6 Wis. 367.

**Cause Tried Before City Council.** — So where a case is tried before a city council and a bill of exceptions is allowed, the bill must be signed by the city council. Bland v. Jackson, 51 Kan. 496.

**Signature by the Last Name of the judge,** with the added designation of "judge," is sufficient. Mays v. Deaver, 1 Iowa 216.

**1. Appellate Judge May Not Sign Without Statutory Authority.** — Fielden v. People, 128 Ill. 595; Davis v. Menasha, 20 Wis. 194.

**Rule Where Different Judges Preside.** — In Bullock v. Neal, 42 Ark. 278, it was held that where different judges preside during the progress of a trial, each should sign a bill of exceptions as to the proceedings before him.

**2. Statement of Fact on Appeal.** — See ENCYC. OF PL. AND PR., article STATEMENT OF FACT ON APPEAL.

**3. Duty of Judge Hearing Cause to Decide Motion for New Trial.** — Voullaire v. Voullaire, 45 Mo. 602; Ryle v. Harrington, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 59, 4 Abb. Pr. (N. Y.) 421. See also the ENCYC. OF PL. AND PR., article NEW TRIAL, vol. 14, 856.

**4. See the title COURTS,** vol. 8, p. 29.

**5. Power of Judge to Adjourn Court.** — Powers v. State, 23 Tex. App. 42; Barrett v. State, 1 Wis. 175. See also the article ADJOURNMENTS, in 1 ENCYC. OF PL. AND PR., p. 238.

The presiding judge alone may make an adjournment if his assistant judges are disqualified, and he may order the adjournment to the residence of one of the assistant judges in the same town. Bates v. Sabin, 64 Vt. 511.

The special judge has power to adjourn the case for the day, pending the examination of witnesses. Powers v. State, 23 Tex. App. 43.

**Adjournment by Telegraph Legal.** — A telegram from the judge to the clerk, ordering an adjournment of the court, is a written order within the meaning of the statute, and an adjournment made in pursuance thereof is legal. State v. Holmes, 56 Iowa 588, 41 Am. Rep. 121.

**6. May Not Reopen Court Properly Adjourned by Officer Thereof.** — Garza v. State, 12 Tex. App. 261.

**7. Chambers Defined.** — Burrill's L. Dict.; Pittsburg, etc., R. Co. v. Hurd, 17 Ohio St. 144.

A "Judge at Chambers" is simply a judge acting out of court. Whereatt v. Ellis, 65 Wis. 639.

**8. When Decision Said to Be Made at Chambers.** — Pittsburg, etc., R. Co. v. Hurd, 17 Ohio St. 144.

**9. Jurisdiction Incidental to That of Court.** — Pittsburg, etc., R. Co. v. Hurd, 17 Ohio St. 146.

**10. Pittsburg, etc., R. Co. v. Hurd,** 17 Ohio St. 146.



**b. JURISDICTION LIMITED BY THAT OF COURT TO WHICH JUDGE BELONGS.** — The jurisdiction of a judge at chambers being limited to that of the court itself, it follows that such jurisdiction cannot go beyond the jurisdiction of the court to which such judge belongs, or extend to matters with which his court can have nothing to do,<sup>1</sup> and the constitution of a state, in granting such jurisdiction at chambers to the judges of the several courts of such state as may be directed by law, is to be understood as limiting the jurisdiction of each to such subject-matters as are within the jurisdiction of his proper court, and to which it is *ex vi termini* limited.<sup>2</sup>

**3. Powers Regulated by Statute.** — The powers of judges at chambers in term and vacation are matters of statutory regulation or are regulated by rules of court. The general rule upon this subject is that judicial business must be transacted in court, and any transaction of such judicial business out of court must be expressly authorized by statute.<sup>3</sup>

**4. Authority of Judge over Jury After Adjournment of Court.** — In the case of a trial by jury, when the court adjourns the judge carries no powers with him to his lodgings, and has no more authority over the jury than any other person, and any direction to the jury from him, either verbal or in writing, is improper.<sup>4</sup>

**V. JUDGES AS WITNESSES — 1. When Essential Members of Court — General Rule.** — The inclination of the courts has been to hold that when it is necessary for the conduct of the trial of a cause that one should act as judge, he may not be called from the bench to be examined as a witness.<sup>5</sup>

**1. Jurisdiction Limited to That of Court.** — *Pittsburg, etc., R. Co. v. Hurd*, 17 Ohio St. 146.

**2. Pittsburg, etc., R. Co. v. Hurd, 17 Ohio St. 146, in which case it was held that under the constitution of *Ohio*, the General Assembly could not confer upon a judge of the Supreme Court jurisdiction at chambers to grant or dissolve an injunction in a cause pending in another court.**

**3. Powers Regulated by Statute — California.** — *Larco v. Casaneuava*, 30 Cal. 561; *Norwood v. Kenfield*, 34 Cal. 332; *Loomis v. Andrews*, 49 Cal. 239.

*Illinois.* — *Blair v. Reading*, 99 Ill. 600; *Devine v. People*, 100 Ill. 295; *Watts v. McCleave*, 16 Ill. App. 272; *Nevitt v. Woodburn*, 45 Ill. App. 417.

*Indiana.* — *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305, 20 Am. Dec. 115; *Ferger v. Wesler*, 35 Ind. 53; *Newman v. Hammond*, 46 Ind. 120; *Pressley v. Harrison*, 102 Ind. 14.

*Iowa.* — *Prosser v. Prosser*, 64 Iowa 378.

*Kansas.* — *Reyburn v. Bassett, McCahon* (Kan.) 86.

*Missouri.* — *State v. Rombauer*, 104 Mo. 623.

*Nebraska.* — *Ellis v. Karl*, 7 Neb. 381.

*New York.* — *Bangs v. Selden*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 374.

*Ohio.* — *Pittsburg, etc., R. Co. v. Hurd*, 17 Ohio St. 146.

*South Carolina.* — *Grierson v. Harmon*, 16 S. Car. 618.

*Washington.* — *Suffern v. Chisholm*, 1 Wash. Ct. 486.

**Entry of Orders in Vacation Must Be Expressly Authorized.** — "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation except such as are expressly authorized by statute." *Blair v. Reading*, 99 Ill. 600.

**Judicial Acts of a Circuit Judge at Chambers** must be either acts done out of court in a cause pending in court, or acts which the judge is specially authorized by statute to perform out of court. *Streeter v. Paton*, 7 Mich. 341.

**Exercise of Judicial Powers Out of Court.** — Strictly judicial powers can be vested only in certain courts named in the constitution. The Circuit Courts as courts have such powers, but the judges out of court merely as judges cannot exercise them. *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456.

**What Powers May Properly Be Exercised at Chambers.** — The question as to what powers may properly be exercised by a judge at chambers, in term and in vacation, is fully treated in the article CHAMBERS AND VACATION, in vol. 4 ENCYC. OF PL. AND PR., p. 336.

**4. Authority over Jury After Adjournment of Court.** — *Sargent v. Roberts*, 1 Pick. (Mass.) 337; *Rafferty v. People*, 72 Ill. 37.

**Ground for New Trial.** — In *Sargent v. Roberts*, 1 Pick. (Mass.) 337, a new trial was granted because the judge, after the court was adjourned, wrote a letter to the jury respecting the cause that had been committed to them.

**5. Judge Essential to Trial Should Not Be Examined as Witness.** — *Estes v. Bridgforth*, 114 Ala. 221; *Dabney v. Mitchell*, 66 Ala. 499; *Rogers v. State*, 60 Ark. 26; *Shockley v. Morgan*, 103 Ga. 156; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *People v. Miller*, (Supm. Ct. Gen. T.) 2 Park. Cr. (N. Y.) 197; *Ross v. Buhler*, 2 Mari. N. S. (La.) 312; *Maitland v. Zanga*, 14 Wash. 92.

A judge's testimony may be an expression of opinion on the part of a judge very damaging to one of the parties to the case, and expressions of opinion by the judge are forbidden in many states. *Rogers v. State*, 60 Ark. 26.

The same rule applies to justices of the



**Error for Such Judge to Become Witness.** — It is error for a judge who is a member of the court, and necessary to make a duly constituted court, to become a witness in a case before the court, and if objection be made and exception taken such error will be fatal to the judgment.<sup>1</sup>

**Court Does Not Thereby Lose Jurisdiction.** — Although it may be error for such essential member of the court thus to testify in a case before it, it has been held that the court does not on that account lose jurisdiction of the case.<sup>2</sup>

**2. When Not Essential to Composition of Court.** — Although cases are not wanting which hold that judges should not take the witness stand in cases in which they do not preside,<sup>3</sup> the better holding on this point would seem to be that a judge may become a witness when there is a sufficient court without him, but that he should not then return to the bench.<sup>4</sup>

**3. Cases in Which Judge May Be Witness — To Prove Notes.** — A judge may be called to prove the correctness of his notes.<sup>5</sup>

**To Prove Testimony of Witness.** — A judge may be examined for the purpose of showing what a witness testified to on a former occasion.<sup>6</sup>

**To Prove Himself Disinterested.** — It has been held that a judge is a competent witness to prove that he is not interested.<sup>7</sup>

**Testimony as to Grounds of Former Decision.** — It has been held erroneous to receive the statement of a justice himself, as a witness, as to the grounds upon which he placed his decision in a former case.<sup>8</sup>

**VI. LIABILITY OF JUDGES FOR ACTS AND OPINIONS — 1. Judicial Acts and Opinions — a. ACTS AND OPINIONS WITHIN JURISDICTION — (1) General Rule.** — It is a settled principle of law that no action for damages will lie against a judge for a judicial act or opinion in a case of which he has jurisdiction;<sup>9</sup> and this, too, without regard to the motives with which such acts

peace. *Baker v. Thompson*, 89 Ga. 486; *McMillen v. Andrews*, 10 Ohio St. 112. But justices of the peace have been allowed to testify on appeal as to what took place on the trial before them. *State v. Duffy*, 57 Conn. 525. And see the title *JUSTICE OF THE PEACE*, *post*.

The former rule seems to have been that there was no exception in favor of judges and that they were admissible as witnesses. 2 Hawk. P. C., c. 46, § 17. See also *Fernley's Trial*, 11 How. St. Tr. 459; *Colonel Hacker's Trial*, 5 How. St. Tr. 1176.

**Referees.** — In *Morss v. Morss*, 11 Barb. (N. Y.) 510, it was held that one of three referees before whom a cause is tried cannot be sworn and examined as a witness on the trial. As to arbitration generally, see the title *ARBITRATORS*, vol. 2, p. 704.

**1. Error for Such Judge to Take Stand.** — *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349.

**2. Court Does Not Thereby Lose Jurisdiction.** — *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349, *overruling* on this point *Dohring v. People*, 2 Thomp. & C. (N. Y.) 458.

**3. View that Judge Should Not Act as Witness Even When Not Presiding.** — "With respect to those who fill the office of judge, it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say prevent, them being examined." *Per* Cleasby, B., in *Buckleuch v. Metropolitan Board of Works*, L. R. 5 H. L.

418, holding, however, that an arbitrator may be called as a witness in a proceeding to enforce his award. See also *Reg. v. Gazard*, 8 C. & P. 595, 34 E. C. L. 542.

**The Judge of an Inferior Court** may perhaps be examined, if willing to appear. *Rex v. Harvey*, 8 Cox C. C. 103. But see the title *JUSTICE OF THE PEACE*, *post*.

**4. May Be Witness When Action as Judge Not Required.** — *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349. See also *Col. Hacker's Trial*, 5 How. St. Tr. 1176.

**5. To Prove Notes.** — *Huff v. Bennett*, 4 Sandf. (N. Y.) 120.

**6. To Prove Testimony of Witness.** — *Supples v. Cannon*, 44 Conn. 424; *Corby v. Wright*, 9 Mo. App. 5; *Agan v. Hey*, 30 Hun (N. Y.) 591; *Zitske v. Goldberg*, 38 Wis. 216.

**Judge May Excuse Himself from Testifying.** — In *Welcome v. Batchelder*, 23 Me. 85, the Supreme Court held that public policy authorizes a judge of a court to excuse himself from testifying as to what witnesses have testified on trials before him, but that it furnishes no ground of exception should he not insist on his right to be excused.

**7. Competent to Prove Disinterestedness.** — On an appeal from a decree of a judge of probate respecting the estate of a deceased person, on the ground of his being interested in the estate and therefore ousted of jurisdiction over it, the judge is a competent witness to prove that he is not interested. *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

**8. Testimony as to Reasons for Former Decision.** — *Agan v. Hey*, 30 Hun (N. Y.) 591.

**9. No Liability for Judicial Acts or Opinions Within Jurisdiction** — *England*. — *Groenvelt v.*



are performed.<sup>1</sup>

**No Liability for Error of Judgment in Acting or Failing to Act.** — A judge may not be questioned in a civil suit for error of judgment in doing or in neglecting or refusing to do a particular official act in the exercise of his judicial power.<sup>2</sup>

**Liability for Fraud and Corruption.** — According to the weight of authority it would seem that the rule as to the exemption of a judge, whether of a superior or inferior court, from liability for his judicial acts, is not altered by the averment of malice or fraud and corruption in such act,<sup>3</sup> though cases are not

Burwell, 1 *Ld. Raym.* 454; *Mostyn v. Fabrigas*, 1 *Cowp.* 172; *Scott v. Stansfield*, *L. R.* 3 *Exch.* 220; *Fray v. Blackburn*, 3 *B. & S.* 576, 113 *E. C. L.* 576; *Miller v. Seare*, 2 *W. Bl.* 1144; *Ward v. Freeman*, 2 *Ir. C. L.* 460; *Taafe v. Downes*, 3 *Moo. P. C.* 36, note; *Kemp v. Neville*, 10 *C. B. N. S.* 523, 100 *E. C. L.* 523; *Houlden v. Smith*, 14 *Q. B.* 841, 68 *E. C. L.* 841; *Beaurain v. Scott*, 3 *Campb.* 388; *Doswell v. Impey*, 1 *B. & C.* 163, 8 *E. C. L.* 70; *Barnardiston v. Soame*, 6 *How. St. Tr.* 1096; *Newcastle v. Clark*, 8 *Taunt.* 602, 4 *E. C. L.* 219; *Dicas v. Brougham*, 6 *C. & P.* 249, 25 *E. C. L.* 382; *Brittain v. Kinnaird*, 1 *Brod. & B.* 432, 5 *E. C. L.* 137; *Linford v. Fitzroy*, 13 *Q. B.* 240, 66 *E. C. L.* 240; *Garnett v. Ferrand*, 6 *B. & C.* 611, 13 *E. C. L.* 277.

*United States.* — *Randall v. Brigham*, 7 *Wall. (U. S.)* 523; *Philbrook v. Newman*, 85 *Fed. Rep.* 139; *Bradley v. Fisher*, 13 *Wall. (U. S.)* 335.

*Alabama.* — *Craig v. Burnett*, 32 *Ala.* 728; *Hamilton v. Williams*, 26 *Ala.* 527; *Busteed v. Parsons*, 54 *Ala.* 393, 25 *Am. Rep.* 688; *Duckworth v. Johnston*, 7 *Ala.* 578.

*Arkansas.* — *Trammell v. Russellville*, 34 *Ark.* 105, 36 *Am. Rep.* 1.

*Colorado.* — *Hughes v. McCoy*, 11 *Colo.* 591; *Terry v. Wright*, 9 *Colo. App.* 11.

*Connecticut.* — *Ambler v. Church*, 1 *Root (Conn.)* 211; *Phelps v. Sill*, 1 *Day (Conn.)* 315; *Tracy v. Williams*, 4 *Conn.* 113, 10 *Am. Dec.* 102.

*Delaware.* — *Bailey v. Wiggins*, 5 *Harr. (Del.)* 462, 60 *Am. Dec.* 650.

*Georgia.* — *Upshaw v. Oliver*, *Dudley (Ga.)* 241; *Gault v. Wallis*, 53 *Ga.* 675; *Calhoun v. Little*, 106 *Ga.* 336.

*Iowa.* — *Jones v. Brown*, 54 *Iowa* 78, 37 *Am. Rep.* 185.

*Kansas.* — *Harrison v. Redden*, 53 *Kan.* 265; *Clark v. Spicer*, 6 *Kan.* 440.

*Kentucky.* — *Ely v. Thompson*, 3 *A. K. Marsh. (Ky.)* 70; *Hollon v. Lilly*, 100 *Ky.* 553.

*Louisiana.* — *Maguire v. Hughes*, 13 *La. Ann.* 281; *State v. Whitaker*, 45 *La. Ann.* 1299.

*Maine.* — *Morrison v. McDonald*, 21 *Me.* 550. *Massachusetts.* — *Way v. Townsend*, 4 *Allen (Mass.)* 114.

*Minnesota.* — *Stewart v. Cooley*, 23 *Minn.* 347, 23 *Am. Rep.* 690.

*Missouri.* — *Wood v. Ruland*, 10 *Mo.* 143; *Stone v. Graves*, 8 *Mo.* 148, 40 *Am. Dec.* 131; *Lenox v. Grant*, 8 *Mo.* 254; *Williams v. Elliott*, 76 *Mo. App.* 8.

*New Hampshire.* — *Evans v. Foster*, 1 *N. H.* 374; *Burnham v. Stevens*, 33 *N. H.* 247; *Fawcett v. Dole*, 67 *N. H.* 168.

*New Jersey.* — *Little v. Moore*, 4 *N. J. L.*

82, 7 *Am. Dec.* 574; *Taylor v. Doremus*, 16 *N. J. L.* 473; *Grove v. Van Duyn*, 44 *N. J. L.* 654, 43 *Am. Rep.* 412.

*New York.* — *Moore v. Ames*, 3 *Cai. (N. Y.)* 170; *Yates v. Lansing*, 5 *Johns. (N. Y.)* 282, 9 *Johns. (N. Y.)* 395, 6 *Am. Dec.* 290; *Vanderheyden v. Young*, 11 *Johns. (N. Y.)* 150; *Tompkins v. Sands*, 8 *Wend. (N. Y.)* 462, 24 *Am. Dec.* 46; *Merwin v. Rogers*, *N. Y. City Ct. Gen. T.* 2 *N. Y. Supp.* 396; *Cunningham v. Bucklin*, 8 *Cow. (N. Y.)* 178, 18 *Am. Dec.* 432; *Ayers v. Russell*, 50 *Hun (N. Y.)* 282; *Bigelow v. Stearns*, 19 *Johns. (N. Y.)* 39, 10 *Am. Dec.* 189; *Easton v. Calendar*, 11 *Wend. (N. Y.)* 90; *Wilson v. New York*, 1 *Den. (N. Y.)* 598, 43 *Am. Dec.* 719.

*Ohio.* — *Childs v. Voris*, 6 *Ohio Dec.* 75.

*Pennsylvania.* — *Ross v. Rittenhouse*, 2 *Dall. (Pa.)* 160.

*South Carolina.* — *Brodie v. Rutledge*, 2 *Bay (S. Car.)* 69; *Young v. Herbert*, 2 *Nott. & M. (S. Car.)* 172; *Reid v. Hood*, 2 *Nott & M. (S. Car.)* 168, 10 *Am. Dec.* 582; *Lining v. Benthams*, 2 *Bay (S. Car.)* 1.

*Tennessee.* — *Cope v. Ramsey*, 2 *Heisk. (Tenn.)* 197; *Boyd v. Ferris*, 10 *Humph. (Tenn.)* 406; *Hoggatt v. Bigley*, 6 *Humph. (Tenn.)* 236.

*Texas.* — *Rains v. Simpson*, 50 *Tex.* 495; *Coupland v. Tullar*, 21 *Tex.* 523; *Taylor v. Goodrich*, *(Tex. Civ. App. 1897)* 40 *S. W. Rep.* 515.

*Utah.* — *Marks v. Sullivan*, 9 *Utah* 12.

*Vermont.* — *Rudd v. Darling*, 64 *Vt.* 456.

*Wisconsin.* — *Carter v. Dow*, 16 *Wis.* 298.

**Act of Judge Must Be "in a Matter Within His Jurisdiction."** — In *Lange v. Benedict*, 73 *N. Y.* 12, 29 *Am. Rep.* 80, the court, in adopting the language of *Gwynne v. Pool*, *Lutw.* 290, that a judge is not liable in a civil action if the act was done "in a matter within his jurisdiction," said: "Those words mean that when the person assumed to do the act as judge he had judicial jurisdiction of the person acted upon and of the subject-matter as to which it was done."

**1. Motive Immaterial.** — *Bradley v. Fisher*, 13 *Wall. (U. S.)* 347.

**2. No Liability for Acting or Failing to Act.** — *Phelps v. Sill*, 1 *Day (Conn.)* 315.

**3. No Liability in Case of Fraud and Corruption.** — *Barnardiston v. Soame*, 6 *How. St. Tr.* 1096; *Scott v. Stansfield*, *L. R.* 3 *Exch.* 220; *Fray v. Blackburn*, 3 *B. & S.* 576, 113 *E. C. L.* 576; *Floyd v. Barker*, 12 *Coke* 25; *Miller v. Hope*, 2 *Shaw Sc. App. Cas.* 125; *Bradley v. Fisher*, 13 *Wall. (U. S.)* 335; *Jones v. Brown*, 54 *Iowa* 78, 37 *Am. Rep.* 185; *Pratt v. Gardner*, 2 *Cush. (Mass.)* 63, 48 *Am. Dec.* 652; *Stone v. Graves*, 8 *Mo.* 148, 40 *Am. Dec.* 131; *Lenox v. Grant*, 8 *Mo.* 254; *Taylor v. Doremus*, 16 *N. J. L.* 473.



wanting which hold that malice or corruption will render a judge liable.<sup>1</sup> The usual remedy in such cases is held to be by indictment or impeachment.<sup>2</sup>

**Liability for Slanderous Words.** — It has been held that a judge is not liable to a civil action for slanderous words spoken by him in his judicial capacity, even though it is averred that they were spoken falsely, maliciously, and without probable cause.<sup>3</sup>

**Liability for Conspiracy.** — The general rule as to freedom of judges from liability will not, it would seem, exempt a judge from liability for becoming a party to a conspiracy for the injury of a person, as by causing his arrest and imprisonment on a false charge, since such conspiracy could not be construed as a judicial action on the part of the judge.<sup>4</sup>

(2) *Reason for Rule.* — This rule as to the exemption of judges from liability for judicial acts within their jurisdiction is for the benefit of the public, and was established in order to secure the independence of the judges, and to prevent their being harassed by vexatious actions.<sup>5</sup>

(3) *To What Judges Rule Applicable* — **Application to All Judges.** — The doctrine of exemption from civil liability for judicial acts and opinions within their jurisdiction is universal in its character, and applies not only to judges of courts of general and superior jurisdiction, but equally to those of inferior courts of limited jurisdiction.<sup>6</sup> Thus, for instance, the rule exempts from liability not only judges of the superior common-law courts, but equity judges,<sup>7</sup> justices of the peace,<sup>8</sup> and coroners.<sup>9</sup>

**Application to All Persons Acting in Judicial Capacity.** — Furthermore, this rule is not confined in its application to actual judges, but is extended to all persons while acting in a judicial capacity within their jurisdiction. Illustrations of

1. **Liability for Malice or Corruption.** — *Gault v. Wallis*, 53 Ga. 675; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 711; *Robinson v. Ramey*, 8 B. Mon. (Ky.) 216; *Gregory v. Brown*, 4 Bibb (Ky.) 28, 7 Am. Dec. 731; *Cope v. Ramsey*, 2 Heisk. (Tenn.) 197; *Hoggatt v. Bigley*, 6 Humph. (Tenn.) 236.

2. **Remedy by Indictment or Impeachment.** — *Bradley v. Fisher*, 13 Wall. (U. S.) 354; *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; *Lenox v. Grant*, 8 Mo. 254; *Taylor v. Doremus*, 16 N. J. L. 473; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290, *affirming* 5 Johns. (N. Y.) 282; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Voorhees v. Martin*, 12 Barb. (N. Y.) 508; *Brodie v. Rutledge*, 2 Bay (S. Car.) 69; *Lining v. Bentham*, 2 Bay (S. Car.) 1. See also the title IMPEACHMENT, vol. 15, p. 1061.

**May Not Be Excepted to or Challenged for Corruption.** — In *M'Dowell v. Van Deusen*, 12 Johns. (N. Y.) 356, the court said: "It is a general principle \* \* \* that a judge cannot be excepted to or challenged for corruption, but must be punished by indictment or impeachment."

3. **No Liability for Slanderous Words.** — *Scott v. Stansfield*, L. R. 3 Exch. 220. See also the title LIBEL AND SLANDER.

**Liability of Coroner for Address to Jury.** — In *Thomas v. Churton*, 2 B. & S. 475, 110 E. C. L. 475, it was held that a coroner holding an inquest on a dead body is not liable to an action for words falsely and maliciously spoken by him in his address to the jury.

In the *United States* his privileges are not so extended. See the title CORONERS, vol. 7, p. 614, the subdiv. *Privileges and Liabilities* — *As a Judicial Officer*.

4. **Liability for Conspiracy.** — See *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690.

5. **Rule for Benefit of Public.** — *Scott v. Stansfield*, L. R. 3 Exch. 220; *Fray v. Blackburn*, 3 B. & S. 576, 113 E. C. L. 576; *Taaffe v. Downes*, 3 Moo. P. C. 41, note; *Bradley v. Fisher*, 13 Wall. (U. S.) 347; *Phelps v. Sill*, 1 Day (Conn.) 315.

6. **Exemption Applies to All Judges Acting Within Jurisdiction** — *Connecticut*. — *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102.

*Illinois*. — *Lancaster v. Lane*, 19 Ill. 242.

*Indiana*. — *Willey v. Strickland*, 8 Ind. 453.

*Iowa*. — *Jones v. Brown*, 54 Iowa 74, 37 Am. Rep. 185; *Wasson v. Mitchell*, 18 Iowa 153; *Londegan v. Hammer*, 30 Iowa 508.

*Kansas*. — *Clark v. Spicer*, 6 Kan. 440.

*Kentucky*. — *Robinson v. Ramey*, 8 B. Mon. (Ky.) 216; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 711.

*Maine*. — *State v. Hartwell*, 35 Me. 129; *Lane v. Crosby*, 42 Me. 327.

*Massachusetts*. — *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 48 Am. Dec. 652.

*Missouri*. — *Mooney v. Williams*, 15 Mo. 442.

*South Carolina*. — *State v. Johnson*, 2 Bay (S. Car.) 385.

*Vermont*. — *Wright v. Hazen*, 24 Vt. 143.

See also *Hamond v. Howell*, 1 Mod. 184.

7. **Applies to Equity Judges.** — *Dicas v. Brougham*, 1 M. & Rob. 309.

8. **Justices of the Peace.** — *Rex v. Cox*, 2 Burr. 785; *Harman v. Tappenden*, 1 East 556; *Ambler v. Church*, 1 Root (Conn.) 211; *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46.

9. **Coroners.** — *Garnett v. Ferrand*, 6 B. & C. 611, 13 E. C. L. 277; *Thomas v. Churton*, 2 B. & S. 475, 110 E. C. L. 475.



such exemption will be found in the note.<sup>1</sup>

(4) *What Are Judicial Acts Within Rule* — *In General.* — What are judicial acts within the meaning of the rule exempting judges from liability therefor must be decided by the generally accepted definition of a judicial act — namely, that it is an act done in the exercise of judicial power; an act performed by a court touching the rights of parties or property brought before it by voluntary appearance or by the prior action of ministerial officers.<sup>2</sup>

*Illustrations.* — Under this definition the following have been held to be judicial acts, and as such within the meaning of the rule: the taking of recognizances;<sup>3</sup> the commitment of a witness for contempt, provided such commitment is pending a trial, and thus within the jurisdiction of the judge;<sup>4</sup> the exclusion of persons from a court room as a judge may see fit;<sup>5</sup> the striking off of an attorney's name from the roll;<sup>6</sup> making an order reinstating a case without notice;<sup>7</sup> the requirement of or failure to require security or additional security from a guardian;<sup>8</sup> and granting or refusing to grant an appeal.<sup>9</sup>

*b. ACTS AND OPINIONS NOT WITHIN JURISDICTION* — (1) *Judges of Courts of Superior or General Jurisdiction* — (a) *Acts in Excess of Jurisdiction.* — The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction<sup>10</sup> and are alleged to have been done

**1. Arbitrators.** — *Pappa v. Rose*, L. R. 7 C. P. 32; *Jones v. Brown*, 54 Iowa 74, 37 Am. Rep. 185.

**Election Officers.** — *Barnardiston v. Saome*, 6 How. St. Tr. 1096.

In some jurisdictions, however, it would seem that election officers are not held exempt by reason of acting as such. *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio 372; *Anderson v. Millikin*, 9 Ohio St. 568.

It has been held that election officers will be held liable in cases of their acting maliciously. *Murphy v. Ramsey*, 114 U. S. 15. See also *Goetheus v. Matthews*, 61 N. Y. 420.

**County Commissioners.** — *Hunter v. Mobley*, 26 S. Car. 192, in which case it was held that where county commissioners when acting in an honest opinion of the law, and without negligence, refuse to pay a claim, they are not to be held liable as individuals, the remedy being by mandamus. See also *State v. Tippecanoe County*, 45 Ind. 501.

**Tax Commissioners.** — *Apgar v. Hayward*, 110 N. Y. 225; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117.

**Commissioners on Damages in Eminent Domain Proceedings.** — *Van Steenberg v. Bigelow*, 3 Wend. (N. Y.) 42.

**Churchwardens.** — *Tozer v. Child*, 7 El. & Bl. 377, 90 E. C. L. 377.

**Pilot Commissioners.** — As holding that pilot commissioners constitute a quasi-judicial body, and are not answerable civilly for their acts requiring judgment, see *Downer v. Lent*, 6 Cal. 94.

**Commissioners of Insolvency** are not responsible for errors of judgment in judicial matters, even though they may be for wilful misconduct. *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432.

**Boards of Health.** — *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3; *Salem v. Eastern R. Co.*, 68 Mass. 431, 96 Am. Dec. 650; *Underwood v. Green*, 42 N. Y. 140.

**Prison Directors.** — *Porter v. Haight*, 45 Cal. 631.

**Municipal Officers.** — As to the exemption from liability of municipal officers while acting in a judicial capacity, see *East River Gas-Light Co. v. Donnelly*, 25 Hun (N. Y.) 614.

**Inspectors of Goods.** — *Warne v. Varley*, 6 T. R. 443; *Seaman v. Patten*, 2 Cai. (N. Y.) 312; *Fath v. Koepfel*, 72 Wis. 289.

**2. Definition of Judicial Act.** — *Bouv. L. Dict.*; *And. L. Dict.*, *Flournoy v. Jeffersonville*, 17 Ind. 170, 79 Am. Dec. 468.

**3. Taking Recognizances.** — *Chickering v. Robinson*, 3 Cush. (Mass.) 543; *Way v. Townsend*, 4 Allen (Mass.) 114, in which latter case it was held that no action lies against a magistrate to recover damages sustained by reason of his taking an invalid recognizance.

**4. Commitment for Contempt.** — *Morrison v. McDonald*, 21 Me. 550.

**5. Excluding Person from Court Room.** — *Garnett v. Ferrand*, 6 B. & C. 628, 13 E. C. L. 286.

**6. Striking Attorney's Name from Roll.** — *Bradley v. Fisher*, 13 Wall. (U. S.) 335. See also *Manning v. French*, 149 Mass. 391.

**7. Order Reinstating Case Without Notice.** — *Hughes v. McCoy*, 11 Colo. 591.

**8. Requirement or Failure to Require Security from Guardian.** — *Hamilton v. Williams*, 26 Ala. 527. See, however, *Cosby v. Com.*, 91 Ky. 235.

**9. Granting or Refusing Appeal.** — *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Tichenor v. Hewson*, 14 N. J. L. 26. See *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46.

**10. No Liability for Acts in Excess of Jurisdiction** — *England.* — *Miller v. Seare*, 2 W. Bl. 1141; *Ackerley v. Parkinson*, 3 M. & S. 411.

*United States.* — *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Randall v. Brigham*, 7 Wall. (U. S.) 523.

*Alabama.* — *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688.

*Arkansas.* — *McClure v. Hill*, 36 Ark. 268.

*Colorado.* — *Terry v. Wright*, 9 Colo. App. 11.

*Georgia.* — *Calhoun v. Little*, 106 Ga. 336.

*Iowa.* — *Jones v. Brown*, 54 Iowa 74, 37 Am. Rep. 185.



maliciously or corruptly.<sup>1</sup> "Where jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend."<sup>2</sup>

**Intendment in Favor of Jurisdiction.** — It has been stated that "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."<sup>3</sup>

(b) **Acts in Absence of Jurisdiction.** — A distinction must, however, be observed between mere excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter of the action,<sup>4</sup> for while in the former case there is no civil liability though the judicial act is void,<sup>5</sup> yet in the latter case the exercise of usurped authority by a judge with knowledge of his want of jurisdiction over the subject-matter may not be excused.<sup>6</sup>

(2) **Judges of Inferior Courts** — (a) **View that Judges Are Liable for Acts in Absence or Excess of Jurisdiction** — *aa.* **STATEMENT OF RULE** — **No Presumption in Favor of Jurisdiction.** While the rule exempting judges from civil liability for judicial acts and opinions within their jurisdiction applies equally to judges of inferior courts as to judges of superior courts,<sup>7</sup> this distinction must be observed, that while in the case of judges of superior courts jurisdiction, as has been seen, is presumed, unless the absence thereof be clearly shown,<sup>8</sup> the jurisdiction of judges of inferior courts, whose jurisdiction is special and limited, must affirmatively appear by the record,<sup>9</sup> and no intendment exists in their favor.<sup>10</sup>

*Michigan.* — *Ross v. Griffin*, 53 Mich. 9.  
*Mississippi.* — *Wilcox v. Williamson*, 61 Miss. 310.

*New Jersey.* — *Grove v. Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412.

*New York.* — *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Yates v. Lansing*, 5 Johns. (N. Y.) 282.

*North Dakota.* — *Root v. Rose*, 6 N. Dak. 575.  
*Wisconsin.* — *Robertson v. Parker*, 99 Wis. 652.

See also the titles **ARREST**, vol. 2, p. 899; **FALSE IMPRISONMENT**, vol. 12, p. 758.

**1. Rule Not Altered by Allegation of Malice or Corruption.** — *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Jones v. Brown*, 54 Iowa 74, 37 Am. Rep. 185; *Robertson v. Parker*, 99 Wis. 652.

**2. Per Field, J., in Bradley v. Fisher**, 13 Wall. (U. S.) 352. See also *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688.

**3. Jurisdiction Presumed.** — *Peacock v. Bell*, 1 Saund. 73. See also *Winford v. Powell*, 2 Ld. Raym. 1310; *Stanian v. Davies*, 2 Ld. Raym. 796; *Sears v. Terry*, 26 Conn. 280; *Clark v. Holmes*, 1 Dougl. (Mich.) 390.

**4. Excess and Absence of Jurisdiction Distinguished.** — *Per Field, J., in Bradley v. Fisher*, 13 Wall. (U. S.) 351. To the same effect see *Terry v. Wright*, 9 Colo. App. 11; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80. See also *Ackerley v. Parkinson*, 3 M. & S. 411; *Mills v. Collett*, 6 Bing. 85, 19 E. C. L. 11; *Marshalsea's Case*, 10 Coke 68; *Groenvelt v. Burwell*, 1 Ld. Raym. 454; *Cooke v. Bangs*, 31 Fed. Rep. 640; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Craig v. Burnett*, 32 Ala. 728; *Phelps v. Sill*, 1 Day (Conn.) 315; *Clarke v. May*, 2 Gray (Mass.) 470, 61 Am. Dec. 470; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am.

Dec. 438; *Rowe v. Addison*, 34 N. H. 306; *Palmer v. Carroll*, 24 N. H. 314; *Taylor v. Doremus*, 16 N. J. L. 473; *Yates v. Lansing*, 5 Johns. (N. Y.) 282.

**5. No Liability for Excess.** — *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

**6. Exercise of Usurped Authority.** — *Bradley v. Fisher*, 13 Wall. (U. S.) 335.

**7. See supra**, this section, *To What Judges Rule Applicable*.

**8. See supra**, this section, *Acts in Excess of Jurisdiction*.

**9. Jurisdiction Must Affirmatively Appear** — *Arkansas.* — *McClure v. Hill*, 36 Ark. 268.

*Colorado.* — *Terry v. Wright*, 9 Colo. App. 11.  
*Connecticut.* — *Sears v. Terry*, 26 Conn. 273;  
*Georgia.* — *Gray v. McNeal*, 12 Ga. 426.

*Illinois.* — *Shufeldt v. Buckley*, 45 Ill. 223;  
*Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 696.

*Maryland.* — *Taylor v. Bruscup*, 27 Md. 219.  
*Massachusetts.* — *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

*Michigan.* — *Wight v. Warner*, 1 Dougl. (Mich.) 384; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Wall v. Trumbull*, 16 Mich. 228; *Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688; *Wilson v. Davis*, 1 Mich. 156; *Shadbolt v. Bronson*, 1 Mich. 85; *Chandler v. Nash*, 5 Mich. 409; *Elliott v. Dudley*, 8 Mich. 62; *Platt v. Stewart*, 10 Mich. 260; *Bush v. Dunham*, 4 Mich. 339; *Bryan v. Smith*, 10 Mich. 229; *Merrill v. Montgomery*, 25 Mich. 74; *Weimer v. Bunbury*, 30 Mich. 201; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

*New Jersey.* — *Taylor v. Doremus*, 16 N. J. L. 481.

**10. No Intendment in Favor of Jurisdiction.** — *Peacock v. Bell*, 1 Saund. 74; *Winford v.*



**Judge Acting Without Jurisdiction Liable as Trespasser.** — According to the general rule, when judges of inferior courts act without jurisdiction of the subject-matter and of the person, or exceed their jurisdiction, their proceedings are void and cannot afford justification or protection to them; and a judge so acting, either without jurisdiction or exceeding it, becomes a trespasser, and as such liable to any person injured by his act.<sup>1</sup>

*bb. APPLICATION OF RULE* — **Liability for Actions under Statute Subsequently Declared Unconstitutional.** — In applying the rule just laid down in the text some decisions have gone to the length of holding that a judge of an inferior court is liable for his judicial acts under a statute which after his action thereunder was decided to be unconstitutional, on the ground that he could derive no jurisdiction from a void statute.<sup>2</sup>

**Liability for Want of Jurisdiction over Person, Process, and Subject-matter.** — If a judge of an inferior court has not jurisdiction over the process as well as over the person and the subject-matter, his acts in the capacity of a judge are void, and he will be liable to one injured by such acts.<sup>3</sup>

**Liability for Acting upon Insufficient Affidavits or Complaints.** — With regard to the personal liability of a judge for acting upon an affidavit concerning the sufficiency of which there is a question of real doubt, the decisions are not uniform. Thus, according to some decisions, it would seem to be held that as the jurisdiction of the judge requires him to pass on complaints, error in deciding the sufficiency of an affidavit or complaint is error within the limits of jurisdiction and made in a judicial capacity, and the judge is not liable therefor.<sup>4</sup> According to other decisions, however, an error of this kind is not within the

Powell, 2 *Ld. Raym.* 1310; *McClure v. Hill*, 36 *Ark.* 268; *Sears v. Terry*, 26 *Conn.* 273; *Shufeldt v. Buckley*, 45 *Ill.* 223; *Blincoe v. Head*, (*Ky.* 1898) 44 *S. W. Rep.* 374.

**1. Liability for Acting Without Jurisdiction** — *England.* — *Miller v. Seare*, 2 *W. Bl.* 1145; *Perkin v. Proctor*, 2 *Wils. C. Pl.* 382; *Morse v. James*, *Willes* 122.

*Alabama.* — *Duckworth v. Johnston*, 7 *Ala.* 578; *Craig v. Burnett*, 32 *Ala.* 728.

*Arkansas.* — *McClure v. Hill*, 36 *Ark.* 268; *Welsh v. Lloyd*, 5 *Ark.* 367; *Trammell v. Russellville*, 34 *Ark.* 105, 36 *Am. Rep.* 1.

*Indiana.* — *Barkeloo v. Randall*, 4 *Blackf. (Ind.)* 476, 32 *Am. Dec.* 46.

*Iowa.* — *Jones v. Brown*, 54 *Iowa* 74, 37 *Am. Rep.* 185.

*Massachusetts.* — *Kelly v. Bemis*, 4 *Gray (Mass.)* 83, 64 *Am. Dec.* 50; *Fisher v. McGirr*, 1 *Gray (Mass.)* 45, 61 *Am. Dec.* 381; *Clarke v. May*, 2 *Gray (Mass.)* 410, 61 *Am. Dec.* 470; *Piper v. Pearson*, 2 *Gray (Mass.)* 120, 61 *Am. Dec.* 438; *Sullivan v. Jones*, 2 *Gray (Mass.)* 570.

*Michigan.* — *Clark v. Holmes*, 1 *Dougl. (Mich.)* 390.

*Mississippi.* — *Wilcox v. Williamson*, 61 *Miss.* 310.

*New Jersey.* — *Taylor v. Doremus*, 16 *N. J. L.* 473.

*New York.* — *Lange v. Benedict*, 73 *N. Y.* 12, 29 *Am. Rep.* 80; *Hubbard v. Spencer*, 15 *Johns. (N. Y.)* 244; *Easton v. Calendar*, 11 *Wend. (N. Y.)* 90; *Adkins v. Brewer*, 3 *Cow. (N. Y.)* 206, 15 *Am. Dec.* 264; *Savacool v. Boughton*, 5 *Wend. (N. Y.)* 180, 21 *Am. Dec.* 181; *Moor v. Ames*, 3 *Cai. (N. Y.)* 170; *Bigelow v. Stearns*, 19 *Johns. (N. Y.)* 39, 10 *Am. Dec.* 189; *Clark v. Holdridge*, 58 *Barb. (N. Y.)* 61; *Reynolds v. Orvis*, 7 *Cow. (N. Y.)* 269; *Horton v. Auchmoody*, 7 *Wend. (N. Y.)* 200; *Harrington v. People*, 6 *Barb. (N. Y.)* 607; *Yates v.*

*Lansing*, 5 *Johns. (N. Y.)* 282; *Butler v. Kent*, 19 *Johns. (N. Y.)* 223, 10 *Am. Dec.* 219; *Cunningham v. Bucklin*, 8 *Cow. (N. Y.)* 178, 18 *Am. Dec.* 432; *Wilson v. New York*, 1 *Den. (N. Y.)* 599, 43 *Am. Dec.* 719.

**Protected as to Errors of Judgment Only While Acting Within Authority.** — "In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority they are protected as to errors in judgment; otherwise they are not protected." *De Grey, C. J.*, in *Miller v. Seare*, 2 *W. Bl.* 1145.

**2. Liability for Acting under Statutes Subsequently Declared Unconstitutional.** — *Kelly v. Bemis*, 4 *Gray (Mass.)* 83, 64 *Am. Dec.* 50. See also *Ely v. Thompson*, 3 *A. K. Marsh. (Ky.)* 76; *Monroe v. Collins*, 17 *Ohio St.* 665.

**Contra — No Liability for Enforcing Void Ordinance.** — *Henke v. McCord*, 55 *Iowa* 378.

**3. Liability for Want of Jurisdiction over Person, Process, and Subject-matter.** — *Tracy v. Williams*, 4 *Conn.* 107, 10 *Am. Dec.* 102; *Grumon v. Raymond*, 1 *Conn.* 40, 6 *Am. Dec.* 200; *Bigelow v. Stearns*, 19 *Johns. (N. Y.)* 39, 10 *Am. Dec.* 189. See also *Maguire v. Hughes*, 13 *La. Ann.* 281; *Borden v. Fitch*, 15 *Johns. (N. Y.)* 121, 8 *Am. Dec.* 225; and the titles *ARREST*, vol. 2, p. 832; *FALSE IMPRISONMENT*, vol. 12, p. 719, etc.

**4. View that Error in Deciding on Sufficiency Is Error Within Limits of Jurisdiction.** — *Clark v. Spicer*, 6 *Kan.* 440; *Wilcox v. Williamson*, 61 *Miss.* 310; *Bell v. McKinney*, 63 *Miss.* 187; *Stewart v. Hawley*, 21 *Wend. (N. Y.)* 552. See also *Grove v. Van Duyn*, 44 *N. J. L.* 654, 43 *Am. Rep.* 412; *Bocock v. Cochran*, 32 *Hun (N. Y.)* 521; *McCall v. Cohen*, 16 *S. Car.* 445, 42 *Am. Rep.* 641; and the title *JUSTICE OF THE PEACE*, *post*.



limits of a judge's jurisdiction, and he will be liable therefor in a civil action; and honesty of purpose in such a case, while it may mitigate damages, cannot justify the clear usurpation of power.<sup>1</sup>

**Liability in Attachment Cases.** — In order to give to a judge jurisdiction of an attachment case, all requirements of the attachment laws must be complied with, and a failure so to comply will render the judge liable as a trespasser to the person injured.<sup>2</sup>

**Liability for Acts After Termination of Jurisdiction.** — Where a judge has power to do a certain act when incidental and auxiliary to the trial of the cause before him, such power can be exercised only during the pendency of such cause, and if he attempts to exercise it after the cause has been finally disposed of by judgment his act is without jurisdiction, and he is liable therefor.<sup>3</sup>

(b) **View that Judges Are Not Liable for Acts in Excess of Jurisdiction.** — There are cases which hold that the same rule as to the liability of judges of superior courts for acts in excess of jurisdiction should apply to judges of inferior courts,<sup>4</sup> and condemn the distinction between the courts as unreasonable, unjust, and illogical.<sup>5</sup> These cases hold that if, acting in good faith and with probable cause, a judge of an inferior court exceeds his jurisdiction, or erroneously decides that he has jurisdiction, he will not be civilly liable.<sup>6</sup>

**Good Faith Held Proper Test.** — According to these authorities, the test, generally speaking, seems to be whether the judge in acting in his judicial capacity did so in good faith.<sup>7</sup>

(c) **Mistake of Fact.** — Although, as just stated, it is incumbent on judges of inferior courts to show their jurisdiction affirmatively, it has been held that such judges cannot be held liable in trespass for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to the particular case, of which the judge or magistrate has neither knowledge nor the means of knowledge; in other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the judge or magistrate, in order to hold him liable for acts done without jurisdiction, otherwise the maxim *ignorantia facti excusat* applies.<sup>8</sup>

**2. Ministerial Acts — a. GENERAL RULE** — Where Duty Purely Ministerial. — Where a ministerial duty or authority is annexed to a judicial office, the judge may be sued for damages occasioned by his neglect to perform such ministerial act.<sup>9</sup>

**1. View that Such Error Is Not Within Limits of Jurisdiction.** — *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438; *Truesdell v. Combs*, 33 Ohio St. 186. See also *Houlden v. Smith*, 14 Q. B. 841, 68 E. C. L. 841; *McClure v. Hill*, 36 Ark. 268; *Cohoon v. Speed*, 2 Jones L. (47 N. Car.) 133; and the title *FALSE IMPRISONMENT*, vol. 12, p. 761.

**2. Attachment Cases.** — *Barkeloo v. Randall*, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; *Adkins v. Brewer*, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175.

**3. Liability for Acts After Termination of Jurisdiction.** — *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

**4. Exemption from Liability for Exceeding Jurisdiction Applied to All Judges.** — *Calhoun v. Little*, 106 Ga. 336; *Thompson v. Jackson*, 93 Iowa 376; *Robertson v. Parker*, 99 Wis. 652. See also *Bell v. McKinney*, 63 Miss. 187.

**5. Distinction Between Courts Held Unreasonable, Unjust, and Illogical.** — *Thompson v. Jackson*, 93 Iowa 376.

**6. Inferior Judge Not Liable for Exceeding or Erroneously Deciding that He Has Jurisdiction.** — *Thompson v. Jackson*, 93 Iowa 376; *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137; *Austin v. Vrooman*, 128 N. Y. 229; *Marks v. Sullivan*, 9 Utah 12; *Robertson v. Parker*, 99 Wis. 652.

**7. Good Faith Proper Test.** — *Calhoun v. Little*, 106 Ga. 336; *Robertson v. Parker*, 99 Wis. 652.

**8. No Liability for Mistake of Fact.** — *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470, citing *Pike v. Carter*, 3 Bing. 78, 11 E. C. L. 37; *Calder v. Halket*, 3 Moo. P. C. 77; and *Lowther v. Radnor*, 8 East 113.

**9. Liability for Ministerial Acts — England.** — *Ferguson v. Kinnoull*, 9 Cl. & F. 251.

*Alabama.* — *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

*Iowa.* — *Thompson v. Jackson*, 93 Iowa 376; *Lanpher v. Dewell*, 56 Iowa 153; *Horne v. Pudil*, 88 Iowa 533.

*Massachusetts.* — *Briggs v. Wardwell*, 10 Mass. 356.



**Judicial Character No Protection.** — His judicial character will not protect him in such cases, and if he executes his ministerial duty wrongfully, whether by mistake or by fraud, he is answerable to the injured party.<sup>1</sup>

**6. MINISTERIAL ACTS WITHIN MEANING OF RULE** — **What Are Ministerial Acts.** — Generally speaking, a ministerial as opposed to a judicial act is one which is performed in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without regard to the exercise of one's own judgment as to the propriety of the act to be done.<sup>2</sup>

**Illustrations.** — The following, among others, have been held to be ministerial acts, for neglect in performing which, or for refusal to perform an action will lie in favor of the person injured thereby: the entry by a justice of a judgment on his docket;<sup>3</sup> the entry by a justice of a stay of execution;<sup>4</sup> and the making of a return by a justice to the Common Pleas upon an appeal.<sup>5</sup> The issuance of an execution by a judge is also held to be a ministerial act which, if improperly done, will subject him to an action of trespass by the party injured.<sup>6</sup> Other illustrations of acts held to be ministerial will be found in the notes.<sup>7</sup>

**VII. DISQUALIFICATION OF JUDGES** — **1. General Principle** — **No Man May Act as Judge in His Own Cause.** — The principle that a man may not be a judge in his own cause is of universal acceptance and has been established since the earliest periods of the common law.<sup>8</sup>

*Missouri.* — *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131.

*New Jersey.* — *Taylor v. Doremus*, 16 N. J. L. 473.

*New York.* — *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; *Houghton v. Swarthout*, 1 Den. (N. Y.) 589; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432.

*Ohio.* — *Kerns v. Schoonmaker*, 4 Ohio 331, 22 Am. Dec. 757.

**1. Judicial Character No Protection.** — *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Taylor v. Doremus*, 16 N. J. L. 473.

**Responsibility for Manner of Performance or Failure to Perform.** — "When the law assigns to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability." *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

**2. Definition.** — *And. L. Dict.*; *Flournoy v. Jeffersonville*, 17 Ind. 173, 79 Am. Dec. 468. See also *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

**3. Entry by Justice of Judgment on His Docket.** — *Christopher v. Van Liew*, 57 Barb. (N. Y.) 17. See also *Sibley v. Howard*, 3 Den. (N. Y.) 72, 45 Am. Dec. 448; *Hall v. Tuttle*, 6 Hill (N. Y.) 38, 40 Am. Dec. 382.

**4. Entry by Justice of Stay of Execution.** — *Kerns v. Schoonmaker*, 4 Ohio 331, 22 Am. Dec. 757.

**5. Making of Return by Justice to Common Pleas on Appeal.** — *Houghton v. Swarthout*, 1 Den. (N. Y.) 589.

**6. Issuance of Execution by Justice.** — *Briggs v. Wardwell*, 10 Mass. 355. See also *Taylor v. Trask*, 7 Cow. (N. Y.) 249; *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49; *Milliken v. Brown*, 10 S. & R. (Pa.) 188. *Contra*, *Wertheimer v. Howard*, 30 Mo. 420.

**7. An Action Lies Against a Probate Judge for Refusing a Liquor License**, since such action is ministerial and not judicial. *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65.

**Illegal Issuance of Marriage License.** — In issuing a marriage license a probate judge acts ministerially and at his peril in case of violation of duty. *Cotten v. Rutledge*, 33 Ala. 110. See also *Wood v. Farnell*, 50 Ala. 546, wherein a probate judge was held liable for the illegal issuance of a marriage license by his clerk.

**8. No Man May Act as Judge in His Own Cause** — *England.* — *Bonham's Case*, 8 Coke 118; *Derbie's Case*, 12 Coke 114; *Day v. Savage*, Hob. 87; *Brookes v. Rivers*, Hardres 503; *Lincoln v. Smith*, 1 Vent. 3; *Anonymous*, 1 Salk. 396; *Chester v. Bowker*, 1 Stra. 639; *Great Charte v. Kennington*, 2 Stra. 1174; *Wright v. Crump*, 2 Ld. Raym. 766; *London v. Markwick*, 11 Mod. 164; *London v. Wood*, 12 Mod. 687; *Hesketh v. Braddock*, 3 Burr. 1847; *Rex v. Justices*, 5 M. & S. 513; *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759, 16 Eng. L. & Eq. 63.

*Alabama.* — *State v. Castleberry*, 23 Ala. 85. *California.* — *Meyer v. San Diego*, 121 Cal. 102.

*Kansas.* — *Tootle v. Berkle*, 60 Kan. 446.

*Massachusetts.* — *Pearce v. Atwood*, 13 Mass. 324.

*New Jersey.* — *Peck v. Essex*, 21 N. J. L. 656; *Vernon Tp. v. Wantage Tp.*, 2 N. J. L. 293; *Schroder v. Ehlers*, 31 N. J. L. 44; *State v. Crane*, 36 N. J. L. 394.

*New York.* — *Washington Ins. Co. v. Price*, Hopk. (N. Y.) 1; *Place v. Butternuts Woolen, etc., Mfg. Co.*, 28 Barb. (N. Y.) 503; *Foot v. Stiles*, 57 N. Y. 399; *Matter of Hancock*, 27 Hun (N. Y.) 78; *Oakley v. Aspinwall*, 3 N. Y. 549.

*Ohio.* — *Pike County v. Sergeant*, Wright (Ohio) 482; *Gregory v. Cleveland, etc., R. Co.*, 4 Ohio St. 675.

*Pennsylvania.* — *Boyer v. Potts*, 14 S. & R. (Pa.) 157.

*Texas.* — *Taylor v. Williams*, 26 Tex. 583.



**Legislative Authority May Not Give Such Power.** — Some decisions have gone so far as expressly to hold that it is beyond the scope of legislative authority to confer upon a party to a controversy or one interested therein the power to act as judge in such cause.<sup>1</sup>

**Rule Intended to Remove All Suspicion of Fairness and Integrity of Judge.** — The reason for the universal application of this principle has been well stated to be that "next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."<sup>2</sup>

**2. Grounds of Disqualification** — *a.* **AT COMMON LAW** — (1) *General Rule.* — The maxim just set out, that no man may be a judge in his own cause, was always applied at common law where the judge had an interest in the cause.<sup>3</sup>

(2) *Nature of Interest* — **Personal Interest or Interest Disqualifying as Witness.** — It has been held that at common law the only ground for challenging a judge was personal interest<sup>4</sup> or interest such as would disqualify a witness.<sup>5</sup>

**Relationship No Ground of Disqualification.** — Under the common-law rule it was held not objectionable for a judge to sit in a cause to which a relative was a party,<sup>6</sup> this doctrine being based on the ground that favor will not be presumed in a judge.<sup>7</sup> Cases are not wanting, however, which hold that even at common law relationship to parties operated to disqualify a judge or was at least sufficient ground for his retirement of his own motion.<sup>8</sup>

**No Disqualification for Having Acted as Counsel.** — At common law the fact that a judge formerly acted as attorney or counsel for one of the parties did not disqualify him.<sup>9</sup> In *Florida*, however, it has been held that though there was no statute in existence making the former relation of attorney and client a ground for disqualification, yet such relation would be recognized as disqualifying the judge.<sup>10</sup>

*b.* **STATUTORY PROVISIONS** — (1) *In General.* — The constitutions of most, if not all, of the states of the American Union, while expressly retaining the common-law rule as to the disqualification of judges, have prescribed other

*West Virginia.* — *Findley v. Smith*, 42 W. Va. 299.

*Wisconsin.* — *Case v. Hoffman*, 100 Wis. 351.

**1. Beyond Scope of Legislative Authority to Confer Such Power.** — *Cooley Const. Lim.* 412; *Day v. Savage*, Hob. 87; *Hesketh v. Brad-dock*, 3 Burr. 1847; *Bonham's Case*, 8 Coke 118; *Great Charte v. Kennington*, 2 Stra. 1173; *State v. Castleberry*, 23 Ala. 85; *Peck v. Essex*, 21 N. J. L. 656; *State v. Crane*, 36 N. J. L. 394; *Conklin v. Squire*, 4 Ohio Dec. 493; *Chambers v. Hodges*, 23 Tex. 104.

In *Day v. Savage*, Hob. 87, it was held that even an Act of Parliament made against natural equity so as to make a man a judge in his own cause is void in itself.

**Legislature Cannot Change Essential Nature of Judicial Functions.** — *State v. Crane*, 36 N. J. L. 394.

**2. Rule Intended to Remove All Suspicion of Judge's Fairness.** — *Per* *Bronson, J.*, in *People v. Suffolk Common Pleas*, 18 Wend. (N. Y.) 550. See also *State v. Castleberry*, 23 Ala. 85; *Meyer v. San Diego*, 121 Cal. 102; *Darling v. Pierce*, 15 Hun (N. Y.) 543.

**3. Interest Ground of Disqualification.** — *Dimes v. Grand Junction Canal Co.*, 3 H. C. L. 759, 16 Eng. L. & Eq. 63; *Great Charte v. Kenning-ton*, 2 Stra. 1174; *Ochus v. Sheldon*, 12 Fla. 138; *Russell v. Belcher*, 76 Me. 501; *Taylor v. Williams*, 26 Tex. 583; *Case v. Hoffman*, 100 Wis. 351.

**Applies Only to Persons Holding Courts.** — *Foot v. Stiles*, 57 N. Y. 399.

**4. Personal Interest.** — *Russell v. Belcher*, 76 Me. 501.

**5. Interest Disqualifying Witness.** — *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759, 16 Eng. L. & Eq. 63.

**6. Relationship No Disqualification.** — *Brookes v. Rivers*, Hardres 503; *Winchester v. Hinsdale*, 12 Conn. 88; *Russell v. Belcher*, 76 Me. 501; *Matter of Dodge, etc., Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579.

"At common law it was no disqualification in a justice of the peace to try a cause, that he was related in any of the degrees of consanguinity or was of affinity to either of the parties." *Place v. Butternuts Woolen, etc., Mfg. Co.*, 28 Barb. (N. Y.) 503, *citing* *Pierce v. Sheldon*, 13 Johns. (N. Y.) 191; *Eggleston v. Smiley*, 17 Johns. (N. Y.) 133.

**7. Favor Not Presumed in Judge.** — *Brookes v. Rivers*, Hardres 503; *Winchester v. Hinsdale*, 12 Conn. 88.

**8. Relationship Held to Disqualify.** — *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Case v. Hoffman*, 100 Wis. 351.

**9. Judge Not Disqualified by Having Been of Counsel.** — *Townsend v. Hughes*, 2 Mod. 150; *Owings v. Gibson*, 2 A. K. Marsh. (Ky.) 515. See also *Den v. Tatem*, 1 N. J. L. 190.

**10. Florida** — **Disqualification.** — *Tampa St. R.*



grounds, differing somewhat in the various states, which operate to disqualify a judge from acting in a case where such disqualifying conditions exist.<sup>1</sup>

(2) *Illustrations* — (a) *Provision as to Interest* — *aa. IN GENERAL.* — The constitutions or statutes of the different states usually contain a general provision to the effect that a judge shall not act as such in a cause in which he is interested.<sup>2</sup>

*bb. DISQUALIFICATION BY REASON OF INTEREST AS STOCKHOLDER* — *In General.* — It is a generally accepted rule that a stockholder in a corporation cannot sit as judge in an action to which such corporation is a party, such interest being sufficient to disqualify him.<sup>3</sup>

etc., *Co. v. Tampa Suburban R. Co.*, 30 Fla. 515.

1. See the statutes of the various states.

The following cases construe the several statutes:

*California.* — *People v. De La Guerra*, 24 Cal. 73; *Patterson v. Police Judges*, 123 Cal. 453.

*Florida.* — *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Conn. v. Chadwick*, 17 Fla. 428; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190.

*Iowa.* — *Jewett v. Miller*, 12 Iowa 85; *Chase v. Weston*, 75 Iowa 159; *Stone v. Marion County*, 78 Iowa 14.

*Louisiana.* — *Rheas Succession*, 31 La. Ann. 323.

*Maine.* — *Russell v. Belcher*, 76 Me. 501.

*Maryland.* — *Buckingham v. Davis*, 9 Md. 324.

*Michigan.* — *Stockwell v. Township Board*, 22 Mich. 341; *Horton v. Howard*, 79 Mich. 643, 19 Am. St. Rep. 198.

*Texas.* — *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604.

2. *Judge May Not Act in Cause in Which He Is Interested* — *Alabama.* — *Ellis v. Smith*, 42 Ala. 349; *Ex p. State Bar Assoc.*, 92 Ala. 113; *Gill v. State*, 61 Ala. 169.

*Arkansas.* — *Foreman v. Marianna*, 43 Ark. 321.

*California.* — *Patterson v. Police Judge's Ct.*, 123 Cal. 453; *Matter of White*, 37 Cal. 190; *People v. De La Guerra*, 24 Cal. 73; *Adams v. Minor*, 121 Cal. 372; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Howell v. Budd*, 91 Cal. 344; *Southern California Motor Road Co. v. San Bernardino Nat. Bank*, 100 Cal. 316; *Oakland v. Oakland Water Front Co.*, 118 Cal. 249; *Meyer v. San Diego*, 121 Cal. 102; *Heilbron v. Campbell*, (Cal. 1889) 23 Pac. Rep. 122.

*Georgia.* — *Knight v. Hardeman*, 17 Ga. 253; *Burnside v. Terry*, 45 Ga. 621; *Woolfolk v. State*, 85 Ga. 69; *Lloyd v. Smith*, T. U. P. Charlt. (Ga.) 143.

*Indiana.* — *Kelly v. Hockett*, 10 Ind. 299.

*Iowa.* — *Chase v. Weston*, 75 Iowa 159; *Foreman v. Hunter*, 59 Iowa 550; *Jewett v. Miller*, 12 Iowa 85; *Stone v. Marion County*, 78 Iowa 14.

*Kansas.* — *Tootle v. Berkley*, 60 Kan. 446; *In re Peyton*, 12 Kan. 398; *Limerick v. Murlatt*, 43 Kan. 318.

*Maryland.* — *Buckingham v. Davis*, 9 Md. 324; *Magruder v. Swann*, 25 Md. 173.

*Massachusetts.* — *Pearce v. Atwood*, 13 Mass. 321; *Richardson v. Welcome*, 6 Cush. (Mass.) 331; *Clark v. Lamb*, 2 Allen (Mass.) 396.

*Michigan.* — *Stockwell v. Township Board*,

22 Mich. 341; *Horton v. Howard*, 79 Mich. 643, 19 Am. St. Rep. 198; *West v. Wheeler*, 49 Mich. 505.

*Minnesota.* — *Sjoberg v. Nordin*, 26 Minn. 501.

*Mississippi.* — *Ferguson v. Brown*, 75 Miss. 214.

*Missouri.* — *Kansas City v. Knotts*, 78 Mo. 356; *State v. O'Bryan*, 102 Mo. 254.

*Nebraska.* — *Chicago, etc., R. Co. v. Kellogg*, 54 Neb. 138.

*New Hampshire.* — *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Nashua's Petition*, 12 N. H. 425.

*New Jersey.* — *Peck v. Essex*, 21 N. J. L. 656.

*New York.* — *Matter of Hancock*, 27 Hun (N. Y.) 78; *Darling v. Pierce*, 15 Hun (N. Y.) 542; *People v. Edmonds*, 15 Barb. (N. Y.) 529; *Carrington v. Andrews*, (County Ct.) 12 Abb. Pr. (N. Y.) 348; *In re Reddish*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 259; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Higbe v. Leonard*, 1 Den. (N. Y.) 186; *Foot v. Stiles*, 57 N. Y. 399; *Matter of Dodge, etc., Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579.

*Ohio.* — *State v. Rabbitts*, 46 Ohio St. 178; *Conklin v. Squire*, 4 Ohio Dec. 493.

*Oklahoma.* — *Cullins v. Overton*, 7 Okla. 470.

*Tennessee.* — *Reams v. Kearns*, 5 Coldw. (Tenn.) 217.

*Texas.* — *Casey v. Kinsey*, 5 Tex. Civ. App. 3; *Dicks v. Austin College*, 1 Tex. App. Civ. Cas., § 1068; *Beckham v. Rice*, 1 Tex. Civ. App. 281; *Chambers v. Hodges*, 23 Tex. 104; *Taylor v. Williams*, 26 Tex. 583; *Houston, etc., R. Co. v. Ryan*, 44 Tex. 426; *McFaddin v. Preston*, 54 Tex. 403; *Burks v. Bennett*, 55 Tex. 237; *King v. Sapp*, 66 Tex. 519; *McInnes v. Wallace*, (Tex. Civ. App. 1898) 44 S. W. Rep. 537; *Templeton v. Giddings*, (Tex. 1889) 12 S. W. Rep. 851; *Grigsby v. May*, 84 Tex. 240; *Meyers v. Bloon*, 20 Tex. Civ. App. 554.

*West Virginia.* — *Findley v. Smith*, 42 W. Va. 299.

*Wisconsin.* — *Hungerford v. Cushing*, 2 Wis. 397; *State v. Collins*, 5 Wis. 339.

Suit on a promissory note cannot be brought before a justice to whom it has been indorsed for collection, as he has thereby become the plaintiff's agent therefor. *West v. Wheeler*, 49 Mich. 505.

3. *Disqualification by Reason of Interest as Stockholder* — *England.* — *Wright v. Crump*, 2 Ld. Raym. 766; *Dimes v. Grand Junction Canal*, 3 H. L. C. 759, 16 Eng. L. & Eq. 63.

*California.* — *Adams v. Minor*, 121 Cal. 372.

*Florida.* — *State v. Young*, 31 Fla. 594, 34 Am. St. Rep. 41.

*Georgia.* — *Johnson v. Marietta, etc., R. Co.*, 70 Ga. 712.



**Interest Must Be Present.** — Such interest must, however, be a present interest, and the fact that a judge was formerly a stockholder in a corporation will not disqualify him from sitting in a case to which the corporation is a party, after such interest has ceased.<sup>1</sup>

**Honorary Membership in Corporation Does Not Disqualify.** — It has been held that a judge who is merely an honorary member of a corporation is not on that account disqualified to sit at the trial of a case instituted by such corporation.<sup>2</sup>

**Relationship to Stockholder.** — With regard to the effect of a judge's relationship to a stockholder in a corporation which is a party to an action before him, the authorities differ. It has been held that the fact of relationship to a corporation stockholder will not form a ground of objection.<sup>3</sup> The contrary has also been held, however, on the ground that, a stockholder being a party to a suit brought against the corporation, a judge who is related to such stockholder is disqualified as being related to a party in the cause.<sup>4</sup>

*cc.* **INTEREST IN DECEDENTS' ESTATES — Statutory Provision.** — The statutes in a number of the states expressly provide that a judge shall not act as such in the matter of a decedent's estate where he is interested in such estate, and such statutes usually provide for the transmission of such case to a specified court.<sup>5</sup>

**Under General Disqualification for Interest.** — In other states it has been held that a judge who is interested in a decedent's estate is disqualified to act in relation to such estate under the general provisions disqualifying on the ground of interest.<sup>6</sup>

*dd.* **DISQUALIFICATION AS RESIDENT OR TAXPAYER — On Ground of Interest.** — It has been held that under the provision disqualifying a judge by reason of interest, the mere fact that a judge is a resident or taxpayer in a county or town will not disqualify him to act as judge in a case to which such county or town is a party.<sup>7</sup> Other decisions, however, hold that one who owns property subject to city taxes may not act as judge in a case involving the levy of a tax or enjoining the collection of a tax, on the ground of his pecuniary interest in such case.<sup>8</sup>

**Express Statutory Authorization.** — It is expressly provided by statute in some

*Missouri.* — *Bowman's Case*, 67 Mo. 146.

*New York.* — *Matter of Dodge*, etc., Mfg. Co., 77 N. Y. 101, 33 Am. Rep. 579; *Palmer v. Lawrence*, 5 N. Y. 389; *In re Reddish*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 259; *Washington Ins. Co. v. Price*, *Hopk.* (N. Y.) 1; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Place v. Butternuts Woolen*, etc., Mfg. Co., 28 Barb. (N. Y.) 503.

*Ohio.* — *Gregory v. Cleveland*, etc., R. Co., 4 Ohio St. 675; *Cincinnati*, etc., R. Co. v. *Gill*, 10 West. L. J. 213, 1 Ohio Dec. (Reprint) 501.

*Texas.* — *Nicholson v. Showalter*, 83 Tex. 99; *Williams v. City Nat. Bank*, (Tex. Civ. App. 1894) 27 S. W. Rep. 147.

*Vermont.* — *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315.

**1. Interest Must Be Present and Not Past.** — *Johnson v. Marietta*, etc., R. Co., 70 Ga. 712. See also *Palmer v. Lawrence*, 5 N. Y. 389.

**2. Honorary Membership Insufficient.** — *Bowman's Case*, 67 Mo. 146.

**3. Relationship to Stockholder Insufficient.** — *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315.

**4. Relation to Stockholder Held to Disqualify.** — *Place v. Butternuts Woolen*, etc., Mfg. Co., 28 Barb. (N. Y.) 503.

**5. Disqualification for Interest in Decedent's**

**Estate.** — *Graham v. People*, 111 Ill. 253; *Cottle*, Appellant, 5 Pick. (Mass.) 483; *Aldrich*, Appellant, 110 Mass. 189; *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; *Gay v. Minot*, 3 Cush. (Mass.) 352; *Bacon*, Appellant, 7 Gray (Mass.) 391; *Northampton v. Smith*, 11 Met. (Mass.) 390; *Stearns v. Wright*, 51 N. H. 600; *Hopkins v. Lane*, 6 Dem. (N. Y.) 12; *Morgan v. Hammett*, 23 Wis. 30; *Schæffner's Appeal*, 41 Wis. 260. See also the title PROBATE COURTS.

**6. Disqualified on General Ground of Interest.** — *Matter of White*, 37 Cal. 190, *Rhea's Succession*, 31 La. Ann. 323; *Burks v. Bennett*, 62 Tex. 277; *Glavecke v. Tijirina*, 24 Tex. 663. See also the title PROBATE COURTS.

**7. Interest as Resident or Taxpayer.** — *Peck v. Essex*, 20 N. J. L. 457.

**Residence in Territory to Be Annexed.** — It has been held that a judge is not disqualified to act in the matter of an application for the annexation of certain territory to a municipal corporation on account of his residence in such a corporation, or by the fact that he voted in the matter of such annexation. *Foreman v. Marianna*, 43 Ark. 324.

**8. Meyer v. San Diego**, 121 Cal. 102; *Wetzel v. State*, 5 Tex. Civ. App. 17; *Austin v. Nalle*, 85 Tex. 520. Compare *Thornburgh v. Tyler*, 16 Tex. Civ. App. 439.



jurisdictions that no judge or justice shall be disqualified by interest as a resident or taxpayer in any town that is a party to proceedings before him.<sup>1</sup>

(b) **Where Judge Is a Party.** — The statutes of many of the states contain express provisions that a judge shall not act in any action or proceeding to which he is a party.<sup>2</sup>

(c) **Disqualification by Reason of Relationship** — *aa. IN GENERAL.* — It is a general if not a universal provision of the statutes prescribing the grounds upon which a judge may be disqualified, that relationship of the judge to a party in a cause will operate to disqualify him from sitting as judge in such cause;<sup>3</sup> and such

**1. Statutory Provision.** — *New Hartford v. Canaan*, 52 Conn. 158; *State v. Craig*, 80 Me. 85; *State v. Intoxicating Liquors*, 54 Me. 564; *State v. Severance*, (Me. 1886) 4 Atl. Rep. 560; *Fletcher v. Somerset R. Co.*, 74 Me. 434; *Com. v. Fletcher*, 157 Mass. 14.

**2. Judge Disqualified by Reason of Being Party** — *California.* — *Patterson v. Police Judge's Ct.*, 123 Cal. 453; *Livermore v. Brundage*, 64 Cal. 299; *Howell v. Budd*, 91 Cal. 344; *People v. De La Guerra*, 24 Cal. 73; *People v. Ah Lee Doon*, 97 Cal. 171; *Southern California Motor Road Co. v. San Bernardino Nat. Bank*, 100 Cal. 316.

*Florida.* — *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190; *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Ochus v. Sheldon*, 12 Fla. 138.

*Iowa.* — *Chase v. Weston*, 75 Iowa 159; *Stone v. Marion County*, 78 Iowa 14; *Foreman v. Hunter*, 59 Iowa 550.

*Michigan.* — *Stockwell v. Township Board*, 22 Mich. 341; *Horton v. Howard*, 79 Mich. 643, 19 Am. St. Rep. 198.

*New York.* — *Place v. Butternuts Woolen, etc.*, Mfg. Co., 28 Barb. (N. Y.) 503; *Foot v. Stiles*, 57 N. Y. 399; *Stuart v. Mechanics, etc.*, Bank, 19 Johns. (N. Y.) 496; *Higbe v. Leonard*, 1 Den. (N. Y.) 186; *Carrington v. Andrews*, (County Ct.) 12 Abb. Pr. (N. Y.) 348; *People v. Edmonds*, 15 Barb. (N. Y.) 529; *Converse v. McArthur*, 17 Barb. (N. Y.) 410.

*Texas.* — *Hawke v. Smith*, 22 Tex. 410.

**A Judge May Confess a Judgment Against Himself** in a suit in his own court to which he is a party. *Thornton v. Lane*, 11 Ga. 459.

**3. Disqualification of Judge by Reason of Relationship** — *Alabama.* — *Gill v. State*, 61 Ala. 169; *Salm v. State*, 89 Ala. 56; *Trawick v. Trawick*, 67 Ala. 271.

*Arkansas.* — *Fowler v. Byers*, 16 Ark. 196.

*California.* — *De La Guerra v. Burton*, 23 Cal. 593; *Matter of White*, 37 Cal. 190; *People v. De La Guerra*, 24 Cal. 73; *Howell v. Budd*, 91 Cal. 344; *People v. Ah Lee Doon*, 97 Cal. 171; *Southern California Motor Road Co. v. San Bernardino Nat. Bank*, 100 Cal. 316; *Johnston v. Brown*, 115 Cal. 694; *Patterson v. Police Judge's Ct.*, 123 Cal. 453.

*Connecticut.* — *Nettleton v. Nettleton*, 17 Conn. 542; *Groton v. Hurlburt*, 22 Conn. 178.

*Delaware.* — *Bayard v. McLane*, 3 Harr. (Del.) 139.

*Florida.* — *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Williams v. Robles*, 22 Fla. 95; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190; *Ex p. Harris*, 26 Fla. 77, 23 Am. St. Rep. 548; *State v. Young*, 31 Fla. 594, 34 Am. St. Rep. 41.

*Georgia.* — *Deupree v. Deupree*, 45 Ga. 414; *Burnside v. Terry*, 45 Ga. 621; *Thomas v.*

*Jones*, 64 Ga. 139; *Brantley v. Greer*, 71 Ga. 11; *Beall v. Sinquefield*, 73 Ga. 48; *Woolfolk v. State*, 85 Ga. 69; *Short v. Mathis*, 101 Ga. 287; *Shope v. State*, 106 Ga. 226.

*Indiana.* — *Kelly v. Hockett*, 10 Ind. 299.

*Iowa.* — *Chase v. Weston*, 75 Iowa 159; *Stone v. Marion County*, 78 Iowa 14.

*Kansas.* — *In re Peyton*, 12 Kan. 398.

*Louisiana.* — *State v. Voorhies*, 41 La. Ann. 567; *State v. Judge*, 39 La. Ann. 994.

*Maine.* — *Russell v. Belcher*, 76 Me. 501.

*Maryland.* — *Buckingham v. Davis*, 9 Md. 324.

*Massachusetts.* — *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513.

*Missouri.* — *Barnes v. McMullins*, 78 Mo. 260; *Kansas City v. Knotts*, 78 Mo. 356; *State v. O'Bryan*, 102 Mo. 254.

*New Hampshire.* — *Sanborn v. Fellows*, 22 N. H. 473; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

*New Jersey.* — *Vannoy v. Givens*, 23 N. J. L. 201.

*New York.* — *Carrington v. Andrews*, (County Ct.) 12 Abb. Pr. (N. Y.) 348; *Higbe v. Leonard*, 1 Den. (N. Y.) 186; *Schoonmaker v. Clearwater*, 41 Barb. (N. Y.) 200; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Chambers v. Clearwater*, 1 Keyes (N. Y.) 310; *Birdsall v. Fuller*, 11 Hun (N. Y.) 204; *Bell v. Vernooy*, 18 Hun (N. Y.) 125; *Matter of Van Wagoner*, 69 Hun (N. Y.) 365; *Matter of Hopper*, 5 Paige (N. Y.) 489; *New York L. Ins., etc., Co. v. Rand*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 35; *New York, etc., R. Co. v. Schuyler*, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 187; *Matthews v. Noble*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 674; *Matter of Leefe*, 2 Barb. Ch. (N. Y.) 39; *Place v. Butternuts Woolen, etc., Mfg. Co.*, 28 Barb. (N. Y.) 503; *Hopkins v. Lane*, 6 Dem. (N. Y.) 12; *Foot v. Stiles*, 57 N. Y. 399; *Matter of Dodge, etc., Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579. See also *Edwards v. Russell*, 21 Wend. (N. Y.) 63; *Oakley v. Aspinwall*, 3 N. Y. 548.

*Pennsylvania.* — *Com. v. Drum*, 58 Pa. St. 9.

*Tennessee.* — *Crozier v. Goodwin*, 1 Lea (Tenn.) 125; *Hilton v. Miller*, 5 Lea (Tenn.) 395; *Smith v. Pearce*, 6 Baxt. (Tenn.) 72; *Reams v. Kearns*, 5 Coldw. (Tenn.) 217; *Waterhouse v. Martin*, Peck (Tenn.) 374; *Pierce v. Bowers*, 8 Baxt. (Tenn.) 353.

*Texas.* — *Houston, etc., R. Co. v. Ryan*, 44 Tex. 426; *Hodde v. Susan*, 58 Tex. 389; *Gains v. Barr*, 60 Tex. 676; *Jordan v. Moore*, 65 Tex. 363; *Dennard v. Jordan*, 14 Tex. Civ. App. 398; *King v. Sapp*, 66 Tex. 519; *Schultze v. McLeary*, 73 Tex. 92; *Patton v. Collier*, 90 Tex. 115; *Tyler Tap R. Co. v. Overton*, 1 Tex. App. Civ. Cas., § 533; *Fellrath v. Gilder*, 1 Tex. App. Civ. Cas., § 1060; *Poole v. Muller*



provision is held to apply equally to civil and criminal trials.<sup>1</sup>

*bb. DEGREE OF RELATIONSHIP NECESSARY TO DISQUALIFY.* — The degree of relationship which will disqualify a judge is as a rule fixed by the statute prescribing such ground of disqualification, and varies somewhat in the different states.<sup>2</sup> Illustrations of relationships held to be sufficient or insufficient to disqualify will be found in the notes.<sup>3</sup>

*cc. CONSTRUCTION OF TERM "PARTY"* — *In General.* — The cases construing the various statutory provisions disqualifying for relationship to a "party" are not uniform, some confining their application to actual parties, while others are much broader in their construction. Below are instances of the different holdings upon this point.<sup>4</sup>

Brothers Furniture, etc., Co., 80 Tex. 189; January v. State, 36 Tex. Crim. 488; Yerby v. Martin, (Tex. Civ. App. 1897) 38 S. W. Rep. 541; *Ex p.* Tinsley, 37 Tex. Crim. 517 [citing Houston Cemetery Co. v. Drew, 13 Tex. Civ. App. 536]; McInnes v. Wallace, (Tex. Civ. App. 1898) 44 S. W. Rep. 537; Patterson v. Seeton, 19 Tex. Civ. App. 430; Baker v. McRimmon, (Tex. Civ. App. 1899) 48 S. W. Rep. 742; Meyers v. Bloom, 20 Tex. Civ. App. 554. See also Newcomb v. Light, 58 Tex. 141, 44 Am. Rep. 604.

*Vermont.* — Hill v. Wait, 5 Vt. 124; Bates v. Thompson, 2 D. Chip. (Vt.) 96; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

*Wisconsin.* — Hungerford v. Cushing, 2 Wis. 397; Hibbard v. Odell, 16 Wis. 633; Elderkin v. Wiswell, 61 Wis. 498.

*In Michigan*, by How. Annot. Stat. (1882), § 7245, a judge is disqualified by "consanguinity or affinity to either of the parties." Horton v. Howard, 79 Mich. 642, 19 Am. St. Rep. 198.

*Affinity Must Extend to Judge.* — Waterhouse v. Martin, Peck (Tenn.) 374.

*Effect of Relationship in Equal Degree to Both Parties.* — In Beall v. Siquefield, 73 Ga. 48, the court apparently inclined to the opinion that relationship in equal degree to both parties would not disqualify a judge, though in that case the judgment was held to be valid on the additional ground that it had been acquiesced in for more than five years.

*1. Applies Equally to Civil and Criminal Trials.* — People v. Connor, 142 N. Y. 130.

*Provision Applicable Only Where There Are Adverse Parties.* — Matter of Dodge, etc., Mfg. Co., 77 N. Y. 101, 33 Am. Rep. 579.

*Application to Actions of Partition.* — In Matthews v. Noble, (Supm. Ct. Spec. T.) 25 Misc. N. Y.) 674, it was held that an action of partition was a "controversy" within the meaning of Code Civ. Pro. N. Y., § 46, prohibiting a judge from sitting in an action where he is related within the sixth degree to any party to the controversy.

*2. Degrees of Relationship Which Disqualify.* — See generally the statutes of the various jurisdictions. Following are a few illustrations of degrees held to disqualify:

*Third Degree.* — Lewis v. Hillsboro Roller-Mill Co., (Tex. Civ. App. 1893) 23 S. W. Rep. 338.

*Fourth Degree.* — Hine v. Hussey, 45 Ala. 496; Trawick v. Trawick, 67 Ala. 271; Gill v. State, 61 Ala. 169; Rogers v. Felker, 77 Ga. 46; Short v. Mathis, 101 Ga. 287; Reed v. Newcomb, 62 Vt. 75.

*Sixth Degree.* — Matthews v. Noble, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 674.

*Ninth Degree.* — Edwards v. Russell, 21 Wend. (N. Y.) 63; Foot v. Morgan, 1 Hill (N. Y.) 654, cited in Place v. Butternuts Woolen, etc., Mfg. Co., 28 Barb. (N. Y.) 503.

*3. Relationship of Brother-in-law Will Disqualify.* — Bayard v. McLane, 3 Harr. (Del.) 139.

*The Relationship of Uncle and Nephew by Marriage* disqualifies a judge by statute in *Connecticut*. Winchester v. Hinsdale, 12 Conn. 88.

*Fifth Cousins* equally removed from their common ancestor being related within the fourth degree of consanguinity, it follows that a judge of the Superior Court who is a fourth cousin of a person pecuniarily interested in the result of a pending case is disqualified to preside in the trial thereof. Short v. Mathis, 101 Ga. 287.

*Relationship of Nephew or Cousin.* — In *Michigan* a circuit judge who was a nephew of one of three complainants and a cousin by marriage of the other two was held to be disqualified from sitting in the cause or signing a decree therein. Horton v. Howard, 79 Mich. 642, 19 Am. St. Rep. 198.

*Relationship as Second Cousin Insufficient.* — In *Vermont* a magistrate is not disqualified from taking a deposition by the fact that he is second cousin to the party offering it, since such relationship is held not to be within the fourth degree. Reed v. Newcomb, 62 Vt. 75.

*No Disqualifying Affinity Between Brother of Wife and Brother of Her Husband.* — *Ex p.* Harris, 26 Fla. 77, 23 Am. St. Rep. 548. And see AFFINITY, vol. I, p. 911.

*4. Term "Party" Not Confined to Parties to Record by Name.* — Howell v. Budd, 91 Cal. 344.

A judge may not sit in an action of partition where he is related within the prohibited degree to a defendant who though not herself answering is pecuniarily interested with regard to the extent of her title in a determination of issues raised by other parties to the action. Matthews v. Noble, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 674.

*Judge Must Be Related to One Actually a Party.* — Matter of Dodge, etc., Mfg. Co., 77 N. Y. 101, 33 Am. Rep. 579. See also Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

*Relationship to Attorney or Agent of Party* has been held sufficient to disqualify a judge. Patterson v. Police Judge's Ct., 123 Cal. 453. See also Johnston v. Brown, 115 Cal. 694.

*Disqualification for Relationship to Mere Surety.* — Disqualification of a judge on the ground of relationship has been held to exist although



*dd.* DISQUALIFICATION FOR AFFINITY REMOVED BY DEATH. — Statutes disqualifying on the ground of affinity are restricted in their interpretation to affinity subsisting at the time of the challenge for disqualification,<sup>1</sup> and where such affinity within the prohibited degree has been dissolved, as, for instance, by death, the judge is no longer disqualified to act.<sup>2</sup>

(d) Disqualification for Prejudice — In General. — In the absence of express statutory provision, prejudice or bias on the part of the judge which is not based on interest is not assignable as a ground for his disqualification,<sup>3</sup> though it has been held that a judge might properly, of his own will, retire from a case under such circumstances.<sup>4</sup> At the present time, however, bias or prejudice on the part of a judge is expressly recognized in the statutes of many of the states,<sup>5</sup> and it is usually provided that a judge shall not act in a case when it appears from affidavits properly made and substantiated that either party cannot have a fair trial before him by reason of the bias and prejudice of such judge.<sup>6</sup>

(e) Exhibition of Partisan Feeling or Unnecessary Expression of Opinion. — In accordance with the general rule that statutory provisions as to the grounds of disqualification are exclusive,<sup>7</sup> it has been held that the mere exhibition by a judge of partisan feeling or the unnecessary expression by him of an opinion upon the justice or merits of a controversy, though indecorous and reprehensible, should not, unless so provided by statute, be held sufficient to authorize a change

the party to whom he is related is a mere surety for another or is fully indemnified against the result of the action. *Oakley v. Aspinwall*, 3 N. Y. 547.

**Relationship to Formal Party Without Interest Insufficient.** — The statutory prohibition has been held to be inapplicable in the case of a mere formal party who has no personal interest in either the subject-matter or the decision. *Matter of Hopper*, 5 Paige (N. Y.) 489. See also *Fowler v. Byers*, 16 Ark. 196, holding that relationship to a trustee, a mere formal party, will not disqualify.

1. Application of Statute Restricted to Affinity at Time of Challenge. — *Carman v. Newell*, 1 Den. (N. Y.) 25.

2. Affinity Dissolved by Death — Disqualification Ceases. — *Carman v. Newell*, 1 Den. (N. Y.) 25. See also to the same effect *Winchester v. Hinsdale*, 12 Conn. 88; *Cain v. Ingham*, 7 Cow. (N. Y.) 479, note a.

Though a judge is disqualified by the fact that he is the plaintiff's father-in-law, it was held in *Yerby v. Martin*, (Tex. Civ. App. 1897) 38 S. W. Rep. 541, that this disqualification was removed by the death of such plaintiff's wife without issue.

3. Prejudice or Bias No Ground in Absence of Statute. — *McCauley v. Weller*, 12 Cal. 500; *People v. Williams*, 24 Cal. 31; *People v. Compton*, 123 Cal. 403; *Cooper v. Brewster*, 1 Minn. 94; *Bent v. Lewis*, 15 Mo. App. 40; *Charlotte v. Chouteau*, 33 Mo. 194; *Barnes v. McMullins*, 78 Mo. 267.

4. *Williams v. Robinson*, 6 Cush. (Mass.) 333.

5. Bias or Prejudice Statutory Ground of Disqualification — *California*. — *People v. Compton*, 123 Cal. 403; *Patterson v. Police Judge's Ct.*, 123 Cal. 453.

*Florida*. — *Conn v. Chadwick*, 17 Fla. 428.

*Illinois*. — *McGoon v. Little*, 7 Ill. 42.

*Indiana*. — *Bernhamer v. State*, 123 Ind. 577.

*Iowa*. — *Berner v. Frazier*, 8 Iowa 77.

*Kansas*. — *In re Peyton*, 12 Kan. 398.

*Kentucky*. — *Turner v. Com.*, 2 Met. (Ky.) 619; *German Ins. Co. v. Landram*, 88 Ky. 433; *Powers v. Reynolds*, 89 Ky. 259; *Russell v. Russell*, (Ky. 1889) 12 S. W. Rep. 709; *Massie v. Com.*, 93 Ky. 588.

*Minnesota*. — *Ex p. Curtis*, 3 Minn. 274.

*Missouri*. — *State v. Greenwade*, 72 Mo. 298; *Barnes v. McMullins*, 78 Mo. 260; *Ex p. Bedard*, 106 Mo. 616.

*South Dakota*. — *State v. Chapman*, 1 S. Dak. 414; *Territory v. Egan*, 3 Dak. 119; *State v. Rodway*, 1 S. Dak. 575.

*Wisconsin*. — *Runals v. Brown*, 11 Wis. 185; *Rines v. Boyd*, 7 Wis. 155; *Fatt v. Fatt*, 78 Wis. 633; *Haley v. Jump River Lumber Co.*, 81 Wis. 412.

*Wyoming*. — *Dolan v. Church*, 1 Wyo. 187; *Ross v. State*, (Wyo. 1899) 57 Pac. Rep. 924.

**Prejudice Must Be Against Party to Cause.** — The prejudice contemplated as a cause to disqualify a justice from sitting in a case under the provisions of *Laws Fla. 1899, c. 3120*, is a prejudice against a party to the cause, and an affidavit not setting up this fact specifically is insufficient. *Conn v. Chadwick*, 17 Fla. 428.

**Substitute Judge Cannot Be Thus Disqualified.** — *State v. Greenwade*, 72 Mo. 298.

6. Affidavit that Party Cannot Have a Fair Trial by Reason of Judge's Bias or Prejudice. — *Patterson v. Police Judge's Ct.*, 123 Cal. 453; *People v. Compton*, 123 Cal. 403; *Conn v. Chadwick*, 17 Fla. 428; *McGoon v. Little*, 7 Ill. 42; *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *Barnes v. McMullins*, 78 Mo. 260; *State v. Shipman*, 93 Mo. 147; *State v. Chapman*, 1 S. Dak. 414; *Ross v. State*, (Wyo. 1899) 57 Pac. Rep. 924. And see cases cited in preceding note.

**Judge Has No Discretion When Proper Affidavit Made.** — *Barnes v. McMullins*, 78 Mo. 260, *citing* *Corpenney v. Sedalia*, 57 Mo. 88. See also *Runals v. Brown*, 11 Wis. 185.

7. See *infra*, this section, *Constitutional or Statutory Grounds Exclusive*.



of venue on the ground that the judge is disqualified to hear the cause.<sup>1</sup>

(f) **Disqualification as Former Counsel** — *aa. GENERAL RULE.* — As has been seen, a judge was not disqualified at common law because of the fact that he had been of counsel in the case.<sup>2</sup> At the present time, however, it is usually if not universally provided in the constitutions or statutes of the different states that one who has been of counsel in the case may not act as judge;<sup>3</sup> and such provisions are equally applicable in criminal and in civil cases.<sup>4</sup>

*bb. REASON OF RULE.* — Since the disqualification by reason of having been of counsel may exist independently of relationship or pecuniary interest in the result of the cause, it is doubtless based upon considerations of supposed bias, partiality, or prejudice arising from the relationship which, it may be reasonably presumed, might influence the action of the judge.<sup>5</sup> The question of

1. **Exhibition of Feeling or Unnecessary Expression of Opinion.** — *McCauley v. Weller*, 12 Cal. 500. See also *Patterson v. Police Judge's Ct.*, 123 Cal. 453; *Drechsel v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 678.

Where a Trial Judge Contributed to a Fund for the Procurement of a Witness for the Prosecution, yet was not a party to the cause, and had no pecuniary interest therein, it was held that the judgment was valid, though the reviewing court characterized as "reprehensible" his act in trying the cause, *Foreman v. Hunter*, 59 Iowa 550.

2. See *supra*, this section, *At Common Law* — *Nature of Interest.*

3. **Disqualification by Reason of Relationship of Attorney and Client** — *England.* — *Townsend v. Hughes*, 2 Mod. 151.

*Alabama.* — *Gill v. State*, 61 Ala. 169.

*California.* — *Cleghorn v. Cleghorn*, 66 Cal. 309; *Kern Valley Water Co. v. McCord*, 70 Cal. 646; *People v. Ah Lee Doon*, 97 Cal. 171; *Southern California Motor Road Co. v. San Bernardino Nat. Bank*, 100 Cal. 316; *Patterson v. Police Judge's Ct.*, 123 Cal. 453.

*Colorado.* — *Karcher v. Pearce*, 14 Colo. 557; *People v. District Ct.*, 14 Colo. 396.

*Florida.* — *Tampa St. R., etc., Co. v. Tampa Suburban R. Co.*, 30 Fla. 595; *State v. Hocker*, 34 Fla. 25.

*Georgia.* — *Lloyd v. Smith*, T. U. P. Charlt. (Ga.) 143; *Kean v. Lathrop*, 58 Ga. 355; *McMillan v. Nichols*, 62 Ga. 36; *Woolfolk v. State*, 85 Ga. 69.

*Idaho.* — *Gordon v. Connor*, (Idaho 1897) 51 Pac. Rep. 747.

*Indiana.* — *Fechheimer v. Washington*, 77 Ind. 366; *Chicago, etc., R. Co. v. Summers*, 113 Ind. 10, 3 Am. St. Rep. 616.

*Iowa.* — *Jewett v. Miller*, 12 Iowa 85; *Floyd County v. Cheney*, 57 Iowa 160; *Chase v. Weston*, 75 Iowa 159.

*Kansas.* — *In re Peyton*, 12 Kan. 398; *Tootle v. Berkeley*, 60 Kan. 446.

*Louisiana.* — *Nugent v. Stark*, 34 La. Ann. 628.

*Massachusetts.* — *McGregor v. Crane*, 98 Mass. 530.

*Michigan.* — *Pack v. Simpson*, 74 Mich. 28; *Curtis v. Wilcox*, 74 Mich. 69; *Fellows v. Canney*, 75 Mich. 445.

*Missouri.* — *Barnes v. McMullins*, 78 Mo. 260; *State v. O'Bryan*, 102 Mo. 254.

*Montana.* — *State v. Woody*, 14 Mont. 455; *Littrell v. Wilcox*, 11 Mont. 77.

*Nevada.* — *Frevort v. Swift*, 19 Nev. 363.

*New Hampshire.* — *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

*New Jersey.* — *Den v. Tatem*, 1 N. J. L. 190; *Pearson v. Hopkins*, 2 N. J. L. 181.

*New York.* — *Whitney v. Post*, 8 Paige (N. Y.) 36; *Ten Eick v. Simpson*, 11 Paige (N. Y.) 177; *Darling v. Pierce*, 15 Hun (N. Y.) 542; *Carrington v. Andrews*, (County Ct.) 12 Abb. Pr. (N. Y.) 348; *McLouth v. Myers*, 61 Hun (N. Y.) 624, 16 N. Y. Supp. 779.

*Oklahoma.* — *Rhea v. U. S.*, 6 Okla. 249.

*Tennessee.* — *Mathis v. State*, 3 Heisk. (Tenn.) 127; *Cheatham v. Elliott*, King's Tenn. Dig. 1341; *Reams v. Kearns*, 5 Coldw. (Tenn.) 217.

*Texas.* — *Cock v. State*, 8 Tex. App. 666; *Houston, etc., R. Co. v. Ryan*, 44 Tex. 426; *Childress v. Grim*, 57 Tex. 56; *Chambers v. Hodges*, 23 Tex. 104; *Slaven v. Wheeler*, 58 Tex. 23; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *King v. Sapp*, 66 Tex. 519; *Kahanek v. Galveston, etc., R. Co.*, 72 Tex. 476; *Hobbs v. Campbell*, 79 Tex. 360; *Cullen v. Drane*, 82 Tex. 484; *Wilks v. State*, 27 Tex. App. 381; *Thompson v. State*, 9 Tex. App. 649; *Beckham v. Rice*, 1 Tex. Civ. App. 281; *Knapp v. Campbell*, 14 Tex. Civ. App. 199; *Abrams v. State*, 31 Tex. Crim. 449; *Utzman v. State*, 32 Tex. Crim. 426; *King v. Sapp*, 66 Tex. 519; *Johnson v. State*, 29 Tex. App. 526; *Terry v. State*, (Tex. Crim. 1893) 24 S. W. Rep. 510; *McInnes v. Wallace*, (Tex. Civ. App. 1898) 44 S. W. Rep. 537; *Meyers v. Bloon*, 20 Tex. Civ. App. 554.

*Vermont.* — *Clemons v. Clemons*, 69 Vt. 545.

*West Virginia.* — *State v. Coutrell*, 45 W. Va. 837.

*Wisconsin.* — *Hungerford v. Cushing*, 2 Wis. 397; *State v. Collins*, 5 Wis. 339.

**General Retainer.** — In *Kern Valley Water Co. v. McCord*, 70 Cal. 646, it was held that the fact that the judge had received a general retainer from one of the parties would justify changing the place of trial.

**Attorney in Another Case Involving Same Issue.** — In *Cleghorn v. Cleghorn*, 66 Cal. 309, it was held to be no ground of disqualification that the judge before his election to the bench had acted as attorney for one of the parties in another action, though one of the issues on the trial had been involved.

4. **Applicable to Criminal as Well as Civil Cases.** — *Mathis v. State*, 3 Heisk. (Tenn.) 127; *Wilks v. State*, 27 Tex. App. 385; *Cock v. State*, 8 Tex. App. 659; *Thompson v. State*, 9 Tex. App. 649; *State v. Cottrell*, 45 W. Va. 837.

5. **Reason for Rule.** — *Per Bonner, J.*, in *New-*



the disqualification of a judge by reason of having formerly been an attorney is entirely independent of and distinct from any question of pecuniary interest or of the payment of any fee or reward.<sup>1</sup>

*cc. APPLICATION OF RULE — Not Limited to Case Actually Pending When Services Invoked.* — It has been held that the disqualification by reason of the relationship of attorney and client is not limited to cases actually pending at the time when the services of counsel were invoked.<sup>2</sup> Thus, where an attorney, being consulted in his professional capacity, gives advice as to a disputed matter which subsequently results in a suit, he is disqualified by having given such advice from sitting as judge in the resulting suit.<sup>3</sup>

*Immaterial that No Fee Is Charged.* — The fact that an attorney consulted as such charges no fee for his services does not alter the rule as to his disqualification to sit in the case, whether pending or subsequently resulting from his advice.<sup>4</sup>

*No Application Where Party Represented Is No Longer Before Court.* — It has been held that a judge is not incompetent to try a cause on the ground that he has been of counsel, where the party whom he represented is no longer before the court.<sup>5</sup>

*dd. EXTENT OF DISQUALIFICATION.* — A judge who, previous to his commission, has acted as attorney in a case is disqualified to adjudicate not only all matters arising in that identical case, but also all supplemental matters or proceedings had or taken to enforce or to resist the enforcement of any judgment or decree rendered in such case.<sup>6</sup>

*(g) Disqualification as Judge in Court Below.* — In some jurisdictions it is expressly provided by statute that no judge or justice can sit in review in any cause or proceeding wherein he has presided in any inferior judicature.<sup>7</sup>

*(3) Constitutional or Statutory Grounds Exclusive — In General.* — Where the grounds which will operate as a disqualification of a judge are expressly set out in a constitution or statute, such provisions are held to be exclusive, and no other causes than those set out will work a disqualification.<sup>8</sup>

*Exception — Disqualification by Physical Causes.* — It has been held, however, that a judge may be legally disqualified by reason of physical causes as well as by the usual statutory grounds of interest, relationship, etc.<sup>9</sup>

*3. Degree and Nature of Disqualifying Interest — a. DEGREE OF INTEREST IMMATERIAL.* — With regard to the degree of interest necessary to disqualify a judge, it may be stated as a general rule, both at common law and under statute, that the degree is immaterial, and that where the interest of the judge in the case is of a nature to disqualify, it will debar him from sitting in the cause, however small or trifling it may be.<sup>10</sup> The reason for this rule has been

come *v. Light*, 58 Tex. 141, 44 Am. Rep. 604. See also *Darling v. Pierce*, 15 Hun (N. Y.) 542.

*1. Disqualification Independent of Question of Pecuniary Interest.* — *State v. Hocker*, 34 Fla. 25, citing *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Slaven v. Wheeler*, 58 Tex. 23.

*2. Disqualification Not Limited to Case Pending When Advice Given.* — *Slaven v. Wheeler*, 58 Tex. 23.

*3. Disqualification in Suit Resulting from Advice as Attorney.* — *Slaven v. Wheeler*, 58 Tex. 23.

*4. Immaterial that No Fee Is Charged.* — *East Rome Town Co. v. Cothran*, 81 Ga. 359; *Slaven v. Wheeler*, 58 Tex. 23.

*5. Disqualification Removed by Discharge of Party Represented by Judge.* — *Bryan v. Austin*, 10 La. Ann. 612.

*6. Disqualification Extends to All Supplementary Matters or Proceedings.* — *State v. Hocker*, 34 Fla. 25; *Cheatham v. Elliott*, King's Tenn. Dig. 1341.

*7. Having Presided in Courts Below.* — *Moran v. Dillingham*, 174 U. S. 153; *Woolfolk v. State*, 84 Ga. 69; *Van Arsdale v. King*, 152 N.

Y. 69. See also *Philips v. Germania Bank*, 107 N. Y. 630; *Smith v. Wingard*, 3 Wash. Ter. 260; *Case v. Hoffman*, 100 Wis. 352.

*8. Statutory Provisions Exclusive.* — *Patterson v. Police Judge's Ct.*, 123 Cal. 453; *Matter of Jones*, 103 Cal. 397; *Bulwer Consol. Min. Co. v. Standard Consol. Min. Co.*, 83 Cal. 589; *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542; *Taylor v. Williams*, 26 Tex. 583.

*9. Disqualification for Physical Reasons.* — *State v. Blair*, 53 Vt. 24.

*10. Degree of Interest Immaterial.* — *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759, 16 Eng. L. & Eq. 63; *Hesketh v. Braddock*, 3 Burr. 1847; *Adams v. Minor*, 121 Cal. 372; *Tootle v. Berkley*, 60 Kan. 446; *Limerick v. Murlatt*, 43 Kan. 318; *Pearce v. Atwood*, 13 Mass. 324; *Clark v. Lamb*, 2 Allen (Mass.) 396; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Conklin v. Squire*, 4 Ohio Dec. 493; *Taylor v. Williams*, 26 Tex. 583; *Dicks v. Austin College*, 1 Tex. App. Civ. Cas., § 1068; *Findley v. Smith*, 42 W. Va. 299.

*Contra*, as holding that a minute interest



stated to be the fact that "the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line."<sup>1</sup>

**b. NATURE OF DISQUALIFYING INTEREST — In General.** — With regard to the nature of the interest which will disqualify a judge from acting as such in a case, the decisions of the various states differ somewhat in their definitions.

**Interest Must Be Direct and Immediate.** — According to some decisions, the judge's interest, in order to disqualify him, must be a direct and immediate interest in the cause or proceeding,<sup>2</sup> and not merely a remote,<sup>3</sup> uncertain, or speculative interest.<sup>3</sup>

**Such Interest in Subject-matter as Naturally to Influence Held Sufficient.** — It has been held, however, in construing the statute as to disqualification for interest, that the view that the statute disqualifies only where the judge has direct interest in the result in the suit is too narrow; that it should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality, and to this end he should decline to sit, or should be prohibited from sitting, in any case in which his interest in the subject-matter of the action is such as would naturally influence him one way or the other.<sup>4</sup>

**Pecuniary or Property Interest.** — Numerous decisions state that an interest which will disqualify a judge must be a pecuniary or property interest,<sup>5</sup> or one affecting the individual rights of the judge.<sup>6</sup> A few of these decisions, in holding that the interest must be of a pecuniary nature, base their rulings on the ground that by naming those special cases where the judge's feelings may be interested though he may not gain or lose by the event of the suit, *i. e.*, where he has been of counsel or is related to a party, the law doubtless intended to limit all other cases of interest to such as should be of a pecuniary nature.<sup>7</sup>

**Interest in Subject-matter of Suit.** — It has been held that there must be an actual

will not disqualify, see *Vernon Tp. v. Wantage Tp.*, 2 N. J. L. 293.

1. **Reason for Rule.** — *Per Parker, C. J.*, in *Pearce v. Atwood*, 13 Mass. 340.

2. **Interest Must Be Direct and Immediate.** — *Ellis v. Smith*, 42 Ala. 349; *Oakland v. Oakland Water Front Co.*, 118 Cal. 249; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Peck v. Essex*, 20 N. J. L. 457; *Dicks v. Austin College*, 1 Tex. App. Civ. Cas., § 1068.

3. **Remote, Uncertain, or Speculative Interest Insufficient.** — *Oakland v. Oakland Water Front Co.*, 118 Cal. 249; *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Peck v. Essex*, 20 N. J. L. 457. See also **INTEREST — INTERESTED**, vol. 16, p. 1105, note *Judge*.

4. **Such Interest as Would Naturally Influence Sufficient.** — *Heilbron v. Campbell*, (Cal. 1889) 23 Pac. Rep. 122.

5. **Pecuniary or Property Interest — Alabama.** — *Ex p. State Bar Assoc.*, 92 Ala. 113.

*Arkansas.* — *Foreman v. Marianna*, 43 Ark. 324.

*Connecticut.* — *Clyma v. Kennedy*, 64 Conn. 310, 42 Am. St. Rep. 194.

*Florida.* — *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190; *Ochus v. Sheldon*, 12 Fla. 138; *Ex p. Harris*, 26 Fla. 77, 23 Am. St. Rep. 548.

*Iowa.* — *Foreman v. Hunter*, 59 Iowa 550.

*Kansas.* — *Tootle v. Bsrkley*, 60 Kan. 446.

*Minnesota.* — *Sjoberg v. Nordin*, 26 Minn. 501.

*Mississippi.* — *Ferguson v. Brown*, 75 Miss. 214.

*Nebraska.* — *Chicago, etc., R. Co. v. Kellogg*, 54 Neb. 138.

*Ohio.* — *Conklin v. Squire*, 4 Ohio Dec. 493.

*Texas.* — *Taylor v. Williams*, 26 Tex. 583; *King v. Sapp*, 66 Tex. 519; *McInness v. Wallace*, (Tex. Civ. App. 1898) 44 S. W. Rep. 537.

*Wisconsin.* — *Hungerford v. Cushing*, 2 Wis. 397.

**Incidental Interest Insufficient.** — A pecuniary interest in a cause disqualifies a judge from acting judicially therein, but an incidental interest which is not pecuniary does not of itself disqualify. *Clyma v. Kennedy*, 64 Conn. 310, 42 Am. St. Rep. 194.

6. **Interest Affecting Individual Rights of Judge.** — *Ex p. State Bar Assoc.*, 92 Ala. 113; *Foreman v. Marianna*, 43 Ark. 324; *Ferguson v. Brown*, 75 Miss. 214.

**Pecuniary or Personal Right Dependent on Result of Case.** — The "interest" which disqualifies a judge from sitting in a case does not signify every bias, partiality, or prejudice which he may entertain with reference to the case, and which may be included in the broadest sense of the word "interest" as contradistinguished from its use as indicating a pecuniary or personal right or privilege, in some way dependent upon the result of the cause. *Taylor v. Williams*, 26 Tex. 583.

7. **Limitation by Implication.** — *McInnes v. Wallace*, (Tex. Civ. App. 1898) 44 S. W. Rep. 537; *King v. Sapp*, 66 Tex. 519.



interest in the subject-matter of the litigation,<sup>1</sup> and that the prohibition does not extend to cases where the interest is simply in some question of law involved in the controversy.<sup>2</sup>

**4. Effect of Judgment by Disqualified Judge**—*a. AT COMMON LAW*—In General. — In the absence of statute changing the common law, a judgment rendered by a disqualified judge was held to be merely voidable, and not void.<sup>3</sup> The judge's action was regarded as an error or irregularity, and as such a ground to set aside the judgment on error or appeal,<sup>4</sup> except in inferior courts or proceedings where no writ of error or appeal would lie.<sup>5</sup>

**Waiver of Objection.** — In proceedings under the common law, objection to a disqualified judge might be waived by a party so as to preclude him from afterwards taking advantage of it.<sup>6</sup>

*b. UNDER STATUTES*—(1) *General Rule* — **Judgment by Disqualified Judge Void.** — In many of the states the statutory provisions prohibiting judges from acting in certain cases have been construed as changing the common-law rule and as rendering the judgment of one who is disqualified on statutory grounds from acting as judge in a case not only voidable but absolutely void.<sup>7</sup> The decisions to this effect are based upon the ground that the statutory prohibition was intended in the general interests of justice and not merely for the protection of the parties to the suit.<sup>8</sup>

**1. Must Be Interest in Subject-matter of Litigation.** — *Meyers v. Bloon*, 20 Tex. Civ. App. 554; *McFaddin v. Preston*, 54 Tex. 403; *Dicks v. Austin College*, 1 Tex. App. Civ. Cas., § 1068.

**2. Interest in Question of Law Insufficient.** — *People v. Edmonds*, 15 Barb. (N. Y.) 529; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

**Exception.** — An exception to the rule that an interest in the question alone should not disqualify has been held to exist where the judge has a lawsuit pending with another person which rests upon a like state of facts or upon the same points of law as that pending before him. *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114, citing *Davis v. Allen*, 11 Pick. (Mass.) 466, 22 Am. Dec. 386.

**3. Judgment Voidable Merely.** — *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759, 16 Eng. L. & Eq. 63; *Chester v. Bowker*, 1 Stra. 639; *Hesketh v. Braddock*, 3 Burr. 1849; *McMillan v. Nichols*, 62 Ga. 36; *Frevert v. Swift*, 19 Nev. 363; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Stearns v. Wright*, 51 N. H. 600; *Findley v. Smith*, 42 W. Va. 299; *Case v. Hoffman*, 100 Wis. 351.

**4. Ground for Error or Appeal.** — *Frevert v. Swift*, 19 Nev. 363; *Stearns v. Wright*, 51 N. H. 600; *Findley v. Smith*, 42 W. Va. 299.

**5. Exception as to Inferior Courts or Proceedings Where Error or Appeal Will Not Lie.** — *Moses v. Julian*, 45 N. H. 54, 84 Am. Dec. 114; *Stearns v. Wright*, 51 N. H. 600; *Sanborn v. Fellows*, 22 N. H. 473.

**6. Waiver of Objection.** — *Ochus v. Sheldon*, 12 Fla. 138; *Stearns v. Wright*, 51 N. H. 600.

**Waiver Might Be Express or Implied** by proceeding without objection to the trial, knowing the facts. *Case v. Hoffman*, 100 Wis. 356.

**7. Judgment of Disqualified Judge Void** — *California*. — *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Matter of White*, 37 Cal. 192.

*Florida*. — *Ochus v. Sheldon*, 12 Fla. 138.

*Indiana*. — *Chicago, etc., R. Co. v. Summers*,

113 Ind. 10, 3 Am. St. Rep. 616; *Fechheimer v. Washington*, 77 Ind. 366.

*Maryland*. — *Buckingham v. Davis*, 9 Md. 324.

*Massachusetts*. — *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513; *Davis v. Allen*, 11 Pick. (Mass.) 466, 22 Am. Dec. 386.

*Michigan*. — *Horton v. Howard*, 79 Mich. 642, 19 Am. St. Rep. 193; *Peninsular R. Co. v. Howard*, 20 Mich. 25; *Stockwell v. Township Board*, 22 Mich. 349; *Shannon v. Smith*, 31 Mich. 452; *West v. Wheeler*, 49 Mich. 505.

*Nevada*. — *Frevert v. Swift*, 19 Nev. 363.

*New Hampshire*. — *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Waldron v. Berry*, 51 N. H. 136.

*New York*. — *Edwards v. Russell*, 21 Wend. (N. Y.) 63; *Low v. Rice*, 8 Johns. (N. Y.) 409; *Clayton v. Per Dun*, 13 Johns. (N. Y.) 218; *Striker v. Mott*, 6 Wend. (N. Y.) 465; *Birdsall v. Fuller*, 11 Hun (N. Y.) 204; *Matter of Hancock*, 27 Hun (N. Y.) 78; *Converse v. McArthur*, 17 Barb. (N. Y.) 410; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Matter of Dodge, etc., Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579; *People v. Connor*, 142 N. Y. 130.

*Texas*. — *Dicks v. Austin College*, 1 Tex. App. Civ. Cas., § 1068; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Templeton v. Giddings*, (Tex. 1889) 12 S. W. Rep. 851.

*Wisconsin*. — *Case v. Hoffman*, 100 Wis. 351.

**Cannot Be Validated by Consent or Waiver.** — *Gay v. Minot*, 3 Cush. (Mass.) 352; *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; *Chambers v. Clearwater*, 1 Keyes (N. Y.) 310; *Oakley v. Aspinwall*, 3 N. Y. 547; *Schoonmaker v. Clearwater*, 41 Barb. (N. Y.) 200; *Abrams v. State*, 31 Tex. Crim. 449; *Gains v. Barr*, 60 Tex. 678; *Chambers v. Hodges*, 23 Tex. 104; *January v. State*, 36 Tex. Crim. 488; *Wynns v. Underwood*, 1 Tex. 48; *Case v. Hoffman*, 100 Wis. 351.

**8. Prohibition Intended in Interests of Justice.** — *Abrams v. State*, 31 Tex. Crim. 449; *Chambers v. Hodges*, 23 Tex. 104.



(2) *Such Judgment Voidable Only*—Generally. — In a few states, however, it has been held that the judgment of such a judge is voidable only, and not void.<sup>1</sup>

(3) *Waiver of Objection*—By Consent. — In some states it is expressly provided that the objection for disqualification may be waived by consent.<sup>2</sup>

**Waiver by Implication.** — It has been held that a failure to object to the judge's exercise of jurisdiction is by implication such consent as will waive objection thereto on the ground of disqualification.<sup>3</sup>

**5. Collateral Attack on Such Judgment.** — The question whether a judgment by one disqualified to sit as judge may be collaterally attacked depends upon the question already discussed whether such judgments are void or merely voidable.<sup>4</sup> Where the judgment of a disqualified judge is held to be void, it may be collaterally assailed.<sup>5</sup> Where, however, such judgments are held to be merely voidable, they are not liable to collateral attack.<sup>6</sup>

**1. Judgment Voidable and Not Void**—*Alabama*. — *Trawick v. Trawick*, 67 Ala. 271; *Hine v. Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726; *Plowman v. Henderson*, 59 Ala. 559.

*Georgia*. — *Rogers v. Felker*, 77 Ga. 46; *McMillan v. Nichols*, 62 Ga. 36; *Beall v. Sinquefield*, 73 Ga. 48; *Shope v. State*, 106 Ga. 226; *Thomas v. Jones*, 64 Ga. 139.

*Iowa*. — *Floyd County v. Cheney*, 57 Iowa 160; *Chase v. Weston*, 75 Iowa 159; *Stone v. Marion County*, 78 Iowa 14; *Jewett v. Miller*, 12 Iowa 85.

*Ohio*. — *Gregory v. Cleveland, etc., R. Co.*, 4 Ohio St. 675.

*Tennessee*. — *Holmes v. Eason*, 8 Lea (Tenn.) 754; *Crozier v. Goodwin*, 1 Lea (Tenn.) 125.

In the case of *Reams v. Kearns*, 5 Coldw. (Tenn.) 217, the court asserted that the judgment of an incompetent judge was not merely voidable but void, unless such incompetency was waived, and this expression, though a mere dictum of the court, has influenced the decision in several cases which hold to the same effect. This case and those based upon it are expressly overruled in the case of *Holmes v. Eason*, cited above, which holds that the proceedings are voidable only unless the incompetency is waived and then are valid in all respects.

**2. Alabama.** — *Hine v. Hussey*, 45 Ala. 496; *State v. Castleberry*, 23 Ala. 85; *Gill v. State*, 61 Ala. 169; *Alabama R. Co. v. Burkett*, 42 Ala. 83.

*Georgia*. — *McMillan v. Nichols*, 62 Ga. 36; *Thomas v. Jones*, 64 Ga. 139; *Rogers v. Felker*, 77 Ga. 46; *Shope v. State*, 106 Ga. 226.

*Iowa*. — *Jewett v. Miller*, 12 Iowa 85; *Chase v. Weston*, 75 Iowa 159; *Stone v. Marion County*, 78 Iowa 14.

*Missouri*. — *Kansas City v. Knotts*, 78 Mo. 356; *Barnes v. McMullins*, 78 Mo. 260; *Gale v. Michie*, 47 Mo. 326.

*Tennessee*. — *Pierce v. Bowers*, 8 Baxt. (Tenn.) 353; *Waterhouse v. Martin*, Peck (Tenn.) 374; *Reams v. Kearns*, 5 Coldw. (Tenn.) 217; *Hilton v. Miller*, 5 Lea (Tenn.) 395; *Smith v. Pearce*, 6 Baxt. (Tenn.) 72.

Objection on ground that the judge is a stockholder may be waived by a landholder in proceedings to appropriate land to the use of a railroad. *Gregory v. Cleveland, etc., R. Co.*, 4 Ohio St. 675.

**A Confession of Judgment** before a judge related to one of the parties is a waiver in writing, which satisfies the code requirement. *Hilton v. Miller*, 5 Lea (Tenn.) 395.

**3. Implied Waiver.** — *Shope v. State*, 106 Ga. 226; *Thomas v. Jones*, 64 Ga. 139; *Hilton v. Miller*, 5 Lea (Tenn.) 395.

Under the code, both in *Alabama* and in *Georgia*, a waiver of the judge's disqualification is expressly provided for, but it has been held that though no waiver affirmatively appears on the record the judgment is only voidable. *McMillan v. Nichols*, 62 Ga. 36, citing *Hine v. Hussey*, 45 Ala. 496.

**By Going through Trial Without Objection** until after a verdict is reached a disqualification for relationship is waived. *Stone v. Marion County*, 78 Iowa 14.

**Objection Too Late After Judgment.** — In *Pettigrew v. Washington County*, 43 Ark. 33, it was held to be too late after judgment to object to a judge on account of consanguinity to a defendant. See also *Crozier v. Goodwin*, 1 Lea (Tenn.) 125, citing *Wroe v. Greer*, 2 Swan (Tenn.) 172.

**4. See supra**, this section, *Effect of Judgment by Disqualified Judge*.

**5. Judgment Void and Open to Collateral Attack**—*California*. — *Matter of White*, 37 Cal. 192.

*Indiana*. — *Chicago, etc., R. Co. v. Summers*, 113 Ind. 10, 3 Am. St. Rep. 616; *Fechheimer v. Washington*, 77 Ind. 366.

*Massachusetts*. — *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513.

*Michigan*. — *Horton v. Howard*, 79 Mich. 642, 19 Am. St. Rep. 198; *Shannon v. Smith*, 31 Mich. 452; *Peninsular R. Co. v. Howard*, 20 Mich. 25; *Stockwell v. Township Board*, 22 Mich. 349; *West v. Wheeler*, 49 Mich. 505.

*New York*. — *Matter of Hancock*, 27 Hun (N. Y.) 78; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Oakley v. Aspinwall*, 3 N. Y. 547; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Matter of Dodge, etc., Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579.

*Texas*. — *Chambers v. Hodges*, 23 Tex. 104.

See also *Pierce v. Bowers*, 8 Baxt. (Tenn.) 353; *Bolling v. Anderson*, 4 Baxt. (Tenn.) 550. The doctrine that such judgments are void was overruled in *Holmes v. Eason*, 8 Lea (Tenn.) 754.

**6. Voidable Judgments Not Open to Collateral Attack.** — *Phillips v. Eyre*, L. R. 6 Q. B. 1;



6. **Powers of Disqualified Judge** — *a.* **POWER TO MAKE FORMAL ORDERS, ETC.** — As a general rule, while a judge's disqualification will prevent him from sitting in the trial of a case and rendering judgment therein,<sup>1</sup> it does not extend to formal and nonjudicial acts,<sup>2</sup> nor will it prevent his disposing of any preliminary matter which does not affect the merits of the case.<sup>3</sup> Such disqualification will not prevent his making orders purely formal in their character,<sup>4</sup> tending to prepare the case for trial.<sup>5</sup>

*b.* **NECESSITY AUTHORIZING JUDGE TO ACT.** — According to numerous authorities, both at common law and under statutes, an exception to the general rule as to the effect of disqualification of a judge exists where there may be a necessity that the one interested should act in order to prevent a failure in the administration of justice.<sup>6</sup> Thus it has been held that where the judicial power has been confided to one judge, and if he should refuse to act there would be no means of proceeding in the case, he may, though interested in the case, take such cognizance thereof as may be absolutely necessary in so far that the party shall not be without remedy.<sup>7</sup>

*Trawick v. Trawick*, 67 Ala. 271; *Fowler v. Brooks*, 61 N. H. 423, 10 Am. St. Rep. 425; *Gorrell v. Whittier*, 3 N. H. 265.

1. *Gordon v. Conor*, (Idaho 1897) 51 Pac. Rep. 747; *Chase v. Weston*, 75 Iowa 159; *State v. Judge*, 39 La. Ann. 994; *Lacy v. Barrett*, 75 Mo. 469; *Frevert v. Swift*, 19 Nev. 363; *State v. Burks*, 82 Tex. 584; *Baldwin v. McMillan*, 1 Tex. App. Civ. Cas., § 515; *Fellrath v. Gilder*, 1 Tex. App. Civ. Cas., § 1060.

2. **Mere Ministerial Acts Involving No Discretion** whatever, done by a judge disqualified by reason of relationship from considering the cause, are not on that account invalid or reversible for error. *Hayes v. Collier*, 47 Ala. 726.

Within this class of ministerial acts have been held to be such acts as filing papers and issuing process, *State v. Gurney*, 17 Neb. 523; executing the mandate of the Supreme Court in a case, *State v. Collins*, 5 Wis. 339 (*compare Dawson v. Dawson*, 29 Mo. App. 521); entering formal judgment under the direction of an appellate court, *Collins v. Overton*, 7 Okla. 470; ordering and superintending the drawing of a panel of jurors for a session of the court, *People v. Ah Lee Doon*, 97 Cal. 171; the issuance of an open venire for a jury to try such case where the regular panel has been discharged, *Littrell v. Wilcox*, 11 Mont. 77; making an order setting a day for trial or determining the number of special jurors and the manner of drawing them, *Salm v. State*, 89 Ala. 56; entering an order appointing the person agreed on or appointed to try the case, or receiving the report of the grand jury for the term, although the report includes an indictment at the trial of which the judge is not qualified to preside, *Cock v. State*, 8 Tex. App. 666, *per Winkler*, J.

3. **May Dispose of Preliminary Matter.** — *Chase v. Weston*, 75 Iowa 159.

4. **May Make Formal Orders** — *Alabama*. — *Heydenfeldt v. Towns*, 27 Ala. 423.

*California*. — *Livermore v. Brundage*, 64 Cal. 299.

*Florida*. — *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Ochus v. Sheldon*, 12 Fla. 138; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190.

*Georgia*. — *Thornton v. Wilson*, 55 Ga. 607.

*New York*. — *Underhill v. Dennis*, 9 Paige

(N. Y.) 202; *Bell v. Vernoooy*, 18 Hun (N. Y.) 125.

In *Missouri* it is held that a disqualification, when once ascertained, "extends through the whole progress of the cause and to every order or ruling that might be made therein." *Dawson v. Dawson*, 29 Mo. App. 521. See also *Lacy v. Barrett*, 75 Mo. 469; *Barnes v. McMullins*, 78 Mo. 260.

5. **Matters Tending to Prepare Case for Trial.** — *Buckingham v. Davis*, 9 Md. 324; *McFarlane v. Clark*, 39 Mich. 44, 33 Am. Rep. 346; *Frevert v. Swift*, 19 Nev. 363; *Findley v. Smith*, 42 W. Va. 299.

**The Arrangement of the Calendar or the Regulation of the Order of Business** by a judge disqualified to sit on the case is allowable under this head. *People v. De La Guerra*, 24 Cal. 73; *Matter of White*, 37 Cal. 190; *Frevert v. Swift*, 19 Nev. 363.

So an **Order Granting Change of Venue** may be made by a disqualified judge. *Richardson v. Boston*, 1 Curt. (U. S.) 251; *Matter of White*, 37 Cal. 190; *Cock v. State*, 8 Tex. App. 666. See also *Washington Ins. Co. v. Price*, Hopk. (N. Y.) 2.

6. **Interested Judge May Act in Case of Necessity.** — *Great Charter v. Kennington*, 2 Stra. 1173; *London v. Markwick*, 11 Mod. 164; *Grand Junction Canal Co. v. Dimes*, 12 Beav. 63; *Heydenfeldt v. Towns*, 27 Ala. 423; *Pearce v. Atwood*, 13 Mass. 324; *Hill v. Wells*, 6 Pick. (Mass.) 104; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331; *Ten Eick v. Simpson*, 11 Paige (N. Y.) 177; *Converse v. McArthur*, 17 Barb. (N. Y.) 411.

*Contra.* — *Anonymous*, 1 Salk. 396.

"Whatever is necessary to be done to preserve the rights of parties may be justified by the necessity, as to order a case to be continued or transferred to another tribunal; but it can never be necessary for a judge who is by law disqualified to decide, to assume to determine a case which the law presumes he may probably decide wrong." *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114, *citing* *Washington Ins. Co. v. Price*, Hopk. (N. Y.) 1.

7. **In Case of Exclusive Jurisdiction.** — *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Matter of Leefe*, 2 Barb. Ch. (N. Y.) 39. And see the cases cited in the preceding note.



**7. Right of Disqualified Judge to Retire of His Own Motion.** — It has been held in numerous cases, both at common law and under statutes, that it is not only the right but the duty of a judge who is incompetent by reason of legal disqualification to hear a cause to retire of his own motion,<sup>1</sup> and without waiting for an objection to his jurisdiction.<sup>2</sup>

**8. Mandamus to Compel Transfer of Cause.** — When a judge improperly refuses to transfer a cause in which he is interested, mandamus will lie to compel such transfer.<sup>3</sup>

**9. Mandamus to Judge Improperly Recusing Himself.** — Where a judge has decided that he is disqualified to hear a case and on that account has made an order refusing to hear it, it has been held that mandamus is the proper remedy to require him to hear it if in reality he is not disqualified.<sup>4</sup>

**VIII. DE FACTO JUDGES.** — The rules of law relative to judges *de facto* have been fully examined elsewhere.<sup>5</sup>

**IX. SPECIAL OR SUBSTITUTE JUDGES — 1. Definition.** — A special judge is a person, usually a member of the bar, appointed or chosen to preside in the place of the regular judge owing to the latter's absence, disqualification, or other cause.<sup>6</sup> A substitute judge, strictly speaking, is the judge of another court who has been called in upon due notice, for similar reasons, to preside.<sup>7</sup>

**1. Judge May Retire of His Own Motion** — *England*. — Reg. v. Justices, 14 Eng. L. & Eq. 93; *Great Charter v. Kennington*, 2 Stra. 1173.

*California*. — *People v. De La Guerra*, 24 Cal. 73; *Meyer v. San Diego*, 121 Cal. 102; *Heilbron v. Campbell*, (Cal. 1889) 23 Pac. Rep. 122.

*Florida*. — *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Ochus v. Sheldon*, 12 Fla. 138.

*Iowa*. — *Chase v. Weston*, 75 Iowa 159.

*Louisiana*. — *Nugent v. Stark*, 34 La. Ann. 628; *State v. Judges*, 41 La. Ann. 319; *State v. Voorhies*, 41 La. Ann. 567.

*New Hampshire*. — *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

*New York*. — *Ten Eick v. Simpson*, 11 Paige (N. Y.) 179; *Edwards v. Russell*, 21 Wend. (N. Y.) 64; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 333; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 724.

**2. Should Not Wait for Objection of Parties.** — *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Chase v. Weston*, 75 Iowa 159; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

**Change of Venue Awarded Without Application.** — See *State v. O'Bryan*, 102 Mo. 254.

**3. Mandamus to Compel Transfer of Cause.** — *State v. Castleberry*, 23 Ala. 85.

**4. Mandamus to Judge Improperly Recusing Himself.** — *State v. Young*, 31 Fla. 594, 34 Am. St. Rep. 41.

**5. See the title DE FACTO OFFICERS**, vol. 8, p. 781.

**6. A Special Judge Defined.** — See *Little Rock, etc., R. Co. v. Barker*, 39 Ark. 492; *Henderson v. Pope*, 39 Ga. 361; *State v. Phillips*, 27 La. Ann. 663; *State v. Fritz*, 27 La. Ann. 689; *Ligan v. State*, 3 Heisk. (Tenn.) 159; *Thompson v. State*, 9 Tex. App. 649; *State v. Williams*, 14 W. Va. 851.

As to the Circumstances Justifying the Appointment or Choice of a Special Judge and as to the procedure, the statutory provisions vary, and the reader is referred to the statutes of the various states.

See also the following cases wherein such an

appointment was held to be justified: *State v. Lewis*, 107 N. Car. 967 (death of judge); *State v. Punshon*, 133 Mo. 44 (sickness of judge); *Bullock v. Neal*, 42 Ark. 278 (sickness of judge after the evidence is in).

The absence of a substitute judge, not able to be present at the time to which a criminal case was adjourned, has been held not to require the calling of another judge, *State v. Noland*, 111 Mo. 473; nor will the absence of the regular judge detained by judicial business elsewhere at the time appointed for an adjourned session justify the election of a special judge, *Butler v. Williams*, 48 Ark. 227. When a judge in the same district can act, the appointment of a special judge is unauthorized, *State v. Judges*, 35 La. Ann. 1007. For the practice see 12 ENCYC. OF PL. AND PR. 786.

**7. A Substitute Judge Is a Judge of Another Court** called in to preside in place of the regular judge where the latter is unable to preside. See *Benjamin v. Evansville, etc., R. Co.*, 28 Ind. 416; *State v. Phillips*, 27 La. Ann. 663; *Peter v. State*, 6 How. (Miss.) 326; *State v. Shea*, 95 Mo. 85; *State v. Greenwade*, 72 Mo. 298; *State v. Noland*, 111 Mo. 473; *State v. Punshon*, 133 Mo. 44, *State v. Newsum*, 129 Mo. 154; *State v. Gonce*, 87 Mo. 627; *Combs v. Com.*, 90 Va. 88; *Gresham v. Ewell*, 85 Va. 1.

As to when a substitute judge may be called, and for the procedure in such cases, the reader is referred to the statutes of the different states, which are by no means uniform in their provisions.

**Right of Judge to Call Another When He Sees Fit.** — In *Colorado* a judge of one district may at any time, and for any purpose which seems proper to him, call in another judge from another district to try any cause or proceeding pending in his court, whether it be an ordinary action or a special proceeding. *Sterling No. 2 Ditch Co. v. Iliff, etc., Ditch Co.*, 24 Colo. 491. See also *Riggs v. Owen*, 120 Mo. 176.

**Duty to Call In Another Judge on Proper Affidavit of Bias or Prejudice.** — See *State v. Palmer*, 4 S. Dak. 543.



2. **Constitutional Provisions — Statutes Providing for Special Judges Held Constitutional.** — In *Alabama* when the question arose as to the constitutionality of statutes authorizing the election or appointment of special judges, very broad ground was at first taken by the court. In that state the court alluded to the rule that constitutional provisions relating to legislative power are not grants of power, but limitations of power to be strictly construed,<sup>1</sup> and held that the implied restriction upon the legislative power to erect and regulate courts, contained in the declaration that the judicial power shall consist of a supreme court, a circuit court, etc., and that judges of such circuit courts should be elected, did not extend to the case of trials in such circuit courts which the regular judge should decline or be incompetent to try. As to such emergencies the innate power of the legislature continued unrestrained.<sup>2</sup> Decisions very similar to this have been made in other states.<sup>3</sup>

**Provisions for Special Judges Held Unconstitutional.** — By an *Alabama* decision later than those above referred to, the constitutional provision for election of judges was held to prevent a statute providing for the election or appointment of special judges in case of the incompetency of the presiding judge from interest or relationship.<sup>4</sup> In accord with the later *Alabama* doctrine are decisions in at least two other states.<sup>5</sup> According to these decisions, however, it is held that such provision does not apply to courts erected by the legislature.<sup>6</sup>

**Effect of Constitutional Provision for Substitution of Judges.** — In some states constitutional provision for substitution of judges from other courts has been held to forbid a statute providing for the appointment of attorneys as special judges.<sup>7</sup>

**Constitutional Provision as to Mode of Selection Exclusive.** — Where the constitution prescribes a mode of selection of a substitute or special judge and indicates the causes which will justify such selection, it excludes other modes of selection and other causes.<sup>8</sup>

1. **Constitutional Provisions as to Legislative Powers Not Grants but Limitations.** — *Alabama*, etc., *R. Co. v. Burkett*, 42 Ala. 83, citing *Fletcher v. Peck*, 6 Cranch (U. S.) 87, and *Golden v. Prince*, 3 Wash. (U. S.) 313. See also the title CONSTITUTIONAL LAW, vol. 6, p. 934.

2. **Regular Judge Declining or Incompetent to Act — Legislature May Provide Substitute.** — *Alabama*, etc., *R. Co. v. Burkett*, 42 Ala. 83. See also *Holly v. Carson*, 39 Ala. 345.

3. **Statutes Authorizing Special Judges Not Unconstitutional.** — *Henderson v. Pope*, 39 Ga. 361; *People v. Petty*, 32 Hun (N. Y.) 443; *Ligan v. State*, 3 Heisk. (Tenn.) 159; *State v. Williams*, 14 W. Va. 851.

**Appointment of Special Chancellor Not Void.** — *Grinstead v. Buckley*, 32 Miss. 148.

4. **Statute Providing for Selection or Appointment of Special Judges Held Unconstitutional.** — *Ex p. Amos*, 51 Ala. 57.

**Authorizing One to Sit as Arbitrator.** — The provision in this statute for sitting as arbitrator and allowing an appeal to the Supreme Court was upheld. *Ex p. Amos*, 51 Ala. 57.

5. **Statutes Held Unconstitutional in Illinois and Iowa.** — *Hoagland v. Creed*, 81 Ill. 506; *Winchester v. Ayres*, 4 Greene (Iowa) 104.

In *Indiana* it was held in *Brown v. Buzan*, 24 Ind. 194, that since the constitution had fixed the number and manner of election of circuit judges, it would be incompetent for the legislature without express authority to provide by law for a temporary judge to be appointed to act while the judge elected was in office, and

hence an additional section was necessary to give that authority. In the case of inferior courts, however, no express authority as to temporary judges was necessary, and an act authorizing the appointment of a judge *pro tempore* to hold the Court of Common Pleas was constitutional.

6. **No Application to Courts Erected by the Legislature.** — *Harper v. Jacobs*, 51 Mo. 296; *Smith v. Haworth*, 53 Mo. 88.

Where the constitution authorizes legislative provisions for special judges in certain courts, if part of the jurisdiction of one of these courts be given in its relief to a newly erected court, the legislature may provide for special judges in the new court. *Rudd v. Woolfolk*, 4 Bush (Ky.) 555.

7. **Constitutional Provision for Substitution of Judges.** — *Harper v. Jacobs*, 51 Mo. 296; *Smith v. Haworth*, 53 Mo. 88; *Peter v. State*, 6 How. (Miss.) 326.

8. **Constitutional Provision as to Mode of Selection and Causes Therefor Exclusive.** — *State v. Judge*, 9 La. Ann. 62; *Hayes v. Hayes*, 8 La. Ann. 468.

**Provision as to Recused Judge Not Applicable to Sick Judge.** — *State v. Fritz*, 27 La. Ann. 689. See also *State v. Phillips*, 27 La. Ann. 663.

**Statute Allowing Selection by Bar Authorized by provision that legislature may provide for special judges:** *Ligan v. State*, 3 Heisk. (Tenn.) 159; *State v. Williams*, 14 W. Va. 851.

So also such provision has been held to authorize the selection by the governor. *Kennedy v. Com.*, 78 Ky. 447.



**Parties May Not of Their Own Authority Confer Judicial Authority.** — Parties cannot, of their own authority and independently of constitution or statutes, confer judicial authority.<sup>1</sup>

**3. When Special Judges Can Act.** — The following have been held to be civil actions in the sense that a party may have a change of judge on proper application: proceedings by an administrator for the sale of real estate;<sup>2</sup> divorce proceedings;<sup>3</sup> proceedings supplementary to execution;<sup>4</sup> motions for receivers;<sup>5</sup> signing and settling a case made<sup>6</sup> or a bill of exceptions, etc.;<sup>7</sup> actions involving the judge's right to office.<sup>8</sup>

**Where Special Judge Disqualified as to a Certain Action.** — Where a special judge, who has already been chosen for the term, is disqualified as to a certain action, another may be appointed to preside in that trial.<sup>9</sup>

**Where Judge Petitioned for Appeal Has Been Counsel.** — In *Louisiana* where appeal is asked if the judge petitioned had formerly been counsel, he may, of his own motion, recuse himself, and may appoint an attorney judge *pro hac vice*.<sup>10</sup>

**Right of Special Judges to Act in Criminal Cases.** — In several states the statutes authorizing the appointment of attorneys as special judges apply to criminal as well as to civil cases.<sup>11</sup> In some jurisdictions, however, they are held to be limited in their application to civil cases.<sup>12</sup>

**Transfer of Equity Cases to Another Court.** — According to one decision it is held that an equity case is not one wherein there can be a transfer to another court because of objection to the chancellor.<sup>13</sup> Cases are not wanting, however, which hold that a chancellor *pro tem.* may be selected to try a cause where the chancellor is disqualified or other emergency may require such selection.<sup>14</sup>

**4. When Special Judges Cannot Act.** — The district judge need not appoint an attorney at law to try a case in which he has recused himself as having been of counsel when the court of which he is an officer is represented by another judge clothed with concurrent powers, and who is not himself

1. See the title JURISDICTION, *post*.

2. Proceeding by Administrator for Sale of Real Estate. — *Scherer v. Ingberman*, 110 Ind. 428. See also *Lester v. Lester*, 70 Ind. 201.

3. Divorce Proceedings. — *Powell v. Powell*, 104 Ind. 18, *limiting* *Musselman v. Musselman*, 44 Ind. 106.

4. Supplementary Proceedings. — *Toledo, etc., R. Co. v. Howes*, 68 Ind. 458; *McMahan v. Works*, 72 Ind. 19; *Kissell v. Anderson*, 73 Ind. 485; *Abell v. Riddle*, 75 Ind. 345; *Johnson v. Jones*, 79 Ind. 141; *Joseph v. Schnepfer*, 1 Ind. App. 154.

A proceeding supplementary to execution is such a civil action as entitles a party, upon a proper application, to a change of venue or judge. *Burkett v. Holman*, 104 Ind. 6.

5. Motion for Receiver. — *Corbin v. Berry*, 83 N. Car. 27.

6. Signing and Settling Case Made. — *Garvin v. Jennerson*, 20 Kan. 371.

7. *Holliday v. Mansker*, 44 Mo. App. 465. See also *Bowden v. Wilson*, 21 Fla. 165.

8. Actions Involving the Judge's Right to Office. — *Nugent v. Stark*, 34 La. Ann. 628; *State v. Judge*, 33 La. Ann. 1293; *Magruder v. Swann*, 25 Md. 173.

9. Special Judge Disqualified in an Action. — *Little Rock, etc., R. Co. v. Barker*, 39 Ark. 491. In *Barnes v. McMullins*, 78 Mo. 260, it was held that where the special judge is disqualified by prejudice, the remedy is not a change of venue, but a new election.

10. Right of Judge Who Has Been of Counsel to Recuse Himself and Appoint an Attorney. — *Nugent v. Stark*, 34 La. Ann. 628.

11. Applicable to Criminal Cases — *Indiana*, — *Herbster v. State*, 80 Ind. 484; *State v. Murdock*, 86 Ind. 124; *Burrell v. State*, 129 Ind. 290. In *Feigel v. State*, 85 Ind. 580, it was so held notwithstanding the statute was entitled "An act concerning proceedings in civil cases," the statute relating to Circuit Courts, wherein both classes of cases were triable.

*Missouri*. — *State v. Daniels*, 66 Mo. 192; *Ex p. Allen*, 67 Mo. 534; *State v. Neiderer*, 94 Mo. 79; *Ex p. Clay*, 98 Mo. 578; *State v. Sanders*, 106 Mo. 188; *State v. Gilmore*, 110 Mo. 1; *State v. Wofford*, 111 Mo. 526; *State v. Bishop*, 22 Mo. App. 435.

*Pennsylvania*. — President Judges' Application, 64 Pa. St. 33.

*Tennessee*. — *Glasgow v. State*, 9 Baxt. (Tenn.) 485; *Ligan v. State*, 3 Heisk. (Tenn.) 159.

*Texas*. — *Davis v. State*, 44 Tex. 523; *Early v. State*, 9 Tex. App. 476; *Thompson v. State*, 9 Tex. App. 649.

12. Limited to Civil Cases. — *Castleberry v. State*, 68 Ga. 49; *State v. Thomas*, 56 Me. 490; *Peter v. State*, 6 How. (Miss.) 326.

13. Equity Case Not Transferable. — *Cooke v. Cooke*, 41 Md. 362.

14. Election of Chancellor Pro Tem. — *Rudd v. Woolfolk*, 4 Bush (Ky.) 555; *Grimstead v. Buckley*, 32 Miss. 148.



recused.<sup>1</sup> The fact that a scurrilous newspaper attack has been made on a judge will not afford legal ground for the transfer of the cause to another court.<sup>2</sup> The acknowledgment of a sheriff's deed is not a proceeding in which the judge of an adjoining circuit may be called in on the ground that the regular judge is the grantee in such deed.<sup>3</sup> It has been held in one state that the sentencing of a convicted person is not a proceeding in which the regular judge is authorized to call in a substitute judge.<sup>4</sup> In another state, however, it was held that this was a matter properly left to the discretion of the regular judge.<sup>5</sup>

**5. Oath of Special Judge.**—The statutes of some states expressly require that a special judge shall be sworn before trying the cause,<sup>6</sup> and specify the form of such oath.<sup>7</sup>

**Oath of Same Import as Statutory Form Sufficient.**—Where the oath taken by a special judge is of the exact import of the one required by statute it will be sufficient.<sup>8</sup>

**6. Powers**—Powers Same as Those of Regular Judge.—With regard to the powers of a special judge duly appointed or elected, it may be stated generally that during the cause or term for which he has been chosen, the powers and duties of a special judge are the same as those of the regular judge.<sup>9</sup>

**Judgment That of Court.**—The judgment of a special judge in the case or during the term for which he is selected is the judgment of the court in which

**1. Appointment Unnecessary Where Judge with Concurrent Powers Is Present.**—*State v. Judges*, 35 La. Ann. 1067.

**2. Transfer of Cause Not Authorized by Newspaper Attack.**—*Voullaire v. Voullaire*, 45 Mo. 602.

**3. Unnecessary to Call In Substitute Judge in Acknowledgment of Sheriff's Deed.**—*Lewis v. Curry*, 74 Mo. 50.

**4. Improper to Call In Substitute Judge to Sentence Convicted Person.**—*State v. Shea*, 95 Mo. 85, holding also that although such sentence by the substitute judge is error, and will be reversed, the reversal is to be confined to the judgment and sentence. It does not invalidate or overthrow the steps antecedent to the judgment and sentence.

**5. Discretionary with Regular Judge.**—*Thomas v. State*, 5 How. (Miss.) 20.

**6. Necessity of Oath.**—An attorney who has been chosen to act as a special judge must be sworn. *Kennedy v. State*, 53 Ind. 542; *Herbster v. State*, 80 Ind. 484; *Rudd v. Woolfolk*, 4 Bush (Ky.) 555; *Slone v. Slone*, 2 Met. (Ky.) 339; *Grant v. Holmes*, 75 Mo. 109; *Citizens' Nat. Bank v. Graham*, 147 Mo. 250; *State v. Bishop*, 22 Mo. App. 435; *State v. French*, 47 Mo. App. 474; *Thompson v. State*, 9 Tex. App. 649; *Smith v. State*, 24 Tex. App. 290.

**Act Failing to Provide for Oath.**—That an act providing for the appointment of special judges in certain cases does not provide that such judges shall take the oath required of judges by the constitution, does not render it unconstitutional. If such special judge is a judicial officer the clause of the constitution is binding upon him, and in the absence of anything in the record it will be presumed that he took the proper oath. *Harper v. Jacobs*, 51 Mo. 206; *Smith v. Haworth*, 53 Mo. 88.

**Waiver of Oath.**—In *Ford v. Cameron First Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 684; *Grant v. Holmes*, 75 Mo. 109; and *State v. Van Wye*, 136 Mo. 227, it was held that the

failure of the special judge to take the oath may be waived by the parties.

**7. Statutory Provision as to Form of Oath.**—*Rev. Stat. Mo.* (1899), § 2596; *State v. French*, 47 Mo. App. 474; *State v. Bulling*, 100 Mo. 87; *State v. Sneed*, 91 Mo. 552.

**8. Oath of Same Import as Statutory Form.**—*State v. French*, 47 Mo. App. 474.

In *State v. Bishop*, 22 Mo. App. 435, the oath prescribed by the *Missouri* constitution for all officers civil and military to support the constitution was held sufficient.

**Oath as Attorney Sufficient.**—In *Georgia* it is held that the oath taken by all attorneys when admitted to practice is sufficient, and that a special oath is not required where an attorney is chosen to act as special judge. *Reeves v. Graffing*, 67 Ga. 512.

**9. See** *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *Paducah Land, etc., Co. v. Cochran*, (Ky. 1896) 37 S. W. Rep. 67.

As to the powers and duties of judges generally, see *supra*, this title, second and third sections.

**Special or Substitute Judge May Try All Matters Connected with Case.**—*State v. Wofford*, 111 Mo. 531; *State v. Tomlinson*, 7 N. Dak. 294.

**A Special Judge May Suspend a Rule of Court setting apart a term for the trial of criminal cases.** *Paducah Land, etc., Co. v. Cochran*, (Ky. 1896) 37 S. W. Rep. 67.

**Filing an Amended Petition and Suing Out an Alias Summons after the qualification of the special judge do not affect his jurisdiction.** *Naffzieger v. Reed*, 98 Mo. 87.

**Rulings Entitled to Same Faith and Credit as Those of Regular Judge.**—*State v. Wear*, 145 Mo. 162, *citing* *Green v. Walker*, 99 Mo. 68, and *State v. Gamble*, 108 Mo. 500.

**May Sign Bills of Exceptions After Term Time.**—*Watkins v. State*, 37 Ark. 370; *Cowall v. Alitchul*, 40 Ark. 172; *Bacon v. State*, 22 Fla. 46.



he sits,<sup>1</sup> and writs of error or appeals run to the court in which he sits.<sup>2</sup>

**No Power Outside of Case for Which Selected.** — A judge who is appointed specially or called in to try one cause is not thereby authorized to try any other cause pending in the court.<sup>3</sup>

**Duration of Power.** — When a special judge has qualified in a suit he becomes the judge of the court for all the purposes of that suit, and his powers do not cease until the final termination of the cause, or the end of the term for which he was appointed or elected.<sup>4</sup>

**Authority of Judge Ends with Beginning of Subsequent Term.** — In some states it is provided that only one district court shall sit in a given district at once, and it is held in such jurisdictions that the beginning of a regularly appointed term of the district court terminates a term thereof in another county. Therefore, a special judge cannot continue to sit in one county when the regular judge has opened court at the regularly appointed time in another county of the same district.<sup>5</sup>

**1. Judgment That of Court.** — *Henderson v. Pope*, 39 Ga. 361; *Taylor v. Smith*, 4 Ga. 133.

**2. Writ of Error to Court in Which Special Judge Sat.** — *Henderson v. Pope*, 39 Ga. 361.

**3. No Power at Subsequent Term.** — Where a special judge has been elected for a special case, he may not preside at a subsequent term in any case. *Dillard v. State*, 65 Ark. 404; *Fishback v. Weaver*, 34 Ark. 569; *Wallace v. Caldwell*, (Kan. App. 1899) 59 Pac. Rep. 379; *Small v. Reeves*, (Ky. 1898) 46 S. W. Rep. 726.

**May Not Receive Verdict in Another Case.** — A judge from another circuit temporarily present for the trial of a particular case has no jurisdiction to receive a verdict in another case and discharge the jury. *Allen v. Snyder*, 82 Mo. 256.

**Power to Hold Special Term.** — In *Arkansas* a special judge, appointed by the governor to sit in a certain court in cases where the regular judge is incompetent to sit, cannot hold a special term, and all proceedings had before him at such term are *coram non iudice*. *Brown v. Fleming*, 3 Ark. 284.

**Consolidation of Causes.** — Where other cases are consolidated by order of the regular judge with the case in which the special judge has been appointed to preside, the special judge has authority to dispose of all the consolidated causes. *Mills v. Paul*, (Tex. Civ. App. 1895) 30 S. W. Rep. 242. But the special judge has no authority himself to order the consolidation of another suit with the one in which he is appointed. *Texas-Mexican R. Co. v. Cahill*, (Tex. Civ. App. 1893) 23 S. W. Rep. 232.

**4. Powers Will Not Cease until Final Termination of Cause.** — *Hyllis v. State*, 45 Ark. 478; *Staser v. Hogan*, 120 Ind. 207; *Beitman v. Hopkins*, 109 Ind. 177; *Small v. Reeves*, (Ky. 1896) 37 S. W. Rep. 682; *State v. Davidson*, 69 Mo. 509; *Holliday v. Mansker*, 44 Mo. App. 465; *Dawson v. Dawson*, 29 Mo. App. 521; *State v. Moberly*, 121 Mo. 604; *State v. Hayes*, 81 Mo. 574; *State v. Sneed*, 91 Mo. 552; *Ex p. Clay*, 98 Mo. 578; *Citizens' Nat. Bank v. Graham*, 147 Mo. 250; *Nebraska Mfg. Co. v. Maxon*, 23 Neb. 224; *State v. Sachs*, 3 Wash. 691.

**Termination of Cause or Appointment of Successor.** — It has been held that the powers of a special judge who takes the place of a disqualified regular judge terminate immediately

upon the appearance of a regularly elected or appointed and duly qualified judge who properly succeeds the disqualified judge; but if the special judge proceeds to try the case, his judgment, being *colore officii*, is not collaterally impeachable. *Coles v. Thompson*, 7 Tex. Civ. App. 666. See also *Hyllis v. State*, 45 Ark. 478.

In *Kentucky* a special judge appointed in a particular case is authorized to sit only at the term for which he was elected, and, if the case is not then disposed of, he cannot preside at a subsequent term. *Small v. Reeves*, (Ky. 1898) 46 S. W. Rep. 726, *reversing* in part (Ky. 1896) 37 S. W. Rep. 682.

In another case it is held that when a special judge is selected in a particular case, his authority continues exclusive, notwithstanding the election of a successor to the regular judge. *Citizens' Nat. Bank v. Graham*, 147 Mo. 250, *overruling* *Naffzieger v. Reed*, 98 Mo. 87. See also *State v. Tomlinson*, 7 N. Dak. 294.

**5. One Court in District at a Time.** — *Cox v. State*, 30 Kan. 202; *Williams v. Struss*, 4 Okla. 160. See also *Grable v. State*, 2 Greene (Iowa) 559.

*A Fortiori* there cannot be a court before a regular judge and before a special judge in the same county at the same time, and the proceedings before the special judge are void. *Baisley v. Baisley*, 15 Oregon 183.

If the positions are reversed, and the regular judge continues to sit in a county after a term of court in another county under a special judge has begun, the acts of the regular judge are void. *In re Millington*, 24 Kan. 214.

**Regular Judge Disqualified During Trial Before Judge Pro Tempore.** — Where a regular judge has been superseded for the trial of a particular case by a judge *pro tempore*, it has been said that the regular judge is disqualified from holding his court until the business for which the judge *pro tempore* was appointed has been dispatched. *List v. Jockheck*, 59 Kan. 143, where it was decided that if the regular judge proceeds to hold court and try cases while the temporary judge is presiding in trial for which he was appointed, the proceedings of the regular judge will be held void rather than the pleadings of the special judge. See also *Clark v. Rugg*, 20 Fla. 861, *following* *Bear v. Cohen*, 65 N. Car. 511.



**7. Proof of Authority — Record Should Show Affirmatively Selection and Appointment.** — As a general rule when a special judge sits, the record should show affirmatively his selection and appointment.<sup>1</sup>

**Appointment or Agreement to Be in Writing.** — According to the practice in some jurisdictions the agreement by which a special judge is chosen, or his appointment, must be in writing, and this must be shown by the record.<sup>2</sup> This, however, is unnecessary where the judge of another court is called in.<sup>3</sup>

**Necessity of Setting Out Disability of Regular Judge.** — According to some decisions it is held that where a substitute judge is called in by the presiding judge, the disability of the regular judge should be set forth.<sup>4</sup> It has been held that where a special judge is elected or appointed it is unnecessary to set out the facts disqualifying the regular judge, and that the appellate courts will act on the presumption of the regularity of the proceedings.<sup>5</sup>

**Notice to Substitute Judge.** — Notice to a substitute judge, though required by statute, has been held not to be jurisdictional, and unnecessary to be entered of record.<sup>6</sup>

**Presumption as to Performance of Prerequisites by Special Judge.** — Some courts have held that the prerequisites necessary to be performed by the special judge will be presumed on appeal.<sup>7</sup> Where, however, the authority of the special judge is denied in the court below, it is held that the record should state that the prerequisites were observed.<sup>8</sup>

**Presumption in Case of Second Appointment.** — So also it has been held that it will be presumed on appeal that a second appointment was made for sufficient reason.<sup>9</sup>

**Presumption as to Reappointment.** — Where a special judge continues to act during a term after that for which he was elected, it will be presumed on appeal where the record is silent that the reappointment was duly made.<sup>10</sup>

**Presumption as to Consent.** — In those states where parties may consent to having a special judge in proper cases therefor, if no objection be made below it will be presumed on appeal that objection is waived.<sup>11</sup> Where special judges

1. Record Should Show Election or Appointment. — *Wall v. Looney*, 52 Ark. 113; *Dansby v. Beard*, 39 Ark. 254; *Worsham v. Murchison*, 66 Ga. 715; *Smith v. Haworth*, 53 Mo. 88; *McMurry v. State*, 9 Tex. App. 207; *Brinkley v. Harkins*, 48 Tex. 225; *Bailey v. State*, (Tex. App. 1890) 15 S. W. Rep. 117.

2. *Littleton v. Smith*, 119 Ind. 230; *Kennedy v. State*, 53 Ind. 542; *Evans v. State*, 56 Ind. 459; *Greenwood v. State*, 116 Ind. 485; *Smith v. State*, 145 Ind. 176; *Thompson v. State*, 9 Tex. App. 649; *State v. Sachs*, 3 Wash. 691.

3. Unnecessary Where Another Judge Called In. — *Wood v. Franklin*, 97 Ind. 117; *Lewis v. Albertson*, (Ind. App. 1899) 53 N. E. Rep. 1071.

4. Setting Out Disability of Regular Judge. — President Judges' Application, 64 Pa. St. 33; *Matter of Rhinebeck*, 19 Hun (N. Y.) 346; *People v. Petty*, 32 Hun (N. Y.) 443; *Gresham v. Ewell*, 85 Va. 1. See also *Roberts v. State*, 2 Fla. 244.

In *Missouri* the Record Need Not Recite the Reasons of the Regular Judge in calling in the judge of another circuit, but the judge may make such request, and it will be presumed that it was made in obedience to the statute. *State v. Newsum*, 129 Mo. 154.

5. Unnecessary to Set Out Facts Disqualifying Regular Judge. — *Rudd v. Woolfolk*, 4 Bush (Ky.) 555; *State v. Hosmer*, 85 Mo. 553; *State v. Bishop*, 22 Mo. App. 435.

6. Notice to Substitute Judge Need Not Be Entered of Record. — *Wood v. Franklin*, 97 Ind. 117; *Benjamin v. Evansville*, etc., R. Co., 28 Ind. 416.

7. Presumption as to Performance of Prerequisites. — *Harper v. Jacobs*, 51 Mo. 296.

8. Statement that Prerequisites Were Observed. — *Kennedy v. State*, 53 Ind. 542.

9. Presumption as to Second Appointment. — *Fassinow v. State*, 89 Ind. 235. See also *Cincinnati, etc., R. Co. v. Rowe*, 17 Ind. 568; *Hutts v. Hutts*, 51 Ind. 581; *Glenn v. State*, 46 Ind. 368; *Singleton v. Pidgeon*, 21 Ind. 118.

10. Presumption that Reappointment Was Duly Made. — *Bartley v. Phillips*, 114 Ind. 189.

11. Objection Presumed to Be Waived Where Not Made Below — *Indiana*. — *Kennedy v. State*, 53 Ind. 542; *Miller v. Burger*, 2 Ind. 337; *Negley v. Wilson*, 14 Ind. 215; *Seymour v. State*, 15 Ind. 288; *Redwine v. State*, 15 Ind. 293; *Fountain County v. Coats*, 17 Ind. 150; *King v. State*, 15 Ind. 64; *Danneburg v. State*, 20 Ind. 181; *Feaster v. Woodfill*, 23 Ind. 493; *Barnes v. State*, 28 Ind. 82; *Kambieskey v. State*, 26 Ind. 225; *Watts v. State*, 33 Ind. 237; *Hyatt v. Hyatt*, 33 Ind. 309; *Winterrowd v. Messick*, 37 Ind. 122; *Greenwood v. State*, 116 Ind. 485.

*Kentucky*. — *Slone v. Slone*, 2 Met. (Ky.) 339; *Vandever v. Vandever*, 3 Met. (Ky.) 137; *Rudd v. Woolfolk*, 4 Bush (Ky.) 555; *Salter v. Salter*, 6 Bush (Ky.) 624.



may be agreed upon by parties, consent will not be presumed against parties only constructively before the court, nor against minors or married women, nor against purchasers not parties to the original record.<sup>1</sup>

**Effect of Infirmary Appearing on the Record.** — Where the record shows that a special judge sat illegally, the error is fatal.<sup>2</sup>

**Record Conclusive.** — The record of the court is conclusive, and it cannot be contradicted by proof *aliunde* to show that a stranger sat,<sup>3</sup> or that the commission of the judge was defective.<sup>4</sup>

*Missouri.* — Grant *v.* Holmes, 75 Mo. 109; Harper *v.* Jacobs, 51 Mo. 296. And see Tucker *v.* Allen, 47 Mo. 488.

**1. When Consent Not Presumed.** — Rudd *v.* Woolfolk, 4 Bush (Ky.) 555.

**2. Infirmary Appearing on the Record May Not Be Ignored.** — Haverly *v.* Invincible Min. Co. *v.*

Howcutt, 6 Colo. 574; Winchester *v.* Ayres, 4 Greene (Iowa) 104. See also Rudd *v.* Woolfolk, 4 Bush (Ky.) 555.

**3. Record May Not Be Denied or Contradicted.** — Winchester *v.* Ayres, 4 Greene (Iowa) 104.

**4. Proof that Judge's Commission Was Defective Inadmissible.** — Kennedy *v.* Com., 78 Ky. 447.



# JUDGMENT NOTES.

By LOMAX PITTMAN.

- I. DEFINITION, 752.
- II. NEGOTIABILITY, 753.
- III. IN WHOSE FAVOR JUDGMENT MAY BE CONFESSED, 753.
- IV. WHETHER NOTE MUST BE MATURE, 753.
- V. NO CONFESSION WHEN DEBT OUTLAWED, 755.

## CROSS-REFERENCES.

*For matters of PROCEDURE, see the title JUDGMENTS in the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 11, p. 796, *especially at* p. 973 *et seq.*  
*For special matters connected with this subject, see in this work the titles* ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 17; CORPORATIONS (PRIVATE), vol. 7, p. 784; FOREIGN JUDGMENTS, vol. 13, p. 1007; FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 231, 262; INJUNCTIONS, vol. 16, p. 394.  
*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work the titles* JUDGMENTS AND DECREES, *post*; WARRANTS OF ATTORNEY.

**I. DEFINITION.** — A judgment note is an acknowledgment of debt, generally given in the form of an ordinary promissory note, but containing attached thereto a power of attorney to appear and confess judgment for the sum named therein.<sup>1</sup> It frequently contains a number of stipulations against appeal and other remedies for setting the judgment aside;<sup>2</sup> or it provides for an attorney's fee for obtaining the judgment;<sup>3</sup> or it contains a waiver of exemption as to property which otherwise would be exempt from execution.<sup>4</sup>

**Whether Warrant Must Be Distinct from Note** — Statutes. — The warrant of attorney is sometimes a part of the note, so that a single signature expresses the promise of the maker to pay and also authorizes the confession of judgment.<sup>5</sup> Sometimes, however, a statute requires that the instrument authorizing the confession be distinct from the promise to pay.<sup>6</sup>

**Scope of Treatment.** — The treatment of judgment notes in this title is intended to be limited to matters peculiar to these instruments. The general subjects of judgments by confession and warrants of attorney are treated elsewhere.<sup>7</sup>

1. Bouv. Law Dict.

2. A Waiver of the Right to Appeal or to bring error contained in a judgment note is probably enforceable. *Sloane v. Anderson*, 57 Wis. 123. See also *Townsend v. Masterton*, etc., *Stone Dressing Co.*, 15 N. Y. 587; *People v. Stephens*, 52 N. Y. 306; *Wheeler v. Floral Mill*, etc., *Co.*, 10 Nev. 200; and the title ARBITRATION AND AWARD, vol. 2, p. 613.

For cases wherein such waivers contained in notes are construed, see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 126.

3. **Provision for Attorneys' Fees.** — See the titles ATTORNEY AND CLIENT, vol. 3, p. 431; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 98. See also the title WARRANTS OF ATTORNEY in this work, and the title JUDG-

MENTS in the ENCYC. OF PL. AND PR., vol. 11, p. 1013.

4. See the title EXEMPTIONS (FROM EXECUTIONS), vol. 12, p. 195 *et seq.*; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 126.

5. **Whether Warrant Must Be Distinct.** — *Sloane v. Anderson*, 57 Wis. 123.

6. See *Vliet v. Camp*, 13 Wis. 198; *Richards v. Globe Bank*, 12 Wis. 693. The statute was repealed. See *Sloane v. Anderson*, 57 Wis. 132.

Such a statute exists in *New Jersey*. Gen. Stat. N. J. (1893), p. 172, § 1.

7. See the titles JUDGMENTS AND DECREES, *post*; WARRANTS OF ATTORNEY. And see the table of cross-references at the head of this title.



**II. NEGOTIABILITY.** — The Negotiability of Judgment Notes is a question as to which the courts are not in accord. In *Pennsylvania* their negotiability is denied; in *Ohio* such instruments are held negotiable.<sup>1</sup>

**III. IN WHOSE FAVOR JUDGMENT MAY BE CONFESSED** — Personal Representatives. — A warrant of attorney attached to and made a part of a note is available in favor of the administrator or executor of the payee.<sup>2</sup>

**Transferees.** — Where the warrant fails to specify in whose favor the judgment may be confessed, and it is attached to a note payable to the order of a named person<sup>3</sup> or to bearer,<sup>4</sup> the indorsee or bearer may confess judgment. Where the note is payable to order and the warrant authorizes a confession "in favor of the holder of the note,"<sup>5</sup> or while, the note being payable to A merely, a confession is by the warrant authorized in favor of A "or his assigns," the holder may confess judgment.<sup>6</sup> In *Ohio*, according to the peculiar doctrine in that state, if the note is in form negotiable, and the warrant of attorney authorizes an entry of judgment in favor of the "holder"<sup>7</sup> or the "legal holder,"<sup>8</sup> a judgment may be confessed in favor of such holder; but if the warrant does not designate in whose favor judgment may be confessed, the power to confess judgment becomes invalid on the transfer of the note.<sup>9</sup>

**IV. WHETHER NOTE MUST BE MATURE.** — It is not essential to the validity of a warrant of attorney that confession of judgment be authorized only at the maturity of the note to which it is attached. The warrants sometimes authorize the confession of judgment at any time after date, and therefore

1. See the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, pp. 126, 127; *Sclauch v. O'Hare*, 22 Pa. Co. Ct. 384.

**Non-negotiable by Reason of Special Clause.** — When the note authorized a confession of judgment "at any time hereafter," these words were held to mean at any time after date, and according to the *Massachusetts* doctrine (see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 93) the note was non-negotiable. *Richards v. Barlow*, 140 Mass. 218.

**2. Personal Representative May Confess.** — *Drake v. Simpson*, 30 Cinc. L. Bul. 236, 11 Ohio Dec. (Reprint) 854; *Gealy v. Gealy*, 26 Pittsb. Leg. J. (Pa.) 153. See also *Guyer v. Guyer*, 6 Houst. (Del.) 430. But compare *Wentz v. Bealor*, 14 Pa. Co. Ct. 337. These cases are opposed to the English cases on warrants of attorney, *Henshall v. Matthew*, 1 Dowl. 217; *Foster v. Clagget*, 6 Dowl. 524.

**3. Note Payable to Order — Warrant Indefinite.** — *Shepherd v. Wood*, 73 Ill. App. 486. See also *Martin v. Summers*, 79 Ill. App. 392; *Boyles v. Chytraus*, 175 Ill. 370.

**Where a Judgment Note Is Indorsed to a Person Merely that Judgment May Be Entered in His Name**, he has no standing as complainant in a court of equity, and no title to any affirmative relief based on the judgment entered in his name. *Chisholm v. McDonald*, 30 Ill. App. 176.

**4. Note Payable to Bearer — Warrant Indefinite.** — *Vietor v. Johnson*, 148 Pa. St. 583. See also *Winton v. Collings*, 4 Kulp (Pa.) 491; *Parker v. Poole*, 12 Tex. 86.

**Warrant Passes with Note.** — A warrant of attorney attached to a note is a security, and, upon the transfer of the note, passes to the holder thereof. *Cross v. Moffat*, 11 Colo. 210.

**5. Warrant in Favor of the Holder of the Note.**

— *Champlin v. Smith*, 164 Pa. St. 481. See also *Smith v. Kammerer*, 152 Pa. St. 98.

In *Massachusetts* the validity of a judgment entered on an *Illinois* note of this description, in favor of an indorsee in *Illinois*, has been recognized. *Richards v. Barlow*, 140 Mass. 218.

**6. Warrant in Favor of A. or Assigns.** — *Holmes v. Bemis*, 124 Ill. 453; and it makes no difference whether the holder gains his title mediately or immediately from the payee.

**7. Ohio Doctrine.** — *Clemens v. Hull*, 35 Ohio St. 141. In this case the note was payable to the bearer, and the word "holder" was held to include an equitable holder who took the note without indorsement. The note, being sealed, was negotiable under the *Ohio* statute only by indorsement. See also *Watson v. Paine*, 25 Ohio St. 340.

**8. Cushman v. Welsh, 19 Ohio St. 536, where, the note being under seal and negotiable in form, the warrant was "in favor of the legal holder," and it was held that one who was not the legal holder by indorsement, but merely the equitable holder by delivery, could not confess judgment.**

**9. Osborn v. Hawley, 19 Ohio 130 [explained in *Spence v. Emerine*, 46 Ohio St. 440, 15 Am. St. Rep. 634]; *Ream v. Merchants' Nat. Bank*, 2 Ohio Cir. Ct. 43, 1 Ohio Cir. Dec. 351. See also *Drake v. Simpson*, 30 Cinc. L. Bul. 236, 11 Ohio Dec. (Reprint) 854.**

In *Marsden v. Soper*, 11 Ohio St. 503, where the warrant was "in favor of any holder of this obligation," the court doubted whether the warrant was negotiable, but sustained the judgment entered by the indorsee against the maker on the principle of estoppel.

**The Doctrine Is Founded on the Principle that warrants of attorney must be strictly construed.** *Spence v. Emerine*, 46 Ohio St. 433, 15 Am. St. Rep. 634.



before the maturity of the note,<sup>1</sup> and sometimes only after the maturity of the note.<sup>2</sup>

When the Warrant Is Silent as to the Time When Confession May Be Made, judgment may be confessed only after maturity, and before that time such warrant does not give the court jurisdiction of the person of the defendant, so that a judgment may be rendered.<sup>3</sup>

**Demand Note** — "After Date." — Where the warrant authorizes the confession of a judgment at any time "after date" on a demand note, it will not authorize a judgment on the same day.<sup>4</sup>

**New Jersey Doctrine.** — In New Jersey a statute requires that the debt for which the judgment is confessed be justly and honestly due,<sup>5</sup> and under this statute no judgment can be confessed on a note not yet due,<sup>6</sup> or upon a contingent liability as indorser,<sup>7</sup> or for further advances.<sup>8</sup>

**Execution on Judgments Entered Before Maturity.** — Where judgment is entered by confession before the maturity of the note, the judgment creditor is not entitled to issue execution until the debt has matured; in the meantime the judgment stands as a mere security.<sup>9</sup>

**1. Judgment by Confession Authorized Before Maturity of Note** — *Illinois*. — *Sherman v. Baddely*, 11 Ill. 622; *Roundy v. Hunt*, 24 Ill. 598; *Bush v. Hanson*, 70 Ill. 480; *Adam v. Arnold*, 86 Ill. 185; *Thomas v. Mueller*, 106 Ill. 36; *McDonald v. Chisholm*, 131 Ill. 273; *Farwell v. Huston*, 151 Ill. 239, 42 Am. St. Rep. 237; *Towle v. Gontier*, 5 Ill. App. 409; *Cummins v. Holmes*, 11 Ill. App. 158; *Alldritt v. Morrison First Nat. Bank*, 22 Ill. App. 24, 192; *Chisholm v. McDonald*, 30 Ill. App. 176; *Cohen v. Burgess*, 44 Ill. App. 206; *Elkins v. Wolfe*, 44 Ill. App. 376; *Blanck v. Medley*, 63 Ill. App. 211. See also *Richards v. Barlow*, 140 Mass. 218, a suit on a judgment confessed in Illinois.

*Iowa*. — *McClish v. Manning*, 3 Greene (Iowa) 223.

*Missouri*. — *Mechanics' Bank v. Mayer*, 93 Mo. 417; *Stern v. Mayer*, 19 Mo. App. 511; *Mendel v. Mayer*, (Mo. 1888) 7 S. W. Rep. 5.

*New York*. — *Teel v. Yost*, 128 N. Y. 387.

*Pennsylvania*. — *Volkenand v. Drum*, 143 Pa. St. 525; *Integrity Title Ins., etc., Co. v. Rau*, 153 Pa. St. 488, 32 W. N. C. (Pa.) 83; *Page v. Simpson*, 188 Pa. St. 393; *Candee's Appeal*, 191 Pa. St. 644.

*Wisconsin*. — *Reid v. Southworth*, 71 Wis. 288.

**Confession of Judgment Authorized "at Any Time."** — Where a warrant of attorney authorizes a confession of judgment upon a note "at any time," judgment may be confessed at any time after delivery of the note. *Elkins v. Wolfe*, 44 Ill. App. 376; *Cohen v. Burgess*, 44 Ill. App. 206; *Alldritt v. Morrison First Nat. Bank*, 22 Ill. App. 24, 192.

**2. Warrant Not Authorizing Judgment Before Maturity.** — A judgment entered by confession on two notes before their maturity, under a warrant of attorney authorizing such confession only after maturity, will be vacated on motion, even after one of the notes has matured, without any showing of special injury. *Reid v. Southworth*, 71 Wis. 288.

A promissory note providing that, "on default of payment, I hereby confess judgment in the above amount," will warrant the entry of judgment for such amount, on default of payment. *Burgunder v. Lederer*, 12 Pa. Co. Ct. 222.

**Warrant Authorizing Judgment for "Such Amount as May Appear to Be Unpaid."** — So, too, when the warrant of attorney authorizes a confession of judgment on a note "for such amount as may appear to be unpaid thereon," the use of such expression indicates an understanding on the part of the payee and the payor that the note shall mature, in order to determine what amount shall remain due and unpaid thereafter, and a confession of judgment before maturity is unauthorized. *Sloane v. Anderson*, 57 Wis. 123. See also *Reid v. Southworth*, 71 Wis. 288.

**3. Warrant Silent — No Jurisdiction to Render Judgment Before Maturity.** — *Spier v. Corll*, 33 Ohio St. 236. But see *Teel v. Yost*, 128 N. Y. 396, where *Ruger, C. J.*, remarks: "Under the former practice of entering judgments upon a warrant of attorney, it was uniformly held in England and this country, that where the warrant is given to secure the payment of money it is not necessary that the plaintiff should delay the signing of judgment until default be made in the payment, unless there is some restriction as to the time of entry in the warrant. (See *Graham's Practice* 773, and cases cited.)"

**4. "After Date" Means Subsequent to Day of Date.** — *Waterman v. Jones*, 28 Ill. 54; *White v. Jones*, 38 Ill. 159.

Judgment cannot be entered upon a note payable one day after date, with a warrant to confess judgment, until the termination of the day of payment. *Taylor v. Jacoby*, 2 Pa. St. 495, 45 Am. Dec. 615.

**5. New Jersey.** — See Gen. Stat. N. J., p. 174, § 11.

**6. Sterling v. Fleming**, 53 N. J. L. 652.

**7. Bates v. Norton**, 55 N. J. Eq. 251; *Sayre v. Hewes*, 32 N. J. Eq. 652.

**8. Clapp v. Ely**, 27 N. J. L. 555.

**9. Execution May Not Issue Before Maturity.** — *Integrity Title Ins., etc., Co. v. Rau*, 153 Pa. St. 488, the court saying: "The enforcement of satisfaction, by execution or otherwise, is a matter to be governed by the rights and equities of the parties, and comes within the jurisdiction of the court."

In *Page v. Simpson*, 188 Pa. St. 393, *W.* executed a judgment note to *S.* to protect *S.*



**V. NO CONFESSION WHEN DEBT OUTLAWED.** — A warrant of attorney confers no authority to confess judgment on a note after a remedy for the collection of the debt thereby evidenced has become barred by limitation.<sup>1</sup>

against the amount of indorsements to be made by him for W. The judgment note contained a clause whereby S. was empowered to confess judgment and issue execution for the whole amount of the note in the event of W. becoming insolvent. W. subsequently became insolvent, and S. confessed judgment and issued execution. At the time of the issuance of execution the notes which S. had indorsed were still outstanding, but it appearing that

these notes had matured and been paid by S. to a greater amount than the judgment note before his receipt to the sheriff, it was held that the execution was valid.

**1. Judgment Cannot Be Confessed After Limitations Have Run Against Note.** — No authority is conferred by the warrant beyond the life of the note. *Matzenbaugh v. Doyle*, 156 Ill. 331, *affirming* 56 Ill. App. 343; *Kahn v. Lesser*, 97 Wis. 217. See also *Cross v. Moffat*, 11 Colo. 210.



# JUDGMENTS AND DECREES.

BY THE EDITORIAL STAFF.

## I. DEFINITIONS AND GENERAL CONSIDERATIONS, 762.

1. *Definitions*, 762.
2. *Kinds of Judgments and Decrees*, 763.
  - a. *In General*, 763.
  - b. *Final and Interlocutory Judgments Distinguished*, 763.
  - c. *Domestic and Foreign Judgments Distinguished*, 763.
  - d. *Distinction Between Judgments in Rem and in Personam*, 763.
3. *Whether a Judgment Is a Contract*, 763.
4. *Whether Operative as Assignment or Conveyance*, 764.

## II. REQUISITES OF VALID JUDGMENT, 764.

1. *In General*, 764.
2. *Judgments by Confession*, 765.
  - a. *At Common Law*, 765.
  - b. *Under Statutes*, 765.
    - (1) *In General*, 765.
    - (2) *For What Claims Confession May Be Made*, 765.
      - (a) *In General*, 765.
      - (b) *Debts Not Due*, 765.
      - (c) *Future Advances*, 765.
      - (d) *Contingent Liabilities*, 766.
      - (e) *Torts*, 766.
    - (3) *By and for Whom Confession May Be Made*, 766.
    - (4) *Statement and Affidavit*, 767.
    - (5) *Necessity of Assent of Creditor*, 767.
    - (6) *Time and Place of Making Confession*, 767.
  - c. *Judgments by Default*, 767.

## III. ENTRY OF JUDGMENTS, 768.

## IV. OPERATION AND EFFECT, 768.

1. *As Estoppel*, 768.
  - a. *Conclusiveness as Memorial of Legal Proceedings*, 768.
  - b. *Res Judicata*, 768.
2. *As Lien*, 768.
  - a. *Origin and History of Lien*, 768.
    - (1) *In General*, 768.
    - (2) *In Federal Courts*, 769.
  - b. *Nature of the Lien*, 770.
  - c. *Prerequisites as to Judgment or Decree*, 771.
    - (1) *In General*, 771.
    - (2) *Docketing or Recording*, 772.
      - (a) *In General*, 772.
      - (b) *Effect of Actual Notice of Undocketed Judgment*, 773.
      - (c) *Judgments of Federal Courts*, 774.
      - (d) *Justice's Judgments*, 774.
    - (3) *Indexing*, 774.
    - (4) *Irregularities in Docketing or Indexing*, 775.
      - (a) *In General*, 775.
      - (b) *Omission or Mistake as to Name of Party to Judgment*, 775.
      - (c) *Errors as to Amount of Judgment*, 777.



## JUDGMENTS AND DECREES.

### *d. Interests Subject to Lien, 777.*

#### *(1) Real Estate, 777.*

- (a) In General, 777.*
- (b) Naked Legal Estate, 778.*
- (c) Equitable Interest Generally, 778.*
- (d) Interest of Cestui Que Trust, 779.*
- (e) Equity of Redemption, 779.*
- (f) Lands Subject to Power of Appointment, 780.*
- (g) Interest of Vendor, 780.*
- (h) Interest of Vendee, 782.*
- (i) Estates for Life, 782.*
- (j) Leaseholds, 783.*
- (k) Remainders and Reversionary Interests, 783.*
- (l) Lands Held by Tenancy in Common, 784.*
- (m) Devises, 784.*
- (n) Lands in Hands of Fraudulent Grantee, 784.*
- (o) Estates of Decedents, 785.*
- (p) Homestead, 786.*
- (q) Lands Belonging to Municipality, 786.*
- (r) Right of Redemption from Sheriff's Sales, 786.*
- (s) Partnership Realty, 786.*
- (t) Rents and Profits, 787.*
- (u) Subsequently Acquired Realty, 787.*

#### *(2) Personal Estate, 787.*

- (a) In General, 787.*
- (b) Choses in Action, 788.*
- (c) Oil or Mining License, 788.*

### *e. Amount of Lien, 788.*

### *f. Territorial Extent, 788.*

- (1) Judgments in State Courts, 788.*
- (2) Judgments in Federal Courts, 790.*

### *g. Commencement and Precedence of Lien, 790.*

- (1) In General, 790.*
- (2) Doctrine of Relation, 793.*
- (3) Priority by Fractional Part of Day, 794.*
- (4) Priority as Affected by Issuance of Execution, 795.*
- (5) Priority of Lien in Some Specific Instances, 797.*
  - (a) Against Equitable Interests, 797.*
  - (b) Against Lands Fraudulently Conveyed, 797.*
  - (c) After-acquired Property, 797.*
  - (d) Judgment for Future Advances, 798.*
  - (e) Judgment to Secure Purchase Money, 798.*
- (6) Superior Rights of Third Persons, 798.*
  - (a) In General, 798.*
  - (b) Lands Instantaneously Seized, 799.*
  - (c) Effect of Nunc Pro Tunc Entry of Judgment, 800.*

### *h. Expiration or Extinguishment of Lien, 800.*

- (1) In General, 800.*
- (2) Expiration of Statutory Period, 800.*
  - (a) In General, 800.*
  - (b) Extension of Lien, 802.*
    - aa. Issuance of Execution, 802.*
    - bb. Proceedings Operating to Stay Execution, 802.*
      - (aa) In General, 802.*
      - (bb) Judgment Entered With Stay of Execution, 803.*
      - (cc) Appeal or Writ of Error, 803.*
      - (dd) Injunction, 803.*
    - cc. Agreement, 804.*
    - dd. Death of Judgment Debtor, 804.*



## JUDGMENTS AND DECREES.

*ee. War, 804.*

*ff. Revivor of Judgment, 804.*

- (3) *Release, 805.*
- (4) *Entry of Satisfaction, 805.*
- (5) *Sale of Lands under Execution, 806.*
- (6) *Levy on Personalty, 806.*
- (7) *Imprisonment on Capias ad Satisfaciendum, 806.*
- (8) *Appeal or Writ of Error, 806.*
- (9) *Injunction, 807.*
- (10) *Stay of Execution, 807.*
- (11) *Reversal or Cancellation of Judgment, 807.*
- (12) *Merger, 808.*
- (13) *Payment, 808.*
- (14) *Bankruptcy and Insolvency of Debtor, 808.*
- (15) *Effect of Division of Old County into New County, 808.*

### V. DIRECT ATTACK BY APPEAL OR WRIT OF ERROR, 808.

1. *In General, 808.*
2. *Effect of Reversal, 808.*
  - a. In General, 808.*
  - b. Rights of Third Persons, 810.*
  - c. Where Property Has Been Taken under the Judgment, 810.*
3. *Effect of Modification, 811.*
4. *Effect of Affirmance or Dismissal of Appeal or Writ of Error, 811.*
5. *Costs, 812.*

### VI. CONTROL OF COURT OVER JUDGMENTS DURING TERM AT WHICH RENDERED, 813.

1. *In General — Power to Amend, Open, or Vacate, 813.*
2. *To What Cases the Power Extends, 815.*
3. *What Errors May Be Corrected, 815.*
4. *When Power Will Not Be Exercised, 815.*
5. *Setting Aside Judgment After Appeal Perfected or Bill of Exceptions Taken, 815.*
6. *Duration of Term, 815.*
7. *Proceedings Commenced During Term but Continued to Subsequent Term, 815.*

### VII. AMENDMENT AFTER TERM AT WHICH RENDERED, 816.

1. *As to Matters of Substance, 816.*
  - a. General Rule Stated, 816.*
  - b. To What Judgments the Rule Applies, 817.*
2. *As to Matters of Form, 818.*
  - a. General Rule, 818.*
  - b. Applications of the Rule, 819.*
    - (1) *Natural Applications, 819.*
    - (2) *Strained Application in the Interest of Justice, 822*
      - (a) *In General, 822.*
      - (b) *Amendment as to Method of Payment, 822.*
3. *Evidence to Procure Amendment, 822.*
4. *Notice, 823.*
5. *Effect of Amendment as to Third Persons, 823.*

### VIII. OPENING AND VACATION AFTER TERM AT WHICH RENDERED, 824.

1. *General Rule Against Opening or Vacation, 824.*
2. *Grounds upon Which Judgments May Be Opened or Vacated, 825.*
  - a. Introductory, 825.*
  - b. Judgment Void — Lack of Jurisdiction, 825.*
  - c. Fraud or Collusion, 827.*
  - d. Irregularities, 828.*
  - e. Mistake, Surprise, or Excusable Neglect, 830.*
    - (1) *Mistake, 830.*



## JUDGMENTS AND DECREES.

- (2) *Surprise*, 831.
- (3) *Excusable Neglect — Inadvertence*, 831.
- (4) *Party Who Was Represented by Counsel May Have Relief*, 832.
- (5) *What Mistake or Neglect of Attorney May Afford Ground for Relief*, 833.
- (6) *When Public Corporation Not Entitled to Relief*, 834.
- (7) *Judgment on Verdict*, 834.
- f. *Casualty or Misfortune*, 834.
- g. *Sickness of Party or Attorney*, 835.
- h. *Newly Discovered Evidence*, 835.
- i. *Want of Notice*, 835.
- j. *Judgment Contrary to Agreement*, 835.
- k. *Unauthorized Appearance by Attorney*, 836.
- l. *Absence of Defendant*, 836.
- m. *Disabilities of Defendant*, 837.
- n. *Reversal of Foreign Judgment on Which Judgment Is Based*, 837.
- o. *Unauthorized Entry*, 837.
- p. *Error*, 838.
- q. *Defenses Available at Trial*, 838.
3. *Submission of Parties to Jurisdiction*, 838.
4. *Who May Apply for Opening or Vacation*, 839.
  - a. *General Rule*, 839.
  - b. *Limitations of the Rule*, 839.
  - c. *Party in Whose Favor Judgment Rendered*, 840.
  - d. *Legal Representatives of Party*, 840.
5. *Time for Applying*, 840.
  - a. *Under Statutes*, 840.
    - (1) *In General*, 840.
    - (2) *When Statutory Period Begins to Run*, 841.
  - b. *In the Absence of Statute*, 841.
    - (1) *Requirement of Diligence*, 841.
    - (2) *What Delay Will Bar Relief*, 841.
    - (3) *Where Party Had No Notice of Judgment*, 842.
  - c. *Rule as to Void Judgments*, 842.
6. *Jurisdiction to Open or Vacate*, 842.
7. *Notice*, 843.
8. *Burden of Proof*, 843.
9. *Discretion of Court*, 844.
10. *Existence of Meritorious Defense Must Be Shown*, 846.
11. *Imposition of Terms*, 847.
12. *Appeal*, 848.

### IX. COLLATERAL ATTACK, 848.

### X. EQUITABLE RELIEF AGAINST JUDGMENTS, 850.

### XI. ARREST OF JUDGMENT, 850.

1. *In General*, 850.
2. *Grounds of Arrest*, 850.
  - a. *Errors Apparent on Face of Record*, 850.
  - b. *Error Which Would Be Fatal on Demurrer*, 851.
  - c. *Defect in Pleadings*, 851.
  - d. *Variance*, 853.
  - e. *Objections as to Jurisdiction*, 854.
  - f. *Indictment under Repealed Statute*, 854.
  - g. *Objections to the Jury*, 854.
  - h. *Defect in Verdict*, 855.
  - i. *Defects and Irregularities as to Parties*, 855.
  - j. *Errors of Committing Magistrate*, 855.
  - k. *Record Showing that Defendant Should Be Released*, 855.
  - l. *Statute of Limitations*, 855.



- m. Other Objections, 855.*
- n. Statutory Grounds, 857.*
- 3. *Who May Move in Arrest, 857.*
- 4. *Time for Moving in Arrest, 858.*
- 5. *Effect of Arrest, 858.*
- 6. *Arrest of Judgment in Civil Action Abolished in Maine, 858.*

## **XII. SATISFACTION AND DISCHARGE, 858.**

- 1. *Payment to Whom, 858.*
  - a. In General, 858.*
  - b. One of Joint Judgment Creditors, 858.*
  - c. Real Party in Interest, 859.*
  - d. Attorney of Judgment Creditor, 859.*
  - e. Next Friend of Infant, 859.*
  - f. Officers Authorized by Law to Receive Payment, 860.*
  - g. After Assignment, 860.*
- 2. *Medium of Payment, 861.*
  - a. Where Payment to Judgment Creditor, 861.*
  - b. Where Payment to Attorney or Officer, 862.*
- 3. *Effect of Tender, 862.*
- 4. *Effect of Payment, 862.*
  - a. When Made by One Primarily Liable, 862.*
    - (1) *Absolute Satisfaction, 862.*
    - (2) *Where Several Joint Debtors, 863.*
    - (3) *Cumulative Judgments, 863.*
      - (a) *Against Same Person for Same Cause, 863.*
      - (b) *Against Different Persons for Same Cause, 863.*
  - b. Subrogation of Payor to Rights of Creditor, 864.*
- 5. *Effect of Part Payment, 864.*
  - a. Common-law Rule, 864.*
  - b. When Rule Not Applicable, 864.*
- 6. *Evidence of Payment, 865.*
  - a. Record Entry, 865.*
  - b. Receipt, 866.*
  - c. Parol Evidence, 866.*
  - d. Burden of Proof, 866.*
- 7. *Presumption of Satisfaction from Lapse of Time, 866.*
  - a. Arises After Twenty Years, 866.*
  - b. Presumption Not Conclusive, 867.*
  - c. Evidence in Rebuttal, 867.*
    - (1) *In General, 867.*
    - (2) *Partial Payment, 867.*
    - (3) *Poverty or Insolvency of Debtor, 868.*
    - (4) *Admissions, 868.*
  - d. Question for Court or Jury, 868.*
  - e. Where Less than Twenty Years Have Elapsed, 868.*
    - (1) *Mere Lapse of Time, 868.*
    - (2) *Lapse of Time in Connection with Other Circumstances, 868.*
- 8. *Satisfaction by Set Off, 868.*
- 9. *Satisfaction by Proceedings under Final Process, 869.*
  - a. Executions Against Property, 869.*
    - (1) *Personal Property, 869.*
    - (2) *Real Property, 869.*
    - (3) *Sale under Execution, 869.*
    - (4) *Effect of Forthcoming or Delivery Bond, 869.*
  - b. Executions Against the Person, 869.*
- 10. *Proceedings After Satisfaction in Fact, 869.*
  - a. Compelling Entry of Satisfaction, 869.*
    - (1) *Power of Court to Compel, 869.*
    - (2) *Grounds for Compelling, 870.*



## JUDGMENTS AND DECREES.

- b. Vacating Entry of Satisfaction, 871.*
  - (1) *Power to Vacate, 871.*
  - (2) *Operation and Effect, 871.*
  - (3) *Grounds for Vacating, 871.*

### XIII. ASSIGNMENT OF JUDGMENTS, 872.

- 1. *What Judgments Assignable, 872.*
  - a. Assignability at Common Law, 872.*
  - b. Assignability under Statutes, 873.*
  - c. Judgment for Tort, 873.*
  - d. Future Judgment, 874.*
    - (1) *Where Cause Not Assignable, 874.*
    - (2) *Where Cause Assignable, 874.*
  - e. Partial Assignment, 874.*
    - (1) *Necessity for Judgment Debtor's Consent, 874.*
    - (2) *As Equitable Assignment, 875.*
- 2. *Who May Assign, 875.*
  - a. In General, 875.*
  - b. Attorney, 876.*
- 3. *Method and Form of Assignment, 876.*
  - a. Statutory Assignments, 876.*
    - (1) *In General, 876.*
    - (2) *Statutes Cumulative Only, 877.*
  - b. Equitable Assignments, 877.*
    - (1) *No Particular Form Necessary, 877.*
    - (2) *May Be by Parol, 878.*
    - (3) *Necessity to Record Assignment, 878.*
    - (4) *Proof of Assignment, 878.*
      - (a) *Necessity for, 878.*
      - (b) *Parol Evidence to Show Intent, 879.*
  - c. Sale under Execution, 879.*
- 4. *Notice of Assignment, 879.*
  - a. Necessity For, 879.*
  - b. Rights of Judgment Debtor Before Notice, 879.*
  - c. Effect of Notice to Judgment Debtor, 880.*
  - d. What Constitutes Notice to Judgment Debtor, 880.*
  - e. Duty of Sheriff After Notice of Assignment, 881.*
- 5. *Effect of Assignment, 881.*
  - a. In General, 881.*
  - b. Implied Warranty, 881.*
    - (1) *That Judgment Subsisting and Unpaid, 881.*
    - (2) *No Warranty of Payment, 882.*
  - c. What Rights Pass with Assignment, 882.*
  - d. What Rights Do Not Pass, 883.*
  - e. Assignee's Title No Better than Assignor's, 883.*
  - f. Good Faith in Assignment, 884.*
  - g. Purchase for Less than Face Value, 884.*
  - h. Assignee Taking Subject to Equities, 884.*
    - (1) *General Rule, 884.*
    - (2) *What Equities Not Within the Rule, 885.*
      - (a) *Equities Arising from Other Transactions, 885.*
      - (b) *Secret Equities of Third Persons, 885.*
    - (3) *Effect of Assignment on Right of Set-off, 885.*
  - i. Effect of Reversal or Vacation After Assignment, 885.*

### XIV. JUDGMENTS IN EVIDENCE, 886.

#### CROSS-REFERENCES.

*For matters of PROCEDURE, see the ENCYCLOPEDIA OF PLEADING AND PRACTICE, vol. 11, p. 806, and references there given.*



For other matters of *SUBSTANTIVE LAW* and *EVIDENCE*, related to this subject, see the following titles in this work: *ACCORD AND SATISFACTION*, vol. 1, p. 408; *ARBITRATION AND AWARD*, vol. 2, p. 533; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *CLERKS OF COURTS*, vol. 6, p. 132; *EQUITY*, vol. 11, p. 145; *EXECUTIONS*, vol. 11, p. 604; *FINAL JUDGMENTS AND DECREES*, vol. 13, p. 23; *FOREIGN JUDGMENTS*, vol. 13, p. 974; *INJUNCTIONS*, vol. 16, p. 337; *INTEREST*, vol. 16, p. 984; *JUDGE*, *ante*; *JURISDICTION*, *post*; *LIMITATION OF ACTIONS*; *MERGER*; *PAYMENT*; *PRIVATE INTERNATIONAL LAW*; *RECORDS*; *RELEASE*; *SET-OFF*, *RECOUPMENT*, AND *COUNTERCLAIM*; *SUBROGATION*.

**I. DEFINITIONS AND GENERAL CONSIDERATIONS — 1. Definitions.** — A judgment is a decision or sentence of the law given by a court of justice or other competent tribunal as a result of proceedings instituted therein.<sup>1</sup> While usually the term "judgment" denotes the determination of an action by a court of law, yet in a large sense it embraces the decision of any court,<sup>2</sup> including courts of equity,<sup>3</sup> admiralty,<sup>4</sup> and probate.<sup>5</sup>

**Decrees.** — But the judgment of a court of equity or admiralty, as distinguished from the judgment of a court of common law, is generally known as a decree,<sup>6</sup> and this term usually applies to the judgment of a court of probate.<sup>7</sup>

**Under the Codes.** — In several of the states a judgment is defined by the codes as a final determination of the parties in an action or proceeding.<sup>8</sup> Under the codes abolishing the distinction between actions at law and suits in equity, a decree is included in the code definition of a judgment, and a final determination of a cause is a judgment whether the relief granted be equitable or legal.<sup>9</sup>

**1. Judgment Defined.** — *Smith v. Shawhan*, 37 Iowa 533; *Crippen v. People*, 8 Mich. 124; *Blood v. Bates*, 31 Vt. 150.

For Other Definitions of similar import, see the following cases:

*United States.* — *Davidson v. Smith*, 1 Biss. (U. S.) 351.

*Colorado.* — *Cooper v. American Cent. Ins. Co.*, 3 Colo. 321.

*Connecticut.* — *Gould v. Hayes*, 71 Conn. 86.

*Florida.* — *Fraser v. Willey*, 2 Fla. 123.

*Iowa.* — *Gray v. Iliff*, 30 Iowa 196; *Zeigler v. Vance*, 3 Iowa 530.

*Louisiana.* — *Union Bank v. Marin*, 3 La. Ann. 35.

*Maryland.* — *Truett v. Legg*, 32 Md. 147.

*Michigan.* — *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220.

*Minnesota.* — *Ætna Ins. Co. v. Swift*, 12 Minn. 437; *Karns v. Kunkle*, 2 Minn. 313.

*Missouri.* — *Eppright v. Kauffman*, 90 Mo. 25.

*New Jersey.* — *Evans v. Adams*, 15 N. J. L. 383; *Nichols v. Dissler*, 31 N. J. L. 473, 86 Am. Dec. 219.

*New York.* — *McNulty v. Hurd*, 72 N. Y. 521; *Matter of Negus*, 10 Wend. (N. Y.) 44; *Thompson v. People*, 23 Wend. (N. Y.) 587.

*Pennsylvania.* — *Blystone v. Blystone*, 51 Pa. St. 373.

*Texas.* — *Fordyce v. Beecher*, 2 Tex. Civ. App. 29.

*Wisconsin.* — *Blaikie v. Griswold*, 10 Wis. 293.

**Findings.** — A distinction must be made between a judgment and a finding of court, for a finding amounts to nothing more than an order for judgment. *Gomer v. Chaffe*, 5 Colo. 383; *Alvord v. McGaughey*, 5 Colo. 244; *State*

*v. Brown*, 44 Ind. 329; *Andrews v. Welch*, 47 Wis. 134.

So a judgment is to be distinguished from the finding of a committee, *Cothren v. Olmsted*, 57 Conn. 329; or of a referee, *Demens v. Poyntz*, 25 Fla. 654; *Sheldon v. Mirick*, 144 N. Y. 502.

**2.** *Patterson v. Scott*, 33 Ill. App. 348.

**3. Decree in Equity Included in Judgment in Broad Sense.** — *Green v. Foley*, 2 Stew. & P. (Ala.) 441; *Forsythe v. Richardson*, 1 Idaho 459; *Patterson v. Scott*, 33 Ill. App. 348; *Ex p. Farrars*, 13 S. Car. 254; *Halbert v. Alford*, (Tex. 1891) 16 S. W. Rep. 815. See also *Ward v. Kenner*, (Tenn. Ch. 1896) 37 S. W. Rep. 707; *Hutcheson v. Grubbs*, 80 Va. 253; *Kramer v. Rebman*, 9 Iowa 114.

**4. Decree in Admiralty Included in Judgment in Broad Sense.** — *U. S. v. Wonsom*, 1 Gall. (U. S.) 5.

**5.** See generally the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720.

**6. Decrees Distinguished from Judgments at Law.** — *Burrill's Law Dict.*; *Loyd v. Hicks*, 31 Ga. 140. See *Ward v. Kenner*, (Tenn. Ch. 1896) 37 S. W. Rep. 707.

**7.** See generally the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720.

**8. Code Definition.** — *Crim. v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491; *Matter of Smith*, 122 Cal. 462; *Walker v. Walker*, 93 Iowa 643; *Callanan v. Votruba*, 104 Iowa 672; *Dullard v. Phelan*, 83 Iowa 471; *Smith v. Shawhan*, 37 Iowa 533; *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 123; *In re Sedgely Ave.*, 88 Pa. St. 513.

**9. Decree Included in Code Definition of Judgment.** — *Kimball v. Connor*, 3 Kan. 415; *State*



2. **Kinds of Judgments and Decrees** — *a.* IN GENERAL. — Judgments have been said to be of four sorts: first, where the facts are confessed by the parties, and the law is determined by the courts, as in case of judgment upon demurrer; secondly, where the law is admitted by the parties, and the facts are disputed, as in case of judgment on a verdict; thirdly, where both the facts and the law arising thereon are admitted by the defendant, which is the case of judgment by confession or default; or, lastly, where the plaintiff is convinced that either facts, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a nonsuit or retraxit.<sup>1</sup>

A Full Discussion of This Question will not be attempted here, and reference is made to a more detailed treatment elsewhere.<sup>2</sup>

*b.* FINAL AND INTERLOCUTORY JUDGMENTS DISTINGUISHED. — Interlocutory judgments and decrees are distinguishable from final judgments and decrees in that the former do not dispose of the cause, but reserve some further question or direction for future determination.<sup>3</sup>

**Orders.** — The term "order" is sometimes applied to an interlocutory judgment or decree.<sup>4</sup> Indeed, under the codes of several of the states, interlocutory judgments and decrees are no longer recognized, and orders have been substituted instead.<sup>5</sup> An order under the code has been defined to be a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect.<sup>6</sup>

*c.* DOMESTIC AND FOREIGN JUDGMENTS DISTINGUISHED. — A judgment or decree is distinguishable as domestic or foreign according as it is or is not rendered in the country or state in which it is relied on as establishing a right.<sup>7</sup>

*d.* DISTINCTION BETWEEN JUDGMENTS IN REM AND IN PERSONAM. — A judgment or decree *in rem* has been said to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose.<sup>8</sup> It differs from a judgment or decree *in personam* in this, that the latter is in form as well as in substance between the parties claiming the right in controversy.<sup>9</sup>

3. **Whether a Judgment Is a Contract.** — For certain purposes at least, judgments have frequently been held to be contracts,<sup>10</sup> and by some of the authori-

*v. McArthur*, 5 Kan. 280; *Hughes v. Shreve*, 3 Met. (Ky. 547; *Croghan v. Livingston*, 17 N. Y. 226.

1. **Classification of Judgments and Decrees.** — 3 Black. Com. 395; *Derby v. Jacques*, 1 Cliff. (U. S.) 432; *Blaikie v. Griswold*, 10 Wis. 293.

2. See the title JUDGMENTS, ENCYC. OF PL. AND PR., vol. 11, p. 836. See also the title DECREES, ENCYC. OF PL. AND PR., vol. 5, p. 950.

3. *Chouteau v. Rice*, 1 Minn. 24; *Halbert v. Alford*, (Tex. 1891) 16 S. W. Rep. 814.

For the definition and full discussion of final judgments and decrees, see the title FINAL JUDGMENTS AND DECREES, vol. 13, p. 24.

4. **Orders.** — *Halbert v. Alford*, (Tex. 1891) 16 S. W. Rep. 814.

5. *Loring v. Illsley*, 1 Cal. 27; *Gilman v. Contra Costa County*, 8 Cal. 57, 68 Am. Dec. 290; *Matter of Rose*, 80 Cal. 166; *Sellers v. Union Lumbering Co.*, 36 Wis. 398; *Singer v. Heller*, 40 Wis. 144. See further on this question the title ORDERS, ENCYC. OF PL. AND PR., vol. 15, p. 315.

6. **Code Definition of Order.** — *Loring v. Illsley*, 1 Cal. 28.

7. For a full discussion of foreign judgments, see the title FOREIGN JUDGMENTS, vol. 13, p. 974.

8. **Judgment in Rem Defined** — *Alabama*. — *Martin v. King*, 72 Ala. 360.

*Indiana*. — *Fee v. Moore*, 74 Ind. 323.

*New Jersey*. — *Price v. Lawton*, 27 N. J. Eq. 325.

*Ohio*. — *Cross v. Armstrong*, 44 Ohio St. 624.

*Nevada*. — *State v. Central Pac. R. Co.*, 10 Nev. 80.

*Vermont*. — *Woodruff v. Taylor*, 20 Vt. 73. See also vol. 16, p. 129.

9. **Judgment in Rem Distinguished from Judgment in Personam.** — *Hine v. Hussey*, 45 Ala. 515; *Allen v. Morris*, 34 N. J. L. 162; *Woodruff v. Taylor*, 20 Vt. 73; *Bruff v. Thompson*, 31 W. Va. 27.

As to the distinction between judgments *in rem* and judgments *in personam* as *res judicata*, see the title RES JUDICATA.

10. **Judgments Held to Be Contracts** — *Alabama*. — *Weaver v. Lapsley*, 43 Ala. 224.

*California*. — *Stuart v. Lander*, 16 Cal. 372; *Reed v. Eldredge*, 27 Cal. 348.



ties have been treated as belonging to that class of contracts known as specialties.<sup>1</sup> But as a general rule it may be stated that judgments are not to be regarded as contracts, since they lack the element of agreement of the parties essential to a valid contract, a judgment usually being against the will of the defendant.<sup>2</sup> This question has arisen for determination most frequently in connection with the construction of some particular statute relating to contracts, and hence the conflicting conclusions that have been reached, and this sometimes even in the same jurisdiction.<sup>3</sup>

4. **Whether Operative as Assignment or Conveyance.** — It has been held that a judgment is not an assignment, since it is the act of the law and not of a party.<sup>4</sup> Nor, it has been held, can a decree of itself operate as a conveyance of land,<sup>5</sup> apart from statutory provision to that effect.<sup>6</sup>

II. REQUISITES OF VALID JUDGMENT — 1. In General. — Questions of the validity of judgments and decrees as affected by matters of substance, such as jurisdiction, fraud, or irregularities, will be found discussed in other portions

*Indiana.* — *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354.

*Iowa.* — *Farmers', etc., Bank v. Mather*, 30 Iowa 283.

*Kentucky.* — *Gebhard v. Garnier*, 12 Bush (Ky.) 324, 23 Am. Rep. 721.

*Massachusetts.* — *Way v. Richardson*, 3 Gray (Mass.) 412, 63 Am. Dec. 760.

*Michigan.* — *Wattles v. Wayne Circuit Judge*, 117 Mich. 662.

*New York.* — *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *M'Guire v. Gallagher*, 2 Sandf. (N. Y.) 402; *Taylor v. Root*, 4 Keyes (N. Y.) 335.

*North Carolina.* — *McDonald v. Dickson*, 87 N. Car. 404; *Moore v. Nowell*, 94 N. Car. 265.

*Vermont.* — *Sawyer v. Vilas*, 19 Vt. 43.

*Wisconsin.* — *Childs v. Harris Mfg. Co.*, 68 Wis. 231.

See also *Burnes v. Simpson*, 9 Kan. 658.

**Viewed as Contracts with Reference to Remedies.** — Thus it has been held that judgments are classified with contracts with reference to remedies upon them.

*Iowa.* — *Johnson v. Butler*, 2 Iowa 535.

*Michigan.* — *Wattles v. Wayne Circuit Judge*, 117 Mich. 665.

*New York.* — *Mallory v. Leach*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 507; *Crane v. Crane*, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 691; *Taylor v. Root*, 4 Keyes (N. Y.) 335; *Gutta Percha, etc., Mfg. Co. v. Houston*, 108 N. Y. 276, 2 Am. St. Rep. 412; *Barnes v. Smith*, (N. Y. Super. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 420; *Mahaney v. Penman*, 4 Duer (N. Y.) 603.

*Oregon.* — *Meyer v. Brooks*, 29 Oregon 203, 54 Am. St. Rep. 790.

*Vermont.* — *Sawyer v. Vilas*, 19 Vt. 43.

On the other hand, it has been held that a judgment is not a contract within the meaning of a statute requiring actions upon contracts to be brought in the name of the real party in interest. *Smith v. Harrison*, 33 Ala. 706; *Masterson v. Gibson*, 56 Ala. 56; *Lovins v. Humphries*, 67 Ala. 437; *Wolffe v. Eberlein*, 74 Ala. 99.

1. **Judgments Regarded as Specialties.** — *Morse v. Toppan*, 3 Gray (Mass.) 411. See also *Burnes v. Simpson*, 9 Kan. 658. Compare *Tyler v. Winslow*, 15 Ohio St. 364; *Kimball v. Whitney*, 15 Ind. 280.

2. **General Rule that Judgments Are Not Contracts** — *England.* — *Bidleson v. Whytel*, 3 Burr. 1545.

*United States.* — *Todd v. Crumb*, 5 McLean (U. S.) 172; *Louisiana v. New Orleans*, 109 U. S. 285; *Wadsworth v. Henderson*, 16 Fed. Rep. 447; *Chase v. Curtis*, 113 U. S. 452; *Freeland v. Williams*, 131 U. S. 405; *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162.

*Alabama.* — *Smith v. Harrison*, 33 Ala. 706; *Masterson v. Gibson*, 56 Ala. 56; *Lovins v. Humphries*, 67 Ala. 437; *Wolffe v. Eberlein*, 74 Ala. 99.

*California.* — *Larrabee v. Baldwin*, 35 Cal. 156.

*Illinois.* — *Williams v. Waldo*, 4 Ill. 264; *Rae v. Hulbert*, 17 Ill. 572; *Belford v. Woodward*, 55 Ill. App. 308.

*Kentucky.* — *U. S. Bank v. Dallam*, 4 Dana (Ky.) 574.

*Maine.* — *Jordan v. Robinson*, 15 Me. 168.

*Missouri.* — *Sheehan, etc., Transp. Co., v. Sims*, 28 Mo. App. 64.

*New York.* — *McCoun v. New York Cent., etc., R. Co.*, 50 N. Y. 176; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316.

*South Carolina.* — *In re Kennedy*, 2 S. Car. 226.

*Wyoming.* — *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494.

3. *Sheehan, etc., Transp. Co. v. Sims*, 28 Mo. App. 64.

For a discussion of the question as to whether judgments are contracts within the meaning of statutes of limitations prescribing the periods in which actions upon contracts must be instituted, see the title LIMITATION OF ACTIONS.

For other discussions of this question, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1038; INTEREST, vol. 16, p. 1063; SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

4. *Breeding v. Boggs*, 20 Pa. St. 33.

5. *Proctor v. Ferebee*, 1 Ired. Eq. (36 N. Car.) 143, 36 Am. Dec. 34; *Wallis v. Wilson*, 34 Miss. 357.

6. *Price v. Sisson*, 13 N. J. Eq. 168; *Morris v. White*, 96 N. Car. 91. See also the title SPECIFIC PERFORMANCE.



of this work.<sup>1</sup> The formal requisites of judgments and decrees will also be found fully discussed in their appropriate places elsewhere.<sup>2</sup>

**2. Judgments by Confession** — *a. AT COMMON LAW.* — At common law a judgment by confession is a judgment entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea of other allegation.<sup>3</sup> A full discussion of this class of judgments by confession will be found elsewhere.<sup>4</sup>

*b. UNDER STATUTES* — (1) *In General.* — But under statute, in most jurisdictions at least, provision is made for the confession of judgments without the institution of action or suit.<sup>5</sup> Such statutes, it has been held, must be strictly construed.<sup>6</sup>

(2) *For What Claims Confession May Be Made* — (a) *In General.* — A confession of judgment, to be valid, must be for a debt due or to become due<sup>7</sup> and for a certain and specified sum.<sup>8</sup>

(b) *Debts Not Due.* — In most jurisdictions confession of judgment before the maturity of the debt is allowed by statute.<sup>9</sup>

(c) *Future Advances.* — So it is the rule in many jurisdictions that the judgment may be confessed to secure future advances and responsibilities to the extent of the amount of the judgment, where this arrangement forms a part of the original agreement between the parties.<sup>10</sup>

1. See *infra*, this title, *Opening and Vacation After Term at Which Rendered; Collateral Attack*. See also the title *JURISDICTION, post*.

As to the power of the legislature to validate or invalidate judgments, see the title *CONSTITUTIONAL LAW*, vol. 6, p. 1040.

As to the validity of advisory judicial opinions, see the title *CONSTITUTIONAL LAW*, vol. 6, p. 1065.

2. See the title *JUDGMENTS, ENCYC. OF PL. AND PR.*, vol. 11, p. 796.

3. *Judgments by Confession at Common Law.* — Bouv. L. Dict.; Terrill v. Van Bibber, 3 La. Ann. 634; Burr v. Mathers, 51 Mo. App. 470; Hunter v. Eddy, 11 Mont. 259.

4. See the titles *COGNOVIT, ENCYC. OF PL. AND PR.*, vol. 4, p. 560; *JUDGMENTS*, vol. 11, p. 973.

5. *Statutory Confession of Judgment Without Action* — *Illinois.* — Little v. Dyer, 138 Ill. 272, 32 Am. St. Rep. 140.

*Iowa.* — Edgar v. Greer, 7 Iowa 136; Dullard v. Phelan, 83 Iowa 476.

*New Jersey.* — Clapp v. Ely, 27 N. J. L. 555.

*Ohio.* — Rosebrough v. Ansley, 35 Ohio St. 107.

*South Carolina.* — *Ex p.* Ware Furniture Co., 49 S. Car. 20.

*Vermont.* — Henry v. Estes, 127 Mass. 474, decided under Vermont statute.

*Virginia.* — Brockenbrough v. Brockenbrough, 31 Gratt. (Va.) 580; Shadrack v. Woolfolk, 32 Gratt. (Va.) 707; Saunders v. Lipscomb, 90 Va. 647.

*Washington.* — Puget Sound Nat. Bank v. Levy, 10 Wash. 499.

But see Buchanan v. Scandia Plow Co., 6 Colo. App. 34; Abbott v. Yuma County, 18 Colo. 6.

And see the statutes of the various states.

6. *Strict Construction of Statute Necessary.* — Gardner v. Bunn, 132 Ill. 408; Edgar v. Greer, 7 Iowa 136; Utah Nat. Bank v. Sears, 13 Utah 172. Compare Saunders v. Lipscomb, 90 Va. 647.

7. *Confession Must Be for Debt Due or to Become Due.* — Rea v. Forrest, 88 Ill. 275; West v. Carter, 129 Ill. 249; Forrester v. Strauss, (Supm. Ct. Spec. T.) 21 Civ. Pro. (N. Y.) 166.

8. *Confession Must Be for Sum Certain.* — Curtice v. Scovel, 1 Root (Conn.) 328, 421; Curtice v. Bulkley, 1 Root (Conn.) 329; Talcott v. Sylvester, 2 Root (Conn.) 443; Little v. Dyer, 138 Ill. 272, 32 Am. St. Rep. 140; Vanderveer v. Ingleton, 7 N. J. L. 140; Nichols v. Hewitt, 4 Johns (N. Y.) 423.

9. *Confession of Judgment Before Maturity of Debt* — *California.* — Pond v. Davenport, 45 Cal. 225.

*Illinois.* — Cohen v. Burgess 44 Ill. App. 206; Elkins v. Wolfe, 44 Ill. App. 376; Blanck v. Medley, 63 Ill. App. 211; McDonald v. Chisholm, 131 Ill. 273; Farwell v. Huston, 151 Ill. 239, 42 Am. St. Rep. 237.

*Indiana.* — Robertson v. Huffman, 92 Ind. 247; Calloway v. Byram, 95 Ind. 423.

*Iowa.* — McClish v. Manning, 3 Greene (Iowa) 223.

*Mississippi.* — Black v. Pattison, 61 Miss. 599.

*Missouri.* — Mechanics' Bank v. Mayer, 93 Mo. 417; Mendel v. Mayer, (Mo. 1888) 7 S. W. Rep. 5.

*New York.* — Teel v. Yost, 128 N. Y. 387.

*Pennsylvania.* — Integrity Title Ins., etc., Co. v. Rau, 153 Pa. St. 488, 32 W. N. C. (Pa.) 83.

See also Reid v. Southworth, 71 Wis. 288. Compare Clapp v. Ely, 10 N. J. Eq. 178, 27 N. J. L. 555; Blackwell v. Rankin, 7 N. J. Eq. 152; Sayre v. Hewes, 32 N. J. Eq. 652; Warwick v. Petty, 44 N. J. L. 542; Sterling v. Fleming, 53 N. J. L. 652.

10. *Confession of Judgment to Secure Future Advances.* — Robinson v. Consolidated Real Estate, etc., Co., 55 Md. 105; Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320; Averill v. Loucks, 6 Barb. (N. Y.) 19; Lansing v. Woodworth, 1 Sandf. Ch. (N. Y.) 43; Hammond v. Bush, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.)



(d) **Contingent Liabilities.** — Also, under statute in many states a judgment may be confessed to secure a person against a contingent liability.<sup>1</sup>

(e) **Torts.** — But a confession of a judgment for a tort has been held to be invalid.<sup>2</sup>

(3) *By and for Whom Confession May Be Made* — **In General.** — As a general rule, judgment may be confessed by or in favor of any person natural or artificial, capable of suing or being sued, or of being bound by judgments in general.<sup>3</sup>

**Corporation or Partnership.** — Thus a judgment may be confessed by a corporation<sup>4</sup> or a partnership.<sup>5</sup>

**Married Women.** — At common law a married woman has no power to make a confession of judgment or to execute a warrant of attorney to confess judgment.<sup>6</sup> But a different rule prevails under statutes giving a *feme covert* the capacity to contract the obligation which the confession of judgment is designed to enforce, and making her liable to be sued in a court of law.<sup>7</sup>

**Joint Debtor.** — As a general rule, one joint debtor cannot confess judgment so as to make it binding on the other debtor not joining in the confession.<sup>8</sup>

**Agent or Attorney.** — The rule is established in most jurisdictions that a confession of judgment may be made by an agent or attorney, duly authorized by a warrant or power of attorney.<sup>9</sup>

152; *Livingston v. M'Inlay*, 16 Johns. (N. Y.) 165; *Wilder v. Fonday*, 4 Wend. (N. Y.) 100; *Truscott v. King*, 6 N. Y. 147; *Cook v. Whipple*, 55 N. Y. 150, 14 Am. Rep. 202; *Ter Hoven v. Kerns*, 2 Pa. St. 96; *Shenk's Appeal*, 33 Pa. St. 371; *Parmentier v. Gillespie*, 9 Pa. St. 86; *Kunynybacher v. Charles*, (Pa.) 1 Am. L. Reg. 634.

1. **Confession of Judgment to Secure Against Contingent Liability.** — *Marks v. Reynolds*, (Supm. Ct. Gen. T.) 12 Abb. Pr. (N. Y.) 403; *Allen v. Norton*, 6 Oregon 344; *Miller v. Howry*, 3 P. & W. (Pa.) 374, 24 Am. Dec. 320; *Stewart v. Stocker*, 1 Watts (Pa.) 135; *McClure v. Roman*, 52 Pa. St. 458; *Pennock v. Copeland*, 1 Phila. (Pa.) 29, 7 Leg. Int. (Pa.) 19; *Ford v. Elkin*, 2 Spears L. (S. Car.) 146. *Compare Talcott v. Sylvester*, 2 Root (Conn.) 443; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Sterling v. Fleming*, 53 N. J. L. 652.

**In Justice's Court.** — But in *Adams v. Tator*, 57 Hun (N. Y.) 322, 19 Civ. Pro. (N. Y.) 114, it was held that confessions of judgments for contingent liabilities in a justice's court were without authority.

2. **Confession of Judgment for Tort Invalid.** — *Burns v. Nash*, 23 Ill. App. 552; *Willer v. French*, 27 Ill. App. 76; *Burkham v. Van Saun*, (Supm. Ct. Spec. T.) 14 Abb. Pr. N. S. (N. Y.) 163; *Boutel v. Owens*, 2 Sandf. (N. Y.) 655.

3. **A Clerk of Court empowered to take and enter confessed judgments may enter a confession of judgment in his own favor**, *Moore v. Trimmer*, 32 S. Car. 511; or against himself, *Smith v. Mayo*, 83 Va. 910.

**Confession in Favor of State.** — In *State v. Love*, 1 Ired. L. (23 N. Car.) 264, it was held that a judgment by confession may be made in favor of the state.

**Infants.** — As to the power of an infant to execute a warrant of attorney to confess judgment, see the title **WARRANT OF ATTORNEY**. And see the title **AGENCY**, vol. 1, p. 941.

4. **Confession of Judgment by Corporation.** — *Snyder v. Bailey*, 165 Ill. 447; *Joliet Electric Light, etc., Co. v. Ingalls*, 23 Ill. App. 45; *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96;

*McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Nimocks v. Cape Fear Shingle Co.*, 110 N. Car. 20. See also the title **CORPORATIONS**, vol. 7, p. 854.

As to the power of a corporation to give a power of attorney to confess judgment, see **WARRANT OF ATTORNEY**.

5. **Confession of Judgment by Partnership.** — *Stevens v. Diehl*, 127 Pa. St. 416; *Alexander v. Alexander*, 85 Va. 353; *Pitts v. Spotts*, 86 Va. 71. See also the title **PARTNERSHIP**.

As to the capacity of a partnership to execute a warrant of attorney to confess judgment, see the title **WARRANT OF ATTORNEY**.

6. **Incapacity of Married Woman to Confess Judgment at Common Law.** — *Heywood v. Shreve*, 44 N. J. L. 94. See also the titles **AGENCY**, vol. 1, p. 942; **WARRANT OF ATTORNEY**.

**Antenuptial Debt.** — At common law, upon a warrant of attorney given by a *feme sole* to confess judgment for her antenuptial debt, a judgment may be entered against husband and wife by leave of court. *Anonymous*, 1 Show. 91. See also *Marder v. Lee*, 3 Burr. 1469.

And under a statute releasing the husband from liability for the wife's antenuptial debts, a married woman alone may confess judgment for her antenuptial debt. *Travis v. Willis*, 55 Miss. 557. To the same effect see *Baker v. Lukens*, 35 Pa. St. 146.

7. **Capacity of Married Woman under Statute to Confess Judgment.** — *Heywood v. Shreve*, 44 N. J. L. 96; *White v. Wood*, (Supm. Ct. Gen. T.) 15 Civ. Pro. (N. Y.) 187; *Adams v. Grey*, 154 Pa. St. 258; *Alexander v. Alexander*, 85 Va. 353.

8. **Confession of Judgment by Joint Debtor.** — *Wiggins v. Klienhaus*, 9 N. J. L. 249; *Ballinger v. Sherron*, 14 N. J. L. 144; *Tripp v. Saunders*, (Supm. Ct.) 59 How. Pr. (N. Y.) 379.

As to whether a partner may bind his partner or the partnership by a confession of judgment, see the title **PARTNERSHIP**.

9. For a full discussion of this question, see the title **WARRANT OF ATTORNEY**.

As to the power of an officer or agent to con-



(4) *Statement and Affidavit.* — It is usually required under the statutes that a statement in writing be made and signed by the defendant, verified by his oath, and filed with the clerk, setting forth the amount for which judgment is to be rendered and stating concisely the facts out of which the indebtedness arose, and that the sum confessed is justly due or to become due, as the case may be.<sup>1</sup>

(5) *Necessity of Assent of Creditor.* — To bind the creditor, his assent, either express or implied, must be obtained, as otherwise the judgment confessed might be greatly below the actual amount of the debt.<sup>2</sup> But though the judgment may have been confessed without the creditor's assent it may become binding upon him by a subsequent ratification.<sup>3</sup> It has been held, however, that such ratification can never override nor in any manner affect the rights of third persons acquired prior to the ratification.<sup>4</sup>

(6) *Time and Place of Making Confession.* — The statutes in most of the states authorize a confession of judgment to be made in vacation before the clerk of court as well as in term time.<sup>5</sup>

### 3. Judgments by Default. — A judgment goes by default whenever, between

fess judgment for a private corporation, see the title OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS)

As to the power of public officers to make confession of judgment for public corporations, see the title PUBLIC OFFICERS.

As to the power of a trustee to confess judgment against the trust estate, see the title TRUSTS AND TRUSTEES.

1. *Statement and Affidavit* — *United States.* — French v. Edwards, 5 Sawy. (U. S.) 266, decided under *California* statute.

*Colorado.* — Brown v. Miller, 11 Colo. 431.

*Illinois.* — Condon v. Besse, 86 Ill. 159; Alldritt v. Morrison First Nat. Bank, 22 Ill. App. 24; Chicago Fire Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 487, note.

*Indiana.* — Mavity v. Eastridge, 67 Ind. 211; Calley v. Morgan, 114 Ind. 350; Bible v. Voris, 141 Ind. 569; Davenport Mills Co. v. Chambers, 146 Ind. 156.

*Iowa.* — Edger v. Greer, 7 Iowa 136; Kendig v. Marble, 58 Iowa 529; Briggs v. Yetzer, 103 Iowa 342; Brown v. Bargrover, 82 Iowa 204; Dullard v. Phelan, 83 Iowa 471.

*Minnesota.* — Wells v. Gieseke, 27 Minn. 478; Atwater v. Manchester Sav. Bank, 45 Minn. 341; Hackney v. Wollaston, 73 Minn. 114.

*Missouri.* — Hard v. Foster, 98 Mo. 297; Gilbert v. Gilbert, 33 Mo. App. 259; J. H. Teasdale Commission Co. v. Van Hardenberg, 53 Mo. App. 326; Mechanics' Bank v. Mayer, 93 Mo. 417; Mendel v. Mayer, (Mo. 1888) 7 S. W. Rep. 5; Claflin v. Dodson, 111 Mo. 195.

*New York.* — Seligman v. Franco-American Trading Co., (Supm. Ct. Gen. T.) 17 Civ. Pro. (N. Y.) 342; Tilles v. Albright, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 493; Crouse v. Johnson, 65 Hun (N. Y.) 337; Weil v. Hill, 71 Hun (N. Y.) 133; Miller v. Kosch, 74 Hun (N. Y.) 50; Bradley v. Glass, 20 N. Y. App. Div. 200; Blackmer v. Greene, 20 N. Y. App. Div. 532, 4 N. Y. Annot. Cas. 395; Wild v. Porter, 22 N. Y. App. Div. 179; Rothchild v. Mannesvitch, 29 N. Y. App. Div. 580; Marrin v. Marrin, 27 Hun (N. Y.) 601; Citizens' Nat. Bank v. Allison, 37 Hun (N. Y.) 135; Flour City Nat. Bank v. Doty, 41 Hun (N. Y.) 76; Lanning v. Carpenter, 20 N. Y. 447; Harrison v. Gibbons, 71 N. Y. 58; Critten v. Vreden-

burgh, 151 N. Y. 536; Wood v. Mitchell, 117 N. Y. 439.

*North Carolina.* — Davidson v. Alexander, 84 N. Car. 621; Davenport v. Leary, 95 N. Car. 203; Sharp v. Danville, etc., R. Co., 106 N. Car. 308, 19 Am. St. Rep. 533; Johnston v. Danville, etc., R. Co., 106 N. Car. 322; Uzzle v. Vinson, 111 N. Car. 138; Merchants' Nat. Bank v. Newton Cotton Mills, 115 N. Car. 507; Smith v. Smith, 117 N. Car. 348.

*South Carolina.* — Weinges v. Cash, 15 S. Car. 44; Ex p. Carroll, 17 S. Car. 446; Kohn v. Meyer, 19 S. Car. 190; Woods v. Bryan, 41 S. Car. 74, 44 Am. St. Rep. 688.

*Texas.* — Lanier v. Blount, (Tex. Civ. App. 1898) 45 S. W. Rep. 202.

*Utah.* — Bacon v. Raybould, 4 Utah 357.

*Washington.* — Puget Sound Nat. Bank v. Levy, 10 Wash. 499.

*Wisconsin.* — Sloane v. Anderson, 57 Wis. 123; Rogers v. Cherrier, 75 Wis. 54.

2. *Necessity of Creditor's Assent.* — Ryan v. Daly, 6 Cal. 238; Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Haggerty v. Juday, 58 Ind. 154; Chapin v. McLaren, 105 Ind. 563; Farmers, etc., Bank v. Mather, 30 Iowa 283; Mercer v. James, 6 Neb. 406; Flanagan v. Continental Ins. Co., 22 Neb. 235; Howell v. Gilt Edge Mfg. Co., 32 Neb. 627; Ingersoll v. Dyott, 1 Miles (Pa.) 245; McCalmont v. Peters, 13 S. & R. (Pa.) 196.

*Presumption of Consent.* — In Kennard v. Carter, 64 Ind. 31, it was held that the creditor's consent may, when the contrary does not appear, be presumed from the record. See also McCalmont v. Peters, 13 S. & R. (Pa.) 196.

*Assent by Attorney.* — The consent to the judgment by the creditor's attorney has been held to be sufficient. Chapin v. McLaren, 105 Ind. 563.

3. *Lowenstein v. Caruth*, 59 Ark. 588; Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Chapin v. McLaren, 105 Ind. 563; Haggerty v. Juday, 58 Ind. 154.

4. *Wilcoxson v. Burton*, 27 Cal. 228, 87 Am. Dec. 66. See also *Lowenstein v. Caruth*, 59 Ark. 588.

5. *Time and Place of Making Confession.* — Keith v. Kellogg, 97 Ill. 147; Gardner v. Bunn, 132 Ill. 403; Kellogg v. Keith, 4 Ill. App. 386;



the commencement of the suit and its anticipated decision in court, either of the parties omits to pursue, in the regular method, the ordinary measures for prosecution or defense.<sup>1</sup> A full discussion of the requisites essential to the validity of this class of judgments does not properly come within the scope of this article, and will be found elsewhere.<sup>2</sup>

**III. ENTRY OF JUDGMENTS.** — Judgments are very generally required to be entered in the proper records of the court,<sup>3</sup> and in some of the decisions it is broadly laid down that such entry is essential to the validity of the judgment.<sup>4</sup> But the better view seems to be that the entry of a judgment is but a ministerial act to be performed by the clerk or officer of the court, and hence does not constitute the judgment nor an essential part thereof.<sup>5</sup> Entry may, however, be necessary for the purpose of giving the judgment a specified operation and effect, for instance as a lien,<sup>6</sup> or as evidence in another action.<sup>7</sup>

A Full Discussion of this question will be found elsewhere.<sup>8</sup>

**IV. OPERATION AND EFFECT** — 1. **As Estoppel** — *a. CONCLUSIVENESS AS MEMORIAL OF LEGAL PROCEEDINGS.* — The conclusiveness of a judgment record as a memorial of legal proceedings, as for instance the fact and time of the rendition of the judgment, will be discussed in another portion of this work.<sup>9</sup>

*b. RES JUDICATA.* — A full discussion also of the estoppel arising from the facts adjudicated and enrolled on the judgment record will be found elsewhere in this work.<sup>10</sup>

2. **As Lien** — *a. ORIGIN AND HISTORY OF LIEN* — (1) *In General.* — At common law, except for debts due the king,<sup>11</sup> the lands of the debtor were not liable to the lien of a judgment against him.<sup>12</sup> This, it has been said, was in accordance with the policy of the feudal law introduced into England after the

Sharp *v.* Danville, etc., R. Co., 106 N. Car. 308, 19 Am. St. Rep. 533; Johnston *v.* Danville, etc., R. Co., 106 N. Car. 322; Weinges *v.* Cash, 15 S. Car. 61; Saunders *v.* Lipscomb, 90 Va. 647. Compare Abbott *v.* Yuma County, 18 Colo. 6.

1. Judgment by Default Defined. — Warren *v.* Kennedy, 1 Heisk. (Tenn.) 441.

2. See the title DEFAULTS, ENCYC. OF PL. AND PR., vol. 6, p. 1.

3. Requirement of Entry of Judgment. — Davidson *v.* Murphy, 13 Conn. 213; Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397; Knapp *v.* Roche, 82 N. Y. 366; Jones *v.* Walker, 5 Yerg. (Tenn.) 427.

4. Case *v.* Plato, 54 Iowa 64; Balm *v.* Nunn, 63 Iowa 641; Rockwood *v.* Davenport, 37 Minn. 533, 5 Am. St. Rep. 872; Maurin *v.* Carnes, 71 Minn. 308.

5. *California.* — McMillan *v.* Richards, 12 Cal. 467; Casement *v.* Ringgold, 28 Cal. 335; Gray *v.* Palmer, 28 Cal. 416; Genella *v.* Relyea, 32 Cal. 159; Los Angeles County Bank *v.* Raynor, 61 Cal. 145; Matter of Cook, 77 Cal. 220, 11 Am. St. Rep. 267.

*Colorado.* — Sieber *v.* Frink, 7 Colo. 151.

*Nevada.* — California State Tel. Co. *v.* Paterson, 1 Nev. 150; Kehoe *v.* Blethen, 10 Nev. 445.

*Ohio.* — Newman *v.* Cincinnati, 18 Ohio 323; Miller *v.* Albright, 12 Ohio Cir. Ct. 533, 5 Ohio Cir. Dec. 585.

*Vermont.* — Huntington *v.* Charlotte, 15 Vt. 46.

As to the necessity of entry of judgment as a prerequisite to an execution thereon, see the title EXECUTIONS, vol. 11, p. 610.

6. Callanan *v.* Votruba, 104 Iowa 672; Rock-

wood *v.* Davenport, 37 Minn. 533, 5 Am. St. Rep. 872. See also Maurin *v.* Carnes, 71 Minn. 308; Eastham *v.* Sallis, 60 Tex. 579.

7. Hall *v.* Hudson, 20 Ala. 284; Smith *v.* Steel, 81 Mo. 455.

**Decrees.** — But it has been held that a decree in chancery may be given in evidence in another suit, although such decree has not been formally enrolled. Bates *v.* Delavan, 5 Paige (N. Y.) 303; Butler *v.* Lee, 3 Keyes (N. Y.) 73; Winans *v.* Dunham, 5 Wend. (N. Y.) 47; Lynch *v.* Rome Gas Light Co., 42 Barb. (N. Y.) 591. Compare Drummond *v.* Anderson, 3 Grant Ch. (U. C.) 150. See further the title RECORDS.

8. See the title RENDITION AND ENTRY OF JUDGMENTS, ENCYC. OF PL. AND PR., vol. 18, p. 427.

9. See the title RECORDS.

10. See the title RES JUDICATA.

11. Judgment Lien at Common Law for Debts Due the King. — This was upon the principle that the king was the ultimate proprietor of all landed estates. Com. *v.* Adkins, 8 B. Mon. (Ky.) 380.

In the United States, no such principle exists and no judgment in favor of the commonwealth is operative as a lien unless such lien is expressly given by statute. Com. *v.* Adkins, 8 B. Mon. (Ky.) 380.

And this has been said to be true of judgments in favor of the United States. Thompson *v.* Avery, 11 Utah 214.

12. Judgments Inoperative as Liens at Common Law. — Shrew *v.* Jones, 2 McLean (U. S.) 78; Morsell *v.* Washington First Nat. Bank, 91 U. S. 360; Cooke *v.* Avery, 147 U. S. 385; Woods *v.* Mains, 1 Greene (Iowa) 275; Mitchell *v.*



Conquest. The goods and chattels of the debtor, therefore, and the annual profits of his lands as they arose, were the only funds allotted for the payment of his debts.<sup>1</sup>

**Writ of Elegit and Statutory Judgment Lien.** — This continued to be the law until the passage of the statute Westm. 2, 13 Edw. I., by which, in the interest of trade and commerce, the writ of elegit was for the first time provided for. By that statute a judgment creditor was given his election to sue out a writ of fi. fa. against the goods and chattels of the defendant, or else "a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plow, and the one-half of his land, until the debt be levied upon a reasonable price or extent." When the creditor chose the latter alternative his election was entered on the roll, and hence the writ was denominated an elegit, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by elegit.<sup>2</sup> In several jurisdictions in the *United States* at an early date this statute was substantially adopted, and the rule was laid down thereunder that a judgment acquired a lien as a consequence of the right to take out an elegit.<sup>3</sup> In *Maryland* the judgment lien first arose as a result of the Act of Parliament of 5 Geo. II., c 7, subjecting lands in the colonies to execution as chattels in favor of British merchants, this statute by long usage being so employed and extended as to make the lien applicable to all judgment creditors.<sup>4</sup> But the judgment lien as it exists in the *United States* to-day is as a general rule, if not altogether, supported by statutes expressly giving judgments this effect.<sup>5</sup>

(2) *In Federal Courts.* — Judgments in the federal courts are not liens at common law, but Congress, in adopting the modes of process prevailing in the states at the time the judicial system of the *United States* was organized, made judgments recovered in the federal courts liens in all cases where they were

Wood, 47 Miss. 233; Groves's Appeal, 68 Pa. St. 143; Thompson v. Avery, 11 Utah 214; Hutcheson v. Grubbs, 80 Va. 253.

1. See cases in note immediately preceding.

2. Morsell v. Washington First Nat. Bank, 91 U. S. 360; Cooke v. Avery, 147 U. S. 375; Mitchell v. Wood, 47 Miss. 233; Groves's Appeal, 68 Pa. St. 143.

3. Judgment Lien under Statute Authorizing Writ of Elegit. — U. S. v. Morrison, 4 Pet. (U. S.) 124, declaring law in *Virginia*; U. S. Bank v. Winston, 2 Brock. (U. S.) 252, declaring law in *Virginia*; Barton v. Smith, 13 Pet. (U. S.) 479, declaring law in *Virginia*; Shrew v. Jones, 2 McLean (U. S.) 78, declaring law in *Indiana*; Ridge v. Prather, 1 Blackf. (Ind.) 401; Roads v. Symmes, 1 Ohio 281, 13 Am. Dec. 621; Borst v. Nalle, 23 Gratt. (Va.) 423; Price v. Thrash, 30 Gratt. (Va.) 515; Hutcheson v. Grubbs, 80 Va. 253. See also Rankin v. Scott, 12 Wheat. (U. S.) 177; Scriba v. Deanes, 1 Brock. (U. S.) 166; Renick v. Ludington, 14 W. Va. 367.

**Right to Take Out Elegit Not Suspended by Suing Out Writ of Fi. Fa.** — In U. S. v. Morrison, 4 Pet. (U. S.) 124, it was held that the right to take out an elegit is not suspended by suing out a writ of fieri facias, and consequently that the lien of the judgment continues pending the proceedings on that writ.

**Elegit Abolished.** — In *Virginia* it was not until the revival of 1849 that the lien resulting from the elegit was abolished and a lien given by statute upon the debtor's entire real estate. Gordon v. Rixey, 76 Va. 694; Hutcheson v. Grubbs, 80 Va. 253.

So in *Indiana* and *Ohio* judgments are now made liens by express statutory provision. Shrew v. Jones, 2 McLean (U. S.) 78; Jeffrey v. Moran, 101 U. S. 285.

4. Tayloe v. Thomson, 5 Pet. (U. S.) 358, declaring law in *Maryland*. See also Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Davidson v. Myers, 24 Md. 555.

5. Judgment Liens under Express Statutes. — Mitchell v. Wood, 47 Miss. 235; Moore v. Letchford, 35 Tex. 185, 14 Am. Rep. 363; Gardner v. Spivey, 35 Tex. 508; Northcraft v. Oliver, 74 Tex. 162; Thompson v. Avery, 11 Utah 214; Holmes v. McIndoe, 20 Wis. 657.

**In England** since the Act of 27 & 28 Vict., c. 112, the law affecting freehold, copyhold, and leasehold estates is assimilated to that affecting personal estates in respect of future judgments, and it is the execution and not the judgment that creates a lien on lands. *In re* Bailey, 38 L. J. Ch. 237; Guest v. Cowbridge R. Co., L. R. 6 Eq. 619.

**In Alabama** it has been held that judgments are not liens in that state. Walker v. Carroll, 65 Ala. 67; Carlisle v. Golwin, 68 Ala. 137; Perkins v. Briarfield Iron, etc., Co., 77 Ala. 403. But a different rule prevails at present under statute. Decatur Charcoal Chemical Works v. Moses, 89 Ala. 538.

**In Kentucky** it has been held that a judgment does not bind lands, but the lien attaches only from the delivery of the execution to the sheriff. U. S. Bank v. Tyler, 4 Pet. (U. S.) 366; Waller v. Best, 3 How. (U. S.) 111; Whitehead v. Woodruff, 11 Bush (Ky.) 209; Tilford v. Bunham, 7 Dana (Ky.) 109.



such by the laws of the states.<sup>1</sup> By a later Act of Congress it was provided that judgments shall cease to have operation as liens in the same manner and at the same periods in the respective federal districts as like processes do when issued from the states' courts.<sup>2</sup> Under this legislation no right in the state to regulate the operation of federal judgments was recognized, and the lien of such judgments depended upon the acts of Congress and the rules of the federal courts.<sup>3</sup> There was no law of Congress, however, prior to August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States or regulated the same; but on that day an act was approved which made such judgments liens on property throughout the state in which the federal court sat, in the same manner and to the same extent and under the same conditions only as if rendered by the state courts.<sup>4</sup>

**b. NATURE OF THE LIEN.** — A judgment is not a specific lien upon any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens either legal or equitable.<sup>5</sup> The judgment creditor has no *jus in re*, no property or right in the land itself, but a mere power to make his general lien effectual by following up the steps of the law. In other words, he has the right to levy on the property to the exclusion of other adverse interests subsequent to the judgment, and when the levy is actually made the title of the creditor for this purpose relates back to the time of the judgment so as to cut off intermediate conveyances and incumbrances.<sup>6</sup>

**Legislative Control over Lien.** — The lien of a judgment is entirely the creature of statute, and its extent and operation are fixed by law.<sup>7</sup> The effect given by statute cannot be extended or altered by the courts.<sup>8</sup> Nor can a greater effect be given by any agreement between the parties.<sup>9</sup> But it seems that the general lien of a judgment may by agreement be limited to specific lands.<sup>10</sup>

**Retroactive Statutes** are valid for the purpose of destroying liens or placing restrictions thereon<sup>11</sup> as well as for the purpose of creating and extending

**1. Origin of Judgment Liens in Federal Courts.** — *Baker v. Morton*, 12 Wall. (U. S.) 150; *Ward v. Chamberlain*, 2 Black. (U. S.) 430; *Massingill v. Downs*, 7 How. (U. S.) 760; *Cooke v. Avery*, 147 U. S. 375; *Williams v. Benedict*, 8 How. (U. S.) 107. Compare *Lombard v. Bayard*, 1 Wall. Jr. (C. C.) 196.

**Decrees of Courts of Admiralty** have been held to come within the rule making the judgments of federal courts operative as liens. *Ward v. Chamberlain*, 2 Black (U. S.) 430.

**A Verdict without entry of judgment** in a federal court creates no lien upon real estate. *Norris's Estate*, 6 Phila. (Pa.) 134, 23 Leg. Int. (Pa.) 141.

**2. Baker v. Morton**, 12 Wall. (U. S.) 150; *Myers v. Tyson*, 13 Blatchf. (U. S.) 242; *Crosey v. Crandall*, 2 Blatchf. (U. S.) 341; *Cooke v. Avery*, 147 U. S. 375; *Chouteau v. Nuckolls*, 20 Mo. 442; *Abbey v. Commercial Bank*, 34 Miss 571, 69 Am. Dec. 401. See also *Perkins v. Brierfield Iron, etc., Co.*, 77 Ala. 411.

**3. Cooke v. Avery**, 147 U. S. 375; *Clements v. Berry*, 11 How. (U. S.) 411. See also *Corwin v. Benham*, 2 Ohio St. 36.

**4. Cooke v. Avery**, 147 U. S. 375.

**5. Judgments General and Not Specific Liens.** — *Clonts v. Ritch*, 12 Fla. 633, 95 Am. Dec. 345; *Independent School Dist. v. Werner*, 43 Iowa 643; *Dozier v. Lewis*, 27 Miss. 679; *Rodgers v. Bonner*, 45 N. Y. 379.

**6. United States.** — *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386; *Massingill v. Downs*, 7 How. (U. S.) 767.

*Arkansas.* — *Whiting v. Beebe*, 12 Ark. 421;

*Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

*Louisiana.* — *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563.

*Mississippi.* — *Foute v. Fairman*, 48 Miss. 537.

*North Carolina.* — *Bruce v. Nicholson*, 109 N. Car. 202, 26 Am. St. Rep. 562.

*Pennsylvania.* — *Clawson v. Eichbaum*, 2 Grant Cas. (Pa.) 130.

**7. Legislative Control over Judgment Liens.** — *Houston v. Houston*, 67 Ind. 276; *Castro v. Illies*, 13 Tex. 229; *Thompson v. Avery*, 11 Utah 214.

**8. Castro v. Illies**, 13 Tex. 229.

When a judgment creditor is clothed by law with a lien, the mere absence of an express recognition of the lien in the judgment does not impair the lien. *Hill v. Bourcier*, 29 La. Ann. 841.

**9. Effect of Lien Not to Be Extended by Agreement.** — *Ley v. Edwards*, 21 Fla. 335; *Houston v. Houston*, 67 Ind. 276; *Wells v. Benton*, 108 Ind. 585; *Lanning v. Carpenter*, 48 N. Y. 408; *Thompson v. Avery*, 11 Utah 214.

**10. General Lien Made Specific by Agreement.** — *Carson v. Ford*, 6 Pa. Super. Ct. 17; *Dean's Appeal*, 35 Pa. St. 405; *Stanton v. White*, 32 Pa. St. 358. In the last case there was a stipulation in a bond and warrant of attorney that the judgment, to be entered thereon, should be a lien only on certain designated lands.

**11. Destruction or Limitation of Lien by Statute.** — *Moore v. Letchford*, 35 Tex. 185, 14 Am. Rep. 363; *Gardner v. Spivey*, 35 Tex. 508.



them.<sup>1</sup>

**Enforcement of Judgment at Law in Equity.** — The general lien of a judgment at law cannot be converted into the specific lien of a decree in equity in the absence of statute or in the absence of those facts which by established rule make out a case for equitable interference, since it is a familiar principle that equity never interferes when there is a full and complete legal remedy.<sup>2</sup>

**c. PREREQUISITES AS TO JUDGMENT OR DECREE** — (1) *In General* — **Judgments at Law.** — It may be laid down as a general rule that all valid final judgments operate as liens upon the real estate of the defendant,<sup>3</sup> and this rule includes judgments by default<sup>4</sup> and judgments by confession.<sup>5</sup> But to have this effect the judgment must be final,<sup>6</sup> for a definite sum of money,<sup>7</sup> and one upon which an execution may issue.<sup>8</sup>

**Decrees.** — Under statute in some states decrees as well as judgments may have the effect of creating liens on lands, but to have this effect the decree must be for the payment of money.<sup>9</sup> And it must be for an ascertained and definite amount.<sup>10</sup>

**1. Extension by Lien by Retroactive Statute.** — Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696; Gimbel v. Stolte, 59 Ind. 446; Houston v. Houston, 67 Ind. 276; Tarpley v. Hamer, 9 Smed. & M. (Miss.) 310; Watson v. New York Cent. R. Co., 47 N. Y. 157; Whitehead v. Latham, 83 N. Car. 232; McCormick v. Alexander, 2 Ohio 65; Henry v. Henry, 31 S. Car. 1. See also Moore v. Holland, 16 S. Car. 15; Woodson v. Collins, 56 Tex. 172. Compare Walton v. Dickerson, 4 Rich. L. (S. Car.) 568; King v. Belcher, 30 S. Car. 381. And see the title CONSTITUTIONAL LAW, vol. 6, p. 953.

**2. Enforcement of Judgment at Law in Equity.** — Howe Mach. Co. v. Miner, 28 Kan. 441.

**3. Linsley v. Logan,** 33 Ohio St. 376.

**A Rule Absolute Against a Sheriff,** requiring him to pay over money, has been held not to be such a judgment as binds his property in the same way in which judgments on verdict bind it. Speer v. McPherson, 24 Ga. 146.

**Adjudication of Probate Court Against Executor.** — In Haeussler v. Scheitlin, 9 Mo. App. 303, it was held that an adjudication of the St. Louis Probate Court upon the final settlement of an executor, declaring the balance due from him to the estate, and making an order for final distribution, was effectual to create a lien upon the real estate of the executor.

**An Award may, under statute in Pennsylvania,** have the effect of a lien on real estate. Northumberland First Nat. Bank's Appeal, 100 Pa. St. 418.

**Judgment of Municipal Court.** — Sometimes, by statute, a judgment of a municipal court is given the effect and operation of a lien. Kirk v. Vonberg, 34 Ill. 440. Compare Andrews v. Mastin, (County Ct.) 22 Misc. (N. Y.) 263.

**4. Lien Created by Judgment by Default.** — Thus, in Sellers v. Burk, 47 Pa. St. 344, it was held that a judgment for want of a plea is final, and a lien upon real estate of the defendant from the date of the entry, though the damages may not be assessed, if the claim in the action be for a sum certain, or the amount may be ascertained by calculation from the demand set forth in the pleadings.

But for the rule where the amount is not ascertained, see the title FINAL JUDGMENTS AND DECREES, vol. 13, p. 47.

**5. Lien Created by Judgment by Confession.** — Flemming v. Rotchford, 11 La. Ann. 400;

Hewitt v. Stewart, 11 La. Ann. 100; Gilman v. Hovey, 26 Mo. 280; Stokes v. Cane, 6 Rich. L. (S. Car.) 513. See also Philadelphia Bank v. Craft, 16 S. & R. (Pa.) 347.

**6. Judgment Must Be Final** — *Illinois.* — Grant v. Bennett, 96 Ill. 513; Noe v. Moutray, 170 Ill. 169, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 104.

*Maryland.* — Davidson v. Myers, 24 Md. 538. *Mississippi.* — Crane v. Richardson, 73 Miss. 254.

*North Carolina.* — Den v. Hill, 1 Hayw. (2 N. Car.) 72.

*Pennsylvania.* — McClung v. Murphy, 2 Miles (Pa.) 177; Hays v. Tryon, 2 Miles (Pa.) 208.

*South Carolina.* — De Saussure v. Zeigler, 6 S. Car. 12.

*Texas.* — Eastham v. Sallis, 60 Tex. 576.

In Groves's Appeal, 68 Pa. St. 143, it was held that an order for the payment of a wife's expenses and support *pendente lite* is not a judgment such as to create a lien on the husband's land.

**7. Judgment Must Be for Definite Sum of Money.** — Noe v. Moutray, 170 Ill. 177, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 104; Roane v. Hamilton, 101 Iowa 250; Lirette v. Carrane, 27 La. Ann. 298; Dickson's Succession, 37 La. Ann. 795; Eastham v. Sallis, 60 Tex. 576.

In Philadelphia Bank v. Craft, 16 S. & R. (Pa.) 347, it was held that a judgment by confession for a sum to be ascertained by the prothonotary binds the real estate of the defendant only from the time of the liquidation of the sum by the prothonotary.

**8. Noe v. Moutray,** 170 Ill. 177, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 104.

**9. Statutory Lien of Decree in Equity.** — Scriba v. Deanes, 1 Brock. (U. S.) 166 (declaring rule in Virginia); Eames v. Germania Turn Verein, 74 Ill. 54; Coombs v. Jordan, 3 Bland (Md.) 321, 22 Am. Dec. 236; Close v. Close, 28 N. J. Eq. 472; Conrad v. Everich, 50 Ohio St. 476, 40 Am. St. Rep. 679; Myers v. Hewitt, 16 Ohio 449; Hohman's Appeals, 127 Pa. St. 209; Blake v. Heyward, Bailey Eq. (S. Car.) 208; Lee v. Swepson, 76 Va. 173. See also Batler v. James, 33 Ga. 148; Coulter v. Lumpkin, 94 Ga. 225; Carmichael v. Abrahams, 1 Desaus. (S. Car.) 114.

**10. Decree Must Be for Definite Amount.** — Hamberger v. Easter, 57 Ga. 71.



**Decree of Foreclosure of Mortgage.** — As a general proposition a decree of foreclosure of a mortgage is not a decree for the payment of money so as to confer a lien similar to a judgment lien.<sup>1</sup>

**Deficiency Judgment or Decree.** — And in several jurisdictions, under statutes providing for a deficiency judgment or decree in connection with foreclosure proceedings, it has been held that it is only after a sale of the mortgaged premises has been made, and the fact and amount of the deficiency have been judicially ascertained, that a deficiency judgment or decree can operate as a lien on the land of the debtor other than that mortgaged.<sup>2</sup> But in other states a judgment *in personam* may be had in foreclosure proceedings which will have the effect and operation of a lien on all the mortgagor's realty from the date of the rendition or registration or docketing of the judgment, with this proviso, however, that the mortgaged lands must be first subjected and exhausted for the satisfaction of the debt.<sup>3</sup>

(2) *Docketing or Recording* — (a) **In General.** — Various statutory provisions exist in many of the states requiring a judgment to be docketed, recorded, or registered before it can operate as a lien;<sup>4</sup> the rule being applied in some

1. **Decree of Mortgage Foreclosure Not a Lien.** — *Scott v. Russ*, 21 Fla. 260; *Kirby v. Runals*, 110 Ill. 289; *Myers v. Hewitt*, 16 Ohio 449; *Linn v. Patton*, 10 W. Va. 187; *Huntington v. Meyer*, 92 Wis. 557. See also *Karnes v. Harper*, 48 Ill. 527.

2. **Deficiency Judgment.** — *Chapin v. Broder*, 16 Cal. 403; *Cormerais v. Genella*, 22 Cal. 116; *Englund v. Lewis*, 25 Cal. 337; *Culver v. Rogers*, 28 Cal. 520; *Hibberd v. Smith*, 50 Cal. 511; *Bell v. Gilmore*, 25 N. J. Eq. 104; *Mutual L. Ins. Co. v. Southard*, 25 N. J. Eq. 337; *Mutual L. Ins. Co. v. Hopper*, 43 N. J. Eq. 337; *Close v. Close*, 28 N. J. Eq. 472; *Weil v. Howard*, 4 Nev. 384. See also *Scott v. Russ*, 21 Fla. 260. See also the titles FORECLOSURE OF MORTGAGES, vol. 13, p. 826; FORECLOSURE OF MORTGAGES, ENCYC. OF PL. AND PR., vol. 9, p. 492.

3. *Fletcher v. Holmes*, 25 Ind. 458; *Lisle v. Cheney*, 36 Kan. 578; *Hays v. Miller*, 1 Wash. Ter. 143; *Blum v. Keyser*, 8 Tex. Civ. App. 675; *Thompson v. Hubbard*, 3 Kan. App. 714. See also *McCaskill v. Graham*, 121 N. Car. 190.

4. **Statutes Requiring Judgments to Be Docketed** — *Alabama*. — *Enslin v. Wheeler*, 98 Ala. 200; *Sorrell v. Vance*, 102 Ala. 207.

*Iowa*. — *Ætna L. Ins. Co. v. Hesser*, 77 Iowa 381, 14 Am. St. Rep. 297; *Mather v. Jenswold*, 72 Iowa 550; *Callanan v. Votruba*, 104 Iowa 672.

*Montana*. — *Sklower v. Abbott*, 19 Mont. 228.

*North Carolina*. — *Holman v. Miller*, 103 N. Car. 118; *Hardy v. Carr*, 104 N. Car. 33.

*Pennsylvania*. — *Mann's Appeal*, 1 Pa. St. 24; *Snyder County's Appeal*, 3 Grant Cas. (Pa.) 38; *Bratton's Appeal*, 8 Pa. St. 164.

*South Carolina*. — *Foster v. Chapman*, 4 McCord L. (S. Car.) 291.

*Texas*. — *Hart v. Russell*, 32 Tex. 31; *Wright v. Rhodes*, 42 Tex. 523; *Gunter v. Buckler*, (Tex. Civ. App. 1895) 32 S. W. Rep. 229.

*Wisconsin*. — *Upman v. Second Ward Bank*, 15 Wis. 449; *Huntington v. Meyer*, 92 Wis. 557.

*Canada*. — *Montreal Bank v. Thompson*, 9 Grant. Ch. (U. C.) 51; *Doe v. Boulton*, 9 U. C. Q. B. 532.

See also *Branner v. Nance*, 3 Coldw. (Tenn.) 299.

In *Washington* and *Colorado* the filing of a transcript of a judgment with the county auditor is sufficient to constitute the judgment a lien. *Lamey v. Coffmann*, 11 Wash. 301. See also *Sawtelle v. Weymouth*, 14 Wash. 21; *McFarlan v. Knox*, 5 Colo. 217. See also *Gottlieb v. Thatcher*, 151 U. S. 271.

In *Nebraska* a transcript of a judgment of a county court is by statute made a lien from the date of filing in the District Court. *Work v. Brown*, 38 Neb. 498. See also *Smith v. Hawley*, 2 Neb. 284.

**Certificate Authenticating Abstract.** — Under statute in *Texas* providing for the recording of an abstract of a judgment in order that a lien may be acquired, it has been held not to be necessary that a certificate authenticating the abstract should be recorded with the abstract. *Spence v. Brown*, 86 Tex. 430. Compare *Herring v. Walker*, 3 Tex. Civ. App. 614.

**Certificate of Judgment Lien Including Two Distinct Judgments Not Invalid.** — *Parmalee v. Bethlehem*, 57 Conn. 270.

**Decrees.** — The rule of the text has been applied to decrees for the payment of money. *McKee v. Gayle*, 46 Miss. 678; *Norton v. Tallmadge*, 3 Edw. (N. Y.) 310; *Matter of Underhill*, 1 Connolly (N. Y.) 313; *Reid v. McGowan*, 28 S. Car. 74. See also *Dawson v. Scriven*, 1 Hill Eq. (S. Car.) 177.

Under statute in *New Jersey* giving to decrees in chancery the force, operation, and effect of a judgment at law, and providing in effect that such decrees become liens upon lands not specifically described therein, as against persons not parties to the suit, only after an abstract thereof is filed in the office of the clerk of the supreme court, it has been held that if the parties interested in such decrees wish them to bind extraneous lands against any person whatsoever other than parties to the decrees, the decrees must be docketed. *Vreeland v. Jacobus*, 19 N. J. Eq. 231; *Close v. Close*, 28 N. J. Eq. 472; *Jersey v. Demarest*, 27 N. J. Eq. 299; *Roll v. Rea*, 57 N. J. L. 647.

**Prior Entry on Judgment Book.** — Under statute in *Minnesota* it has been held that there can be no judgment capable of being docketed or enforced in any manner till it is entered in the



cases not only in favor of subsequent purchasers,<sup>1</sup> but subsequent attaching<sup>2</sup> or judgment creditors.<sup>3</sup> In some jurisdictions a judgment is not a lien on real estate as against purchasers thereof for a valuable consideration without notice, unless it be docketed in the mode and within the time prescribed by statute; but as to all other persons and all other real estate, the rights of a judgment creditor who fails to docket his judgment are precisely the same as they would be if the statute requiring a judgment to be docketed had never been passed, and hence a prior judgment whether docketed or undocketed has priority over a subsequent judgment.<sup>4</sup> And in *Indiana* it has been held that the lien of a judgment is not lost as against the judgment debtor or any third person by the failure of the clerk to docket the judgment.<sup>5</sup>

(b) **Effect of Actual Notice of Undocketed Judgment.** — It has been held that an undocketed judgment is not a lien on real estate as against a subsequent attachment creditor, though the attaching creditor had actual knowledge of the judgment at the time of the levy of the attachment.<sup>6</sup> It seems, however, that in *Virginia* a subsequent purchaser may be bound by actual notice of an

judgment book. *Rockwood v. Davenport*, 37 Minn. 535, 5 Am. St. Rep. 872.

**Judgment to Set Aside Fraudulent Conveyance in Favor of Judgment Creditor.** — It has been held that where a judgment, in an action to set aside a fraudulent conveyance which constituted an apparent obstacle to the enforcement of a judgment against the fraudulent grantor, decreed that the judgment against the fraudulent grantor was a lien upon the property, and directed that execution thereon should be issued, and the property sold to satisfy the judgment, it need not be recorded in the office of the register of deeds in order to protect the *bona fide* purchaser without notice at the execution sale. *Branley v. Dambly*, 69 Minn. 282.

**Redocketing of Affirmed Judgment.** — In *Daniels v. Winslow*, 4 Minn. 318, it was held that upon the affirmance of a judgment, the original amount with the accumulated interest remains a lien by virtue of the original docketing in the district court, but if the successful party desires to make that portion of his judgment which is for damages and costs recovered in the supreme court the lien upon the debtor's lands, he must docket the judgment in the district court, and it will become a lien for that amount from the time of such docketing only. To the same effect see *Chapin v. Broder*, 16 Cal. 403. See also *Alsop v. Moseley*, 104 N. Car. 60. Compare *M'Clung v. Berine*, 10 Leigh (Va.) 410.

**1. Necessity of Docketing as Against Subsequent Purchaser.** — *Sorrell v. Vance*, 102 Ala. 207; *Wilcoxson v. Miller*, 49 Cal. 193; *Callanan v. Votruba*, 104 Iowa 672; *Wolfe v. Joubert*, 45 La. Ann. 1100; *Blydenburgh v. Northrop*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 289; *Holman v. Miller*, 103 N. Car. 118; *Corley v. Renz*, (Tex. Civ. App. 1894) 24 S. W. Rep. 935.

**Conveyance Not Delivered until After Docketing of Judgment.** — In *California* it has been held that where a conveyance made by a judgment debtor is not delivered until after the judgment is docketed, the judgment lien has priority over the conveyance. *Hitberd v. Smith*, 50 Cal. 511.

**A Prior Undocketed Judgment will have priority in equity over a conveyance where the purchaser in part payment of the consideration**

agreed to pay and discharge the judgment. *Haverly v. Becker*, 4 N. Y. 169.

**2. Necessity of Docketing as Against Subsequent Attaching Creditor.** — *Sklower v. Abbott*, 19 Mont. 228; *Buchan v. Summer*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305.

**3. Necessity of Docketing as Between Judgment Creditors.** — Thus in many states it is held that judgment creditors acquire liens on real estate in the order in which their judgments are docketed or enrolled. *Schwabacher v. Leibrook*, 48 La. Ann. 821; *New York L. Ins. Co. v. Mayer*, 14 Daly (N. Y.) 318, 108 N. Y. 655; *Harris v. Ricks*, 63 N. Car. 653; *Whitehead v. Latham*, 83 N. Car. 232; *Mann's Appeal*, 1 Pa. St. 24. See also *Wyatt v. Beatty*, 10 Smed. & M. (Miss.) 463; *Emanuel v. Jones*, 12 Smed. & M. (Miss.) 473; *McKee v. Gayle*, 46 Miss. 676.

**Where Two Judgments Are Both Erroneously Docketed and indexed, the one first entered has priority.** *Shaver's Case*, 18 Pa. Co. Ct. 202, 5 Pa. Dist. 610.

**4. Hill v. Rixey**, 26 Gratt. (Va.) 72; *Johnson v. National Exch. Bank*, 33 Gratt. (Va.) 473; *Gordon v. Rixey*, 76 Va. 694; *Max Meadows Land, etc., Co. v. McGavock*, (Va. 1900) 36 S. E. Rep. 490; *Gurnee v. Johnson*, 77 Va. 712; *Anderson v. Nagle*, 12 W. Va. 98; *Renick v. Ludington*, 14 W. Va. 367; *Grantham v. Lucas*, 24 W. Va. 231; *Duncan v. Custard*, 24 W. Va. 730. See also *Redd v. Ramey*, 31 Gratt. (Va.) 265; *Hoffman v. Ryan*, 21 W. Va. 415. Compare *Leake v. Ferguson*, 2 Gratt. (Va.) 420.

**In Georgia**, under statute, judgments date as to *bona fide* conveyances by the debtor to third persons only from the time the executions issuing thereon shall be entered upon the general execution docket, unless such entry be made within ten days after the judgments were rendered. *Bailey v. Bailey*, 93 Ga. 768.

But this act has no application to contests between ordinary common-law judgments, and consequently the order of two such judgments against the same defendant has priority over the younger. *Griffith v. Posey*, 98 Ga. 475.

**5. Johnson v. Schloesser**, 146 Ind. 509, 58 Am. St. Rep. 367.

**6. Sklower v. Abbott**, 19 Mont. 228.



undocketed judgment.<sup>1</sup>

(c) *Judgments of Federal Courts.* — The rule has been laid down that state statutes requiring judgments to be recorded or docketed in order to give the judgment the effect of a lien have no application to judgments obtained in the federal courts.<sup>2</sup> And section 3 of the Act of Congress of August 1, 1888, relating to the filing, docketing, or recording of federal judgments, expressly provides that the act shall not be construed to require the filing of a transcript of a judgment of a United States court in the county clerk's office of the county in which the judgment was rendered, in order that such judgment may be a lien on any property within such county.<sup>3</sup>

(d) *Justice's Judgments.* — In many states it is provided by statute that before a justice's judgment can operate as a lien, an abstract or transcript thereof must be filed and docketed in the office of the clerk of the superior, county, or circuit court, or in the county recorder's office,<sup>4</sup> and in *California* the copy of the judgment recorded must be certified by the justice.<sup>5</sup> In other jurisdictions, however, it will be sufficient if the transcript is filed for record, though it is not actually recorded.<sup>6</sup>

(3) *Indexing.* — In several of the states, judgments, in order to operate as liens, are required by statute to be indexed, and the fact that the judgment is docketed or recorded will not be sufficient, the object of the index being to make the contents of the records readily accessible.<sup>7</sup> But it has been held that an entry on the general index is unnecessary where the proper index is

1. *Johnson v. National Exch. Bank*, 33 Gratt. (Va.) 473.

*Notice to Agent.* — But in the case just cited it was held that in order to affect a creditor by the previous notice or knowledge of his agent or trustee of the existence of a prior unrecorded judgment lien on real estate which is conveyed for his security, it is necessary that the notice or knowledge should have been given or imparted to the agent in the same transaction, unless one transaction is closely followed by and connected with the other.

2. *State Statutes Requiring Docketing Inapplicable to Federal Judgments.* — *Carroll v. Watkins*, 1 Abb. (U. S.) 474; *Cropsey v. Crandall*, 2 Blitchf. (U. S.) 341; *U. S. v. Humphreys*, 3 Hughes (U. S.) 201; *U. S. v. Scott*, 3 Woods (U. S.) 334; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334.

3. See *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546.

4. *Requirement that Justice's Judgment Be Recorded.* — *Bagley v. Ward*, 27 Cal. 369; *Cannon v. Parker*, 81 N. Car. 320; *Adams v. Guy*, 106 N. Car. 275; *Dysart v. Brandreth*, 118 N. Car. 968; *White v. Espey*, 21 Oregon 328. See also *Smith v. Meredith*, 30 Md. 429. Compare *Candler v. Fisher*, 11 Md. 332.

In *South Carolina* it has been held that there is no statutory limit of time within which the transcript must be filed and docketed. *Rhoad v. Patrick*, 37 S. Car. 517.

5. *Bagley v. Ward*, 27 Cal. 369.

6. *Jurisdictions Requiring Trustees' Judgment to Be Filed for Record.* — *Laughlin v. Hawley*, 9 Colo. 170; *Jones v. Luck*, 7 Mo. 551; *Bundling v. Miller*, 10 Mo. 445; *Carpenter v. King*, 42 Mo. 219; *Pullis v. Pullis Bros. Iron Co.*, (Mo. 1900) 57 S. W. Rep. 1095; *McComb v. Thompson*, 42 Ohio St. 139. See also *Babbett v. Morgan*, 31 Ohio St. 273; *Smith v. Wehrly*, 157 Pa. St. 407; *Bowman v. Silvas*, 6 Kulp (Pa.) 496; *Dimond's Estate*, 14 Pa. St. 323;

*Bannan v. Rathbone*, 3 Grant Cas. (Pa.) 259. Compare *Jackman v. Hallock*, 1 Ohio 318, 13 Am. Dec. 627.

*Under Statute in Indiana* it has been held that as between parties to a judgment before a justice and others with actual notice, a transcript thereof is a lien on the real estate of the defendant in the county from the time of its filing in the clerk's office. *American Ins. Co. v. Gibson*, 104 Ind. 336.

*Necessity of Issuance of Execution Prior to Filing of Transcript.* — In *Illinois* it has been held that an execution must have been issued by the justice upon a judgment rendered by him and duly returned *nulla bona* by the proper officer before a valid transcript can be made and filed under the statute in that state, and the transcript must show the issuance and return of the execution. *Hobson v. McCambridge*, 130 Ill. 367; *Cramer v. Bode*, 24 Ill. App. 219. See also *Easterling v. Chiles*, 93 Ky. 315.

But under statute in *Arkansas* it has been held that the issuance of an execution as a prerequisite to the filing of a transcript by the justice's judgment in the clerk's office, is not required where the judgment is aided by attachment. *Hawkins v. Wills*, 49 Fed. Rep. 506.

7. *Jurisdictions Requiring Judgments to Be Indexed.* — *Ætna L. Ins. Co. v. Hesser*, 77 Iowa 381, 14 Am. St. Rep. 297; *Dewey v. Sugg*, 109 N. Car. 333; *Nye v. Moody*, 70 Tex. 434; *Nye v. Gribble*, 70 Tex. 458. See also *Oppenheimer v. Robinson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 320; *Von Stein v. Trexler*, 5 Tex. Civ. App. 299; *Franke v. Lone Star Brewing Co.*, 17 Tex. Civ. App. 9; *Central Coal, etc., Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 334; *Glasscock v. Stringer*, (Tex. Civ. App. 1895) 32 S. W. Rep. 920.

*Date of Index.* — In *Willis v. Smith*, 66 Tex. 31, it was held that in the absence of a date



made on the judgment docket.<sup>1</sup> And according to some of the authorities the index will not be required as against a person having actual notice of the existence of the judgment.<sup>2</sup> And in some jurisdictions it has been held that the docketing is complete without indexing, for the purpose of preserving the liens of judgments upon the real estate of the judgment debtor, even as against a purchaser for valuable consideration without notice.<sup>3</sup>

(4) *Irregularities in Docketing or Indexing* — (a) *In General*. — The lien of a judgment being the creation of statute, it is necessary to its creation that statutes requiring certain formalities of docketing and indexing should be followed in all substantial particulars.<sup>4</sup> It is the duty of the judgment creditor to see that his judgment is correctly and properly docketed and indexed when these formalities are required by statute, so that it may give constructive notice to subsequent purchasers and lien creditors, and his recourse for an improper docketing or indexing is against the clerk or prothonotary.<sup>5</sup> But a subsequent purchaser or judgment creditor is affected with such notice as the index entries afford, and if they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such investigation.<sup>6</sup>

(b) *Omission or Mistake as to Name of Party to Judgment*. — This question has often arisen in connection with omissions and mistakes in the docketing of the names of parties to a judgment.<sup>7</sup>

*Omission of Christian Name*. — It has been held that the omission of the Christian name of the defendant in the docket or index is fatal to the lien of the judgment.<sup>8</sup> Under statute in some states, where a judgment against a partnership is entered and indexed in the name of a firm without naming or giving any sufficient designation of the persons constituting the firm, by the addition of the Christian names, no lien will be acquired as against subsequent purchasers or lien creditors without notice.<sup>9</sup>

the presumption is that the index was made contemporaneously with the registration of the abstract.

1. *Hamilton v. Whitney*, 19 Neb. 304.

But in *Metz v. State Bank*, 7 Neb. 165, it was held that there was no lien where neither the general index nor the judgment record contained the name of the judgment debtor.

2. *Actual Notice as Substitute for Indexing*. — *Hamilton v. Whitney*, 19 Neb. 307; *Cushing v. Edwards*, 68 Iowa 145. See also *Ætna Ins. Co. v. Hesser*, 77 Iowa 381, 14 Am. St. Rep. 297. But see *Glasscock v. Stringer*, (Tex. Civ. App. 1895) 32 S. W. Rep. 920.

*Constructive Notice*. — And the same effect has been given to constructive notice afforded by a sheriff's deed based on the judgment. *Cushing v. Edwards*, 68 Iowa 145.

3. *Jurisdictions in Which Indexing Is Not Required*. — *Calwell v. Prindle*, 19 W. Va. 604; *Old Dominion Granite Co. v. Clarke*, 28 Gratt. (Va.) 617.

4. *Statutes Requiring Docketing and Indexing to Be Substantially Followed*. — *In re Boyd*, 4 Sawy. (U. S.) 262.

*Failure to Record Number of Judgment Fatal*. — *Bonner v. Grigsby*, 84 Tex. 330, 31 Am. St. Rep. 48.

*Lien Not Affected by Failure to Record in Order in Which Judgment Rolls Are Received*. — *Hesse v. Mann*, 40 Wis. 567. See also *School Dist. v. Caldwell*, 16 Neb. 68; *Glasgow v. Kann*, 171 Pa. St. 262.

*Day and Hour of Record Need Not Be Noted*. — *Vidor v. Rawlins*, (Tex. 1900) 54 S. W. Rep. 1026. See also *Sears v. Burnham*, 17 N. Y.

445. Compare *Hutchinson v. Gorham*, (Oregon 1900) 61 Pac. Rep. 431.

*Docketing on Holiday Does Not Invalidate in Absence of Statute*. — *In re Worthington*, 7 Biss. (U. S.) 455, 16 Nat. Bankr. Reg. 52.

5. *Doe v. Purchas*, 2 Hurl. & W. 50; *Hutchinson's Appeal*, 92 Pa. St. 186; *Hamilton's Appeal*, 103 Pa. St. 371; *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51. Compare *Hesse v. Mann*, 40 Wis. 567.

6. *Metz v. State Bank*, 7 Neb. 165.

7. *Failure to Add "Junior" to Name Immaterial*. — *Bidwell v. Coleman*, 11 Minn. 78.

*In Texas Abstract Must Be Indexed under Name of Each Party to Judgment*. — *Gullett Gin Co. v. Oliver*, 78 Tex. 186; *Pierce v. Wimberly*, 78 Tex. 187; *Noble v. Barner*, 22 Tex. Civ. App. 357.

*Failure to State Character in Which Parties Sued or Defended Unimportant*. — *Willis v. Smith*, 66 Tex. 31.

8. *Effect of Omission of Christian Name*. — *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586; *York Bank's Appeal*, 36 Pa. St. 458; *Smith's Appeal*, 47 Pa. St. 128; *Hamilton's Appeal*, 103 Pa. St. 368.

9. *Docketing of Judgment Against Partnership in Firm Name*. — *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586; *York Bank's Appeal*, 36 Pa. St. 458; *Smith's Appeal*, 47 Pa. St. 128; *Hamilton's Appeal*, 103 Pa. St. 371; *Gullett Gin Co. v. Oliver*, 78 Tex. 182; *Pierce v. Wimberly*, 78 Tex. 187; *Steffens v. Cameron*, (Tex. 1892) 19 S. W. Rep. 1068. See also *Glasscock v. Price*, (Tex. Civ. App. 1898) 45 S. W. Rep. 415. Compare *Hibberd v. Smith*, 50 Cal. 511.



**Mistake in Christian Name.** — The same rule has been applied where a wrong Christian name has been entered on the docket or index, as for instance John for Jacob,<sup>1</sup> or Ellen for Helen.<sup>2</sup>

**Abbreviation of Christian Name.** — But an abbreviation of the Christian name of a judgment defendant has been held not to interfere with the attaching of the lien.<sup>3</sup>

**Omission of Middle Initial.** — The omission of the middle initial of the name of the defendant in the index<sup>4</sup> or docket<sup>5</sup> is fatal to the lien, and this as against subsequent judgment creditors as well as purchasers.

**Misspelling of Surname.** — The attaching of the judgment lien as against subsequent purchasers and lien creditors has been prevented also by the misspelling of the surname of the judgment debtor in the docket or index entry.<sup>6</sup> And it has been held that it is not enough that the name entered in the index and the real name are *idem sonans*, since the record addresses itself to the eye and not to the ear alone.<sup>7</sup> But if the name is found under the proper title in the

But an index in the name of "D. & A. Oppenheimer" is sufficient, as in this case each partner's given name is shown by the index. *Oppenheimer v. Robinson*, 87 Tex. 174.

And it has been held not to be necessary that the individual names of a firm be indexed, where it appears that suit was brought in the firm name without stating the names of any persons forming the partnership, and that judgment was rendered in that name. *Willis v. Downes*, (Tex. Civ. App. 1898) 46 S. W. Rep. 921.

**Actual Personal Notice** of the judgment to subsequent purchasers and lienholders before their rights attach will cure such defective entry and index. *Smith's Appeal*, 47 Pa. St. 128; *Hamilton's Appeal*, 103 Pa. St. 371.

**Where a Partnership Is Plaintiff.** — But in a comparatively recent case in the Supreme Court of the United States it was held under the *Texas* statute that the failure of the docket and index to give the individual names of the plaintiffs in a judgment, the name of the firm only being given, will not be fatal to the lien. *Cooke v. Avery*, 147 U. S. 375. Compare *Willis v. Nichols*, 5 Tex. Civ. App. 154.

**Indexing of Firm Name Unnecessary.** — Under statute in this state also it has been held that where the index correctly gives the names of each member constituting a firm, the giving of the firm name is not necessary to the validity of the index. *Willis v. Downes*, (Tex. Civ. App. 1898) 46 S. W. Rep. 920. See also *Semple v. Eubanks*, 13 Tex. Civ. App. 418.

**Indexing Name of Private Corporation.** — Under statute in *Texas* it has been held that in indexing the name of a private corporation, as P. I. Willis & Bro., indexing under the letter W. instead of P. is correct. *Kantz v. Willis*, 16 Tex. Civ. App. 12; *Willis v. Downes*, (Tex. Civ. App. 1898) 46 S. W. Rep. 920. To the same effect see *Burnett v. Cockshatt*, 2 Tex. Civ. App. 304.

**Effect of Enrolment under Initial Letter of One Member of Firm Only.** — In *Hughes v. Lacock*, 63 Miss. 112, it was held, where a judgment was obtained against the mercantile firm of J. & W., and the judgment was enrolled under the letter J., and the individual names of the firm were set out there also, but no entry of the judgment was under the letter W., that such enrolment bound the property of the firm as to

creditors and purchasers, but it was not binding on the individual property of W.

1. *Zimmerman v. Briggans*, 5 Watts (Pa.) 186.

2. *Thomas v. Desney*, 57 Iowa 58.

3. **Effect of Abbreviation of Christian Name.** — *Pinney v. Russell*, 52 Minn. 443; *Jones's Estate*, 27 Pa. St. 336.

**Under Statute in Washington** requiring that the names of the parties to the judgment shall appear at length in the transcript filed with the auditor, it has been held that it is only required that there should be no abbreviation of the names of the parties shown by the judgment entry; that the statute has no reference to the full Christian or other names of the parties, but only to their names as set out in the judgment; and that if the names are so set out in the judgment as not to render it invalid a like setting out in the transcript will be sufficient. *Lamey v. Coffman*, 11 Wash. 301.

**Indiana.** — But in *Johnson v. Hess*, 126 Ind. 298, it was held that the record of a judgment against William Mankedick is not constructive notice to a purchaser in good faith of real estate of which H. W. Mankedick is the remote grantor, that the judgment is against H. W. Mankedick and a lien upon the land.

4. **Omission of Middle Initial of Defendant in Index.** — *Phillips v. McKaig*, 86 Neb. 853; *Wood v. Reynolds*, 7 W. & S. (Pa.) 406; *Crouse v. Murphy*, 27 W. N. C. (Pa.) 444, 140 Pa. St. 335. Compare *Jenny v. Zehnder*, 101 Pa. St. 296.

And the same has been held of the insertion of a wrong middle initial of a name. *Hutchinson's Appeal*, 92 Pa. St. 186.

5. *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51. Compare *Clute v. Emmerich*, 26 Hun (N. Y.) 10, affirmed in 99 N. Y. 342.

6. **Effect of Misspelling of Defendant's Surname.** — Indexing in the name of Hesse instead of Hesser has been held to be such an irregularity as will prevent the attaching of the lien. *Ætna L. Ins. Co. v. Hesser*, 77 Iowa 381, 14 Am. St. Rep. 297.

And the same has been held of the indexing of Burkhead for Bankhead. *Anthony v. Taylor*, 68 Tex. 403.

**Rule Otherwise as Against Fraudulent Grantee.** — *Fuller v. Nelson*, 35 Minn. 213.

7. Thus it has been held that where the true



index with the correct first name and with a variation in the spelling in the middle letter of the surname which makes no change in the name as spoken, the variation is immaterial.<sup>1</sup>

**Effect of Failure to Enter Name of One of Several Defendants.** — Where a judgment against several persons is entered on the judgment docket, but the caption and index and cross index contain the name of only one of the defendants, it has been held that no lien is created against the property of the defendants whose names were omitted.<sup>2</sup> But in such case the judgment will operate as a lien on the property of the defendant against whom the index is made.<sup>3</sup>

(c) **Errors as to Amount of Judgment.** — Under statute in many jurisdictions it has been held that the docket must correctly disclose the amount of the judgments,<sup>4</sup> and the amount still due after the deduction of credits if any.<sup>5</sup> Mere numerals without any indication that they represent dollars or other denominations of money are not sufficient.<sup>6</sup>

**d. INTERESTS SUBJECT TO LIEN** — (1) *Real Estate* — (a) **In General.** — It is a general rule under the statutes of the various jurisdictions that a judgment operates as a lien on the real estate of the judgment debtor,<sup>7</sup> and it is immaterial whether the debtor's interest appears of record or not.<sup>8</sup> Under this rule it has been held that a judgment is a lien on a railroad and the rolling stock, where by virtue of its charter the company acquires a title in fee to the roadbed<sup>9</sup> and the rolling stock owned by it and used in connection with the

name of the judgment defendant is George P. Yoest, an entry in the index of the name George P. Joest was no notice to a purchaser of the existence of a judgment lien. *Heil's Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590.

1. Thus the entry of John Bobb for John Bubb was notice of a judgment lien in a section of the county where these names were *idem sonans*. *Myer v. Fegaly*, 39 Pa. St. 429, 80 Am. Dec. 534. To the same effect see *Bergman's Appeal*, 88 Pa. St. 120.

2. *Dewey v. Sugg*, 109 N. Car. 328; *Cummings v. Long*, 16 Iowa 41, 85 Am. Dec. 502.

3. *Whitacre v. Martin*, 51 Minn. 421; *Blum v. Keyser*, 8 Tex. Civ. App. 675. See also *Fuller v. Hull*, 19 Wash. 400.

4. **Effect of Errors as to Amount of Judgment.** — *Bush v. Farris*, 71 Fed. Rep. 770, 30 U. S. App. 626 (decided under *Texas* statute); *In re Boyd*, 4 Sawy. (U. S.) 262 (decided under *Oregon* statute); *Lea v. Yates*, 40 Ga. 56; *Lirette v. Carrane*, 27 La. Ann. 298; *Glasscock v. Stringer*, (Tex. Civ. App. 1895) 32 S. W. Rep. 920.

**Where There Is a Failure to Set Out the Amount of Costs in a transcript of a judgment, the effect will be to deprive the judgment creditor of the benefit of the lien for such costs.** *Lamey v. Coffman*, 11 Wash. 301.

**Rate of Interest.** — In *Texas* it has been held that the abstract of the judgment should state the rate of interest which the judgment bears, but it is not necessary that there should be a calculation of the interest at the rate stated for the purpose of ascertaining the exact amount due upon the judgment at the date of the abstract. *Willis v. Sommerville*, 3 Tex. Civ. App. 509; *Decatur First Nat. Bank v. Cloud*, 2 Tex. Civ. App. 627.

5. *Noble v. Barnes*, 22 Tex. Civ. App. 357; *Willis v. Sanger*, 15 Tex. Civ. App. 655. See also *Evans v. Frisbie*, 84 Tex. 341.

6. *In re Boyd*, 4 Sawy. (U. S.) 262; *Bush v. Farris*, 71 Fed. Rep. 770.

7. **Judgments as Liens on Real Estate in General.** — *Van Rensselaer v. Sheriff*, 1 Cow. (N. Y.) 501. See also the statutes of the various states.

**Easement Attached to Lands Subject to Lien.** — *Morgan v. Mason*, 20 Ohio 401, 55 Am. Dec. 464.

**Damages in Condemnation Proceedings.** — Under statute in *Washington* it has been held that the decree of appropriation awarding damages in condemnation proceedings is for an interest in the land taken; the money in court represents the substantial interest in lands, and it is subject to the lien of a judgment. *Yakima Water, etc., Co. v. Hathaway*, 18 Wash. 377.

**Possession as Prima Facie Evidence of Title.** — It has been held that when the person against whom a judgment is rendered is in the actual possession of lands, the judgment lien will attach, since actual possession is *prima facie* evidence of title. *Jackson v. Town*, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405.

**Lands Held Adversely.** — It has been held that a judgment lien will not be defeated by the adverse possession of a third person for more than seven years, the statutory period in *Florida*. *Hill v. Gordon*, 45 Fed. Rep. 276. See also *Jackson v. Tuttle*, 9 Cow. (N. Y.) 233, 6 Wend. (N. Y.) 213.

8. **Recording of Title Immateral.** — *Niantic Bank v. Dennis*, 37 Ill. 381; *Denegre v. Haun*, 13 Iowa 240; *Lathrop v. Brown*, 23 Iowa 40; *Logan v. Herbert*, 30 La. Ann. 727; *Richter v. Selin*, 8. S. & R. (Pa.) 425.

9. **Judgment Lien on Railroad.** — *Milwaukee, etc., R. Co. v. James*, 6 Wall. (U. S.) 750.

But the rule is different in a jurisdiction where by statute the right of way secured to a railroad does not include the fee simple estate in the lands. *Scogin v. Perry*, 32 Tex. 21.

Tolls received on a railroad after a judgment rendered against the company, and the appointment of a sequestrator, have been held not to be such an interest in land existing in the corporation as to be bound by a judgment



road is made a fixture by express statute.<sup>1</sup> But it has been held that a judgment against a turnpike company is not a lien upon the turnpike road.<sup>2</sup>

(b) **Naked Legal Estate.** — A judgment lien cannot attach to a mere naked legal estate when the entire equitable estate is vested in some third person.<sup>3</sup> And this is true in equity as well as at law.<sup>4</sup> Thus as a general rule where a third person pays the purchase money, but the deed is taken in the name of the judgment debtor, the judgment debtor acquires no beneficial interest on which the judgment can operate as a lien.<sup>5</sup> But a judgment lien on lands cannot be defeated by the fact that the purchase money for the lands was paid by a third person subsequent to the vesting of title in the judgment debtor, so that no resulting trust was created.<sup>6</sup> When the trust does not extend to the entire interest in the land, as where the title is taken in the name of the judgment debtor and part only of the purchase money is paid out of trust funds in his hands, the judgment against him will be a lien on the land to the extent of his interest therein.<sup>7</sup>

(c) **Equitable Interest Generally.** — Apart from Statutory Provision a judgment at law does not constitute a lien upon an equitable interest, but the creditor must have relief in equity.<sup>8</sup> And indeed under a statute providing that a judgment shall be a lien on real property of the judgment debtor, etc., it has been held

lien. *Leedom v. Plymouth R. Co.*, 5 W. & S. (Pa.) 265.

1. **Judgment Lien on Rolling Stock of Railroad.** — *Milwaukee, etc., R. Co. v. Gaines*, 5 Wall. (U. S.) 750. As to the effect of a judgment as a lien on fixtures, see the title **FIXTURES**, vol. 13, p. 501.

2. **Judgment Not a Lien on Turnpike Road.** — *Beam's Appeal*, 19 Pa. St. 453.

3. **Judgment Not a Lien on Naked Legal Estate** — *United States*. — *Withnell v. Courtland Wagon Co.*, 25 Fed. Rep. 372; *Wade v. Sewell*, 56 Fed. Rep. 129.

*Alabama.* — *Aicardi v. Craig*, 42 Ala. 311.

*Indiana.* — *Hays v. Reger*, 102 Ind. 524; *Foltz v. Wert*, 103 Ind. 404; *Heberd v. Wines*, 105 Ind. 237; *Moore v. Thomas*, 137 Ind. 218; *Wells v. Benton*, 108 Ind. 585.

*Iowa.* — *Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740; *Rice v. Kelso*, 57 Iowa 115; *Brehner v. Johnson*, 84 Iowa 23; *Bucknell v. Deering*, 99 Iowa 548.

*New York.* — *Ells v. Tousley*, 1 Paige (N. Y.) 230.

*Ohio.* — *Birchard v. Edwards*, 11 Ohio St. 84.

*Oklahoma.* — *Baird v. Williams*, 4 Okla. 173.

*Virginia.* — *Coldiron v. Asheville Shoe Co.*, 93 Va. 364.

*Wisconsin.* — *Main v. Bosworth*, 77 Wis. 660; *Davenport v. Stephens*, 95 Wis. 456.

See also *Dodd v. Bond*, 88 Ga. 355; *Brown v. Barngrover*, 82 Iowa 204; *Uhl v. May*, 5 Neb. 157.

4. *Averill v. Loucks*, 6 Barb. (N. Y.) 19; *Lounsbury v. Purdy*, 11 Barb. (N. Y.) 490.

**Effect of Judgment Against Vendee After Cancellation of Deed.** — In *Blaney v. Hanks*, 14 Iowa 400, it was held that while as a general rule the canceling of a deed does not revert the property which has once passed under it, courts of equity will not enforce the lien of a judgment rendered after such cancellation against the vendee named in the destroyed deed, if the cancellation was made in good faith by the parties, and with no intention to defraud creditors. Compare *Parshall v. Shirts*, 54 Barb. (N. Y.) 99.

5. *Atkinson v. Hancock*, 67 Iowa 452; *Holmdel, etc., Turnpike Co. v. Conover*, 34 N. J. Eq. 364.

6. *Ex p. Trenholm*, 19 S. Car. 131.

7. **Where Trustee Holds Beneficial Interest in Part of Lands.** — *Martin v. Baldwin*, 30 Minn. 537.

8. **Judgments Not Liens on Equitable Interests Apart from Statute** — *United States*. — *Morsell v. Washington First Nat. Bank*, 91 U. S. 361; *Brandies v. Cochrane*, 112 U. S. 345; *Withnell v. Courtland Wagon Co.*, 25 Fed. Rep. 372; *U. S. v. Eisenbeis*, 88 Fed. Rep. 4.

*Alabama.* — *Powell v. Knox*, 16 Ala. 364.

*Indiana.* — *Russell v. Houston*, 5 Ind. 180; *Jeffries v. Sherburn*, 21 Ind. 112; *Terrell v. Prestel*, 68 Ind. 86.

*Mississippi.* — *Roach v. Bennett*, 24 Miss. 98.

*Nebraska.* — *Nessler v. Neher*, 18 Neb. 649; *Omaha Coal, etc. Co. v. Suess*, 54 Neb. 379.

*New Jersey.* — *Woodruff v. Johnson*, 8 N. J. Eq. 729, 55 Am. Dec. 247; *Disborough v. Outcalt*, 1 N. J. Eq. 298; *Vancleave v. Groves*, 4 N. J. Eq. 330; *Halsted v. Davison*, 10 N. J. Eq. 290; *Trusdell v. Lehmann*, 47 N. J. Eq. 221; *Sipley v. Wass*, 49 N. J. Eq. 463, 31 Am. St. Rep. 702.

*New York.* — *Bogart v. Perry*, 1 Johns. Ch. (N. Y.) 52; *Jackson v. Chapin*, 5 Cow. (N. Y.) 485; *Kellogg v. Wood*, 4 Paige (N. Y.) 578; *Arnot v. Beadle, Hill & D. Supp.* (N. Y.) 181.

*Ohio.* — *Baird v. Kirtland*, 8 Ohio 21; *Birchard v. Edwards*, 11 Ohio St. 88.

*Tennessee.* — *Chapron v. Cassaday*, 3 Humph. (Tenn.) 661.

See also *Smith v. McCann*, 24 How. (U. S.) 398; *Trask v. Green*, 9 Mich. 358.

In *Pennsylvania*, where there is no court of chancery, it has, from necessity, been established as a principle that judgments have an immediate operation as liens on equitable estates. *Auwerter v. Mathiot*, 9 S. & R. (Pa.) 402; *Carkhuff v. Anderson*, 3 Binn. (Pa.) 4; *Semple v. Mown*, 4 Phila. (Pa.) 85, 17 Leg. Int. (Pa.) 213; *Fair Hope North Savage F. Brick Co.'s Estate*, 183 Pa. St. 96.



that a judgment is not a lien on an equitable estate.<sup>1</sup>

But under Statute in some jurisdictions it is expressly provided that a judgment is a lien upon an equitable interest in real estate.<sup>2</sup>

**Judgment Regarded as Lien in Chancery.** — And courts of chancery following by analogy the principles of the common law will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor.<sup>3</sup>

(d) **Interest of Cestui Que Trust.** — Under the rule in some jurisdictions denying to judgments the effect of liens on equitable estates, it has been held that a judgment does not attach as a lien upon the interest of a *cestui que trust*, as for instance land which has been purchased with the money of a judgment debtor, but the title to which has been taken in the name of a third person.<sup>4</sup> But in some jurisdictions a distinction has been made in this respect between active and passive trusts, it being held that where the legal title to lands is in trustees, for the purpose of serving the requirements of an active trust, a judgment creditor of the *cestui que trust* has no lien and can acquire none at law, but can obtain one only by filing a bill in equity for that purpose, while with regard to merely passive trusts a different rule is applied.<sup>5</sup> And under statute it has been broadly laid down that a judgment is a lien on land held in trust for the judgment debtor.<sup>6</sup>

(e) **Equity of Redemption.** — An equity of redemption being regarded at common law as a mere equitable interest is not, apart from statute, an interest on which a judgment lien will attach.<sup>7</sup> And the same is true of the residuary interest of the grantor in a deed of trust apart from statute.<sup>8</sup> But in such

1. *Smith v. Ingles*, 2 Oregon 43; *Bloomfield v. Humason*, 11 Oregon 229.

2. **Judgments as Statutory Liens on Equitable Interests.** — *Niantic Bank v. Dennis*, 37 Ill. 381; *Blain v. Stewart*, 2 Iowa 378; *Harrison v. Kramer*, 3 Iowa 543; *Cook v. Dillon*, 9 Iowa 407, 74 Am. Dec. 354; *Baldwin v. Thompson*, 15 Iowa 504; *Lathrop v. Brown*, 23 Iowa 40; *Denegre v. Haun*, 13 Iowa 240; *Rand v. Garner*, 75 Iowa 311; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *McMechen v. Marman*, 8 Gill & J. (Md.) 57; *McKeithan v. Walker*, 66 N. Car. 95; *Hoppock v. Shober*, 69 N. Car. 153; *Trimble v. Hunter*, 104 N. Car. 135. See also *Maxwell v. Vaught*, 96 Ind. 141; *Kirkwood v. Koester*, 11 Kan. 471.

3. **Judgments as Equitable Liens on Equitable Interests** — *Indiana*. — *Unknown Heirs v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638.

*Maryland*. — *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589.

*Mississippi*. — *Roach v. Bennett*, 24 Miss. 98.  
*New Jersey*. — *Halsted v. Davison*, 10 N. J. Eq. 290.

*Tennessee*. — *Chapron v. Cassaday*, 3 Humph. (Tenn.) 661.

*Virginia*. — *Haleys v. Williams*, 1 Leigh (Va.) 140, 19 Am. Dec. 743; *Coutts v. Walker*, 2 Leigh (Va.) 268; *Michaux v. Brown*, 10 Gratt (Va.) 612.

*West Virginia*. — *Damron v. Smith*, 37 W. Va. 580; *Davis v. Vass*, (W. Va. 1900) 35 S. E. Rep. 826.

See also *Shepherd v. Brown*, 3 Mackey (D. C.) 266.

4. **Judgment Held Not a Lien on Interest of Cestui Que Trust.** — *Smith v. Ingles*, 2 Oregon 43.

The trust which arises under the statutes in some of the states, where one person furnishes the purchase price of land and title is taken in

the name of another, is a trust for the creditors of the former, and he acquires no title to which a judgment lien can attach. *Miner v. Lane*, 87 Wis. 348; *Blackburn v. Lake Shore Traffic Co.*, 90 Wis. 362; *Garfield v. Hatmaker*, 15 N. Y. 475; *Wood v. Robinson*, 22 N. Y. 564; *Donovan v. Sheridan*, 37 N. Y. Super. Ct. 256.

Under statute in *North Carolina* making a docketed judgment a lien on both legal and equitable estates in lands, it has been held that such a judgment does not constitute a lien upon real property purchased and paid for by the debtor, where the title is taken in the name of some third person. *Dixon v. Dixon*, 81 N. Car. 323.

**Interest of Beneficiary under Deed of Trust to Secure a Debt.** — It has been held that the interest of the beneficiary in a deed of trust to secure a debt is not subject to a judgment lien, and his assignee of the debt secured by the deed of trust takes the debt and the security free from any such lien. *Beckett v. Dean*, 57 Miss. 232.

5. **Distinction Between Active and Passive Trusts.** — *Spindle v. Shreve*, 111 U. S. 542; *Brandies v. Cochrane*, 112 U. S. 344; *Flanagin v. Daws*, 2 Houst. (Del.) 476; *Doe v. Lank*, 4 Houst. (Del.) 648.

6. **Judgment Held to Be a Lien on Interest of Cestui Que Trust.** — *Maxwell v. Vaught*, 96 Ind. 141.

7. **Equity of Redemption Not Subject to Judgment Lien at Common Law.** — *Cantzon v. Dorr*, 27 Miss. 251. See also *Van Ness v. Hyatt*, 13 Pet. (U. S.) 294.

8. **Interest of Grantor in Deed of Trust Not Subject to Lien.** — *Morsell v. Washington First Nat. Bank*, 91 U. S. 357; *Freedman's Sav., etc., Co. v. Earle*, 110 U. S. 710; *Marlow v. Johnson*, 31 Miss. 128.



cases relief may be had in equity.<sup>1</sup> In many jurisdictions, as a result either of statutes making judgments liens on equitable interests, or of departures by statute or otherwise from the common-law view as to the equitable nature of the mortgagor's interest, the mortgagor's interest or the residuary interest of a person executing a deed of trust is subject to the lien of a judgment,<sup>2</sup> and a judgment debtor, it has been held, cannot by conveying his equity of redemption to a prior mortgagee cut off the lien of the judgment.<sup>3</sup>

(f) **Lands Subject to Power of Appointment.** — At common law a judgment against a party having a power of appointment with the estate vested in him until and in default of appointment, is defeated by the subsequent execution of the power.<sup>4</sup> But where a person has the general power of appointment, either by deed or will, and executes this power, the property appointed is deemed, in equity, part of his assets, and subject to the demands of his judgment creditors in preference to the claims of his voluntary appointees or legatees.<sup>5</sup>

**Lands Subject to Power of Appointment in Third Person.** — But a judgment has been held in equity to be subordinate to a power of appointment in a third person, as for instance a power of sale vested in executors by will.<sup>6</sup> And the same principle has been applied to a power of appointment resting in the discretion of trustees, qualified only by the necessity of obtaining the consent of the judgment debtor to the exercise of that discretion.<sup>7</sup>

(g) **Interest of Vendor.** — A judgment obtained against the vendor of land after the execution of articles of agreement, but before the execution of a deed and before the entire purchase money is paid, is a lien on the legal estate of the vendor to the amount of the purchase money then unpaid,<sup>8</sup> and on a

1. *Freedman's Sav., etc., Co. v. Earle*, 110 U. S. 710; *Michaux v. Brown*, 10 Gratt. (Va.) 612; *Hale v. Horne*, 21 Gratt. (Va.) 112.

2. **Judgment as Lien on Equity of Redemption under Statute.** — *Pahlman v. Shumway*, 24 Ill. 128; *Walters v. Defenbaugh*, 90 Ill. 241; *Julian v. Beal*, 26 Ind. 222, 89 Am. Dec. 460; *Cook v. Dillon*, 9 Iowa 407, 74 Am. Dec. 354; *Sprinkle v. Martin*, 66 N. Car. 55; *McKeithan v. Walker*, 66 N. Car. 95; *Hoppock v. Shober*, 69 N. Car. 153; *Trimble v. Hunter*, 104 N. Car. 129; *Kinports v. Boynton*, 120 Pa. St. 319, 6 Am. St. Rep. 706. See also *Macauley v. Smith*, 132 N. Y. 531; *Cottingham v. Springer*, 88 Ill. 95; *Baird v. Kirtland*, 8 Ohio 21; *Loring v. Melendy*, 11 Ohio 355; *Brawner v. Watkins*, 28 Md. 218; *Sullivan v. Leckie*, 60 Iowa 326.

**Deed Absolute in Form but Intended as Mortgage.** — This rule has been applied to the interest of a person conveying his land by a deed absolute in form but intended as a mortgage. *Marston v. Williams*, 45 Minn. 118.

But in other jurisdictions a different view obtains, it being held that a deed absolute in form but intended as a mortgage passes the legal title. *Baird v. Kirtland*, 8 Ohio 25; *Loring v. Melendy*, 11 Ohio 355; *Omaha Coal, etc., Co. v. Suess*, 54 Neb. 379.

**Enforcement of Lien Against Surplus Proceeds in Equity.** — In *New York* it has been held that a judgment obtained against the owner of an equity of redemption in mortgaged premises after a decree of foreclosure, but before a sale of the premises by the master, has an equitable lien upon the surplus moneys produced by the sale under the decree, but it is otherwise if the judgment was docketed subsequent to the decree. *Sweet v. Jacobs*, 6 Paige (N. Y.) 355, 31 Am. Dec. 252. See also *Goodhue v. Berrien*, 2 Sandf. Ch. (N. Y.) 630; *Shepard v. O'Neil*, 4 Barb. (N. Y.) 125.

3. *Walters v. Defenbaugh*, 90 Ill. 241.

4. **Lien Against Person with Power of Appointment Defeated by Execution of Power at Common Law.** — *Brandies v. Cochrane*, 112 U. S. 344. See also *Doe v. Jones*, 10 B. & C. 459, 21 E. C. L. 113; *Tunstall v. Trappes*, 3 Sim. 286; *Eaton v. Sanxter*, 6 Sim. 517; *Skeeles v. Shearly*, 8 Sim. 153, on appeal 3 Myl. & C. 112.

The statute 1 & 2 Vict., c. 110, altered the law in this respect, by making a judgment an actual charge on the debtor's property, where he has, at the time when the judgment is entered up or at any time afterwards, any disposing power over it, which he might, without the assent of any other person, exercise for his own benefit; so that it would continue to bind the property, notwithstanding any appointment. 2 Sugden on Powers (7th Lond. ed.) 33; *Burton on Real Property* (8th Lond. ed.) 283; *Hotham v. Somerville*, 9 Beav. 63.

5. *Brandies v. Cochrane*, 112 U. S. 344; *Tallmadge v. Sill*, 21 Bart. (N. Y.) 34. See also *In re Harvey*, 13 Ch. D. 216; *Clapp v. Ingraham*, 126 Mass. 200. Compare *Leggett v. Doremus*, 25 N. J. Eq. 122.

6. *Wetmore v. Midmer*, 21 N. J. Eq. 242.

7. *Leggett v. Doremus*, 25 N. J. Eq. 128.

8. **Judgment as Lien on Vendor's Interest** — *Alabama*. — *Sellers v. Hayes*, 17 Ala. 749.

*Georgia*. — *Ware v. Jackson*, 19 Ga. 452; *Bell v. McDuffie*, 71 Ga. 264; *Brown v. Hardee*, 75 Ga. 457.

*Indiana*. — *Gaar v. Lockridge*, 9 Ind. 92.

*Minnesota*. — *Minneapolis, etc., R. Co. v. Wilson*, 25 Minn. 382; *Welles v. Baldwin*, 28 Minn. 408; *Coolbaugh v. Roemer*, 30 Minn. 424.

*Nebraska*. — *Courtney v. Parker*, 21 Neb. 582; *Olander v. Tighe*, 43 Neb. 344.

*Pennsylvania*. — *McMullen v. Wenner*, 16 S. & R. (Pa.) 18, 16 Am. Dec. 543; *Fasholt v.*



sale under such judgment the sheriff's vendee stands precisely in the situation of the original vendor, and is entitled to the unpaid purchase money.<sup>1</sup> But where no part of the purchase money remains unpaid at the date of the judgment, the judgment debtor is a mere naked trustee of the legal title and no judgment lien will attach.<sup>2</sup> And a contract for land made *bona fide* for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at the time, and a judgment obtained by a third person against the vendor between the making of the contract and the payment of the money cannot defeat or impair the equitable interest thus acquired, on the general principle that a contract which creates a specific lien on real property has a superior equity to the general lien of a subsequent judgment.<sup>3</sup> It is not an unusual practice for courts of equity to control the operation of a judgment obtained against a vendor subsequent to a contract for the sale of lands, and where the unpaid purchase money is brought into court equity may, upon a proper showing, restrain proceedings to enforce the judgment by execution sale of the land.<sup>4</sup> And where a vendee in possession, subsequent to the recovery of a judgment against the vendor, but without actual notice thereof, has paid over a balance of purchase money to the judgment debtor, the lien of the judgment is lost, and the vendee is, at law and in equity, entitled to be protected against such claim.<sup>5</sup>

Reed, 16 S. & R. (Pa.) 266; Chahoon v. Hollenback, 16 S. & R. (Pa.) 425, 16 Am. Dec. 587; Catlin v. Robinson, 2 Watts (Pa.) 373; Stewart v. Coder, 11 Pa. St. 94; Kinports v. Boynton, 120 Pa. St. 306, 6 Am. St. Rep. 706.

See also Uhl v. May, 5 Neb. 157; Niles v. Davis, 60 Miss. 750. But see Woodward v. Dean, 46 Iowa 499; Benbow v. Boyer, 89 Iowa 494; Money v. Dorcey, 7 Smed. & M. (Miss.) 15; Hoy v. Taliaferro, 8 Smed. & M. (Miss.) 727.

Thus it has been held that where land is sold, a bond for title given, a part of the purchase money paid, and a note for the balance is held by the vendor, the title remaining in the vendor is subject to the lien of a judgment subsequently rendered. Hardee v. McMichael, 68 Ga. 678. See also Neal v. Murphey, 60 Ga. 388. But see Elwell v. Hitchcock, 41 Kan. 130.

But it has been held that the lien is lost if a note is given for the balance of the unpaid purchase, and is transferred to a *bona fide* holder for value without notice to whom payment was made at maturity by the vendee, the maker of the note. Riddle's Appeal, (Pa. 1886) 7 Atl. Rep. 232.

In North Carolina it has been held that where a vendor of land receives a part of the purchase money and takes notes for the residue thereof, retaining the title until such notes shall be paid, and afterwards a judgment is obtained and docketed against him, and he then dies, such judgment will not be a lien upon the land or the notes in the hands of his executors, but the notes, when collected, will be assets for the payment of debts. Moore v. Byers, 65 N. Car. 240.

1. Minneapolis, etc., R. Co. v. Wilson, 25 Minn. 382; Courtney v. Parker, 16 Neb. 311; 21 Neb. 582; Fasholt v. Reed, 16 S. & R. (Pa.) 266; Kinports v. Boynton, 120 Pa. St. 319, 6 Am. St. Rep. 706.

2. Effect of Judgment Against Vendor After Payment of Entire Purchase Money—*Maryland*.—Valentine v. Seiss, 79 Md. 187.

*Minnesota*.—Baker v. Thompson, 36 Minn. 314.

*New Jersey*.—Hoagland v. Latourette, 2 N. J. Eq. 254.

*New York*.—Lounsbury v. Purdy, 11 Barb. (N. Y.) 490.

*Ohio*.—Minns v. Morse, 15 Ohio 568, 45 Am. Dec. 590.

*Oregon*.—Stannis v. Nicholson, 2 Oregon 335.

*Pennsylvania*.—Gibbs v. Tiffany, 4 Pa. Super. Ct. 29.

*Virginia*.—Brown v. Butler, 87 Va. 621; Floyd v. Harding, 28 Gratt. (Va.) 401.

*West Virginia*.—Snyder v. Martin, 17 W. Va. 276, 41 Am. Rep. 670; Pack v. Hansbarger, 17 W. Va. 313; Snyder v. Botkin, 37 W. Va. 355.

*Wisconsin*.—Goodell v. Blumer, 41 Wis. 436.

See also Thomas v. Kennedy, 24 Iowa 397, 95 Am. Dec. 740; Elwell v. Hitchcock, 41 Kan. 130; Manley v. Hunt, 1 Ohio 258; Young v. Devries, 31 Gratt. (Va.) 304; Finch v. Winchelsea, 1 P. Wms. 277.

3. Hampson v. Edelen, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530. See also Georgetown Corp. v. Smith, 4 Cranch (C. C.) 91; Matter of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; Delaire v. Keenan, 3 Desaus. (S. Car.) 74, 4 Am. Dec. 601.

Effect of Subsequent Conveyance Not in Accordance with Contract. — A subsequent transaction whereby the judgment debtor conveys the land to the vendee on conditions of payment materially different from those prescribed in the executory contract, will be regarded as a new contract and not as a mere performance of the original contract, and the vendee acquires such new rights with constructive notice of the judgment lien, and therefore becomes a purchaser subject thereto. Coolbaugh v. Roemer, 30 Minn. 424.

4. Lane v. Ludlow, 2 Paine (U. S.) 591. See also Berryhill v. Potter, 42 Minn. 279.

5. Hampson v. Edelen, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; Berryhill v. Potter, 42 Minn.



(h) **Interest of Vendee.** — At common law the vendee in possession under a contract of purchase has no such interest as is subject to the lien of a judgment against him, and this whether he has paid the purchase money or not.<sup>1</sup> But in those jurisdictions where by statute or otherwise a judgment is a lien on an equitable estate in lands, it is the rule that a vendee who holds under a contract of purchase, but who has not received a conveyance, acquires an interest upon which a judgment will attach as a lien,<sup>2</sup> and this rule has been applied where the whole or a part of the purchase money has been paid,<sup>3</sup> and even where no payment whatever has been made.<sup>4</sup>

(i) **Estates for Life.** — An estate for life, as well as an absolute estate, may be affected by a judgment lien.<sup>5</sup> Thus a judgment may be a lien upon an estate

279; *Parks v. Jackson*, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; *Moyer v. Hinman*, 13 N. Y. 185. See also *Adickes v. Lowry*, 15 S. Car. 128; *Smith v. Gage*, 41 Barb. (N. Y.) 60.

But the rule has been held to be otherwise where, with full knowledge of the pendency of a suit against the vendor which might result in judgment against him, the vendee pays the balance of the purchase money to the vendor. *Lefferson v. Dallas*, 20 Ohio St. 75; *Wehn v. Fall*, 55 Neb. 547.

**1. Interest of Vendee Not Subject to Lien.** — *Gentry v. Allison*, 20 Ind. 481; *Jeffries v. Sherburn*, 21 Ind. 112; *Evans v. Feeny*, 81 Ind. 532; *Roddy v. Elam*, 12 Rich. Eq. (S. Car.) 343. See also *Powell v. Bell*, 81 Va. 222.

**A Parol Agreement** to purchase land, accompanied with possession and the payment of the purchase money, without evidence of the making of valuable improvements, has been held not to be sufficient to confer such title on the vendee as would be subject to levy and sale as his property. *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350. See also *Rosenberger v. Jones*, 118 Mo. 559.

**Where Purchase Money Has Not Been Paid.** — Where a vendee had only a bond for a deed, and had paid nothing whatever on the notes mentioned in the bond, he has not even an equitable title to the land, and consequently has no interest on which a judgment lien may attach. *Sweeney v. Pratt*, 70 Conn. 276.

**Under Statutes in New York** it has been held that the interest of a person holding a contract for the purchase of land is not bound by the docketing of a judgment, and his interest in the land as a purchaser cannot be sold by execution upon such judgment, but that his interest can be reached only by his judgment creditor by filing a creditor's bill after the return of an execution not satisfied. *Boughton v. Orleans Bank*, 2 Barb. Ch. (N. Y.) 458; *Griffin v. Spencer*, 6 Hill (N. Y.) 525; *Talbot v. Chamberlin*, 3 Paige (N. Y.) 219; *Grosvenor v. Allen*, 9 Paige (N. Y.) 74; *Ellsworth v. Cuyler*, 9 Paige (N. Y.) 418. Compare *Bogert v. Perry*, 17 Johns. (N. Y.) 351, 8 Am. Dec. 411; *Jackson v. Parker*, 9 Cow. (N. Y.) 73.

**2. Judgment as Lien on Vendee's Interest under Statute.** — *Ralston v. Field*, 32 Ga. 453; *Rand v. Garner*, 75 Iowa 311; *Adams v. Harris*, 47 Miss. 144.

**Lands Purchased from United States Before Issuance of Patent.** — It has been held that lands purchased from the United States are subject to a judgment lien before a patent has been issued by the government. *Rogers v. Brent*,

10 Ill. 573, 50 Am. Dec. 422. See also *Levi v. Thompson*, 4 How. (U. S.) 17; *Landes v. Brant*, 10 How. (U. S.) 348; *Cavender v. Smith*, 5 Iowa 157; *Huntingdon v. Grantland*, 33 Miss. 453.

But it has been held that a judgment cannot operate as a lien on a mere pre-emption right in lands. *Harrington v. Sharp*, 1 Greene (Iowa) 131, 48 Am. Dec. 365.

**In Pennsylvania** there are numerous decisions to the effect that apart from statute a judgment against the equitable estate which a vendee holds under articles of agreement for the sale and purchase of land attaches to and binds the legal estate the instant it vests in the vendee; this doctrine being an exception to the general rule established in Pennsylvania that the lien of a judgment does not affect a subsequently acquired interest of the debtor by revival. *Richter v. Selin*, 8 S. & R. (Pa.) 425; *Episcopal Academy v. Frieze*, 2 Watts (Pa.) 16; *Catlin v. Robinson*, 2 Watts (Pa.) 373; *Foster's Appeal*, 3 Pa. St. 80; *Lyon v. McGuffey*, 4 Pa. St. 128, 45 Am. Dec. 675; *Lynch v. Dearth*, 2 P. & W. (Pa.) 110; *Russell's Appeal*, 15 Pa. St. 319; *Waters's Appeal*, 35 Pa. St. 524, 78 Am. Dec. 354; *Holmes's Appeal*, 108 Pa. St. 23; *Geiger v. Hill*, 1 Pa. St. 509; *Carneghan v. Brewster*, 2 Pa. St. 41; *Slater's Appeal*, 28 Pa. St. 171; *Morrison v. Wurtz*, 7 Watts (Pa.) 437; *Winter v. Thompson*, 3 Lack. Jur. (Pa.) 398.

And in *Pugh v. Good*, 3 W. & S. (Pa.) 62, 37 Am. Dec. 534, it was held to be unnecessary for the vendee to take actual possession of the land, and that possession by a tenant was sufficient.

The lands are subject to the lien of the judgment in the hands of an assignee of the vendee. *Winter v. Thompson*, 3 Lack. Jur. (Pa.) 398.

**A Purchaser at a Sheriff's Sale** has also been held to have such an interest before he gets his deed as will be bound by a judgment. *Slater's Appeal*, 28 Pa. St. 169; *Morrison v. Wurtz*, 7 Watts (Pa.) 437. Compare *Bowman v. People*, 82 Ill. 246, 25 Am. Rep. 316.

**3. Ralston v. Field**, 32 Ga. 453; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Adams v. Harris*, 47 Miss. 144; *Winter v. Thompson*, 3 Lack. Jur. (Pa.) 398; *Auwerter v. Mathiot*, 9 S. & R. (Pa.) 397; *Foster's Appeal*, 3 Pa. St. 79.

**4. Rand v. Garner**, 75 Iowa 311.

**5. Judgments as Liens on Life Estates.** — *Verdin v. Slocum*, 71 N. Y. 345; *Bridge v. Ward*, 35 Wis. 687.



by curtesy.<sup>1</sup> But if the life estate is subject to be divested by the breach of any condition subsequent, any such breach that would divest the estate will of necessity destroy the lien.<sup>2</sup> And the same has been held of an estate which is subject to be destroyed by the execution of a power.<sup>3</sup>

(j) **Leaseholds.** — At common law a judgment is not a lien on a term for years, but like any other chattel a leasehold is only bound by an execution.<sup>4</sup> Under statutes in some jurisdictions, however, a different rule is laid down.<sup>5</sup>

**Lease with Provision for Absolute Conveyance.** — Where the lease contains a provision for an absolute conveyance of the demised premises by the lessor to the lessee under certain conditions, it has been held that the lessee has an interest in lands upon which a judgment lien will attach.<sup>6</sup> But in *Iowa* it has been held that where certain premises were leased for a term of years, with the right in the lessee, if he so elected, to purchase the premises at a designated price, the leasehold, but not the option to purchase, constituted an interest in lands upon which a judgment would attach as a lien.<sup>7</sup>

(k) **Remainders and Reversionary Interests.** — A remainder or reversion, when vested, may be subject to the lien of a judgment, and may be levied upon and sold for the payment of such judgment.<sup>8</sup>

**Contingent Remainders.** — But it seems to be the prevailing rule that this doctrine does not apply to contingent remainders.<sup>9</sup>

**1. Judgments as Liens on Estates by the Curtesy.** — *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Beard v. Deitz*, 1 Watts (Pa.) 309.

Thus, in *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398, it was held that a judgment against a tenant by the curtesy initiate after issue born, binds his estate in his wife's lands which have been ordered to be appraised in proceedings in partition, but which have not been accepted or sold at the date of the recovery of the judgment.

**Effect of Statute Prohibiting Sale of Curtesy During Wife's Life.** — In *Maryland* this rule has been applied, notwithstanding a statute suspending the right of execution during the wife's life. *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708. See also the title **CURTESY**, vol. 8, p. 516.

**2. Moore v. Pitts**, 53 N. Y. 91.

**3. Leggett v. Doremus**, 25 N. J. Eq. 122.

**4. Leasehold Not Subject to Lien at Common Law.** — *Fleetwood's Case*, 8 Coke 171; *Merry v. Hallet*, 2 Cow. (N. Y.) 497; *Vredenbergh v. Morris*, 1 Johns. Cas. (N. Y.) 223; *Krause's Appeal*, 2 Whart. (Pa.) 398; *Bismark Bldg., etc., Assoc. v. Bolster*, 92 Pa. St. 123.

**5. Leasehold Subject to Lien under Statute.** — *Davenport First Nat. Bank v. Bennett*, 40 Iowa 537; *Loring v. Melendy*, 11 Ohio 355; *Northern Bank v. Roosa*, 13 Ohio 334; *McLean v. Rockey*, 3 McLean (U. S.) 239, declaring law in Ohio; *Steers v. Daniel*, 4 Fed. Rep. 587, declaring the law under statute in Tennessee.

**Building Erected on Leased Lands.** — In *Hayden v. Goppinger*, 67 Iowa 106, it was held that a building erected by a tenant on leased land, which cannot be moved by him, becomes attached to the leased premises and is subject to the lien of a judgment against the tenant.

**Lands Leased from the State.** — In *Buckingham v. Reeve*, 19 Ohio 399, it was held that lands and water power upon the canals and rivers leased from the state are not subject to judgment liens, since such leases lack that

character for permanency and stability which is requisite to elevate them to the standard of "lands and tenements" which alone are subject to judgment liens at law.

**Under New York Code of Civ. Pro., § 1430**, providing that the expression "real property" as used in c. 13, arts. 3, 4, relating to execution sales of land, includes leasehold property where at the time of sale the lessee or assignee is possessed of at least five years unexpired term of lease, it has been held that a judgment is not a lien upon a lease in a case where there were but two years unexpired of the lease when the judgment was docketed. *Taylor v. Wynne*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 644.

**Lessee Without Present Right of Possession.** — In *Crane v. O'Connor*, 4 Edw. (N. Y.) 409, it was held that judgments do not attach to leasehold premises where the lessee or the judgment debtor does not have the present possession, and parts with the lease before the time arrives for him to enter upon the possession.

**6. Gorham v. Farson**, 119 Ill. 425; *Ely v. Beaumont*, 5 S. & R. (Pa.) 124.

**7. Sweezy v. Jones**, 65 Iowa 272.

**8. Lien on Vested Remainder or Reversion.** — *Bockover v. Ayres*, 22 N. J. Eq. 13. See also *Williams v. Amory*, 14 Mass. 20; *Brown v. Gale*, 5 N. H. 416; *Den v. Hillman*, 7 N. J. L. 180; *Humphreys v. Humphreys*, 1 Yeates (Pa.) 427.

**Judgment Against Ancestor from Whom Land Was Derived.** — In *Burton v. Smith*, 13 Pet. (U. S.) 464, it was held that the reversion, after an estate for life, is bound by a judgment obtained from the ancestor from whom it immediately descended.

**9. Judgment Not a Lien on Contingent Remainder.** — *Watson v. Dodd*, 68 N. Car. 528; *Allston v. State Bank*, 2 Hill Eq. (S. Car.) 235; *Brooks v. Brooks*, 12 S. Car. 422. See also *Jackson v. Middleton*, 52 Barb. (N. Y.) 9. But see *Ogden v. Knepler*, 1 Pearson (Pa.) 145.



(1) **Lands Held by Tenancy in Common.** — A judgment against a tenant in common is a lien upon the interest of the debtor in the land.<sup>1</sup>

**Where There Is a Partition.** — But a judgment against a tenant in common does not prevent partition. The tenant against whom the judgment is taken, or any of his cotenants, may sue out a writ of partition and proceed to have the share of each set out in severalty. In such case the lien of the judgment will attach to the part allotted to the defendant in the judgment,<sup>2</sup> or if upon partition by sale his interest is converted into money, the priority of the judgment lien is preserved against the fund.<sup>3</sup> A voluntary partition made by tenants in common, it has been held, will not prevail against the lien of a judgment rendered against one of the cotenants prior to the partition.<sup>4</sup>

(m) **Devises.** — A judgment lien may attach to an interest or estate by devise or descent after the death of the testator.<sup>5</sup> But a judgment cannot take effect as a lien on a mere expectancy, a mere prospect of inheritance, and hence may be subordinated to a valid conveyance by the heir of his interest prior to the death of his ancestor.<sup>6</sup>

(n) **Lands in Hands of Fraudulent Grantee.** — It seems to be the prevailing rule that a judgment against a debtor is a lien upon real estate in the hands of his fraudulent grantee though the conveyance was prior to the rendition of the judgment.<sup>7</sup> The creditor seeking relief may sell the real estate upon execution issued upon his judgment,<sup>8</sup> and leave the purchaser to contest the validity of the defendant's title in an action of ejectment.<sup>9</sup>

**Remedy in Equity.** — Furthermore, if the debtor has fraudulently conveyed away or encumbered his real estate so as to interpose an obstacle which embarrasses the creditor in appropriating it by legal process in satisfaction of his debt, then the creditor who has acquired a judgment lien may file his bill to remove out of the way such fraudulent conveyance or incumbrance; and, as between the debtor and creditor at least, it is not necessary for him to take

1. **Judgment Lien Against Tenant in Common.** — *Eldridge v. Post*, 20 Fla. 579; *Tureaud v. Gex*, 21 La. Ann. 253.

2. **Operation of Lien After Partition.** — *Bavington v. Clarke*, 2 P. & W. (Pa.) 115, 21 Am. Dec. 432; *Polhemus v. Emson*, 28 N. J. Eq. 576. See also *Williard v. Williard*, 56 Pa. St. 127; *Argyle v. Dwinel*, 29 Me. 45.

3. *Garvin v. Garvin*, 1 S. Car. 55; *Eldridge v. Post*, 20 Fla. 579.

**Rights as Against Purchaser under Partition Proceedings.** — But it has been held that the purchaser under a judgment for partition takes the lands discharged of the lien of a prior judgment against one of the cotenants. *Burris v. Gooch*, 5 Rich. L. (S. Car.) 1. See also *Cradlebaugh v. Pritchett*, 8 Ohio St. 646, 72 Am. Dec. 610.

4. **Judgment Lien Not Affected by Voluntary Partition.** — *Emson v. Polhemus*, 28 N. J. Eq. 439.

5. **Judgment as Lien on Lands by Devise or Descent.** — *Stephenson v. Cotter*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 749; *Frank v. Lone Star Brewing Co.*, 17 Tex. Civ. App. 9; *Bridge v. Ward*, 35 Wis. 687. See also *Wetmore v. Midmer*, 21 N. J. Eq. 242; *Bockover v. Ayres*, 22 N. J. Eq. 13; *Leggett v. Doremus*, 25 N. J. Eq. 122; *Robisson v. Miller*, 158 Pa. St. 177.

6. **Judgment Not a Lien on Mere Expectancy.** — *Hile v. Hollon*, 14 Tex. Civ. App. 96.

7. **Judgments as Liens on Property Fraudulently Conveyed.** — See the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 210. And see the following additional cases: *In re Lowe*, 19

Fed. Rep. 589, (decided under Indiana statute); *Smith v. Morse*, 2 Cal. 524; *Manhattan Co. v. Evertson*, 6 Paige (N. Y.) 466; *Chautauque County Bank v. Risley*, 19 N. Y. 370, 75 Am. Dec. 347; *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683; *Slattery v. Jones*, 96 Mo. 216, 9 Am. St. Rep. 344; *Miner v. Warner*, 2 Grant Cas. (Pa.) 448; *McKee v. Gilchrist*, 3 Watts (Pa.) 230; *Eastman v. Schettler*, 13 Wis. 324. Compare *Brooks v. Wilson*, 53 Hun (N. Y.) 173.

*Contra.* — But for cases holding a different view, see *Miller v. Sherry*, 2 Wall. (U. S.) 237; *In re Estes*, 3 Fed. Rep. 134, (decided under Oregon statute); *Doster v. Manistee Nat. Bank*, 67 Ark. 325; *Joyce v. Perry*, (Iowa 1900) 82 N. W. Rep. 941; *Davidson v. Burke*, 143 Ill. 139; *Preston-Parton Milling Co. v. Horton*, (Wash. 1900) 60 Pac. Rep. 412.

8. **Right of Judgment Creditor to Sell under Execution.** — *In re Lowe*, 19 Fed. Rep. 589 (decided under Indiana statute); *Smith v. Morse*, 2 Cal. 524; *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683; *Slattery v. Jones*, 96 Mo. 216, 9 Am. St. Rep. 344; *Chautauque County Bank v. Risley*, 19 N. Y. 370, 75 Am. Dec. 347; *Miner v. Warner*, 2 Grant Cas. (Pa.) 448. See also the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 311.

9. *Mulford v. Peterson*, 35 N. J. L. 133; *Chautauque County Bank v. Risley*, 19 N. Y. 370, 75 Am. Dec. 347; *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683. See also the titles **EJECTMENT**, vol. 10, p. 520; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 312.



out execution upon his judgment.<sup>1</sup>

(o) **Estates of Decedents — Judgments Recovered in Decedent's Lifetime.** — It may be laid down as a general rule that a judgment lien obtained against a debtor during his lifetime is not lost by his death, and continues against his lands in the hands of his heirs or devisees for the payment thereof.<sup>2</sup> And it has been held that a judgment against a testator attaches to his entire real estate, and the subdivision of the estate into parts between the devisees under a partition proceeding cannot impair the creditor's right to enforce satisfaction out of any of its parts, and a release to one devisee of a part of the lands devised will not operate to exonerate the lands devised to other devisees.<sup>3</sup> So it has been held that an executor's sale of real estate under a testamentary power does not divest the lien of a judgment which had attached anterior to the testator's death.<sup>4</sup> The death of one of two joint debtors in a judgment at law does not exonerate from the debt the lands of the deceased debtor, but they continue subject to the lien of the judgment.<sup>5</sup>

**Personal Estate as Primary Fund.** — It has been held that the lien of the judgment is subject to the right of the heirs to have the debt satisfied and the lien discharged by the personal property of the debtor in the hands of the personal representative, if there be a sufficiency for that purpose.<sup>6</sup>

**Necessity of Presentation of Judgment Claim.** — In some states where jurisdiction is vested in the probate or surrogate's court to hear and determine the validity of claims against the estate, a judgment must be presented in order to protect the lien.<sup>7</sup>

**Judgment Recovered After Debtor's Death.** — Under the statute 17 Car. II., c. 8, § 1, it has been held that where a defendant dies after verdict and before judgment, his lands are bound in the hands of his heir by a judgment entered up within two terms after verdict.<sup>8</sup> But under statute in *New York* it has been held that a judgment entered after the death of the defendant, though the death happened during the term of which the judgment was entered, is not a lien on the real estate of the deceased, but is merely a debt to be paid in the usual course of administration.<sup>9</sup>

**Judgment Against Personal Representative.** — A judgment obtained by a creditor against an executor or administrator does not operate as a lien on the realty

**1. Enforcement of Lien in Equity Against Fraudulent Grantee.** — *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460; *Chautauque County Bank v. Risley*, 19 N. Y. 373, 75 Am. Dec. 347. See further the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 326.

**2. Judgment Lien Not Affected by Death of Judgment Debtor.** — *United States*. — *Burton v. Smith*, 13 Pet. (U. S.) 481.

*Alabama*. — *Enslen v. Wheeler*, 98 Ala. 200.

*Florida*. — *Union Bank v. Powell*, 3 Fla. 175, 52 Am. Dec. 367.

*Georgia*. — *Carlton v. Davant*, 58 Ga. 451.

*Illinois*. — *Reynolds v. Henderson*, 7 Ill. 110; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275.

*Kansas*. — *Mendenhall v. Burnette*, 58 Kan. 355.

*Maryland*. — *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

*Minnesota*. — *Byrnes v. Sexton*, 62 Minn. 138.

*North Carolina*. — *Murchison v. Williams*, 71 N. Car. 135.

*Oregon*. — *Barrett v. Furnish*, 21 Oregon 17.

*Pennsylvania*. — *Middleton v. Middleton*, 106 Pa. St. 259; *Grover v. Boon*, 124 Pa. St. 399; *Long v. McConnell*, 158 Pa. St. 573.

*West Virginia*. — *Laidley v. Kline*, 8 W. Va. 218.

See also *Peters v. Holliday*, 40 Mo. 544; *Finley v. Caldwell*, 1 Mo. 512. Compare *Berry v. Marshall*, 1 Blackf. (Ind.) 340; *Miller v. Doan*, 19 Mo. 650; *Clark's Case*, (Supm. Ct.) 15 Abb. Pr. (N. Y.) 229.

**Lien Not Enforceable in Equity.** — See *Miami Exporting Co. Bank v. Turpin*, 3 Ohio 514.

**3.** *Arrington v. Arrington*, 102 N. Car. 491.

**4.** *Fisher v. Kurtz*, 28 Pa. St. 47.

**5.** *Ex p. Dixon*, 1 Del. Ch. 261, 12 Am. Dec. 92. See also *Smarte v. Edsun*, Lev. 30; *Pennoir v. Brace*, 1 Salk. 320.

**6.** *Murchison v. Williams*, 71 N. Car. 135. See also *Boyd v. Collins*, 70 Iowa 296. See generally the title DEBTS OF DECEDENTS, vol. 8, p. 1097; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720.

**7.** See the title DEBTS OF DECEDENTS, vol. 8, p. 1063.

But in other jurisdictions a different rule is applied. See the title DEBTS OF DECEDENTS, vol. 8, p. 1063. And see *Allen v. Moer*, 16 Iowa 307; *Davis v. Shawhan*, 34 Iowa 91; *Mendenhall v. Burnette*, 58 Kan. 355.

**8.** *Saunders v. M'Gowran*, 12 M. & W. 221.

**9.** *Nichols v. Chapman*, 9 Wend. (N. Y.) 452.



of the decedent.<sup>1</sup> And even in a case where an executor is also a devisee, and a judgment is recovered against him as executor *eo nomine* upon a claim against the decedent's estate, the judgment is no lien either upon the estate of the decedent or upon the estate which comes to the defendant not as executor but as devisee of the lands of the testator.<sup>2</sup>

(p) **Homestead.** — The question as to whether a judgment creates a lien on a homestead will be found fully discussed in another portion of this work.<sup>3</sup>

(q) **Lands Belonging to Municipality.** — It is essential to the existence of a judgment lien that it be recognized by law by being enforced and protected as such. Hence a judgment against a municipal corporation has been held not to be a lien upon its real estate, on the ground that no execution could issue against the land.<sup>4</sup>

(r) **Right of Redemption from Sheriff's Sales.** — Under statute in *Iowa* it has been held that the legal estate of a judgment debtor is not divested by a sale of his land under execution, until after the time for redemption has expired and the title has vested in the purchaser by deed from the sheriff, and a judgment rendered against a debtor after sale of his land and before the expiration of the time allowed for redemption attaches as a lien upon the premises sold.<sup>5</sup>

(s) **Partnership Realty.** — The principle has been broadly laid down that a judgment against two or more persons is a lien upon all the real estate owned by the defendants at the rendition of the judgment, whether held by a tenancy in common or in severalty.<sup>6</sup> Hence a judgment against partners for a debt due by the firm is a lien upon the partnership realty<sup>7</sup> and, it would seem,

**1. Judgment Against Executor Not a Lien on Defendant's Lands.** — *Connecticut.* — Flynn v. Morgan, 55 Conn. 130.

*Illinois.* — Stone v. Wood, 16 Ill. 177; Noe v. Moutray, 170 Ill. 169.

*Mississippi.* — Treadwell v. Herndon, 41 Miss. 38.

*Missouri.* — Scott v. Whitehill, 1 Mo. 764.

*New York.* — Cook v. Ryan, 29 Hun (N. Y.) 249.

*North Carolina.* — Williams v. Green, 80 N. Car. 76.

*Tennessee.* — Peck v. Wheaton, Mart. & Y. (Tenn.) 353.

*West Virginia.* — Laidley v. Kline, 8 W. Va. 218; Woodyard v. Polsley, 14 W. Va. 211; Custer v. Custer, 17 W. Va. 113.

*Canada.* — Hamilton v. Beardmore, 7 Grant Ch. (U. C.) 286. See also Kelly's Appeal, 77 Pa. St. 232.

*Compare* Steel v. Henry, 9 Watts (Pa.) 529; Williamson's Appeal, 24 W. N. C. (Pa.) 337; Payne v. Craft, 7 W. & S. (Pa.) 458; Bell v. Ingram, 2 Pa. St. 490; Keenan v. Gibson, 9 Pa. St. 249.

**Judgment Against Receiver of Testator's Estate.** — The same rule has been applied to a judgment against the receiver of the estate of a testator. Platt v. Platt, 105 N. Y. 497; Cooke v. De Graw, 55 N. Y. Super. Ct. 548, 112 N. Y. 658.

**2.** Mott v. Newark German Hospital, 55 N. J. Eq. 722.

**3.** See the title **HOMESTEAD**, vol. 15, p. 618.

**4. Judgment No Lien on Lands of Municipality.** — Schaffer v. Cadwallader, 36 Pa. St. 126. See also New Orleans v. Holmes, 13 La. Ann. 502.

**Not a Lien on City Hospital.** — Davenport v. Peoria M. & F. Ins. Co., 17 Iowa 276.

**5. Judgment as Lien on Right of Redemption from Execution Sale.** — Curtis v. Millard, 14 Iowa 128, 81 Am. Dec. 460. See also McMil-

lan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Wilhelm v. Humphries, 97 Ind. 520.

**Right of Redemption from Tax Sale.** — Under statute in *Arkansas*, when lands are sold for nonpayment of taxes the purchaser is not entitled to a deed until the expiration of two years allowed by statute for redemption, and the title of the owner during this period is an interest in real estate to which the lien of a judgment may attach. McNeill v. Carter, 57 Ark. 579. See the title **TAX SALES**.

**6. Effect of Judgment Against Two or More Persons.** — Cummings's Appeal, 25 Pa. St. 268, 64 Am. Dec. 605.

**7. Judgment as Lien on Partnership Realty.** — *In re* Codding, 9 Fed. Rep. 849; Lauffer v. Cavett, 87 Pa. St. 479.

**Judgment Against Partner on Individual Claim a Lien on Partnership Realty.** — In *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Dec. 788, it was held that the judgment against a partner on an individual claim is a lien upon the partnership real estate, but such lien is good to the extent only of the residuary interest of the partners in the land after the satisfaction of all claims against the partnership, and hence must be postponed to the equity of a firm creditor whose claim accrued during the continuance of the partnership, although subsequent to the time that such statutory lien attached. See also Hoskins v. Johnson, 24 Ga. 625; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719. *Compare* Dennis v. Green, 20 Ga. 386.

In *New York* it has been held that a judgment against all the members of a firm, although not on its indebtedness, might be enforced against the firm property, and a good and full title acquired thereto by the purchaser both in law and equity, not only against the judgment debtors, but the creditors of the firm. Saunders v. Reilly, 105 N. Y. 12, 59 Am. Rep.



against the individual real estate of the partners also.<sup>1</sup>

(t) **Rents and Profits.** — It has been held that the lien of a judgment is confined to the real estate itself, and does not, even in a court of equity, extend to the rents and profits.<sup>2</sup> On the other hand, it has been held that where, on the filing of a bill to remove an incumbrance on lands so that they may be sold under the plaintiff's judgment, a receiver is appointed of the rents and profits, they are in equity subject to the lien of the judgment the same as the land itself.<sup>3</sup>

(u) **Subsequently Acquired Realty.** — In a few jurisdictions it has been held that a judgment is not a lien on lands acquired subsequent to the rendition or docketing of the judgment, and hence the conveyance of the lands before the levy of an execution is valid.<sup>4</sup> But the prevailing rule is that the judgment lien attaches on lands subsequently acquired,<sup>5</sup> and this, it has been held, though the instrument by which the title is acquired is unrecorded.<sup>6</sup>

(2) **Personal Estate** — (a) **In General.** — Under the statute 13 Edw. I., c. 18, providing for the writ of *elegit*, a judgment was not regarded as a lien on personalty, but the *elegit* constituted the lien from the date of its teste.<sup>7</sup> And it is the prevailing rule under modern legislation giving judgments the force of liens, that no lien is created on personalty by a judgment, but it arises only under an execution<sup>8</sup> and as a general rule is binding only from the time

472; *Davis v. Delaware, etc., Canal Co.*, 109 N. Y. 50.

1. **Judgment Against Partners as Lien on Individual Realty.** — *Cummings's Appeal*, 25 Pa. St. 268, 64 Am. Dec. 695; *Pitts v. Spotts*, 86 Va. 71. See also *Fox's Appeal*, (Pa. 1887) 11 Atl. Rep. 228. Compare *Stadler v. Allen*, 44 Iowa 198.

2. **Lien Held Not to Extend to Rents and Profits from Realty.** — *Fifield v. Gorton*, 15 Ill. App. 458. See also *Belmont v. Ponvert*, 35 N. Y. Super. Ct. 208; *Boggs v. Douglass*, 105 Iowa 344.

3. *U. S. v. Butler*, 2 Blatchf. (U. S.) 201.

4. **Judgment Held Not to Be Lien on After-acquired Realty.** — *Roads v. Symmes*, 1 Ohio 314, 13 Am. Dec. 621; *Stiles v. Murphy*, 4 Ohio 92; *Smith v. Hogg*, 52 Ohio St. 527.

In *Pennsylvania* the rule is established that judgments do not bind subsequently acquired real estate. *Rundle v. Ettwein*, 2 Yeates (Pa.) 23; *Colhoun v. Snider*, 6 Binn. (Pa.) 135; *Abbott v. Remington*, 4 Phila. (Pa.) 34, 17 Leg. Int. (Pa.) 108; *Packer's Appeal*, 6 Pa. St. 277; *Lea v. Hopkins*, 7 Pa. St. 492; *Moorehead v. McKinney*, 9 Pa. St. 265. With this qualification, that a judgment against the equitable estate which the vendee holds under articles of agreement for the sale and purchase of land attaches to and binds the legal estate the instant that it vests in the vendee. *Stephens's Appeal*, 8 W. & S. (Pa.) 186; *Waters's Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354.

5. **Prevailing Rule that Judgment Is Lien on After-acquired Realty** — *United States*. — *Jackson v. U. S. Bank*, 5 Cranch (C. C.) 1.

*Arkansas*. — *Real Estate Bank v. Watson*, 13 Ark. 74; *Petray v. Howell*, 20 Ark. 615.

*Florida*. — *Harrison v. Roberts*, 6 Fla. 711.

*Georgia*. — *Ex p. Stebbins*, R. M. Charl. (Ga.) 77; *Forsyth v. Marbury*, R. M. Charl. (Ga.) 324; *Kollock v. Jackson*, 5 Ga. 153; *Ralston v. Field*, 32 Ga. 453.

*Illinois*. — *Wales v. Bogue*, 31 Ill. 464; *Root v. Curtis*, 38 Ill. 192; *Breed v. Gorham*, 108 Ill. 83.

*Indiana*. — *Ridge v. Prather*, 1 Blackf. (Ind.) 401; *Barth v. Makeever*, 4 Biss. (U. S.) 206 (decided under statute in Indiana).

*Iowa*. — *Ware v. Delahay*, 95 Iowa 667.

*Kansas*. — *Babcock v. Jones*, 15 Kan. 296; *Lisle v. Cheney*, 36 Kan. 578.

*Louisiana*. — *Dickson v. Hynes*, 36 La. Ann. 684; *Gallaugh v. Hebrew Congregation*, 35 La. Ann. 829.

*Mississippi*. — *Moody v. Doe*, 25 Miss. 484; *Jenkins v. Gowen*, 37 Miss. 444; *Cayce v. Stovall*, 50 Miss. 396.

*Nebraska*. — *Colt v. Du Bois*, 7 Neb. 391 (overruling *Filley v. Duncan*, 1 Neb. 135); *Berkley v. Lamb*, 8 Neb. 399; *Duell v. Potter*, 51 Neb. 241; *Lessert v. Sieterling*, (Neb. 1899) 80 N. W. Rep. 900.

*North Carolina*. — *Moore v. Jordan*, 117 N. Car. 86, 53 Am. St. Rep. 576.

*Tennessee*. — *Greenway v. Cannon*, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161; *Chapron v. Cassaday*, 3 Humph. (Tenn.) 661; *Davis v. Benton*, 2 Sneed (Tenn.) 665.

*Texas*. — *Thulemeyer v. Jones*, 37 Tex. 560; *Barron v. Thompson*, 54 Tex. 235; *Willis v. Downes*, (Tex. Civ. App. 1898) 46 S. W. Rep. 920.

*Virginia*. — *M'Clung v. Beirne*, 10 Leigh (Va.) 410; *Taylor v. Spindle*, 2 Gratt. (Va.) 44.

*West Virginia*. — *Handly v. Sydensricker*, 4 W. Va. 605.

Compare *Harrington v. Sharp*, 1 Greene (Iowa) 131, 48 Am. Dec. 365; *Woods v. Mains*, 1 Greene (Iowa) 275.

6. *Logan v. Herbert*, 30 La. Ann. 727; *Gallaugh v. Hebrew Congregation*, 35 La. Ann. 829.

7. See *Porter v. Cocke*, Peck (Tenn.) 34; *Stahlman v. Watson*, (Tenn. Ch. 1897) 39 S. W. Rep. 1055.

8. **Judgment Not a Lien on Personalty.** — *Baldwin v. Johnston*, 8 Ark. 260; *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460; *McNamara v. New York, etc., R. Co.*, 56 N. J. L. 56; *Jaffray v. Saussmann*, 52 Hun (N. Y.) 561, 117 N. Y. 648; *Selby v. Dixon*, 4 Hawks (11 N.



the writ is delivered to the officer to be executed.<sup>1</sup>

(b) *Choses in Action*. — So a judgment lien does not attach at law to choses in action, such as promissory notes or bonds,<sup>2</sup> nor does a judgment creditor acquire a lien in equity upon the choses in action of his debtor until a bill is filed to charge them.<sup>3</sup>

(c) *Oil or Mining License*. — It has been held that a judgment against a person having a right under an oil lease or license to enter on lands for the purpose of drilling and operating for oil is not a lien upon the rights of the licensee, as such rights do not constitute an interest in real estate.<sup>4</sup> And the same rule has been applied to a right to mine for lead ore under a revocable license.<sup>5</sup>

*e. AMOUNT OF LIEN*. — It may be stated as a general rule that a judgment may operate as a lien to the extent of the amount recovered in the judgment.<sup>6</sup>

*Interest on Judgment*. — The interest accruing upon a judgment recovered, in the absence of a statute authorizing it to be collected on execution, has been held not to become a lien upon land until it is included in a fresh judgment.<sup>7</sup> But under statute in several jurisdictions it is held that the lien of a judgment covers the interest which may accrue on the judgment as well as on the principal debt.<sup>8</sup>

*Costs*. — So in some jurisdictions it has been held that the costs of the proceedings are included in the judgment lien.<sup>9</sup>

*f. TERRITORIAL EXTENT* — (1) *Judgments in State Courts*. — In those states in which judgments or decrees are liens on the lands of the debtor, the lien is, in the absence of statutory provision to the contrary, restricted to the territorial jurisdiction of the court rendering the judgment, and this territory usually comprises a county.<sup>10</sup> But in some jurisdictions provision is made by

Car.) 424; *Stahlman v. Watson*, (Tenn. Ch. 1897) 59 S. W. Rep. 1055; *Knox v. Webster*, 18 Wis. 406, 86 Am. Dec. 779. See also the title *EXECUTIONS*, vol. 11, p. 669.

*Contra*. — Under statute in other jurisdictions, however, judgments may operate as liens on personality. *Street v. Duncan*, 117 Ala. 571; *Fidelity, etc., Co. v. Exchange Bank*, 100 Ga. 622; *Brown v. Clarke*, 4 How. (U. S.) 4; *Burney v. Boyett*, 1 How. (Miss.) 39; *Simpson v. Smith Sons Gin, etc., Co.*, 75 Miss. 505. See also *Watts v. Kilburn*, 7 Ga. 356; *Hammond v. Stovall*, 17 Ga. 491; *Chilton v. Cox*, 7 Smed. & M. (Miss.) 797; *Botters v. Edrington*, 30 Miss. 580.

*Money*. — But in *Mississippi* it has been held that the lien of a judgment does not attach to money. *Cahn v. Person*, 56 Miss. 363.

*Growing Crops*. — In *Planters' Bank v. Walker*, 3 Smed. & M. (Miss.) 409, it was held that under a statute preventing seizure of growing crops under an execution, a judgment was not a lien upon growing crops, notwithstanding another statute declaring a judgment to be a lien on all property.

1. See the title *EXECUTIONS*, vol. 11, p. 669.

2. *Judgment Not a Lien on a Chose in Action*. — *McGehee v. Cherry*, 6 Ga. 550; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Logan v. Pannill*, 90 Va. 11; *Blakemore v. Wise*, 95 Va. 269. See also *Fidelity, etc., Co. v. Exchange Bank*, 100 Ga. 619; *Dotterer v. Harden*, 88 Ga. 145.

3. *Douglass v. Huston*, 6 Ohio 156. See also *Cincinnati v. Hafer*, 49 Ohio St. 60.

4. *Judgment Not a Lien on Oil Lease or License*. — *Meridian Nat. Bank v. McConica*, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106.

5. *Judgment Not a Lien on Mining Privilege*. — *Blindert v. Kreiser*, 81 Wis. 174.

6. See *Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774.

7. *Mason v. Sudam*, 2 Johns. Ch. (N. Y.) 180; *De La Vergne v. Everton*, 1 Paige (N. Y.) 182, 19 Am. Dec. 411; *Mower v. Kip*, 2 Edw. (N. Y.) 165.

8. *Interest on Judgment Included in Lien*. — *Mower v. Kip*, 2 Edw. (N. Y.) 165; *Loomis v. Second German Bldg. Assoc.*, 37 Ohio St. 392; *Winslow v. Ancrum*, 1 McCord Eq. (S. Car.) 105; *Sims v. Campbell*, 1 McCord Eq. (S. Car.) 53, 16 Am. Dec. 595.

9. *Costs Included in Lien*. — *Lind v. Adams*, 10 Iowa 398, 77 Am. Dec. 123. See also *Forrest v. Camp*, 16 Ala. 642; *Edmunds v. Smith*, 52 N. J. Eq. 212; *Altman v. Klingensmith*, 6 Watts (Pa.) 445.

*Costs and Damages in Appellate Court*. — It has been held in a jurisdiction where the damages and costs in the appellate court are certified to the court below whose clerk is directed to calculate the amount and the execution issues thereon accordingly, that they become appendages to the original judgment, and are included in the judgment lien. *M'Clung v. Beirne*, 10 Leigh (Va.) 410.

10. *Lien of Judgments in State Courts Restricted to Jurisdiction of Court*. — *McNeill v. Carter*, 57 Ark. 579; *Bustard v. Morrison*, 2 Ill. 235; *Sapp v. Wightman*, 103 Ill. 150; *State Bank v. Carson*, 4 Neb. 498; *Thompson v. Atherton*, 6 Ohio 30; *Glasgow v. Smith*, 1 Overt, (Tenn.) 144; *Riddle v. Bush*, 27 Tex. 675; *Nicholas v. Hester*, 42 Tex. 180.

*Supreme Court*. — In *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275, it was held that the



statute for the making of a judgment effectual as a lien on lands outside of the county in which it is rendered, by means of recording an abstract or transcript of the original judgment docket in the county in which the lands are situated.<sup>1</sup> By the terms of the statute in other jurisdictions, it is not necessary, in order to create a lien upon real estate of the judgment debtor in another county than that in which the judgment was rendered, that the certified transcript of the original docket should be recorded, but it is sufficient that such transcript be filed with the recorder of another county.<sup>2</sup> In other states a judgment is made a lien on lands in another county than that in which the judgment is rendered, from the time the lands are seized in execution, and such execution and levy are duly entered upon the foreign execution docket.<sup>3</sup>

**Effect of Acquisition of Lien in Second County on Lien in First County.** — It has been held that the fact that a judgment docketed in one county is afterwards docketed in another does not deprive it of the lien it had on the defendant's land in the first county.<sup>4</sup>

lien of a judgment of the Supreme Court is co-extensive with the jurisdiction of the court, and it is unnecessary that the judgment should be docketed in the county where land of the judgment debtor is situated. See also *Livingston v. Moore*, Baldw. (U. S.) 424.

And the same rule was laid down in *New York* in the case of a judgment recovered prior to the passage of the statute requiring judgments in the Supreme Court to be docketed in the several counties. *Clark v. Dakin*, 2 Barb. Ch. (N. Y.) 36.

In *Rhyne v. McKee*, 73 N. Car. 263, it was held that an execution issuing from the Supreme Court upon a judgment obtained therein, to a county in which the defendant has land, is a lien upon the land from its teste so as to gain priority over another judgment subsequently docketed, and the docketing of the prior judgment in the county will be unnecessary to constitute a lien.

**1. Extension of Lien to Another County by Recording Abstract, etc.** — *Ex p.* Becker, 4 Hill (N. Y.) 613; *Firebaugh v. Ward*, 51 Tex. 409. See *King v. Portis*, 77 N. Car. 25, 81 N. Car. 382; *Logan v. Pannill*, 90 Va. 11.

**Under Statute in Indiana** it has been held that the transcript of a judgment filed in another county than that in which the judgment was rendered does not create a lien against subsequent purchasers in good faith without notice unless recorded and entered in the judgment docket. *Berry v. Reed*, 73 Ind. 235; *Bell v. Davis*, 75 Ind. 314; *State v. Record*, 80 Ind. 348. See also *Baker v. Chandler*, 51 Ind. 85.

**In Illinois** it has been held that a judgment or decree may have the operation of a lien under a statute providing for the filing and docketing of a transcript of the judgment or decree, in a case where the venue has been changed, in the clerk's office in the county from which the change of venue is taken. *Yackle v. Wightman*, 103 Ill. 169.

**Under Statute in Mississippi** it has been held that in order to give a judgment operation as a lien on property of the defendant in a county other than that in which it was recovered, it is necessary not only that an abstract of the judgment should be filed in the office of the clerk of the Circuit Court of such other county and enrolled on the judgment roll therein, but

that it should also be recorded "in a separate book to be kept for that purpose." *Bergen v. State*, 58 Miss. 623; *Hamilton-Brown Shoe Co. v. Walker*, 67 Miss. 197; *Gresham v. Roberts*, 2 Smed. & M. (Miss.) 471. Compare *Commercial, etc.*, *Bank v. Helderburn*, 6 How. (Miss.) 536.

**Under Statute in Tennessee** the lien of a judgment or decree fastens upon land only when obtained in the county where the debtor resides at the time of rendition, or, if rendered in any other county, when a certified copy of the judgment or decree shall be registered in the county where he resides, if a resident of the state, and if not a resident of the state, then in the county where the land lies. But the *onus probandi* upon these points is on the judgment creditor. *Bridges v. Cooper*, 98 Tenn. 394.

**Under Statute in South Carolina** it has been held that judgments of the Circuit Court bind lands throughout the state when abstracts of the judgments have been forwarded to the clerk of the court for the Charleston district, to be recorded conformably to the statute, and in absence of any proof on the subject it will be presumed that the officers charged with that duty have discharged it. *Woodward v. Hill*, 3 McCord L. (S. Car.) 241; *Dawkins v. Smith*, 1 Hill Eq. (S. Car.) 369.

**Judgment in Favor of State.** — It has been held that a statutory requirement that a judgment to operate as a lien in another county than that in which it was rendered must be enrolled in the county where the property is, does not apply to a judgment in favor of a state where such state is not included in the terms of the statute. *Josselyn v. Stone*, 28 Miss. 753.

**2. Extension of Lien to Another County by Filing Abstract.** — *Moore v. Taylor*, 1 Idaho 630; *Seaton v. Hamilton*, 10 Iowa 394; *Hubbard v. Jones*, 61 Kan. 722; *Bostwick v. Benedict*, 4 S. Dak. 414.

*Colt v. Du Bois*, 7 Neb. 391; *Smithfield First Nat. Bank v. Wheeling, etc.*, *Coal Co.*, 11 Ohio Cir. Ct. 412, 5 Ohio Cir. Dec. 421. See also *Hayden v. Stewart*, 1 Md. Ch. 459; *Farmers Bank v. Heighe*, 3 Md. 357. Compare *Cape Sable Co.'s Case*, 3 Bland (Md.) 606.

**4. Effect of Acquisition of Lien in Second County on Lien in First County.** — *Perry v. Mor-*



**Duration of Lien Transferred from One County to Another.** — It has been held that the lien of a judgment transferred from one county to another commences when the requisite formalities of filing or docketing have been complied with, and continues for the prescribed statutory period, and the fact that a lien under the judgment has existed and has even expired in another county can make no difference in its duration.<sup>1</sup>

(2) *Judgments in Federal Courts.* — In numerous decisions the doctrine has been laid down that the lien of judgments in the federal courts is co-extensive with the territorial jurisdiction of such courts, and that state statutes requiring the filing or docketing of a transcript of a judgment for the purpose of extending the lien beyond the limits of the county in which the judgment was rendered, will have no application where no such provision is specifically made with reference to federal judgments.<sup>2</sup> And indeed the same rule has been applied notwithstanding a state statute expressly including federal judgments in its provisions.<sup>3</sup> But under the Act of Congress of Aug. 1, 1888, unless a federal judgment is docketed in accordance with a state statute expressly referring to federal judgments, the lien of the judgment extends only to lands of the judgment debtor in the county in which the court was held.<sup>4</sup>

**g. COMMENCEMENT AND PRECEDENCE OF LIEN** — (1) *In General.* — In many states by express statutory provision the lien of a judgment commences to operate from the time of docketing, recording, registration, or actual entry thereof.<sup>5</sup> Under other statutes, however, the lien dates from the rendition of the judgment, *i. e.*, the time when the court signifies its assent to the sentence of the law as a result of the proceedings in the case.<sup>6</sup> And in some jurisdictions, while the docketing of the judgment is required for the purpose of creating a lien, yet when the judgment is docketed within a prescribed time it will operate as a lien from its rendition.<sup>7</sup> According to general prin-

ris, 65 N. Car. 221; *Isler v. Colgrove*, 75 N. Car. 334.

1. **Duration of Lien Transferred from One County to Another.** — *Donner v. Palmer*, 23 Cal. 46; *Knauss's Appeal*, 49 Pa. St. 419. Compare *Brandt's Appeal*, 16 Pa. St. 346; *Bradfield v. Newby*, 130 Ind. 59.

2. **Judgments in Federal Courts** — *United States*. — *Lombard v. Bayard*, 1 Wall. Jr. (C. C.) 196; *Shrew v. Jones*, 2 McLean (U. S.) 78; *Barth v. Makeever*, 4 Biss. (U. S.) 208; *U. S. v. Scott*, 3 Woods (U. S.) 334; *U. S. v. Humphreys*, 3 Hughes (U. S.) 201; *Cropsey v. Crandall*, 2 Blatchf. (U. S.) 341; *Carroll v. Watkins*, 1 Abb. (U. S.) 474; *Massingill v. Downs*, 7 How. (U. S.) 760; *Koning v. Bayard*, 2 Paine (U. S.) 251.

*Alabama.* — *Pollard v. Cocke*, 19 Ala. 188. *Arkansas.* — *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 271; *Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338.

*Florida.* — *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334.

*Illinois.* — *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593. See also *Jones v. Guthrie*, 23 Ill. 421; *Bustard v. Morrison*, 2 Ill. 235.

*New York.* — *Manhattan Co. v. Evertson*, 6 Paige (N. Y.) 457.

*Missouri.* — *Dermott v. Carter*, 109 Mo. 21.

*Ohio.* — *Sellers v. Corwin*, 5 Ohio 398, 24 Am. Dec. 301; *Lawrence v. Belger*, 31 Ohio St. 175.

*Texas.* — *Branch v. Lowery*, 31 Tex. 96. See also *Brown v. Pierce*, 7 Wall. (U. S.) 205. But see *Vance v. Johnson*, 10 Humph. (Tenn.)

214; *Reid v. House*, 2 Humph. (Tenn.) 576; *Tarpley v. Hamer*, 9 Smed. & M. (Miss.) 310.

3. *Carroll v. Watkins*, 1 Abb. (U. S.) 474. But see *Hall v. Green*, 60 Miss. 47.

4. *Dartmouth Sav. Bank v. Bates*, 44 Fed. Rep. 546; *Washington First Nat. Bank v. Clark*, 55 Kan. 219; *Alsop v. Moseley*, 104 N. Car. 60.

**Retroactive Effect of Statute Denied.** — But it has been held that statutes of this kind do not apply to judgments which have already become liens on real estate under prior laws, there being nothing in the statutes indicating that they were intended to have a retroactive operation. *Rock Island Nat. Bank v. Thompson*, 173 Ill. 607; *Commercial Bank v. Eastern Banking Co.*, 51 Neb. 766.

5. **Commencement of Lien Held to Date from Docketing or Recording.** — *Vansiver v. Bryan*, 13 N. J. Eq. 434; *Reeves v. Johnson*, 12 N. J. L. 29; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Reid v. McGowan*, 28 S. Car. 74; *Corley v. Renz*, (Tex. Civ. App. 1894) 24 S. W. Rep. 935; *Miller v. Duggan*, 21 Can. Sup. Ct. 33.

6. **Lien Held to Date from Rendition of Judgment.** — *Johnson v. Schloesser*, 146 Ind. 514, 58 Am. St. Rep. 367.

**Judgments on Bonds Payable to the State of Indiana** have been held to bind the real estate of the debtor from the commencement of the action. *Shane v. Francis*, 30 Ind. 92.

7. *Clark v. Duke*, 59 Miss. 575; *Gurnee v. Johnson*, 77 Va. 712; *Grantham v. Lucas*, 24 W. Va. 231; *Duncan v. Custard*, 24 W. Va.



ciples and apart from any statutory provisions to the contrary, a judgment lien when fixed by rendition or docketing remains until legally removed, and it is not defeated or weakened, nor are the legal measures to enforce or discharge it frustrated, by a subsequent conveyance,<sup>1</sup> mortgage,<sup>2</sup> or other subse-

736. See also *Ferrell v. Hales*, 119 N. Car. 213. *Compare* *Stevens v. Mangum*, 27 Miss. 481.

1. **Judgment Lien Not Divested by Subsequent Conveyance**—*Alabama*.—*Fawcetts v. Kimmey*, 33 Ala. 261.

*Georgia*.—*Means v. Sanders*, 14 Ga. 113.

*Idaho*.—*Lewiston First Nat. Bank v. Hays*, (Idaho 1900) 61 Pac. Rep. 287.

*Illinois*.—*Tinney v. Wolston*, 41 Ill. 215.

*Indiana*.—*Brooker v. Sprague*, 99 Ind. 169; *Minnich v. Shaffer*, 135 Ind. 634.

*Iowa*.—*Vannice v. Greene*, 16 Iowa 574.

*Louisiana*.—*Hamilton v. State Nat. Bank*, 39 La. Ann. 932.

*Mississippi*.—*Cahn v. Person*, 56 Miss. 363.

*Missouri*.—*Stewart v. Perkins*, 110 Mo. 660.

*Nebraska*.—*Lessert v. Sieberling*, (Neb. 1899) 80 N. W. Rep. 900.

*New Jersey*.—*Cook v. Bodine*, 30 N. J. Eq. 470.

*Pennsylvania*.—*Shaeffer's Appeal*, 101 Pa. St. 45; *Lauffer v. Cavett*, 87 Pa. St. 479; *Gump's Estate*, 13 Phila. (Pa.) 495, 34 Leg. Int. (Pa.) 150.

*South Carolina*.—*Hart v. Felder*, 4 Desaus. (S. Car.) 202; *Younger v. Massey*, 41 S. Car. 50. *Tennessee*.—*Miller v. Estill*, 8 Yerg. (Tenn.) 452.

*Texas*.—*Cook v. Love*, 33 Tex. 487; *Franke v. Lone Star Brewing Co.*, 17 Tex. Civ. App. 9. *Virginia*.—*Kline v. Triplett*, (Va. 1896) 25 S. E. Rep. 886.

**Justice's Judgment.**—This rule has been held to apply to a justice's judgment. *Heirmann v. Stricklin*, 60 Miss. 234.

**By Statute in Georgia** it is provided that when any person has *bona fide* and for a valuable consideration purchased real property, and has been in the possession for four years, the same shall be discharged from the lien of any judgment against the person from whom he purchased. *Dooley v. Isbell*, 39 Ga. 342; *Chapman v. Akin*, 39 Ga. 347; *Glanton v. Heard*, 48 Ga. 410; *Hays v. Reynolds*, 53 Ga. 328; *Prater v. Cox*, 64 Ga. 706; *Blalock v. Denham*, 85 Ga. 646; *Hale v. Robertson*, 100 Ga. 168; *Trice v. Rose*, 80 Ga. 408; *Westbrook v. Hays*, 89 Ga. 101.

**Priority of Judgment Lien Limited to Amount of Judgment.**—A purchaser of land which is subject to the lien of a judgment takes it subject only to the amount called for by the judgment as docketed, and it is not liable to the judgment increased by usury under a subsequent agreement between the creditor and judgment debtor, of which the purchaser had no notice. *Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774.

**Effect of Improvements by Purchaser.**—A purchaser of real estate must take notice of judgment liens, and if, in actual ignorance thereof, he purchases and makes valuable improvements, he cannot, by paying upon the judgment the value of the property without the improvements, release the property from the lien of the judgment if not fully paid. *Taylor*

*v. Morgan*, 86 Ind. 295; *Lessert v. Sieberling*, (Neb. 1899) 80 N. W. Rep. 900. See also *Rounsaville v. Hazen*, 39 Kan. 610; *Martin v. Beatty*, 54 Ill. 100.

**Whether Lien Attaches to Fund Received from Sale.**—Where land covered by a judgment lien is sold, the lien still remains upon the land and does not attach to the fund received. *Sullivan v. Leckie*, 60 Iowa 326.

And the same has been held in *Mississippi* in respect to the proceeds on personality, a judgment being a lien on personality in that state. *Simpson v. Smith Sons Gin, etc., Co.*, 75 Miss. 505.

But where a judgment creditor has made an election to receive part of his debt out of the proceeds from the sale of lands on which his judgment was a prior lien, he cannot afterwards enforce the lien against the land. *Effinger v. Kenney*, 92 Va. 45. See also *Houston, etc., R. Co. v. Keller*, (Tex. Civ. App. 1896) 36 S. W. Rep. 859; *Doub v. Barnes*, 4 Gill (Md.) 1.

**A Voluntary Assignment of real estate for the benefit of creditors** does not affect liens on the same created by existing judgments against the assignor. *Shaeffer's Appeal*, 101 Pa. St. 45. See also *Scott v. Dunn*, 26 Ohio St. 63. And see the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 100.

2. **Judgment Lien Not Defeated by Subsequent Mortgage.**—*Bronson v. La Crosse, etc., R. Co.*, 2 Wall. (U. S.) 283; *Murphy v. Cord*, 12 Gill & J. (Md.) 182; *Beach v. Reed*, 55 Neb. 605; *Vansciver v. Bryan*, 13 N. J. Eq. 434; *Leak v. Gay*, 107 N. Car. 468, *overruled* in *Vanstory v. Thornton*, 112 N. Car. 196, 34 Am. St. Rep. 483; *Gulley v. Thurston*, 112 N. Car. 192.

**A Judgment on an Administrator's Bond** has been held to be a lien on real estate of the defendant thereto from the commencement of the suit thereon, and will have priority over a mortgage executed after that time. *Day v. Worland*, 92 Ind. 75.

**A Judgment Against a Sheriff** is, under statute in *West Virginia*, a lien from the time he is served with notice or summons pursuant to which the judgment is afterwards rendered, and is superior to a deed of trust executed by the sheriff after such service of summons. *Hoge v. Brookover*, 28 W. Va. 304. See also *Com. v. Jackson*, 10 Bush (Ky.) 425.

**Priority Between Judgment and Mortgage on Ungrown Crop.**—It has been held that as between a mortgage and a judgment on a non-existing crop the mortgage has a prior lien, since the judgment takes effect as a lien only from the time the crop has an actual existence, but by statute the mortgage takes effect as a lien *eo instanti* with its execution. *Cooper v. Turnage*, 52 Miss. 431.

**Priority Lost by Levy of Execution on Subsequent Judgment.**—Under statute in *New Jersey* it has been held that where there are two judgments against the real estate of a debtor and a mortgage thereon, the lien of one judgment being prior to the mortgage, and the lien of the other judgment being subsequent thereto,



quent lien.<sup>1</sup> And of course a purchaser at a sheriff's sale under the judgment will succeed to the rights of the judgment creditor in these respects.<sup>2</sup>

**Order of Subjection of Lands Conveyed in Parcels.** — But although a judgment lien is not divested by the subsequent sale or incumbrance of the land, yet in equity the judgment creditor is not entitled to enforce the payment of the judgment against the land of a subsequent purchaser as long as there is sufficient land of the debtor remaining unsold to satisfy the judgment; and if there is not sufficient land of the debtor remaining unsold to satisfy the judgment entirely, the creditor is entitled in equity to resort to the land of the purchaser or incumbrancer to the extent only of his debt which may remain unpaid after the estate of the debtor has been exhausted.<sup>3</sup> Also where real estate is subject to the lien of a judgment in the hands of its owner, and he sells or mortgages separate parcels of that property subsequently to different persons, and at different times, these parcels are in equity to be subjected to the payment of the lien in the inverse order of their alienation.<sup>4</sup> And this though the last purchaser secures a conveyance before the first purchaser.<sup>5</sup> Nor is the application of the rule affected by the fact that the lands conveyed were acquired by the judgment debtor at different times and from different sources.<sup>6</sup>

**Effect of Release or Waiver of Lien on One Parcel.** — It has been held that a judgment creditor having released or by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.<sup>7</sup> But in *Pennsylvania* it has been held that where lands subject to a judgment lien are successively alienated the release of the lien on a portion subsequently con-

ant in execution under the subsequent judgment will discharge the lien of the prior judgment and thereby give priority to the mortgage over the liens of both judgments. *Lambertsville Nat. Bank v. Boss*, (N. J. 1888) 13 Atl. Rep. 18. Compare *Holliday v. Franklin Bank*, 16 Ohio 534; *Brazee v. Lancaster Bank*, 14 Ohio 318; *Fitch v. Mendenhall*, 17 Ohio 578.

1. As for instance a lease, *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; or the subsequent lien of a creditor's bill, *Eldridge v. Post*, 20 Fla. 579; or a subsequent attachment, *Reeves v. Johnson*, 12 N. J. L. 33; *Cake's Estate*, 186 Pa. St. 412. See also *Floyd v. Sellers*, 7 Colo. App. 498; *Willis v. Parsons*, 13 Ga. 335; *Andrews v. Kaufmans*, 60 Ga. 669.

2. *Hart v. Felder*, 4 Desaus. (S. Car.) 202.

**A Purchaser at a Sheriff's Sale** under a judgment will stand in the place of the judgment creditor in respect to a subsequent mortgage, though there should appear to be a defect in his title under the sale. *Wait v. Savage*, (N. J. 1888) 15 Atl. Rep. 225.

3. **Purchaser's Right in Equity to Have Remaining Property of Debtor Exhausted to Satisfy Judgment.** — *Relfe v. Bibb*, 43 Ala. 519; *Howse v. Judson*, 1 Fla. 133; *Hurd v. Eaton*, 28 Ill. 122; *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; *James v. Hubbard*, 1 Paige (N. Y.) 228; *Ingalls v. Morgan*, 10 N. Y. 178; *Semple v. Eubanks*, 13 Tex. Civ. App. 418; *Blakemore v. Wise*, 95 Va. 269. See also *Wilson v. Wilson*, 3 Del. Ch. 183; *Decker v. Gilbert*, 80 Ind. 107; *Brooker v. Sprague*, 99 Ind. 169; *Meek v. Thompson*, 99 Tenn. 732.

But a Court of Law has been held not to be able to control the general lien of a judgment by directing execution of the judgment against specific portions of the property of the defend-

ant in execution to the exclusion of other portions equally subject to the general lien on account of equities claimed to exist in favor of a mortgagee who is not a party to the judgment or execution. *Clonts v. Ritch*, 12 Fla. 633, 95 Am. Dec. 345.

4. **Lands Alienated in Parcels to Be Subjected to Lien in Inverse Order of Alienation** — *United States*. — *National Sav. Bank v. Creswell*, 100 U. S. 630.

*Alabama*. — *Relfe v. Bibb*, 43 Ala. 519.

*Indiana*. — *Sidener v. White*, 46 Ind. 588; *Houston v. Houston*, 67 Ind. 276; *Merritt v. Richey*, 97 Ind. 238; *Day v. Patterson*, 18 Ind. 114.

*Mississippi*. — *Pallen v. Agricultural Bank*, *Freem.* (Miss.) 419.

*New York*. — *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235.

*Ohio*. — *Commercial Bank v. Western Reserve Bank*, 11 Ohio 444, 38 Am. Dec. 739.

*Pennsylvania*. — *Nailer v. Stanley*, 10 S. & R. (Pa.) 450, 13 Am. Dec. 691.

*South Carolina*. — *Hamburg Bank v. Howard*, 1 Strob. Eq. (S. Car.) 173.

*Tennessee*. — *Meek v. Thompson*, 99 Tenn. 732; *Mowry v. Davenport*, 6 Lea (Tenn.) 80; *Jones v. Maney*, 7 Lea (Tenn.) 341; *Hunt v. Ewing*, 12 Lea (Tenn.) 519.

*Virginia*. — *M'Clung v. Beirne*, 10 Leigh (Va.) 410 (*overruling* *Beverley v. Brooke*, 2 Leigh (Va.) 425); *Brengle v. Richardson*, 78 Va. 406.

5. *Northrup v. Metcalf*, 11 Paige (N. Y.) 570; *Rodgers v. M'Cluer*, 4 Gratt. (Va.) 81, 47 Am. Dec. 715.

6. *Meek v. Thompson*, 99 Tenn. 732.

7. *Hurd v. Eaton*, 28 Ill. 131; *James v. Hubbard*, 1 Paige (N. Y.) 228; *Jones v. Myrick*, 8 Gratt. (Va.) 180.



vayed will not discharge the lien on a portion previously conveyed, unless the judgment creditor is distinctly notified before the release of the prior conveyance, and cautioned against doing any act by which the rights of the grantee in such prior conveyance will be diminished.<sup>1</sup>

**Lands Sold Contemporaneously.** — Where the different parcels of land are sold contemporaneously, they must contribute *pro rata* to the satisfaction of the judgment.<sup>2</sup>

**A Full Discussion** of this question will be found in a subsequent portion of this work.<sup>3</sup>

(2) *Doctrine of Relation.* — At common law judgments of a court of record, on whatever day of the term they may in fact be rendered, relate to and are considered as judgments of the first day of the term,<sup>4</sup> and as a deduction from this rule it has been held that the lien of a judgment upon lands of the judgment debtor relates back to the commencement of the term at which the judgment is obtained.<sup>5</sup> But this fiction of relation does not apply to a case where the cause in which the judgment was rendered was not in a condition to be heard on the first day of the term.<sup>6</sup> And it has been held that the term is not considered as commencing on the day appointed by law for its commencement, when in point of fact the court is not held until afterwards.<sup>7</sup> It results from this doctrine of relation that judgments entered at the same term are placed on an equality, though they are entered on different days of the term, for the reason that all suitors whose cases are in such a situation as to entitle them to a judgment on the first day of the court, ought to have no advantage the one over the other.<sup>8</sup> In several of the states this rule has been supported by express statutory enactment.<sup>9</sup> And indeed it has been held that on the common-law principle of relation a judgment lien overreaches all conveyances or incumbrances upon the debtor's lands executed on or after the first day of the term during which the judgment was rendered.<sup>10</sup> And under statute in some jurisdictions judgments in actions brought prior to the term at which the judgments are rendered, except judgments by confession,

1. *Snyder v. Crawford*, 98 Pa. St. 414.

2. *Harman v. Oberdorfer*, 33 Gratt. (Va.) 497.

3. See the title **MARSHALING ASSETS**.

4. *Doctrine of Relation.* — *Farley v. Lea*, 4 Dev. & B. L. (20 N. Car.) 169, 32 Am. Dec. 680; *Hockman v. Hockman*, 93 Va. 455, 57 Am. St. Rep. 816.

5. *Relation Back of Judgment Lien to Commencement of Term.* — See *Coutts v. Walker*, 2 Leigh (Va.) 268; *Jones v. Myrick*, 8 Gratt. (Va.) 179; *Wynne v. Wynne*, 1 Wils. R. 42.

6. *Withers v. Carter*, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; *Yates v. Robertson*, 80 Va. 475. See also *Swann v. Broome*, 3 Burr. 1596.

7. *Skipwith v. Cunningham*, 8 Leigh (Va.) 278, 31 Am. Dec. 642. Compare *Norwood v. Thorp*, 64 N. Car. 684.

*Fraction of First Day of Term Considered.* — And it has been held that where a mortgage is delivered for record on the first day of the term of court, previous to the hour at which it actually convenes, the mortgage will prevail against the lien of a judgment rendered at that term. *Follett v. Hall*, 16 Ohio 111, 47 Am. Dec. 365; *Holliday v. Franklin Bank*, 16 Ohio 533. Compare *Davis v. Messenger*, 17 Ohio St. 231; *Hemminway v. Davis*, 24 Ohio St. 150.

8. *Judgments at Same Time Placed on Equality.* — *Norwood v. Thorp*, 64 N. Car. 682; *Porter v. Earthman*, 4 Yerg. (Tenn.) 358; *Johnson v. Mitchell*, 17 Ga. 593; *Brockenbrough* v.

*Brockenbrough*, 31 Gratt. (Va.) 580. See also *Ex p. Stagg*, 1 Nott & M. (S. Car.) 405.

*Contra.* — *Anderson v. Tuck*, 33 Md. 225; *Welsh v. Murray*, 4 Dall. (Pa.) 320. See also *Hanson v. Barnes*, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322.

9. *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Coe v. Hallam*, 173 Ill. 461; *Dloughy v. Spaninger*, 30 Ill. App. 302. See also *Ferrell v. Hales*, 119 N. Car. 199.

*Commencement of Lien on Last Day of Term.* — Under statute in *Missouri*, if two or more judgments are rendered at the same term as between the parties entitled to such judgments, the lien shall commence on the last day of the term at which they were rendered. *Bradley v. Heffernan*, (Mo. 1900) 57 S. W. Rep. 765; *Dunscomb v. Maddox*, 21 Mo. 144. Compare *Friar v. Ray*, 5 Mo. 510.

Under statute in *Louisiana* a similar rule has been laid down. *Wolfe v. Joubert*, 45 La. Ann. 1100.

10. *Sturgess v. Cleveland Bank*, 3 McLean (U. S.) 140; *Urbana Bank v. Baldwin*, 3 Ohio 65; *Mutual Assur. Soc. v. Stanard*, 4 Munf. (Va.) 539; *Coutts v. Walker*, 2 Leigh (Va.) 268; *Skipwith v. Cunningham*, 8 Leigh (Va.) 278, 31 Am. Dec. 642. See also *Thompson v. Atherton*, 6 Ohio 30.

Under statute in *Arkansas* the same rule has been laid down. *Keatts v. Fowler*, 22 Ark. 483.



become liens upon the real estate of the judgment debtor from the first day of the term, and as a consequence overreach *bona fide* conveyances and incumbrances made by the debtor before the rendition of the judgment but after the commencement of the term.<sup>1</sup> But under statute in several jurisdictions it has been held that a judgment rendered during the term does not relate back to the beginning of the term so as to defeat an intermediate *bona fide* purchaser.<sup>2</sup>

(3) *Priority by Fractional Part of Day* — Judgments Entered on the Same Day. — The view obtains in some jurisdictions that the courts are bound to look to the fractional parts of a day in order to determine the priority of judgment liens where several are entered, filed, or registered against the same debtor on the same day.<sup>3</sup> And it has been held that the entry on the minutes is conclusive of the order of rendition, and being record evidence cannot be controverted or controlled by other evidence.<sup>4</sup> But in other jurisdictions it is held that in determining the priority of liens between judgments entered on the same day, a day is not susceptible of juridical division, and in the appropriation of the proceeds of land sold by the sheriff, when the fund is insufficient to discharge them all, they are to be paid *pro rata*.<sup>5</sup>

*Judgment and Conveyance on Same Day.* — It seems to be the prevailing rule that the law will take into consideration the fractional parts of a day in determining the priority between a judgment and a conveyance on the same day.<sup>6</sup> And it has been held that to affect lands in the hands of a purchaser, a judgment must have been not merely simultaneous with, but anterior to, the conveyance,<sup>7</sup> and that as an indispensable measure of justice the precise time at which the judgment was entered is provable by less than record proof.<sup>8</sup> But

1. *Jeffrey v. Moran*, 101 U. S. 285 (declaring the law in *Ohio*); *National Bank v. Tennessee Coal, etc., Co.*, (Ohio 1900) 57 N. E. Rep. 450; *Kellerman v. Aultman*, 30 Fed. Rep. 888 (declaring the law in *Nebraska*); *Norfolk State Bank v. Murphy*, 40 Neb. 735; *Ocobock v. Baker*, 52 Neb. 447; *Colt v. Du Bois*, 7 Neb. 391; *Hogland v. Green*, 54 Neb. 164.

2. *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Morgan v. Sims*, 26 Ga. 283; *Quinn v. Wiswall*, 7 Ala. 645. See also *Ryhiner v. Frank*, 105 Ill. 326; *Dyson v. Simmons*, 48 Md. 212; *Ex p. Stagg*, 1 Nott & M. (S. Car.) 405.

By the statute 29 Car. II., c. 5, §§ 13-15, all judgments entered in the courts of Westminster Hall, as against purchases of land, etc., shall, in consideration of law, be judgments only from the time they are so entered. *Hunt v. Swayze*, 55 N. J. L. 36.

3. *View that Fraction of a Day Is to Be Considered in Determining Priority Between Judgments.* — *German Security Bank v. Campbell*, 99 Ala. 249, 42 Am. St. Rep. 55; *Biggam v. Merritt, Walk.* (Miss.) 430, 12 Am. Dec. 576; *Smith v. Ship*, 1 How. (Miss.) 234; *Reed v. Haviland*, 38 Miss. 323; *Herron v. Walker*, 69 Miss. 709; *Lemon v. Staats*, 1 Cow. (N. Y.) 592. See also *Safford v. Douglas*, 4 Edw. (N. Y.) 537. Compare *Burney v. Boyett*, 1 How. (Miss.) 39; *Bliss v. Watkins*, 16 Ala. 229.

*Justice's Judgment.* — In *Bates v. Hinsdale*, 65 N. Car. 423, it was held that the law takes notice of the fractional parts of a day when there is a conflict between justice's judgments filed and docketed on the same day.

*Judgments Docketed Out of Office Hours.* — Under statute in *New York* it has been held that all judgments filed and docketed by a clerk out of office hours, although some may

be entered before others, must take effect and become liens equally at the next office hour after such docketing. *Wardell v. Mason*, 10 Wend. (N. Y.) 575; *France v. Hamilton*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 180.

4. *Herron v. Walker*, 69 Miss. 709.

5. *View that Judgments on the Same Day Share Pro Rata.* — *McLean v. Rockey*, 3 McLean (U. S.) 235; *Rockhill v. Hanna*, 4 McLean (U. S.) 555; *Bruce v. Vogel*, 38 Mo. 100; *Emerick v. Garwood*, 1 Browne (Pa.) 20; *Metzler v. Kilgore*, 3 P. & W. (Pa.) 245, 23 Am. Dec. 76; *McClure v. Roman*, 52 Pa. St. 458; *Janney v. Stephen*, 2 Patt. & H. (Va.) 11. See also *Mechanics' Bank v. Gorman*, 8 W. & S. (Pa.) 307.

*Where One Judgment Creditor Has Superior Equity.* — In *Verheller's Appeal*, 24 Pa. St. 109, 62 Am. Dec. 365, it was held that where one of two judgment debtors had a judgment against his co-debtor entered on the same day with a judgment entered against both of them, and the real estate of such co-debtor was subsequently sold at sheriff's sale under the judgment against the two, the debtor having the judgment could not claim any part of the proceeds of sale in opposition to his own judgment creditor, since the equity of the latter is superior to that of the former.

6. *Fraction of Day Considered in Determining Priority Between Judgment and Conveyance.* — *Hoppock v. Ramsey*, 28 N. J. Eq. 413; *Mechanics' Bank v. Gorman*, 8 W. & S. (Pa.) 304; *Small's Appeal*, 24 Pa. St. 398; *Ladley v. Creighton*, 70 Pa. St. 490; *Murfree v. Cairmack*, 4 Verg. (Tenn.) 270, 26 Am. Dec. 232.

7. *Mechanics' Bank v. Gorman*, 8 W. & S. (Pa.) 304.

8. *Mechanics' Bank v. Gorman*, 8 W. & S. (Pa.) 307; *Hunt v. Swayze*, 55 N. J. L. 33.



where no proof of the time of entry of the judgment is excluded, and the difficulty arises not from a denial of the right to give it, but from the inability to furnish it, the judgment will have priority over a conveyance on the same day, the presumption being that the judgment was entered at the earliest hour of the day when an actual entry of a judgment may be made in the usual course of business.<sup>1</sup>

**As Between Judgment and Mortgage.** — In some cases it is held that where a judgment and a mortgage are entered on the same day, the fractional division of the day is not to be considered, and they are therefore entitled to be paid *pro rata* from the proceeds of the real estate.<sup>2</sup> In other jurisdictions a judgment entered becomes a lien on the very first moment of the day of entry, and has preference over a mortgage recorded at any specified hour of the same day, though in point of fact the mortgage was recorded prior to the entry of the judgment.<sup>3</sup> And in *Virginia* it is held that there is no distinction in this respect between judgments and decrees pronounced in term by the courts, and judgments and decrees confessed or rendered in vacation.<sup>4</sup> In still other jurisdictions, however, the rule is that to ascertain the question of preference between a mortgage and a judgment the fractional parts of a day are to be considered.<sup>5</sup> But even here it has been held that in the absence of proof by either lienholder that his lien was in fact anterior in point of time, the titles are equal.<sup>6</sup>

(4) **Priority as Affected by Issuance of Execution.** — The fact that no execution was issued, or, being issued, that no levy was made, does not affect the priority of the lien of a judgment over subsequent deeds and mortgages,<sup>7</sup> or attachment.<sup>8</sup>

**As Between Two or More Judgments.** — It seems also to be the prevailing rule that a sale under execution issued upon a junior judgment does not operate to discharge the lien of a prior judgment or to pass the title to the land except subject to the prior lien, and hence a sale under the elder judgment gives a better title than a prior sale under the junior judgment.<sup>9</sup> But it is held that the money realized from the sale under a junior judgment cannot be applied

1. *Clark v. Duke*, 59 Miss. 575; *Hunt v. Swayze*, 55 N. J. L. 33; *Boyer's Estate*, 51 Pa. St. 432, 91 Am. Dec. 129. Compare *Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

2. **View that Fractions of a Day Are Not to Be Considered in Determining Priority Between Judgment and Mortgage.** — *Claason's Appeal*, 22 Pa. St. 359; *Hendrickson's Appeal*, 24 Pa. St. 363. See also *Goetzinger v. Rosenfeld*, 16 Wash. 392.

3. **Judgment Held to Be Superior to Mortgage Recorded on the Date of Judgment Entry.** — *Alrichs v. Thompson*, 5 Harr. (Del.) 432.

4. *Hockman v. Hockman*, 93 Va. 455, 57 Am. St. Rep. 816.

5. **View that Fractions of a Day Between Judgment and Mortgage Are to Be Considered.** — *Ex d. Stagg*, 1 Nott & M. (S. Car.) 405; *Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232. Compare *Clements v. Berry*, 11 How. (U. S.) 398, reversing decision of Supreme Court of Tennessee.

6. *Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

7. *Vansciver v. Bryan*, 13 N. J. Eq. 434. See also *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429.

8. *Reeves v. Johnson*, 12 N. J. L. 33. See also *Turner v. Lawrence*, 11 Ala. 427.

9. **Lien of Senior Judgment Not Discharged by Execution under Junior Judgment.** — *Rankin v.*

*Scott*, 12 Wheat. (U. S.) 177, declaring rule in *Missouri*; *Littlefield v. Nichols*, 42 Cal. 372; *Lathrop v. Brown*, 23 Iowa 40; *Ridgely v. Gartrell*, 3 Har. & M. (Md.) 449; *Titman v. Rhyne*, 89 N. Car. 64; *Stuble v. Walpole*, Wright (Ohio) 447. Compare *Den v. Hill*, 1 Hayw. (2 N. Car.) 72; *Rhyne v. McKee*, 73 N. Car. 259.

**Sale under Concurrent Judicial Mortgage.** — Also it has been held that a sale made under an execution of a judgment secured by judicial mortgage will not discharge a judicial mortgage recorded on the same day. *Young v. Hays*, 14 La. Ann. 665.

**Where Judgments Are Held by Same Person.** — And where the same person holds two judgments against another, the fact that he sells land of the judgment debtor under the junior judgment without disclosing at the time of sale that he held the senior judgment as a subsisting and valid judgment will not defeat the lien of the senior judgment where the purchaser knew of the existence of such judgment. *Shotwell v. Murray*, 1 Johns. Ch. (N. Y.) 512.

**Under Statute in New Jersey** it has been held that it is essential to the maintenance of a priority of lien on land under execution by a senior over a junior creditor, that there should be a levy on it after recording and delivering the writ to the sheriff, and a junior judgment creditor by suing out and levying the first execution acquires a priority of lien. *Reeves v.*



to an execution issued on an elder judgment.<sup>1</sup> In other jurisdictions it is held that a sale by the sheriff under the junior judgment divests the lien of senior judgments, whether executions have been issued thereon or not, but it is the duty of the sheriff to apply the proceeds of the sale in the order of the priority of the judgment.<sup>2</sup> And it has been held that where a judgment creditor waives his right to a fund arising from a sale on a subsequent judgment, he does not thereby prejudice his right to claim a fund arising from a sale of other property of the debtor upon another subsequent judgment.<sup>3</sup>

**Where Judgment Liens Are Equal.** — It may be laid down as a general rule that where liens of judgment are equal, one judgment creditor may acquire a priority over another by superior vigilance in executing his judgment.<sup>4</sup> Thus in some cases it has been held that when judgments in favor of different persons and against the same defendant are rendered or recorded on the same day, the judgment creditor first issuing execution and levying upon the debtor's property acquires a prior right to satisfaction.<sup>5</sup> And the same rule has been applied to judgments rendered at the same term where by statute such judgments are made equal liens on the defendant's real estate.<sup>6</sup> So the rule has been applied in a case where two liens on real estate were created by

Johnson, 12 N. J. L. 33; *Wills v. McKinney*, 41 N. J. L. 120; *Clement v. Kaighn*, 15 N. J. Eq. 47; *South Amboy Bldg., etc., Assoc. v. Murphy*, (N. J. 1887) 9 Atl. Rep. 590.

In *Kansas* it is held under statute that if no execution is taken out and levied before the expiration of a specified period after the rendition of the judgment, the judgment becomes subsequent and inferior to the liens of other judgment creditors. *Lamme v. Schilling*, 25 Kan. 93; *Thompson v. Hubbard*, 3 Kan. App. 714.

1. *Bruce v. Vogel*, 38 Mo. 100.

2. **Senior Lien Divested by Sale under Junior Judgment.** — *U. S. v. Mechanics' Bank*, Gilp. (U. S.) 57, declaring rule in *Pennsylvania*; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Jones v. Wright*, 60 Ga. 364; *Snipes v. Sheriff*, 1 Bay (S. Car.) 295; *Trumbo v. Cumming*, 20 S. Car. 336; *Garvin v. Garvin*, 34 S. Car. 388; *Matthews v. Nance*, 49 S. Car. 389. See also *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301.

In *Com. v. Alexander*, 14 S. & R. (Pa.) 257, it was held that a purchaser at a sheriff's sale under a judgment does not take the land subject to a previous judgment obtained against the former owner of the land, unless it was sold expressly subject to such prior judgment.

In *Brunswick Sav., etc., Co. v. National Bank*, 102 Ga. 776, it was held that the sale of property under an execution issued upon the foreclosure of a mortgage thereon will divest the lien of a judgment against the mortgagor of older date than the mortgage, and will pass to the purchaser the title to the mortgaged property freed from the judgment lien.

In *Spring v. Eisenach*, 51 Tex. 432, it was held that the title of a purchaser of land under a junior judgment, whose sheriff's deed has been duly recorded, is not affected by a subsequent sale of the same land, made by order of a bankrupt court, for the enforcement of a senior judgment lien, if the purchaser under the junior judgment was not a party to the bankrupt proceedings ordering the sale.

In *Mississippi* the rule established by statute is that the judgment or decree having the oldest lien upon the property shall have the money

produced by a sale, whether made under a senior or junior judgment or both, unless the senior judgment has lost its lien by reason of the negligence of the creditor. *Bonafee v. Fisk*, 13 Smed. & M. (Miss.) 682; *Curry v. Lampkin*, 51 Miss. 94. Compare *Talbert v. Melton*, 9 Smed. & M. (Miss.) 9; *Andrews v. Wilkes*, 6 How. (Miss.) 565, 38 Am. Dec. 450; *Commercial Bank v. Yazoo County*, 6 How. (Miss.) 530, 38 Am. Dec. 447.

But in this state the priority of liens provided in favor of enrolled judgments according to their seniority does not extend to judgment creditors who neglect or refuse to sue out execution until a judgment creditor, after giving the requisite notice to the senior judgment creditor, has by due diligence caused his execution to be levied. *Curry v. Lampkin*, 51 Miss. 93; *Virden v. Robinson*, 59 Miss. 28.

But if on being notified by a junior creditor to proceed in the collection of his judgment he sues out execution and places it in the hands of the proper officer, this is sufficient, and it will not be necessary for him to point out to the officer property of the defendant which is subject to levy and sale. *Scharff v. Zimmerman*, 60 Miss. 760.

3. *Uniontown Bldg., etc., Assoc.* Appeal, 92 Pa. St. 200.

4. **Priority Acquired by Execution Where Liens Are Equal.** — *Smith v. Lind*, 29 Ill. 24; *Bruce v. Vogel*, 38 Mo. 100.

5. **Priority Acquired by Execution Between Judgments of the Same Day** — *United States*, — *Rockhill v. Hanna*, 15 How. (U. S.) 189.

*Alabama*, — *Bliss v. Watkins*, 16 Ala. 229.

*Iowa*, — *Cook v. Dillon*, 9 Iowa 407, 74 Am. Dec. 354; *Lippencott v. Wilson*, 40 Iowa 425; *Wilson v. Baker*, 52 Iowa 428; *Kisterson v. Tate*, 94 Iowa 665, 58 Am. St. Rep. 419.

*Missouri*, — *Bruce v. Vogel*, 38 Mo. 100.

*New York*, — *Adams v. Dyer*, 8 Johns. (N. Y.) 347, 5 Am. Dec. 344; *Waterman v. Haskin*, 11 Johns. (N. Y.) 228.

See also *McLean v. Rockey*, 3 McLean (U. S.) 235; *Metzler v. Kilgore*, 3 P. & W. (Pa.) 249, 23 Am. Dec. 76.

6. *Smith v. Lind*, 29 Ill. 24; *Bradley v. Heffernan*, (Mo. 1900) 57 S. W. Rep. 764.



the same decree.<sup>1</sup> So a sheriff's sale upon a judgment has been held to divest the lien of a mortgage recorded on the same day that the judgment is entered.<sup>2</sup>

(5) *Priority of Lien in Some Specific Instances* — (a) *Against Equitable Interests* — *Contest Between Judgment Creditors.* — It has been held that if several creditors having judgments of different dates resort to a court of equity for satisfaction out of an equitable interest of their debtor in real estate, they are to have satisfaction out of the fund according to the order of their judgments in point of time, the elder being entitled to priority over the younger.<sup>3</sup> On the other hand it has been held that the judgment creditor who first files his bill to enforce an equitable lien on land obtains a priority in relation to the land named in his bill, and it is not necessary that the action should be prosecuted for the benefit of all the creditors.<sup>4</sup>

*Contest Between Judgment Creditor and a Purchaser.* — A judgment though docketed will not have a prior lien on a mere equitable interest in lands over a subsequent *bona fide* purchaser without actual notice from the holder of the legal title.<sup>5</sup>

(b) *Against Lands Fraudulently Conveyed.* — Under the rule in some jurisdictions giving a judgment the force of a lien against property fraudulently conveyed, it has been held to follow as a result that a junior judgment lien acquires no preference over a senior judgment lien by virtue of prior proceedings to execute the judgment.<sup>6</sup> But in other jurisdictions in which it is conceded that a judgment may be a lien on lands fraudulently conveyed, it has been intimated that a junior creditor who first takes out an execution on his judgment secures a priority, and this though a senior creditor had previously filed his bill in equity to remove the fraudulent obstruction to the enforcement of his lien.<sup>7</sup> And in jurisdictions where judgments are denied the effect of liens against property fraudulently conveyed, it has been held that a junior judgment creditor who first files his bill to reach land of his debtor which has been fraudulently conveyed is entitled to priority over a senior judgment creditor.<sup>8</sup>

*As Against Bona Fide Purchaser from Fraudulent Grantee.* — It has been held that the lien of a judgment against land held fraudulently ceases to operate when it is transferred to a *bona fide* purchaser.<sup>9</sup>

(c) *After-acquired Property.* — In those jurisdictions in which a judgment is held to be a lien on after-acquired property, it is a general rule that a lien

1. Shirley v. Brown, 80 Mo. 244.

2. Magaw v. Garrett, 25 Pa. St. 319.

3. Judgments Held to Be Liens Against Equitable Interests According to Priority in Point of Time. — Haleys v. Williams, 1 Leigh (Va.) 140, 19 Am. Dec. 743. See also Hale v. Horne, 21 Gratt. (Va.) 122.

In Maxwell v. Vaught, 96 Ind. 136, it was held that judgments are by statute liens on lands held in trust for the judgment debtor in their chronological order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where the plaintiff in the senior judgment is not a party.

4. Priority Acquired Against Equitable Interests by Filing Bill. — Freedman's Sav., etc., Co. v. Earle, 110 U. S. 710; Tallmadge v. Sill, 21 Barb. (N. Y.) 34; Loring v. Melendy, 11 Ohio 355. See also De La Vergne v. Evertson, 1 Paige (N. Y.) 181, 19 Am. Dec. 411.

5. Kirkwood v. Koester, 11 Kan. 471; Moore v. Sexton, 30 Gratt. (Va.) 505; Harper v. Bibb, 34 Miss. 472, 69 Am. Dec. 397.

6. View that No Priority Is Acquired Between Judgments by Prior Proceedings Against Lands Fraudulently Conveyed. — Jackson v. Holbrook,

36 Minn. 494, 1 Am. St. Rep. 683; Slattery v. Jones, 96 Mo. 217, 9 Am. St. Rep. 344; Wilkinson v. Paddock, 125 N. Y. 748; McKee v. Gilchrist, 3 Watts (Pa.) 230; Duncan's Appeal, 88 Pa. St. 414; Fidler v. John, 178 Pa. St. 112. See also *In re* Lowe, 19 Fed. Rep. 589; New York L. Ins. Co. v. Mayer, 14 Daly (N. Y.) 318, 108 N. Y. 655.

Priority Not Lost by Advising the Fraudulent Conveyance. — Fidler v. John, 178 Pa. St. 112.

7. Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460. See also Chautauque County Bank v. Risley, 19 N. Y. 373, 75 Am. Dec. 347.

8. View that Priority Is Acquired by Filing Bill Against Lands Fraudulently Conveyed. — Neal v. Foster, 36 Fed. Rep. 29, affirmed in 144 U. S. 585 (decided under Oregon statute); Doster v. Manistee Nat. Bank, 67 Ark. 325; Lyon v. Robbins, 46 Ill. 279; Rappleye v. International Bank, 93 Ill. 400; Bridgman v. McKissick, 15 Iowa 260; Howland v. Knox, 59 Iowa 45; Boyle v. Maroney, 73 Iowa 70, 5 Am. St. Rep. 657; Preston-Parton Milling Co. v. Horton, (Wash. 1900) 60 Pac. Rep. 412. See also Miller v. Sherry, 2 Wall. (U. S.) 237; Dargan v. Waring, 11 Ala. 988, 46 Am. Dec. 234.

9. Wood v. Wright, 9 Biss. (U. S.) 365.



attaches to after-acquired property from the time it is acquired by the debtor, and does not relate back to the date of the judgment, and hence the liens of all judgments in existence when the property is acquired attach simultaneously, and no priority exists.<sup>1</sup>

(d) **Judgment for Future Advances.** — The principle has been laid down that a judgment may be taken or held as the security for future advances and responsibilities to the extent of it when such a provision forms a part of the original agreement between the parties,<sup>2</sup> and that the judgment may operate as a lien on lands to the extent of the future advances in preference to the claim under a junior intervening incumbrance with notice of the agreement.<sup>3</sup> On the other hand it has been held in some jurisdictions that a judgment becomes a lien for future advances as against intervening incumbrances only from the date of such future advances, and not from the date of the judgment.<sup>4</sup>

(e) **Judgment to Secure Purchase Money.** — If a vendor at the time of parting with his title takes a judgment as a part of the transaction to secure his purchase money, he retains a lien upon the estate conveyed not to be displaced by any other lien or incumbrance against the vendee, though prior to the conveyance and judgment.<sup>5</sup> This rule has been applied where at the time of delivery of the deed the vendor has already entered a judgment for purchase money,<sup>6</sup> where the delivery of the conveyance and the entry of the judgment occurred on the same day,<sup>7</sup> and even where the judgment was entered on a day subsequent to the conveyance if the circumstances were such as to show one continuous transaction.<sup>8</sup>

(6) **Superior Rights of Third Persons** — (a) **In General.** — The lien of a judgment is limited to the actual interest the judgment debtor has in the lands, and hence as a general rule is subordinate to prior conveyances, incumbrances, and all other existing liens whether legal or equitable in favor of third persons.<sup>9</sup> Thus it has been held that where a person makes a conveyance of

**1. Judgment Liens Attach on After-acquired Property Simultaneously.** — *Michaels v. Boyd*, 1 Ind. 239; *Ware v. Purdy*, (Iowa 1894) 60 N. W. Rep. 526; *Kisterson v. Tate*, 94 Iowa 665, 58 Am. St. Rep. 419; *Ware v. Delahaye*, 95 Iowa 667; *Cayce v. Stovall*, 50 Miss. 396; *Matter of Hazard*, 141 N. Y. 586; *Goetz v. Mott*, (Supm. Ct.) 21 Abb. N. Cas. (N. Y.) 246, 15 Civ. Pro. (N. Y.) 11; *Matter of Foster*, (Surrogate Ct.) 8 Misc. (N. Y.) 344; *Moore v. Jordan*, 117 N. Car. 86, 53 Am. St. Rep. 576; *Belknap v. Greene*, 56 S. Car. 119; *Relfe v. McComb*, 2 Head (Tenn.) 558, 75 Am. Dec. 748; *Willis v. Downes*, (Tex. Civ. App. 1898) 46 S. W. Rep. 920; *Matula v. Lane*, 22 Tex. Civ. App. 391. But see *Creighton v. Leeds*, 9 Oregon 215.

**As Between Judgment and Equitable Lien.** — It has been held that an agreement to execute a mortgage made subsequent to a judgment has no preference as an equitable lien over the judgment on property subsequently acquired by the judgment debtor where the agreement was not on a new consideration, but was founded on an old debt. *Dwight v. Newell*, 3 N. Y. 185.

**2. Future Advances.** — *Livingston v. M'Inlay*, 16 Johns. (N. Y.) 105; *Binkerhoff v. Marvin*, 5 Johns. Ch. (N. Y.) 320; *Truscott v. King*, 6 N. Y. 147.

*3. Truscott v. King*, 6 N. Y. 147; *Norton v. Whiting*, 1 Paige (N. Y.) 578.

*4. Kerr's Appeal*, 92 Pa. St. 236. See also *Walker v. Arthur*, 9 Rich. Eq. (S. Car.) 397. Compare *Parmentier v. Gillespie*, 9 Pa. St. 86.

**5. Priority of Judgment to Secure Purchase Money.** — *Stoner v. Neff*, 50 Pa. St. 258. See also *Allen v. Sharp*, 62 Ga. 183.

**Where Vendor's Lien Is Not Asserted in Judgment.** — In *Fisher v. Foote*, 25 Tex. Supp. 316, it was held that where in the rendition of judgment upon a note for purchase money the lien is not asserted, but the judgment is rendered in *personam* only, it operates as a lien from its rendition and is not superior to incumbrances prior to that date.

**6. Zeigler's Appeal**, 69 Pa. St. 471. See also *Vierheller's Appeal*, 24 Pa. St. 105, 62 Am. Dec. 365.

**7. Stoner v. Neff**, 50 Pa. St. 258; *Love v. Jones*, 4 Watts (Pa.) 465.

**8. Jacobs's Appeal**, 23 Pa. St. 480; *Snyder's Appeal*, 91 Pa. St. 477. Compare *Watt v. Steel*, 1 Pa. St. 386.

**9. Limitation of Lien to Actual Interest of Judgment Debtor** — *United States*, — *Jeffrey v. Moran*, 101 U. S. 285; *Milwaukee, etc., R. Co. v. James*, 6 Wall. (U. S.) 750; *Brown v. Pierce*, 7 Wall. (U. S.) 205; *Baker v. Morton*, 12 Wall. (U. S.) 150; *In re Estes*, 6 Sawy. (U. S.) 459.

*Arkansas.* — *Watkins v. Wassell*, 15 Ark. 73; *Doswell v. Adler*, 28 Ark. 82; *Apperson v. Burgett*, 33 Ark. 328.

*California.* — *Schwartz v. Cowell*, 71 Cal. 306.

*Georgia.* — *Colquitt v. Thomas*, 8 Ga. 258; *McFerran v. Davis*, 70 Ga. 661; *Crawford v. Williams*, 76 Ga. 792; *Horne v. Seisel*, 92 Ga. 683.

*Indiana.* — *Wharton v. Wilson*, 60 Ind. 591;



land, which is defective by reason of a wrong description of the premises, the lien of a judgment against the grantor subsequent to the conveyance and prior to the reformation of the deed will not attach to the lands.<sup>1</sup>

**Effect of Recording Acts.** — The question whether or not under the recording acts of the different states notice actual or constructive of the superior interests of third persons is required for the protection of such interests against the lien of a judgment, will be discussed in another portion of this work.<sup>2</sup>

(b) **Lands Instantaneously Seized.** — It results from the doctrine laid down above, limiting the judgment lien to the actual interest of the judgment debtor, that as a general rule whenever a man parts with a freehold estate at the same time and as a part of the same act or transaction by which he acquires it, his seizin for an instant does not subject the estates conveyed to him to the lien of a judgment against him.<sup>3</sup>

**Judgment Debtor as Mere Conduit to Pass Title.** — This rule has been applied where the judgment debtor is a mere instrument or conduit to pass title to another.<sup>4</sup> Thus where husband and wife convey lands to a third person, who simultaneously and as part of the same transaction reconveys to the wife, such third person acquires no interest in the lands to which the lien of a judgment can attach.<sup>5</sup> So where a third person executed a conveyance of land to a judgment debtor for the purpose of enabling the judgment debtor to secure a loan for the grantor, and simultaneously the judgment debtor executed a mortgage on the land for this purpose and a reconveyance of the land to the grantor, the instantaneous seizin of the judgment debtor did not vest in him an interest upon which the judgment lien could attach.<sup>6</sup>

**Subsequently Acquired Title of Grantor Passing to Grantee by Estoppel.** — So as a general rule if one sells and conveys real estate to which he has no title or an imperfect title at the time of the sale, and subsequently acquires a perfect title, it

*Sharpe v. Davis*, 76 Ind. 17; *Clark v. Merriam*, 83 Ind. 58; *Hays v. Reger*, 102 Ind. 524; *Foltz v. Wert*, 103 Ind. 404; *Wells v. Benton*, 108 Ind. 585; *Moore v. Thomas*, 137 Ind. 218.

*Iowa.* — *Jones v. Jones*, 13 Iowa 276; *Churchill v. Morse*, 23 Iowa 229, 92 Am. Dec. 422; *Anglo-American Land, etc., Co. v. Bush*, 84 Iowa 272.

*Kansas.* — *Harrison v. Andrews*, 18 Kan. 535; *Holden v. Garrett*, 23 Kan. 98; *Bowling v. Garrett*, 49 Kan. 504, 33 Am. St. Rep. 377. *Maryland.* — *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

*Mississippi.* — *Jenkins v. Bodley, Smed. & M. Ch. (Miss.)* 338; *Dulap v. Burnett*, 5 Smed. & M. (Miss.) 702; *Walker v. Gilbert, Freem. (Miss.)* 85.

*New Jersey.* — *Williams v. Gilbert*, 37 N. J. Eq. 84.

*New York.* — *Matter of Howe*, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Ells v. Tousley*, 1 Paige (N. Y.) 280; *White v. Carpenter*, 2 Paige (N. Y.) 217; *Keirsted v. Avery*, 4 Paige (N. Y.) 1; *Johnson v. Strong*, 65 Hun (N. Y.) 470; *Towsley v. McDonald*, 32 Barb. (N. Y.) 604; *Grosvenor v. Allen, Clarke (N. Y.)* 275.

*Pennsylvania.* — *Kuhn's Appeal*, 2 Pa. St. 264; *Com. v. Wilson*, 34 Pa. St. 63; *Mercur v. State Line, etc., R. Co.*, 171 Pa. St. 12; *Benson v. Maxwell*, (Pa. 1888) 14 Atl. Rep. 161.

*South Carolina.* — *State Bank v. Campbell*, 2 Rich. Eq. (S. Car.) 179.

*Tennessee.* — *Tappan v. Harrison*, 2 Humph. (Tenn.) 172; *Hurt v. Reeves*, 5 Hayw. (Tenn.) 50.

*Texas.* — *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Frazer v. Thatcher*, 49 Tex. 26; *Kennard v. Mabry*, 78 Tex. 151.

*Virginia.* — *Floyd v. Harding*, 28 Gratt. (Va.) 407; *Borst v. Nalle*, 28 Gratt. (Va.) 433. *Powell v. Bell*, 81 Va. 222; *Coldiron v. Ashesville Shoe Co.*, 93 Va. 373.

**Lands Forfeited for non-entry on the assessor's land books under statute in West Virginia** vests in the state upon the forfeiture by the mere force of the statute, and therefore a judgment against the former owner rendered after such forfeiture is no lien on the land. *Wiant v. Hays*, 38 W. Va. 681.

**Superior Lien of Judgment for Injuries by Railroad.** — Under the code of *Iowa* a judgment against a railway corporation for injuries to a person is a lien upon the corporate property superior to the lien of mortgages previously recorded. *Central Trust Co. v. Central Iowa R. Co.*, 38 Fed. Rep. 889. See also *White v. Keokuk, etc., R. Co.*, 52 Iowa 97; *Burlington, etc., R. Co. v. Verry*, 48 Iowa 458.

1. *Lumbard v. Abbey*, 73 Ill. 177; *Wells v. Benton*, 108 Ind. 585; *Swarts v. Stees*, 2 Kan. 236, 85 Am. Dec. 588. See also *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 185; *Gouverneur v. Titus*, 6 Paige (N. Y.) 347.

2. See the title RECORDING ACTS.

3. **General Rule that Judgment Is Not a Lien on Lands Instantaneously Seized.** — *Hazleton v. Lesure*, 9 Allen (Mass.) 24.

4. See *Atkinson v. Hancock*, 67 Iowa 452; *Hazleton v. Lesure*, 9 Allen (Mass.) 24; *Roller v. Caruthers*, 5 App. Cas. (D. C.) 368.

5. *Harrison v. Andrews*, 18 Kan. 535.

6. *Ransan v. Sargent*, 22 Kan. 516. See also *Tallman v. Farley*, 1 Barb. (N. Y.) 280; *Huffaker v. Bowman*, 4 Sneed (Tenn.) 89; *Cowardin v. Anderson*, 78 Va. 88.



inures immediately to the benefit of the grantee, and if between the date of the conveyance and the acquisition of the perfect title a judgment is rendered against the grantor, the title of the grantee is superior to that of the judgment creditor, since there is no moment of time at which the lien of the judgment could attach.<sup>1</sup>

**Priority of Mortgage Back to Secure Purchase Money.** — Where a purchaser contemporaneously with delivery of conveyance of the purchased land executes a mortgage or a trust deed to secure the purchase money, he acquires a transitory seizin only, and not such an interest in the land as becomes subject to the lien of a prior judgment against him in preference to the mortgage or deed of trust;<sup>2</sup> and it seems that the rule applies as well where part of the purchase money is paid, and the mortgage is given to secure the balance, as when the mortgage is given for the whole purchase money.<sup>3</sup> And the doctrine has been said to apply equally in favor of a third person who advances the purchase money, and at the time of the conveyance takes a mortgage on the land for his indemnity.<sup>4</sup> And the same priority has been given to an unrecorded mortgage for purchase money over a judgment subsequently obtained.<sup>5</sup> On the other hand, it has been held that a judgment creditor who advances his money upon the faith of an unencumbered title upon the record without notice is entitled to the lien acquired thereby in preference to the secret unrecorded lien of the vendor for a part of the purchase money.<sup>6</sup>

(c) **Effect of Nunc Pro Tunc Entry of Judgment.** — A judgment entered *nunc pro tunc* cannot create a lien upon the debtor's lands sold or mortgaged prior to the date of its actual entry.<sup>7</sup>

*h.* **EXPIRATION OR EXTINGUISHMENT OF LIEN** — (1) *In General.* — As a general rule a judgment creditor does not lose his lien unless it be by some act of his own, either of omission or of commission.<sup>8</sup> The judgment debtor cannot, by sale, mortgage, lease, or otherwise than by payment or satisfaction of the judgment, remove, impair, or in the least alter the lien.<sup>9</sup>

(2) *Expiration of Statutory Period* — (a) *In General.* — In most jurisdictions a period is prescribed by statute during which the lien of a judgment may continue operative, the statutory period in the majority of cases being

1. *Skidmore v. Pittsburg, etc., R. Co.*, 112 U. S. 33; *Lamprey v. Pike*, 28 Fed. Rep. 30; *Watkins v. Wassell*, 15 Ark. 73. Compare *Van Camp v. Peerenboom*, 14 Wis. 65.

2. **Purchase Money Mortgage Superior to Judgment Against Vendor** — *Georgia*. — *Scott v. Warren*, 21 Ga. 408.

*Iowa*. — *Parsons v. Hoyt*, 24 Iowa 154.

*Louisiana*. — *Rochereau v. Colomb*, 27 La. Ann. 337.

*New Jersey*. — *Bradley v. Bryan*, 43 N. J. Eq. 396.

*Pennsylvania*. — *Cake's Appeal*, 23 Pa. St. 186, 62 Am. Dec. 328.

*Virginia*. — *Summers v. Darne*, 31 Gratt. (Va.) 791; *Cowardin v. Anderson*, 78 Va. 88; *Straus v. Bodeker*, 86 Va. 543.

See also *Ruttan v. Levisconte*, 16 U. C. Q. B. 495; *Hughson v. Davis*, 4 Grant. Ch. (U. C.) 588; *Morrison v. Citizens' Bank*, 27 La. Ann. 401; *Clark v. Butler*, 32 N. J. Eq. 664.

**Vendor's Lien Reserved on Face of Conveyance.** — So it has been held that a vendor's lien reserved on the face of the conveyance will have priority over a judgment against the grantee. *Kline v. Triplett*, (Va. 1896) 25 S. E. Rep. 886. See further the title **VENDOR'S LIENS**.

**Where Conveyance and Mortgage Are Executed at Different Times.** — But it seems that a different rule is to be applied where the conveyance

and mortgage are not executed at the same time so that the execution of the two instruments constitutes one transaction. *Curtis v. Root*, 28 Ill. 367.

**Mortgage Not for Purchase Money.** — So the rule has been held not to apply in the case of a mortgage contemporaneously executed, but not for purchase money. *Root v. Curtis*, 38 Ill. 192; *Weil v. Casey*, 125 N. Car. 356. Compare *Christie v. Hale*, 46 Ill. 117.

3. *Courson v. Walker*, 94 Ga. 175. In this case the contest was between a chattel mortgage to secure part of the purchase money and an existing judgment against the mortgagor.

4. See *Cowardin v. Anderson*, 78 Va. 91.

5. *Cowardin v. Anderson*, 78 Va. 90.

6. *Hulett v. Whipple*, 58 Barb. (N. Y.) 224. See also *Cutler v. Ammon*, 65 Iowa 281; *Stevens v. Sellars*, 59 Ga. 540.

7. **Effect of Nunc Pro Tunc Entry of Judgment as Against Purchaser or Mortgagee.** — *Lea v. Yats*, 40 Ga. 56; *Miller v. Wolf*, 63 Iowa 233; *Ferrell v. Hales*, 119 N. Car. 213; *Eastham v. Sallis*, 60 Tex. 576. See also *McNamara v. New York, etc., R. Co.*, 56 N. J. L. 56.

8. *Lucas v. Stewart*, 3 Smed. & M. (Miss.) 231. See also *Robinson v. Green*, 6 How. (Miss.) 223.

9. See *supra*, this section, **Commencement and Precedence of Lien**.



restricted to ten years.<sup>1</sup> In some jurisdictions, where no period is expressly provided for by statute for the continuance of the lien of a judgment, it has been held that the lien ceases when the right to sue out execution on the

**1. Expiration of Statutory Period for Continuance of Judgment Lien — United States.** — *Canal Bank v. Hudson*, 111 U. S. 66 (decided under *Mississippi* statute); *McAleer v. Clay County*, 42 Fed. Rep. 665 (decided under *Iowa* statute); *Hurst v. Hurst*, 2 Wash. (U. S.) 69 (decided under *Pennsylvania* statute).

*Arkansas.* — *Pettit v. Johnson*, 15 Ark. 55; *Shall v. Biscoe*, 18 Ark. 142; *Lawson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596.

*California.* — *Isaac v. Swift*, 10 Cal. 71, 70 Am. Dec. 698; *McMann v. San Francisco*, 74 Cal. 106.

*Illinois.* — *Gridley v. Watson*, 53 Ill. 186; *Hastings v. Bryant*, 115 Ill. 69.

*Indiana.* — *Applegate v. Edwards*, 45 Ind. 329; *Brown v. Wuskoff*, 118 Ind. 569; *Wells v. Bower*, 126 Ind. 115, 22 Am. St. Rep. 570; *Shanklin v. Sims*, 110 Ind. 143; *Yeager v. Wright*, 112 Ind. 230; *Mahoney v. Neff*, 124 Ind. 380; *McAfee v. Reynolds*, 130 Ind. 33.

*Iowa.* — *Albee v. Curtis*, 77 Iowa 644; *Virden v. Shepard*, 72 Iowa 546; *Polk County v. Nelson*, 75 Iowa 648; *Rand v. Garner*, 75 Iowa 311; *Lakin v. McCormick*, 81 Iowa 545; *Benbow v. Boyer*, 89 Iowa 494.

*Maryland.* — *Doub v. Barnes*, 4 Gill (Md.) 1.

*Minnesota.* — *Marshall v. Hart*, 4 Minn. 450; *Davidson v. Gaston*, 16 Minn. 230; *Lamprey v. Davidson*, 16 Minn. 480; *Erickson v. Johnson*, 22 Minn. 380; *Sherburne v. Rippe*, 35 Minn. 540; *Spencer v. Haug*, 45 Minn. 231.

*Mississippi.* — *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 43; *Rupert v. Dantzler*, 12 Smed. & M. (Miss.) 697; *Beirne v. Mower*, 13 Smed. & M. (Miss.) 427; *Kilpatrick v. Byrne*, 25 Miss. 571; *Fowler v. McCartney*, 27 Miss. 509; *Murphy v. Klein*, 71 Miss. 908.

*Missouri.* — *Crittenden v. Leitsendorfer*, 35 Mo. 239; *Riggs v. Goodrich*, 74 Mo. 108; *Tracy v. Whitsett*, 51 Mo. App. 149; *Dermott v. Carter*, 109 Mo. 21.

*Nebraska.* — *Horbach v. Smiley*, 54 Neb. 217.

*New York.* — *Lansing v. Vischer*, 1 Cow. (N. Y.) 431; *Dickenson v. Gilliland*, 1 Cow. (N. Y.) 481; *Roe v. Swart*, 5 Cow. (N. Y.) 294; *Scott v. Howard*, 3 Barb. (N. Y.) 319; *Muir v. Leitch*, 7 Barb. (N. Y.) 341; *Mohawk Bank v. Atwater*, 2 Paige (N. Y.) 54; *Pettit v. Shepherd*, 5 Paige (N. Y.) 403, 28 Am. Dec. 437; *Little v. Harvey*, 9 Wend. (N. Y.) 157; *Tufts v. Tufts*, 18 Wend. (N. Y.) 621; *Darling v. Littlejohn*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 205; *Floyd v. Clark*, 16 Daly (N. Y.) 528; *Brown v. Hyman*, (County Ct.) 27 N. Y. Supp. 436; *Anderson v. Porter*, (C. Pl. Spec. T.) 23 Civ. Pro. (N. Y.) 297, 7 Misc. (N. Y.) 218; *Matter of Harmon*, 79 Hun (N. Y.) 226; *Nutt v. Cuming*, 22 N. Y. App. Div. 92; *Waltermire v. Westover*, 14 N. Y. 16; *Wing v. De La Rionda*, 125 N. Y. 678.

*North Carolina.* — *Adams v. Guy*, 106 N. Car. 275; *Pipkin v. Adams*, 114 N. Car. 201; *McCaskill v. Graham*, 121 N. Car. 190.

*Oregon.* — *Murch v. Moore*, 2 Oregon 189.

*Pennsylvania.* — *Com. v. McKisson*, 13 S. & R. (Pa.) 144; *Bombay v. Boyer*, 14 S. & R.

(Pa.) 253, 16 Am. Dec. 494; *Bank of North America v. Fitzsimons*, 3 Binn. (Pa.) 342; *Hurst v. Hurst*, 3 Binn. (Pa.) 347, note a; *Ahl's Estate*, 6 Pa. Dist. 393; *Suter v. Findlay*, 13 Monig. Co. Rep. (Pa.) 73, 19 Pa. Co. Ct. 10, 6 Pa. Dist. 253, 44 Pittsb. Leg. J. (Pa.) 350; *Davis v. Ehrman*, 20 Pa. St. 256; *Matter of Fulton*, 51 Pa. St. 204; *Neil v. Colwell*, 66 Pa. St. 216; *Allen v. Liggett*, 81 Pa. St. 486; *Porter v. Hitchcock*, 98 Pa. St. 625.

*South Carolina.* — *Adickes v. Lowry*, 12 S. Car. 97; *Patterson v. Baxley*, 33 S. Car. 354; *Henry v. Henry*, 31 S. Car. 1; *Kaminsky v. Trantham*, 45 S. Car. 393.

*Tennessee.* — *Greenway v. Cannon*, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161; *Dickinson v. Collins*, 1 Swan. (Tenn.) 516; *Wooldridge v. Planter's Bank*, 1 Sneed (Tenn.) 297; *Hickman v. Murfree*, Mart. & Y. (Tenn.) 26; *Gardenhire v. King*, 97 Tenn. 585.

*Utah.* — *Thompson v. Avery*, 11 Utah 214.

See also *Ridge v. Prather*, 1 Blackf. (Ind.) 401; *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202.

**Statutory Limitation Held Not Applicable Between Debtor and Creditor.** — In some jurisdictions the statutory limitation as to the duration of a judgment lien is held to be applicable so far as concerns purchasers and intervening creditors, but not in the case of the judgment creditor himself. *Gottlieb v. Thatcher*, 151 U. S. 280 (decided under *Colorado* statute); *Fetterman v. Murphy*, 4 Watts (Pa.) 424, 28 Am. Dec. 729; *Aurand's Appeal*, 34 Pa. St. 151; *Brown's Appeal*, 91 Pa. St. 485; *McCahan v. Elliott*, 103 Pa. St. 636.

And a like distinction was at one time made in *New York*. *Tufts v. Tufts*, 18 Wend. (N. Y.) 621.

But under subsequent legislation abolishing this distinction, it has been held that the limitation of the duration of the lien is applicable to all persons. *Matter of Harmon*, 79 Hun (N. Y.) 226.

**Operation of Statute Against Judgment in Favor of Commonwealth.** — On the principle that statutes of limitations do not extend to the commonwealth unless the commonwealth is expressly named, it has been held that a judgment in the name of the treasurer for the use of the commonwealth is substantially a judgment for the commonwealth so as to exempt it from the operation of a statute limiting the period for which a judgment shall continue a lien. *Com. v. Baldwin*, 1 Watts (Pa.) 54, 26 Am. Dec. 33; *McKeehan v. Com.*, 3 Pa. St. 153. But see *Thompson v. Avery*, 11 Utah 214, holding a different view in regard to a judgment in favor of the United States.

**Duration of Lien of Justice's Judgment.** — In *Iowa* it has been held that the lien of a justice's judgment expires ten years from the date of the filing of the transcript of the judgment. *Stover v. Elliott*, 80 Iowa 329; *Rand v. Garner*, 75 Iowa 312.

But in *Indiana* it has been held that the lien expires ten years from the rendition of the judgment. *Brown v. Wuskoff*, 118 Ind. 575.



judgment or to revive it by scire facias is barred by the statute of limitations.<sup>1</sup> It has been held that a lien cannot be enforced in equity after it has ceased to be enforceable at law by the expiration of the statutory period.<sup>2</sup>

(b) **Extension of Lien** — *aa*. **ISSUANCE OF EXECUTION.** — In many of the states it is held that the judgment creditor cannot extend his lien by the mere act of issuing an execution, though during the continuance of the lien, if the sale does not take place until after the expiration of the statutory period.<sup>3</sup> But in other jurisdictions provision is made by statute for the continuance of the lien of a judgment beyond a prescribed time by the issuance of executions at specified intervals.<sup>4</sup> And in other jurisdictions still, though a period is prescribed by statute for the continuance of the lien, it is held to be necessary for its continuance during that period, that execution should be taken out within a certain time, as for instance within one year after the rendition of the judgment.<sup>5</sup>

*bb*. **PROCEEDINGS OPERATING TO STAY EXECUTION** — (*aa*) *In General.* — Various provisions are made by statute in the different states for the extension of the statutory period for the continuance of judgment liens by proceedings in the courts

1. *Eppes v. Randolph*, 2 Call (Va.) 125; *Sutton v. McKenney*, 82 Va. 46; *Paxton v. Rich*, 85 Va. 378; *McCarty v. Ball*, 82 Va. 872; *Kennerly v. Swartz*, 83 Va. 704; *Serles v. Cromer*, 88 Va. 426; *Speidel v. Schlosser*, 13 W. Va. 686; *Werdenbaugh v. Reid*, 20 W. Va. 583; *Shipley v. Pew*, 23 W. Va. 487; *Laidley v. Kline*, 23 W. Va. 565; *Reilly v. Clark*, 31 W. Va. 572.

2. **Lien Barred at Law is Unenforceable in Equity.** — *Smith v. Meredith*, 30 Md. 429; *Gardenhire v. King* 97 Tenn. 587; *Hutcherson v. Grubbs*, 80 Va. 251; *Sutton v. McKenney*, 82 Va. 46; *McCarty v. Ball*, 82 Va. 872; *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 498.

3. **Jurisdictions Holding Lien Not Extended by Issuance of Execution.** — *Lawson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596; *Isaac v. Swift*, 10 Cal. 71, 70 Am. Dec. 608; *Albee v. Curtis*, 77 Iowa 644; *Lakin v. McCormick*, 81 Iowa 545; *Wells v. Bower*, 126 Ind. 115, 22 Am. St. Rep. 570; *Darling v. Littlejohn*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 205; *Roe v. Swart*, 5 Cow. (N. Y.) 294; *Spicer v. Gambill*, 93 N. Car. 378; *Pipkin v. Adams*, 114 N. Car. 201; *Davis v. Ehrman*, 20 Pa. St. 256; *Gardenhire v. King*, 97 Tenn. 585. See also *Stephen's Appeal*, 38 Pa. St. 9. Compare *Riggs v. Goodrich*, 74 Mo. 108; *State Bank v. Wells*, 12 Mo. 361.

4. **Extension of Lien by Issuance of Executions at Specified Intervals.** — *Brockway v. Oswego Tp.*, 40 Fed. Rep. 612 (decided under *Kansas* statute); *Flagg v. Flagg*, 39 Neb. 229; *Cotton v. Superior First Nat. Bank*, 51 Neb. 751; *Webster v. Dennis*, 4 Ohio Cir. Ct. 313, 2 Ohio Cir. Dec. 566; *McCormick v. Alexander*, 2 Ohio 65; *Earnfit v. Winans*, 3 Ohio 135; *Shuee v. Ferguson*, 3 Ohio 137; *Riddle v. Bryan*, 5 Ohio 48; *Corwin v. Benham*, 2 Ohio St. 36; *Kelley v. Vincent*, 8 Ohio St. 415; *Tucker v. Shade*, 25 Ohio St. 355; *Shourds v. Allison*, 7 Ohio Dec. 25; *Wuest v. James*, 51 Ohio St. 230. See also *Lamme v. Schilling*, 25 Kan. 93; *Thompson v. Hubbard*, 3 Kan. App. 714; *Murphy v. Klein*, 71 Miss. 908; *Reynolds v. Cobb*, 15 Neb. 380; *Sullivan v. Hart*, 32 Cinc. L. Bul. 185, 2 Ohio Dec. 592; *Bish v. Burns*, 7 Ohio Cir. Ct. 285, 4 Ohio Cir. Dec. 593; *Sellers v.*

*Corwin*, 5 Ohio 398, 24 Am. Dec. 301. Compare *Ford v. Delta, etc., Land Co.*, 43 Fed. Rep. 181.

By the *Georgia Code* it is provided that no judgment shall be enforced after the expiration of seven years from the time of its rendition when no execution has been issued on it, or when execution has been issued and seven years have expired from the time of the last entry on the execution made by an officer authorized to execute and return the same. *Mosely v. Sanders*, 76 Ga. 293; *Anderson v. Kilgo*, 81 Ga. 699; *Long v. Wight*, 82 Ga. 431; *Formby v. Shackelford*, 94 Ga. 670; *Hanks v. Pearce*, 96 Ga. 159; *Black v. McAfee*, 96 Ga. 811; *Stanley v. McWhorter*, 78 Ga. 37; *Banks v. Zellner*, 77 Ga. 424; *Seals v. Benson*, 81 Ga. 44; *Gholston v. O'Kelley*, 81 Ga. 19; *Prendergast v. Wiseman*, 80 Ga. 419; *Smith v. Williams*, 89 Ga. 9, 32 Am. St. Rep. 67; *Daniel v. Haynes*, 91 Ga. 123; *Orr v. Herring*, 91 Ga. 148; *Lewis v. Smith*, 99 Ga. 603.

5. **Execution Within Specified Time Required for Continuance of Lien During Statutory Period** — *United States.* — *Gottlieb v. Thatcher*, 151 U. S. 271 (decided under *Colorado* statute).

*Illinois.* — *Riggin v. Mulligan*, 9 Ill. 50; *Fitts v. Davis*, 42 Ill. 391; *Harris v. Cornell*, 80 Ill. 54; *James v. Wortham*, 88 Ill. 69; *Breed v. Gorham*, 108 Ill. 81; *Hastings v. Bryant*, 115 Ill. 69; *Thomas v. Van Meter*, 164 Ill. 304; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593.

*Texas.* — *Bennett v. Gamble*, 1 Tex. 124; *Hall v. McCormick*, 7 Tex. 269; *North v. Swing*, 24 Tex. 193; *Russell v. McCampbell*, 29 Tex. 31; *Ayers v. Waul*, 44 Tex. 549; *Jackson v. Butler*, 47 Tex. 423; *Sampson v. Wyett*, 49 Tex. 627; *Bassett v. Proetzel*, 53 Tex. 569; *Barion v. Thompson*, 54 Tex. 235; *Ficklin v. McCarty*, 54 Tex. 370; *Gruner v. Westin*, 66 Tex. 209; *Harvey v. Edens*, 69 Tex. 420; *Wylie v. Posey*, 71 Tex. 34; *Cole v. Terrell*, 71 Tex. 549; *Adams v. Crosby*, 84 Tex. 99; *Mundine v. Brown*, (Tex. Civ. App. 1893) 23 S. W. Rep. 90; *Central Coal, etc., Co. v. Southern Nat. Bank*, 12 Tex. Civ. App. 334; *Simple v. Eubanks*, 13 Tex. Civ. App. 418.

But in *Illinois* an execution lien is provided for whereby real estate levied upon at any



having the effect to stay execution on judgments.<sup>1</sup> But a suspension of the running of such statute has been held not to result from a legal proceeding whose object and effect are not to suspend the right to sue out execution on the judgment in question.<sup>2</sup> And where by statute the effect of extending the statutory period is given only to proceedings adverse to the judgment, it has been held that a voluntary suit in equity by the judgment creditor for the enforcement of the judgment will not have this effect.<sup>3</sup> But under statute in *West Virginia* it has been held that a chancery suit brought to complete the relief of a judgment by enabling the judgment creditor to reach the lands of the judgment debtor after a writ of fieri facias had been issued and returned "no property found," has the effect of holding the statute of limitations in abeyance until the date of the final decree.<sup>4</sup>

(bb) *Judgment Entered with Stay of Execution.* — Under statute it has been held that where a stay of execution on a judgment for a specified time, or until the happening of a certain event, is made a part of the record entry of the judgment, the time during which execution is thus stayed is not to be computed as a part of the statutory period for the continuance of the judgment lien.<sup>5</sup> And the same rule has been applied apart from any express statutory provision on the question.<sup>6</sup>

(cc) *Appeal or Writ of Error.* — In many jurisdictions by express statute it has been provided that where the judgment creditor is prevented from enforcing his judgment by execution by the operation of an appeal, the term of the pendency of the appeal cannot be treated as a part of the statutory period allowed for the continuance of the judgment lien.<sup>7</sup> And the same rule has been applied under statute to judgments which have been suspended by supersedeas on a writ of error.<sup>8</sup> But in the absence of any statutory provision on the question it has been held that an appeal taken and an appeal bond given which operates as a supersedeas do not have the effect of extending the judgment lien beyond the statutory period.<sup>9</sup>

(dd) *Injunction.* — Under statute in many jurisdictions provision is made for the extension of the statutory period for the continuance of a judgment lien when the judgment creditor is prevented from enforcing his judgment by an injunction.<sup>10</sup> But it has been held that apart from statute the fact that the creditor, at the suit of the judgment debtor, is enjoined from issuing execution,

time within the statutory period for the continuance of the judgment lien may be sold at any time within one year after the expiration of the statutory period. *Hastings v. Bryant*, 115 Ill. 72.

1. See the statutes of the various states.

2. **Statutory Period Not Extended by Proceeding Not Staying Execution.** — *Straus v. Bodeker*, 86 Va. 543; *Dabney v. Shelton*, 82 Va. 349.

3. *Bridges v. Cooper*, 98 Tenn. 394. See also *Gardenhire v. King*, 97 Tenn. 585.

4. *Ryan v. Kanawha Valley Bank*, 25 U. S. App. 582, 71 Fed. Rep. 912. See also *Dempsey v. Bush*, 18 Ohio St. 376.

5. **Statute of Limitations Suspended by Stay of Execution Entered with Judgment.** — *Mercantile Trust Co. v. St. Louis, etc., R. Co.*, 69 Fed. Rep. 193.

6. *Pennock v. Hart*, 8 S. & R. (Pa.) 369.

7. **Statute of Limitations Suspended by Appeal.** — *Twitty v. Bower*, 84 Ga. 751; *Adams v. Guy*, 106 N. Car. 275.

8. **Statute of Limitations Held to Be Suspended by Writ of Error.** — *Gottlieb v. Thatcher*, 151 U. S. 271; *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593; *Planters' Bank v. Union Bank*, 5 Humph. (Tenn.) 304; *Brinkley v. Welch*, 7 Lea (Tenn.) 278.

9. **Statute of Limitations Held Not to Be Suspended by Appeal Apart from Express Provision.** — *Christy v. Flanagan*, 87 Mo. 670. See also *Green v. Dougherty*, 55 Mo. App. 217.

In *Chouteau v. Nuckolls*, 20 Mo. 442, this rule was applied to judgments in the federal courts.

**Contra.** — But in some jurisdictions a different view obtains. *Dewey v. Latson*, 6 Cal. 130; *Englund v. Lewis*, 25 Cal. 337; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

In *California*, however, it is held that any period of time which may pass between the docketing of the judgment and the stay of proceedings will be included in the computation. *Barroilhet v. Hathaway*, 31 Cal. 398.

10. **Suspension of Statute of Limitation by Injunction.** — *Gottlieb v. Thatcher*, 151 U. S. 271 (decided under *Colorado* statute); *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593; *Applegate v. Edwards*, 45 Ind. 335; *Shanklin v. Sims*, 110 Ind. 143; *Planters' Bank v. Union Bank*, 5 Humph. (Tenn.) 304.

But it has been held that for an injunction to have this operation it must have for its purpose the restraining of the enforcement of the judgment, and not simply the restraining of the judgment creditor from selling a particu-



has not the effect to prolong the lien beyond the statutory period as against a purchaser from the judgment creditor.<sup>1</sup>

*cc. AGREEMENT.* — Under statute in *Indiana* it has been held that where a judgment is rendered in pursuance of a written agreement of the parties entered of record that the judgment shall be rendered collectible and payable at a specified time from its date, the statute of limitations will not begin to run against the judgment lien until after the expiration of the stipulated period.<sup>2</sup> But apart from statute a judgment lien is not extended beyond the statutory period because the creditor has, by an agreement with his debtor, prevented himself from calling for an execution during the whole or the greater part of that time.<sup>3</sup>

*dd. DEATH OF JUDGMENT DEBTOR.* — The period prescribed by statute for the continuance of judgment liens has been held in some jurisdictions not to be extended by the death of the judgment debtor.<sup>4</sup> But in *New York*, under a statute making provision for a stay of execution for a specified period on the judgment debtor's lands after his death, it has been held that the period during which the stay operates is not to be counted as a part of the statutory period for the continuance of the lien.<sup>5</sup> And under statute in *Pennsylvania* it has been held that the lien of a judgment against a decedent at the time of his death continues a lien for five years after the decease, on the real estate of the decedent, as against a *bona fide* purchaser, mortgagee, or other judgment creditor of the decedent, but not longer unless revived by scire facias or otherwise.<sup>6</sup> But it has been held that the lien of a judgment against a decedent at the time of his death, as against his heirs or devisees, is without limit, and needs not to be revived every five years in order to be executed at any time, on lands still held by them.<sup>7</sup>

*ee. WAR.* — It has been held that the lien of a judgment was not extended beyond the time fixed by law by reason of the late civil war, and the courts would not take judicial notice that legal process could not be executed during that period.<sup>8</sup>

*ff. REVIVOR OF JUDGMENT* — **Effect as Between Parties to Judgment.** — Provision is sometimes made by statute for the extension of the statutory period for the continuance of a judgment lien as between the parties to the judgment by a revival of the judgment by scire facias or otherwise.<sup>9</sup>

**Effect as Between Judgment Creditor and Purchaser — Revival During Life of Lien.** — In

lar parcel of land under it, not owned by the judgment debtor. *Shanklin v. Sims*, 110 Ind. 113.

1. Statute of Limitations Held Not to Be Suspended by Injunction Apart from Express Provision. — *Tucker v. Shade*, 25 Ohio St. 355. Compare *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549.

2. Statute of Limitations Held to Be Suspended by Agreement. — *Applegate v. Edwards*, 45 Ind. 329. See also *Ristine v. Early*, 21 Ind. 103.

3. Statute of Limitations Held Not to Be Suspended by Agreement. — *Reilly v. Clark*, 31 W. Va. 571; *Gardenhire v. King*, 97 Tenn. 587.

4. Statutory Period Held Not to Be Extended by Death of Judgment Debtor. — *Davis v. Shawhan*, 34 Iowa 94; *Erickson v. Johnson*, 22 Minn. 380.

5. *Matter of Holmes*, 131 N. Y. 80.

6. *Nicholas v. Phelps*, 15 Pa. St. 36; *Stevens v. Black*, (Pa. 1885) 1 Atl. Rep. 312.

7. *Brobst v. Bright*, 8 Watts (Pa.) 124; *Aurand's Appeal*, 34 Pa. St. 151; *Shearer v. Brinley*, 76 Pa. St. 300; *Shannon v. Newton*,

132 Pa. St. 375. See also *Stephenson v. Cotter*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 749. Compare *Moorehead v. McKinney*, 9 Pa. St. 265.

8. Statutory Period Not Extended by War. — *Swanson v. Tarkington*, 7 Heisk. (Tenn.) 612; *Smart v. Mason*, 2 Heisk. (Tenn.) 223.

9. Extension of Statutory Period as Between Parties by Revivor of Judgment. — *Cottingham v. Springer*, 88 Ill. 97; *Cathcart v. Potterfield*, 5 Watts (Pa.) 163; *Meinweiser v. Hains*, 110 Pa. St. 468. See also *Norton v. Beaver*, 5 Ohio 178; *Miner v. Wallace*, 10 Ohio 403.

**Revivor of Judgment with Restricted Lien.** — In *Dean's Appeal*, 35 Pa. St. 405, it was held that a judgment entered on a bond and warrant of attorney, with a stipulation that its lien shall be restricted to certain specified real estate, and subsequently revived generally, by confession, after the expiration of five years from the entry of the original judgment, is without limitation or restriction as to its lien on the defendant's real estate. Compare *Carson v. Ford*, 6 Pa. Super. Ct. 17.

For a discussion of a revival of judgments generally, see the title JUDGMENTS, ENCYC. OF PL. AND PR., vol. 11, p. 1053.



some jurisdictions also it has been held under statute that the lien of a judgment may be extended beyond the statutory period as against a purchaser or incumbrancer subsequent to the recovery of the judgment by a revival of the judgment by agreement between the judgment creditor and such purchaser or incumbrancer,<sup>1</sup> or by the suing out of a scire facias before the termination of the lien.<sup>2</sup> But in other jurisdictions where by statute a period is prescribed for the continuance of the judgment lien, and the right to enforce execution thereon exists for a shorter period unless such right is revived by scire facias, it has been held that the revivor of a judgment by scire facias within the time prescribed for the continuance of the lien will not extend the statutory period as against purchasers or incumbrancers whose rights accrued subsequent to the entry of the original judgment.<sup>3</sup>

**Revival After Dormancy or Expiration of Lien.** — After a judgment has become dormant or the judgment lien has expired by the lapse of time, it has been held that the lien cannot be revived so as to overreach conveyances or incumbrances subsequent to the entry of the original judgment and prior to its revival.<sup>4</sup>

(3) *Release.* — The holder of a judgment binding real estate may release his lien,<sup>5</sup> and indeed as between the judgment debtor and himself he has the right to discharge by covenant or release a portion of the estate bound by the lien, and preserve the lien in force against the remainder.<sup>6</sup> But a different rule is to be applied where the rights of a subsequent purchaser or incumbrancer of the unreleased portion would be interfered with.<sup>7</sup>

(4) *Entry of Satisfaction.* — The rule has been stated that when a judgment creditor enters satisfaction of his judgment or causes an execution to be returned satisfied, a third person is justified in treating the real estate of the judgment debtor as released from the lien of the judgment.<sup>8</sup> But it has been held that a junior judgment creditor will not gain priority over a senior judgment creditor by the fact that there has been an erroneous entry of satisfaction on the judgment of the latter and a subsequent order of the court striking it off, in the absence of evidence that the junior creditor has been misled to his injury.<sup>9</sup> So it has been held that where an agreement between the judgment debtor and creditor to have execution on the judgment returned satis-

1. **Statutory Period Held to Be Extended as to Purchasers by Revival by Agreement.** — *Armstrong's Appeal*, 5 W. & S. (Pa.) 352; *Sames's Appeal*, 26 Pa. St. 184. See also *Young v. Young*, 6 Pa. Dist. 582.

2. **Statutory Period Held to Be Extended as to Purchasers by Revival by Scire Facias.** — *Hershy v. Rogers*, 45 Ark. 304; *Poole v. Williamson*, 4 Rawle (Pa.) 317; *Meinweiser v. Hains*, 110 Pa. St. 468. See also *Wetmore v. Wetmore*, 155 Pa. St. 507; *Horbach v. Smiley*, 54 Neb. 217. Compare *Whiting v. Beebe*, 12 Ark. 577.

3. **Statutory Period Held Not to Be Extended as to Purchasers.** — *Denegre v. Haun*, 13 Iowa 240; *Mower v. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748; *Graff v. Kip*, 1 Edw. (N. Y.) 619; *Tufts v. Tufts*, 18 Wend. (N. Y.) 621. See also *Cottingham v. Springer*, 88 Ill. 97.

4. **Revival After Expiration of Statutory Period Ineffectual to Extend It** — *United States*, — *Tracy v. Tracy*, 5 McLean (U. S.) 456, declaring law in *Ohio*.

*Arkansas.* — *Hanly v. Adams*, 15 Ark. 232. *Maryland.* — *Post v. Mackall*, 3 Bland (Md.) 486; *Cape Sable Co.'s Case*, 3 Bland (Md.) 606.

*Ohio.* — *Norton v. Beaver*, 5 Ohio 178; *Miner v. Wallace*, 10 Ohio 403; *Tucker v. Shade*, 25 Ohio St. 355; *Smith v. Hogg*, 52 Ohio St. 527.

*Utah.* — *Smith v. Schwartz*, (Utah 1899) 60 Pac. Rep. 305.

See also *Woodward v. Woodward*, 39 S. Car. 259.

5. **Release of Judgment Lien.** — See *Barnes v. Mott*, 64 N. Y. 399, 21 Am. Rep. 625.

**Effect of Release on Purchaser under Judgment Without Notice.** — In *Huff v. Morton*, 83 Mo. 399, it was held that a quitclaim deed by the owner of a judgment, purporting to release to the judgment debtor the lien of the judgment on land described in the deed, does not satisfy the judgment so as to avoid a sale thereunder to a purchaser without notice, actual or constructive, of the release. See also *Melion's Appeal*, 96 Pa. St. 475.

**Parol Release — Proof Must Be Clear and Satisfactory.** — *Dalby v. Cronkhite*, 22 Iowa 222.

6. **Release of Portion of Debtor's Realty.** — *Wolfe v. Gardner*, 4 Harr. (Del.) 338; *Taylor v. Maris*, 5 Rawle (Pa.) 55.

7. See *Barnes v. Mott*, 64 N. Y. 403, 21 Am. Rep. 625; *Ingalls v. Morgan*, 10 N. Y. 178; *Frost v. Koon*, 30 N. Y. 428.

8. **Entry of Satisfaction as Release of Lien.** — See *Page v. Benson*, 22 Ill. 484; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388.

9. *McCune v. McCune*, 164 Pa. St. 611.



fied is procured by misrepresentations of the judgment debtor, it will not operate as a release in favor of a purchaser of part of the debtor's land, who had no notice of the return.<sup>1</sup>

(5) *Sale of Lands under Execution.* — A sale of lands under execution for the full amount of the judgment is a satisfaction of the judgment and extinguishes the creditor's lien as regards other real estate owned by the debtor.<sup>2</sup> And such sale, though in partial satisfaction of the judgment, discharges the lien on the land sold as against the execution purchaser.<sup>3</sup> But it has been held that if real estate has been sold in part satisfaction of a judgment, and redeemed by the judgment debtor, the balance of the judgment at once attaches as a lien upon the property in his hands.<sup>4</sup> And it has been said that if a judgment creditor exhausts all the real property of the debtor by execution sale, and himself becomes the purchaser at the sale, and part of the judgment remains unsatisfied, and the debtor afterwards acquires other real estate, the unsatisfied part of the judgment attaches thereto as a lien.<sup>5</sup>

(6) *Levy on Personalty.* — It may be laid down as a general rule that so far as the rights of third persons are concerned a levy on personal property sufficient to satisfy a *fi. fa.* is an extinguishment of the judgment on which it is issued,<sup>6</sup> and the judgment therefore ceases to be a lien on real estate,<sup>7</sup> and this whether the property levied on is sold or not except where the judgment creditor is deprived of the fruit of his levy without any fault of his own.<sup>8</sup> Thus if, instead of having the property sold to satisfy the judgment, the levy is released or withdrawn by the mutual agreement of the parties to the execution, the judgment will not be a lien on land as against an intervening purchaser or creditor.<sup>9</sup>

(7) *Imprisonment on Capias ad Satisfaciendum.* — This topic has already been discussed.<sup>10</sup>

(8) *Appeal or Writ of Error.* — It seems to be a general rule that the lien of a judgment is not discharged, but merely the right to enforce the lien is suspended by the pendency of an appeal or writ of error, and upon the affirmance of the judgment the lien is restored with full force so that no priority is acquired by a purchase or incumbrance made while such appeal or writ of error is pending.<sup>11</sup> And it has been held that where a decree is reversed in

1. *Renick v. Ludington*, 14 W. Va. 368, affirmed in 20 W. Va. 511.

2. *Satisfaction by Sale under Execution.* — *Walker v. Powers*, 104 U. S. 245. See the title EXECUTIONS, vol. 11, p. 711.

3. *Hewson v. Deygert*, 8 Johns. (N. Y.) 333. See also *People v. Easton*, 2 Wend. (N. Y.) 298.

4. *State v. Sherill*, 34 Ind. 57; *Clayton v. Ellis*, 50 Iowa 590; *Peckenbaugh v. Cook*, 61 Iowa 477.

*Redemption by Lienholder.* — But it has been held that when redemption is made by a lienholder the land does not again become liable for the unsatisfied judgment. *Hays v. Thode*, 18 Iowa 52.

5. *Peckenbaugh v. Cook*, 61 Iowa 477.

6. For a discussion of this question see *infra*, this title, *Satisfaction and Discharge*. And see the title EXECUTIONS, vol. 11, p. 703.

7. *Extinguishment of Lien by Levy on Personalty.* — *Ex p. Lawrence*, 4 Cow. (N. Y.) 417, 15 Am. Dec. 336; *Jackson v. Bowen*, 7 Cow. (N. Y.) 21. See also *Hunt v. Breeding*, 12 S. & R. (Pa.) 37, 14 Am. Dec. 665.

*Otherwise Where Levy on Personalty Insufficient to Satisfy Execution.* — *Muir v. Leitch*, 7 Barb. (N. Y.) 349.

*The Failure of a Senior Judgment Creditor to*

*Satisfy His Judgment out of personalty belonging to the judgment debtor will not subordinate his lien to that of a junior judgment creditor.* *Leonard v. Broughton*, 120 Ind. 536, 16 Am. St. Rep. 347; *Henderson v. Hill*, 59 Ga. 595. See also *Moore's Appeal*, 7 W. & S. (Pa.) 298.

8. *Lien Not Extinguished by Issuance of Forthcoming Bond.* — *Taylor's Appeal*, 1 Pa. St. 393. See also *Branch Bank v. Curry*, 13 Ala. 304; *Campbell v. Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Caperton v. Martin*, 5 Ala. 217; *Bartlett v. Doe*, 6 Ala. 305, 41 Am. Dec. 52; *Walker v. McDowell*, 4 Smed. & M. (Miss.) 118; *Doe v. Roe*, 2 Blackf. (Ind.) 195.

9. *Banta v. McClellan*, 14 N. J. Eq. 120; *Ford v. Geauga County*, 7 Ohio (pt. ii.) 148. See also *Lyon v. Hampton*, 20 Pa. St. 48; *Dean v. Patton*, 13 S. & R. (Pa.) 341; *Morrison v. Hoffman*, 1 Pa. St. 13. But see *Burk's Appeal*, 89 Pa. St. 400.

10. See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, vol. 16, p. 12.

11. *Lien Not Discharged by Appeal.* — *Low v. Adams*, 6 Cal. 277; *Curtis v. Root*, 28 Ill. 367; *Planters' Bank v. Calvit*, 3 Smed. & M. (Miss.) 193; *Montgomery v. McGimpsey*, 7 Smed. & M. (Miss.) 557; *Rhyme v. McKee*, 73 N. Car. 262; *Leonard's Appeal*, 94 Pa. St. 180; *Covington v. Bass*, 88 Tenn. 489; *Thulemeyer v.*



part and affirmed as to the residue, the partial reversal does not destroy the lien of so much of the decree as is unreversed or affirmed.<sup>1</sup>

**Effect of Appeal from Justice's Judgment.** — In a few cases it has been held that the lien created by filing or recording the transcript of a justice's judgment is destroyed if an appeal is entered within the time limited by law; the cause then goes to the higher court for new trial and judgment, and the lien of that judgment can date only from its rendition, and does not relate back to the time of entry of the transcript of the justice's judgment.<sup>2</sup> But in other states a contrary view obtains.<sup>3</sup>

(9) *Injunction.* — The fact that the execution of a judgment is stayed by injunction does not destroy the lien, but as soon as the restraint is removed by the dissolution of the injunction, the lien is restored to all its incidents, and it will not be thereby postponed so as to give priority to a subsequent purchaser or incumbrancer,<sup>4</sup> and this rule has been applied though the injunction was granted on the condition of the execution of a bond furnishing the judgment creditor additional security for his debt.<sup>5</sup> And where an injunction to a judgment is perpetuated as to a part of it only, the lien of the part not affected continues from the date of the judgment.<sup>6</sup>

(10) *Stay of Execution.* — In those jurisdictions where by statute it is expressly declared that a lien shall exist by virtue of a judgment, the fact that a judgment is rendered with a stay of execution, or a stay is afterward made by order of court, will not destroy or suspend the lien so as to give priority to intervening creditors or purchasers,<sup>7</sup> and this though the stay was by the direction or with the consent of the judgment creditor.<sup>8</sup>

(11) *Reversal or Cancellation of Judgment.* — After a judgment is reversed or canceled it has no vitality to support a continuing lien.<sup>9</sup> But when an

Jones, 37 Tex. 560. See also *U. S. v. Sturgis*, 14 Fed. Rep. 810; *Dewey v. Latson*, 6 Cal. 130; *Hardee v. Stovall*, 1 Ga. 92; *Swift v. Conboy*, 12 Iowa 444; *Meyer v. Campbell*, 12 Mo. 604; *Moore v. Rittenhouse*, 15 Ohio St. 310; *Loomis v. Second German Bldg. Assoc.*, 37 Ohio St. 394. Compare *M'Rae v. M'Lean*, 3 Port. (Ala.) 138; *Campbell v. Spence*, 4 Ala. 550, 39 Am. Dec. 301; *Snelling v. Parker*, 8 Ga. 121; *Myers v. Tyson*, 13 Blatchf. (U. S.) 242.

In New York it has been held that the entry on a judgment docket of the memorandum "lien suspended on appeal," by virtue of section 1256 of the Code of Civ. Pro., has the effect to release the lien of the judgment so suspended on appeal in regard to all property upon which it otherwise would become a lien, until the courts order that it be restored by a redocket, and the rule includes subsequently acquired property. *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661. See also *Harmon v. Hope*, 87 N. Y. 10.

1. *Shepherd v. Chapman*, 83 Va. 215. See also *Moss v. Moorman*, 24 Gratt. (Va.) 97; *Rhyne v. McKee*, 73 N. Car. 262. Compare *Shepherd v. Chapman*, 83 Va. 215.

2. **View that Lien of Justice's Judgment Is Destroyed by Appeal.** — *Earl v. Hart*, 89 Mo. 263; *Drake v. Mitchell*, 2 Lack. Leg. N. (Pa.) 186; *Hastings v. Lolough*, 7 Watts (Pa.) 540; *Myers v. Bott*, 10 W. N. C. (Pa.) 259; *Shugar v. Mumford*, 1 Pa. Dist. 324; *Rubinsky v. Patrick*, 2 Pa. Dist. 695. See also *McKinney v. Brown*, 130 Pa. St. 368.

3. **View that Lien of Justice's Judgment Is Not Destroyed by Appeal.** — *Dawson v. Cuning*, 50 Ill. App. 286; *Dysart v. Brandreth*, 118 N. Car. 968.

4. **Lien Not Destroyed by Injunction.** — *Smith v. Everly*, 4 How. (Miss.) 178; *Lynn v. Gridley*, Walk. (Miss.) 550; *Overton v. Perkins*, Mart. & Y. (Tenn.) 367; *Craig v. Sebrell*, 9 Gratt. (Va.) 131.

5. *Overton v. Perkins*, Mart. & Y. (Tenn.) 367. See also *Bartlett v. Doe*, 6 Ala. 305, 41 Am. Dec. 52. Compare *Mansony v. U. S. Bank*, 4 Ala. 735.

6. *Grafton, etc., R. Co. v. Davisson*, 45 W. Va. 12.

7. **Lien Not Lost by Stay of Execution.** — *Hobbs v. Simmonds*, 61 Conn. 235; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708. See also *Pickett v. Doe*, 5 Smed. & M. (Miss.) 478, 43 Am. Dec. 523. Compare *Virden v. Robinson*, 59 Miss. 28.

8. *Brewster v. Clamfit*, 33 Ark. 72; *Lisle v. Cheney*, 36 Kan. 578; *Love v. Harper*, 4 Humph. (Tenn.) 113, overruling *Porter v. Cocke*, Peck. (Tenn.) 33.

**Agreement Not of Record.** — And the same rule has been applied to a direction or agreement to stay execution not entered of record. *Green v. Allen*, 2 Wash. (U. S.) 280; *Marshall v. Moore*, 36 Ill. 321; *Muir v. Leitch*, 7 Barb. (N. Y.) 341; *Ayers v. Waul*, 44 Tex. 549. See also *Decatur Charcoal Chemical Works v. Moses*, 89 Ala. 538. Compare *Doe v. Bates*, 6 Ala. 480; *Patton v. Hayter*, 15 Ala. 18; *Sanford v. Ogden*, 34 Ala. 118; *Michie v. Planters' Bank*, 4 How. (Miss.) 130, 34 Am. Dec. 112; *Patterson v. Cummin*, 2 P. & W. (Pa.) 520.

9. **Lien of Judgment Lost by Reversal or Cancellation.** — *Polk County v. Nelson*, 75 Iowa 648; *Meyer v. Campbell*, 12 Mo. 603; *Foot v. Dillaye*, 65 Barb. (N. Y.) 521; *Cope's Appeal*, 96 Pa. St. 294.



order vacating a judgment is set aside the lien is revived in all its pristine vigor, and is as effective as before the order was made except as to rights acquired in the meantime.<sup>1</sup>

**Effect of Opening Judgment.** — It has been held that opening a judgment to let the defendant into a defense does not destroy the lien.<sup>2</sup>

(12) *Merger — Recovery of New Judgment.* — Where a creditor has obtained a lien upon real estate by judgment at law, if he subsequently brings an action of debt on his judgment and recovers a new judgment, he will lose his first lien.<sup>3</sup>

**Subsequent Purchase of Lands.** — But since a judgment lien is general and not specific, the mere fact that the judgment creditor purchases lands on which the judgment is a lien will not merge the judgment lien and thereby prevent it from attaching to other lands of the judgment debtor.<sup>4</sup> But it has been held that if a judgment creditor becomes the owner of the land upon which the judgment is a lien, the lien as to that specific land in the hands of his grantee becomes extinct in the absence of an agreement or intention to continue it manifested at the time he became owner.<sup>5</sup>

(13) *Payment.* — For a discussion of this matter reference is made to another part of this article.<sup>6</sup>

(14) *Bankruptcy and Insolvency of Debtor.* — The effect of the bankruptcy or insolvency of the debtor upon an existing judgment lien against him will be found discussed in another portion of this work.<sup>7</sup>

(15) *Effect of Division of Old County into New County.* — As a general rule a judgment lien is not lost where a new county is organized out of a portion of the territory of the old county, and lands subject to the judgment lien in the old county fall within the new organization.<sup>8</sup> And for this purpose it seems that a judgment entered in the old county after the erection, but before the organization of the new county, is well entered.<sup>9</sup>

**V. DIRECT ATTACK BY APPEAL OR WRIT OF ERROR — 1. In General.** — The most usual form of direct attack on judgments is by taking an appeal to, or procuring a writ of error from, a higher court. As these proceedings are fully discussed elsewhere,<sup>10</sup> it is deemed sufficient to give here a mere mention of some of the most general principles relating thereto.

**2. Effect of Reversal — a. IN GENERAL.** — If such attack be successful and

**Modification of Judgment.** — Under statute in *Washington* it has been held that where a new judgment is a modification only of the old judgment, the old judgment is continued for the purpose of protecting the lien acquired thereunder, except to the extent that it is substantially changed. *Smith v. De Lanty*, 11 Wash. 386.

**Reversal by Judgment Creditor.** — Where the plaintiff appeals from an award in his favor, and recovers a verdict and judgment more favorable to himself, the lien of such judgment has no relation to the date of the award. *Lentz v. Lamplugh*, 12 Pa. St. 344.

**Judgment Declared Null and Void in Proceeding in Equity.** — In *Owen v. Howard*, (Ariz. 1894) 35 Pac. Rep. 1057, it was held that a court has no power to perpetuate a judgment lien and at the same time declare the judgment upon which the lien vests null and void.

1. *King v. Harris*, 34 N. Y. 330; *Leonard's Appeal*, 94 Pa. St. 180.

2. **Lien Not Destroyed by Opening Judgment.** — *Steinbridge's Appeal*, 1 P. & W. (Pa.) 481; *Cope's Appeal*, 96 Pa. St. 294; *Kittenning Ins. Co. v. Scott*, 101 Pa. St. 449. See also *Hansee v. Fiero*, 56 Hun (N. Y.) 463, 25 Abb. N. Cas. (N. Y.) 46; *Flagg v. Cooper*, 54 N. Y. Super.

Ct. 50; *Holmes v. Bush*, 35 Hun (N. Y.) 637.

3. **Lien Lost by Recovery of New Judgment.** — *Bertram v. Waterman*, 18 Iowa 529; *Purdy v. Doyle*, 1 Paige (N. Y.) 558. See generally the title *MERGER*.

4. *Caley v. Morgan*, 114 Ind. 350. See also *Voorhies v. Latimer*, 46 S. Car. 114.

5. *Vroom v. Ditmas*, 4 Paige (N. Y.) 526; *Loomis v. Stuyvesant*, 10 Paige (N. Y.) 490; *Greenwich Bank v. Loomis*, 2 Sandf. Ch. (N. Y.) 70; *Koons v. Hartman*, 7 Watts (Pa.) 20. Compare *Floyd v. Sellers*, 7 Colo. App. 498, affirmed in *Sellers v. Floyd*, 24 Colo. 484.

6. See *infra*, this title, *Satisfaction and Discharge*.

7. See the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 706.

8. **Effect on Lien of Division of Old County** — *Bowman v. Hovious*, 17 Cal. 471; *Garvin v. Garvin*, 34 S. Car. 388. See also the title *COUNTIES*, vol. 7, p. 924.

9. *Hart's Appeal*, 8 Pa. St. 185. See also *McCullough's Appeal*, 34 Pa. St. 248; *Folts v. Ferguson*, 77 Tex. 301.

10. **For a Full Discussion** see the titles *APPEALS*, 2 ENCYC. OF PL. AND PR. 1; *ERROR, WRIT OF*, 7 ENCYC. OF PL. AND PR. 817.



the judgment be reversed, this effects a complete vacation or annulment of the judgment,<sup>1</sup> without any action on the part of the court in which it was rendered,<sup>2</sup> and the parties are left to proceed below as though no such judgment had ever been entered,<sup>3</sup> unless the appellate court should direct the proceedings to be had or the judgment to be rendered in the trial court,<sup>4</sup> or should itself, as it has power to do in some cases, render a final judgment in the cause.<sup>5</sup>

**1. Reversal Effects Complete Vacation or Annulment of Judgment.** — *French v. Edwards*, 4 Sawy. (U. S.) 125; *Heidt v. Minor*, 113 Cal. 385; *Allen v. Adams*, 17 Conn. 67; *Cox v. Pruitt*, 25 Ind. 90; *Crispen v. Hannovan*, 86 Mo. 160; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495, 21 Am. Rep. 385; *Zanesville Gas-Light Co. v. Zanesville*, 47 Ohio St. 35.

**A Reversal by Agreement Has the Same Effect** as a reversal on litigation. *Maghee v. Collins*, 27 Ind. 83.

**2. No Action of Trial Court Necessary.** — *Cox v. Pruitt*, 25 Ind. 90.

**3. Reversal Leaves Parties to Proceed as Though No Judgment Had Been Entered.** — *French v. Edwards*, 4 Sawy. (U. S.) 125; *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296; *Argenti v. San Francisco*, 30 Cal. 458; *Ragan v. Cuyler*, 24 Ga. 400; *Close v. Stuart*, 4 Wend. (N. Y.) 95.

**An Assignee of a Judgment** stands in no better position upon a reversal thereof than the original judgment creditor would have stood. *Reynolds v. Hosmer*, 45 Cal. 630; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449. See also *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.

**4. Direction by Appellate Court as to Proceedings to Be Had or Judgment to Be Rendered in Trial Court.** — *United States*. — *Pacific Postal Tel. Cable Co. v. Fleischer*, 66 Fed. Rep. 899; *Grant v. Phoenix L. Ins. Co.*, 121 U. S. 105.

*Alabama*. — *Sprague v. Daniels*, 31 Ala. 444.

*Arkansas*. — *Powell v. Holman*, 50 Ark. 85.

*California*. — *Love v. Shartzer*, 31 Cal. 488; *Evans v. Jacob*, 59 Cal. 628.

*Colorado*. — *Tucker v. Parks*, 7 Colo. 298.

*Georgia*. — *Summerville v. Reid*, 35 Ga. 47.

*Illinois*. — *Storing v. Onley*, 44 Ill. 123; *Ogilvie v. Copeland*, 145 Ill. 98.

*Indiana*. — *McCole v. Loehr*, 79 Ind. 430; *McAfee v. Reynolds*, 130 Ind. 33, 30 Am. St. Rep. 194.

*Iowa*. — *Roberts v. Corbin*, 28 Iowa 355; *Ware v. Thompson*, 29 Iowa 65; *Gray v. Regan*, 37 Iowa 688; *Drefahl v. Tuttle*, 42 Iowa 177; *Hait v. Ensign*, 61 Iowa 724; *Boyce v. Wabash R. Co.*, 63 Iowa 70, 50 Am. Rep. 730.

*Kansas*. — *Crockett v. Gray*, 31 Kan. 346; *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371.

*Missouri*. — *Saddoth v. Bryan*, 39 Mo. App. 652; *Jones v. Hart*, 60 Mo. 351.

*Oregon*. — *Fisk v. Henarie*, 14 Oregon 29.

*Texas*. — *Cotton v. Coit*, 88 Tex. 414.

*Washington*. — *Bernhard v. Reeves*, 6 Wash. 424.

*Wisconsin*. — *Finney v. Ford*, 22 Wis. 173; *Garbutt v. Prairie du Chien Bank*, 22 Wis. 384; *Pickett v. School Dist. No. One*, 25 Wis. 551, 3 Am. Rep. 105; *Hegar v. Chicago, etc., R. Co.*, 26 Wis. 624; *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Stow-*

*ell v. Eldred*, 39 Wis. 614; *Pike v. Vaughn*, 45 Wis. 660; *Burke v. Birchard*, 47 Wis. 35; *Jones v. Chicago, etc., R. Co.*, 49 Wis. 352; *Boland v. Benson*, 50 Wis. 225; *Atkinson v. Hewitt*, 51 Wis. 275; *Elderkin v. Wiswell*, 61 Wis. 498; *Crichton v. Crichton*, 73 Wis. 59; *Stewart v. Everts*, 76 Wis. 35, 20 Am. St. Rep. 17; *Combs v. Scott*, 76 Wis. 662; *Fintel v. Cook*, 88 Wis. 485.

**5. Rendition of Final Judgment by Appellate Court.** — *Alabama*. — *Reid v. McLeod*, 20 Ala. 576.

*Arkansas*. — *De Yampert v. Johnson*, 54 Ark. 165.

*Illinois*. — *Pearsons v. Hamilton*, 2 Ill. 415; *Linder v. Monroe*, 33 Ill. 388; *Schneider v. Seely*, 40 Ill. 257; *Commercial Ins. Co. v. Scammon*, 123 Ill. 601; *Everts v. Lawther*, 165 Ill. 487.

*Iowa*. — *Searles v. Lux*, 91 Iowa 754.

*Kentucky*. — *Rosenfeld v. Goldsmith*, (Ky. 1890) 13 S. W. Rep. 3.

*Maryland*. — *Howard v. Carpenter*, 22 Md. 249. See also *Berry v. Pierson*, 1 Gill (Md.) 234; *Nesbit v. Manro*, 11 Gill & J. (Md.) 261; *Mudd v. Harper*, 1 Md. 110; *Commercial, etc., Nat. Bank v. Baltimore First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *Deutsch v. Bond*, 46 Md. 164.

*Mississippi*. — *Rigby v. Hardy*, (Miss. 1888) 4 So. Rep. 114.

*Missouri*. — *Brown v. Home Sav. Bank*, 5 Mo. App. 1; *Davis v. Krum*, 12 Mo. App. 279; *Quay v. Lucas*, 25 Mo. App. 4; *Carroll v. Campbell*, 25 Mo. App. 630.

*Montana*. — *Barkley v. Tieleke*, 2 Mont. 435.

*Nebraska*. — *Furbush v. Barker*, 38 Neb. 1.

*New Jersey*. — *Shotwell v. Dennman*, 1 N. J. L. 342.

*New York*. — *Newell v. Wheeler*, 4 Robt. (N. Y.) 247; *Burkhardt v. McClellan*, (Ct. App.) 15 Abb. Pr. (N. Y.) 243, note; *Price v. Price*, 33 Hun (N. Y.) 432; *Wood v. Baker*, 60 Hun (N. Y.) 337; *Marquat v. Marquat*, 12 N. Y. 336; *Edmonston v. McLoud*, 16 N. Y. 545. See also *Patterson v. Robinson*, 37 Hun (N. Y.) 341; *Peterson v. Walsh*, 1 Daly (N. Y.) 182; *Cuff v. Dorland*, 57 N. Y. 560.

*Pennsylvania*. — *Chandler v. Commerce F. Ins. Co.*, 88 Pa. St. 223; *Henry v. Heilman*, 114 Pa. St. 499.

*Texas*. — *Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296; *Galveston, etc., R. Co. v. Drew*, 59 Tex. 10, 46 Am. Rep. 261; *Connor v. Paris*, 87 Tex. 32; *Durrell v. Farwell*, 88 Tex. 98; *Maverick v. Routh*, 7 Tex. Civ. App. 669; *Williams v. Jones*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1092.

*Vermont*. — *Smith v. Hill*, 45 Vt. 90, 12 Am. Rep. 189; *Miltimore v. Bottom*, 66 Vt. 168.

*Virginia*. — *Willard v. Overseers of Poor*, 9 Gratt. (Va.) 139.



*b. RIGHTS OF THIRD PERSONS.* — As a general rule it is settled that the reversal of a judgment does not affect the rights of third persons acquired in good faith under or by virtue of such judgment while it was in full force and execution thereon not stayed, as, for example, the rights acquired by a purchaser at an execution or judicial sale,<sup>1</sup> even although such person may have known that an appeal, in which there was no supersedeas, was pending or contemplated.<sup>2</sup>

*Voluntary Purchases from Party.* — But this rule rests upon a policy which has not been made to apply to purchases voluntarily made from a party to the suit, as in such case the purchaser acquires only the right of the party, and when his title is defeated, the purchaser's title, which was only derivative and depended entirely upon the party's, must fall at the same instant.<sup>3</sup>

*c. WHERE PROPERTY HAS BEEN TAKEN UNDER THE JUDGMENT.* — Where the unsuccessful party has been deprived of his property under or by virtue of the judgment against him, he is entitled to have it returned to him,<sup>4</sup> unless it has been sold to third persons who are entitled to protection,<sup>5</sup> in which case he may recover its value.<sup>6</sup>

*Purchase by Judgment Creditor.* — It is considered, however, that where a judgment creditor has purchased at a sale under his own execution, the defendant is entitled, upon a reversal of the judgment, to elect whether he will have restitution of the property or affirm the sale and sue for damages,<sup>7</sup> unless the plaintiff has assigned his certificate of purchase before reversal, in which case the assignee is not affected by the reversal.<sup>8</sup>

*Washington.* — Winsor *v.* Johnson, 5 Wash. 429.

*When Reversal Precludes New Trial.* — Artz *v.* Chicago, etc., R. Co., 38 Iowa 293.

*1. Rights of Third Persons Not Affected by Reversal of Judgment — California.* — Farmer *v.* Rogers, 10 Cal. 335.

*Colorado.* — Cheever *v.* Minton, 12 Colo. 557, 13 Am. St. Rep. 258; Stout *v.* Gully, 13 Colo. 604.

*Florida.* — Florida Cent. R. Co. *v.* Bisbee, 18 Fla. 60.

*Illinois.* — Allman *v.* Taylor, 101 Ill. 185; Dunning *v.* Bathrick, 41 Ill. 425; Whitman *v.* Fisher, 74 Ill. 147; Montanye *v.* Wallahan, 84 Ill. 355; Hannas *v.* Hannas, 110 Ill. 53. See also Gilman *v.* Hamilton, 16 Ill. 233.

*Indiana.* — Hibbits *v.* Jack, 97 Ind. 570, 49 Am. Rep. 478; McCormick *v.* McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441.

*Iowa.* — Davis *v.* Bonar, 15 Iowa 171.

*Kansas.* — McMillan *v.* Baker, 20 Kan. 50; Miller *v.* Dixon, 2 Kan. App. 445. See also Sheldon *v.* Pruessner, 52 Kan. 593; Hubbard *v.* Ogden, 22 Kan. 671.

*Kentucky.* — Clarey *v.* Marshall, 4 Dana (Ky.) 99. See also Debell *v.* Foxworthy, 9 B. Mon. (Ky.) 228.

*Louisiana.* — Frost *v.* McLeod, 19 La. Ann. 69; Taylor *v.* Lauer, 26 La. Ann. 307.

*Maryland.* — Ward *v.* Hollins, 14 Md. 158.

*Missouri.* — Gott *v.* Powell, 41 Mo. 416; Macklin *v.* Allenberg, 100 Mo. 337.

*Nebraska.* — Parker *v.* Courtney, 28 Neb. 605, 26 Am. St. Rep. 360.

*New York.* — Costar *v.* Peters, (N. Y. Super. Ct. Gen. T.) 4 Abb. Pr. N. S. (N. Y.) 53.

*Ohio.* — Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603. See also Ludlow *v.* Kidd, 3 Ohio 550.

*Texas.* — Harle *v.* Langdon, 60 Tex. 555.

See also the title *JUDICIAL SALES*, *post*.

*Third Person Purchasing for Judgment Creditor Not Protected.* — Sheldon *v.* Pruessner, 52 Kan. 593. See also Hubbard *v.* Ogden, 22 Kan. 671.

*2. Rule Applies Though Third Person Knew that Appeal Was Pending or Contemplated.* — Clarey *v.* Marshall, 4 Dana (Ky.) 99; Harle *v.* Langdon, 60 Tex. 555.

*3. Rule Does Not Apply to Voluntary Purchases from Party.* — Clarey *v.* Marshall, 4 Dana (Ky.) 99; Harle *v.* Langdon, 60 Tex. 555. See also Gilman *v.* Hamilton, 16 Ill. 225; Debell *v.* Foxworthy, 9 B. Mon. (Ky.) 228; Ludlow *v.* Kidd, 3 Ohio 550.

*4. Right of Owner of Property Taken under Judgment to Have It Returned.* — See Bickett *v.* Garner, 31 Ohio St. 28.

*5. Third Persons Entitled to Protection.* — See *supra*, this section.

*6. Owner of Property May Recover Value.* — And this without reference to the merits of the cause of action upon which the judgment was rendered. Bickett *v.* Garner, 31 Ohio St. 28.

*7. Election of Defendant.* — Marks *v.* Cowles, 61 Ala. 299; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Major *v.* Collins, 17 Ill. App. 239; Twogood *v.* Franklin, 27 Iowa 239; Smith *v.* Bohon, 12 Bush (Ky.) 448; Gott *v.* Powell, 41 Mo. 416; Wambaugh *v.* Gates, 8 N. Y. 138; McBain *v.* McBain, 15 Ohio St. 337, 86 Am. Dec. 478; Corwith *v.* Illinois State Bank, 15 Wis. 289. Compare South Fork Canal Co. *v.* Gordon, 2 Abb. (U. S.) 479; Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723.

*8. Assignee of Plaintiff's Certificate of Purchase Not Affected by Reversal.* — Wadhams *v.* Gay, 73 Ill. 422; Guiteau *v.* Wisely, 47 Ill. 433; McCormick *v.* McClure, 6 Blackf. (Ind.) 466, 39 Am. Dec. 441; Vogler *v.* Montgomery, 54 Mo. 577; McAusland *v.* Pundi, 1 Neb. 211, 93 Am. Dec. 358; Taylor *v.* Boyd, 3 Ohio 337, 17 Am. Dec. 603. Compare Marks *v.* Cowles, 61 Ala. 299.



**3. Effect of Modification.** — It would be impossible to lay down any fixed rule as to what the effect is where the attack is partly successful and the judgment is modified, as this must depend entirely upon the extent of the modification.<sup>1</sup>

**4. Effect of Affirmance or Dismissal of Appeal or Writ of Error.** — The attack on the judgment may prove entirely unsuccessful by the judgment being affirmed, or the appeal or writ of error dismissed. In the former case the rights established by the judgment below become absolutely fixed,<sup>2</sup> unless, of course, there is a still higher court to which a further appeal may be taken. In the latter case the parties are remitted to their legal rights and the conditions existing prior to the taking of the appeal;<sup>3</sup> but such dismissal is not equivalent to a judgment of affirmance on the merits,<sup>4</sup> except where it operates by statute or otherwise as a bar to a second appeal.<sup>5</sup>

**Damages.** — In most of the states, the party who has made an unsuccessful attack on the judgment by appeal or writ of error may be adjudged to pay damages to his opponent to compensate him for the delay in his recovery which such attack has caused.<sup>6</sup>

**1. Modification.** — As to the power to modify judgments on appeal and particular modifications, see the title *JUDGMENTS*, II *ENCYC. OF PL. AND PR.* 1068-1071.

**2. Effect of Affirmance.** — *Wayne County v. Kennicott*, 94 U. S. 498; *Perry v. Little Rock, etc.*, R. Co., 44 Ark. 383; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Alexandria Sav. Inst. v. McVeigh*, 84 Va. 41; *Cralle v. Cralle*, 84 Va. 198; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744; *Campbell v. Campbell*, 22 Gratt. (Va.) 649; *Chahoon v. Com.*, 21 Gratt. (Va.) 822. See also *Himely v. Rose*, 5 Cranch (U. S.) 314; *Martin v. Hunter*, 1 Wheat. (U. S.) 355; *Browder v. M'Arthur*, 7 Wheat. (U. S.) 58; *Ex p. Sibbald*, 12 Pet. (U. S.) 492; *Corning v. Troy Iron, etc., Factory*, 15 How. (U. S.) 466; *Sizer v. Many*, 16 How. (U. S.) 103; *Roberts v. Cooper*, 20 How. (U. S.) 481; *Tyler v. Magwire*, 17 Wall. (U. S.) 283.

**3. Effect of Dismissal of Appeal or Writ of Error** — *United States*. — *London v. Taxing Dist.*, 104 U. S. 771; *U. S. v. Gomez*, 23 How. (U. S.) 326; *Maxwell v. Williams*, Hempst. (U. S.) 172.

*Arkansas*. — *Ashley v. Brasil*, 1 Ark. 144.

*California*. — *Rowland v. Kreyenhagen*, 24 Cal. 52. See also *Dorn v. Crank*, 96 Cal. 381.

*Colorado*. — *Pueblo Chicago Lumber Co. v. Danziger*, 7 Colo. App. 149.

*Georgia*. — *Hardee v. Stovall*, 1 Ga. 95; *Perry v. Gunby*, 42 Ga. 41.

*Illinois*. — *Hancock County v. Marsh*, 3 Ill. 491.

*Indiana*. — *Huntington County v. Brown*, 14 Ind. 191.

*Kentucky*. — *Manier v. Lindsey*, 3 Bush (Ky.) 94; *Helm v. Boone*, 6 J. J. Marsh. (Ky.) 351, 22 Am. Dec. 75; *Crawford v. Bashford*, 16 B. Mon. (Ky.) 3.

*Maryland*. — *Lee v. Pindle*, 12 Gill & J. (Md.) 288.

*Massachusetts*. — *Cleveland v. Quilty*, 128 Mass. 578.

*Pennsylvania*. — *Ayres v. Novinger*, 8 Pa. St. 412.

*Tennessee*. — *Furber v. Carter*, 2 Sneed (Tenn.) 1.

**4. Dismissal Not Equivalent to Judgment of Affirmance on the Merits.** — *U. S. v. Gomez*, 23

How. (U. S.) 326; *Ashley v. Brasil*, 1 Ark. 144; *Freas v. Engelbrecht*, 3 Colo. 377; *Monti v. Bishop*, 3 Colo. 605; *State v. McKinnon*, 8 Oregon 485.

**5. When Dismissal May Be Equivalent to Affirmance** — *California*. — *Karth v. Light*, 15 Cal. 326; *Haight v. Gay*, 8 Cal. 300, 68 Am. Dec. 323; *Garibaldi v. Garr*, 97 Cal. 253; *Chamberlain v. Reed*, 16 Cal. 207. See also *Rowland v. Kreyenhagen*, 24 Cal. 52; *Chase v. Beraud*, 29 Cal. 138.

*Colorado*. — *Freas v. Engelbrecht*, 3 Colo. 383; *Shannon v. Dodge*, 18 Colo. 165.

*Georgia*. — See *Rice v. Carey*, 4 Ga. 558; *Price v. Lathrop*, 66 Ga. 545.

*Illinois*. — *McConnel v. Swailes*, 3 Ill. 572. See also *Sutherland v. Phelps*, 22 Ill. 92.

*Mississippi*. — *Bull v. Harrell*, 7 How. (Miss.) 11.

*Nebraska*. — See *Dunterman v. Storey*, 40 Neb. 447.

*Ohio*. — See *Cohen v. Cover*, 8 Ohio Cir. Ct. 678, 4 Ohio Cir. Dec. 7.

*Oregon*. — *Simpson v. Prather*, 5 Oregon 86; *State v. McKinnon*, 8 Oregon 485.

*Utah*. — *Corinne Mill, etc., Co. v. Johnston*, 5 Utah 150.

*Virginia*. — *Woodson v. Leyburn*, 83 Va. 847; *Barksdale v. Fitzgerald*, 76 Va. 892; *Beecher v. Lewis*, 84 Va. 632; *Alvey v. Cahoon*, 86 Va. 173.

*Wisconsin*. — *Haner v. Polk*, 6 Wis. 350.

**6. Awarding of Damages Against Unsuccessful Party** — *Alabama*. — *Clements v. Crawford*, 1 Ala. 531; *McConnell v. White*, Minor (Ala.) 112.

*Arkansas*. — *Bass v. Haney*, 27 Ark. 105.

*California*. — *Matter of Sharp*, 92 Cal. 577; *Meyers v. Trujillo*, (Cal. 1892) 30 Pac. Rep. 579.

*Florida*. — *Redmond v. Donaldson*, 35 Fla. 167.

*Georgia*. — *Garrison v. Wilcoxson*, 11 Ga. 157; *Gunnels v. Deavours*, 57 Ga. 177.

*Idaho*. — *Cady v. Scaniker*, 1 Idaho 168.

*Illinois*. — *Woolley v. Lyon*, 115 Ill. 296; *Garrick v. Chamberlain*, 97 Ill. 620; *Neagle v. Dawson*, 64 Ill. App. 538.

*Indiana*. — *Allen v. Northwestern Mut. L. Ins. Co.*, 136 Ind. 608. But compare *Meikel v. German Sav. Fund Soc.*, 24 Ind. 78.



5. *Costs.* — In the absence of some statutory limitation,<sup>1</sup> an appellate court has an absolute discretion in regard to the matter of costs, and may adjudge against or award to either party such costs as may be consistent with the law and justice of the case, without respect to the affirmance or reversal of the judgment below.<sup>2</sup>

*Iowa.* — *Berryhill v. Keilmeyer*, 33 Iowa 20.  
*Kentucky.* — *Madison, etc., R. Co. v. Briscoe*, 18 B. Mon. (Ky.) 570; *Evans v. Com.*, 3 Bush (Ky.) 161.

*Louisiana.* — *Lusse v. Mische*, 22 La. Ann. 256.

*Massachusetts.* — *Howland v. Rooke*, 158 Mass. 590.

*Michigan.* — *Storey v. Bird*, 8 Mich. 316; *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. Rep. 431.

*Minnesota.* — *Burr v. Crichton*, 51 Minn. 343.

*Mississippi.* — *Redd v. Thompson*, 56 Miss. 230; *Tigner v. McGehee*, 60 Miss. 242.

*Missouri.* — *Cordell v. Kansas City First Nat. Bank*, 64 Mo. 600; *Rose v. Cobb*, 64 Mo. 464; *State v. Brooke*, 29 Mo. App. 286; *Haley v. Scott*, 18 Mo. 202; *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236.

*Montana.* — *Burns v. Paulsen*, 16 Mont. 333.

*Nevada.* — *Lehane v. Keyes*, 2 Nev. 361; *Table Mountain Gold, etc., Min. Co. v. Waller's Defeat Silver Min. Co.*, 4 Nev. 218, 97 Am. Dec. 526.

*New Mexico.* — *Shafer v. New Mexico Second Nat. Bank*, 4 N. Mex. 141.

*New York.* — *Cohen v. New York*, 128 N. Y. 594, 38 N. Y. St. Rep. 846; *Utica Bank v. Finch*, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175.

*North Dakota.* — *Sigmund v. Minot Bank*, 4 N. Dak. 164.

*Oregon.* — *Hawkins v. Jones*, 21 Oregon 502.

*Pennsylvania.* — *Wolf v. Philadelphia Traction Co.*, 181 Pa. St. 399.

*South Dakota.* — *Himebaugh v. Crouch*, 3 S. Dak. 409.

*Tennessee.* — *Betts v. Demumbrune, Cooke* (Tenn.) 39.

*Texas.* — *Chambers v. Hodges*, 3 Tex. 517.

*Vermont.* — *Bellamy v. Corban*, 1 Tyler (Vt.) 372.

*Virginia.* — *Abrahams v. Com.*, 1 Rob. (Va.) 711.

*Washington.* — *Seattle, etc., R. Co. v. Joergenson*, 3 Wash. 622.

*Wisconsin.* — *Tourville v. Nemadji Boom Co.*, 70 Wis. 81.

*Wyoming.* — *Syndicate Imp. Co. v. Bradley*, 6 Wyo. 171.

1. *Statutory Regulation as to Costs.* — See *St. Charles v. O'Malley*, 18 Ill. 407; *Logue v. Gillick*, 1 E. D. Smith (N. Y.) 398. And see *infra*, p. 813, note 2, *Requirement that Appellant Obtain More Favorable Judgment.*

2. *Discretion of Appellate Court in Regard to Costs.* — *United States.* — *Phillips v. Russell, Hempst.* (U. S.) 62; *Matter of Guild*, 1 Woodb. & M. (U. S.) 29; *Baldwin v. Ely*, 9 How. (U. S.) 580.

*Alabama.* — *Paulding v. Watson*, 21 Ala. 279; *Maybury v. Grady*, 67 Ala. 147.

*Arkansas.* — *Meadows v. Rogers*, 17 Ark. 361.

*California.* — *Reniff v. The Cynthia*, 18 Cal. 669.

*Georgia.* — *Loyd v. Hicks*, 32 Ga. 499; *Gunnels v. Deavours*, 59 Ga. 196.

*Illinois.* — *Phy v. Clark*, 35 Ill. 377.

*Indiana.* — *Waterhouse v. Fickle*, 1 Ind. 529; *Allen v. Wells*, 22 Ind. 118; *Miller v. Beal*, 26 Ind. 234.

*Kansas.* — *St. Louis, etc., R. Co. v. Martin*, 29 Kan. 750.

*Kentucky.* — *Warner v. Case*, 6 J. J. Marsh. (Ky.) 639; *Galloway v. Hamilton*, 3 T. B. Mon. (Ky.) 270, 16 Am. Dec. 101; *Gentry v. Doolin*, 1 Bush (Ky.) 1.

*Louisiana.* — *Whipple v. Hertzberger*, 11 La. Ann. 475; *Dalzell v. Steamboat Saxon*, 10 La. Ann. 280; *Boulin v. Maynard*, 15 La. Ann. 658.

*Maine.* — *Dresser v. Witherle*, 9 Me. 111; *Brown v. Cousins*, 51 Me. 301.

*Maryland.* — *Dorsey v. Smith*, 7 Har. & J. (Md.) 345.

*Massachusetts.* — *Croxford v. Massachusetts Cotton Mills*, 15 Gray (Mass.) 70.

*Michigan.* — *Price v. Price*, 46 Mich. 68; *Culver v. McKeown*, 43 Mich. 322; *Clare County v. Auditor Gen.*, 41 Mich. 182; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Bernier v. Bernier*, 72 Mich. 43; *Steinhauser v. Wayne Circuit Judge*, 42 Mich. 463; *Match v. Hunt*, 38 Mich. 1; *Prosser v. Whitney*, 46 Mich. 405; *Wyatt v. Herring*, 90 Mich. 581.

*Minnesota.* — *Coit v. Waples*, 1 Minn. 134.

*Missouri.* — *Street v. Bushnell*, 24 Mo. 328; *Totten v. James*, 55 Mo. 495; *Hubbard v. Gilpin*, 57 Mo. 441; *Wayne County v. St. Louis, etc., R. Co.*, 66 Mo. 77; *Heyneman v. Garneau*, 33 Mo. 565.

*Nevada.* — *Flannery v. Anderson*, 4 Nev. 437.

*New Hampshire.* — *Stratton v. Upton*, 36 N. H. 582; *Davis v. Clark*, 39 N. H. 62.

*New York.* — *Porter v. Jones*, (Ct. App.) 7 How. Pr. (N. Y.) 192; *Hesse v. Briggs*, 45 N. Y. Super. Ct. 417; *Mechanics' Bank v. Snowden*, 2 Paige (N. Y.) 299; *Mackie v. Cairns, Hopk.* (N. Y.) 373; *Larmon v. Aiken*, 4 Hill (N. Y.) 591; *Miller v. Adsit*, 18 Wend. (N. Y.) 658; *Bolton v. Gardner*, 3 Paige (N. Y.) 273; *Jackson v. Rathbone*, 2 Cow. (N. Y.) 602; *Newman v. Van Antwerp*, 4 Cow. (N. Y.) 711; *Jackson v. Haight*, 5 Cow. (N. Y.) 445; *Law v. Jackson*, 2 Wend. (N. Y.) 209; *Ives v. Miller*, 19 Barb. (N. Y.) 197; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Goodridge v. Connor*, (N. Y. City Ct. Spec. T.) 66 How. Pr. (N. Y.) 143; *Stevenson v. Pusch*, (Supm. Ct. Gen. T.) 40 How. Pr. (N. Y.) 91; *Chamberlain v. Chamberlain*, 25 Hun (N. Y.) 199; *Hoffman v. Barry*, 4 Thomp. & C. (N. Y.) 255; *Cregin v. Brooklyn Crosstown R. Co.*, 19 Hun (N. Y.) 349; *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619; *Humiston v. Ballard*, (Supm. Ct. Gen. T.) 40 How. Pr. (N. Y.) 40; *Dean v. Gridley*, 11 Wend. (N. Y.) 167.



The Universal Custom is, however, to adjudge costs to the prevailing party unless there be some special reason for a different direction,<sup>1</sup> and in many of the states the statutes require that an appellant, in order to be entitled to costs, must obtain in the appellate court a judgment more favorable to him than that rendered in the court below, and in such cases the statutory requirement is rigorously exacted.<sup>2</sup>

**VI. CONTROL OF COURT OVER JUDGMENTS DURING TERM AT WHICH RENDERED — 1. In General — Power to Amend, Open, or Vacate.** — Every court has absolute control over its own judgments and decrees during the term at which they were rendered, and may therefore, at any time before the expiration of the

*Ohio.* — *Armstrong v. McAlpin*, 18 Ohio St. 189.

*Tennessee.* — *Cannon v. Blakemore*, 10 Humph. (Tenn.) 227.

*Texas.* — *Hotchkiss v. Chevaillier*, 12 Tex. 224; *Foreman v. Gregory*, 17 Tex. 193; *Smock v. Tandy*, 28 Tex. 130; *Hopson v. Murphy*, 4 Tex. 248; *Weaver v. Lewis*, 12 Tex. 103.

*Vermont.* — *Downer v. Frizzle*, 10 Vt. 541.

*Wisconsin.* — *Lanyon v. Woodward*, 65 Wis. 543; *H. S. Benjamin Wagon, etc., Co. v. Merchants' Exch. Bank*, 63 Wis. 470; *Harrison Mach. Works v. Hosig*, 73 Wis. 184.

**1. Costs Usually Adjudged to Prevailing Party** — *United States.* — *Montale v. Murray*, 3 Cranch (U. S.) 249, 4 Cranch (U. S.) 46.

*California.* — *Leech v. West*, 2 Cal. 98; *Hagar v. Mead*, 25 Cal. 600. See also *Hathaway v. Davis*, 33 Cal. 161.

*Georgia.* — *Markham v. Ross*, 73 Ga. 105.

*Iowa.* — *Ares v. Hancock*, 4 Iowa 568.

*Louisiana.* — *Seawell v. Key*, 5 La. Ann. 271. *Maine.* — *Goodwin v. Boston, etc., R. Co.*, 63 Me. 363.

*Massachusetts.* — *Moore v. Lyman*, 13 Gray (Mass.) 394; *Stevens v. Hale*, 7 Met. (Mass.) 85; *Williams v. Hodge*, 11 Met. (Mass.) 266; *Bowler v. Palmer*, 2 Gray (Mass.) 553.

*Michigan.* — *Jeffery v. Hursh*, 58 Mich. 246.

*Minnesota.* — *Allen v. Jones*, 8 Minn. 202; *Walker v. Barron*, 6 Minn. 508.

*New Hampshire.* — *Eames v. Stevens*, 26 N. H. 124.

*New Jersey.* — *Sandford v. Clarke*, 38 N. J. Eq. 265.

*New York.* — *Sherwood v. Travelers Ins. Co.*, 12 Daly (N. Y.) 137; *Sanders v. Townshend*, (C. Pl. Spec. T.) 63 How. Pr. (N. Y.) 343; *Anonymous*, (U. S. Cir. Ct.) 13 Abb. N. Cas. (N. Y.) 54; *Bray v. Andreas*, 1 E. D. Smith (N. Y.) 387.

*Ohio.* — *Cleveland v. Bodwell*, 13 Ohio 133.

*Oregon.* — *Miller v. Tobin*, 15 Oregon 595.

*South Carolina.* — See *Bratton v. Massey*, 18 S. Car. 555.

*Tennessee.* — *Jackson v. Baxter*, 5 Lea (Tenn.) 345.

*Utah.* — *Corinne Mill, etc., Co. v. Johnston*, 5 Utah 149; *Smith v. Fisher*, 3 Utah 24.

*Vermont.* — *Shaw v. Johnson, Brayt.* (Vt.) 47; *Scott v. Lance*, 21 Vt. 507; *Hogg v. Wolcott*, 1 Tyler (Vt.) 141; *Baker v. Bloodget*, 1 Vi. 141; *Goddard v. Collins*, 25 Vt. 712.

*Wisconsin.* — *Schoeffel v. Hinze*, 47 Wis. 647.

**2. Requirement that Appellant Obtain More Favorable Judgment** — *United States.* — *Thommesen v. Whitwill*, 21 Blatchf. (U. S.) 45.

*Indiana.* — *Foglesong v. Moon*, 5 Ind. 545.

*Maine.* — *Baker v. Appleton*, 4 Me. 66; *Abbott v. Penobscot County*, 52 Me. 584; *Duncan v. Sylvester*, 13 Me. 438; *Moore v. Thompson*, 34 Me. 207; *Brown v. Attwood*, 7 Me. 361; *Cole v. Sprowl*, 38 Me. 190.

*Massachusetts.* — *Godfrey v. Godfrey*, 1 Pick. (Mass.) 236; *Plimpton v. Baker*, 9 Pick. (Mass.) 72; *Chace v. Tucker*, 2 Pick. (Mass.) 27; *Andrews v. Austin*, 2 Pick. (Mass.) 528; *Framingham Mfg. Co. v. Barnard*, 2 Pick. (Mass.) 532; *Johnson v. Wetherbee*, 3 Pick. (Mass.) 247; *Emerson v. Newbury*, 13 Pick. (Mass.) 377; *Briggs v. Murdock*, 13 Pick. (Mass.) 321; *Abbott v. Wiley*, 17 Pick. (Mass.) 321; *Stone v. Kelly*, 8 Mass. 98; *Lakeman v. Morse*, 9 Mass. 126; *Ham v. Ricker*, 9 Mass. 28, 6 Am. Dec. 21; *Gilman v. Burgess*, 12 Mass. 205.

*Michigan.* — *Bowe v. Bowe*, 42 Mich. 195.

*Minnesota.* — *Henry v. Meighen*, 46 Minn. 548; *Sanborn v. Webster*, 2 Minn. 323.

*Nebraska.* — *Rosenbaum v. Dunston*, 16 Neb. 111; *Burlington, etc., R. Co. v. Spere*, 24 Neb. 125; *Atchison, etc., R. Co. v. Plant*, 24 Neb. 127.

*New Hampshire.* — *Roby v. Marsh*, 4 N. H. 175; *Swasey v. Wilmot*, 4 N. H. 233; *Avery v. Holmes*, 10 N. H. 574.

*New York.* — *Duff v. Wardell*, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 84; *Bancroft v. Shannon*, (Supm. Ct. Gen. T.) 42 How. Pr. (N. Y.) 1; *Rice v. Childs*, 28 Hun (N. Y.) 303; *Chapin v. Skeels*, 20 Hun (N. Y.) 448; *Younghanse v. Fingar*, 47 N. Y. 99; *Pike v. Johnson*, 47 N. Y. 1.

*Ohio.* — *Cadiz Bank v. Slemmons*, 34 Ohio St. 142, 32 Am. Rep. 364; *Waters v. Lemmon*, 4 Ohio 229; *Wheeler v. Lucas*, 13 Ohio 248; *Scoles v. Wright*, Wright (Ohio) 92.

*Pennsylvania.* — *Cameron v. Paul*, 11 Pa. St. 277; *Haines v. Moorhead*, 2 Pa. St. 65; *Davidson v. Smith*, 2 Pa. L. J. Rep. 24, 3 Pa. L. J. 239; *Pratt v. Naglee*, 6 S. & R. (Pa.) 299; *Bellas v. Oyster*, 7 Watts (Pa.) 341; *Holdship v. Alexander*, 13 S. & R. (Pa.) 230; *Landis v. Shaeffer*, 4 S. & R. (Pa.) 196; *Poke v. Kelly*, 13 S. & R. (Pa.) 165; *Rankin v. Murry*, 2 P. & W. (Pa.) 74; *Carney v. Kenney*, 1 Miles (Pa.) 9; *Ilgenfritz v. Douglass*, 6 Binn. (Pa.) 402; *Com. v. Shannon*, 13 S. & R. (Pa.) 109; *Honniter v. Brown*, 1 P. & W. (Pa.) 487; *Ross v. Soles*, 1 Watts (Pa.) 43; *Gallatin v. Cornman*, 1 P. & W. (Pa.) 115; *Fresher v. Brenizer*, 3 Pa. L. J. Rep. 41, 4 Pa. L. J. 377; *Guy v. Wilkeson*, 2 Watts (Pa.) 133; *Remely v. Kuntz*, 10 Pa. St. 180.

*Texas.* — *Conner v. Elkins*, 66 Tex. 551.

*Washington.* — *Baxter v. Scoland*, 2 Wash. Ter. 86.



term, in the exercise of its discretion, open, amend, correct, revise, vacate, or supplement any judgment or decree rendered during such term.<sup>1</sup>

**1. Control of Court over Judgments and Decrees During Term at Which Rendered — England.** — *In re Riley*, 30 W. R. 78.

*Canada.* — *Ross v. Grange*, 27 U. C. Q. B. 306; *Palsgrave v. Ross*, 2 L. C. Jur. 95.

*United States.* — *Bronson v. Schulten*, 104 U. S. 410; *Memphis v. Brown*, 94 U. S. 715; *Morgan v. Eggers*, 127 U. S. 63; *Alabama Gold L. Ins. Co. v. Nichols*, 109 U. S. 232; *Barrell v. Tilton*, 119 U. S. 637; *Tilton v. Barrell*, 17 Fed. Rep. 59; *Goddard v. Ordway*, 101 U. S. 745; *Creamer v. Bowers*, 30 Fed. Rep. 185; *Spring v. Domestic Sewing Mach. Co.*, 13 Fed. Rep. 446; *U. S. Bank v. Moss*, 6 How. (U. S.) 31; *Doss v. Tyack*, 14 How. (U. S.) 297; *Celina v. Eastport Sav. Bank*, 37 U. S. App. 164; *Walden v. Craig*, 14 Pet. (U. S.) 147; *Figh's Case*, 3 Ct. Cl. 97; *Henderson v. Carbondale Coal, etc., Co.*, 140 U. S. 25; *Ex p. Lange*, 18 Wall. (U. S.) 163; *Cheang-Kee v. U. S.*, 3 Wall. (U. S.) 320; *Basset v. U. S.*, 9 Wall. (U. S.) 38; *U. S. v. Harmonson*, 3 Sawy. (U. S.) 556. See also *Wylie v. Cox*, 14 How. (U. S.) 1; *Brockett v. Brockett*, 2 How. (U. S.) 238; *Austin v. Riley*, 55 Fed. Rep. 833.

*Alabama.* — *Johnson v. Lattimore*, 7 Ala. 200; *Neale v. Caldwell*, 3 Stew. (Ala.) 134; *Acre v. Ross*, 3 Stew. (Ala.) 288.

*Arkansas.* — *Ashley v. Hyde*, 6 Ark. 100, 42 Am. Dec. 685; *King v. State Bank*, 9 Ark. 188, 47 Am. Dec. 739; *McKnight v. Strong*, 25 Ark. 212; *Underwood v. Sledge*, 27 Ark. 295.

*California.* — See *Gronfier v. Minturn*, 5 Cal. 492.

*Colorado.* — *Martin v. Skehan*, 2 Colo. 614.

*Connecticut.* — *Wilkie v. Hall*, 15 Conn. 37. See also *Sturdevant v. Stanton*, 47 Conn. 579.

*Georgia.* — *Jobe v. State*, 28 Ga. 235; *Baker v. Thompson*, 75 Ga. 164; *Calloway v. McElmurray*, 91 Ga. 166; *Jordan v. Tarver*, 92 Ga. 379.

*Idaho.* — *Moore v. Taylor*, 1 Idaho 630; *State v. Griffin*, (Idaho 1895) 40 Pac. Rep. 60.

*Illinois.* — *Stahl v. Webster*, 11 Ill. 514; *Coughran v. Gutcheus*, 18 Ill. 390; *Bolton v. McKinley*, 22 Ill. 203; *Brush v. Seguin*, 24 Ill. 254; *Cook v. Wood*, 24 Ill. 295; *Mason v. McNamara*, 57 Ill. 274; *Hawkins v. Taber*, 47 Ill. 459; *Edwards v. Irons*, 73 Ill. 583; *Wyman v. Yeomans*, 84 Ill. 403; *Burwell v. Orr*, 84 Ill. 465; *Godfreidson v. People*, 88 Ill. 284; *Becker v. Sauter*, 89 Ill. 596; *Atchison, etc., R. Co. v. Elder*, 149 Ill. 173; *Heeney v. Alcock*, 9 Ill. App. 431; *Allen v. Hoffman*, 12 Ill. App. 573; *Dunlap v. Gregory*, 14 Ill. App. 601; *Slack v. Casey*, 22 Ill. App. 412.

*Indiana.* — *Bland v. State*, 2 Ind. 608; *Layman v. Graybill*, 14 Ind. 166; *Obenchain v. Comegys*, 15 Ind. 496; *Ralston v. Lothain*, 18 Ind. 303; *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263; *Richardson v. Howk*, 45 Ind. 451; *Ryon v. Thomas*, 104 Ind. 59.

*Iowa.* — *Taylor v. Lusk*, 9 Iowa 444; *Dawson v. Wisner*, 11 Iowa 6; *Wolmersstadt v. Jacobs*, 61 Iowa 372; *State v. Dougherty*, 70 Iowa 439.

*Kansas.* — *Cornell University v. Parkinson*, 59 Kan. 365; *State v. Sowders*, 42 Kan. 312; *Foreman v. Carter*, 9 Kan. 674; *Wilson, etc., Invest. Co. v. Hillyer*, 50 Kan. 446.

*Kentucky.* — *Bailey v. Villier*, 6 Bush (Ky.) 27; *Rogers v. Bradford*, 8 Bush (Ky.) 164; *Kyle v. Conn. Sneed* (Ky.) 186; *Worthington v. Campbell*, (Ky. 1886) 1 S. W. Rep. 714; *Brown v. U. S. Home, etc., Assoc.*, (Ky. 1890) 13 S. W. Rep. 1085; *Farmers' Bank v. Peter*, 13 Bush (Ky.) 591. See also *Yocum v. Foreman*, 14 Bush (Ky.) 494.

*Maryland.* — *Robinson v. Harford County*, 12 Md. 132; *Rutherford v. Pope*, 15 Md. 579; *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Thruston v. Devecmon*, 30 Md. 210; *Townshend v. Chew*, 31 Md. 247; *Loney v. Bailey*, 43 Md. 10; *Burch v. Scott*, 1 Band (Md.) 112. See also *Nowland v. Glenn*, 2 Md. Ch. 368.

*Massachusetts.* — *Com. v. Weymouth*, 2 Allen (Mass.) 144, 79 Am. Dec. 776.

*Minnesota.* — In some of the earlier cases the rule stated in the text was questioned. See *Grant v. Schmidt*, 22 Minn. 1; *Semrow v. Semrow*, 23 Minn. 214; *Weld v. Weld*, 28 Minn. 33. But it is now established by statute, *Gen. Stat. Minn.* 1894, § 5267, and is recognized as governing. *State Sash, etc., Mfg. Co. v. Adams*, 47 Minn. 399; *Beckett v. Northwestern Masonic Aid Assoc.*, 67 Minn. 298. See also *Swanstrom v. Marvin*, 38 Minn. 359; *Pratt v. Pioneer Press Co.*, 32 Minn. 217.

*Mississippi.* — *Barker v. Justice*, 41 Miss. 240; *Pattison v. Josselyn*, 43 Miss. 373; *McRaven v. McGuire*, 9 Smed. & M. (Miss.) 34; *Sagory v. Bayless*, 13 Smed. & M. (Miss.) 153.

*Missouri.* — *Ashby v. Glasgow*, 7 Mo. 320; *Bergen v. Bolton*, 10 Mo. 658; *Huthsing v. Maus*, 36 Mo. 109; *State v. Callaway County*, 43 Mo. 228; *Randolph v. Sloan*, 58 Mo. 155; *Smith v. Perkins*, 124 Mo. 50; *Eddie v. Eddie*, 138 Mo. 599; *Rankin v. Lawton*, 17 Mo. App. 574; *Nelson v. Ghiselin*, 17 Mo. App. 663; *Warren v. Williams*, 25 Mo. App. 22; *Fannon v. Plummer*, 30 Mo. App. 25; *Bell v. Clark*, 30 Mo. App. 224.

*Nebraska.* — *Volland v. Wilcox*, 17 Neb. 46; *Harris v. State*, 24 Neb. 803; *Bradley v. Slater*, 55 Neb. 334.

*Nevada.* — *Ballard v. Purcell*, 1 Nev. 342; *State v. Nevada First Nat. Bank*, 4 Nev. 358.

*New Jersey.* — *Fraleigh v. Feather*, 46 N. J. L. 429.

*New York.* — *Coffin v. Lester*, 36 Hun (N. Y.) 347; *Commercial Bank v. Catto*, 13 N. Y. App. Div. 608.

*North Carolina.* — *Faircloth v. Isler*, 76 N. Car. 49.

*Ohio.* — *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169; *Huntington v. Finch*, 3 Ohio St. 445; *Ash v. Marlow*, 20 Ohio 131; *Kelley v. Stanbery*, 13 Ohio 408; *Niles v. Parks*, 49 Ohio St. 370; *Knox County Bank v. Doty*, 9 Ohio St. 505.

*Pennsylvania.* — *King v. Brooks*, 72 Pa. St. 363.

*Rhode Island.* — *Bishop v. Aborn*, 16 R. I. 568.

*South Carolina.* — *Lemacks v. Glover*, 1 Rich. Eq. (S. Car.) 141; *Clawson v. Hutchinson*, 14 S. Car. 517.

*Tennessee.* — *Timmons v. Garrison*, 4 Humph. (Tenn.) 148; *Smith v. Lurry*, *Cooke* (Tenn.) 190; *Moore v. Watson*, 4 Coldw. (Tenn.) 64;



**2. To What Cases the Power Extends.** — This power is not confined to civil cases, but extends to criminal cases also,<sup>1</sup> so that a court may increase a sentence which it has imposed during the term.<sup>2</sup>

**3. What Errors May Be Corrected.** — The power of the court to correct or amend its judgments during the term is not confined to the correction of mere clerical errors or omissions, but an error in the decision itself may be corrected,<sup>3</sup> and this without any necessity for a new trial.<sup>4</sup>

**4. When Power Will Not Be Exercised.** — The rule that the court has control of its judgments during the entire term at which they are rendered should not be so construed or applied as to enable a party to take advantage of his own negligence or misconduct to the injury of other parties who may be wronged thereby.<sup>5</sup>

**5. Setting Aside Judgment After Appeal Perfected or Bill of Exceptions Taken.** — It has been held in *Texas* that a trial court may set aside its judgment during the term at which rendered, even though at the time it is set aside an appeal to the supreme court has been perfected and a supersedeas obtained,<sup>6</sup> and in *Ohio* it is considered that the control of a court of common pleas over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify the same at discretion, is not affected by the incidents that a motion for a new trial has been heard and overruled, and that a bill of exceptions has been taken.<sup>7</sup>

**6. Duration of Term.** — Unless the court has previously adjourned *sine die*, every term continues, for the purpose of amending, opening, or vacating judgments, until the commencement of the next term.<sup>8</sup>

**7. Proceedings Commenced During Term but Continued to Subsequent Term.** — It is well established as a general rule that where proceedings to amend, open, or vacate a judgment or decree are commenced during the term at which it was rendered, the jurisdiction of the court over it for this purpose may be continued for a subsequent term, and the relief sought be granted at such term.<sup>9</sup>

*Robertson v. Maclin*, 4 Hayw. (Tenn.) 53. See also *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228.

*Texas.* — *Wood v. Wheeler*, 7 Tex. 13; *McPherson v. Johnson*, 69 Tex. 484; *Lane v. Ellinger*, 32 Tex. 369; *Garza v. Baker*, 58 Tex. 483; *Hooker v. Williamson*, 60 Tex. 524; *Aycock v. Kimbrough*, 71 Tex. 330, 10 Am. St. Rep. 745; *Henderson v. Banks*, 70 Tex. 398; *Sugg v. Thornton*, 73 Tex. 666; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223; *Texas Sav. Loan Assoc. v. Smith*, (Tex. Civ. App. 1895) 32 S. W. Rep. 380; *Studebaker Bros. Mfg. Co. v. Hunt*, (Tex. Civ. App. 1896) 38 S. W. Rep. 1134; *Blum v. Wettermark*, 58 Tex. 125.

*Virginia.* — *Langyher v. Patterson*, 77 Va. 470; *Clendenning v. Conrad*, 91 Va. 410.

*West Virginia.* — *Green v. Pittsburgh, etc., R. Co.*, 11 W. Va. 685; *Kelty v. High*, 29 W. Va. 381.

*Wisconsin.* — *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Brown v. Brown*, 53 Wis. 29; *Turner v. Nachtsheim*, 71 Wis. 16. See also *Milwaukee Mut. Loan, etc., Soc. v. Jagodzinski*, 84 Wis. 35.

**Courts of Continuous Session.** — Under section 988 of the *Kentucky* statutes of 1894, a court of continuous session has control over its judgments for sixty days, in the same manner as circuit courts have control over their judgments during the term in which they are rendered. *Schlosser v. Murnan*, (Ky. 1899) 49 S. W. Rep. 421.

**1. Power Extends to Criminal as Well as Civil Cases.** — *Ex p. Lange*, 18 Wall. (U. S.) 163; *Jobe v. State*, 28 Ga. 235; *State v. Dougherty*, 70 Iowa 439; *Com. v. Weymouth*, 2 Allen (Mass.) 144, 79 Am. Dec. 776.

**2. Sentence May Be Increased.** — *Com. v. Weymouth*, 2 Allen (Mass.) 144, 79 Am. Dec. 776.

**3. Erroneous Decision May Be Corrected.** — *Wolmerstadt v. Jacobs*, 61 Iowa 372.

**4. New Trial Not Necessary.** — *Taylor v. Gribble*, (Tex. Civ. App. 1896) 33 S. W. Rep. 765. In this case the trial had been without a jury.

**5. Power Will Not Be Exercised so as to Enable Party to Take Advantage of His Own Negligence or Misconduct.** — *Cornell University v. Parkinson*, 59 Kan. 365.

**6. Judgment May Be Set Aside After Appeal Perfected.** — *Blum v. Wettermark*, 58 Tex. 125.

**7. Power Not Affected by Fact that Motion for New Trial Has Been Refused and Bill of Exceptions Taken.** — *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169.

**8. Every Term Continues until Commencement of Next Term, unless Court Has Previously Adjourned Sine Die.** — *Doss v. Tyack*, 14 How. (U. S.) 297; *Taylor v. Lusk*, 9 Iowa 444; *Townshend v. Chew*, 31 Md. 247.

**9. Proceedings May Be Continued to Subsequent Term.** — *United States.* — *Goddard v. Ordway*, 101 U. S. 745; *Loring v. Frue*, 104 U. S. 223. See also *Amy v. Watertown*, 130 U. S. 301; *Bronson v. Schulten*, 104 U. S. 410.

*California.* — *Baldwin v. Kramer*, 2 Cal. 582; *Robb v. Robb*, 6 Cal. 21; *Shaw v. Mc.*



**VII. AMENDMENT AFTER TERM AT WHICH RENDERED — 1. As to Matters of Substance — a. GENERAL RULE STATED.** — It is well established as a general rule, that, after the expiration of the term at which a judgment was rendered, the court rendering the same is absolutely without power to amend it in any matter of substance or going to the merits of the cause.<sup>1</sup>

Gregor, 8 Cal. 521; Bell v. Thompson, 19 Cal. 706; De Castro v. Richardson, 25 Cal. 49; Norton v. Atchison, etc., R. Co., 97 Cal. 388, 33 Am. St. Rep. 198.

*Illinois.* — Morgan v. Hays, 1 Ill. 126, 12 Am. Dec. 147; Atkins v. Hinman, 7 Ill. 437; Cook v. Wood, 24 Ill. 295; Smith v. Wilson, 26 Ill. 186; Messervy v. Beckwith, 41 Ill. 452; McKindley v. Buck, 43 Ill. 488; State Sav. Inst. v. Nelson, 49 Ill. 171; Windett v. Hamilton, 52 Ill. 180; Knox v. Winsted Sav. Bank, 57 Ill. 330; Lill v. Stookey, 72 Ill. 495; Fix v. Quinn, 75 Ill. 232; Coursen v. Hixon, 78 Ill. 339; Church v. English, 81 Ill. 442; Robinson v. Brown, 82 Ill. 279; Hibbard v. Mueller, 86 Ill. 256; Hearsch v. Graudine, 87 Ill. 115; Becker v. Sauter, 89 Ill. 596; People v. Springer, 106 Ill. 542; Tucker v. Hamilton, 108 Ill. 464; Jansen v. Grimshaw, 125 Ill. 468; Bennett v. Bradford, 132 Ill. 269; Atchison, etc., R. Co. v. Elder, 149 Ill. 173, *affirming* 50 Ill. App. 276; Bannon v. People, 1 Ill. App. 496; Baragwanath v. Wilson, 4 Ill. App. 80; Kihlholz v. Wolff, 8 Ill. App. 371; Pease v. Roberts, 9 Ill. App. 132; Reynolds v. Anspach, 14 Ill. App. 38; Ives v. Hulce, 17 Ill. App. 30; Schmidt v. Thomas, 33 Ill. App. 109; Whipple v. People, 40 Ill. App. 301; Major v. Rand, 72 Ill. App. 279.

*Missouri.* — Smith v. Best, 42 Mo. 185; McGurvy v. Wall, 122 Mo. 614.

*Nevada.* — State v. State First Nat. Bank, 4 Nev. 358; Daniels v. Daniels, 12 Nev. 118; State v. Fourth Dist. Ct., 16 Nev. 371.

*Ohio.* — Knox County Bank v. Doty, 9 Ohio St. 505; Niles v. Parks, 49 Ohio St. 370.

*Rhode Island.* — Trott v. Wheaton, 5 R. I. 353.

*Utah.* — Darke v. Ireland, 4 Utah 192.

*Wisconsin.* — Baker v. Baker, 51 Wis. 538.

*Wyoming.* — O'Keefe v. Foster, 5 Wyo. 343. But compare Siloam Springs v. McPhitridge, 53 Ark. 21.

**1. Judgment Cannot Be Amended as to Matters of Substance After Term at Which Rendered — United States.** — Adams v. Law, 17 How. (U. S.) 417; Hicklin v. Marco, 64 Fed. Rep. 609; Phillips v. Negley, 117 U. S. 665; Doe v. Waterloo Min. Co., 60 Fed. Rep. 643; Petersburg Sav., etc., Co. v. Dellatorre, 30 U. S. App. 504; Elder v. Richmond Gold, etc., Min. Co., 58 Fed. Rep. 536; Jenkins v. Eldredge, 1 Woodb. & M. (U. S.) 61; Morgan's Louisiana, etc., R., etc., Co. v. Texas Cent. R. Co., 32 Fed. Rep. 525; U. S. v. The Brig Glamorgan, 2 Curt. (U. S.) 236. See also Albers v. Whitney, 1 Story (U. S.) 310.

*Alabama.* — Emerson v. Heard, 81 Ala. 443; Saltmarsh v. Bird, 19 Ala. 665; Summersett v. Summersett, 40 Ala. 596, 91 Am. Dec. 494; Tippers v. Peters, 103 Ala. 196; Kidd v. Montague, 19 Ala. 619; Gayle v. Agee, 4 Port. (Ala.) 439; Harris v. Billingsley, 18 Ala. 438; Browder v. Faulkner, 82 Ala. 257; Noland v. Lock, 16 Ala. 52; Owen v. Bankhead, 82 Ala. 399; Thomason v. Gray, 84 Ala. 559.

*Arkansas.* — McLain v. Duncan, 57 Ark. 49.

*California.* — Leviston v. Swan, 33 Cal. 480; De Castro v. Richardson, 25 Cal. 49; Hastings v. Cunningham, 35 Cal. 549; Barry v. San Francisco, 91 Cal. 486; Egan v. Egan, 90 Cal. 15; Fresno First Nat. Bank v. Dusy, 110 Cal. 69. See also Hobbs v. Duff, 43 Cal. 485.

*Connecticut.* — Wilkie v. Hall, 15 Conn. 37. See also Taylor v. Starr, 2 Root (Conn.) 293.

*Delaware.* — Brown v. Smyth, 4 Harr. (Del.) 204.

*Florida.* — Higgins v. Driggs, 21 Fla. 103.

*Georgia.* — McDaniel v. Mitchell, 95 Ga. 40.

*Illinois.* — Becker v. Sauter, 89 Ill. 596; Humphreyville v. Culver, 73 Ill. 485; Coughran v. Gutcheus, 18 Ill. 390; Howe v. Warren, 46 Ill. App. 325; Cook v. Wood, 24 Ill. 295; Horner v. Horner, 37 Ill. App. 199; Forquer v. Forquer, 19 Ill. 68; Adams v. Gill, 158 Ill. 190. See also Buckles v. Northern Bank, 63 Ill. 268.

*Indiana.* — Pursley v. Wickle, 4 Ind. App. 382; Nixon v. Nichols, 10 Ind. App. 1; Bole v. Newberger, 81 Ind. 274; Strange v. Tyler, 95 Ind. 396; Majors v. Craig, 144 Ind. 39. See also Boos v. State, 11 Ind. App. 257.

*Iowa.* — Carpenter v. Zuver, 56 Iowa 390; Knox v. Moser, 72 Iowa 154; Fairbairn v. Dana, 68 Iowa 231. See also Kenyon v. Baker, 82 Iowa 724.

*Kentucky.* — Bramblet v. Pickett, 2 A. K. Marsh. (Ky.) 10, 12 Am. Dec. 350; Scroggin v. Scroggin, 1 J. J. Marsh. (Ky.) 362; Baker v. Madison, 4 J. J. Marsh. (Ky.) 390; Daviess County Ct. v. Howard, 13 Bush (Ky.) 102; Bradford v. Patterson, 1 A. K. Marsh. (Ky.) 464; Kelly v. Keizer, 3 A. K. Marsh. (Ky.) 268; Bonar v. Gosney, 17 Ky. L. Rep. 92, (Ky. 1895) 30 S. W. Rep. 602. See also Ballard v. Davis, 3 J. J. Marsh. (Ky.) 656.

*Louisiana.* — Balio v. Wilson, 12 Mart. (La.) 358; Factors, etc., Ins. Co. v. New Harbor Protection Co., 39 La. Ann. 583; State v. Judge, 27 La. Ann. 214; State v. Accommodation Bank, 28 La. Ann. 874.

*Maine.* — Limerick, Petitioner, 18 Me. 183.

*Maryland.* — Kemp v. Cook, 18 Md. 131, 79 Am. Dec. 681; Montgomery v. Murphy, 19 Md. 576, 81 Am. Dec. 654; Dorsey v. Gary, 37 Md. 74, 11 Am. Rep. 528.

*Massachusetts.* — Radclyffe v. Barton, 154 Mass. 157.

*Michigan.* — Whitwell v. Emory, 3 Mich. 84, 59 Am. Dec. 220.

*Minnesota.* — Windom v. Wolverton, 40 Minn. 439.

*Mississippi.* — Shackelford v. Levy, 63 Miss. 125; Sagory v. Bayless, 13 Smed. & M. (Miss.) 153.

*Missouri.* — Ashby v. Glasgow, 7 Mo. 320; Harrison v. State, 10 Mo. 686; Stacker v. Cooper Circuit Ct., 25 Mo. 401; Harbor v. Pacific R. Co., 32 Mo. 423; Murdock v. Ganahl, 47 Mo. 135; State v. County Ct., 51 Mo. 522; State v. Harper, 56 Mo. App. 611; Wooldridge v. Quinn, 70 Mo. 370; Scales v. Scales, 65



*b. TO WHAT JUDGMENTS THE RULE APPLIES.* — This rule, however, applies only to final judgments, and has no application to a judgment or order which does not put an end to the proceedings, but leaves them *in fieri*,<sup>1</sup> as

Mo. App. 292; Atkinson *v.* Atchison, etc., R. Co., 81 Mo. 50; Ross *v.* Ross, 83 Mo. 100.

Montana. — Boyd *v.* Platner, 5 Mont. 226; Fredericks *v.* Davis, 6 Mont. 460.

Nebraska. — Barnes *v.* Hale, 44 Neb. 355.  
New Hampshire. — Laighton *v.* Lord, 29 N. H. 237.

New Jersey. — Den *v.* Morse, 12 N. J. L. 331.  
New York. — Killpatrick *v.* Rose, 9 Johns.

(N. Y.) 78; Stannard *v.* Hubbell, 123 N. Y. 520; Ray *v.* Connor, 3 Edw. (N. Y.) 478; Matter of Humfreville, 8 N. Y. App. Div. 312;

Gardner *v.* Dering, 2 Edw. (N. Y.) 131; Heert *v.* Cruger, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 508; Bennett *v.* Winter, 2 Johns. Ch. (N. Y.) 205; Heath *v.* New York Bldg. Loan Banking Co., 84 Hun (N. Y.) 302; Allen *v.* Smillie, (Supm. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 354;

Duryea *v.* Fuechsel, 76 Hun (N. Y.) 404; Jones *v.* Newton, (Supm. Ct. Gen. T.) 47 N. Y. St. Rep. 217; Chamberlain *v.* Chamberlain, 63 Hun (N. Y.) 96; Parker *v.* Linden, 59 Hun (N. Y.) 359; McLean *v.* Stewart, 14 Hun (N. Y.) 472;

Kingsland *v.* New York, 42 Hun (N. Y.) 599; Rockwell *v.* Carpenter, 25 Hun (N. Y.) 529; Allen *v.* Swan, 32 Hun (N. Y.) 363; Adams *v.* Ash, 46 Hun (N. Y.) 105. See also *Hotaling v. Marsh*, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 161; Mackay *v.* Dennington, 82 Hun (N. Y.) 509.

North Carolina. — Hinton *v.* Virginia L. Ins. Co., 116 N. Car. 22; Dobson *v.* Simonton, 100 N. Car. 56. See also Wilson *v.* Myers, 4 Hawks (11 N. Car.) 73, 15 Am. Dec. 510.

Ohio. — Cleveland Leader Printing Co. *v.* Green, 52 Ohio St. 487, 49 Am. St. Rep. 725; Botkin *v.* Pickaway County, 1 Ohio 375, 13 Am. Dec. 630.

Oregon. — Farmers' Loan Co. *v.* Oregon Pac. R. Co., 28 Oregon 44.

Pennsylvania. — Galbraith *v.* Galbraith, 6 Watts (Pa.) 112; McCutcheon *v.* Allen, 96 Pa. St. 319; Seitzinger *v.* New Era L. Assoc., 111 Pa. St. 557; Emerald Benev. Assoc. *v.* Burke, 9 Kulp (Pa.) 177; McCullough's Estate, 26 W. N. C. (Pa.) 398; Curran's Estate, 28 W. N. C. (Pa.) 96; White's Estate, 31 W. N. C. (Pa.) 159; Allen *v.* Gregg, 22 W. N. C. (Pa.) 520; Gannon *v.* Riel, 3 Lack. Leg. N. (Pa.) 68; Bonnell's Appeal, (Pa. 1886) 5 Cent. Rep. 739; Ullery *v.* Clark, 18 Pa. St. 148.

South Carolina. — Converse *v.* Converse, 9 Rich. Eq. (S. Car.) 535; Barrett *v.* James, 30 S. Car. 329; Garlington *v.* Copeland, 32 S. Car. 57; Ruff *v.* Elkin, 40 S. Car. 69.

South Dakota. — Sundback *v.* Griffith, 7 S. Dak. 109.

Tennessee. — Ocoee Bank *v.* Hughes, 2 Coldw. (Tenn.) 52; Franklin *v.* Franklin, 2 Swan (Tenn.) 521; Clark *v.* Lary, 3 Sneed (Tenn.) 77; Planters' Bank *v.* Fowlkes, 4 Sneed (Tenn.) 461; Meek *v.* Mathis, 1 Heisk. (Tenn.) 534; Saunders *v.* Gregory, 3 Heisk. (Tenn.) 567; State *v.* Bank of Commerce, 96 Tenn. 591.

Texas. — Imlay *v.* Brewster, 3 Tex. Civ. App. 103; Rogers *v.* East Line Lumber Co., 11 Tex. Civ. App. 108; Holland *v.* Preston, 12

Tex. Civ. App. 585; Smith *v.* Fox, (Tex. App. 1890) 15 S. W. Rep. 196; Green *v.* Brown, 4 Tex. App. Civ. Cas., § 163; Brownsville *v.* Basse, 43 Tex. 441; Milam County *v.* Robert-

son, 47 Tex. 222; Lindsay *v.* Jaffray, 55 Tex. 626; McKay *v.* Paris Exch. Bank, 75 Tex. 181, 16 Am. St. Rep. 884; Missouri Pac. R. Co. *v.* Haynes, 82 Tex. 448; Hinzle *v.* Kempner, 82 Tex. 617; Hedgecote *v.* Conner, (Tex. Civ. App. 1897) 43 S. W. Rep. 322.

Virginia. — Shipman *v.* Fletcher, 91 Va. 473. See also Cralle *v.* Cralle, 84 Va. 198.

Washington. — Hawks *v.* Votaw, 1 Wash. 70; State *v.* Langhorne, 12 Wash. 588.

West Virginia. — Morris *v.* Peyton, 29 W. Va. 201; Crawford *v.* Fickey, 41 W. Va. 544; Barbour County Ct. *v.* O'Neal, 42 W. Va. 295.

Wisconsin. — Smith *v.* Armstrong, 25 Wis. 517; Cole's Will, 52 Wis. 591; Boland *v.* Benson, 54 Wis. 387; Selz *v.* Ft. Atkinson First Nat. Bank, 60 Wis. 246; Williams *v.* Hayes, 68 Wis. 248.

Canada. — Bertrand *v.* Gagy, 9 L. C. Rep. 260. See also the title FINAL JUDGMENTS AND DECREES, vol. 13, p. 32, note 3.

A Report of a Referee, which has been confirmed and on which a final judgment has been entered, is not open to a motion at a subsequent term to correct an alleged error. Garrett *v.* Love, 90 N. Car. 368.

1. Rule Applies Only to Final Judgments — California. — Hastings *v.* Cunningham, 35 Cal. 549.

Colorado. — Carson Min. Co. *v.* Hill, 7 Colo. App. 141.

Indiana. — McClellan *v.* Binkley, 78 Ind. 504; Cox *v.* Dill, 85 Ind. 336; Stout *v.* Duncan, 87 Ind. 388; Chicago, etc., R. Co. *v.* Johnston, 89 Ind. 88; Ryon *v.* Thomas, 104 Ind. 59.

Kentucky. — Royse *v.* Royse, (Ky. 1896) 34 S. W. Rep. 1068.

Massachusetts. — Pingree *v.* Coffin, 12 Gray (Mass.) 288; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Com. *v.* Foster, 122 Mass. 317.

Mississippi. — Cook *v.* Bay, 4 How. (Miss.) 485.

Missouri. — Loring *v.* Groomer, 110 Mo. 632; Aull *v.* Day, 133 Mo. 337.

New York. — Mingay *v.* Lackey, 142 N. Y. 449.

North Carolina. — Winslow *v.* Anderson, 3 Dev. & B. L. (20 N. Car.) 9, 32 Am. Dec. 651.

Pennsylvania. — McCoy *v.* Porter, 17 S. & R. (Pa.) 59.

South Carolina. — Chaplin *v.* Jenkins, 2 Strobb. Eq. (S. Car.) 96.

Tennessee. — Morris *v.* Richardson, 11 Humph. (Tenn.) 389; Franklin *v.* Franklin, 2 Swan (Tenn.) 521; Delap *v.* Hunter, 1 Sneed (Tenn.) 101; Rutherford *v.* Richardson, 1 Sneed (Tenn.) 609; Helms *v.* Mynatt, 6 Coldw. (Tenn.) 215; Abbott *v.* Fagg, 1 Heisk. (Tenn.) 742; Harrison *v.* Farnsworth, 1 Heisk. (Tenn.) 751; Allen *v.* McCullough, 2 Heisk. (Tenn.) 174, 5 Am. Rep. 27.

Texas. — Houston *v.* Blythe, 71 Tex. 719.

West Virginia. — Clarke *v.* Ohio River R. Co., 39 W. Va. 732.



in the case of an interlocutory judgment,<sup>1</sup> such as an order for partition or for a sale in case partition cannot be made.<sup>2</sup>

**2. As to Matters of Form** — *a. GENERAL RULE.* — It is a power inherent in the authority of every court having general jurisdiction, to correct errors in the making up of its records, whereby they fail to express the truth in regard to its proceedings, and this power may be exercised by the court at any time when an error is brought to its attention, when no injury is likely to result to the parties or other persons by its exercise.<sup>3</sup> Therefore the court may at any time, even after the expiration of the term at which a judgment was rendered, correct or amend the entry thereof so as to make it conform to the judgment which the court actually rendered.<sup>4</sup>

**1. Rule Does Not Apply to Interlocutory Judgment.** — *Aull v. Day*, 133 Mo. 337; *Loring v. Groomer*, 110 Mo. 632; *Mingay v. Lackey*, 142 N. Y. 449; *Houston v. Blythe*, 71 Tex. 719.

**2. Rule Does Not Apply to Order for Partition or Sale.** — See *Hastings v. Cunningham*, 35 Cal. 549.

**3. Inherent Power of Court.** — *Odell v. Reynolds*, 70 Fed. Rep. 656. See also *Gilmer v. Grand Rapids*, 16 Fed. Rep. 708; *In re Wight*, 134 U. S. 136; *Emery v. Whitwell*, 6 Mich. 474; *Frink v. Frink*, 43 N. H. 508, 80 Am. Dec. 189.

**4. Entry May Be Amended or Corrected So as to Conform to Judgment Actually Rendered** — *England*. — *Hatton v. Harris*, (1892) A. C. 547; *Paddon v. Bartlett*, 5 N. & M. 384; *Green v. Bennet*, 1 T. R. 782.

*United States.* — *Jenkins v. Eldredge*, 1 Woodb. & M. (U. S.) 61; *Brush v. Robbins*, 3 McLean (U. S.) 486; *Robinson v. Rudkins*, 28 Fed. Rep. 8; *Odell v. Reynolds*, 70 Fed. Rep. 656, 37 U. S. App. 447; *Pierce v. Turner*, 1 Cranch (C. C.) 433; *U. S. Bank v. Moss*, 6 How. (U. S.) 31; *Hickman v. Ft. Scott*, 141 U. S. 415.

*Alabama.* — *Jordan v. Bell*, 8 Port. (Ala.) 53; *Brown v. Bartlett*, 2 Ala. 29; *Allen v. Bradford*, 3 Ala. 281, 37 Am. Dec. 689; *Harvey v. Jeter*, 7 Ala. 688; *Hood v. Branch of State Bank*, 9 Ala. 335; *Gibson v. Wilson*, 18 Ala. 63; *Harris v. Billingsley*, 18 Ala. 438; *Lee v. Houston*, 20 Ala. 301; *Wainright v. Sanders*, 20 Ala. 602; *Glass v. Glass*, 24 Ala. 468; *Dumas v. Hunter*, 30 Ala. 188; *Whitten v. Graves*, 40 Ala. 578; *Russell v. Erwin*, 41 Ala. 292; *Ex p. Henderson*, 84 Ala. 36; *Myers v. Conway*, 90 Ala. 109; *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634; *Garner v. Garner*, 107 Ala. 242; *Burdshaw v. Comer*, 108 Ala. 617.

*Arkansas.* — *Portis v. Talbot*, 33 Ark. 218.

*California.* — *Morrison v. Dapman*, 3 Cal. 255; *Anderson v. Parker*, 6 Cal. 197; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565; *Browner v. Davis*, 15 Cal. 9; *Swain v. Naglee*, 19 Cal. 127; *De Castro v. Richardson*, 25 Cal. 49; *Hegeler v. Henckell*, 27 Cal. 491; *Will v. Sinkwitz*, 41 Cal. 588; *Rousset v. Boyle*, 45 Cal. 64; *Matter of Schroeder*, 46 Cal. 305; *Dreyfuss v. Tompkins*, 67 Cal. 339; *In re Mahon*, 71 Cal. 586; *San Joaquin Land, etc., Co. v. West*, 99 Cal. 345; *Matter of Thompson*, 101 Cal. 349; *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321.

*Colorado.* — *Doane v. Glenn*, 1 Colo. 454; *Pleyte v. Pleyte*, 15 Colo. 44; *Gaynor v. Clements*, 16 Colo. 209; *Breene v. Booth*, 6 Colo. App. 140; *Wolfley v. Lebanon Min. Co.*, 3 Colo. 296.

*Connecticut.* — *Wilkie v. Hall*, 15 Conn. 37; *Weed v. Weed*, 25 Conn. 344; *Waldo v. Spencer*, 4 Conn. 77.

*Florida.* — *Adams v. Re Qua*, 22 Fla. 250, 1 Am. St. Rep. 191; *Adams v. Higgins*, 23 Fla. 13; *McLane v. Piaggio*, 24 Fla. 71; *McGriff v. Ried*, 37 Fla. 51.

*Illinois.* — *Smith v. Wilson*, 26 Ill. 186; *Newman v. Chicago*, 153 Ill. 466; *Hogue v. Corbit*, 156 Ill. 540, 47 Am. St. Rep. 232; *Morrison v. Stewart*, 21 Ill. App. 113; *Littlefield v. Schmoldt*, 24 Ill. App. 624; *Woodard v. People*, 56 Ill. App. 45.

*Indiana.* — *Lambert v. Blackman*, 1 Blackf. (Ind.) 59; *Fite v. Doe*, 1 Blackf. (Ind.) 127; *King v. Anthony*, 2 Blackf. (Ind.) 131; *Smith v. Myers*, 5 Blackf. (Ind.) 223; *McManus v. Richardson*, 8 Blackf. (Ind.) 100; *Silner v. Butterfield*, 2 Ind. 24; *Lippencott v. Wygant*, 2 Ind. 661; *State v. Cross*, 5 Ind. 387; *Wasson v. Beauchamp*, 11 Ind. 18; *Burson v. Blair*, 12 Ind. 371; *Jenkins v. Long*, 23 Ind. 460; *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263; *Goodwine v. Hedrick*, 29 Ind. 383; *Temple v. Irvin*, 34 Ind. 412; *Sherman v. Nixon*, 37 Ind. 153; *Latta v. Griffith*, 57 Ind. 329; *Bales v. Brown*, 57 Ind. 282; *Miller v. Royce*, 60 Ind. 189; *Hughes v. Hinds*, 69 Ind. 93; *Reily v. Burton*, 71 Ind. 118; *Conway v. Day*, 79 Ind. 318, 92 Ind. 422; *Ellis v. Keller*, 82 Ind. 524; *Stuart v. Logansport*, 87 Ind. 584; *Gray v. Robinson*, 90 Ind. 527; *Runnels v. Kaylor*, 95 Ind. 503; *People's Sav., etc., Assoc. v. Spears*, 115 Ind. 297; *Stratton v. Lockhart*, 1 Ind. App. 380; *Hunt v. Markle*, 12 Ind. App. 335. See also *Strange v. Tyler*, 95 Ind. 396.

*Iowa.* — *Knox v. Moser*, 72 Iowa 154; *Deere v. Nelson*, 73 Iowa 186; *Reed v. Lane*, 96 Iowa 454.

*Kansas.* — *Morris v. Bunyan*, 58 Kan. 210; *Birmingham v. Leonhardt*, 2 Kan. App. 513.

*Kentucky.* — *Speed v. Hann*, 1 T. B. Mon. (Ky.) 16, 15 Am. Dec. 78; *Scroggin v. Scroggin*, 1 J. J. Marsh. (Ky.) 362; *Smith v. Todd*, 3 J. J. Marsh. (Ky.) 299; *Graham v. Lynn*, 4 B. Mon. (Ky.) 18, 39 Am. Dec. 493; *Smith v. Mullins*, 3 Met. (Ky.) 182; *Johnson v. State Bank*, 2 Duv. (Ky.) 521; *Long v. Gaines*, 4 Bush (Ky.) 354; *Finnell v. Jones*, 7 Bush (Ky.) 359; *Seiler v. Northern Bank*, 86 Ky. 128; *Brown v. U. S. Home, etc., Assoc.*, (Ky. 1890) 13 S. W. Rep. 1085; *Young v. Sadler*, (Ky. 1893) 24 S. W. Rep. 877; *Emison v. Walker*, 17 Ky. L. Rep. 238, (Ky. 1895) 31 S. W. Rep. 461; *Treasy v. Moore*, 18 Ky. L. Rep. 421, (Ky. 1896) 36 S. W. Rep. 1132. See also *Daviess County Ct. v. Howard*, 13 Bush (Ky.) 101.

*Louisiana.* — *Thompson v. Comeau*, 23 La.



*b. APPLICATIONS OF THE RULE*—(1) *Natural Applications*.—Specific instances of the natural applications of the rule above stated might be multiplied almost indefinitely; but without going into unnecessary details, it is sufficient to say that the most common applications consist in the correction

Ann. 556; *State v. Cox*, 33 La. Ann. 1056; *Mullan v. His Creditors*, 39 La. Ann. 397; *Goldman v. Goldman*, 47 La. Ann. 1463.

*Maine*.—Hall v. Williams, 10 Me. 278; *Chase v. Gilman*, 15 Me. 64; *Limerick, Petitioner*, 18 Me. 183; *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49.

*Maryland*.—Duvall v. Wells, 4 Har. & M. (Md.) 164; *Ecker v. New Windsor First Nat. Bank*, 64 Md. 292.

*Massachusetts*.—Atkins v. Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Bacon v. Lincoln*, 2 Cush. (Mass.) 124; *Balch v. Shaw*, 7 Cush. (Mass.) 282; *Fay v. Wenzell*, 8 Cush. (Mass.) 315; *Rugg v. Parker*, 7 Gray (Mass.) 172; *Com. v. Magoun*, 14 Gray (Mass.) 398. See also *Savage v. Blanchard*, 148 Mass. 348.

*Michigan*.—Ship Milwaukee v. Hale, 1 Dougl. (Mich.) 306; *Hall v. Grovier*, 25 Mich. 428; *Hiaawatha v. The Steere*, 90 Mich. 270.

*Minnesota*.—Bilansky v. State, 3 Minn. 427; *Dodge v. Chandler*, 13 Minn. 114; *La Crosse, etc., Steam Packet Co. v. Robertson*, 13 Minn. 291; *McClure v. Bruck*, 43 Minn. 305; *Hall v. Merrill*, 47 Minn. 260; *Nell v. Dayton*, 47 Minn. 257.

*Missouri*.—Hickman v. Barnes, 1 Mo. 156; *Fugate v. Glasscock*, 7 Mo. 577; *Hull v. Dowdall*, 20 Mo. 359; *Turner v. Christy*, 50 Mo. 145; *Allen v. Sales*, 56 Mo. 28; *Robertson v. Neal*, 60 Mo. 579; *State v. Primm*, 61 Mo. 166; *Harlan v. Moore*, 132 Mo. 483; *Evans v. Fisher*, 26 Mo. App. 541; *L. H. Rumsey Mfg. Co. v. Baker*, 35 Mo. App. 217.

*Montana*.—Quigley v. Birdseye, 11 Mont. 439.

*Nebraska*.—State v. Moran, 24 Neb. 103; *Grimes v. Grosjean*, 24 Neb. 700; *Brownlee v. Davidson*, 28 Neb. 785; *Becker v. Simonds*, 33 Neb. 680; *Hoagland v. Way*, 35 Neb. 387.

*New Hampshire*.—Chase v. Wyeth, 17 N. H. 486; *Eastman v. Concord*, 64 N. H. 263.

*New Jersey*.—Dewey v. Ten Eyck, 3 N. J. L. 576; *Hood v. Spaeth*, 51 N. J. L. 129; *King v. Ruckman*, 22 N. J. Eq. 551.

*New York*.—Seaman v. Drake, 1 Cai. (N. Y.) 9; *Tillotson v. Cheetham*, 3 Johns. (N. Y.) 95; *Close v. Gillespey*, 3 Johns. (N. Y.) 526; *Sing v. Annin*, 10 Johns. (N. Y.) 302; *People v. M'Donald*, 1 Cow. (N. Y.) 189; *Murray v. Blachford*, 2 Wend. (N. Y.) 221; *Wilson v. Gale*, 4 Wend. (N. Y.) 623; *Moore v. Tracy*, 7 Wend. (N. Y.) 229; *Adams v. Ash*, 46 Hun (N. Y.) 105; *Martin v. Huyler*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 66; *Sexton v. Bennett*, 63 Hun (N. Y.) 624, 17 N. Y. Supp. 437; *Smith v. Coe*, 7 Robt. (N. Y.) 477; *Jordan v. Posey*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 123; *Wight v. Alden*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 213; *De Agreda v. Mantel*, (N. Y. Super. Ct. Spec. T.) 1 Abb. Pr. (N. Y.) 130; *Daly v. Matthews*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 403, note, 20 How. Pr. (N. Y.) 267; *Rauth v. New York El. R. Co.*, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 95; *Taylor v. Taylor*, (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 743, 7 N. Y. Supp. 880; *Robertson v. Hay*, (C. Pl.

Gen. T.) 12 Misc. (N. Y.) 7; *Granite State Provident Assoc. v. McHugh*, (Supm. Ct. Gen. T.) 34 N. Y. Supp. 341; *Palmer v. Lawrence*, 5 N. Y. 455; *Chautauqua County Bank v. White*, 23 N. Y. 347; *New York Ice Co. v. North Western Ins. Co.*, 23 N. Y. 357, 12 Abb. Pr. (N. Y.) 414, 21 How. Pr. (N. Y.) 296; *Buckingham v. Dickinson*, 54 N. Y. 682; *Guernsey v. Miller*, 80 N. Y. 181; *Kenney v. Apgar*, 93 N. Y. 539; *Corn Exch. Bank v. Blye*, 119 N. Y. 414; *Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546; *Toronto Gen. Trust Co. v. Chicago, etc.*, R. Co., 123 N. Y. 37; *Roberts v. Buckley*, 145 N. Y. 215.

*North Carolina*.—Wilson v. Myers, 4 Hawks (11 N. Car.) 73, 15 Am. Dec. 510; *Brady v. Beason*, 6 Ired. L. (28 N. Car.) 425; *Griffin v. Hinson*, 6 Jones L. (51 N. Car.) 154; *Strickland v. Strickland*, 95 N. Car. 471; *State v. Warren*, 95 N. Car. 674; *Brooks v. Stephens*, 100 N. Car. 297; *Beam v. Bridgers*, 111 N. Car. 269.

*North Dakota*.—Tyler v. Shea, 4 N. Dak. 377.

*Ohio*.—Hammer v. McConnel, 2 Ohio 31; *Nigh v. Stillwell, etc., Co.*, 12 Ohio Cir. Ct. 40, 5 Ohio Cir. Dec. 335; *State v. Beam*, 3 Ohio St. 508; *Doty v. Rigour*, 9 Ohio St. 519; *Elliott v. Plattor*, 43 Ohio St. 198.

*Pennsylvania*.—Stephens v. Cowan, 6 Watts (Pa.) 511; *Scranton v. Hull*, 3 Lack. Leg. N. (Pa.) 99; *Gourley v. Hess*, 8 W. N. C. (Pa.) 140; *Smith v. Hood*, 25 Pa. St. 218, 64 Am. Dec. 692. See also *Seitzinger v. New Era L. Assoc.*, 111 Pa. St. 557.

*South Carolina*.—Chafee v. Rainey, 21 S. Car. 17; *Wood v. Reeves*, 23 S. Car. 388; *Crane v. Lipscomb*, 24 S. Car. 430; *Gowan v. Gentry*, 32 S. Car. 369; *Knox v. Moore*, 41 S. Car. 355.

*Tennessee*.—Fanning v. Fly, 2 Coldw. (Tenn.) 486; *Provident Sav. L. Assur. Soc. v. Edmonds*, 95 Tenn. 53.

*Texas*.—Clapp v. Walters, 2 Tex. 130; *Underwood v. Parrott*, 2 Tex. 168; *Chambers v. Hodges*, 3 Tex. 517; *Swift v. Faris*, 11 Tex. 18; *Texas, etc., R. Co. v. Connor*, 13 Tex. Civ. App. 423; *Morris v. Coleman County*, (Tex. Civ. App. 1896) 35 S. W. Rep. 29. See also *Milam County v. Robertson*, 47 Tex. 222.

*Vermont*.—Peaslee v. Barney, 1 D. Chip. (Vt.) 331.

*Virginia*.—Marr v. Miller, 1 Hen. & M. (Va.) 204; *Snead v. Coleman*, 7 Gratt. (Va.) 300, 56 Am. Dec. 112; *Davis v. Com.*, 16 Gratt. (Va.) 134; *Shipman v. Fletcher*, 91 Va. 473.

*Washington*.—Seattle, etc., R. Co. v. Johnson, 7 Wash. 97.

*West Virginia*.—Stringer v. Anderson, 23 W. Va. 482.

*Wisconsin*.—Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; *Schmidt v. Gilson*, 14 Wis. 514; *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Wyman v. Buckstaff*, 24 Wis. 477; *Durning v. Burkhardt*, 34 Wis. 585; *Scheer v. Keown*, 34 Wis. 349; *Quaw v. Lamerach*, 36 Wis. 626;



of clerical errors or misprisions.<sup>1</sup> Thus the judgment may be amended by striking out erroneous entries,<sup>2</sup> supplying omissions,<sup>3</sup> or inserting matter for the purpose of removing any apparent ambiguity,<sup>4</sup> or giving effect to the judgment.<sup>5</sup>

**Mistake in Date.** — A mistake in the date of a judgment may be corrected.<sup>6</sup>

**Mistake in Amount.** — And so may also a mistake in the amount of the judgment, whether a mere clerical error,<sup>7</sup> or the result of a mistake in

Cole's Will, 52 Wis. 591; *Williams v. Hayes*, 68 Wis. 248; *State v. Delafield*, 69 Wis. 264.

**Power Extends to Both Civil and Criminal Cases.** — *Anonymous*, 1 Gall. (U. S.) 22; *Ex p. Jones*, 61 Ala. 399; *State v. Seaborn*, 4 Dev. L. (15 N. Car.) 319; *Young v. State*, 6 Ohio 435; *Sharff v. Com.*, 2 Binn. (Pa.) 514; *State v. Williams*, 2 McCord L. (S. Car.) 301.

**1. Correction of Clerical Errors or Misprisions — United States.** — *Brush v. Robbins*, 3 McLean (U. S.) 486; *U. S. Bank v. Moss*, 6 How. (U. S.) 31; *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 744.

*Alabama.* — *Pettus v. McClannahan*, 52 Ala. 55; *Whorley v. Memphis, etc., R. Co.*, 72 Ala. 20, 74 Ala. 264. See also *Johnson v. Glascok*, 2 Ala. 522.

*California.* — *Smith v. His Creditors*, 59 Cal. 267; *Dreyfuss v. Tompkins*, 67 Cal. 339.

*Colorado.* — *Pleyte v. Pleyte*, 15 Colo. 44.

*Illinois.* — *O'Conner v. Mullen*, 11 Ill. 57; *Ives v. Hulce*, 17 Ill. App. 30.

*Indiana.* — *Burson v. Blair*, 12 Ind. 371; *Conway v. Day*, 79 Ind. 318; *Stuart v. Logansport*, 87 Ind. 584.

*Kentucky.* — *Finnell v. Jones*, 7 Bush (Ky.) 359.

*Maryland.* — *Waters v. Engle*, 53 Md. 179; *Duval v. Wells*, 4 Har. & M. (Md.) 164.

*Michigan.* — *Grand Rapids Sav. Bank v. Widdicomb*, 114 Mich. 639.

*Missouri.* — *Farley v. Cammann*, 43 Mo. App. 168; *Cauthorn v. Berry*, 69 Mo. App. 404.

*West Virginia.* — *Morris v. Peyton*, 29 W. Va. 201.

See also cases cited in preceding section.

**2. Striking Out Erroneous Entries — Alabama.** — *Petree v. Wilson*, 104 Ala. 157.

*Minnesota.* — *Chase v. Whitten*, 62 Minn. 498.

*New York.* — *Brusie v. Peck*, 62 Hun (N. Y.) 248; *Card v. Meincke*, 70 Hun (N. Y.) 382;

*Petrie v. Hamilton College*, 92 Hun (N. Y.) 81;

*People v. Alden*, (Supm. Ct. Spec. T.) 13 Civ. Pro. (N. Y.) 317; *Riggs v. Chapin*, (N. Y. City Ct. Gen. T.) 7 N. Y. Supp. 765; *Goldstein v. Parker*, (N. Y. Super. Ct. Gen. T.) 30 N. Y. St. Rep. 245; *Mannion v. Broadway, etc., R. Co.*, (Supm. Ct. Spec. T.) 18 Civ. Pro. (N. Y.) 40; *Vandenburgh v. New York City Cent. Underground R. Co.*, 57 N. Y. Super. Ct. 285.

*Wisconsin.* — *Williams v. Hayes*, 68 Wis. 248.

*Wyoming.* — *O'Keefe v. Foster*, 5 Wyo. 343.

**3. Supplying Omissions — Alabama.** — *Whorley v. Memphis, etc., R. Co.*, 72 Ala. 20; *Nabers v. Meredith*, 67 Ala. 333.

*Arkansas.* — *Crane v. Crane*, 51 Ark. 287.

*California.* — *Dickey v. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321.

*Colorado.* — *Doane v. Glenn*, 1 Colo. 454.

*Georgia.* — *Gaines v. Wedgeworth*, 19 Ga. 31.

*Illinois.* — *Reid v. Morton*, 119 Ill. 118.

*Indiana.* — *Douglass v. Keehn*, 78 Ind. 199;

*Security Co. v. Arbuckle*, 123 Ind. 518.

*Iowa.* — *Thorp v. Platt*, 34 Iowa 314.

*Maine.* — *Lewis v. Ross*, 37 Me. 230, 59 Am. Dec. 49.

*Massachusetts.* — *Savage v. Blanchard*, 148 Mass. 348.

*Nebraska.* — *State v. Moran*, 24 Neb. 103.

*New York.* — *Lippe v. Metropolitan El. R. Co.*, (N. Y. Super. Ct. Gen. T.) 32 N. Y. St. Rep. 418; *Miller v. Morton*, 70 Hun (N. Y.) 61; *Gasz v. Strick*, (Buffalo Super. Ct. Gen. T.) 9 N. Y. Supp. 408; *McKelvey v. Lewis*, 44 N. Y. Super. Ct. 561.

*North Carolina.* — *Galloway v. McKeithen*, 5 Ired. L. (27 N. Car.) 12, 42 Am. Dec. 153.

*Texas.* — *Trammell v. Trammell*, 25 Tex. Supp. 261.

**4. Insertion of Matter to Remove Apparent Ambiguity.** — *Keene v. Welsh*, 8 Mont. 305.

**5. A Clause May Be Inserted to Give Effect to the Judgment**, where the record discloses the matter supplied. *Van Bergen v. Palmer*, 18 Johns. (N. Y.) 504; *Newburgh Bank v. Seymour*, 14 Johns. (N. Y.) 219; *Adams v. Ash*, 46 Hun (N. Y.) 105; *Trammell v. Trammell*, 25 Tex. Supp. 261. See also *Smith v. Miller*, 66 Tex. 74.

**6. Mistake in Date — England.** — *In re Cobbett*, 5 L. T. N. S. 285.

*United States.* — *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 744.

*Illinois.* — *Burnham v. Chicago*, 24 Ill. 496.

*Maryland.* — *Ecker v. New Windsor First Nat. Bank*, 64 Md. 292.

*Nebraska.* — *Grimes v. Grosjean*, 24 Neb. 700.

*New Hampshire.* — *Carlton v. Patterson*, 29 N. H. 580.

*New Jersey.* — *York v. Ackerman*, 3 N. J. L. 460; *Day v. Argus Printing Co.*, 47 N. J. Eq. 594; *Hood v. Spaeth*, 51 N. J. L. 129.

*New York.* — *Rogers v. Edmonds*, (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 749.

**7. Mistake in Amount of Judgment — Alabama.** — *Modawell v. Hudson*, 57 Ala. 75; *Sherry v. Priest*, 57 Ala. 410.

*Arkansas.* — *Arrington v. Conrey*, 17 Ark. 100.

*California.* — *Alpers v. Schammel*, 75 Cal. 590.

*Colorado.* — *Gaynor v. Clements*, 16 Colo. 209; *Kindel v. Beck, etc., Lith. Co.*, 19 Colo. 310.

*Georgia.* — *Alexander v. Troutman*, 1 Ga. 469.

*Indiana.* — *Weaver v. Field*, 1 Blackf. (Ind.) 334; *Sherman v. Nixon*, 37 Ind. 153; *Latta v. Griffith*, 57 Ind. 329; *Miller v. Royce*, 60 Ind. 189; *Daniels v. McGinnis*, 97 Ind. 549; *Pursley v. Wickle*, 4 Ind. App. 382.

*Kansas.* — *Clevenger v. Hansen*, 44 Kan. 182.

*Louisiana.* — *Goldman v. Goldman*, 47 La. Ann. 1463.

*Maine.* — *White v. Blake*, 74 Me. 489.



calculation.<sup>1</sup>

**Mistake as to Parties.** — A mistake in the names of the parties may be corrected,<sup>2</sup> and a name improperly entered may be struck out,<sup>3</sup> or the name of a party improperly omitted inserted.<sup>4</sup>

**Error in Description of Parties or Attorney.** — An error in the description of the parties may be corrected,<sup>5</sup> as may also an error in the description of the attorney.<sup>6</sup>

**Erroneous or Omitted Description of Land.** — An erroneous description of the land

*Michigan.* — Lyman *v.* Becannon, 29 Mich. 466

*Minnesota.* — Hodgins *v.* Heaney, 15 Minn. 185; Brown *v.* Lawler, 21 Minn. 327; Knap-  
pen *v.* Freeman, 47 Minn. 491.

*Nevada.* — Howard *v.* Richards, 2 Nev. 128.

*New Jersey.* — Coxe *v.* Field, 13 N. J. L. 217.

*New York.* — Hunt *v.* Grant, 19 Wend. (N. Y.) 90; New York *v.* Lyons, 1 Daly (N. Y.) 296; Bagley *v.* Brown, 3 E. D. Smith (N. Y.) 66.

*North Carolina.* — Wall *v.* Covington, 83 N. Car. 144; Anthony *v.* Estes, 101 N. Car. 541.

*Ohio.* — Kellogg *v.* Churchill, 1 West. L. Month. 45, 2 Ohio Dec. (Reprint) 4.

*Pennsylvania.* — Smith *v.* Hood, 25 Pa. St. 218, 64 Am. Dec. 692; Budd *v.* Shoch, 1 Pa. Dist. 584.

*Texas.* — Stevens *v.* Lee, 70 Tex. 279; De Hymel *v.* Scottish-American Mortg. Co., 80 Tex. 493; Smith *v.* Fox, (Tex. App. 1890) 15 S. W. Rep. 196.

*Washington.* — Tacoma Lumber, etc., Co. *v.* Wolff, 7 Wash. 478.

*West Virginia.* — Triplett *v.* Lake, 43 W. Va. 428.

**1. Mistake in Calculation** — *Delaware.* — Walker *v.* Walker, 3 Harr. (Del.) 503.

*Indiana.* — Sidener *v.* Coons, 83 Ind. 183; Hughes *v.* Hinds, 69 Ind. 93.

*Kentucky.* — Seiler *v.* Northern Bank, 86 Ky. 128.

*Massachusetts.* — Bowers *v.* Hammond, 139 Mass. 360.

*Minnesota.* — Knappen *v.* Freeman, 47 Minn. 491.

*Mississippi.* — Poole *v.* McLeon, 1 Smed. & M. (Miss.) 392; Graves *v.* Fulton, 7 How. (Miss.) 592.

*Nevada.* — Feusier *v.* Virginia City, 3 Nev. 58.

*Tennessee.* — Rickman *v.* Rickman, 6 Lea (Tenn.) 483.

*Texas.* — Metz *v.* Bremond, 13 Tex. 394; Grier *v.* Powell, 14 Tex. 320.

*West Virginia.* — Morris *v.* Peyton, 29 W. Va. 201.

**Amendment So as to Include Interest.** — Commonwealth Bank *v.* Wister, 2 Pet. (U. S.) 318.

**2. Mistake in Name of Party** — *Alabama.* — Smith *v.* Redus, 9 Ala. 99, 44 Am. Dec. 429; Kennedy *v.* Young, 25 Ala. 563.

*California.* — Santa Monica First Nat. Bank *v.* Kowalsky, (Cal. 1893) 31 Pac. Rep. 1133.

*Georgia.* — Wright *v.* McBride, 42 Ga. 234; Hicks *v.* Riley, 83 Ga. 332.

*Illinois.* — Chandler *v.* Frost, 88 Ill. 559; Davenport *v.* Kirkland, 156 Ill. 169.

*Indiana.* — Bales *v.* Brown, 57 Ind. 282; McGaughey *v.* Woods, 106 Ind. 380.

*Kansas.* — Southern Kansas R. Co. *v.* Brown, 44 Kan. 681.

*Louisiana.* — Shelly *v.* Dobbins, 31 La. Ann. 530.

*Michigan.* — Merrick *v.* Mayhue, 40 Mich. 196; Barmon *v.* Clippert, 58 Mich. 377.

*Missouri.* — Parry *v.* Woodson, 33 Mo. 347, 84 Am. Dec. 51.

*Montana.* — Barber *v.* Briscoe, 9 Mont. 341.

*New Jersey.* — Probasco *v.* Probasco, 3 N. J. L. 565.

*New York.* — Sanders *v.* Pheubottom, 108 N. Y. 622; Marsh *v.* Berry, 7 Cow. (N. Y.) 344.

*North Carolina.* — Patterson *v.* Walton, 119 N. Car. 500.

*Texas.* — Chandler *v.* Scherer, 32 Tex. 573.

**3. Name Improperly Entered May Be Struck Out** — *Alabama.* — Renfro *v.* Willis, 67 Ala. 488; Neff *v.* Edwards, 81 Ala. 246; Brown *v.* Barnes, 93 Ala. 58.

*California.* — Mulliken *v.* Hull, 5 Cal. 245.

*Illinois.* — Heintz *v.* Pratt, 54 Ill. App. 616.

*Missouri.* — Hanly *v.* Dewes, 1 Mo. 16;

Crispen *v.* Hannovan, 86 Mo. 160; McClanahan *v.* West, 100 Mo. 309; State *v.* Tate, 109 Mo. 265, 32 Am. St. Rep. 664; L. H. Rumsey Mfg. Co. *v.* Baker, 35 Mo. App. 217.

*New York.* — Brittin *v.* Wilder, 6 Hill (N. Y.) 242; Vandenburg *v.* New York City Cent. Underground R. Co., 57 N. Y. Super. Ct. 285.

*Texas.* — Henderson *v.* Banks, 70 Tex. 398.

*Virginia.* — Gunn *v.* Turner, 21 Gratt. (Va.) 382.

*West Virginia.* — Carlon *v.* Ruffner, 12 W. Va. 298; Capehart *v.* Cunningham, 12 W. Va. 750.

**4. Names of Parties Improperly Omitted May Be Inserted** — *Alabama.* — Russell *v.* Erwin, 41 Ala. 292.

*Arkansas.* — Freeman *v.* Mears, 35 Ark. 278.

*Colorado.* — Breene *v.* Booth, 6 Colo. App. 140.

*Georgia.* — Walker *v.* Scott, 29 Ga. 392.

*Kentucky.* — Shackelford *v.* Fountain, 1 T. B. Mon. (Ky.) 252, 15 Am. Dec. 115.

*Montana.* — Comanche Min. Co. *v.* Rumley, 1 Mont. 201.

*New York.* — Jackson *v.* Young, 1 Cow. (N. Y.) 131; Knowlton *v.* Pierce, (Supm. Ct. Gen. T.) 41 How. Pr. (N. Y.) 361.

*Texas.* — Whittaker *v.* Gee, 63 Tex. 435.

**5. Error in Description of Parties** — *Arkansas.* — Crane *v.* Crane, 51 Ark. 287.

*Florida.* — Adams *v.* Re Qua, 22 Fla. 250, 1 Am. St. Rep. 191.

*Maryland.* — Kent *v.* Lyles, 7 Gill & J. (Md.) 73.

*Massachusetts.* — Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188.

*New York.* — Von Hatten *v.* Sholl, 1 N. Y. App. Div. 32; McElwain *v.* Corning, (Supm. Ct. Gen. T.) 12 Abb. Pr. (N. Y.) 16.

**6. Attorney at Law Instead of Attorney in Fact.** — Odell *v.* Reynolds, 70 Fed. Rep. 656.



involved may be corrected, or an omitted description inserted, by amendment at a subsequent term.<sup>1</sup>

(2) *Strained Application in the Interest of Justice* — (a) *In General*. — In some instances the rule which has been stated above is given a strained construction so as to promote the interests of justice. Thus, in cases where it clearly appears that a certain judgment should have been rendered as of course upon the facts appearing in the record, the court will assume that a different judgment was the result of a clerical error or misprision, and will amend the same so as to make it conform to the judgment which should have been rendered.<sup>2</sup>

(b) *Amendment as to Method of Payment*. — In a *New York* case, where the judgment directed that the defendants should tender to the plaintiff a certain sum within a specified time, in avoidance of an injunction restraining the defendants from maintaining and operating their elevated railroad in front of the plaintiff's premises, and the defendants were unable to find the plaintiff after diligent search, the court amended the judgment so as to permit the defendants to pay the money into court.<sup>3</sup>

3. *Evidence to Procure Amendment*. — While there are many cases which assert that an amendment of a judgment may be based on any satisfactory evidence,<sup>4</sup> the weight of authority supports the view that the amendment must be based on evidence contained in the record, at least where the error or mistake complained of is such that if it exists it should be apparent from the papers and records in the case.<sup>5</sup>

#### 1. Erroneous or Omitted Description of Land.

-- Taylor v. Harwell, 65 Ala. 1; Bushnell v. Crooke Min., etc., Co., 12 Colo. 247; Johnson v. Duncan, 90 Ga. 1; Wood v. Martin, 66 Barb. (N. Y.) 241; Converse v. Langshaw, 81 Tex. 275. But see Stringer v. Anderson, 23 W. Va. 482.

#### 2. Amendment of Judgment in Interest of Justice

— *Utah*. — Smith v. Kennedy, 63 Alt. 334; Ladiga Saw-Mill Co. v. Smith, 78 Ala. 108.

*California*. — Matter of Schroeder, 46 Cal. 376. See also Leviston v. Swan, 33 Cal. 480.

*Colorado*. — Doane v. Glenn, 1 Colo. 454.

*Illinois*. — Marine Bank Co. v. Mallers, 58 Ill. App. 232

*Indiana*. — Bain v. Goss, 123 Ind. 511.

*Kentucky*. — Norton v. Sanders, 7 J. J. Marsh. (Ky.) 12.

*Michigan*. — Emery v. Whitwell, 6 Mich. 474.

*Mississippi*. — Forbes v. Navra, 63 Miss. 1.

*Montana*. — Keene v. Welsh, 8 Mont. 305.

*New Jersey*. — Jones v. Davenport, 45 N. J. Eq. 77.

*New York*. — Stannard v. Hubbell, 123 N. Y. 524; Sprague v. Jones, 9 Paige (N. Y.) 252; Clark v. Hall, 7 Paige (N. Y.) 382; Vandenberg v. New York City Cent. Underground R. Co., 57 N. Y. Super. Ct. 285; Beitz v. Fuller, 92 Hun (N. Y.) 457; Gasz v. Strick, (Buffalo Super. Ct. Gen. T.) 9 N. Y. Supp. 408.

*North Carolina*. — Scott v. Queen, 95 N. Car. 340.

3. *Amendment as to Method of Payment* — Rauth v. New York El. R. Co., (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 95.

4. *Amendment May Be Based on Any Satisfactory Evidence* — *United States*. — Murphy v. Stewart, 2 How. (U. S.) 263. See also Hicklin v. Marco, 64 Fed. Rep. 609.

*Arkansas*. — Arrington v. Conrey, 17 Ark. 100; King v. State Bank, 9 Ark. 188, 47 Am. Dec. 739.

*Colorado*. — Doane v. Glenn, 1 Colo. 456; Breene v. Booth, 6 Colo. App. 140; People v. County Ct., 9 Colo. App. 41.

*Connecticut*. — Weed v. Weed, 25 Conn. 337. Compare Waldo v. Spencer, 4 Conn. 77; Leavensworth v. Tomlinson, 1 Root (Conn.) 437.

*Illinois*. — Gillett v. Booth, 95 Ill. 183; Forquer v. Forquer, 19 Ill. 68.

*Indiana*. — Mitchell v. Lincoln, 78 Ind. 531.

*Iowa*. — Stockdale v. Johnson, 14 Iowa 178.

*Maine*. — Limerick, Petitioner, 18 Me. 183.

*Massachusetts*. — Clark v. Lamb, 8 Pick. (Mass.) 415, 19 Am. Dec. 332; Rugg v. Parker, 7 Gray (Mass.) 172.

*Nebraska*. — Sullivan Sav. Inst. v. Clark, 12 Neb. 578.

*New Hampshire*. — Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189.

*North Carolina*. — Galloway v. McKeithen, 5 Ired. L. (27 N. Car.) 12, 42 Am. Dec. 153; State v. King, 5 Ired. L. (27 N. Car.) 203.

*Ohio*. — Hollister v. Judges, 8 Ohio St. 201, 70 Am. Dec. 100; Elliott v. Plattor, 43 Ohio St. 198.

*Wisconsin*. — Wyman v. Buckstaff, 24 Wis. 477.

*Recollection of Judge Held Sufficient*. — Wyman v. Buckstaff, 24 Wis. 477. But see note following.

5. *Amendment Should Be Based on Evidence Contained in the Record* — *United States*. — Albers v. Whitney, 1 Story (U. S.) 310.

*Alabama*. — Pettus v. McClannahan, 52 Ala. 55; Summersett v. Summersett, 40 Ala. 596, 91 Am. Dec. 494; Kemp v. Lyon, 76 Ala. 212; Leinkauff v. Tuskaloosa Sale, etc., Co., 105 Ala. 328.

*California*. — Morrison v. Dapman, 3 Cal. 255; Branger v. Chevalier, 9 Cal. 172; Swain v. Naglee, 19 Cal. 127; De Castro v. Richardson, 25 Cal. 49; Hegeler v. Henckell, 27 Cal. 491; Bostwick v. McEvoy, 62 Cal. 496; Alpers



4. **Notice.** — The necessity for notice of an amendment or correction of a judgment depends upon the circumstances of the particular case. Thus where a correction is made upon that which appears in the record itself, and is necessary to make it consistent and harmonious, one part with another, notice to the parties would seem to be unnecessary, for no new thing is brought upon the record, and there is nothing to litigate, and no right is substantially affected, but the court merely, for the clearer and more accurate expression of its final action, moulds into a form that which is easily deducible from its whole record taken together.<sup>1</sup> If the matter upon which the amendment is based rests in the recollection of the court, it is doubtful whether notice is required, for the reason that it is not open to contest; at all events, it would seem that corrections of a record based upon such matters would not be collaterally assailable though made without notice.<sup>2</sup> If, however, the action is based upon other evidence, it seems to be settled by the preponderance of authority that notice is required and that without it the proceeding for correction would be void.<sup>3</sup>

5. **Effect of Amendment as to Third Persons.** — Any material amendment of a judgment must be made with a saving of intervening rights, and it is proper to express this in the order allowing the amendment, by way of removing all

*v. Schammel*, 75 Cal. 590; *Fallon v. Brittan*, 84 Cal. 511.

*Florida.* — *Adams v. Higgins*, 23 Fla. 13.

*Georgia.* — *Pitman v. Lowe*, 24 Ga. 429; *Dixon v. Mason*, 68 Ga. 478.

*Illinois.* — *In re Barnes*, 27 Ill. App. 151; *Horner v. Horner*, 37 Ill. App. 199; *Stony Island Hotel Co. v. Johnson*, 57 Ill. App. 608; *Forquer v. Forquer*, 19 Ill. 68; *Hansen v. Schlesinger*, 125 Ill. 230; *Culver v. Cougle*, 165 Ill. 417; *Frew v. Danforth*, 126 Ill. 242.

*Indiana.* — *Boyd v. Blaisdell*, 15 Ind. 73; *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263; *Mitchell v. Lincoln*, 78 Ind. 531; *Ellis v. Keller*, 82 Ind. 524; *Williams v. Henderson*, 90 Ind. 577; *Conway v. Day*, 92 Ind. 422; *Brownlee v. Grant County*, 101 Ind. 401; *Johnson v. Moore*, 112 Ind. 91.

*Iowa.* — *Giddings v. Giddings*, 70 Iowa 486.

*Kentucky.* — *Long v. Gaines*, 4 Bush (Ky.) 354; *Finnell v. Jones*, 7 Bush (Ky.) 359; *Graham v. Lynn*, 4 B. Mon. (Ky.) 18, 39 Am. Dec. 493; *Stephens v. Wilson*, 14 B. Mon. (Ky.) 71; *Norton v. Sanders*, 7 J. J. Marsh. (Ky.) 12; *Bennett v. Tiernay*, 78 Ky. 580; *Seiler v. Northern Bank*, 86 Ky. 128.

*Louisiana.* — *Factors, etc., Ins. Co. v. New Harbor Protection Co.*, 39 La. Ann. 583; *Mullen v. His Creditors*, 39 La. Ann. 397.

*Mississippi.* — *Burney v. Boyett*, 1 How. (Miss.) 39; *Dickson v. Hoff*, 3 How. (Miss.) 165; *Russell v. McDougall*, 3 Smed. & M. (Miss.) 234; *Rhodes v. Sherrod*, 8 Smed. & M. (Miss.) 97; *Boon v. Boon*, 8 Smed. & M. (Miss.) 318; *Gray v. Thomas*, 12 Smed. & M. (Miss.) 111; *Moody v. Grant*, 41 Miss. 565; *Shackelford v. Levy*, 63 Miss. 125.

*Missouri.* — *State v. Clark*, 18 Mo. 432; *Saxton v. Smith*, 50 Mo. 490; *State v. Primm*, 61 Mo. 166; *Blize v. Castlio*, 8 Mo. App. 290; *McGonigle v. Bresnen*, 44 Mo. App. 423.

*Nebraska.* — *State v. Moran*, 24 Neb. 103.

*Nevada.* — *Solomon v. Fuller*, 14 Nev. 63.

*Oregon.* — *Nicklin v. Robertson*, 28 Oregon 278, 52 Am. St. Rep. 790.

*Texas.* — *Ramsey v. McCauley*, 9 Tex. 106, 58 Am. Dec. 134; *Stevens v. Lee*, 70 Tex. 279; *Missouri Pac. R. Co. v. Haynes*, 82 Tex. 448.

*Judge's Docket and Clerk's Minutes Part of Record for Purposes of Amendment.* — *State v. Primm*, 61 Mo. 166.

*Judge's Notes Incompetent to Amend Record By.* — *Rhodes v. Sherrod*, 8 Smed. & M. (Miss.) 97; *Boon v. Boon*, 8 Smed. & M. (Miss.) 318; *Dickson v. Hoff*, 3 How. (Miss.) 165; *Shackelford v. Levy*, 63 Miss. 125.

*Recollection of Judge Held Insufficient.* — *In re Barnes*, 27 Ill. App. 151; *Horner v. Horner*, 37 Ill. App. 199; *Stony Island Hotel Co. v. Johnson*, 57 Ill. App. 608; *Missouri Pac. R. Co. v. Haynes*, 82 Tex. 448. See preceding note.

1. **Notice Not Necessary Where Cause for Correction Appears in the Record.** — *Odell v. Reynolds*, 70 Fed. Rep. 656. See also *Dixon v. Mason*, 68 Ga. 478; *Sanders v. Williams*, 75 Ga. 283. *Compare* *Michael v. Mattoon*, 172 Ill. 394; *O'Conner v. Mullen*, 11 Ill. 57; *Gaines v. Mensing*, 64 Tex. 325.

2. **Notice Not Necessary Where Cause for Correction Rests in Recollection of the Judge.** — *Odell v. Reynolds*, 70 Fed. Rep. 656.

3. **Notice Necessary Where Correction Is Based upon Evidence Adduced Aliunde** — *England.* — *Wallis v. Thomas*, 7 Ves. Jr. 292.

*United States.* — *Odell v. Reynolds*, 70 Fed. Rep. 656.

*Alabama.* — *Nabers v. Meredith*, 67 Ala. 333.

*Arkansas.* — *Alexander v. Stewart*, 23 Ark. 18.

*California.* — *Scamman v. Bonstett*, 118 Cal. 93.

*Connecticut.* — *Weed v. Weed*, 25 Conn. 337; *Wooster v. Glover*, 37 Conn. 315.

*Illinois.* — *Cook v. Wood*, 24 Ill. 295; *Means v. Means*, 42 Ill. 50.

*Indiana.* — *Corwin v. Thomas*, 83 Ind. 110.

*Maine.* — *Rockland Water Co. v. Pillsbury*, 60 Me. 427.

*Minnesota.* — *Berthold v. Fox*, 21 Minn. 51.

*Mississippi.* — *Poole v. McLeod*, 1 Smed. & M. (Miss.) 391; *Forbes v. Navra*, 63 Miss. 1.

*Texas.* — *McNairy v. Castleberry*, 6 Tex. 286.

*Wisconsin.* — *Hill v. Hoover*, 5 Wis. 386, 68 Am. Dec. 70.



doubt,<sup>1</sup> but, whether expressed or not, the law makes the reservation.<sup>2</sup>

**VIII. OPENING AND VACATION AFTER TERM AT WHICH RENDERED — 1. General Rule Against Opening or Vacation.** — It is well settled as a general rule that a court has no power, after the expiration of the term at which a judgment is rendered, to open or vacate the same, or otherwise revise, modify, or correct the decision.<sup>3</sup>

**1. Order Allowing Amendment Should Provide for Protection of Intervening Rights of Third Persons.** — *Perdue v. Bradshaw*, 18 Ga. 287; *Ligon v. Rogers*, 12 Ga. 281; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388. But compare *Walton v. Pearson*, 85 N. Car. 34.

**2. Rights of Third Persons Protected Without Express Reservation.** — *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388. See also *Auerbach v. Gieseke*, 40 Minn. 258; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

**3. Court Cannot Open or Vacate Judgment After Term at Which Rendered** — *United States*. — *Cameron v. M'Roberts*, 3 Wheat. (U. S.) 591; *McMicken v. Perin*, 18 How. (U. S.) 507; *Brush v. Robbins*, 3 McLean (U. S.) 486; *Northern Bank v. Labitut*, 1 Woods (U. S.) 11; *Allen v. Wilson*, 21 Fed. Rep. 881; *Baptist v. Farwell Transp. Co.*, 29 Fed. Rep. 180; *U. S. v. Wallace*, 46 Fed. Rep. 569; *Grames v. Hawley*, 50 Fed. Rep. 319; *Austin v. Riley*, 55 Fed. Rep. 833; *Craven v. Canadian Pac. R. Co.*, 62 Fed. Rep. 170; *Klever v. Seawell*, 22 U. S. App. 458; *Bronson v. Schulten*, 104 U. S. 410; *Phillips v. Negley*, 117 U. S. 665; *U. S. v. Pile*, 130 U. S. 280; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207; *Medford v. Dorsey*, 2 Wash. (U. S.) 433.

*Alabama*. — *Slatter v. Glover*, 14 Ala. 648, 48 Am. Dec. 118; *Crothers v. Ross*, 15 Ala. 800; *Walker v. Hale*, 16 Ala. 26; *Noland v. Lock*, 16 Ala. 52; *Harris v. Billingsley*, 18 Ala. 438; *Kidd v. McMillan*, 21 Ala. 325; *Griffin v. Griffin*, 40 Ala. 296; *Ex p. Sims*, 44 Ala. 248; *Trawick v. Trawick*, 67 Ala. 271; *Buchanan v. Thomason*, 70 Ala. 401; *Kohn v. Haas*, 95 Ala. 478; *Soulard v. Vacuum Oil Co.*, 109 Ala. 387.

*Arizona*. — *Woffenden v. Woffenden*, 1 Ariz. 328.

*Arkansas*. — *Smith v. Stinnett*, 1 Ark. 497; *Byrd v. Brown*, 5 Ark. 709; *Ashley v. May*, 5 Ark. 408; *Little Rock v. Bullock*, 6 Ark. 282; *Ashley v. Hyde*, 6 Ark. 100, 42 Am. Dec. 685; *Cossitt v. Biscoe*, 12 Ark. 95; *Biscoe v. Sandefur*, 14 Ark. 568; *Rawdon v. Rapley*, 14 Ark. 203, 58 Am. Dec. 370; *Derton v. Boyd*, 21 Ark. 264; *Brooks v. Hanauer*, 22 Ark. 176; *McKnight v. Strong*, 25 Ark. 212; *Ex p. Hardy*, 26 Ark. 94; *Johnson v. Campbell*, 52 Ark. 316; *State Nat. Bank v. Neel*, 53 Ark. 110, 22 Am. St. Rep. 185; *Williams v. Reutzel*, 60 Ark. 155. See also *Siloam Springs v. McPhitridge*, 53 Ark. 21.

*Colorado*. — *Exchange Bank v. Ford*, 7 Colo. 314; *Exchange Bank v. Streeter*, (Colo. 1884) 4 Pac. Rep. 746.

*Connecticut*. — *Hall v. Paine*, 47 Conn. 429.

*District of Columbia*. — *Anderson v. Tinney*, 5 Mackey (D. C.) 335.

*Florida*. — *Internal Imp. Fund v. Bailey*, 10 Fla. 238.

*Georgia*. — *Camp v. Phillips*, 88 Ga. 415; *Clements v. Empire Lumber Co.*, 96 Ga. 319.

*Illinois*. — *Morgan v. Hays*, 1 Ill. 126, 12

Am. Dec. 147; *Garner v. Crenshaw*, 2 Ill. 143; *Lampsett v. Whitney*, 4 Ill. 170; *Cook v. Wood*, 24 Ill. 295; *Smith v. Wilson*, 26 Ill. 186; *Cox v. Brackett*, 41 Ill. 222; *McKindley v. Buck*, 43 Ill. 488; *Jansen v. Grimshaw*, 125 Ill. 468; *Cook County v. Calumet, etc., Canal, etc., Co.*, 131 Ill. 505; *Gage v. Chicago*, 141 Ill. 642; *Kelly v. Chicago*, 148 Ill. 90; *Ayer v. Chicago*, 149 Ill. 262; *Baldwin v. McClelland*, 152 Ill. 42; *McChesney v. Chicago*, 161 Ill. 110; *People v. McWethy*, 165 Ill. 222; *Hewetson v. Chicago*, 172 Ill. 112; *Schmidt v. Thomas*, 33 Ill. App. 109; *Maple v. Havenhill*, 37 Ill. App. 311; *Davies v. Coryell*, 37 Ill. App. 505; *Packer v. Roberts*, 40 Ill. App. 445; *Dunkelmann v. Brunnell*, 44 Ill. App. 438; *Leonard v. The Times*, 51 Ill. App. 427; *Kuehne v. Goit*, 54 Ill. App. 596; *Chambers v. Kirschhoff*, 57 Ill. App. 615; *Cohen v. Moore*, 59 Ill. App. 396; *Stettauer v. Chicago Title, etc., Co.*, 62 Ill. App. 31; *Kelley v. Heath, etc., Mfg. Co.*, 66 Ill. App. 528; *Fleet v. Gilbert*, 66 Ill. App. 678.

*Indiana*. — *Blair v. Russell*, 1 Ind. 516; *Bland v. State*, 2 Ind. 608.

*Iowa*. — *Emerson v. Tomlinson*, 4 Greene (Iowa) 398; *Fairbairn v. Dana*, 68 Iowa 231; *Walker v. Freelove*, 79 Iowa 752.

*Kentucky*. — *Bramblett v. Pickett*, 2 A. K. Marsh. (Ky.) 10, 12 Am. Dec. 350; *Bobb v. Bobb*, 2 A. K. Marsh. (Ky.) 240; *Kelly v. Keizer*, 3 A. K. Marsh. (Ky.) 268; *Carpenter v. Strother*, 16 B. Mon. (Ky.) 295; *Anderson v. Anderson*, 18 B. Mon. (Ky.) 95; *Newland v. Gentry*, 18 B. Mon. (Ky.) 666; *Megowan v. Pennebaker*, 3 Met. (Ky.) 502; *McManama v. Garnett*, 3 Met. (Ky.) 517; *Hocker v. Gentry*, 3 Met. (Ky.) 463; *Dawson v. Litsey*, 10 Bush (Ky.) 411; *Pepper v. Thomas*, 85 Ky. 539; *Kincaid v. Tutt*, 88 Ky. 392; *Schlosser v. Murnan*, (Ky. 1899) 49 S. W. Rep. 421. See also *Todd v. Dowd*, 1 Met. (Ky.) 284.

*Maryland*. — *Loney v. Bailey*, 43 Md. 10.

*Massachusetts*. — *Mason v. Pearson*, 118 Mass. 61; *Wood v. Payea*, 138 Mass. 61; *Radclyffe v. Barton*, 154 Mass. 157.

*Michigan*. — *Whitwell v. Emory*, 3 Mich. 84, 59 Am. Dec. 220.

*Mississippi*. — *Shirley v. Conway*, 44 Miss. 434; *Cotten v. McGehee*, 54 Miss. 621; *Alabama, etc., R. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541.

*Missouri*. — *Lindell v. State Bank*, 4 Mo. 228, 315; *Ashby v. Glasgow*, 7 Mo. 320; *Peake v. Redd*, 14 Mo. 79; *Hill v. St. Louis*, 20 Mo. 584; *Brewer v. Dinwiddie*, 25 Mo. 351; *Harbor v. Pacific R. Co.*, 32 Mo. 423; *Downing v. Still*, 43 Mo. 309; *L. H. Rumsey Mfg. Co. v. Baker*, 35 Mo. App. 217; *Orvis v. Elliott*, 65 Mo. App. 96.

*Nebraska*. — *Carlow v. Aultman*, 28 Neb. 672; *McBrien v. Riley*, 38 Neb. 561.

*Nevada*. — *State v. State First Nat. Bank*, 4 Nev. 358; *Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337.



**2. Grounds upon Which Judgments May Be Opened or Vacated — a. INTRODUCTORY.** — The above rule is, however, subject to many limitations and exceptions; for there are many grounds which are recognized as sufficient to warrant the opening or vacation<sup>1</sup> of a judgment after the term at which it was rendered. These will now be discussed in detail.

**b. JUDGMENT VOID — LACK OF JURISDICTION.** — A court may, at any time, vacate or set aside a judgment which is void,<sup>2</sup> as, for example, a judgment rendered where there was a lack of the necessary jurisdiction, whether through omission or defect of service, or otherwise.<sup>3</sup>

*New Hampshire.* — Probate Judge *v.* Webster, 46 N. H. 518.

*North Carolina.* — Simms *v.* Thompson, 1 Dev. Eq. (16 N. Car.) 197; Dunns *v.* Batchelor, 3 Dev. & B. L. (20 N. Car.) 54; Ramsour *v.* Raper, 7 Ired. L. (29 N. Car.) 346; State *v.* Auman, 13 Ired. L. (35 N. Car. 241); Murphy *v.* Merriitt, 63 N. Car. 502; Moore *v.* Hinnant, 90 N. Car. 163; State *v.* Bennett, 93 N. Car. 503; Clemmons *v.* Field, 99 N. Car. 400, 6 Am. St. Rep. 529.

*Ohio.* — Guernsey County *v.* Cambridge, 7 Ohio Cir. Ct. 72, 3 Ohio Cir. Dec. 669; Wellman *v.* Wellman, 9 Ohio Cir. Ct. 72, 6 Ohio Cir. Dec. 61, 2 Ohio Dec. 136.

*Oregon.* — Deering *v.* Quivey, 26 Oregon 556.

*Pennsylvania.* — Hill *v.* Egan, 39 W. N. C. (Pa.) 267.

*South Carolina.* — Coleman *v.* Keels, 30 S. Car. 614.

*Tennessee.* — Anderson *v.* Thompson, 7 Lea (Tenn.) 259; Memphis, etc., R. Co. *v.* Johnson, 16 Lea (Tenn.) 387; Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126; Vaccaro *v.* Cicalla, 89 Tenn. 63.

*Texas.* — Thomas *v.* Neel, (Tex. App. 1892) 18 S. W. Rep. 138; Imlay *v.* Brewster, 3 Tex. Civ. App. 103; Hirshfeld *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. Rep. 962; Laclede Nat. Bank *v.* Betterton, 5 Tex. Civ. App. 355; Merle *v.* Andrews, 4 Tex. 200; Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Ragsdale *v.* Green, 36 Tex. 193.

*Utah.* — Darke *v.* Ireland, 4 Utah 192.

*Virginia.* — State Bank *v.* Craig, 6 Leigh (Va.) 399; Thompson *v.* Carpenter, 88 Va. 702.

*Washington.* — Hancock *v.* Stewart, 1 Wash. Ter. 323.

*West Virginia.* — Green *v.* Pittsburgh, etc., R. Co., 11 W. Va. 685; Morgan *v.* Ohio River R. Co., 39 W. Va. 17; Stewart *v.* Stewart, 40 W. Va. 65; Crawford *v.* Fickey, 41 W. Va. 544, 2 Am. & Eng. Corp. Cas. N. S. 417; Morris *v.* Peyton, 29 W. Va. 201.

*Wisconsin.* — Gardner *v.* Grant County, 1 Pin. (Wis.) 210; Spafford *v.* Janesville, 15 Wis. 474; Quaw *v.* Lameraux, 36 Wis. 626; Eaton *v.* Youngs, 36 Wis. 171; Gray *v.* Gates, 37 Wis. 614; Pringle *v.* Dunn, 39 Wis. 435; Pier *v.* Amory, 40 Wis. 571; Salter *v.* Hilgen, 40 Wis. 363; Egan *v.* Sengpiel, 46 Wis. 703; Baker *v.* Baker, 51 Wis. 538; Breed *v.* Ketchum, 51 Wis. 164; Williams *v.* Williams, 55 Wis. 300, 42 Am. Rep. 708; Pormann *v.* Frede, 72 Wis. 226; McBride *v.* Wright, 75 Wis. 306; Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35; Day *v.* Mertlock, 87 Wis. 577; Gilbert-Arnold Land Co. *v.* O'Hare, 93 Wis. 194.

**1. Distinction Between Opening and Vacation.** — Opening a judgment is not setting it aside,

annulling, or reversing it; it is but a mode of allowing the defendant a hearing upon the merits. *Huston Tp. Co-operative Mut. F. Ins. Co. v. Beale*, 110 Pa. St. 324. See also *Braddee v. Brownfield*, 2 W. & S. (Pa.) 279; *King v. Brooks*, 72 Pa. St. 363; *O'Hara v. Baum*, 82 Pa. St. 416; *Hall v. West Chester Pub. Co.*, 180 Pa. St. 561.

**Application to Open a Judgment Tantamount to Admission of Regularity.** — See *Durham v. Moore*, 48 Kan. 135.

**2. Void Judgment May Be Vacated — Alabama.** — *Pettus v. McClannahan*, 52 Ala. 55; *Kohn v. Haas*, 95 Ala. 478.

*Georgia.* — *Crane v. Barry*, 47 Ga. 476.

*Illinois.* — *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530.

*Kansas.* — *Newton First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 45 Kan. 510; *Foreman v. Carter*, 9 Kan. 674; *Reynolds v. Fleming*, 30 Kan. 106, 46 Am. Rep. 86.

*Kentucky.* — See *Stevens v. Deering*, (Ky. 1888) 9 S. W. Rep. 292.

*Montana.* — *In re Charlebois*, 6 Mont. 373.

*New York.* — *Dederick v. Richley*, 19 Wend. (N. Y.) 108; *Manufacturers, etc., Bank v. Boyd*, 3 Den. (N. Y.) 257.

*North Carolina.* — *Hervey v. Edmunds*, 68 N. Car. 243; *Cowles v. Hayes*, 69 N. Car. 406; *Winslow v. Anderson*, 3 Dev. & B. L. (20 N. Car.) 9, 32 Am. Dec. 651; *Koonce v. Butler*, 84 N. Car. 221.

*Ohio.* — *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459.

*Pennsylvania.* — *Pantale v. Dickey*, 123 Pa. St. 431, 23 W. N. C. (Pa.) 187; *Brown v. McKinney*, 25 W. N. C. (Pa.) 76, 130 Pa. St. 365.

*South Carolina.* — *Mills v. Dickson*, 6 Rich. L. (S. Car.) 487; *Latimer v. Latimer*, 22 S. Car. 257.

*Vermont.* — *Franks v. Lockey*, 45 Vt. 395.

*Wisconsin.* — *Cleveland v. Hopkins*, 55 Wis. 387.

**3. Judgment Rendered Without Jurisdiction — United States.** — *Shuford v. Cain*, 1 Abb. (U. S.) 302; *Harris v. Hardeman*, 14 How. (U. S.) 344.

*Alabama.* — *Bruce v. Strickland*, 47 Ala. 192; *Pettus v. McClannahan*, 52 Ala. 55; *Baker v. Barclift*, 76 Ala. 414; *Jennings v. Pearce*, 101 Ala. 538.

*Arizona.* — *San Pedro Cattle Co. v. Williams*, (Ariz. 1894) 36 Pac. Rep. 34.

*Arkansas.* — *Hill v. Bates*, (Ark. 1890) 12 S. W. Rep. 874.

*California.* — *Hanson v. Hanson*, (Cal. 1889) 20 Pac. Rep. 736; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448; *People v. Harrison*, 84 Cal. 607; *People v. Blake*, 84 Cal. 611; *Norton v. Atchison*, etc., R. Co., 97 Cal. 388, 33 Am. St. Rep. 198; *Hunter v. Bryant*, 98



**Invalidity Not Apparent on Face of Record.** — But it has been held that this rule does not apply where the invalidity of the judgment is not apparent on the face of the record, but can be shown only by matters extrinsic to or *dehors* the record.<sup>1</sup>

**Judgment Entered by Consent.** — And it has also been held that where a party has consented to the entry of a judgment or order against him, such judgment or order cannot be subsequently set aside on the ground that it was

Cal. 247; *People v. Hemme*, (Cal. 1890) 24 Pac. Rep. 313; *People v. Brady*, (Cal. 1890) 24 Pac. Rep. 313.

*Colorado.* — *Medina v. Medina*, 22 Colo. 146; *Lomax v. Besley*, 1 Colo. App. 21.

*Delaware.* — *Wilmington v. Kearns*, 1 *Houst. (Del.)* 363.

*Georgia.* — *Harralson v. McArthur*, 87 Ga. 478.

*Illinois.* — *Orr v. Howard*, 5 Ill. 559. See also *Brady v. Washington Ins. Co.*, 67 Ill. App. 159.

*Indiana.* — *Sage v. Matheny*, 14 Ind. 369; *Smith v. Noe*, 30 Ind. 117; *Hite v. Fisher*, 76 Ind. 231; *Zerger v. Flattery*, 83 Ind. 401; *Nichols v. Nichols*, 96 Ind. 433; *Nietert v. Trentman*, 104 Ind. 390; *Dobbins v. McNamara*, 113 Ind. 54, 3 Am. St. Rep. 626; *Coleman v. Floyd*, 131 Ind. 330; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334.

*Iowa.* — *Priestman v. Priestman*, 103 Iowa 320; *Davis v. Burt*, 7 Iowa 56; *Allen v. Rogers*, 27 Iowa 106; *State Ins. Co. v. Waterhouse*, 78 Iowa 674; *Jamison v. Weaver*, 87 Iowa 72; *Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 54 Am. St. Rep. 573; *Corn Exch. Bank v. Applegate*, 97 Iowa 67.

*Kansas.* — *Parker v. Elder*, 8 Kan. 460; *Foreman v. Carter*, 9 Kan. 679; *Simcock v. Emporia First Nat. Bank*, 14 Kan. 529; *Pritchard v. Greenwood County*, 26 Kan. 584; *Hanson v. Wolcott*, 19 Kan. 207; *Satterlee v. Grubb*, 38 Kan. 234; *Mortgage Trust Co. v. Cowles*, 3 Kan. App. 660.

*Kentucky.* — *Triplett v. Gillen*, 6 J. J. Marsh. (Ky.) 565; *Joyce v. O'Toole*, 6 Bush (Ky.) 32.

*Maryland.* — *Siewerd v. Farnen*, 71 Md. 627; *Coulbourn v. Fleming*, 78 Md. 210; *Pattison v. Hughes*, 80 Md. 559.

*Michigan.* — *Hurlburt v. Reed*, 5 Mich. 30; *People v. Bacon*, 18 Mich. 247; *Ludington First Nat. Bank v. Dwight*, 85 Mich. 509.

*Minnesota.* — *Heffner v. Gunz*, 29 Minn. 108; *Magin v. Lamb*, 43 Minn. 80, 19 Am. St. Rep. 216; *Allen v. McIntyre*, 56 Minn. 351.

*Mississippi.* — *Cotten v. McGehee*, 54 Miss. 621; *Quarles v. Hiern*, 70 Miss. 891; *Houston v. Black*, (Miss. 1894) 14 So. Rep. 529.

*Missouri.* — *Smith v. Rollins*, 25 Mo. 408; *McClanahan v. West*, 100 Mo. 309; *Bradley v. Welch*, 100 Mo. 258.

*Nebraska.* — *Morse v. Engle*, 28 Neb. 534; *Scarborough v. Myrick*, 47 Neb. 794; *Hyde v. Kent*, 47 Neb. 26.

*New Jersey.* — *McKelway v. Jones*, 17 N. J. L. 345; *A. v. B.*, 8 N. J. L. J. 351.

*New York.* — *Rogers v. Ivers*, 23 Hun (N. Y.) 424; *Larocque v. Harvey*, 57 Hun (N. Y.) 366, 19 Civ. Pro. (N. Y.) 109; *Siebert v. Abbott*, 62 Hun (N. Y.) 475; *Matter of Harlow*, 73 Hun (N. Y.) 433; *American Aquol, etc., Paint Co. v. Smith*, 90 Hun (N. Y.) 609, 35 N. Y. Supp.

723; *Hallett v. Righters*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 43; *Southwell v. Maryatt*, (C. Pl. Spec. T.) 1 Abb. Pr. (N. Y.) 218; *Hilton v. Thurston*, (C. Pl. Spec. T.) 1 Abb. Pr. (N. Y.) 318; *Warren v. Tiffany*, (Supm. Ct. Spec. T.) 9 Abb. Pr. (N. Y.) 66, 17 How. Pr. (N. Y.) 106; *Matter of Broadway Ins. Co.*, 23 N. Y. App. Div. 282; *Upham v. Cohn*, (N. Y. City Ct. Spec. T.) 14 Civ. Pro. (N. Y.) 27; *Burton v. Sherman*, 20 N. Y. Wkly. Dig. 419; *Kinne v. Meyer*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 448; *Lyster v. Pearson*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 98; *Buchanan v. Prospect Park Hotel Co.*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 435. See also *Matter of Underhill*, 1 Connolly (N. Y.) 313; *Anderson v. Carr*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 281.

*North Carolina.* — *Keaton v. Banks*, 10 Ired. L. (32 N. Car.) 381, 51 Am. Dec. 393; *Roberts v. Allman*, 106 N. Car. 391. See also *Matthews v. Joyce*, 85 N. Car. 258; *Syme v. Trice*, 96 N. Car. 243.

*Ohio.* — *Whitehead v. Post*, 3 West. L. Month. 195, 2 Ohio Dec. (Reprint) 468; *Roberts v. Price*, 4 West. L. Month. 581, 2 Ohio Dec. (Reprint) 681.

*Oregon.* — *Ladd v. Mason*, 10 Oregon 308.

*Pennsylvania.* — *Lewis Lumber, etc., Co. v. Lewis*, 6 Kulp (Pa.) 422; *Pantall v. Dickey*, 123 Pa. St. 431; *Bryn Mawr Nat. Bank v. James*, 152 Pa. St. 364.

*Rhode Island.* — *In re College St.*, 11 R. I. 472; *Locke v. Locke*, 18 R. I. 716.

*South Dakota.* — *North American L. & T. Co. v. Colonial, etc. Mortg. Co.*, 3 S. Dak. 590; *Brettell v. Deffebach*, 6 S. Dak. 21, 39.

*Texas.* — *Craddock v. State*, 15 Tex. App. 641.

*Vermont.* — *Kimball v. Kelton*, 54 Vt. 177.

*Washington.* — *McEachern v. Brackett*, 8 Wash. 652, 40 Am. St. Rep. 922; *McMaster v. Advance Thresher Co.*, 10 Wash. 147.

*West Virginia.* — *Midkiff v. Lusher*, 27 W. Va. 439.

*Wisconsin.* — *Carr v. Commercial Bank*, 16 Wis. 50; *Weatherbee v. Weatherbee*, 20 Wis. 499; *Mariner v. Waterloo*, 75 Wis. 438; *Bond v. Neuschwander*, 86 Wis. 391; *Day v. Mertlock*, 87 Wis. 577. But see *State v. Waupaca County Bank*, 20 Wis. 640.

*Wyoming.* — *White v. Hinton*, 3 Wyo. 753.

**Where the Service Was Sufficient to Put the Defendant on Notice**, judgment by default for want of an appearance will not be set aside on account of irregularities in such service. *Williams v. Buchanan*, 75 Ga. 789; *Baker v. Thompson*, 75 Ga. 164; *Grant v. Birdsall*, 48 N. Y. Super. Ct. 427. See also *Foster v. Hauswirth*, 5 Mont. 566.

**1. Invalidity Not Apparent on Face of Record.** — *Kohn v. Haas*, 95 Ala. 478. See also *Pettus v. McClannahan*, 52 Ala. 55.



entered without jurisdiction.<sup>1</sup>

*c. FRAUD OR COLLUSION.* — The fact that a judgment was obtained through fraud or collusion is universally held to constitute a sufficient reason for opening or vacating such judgment after the term at which it was rendered.<sup>2</sup>

1. **Judgment Entered by Consent.** — *Anderson v. Carr*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 281.

2. **Judgment May Be Vacated for Fraud or Collusion** — *England*, — *Shedden v. Patrick*, 1 Macq. H. L. 535; *Cammell v. Sewell*, 3 H. & N. 617, 27 L. J. Exch. 447; *Cannan v. Reynolds*, 5 El. & Bl. 301, 85 E. C. L. 301; *Philipson v. Egremont*, 6 Q. B. 587, 51 E. C. L. 587; *Williams v. Preston*, 20 Ch. D. 672, 51 L. J. Ch. 927.

*Canada*. — *Price v. Mercier*, 18 Can. Sup. Ct. 303.

*United States*. — *Guild v. Phillips*, 44 Fed. Rep. 461; *Young v. Sigler*, 48 Fed. Rep. 182; *Ring Refrigerator, etc., Co. v. St. Louis Ice Mfg., etc., Co.*, 67 Fed. Rep. 535; *Kingsbury v. Buckner*, 134 U. S. 650; *Leavenworth County v. Chicago, etc., R. Co.*, 134 U. S. 688.

*Arkansas*. — *Chambliss v. Reppy*, 54 Ark. 539.

*California*. — *Barrett v. Graham*, 19 Cal. 632; *Hayden v. Hayden*, 46 Cal. 333; *Amador Canal, etc., Co. v. Mitchell*, 59 Cal. 168; *Baker v. O'Riordan*, 65 Cal. 368; *Zellerbach v. Allenberg*, 67 Cal. 296; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159; *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143; *Collins v. Scott*, 100 Cal. 446; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111; *Hanley v. Hanley*, 114 Cal. 690.

*Colorado*. — *Morton v. Morton*, 16 Colo. 358; *Peck Lateral Ditch Co. v. Pella Irrigating Ditch Co.*, 19 Colo. 222.

*Connecticut*. — *Schoonmaker v. Albertson*, etc., Mach. Co., 51 Conn. 387.

*Florida*. — *Shrader v. Shrader*, 36 Fla. 502.

*Georgia*. — See *Mahan v. Cavender*, 77 Ga. 118.

*Illinois*. — *Walker v. Shreve*, 87 Ill. 474; *Chicago Bldg. Soc. v. Haas*, 111 Ill. 176; *Ward v. Durham*, 134 Ill. 195; *Mitchell v. Shanenberg*, 149 Ill. 420; *Anderson v. Field*, 6 Ill. App. 307; *Pease v. Roberts*, 16 Ill. App. 634; *Kingman v. Reinemer*, 58 Ill. App. 173; *Kingman v. Kingman*, 61 Ill. App. 134. See also *Illinois Steel Co. v. Szutenbach*, 67 Ill. App. 280.

*Indiana*. — *Nealis v. Dicks*, 72 Ind. 374; *Hogg v. Link*, 90 Ind. 346; *Duringer v. Moschino*, 93 Ind. 495; *Brown v. Eaton*, 98 Ind. 591; *Overton v. Rogers*, 99 Ind. 595; *Dickerson v. Davis*, 111 Ind. 433; *Wilhite v. Wilhite*, 124 Ind. 230; *Douthit v. Douthit*, 133 Ind. 35; *Hollinger v. Reeme*, 138 Ind. 363, 46 Am. St. Rep. 402; *Adams School Tp. v. Irwin*, 150 Ind. 12; *Hoag v. Old People's Mut. Ben. Soc.*, 1 Ind. App. 32. See also *Cicero Tp. v. Picken*, 122 Ind. 260.

*Iowa*. — *Harshey v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520; *Melick v. Tama City First Nat. Bank*, 52 Iowa 94; *Brown v. Byam*, 59 Iowa 52; *Heathcote v. Haskins*, 74 Iowa 566; *Priestman v. Priestman*, 103 Iowa 320. See also *Independent School Dist. v. Schreiner*, 46 Iowa 172; *Dady v. Brown*, 76 Iowa 528.

*Kansas*. — *Adams v. Secor*, 6 Kan. 542; *McIntosh v. Crawford County*, 13 Kan. 171; *Haverty v. Haverty*, 35 Kan. 438; *Laithe v.*

*McDonald*, 12 Kan. 340; *Steele v. Duncan*, 47 Kan. 511.

*Louisiana*. — *Noyes v. Loeb*, 24 La. Ann. 48; *Lazarus v. McGuirk*, 42 La. Ann. 194.

*Maryland*. — *Taylor v. Sindall*, 34 Md. 38; *Craig v. Wroth*, 47 Md. 281; *Foran v. Johnson*, 58 Md. 144.

*Massachusetts*. — *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Keith v. McCaffrey*, 145 Mass. 18.

*Minnesota*. — *Young v. Young*, 17 Minn. 181; *Olmstead v. Olmstead*, 41 Minn. 297; *Hass v. Billings*, 42 Minn. 63; *Sturm v. School Dist. No. 70*, 45 Minn. 88; *Wilkins v. Sherwood*, 55 Minn. 154.

*Missouri*. — *Miles v. Jones*, 28 Mo. 87; *Harkness v. Austin*, 36 Mo. 47; *Harris v. Sanders*, 38 Mo. 421; *Downing v. Still*, 43 Mo. 309; *Mayberry v. McClurg*, 51 Mo. 256; *Murphy v. De France*, 101 Mo. 151; *Richardson v. Stowe*, 102 Mo. 33; *Irvine v. Leyh*, 102 Mo. 200; *F. G. Oxley Stave Co. v. Butler Company*, 121 Mo. 614; *Hyatt v. Wolfe*, 22 Mo. App. 191; *Weinert v. Trendley*, 39 Mo. App. 333; *Link v. Link*, 48 Mo. App. 345. See also *Bates v. Hamilton*, 144 Mo. 1.

*Nebraska*. — *Burley v. Millard*, 11 Neb. 286; *Aspinwall v. Sabin*, 22 Neb. 73, 3 Am. St. Rep. 258; *Cox v. Barnes*, 45 Neb. 172. See also *Shufeldt v. Gandy*, 25 Neb. 602.

*New Jersey*. — *Alderman v. Diamant*, 7 N. J. L. 199, note; *Binsse v. Barker*, 13 N. J. L. 263, 23 Am. Dec. 720; *Stillwell v. Stillwell*, 47 N. J. Eq. 275.

*New York*. — *Mather v. Parsons*, 32 Hun (N. Y.) 338; *Simmons v. Johnson*, 48 Hun (N. Y.) 131; *Utter v. McLean*, 53 Hun (N. Y.) 568, 17 Civ. Pro. (N. Y.) 150; *Simons v. Goldbach*, 56 Hun (N. Y.) 204; *Jones v. Jones*, 71 Hun (N. Y.) 519; *Matter of Hodgman*, 82 Hun (N. Y.) 419; *Nevitt v. Albany First Nat. Bank*, 91 Hun (N. Y.) 43; *People v. New York*, (Supm. Ct. Spec. T.) 19 How. Pr. (N. Y.) 289; *Cleveland v. Porter*, (Supm. Ct.) 10 Abb. Pr. (N. Y.) 407; *Ross v. Bridge*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 150; *Stillwell v. Carpenter*, (Ct. App.) 2 Abb. N. Cas. (N. Y.) 238; *People v. Hektograph Co.*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 358; *Anderson v. Carr*, (Supm. Ct. Gen. T.) 26 N. Y. St. Rep. 642; *Oetjen v. Fayen*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 496; *Ross v. Wood*, 70 N. Y. 8; *Ward v. Southfield*, 102 N. Y. 287; *New York v. Brady*, 115 N. Y. 599; *Stevens v. Central Nat. Bank*, 144 N. Y. 50; *Furman v. Furman*, 153 N. Y. 309, 60 Am. St. Rep. 629, *affirming* 9 N. Y. App. Div. 94.

*North Carolina*. — *Beck v. Bellamy*, 93 N. Car. 129; *Smith v. Fort*, 105 N. Car. 446; *Wilson Cotton Mills v. Randleman Cotton Mills*, 116 N. Car. 647. See also *Bost v. Lassiter*, 105 N. Car. 490; *Sharp v. Danville, etc., R. Co.*, 106 N. Car. 308, 19 Am. St. Rep. 533; *Johnston v. Danville, etc., R. Co.*, 106 N. Car. 322.

*Ohio*. — *Huntington v. Finch*, 3 Ohio St. 445; *Fox v. Lima Nat. Bank*, 25 Cinc. L. Bul. 28, 11 Ohio Dec. (Reprint) 127; *Howenstine v.*



**What Fraud Will Afford Ground for Vacating Judgment.** — It is held that the fraud relied on must relate to some act in securing jurisdiction, or to something done concerning the trial or the judicial proceedings themselves; and the rule has no application to cases of fraud in the transaction out of which the legal controversy arose, or matters connected with it.<sup>1</sup>

**Perjury.** — Where a party obtains a judgment by his own wilful perjury, or by the use of false testimony, which he knows at the time to be false, he practices a fraud for which the judgment may be vacated.<sup>2</sup>

**Fraud or Collusion Must Be Clearly Shown.** — Fraud or collusion will not be presumed, and its existence must be clearly shown in order to authorize the nullifying interference of the court.<sup>3</sup>

**d. IRREGULARITIES.** — It is usually considered that a judgment may be opened or vacated on the ground of irregularities or improper conduct in procuring it to be rendered or entered; but in order to authorize this, it must appear that the irregularity is of such a nature that it has resulted or may result in a considerable injury to the party complaining thereof,<sup>4</sup> and that the setting aside

Sweet, 13 Ohio Cir. Ct. 239, 7 Ohio Cir. Dec. 498.

*Oklahoma.* — Provins v. Lovi, 6 Okla. 94.

*Oregon.* — Marsh v. Perrin, 10 Oregon 364.

*Pennsylvania.* — Allen v. Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Monroe v. Monroe, 93 Pa. St. 520; Kemmerer's Appeal, 125 Pa. St. 283; Loeffler v. Schmertz, 152 Pa. St. 615; Fisher v. Hestonville, etc., Pass. R. Co., 185 Pa. St. 602; Humphreys v. Rawn, 8 Watts (Pa.) 78; Peterson v. Peterson, 13 Phila. (Pa.) 82, 36 Leg. Int. (Pa.) 4; Todd v. Hoff, 13 Montg. Co. Rep. (Pa.) 207; Yost v. Mensch, 27 W. N. C. (Pa.) 562; Weaver v. Painter, (Pa. 1886) 3 Cent. Rep. 259; National Mut. Bldg., etc., Assoc. v. Kondrak, 9 Kulp (Pa.) 14; Reeser v. Brenneman, 4 Pa. Dist. 143; Walker v. Sallada, 17 Pa. Co. Ct. 371. See also Lee v. Colvin, 4 Lack. Leg. N. (Pa.) 168.

*South Carolina.* — Coleman v. Keels, 30 S. Car. 614; Brown v. Buttz, 15 S. Car. 490; Dial v. Farrow, 1 McMull. L. (S. Car.) 292, 36 Am. Dec. 267.

*Tennessee.* — Conn v. Whiteside, 6 Humph. (Tenn.) 47; Pyett v. Hatfield, 15 Lea (Tenn.) 473; Noll v. Chattanooga Co., (Tenn. Ch. 1896) 38 S. W. Rep. 287; Smith v. Miller, (Tenn. Ch. 1897) 42 S. W. Rep. 182.

*Texas.* — Grassmeyer v. Beeson, 18 Tex. 753, 70 Am. Dec. 309; Buchanan v. Bilger, 64 Tex. 589; Bryan v. Bowser, 77 Tex. 324; Lumpkin v. Williams, 1 Tex. Civ. App. 214; Goliat v. Weisiger, 4 Tex. Civ. App. 653; Wood v. Lenox, 5 Tex. Civ. App. 318; Rodriguez v. Espinosa, (Tex. Civ. App. 1894) 25 S. W. Rep. 669; Youngstown Bridge Co. v. North Galveston, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. Rep. 420. See also Wilson v. Smith, 17 Tex. Civ. App. 188.

*Virginia.* — Evans v. Spurgin, 11 Gratt. (Va.) 615.

*Washington.* — State v. Lockhart, 18 Wash. 531.

*Wisconsin.* — Matter of Fisher, 15 Wis. 511; Wadsworth v. Willard, 22 Wis. 238; Nye v. Sochor, 92 Wis. 40, 53 Am. St. Rep. 896. See also Tucker v. Whittlesey, 74 Wis. 74.

**Judgment Will Not Be Vacated on Behalf of Party Guilty of Fraud Complied of.** — See Kunkle's Appeal, 107 Pa. St. 368.

**1. What Fraud Will Afford Ground for Vacating Judgment.** — Adams School Tp. v. Irwin, 150 Ind. 12; Davis v. Steuben School Tp., 19 Ind. App. 694; Cicero Tp. v. Picken, 122 Ind. 260; Bates v. Hamilton, 144 Mo. 1. See also Zellerbach v. Allenberg, 67 Cal. 296; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; Fox v. Mt. Sterling Nat. Bank, (Ky. 1889) 10 S. W. Rep. 368; Gray v. Barton, 62 Mich. 186; Stratton v. Allen, 16 N. J. Eq. 229.

**2. Perjury.** — Klaes v. Klaes, 103 Iowa 689; Laithe v. McDonald, 7 Kan. 254, 12 Kan. 340; Spooner v. Spooner, 26 Minn. 137; Munro v. Callahan, 55 Neb. 75. See also Hass v. Billings, 42 Minn. 63.

But compare Pico v. Cohn, 91 Cal. 120, 25 Am. St. Rep. 159; Hass v. Billings, 42 Minn. 63; Loucheine v. Strouse, 49 Wis. 623.

**3. Fraud or Collusion Must Be Clearly Shown.** — Jones v. Brittan, 1 Woods (U. S.) 667; Layton v. Prewitt, (Ky. 1894) 25 S. W. Rep. 882; Oxley Stave Co. v. Butler County, 121 Mo. 614; Obermeyer v. Einstein, 62 Mo. 341; Caldwell v. Fifield, 24 N. J. L. 150; Nevitt v. Albany First Nat. Bank, 91 Hun (N. Y.) 43; National Mut. Bldg., etc., Assoc. v. Kondrak, 9 Kulp (Pa.) 14; Smith v. Miller, (Tenn. Ch. 1897) 42 S. W. Rep. 182; Grassmeyer v. Beeson, 18 Tex. 753, 70 Am. Dec. 309. See also Davis v. Chalfant, 81 Cal. 627.

**Evidence Insufficient to Warrant Vacating Judgment on Ground of Fraud.** — State v. Lockhart, 18 Wash. 531. See also Magowan v. Magowan, 57 N. J. Eq. 195.

**4. Judgment May Be Set Aside for Irregularity or Improper Conduct.** — *England.* — Stopford v. Fitzgerald, 4 Dowl. & L. 725; Field v. Partidge, 7 Exch. 689; Curling v. Bingham, 10 W. R. 628.

*United States.* — Newton v. Weaver, 2 Cranch (C. C.) 685. See also Blythe v. Hinckley, 84 Fed. Rep. 228.

*Arkansas.* — Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.

*California.* — Ziel v. Dukes, 12 Cal. 479; Oliphant v. Whitney, 34 Cal. 25; Mace v. O'Reilly, 70 Cal. 231; Cummings v. Ross, 90 Cal. 68; Hunter v. Bryant, 98 Cal. 252; Jacks v. Baldez, 97 Cal. 91; Kaufman v. Shain, 111 Cal. 16, 52 Am. St. Rep. 139.

*Delaware.* — Brown v. Smyth, 4 Harr. (Del.)



204; *Wilmington, etc., Bank v. Sharpe*, 5 Harr. (Del.) 170.

*Georgia*. — *Wolf v. Kennedy*, 93 Ga. 219; *King v. Meyer*, 97 Ga. 379.

*Illinois*. — *Gillespie v. Rout*, 39 Ill. 247; *Union Hide, etc., Co. v. Woodley*, 75 Ill. 435; *Walters v. Walters*, 132 Ill. 467; *Jasper v. Schlesinger*, 22 Ill. App. 637.

*Indiana*. — *Jamieson v. Caster*, 16 Ind. 426; *Crescent Brewing Co. v. Cullins*, 125 Ind. 110. See also *Busching v. Sunman*, 19 Ind. App. 683.

*Iowa*. — *Priestman v. Priestman*, 103 Iowa 320; *Bowen v. Troy Portable Mill Co.*, 31 Iowa 460; *Searle v. Fairbanks*, 80 Iowa 307; *Walker v. Freelove*, 79 Iowa 752.

*Kansas*. — *Newton First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 45 Kan. 510; *Foreman v. Carter*, 9 Kan. 674; *Utiley v. Fee*, 33 Kan. 689; *Barons v. Anderson*, 37 Kan. 399; *Woodward v. Trask Fish Co.*, 38 Kan. 283; *School Dist. No. 63 v. Chicago Lumber Co.*, 41 Kan. 618; *Sexton v. Rock Island Lumber, etc., Co.*, 49 Kan. 153.

*Kentucky*. — *Williams v. McAfee, Sneed (Ky.)* 7; *Elliston v. Commonwealth Bank*, 3 Dana (Ky.) 99; *Spalding v. Wathen*, 7 Bush (Ky.) 653; *Carr v. Carr*, 92 Ky. 552; *Marcum v. Powers*, 10 Ky. L. Rep. 380, (Ky. 1888) 9 S. W. Rep. 255.

*Maryland*. — *Mailhouse v. Inloes*, 18 Md. 329; *Graff v. Merchants, etc., Transp. Co.*, 18 Md. 364; *Craig v. Wroth*, 47 Md. 281; *Ecker v. New Windsor First Nat. Bank*, 62 Md. 519; *Huntington v. Emery*, 74 Md. 67.

*Michigan*. — *Jagger v. Coon*, 5 Mich. 31; *People v. Bacon*, 18 Mich. 247; *Hunt v. Patterson*, 38 Mich. 95; *Reilly v. Blaser*, 61 Mich. 399.

*Mississippi*. — *Pipkin v. Haun, Freem. (Miss.)* 254.

*Missouri*. — *Alexander v. Haden*, 2 Mo. 228; *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Doan v. Holly*, 27 Mo. 256; *Branstetter v. Rives*, 34 Mo. 318; *Norman v. Hooker*, 35 Mo. 366; *Harkness v. Austin*, 36 Mo. 47; *Downing v. Still*, 43 Mo. 309; *Reed v. Wangler*, 46 Mo. 508; *Stupp v. Holmes*, 48 Mo. 89; *State v. Tate*, 109 Mo. 265, 32 Am. St. Rep. 664; *Oxley Stave Co. v. Butler County*, 121 Mo. 614.

*Montana*. — *In re Charlebois*, 6 Mont. 373.

*Nebraska*. — *Slater v. Skirving*, 45 Neb. 594; *Scarborough v. Myrick*, 47 Neb. 794.

*New Jersey*. — *Reed v. Bainbridge*, 4 N. J. L. 400; *Sheridan v. Van Winkle*, 43 N. J. 579; *Benedict v. Mortimer*, (N. J. 1889) 18 Atl. Rep. 246.

*New York*. — *Bascom v. Feazler*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 16; *Dix v. Palmer*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 233; *James v. Kirkpatrick*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 241; *Holmes v. Honie*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 384; *Spencer v. Tooker*, (Supm. Ct.) 12 Abb. Pr. (N. Y.) 353; *Lewis v. Jones*, (N. Y. Super. Ct.) 13 Abb. Pr. (N. Y.) 427; *Havemeyer v. Brooklyn Sugar Refining Co.*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 157; *New York City Baptist Mission Soc. v. Tabernacle Baptist Church*, 10 N. Y. App. Div. 288; *Breckenridge Co. v. Perkins*, 14 N. Y. App. Div. 629, 43 N. Y. Supp. 800; *Furman v. Furman*, 153 N. Y. 309, 60 Am. St. Rep. 629, *affirming* 9 N. Y. App.

Div. 94; *Corn Exch. Bank v. Blye*, 119 N. Y. 414, 54 Hun (N. Y.) 312; *Van Dolsen v. Abendroth*, 53 N. Y. Super. Ct. 35; *New York v. Smith*, 61 N. Y. Super. Ct. 374; *Chester v. Jumel*, (Supm. Ct. Gen. T.) 24 N. Y. St. Rep. 229; *Bullard v. Harris*, (Supm. Ct. Gen. T.) 49 N. Y. St. Rep. 133; *Matter of Foulks*, (Surrogate Ct.) 18 Civ. Pro. (N. Y.) 175; *Matter of Hesdra*, (Surrogate Ct.) 4 Misc. (N. Y.) 37; *Timolat v. S. J. Held Co.*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 630; *Fenton v. Garlick*, 6 Johns. (N. Y.) 288; *U. S. Life Ins. Co. v. Jordan*, 46 Hun (N. Y.) 201; *Crook v. Hamlin*, 71 Hun (N. Y.) 136; *Petrie v. Hamilton College*, 92 Hun (N. Y.) 81; *Grinnell v. Schmidt*, 2 Sandf. (N. Y.) 706; *Mattern v. Sage*, 15 Daly (N. Y.) 38; *Bulkley v. Smith*, 1 Duer (N. Y.) 643; *Croden v. Drew*, 3 Duer (N. Y.) 652; *Jellinghaus v. New York Ins. Co.*, 5 Bosw. (N. Y.) 678; *Johnson v. Carnley*, 10 N. Y. 570, 51 Am. Dec. 762; *Edwards v. Woodruff*, 90 N. Y. 396. See also *Case v. Mannis*, 57 Hun (N. Y.) 594, 19 Civ. Pro. (N. Y.) 206.

*North Carolina*. — *Winslow v. Anderson*, 3 Dev. & B. L. (20 N. Car.) 9, 32 Am. Dec. 651; *Keaton v. Banks*, 10 Ired. L. (32 N. Car.) 381, 51 Am. Dec. 393; *Davis v. Shaver*, Phil. L. (61 N. Car.) 18, 91 Am. Dec. 92; *Dick v. McLaurin*, 63 N. Car. 185; *Hervey v. Edmunds*, 68 N. Car. 243; *Cowles v. Hayes*, 69 N. Car. 410; *Wolfe v. Davis*, 74 N. Car. 597; *Williamson v. Hartman*, 92 N. Car. 236; *Stancill v. Gay*, 92 N. Car. 455; *Peoples v. Norwood*, 94 N. Car. 167; *Syme v. Trice*, 96 N. Car. 243; *Knott v. Taylor*, 99 N. Car. 511, 6 Am. St. Rep. 547; *Roberts v. Allman*, 106 N. Car. 391; *Everett v. Reynolds*, 114 N. Car. 366. See also *Walton v. McKesson*, 101 N. Car. 428.

*Ohio*. — *Hunt v. Yeatman*, 3 Ohio 16; *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459; *Dougherty v. Walters*, 1 Ohio St. 201; *Huntington v. Finch*, 3 Ohio St. 445; *Knox County Bank v. Dety*, 9 Ohio St. 505; *Follett v. Alexander*, 58 Ohio St. 202; *Guernsey County v. Cambridge*, 7 Ohio Cir. Ct. 72, 3 Ohio Cir. Dec. 669.

*Pennsylvania*. — *Kellogg v. Krauser*, 14 S. & R. (Pa.) 137; *Banning v. Taylor*, 24 Pa. St. 289; *Hutchinson v. Ledlie*, 36 Pa. St. 112; *Newcomer's Appeal*, 43 Pa. St. 43; *Murdock v. Steiner*, 45 Pa. St. 349; *O'Hara v. Baum*, 82 Pa. St. 416; *Grossman's Appeal*, 102 Pa. St. 137; *Allen v. Krips*, 119 Pa. St. 1; *Colwell v. Wehrly*, 150 Pa. St. 523; *Evans v. Cleveland*, 8 Kulp (Pa.) 286; *Geise's Estate*, 4 Leg. Gaz. (Pa.) 233; *Marshall v. Dennison*, 2 Luz. Leg. Reg. (Pa.) 87; *Patterson v. Pyle*, 1 Mona. (Pa.) 351; *Weir v. Craige*, 13 Pa. Co. Ct. 46; *Saxman v. Perkins*, 6 Pa. Dist. 548; *Seipe's Estate*, 20 Phila. (Pa.) 158, 48 Leg. Int. (Pa.) 450, 11 Pa. Co. Ct. 27.

*South Carolina*. — *Cooper v. Smith*, 16 S. Car. 333; *Clemson Agricultural College v. Pickens*, 42 S. Car. 511.

*South Dakota*. — *Bell v. Thomas*, 7 S. Dak. 202.

*Texas*. — *Pullen v. Baker*, 41 Tex. 419; *Cave v. Houston*, 65 Tex. 619; *Krall v. Campbell Printing Press, etc., Co.*, 79 Tex. 556.

*Virginia*. — *Johnson v. Fry*, 88 Va. 695.

*Washington*. — *Port Townsend Nat. Bank v. Weymouth*, 11 Wash. 412.

*Wisconsin*. — *Lathrop v. Snyder*, 17 Wis.



of the judgment is the action which the right and justice of the case require.<sup>1</sup> A judgment will not be opened or vacated at a subsequent term for an alleged irregularity which is of a purely technical nature,<sup>2</sup> nor will a judgment be set aside where it appears that the irregularity or improper conduct has been waived or cured.<sup>3</sup>

Errors or Irregularities as to Costs will not, as a rule, constitute ground for opening or vacating a judgment.<sup>4</sup>

Presumption of Regularity. — It must be presumed, in the absence of any showing to the contrary, that there was no irregularity in the rendition of the judgment, or in the reading and signing of the judgment roll.<sup>5</sup>

*e.* MISTAKE, SURPRISE, OR EXCUSABLE NEGLIGENCE — (1) *Mistake.* — In a great many jurisdictions there are statutes authorizing the opening or vacation of a judgment or decree on the ground of its having been obtained through some mistake of the party against whom it was rendered.<sup>6</sup>

110; Knowles v. Fritz, 58 Wis. 216; Reid v. Southworth, 71 Wis. 288; Pormann v. Frede, 72 Wis. 226.

Wyoming. — White v. Hinton, 3 Wyo. 753.

Judgment Entered on Offer of Defendant Personally, Without Notice to His Attorney, Set Aside for Irregularity. — Webb v. Dill, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 264. In this case the court said: "It always was the practice, after an attorney had appeared in a case, to require all the proceedings to be conducted through him. Any other rule would lead to great confusion in the administration of justice."

1. Right and Justice of the Case Must Require Setting Aside. — Huntington v. Finch, 3 Ohio St. 445.

2. Mere Technicality Will Not Avail to Set Aside Judgment. — Jones v. San Francisco Sulphur Co., 14 Nev. 172; Roberts v. Allman, 106 N. Car. 391.

3. Irregularity or Improper Conduct Must Not Have Been Waived or Cured. — Woodward v. Trask Fish Co., 38 Kan. 283; Benedict v. Mortimer, (N. J. 1889) 18 Atl. Rep. 246; Van Dolsen v. Abendroth, 53 N. Y. Super. Ct. 35; Matter of Hesdra, (Surrogate Ct.) 4 Misc. (N. Y.) 37; Williamson v. Hartman, 92 N. Car. 236.

4. Errors or Irregularities as to Costs Not Sufficient Ground for Opening or Vacation — United States. — Doe v. Fenn, 3 McLean (U. S.) 411.

New York. — Mabbett v. Kelly, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 62; Toll v. Thomas, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 315; Henry v. Bow, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 215; Howe v. Lloyd, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 257; Hees v. Nellis, 65 Barb. (N. Y.) 441; Watson v. Gardiner, 50 N. Y. 671.

Vermont. — Harriman v. Swift, 31 Vt. 385.

Washington. — Dickson v. Matheson, 12 Wash. 196.

Wisconsin. — Killops v. Stephens, 73 Wis. 111.

5. Presumption of Regularity. — Busching v. Sunman, 19 Ind. App. 683.

6. Judgment May Be Opened or Vacated on Ground of Mistake — England. — Cannan v. Reynolds, 5 El. & Bl. 301, 85 E. C. L. 301, 26 L. J. Q. B. 62, 1 Jur. N. S. 873.

United States. — Franklin Sav. Bank v. Taylor, 53 Fed. Rep. 854.

Arizona. — Woffenden v. Woffenden, 1 Ariz. 328.

California. — Douglass v. Brooks, 38 Cal. 670; Craig v. San Bernardino Invest. Co., 101 Cal. 122. See also De McKinley v. Tuttle, 34 Cal. 235.

Colorado. — Robert E. Lee Silver Min. Co. v. Englebach, 18 Colo. 106.

Georgia. — Murray v. Derrick, 101 Ga. 113.

Illinois. — See Dunlap v. Gregory, 14 Ill. App. 601.

Indiana. — Adams School Tp. v. Irwin, 150 Ind. 12; Robertson v. Bergen, 10 Ind. 402; Western Union Tel. Co. v. Griffin, 1 Ind. App. 46; Clandy v. Caldwell, 106 Ind. 260; Center Tp. v. Marion County, 110 Ind. 579; Indianapolis, etc., R. Co. v. Crockett, 2 Ind. App. 136; Nord v. Marty, 56 Ind. 531; Williams v. Grooms, 122 Ind. 391; Hobbs v. Tipton County, 122 Ind. 180; Thompson v. Harlow, 150 Ind. 450; Davis v. Steuben School Tp., 19 Ind. App. 694. See also Beatty v. O'Connor, 106 Ind. 81; Ratcliffe v. Baldwin, 29 Ind. 16, 92 Am. Dec. 330; Cruse v. Cunningham, 79 Ind. 402; Nash v. Cars, 92 Ind. 216.

Iowa. — Walker v. Freelove, 79 Iowa 752; Beuna Vista County v. Iowa Falls, etc., R. Co., 49 Iowa 657; Jean v. Hennessy, 74 Iowa 348, 7 Am. St. Rep. 486.

Kansas. — Sanders v. Hall, 37 Kan. 271. See also Nash v. Denton, 59 Kan. 771, 51 Pac. Rep. 896.

Maryland. — Patterson v. Preston, 51 Md. 190.

Massachusetts. — Keith v. McCaffrey, 145 Mass. 18.

Minnesota. — Barker v. Keith, 11 Minn. 65.

Missouri. — Cooper v. Duncan, 20 Mo. App. 355; Weinerth v. Trendley, 39 Mo. App. 333; Herwick v. Koken Barber Supply Co., 61 Mo. App. 454.

Montana. — Anaconda Min. Co. v. Saile, 16 Mont. 8, 50 Am. St. Rep. 472.

Nevada. — Lang Syne Gold Min. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337.

New York. — Furman v. Furman, 153 N. Y. 309, 60 Am. St. Rep. 629, affirming 9 N. Y. App. Div. 94; Arnold v. Norfolk, etc., Hosiery Co., (Supm. Ct. Gen. T.) 47 N. Y. St. Rep. 362, 19 N. Y. Supp. 957; Jospe v. Lighte, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 146; Devlin v. Boyd, 69 Hun (N. Y.) 328; Patterson v. Hochster, 21 N. Y. App. Div. 432; Pettigrew v.



The Mistake Must Be One of Fact, for no relief can be afforded against the consequences of a mistake of law.<sup>1</sup>

(2) *Surprise*. — There are also in many jurisdictions statutes authorizing the opening or vacating of judgments on the ground that they were obtained through some surprise of the party injuriously affected.<sup>2</sup>

(3) *Excusable Neglect* — *Inadvertence*. — That a judgment against a party was obtained because of his excusable neglect or inadvertence is, under the statutes in force in many jurisdictions, a sufficient ground for opening or vacating such judgment.<sup>3</sup>

New York, (N. Y. Super. Ct. Spec. T.) 9 Abb. Pr. (N. Y.) 141, note; Kiefer *v.* Grand Trunk R. Co., (Supm. Ct. Gen. T.) 8 N. Y. Supp. 230; Mattern *v.* Sage, 15 Daly (N. Y.) 38; Matter of Underhill, 1 Connolly (N. Y.) 313.

North Carolina. — Clemmons *v.* Field, 99 N. Car. 400, 6 Am. St. Rep. 529; Flowers *v.* Alford, 111 N. Car. 248; Skinner *v.* Terry, 107 N. Car. 103; Brown *v.* Rhinehart, 112 N. Car. 772; Branch *v.* Walker, 92 N. Car. 87. See also Pickens *v.* Fox, 90 N. Car. 369; Isler *v.* Brown, 69 N. Car. 125.

Ohio. — Murphy *v.* Swadner, 34 Ohio St. 672.

Oregon. — Weiss *v.* Meyer, 24 Oregon 108; Deering *v.* Quivey, 26 Oregon 556.

Pennsylvania. — Clarion, etc., R. Co. *v.* Hamilton, 127 Pa. St. 1; Jackson *v.* Vanhorn, 1 Dall. (Pa.) 241.

South Carolina. — Martin *v.* Fowler, 51 S. Car. 164; Kaminitzky *v.* Northeastern R. Co., 25 S. Car. 53; *Ex p.* Jones, 47 S. Car. 393.

Tennessee. — See Panesi *v.* Boswell, 12 Heisk. (Tenn.) 323.

Vermont. — Kimball *v.* Kelton, 54 Vt. 177.

Virginia. — Epes *v.* Williams, 89 Va. 794, 17 Va. L. J. 223.

Washington. — Denton *v.* Merchants' Nat. Bank, 18 Wash. 387; Northern Pac., etc., R. Co. *v.* Black, 3 Wash. 327.

Wisconsin. — Milwaukee Mut. Loan, etc., Soc. *v.* Jagodzinski, 84 Wis. 35; Johnson *v.* Eldred, 13 Wis. 482; Bertline *v.* Bauer, 25 Wis. 486; Nye *v.* Sochor, 92 Wis. 40, 53 Am. St. Rep. 896; Loomis *v.* Rice, 37 Wis. 262; Spafford *v.* Janesville, 15 Wis. 474; Etna L. Ins. Co. *v.* McCormick, 20 Wis. 265; Landon *v.* Burke, 33 Wis. 452; Scheer *v.* Keown, 34 Wis. 349; Durning *v.* Burkhardt, 34 Wis. 585.

Instances of Mistakes Held Not Sufficient to Warrant Opening or Vacating Judgment. — See Langdon *v.* Bullock, 8 Ind. 341; Robertson *v.* Bergen, 10 Ind. 402; Almy *v.* Hess, 2 Utah 223. See also Martin *v.* Fowler, 51 S. Car. 164.

1. No Relief Against Mistake of Law. — Thompson *v.* Harlow, 150 Ind. 450. Compare Butler *v.* Mitchell, 17 Wis. 54.

2. Surprise a Sufficient Ground for Opening or Vacating Judgment — England. — Waters *v.* Waters, 2 DeG. & Sm. 591.

Arizona. — Woffenden *v.* Woffenden, 1 Ariz. 328.

California. — Heilbron *v.* Campbell, (Cal. 1890) 23 Pac. Rep. 1032.

Colorado. — Leahy *v.* Dunlap, 6 Colo. 552; Robert E. Lee Silver Min. Co. *v.* Englebach, 18 Colo. 106.

Georgia. — Winter *v.* State, 18 Ga. 275.

Indiana. — Clandy *v.* Caldwell, 106 Ind. 260; Edsall *v.* Ayres, 15 Ind. 286; Ely *v.* Hawkins, 15 Ind. 230; Bush *v.* Bush, 46 Ind. 70; Smith *v.* Noe, 30 Ind. 117; Davis *v.* Steuben School

Tp., 19 Ind. App. 694; Nord *v.* Marty, 56 Ind. 531; Cavanaugh *v.* Toledo, etc., R. Co., 49 Ind. 149; Hobbs *v.* Tipton County, 122 Ind. 180; Indianapolis, etc., R. Co. *v.* Crockett, 2 Ind. App. 136; Western Union Tel. Co. *v.* Griffin, 1 Ind. App. 46; Ratliff *v.* Baldwin, 29 Ind. 16, 92 Am. Dec. 330.

Iowa. — Heathcote *v.* Haskins, 74 Iowa 566.

Kentucky. — Ross *v.* Louisville, etc., R. Co., 92 Ky. 583.

Maryland. — Huntington *v.* Emery, 74 Md. 67.

Minnesota. — Dupries *v.* Milwaukee, etc., R. Co., 20 Minn. 156; Covert *v.* Clark, 23 Minn. 539.

Montana. — Briscoe *v.* McCaffery, 8 Mont. 336; Simpkins *v.* Simpkins, 14 Mont. 386, 43 Am. St. Rep. 641.

Nebraska. — See Proctor *v.* Pettitt, 25 Neb. 96.

New Jersey. — United Security L. Ins., etc., Co. *v.* Ott, (N. J. 1893) 26 Atl. Rep. 923.

New York. — Lanahan *v.* Drew, (N. Y. City Ct. Gen. T.) 17 N. Y. Supp. 840, (C. Pl. Gen. T.) 19 N. Y. Supp. 910; Matter of Underhill, 1 Connolly (N. Y.) 313; Jospe *v.* Lighte, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 146; Kiefer *v.* Grand Trunk R. Co., (Supm. Ct. Gen. T.) 8 N. Y. Supp. 230; Mattern *v.* Sage, 15 Daly (N. Y.) 38.

North Carolina. — Brown *v.* Rhinehart, 112 N. Car. 772; Flowers *v.* Alford, 111 N. Car. 248; Winborne *v.* Johnson, 95 N. Car. 46; Clemmons *v.* Field, 99 N. Car. 400, 6 Am. St. Rep. 529.

Ohio. — Mitchell *v.* Knight, 7 Ohio Cir. Ct. 204, 3 Ohio Cir. Dec. 729.

South Carolina. — Kaminitzky *v.* Northeastern R. Co., 25 S. Car. 53; *Ex p.* Roundtree, 51 S. Car. 405; Martin *v.* Fowler, 51 S. Car. 164.

Virginia. — Cottrell *v.* Watkins, 89 Va. 801, 37 Am. St. Rep. 897, 17 Va. L. J. 323.

Washington. — Denton *v.* Merchants Nat. Bank, 18 Wash. 387.

West Virginia. — Bennett *v.* Jackson, 34 W. Va. 62.

Wisconsin. — Breed *v.* Ketchum, 51 Wis. 164; Dunlop *v.* Schubert, 97 Wis. 135; Loomis *v.* Rice, 37 Wis. 262; Spafford *v.* Janesville, 15 Wis. 474; Etna L. Ins. Co. *v.* McCormick, 20 Wis. 265; Landon *v.* Burke, 33 Wis. 452; Scheer *v.* Keown, 34 Wis. 349; Durning *v.* Burkhardt, 34 Wis. 585.

Surprise at a Ruling of Court. — But a statute providing for relief against a judgment on the ground of surprise does not apply where the only surprise alleged is at the ruling of the court in refusing to continue a cause on motion, and the unsuccessful party is not entitled to relief against the judgment rendered in the cause upon this ground. Breed *v.* Ketchum, 51 Wis. 164.

3. Judgment May Be Opened or Vacated on Ground of Excusable Neglect or Inadvertence of



(4) *Party Who Was Represented by Counsel May Have Relief.* — A judgment may be vacated for excusable neglect or surprise, although the party against whom the judgment was rendered was represented by counsel, for it is easy to conceive of a case where a judgment may be rendered against a

**Defendant — England.** — *King v. Sandeman*, 38 L. T. N. S. 461, 26 W. R. 509; *Wright v. Clifford*, 47 L. J. Ch. 543, 26 W. R. 369.

**United States.** — *Pelzer Mfg. Co. v. Hamburg-Bremen F. Ins. Co.*, 71 Fed. Rep. 826.

**California.** — *Towle v. Clunie*, (Cal. 1890) 23 Pac. Rep. 314; *McGuire v. Drew*, 83 Cal. 225; *Buell v. Emerich*, 85 Cal. 116; *Grady v. Donahoo*, 108 Cal. 211.

**Colorado.** — *City Block Directory Co. v. App*, 4 Colo. App. 350; *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106.

**Georgia.** — *Eady v. Napier*, 96 Ga. 736.

**Indiana.** — *Chapman v. Clevinger*, 10 Ind. 23; *Hays v. State Bank*, 21 Ind. 154; *Ratliff v. Baldwin*, 29 Ind. 16, 92 Am. Dec. 330; *Nord v. Marty*, 56 Ind. 531; *Bash v. Van Osdol*, 75 Ind. 186; *Monroe v. Paddock*, 75 Ind. 422; *Hite v. Fisher*, 76 Ind. 231; *Birch v. Frantz*, 77 Ind. 199; *Williams v. Kessler*, 82 Ind. 183; *Brumbaugh v. Stockman*, 83 Ind. 583; *McGaughey v. Woods*, 92 Ind. 296; *Kreite v. Kreite*, 93 Ind. 583; *Beatty v. O'Connor*, 106 Ind. 81; *Clandy v. Caldwell*, 106 Ind. 260; *Hobbs v. Tipton County*, 122 Ind. 180; *Crescent Brewing Co. v. Cullins*, 125 Ind. 110; *Lowe v. Hamilton*, 132 Ind. 406; *Jones v. Crowell*, 143 Ind. 218; *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46; *Devenbaugh v. Nifer*, 3 Ind. App. 379; *Cresswell v. White*, 3 Ind. App. 306; *Davis v. Steuben School Tp.*, 19 Ind. App. 694; *Indianapolis, etc., R. Co. v. Crockett*, 2 Ind. App. 136; *Thompson v. Harlow*, 150 Ind. 450.

**Iowa.** — *Grove v. Bush*, 86 Iowa 94; *Walker v. Freelove*, 79 Iowa 752.

**Kentucky.** — *Dixon v. Lyne*, (Ky. 1889) 10 S. W. Rep. 469, 10 Ky. L. Rep. 769; *Chaffin v. Fulkerson*, 95 Ky. 277, 15 Ky. L. Rep. 635; *Kammn v. Ottod*, (Ky. 1896) 34 S. W. Rep. 1070.

**Louisiana.** — *Warren v. Copp*, 48 La. Ann. 810.

**Maryland.** — *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Taylor v. Sindall*, 34 Md. 38; *Smith v. Black*, 51 Md. 247.

**Massachusetts.** — *Keith v. McCaffrey*, 145 Mass. 18.

**Minnesota.** — *Carlson v. Phinney*, 56 Minn. 476; *Jones v. Swain*, 57 Minn. 251.

**Missouri.** — *Piper v. Aldrich*, 41 Mo. 421; *Frazier v. Bishop*, 29 Mo. 447.

**Nebraska.** — *Funk v. Kansas Mfg. Co.*, 53 Neb. 450.

**Nevada.** — *Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337.

**New Jersey.** — *Den v. Ball*, 3 N. J. L. 528; *Abrams v. Wood*, 4 N. J. L. 33; *Truax v. Roberts*, 4 N. J. L. 327; *Rorke v. Walton*, 58 N. J. L. 150.

**New York.** — *Matter of Traver*, (Surrogate Ct.) 9 Misc. (N. Y.) 621; *Jospe v. Lighte*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 146; *Matter of Hodgman*, 82 Hun (N. Y.) 419; *Egan v. Rooney*, (N. Y. Super. Ct. Spec. T.) 38 How. Pr. (N. Y.) 121; *Mann v. Provost* (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 446;

*Matter of Underhill*, 1 Connoly (N. Y.) 313; *Born v. Schrenkeisen*, 52 N. Y. Super. Ct. 219; *Mattern v. Sage*, 15 Daly (N. Y.) 38; *Kiefer v. Grand Trunk R. Co.*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 230.

**North Carolina.** — *Sluder v. Rollins*, 76 N. Car. 271; *Branch v. Walker*, 92 N. Car. 87; *Warren v. Harvey*, 92 N. Car. 137; *Wiley v. Logan*, 94 N. Car. 564; *Whitson v. Western North Carolina R. Co.*, 95 N. Car. 385; *Clemmons v. Field*, 99 N. Car. 400, 6 Am. St. Rep. 529; *Finlayson v. American Acc. Co.*, 109 N. Car. 196; *Sikes v. Weatherly*, 110 N. Car. 131; *Flowers v. Alford*, 111 N. Car. 248; *Brown v. Rhinehart*, 112 N. Car. 772; *Simpson v. Brown*, 117 N. Car. 482; *Stith v. Jones*, 119 N. Car. 428.

**Oregon.** — *Hicklin v. McClear*, 19 Oregon 508; *Weiss v. Meyer*, 24 Oregon 108; *Deering v. Quivey*, 26 Oregon 556.

**Pennsylvania.** — *Slaymaker v. Bates*, 14 Lanc. L. Rev. 247.

**South Carolina.** — *Wagener v. Swygert*, 30 S. Car. 296; *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 53; *Martin v. Fowler*, 51 S. Car. 164; *Ex p. Roundtree*, 51 S. Car. 405.

**South Dakota.** — *Searles v. Christensen*, 5 S. Dak. 650.

**Tennessee.** — *Rowland v. Jones*, 2 Heisk. (Tenn.) 321.

**Texas.** — *Tullis v. Scott*, 38 Tex. 537.

**Washington.** — *Denton v. Merchants Nat. Bank*, 18 Wash. 387.

**Wisconsin.** — *Spafford v. Janesville*, 15 Wis. 474; *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Wicke v. Lake*, 21 Wis. 410, 94 Am. Dec. 552; *Landon v. Burke*, 33 Wis. 452; *Scheer v. Keown*, 34 Wis. 349; *Durning v. Burkhardt*, 34 Wis. 585; *Loomis v. Rice*, 37 Wis. 262; *Black v. Hurlbut*, 73 Wis. 126; *Milwaukee Mut. Loan, etc., Soc. v. Jagodzinski*, 84 Wis. 35.

**Instances of Neglect Held Not Excusable.** — *McGuire v. Drew*, 83 Cal. 225; *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46; *Funk v. Kansas Mfg. Co.*, 53 Neb. 450; *Vick v. Baker*, 122 N. Car. 98; *Leader v. Dunlap*, 6 Pa. Super. Ct. 243, 41 W. N. C. (Pa.) 477. See also *Towle v. Clunie*, (Cal. 1890) 23 Pac. Rep. 314; *Merrill v. Roberts*, 78 Tex. 28.

**Instances of Facts Constituting Such "Excusable Neglect" as to Justify Opening or Vacating Judgment — Alabama.** — *Ex p. O'Neal*, 72 Ala. 560.

**California.** — See *Byrne v. Alas*, 68 Cal. 479.

**Florida.** — *Tidwell v. Witherspoon*, 18 Fla. 282.

**Illinois.** — *Dunlap v. Gregory*, 14 Ill. App. 601.

**Indiana.** — *McGaughey v. Woods*, 92 Ind. 296; *Newcome v. Wiggins*, 78 Ind. 306; *Hill v. Crump*, 24 Ind. 291; *Sage v. Matheny*, 14 Ind. 369; *Flanagan v. Patterson*, 78 Ind. 514; *Slagle v. Bodmer*, 75 Ind. 330; *Bristor v. Galvin*, 62 Ind. 352; *Clandy v. Caldwell*, 106 Ind. 256.

**Iowa.** — *Montgomery County v. American Emigrant Co.*, 47 Iowa 91; *Luscomb v. Maloy*, 26 Iowa 444.



party through some excusable neglect or surprise of his counsel, and the terms of the statute are broad enough to cover such a case.<sup>1</sup>

(5) *What Mistake or Neglect of Attorney May Afford Ground for Relief.* — It has been considered that the mistake or neglect of an attorney is not ground for vacating a judgment, unless it is such as would be excusable if attributable to the client.<sup>2</sup> Thus, a party has been considered not entitled to relief on the ground that he acted on the erroneous advice of counsel,<sup>3</sup> and the court has refused to vacate a judgment because an attorney neglected to file a pleading in due time<sup>4</sup> or forgot the day of trial.<sup>5</sup> But a judgment has

*Kansas.* — Gheer v. Huber, 32 Kan. 319.

*Minnesota.* — Moran v. Mackey, 32 Minn. 266.

*New York.* — Born v. Schrenkeisen, 52 N. Y. Super. Ct. 219.

*North Carolina.* — Nicholson v. Cox, 83 N. Car. 48; Weil v. Woodard, 104 N. Car. 94; Branch v. Walker, 92 N. Car. 87; North Carolina University v. Lassiter, 83 N. Car. 38.

*Oregon.* — Weiss v. Meyer, 24 Oregon 108.

*Texas.* — Goodhue v. Meyers, 58 Tex. 405.

*Wisconsin.* — Cleveland v. Burnham, 55 Wis. 598; Johnson v. Eldred, 13 Wis. 482; McArthur v. Slauson, 60 Wis. 293.

1. *Party Represented by Counsel May Have Relief* — *Ex p. Roundtree*, 51 S. Car. 405. See also *Taylor v. Pope*, 106 N. Car. 267, 19 Am. St. Rep. 530; *Vaughan v. Hewitt*, 17 S. Car. 445.

2. *No Relief for Mistake or Neglect of Attorney Unless Such as Would Be Excusable if Attributable to Client* — *United States*, — U. S. v. Wallace, 46 Fed. Rep. 569; *Bonnifield v. Thorp*, 71 Fed. Rep. 924.

*California.* — Sampson v. Ohleyer, 22 Cal. 200; *Smith v. Tunstead*, 56 Cal. 175; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425; *Edwards v. Hellings*, 103 Cal. 204.

*Georgia.* — *Western, etc., R. Co. v. Pitts*, 79 Ga. 532; *Phillips v. Taber*, 83 Ga. 565; *Parker v. Belcher*, 87 Ga. 110.

*Illinois.* — *Mendell v. Kimball*, 85 Ill. 582; *Schroer v. Wessell*, 89 Ill. 113; *Clark v. Ewing*, 93 Ill. 573; *East St. Louis v. Thomas*, 102 Ill. 453; *Culver v. Colehour*, 115 Ill. 558; *Schultz v. Meiselbar*, 44 Ill. App. 233, *affirmed* 144 Ill. 26; *German F. Ins. Co. v. Perry*, 45 Ill. App. 197.

*Indiana.* — *Spaulding v. Thompson*, 12 Ind. 477, 74 Am. Dec. 221; *Comstock v. Whitworth*, 75 Ind. 129; *Brumbaugh v. Stockman*, 83 Ind. 583; *Bowen v. Bragunier*, 88 Ind. 558; *Kreite v. Kreite*, 93 Ind. 583; *Sharp v. Moffitt*, 94 Ind. 240; *Center Tp. v. Marion County*, 110 Ind. 579; *Parker v. Indianapolis Nat. Bank*, 1 Ind. App. 462; *Baltimore, etc., R. Co. v. Flinn*, 2 Ind. App. 55; *Heaton v. Peterson*, 6 Ind. App. 1.

*Iowa.* — *State v. Elgin*, 11 Iowa 216; *Ordway v. Suchard*, 31 Iowa 481; *Jones v. Leech*, 46 Iowa 186; *Niagara Ins. Co. v. Rodecker*, 47 Iowa 162.

*Kansas.* — *Welch v. Challen*, 31 Kan. 696.

*Kentucky.* — *Marcum v. Powers*, (Ky. 1888) 9 S. W. Rep. 255.

*Louisiana.* — *McFarland v. White*, 13 La. Ann. 394.

*Maryland.* — *Huntington v. Emery*, 74 Md. 67.

*Minnesota.* — *Merritt v. Putnam*, 7 Minn. 493.

*Missouri.* — *Kerby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 192; *Webster v. McMahan*, 13 Mo. 582; *Bosbyshell v. Summers*, 40 Mo. 172; *Gehrke v. Jod*, 59 Mo. 522; *Matthis v. Cameron*, 62 Mo. 504.

*Montana.* — *Haggin v. Lorentz*, 13 Mont. 406; *Thomas v. Chambers*, 14 Mont. 423.

*Nebraska.* — *Ganzer v. Schiffbauer*, 40 Neb. 633.

*Nevada.* — *Harper v. Mallory*, 4 Nev. 447.

*North Carolina.* — *Burke v. Stokely*, 65 N. Car. 569; *Finlayson v. American Acc. Co.*, 109 N. Car. 196; *Whitson v. Western North Carolina R. Co.*, 95 N. Car. 385.

*Oregon.* — *Mitchell, etc., Co. v. Downing*, 23 Oregon 448.

*South Carolina.* — *Ruff v. Doty*, 26 S. Car. 173, 4 Am. St. Rep. 709; *Foster v. Jones*, 1 McCord L. (S. Car.) 116.

*Texas.* — *See Wilson v. Smith*, 17 Tex. Civ. App. 188; *Woolley v. Sullivan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 919, (Tex. 1898) 45 S. W. Rep. 377.

*Vermont.* — *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290.

*Wisconsin.* — *Dick v. Williams*, 87 Wis. 651.

*Cases Holding Negligence of Counsel a Sufficient Ground for Relief.* — There are, however, a considerable number of cases in which it has been held that where the party himself has not been guilty of negligence, a judgment against him may be set aside because obtained through the negligence of his counsel.

*Illinois.* — *Gibbs, etc., Mfg. Co. v. Kaszezyki*, 18 Ill. App. 623; *Slack v. Casey*, 22 Ill. App. 412.

*Michigan.* — *Loree v. Reeves*, 2 Mich. 133.

*Minnesota.* — *Nye v. Swan*, 42 Minn. 243.

*New York.* — *Clark v. Lyon*, 2 Hilt. (N. Y.) 91; *Nash v. Wetmore*, 33 Barb. (N. Y.) 159; *Philips v. Hawley*, 6 Johns. (N. Y.) 129; *Meacham v. Dudley*, 6 Wend. (N. Y.) 514.

*North Carolina.* — *Griel v. Vernon*, 65 N. Car. 76; *Bradford v. Coit*, 77 N. Car. 72; *Gwathney v. Savage*, 101 N. Car. 103; *Roberts v. Allman*, 106 N. Car. 391.

*Wisconsin.* — *Hanson v. Michelson*, 19 Wis. 498.

3. *Erroneous Advice of Counsel Not Ground for Relief.* — *Lowe v. Hamilton*, 132 Ind. 406; *Mouser v. Harmon*, 96 Ky. 591; *Anderson v. Carr*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 281.

4. *No Relief Where Attorney Neglected to File Pleading in Due Time.* — *People v. Rains*, 23 Cal. 127; *Bailey v. Taaffe*, 29 Cal. 422; *East St. Louis v. Thomas*, 102 Ill. 453; *Bash v. Van Osdol*, 75 Ind. 186; *Welch v. Challen*, 31 Kan. 696. Compare *Tidwell v. Witherspoon*, 18 Fla. 282; *Griel v. Vernon*, 65 N. Car. 76. See also *Burke v. Stokely*, 65 N. Car. 569.

5. *No Relief Where Attorney Forgot Day of*



been set aside where the defendant's attorney overlooked the case by reason of its being placed on the trial calendar under a title calculated to mislead,<sup>1</sup> and where the defendant's attorney resided a considerable distance from the place of trial, and had reason to believe that the case would not be tried at the time it was taken up.<sup>2</sup>

**Unavoidable Absence of Counsel.** — There are several cases in which a judgment has been opened or vacated on account of the unavoidable absence of counsel of the party against whom such judgment was rendered.<sup>3</sup>

**Misunderstanding Between Parties and Attorneys.** — And there are also cases in which the fact that a judgment has been obtained against a party on account of some misunderstanding between him and his counsel has been held a sufficient ground for opening or vacating such judgment.<sup>4</sup>

(6) *When Public Corporation Not Entitled to Relief.* — A public corporation cannot be relieved from a judgment under a statute authorizing relief on the ground of "mistake, inadvertence, surprise, or excusable neglect," where the officer who is authorized to act for it had full knowledge of all the facts leading up to the rendition of the judgment.<sup>5</sup>

(7) *Judgment on Verdict.* — It has been held that a statute authorizing the setting aside of a judgment for "mistake, inadvertence, surprise, or excusable neglect," does not apply to such judgments as necessarily follow a verdict, the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, and the verdict would stand even if the judgment were vacated, as such verdict could not be set aside after the term.<sup>6</sup>

**f. CASUALTY OR MISFORTUNE.** — Under the statutes of a good many of the states, a party may have a judgment adverse to him opened or vacated at a term subsequent on the ground that he was prevented by unavoidable casualty or misfortune from appearing and prosecuting or defending the action in which it was rendered.<sup>7</sup>

**Trial.** — *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290. But compare *Dougherty v. Nevada Bank*, 68 Cal. 275; *Farmers Mut. Ins. Co. v. Reynolds*, 52 Vt. 405.

1. **Case Overlooked by Attorney on Account of Misleading Title on Calendar.** — *Allen v. Hoffman*, 12 Ill. App. 573.

2. **Reasonable Belief that Case Would Not Be Tried.** — *Cameron v. Carroll*, 67 Cal. 500.

3. **Judgment May Be Opened or Vacated on Account of Unavoidable Absence of Counsel** — *Georgia*. — *Beall v. Marietta Paper Mill Co.*, 45 Ga. 28. See also *Western, etc., R. Co. v. Pitts*, 79 Ga. 532.

*Indiana*. — *Hill v. Crump*, 24 Ind. 291; *McGaughey v. Woods*, 92 Ind. 296; *Green v. Stobo*, 118 Ind. 332.

*Iowa*. — *Ellis v. Butler*, 78 Iowa 632.

*Missouri*. — *Stout v. Lewis*, 11 Mo. 438.

*South Carolina*. — See *Claussen v. Johnson*, 32 S. Car. 86.

*Wisconsin*. — *McArthur v. Slauson*, 60 Wis. 293. See also *infra*, this section, *Sickness of Party or Attorney*.

**Judgment Not Vacated Where Absence of Attorney Voluntary and Not Unavoidable.** — *Gray v. Sabin*, 87 Cal. 211. See also cases cited *supra*, this section.

4. **Judgment Obtained Through Misunderstanding Between Party and Counsel** — *Arkansas*. — *Kupferle v. Merchants Nat. Bank*, 32 Ark. 717. *California*. — *De McKinley v. Tuttle*, 34 Cal. 235.

*Georgia*. — *Howell v. Glover*, 65 Ga. 466.

*Indiana*. — *Beatty v. O'Connor*, 106 Ind. 81. *Kentucky*. — *Dixon v. Lyne*, (Ky. 1889) 10 S. W. Rep. 469.

*Maryland*. — *Heaps v. Hoopes*, 68 Md. 383.

*Tennessee*. — *Panesi v. Boswell*, 12 Heisk. (Tenn.) 323.

5. **When Public Corporation Not Entitled to Relief.** — *Davis v. Steuben School Tp.*, 19 Ind. App. 694.

6. **Judgment on Verdict Cannot Be Vacated.** — *Beck v. Bellamy*, 93 N. Car. 129; *Flowers v. Alford*, 111 N. Car. 248; *Brown v. Rhinehart*, 112 N. Car. 772; *Clemmons v. Field*, 99 N. Car. 400, 6 Am. St. Rep. 529.

7. **Unavoidable Casualty or Misfortune May Afford Ground for Relief** — *Arkansas*. — *Leaming v. McMillan*, 59 Ark. 162, 43 Am. St. Rep. 26.

*Indiana*. — *Decker v. Graves*, 10 Ind. App. 25.

*Iowa*. — *Browning v. Gosnell*, 91 Iowa 448.

*Kansas*. — *Laithe v. McDonald*, 12 Kan. 340; *Schnitzler v. Wichita Fourth Nat. Bank*, 1 Kan. App. 674; *Winsor v. Goddard*, 15 Kan. 118; *Welch v. Challen*, 31 Kan. 696; *Gheer v. Huber*, 32 Kan. 319.

*Kentucky*. — *Cooley v. Barbourville Land, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 464; *Bean v. Haffendorfer*, 84 Ky. 685.

*Nebraska*. — *Ganzer v. Schiffbauer*, 40 Neb. 633.

*New York*. — *Bonnell v. Rome, etc., R. Co.*, 12 Hun (N. Y.) 218.

*Ohio*. — *Howard v. Abbey*, 1 West. L. Month. 278, 2 Ohio Dec. (Reprint) 64.

*Wisconsin*. — *Omro v. Ward*, 19 Wis. 232.



*g.* SICKNESS OF PARTY OR ATTORNEY. — The weight of authority supports the view that the sickness of a party to an action, or of his attorney, whereby either of them is prevented from attending the trial, is such an unavoidable casualty or misfortune, or a failure to attend for this reason is such excusable neglect, that the party may subsequently have a judgment rendered against him opened or vacated.<sup>1</sup> There are, however, several cases in which this has been denied.<sup>2</sup>

*h.* NEWLY DISCOVERED EVIDENCE. — A judgment may be set aside because of newly discovered evidence.<sup>3</sup>

*i.* WANT OF NOTICE — A judgment may be vacated where it was rendered without the service of process upon the defendant,<sup>4</sup> or where the party against whom it was rendered was not given notice of the time of trial;<sup>5</sup> and under the statutes of some states a judgment rendered without personal service, as upon service by publication, may be opened where the defendant had no actual notice.<sup>6</sup>

A Judgment Against Several Defendants, one or more of whom was not served or given proper notice, may be opened or vacated as to such defendant.<sup>7</sup>

*j.* JUDGMENT CONTRARY TO AGREEMENT. — A judgment taken or entered contrary to or in violation of an agreement between the parties may be opened or vacated at the instance of the party injured thereby,<sup>8</sup> but such an agree-

**Circumstances Held Not to Constitute Such Unavoidable Casualty or Misfortune as to Warrant Vacation of Judgment — Negligence of Attorney.** — *Wynn v. Frost*, 6 Okla. 89.

*Failure of Husband to Deliver Copy of Summons to Wife.* — *Morse v. Engle*, 28 Neb. 534.

*Failure of Attorney to Appear on Account of Sickness of Wife.* — *Kincaid v. Tutt*, 88 Ky. 392.

**1. Sickness of Party a Sufficient Ground for Opening or Vacating Judgment —** *Indiana*. — *Sage v. Matheny*, 14 Ind. 369; *Slagle v. Bodmer*, 75 Ind. 330; *Monroe v. Paddock*, 75 Ind. 422; *Flanagan v. Patterson*, 78 Ind. 514; *Clandy v. Caldwell*, 106 Ind. 256.

*Iowa*. — *Luscomb v. Maloy*, 26 Iowa 444. See also *Brewer v. Holborn*, 34 Iowa 473.

*Kansas*. — *Gheer v. Huber*, 32 Kan. 319.

*Montana*. — *Benedict v. Spendiff*, 9 Mont. 85.

*North Carolina*. — *Depriest v. Patterson*, 85 N. Car. 376.

*Texas*. — *Goodhue v. Meyers*, 58 Tex. 405.

**Sickness of Attorney a Sufficient Ground.** — *Bristol v. Galvin*, 62 Ind. 352; *Snell v. Iowa Homestead Co.*, 67 Iowa 405; *Stout v. Lewis*, 11 Mo. 438. See also *Wilmarth v. Gatfield*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 52.

**2. Sickness of Party Not Sufficient.** — *Shaffer v. Sutton*, 49 Ill. 506; *Jonsson v. Lindstrom*, 114 Ind. 152. See also *Cannon v. Harrold*, 61 Ga. 158; *Edwards v. McKay*, 73 Ill. 570.

**Sickness of Attorney Not Sufficient.** — *Clark v. Ewing*, 93 Ill. 572.

**3. Judgment May Be Set Aside Because of Newly Discovered Evidence —** *United States*. — *Guild v. Phillips*, 44 Fed. Rep. 461; *Witters v. Sowles*, 32 Fed. Rep. 765.

*Iowa*. — *Heathcote v. Haskins*, 74 Iowa 566. See also *Searle v. Fairbanks*, 80 Iowa 307.

*Kansas*. — *McMillan v. Baker*, 20 Kan. 50.

*Maryland*. — *Ahl v. Ahl*, 71 Md. 555.

*Michigan*. — See *Mueller v. Marsh*, 116 Mich. 375.

*New York*. — *Wetmore v. Law*, 34 Barb. (N. Y.) 515; *People v. New York*, (Supm. Ct. Spec. T.) 11 Abr. Pr. (N. Y.) 66.

*Oregon*. — *Wells v. Wall*, 1 Oregon 295.

*Virginia*. — *Roberts v. Cocke*, 1 Rand. (Va.) 121.

*Wisconsin*. — *Cooley v. Gregory*, 16 Wis. 303; *Spafford v. Janesville*, 15 Wis. 474.

**4. Defendant Not Served with Process.** — *Vilas v. Plattsburgh*, etc., R. Co., 123 N. Y. 440; *Daniels v. Southard*, 36 N. Y. App. Div. 540, (County Ct.) 23 Misc. (N. Y.) 235; *Droham v. Norton*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 486; *Duhaime v. Monast*, 20 R. I. 524.

**No Presumption of Lack of Service.** — In the absence of a showing that the summons was not served, a judgment will not be vacated several years after its rendition merely because the record does not show that the affidavit of service was sworn to. *State v. Superior Ct.*, 19 Wash. 128.

**5. Judgment May Be Vacated at Instance of Party Not Notified of Time of Trial.** — *Cottrell v. Cottrell*, 83 Cal. 457. See also *Proctor v. Pettitt*, 25 Neb. 96.

**6. Judgment Rendered Without Personal Service or Actual Notice May Be Opened.** — *Quinton v. Durein*, 59 Kan. 772, 51 Pac. Rep. 898; *Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337; *Blyth*, etc., *Co. v. Swenson*, 15 Utah 345. See also *Satterlee v. Grubb*, 38 Kan. 234.

**7. Judgment Against Several Defendants May Be Vacated as to Those Not Served.** — *Daniels v. Southard*, (County Ct.) 23 Misc. (N. Y.) 235, 36 N. Y. App. Div. 540; *Droham v. Norton*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 486; *Ferguson v. Millender*, 32 W. Va. 30. See also *Blyth*, etc., *Co. v. Swenson*, 15 Utah 345.

**8. Judgment Contrary to Agreement —** *United States*. — *Whitcomb v. Gandy*, 37 Fed. Rep. 735.

*Arkansas*. — *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218.

*Georgia*. — *Camp v. Morgan*, 81 Ga. 740.

*Indiana*. — *Duringer v. Moschino*, 93 Ind. 500; *Wood v. Hughes*, 138 Ind. 179.

*Iowa*. — *Chicago*, etc., R. Co. *v. Gillett*, 38



ment is not regarded with much favor when not in writing.<sup>1</sup>

*k. UNAUTHORIZED APPEARANCE BY ATTORNEY.* — The general rule is that where a judgment has been entered without proper service, and upon an appearance by an attorney who is clearly shown to have been without authority to appear for the party whom he has undertaken to represent,<sup>2</sup> it may be vacated at the instance of such party.<sup>3</sup>

*Distinction Depending upon Whether or Not Attorney Is Solvent.* — There are, however, several cases in which it has been held that the remedy of the party against whom judgment is thus rendered is primarily against the attorney who has assumed to represent him without authority, and that such judgment should not be set aside when the attorney is solvent and able to respond in damages for his wrong, but may be set aside when the attorney is not solvent or responsible.<sup>4</sup>

*l. ABSENCE OF DEFENDANT.* — In *Nebraska* it has been held that a statute authorizing the setting aside of a judgment rendered against a defendant in his absence did not apply where a defendant had entered his appearance to the action, but absented himself upon the day of trial.<sup>5</sup> And in *Texas* it has been held that a motion to set aside a judgment because of the absence of the defendant on the day of trial was properly refused where it was stated

*Iowa* 434; *Wolf v. Shenandoah Nat. Bank*, 84 Iowa 138.

*Kansas.* — *McIntosh v. Crawford County*, 13 Kan. 171; *McCoy v. Hazlett*, 14 Kan. 430.

*Kentucky.* — *Perry v. Fisher*, (Ky. 1898) 44 S. W. Rep. 378.

*Maryland.* — *Miller v. State*, 12 Md. 207.

*Michigan.* — *Roche v. Judge*, 26 Mich. 370.

*Mississippi.* — *Reid v. Louisville, etc., R. Co.*, (Miss. 1895) 16 So. Rep. 675.

*Missouri.* — *Schroeder v. Miller*, 35 Mo App. 227.

*Nebraska.* — *Cadwallader v. McClay*, 37 Neb. 359, 40 Am. St. Rep. 496.

*New Jersey.* — *Binsse v. Barker*, 13 N. J. L. 263, 23 Am. Dec. 720.

*New York.* — *Ladenberg v. Old Dominion Copper Co.*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 649.

*Pennsylvania.* — *Burns v. Beck*, 1 Leg. Rec. (Pa.) 81.

*Texas.* — See *Field v. Fowler*, 62 Tex. 65.

*Wisconsin.* — *Stafford v. McMillan*, 25 Wis. 566.

1. *Agreement Not Regarded with Favor When Not in Writing.* — *Dixon v. Brophay*, 29 Iowa 460. See also *Schroeder v. Miller*, 35 Mo. App. 227.

2. *Want of Authority Must Be Clearly Shown.* — *Russell v. Pottawottamie County*, 29 Iowa 256; *Winters v. Means*, 25 Neb. 241, 13 Am. St. Rep. 489; *Connell v. Galligher*, 36 Neb. 749; *Swartz v. Morgan*, 163 Pa. St. 201.

*The Burden of Proof Is on the Party Asserting the Want of Authority.* — *Connell v. Galligher*, 36 Neb. 749.

3. *Judgment Rendered on Unauthorized Appearance of Attorney May Be Vacated* — *District of Columbia.* — *Woods v. Dickinson*, 18 D. C. 301.

*Illinois.* — *Lyon v. Boilvin*, 7 Ill. 629; *Truett v. Wainwright*, 9 Ill. 411; *Frazier v. Resor*, 23 Ill. 88; *Kenyon v. Shreck*, 52 Ill. 382; *Leslie v. Fischer*, 62 Ill. 118.

*Iowa.* — *Russell v. Pottawottamie County*, 29 Iowa 256.

*Kentucky.* — *Holbert v. Montgomery*, 5 Dana (Ky.) 16.

*Louisiana.* — *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424.

*Maryland.* — *Heaps v. Hoopes*, 68 Md. 383.

*Missouri.* — *Bradley v. Welch*, 100 Mo. 258.

*Nebraska.* — *Winters v. Means*, 25 Neb. 241, 13 Am. St. Rep. 489; *Connell v. Galligher*, 36 Neb. 749.

*Nevada.* — *Stanton-Thompson Co. v. Crane*, (Nev. 1897) 51 Pac. Rep. 116.

*New York.* — *Bogardus v. Livingston*, 2 Hilt. (N. Y.) 236; *Ellsworth v. Campbell*, 31 Barb. (N. Y.) 134; *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 440, *reversing* (Supm. Ct. Gen. T.) 9 N. Y. Supp. 82; *Post v. Charlesworth*, 6 Hun (N. Y.) 256; *New York v. Smith*, 61 N. Y. Super. Ct. 374; *Yates v. Horanson*, 7 Robt. (N. Y.) 12.

*Ohio.* — *Critchfield v. Porter*, 3 Ohio 518; *Abernathy v. Latimore*, 19 Ohio 286.

*Pennsylvania.* — *Bryn Mawr Nat. Bank v. James*, 152 Pa. St. 364, 31 W. N. C. (Pa.) 386; *Swartz v. Morgan*, 163 Pa. St. 201; *Sheriff Mfg. Co. v. Pritsch Coal Co.*, 27 Pittsb. Leg. J. N. S. (Pa.) 218.

*Utah.* — *Blyth, etc., Co. v. Swenson*, 15 Utah 345.

4. *Distinction Depending upon Whether or Not Attorney Is Solvent* — *England.* — *Bayley v. Buckland*, 1 Exch. 1.

*California.* — *Holmes v. Rogers*, 13 Cal. 191; *Seale v. McLaughlin*, 28 Cal. 668.

*Massachusetts.* — *Smith v. Bowditch*, 7 Pick. (Mass.) 137.

*Mississippi.* — *Schirling v. Scites*, 41 Miss. 644.

*New York.* — *Powers v. Trenor*, 3 Hun (N. Y.) 3; *Gilman v. Tucker*, (N. Y. Super. Ct. Gen. T.) 18 Civ. Pro. (N. Y.) 50; *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

*North Carolina.* — *North Carolina University v. Lassiter*, 83 N. Car. 38; *Chadbourn v. Johnston*, 119 N. Car. 282.

5. *When Absence of Defendant Does Not Require Vacation of Judgment.* — *Strine v. Kaufman*, 12 Neb. 423; *Western Mut. Benev. Assoc. v. Pace*, 23 Neb. 494.



in the motion that the defendant was informed and believed that his attorney was not aware that he could give certain testimony in reference to certain payments, but no affidavit of the attorney to this effect appeared, and it did appear that the defendant did not much rely upon his ability to establish that the payments had been made.<sup>1</sup>

*m. DISABILITIES OF DEFENDANT.* — It is usually considered that a judgment may be opened or vacated on the ground that at the time of its rendition the party against whom it was rendered was under some legal disability such as infancy, coverture, or lunacy,<sup>2</sup> and the same has been held to be true where a party was dead at the time the judgment was rendered against him.<sup>3</sup>

*n. REVERSAL OF FOREIGN JUDGMENT ON WHICH JUDGMENT IS BASED.* — If, after a judgment has been obtained on a foreign judgment, the latter is reversed by an appellate tribunal, the defendant is entitled to relief against the judgment founded on such reversed judgment, and it may be set aside or vacated.<sup>4</sup>

*o. UNAUTHORIZED ENTRY.* — A judgment may be opened or vacated after the term where it is shown that it was entered without any authority therefor, whether there was a total lack of authority to enter any judgment or only a lack of authority to enter such judgment as was actually entered.<sup>5</sup>

*Judgment for Bona Fide Debt.* — In *Illinois*, however, the court has refused to set aside a judgment, although it was entered without authority, where it was entered for a *bona fide* debt several months overdue.<sup>6</sup>

1. *Helm v. Weaver*, 69 Tex. 143.

2. *Judgment Against Person under Disability May Be Opened or Vacated* — *England.* — *Matthey v. Wiseman*, 18 C. B. N. S. 657, 114 E. C. L. 657, 34 L. J. C. Pl. 216, 11 Jur. N. S. 603.

*United States.* — *U. S. v. Gayle*, 50 Fed. Rep. 169.

*Alabama.* — *Marion v. Regenstien*, 98 Ala. 475.

*Arkansas.* — *Richardson v. Matthews*, 58 Ark.

484.

*Delaware.* — *Mendenhall v. Springer*, 3 Harr. (Del.) 87; *Waples v. Hastings*, 3 Harr. (Del.)

403; *Carnahan v. Allderdice*, 4 Harr. (Del.) 99.

*Georgia.* — See *Foster v. Roe*, 23 Ga. 168.

*Illinois.* — *Maloney v. Dewey*, 127 Ill. 395,

11 Am. St. Rep. 131; *Atchison, etc., R. Co. v.*

*Elder*, 149 Ill. 173; *Crawford v. Thomson*, 161

Ill. 161.

*Indiana.* — *McClain v. Davis*, 77 Ind. 419;

*Zerger v. Flattery*, 83 Ind. 399; *Woods v.*

*Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Clandy*

*v. Caldwell*, 106 Ind. 256; *Dickerson v. Davis*,

111 Ind. 433; *Crescent Brewing Co. v. Cullins*,

125 Ind. 110. See also *Van Walters v. Board*

*of Children's Guardians*, 132 Ind. 567.

*Kentucky.* — *Bagby v. Champ*, 83 Ky. 13;

*Small v. Reeves*, (Ky. 1898) 46 S. W. Rep. 726.

See also *Allison v. Taylor*, 6 Dana (Ky.) 87, 32

Am. Dec. 68.

*Missouri.* — *Powell v. Gott*, 13 Mo. 458, 53

Am. Dec. 153; *Randalls v. Wilson*, 24 Mo. 76;

*Townsend v. Cox*, 45 Mo. 401.

*New Hampshire.* — See *Lamprey v. Nudd*, 29

N. H. 303.

*New York.* — *Collins v. Heather*, (Supm. Ct.

Spec. T.) 24 How. Pr. (N. Y.) 132; *Keyes v.*

*Ellensohn*, 72 Hun (N. Y.) 392.

*North Carolina.* — *Keaton v. Banks*, 10 Ired.

L. (32 N. Car.) 381, 51 Am. Dec. 393.

*Ohio.* — See *Johnson v. Pomeroy*, 31 Ohio St.

248.

*Pennsylvania.* — *Murdock v. Wasson*, 158

Pa. St. 295; *Rauch v. Young*, 9 Pa. Co. Ct.

416; *Rice v. Foy*, 2 Pa. Dist. 333; *Dornes v.*

*Staley*, 2 Pa. Dist. 332; *Shreiner v. Dommel*,

2 Pa. Dist. 332; *Ash v. Conyers*, 2 Miles (Pa.)

94; *Adams v. Grey*, 154 Pa. St. 258; *Littster*

*v. Littster*, 151 Pa. St. 474; *Krumrine v. Bot-*

*torf*, 12 Pa. Co. Ct. 67. See also *Krebs v.*

*Clark*, 9 Pa. Co. Ct. 420; *McIntire v. Bimber*,

9 Pa. Co. Ct. 463.

*South Carolina.* — *Levy v. Williams*, 4 S. Car.

515.

*Texas.* — See *Denni v. Elliott*, 60 Tex. 337;

*Brown v. Rentfro*, 57 Tex. 327.

*Wisconsin.* — *Gerster v. Hilbert*, 38 Wis. 609;

*Bond v. Neuschwander*, 86 Wis. 391.

*Wyoming.* — *White v. Hinton*, 3 Wyo. 753.

3. *Judgment Against Party Dead at Time of*

*Rendition May Be Opened or Vacated.* — *Clafin*

*v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263.

See also *Kohn v. Haas*, 95 Ala. 478. Compare

*Hoopes's Estate*, 185 Pa. St. 167.

4. *Defendant Entitled to Relief upon Reversal*

*of Foreign Judgment on Which Judgment Is Based.*

— *Heckling v. Allen*, 15 Fed. Rep. 196. See

also *Raven v. Smith*, 76 Hun (N. Y.) 60; *Mer-*

*chants' Ins. Co. v. De Wolf*, 33 Pa. St. 45, 75

Am. Dec. 577; *Ætna Ins. Co. v. Aldrich*, 38

Wis. 107.

5. *Judgment Entered Without Authority May*

*Be Opened or Vacated* — *United States.* — *U. S.*

*v. McKnight*, 1 Cranch (C. C.) 84.

*California.* — *Wharton v. Harlan*, 68 Cal. 422.

*Illinois.* — *Atchison, etc., R. Co. v. Elder*,

149 Ill. 173.

*Iowa.* — *Drake v. Smythe*, 44 Iowa 410.

*Maryland.* — *Montgomery v. Murphy*, 19 Md.

577, 81 Am. Dec. 654; *Merrick v. Baltimore*,

43 Md. 219.

*New York.* — *U. S. Life Ins. Co. v. Jordan*,

46 Hun (N. Y.) 201.

*Pennsylvania.* — *Miller v. Neidzielska*, 176

Pa. St. 409. See also *Weixel v. Lennox*, 179

Pa. St. 459; *Duton v. Suplee*, 8 Pa. Co. Ct. 92.

6. *Judgment Entered for Bona Fide Debt.* —

*Reynertson v. Central Lumber Co.*, 69 Ill.

App. 131.



*p.* **ERROR.** — It is well established as a general rule that a court cannot open or vacate a judgment rendered at a previous term where the only ground upon which such action is invoked is that the judgment is erroneous in point of law.<sup>1</sup>

**Judgment Not Warranted by Pleadings.** — But in *Kansas* a money judgment entered against a defendant upon a petition which did not contain any averment stating a liability against him has been set aside.<sup>2</sup>

*q.* **DEFENSES AVAILABLE AT TRIAL.** — It is well established that a judgment will not be opened or vacated in order to allow the defendant to raise defenses which were known to him and available at the time of the trial, but of which he neglected or failed to take advantage.<sup>3</sup>

**Counterclaim.** — Thus in *Pennsylvania* the court has refused to open a judgment in order to let in a counterclaim.<sup>4</sup>

**3. Submission of Parties to Jurisdiction.** — The rule that a court has no jurisdiction after the close of a term on its own motion to alter or vacate any judgment rendered during the term, has no application when the parties voluntarily submit themselves to the jurisdiction of the court at a subsequent term, and ask for the alteration, opening for defense, or vacation of a judgment.<sup>5</sup>

**1. Judgment Cannot Be Opened or Vacated on Ground of Error** — *England.* — *Davies v. Felix*, 4 Ex. D. 32.

*United States.* — *A. B. Dick Co. v. Wickelman*, 77 Fed. Rep. 853; *U. S. Bank v. Moss*, 6 How. (U. S.) 31.

*California.* — See *Hunter v. Bryant*, 98 Cal. 247.

*Georgia.* — *Brown v. Bennett*, 55 Ga. 189; *Hollifield v. Spencer*, 90 Ga. 253; *East Tennessee, etc., R. Co. v. Greene*, 95 Ga. 35.

*Indiana.* — *Burton v. Harris*, 76 Ind. 429; *Lawler v. Couch*, 80 Ind. 369; *Center Tp. v. Marion County*, 110 Ind. 579.

*Kansas.* — *Barnum v. Kennedy*, 21 Kan. 181; *Sexton v. Rock Island Lumber, etc., Co.*, 49 Kan. 153.

*Kentucky.* — *Coffey v. Proctor Coal Co.*, (Ky. 1892) 20 S. W. Rep. 286.

*Louisiana.* — *Taliaferro v. Steele*, 14 La. Ann. 666; *Elder v. New Orleans*, 31 La. Ann. 500.

*Minnesota.* — *Grant v. Schmidt*, 22 Minn. 1.

*Missouri.* — *Peake v. Redd*, 14 Mo. 79.

*New York.* — *Craig v. Fanning*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 336; *Wilsey v. Rooney*, (Supm. Ct. Gen. T.) 41 N. Y. St. Rep. 444.

*North Carolina.* — *Wolfe v. Davis*, 74 N. Car. 597; *State v. Horton*, 89 N. Car. 581; *May v. Stimson Lumber Co.*, 119 N. Car. 96.

*Pennsylvania.* — *Johns v. Humphreville*, 11 Lanc. L. Rev. 180.

*Vermont.* — *Harriman v. Swift*, 31 Vt. 385.

*Washington.* — *Tacoma Lumber, etc., Co. v. Wolff*, 7 Wash. 478.

*Wisconsin.* — *Loomis v. Rice*, 37 Wis. 262. See also *Spafford v. Janesville*, 15 Wis. 474; *Etna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Landon v. Burke*, 33 Wis. 452; *Scheer v. Keown*, 34 Wis. 349; *Durning v. Burkhardt*, 34 Wis. 585.

**2. Money Judgment on Petition Not Stating Any Liability Set Aside.** — *Mason v. Kansas City Circular R. Co.*, 58 Kan. 817, 51 Pac. Rep. 284.

**3. Judgment Not Opened or Vacated to Let In Defenses Available on First Trial** — *England.* — Anonymous, 4 Taunt. 885.

*United States.* — *Vowell v. Lyles*, 1 Cranch (C. C.) 329; *Witters v. Sowles*, 32 Fed. Rep. 765.

*California.* — *Hildreth v. James*, 109 Cal. 301.

*Colorado.* — *Snider v. Rinehart*, 20 Colo. 448; *Rogers v. McMillen*, 6 Colo. App. 14.

*Georgia.* — *Barksdale v. Greene*, 29 Ga. 418;

*Easley v. Camp*, 40 Ga. 698; *Gladden v. Cobb*, 80 Ga. 11. See also *Field v. Sisson*, 40 Ga. 67.

*Indiana.* — *Hite v. Fisher*, 76 Ind. 231; *Wills v. Browning*, 96 Ind. 149; *Center Tp. v. Marion County*, 110 Ind. 579.

*Kansas.* — *Elder v. National Bank*, 12 Kan. 242.

*Kentucky.* — *McCown v. Macklin*, 7 Bush (Ky.) 310; *Dickinson v. Trout*, 8 Bush (Ky.) 444.

*Louisiana.* — See *Robichaud v. Nelson*, 28 La. Ann. 578.

*Minnesota.* — *Clark v. Lee*, 58 Minn. 410.

*Missouri.* — *Murphy v. De France*, 101 Mo. 151; *Hall v. Lane*, 123 Mo. 633.

*New Jersey.* — *Fox v. Lambson*, 8 N. J. L. 368.

*New York.* — *Merrifield v. Bell*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 322; *New York v. Brady*, 115 N. Y. 599.

*North Carolina.* — *Council v. Willis*, 66 N. Car. 359; *Williamson v. Boykin*, 104 N. Car. 100.

*Pennsylvania.* — *Humphrey v. Tozier*, 154 Pa. St. 410. See also *Smith v. Wachob*, 179 Pa. St. 260, 40 W. N. C. (Pa.) 15.

*Rhode Island.* — *Pierce v. Probate Ct.*, 19 R. I. 472.

**Plaintiff in Real Action Who Might Have Avoided Judgment Against Him by Taking Nonsuit Not Entitled to Have Judgment Set Aside.** — *Brownson v. Reynolds*, 77 Tex. 254.

**Usury.** — In *Illinois* the court has ordered the opening of a judgment by confession entered under a warrant of attorney in order to let in a defense of usury. *Fleming v. Jencks*, 22 Ill. 475.

**4. Judgment Not Opened to Let In Counterclaim.** — *Croop v. Dodson*, 7 Kulp (Pa.) 12.

**5. Voluntary Submission to Jurisdiction at Subsequent Term.** — *Hewetson v. Chicago*, 172 Ill. 112.



**4. Who May Apply for Opening or Vacation** — *a. GENERAL RULE.* — The general rule is that an application to open a judgment or decree can be made only by a party to the record<sup>1</sup> who has been in some way prejudicially affected by such judgment or decree,<sup>2</sup> and that a stranger to the record cannot make such an application.<sup>3</sup>

*b. LIMITATIONS OF THE RULE.* — This rule is, however, subject to the limitation that a person not a party may apply for the opening or vacation of the judgment where his rights are injuriously affected thereby.<sup>4</sup> Thus, an application to set aside a judgment by confession may be made by subsequent or junior judgment creditors of the defendant,<sup>5</sup> or purchasers or mortgagees of land to which the lien of such judgment attaches.<sup>6</sup> And it has been held that

**1. Relief Can Be Granted Only to Party.** — See *Mock v. Coggin*, 101 N. Car. 366.

**2. Application Can Be Made Only by Party Injuri-ously Affected** — *United States.* — *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574.

*Iowa.* — *Searle v. Fairbanks*, 80 Iowa 307.

*Missouri.* — *Hardin v. Lee*, 51 Mo. 241; *Downing v. Still*, 43 Mo. 309.

*New York.* — *Havemeyer v. Brooklyn Sugar Refining Co.*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 157; *Hudson v. Hudson*, Sheld. (N. Y.) 386; *Tinson v. Welch*, 51 N. Y. 244.

*North Carolina.* — *Hervey v. Edmunds*, 68 N. Car. 243; *Knott v. Taylor*, 99 N. Car. 511, 6 Am. St. Rep. 547; *Uzzle v. Vinson*, 111 N. Car. 138; *Hinsdale v. Hawley*, 89 N. Car. 87.

*Pennsylvania.* — *Reap v. Battle*, 6 Kulp (Pa.) 423.

*South Carolina.* — *Latimer v. Latimer*, 22 S. Car. 257.

*Texas.* — *Sowell v. Jones*, (Tex. 1887) 4 S. W. Rep. 620; *Roller v. Ried*, 87 Tex. 69.

**"Unknown" Parties.** — Persons who are actually affected by a judgment by reason of having been made parties, under statute, as "unknown" defendants, may apply to have such judgment opened or vacated. *Boeing v. McKinley*, 44 Minn. 392; *Brown v. Brown*, 86 Tenn. 277.

**3. Stranger to Record Cannot Apply for Opening or Vacation** — *United States.* — *Foster v. Mansfield, etc.*, R. Co., 146 U. S. 88; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574.

*Georgia.* — *Merchants', etc., Bank v. Haiman*, 80 Ga. 624; *Morris v. Winkles*, 88 Ga. 717.

*Illinois.* — *West v. Carter*, 129 Ill. 249; *In re Burdick*, 162 Ill. 48.

*Indiana.* — *English v. Aldrich*, 132 Ind. 500, 32 Am. St. Rep. 270; *Indianapolis, etc., R. Co. v. Crockett*, 2 Ind. App. 136.

*Iowa.* — *Wright v. Keithler*, 7 Iowa 92; *Coleman v. Case*, 66 Iowa 534.

*Michigan.* — *Baugh v. Baugh*, 37 Mich. 59, 26 Am. Rep. 495.

*Minnesota.* — *Stewart v. Duncan*, 40 Minn. 410; *Mueller v. Reimer*, 46 Minn. 314.

*Nebraska.* — *Powell v. McDowell*, 16 Neb. 424.

*New York.* — *Howland v. Ralph*, 3 Johns. (N. Y.) 20; *Lowber v. New York*, 26 Barb. (N. Y.) 262; *Gere v. Gundlach*, 57 Barb. (N. Y.) 13; *Scheidt v. Sturgis*, 10 Bosw. (N. Y.) 606; *Cotes v. Smith*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 326.

*North Carolina.* — *Cody v. Quinn*, 6 Ired. L. (28 N. Car.) 191, 44 Am. Dec. 75; *Jacobs v. Burgwyn*, 63 N. Car. 196; *Smith v. Newbern*, 73 N. Car. 303; *Rollins v. Henry*, 78 N. Car.

342; *Walton v. Walton*, 80 N. Car. 26; *Hinsdale v. Hawley*, 89 N. Car. 87; *Knott v. Taylor*, 99 N. Car. 511, 6 Am. St. Rep. 547; *Walton v. McKesson*, 101 N. Car. 428; *Uzzle v. Vinson*, 111 N. Car. 138; *McDonald v. McBryde*, 117 N. Car. 125.

*Pennsylvania.* — *Hauer's Appeal*, 5 W. & S. (Pa.) 473; *Lowber's Appeal*, 8 W. & S. (Pa.) 387, 42 Am. Dec. 302; *Koons v. Koons*, 6 Kulp (Pa.) 317; *Brink v. Brink*, 8 Kulp (Pa.) 367; *In re Rowland*, 4 Pa. L. J. Rep. 199, 7 Pa. L. J. 312; *Drexel's Appeal*, 6 Pa. St. 272.

*Texas.* — *McGhee v. Romatka*, 18 Tex. Civ. App. 436; *Mayes v. Woodall*, 35 Tex. 687.

*Vermont.* — *Robinson v. Stevens*, 63 Vt. 555.

*Wisconsin.* — *Ward v. Clark*, 6 Wis. 509; *Packard v. Smith*, 9 Wis. 184; *Bean v. Fisher*, 14 Wis. 57; *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107.

**4. Person Not a Party May Apply for Opening at Vacation of Judgment Injuri-ously Affecting His Rights.** — *Gould v. Mortimer*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 167; *Kellogg v. Howell*, 62 Barb. (N. Y.) 280. See also *Mueller v. Reimer*, 46 Minn. 314; *People v. Hektograph Co.*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 358; *Stevens v. Central Nat. Bank*, 144 N. Y. 50; *Lowber v. New York*, 26 Barb. (N. Y.) 262; *Matter of Flynn*, 136 N. Y. 287; *Gere v. Gundlach*, 57 Barb. (N. Y.) 15; *Brettell v. Deffenbach*, 6 S. Dak. 21.

**Relief to Attorney of Party.** — In a *New York* case, where the defendant, after employing an attorney who appeared for him, made an offer to allow judgment to be taken against him, signing it in his own name, and such offer was accepted and judgment entered up in accordance therewith, the judgment was set aside for irregularity on the motion of the defendant's attorney. *Webb v. Dill*, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 264.

**5. Application by Judgment Creditors of Defendant** — *Georgia.* — *Smith v. Gettinger*, 3 Ga. 140.

*Missouri.* — *Bryant v. Harding*, 29 Mo. 347; *How v. Dorscheimer*, 31 Mo. 349.

*New York.* — *Easton Nat. Bank v. Buffalo Chemical Works*, 48 Hun (N. Y.) 557; *Wood v. Mitchell*, 53 Hun (N. Y.) 451; *Utter v. McLean*, 53 Hun (N. Y.) 568, 17 Civ. Pro. (N. Y.) 150; *Beekman v. Kirk*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 228; *Chappel v. Chappel*, 17 N. Y. 215, 64 Am. Dec. 496; *Dunham v. Waterman*, 17 N. Y. 14.

*Wyoming.* — *O'Keefe v. Foster*, 5 Wyo. 343.

**When Creditor Cannot Have Judgment Set Aside.** — See *Mahan v. Cavender*, 77 Ga. 118.

**6. Application by Subsequent Purchaser or Mortgagee.** — *Reed v. Bainbridge*, 4 N. J. L. 400;



an assignee of the interest of the defendant may also apply for the opening or vacation of a judgment.<sup>1</sup>

*c. PARTY IN WHOSE FAVOR JUDGMENT RENDERED* — The fact that a judgment has been rendered in favor of a party does not deprive him of the right to apply to have it vacated or set aside, in case he considers himself in any way injured thereby.<sup>2</sup>

*d. LEGAL REPRESENTATIVES OF PARTY.* — Under the statutes of some jurisdictions the legal representatives of a party against whom a judgment by default has been taken, may apply to have such judgment vacated.<sup>3</sup>

**5. Time for Applying** — *a. UNDER STATUTES* — (1) *In General.* — As a general rule, statutes providing for the opening or vacation of judgments upon grounds therein specified, also contain provisions limiting the time within which an application for such opening or vacation may be made.<sup>4</sup> Such limitations do not, of course, apply to applications based upon grounds not dependent upon statute for their force,<sup>5</sup> but there are in some jurisdictions

*Kendall v. Hodgins*, 1 Bosw. (N. Y.) 659; *Norris v. Denton*, 30 Barb. (N. Y.) 117; *Daly v. Matthews*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 403, note; *Bonnell v. Henry*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 142; *Sutton v. Pettus*, 4 Rich. L. (S. Car.) 163. But compare *Jacobs v. Burgwyn*, 63 N. Car. 196; *Packard v. Smith*, 9 Wis. 184.

**1. Assignee of Interest of Defendant May Apply** — *California.* — *Plummer v. Brown*, 64 Cal. 429; *People v. Mullan*, 65 Cal. 396; *Malone v. Big Flat Gravel Min. Co.*, 93 Cal. 384.

*New York.* — *Ladd v. Stevenson*, 112 N. Y. 325, 8 Am. St. Rep. 748.

*Utah.* — *Thomas v. Morris*, 8 Utah 284.

*Wisconsin.* — *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107.

**2. Party in Whose Favor Judgment Was Rendered May Apply for Opening or Vacation** — *California.* — *Brackett v. Banegas*, 99 Cal. 623.

*Illinois.* — *Atchison, etc., R. Co. v. Elder*, 149 Ill. 173.

*Louisiana.* — *May v. Ball*, 12 La. Ann. 416.

*Missouri.* — *Downing v. Still*, 43 Mo. 309.

*New York.* — *Montgomery v. Ellis*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 326; *Graef v. Bernard*, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 246; *Dietz v. Farish*, 43 N. Y. Super. Ct. 87; *Hatch v. Central Nat. Bank*, 78 N. Y. 487.

*North Carolina.* — See *Hinsdale v. Hawley*, 89 N. Car. 87.

**3. Application by Legal Representatives.** — *Plummer v. Brown*, 64 Cal. 429; *Corwin v. Bensley*, 43 Cal. 253; *Whitney v. Bohlen*, 157 Ill. 571; *Knott v. Taylor*, 99 N. Car. 511, 6 Am. St. Rep. 547; *Ward v. Southfield*, 102 N. Y. 287; *Hartigan v. Nagle*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 449.

**4. Limitation of Time for Application to Open or Vacate Judgments on Statutory Grounds** — *California.* — *People v. Lafarge*, 3 Cal. 130; *Carpentier v. Hart*, 5 Cal. 406; *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490; *Shaw v. McGregor*, 8 Cal. 521; *People v. Harrison*, 84 Cal. 607; *Moore v. Superior Ct.*, 86 Cal. 495; *Brackett v. Banegas*, 99 Cal. 623; *Dyerville Mfg. Co. v. Heller*, 102 Cal. 615; *Whitney v. Daggett*, 108 Cal. 232.

*Colorado.* — *Pleyte v. Pleyte*, 15 Colo. 44; *Clark v. Perry*, 17 Colo. 56.

*Dakota.* — *Yerkes v. McHenry*, 6 Dak. 5.

*Indiana.* — *Indianapolis, etc., R. Co. v. Crockett*, 2 Ind. App. 136; *Carlisle v. Wilkin-*

*son*, 12 Ind. 91; *Ryon v. Thomas*, 104 Ind. 59; *Hobbs v. Tipton County*, 122 Ind. 180.

*Iowa.* — *Hunt v. Stevens*, 26 Iowa 399; *Independent School Dist. v. Schreiner*, 46 Iowa 172.

*Kansas.* — *Albright v. Warkentin*, 31 Kan. 442; *Satterlee v. Grubb*, 38 Kan. 234.

*Kentucky.* — *Jackson v. Speed*, 2 Duv. (Ky.) 426; *Kinney v. O'Bannon*, 6 Bush (Ky.) 692.

*Minnesota.* — *Kern v. Chalfant*, 7 Minn. 487; *Holmes v. Campbell*, 13 Minn. 66; *Frankoviz v. Smith*, 35 Minn. 278; *Lord v. Hawkins*, 39 Minn. 73; *Drew v. St. Paul*, 44 Minn. 501; *Cutler v. Button*, 51 Minn. 550.

*Missouri.* — *Blanchard v. Hatch*, 32 Mo. 261.

*Nevada.* — *Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337; *Stanton-Thompson Co. v. Crane*, (Nev. 1897) 51 Pac. Rep. 116.

*New York.* — *Matter of Underhill*, 1 Connolly (N. Y.) 313; *Patterson v. Hochster*, 21 N. Y. App. Div. 432; *Mattern v. Sage*, 15 Daly (N. Y.) 38; *Jex v. Jacob*, 9 Daly (N. Y.) 293.

*North Carolina.* — *Cowles v. Hayes*, 69 N. Car. 406; *Roberts v. Allman*, 106 N. Car. 391; *Sluder v. Graham*, 118 N. Car. 835.

*Ohio.* — *Follett v. Alexander*, 58 Ohio St. 202.

*South Carolina.* — *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 53.

*Tennessee.* — *Brown v. Brown*, 86 Tenn. 277.

*Texas.* — *Snow v. Hawpe*, 22 Tex. 168; *Davis v. Davis*, 24 Tex. 187; *Kenedy v. Jarvis*, (Tex. 1886) 1 S. W. Rep. 191.

*Utah.* — *Elliott v. Bastian*, 11 Utah 452.

*Wisconsin.* — *Milwaukee Mut. Loan, etc., Soc. v. Jagodzinski*, 84 Wis. 35; *Butler v. Mitchell*, 17 Wis. 52; *Knox v. Clifford*, 41 Wis. 458.

**5. Limitations Not Applicable to Applications Based on Grounds Not Statutory** — *United States.* — *U. S. v. Williams*, 67 Fed. Rep. 384.

*California.* — *California Beet Sugar Co. v. Porter*, 68 Cal. 369; *Mace v. O'Reilly*, 70 Cal. 231; *Ex-Mission Land, etc., Co. v. Flash*, 97 Cal. 610; *Norton v. Atchison, etc., R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198.

*Colorado.* — See *Pleyte v. Pleyte*, 15 Colo. 44.

*Iowa.* — *Larson v. Williams*, 100 Iowa 110.

*Kentucky.* — *Newland v. Gentry*, 18 B. Mon. (Ky.) 666.

*Minnesota.* — *Stocking v. Hanson*, 22 Minn. 542.

*Mississippi.* — *Harper v. Barnett*, (Miss. 1895) 16 So. Rep. 533.



statutes limiting the time for such applications as well.<sup>1</sup>

Application for Relief Must Be Made Within the Time Limited, otherwise the judgment cannot be opened or vacated.<sup>2</sup>

(2) *When Statutory Period Begins to Run.* — The provisions or construction of such statutes as to when the period of limitation shall begin to run vary in different jurisdictions. In some the time begins to run from the rendition of the judgment,<sup>3</sup> or from the adjournment of the term at which the judgment was rendered;<sup>4</sup> while in others it runs only from the time when the party injuriously affected has notice of the judgment.<sup>5</sup>

*b. IN THE ABSENCE OF STATUTE* — (1) *Requirement of Diligence.* — In the absence of statute it is very generally considered that a party seeking to have a judgment opened or vacated must proceed with proper diligence and take the proper steps therefor within a reasonable time, and that his right to relief may be lost by laches.<sup>6</sup>

(2) *What Delay Will Bar Relief.* — It is, of course, impossible to lay down any fixed rule as to what will constitute such laches as to deprive a party of any right to relief against a judgment, but each case must be governed by its own circumstances.<sup>7</sup>

*New York.* — Matter of Underhill, 1 Conolly (N. Y.) 313; Ladd v. Stevenson, 112 N. Y. 325, 8 Am. St. Rep. 748; Corn Exch. Bank v. Blye, 54 Hun (N. Y.) 312; Matter of Flynn, 136 N. Y. 287; Hurlbut v. Coman, 43 Hun (N. Y.) 586; Kiefer v. Grand Trunk R. Co., (Supm. Ct. Gen. T.) 8 N. Y. Supp. 230.

*North Carolina.* — Cowles v. Hayes, 69 N. Car. 406.

*Texas.* — Heidenheimer v. Loring, 6 Tex. Civ. App. 560; Hirshfeld v. Brown, (Tex. Civ. App. 1895) 30 S. W. Rep. 962.

1. *Statutes Limiting Time for Application on Grounds Not Statutory* — *Georgia.* — Girardey v. Bessman, 77 Ga. 483.

*Idaho.* — Bunnell, etc., Invest. Co. v. Curtis, (Idaho 1897) 51 Pac. Rep. 767.

*Iowa.* — Priestman v. Priestman, 103 Iowa 320.

*Kansas.* — Newton First Nat. Bank v. Wm. B. Grimes Dry Goods Co., 45 Kan. 510; Sanford v. Weeks, 50 Kan. 339.

*Missouri.* — Stacker v. Cooper Circuit Ct., 25 Mo. 401; Harkness v. Austin, 36 Mo. 47; Downing v. Still, 43 Mo. 309.

*New York.* — Corn Exch. Bank v. Blye, 119 N. Y. 414; Matter of Hesdra, (Surrogate Ct.) 4 Misc. (N. Y.) 37; Corbin v. Westcott, 2 Dem. (N. Y.) 559; Hood v. Hood, 5 Dem. (N. Y.) 50; In re Filley, (Surrogate Ct.) 20 N. Y. Supp. 427; In re Post, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 205; Matter of Foulks, (Surrogate Ct.) 18 Civ. Pro. (N. Y.) 175.

*Utah.* — Blyth, etc., Co. v. Swenson, 15 Utah 345.

*Wisconsin.* — Pier v. Storm, 37 Wis. 247. See also Loomis v. Rice, 37 Wis. 262.

2. *Application Must Be Made Within Time Limited.* — Moore v. Superior Ct., 86 Cal. 495; Mattern v. Sage, 15 Daly (N. Y.) 38; Hawks v. Votaw, 1 Wash. 70. And see cases cited in preceding notes.

3. *Limitation Running from Rendition of Judgment* — *California.* — Brackett v. Banegas, 99 Cal. 623.

*Dakota.* — Yerkes v. McHenry, 6 Dak. 5.

*Florida.* — Burrows v. Mickler, 22 Fla. 577.

*Iowa.* — Walker v. Cameron, 78 Iowa 315; Gray v. Coan, 48 Iowa 424.

*Michigan.* — Boyce v. Judkins, 79 Mich. 154. *New York.* — Mattern v. Sage, 15 Daly (N. Y.) 38.

*North Carolina.* — Roberts v. Allman, 106 N. Car. 391; Sluder v. Graham, 118 N. Car. 835.

4. *Limitation Running from Adjournment of Term.* — Pleyte v. Pleyte, 15 Colo. 44; Clark v. Perry, 17 Colo. 56; Elliott v. Bastian, 11 Utah 452.

5. *Limitation Running from Notice of Judgment* — *Dakota.* — Yerkes v. McHenry, 6 Dak. 5.

*Georgia.* — Beardsley v. Hilson, 94 Ga. 50.

*Minnesota.* — Nornborg v. Larson, 69 Minn. 344; Wieland v. Shillock, 23 Minn. 227.

*New York.* — Jex v. Jacob, (Supm. Ct. Gen. T.) 7 Abb. N. Cas. (N. Y.) 452; O'Neil v. Hoover, 17 N. Y. Wkly. Dig. 354; Bissell v. New York Cent., etc., R. Co., 67 Barb. (N. Y.) 385.

*North Carolina.* — Sluder v. Graham, 118 N. Car. 835.

*North Dakota.* — Sargent v. Kindred, 5 N. Dak. 472.

*South Dakota.* — Weber v. Tschetter, 1 S. Dak. 205.

*Tennessee.* — Brown v. Brown, 86 Tenn. 277.

*Wisconsin.* — Superior Consol. Land Co. v. Dunphy, 93 Wis. 188.

6. See the cases following; also the title LACHES.

7. *Delay Sufficient to Bar Relief* — *Twenty-three Years.* — People v. Goodhue, 80 Cal. 199.

*Twenty-one Years.* — Bradley v. Towanda Tp., 133 Pa. St. 371.

*Twenty Years.* — Thompson v. Skinner, 7 Johns. (N. Y.) 556.

*Sixteen Years.* — People v. Harrison, 84 Cal. 607; People v. Blake, 84 Cal. 611; People v. Hemme, (Cal. 1890) 22 Pac. Rep. 1143.

*Fourteen Years.* — Wade v. De Leyer, 40 N. Y. Super. Ct. 541.

*Thirteen Years.* — Richards's Appeal, 127 Pa. St. 63.

*Eleven Years.* — Lytle v. Forrest, 175 Pa. St. 408.

*Seven Years.* — Applebee's Appeal, 126 Pa. St. 385; Harrison v. Meredith, 3 J. J. Marsh. (Ky.) 219.



(3) *Where Party Had No Notice of Judgment.* — A considerable delay in applying to have a judgment opened or vacated will not deprive a party of his right to relief, where he was without notice of the judgment against him, and such lack of notice was not due to his own fault.<sup>1</sup>

*c. RULE AS TO VOID JUDGMENTS.* — It has been frequently held that a judgment which is absolutely void may be vacated at any time, and that the right to have such judgment set aside is not lost by delay regardless of whether or not the time for making application is limited by statute.<sup>2</sup>

6. *Jurisdiction to Open or Vacate.* — The general rule is that a judgment can be opened or vacated only by the court by which it was rendered,<sup>3</sup> even though a transcript thereof has been filed in another court.<sup>4</sup>

*Five Years.* — *Osborn v. Gehr*, 29 Neb. 661.

*Four Years.* — *School Dist. No. 63 v. Chicago Lumber Co.*, 41 Kan. 618.

*Three Years.* — *Smallwood v. Trenwith*, 110 N. Car. 91.

*Two Years.* — *Société Foncière, etc., v. Milliken*, 135 U. S. 304.

*Seventeen Months.* — *Ammerman v. State*, 98 Ill. 165.

*One Year.* — *Sanderson v. Dox*, 6 Wis. 164.

*Eleven Months.* — *Altmann v. Gabriel*, 28 Minn. 132.

*Eight Months.* — *In re Peekamoose Fishing Club*, (Supm. Ct. App. Div.) 40 N. Y. Supp. 959.

1. *Party Without Notice of Judgment.* — *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47; *Stocking v. Hanson*, 35 Minn. 207. See also *Lapham v. Campbell*, 61 Cal. 296; *Shaw v. McGregor*, 8 Cal. 521; *Welch v. Singleton*, 95 Ga. 519.

2. *Delay Does Not Deprive of Right to Have Void Judgment Set Aside* — *United States*. — *Ex p. Crenshaw*, 15 Pet. (U. S.) 119; *U. S. v. Wallace*, 46 Fed. Rep. 569; *Thomas v. American Freehold Land, etc., Co.*, 47 Fed. Rep. 550.

*Alabama.* — *Stewart v. Nuckols*, 15 Ala. 226; *Swink v. Snodgrass*, 17 Ala. 653, 52 Am. Dec. 190; *Moore v. Easley*, 18 Ala. 619; *Bruce v. Strickland*, 47 Ala. 192; *De Bardelaben v. Stoudenmire*, 48 Ala. 643; *Pettus v. McClanahan*, 52 Ala. 55; *Baker v. Barclift*, 76 Ala. 414.

*California.* — *People v. Mullen*, 65 Cal. 396; *Wharton v. Harlan*, 68 Cal. 422; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448; *People v. Pearson*, 76 Cal. 400; *People v. Goodhue*, 80 Cal. 199; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52; *People v. Temple*, 103 Cal. 447; *People v. Harrison*, 107 Cal. 541; *Hanson v. Hanson*, (Cal. 1889) 20 Pac. Rep. 736. See also *Moore v. Superior Ct.*, 86 Cal. 495.

*Georgia.* — *Crane v. Barry*, 47 Ga. 476.

*Illinois.* — *Maple v. Havenhill*, 37 Ill. App. 311; *Packer v. Roberts*, 40 Ill. App. 445; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530.

*Kansas.* — *Foreman v. Carter*, 9 Kan. 674; *Hanson v. Wolcott*, 19 Kan. 207; *Newton First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 45 Kan. 510.

*Minnesota.* — *Feikert v. Wilson*, 38 Minn. 341.

*New York.* — *Matter of Underhill*, 1 Connoly (N. Y.) 313. See also *Bridenbecker v. Mason*, (Supm. Ct.) 16 How. Pr. (N. Y.) 203.

*Oregon.* — *Ladd v. Mason*, 10 Oregon 308.

*South Carolina.* — *Mills v. Dickson*, 6 Rich. L. (S. Car.) 487.

*Texas.* — *Dazey v. Pennington*, 10 Tex. Civ. App. 326.

*Utah.* — *Bullion, etc., Min. Co. v. Eureka Hill Min. Co.*, 5 Utah 182.

*Wisconsin.* — *Thompson v. Thompson*, 73 Wis. 84. *Compare State v. Waupaca County Bank*, 20 Wis. 640.

3. *Judgment Can Be Opened or Vacated Only by Court Which Rendered It* — *United States*. — *Elder v. Richmond Gold, etc., Min. Co.*, 58 Fed. Rep. 536.

*Alabama.* — *Bagby v. Chandler*, 8 Ala. 230.

*Indiana.* — *Plunkett v. Black*, 117 Ind. 14.

*Minnesota.* — *Crosby v. Farmer*, 39 Minn. 305; *Buffham v. Perkins*, 43 Minn. 158.

*Nebraska.* — *State v. Duncan*, 37 Neb. 631.

*New York.* — *Smith v. Nelson*, 62 N. Y. 288; *Ross v. Wood*, 70 N. Y. 10; *New York v. Brady*, 115 N. Y. 599.

*Pennsylvania.* — *Beck v. Church*, 113 Pa. St. 200; *Nelson v. Guffey*, 131 Pa. St. 273; *Wyoming Mfg. Co. v. Mohler*, (Pa. 1889) 17 Atl. Rep. 31.

*South Carolina.* — *Garvin v. Garvin*, 13 S. Car. 162.

*Texas.* — *Jordan v. Jordan*, 4 Tex. Civ. App. 559.

*Wisconsin.* — *Coon v. Seymour*, 71 Wis. 340.

A Change in the Constitution of a Court does not affect its power to vacate a judgment rendered by it before the change. *State v. Superior Ct.*, 18 Wash. 227.

*Judgment Affirmed by Appellate Court.* — When an appeal is taken from a final judgment of the superior court to the supreme court, and the judgment is there affirmed, the judgment is that of the supreme court, and there is no judgment of the superior court left. Consequently the superior court cannot, at a subsequent term, vacate the judgment on the ground of mistake. *Isler v. Brown*, 69 N. Car. 125.

4. *Rule Applies though Transcript Filed in Another Court* — *Minnesota.* — *Buffham v. Perkins*, 43 Minn. 158. See also *Crosby v. Farmer*, 39 Minn. 305.

*North Carolina.* — *Whitehurst v. Merchants, etc., Transp. Co.*, 109 N. Car. 342. See also *King v. Wilmington, etc., R. Co.*, 112 N. Car. 318; *Gallop v. Allen*, 113 N. Car. 24.

*Pennsylvania.* — *Boyd v. Miller*, 52 Pa. St. 431; *McKinney v. Brown*, 130 Pa. St. 365; *Littster v. Littster*, 151 Pa. St. 474; *Brendle v. Gorley*, 14 Pa. Co. Ct. 113; *Couch v. Keffron*, 15 Pa. Co. Ct. 636; *Weldy v. Young*, 21 Pa. Co. Ct. 15; *Ward v. Fannon*, 7 Kulp (Pa.) 488.

*Wisconsin.* — *Coon v. Seymour*, 71 Wis. 340.

Striking Void Judgment from Records. — In



A Judge at Chambers possesses no power or jurisdiction to vacate orders or judgments of the court.<sup>1</sup>

**7. Notice.** — An application to open or vacate a judgment after the term at which it was rendered, must be upon notice to the adverse party,<sup>2</sup> but a failure to give such notice is not material, where the adverse party has waived it by appearing either in person or by attorney, and opposing the application.<sup>3</sup>

**8. Burden of Proof.** — While it is considered that it is incumbent upon the party seeking to have a judgment opened or vacated to establish the facts upon which he relies as entitling him to the relief sought,<sup>4</sup> it has also been considered in a good many cases that where the court is in doubt the better course is to give the applicant the benefit of the doubt.<sup>5</sup>

*Pennsylvania* when a judgment of a justice filed in the court of common pleas is void upon its face the latter court may strike it from the record. *Weldy v. Young*, 21 Pa. Co. Ct. 15; *McKinney v. Brown*, 130 Pa. St. 365; *Couch v. Heffron*, 15 Pa. Co. Ct. 636; *Knoblauch v. Heffron*, 3 Pa. Dist. 765; *Rea v. Titman*, 3 Pa. Dist. 458; *Ward v. Fannon*, 7 Kulp (Pa.) 488.

**Vacation of Transcript and Judgment Thereon.** — In *New York* it is held that a county court in which a transcript of a judgment of a justice's court is entered may vacate the transcript and the judgment entered thereon in the county court, but cannot go further and vacate the judgment entered by the justice. *Daniels v. Southard*, 36 N. Y. App. Div. 540.

**1. Judge at Chambers Cannot Vacate Judgment of Court.** — *Kime v. Fenner*, 54 Neb. 476; *Clawson v. Hutchinson*, 14 S. Car. 521; *Ingram v. Belk*, 2 Rich. L. (S. Car.) 111. See also *Myrick v. Merritt*, 21 Fla. 799; *Forcheimer v. Tarble*, 23 Fla. 99.

**2. Necessity for Notice — England.** — *Jones v. Davis*, 36 L. T. N. S. 415.

*California.* — *Vallejo v. Green*, 16 Cal. 160.

*Colorado.* — *Doane v. Glenn*, 1 Colo. 454;

*Hughes v. McCoy*, 11 Colo. 591.

*Dakota.* — *Beach v. Beach*, 6 Dak. 371.

*Georgia.* — *Whitaker v. Smith*, 33 Ga. 237.

*Illinois.* — *Ryder v. Twiss*, 4 Ill. 4; *Hall v. O'Brien*, 5 Ill. 405; *Reynolds v. Anspach*, 14 Ill. App. 38; *Brady v. Washington Ins. Co.*, 67 Ill. App. 159.

*Indiana.* — *Smith v. Chandler*, 13 Ind. 513; *Martindale v. Brown*, 18 Ind. 284; *Yancy v. Teter*, 39 Ind. 305; *Burnside v. Ennis*, 43 Ind. 411; *Lake v. Jones*, 49 Ind. 297; *Durre v. Brown*, 7 Ind. App. 127; *Albany Land Co. v. McElwaine-Richards Co.*, 11 Ind. App. 477.

*Kansas.* — *Byington v. Call*, 36 Kan. 455; *Satterlee v. Grubb*, 38 Kan. 234; *Newton First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 45 Kan. 510; *Alliance Trust Co. v. Barrett*, 6 Kan. App. 689.

*Louisiana.* — *Bajourin v. Ramelli*, 34 La. Ann. 554; *Florsheim Bros. Dry Goods Co. v. Williams*, 45 La. Ann. 1196;

*Minnesota.* — *Chisholm v. Clitherall*, 12 Minn. 375.

*Mississippi.* — *Lane v. Wheless*, 46 Miss. 666; *Moore v. Hoskins*, 66 Miss. 496.

*Missouri.* — *Masterson v. Ellington*, 10 Mo. 712; *Coleman v. McNulty*, 16 Mo. 173, 57 Am. Dec. 229; *Molloy v. Batchelder*, 69 Mo. 503.

*Nebraska.* — *Nuckolls v. Irwin*, 2 Neb. 60; *Tootle v. Jones*, 19 Neb. 588.

*New York.* — *Wheeler v. Emmeluth*, (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 737.

*North Carolina.* — *Branch v. Walker*, 92 N. Car. 87; *Allison v. Whittier*, 101 N. Car. 490; *Coor v. Smith*, 107 N. Car. 430; *Harper v. Sugg*, 111 N. Car. 324.

*Ohio.* — *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459; *Hettrick v. Wilson*, 12 Ohio St. 136, 80 Am. Dec. 337; *Fitzgerald v. Cross*, 30 Ohio St. 444.

*Pennsylvania.* — *Grossman's Appeal*, 102 Pa. St. 137.

*South Carolina.* — *Ingram v. Belk*, 2 Rich. L. (S. Car.) 111.

*Tennessee.* — *Brown v. Brown*, 86 Tenn. 277.

**Notice to Attorney Sufficient.** — *Merriam v. Gordon*, 17 Neb. 325.

**3. When Failure to Give Notice Not Material** — *Alabama.* — *Moore v. Easley*, 18 Ala. 619; *Jennings v. Pearce*, 101 Ala. 538.

*California.* — *Acoc v. Halsey*, 90 Cal. 215.

*Georgia.* — *Jordan v. Tarver*, 92 Ga. 379.

*Indiana.* — *Hill v. Crump*, 24 Ind. 291; *Beatty v. O'Connor*, 106 Ind. 81; *Hoag v. Old People's Ben. Mut. Soc.*, 1 Ind. App. 28.

*Kansas.* — *Babcock Hardware Co. v. Farmers', etc.*, Bank, 50 Kan. 648.

*Nebraska.* — *Scarborough v. Myrick*, 47 Neb. 794.

*Ohio.* — *Braden v. Hoffman*, 46 Ohio St. 641.

**4. Burden of Proof** — *Indiana.* — *Dunlap v. Jones*, 4 Ind. 641. See also *Priest v. Martin*, 4 Blackf. (Ind.) 311.

*Maryland.* — *Smith v. Black*, 51 Md. 247.

*Pennsylvania.* — *Ansley v. Arnt*, 3 Kulp (Pa.) 152. See also *Woods v. Irwin*, 141 Pa. St. 278, 23 Am. St. Rep. 282, 28 W. N. C. (Pa.) 185.

*New York.* — See *Jospe v. Lighter*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 146.

**Evidence Sufficient to Warrant Opening Judgment.** — *Lee v. Sallada*, 7 Pa. Super. Ct. 98, 42 W. N. C. (Pa.) 86; *Yost v. Mensch*, 141 Pa. St. 73, 27 W. N. C. (Pa.) 562.

**Evidence Not Sufficient.** — *Braden v. Wilson*, 19 Pa. Co. Ct. 650, 28 Pittsb. Leg. J. N. S. 231. See also *Huntington v. Emery*, 74 Md. 67.

**5. Applicant Should Receive Benefit of Doubt** — *California.* — *Watson v. San Francisco, etc.*, R. Co., 41 Cal. 17; *Dougherty v. Nevada Bank*, 68 Cal. 275; *Wolff v. Canadian Pac. R. Co.*, 89 Cal. 332; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425.

*Illinois.* — *Lake v. Cook*, 15 Ill. 353; *Heeney v. Alcock*, 9 Ill. App. 431; *Condon v. Besse*, 86 Ill. 159.

*Pennsylvania.* — *Steiner v. Scholl*, 163 Pa. St. 465; *Klopfer v. Ekis*, 155 Pa. St. 47; *Mullen*



**9. Discretion of Court.** — Whether an application for the opening or vacation of a judgment shall be granted or refused is a matter resting in the sound legal discretion of the court to which it is addressed.<sup>1</sup> And while the action

*v. Mageoch*, 14 W. N. C. (Pa.) 127. But compare *Tishblate v. McCullough*, 7 Pa. Dist. 364.

**1. Discretion of Court — Alabama.** — *Acre v. Ross*, 3 Stew. (Ala.) 288; *Wilson v. Torbert*, 3 Stew. (Ala.) 296, 21 Am. Dec. 632; *Ewing v. Peck*, 17 Ala. 339.

**California.** — *People v. Lafarge*, 3 Cal. 130; *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heyneman*, 19 Cal. 605; *Roland v. Kreyenhagen*, 18 Cal. 455; *Woodward v. Backus*, 20 Cal. 137; *People v. Rains*, 23 Cal. 127; *People v. O'Connell*, 23 Cal. 281; *Bailey v. Taaffe*, 29 Cal. 422; *Howe v. Independence Consol. Gold, etc., Min. Co.*, 29 Cal. 72; *Francis v. Cox*, 33 Cal. 325; *Watson v. San Francisco, etc., R. Co.*, 41 Cal. 17; *Dougherty v. Nevada Bank*, 68 Cal. 275; *Robinson v. Merrill*, 80 Cal. 415; *Harbaugh v. Honey Lake Valley Land, etc., Co.*, 109 Cal. 70.

**Colorado.** — *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106.

**Connecticut.** — *Schoonmaker v. Albertson, etc.*, Mach. Co., 51 Conn. 387.

**Georgia.** — *Aiken v. Wolfe*, 76 Ga. 816.

**Illinois.** — *Harmison v. Clark*, 2 Ill. 131; *Wallace v. Jerome*, 2 Ill. 524; *Gillet v. Stone*, 2 Ill. 539; *Backmaster v. Drake*, 10 Ill. 321; *Woodruff v. Tyler*, 10 Ill. 457; *Greenleaf v. Roe*, 17 Ill. 474; *Rich v. Hathaway*, 18 Ill. 548; *Chicago v. Adams*, 24 Ill. 492; *Chicago v. Rosenfeld*, 24 Ill. 495; *U. S. Express Co. v. Bedbury*, 34 Ill. 459; *Bowman v. Wood*, 41 Ill. 203; *Cox v. Brackett*, 41 Ill. 222; *Bell v. Nims*, 51 Ill. 171; *Scales v. Labar*, 51 Ill. 232; *Hovey v. Middleton*, 56 Ill. 463; *Mason v. McNamara*, 57 Ill. 274; *Bowman v. Bowman*, 64 Ill. 75; *Fergus v. Garden City Planing Mill, etc., Mfg. Co.*, 71 Ill. 51; *Boyle v. Levi*, 73 Ill. 175; *Thielmann v. Burg*, 73 Ill. 293; *Peoria, etc., R. Co. v. Mitchell*, 74 Ill. 394; *Union Hide, etc., Co. v. Woodley*, 75 Ill. 435; *Constantine v. Wells*, 83 Ill. 192; *Hitchcock v. Herzer*, 90 Ill. 543; *Gallagher v. People*, 91 Ill. 590; *Andrews v. Campbell*, 94 Ill. 577; *Palmer v. Harris*, 98 Ill. 507; *Walsh v. Walsh*, 114 Ill. 655; *Hall v. Emporia First Nat. Bank*, 133 Ill. 234; *Waugh v. Suter*, 3 Ill. App. 271; *Franz v. Winne*, 6 Ill. App. 82; *Bridges v. Stephenson*, 10 Ill. App. 369; *Board of Education v. Hoag*, 21 Ill. App. 588; *Stenzel v. Sims*, 25 Ill. App. 538; *Wheeler Chemical Works v. Alexander*, 30 Ill. App. 502; *Byrne v. O'Neill*, 35 Ill. App. 361; *Whitton v. Whitton*, 64 Ill. App. 53.

**Indiana.** — *Cavanaugh v. Toledo, etc., R. Co.*, 49 Ind. 149; *Hoag v. Old People's Mut. Ben. Soc.*, 1 Ind. App. 33.

**Iowa.** — *Martin v. Van Bergen*, 1 Greene (Iowa) 314; *Bailey v. Hearn*, 3 Greene (Iowa) 415; *Yetter v. Martin*, 58 Iowa 612; *Willett v. Millman*, 61 Iowa 123; *Williams v. Westcott*, 77 Iowa 332, 14 Am. St. Rep. 287; *Matter of Behrens*, 104 Iowa 29.

**Kansas.** — *Parsons First Nat. Bank v. Wentworth*, 28 Kan. 183; *State v. Sowders*, 42 Kan. 312; *Freeman v. Hill*, 45 Kan. 435; *Wilson, etc., Invest. Co. v. Hillyer*, 50 Kan. 446.

**Kentucky.** — *Elliston v. Commonwealth Bank*, 3 Dana (Ky.) 99; *Dixon v. Lyne*, (Ky. 1889) 10 S. W. Rep. 469.

**Louisiana.** — *Lazarus v. McGuirk*, 42 La. Ann. 194.

**Maryland.** — *Preston v. McCann*, 77 Md. 30.

**Michigan.** — *Detroit v. Jackson*, 1 Dougl. (Mich.) 106; *Van Renselaer v. Whiting*, 12 Mich. 449; *Campau v. Coates*, 17 Mich. 235; *People v. Bacon*, 18 Mich. 247; *Evans v. Saginaw Circuit Judge*, 39 Mich. 123; *Chicago, etc., R. Co. v. Genesee Circuit Judge*, 40 Mich. 168; *Alderman v. Montcalm Circuit Judge*, 41 Mich. 550; *Granger v. Judge*, 44 Mich. 384; *Low v. Mills*, 61 Mich. 35.

**Minnesota.** — *Merritt v. Putnam*, 7 Minn. 493; *Barker v. Keith*, 11 Minn. 65; *Frear v. Heichert*, 34 Minn. 96; *Exley v. Berryhill*, 36 Minn. 117; *Waite v. Coaracy*, 45 Minn. 159; *Nauer v. Benham*, 45 Minn. 252; *Bausman v. Tilley*, 46 Minn. 66; *Seibert v. Minneapolis, etc., R. Co.*, 58 Minn. 72.

**Mississippi.** — *Barker v. Justice*, 41 Miss. 241.

**Missouri.** — *Frazier v. Bishop*, 29 Mo. 447; *Young v. Bircher*, 31 Mo. 136, 77 Am. Dec. 638; *Craig v. Smith*, 65 Mo. 536; *Pry v. Hannibal, etc., R. Co.*, 73 Mo. 123; *Scott v. Smith*, 133 Mo. 618; *Wells v. Andrews*, 133 Mo. 663.

**Montana.** — *Whiteside v. Logan*, 7 Mont. 373; *Blaine v. Briscoe*, 16 Mont. 582.

**Nevada.** — *Howe v. Coldren*, 4 Nev. 171.

**New Jersey.** — *Alderman v. Diamond*, 7 N. J. L. 199; *Cresse v. Security Land Invest. Co.*, 54 N. J. Eq. 447.

**New York.** — *Palmer v. Hutchins*, 1 Cow. (N. Y.) 42; *Wooster v. Woodhull*, 1 Johns. Ch. (N. Y.) 539; *Fortunato v. New York, (C. Pl. Gen. T.)* 2 Misc. (N. Y.) 406; *Jospe v. Lightie*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 146; *Smith v. Askin*, 20 N. Y. Wkly. Dig. 394; *Wettig v. Moltz*, 45 N. Y. Super. Ct. 389; *Droham v. Norton*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 486; *Spektorsky v. American New System Carbonating, etc., Co.*, (Supm. Ct. App. Div.) 39 N. Y. Supp. 73; *Beards v. Wheeler*, 76 N. Y. 213; *Smith v. Frankfield*, 77 N. Y. 414; *Peck v. New York, etc., R. Co.*, 85 N. Y. 246.

**North Carolina.** — *Winslow v. Anderson*, 3 Dev. & B. L. (20 N. Car.) 9, 32 Am. Dec. 651; *Hudgins v. White*, 65 N. Car. 393; *Jowell v. Weith*, 68 N. Car. 342; *Smith v. Smith*, 101 N. Car. 468; *Allison v. Whittier*, 101 N. Car. 490; *Gwinn v. Parker*, 119 N. Car. 19.

**Ohio.** — *Huntington v. Finch*, 3 Ohio St. 445.

**Oregon.** — *White v. Northwest Stage Co.*, 5 Oregon 99.

**Pennsylvania.** — *Eldred v. Hazlett*, 38 Pa. St. 16; *Cochran v. Eldredge*, 49 Pa. St. 365; *Gilliland v. Bredin*, 63 Pa. St. 393; *McClelland v. Pomeroy*, 75 Pa. St. 410; *Sweetey v. Kitchen*, 80 Pa. St. 160; *Lamb's Appeal*, 89 Pa. St. 407; *Hickernell's Appeal*, 90 Pa. St. 328; *Earley's Appeal*, 90 Pa. St. 322; *Wernet's Appeal*, 91 Pa. St. 319; *Schenck's Appeal*, 94 Pa. St. 37; *Babcock v. Day*, 104 Pa. St. 4; *Lyon v. Phillips*, 106 Pa. St. 57; *Herman v. Rinker*, 106 Pa. St. 121; *Philadelphia v. Weaver*, 155 Pa. St. 74; *Duane v. Addicks*, 155 Pa. St. 124; *La Roche Electric Works v. Emery*, 173 Pa. St. 331; *Jenkintown Nat. Bank's Appeal*, 23 W. N.



of the court in the premises may be reviewed on appeal,<sup>1</sup> and, when the justice of the case so requires, reversed,<sup>2</sup> its disposition of the application will not be disturbed unless it clearly appears that this discretion has been abused.<sup>3</sup>

*C. (Pa.)* 359; *Pfaff v. Thomas*, 39 W. N. C. (Pa.) 570; *Comp v. Messimer*, 5 Pa. Dist. 566; *Dorney v. Mertz*, 8 Phila. (Pa.) 553; *Leader v. Dunlap*, 6 Pa. Super. Ct. 243, 41 W. N. C. (Pa.) 477; *Sand's Appeal*, 37 Leg. Int. (Pa.) 158; *Barton's Appeal*, (Pa. 1886) 7 Atl. Rep. 168. See also *Fisher v. Hestonville, etc.*, Pass. R. Co., 185 Pa. St. 602.

*South Carolina*. — *Truett v. Rains*, 17 S. Car. 454; *Le Conte v. Irwin*, 19 S. Car. 557.

*South Dakota*. — *Weber v. Tschetter*, 1 S. Dak. 205; *Evans v. Fall River County*, 4 S. Dak. 119; *Minnekahta State Bank v. Fall River County*, 4 S. Dak. 124.

*Utah*. — *Thomas v. Morris*, 8 Utah 284.

*Vermont*. — *Arlington Mfg. Co. v. Mears*, 65 Vt. 414.

*Virginia*. — *Staples v. Staples*, 85 Va. 76.

*West Virginia*. — *Midkiff v. Lusher*, 27 W. Va. 439; *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744.

*Wisconsin*. — *Johnson v. Eldred*, 13 Wis. 482; *Seymour v. Chippewa County*, 40 Wis. 62; *Cleveland v. Hopkins*, 55 Wis. 387; *Wheeler, etc., Mfg. Co. v. Monahan*, 63 Wis. 194; *Jefferson County Bank v. Robbins*, 67 Wis. 68; *Smith v. Wilson*, 87 Wis. 14; *Superior Consol. Land Co. v. Dunphy*, 93 Wis. 188.

*Wyoming*. — *Brophy v. Brunswick, etc., Co.*, 2 Wyo. 86.

1. *Appeal* — *California*. — *Bailey v. Taaffe*, 29 Cal. 423.

*Illinois*. — *Mason v. McNamara*, 57 Ill. 274; *Franz v. Winne*, 6 Ill. App. 82; *Dunlap v. Gregory*, 14 Ill. App. 601.

*Minnesota*. — *Johnson v. Lough*, 22 Minn. 203.

*Missouri*. — *Craig v. Smith*, 65 Mo. 536.

*New York*. — *Draham v. Norton*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 486.

*Pennsylvania*. — *Gillespie v. Campbell*, (Pa. 1885) 1 Atl. Rep. 665.

2. *Action May Be Reversed*. — *People v. O'Connell*, 23 Cal. 282; *Bailey v. Taaffe*, 29 Cal. 422; *Watson v. San Francisco, etc., R. Co.*, 41 Cal. 17; *Craig v. Smith*, 65 Mo. 536; *Union Nat. Bank v. Benjamin*, 61 Wis. 512.

3. *Exercise of Discretion Not Disturbed unless Abuse Clearly Appears* — *Alabama*. — *Acre v. Ross*, 3 Stew. (Ala.) 288; *Wilson v. Torbert*, 3 Stew. (Ala.) 296, 21 Am. Dec. 632; *Ewing v. Peck*, 17 Ala. 339.

*California*. — *Roland v. Kreyenhagen*, 18 Cal. 455; *Woodward v. Backus*, 20 Cal. 137; *Howe v. Independence Consol. Gold, etc., Min. Co.*, 29 Cal. 72; *Bailey v. Taaffe*, 29 Cal. 423; *Dougherty v. Nevada Bank*, 68 Cal. 275; *Robinson v. Merrill*, 80 Cal. 415; *Cottrell v. Cottrell*, 83 Cal. 457; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425.

*Colorado*. — *Robert E. Lee Silver Min. Co. v. Englebach*, 18 Colo. 106.

*Georgia*. — *Aiken v. Wolfe*, 76 Ga. 816.

*Illinois*. — *Bolton v. McKinley*, 22 Ill. 203; *Mason v. McNamara*, 57 Ill. 274; *Whitton v. Whitton*, 64 Ill. App. 53.

*Indiana*. — *Ely v. Hawkins*, 15 Ind. 230;

*Hill v. Crump*, 24 Ind. 291; *Hoag v. Old People's Mut. Ben. Soc.*, 1 Ind. App. 28; *La Porte v. Organ*, 3 Ind. App. 525.

*Iowa*. — *Yeitzer v. Martin*, 58 Iowa 612; *Willett v. Millman*, 61 Iowa 123.

*Kansas*. — *Parsons First Nat. Bank v. Wentworth*, 28 Kan. 183.

*Kentucky*. — *Elliston v. Commonwealth Bank*, 3 Dana (Ky.) 99; *Dixon v. Lyne*, (Ky. 1889) 10 S. W. Rep. 469.

*Maryland*. — *Henderson v. Gibson*, 19 Md. 234; *Townshend v. Chew*, 31 Md. 247.

*Minnesota*. — *Westervelt v. King*, 4 Minn. 320; *Marty v. Ahl*, 5 Minn. 27; *Myrick v. Pierce*, 5 Minn. 65; *Groh v. Bassett*, 7 Minn. 325; *Merritt v. Putnam*, 7 Minn. 493; *Jorgensen v. Boehmer*, 9 Minn. 181; *Barker v. Keith*, 11 Minn. 65; *Woods v. Woods*, 16 Minn. 81; *Reagan v. Madden*, 17 Minn. 402; *Hildebrandt v. Robbecke*, 20 Minn. 100; *Granse v. Frings*, 46 Minn. 352; *Lathrop v. O'Brien*, 47 Minn. 428.

*Missouri*. — *Frazier v. Bishop*, 29 Mo. 447; *Craig v. Smith*, 65 Mo. 536; *Pry v. Hannibal, etc., R. Co.*, 73 Mo. 123.

*Nebraska*. — *Haggerty v. Walker*, 21 Neb. 596.

*New York*. — *Wooster v. Woodhull*, 1 Johns. Ch. (N. Y.) 539; *Palmer v. Hutchins*, 1 Cow. (N. Y.) 42; *Patterson v. Hare*, 74 Hun (N. Y.) 269; *Drohan v. Norton*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 486; *Whitney v. Townsend*, 67 N. Y. 40.

*North Carolina*. — *Hudgins v. White*, 65 N. Car. 393; *Kerchner v. Baker*, 82 N. Car. 109; *Hiatt v. Waggoner*, 82 N. Car. 273.

*Ohio*. — *Huntington v. Finch*, 3 Ohio St. 445.

*Oregon*. — *White v. Northwest Stage Co.*, 5 Oregon 99; *Lovejoy v. Willamette Locks Co.*, 24 Oregon 569.

*Pennsylvania*. — *Kalbach v. Fisher*, 1 Rawle (Pa.) 323; *Eldred v. Hazlett*, 38 Pa. St. 16; *Gilliland v. Bredin*, 63 Pa. St. 393; *McClelland v. Pomeroy*, 75 Pa. St. 410; *Sweesey v. Kitchen*, 80 Pa. St. 160; *Lamb's Appeal*, 89 Pa. St. 407; *Earley's Appeal*, 90 Pa. St. 321; *Hickernell's Appeal*, 90 Pa. St. 328; *Wernet's Appeal*, 91 Pa. St. 319; *Lowenstein v. North Schuylkill Mut. F. Ins. Co.*, 132 Pa. St. 410; *Gibson v. Simmons*, 134 Pa. St. 189; *Philadelphia v. Weaver*, 155 Pa. St. 74; *La Roche Electric Works v. Emery*, 173 Pa. St. 331.

*South Carolina*. — *Truett v. Rains*, 17 S. Car. 454; *Le Conte v. Irwin*, 19 S. Car. 557.

*South Dakota*. — *Evans v. Fall River County*, 4 S. Dak. 119; *Minnekahta State Bank v. Fall River County*, 4 S. Dak. 124.

*Washington*. — *Northern Pac., etc., R. Co. v. Black*, 3 Wash. 327; *Livesley v. O'Brien*, 6 Wash. 553.

*West Virginia*. — *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744.

*Wisconsin*. — *Seymour v. Chippewa County*, 40 Wis. 62; *Cleveland v. Hopkins*, 55 Wis. 387; *Cleveland v. Burnham*, 55 Wis. 598; *Union Nat. Bank v. Benjamin*, 61 Wis. 512; *Wheeler, etc., Mfg. Co. v. Monahan*, 63 Wis. 194; *Jefferson County Bank v. Robbins*, 67 Wis. 68;



**10. Existence of Meritorious Defense Must Be Shown.** — In order to entitle a party to have a judgment against him opened or vacated at a subsequent term he must make at least a *prima facie* showing that he has a meritorious defense to the cause of action on which such judgment is based,<sup>1</sup> and the relief sought will not be granted when the only defense shown is of a purely technical nature.<sup>2</sup>

*Whereatt v. Ellis*, 68 Wis. 61; *Elmer v. Mitchell*, 75 Wis. 358; *Smith v. Wilson*, 87 Wis. 14.

*Wyoming*. — *Brophy v. J. M. Brunswick*, etc., Co., 2 Wyo. 86.

**1. Necessity of Showing a Meritorious Defense** — *Arkansas*. — *Wilson v. Phillips*, 5 Ark. 183; *Browning v. Reane*, 9 Ark. 354, 50 Am. Dec. 218; *Chambliss v. Reppy*, 54 Ark. 539.

*California*. — *People v. Rains*, 23 Cal. 128; *Bailey v. Taaffe*, 29 Cal. 422; *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165. See also *Parrott v. Den*, 34 Cal. 79; *Morgan v. McDonald*, 70 Cal. 32; *Will v. Lytle Creek Water Co.*, 100 Cal. 344; *Collins v. Scott*, 100 Cal. 446; *Jenkins v. Gamewell F. Alarm Tel. Co.*, (Cal. 1892) 31 Pac. Rep. 570.

*Florida*. — See *Russ v. Gilbert*, 19 Fla. 54.

*Illinois*. — *Grubb v. Crane*, 5 Ill. 153; *Roberts v. Corby*, 86 Ill. 182; *Crossman v. Wohlleben*, 90 Ill. 537; *Ward v. Durham*, 134 Ill. 195; *Chicago Fire Proofing Co. v. Park Nat. Bank*, 145 Ill. 481; *Treftz v. Stahl*, 46 Ill. App. 462; *Brewer, etc., v. Brewing Co. v. Lonergan*, 63 Ill. App. 28; *Mann v. Warde*, 64 Ill. App. 108. See also *Knox v. Winsted Sav. Bank*, 57 Ill. 330; *Reynertson v. Cental Lumber Co.*, 69 Ill. App. 131; *Goergen v. Schmidt*, 69 Ill. App. 538.

*Indiana*. — *Frost v. Dodge*, 15 Ind. 139; *Toledo, etc., R. Co. v. Gates*, 32 Ind. 238; *Lake v. Jones*, 49 Ind. 297; *Slagle v. Bodmer*, 75 Ind. 330; *Cruse v. Cunningham*, 79 Ind. 402; *Rupert v. Martz*, 116 Ind. 72; *West v. Miller*, 125 Ind. 70; *Davis v. Sieuben School Tp.*, 19 Ind. App. 694.

*Iowa*. — *Jaeger v. Evans*, 46 Iowa 188; *Palmer v. Rogers*, 70 Iowa 381; *Jean v. Hennessy*, 74 Iowa 348, 7 Am. St. Rep. 486; *Stratton Bank v. Dixon*, 105 Iowa 148. See also *Russell v. Pottawottamie County*, 29 Iowa 256; *Ellis v. Butler*, 78 Iowa 632; *Piggott v. Adicks*, 3 Greene (Iowa) 427, 56 Am. Dec. 547.

*Kansas*. — *Mulvaney v. Lovejoy*, 37 Kan. 305.

*Minnesota*. — *People's Ice Co. v. Schlenker*, 50 Minn. 1.

*Missouri*. — *Palmer v. Russell*, 34 Mo. 476; *Lamb v. Nelson*, 34 Mo. 501; *Castlio v. Bishop*, 51 Mo. 162; *Carr v. Dawes*, 46 Mo. App. 351.

*Montana*. — See *Donnelly v. Clark*, 6 Mont. 135.

*Nebraska*. — *Gilbert v. Marrow*, 54 Neb. 77; *Kime v. Fenner*, 54 Neb. 476; *Clark v. Charles*, 55 Neb. 202.

*New Jersey*. — *Miller v. Alexander*, 1 N. J. L. 459; *Hendrickson v. Herbert*, 38 N. J. L. 206.

*New York*. — *Tallman v. Sprague*, 60 N. Y. Super. Ct. 425; *Van Horne v. Montgomery*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 238; *Devlin v. Boyd*, 69 Hun (N. Y.) 328. See also *Jospe v. Lighte*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 146.

*Ohio*. — *Follett v. Alexander*, 58 Ohio St. 202. See also *Huntington v. Finch*, 3 Ohio St. 445.

*Oklahoma*. — *Provins v. Lovi*, 6 Okla. 94.

*Pennsylvania*. — *Welton v. Littlejohn*, 163 Pa. St. 205; *Shenk v. Hacker*, 3 Pa. Super. Ct. 439.

*Rhode Island*. — *Draper v. Bishop*, 4 R. I. 489.

*South Dakota*. — *Pettigrew v. Sioux Falls*, 5 S. Dak. 646.

*Texas*. — *Watson v. Newsham*, 17 Tex. 437; *Foster v. Martin*, 20 Tex. 118; *Contreras v. Haynes*, 61 Tex. 103; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633.

*Washington*. — *Western Security Co. v. Lafleur*, 17 Wash. 406; *State v. Lockhart*, 18 Wash. 531.

*West Virginia*. — *Robinson v. Braiden*, 44 W. Va. 183.

*Wisconsin*. — *Mowry v. Hill*, 11 Wis. 146; *Butler v. Mitchell*, 15 Wis. 355; *Milwaukee Mut. Loan, etc., Soc. v. Jagodzinski*, 84 Wis. 35; *Day v. Mortlock*, 87 Wis. 577; *Dick v. Williams*, 87 Wis. 651.

*Wyoming*. — *White v. Hinton*, 3 Wyo. 753.

**2. Technical Defense Not Sufficient** — *United States*. — *Société Foncière, etc., v. Milliken*, 135 U. S. 304.

*Arkansas*. — *Pennington v. Gibson*, 6 Ark. 447.

*California*. — *People v. Rains*, 23 Cal. 127; *Parrott v. Den*, 34 Cal. 79.

*Florida*. — *Russ v. Gilbert*, 19 Fla. 54.

*Illinois*. — *Boas v. Heffron*, 40 Ill. App. 652.

*Indiana*. — *Cresswell v. White*, 3 Ind. App. 306; *Hazelrigg v. Wainwright*, 17 Ind. 215.

*Iowa*. — *Niagara Ins. Co. v. Rodecker*, 47 Iowa 162; *Stratton Bank v. Dixon*, 105 Iowa 148.

*Kansas*. — *Anderson v. Beebe*, 22 Kan. 768.

*Minnesota*. — *Jorgensen v. Griffin*, 14 Minn. 464.

*Missouri*. — *Carr v. Dawes*, 46 Mo. App. 351.

*Montana*. — *Donnelly v. Clark*, 6 Mont. 135.

*Nebraska*. — *Mulhollan v. Scoggins*, 8 Neb. 202.

*New Jersey*. — *Marsh v. Lasher*, 13 N. J. Eq. 253.

*New York*. — *Farish v. Corlies*, 1 Daly (N. Y.) 274; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Gourlay v. Hutton*, 10 Wend. (N. Y.) 595; *Bard v. Fort*, 3 Barb. Ch. (N. Y.) 632; *Leahey v. Kingon*, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 209; *Abram French Co. v. Marx*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 490; *Lovett v. Cowman*, 6 Hill (N. Y.) 226; *Morris v. Slatery*, (N. Y. Super. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 74; *Grant v. McCaughin*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 216; *Audubon v. Excelsior F. Ins. Co.*, (C. Pl. Spec. T.) 10 Abb. Pr. (N. Y.) 64.

*North Carolina*. — *Statesville Bank v. Foote*, 77 N. Car. 131.

*Ohio*. — *Sheets v. Baldwin*, 12 Ohio 120; *Newson v. Ran*, 18 Ohio 240; *McCulloch v. Tapp*, 4 West. L. Month. 575, 2 Ohio Dec. (Reprint) 678.



Where the Judgment Is Void, as for lack of jurisdiction, it is, of course, not necessary to show any defense.<sup>1</sup>

11. **Imposition of Terms.**—A court, in opening or vacating a judgment, has power to impose upon the applicant, as a condition of granting the relief asked, such terms as in its discretion it may deem proper,<sup>2</sup> and its action in

*Pennsylvania.*—*Croop v. Dodson*, 7 Kulp (Pa.) 13; *Worthline v. Bisbing*, 1 W. N. C. (Pa.) 92; *Bowman v. Davis*, 1 Pa. Dist. 772; *Maneval v. Jackson Tp.*, 141 Pa. St. 426; *Caldwell v. Carter*, 153 Pa. St. 310; *Reap v. Battle*, 155 Pa. St. 265.

*Wyoming.*—*White v. Hinton*, 3 Wyo. 753.

1. **No Defense Need Be Shown When Judgment Void**—*Indiana.*—*Dobbins v. McNamara*, 113 Ind. 54, 3 Am. St. Rep. 626.

*Iowa.*—*Rice v. Griffith*, 9 Iowa 539.

*Minnesota.*—*Magin v. Lamb*, 43 Minn. 80, 19 Am. St. Rep. 216; *Savings Bank v. Authier*, 52 Minn. 98.

*New York.*—*Lambert v. Converse*, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 265.

2. **Court May Impose Terms on Opening or Vacating Judgment**—*England.*—*Williams v. Briscoe*, 29 W. R. 713; *Willett v. Atterton*, 1 W. Bl. 35.

*United States.*—*Whitcomb v. Gaudy*, 37 Fed. Rep. 735; *Phenix Ins. Co. v. Charleston Bridge Co.*, 25 U. S. App. 190, 65 Fed. Rep. 628.

*California.*—*Roland v. Kreyenhagen*, 18 Cal. 455; *Gregory v. Haynes*, 21 Cal. 443; *People v. O'Connell*, 23 Cal. 281; *Howe v. Independence Consol. Gold, etc., Min. Co.*, 29 Cal. 72; *Bailey v. Taaffe*, 29 Cal. 422; *Leet v. Grants*, 36 Cal. 288; *Watson v. San Francisco, etc., R. Co.*, 41 Cal. 17; *Ryan v. Mooney*, 49 Cal. 33; *Hartman v. Olvera*, 49 Cal. 101; *Robinson v. Merrill*, 80 Cal. 415; *Youngman v. Tonner*, 82 Cal. 611; *Cottrell v. Cottrell*, 83 Cal. 457; *Wolff v. Canadian Pac. R. Co.*, 89 Cal. 332; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425; *Dennison v. Chapman*, 102 Cal. 618.

*Dakota.*—*Warder v. Patterson*, 6 Dak. 83.

*Delaware.*—*Whitaker v. Parker*, 2 Harr. (Del.) 413.

*Illinois.*—*Fleming v. Jencks*, 22 Ill. 475; *Hovey v. Middleton*, 56 Ill. 468; *Mason v. McNamara*, 57 Ill. 274; *Norton v. Allen*, 69 Ill. 306; *Burhans v. Norwood Park*, 138 Ill. 147; *Yost v. Minneapolis Harvester Works*, 41 Ill. App. 556; *McGuire v. Campbell*, 58 Ill. App. 188; *Jordan v. Huntington*, 58 Ill. App. 646; *Dulle v. Lally*, 64 Ill. App. 292.

*Indiana.*—*Cavanaugh v. Toledo, etc., R. Co.*, 49 Ind. 149.

*Iowa.*—*Worth v. Wetmore*, 87 Iowa 62. See also *Walker v. Cameron*, 78 Iowa 315.

*Kansas.*—*Board of Education v. National Bank of Commerce*, 4 Kan. App. 438.

*Kentucky.*—*Carter v. West*, 93 Ky. 211.

*Maryland.*—*Merrick v. Baltimore, etc., R. Co.*, 33 Md. 481; *Heaps v. Hoopes*, 68 Md. 383.

*Michigan.*—*Mabley v. Judge*, 41 Mich. 31.

*Minnesota.*—*Exley v. Berryhill*, 36 Minn. 117; *Brown v. Brown*, 37 Minn. 128.

*Missouri.*—*Young v. Bircher*, 31 Mo. 136, 77 Am. Dec. 638; *Smith v. Rollins*, 25 Mo. 408.

*Montana.*—*Anaconda Min. Co. v. Saile*, 16 Mont. 8, 50 Am. St. Rep. 472.

*Nebraska.*—*Blair v. West Point Mfg. Co.*, 7

Neb. 146; *Haggerty v. Walker*, 21 Neb. 596; *Farmers L. & T. Co. v. Killinger*, 46 Neb. 677.

*Nevada.*—*Howe v. Coldren*, 4 Nev. 171.

*New Jersey.*—*Alderman v. Diamant*, 7 N. J. L. 199, note; *Oram v. Dennison*, 13 N. J. Eq. 438.

*New York.*—*Popham v. Barretto*, 20 Hun (N. Y.) 299; *O'Brien v. Long*, 49 Hun (N. Y.) 80; *Marvin v. Brandy*, 56 Hun (N. Y.) 242; *Muller v. Post*, 58 Hun (N. Y.) 604, 33 N. Y. St. Rep. 992; *McCarty v. Altonwood Stock Farm*, 68 Hun (N. Y.) 551; *Ridley v. Manhattan R. Co.*, 72 Hun (N. Y.) 164; *Pape v. Schofield*, 77 Hun (N. Y.) 236; *Spiehler v. Asiel*, 83 Hun (N. Y.) 223; *Weidner v. Weidner*, 85 Hun (N. Y.) 432; *Dudley v. Brinck*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 76; *Parmele v. Rosenthal*, (Buffalo Super. Ct. Spec. T.) 10 Misc. (N. Y.) 433; *Zimmermann v. Bloch*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 158; *Fuchs, etc., Mfg. Co. v. Springer, etc., Co.*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 443; *Jackson v. Brunor*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 294, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 339; *Sweet v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 355; *Szerlip v. Baier*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 351; *Lewy v. Fox*, 54 N. Y. Super. Ct. 397; *New York v. Smith*, 61 N. Y. Super. Ct. 374; *Hart v. Washburn*, (Supm. C. Gen. T.) 42 N. Y. St. Rep. 440; *Ketcham v. Elliott*, (Supm. Ct. Gen. T.) 49 N. Y. St. Rep. 806; *Hornthal v. Finelite*, (N. Y. City Ct. Gen. T.) 60 N. Y. St. Rep. 838; *Watt v. Watt*, 2 Barb. Ch. 371; *Pomares v. Duncan*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 58; *Robertson v. Merz Universal Extractor, etc., Co.*, 2 N. Y. App. Div. 515; *Yates v. Guthrie*, 119 N. Y. 420; *Furman v. Furman*, 153 N. Y. 309, 60 Am. St. Rep. 629. See also *McCall v. McCall*, 54 N. Y. 541.

*Ohio.*—*Fowble v. Walker*, 4 Ohio 64.

*Pennsylvania.*—*Kunes v. McCloskey*, 10 Pa. Co. Ct. 542; *Deskins v. Reverting Fund Assoc.*, 3 Pa. Dist. 394; *Ensly v. Wright*, 3 Pa. St. 501; *Dennison v. Leech*, 9 Pa. St. 164; *Bailey v. Clayton*, 20 Pa. St. 295; *McMurray v. Erie*, 59 Pa. St. 223; *Gilliland v. Bredin*, 63 Pa. St. 393, 67 Pa. St. 34; *Kightlinger's Appeal*, 101 Pa. St. 545; *Huston Tp. Co-operative Mut. F. Ins. Co. v. Beale*, 110 Pa. St. 321; *Putney v. Collins*, 3 Grant Cas. (Pa.) 72; *Cooper v. Kingston*, 6 Kulp (Pa.) 344; *Braddee v. Brownfield*, 2 W. & S. (Pa.) 279; *Gilkyson v. Larue*, 6 W. & S. (Pa.) 213; *Strauch v. Royal Land Co.*, 5 W. N. C. (Pa.) 472.

*South Dakota.*—*Griswold Linseed Oil Co. v. Lee*, 1 S. Dak. 531, 36 Am. St. Rep. 761; *Ormsby v. Conrad*, 4 S. Dak. 599.

*Texas.*—*Hargrave v. Boero*, (Tex. Civ. App. 1893) 23 S. W. Rep. 403.

*Washington.*—*Halter v. Spokane Soap Works Co.*, 12 Wash. 662.

*Wisconsin.*—*Magoon v. Callahan*, 39 Wis. 141.



this respect will not be reviewed or overruled by a higher court unless it has clearly exceeded the limits of a sound legal discretion by imposing terms which are plainly unreasonable or unjust.<sup>1</sup>

**Imposition of Terms Not Necessary.** — It is not, however, an abuse of discretion for a court to open or vacate a judgment without imposing any terms, especially if no request for the imposition of terms has been made.<sup>2</sup>

**12. Appeal.** — It is usually considered that an appeal will lie from the determination of the court on an application to open or vacate a judgment.<sup>3</sup>

**IX. COLLATERAL ATTACK — Definition.** — A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying such judgment or decree.<sup>4</sup>

**Grounds of Attack — Want of Jurisdiction.** — The most usual ground for the collateral attack of a judgment is the want of jurisdiction of the tribunal rendering the judgment. This question will be fully discussed in another portion of this work.<sup>5</sup>

**Fraud — Attack by Parties or Privies.** — It is a general rule at common law that a judgment of a court having jurisdiction over the subject-matter and the parties cannot be questioned collaterally for fraud *aliunde* the record by the parties or their privies. After a party has been duly served with process it is his duty to see that the judgment is not fraudulently obtained against him, and if it is he must take some proper proceedings to have it annulled. This rule is a branch of the doctrine of *res judicata*, and is founded upon the broad principle that the good order and peace of society require that there should be an end to litigation.<sup>6</sup>

**The Terms Imposed Must Be Complied With.** — Otherwise the judgment will remain in full force. *Gregory v. Haynes*, 21 Cal. 443; *Hartman v. Olvera*, 49 Cal. 101; *Mabley v. Judge*, 41 Mich. 31; *Friese v. Homeopathic Mut. L. Ins. Co.*, 107 Pa. St. 134. See also *Willis v. Planters, etc.*, Bank, 19 Ala. 141; *Ex p. McLendon*, 33 Ala. 276. But compare *Dana v. Gill*, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 255; *Johnson v. Taylor*, 3 Smed. & M. (Miss.) 92.

**Terms May Be Imposed as a Condition of Refusing to Open Judgment.** — *Irwin's Appeal*, (Pa. 1833) 12 Atl. Rep. 840.

**1. Action in Reference to Imposing Terms Not Disturbed unless Discretion Clearly Abused.** — *Hovey v. Middleton*, 56 Ill. 468; *Huston Tp. Co-operative Mut. F. Ins. Co. v. Beale*, 110 Pa. St. 321. And see cases cited in preceding note.

**2. Imposition of Terms Not Necessary.** — *Robinson v. Merrill*, 80 Cal. 415; *Stanton-Thompson Co. v. Crane*, (Nev. 1897) 51 Pac. Rep. 116. See also *Warder v. Patterson*, 6 Dak. 83.

**3. Appeal Will Lie — Alabama.** — *Albritton v. Canterbury*, 44 Ala. 290.

*California.* — *Belt v. Davis*, 1 Cal. 135.

*Connecticut.* — *Schoonmaker v. Albertson*, etc., Mach. Co., 51 Conn. 387.

*Iowa.* — *Dryden v. Wyllis*, 51 Iowa 534.

*Kentucky.* — *McCall v. Hitchcock*, 7 Bush (Ky.) 615.

*Maryland.* — *Hawkins v. Bowie*, 9 Gill & J. (Md.) 428.

*Minnesota.* — *Piper v. Johnston*, 12 Minn. 60.

*Nebraska.* — *Horn v. Queen*, 5 Neb. 472.

*New York.* — *Belknap v. Waters*, 11 N. Y. 477; *Fisher v. Hepburn*, 48 N. Y. 41; *Fassett v. Tallmadge*, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 12; *Depew v. Dewey*, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 441; *Security*

*Bank v. National Bank*, 4 Thomp. & C. (N. Y.) 518.

*Pennsylvania.* — *Gillespie v. Campbell*, (Pa. 1885) 1 Atl. Rep. 665.

*Utah.* — *Blyth, etc., Co. v. Swenson*, 15 Utah 345.

*Wisconsin.* — *Schmidt v. Gilson*, 14 Wis. 514; *Paine v. Chase*, 14 Wis. 653; *Johnson v. Curtis*, 51 Wis. 595.

Compare *Connor v. Peugh*, 18 How. (U. S.) 394; *Higgins v. Brown*, 6 Colo. 148; *State v. Burns*, 66 Mo. 227; *Sherman v. Felt*, 2 N. Y. 186.

**Appeal Will Not Lie Where No Substantial Right Affected.** — *Planer v. Smith*, 40 Wis. 31.

**4. Collateral Attack Defined.** — *Nichols v. Smith*, 26 N. H. 300; *Morrill v. Morrill*, 20 Oregon 105, citing 12 AM. AND ENG. ENCYC. OF LAW (2d ed.) 147.

**5. See the title JURISDICTION, post.**

**6. Judgment Not Subject to Collateral Attack by Parties — United States.** — *Lake County v. Platt*, 79 Fed. Rep. 567.

*California.* — *Carpentier v. Oakland*, 30 Cal. 439; *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642.

*Georgia.* — *Williams v. Martin*, 7 Ga. 379.

*Illinois.* — *Burton v. Perry*, 146 Ill. 71; *Trogon v. Cleveland Stone Co.*, 53 Ill. App. 206. Compare *Carr v. Miner*, 42 Ill. 179.

*Indiana.* — *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Mannix v. State*, 115 Ind. 245; *Weiss v. Guérineau*, 109 Ind. 438; *Shultz v. Shultz*, 136 Ind. 323, 43 Am. St. Rep. 320.

*Iowa.* — *Mason v. Messenger*, 17 Iowa 261; *Smith v. Smith*, 22 Iowa 516; *Edmundson v. Independent School Dist.*, 98 Iowa 639.

*Maine.* — *Granger v. Clark*, 22 Me. 128; *Smith v. Abbott*, 40 Me. 442; *Davis v. Davis*, 61 Me. 399.

*Massachusetts.* — *Greene v. Greene*, 2 Gray



**By Stranger.** — But a stranger may collaterally impeach a judgment which stands in his way, by plea and proof of fraud in obtaining it, because this is his only means of availing himself of the fraud.<sup>1</sup> Thus where a judgment has been given by collusion between the debtor and the plaintiff in such judgment for the purpose of hindering and delaying creditors, it may be attacked collaterally by the creditors intended to be defrauded. But in doing so they do not impair the obligation of the judgment between the original parties upon whom it is binding; a fraudulent judgment, like a fraudulent deed, being good against all but the interests intended to be defrauded thereby.<sup>2</sup> But while strangers may attack a judgment collaterally when it is a fraud upon them, as when there has been collusion between the debtor and creditor, they cannot make such collateral attack merely because the debtor has been overreached and a fraud has been perpetrated on him.<sup>3</sup>

(Mass.) 361, 61 Am. Dec. 454; *Homer v. Fish*, 1 Pick. (Mass.) 435, 11 Am. Dec. 218; *M' Rae v. Mattoon*, 13 Pick. (Mass.) 57.

*Michigan.* — *Eureka Iron, etc., Works v. Bresnahan*, 66 Mich. 496; *Dunlap v. Byers*, 110 Mich. 109.

*Missouri.* — *Callahan v. Griswold*, 9 Mo. 784; *Field v. Sanderson*, 34 Mo. 542.

*Montana.* — *Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557.

*New Hampshire.* — *Blanchard v. Webster*, 62 N. H. 468.

*Oregon.* — *Morrill v. Morrill*, 20 Oregon 105; *Finley v. Houser*, 22 Oregon 562.

*Pennsylvania.* — *Otterson v. Middleton*, 102 Pa. St. 86; *Ogle v. Baker*, 137 Pa. St. 378, 21 Am. St. Rep. 886.

*South Carolina.* — *Norton v. Wallace*, 2 Rich. L. (S. Car.) 460.

*Tennessee.* — *Kelley v. Mize*, 3 Sneed (Tenn.) 59.

*Texas.* — *Frisby v. Withers*, 61 Tex. 134.

*Wisconsin.* — *Cody v. Cody*, 98 Wis. 445.

**Fraudulent Use of Judgment.** — But it has been held that where the validity of the judgment is conceded, evidence is admissible in a collateral action to show that the judgment was given for one purpose and had been fraudulently used for a different purpose. *Stark's Appeal*, 128 Pa. St. 545.

**Under the Codes** allowing equitable defenses to be pleaded in actions at law, it has been held that in an action upon a judgment the fact that such judgment was obtained by fraud may be shown. *Rogers v. Gwinn*, 21 Iowa 58; *Mandeville v. Reynolds*, 68 N. Y. 528. See also *Hogg v. Link*, 90 Ind. 351; *Verplanck v. Van Buren*, 76 N. Y. 258.

**In Equity.** — In *Boston, etc., R. Corp. v. Sparhawk*, 1 Allen (Mass.) 448, 79 Am. Dec. 750, it was held that a party to a judgment cannot be permitted in equity any more than at law collaterally to impeach it on the ground of fraud when it is offered in evidence against him in support of the title, which was in issue in the cause in which it was recovered. For a full discussion of the question of the liability of judgments to be impeached in equity, see the title **INJUNCTIONS**, vol. 16, p. 379.

**Foreign Judgments.** — As to the impeachment of foreign judgments for fraud, see the title **FOREIGN JUDGMENTS**, vol. 13, p. 1048.

**1. Collateral Attack by Stranger** — *England.* — *Crosby v. Leng*, 12 East 409; *Rex v. Kingston*, 20 How. St. Tr. 355.

*California.* — *Hackett v. Manlove*, 14 Cal. 85.

*Georgia.* — *Smith v. Cuyler*, 78 Ga. 654.

*Indiana.* — *De Armond v. Adams*, 25 Ind. 455.

*Louisiana.* — *Smith v. Henderson*, 23 La. Ann. 649.

*Maine.* — *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527.

*Massachusetts.* — *Downs v. Fuller*, 2 Met. (Mass.) 135, 35 Am. Dec. 393; *Greene v. Greene*, 2 Gray (Mass.) 365, 61 Am. Dec. 454.

*New Hampshire.* — *Great Falls Mfg. Co. v. Worster*, 45 N. H. 110.

*New York.* — *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 281; *Osborne v. Moss*, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252.

*Pennsylvania.* — *Miner's Trust Co. Bank v. Roseberry*, 81 Pa. St. 312; *Titusville Second Nat. Bank's Appeal*, 85 Pa. St. 528; *Otterson v. Middleton*, 102 Pa. St. 86; *Ogle v. Baker*, 137 Pa. St. 378, 21 Am. St. Rep. 886.

*South Carolina.* — *Hampton Bank v. Fennell*, 55 S. Car. 379.

*Vermont.* — *Atkinson v. Allen*, 12 Vt. 620, 36 Am. Dec. 361.

**2. Attack by Defrauded Creditor.** — *Faris v. Durham*, 5 T. B. Mon. (Ky.) 397; *Shallcross v. Deats*, 43 N. J. L. 177; *Robinson v. Davis*, 11 N. J. Eq. 302, 69 Am. Dec. 591; *Dougherty's Estate*, 9 W. & S. (Pa.) 189; *Titusville Second Nat. Bank's Appeal*, 25 Pa. St. 531; *Otterson v. Middleton*, 102 Pa. St. 86; *Ogle v. Baker*, 137 Pa. St. 378, 21 Am. St. Rep. 886. See also *Mannix v. State*, 115 Ind. 247.

In *Bunn v. Ahl*, 29 Pa. St. 387, 72 Am. Dec. 639, it was held that a judgment confessed for an amount honestly due is voidable by the defendant's creditors if it was given and received for the purpose of forcing such creditors into a compromise of the other claims, though it was never used for that purpose.

**Claims Accruing Subsequent to Judgment.** — In *Lewis v. Peterkin*, 39 La. Ann. 782, it was held that a judgment could not be collaterally attacked for fraud by a creditor whose claims accrued subsequent to the rendition of the judgment.

**3. Fraud upon Judgment Debtor Insufficient to Warrant Attack.** — *McAlpine v. Sweetser*, 76 Ind. 81; *Hogg v. Link*, 90 Ind. 346; *Dougherty's Appeal*, 9 W. & S. (Pa.) 189; *Thompson's Appeal*, 57 Pa. St. 178; *Clark v. Douglass*, 62 Pa. St. 415; *Miners' Trust Co. Bank v. Roseberry*, 81 Pa. St. 312; *Meckley's Appeal*, 102 Pa. St. 542.



**X. EQUITABLE RELIEF AGAINST JUDGMENTS.** — All questions relating to equitable relief against judgments have received a comprehensive treatment in another part of this work, to which a specific reference will be found in the note.<sup>1</sup>

**XI. ARREST OF JUDGMENT — 1. In General.** — Arrest of judgment is the act of staying a judgment or refusing to render judgment in actions at law and in criminal cases, after verdict, for some matter intrinsic, appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.<sup>2</sup> A reading of this definition will at once show that the question of arrest of judgment is not, according to the encyclopædic method of arrangement, strictly within the scope of this article, and it has in fact received a comprehensive treatment elsewhere.<sup>3</sup> But it is a matter so closely related to the subject of judgments that it is deemed not amiss to give in this place a few of the most general rules.

**2 Grounds of Arrest — a. ERRORS APPARENT ON FACE OF RECORD.** — It is well established as a general rule that judgment can be arrested only for errors or defects which are apparent on the face of the record,<sup>4</sup> or on account

**1. Equitable Relief Against Judgments.** — See the title INJUNCTIONS, vol. 16, p. 337, and particularly the matter contained in pp. 374-401.

**2. Definition.** — See 2 ENCYC. OF PL. AND PR. 794.

**3. For a Full Treatment,** see the article ARREST OF JUDGMENT, 2 ENCYC. OF PL. AND PR. 793.

**4. Error or Defect Apparent on Face of Record** — *England.* — *Sutton v. Bishop*, 4 Burr. 2283.

*United States.* — *U. S. v. Hammond*, 1 Cranch (C. C.) 15; *Burrows v. Niblack*, 84 Fed. Rep. 111, 53 U. S. App. 712.

*Alabama.* — *Williamson v. Branch Bank*, 3 Ala. 504; *Sparks v. State*, 59 Ala. 82; *Walker v. State*, 91 Ala. 76.

*Arkansas.* — *Strawn v. State*, 14 Ark. 549; *Atkins v. State*, 16 Ark. 568; *Crow v. State*, 23 Ark. 684; *Walker v. State*, 35 Ark. 386; *State v. Bledsoe*, 47 Ark. 233.

*Connecticut.* — *Fitch v. Hamlin*, 1 Root (Conn.) 110; *Church v. Norwich*, Kirby (Conn.) 142.

*Florida.* — *Sedgwick v. Dawkins*, 18 Fla. 335; *Jordan v. State*, 22 Fla. 528; *Smith v. State*, 29 Fla. 408; *Golding v. State*, 31 Fla. 262.

*Georgia.* — *State v. Allen*, R. M. Charl. (Ga.) 518; *McLane v. State*, 4 Ga. 335; *Terrell v. State*, 9 Ga. 58; *Brown v. Lee*, 21 Ga. 159; *Collins v. Hutchins*, 21 Ga. 270; *Hammond v. Candler*, 22 Ga. 281; *Reinhart v. State*, 29 Ga. 522; *Garner v. State*, 42 Ga. 203; *Loudon v. Coleman*, 62 Ga. 146; *Rountree v. Lathrop*, 69 Ga. 539; *Pulliam v. Dillard*, 71 Ga. 598; *Sanner v. Sayne*, 78 Ga. 467; *Herron v. State*, 93 Ga. 554.

*Illinois.* — *Gardner v. People*, 4 Ill. 83; *Gardner v. People*, 20 Ill. 430; *Wallace v. Curtiss*, 36 Ill. 159; *Winship v. People*, 51 Ill. 296; *Jones v. People*, 53 Ill. 366.

*Indiana.* — *Case v. State*, 5 Ind. 1; *Howard v. State*, 6 Ind. 444; *Adams v. State*, 11 Ind. 304; *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Shepherd v. State*, 64 Ind. 43; *Balliett v. Humphreys*, 78 Ind. 388; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519.

*Louisiana.* — *State v. Addison*, 15 La. Ann. 185; *State v. Crawford*, 32 La. Ann. 526; *State v. Frey*, 35 La. Ann. 106; *State v. Thomas*, 35 La. Ann. 24; *State v. Miller*, 36 La. Ann. 158;

*State v. Green*, 36 La. Ann. 185; *State v. White*, 37 La. Ann. 172; *State v. Pete*, 39 La. Ann. 1095; *State v. Green*, 43 La. Ann. 402; *State v. Casey*, 44 La. Ann. 969.

*Maine.* — *State v. Godfrey*, 24 Me. 232, 41 Am. Dec. 382; *State v. Bangor*, 38 Me. 592; *State v. Carver*, 49 Me. 588, 77 Am. Dec. 275; *State v. Murphy*, 72 Me. 433; *State v. Snow*, 74 Me. 354.

*Maryland.* — *Horsely v. State*, 3 Har. & J. (Md.) 2; *State v. Phelps*, 9 Md. 21; *Byers v. State*, 63 Md. 207.

*Massachusetts.* — *Com. v. Edwards*, 12 Cush. (Mass.) 187; *Com. v. Calhane*, 108 Mass. 431; *Com. v. Donahue*, 126 Mass. 51; *Sawyer v. Boston*, 144 Mass. 470.

*Minnesota.* — *State v. Conway*, 23 Minn. 291.

*Mississippi.* — *Covey v. State*, 8 Smed. & M. (Miss.) 575; *Heward v. State*, 13 Smed. & M. (Miss.) 261; *Green v. State*, 28 Miss. 687; *Frank v. State*, 39 Miss. 705; *McBeth v. State*, 50 Miss. 83.

*Missouri.* — *State v. Connell*, 49 Mo. 282; *Funkhouser v. Mallen*, 62 Mo. 555; *State v. Bonner*, 5 Mo. App. 13; *White v. Caldwell*, 17 Mo. App. 691.

*New Hampshire.* — *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171.

*New York.* — *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; *Lee v. Brown*, 5 Wend. (N. Y.) 221; *Jacobowsky v. People*, 6 Hun (N. Y.) 524; *People v. Menken*, 36 Hun (N. Y.) 90; *People v. Thompson*, 41 N. Y. 1; *People v. Allen*, 43 N. Y. 28; *People v. Kelly*, 94 N. Y. 526.

*North Carolina.* — *State v. George*, 8 Ired. L. (30 N. Car.) 324, 49 Am. Dec. 392; *State v. Douglass*, 63 N. Car. 500; *State v. Craige*, 89 N. Car. 475, 45 Am. Rep. 698; *State v. Lanier*, 90 N. Car. 714; *State v. Sheppard*, 97 N. Car. 401.

*Ohio.* — *Smith v. State*, 8 Ohio 294; *Challen v. Cincinnati*, 40 Ohio St. 113.

*Pennsylvania.* — *Skinner v. Robeson*, 4 Yeates (Pa.) 375; *Com. v. Duff*, 7 Pa. Super. Ct. 415; *Com. v. Armstrong*, 4 Pa. Co. Ct. 5; *Ward v. Lakeside R. Co.*, 20 Pa. Co. Ct. 494; *Delaware Division Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570; *Barriere v. Nairac*, 2 Dall. (Pa.) 249.



of some matter which properly should appear of record but does not.<sup>1</sup>

*b. ERROR WHICH WOULD BE FATAL ON DEMURRER.* — It has also been asserted that the error must be such as would have been fatal upon a general demurrer.<sup>2</sup>

*c. DEFECT IN PLEADINGS.* — Judgment may be arrested where the complaint states no cause of action,<sup>3</sup> but it is otherwise where the pleadings,

*South Carolina.* — *State v. Chitty*, 1 Bailey (S. Car.) 379; *State v. Heyward*, 2 Nott & M. (S. Car.) 312, 10 Am. Dec. 604; *Burnett v. Ballund*, 2 Nott & M. (S. Car.) 435; *State v. Creight*, 1 Brev. (S. Car.) 169, 2 Am. Dec. 656.

*Texas.* — *Peter v. State*, 11 Tex. 762; *Johnson v. State*, 14 Tex. App. 306; *Walker v. State*, 14 Tex. App. 609; *State v. Vahl*, 20 Tex. 779.

*Vermont.* — *Walker v. Sargeant*, 11 Vt. 327; *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135; *State v. Thibeau*, 30 Vt. 100; *State v. Thornton*, 56 Vt. 35.

*Virginia.* — *Com. v. Cohen*, 2 Va. Cas. 158; *Com. v. Watts*, 4 Leigh (Va.) 672; *Com. v. Stephen*, 4 Leigh (Va.) 679; *Hall v. Com.*, 80 Va. 555.

*West Virginia.* — *State v. Martin*, 38 W. Va. 568.

*Wyoming.* — *Territory v. Pierce*, 1 Wyo. 168.

**1. Where Record Does Not Show Matters Which Should Appear** — *United States*. — *U. S. v. Kilpatrick*, 16 Fed. Rep. 765.

*Arkansas.* — *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8.

*Connecticut.* — *Strong v. Avery*, 1 Root (Conn.) 259; *Pettibone v. Gozzard*, 2 Root (Conn.) 254.

*Illinois.* — *Smith v. Curry*, 16 Ill. 147; *Gardner v. People*, 20 Ill. 430; *Schofield v. Settley*, 31 Ill. 515; *Commercial Ins. Co. v. Treasury Bank*, 61 Ill. 482, 14 Am. Rep. 73.

*Indiana.* — *Adams v. State*, 11 Ind. 304; *Sharpe v. Clifford*, 44 Ind. 346; *Vawter v. Gilliland*, 55 Ind. 278; *Buckner v. State*, 56 Ind. 207; *Mitchell v. State*, 63 Ind. 276.

*Kentucky.* — *Young v. Wickliffe*, 7 Dana (Ky.) 447.

*Louisiana.* — *State v. Delerno*, 11 La. Ann. 648.

*Maryland.* — *Keirle v. Shriver*, 11 Gill & J. (Md.) 405.

*Massachusetts.* — *Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Com. v. Fay*, 126 Mass. 235.

*Mississippi.* — *Lusk v. State*, 64 Miss. 845.

*Missouri.* — *Jaccard v. Anderson*, 32 Mo. 188; *Brown v. St. Louis*, etc., R. Co., 69 Mo. App. 418.

*North Carolina.* — *State v. Douglass*, 63 N. Car. 500; *State v. Lanier*, 90 N. Car. 714; *State v. Sheppard*, 97 N. Car. 401.

*Pennsylvania.* — *Barriere v. Nairac*, 2 Dall. (Pa.) 249.

*South Carolina.* — *M'Hugh v. Cave*, 2 Brev. (S. Car.) 37.

**2. Error Such as Would Have Been Fatal on General Demurrer** — *Alabama.* — *Francois v. State*, 20 Ala. 83.

*California.* — *People v. Turner*, 39 Cal. 370.

*Delaware.* — *Higgins v. Bogan*, 4 Harr. (Del.) 330.

*Florida.* — *Murray v. State*, 9 Fla. 246; *Snowden v. State*, 17 Fla. 386.

*Illinois.* — *Wright v. Bennett*, 4 Ill. 258; *Smith v. Curry*, 16 Ill. 147; *Brawner v.*

*Lomax*, 23 Ill. 496; *Wilson v. Myrick*, 26 Ill. 34; *Schofield v. Settley*, 31 Ill. 515; *Commercial Ins. Co. v. Treasury Bank*, 61 Ill. 482, 14 Am. Rep. 73; *Consolidated Coal Co. v. Yung*, 24 Ill. App. 255.

*Indiana.* — *Long v. Brookston*, 79 Ind. 183.

*Kentucky.* — *Tipper v. Com.*, 1 Met. (Ky.) 6.

*Louisiana.* — *State v. Gates*, 9 La. Ann. 94.

*Maine.* — *State v. Putnam*, 38 Me. 296;

*State v. Bangor*, 38 Me. 592.

*Massachusetts.* — *Com. v. Collins*, 2 Cush. (Mass.) 557; *Com. v. Child*, 13 Pick. (Mass.) 200; *Com. v. Bean*, 14 Gray (Mass.) 54; *Com. v. Morse*, 2 Mass. 138; *Brown v. Com.*, 8 Mass. 59; *Com. v. Hinds*, 101 Mass. 209.

*Missouri.* — *Woods v. State*, 10 Mo. 698; *Jaccard v. Anderson*, 32 Mo. 188; *Meyers v. Field*, 37 Mo. 434; *Hart v. Harrison Wire Co.*, 91 Mo. 414.

*New Hampshire.* — *Gould v. Kelley*, 16 N. H. 551; *State v. Gove*, 34 N. H. 510; *State v. Barrett*, 42 N. H. 466.

*New York.* — *Bellows v. Shannon*, 2 Hill (N. Y.) 86.

*Rhode Island.* — *State v. Doyle*, 11 R. I. 574.

*South Carolina.* — *State v. James*, 2 Bay (S. Car.) 215; *Philson v. Bamfield*, 1 Brev. (S. Car.) 202.

*Vermont.* — *Bowdish v. Peckham*, 1 D. Chip. (Vt.) 144.

*Compare Spahr v. Nicklaus*, 51 Ind. 221; *Machon v. Randle*, 66 Tex. 282; *Merritt v. Dearth*, 48 Vt. 65.

**Objections Previously Raised by Demurrer Cannot Be Raised on Motion in Arrest of Judgment** — *Georgia.* — *Hall v. Carey*, 5 Ga. 239.

*Illinois.* — *Rouse v. Peoria County*, 7 Ill. 99; *Independent Order of Mut. Aid v. Paine*, 122 Ill. 625; *Chicago, etc., R. Co. v. Clausen*, 173 Ill. 100, 70 Ill. App. 550; *Brooks v. People*, 11 Ill. App. 422; *Cleveland, etc., R. Co. v. Jenkins*, 70 Ill. App. 415.

*Missouri.* — *Freeman v. Camden*, 7 Mo. 298.

*Compare Newman v. Perrill*, 73 Ind. 153.

**Exceptions Which Might Have Been Taken on Demurrer.** — After a judgment on demurrer there can be no motion in arrest for any exception which might have been taken on the demurrer. *Story*, etc., *Organ Co. v. Rendleman*, 63 Ill. App. 123; *Mayer v. Lawrence*, 58 Ill. App. 104; *Indiana, etc., R. Co. v. Sampson*, 31 Ill. App. 513.

**3. Judgment May Be Arrested Where Complaint States No Cause of Action** — *United States.* — *Dobson v. Campbell*, 1 Sumn. (U. S.) 326.

*Arizona.* — *Consolidated Canal Co. v. Peters*, (Ariz. 1896) 46 Pac. Rep. 74.

*Connecticut.* — *Hitchcock v. Page*, 1 Root (Conn.) 294; *Griffin v. Pratt*, 3 Conn. 515; *Gaylord v. Payne*, 4 Conn. 195; *Russell v. Slade*, 12 Conn. 462; *Dale v. Dean*, 16 Conn. 579; *Phelps v. Baldwin*, 17 Conn. 212; *McCune v. Norwich City Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278.



though defective, are so in form only, and do state, though not properly, a substantial cause of action, or, in the case of an indictment, a public offense.<sup>1</sup> Thus judgment will not be arrested on account of duplicity in the pleadings,<sup>2</sup>

*Florida*. — Snowden *v.* State, 17 Fla. 386.

*Georgia*. — Black *v.* State, 36 Ga. 447, 91 Am. Dec. 772; Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 480.

*Illinois*. — Wright *v.* Bennett, 4 Ill. 258; Smith *v.* Curry, 16 Ill. 147; Schofield *v.* Settley, 31 Ill. 515; Commercial Ins. Co. *v.* Treasury Bank, 61 Ill. 482, 14 Am. Rep. 73; Consolidated Coal Co. *v.* Yung, 24 Ill. App. 255; Seelye *v.* People, 40 Ill. App. 449.

*Indiana*. — Harris *v.* Harris, 61 Ind. 129; Spann *v.* Eagle Mach. Works, 87 Ind. 474; Eberhart *v.* Reister, 96 Ind. 478; Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44. *Compare* Spahr *v.* Nicklaus, 51 Ind. 221.

*Iowa*. — Johnson *v.* Miller, 82 Iowa 693.

*Louisiana*. — State *v.* Delerno, 11 La. Ann. 648.

*Maine*. — State *v.* Hart, 34 Me. 36. *Compare* Barrett *v.* Black, 56 Me. 498, 96 Am. Dec. 497.

*Massachusetts*. — Williams *v.* Hingham, 4 Pick. (Mass.) 341; Kingsley *v.* Bill, 9 Mass. 197; Com. *v.* Hinds, 101 Mass. 209.

*Missouri*. — Jaccard *v.* Anderson, 32 Mo. 188; Pickering *v.* Mississippi Valley Nat. Tel. Co., 47 Mo. 460; State *v.* Williams, 77 Mo. 467.

*New Hampshire*. — Walpole *v.* Marlow, 2 N. H. 385; Gould *v.* Kelley, 16 N. H. 551; Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171; State *v.* Smith, 20 N. H. 399; Bedell *v.* Stevens, 28 N. H. 118; State *v.* Gove, 34 N. H. 510.

*New York*. — Bellows *v.* Shannon, 2 Hill (N. Y.) 86; Addington *v.* Allen, 11 Wend. (N. Y.) 374; Bartlett *v.* Crozier, 17 Johns. (N. Y.) 439.

*Ohio*. — Maxfield *v.* Johnston, 2 Ohio 207.

*South Carolina*. — Philson *v.* Bampfield, 1 Brev. (S. Car.) 202.

*Vermont*. — State *v.* Bacon, 7 Vt. 219; Haselton *v.* Weare, 8 Vt. 484; Harding *v.* Cragie, 8 Vt. 509. *Compare* Merritt *v.* Dearth, 48 Vt. 65.

**1. Formal Defect in Pleadings** — *United States*.

— Dobson *v.* Campbell, 1 Sumn. (U. S.) 326; Gray *v.* James, Pet. (C. C.) 482; U. S. *v.* Gale, 109 U. S. 65.

*Alabama*. — Parker *v.* Abrams, 50 Ala. 35.

*Connecticut*. — Babcock *v.* Huntington, 2 Day (Conn.) 392; Champion *v.* Mumford, Kirby (Conn.) 170; Lewis *v.* Niles, 1 Root (Conn.) 346; Story *v.* Barrell, 2 Conn. 665; Griffin *v.* Pratt, 3 Conn. 515; Gaylord *v.* Payne, 4 Conn. 195; Hendrick *v.* Seely, 6 Conn. 179; Russell *v.* Slade, 12 Conn. 462; Dale *v.* Dean, 16 Conn. 579; Robbins *v.* Wolcott, 19 Conn. 356.

*Florida*. — Hyer *v.* Vaughn, 18 Fla. 647.

*Georgia*. — Bowie *v.* State, 19 Ga. 1; Camp *v.* State, 25 Ga. 689; Horne *v.* State, 37 Ga. 80, 92 Am. Dec. 49; Greene *v.* State, 59 Ga. 859; Rataree *v.* State, 62 Ga. 245.

*Illinois*. — Guykowski *v.* People, 2 Ill. 476; Toledo, etc., R. Co. *v.* Ingraham, 77 Ill. 309.

*Indiana*. — Lowe *v.* State, 46 Ind. 305; Greenley *v.* State, 60 Ind. 141; Shepherd *v.* State, 64 Ind. 43; Graeter *v.* State, 105 Ind. 273; Coleman *v.* State, 111 Ind. 563.

*Iowa*. — Winfield *v.* State, 3 Greene (Iowa) 339; State *v.* Raymond, 20 Iowa 582.

*Kentucky*. — Proctor *v.* Crozier, 6 B. Mon. (Ky.) 268.

*Louisiana*. — State *v.* Millican, 15 La. Ann. 557; State *v.* Johnson, 29 La. Ann. 717.

*Maryland*. — State *v.* Greenwell, 4 Gill & J. (Md.) 407.

*Massachusetts*. — Ingersoll *v.* Jackson, 9 Mass. 495; Com. *v.* Chiovaro, 129 Mass. 489; Com. *v.* McMahon, 133 Mass. 394; Com. *v.* Flannigan, 137 Mass. 560; Com. *v.* Fagan, 15 Gray (Mass.) 194.

*Mississippi*. — Cole *v.* Harman, 8 Smed. & M. (Miss.) 502; Morgan *v.* State, 13 Smed. & M. (Miss.) 242.

*Missouri*. — State *v.* Mertens, 14 Mo. 94; State *v.* Coupenhaver, 39 Mo. 430; Saulsbury *v.* Alexander, 50 Mo. 142; Corpenney *v.* Sedalla, 57 Mo. 88; Pomeroy *v.* Benton, 57 Mo. 531; Burdsal *v.* Davies, 58 Mo. 138; Edmonson *v.* Phillips, 73 Mo. 57; Grove *v.* Kansas City, 75 Mo. 672; State *v.* Williams, 77 Mo. 463; Dollman *v.* Munson, 90 Mo. 85; Priest *v.* Bircher, 3 Mo. App. 565; State *v.* Carroll, 9 Mo. App. 275; Crone *v.* Mallinckrodt, 9 Mo. App. 316.

*New Hampshire*. — Walpole *v.* Marlow, 2 N. H. 385; Payne *v.* Smith, 12 N. H. 34; State *v.* Freeman, 13 N. H. 488; Bedell *v.* Stevens, 28 N. H. 118.

*New York*. — Thompson *v.* People, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 208; People *v.* Kelly, 94 N. Y. 526.

*North Carolina*. — State *v.* Molier, 1 Dev. L. (12 N. Car.) 263; State *v.* Smith, 63 N. Car. 234; State *v.* Brantley, 63 N. Car. 518; State *v.* Walker, 87 N. Car. 541; State *v.* Craige, 89 N. Car. 475, 45 Am. Rep. 698.

*Ohio*. — McFeely *v.* Vantyle, 2 Ohio 197; Maxfield *v.* Johnston, 2 Ohio 208; Jordan *v.* James, 5 Ohio 88.

*Pennsylvania*. — Borbridge *v.* Herst, 6 Phila. (Pa.) 391, 24 Leg. Int. (Pa.) 404; Lutz *v.* Com., 29 Pa. St. 441.

*South Carolina*. — Teague *v.* Griffin, 2 Nott & M. (S. Car.) 93.

*Tennessee*. — Corn *v.* Brzelton, 2 Swan (Tenn.) 273.

*Texas*. — West *v.* State, 6 Tex. App. 485; Friedlander *v.* State, 7 Tex. App. 204; Jones *v.* State, 10 Tex. App. 552; Machon *v.* Randle, 66 Tex. 282.

*Vermont*. — Harding *v.* Cragie, 8 Vt. 509; State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672; Curtis *v.* Belknap, 21 Vt. 433; Merritt *v.* Dearth, 48 Vt. 65.

*Compare* Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 475; Green *v.* Bailey, 5 Munf. (Va.) 246.

**2. Duplicity in Pleadings Not Ground for Motion in Arrest** — *California*. — People *v.* Shotwell, 27 Cal. 395; People *v.* Burgess, 35 Cal. 118; People *v.* Weaver, 47 Cal. 108.

*Connecticut*. — Smith *v.* Northrup, 1 Root (Conn.) 387; Seymour *v.* Mitchel, 2 Root (Conn.) 145; Kilbourn *v.* State, 9 Conn. 562; Seger *v.* Barkhamsted, 22 Conn. 295; State *v.* Miller, 24 Conn. 530; State *v.* Holmes, 28 Conn. 230.



nor, as a general rule, because of a misjoinder of causes of action.<sup>1</sup> And it has also been held that judgment should not be arrested because one count in the declaration is defective, when there is another count which is good and sufficient to support the verdict.<sup>2</sup>

*d. VARIANCE.* — The courts have refused to grant a motion in arrest of judgment on the ground of variance between the allegations and the proof,<sup>3</sup>

*Indiana.* — *Simons v. State*, 25 Ind. 331; *Shafer v. State*, 26 Ind. 191.

*Massachusetts.* — *Com. v. Tuck*, 20 Pick. (Mass.) 356.

*Missouri.* — *House v. Lowell*, 45 Mo. 381; *Pickering v. Mississippi Valley Nat. Tel. Co.*, 47 Mo. 457.

*New York.* — *Polinsky v. People*, 73 N. Y. 72.

*South Carolina.* — *State v. Johnson*, 3 Hill L. (S. Car.) 1.

*Tennessee.* — *Wright v. State*, 4 Humph. (Tenn.) 194; *State v. Brown*, 8 Humph. (Tenn.) 89; *Forrest v. State*, 13 Lea (Tenn.) 103.

*Texas.* — *Coney v. State*, 2 Tex. App. 62.

*Compare Barnes v. State*, 20 Conn. 232; *State v. Merrill*, 44 N. H. 624; *People v. Wright*, 9 Wend. (N. Y.) 193.

**1. Misjoinder of Causes of Action Insufficient** — *United States.* — *U. S. v. Peterson*, 1 Woodb. & M. (U. S.) 305; *U. S. v. Stetson*, 3 Woodb. & M. (U. S.) 164.

*Alabama.* — *State v. Coleman*, 5 Port. (Ala.) 32; *Johnson v. State*, 29 Ala. 68; *Mayo v. State*, 30 Ala. 33; *Cawley v. State*, 37 Ala. 152.

*California.* — *People v. Garnett*, 29 Cal. 622.

*Georgia.* — *Bullock v. State*, 10 Ga. 47, 54 Am. Dec. 369; *Dean v. State*, 43 Ga. 218; *Williams v. State*, 60 Ga. 88.

*Illinois.* — *Guykowski v. People*, 2 Ill. 476.

*Indiana.* — *M'Gregg v. State*, 4 Blackf. (Ind.) 101; *Kennedy v. State*, 6 Ind. 486; *Frolich v. State*, 11 Ind. 213.

*Maryland.* — *State v. McNally*, 55 Md. 563; *State v. Sutton*, 4 Gill (Md.) 494.

*Massachusetts.* — See *Prescott v. Tufts*, 4 Mass. 146.

*Mississippi.* — *Teat v. State*, 53 Miss. 440.

*Missouri.* — *Storrs v. State*, 3 Mo. 10; *House v. Lowell*, 45 Mo. 381; *Pickering v. Mississippi Valley Nat. Tel. Co.*, 47 Mo. 457; *Union Bank v. Dillon*, 75 Mo. 380; *Baker v. Raley*, 18 Mo. App. 562.

*New York.* — *Kane v. People*, 8 Wend. (N. Y.) 211; *People v. Rynders*, 12 Wend. (N. Y.) 425; *Taylor v. People*, 12 Hun (N. Y.) 215.

*North Carolina.* — *State v. Speight*, 69 N. Car. 72; *State v. Watts*, 82 N. Car. 656. See also *State v. Brown*, 2 Winst. L. (60 N. Car.) 54.

*Pennsylvania.* — *Com. v. Gillespie*, 7 S. & R. (Pa.) 469, 10 Am. Dec. 475.

*Tennessee.* — *Wright v. State*, 4 Humph. (Tenn.) 194; *Hampton v. State*, 8 Humph. (Tenn.) 71, 47 Am. Dec. 599; *Cash v. State*, 10 Humph. (Tenn.) 111; *Campbell v. State*, 9 Verg. (Tenn.) 335, 30 Am. Dec. 417.

*Texas.* — *Weathersby v. State*, 1 Tex. App. 645.

*Compare State v. Howe*, 1 Rich. L. (S. Car.) 260.

**Joinder of Count in Tort and Count on Contract May Furnish Ground for Motion in Arrest.** — *Bull v. Mathews*, 20 R. I. 100. See also *Nimocks v. Inks*, 17 Ohio 506; *Joy v. Hill*, 36 Vt. 333.

**2. Judgment Not Arrested Because of Defective**

**Count Where Declaration Contains a Good Count** — *United States.* — *Barrows v. Niblack*, 84 Fed. Rep. 111, 53 U. S. App. 712.

*Alabama.* — *Hayes v. Solomon*, 90 Ala. 520. *Connecticut.* — *Lewis v. Niles*, 1 Root (Conn.) 433; *Hoag v. Hatch*, 23 Conn. 589.

*Illinois.* — *Waugh v. Suter*, 3 Ill. App. 271; *Bradshaw v. Hubbard*, 6 Ill. 390; *Swift v. Fue*, 167 Ill. 443, affirming 66 Ill. App. 651.

*Indiana.* — *Findley v. Buchanan*, 1 Blackf. (Ind.) 12; *Clarkson v. McCarty*, 5 Blackf. (Ind.) 574; *Newell v. Downs*, 8 Blackf. (Ind.) 523; *Waugh v. Waugh*, 47 Ind. 580; *Kelsey v. Henry*, 48 Ind. 37; *Spahr v. Nicklaus*, 51 Ind. 221; *Harris v. Rivers*, 53 Ind. 216; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505; *Baddeley v. Patterson*, 78 Ind. 157; *Louisville, etc., R. Co. v. Fox*, 101 Ind. 416. See also *Sims v. Dame*, 113 Ind. 127.

*Maine.* — *Bishop v. Williamson*, 11 Me. 495.

*Massachusetts.* — *Smith v. Cleveland*, 6 Met. (Mass.) 332.

*Ohio.* — *Chisom v. School Dist. No. 8*, 19 Ohio 289.

**But See the Following Cases:** *Kentucky.* — *Carlisle Bank v. Hopkins*, 1 T. B. Mon. (Ky.) 245, 15 Am. Dec. 113.

*Maine.* — *Clough v. Tenney*, 5 Me. 446.

*Maryland.* — *Hemming v. Elliott*, 66 Md. 197.

*Massachusetts.* — *Stevenson v. Hayden*, 2 Mass. 406; *Kingsley v. Bill*, 9 Mass. 197; *Sullivan v. Holker*, 15 Mass. 374.

*New Hampshire.* — *Blanchard v. Fisk*, 2 N. H. 398; *Peabody v. Kinsley*, 40 N. H. 418.

*Ohio.* — *Maxfield v. Johnston*, 2 Ohio 204.

*Vermont.* — *Haselton v. Weare*, 8 Vt. 480; *Harding v. Cragie*, 8 Vt. 501; *Walker v. Sergeant*, 11 Vt. 327; *Needham v. McAuley*, 13 Vt. 68; *Sylvester v. Downer*, 18 Vt. 32; *Joy v. Hill*, 36 Vt. 333.

**3. Variance Between Allegations and Proof Not Sufficient** — *United States.* — *Scull v. Bridle*, 2 Wash. (U. S.) 200.

*Arkansas.* — *Strawn v. State*, 14 Ark. 549.

*Connecticut.* — *Mott v. Meach*, 1 Root (Conn.) 186; *Carpenter v. Child*, 1 Root (Conn.) 220; *Wickham v. Waterman*, Kirby (Conn.) 273.

*Indiana.* — *Bright v. State*, 90 Ind. 343.

*Iowa.* — *Kirk v. Litterst*, 71 Iowa 71.

*Maryland.* — *Baden v. State*, 1 Gill (Md.) 165; *Coulter v. Western Theological Seminary*, 29 Md. 69.

*Mississippi.* — *Covey v. State*, 8 Smed. & M. (Miss.) 573.

*New Hampshire.* — *Lovell v. Sabin*, 15 N. H. 29.

*New York.* — *People v. Onondaga General Sessions*, 1 Wend. (N. Y.) 296; *Jacobowsky v. People*, 6 Hun (N. Y.) 524.

*North Carolina.* — *State v. Craige*, 89 N. Car. 475, 45 Am. Rep. 698.

*South Carolina.* — *State v. Crank*, 2 Bailey L. (S. Car.) 66; *State v. Graham*, 15 Rich. L. (S. Car.) 310.



the writ and the declaration,<sup>1</sup> or the presentment of the grand jury and the indictment.<sup>2</sup>

c. **OBJECTIONS AS TO JURISDICTION.** — A judgment may be arrested where the court had no jurisdiction over the subject-matter.<sup>3</sup>

f. **INDICTMENT UNDER REPEALED STATUTE.** — The fact that the statute under which an indictment was drawn has been repealed has been held a sufficient cause for an arrest of judgment.<sup>4</sup>

g. **OBJECTIONS TO THE JURY.** — A judgment may also be arrested where either the grand or petit jury was illegally constituted,<sup>5</sup> but not for mere irregularities in summoning and impaneling the jury,<sup>6</sup> objections to the qualification or competency of jurors,<sup>7</sup> nor, it has been held, on account of the mis-

*Texas.* — *Foster v. State*, 1 Tex. App. 531; *Berliner v. State*, 6 Tex. App. 181.

*Virginia.* — *Com. v. Cohen*, 2 Va. Cas. 158.

*Wyoming.* — *Territory v. Pierce*, 1 Wyo. 168.

*Compare Allen v. Word*, 6 Humph. (Tenn.) 284.

1. **Variance Between Writ and Declaration Not Sufficient.** — *P-r v. Bogan*, 2 McCord L. (S. Car.) 386; *Johnson v. Planters Bank*, 1 Humph. (Tenn.) 77.

2. **Variance Between Presentment of Grand Jury and Indictment Not Sufficient.** — *Com. v. Chalmers*, 2 Va. Cas. 76; *Wells v. Com.*, 2 Va. Cas. 333; *Com. v. Jones*, 2 Gratt. (Va.) 555.

3. **Lack of Jurisdiction over Subject Matter — Connecticut.** — *Moulthrop v. Bennet*, Kirby (Conn.) 351; *Strong v. Avery*, 1 Root (Conn.) 259.

*Illinois.* — *Truitt v. People*, 88 Ill. 519.

*Indiana.* — *McClure v. White*, 9 Ind. 209; *Dillon v. State*, 9 Ind. 408; *New Albany, etc., R. Co. v. Huff*, 19 Ind. 444; *Reams v. State*, 23 Ind. 111; *Loeb v. Mathis*, 37 Ind. 306; *Lowe v. State*, 46 Ind. 305; *Bishop v. State*, 50 Ind. 125; *Mullen v. State*, 50 Ind. 169; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505; *Shepherd v. State*, 64 Ind. 43; *Fisher v. State*, 64 Ind. 435; *Dawson v. State*, 65 Ind. 442; *Burroughs v. State*, 72 Ind. 334; *Louisville, etc., R. Co. v. Johnson*, 11 Ind. App. 328.

*Kentucky.* — *Tipper v. Com.*, 1 Met. (Ky.) 7; *Com. v. Hadcraft*, 6 Bush (Ky.) 93; *Weatherford v. Com.*, 10 Bush (Ky.) 198; *Tully v. Com.*, 11 Bush (Ky.) 154; *Walston v. Com.*, 16 B. Mon. (Ky.) 36; *Comely v. Com.*, 17 B. Mon. (Ky.) 409.

*Maine.* — *State v. Bonney*, 34 Me. 223.

*Massachusetts.* — *Morgan v. Stone*, 11 Cush. (Mass.) 254; *Robinson v. Mead*, 7 Mass. 353.

*Minnesota.* — *State v. Loomis*, 27 Minn. 521.

*Nevada.* — *State v. O'Connor*, 11 Nev. 416.

*New York.* — *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766.

*South Carolina.* — *State v. Goudalock*, 1 Brev. (S. Car.) 47.

**Lack of Jurisdiction over Person of Defendant.** — In a criminal case an arrest of judgment on the ground that the court did not have jurisdiction of the person of the defendant, has been refused. *State v. Scott*, 1 Bailey L. (S. Car.) 270.

4. **Indictment under Repealed Statute.** — *Reg. v. Denton*, 18 Q. B. 761, 83 E. C. L. 761, 14 Eng. L. & Eq. 124; *U. S. v. Goodwin*, 20 Fed. Rep. 237.

5. **Jury Illegally Constituted.** — *State v. Babcock*, 1 Conn. 401; *Miller v. State*, 33 Miss. 356, 69 Am. Dec. 351; *Cox v. Moss*, 53 Mo.

432; *Whitehurst v. Davis*, 2 Hayw. (3 N. Car.) 113. See also *Vaughn v. Scade*, 30 Mo. 600. *Compare Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

6. **Irregularities in Summoning and Impaneling Jury.** — *United States.* — *U. S. v. Peaco*, 4 Cranch (C. C.) 601; *U. S. v. Gale*, 109 U. S. 65. *Alabama.* — *State v. Stedman*, 7 Port. (Ala.) 495; *State v. Pile*, 5 Ala. 72; *Shaw v. State*, 18 Ala. 547.

*Connecticut.* — *Chapman v. Welles*, Kirby (Conn.) 133; *Bellows v. Williams*, Kirby (Conn.) 166.

*Georgia.* — *Hatcher v. State*, 18 Ga. 460.

*Illinois.* — *Stone v. People*, 3 Ill. 326; *Barron v. People*, 73 Ill. 256.

*Indiana.* — *Meiers v. State*, 56 Ind. 336; *Veatch v. State*, 56 Ind. 584, 26 Am. Rep. 44; *Miller v. State*, 69 Ind. 284.

*Kansas.* — *Montgomery v. State*, 3 Kan. 263.

*Louisiana.* — *State v. Harris*, 30 La. Ann. 90; *State v. Beasley*, 32 La. Ann. 1162; *State v. Thomas*, 35 La. Ann. 25; *State v. White*, 35 La. Ann. 96; *State v. Jackson*, 36 La. Ann. 96.

*Maryland.* — *Munshower v. State*, 56 Md. 514.

*Massachusetts.* — *Com. v. Smith*, 9 Mass. 107.

*Minnesota.* — *State v. Brown*, 12 Minn. 538; *State v. Conway*, 23 Minn. 292.

*Mississippi.* — *Green v. State*, 28 Miss. 687; *Byrd v. State*, 1 How. (Miss.) 247.

*North Carolina.* — *State v. Boon*, 82 N. Car. 637.

*Ohio.* — *Hurley v. State*, 6 Ohio 400.

*Pennsylvania.* — *Com. v. Chauncey*, 2 Ashm. (Pa.) 103.

*Texas.* — *State v. Vahl*, 20 Tex. 779; *McDaniel v. State*, 24 Tex. App. 552.

*Virginia.* — *Curtis v. Com.*, 87 Va. 589.

*Wisconsin.* — *Byrne v. State*, 12 Wis. 519; *Grubb v. State*, 14 Wis. 434.

*Compare Woodbridge v. Raymond*, Kirby (Conn.) 279; *State v. Dozier*, 2 Spears L. (S. Car.) 211.

7. **Objections to Qualification or Competency of Jurors — California.** — *People v. Samsels*, 66 Cal. 99.

*Connecticut.* — *Parmelee v. Guthery*, 2 Root (Conn.) 185, 1 Am. Dec. 65; *Bellows v. Williams*, Kirby (Conn.) 166; *Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 453; *Starr v. Tracy*, 2 Root (Conn.) 528; *Carew v. Howard*, 1 Root (Conn.) 323. See also *Woodbridge v. Raymond*, Kirby (Conn.) 279. *Compare Talmadge v. Northrop*, 1 Root (Conn.) 454.

*Florida.* — *Reynolds v. State*, 33 Fla. 301.

*Georgia.* — *Johnson v. State*, 62 Ga. 179.

*Louisiana.* — *State v. Griffin*, 38 La. Ann.



conduct of the jury.<sup>1</sup>

*h.* DEFECT IN VERDICT. — Judgment will be arrested where the verdict does not conform to the issue or indictment,<sup>2</sup> or is upon an immaterial issue, or does not determine the merits of the case,<sup>3</sup> or is insufficient to sustain a judgment.<sup>4</sup>

*i.* DEFECTS AND IRREGULARITIES AS TO PARTIES. — The courts have refused to entertain motions in arrest of judgment based upon a defect,<sup>5</sup> misjoinder,<sup>6</sup> or misnomer of parties.<sup>7</sup>

*j.* ERRORS OF COMMITTING MAGISTRATE. — An arrest of judgment on the ground of error in the examination of the defendant by a committing magistrate, has been refused.<sup>8</sup>

*k.* RECORD SHOWING THAT DEFENDANT SHOULD BE RELEASED. — The fact that the record in a criminal case shows that, for any reason, the defendant should be released, is sufficient ground for an arrest of judgment.<sup>9</sup>

*l.* STATUTE OF LIMITATIONS. — In civil cases the statute of limitations cannot be raised on motion in arrest of judgment,<sup>10</sup> and the same has been held to be true in criminal cases,<sup>11</sup> though the weight of authority is otherwise.<sup>12</sup>

*m.* OTHER OBJECTIONS. — It is a general rule, supported by numerous cases, that judgment will not be arrested for mere matters of form,<sup>13</sup> clerical

502; *State v. Thomas*, 35 La. Ann. 25; *State v. McGee*, 36 La. Ann. 206; *State v. Wittington*, 33 La. Ann. 1403; *State v. Harris*, 30 La. Ann. 90.

*New Mexico.* — *Territory v. Romero*, 2 N. Mex. 474.

*North Carolina.* — *State v. Cannon*, 90 N. Car. 711.

*Texas.* — *State v. Vahl*, 20 Tex. 779.

*Vermont.* — *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361.

*Wisconsin.* — *Byrne v. State*, 12 Wis. 519; *Grubb v. State*, 14 Wis. 434.

1. MISCONDUCT OF JURY. — *Brister v. State*, 26 Ala. 107; *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712; *Aphorp v. Backus*, Kirby (Conn.) 407, 1 Am. Dec. 26; *Nichols v. Bronson*, 2 Day (Conn.) 214; *McCann v. State*, 9 Smed. & M. (Miss.) 465. Compare *Dana v. Roberts*, 1 Root (Conn.) 134, 1 Am. Dec. 36; *Warner v. Robinson*, 1 Root (Conn.) 194, 1 Am. Dec. 38; *Bow v. Parsons*, 1 Root (Conn.) 429; *Talmadge v. Northrop*, 1 Root (Conn.) 522; *Smith v. Ward*, 2 Root (Conn.) 302; *Bullock v. Hosford*, 2 Root (Conn.) 349; *Bennett v. Howard*, 3 Day (Conn.) 219.

2. VERDICT NOT CONFORMING TO INDICTMENT OR PLEADINGS. — *Smith v. Bellamy*, 1 Root (Conn.) 200; *Russell v. Cornwell*, 2 Root (Conn.) 68; *State v. Roberts*, T. U. P. Charlt. (Ga.) 30; *State v. Monaquas*, T. U. P. Charlt. (Ga.) 16; *State v. Fort*, 1 Law Repos. (4 N. Car.) 510; *State v. Lohmdn*, 3 Hill L. (S. Car.) 67. Compare *Potter v. McCormack*, 127 Ind. 439; *State v. Snow*, 74 Me. 354.

3. VERDICT NOT DETERMINING MERITS OF CASE — *Connecticut* — *Smith v. Raymond*, 1 Day (Conn.) 189; *Scot v. Turner*, 1 Root (Conn.) 163; *Kegwin v. Campbell*, 1 Root (Conn.) 268; *Henshaw v. Clark*, 2 Root (Conn.) 4; *Basset v. Davis*, 2 Root (Conn.) 204; *Pettibone v. Gozzard*, 2 Root (Conn.) 254; *Palmer v. Seymour*, Kirby (Conn.) 139; *Hill v. Blackstone*, 2 Conn. 250.

*Iowa.* — *Peters v. State*, 3 Greene (Iowa) 74.

*Kentucky.* — *Young v. Wickliffe*, 7 Dana (Ky.) 447.

*Maryland.* — *Keirle v. Shriver*, 11 Gill & J (Md.) 405.

4. VERDICT INSUFFICIENT TO SUPPORT A JUDGMENT. — *Straughan v. State*, 16 Ark. 37; *Com. v. Call*, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; *Butcher v. Metts*, 1 Miles (Pa.) 233; *Senterfit v. State* 41 Tex. 188; *Howell v. State*, 10 Tex. App. 299.

5. DEFECT OF PARTIES NOT SUFFICIENT. — *Vonley v. Thompson*, 30 Ark. 399. Compare *Farni v. Tesson*, 1 Black. (U. S.) 309.

6. MISJOINDER OF PARTIES NOT SUFFICIENT. — *Miller v. Blake*, 6 Colo. 118; *Miller v. Keokuk*, etc., R. Co., 63 Iowa 680; *Demeritt v. Mills*, 59 N. H. 18.

7. MISNOMER OF PARTIES NOT SUFFICIENT. — *Scull v. Bridle*, 2 Wash. (U. S.) 200; *Com. v. Beckley*, 3 Met. (Mass.) 330; *Com. v. Dedham*, 16 Mass. 146; *Foster v. State*, 1 Tex. App. 531.

8. ERROR OF COMMITTING MAGISTRATE. — *Morris v. Com.*, 9 Leigh (Va.) 636; *Angel v. Com.*, 2 Va. Cas. 231.

9. WHERE RECORD SHOWS THAT DEFENDANT SHOULD BE RELEASED. — *Atkins v. State*, 16 Ark. 568; *Hague v. State*, 34 Miss. 616.

10. STATUTE OF LIMITATIONS CANNOT BE RAISED ON MOTION IN ARREST OF JUDGMENT IN CIVIL CASES. — *Thompson v. State*, 54 Miss. 743; *Cooksey v. Kansas City*, etc., R. Co., 17 Mo. App. 132; *Revelle v. St. Louis*, etc., R. Co., 74 Mo. 438; *Allen v. Word*, 6 Humph. (Tenn.) 284; *Murdock v. Herndon*, 4 Hen. & M. (Va.) 200.

11. RULE APPLIED TO CRIMINAL CASES. — *People v. Van Santvoord*, 9 Cow. (N. Y.) 655; *State v. Bowling*, 10 Humph. (Tenn.) 52.

12. STATUTE OF LIMITATIONS CAN BE RAISED ON MOTION IN ARREST OF JUDGMENT IN CRIMINAL CASES. — *State v. Gibbs*, 1 Root (Conn.) 171; *McLane v. State*, 4 Ga. 335; *State v. Hobbs*, 39 Me. 212; *State v. Caverly*, 51 N. H. 446; *State v. G. S.*, 1 Tyler (Vt.) 295, 4 Am. Dec. 724.

13. MATTERS OF FORM — *United States*. — *U. S. v. Chase*, 27 Fed. Rep. 807.

*Connecticut.* — *Babcock v. Huntington*, 2 Day (Conn.) 392.

*Georgia.* — *Hatcher v. State*, 18 Ga. 460; *Bowie v. State*, 19 Ga. 1; *Camp v. State*, 25 Ga.



errors.<sup>1</sup> defects in process,<sup>2</sup> or other defects which are cured by the verdict,<sup>3</sup> or are waived by going to trial.<sup>4</sup> Nor can a motion to arrest judgment be based upon objections to the evidence,<sup>5</sup> or other irregularities attending

689; *Horne v. State*, 37 Ga. 80, 92 Am. Dec. 49; *Ersine v. Wiggins*, 58 Ga. 186; *Greene v. State*, 59 Ga. 859.

*Illinois*. — *Gaykowski v. People*, 2 Ill. 476; *Toledo, etc., R. Co. v. Ingraham*, 77 Ill. 309; *Nelson v. Borchenius*, 52 Ill. 236.

*Indiana*. — *Billings v. State*, 107 Ind. 55, 57 Am. Rep. 77; *Rubush v. State*, 112 Ind. 113; *Sims v. Dame*, 113 Ind. 127.

*Iowa*. — *State v. Raymond*, 20 Iowa 586; *Winfield v. State*, 3 Greene (Iowa) 339.

*Maryland*. — *Loney v. Bailey*, 43 Md. 10.

*Massachusetts*. — *Benson v. Swift*, 2 Mass. 52; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Com. v. Chiovaro*, 129 Mass. 489; *Com. v. McGovern*, 10 Allen (Mass.) 194; *Com. v. Fagan*, 15 Gray (Mass.) 194; *Com. v. Desmarteau*, 16 Gray (Mass.) 1.

*Mississippi*. — *Morgan v. State*, 13 Smed. & M. (Miss.) 242.

*Missouri*. — *State v. Mertens*, 14 Mo. 94; *State v. Coupenhaver*, 39 Mo. 430; *Dollman v. Munson*, 90 Mo. 85.

*New Hampshire*. — *Payne v. Smith*, 12 N. H. 34; *State v. Freeman*, 13 N. H. 488.

*New York*. — *Thompson v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 208.

*North Carolina*. — *State v. Brantley*, 63 N. Car. 518; *State v. Smith*, 63 N. Car. 234; *State v. Walker*, 87 N. Car. 541; *State v. Rinehart*, 75 N. Car. 58; *State v. Lane*, 4 Ired. L. (26 N. Car.) 113; *State v. Molier*, 1 Dev. L. (12 N. Car.) 263.

*Pennsylvania*. — *Lutz v. Com.*, 29 Pa. St. 441; *Borbridge v. Herst*, 6 Phila. (Pa.) 391, 24 Leg. Int. (Pa.) 404.

*South Carolina*. — *State v. Duestoe*, 1 Bay (S. Car.) 378; *Teague v. Griffin*, 2 Nott & M. (S. Car.) 93.

*Tennessee*. — *Corn v. Brazelton*, 2 Swan (Tenn.) 273.

*Texas*. — *Friedlander v. State*, 7 Tex. App. 204; *Jones v. State*, 10 Tex. App. 552.

*Vermont*. — *State v. Gilbert*, 13 Vt. 643; *Merritt v. Dearth*, 48 Vt. 65.

*Virginia*. — *Mitchell v. Com.*, 75 Va. 856.

**1. Clerical Errors** — *Georgia*. — *Hatcher v. State*, 18 Ga. 465; *Herron v. State*, 93 Ga. 554.

*Illinois*. — *Shipherd v. Field*, 70 Ill. 439; *Toledo, etc., R. Co. v. Ingraham*, 77 Ill. 309.

*Indiana*. — *Sims v. Dame*, 113 Ind. 127.

*Iowa*. — *State v. Raymond*, 20 Iowa 582; *Winfield v. State*, 3 Greene (Iowa) 340.

*Massachusetts*. — *Com. v. McMahon*, 133 Mass. 394; *Com. v. Desmarteau*, 16 Gray (Mass.) 1.

*North Carolina*. — *State v. Smith*, 63 N. Car. 234; *State v. Molier*, 1 Dev. L. (12 N. Car.) 263.

**2. Errors or Defects in Process.** — *Lagow v. Patterson*, 1 Blackf. (Ind.) 327; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Prescott v. Tufts*, 7 Mass. 209; *Com. v. Loghlin*, 15 Gray (Mass.) 569. See also *Logan v. Smith*, 2 A. K. Marsh. (Ky.) 53; *Com. v. Gregory*, 7 Gray (Mass.) 498. Compare *Hartridge v. McDaniel*, 20 Ga. 398.

**3. Judgment Cannot Be Arrested on Account of Defects or Irregularities Which Are Cured by the**

**Verdict** — *Colorado*. — *Floyd v. Colorado Fuel, etc., Co.*, 10 Colo. App. 54.

*Connecticut*. — *Gaylord v. Payne*, 4 Conn. 195.

*Delaware*. — *Higgins v. Bogan*, 4 Harr. (Del.) 330.

*Indiana*. — *Westfall v. Stark*, 24 Ind. 377; *Adamson v. Rose*, 30 Ind. 381; *Gandor v. State*, 50 Ind. 539; *McCormick v. Mitchell*, 57 Ind. 248; *Balliet v. Humphreys*, 78 Ind. 389; *Powell v. Bennett*, 131 Ind. 465; *Dougherty v. Wilson*, 1 Blackf. (Ind.) 478; *Nicholson v. Carr*, 3 Blackf. (Ind.) 104; *Bayless v. Jones*, 10 Ind. App. 102.

*Maine*. — *Hutchins v. Adams*, 3 Me. 176.

*Missouri*. — *Burdsal v. Davies*, 58 Mo. 138; *Pry v. Hannibal, etc., R. Co.*, 73 Mo. 123; *Carrington v. Hancock*, 23 Mo. App. 299; *Hurt v. King*, 24 Mo. App. 593.

*New Hampshire*. — *Lord v. State*, 20 N. H. 404, 51 Am. Dec. 231.

*Ohio*. — *Maxfield v. Johnston*, 2 Ohio 204.

**4. Defects Waived by Going to Trial** — *Alabama*. — *Parker v. Abrams*, 50 Ala. 35.

*Arkansas*. — *Yonley v. Thompson*, 30 Ark. 399; *Little Rock, etc., Co. v. Dyer*, 35 Ark. 360.

*Colorado*. — *Miller v. Blake*, 6 Colo. 118; *Floyd v. Colorado Fuel, etc., Co.*, 10 Colo. App. 54.

*Georgia*. — *Slaughter v. Thompkins*, *Dudley* (Ga.) 117.

*Iowa*. — *Miller v. Keokuk, etc., R. Co.*, 63 Iowa 680; *Wau-kon-chaw-neck-kaw v. U. S.*, 1 Morr. (Iowa) 332.

*Kentucky*. — See *Logan v. Smith*, 2 A. K. Marsh. (Ky.) 52.

*Massachusetts*. — See *Com. v. Gregory*, 7 Gray (Mass.) 498; *Morgan v. Stone*, 11 Cush. (Mass.) 254.

*Missouri*. — See *Reugger v. Lindenberger*, 53 Mo. 364; *Edmonson v. Phillips*, 73 Mo. 57. *New Hampshire*. — *Demeritt v. Mills*, 59 N. H. 18.

**5. Objections to Evidence** — *United States*. — *Burrows v. Niblack*, 84 Fed. Rep. 111, 53 U. S. App. 712.

*Connecticut*. — *Wickham v. Waterman*, *Kirby* (Conn.) 273; *Carpenter v. Child*, 1 Root (Conn.) 220.

*Indiana*. — *Howard v. State*, 6 Ind. 444; *State v. Rousch*, 60 Ind. 304; *Bright v. State*, 90 Ind. 343.

*Iowa*. — *Kirk v. Litterst*, 71 Iowa 71.

*Maine*. — *State v. Snow*, 74 Me. 354.

*Maryland*. — *Baden v. State*, 1 Gill (Md.) 171.

*Mississippi*. — *Covey v. State*, 8 Smed. & M. (Miss.) 573.

*New Hampshire*. — *Lovell v. Sabin*, 15 N. H. 29.

*New Jersey*. — *Powe v. State*, 48 N. J. L. 34.

*New York*. — *People v. Allen*, 43 N. Y. 28; *Jacobowsky v. People*, 6 Hun (N. Y.) 524.

*North Carolina*. — *State v. Craige*, 89 N. Car. 475, 45 Am. Rep. 698.

*Pennsylvania*. — See *Ward v. Lakeside R. Co.*, 20 Pa. Co. Ct. 494.

*South Carolina*. — *State v. Graham*, 15 Rich. L. (S. Car.) 310.

*Wyoming*. — *Territory v. Pierce*, 1 Wyo. 168.



the trial.<sup>1</sup>

*n.* STATUTORY GROUNDS. — In some of the states the grounds for arrest of judgment are to a certain extent covered by statute and local rules.<sup>2</sup>

**3. Who May Move in Arrest.** — A motion in arrest of judgment is usually made by the defendant,<sup>3</sup> but the court has power to arrest judgment on its own motion.<sup>4</sup>

**1. Irregularities at Trial Not Sufficient** — *United States*. — *U. S. v. Angell*, 11 Fed. Rep. 34; *U. S. v. Davis*, 6 Blatchf. (U. S.) 464.

*Alabama*. — *Russell v. State*, 33 Ala. 366.

*Arkansas*. — *Freel v. State*, 21 Ark. 212; *Dawson v. State*, 29 Ark. 116; *Benton v. State*, 30 Ark. 344.

*Florida*. — *Frances v. State*, 6 Fla. 306.

*Georgia*. — *Wright v. State*, 18 Ga. 383.

*Illinois*. — *Perry v. People*, 14 Ill. 497.

*Louisiana*. — *State v. Robacker*, 31 La. Ann. 651; *State v. Thomas*, 35 La. Ann. 25.

*Maryland*. — *Loney v. Bailey*, 43 Md. 10.

*Missouri*. — *State v. Mertens*, 14 Mo. 94;

*State v. Coupenhaver*, 39 Mo. 430.

*New Hampshire*. — *State v. Freeman*, 13 N. H. 488.

*Ohio*. — *Smith v. State*, 8 Ohio 294.

*Pennsylvania*. — *Lynch v. Com.*, 88 Pa. St. 189, 32 Am. Rep. 445.

*Virginia*. — *Burgess v. Com.*, 2 Va. Cas. 483.

**Informalities in Returning Indictment into Court** — *Alabama*. — *Russell v. State*, 33 Ala. 366.

*Florida*. — *Frances v. State*, 6 Fla. 306.

*Georgia*. — *State v. Fox*, Ga. Dec. (pt. i.) 35.

*Missouri*. — *State v. Coupenhaver*, 39 Mo. 430; *State v. Mertens*, 14 Mo. 94.

*New Hampshire*. — *State v. Freeman*, 13 N. H. 488.

*New York*. — *Schrumpf v. People*, 14 Hun (N. Y.) 10.

*Virginia*. — *Burgess v. Com.*, 2 Va. Cas. 483.

**Irregularities Held Sufficient to Warrant Arrest of Judgment.** — *Lacefield v. State*, 34 Ark. 282, 36 Am. Rep. 8; *Gardner v. People*, 20 Ill. 430; *Adams v. State*, 11 Ind. 304; *State v. Koerner*, 51 Mo. 174. Compare *Padgett v. State*, 103 Ind. 550.

**2. Statutes and Local Rules Governing Grounds of Arrest** — *United States*. — *U. S. v. Chase*, 27 Fed. Rep. 807.

*Alabama*. — *Hood v. State*, 44 Ala. 81.

*California*. — *People v. Dick*, 37 Cal. 277; *People v. Swenson*, 49 Cal. 388.

*Connecticut*. — *Woodbridge v. Raymond*, Kirby (Conn.) 279.

*Georgia*. — *Wise v. State*, 24 Ga. 31; *Camp v. State*, 25 Ga. 689; *Bostock v. State*, 61 Ga. 635; *Rataree v. State*, 62 Ga. 245; *Hatfield v. State*, 76 Ga. 499; *Slaughter v. Thompkins*, Dudley (Ga.) 117; *Berry v. State*, 92 Ga. 47. See also *McLane v. State*, 4 Ga. 335; *Horne v. State*, 37 Ga. 80, 92 Am. Dec. 40.

*Indiana*. — *Hare v. State*, 4 Ind. 241; *Dillon v. State*, 9 Ind. 408; *Lowe v. State*, 46 Ind. 305; *Bishop v. State*, 50 Ind. 125; *Mullen v. State*, 50 Ind. 169; *McGuire v. State*, 50 Ind. 284; *Laydon v. State*, 52 Ind. 459; *Shepherd v. State*, 64 Ind. 43; *Fisher v. State*, 64 Ind. 435; *Dawson v. State*, 65 Ind. 442; *Burroughs v. State*, 72 Ind. 334; *Bright v. State*, 90 Ind. 343.

*Iowa*. — *State v. Raymond*, 20 Iowa 582.

*Kansas*. — *Guy v. State*, 1 Kan. 448; *State v. Knowles*, 34 Kan. 393.

*Kentucky*. — *Walston v. Com.*, 16 B. Mon. (Ky.) 15; *Comely v. Com.*, 17 B. Mon. (Ky.) 409; *Com. v. Hadcraft*, 6 Bush (Ky.) 91; *Mork v. Com.*, 6 Bush (Ky.) 397; *Weatherford v. Com.*, 10 Bush (Ky.) 196; *Tully v. Com.*, 11 Bush (Ky.) 154; *Tipper v. Com.*, 1 Met. (Ky.) 6.

*Louisiana*. — *State v. Delerno*, 11 La. Ann. 648; *State v. Boudreaux*, 14 La. Ann. 88; *State v. Nicholson*, 14 La. Ann. 798; *State v. Millican*, 15 La. Ann. 557.

*Maine*. — *Stetson v. Corinna*, 44 Me. 29; *State v. Snow*, 74 Me. 354.

*Maryland*. — *State v. Phelps*, 9 Md. 21; *Kellenbeck v. State*, 10 Md. 431; *Wedge v. State*, 12 Md. 232; *Cowman v. State*, 12 Md. 250; *State v. Reed*, 12 Md. 263; *Maguire v. State*, 47 Md. 485; *Davis v. Carroll*, 71 Md. 568. See *Stirling v. Garritee*, 18 Md. 468.

*Massachusetts*. — *Com. v. Galligan*, 113 Mass. 203; *Com. v. Melville*, 160 Mass. 307; *Com. v. Swain*, 160 Mass. 354; *Emery v. Osgood*, 1 Allen (Mass.) 244; *Com. v. Norton*, 13 Allen (Mass.) 550; *Hill v. Dunham*, 7 Gray (Mass.) 543. See also *Stowell v. Flagg*, 11 Mass. 364.

*Minnesota*. — *Bilansky v. State*, 3 Minn. 427; *State v. Loomis*, 27 Minn. 521.

*Mississippi*. — *Lusk v. State*, 64 Miss. 845.

*Missouri*. — *State v. York*, 22 Mo. 462; *State v. Pemberton*, 30 Mo. 376; *State v. Koerner*, 51 Mo. 174.

*Nevada*. — *State v. O'Connor*, 11 Nev. 416.

*New York*. — *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766, 5 N. Y. Crim. 69, (Supm. Ct. Gen. T.) 4 N. Y. Crim. 230; *Gray v. People*, 21 Hun (N. Y.) 140. See also *People v. Buchanan*, (N. Y. Gen. Sess.) 25 N. Y. Supp. 481.

*Ohio*. — *Porter v. Porter*, 14 Ohio 220.

*Pennsylvania*. — *Weaver v. Com.*, 29 Pa. St. 445; *Com. v. Frey*, 50 Pa. St. 245; *Lynch v. Com.*, 88 Pa. St. 189, 32 Am. Rep. 445.

*Rhode Island*. — *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497.

*Tennessee*. — *Perkins v. State*, 8 Baxt. (Tenn.) 559; *State v. Davidson*, 2 Coldw. (Tenn.) 184; *Corn v. Brazelton*, 2 Swan (Tenn.) 273.

*Texas*. — *State v. Vahl*, 20 Tex. 779; *Friedlander v. State*, 7 Tex. App. 204.

*Vermont*. — *State v. Hodgson*, 66 Vt. 134; *State v. O'Neil*, 66 Vt. 356.

*Washington*. — *Freany v. Territory*, 1 Wash. Ter. 71.

**3. One of Several Joint Defendants May Move in Arrest.** — *Rex v. De Berenger*, 3 M. & S. 67; *State v. Covington*, 4 Ala. 603.

**4. Court May Arrest Judgment on Its Own Motion** — *England*. — *Rex v. Price*, 6 East 323; *Rex v. Waddington*, 1 East 143.

*Arkansas*. — *Younger v. State*, 37 Ark. 116.

*Indiana*. — *Smith v. Dods*, 35 Ind. 452; *Hansher v. Hanshew*, 94 Ind. 208.

*New York*. — *Kohn v. Burnett*, (Supm. Ct.) 59 How. Pr. (N. Y.) 410.

*Tennessee*. — *Thurston v. State*, 3 Coldw. (Tenn.) 115.



4. **Time for Moving in Arrest.** — The proper time for moving in arrest of judgment is after verdict but before judgment thereon.<sup>1</sup>

5. **Effect of Arrest.** — When a motion in arrest of judgment is sustained, this puts an end to the action or prosecution,<sup>2</sup> but it does not have the effect of barring a new action,<sup>3</sup> nor does it enable the defendant to escape another prosecution on the plea of former jeopardy.<sup>4</sup>

6. **Arrest of Judgment in Civil Action Abolished in Maine.** — Under the statutes of Maine no motion in arrest of judgment can be sustained in a civil action.<sup>5</sup>

**XII. SATISFACTION AND DISCHARGE** — 1. **Payment to Whom** — *a.* **IN GENERAL.** — That a payment may operate to extinguish a judgment it must be made either to the creditor or to some person authorized by him or by law to receive it.<sup>6</sup>

*b.* **ONE OF JOINT JUDGMENT CREDITORS.** — Payment of the amount due on a judgment to either of joint judgment creditors will discharge the judgment, in the absence of any notice to the debtor by one of such creditors not to pay the other more than his proportion of the judgment.<sup>7</sup> One of the creditors may compound or compromise with the debtor his own interest in

*Virginia.* — *Old v. Com.*, 18 Gratt. (Va.) 915; *Matthews v. Com.*, 18 Gratt. (Va.) 989.

1. **Proper Time for Moving in Arrest** — *Georgia.* — *Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 660.

*Illinois.* — *Perry v. People*, 14 Ill. 496.

*Indiana.* — *Smith v. Dodds*, 35 Ind. 452; *Hilligoss v. Pittsburgh, etc.*, R. Co., 40 Ind. 112; *Brownlee v. Hare*, 64 Ind. 311; *Hansher v. Hansher*, 94 Ind. 208; *Colchen v. Ninde*, 120 Ind. 88; *Potter v. McCormack*, 127 Ind. 439; *Bayless v. Jones*, 10 Ind. App. 102.

*Kentucky.* — *Craig v. Craig*, 6 J. J. Marsh. (Ky.) 171.

*Maryland.* — *Keller v. Stevens*, 66 Md. 132.

*Missouri.* — *Gilstrap v. Felts*, 50 Mo. 432; *Rhorer v. Brockhage*, 15 Mo. App. 17.

*Montana.* — *Territory v. Corbett*, 3 Mont. 50.

*Vermont.* — *State v. Kibling*, 63 Vt. 636; *State v. O'Neil*, 66 Vt. 356.

2. **Arrest of Judgment Puts an End to Action.** — *Raber v. Jones*, 40 Ind. 436; *Crawford v. Crockett*, 55 Ind. 224; *Butcher v. Metts*, 1 Miles (Pa.) 233.

3. **New Action Not Barred.** — *Gerard v. People*, 4 Ill. 362; *State v. Heas*, 10 La. Ann. 195; *Com. v. Gould*, 12 Gray (Mass.) 171; *People v. Casborus*, 13 Johns. (N. Y.) 351; *State v. Thomas*, 8 Rich. L. (S. Car.) 295.

4. **Defendant Cannot Escape New Prosecution** — *England.* — See *Rex v. Price*, 6 East 323.

*Illinois.* — *Gerard v. People*, 4 Ill. 362; *Bedee v. People*, 73 Ill. 320; *Phillips v. People*, 88 Ill. 161.

*Iowa.* — See *Ray v. State*, 1 Greene (Iowa) 316, 48 Am. Dec. 379.

*Louisiana.* — *State v. Heas*, 10 La. Ann. 195. See also *State v. Edson*, 10 La. Ann. 229; *State v. Delerno*, 11 La. Ann. 648; *State v. Foster*, 36 La. Ann. 857; *State v. Burdon*, 38 La. Ann. 358; *State v. Oliver*, 38 La. Ann. 632.

*Massachusetts.* — See *Com. v. Galligan*, 113 Mass. 203.

*Missouri.* — See *State v. Koerner*, 51 Mo. 174.

*New York.* — *People v. Casborus*, 13 Johns. (N. Y.) 351.

*South Carolina.* — See *State v. Holley*, 1

Brev. (S. Car.) 35; *State v. Goudalock*, 1 Brev. (S. Car.) 47.

*Virginia.* — See *Com. v. Hatton*, 3 Gratt. (Va.) 593.

*Compare Hood v. State*, 44 Ala. 85.

5. **Arrest of Judgment Abolished in Civil Actions.** — *Stetson v. Corinna*, 44 Me. 29.

6. **To Creditor or Authorized Agent.** — See generally the title **PAYMENT**, and see the following subdivisions of this section.

**Creditor Not Found** — **Payment into Court.** — Where a judgment directed the defendant to tender the plaintiff within a certain time a specified sum of money and interest, it was held that on a showing by the defendant that the plaintiff could not be found after diligent search, the judgment might be amended so as to allow payment of the amount into court. *Rauth v. New York El. R. Co.*, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 95.

**Deposit in Branch Bank.** — Where the debtor in a judgment recovered by a bank deposited with a branch of such bank money subject to his own check, which was lost by the failure of such bank, it was held that the deposit did not operate to discharge the judgment. *Spilman v. Payne*, 84 Va. 435.

**Forged Authority.** — Where a person represents by a forged memorandum that he is the judgment creditor's agent, and obtains the amount of the judgment, this will not operate to discharge the judgment if the money in fact never comes into the judgment creditor's hands. *Guiles v. Murray*, 22 Pa. Co. Ct. 99. See also *Rounsaville v. Hazen*, 33 Kan. 71.

7. **Payment to One of Joint Creditors.** — *American F. Ins. Co. v. Landfare*, 56 Neb. 482; *Erwin v. Rutherford*, 1 Verg. (Tenn.) 169.

**Creditors with Several Interests.** — Where a judgment was confessed to two persons jointly for a several demand of each, which demands differed in amount, it was held that their interests in the judgment were several, and that moneys received by one of them not under the execution might be applied to his share of the judgment. *Roberts v. Roberts*, McMull. Eq. (S. Car.) 49.



the judgment without the consent of the others,<sup>1</sup> but cannot accept less than the whole amount in full satisfaction of the judgment.<sup>2</sup>

*c. REAL PARTY IN INTEREST.* — Where a judgment is recovered by one person for the use of another, it is the duty of the judgment debtor to make payment to the real creditor in interest;<sup>3</sup> and where the debtor has notice that the judgment belongs to a person other than the nominal judgment creditor, it is his duty to pay the amount to the true owner of the judgment, as much as if the record stated it to be for the use of such person.<sup>4</sup> If the person for whose use the judgment is recovered be a fictitious person, then the debtor is justified in treating the nominal plaintiff as the real owner and proceeding to settle the demand with him.<sup>5</sup>

*d. ATTORNEY OF JUDGMENT CREDITOR.* — The attorney of the judgment creditor has implied authority to receive payment and enter satisfaction of the judgment while his authority in the case remains unrevoked.<sup>6</sup> The attorney, however has no general authority to accept anything in payment but legal money,<sup>7</sup> nor to accept less than the full amount in discharge of the judgment,<sup>8</sup> except, perhaps, in a case where the collection of the judgment is doubtful, in which case, it seems, the attorney may discharge the judgment upon receiving payment of a part and security for the payment of the residue.<sup>9</sup>

*e. NEXT FRIEND OF INFANT.* — It is the general rule that no one but a regularly qualified guardian of an infant has authority to receive payment and enter satisfaction of a judgment recovered in favor of such infant, and that a next friend, proceeding in behalf of the infant, has no such authority,<sup>10</sup> although there are authorities which seem to take the contrary view.<sup>11</sup>

*Where No General Guardian.* — Where there is no general guardian the proceeds of the judgment should be paid into court until a guardian is regularly

1. One Creditor May Compromise with Debtor. — *Penn v. Edwards*, 50 Ala. 63.

2. Cannot Accept Less than Whole Amount. — *Haggin v. Clark*, 61 Cal. 1. And see *infra*, this section, *Effect of Part Payment*.

3. Must Pay to Real Party in Interest. — *Triplet v. Scott*, 12 Ill. 137; *Hodson v. McConnell*, 12 Ill. 170. See also *McGregor v. Comstock*, 28 N. Y. 237.

4. Notice that Judgment Belongs to Another. — *Germania L. Ins. Co. v. Koehler*, 59 Ill. App. 592; *Hodson v. McConnell*, 12 Ill. 170. And see *infra*, this title, *Assignment of Judgments, Effect of Notice to Judgment Debtor*.

5. Fictitious Person. — *McGehee v. Gindrat*, 20 Ala. 95.

6. Authority of Attorney to Receive Payment. — See the title ATTORNEY AND CLIENT, vol. 3, p. 365.

7. Can Take Nothing but Legal Money. See the title ATTORNEY AND CLIENT, vol. 3, p. 363. And see *infra*, this section, *Where Payment to Attorney or Officer*.

8. Cannot Accept Less than the Full Amount. — *Nolan v. Jackson*, 16 Ill. 272; *Jewett v. Wadleigh*, 32 Me. 110; *Lewis v. Gamage*, 1 Pick. (Mass.) 347; *Beers v. Hendrickson*, 45 N. Y. 665; *Lewis v. Woodruff*, (Supm. Ct. Gen. T.) 15 How. Pr. (N. Y.) 539; *Benedict v. Smith*, 10 Paige (N. Y.) 126; *Peters v. Lawson*, 66 Tex. 336. See the title ATTORNEY AND CLIENT, vol. 3, p. 364. And see *infra*, this section, *Effect of Part Payment*.

*After Death of Client.* — Under *New York Code of Civ. Pro.*, § 1260, an attorney of the creditor is not authorized to satisfy a judgment recovered for his client for less than the full amount due thereon after his client's death;

and the representatives of such client are entitled to recover the amount of the judgment. *Wood v. New York*, 44 N. Y. App. Div. 299.

9. Where Collection Doubtful. — *Benedict v. Smith*, 10 Paige (N. Y.) 126.

10. Next Friend Cannot Receive Payment. — *Alabama*. — *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Isaacs v. Boyd*, 5 Port. (Ala.) 388.

*Maryland*. — *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159. But see *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619.

*Mississippi*. — *Klaus v. State*, 54 Miss. 646.

*New York*. — *Leopold v. Meyer*, (C. Pl. Spec. T.) 10 Abb. Pr. (N. Y.) 40; *Genet v. Tallmadge*, 1 Johns. Ch. (N. Y.) 3.

*South Carolina*. — *Allen v. Roundtree*, 1 Spears L. (S. Car.) 80; *Mitchell v. Connolly*, 1 Bailey L. (S. Car.) 203.

*Tennessee*. — *Miles v. Kaigler*, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Benton v. Pope*, 5 Humph. (Tenn.) 392; *Barbee v. Williams*, 4 Heisk. (Tenn.) 522.

*Texas*. — *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *Austin v. Colgate*, (Tex. Civ. App. 1894) 27 S. W. Rep. 896; *Gulf, etc., R. Co. v. Younger*, 19 Tex. Civ. App. 242.

*Where Father Next Friend.* — It is doubtful if the father who prosecutes as next friend can discharge the judgment, as it is said his authority is only commensurate with the writ. *Bernard v. Merrill*, 91 Me. 358.

11. Authorities Contra. — See *O'Donnell v. Broad*, 2 Pa. Dist. 84, 149 Pa. St. 24; *Jones v. Steele*, 36 Mo. 324; *Tripp v. Gifford*, 155 Mass. 109, 31 Am. St. Rep. 530.

*Sale in Partition.* — In *Cook v. Lea*, 6 Paige (N. Y.) 158, it was held that on a sale in par-



appointed or the infant reaches his majority.<sup>1</sup> On the other hand, it has been held that where there is no general guardian the next friend may receive payment and enter satisfaction of the judgment.<sup>2</sup>

**f. OFFICERS AUTHORIZED BY LAW TO RECEIVE PAYMENT — Sheriff.** — The amount due on a judgment may properly be paid to a sheriff or other ministerial officer who holds a writ for the collection of such judgment,<sup>3</sup> and the judgment debtor will be protected in such payment, even though the money may never come to the hands of his creditor.<sup>4</sup> And where a sheriff accepts payment in lawful money, although not at the time authorized to do so, if he pays over the money to the creditor or his attorney of record and it is accepted the judgment is thereby discharged.<sup>5</sup>

**Clerk of Court.** — As a general rule a clerk of a court is authorized to receive payment of judgments rendered in his court.<sup>6</sup> Payment to a clerk when he has not authority to receive it will not operate to satisfy the judgment,<sup>7</sup> but where a clerk receives the money before judgment, retains it in his hands until after judgment, and then manifests by some plain and unequivocal act his intention to hold it in his official capacity as clerk, the payment is good and the judgment is thereby discharged.<sup>8</sup>

**g. AFTER ASSIGNMENT.** — After an assignment of a judgment and notice thereof to the judgment debtor, payment must be made to the assignee.<sup>9</sup>

tion the share of an infant party should be paid to his guardian *ad litem* and not to his general guardian.

**1. No General Guardian — Payment into Court.** — *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Klaus v. State*, 54 Miss. 644; *Miles v. Kaigler*, 10 Verg. (Tenn.) 10, 30 Am. Dec. 425; *Brooke v. Clark*, 57 Tex. 105; *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *Austin v. Colgate*, (Tex. Civ. App. 1894) 27 S. W. Rep. 896. See also *Calmbacher v. Newman*, 60 N. Y. Super. Ct. 404; *Leopold v. Meyer*, (C. Pl. Spec. T.) 10 Abb. Pr. (N. Y.) 40; *Sere v. Coit*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 481.

**Clerk of Court as Guardian Ad Litem.** — Where the clerk of a county court, who was also guardian *ad litem* to a minor, received payment as clerk of a judgment in favor of the minor and gave his receipt as clerk, it was held that he could not, by an entry on his docket, change the character of the payment so as to make it appear that he received it as guardian *ad litem*. *Haynes v. Wheat*, 9 Ala. 239.

**2. Payment to Next Friend.** — *Baltimore, etc., R. Co. v. Fitzpatrick*, 36 Md. 619. See also *Collins v. Brooks*, 4 H. & N. 270.

In *Texas* by statute (Rev. Stat. 1895, tit. 72, c. 1, art. 3498*w*), where the amount of the judgment recovered does not exceed five hundred dollars, and the minor has no guardian, the next friend or any person authorized by the court may receive the money upon giving bond as required by the statute. *Gulf, etc., R. Co. v. Younger*, 19 Tex. Civ. App. 242.

**3. Officer Must Have Writ in His Hands.** — *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Lofland v. Jefferson*, 4 Harr. (Del.) 303; *Irwin v. McKee*, 25 Ga. 646; *Mills v. Allen*, 7 Jones L. (52 N. Car.) 564; *Bailey v. Hester*, 101 N. Car. 538.

**No Authority Before Issuance of Execution.** — *Bobo v. Thompson*, 3 Stew. & P. (Ala.) 385.

**No Authority After Return Day of Writ.** —

*Barton v. Lockhart*, 2 Stew. & P. (Ala.) 109; *Bobo v. Thompson*, 3 Stew. & P. (Ala.) 385; *Dean v. Governor*, 13 Ala. 526; *Wyer v. Andrews*, 13 Me. 168, 29 Am. Dec. 497; *Chapman v. Harrison*, 4 Rand. (Va.) 336.

**A Coroner to whom a writ of execution is delivered may receive payment of the judgment.** See *Codwise v. Field*, 9 Johns. (N. Y.) 263.

**4. Payment Good Though Money Never Reaches Creditor.** — *Beard v. Millikan*, 66 Ind. 231.

**5. Payment to Officer Having No Authority.** — *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508.

**6. Clerk May Receive Payment.** — *Aicardi v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614; *Governor v. Read*, 38 Ala. 252; *Murray v. Charles*, 5 Ala. 678; *Hendry v. Benlisa*, 37 Fla. 609; *McDonald v. Atkins*, 13 Neb. 568; *Bynum v. Barefoot*, 75 N. Car. 576; *Roberts v. Powell*, 22 Tex. Civ. App. 211. And see *Currie v. Thomas*, 8 Port. (Ala.) 293; *Morgan v. Long*, 29 Iowa 434.

**Money Paid to a Justice to be applied upon a judgment in garnishment cannot be used to satisfy a different judgment against the same party, even though the time has expired during which the fund could be bound by the proceedings in garnishment.** *McDonald v. Lewis*, 42 Mich. 135.

**7. No Authority in Clerk — Payment Not a Satisfaction.** — *Hawkeye Ins. Co. v. Luckow*, 76 Iowa 21; *Mazyck v. M'Ewen*, 2 Bailey L. (S. Car.) 28; *Hendry v. Benlisa*, 37 Fla. 609.

**No Authority Before Judgment.** — *Governor v. Read*, 38 Ala. 252.

**No Authority in Vacation.** — *Currie v. Thomas*, 8 Port. (Ala.) 293.

**Decree Ordering Payment to "Complainant."** — Under a decree ordering the payment of a certain sum to the "complainant" payment to the registrar of the court is not a satisfaction. *Lewis v. Kean*, 102 Mich. 605.

**8. Payment to Clerk Before Judgment.** — *Governor v. Read*, 38 Ala. 252.

**9. See *infra*, this title, *Assignment of Judgments, Effect of Notice to Judgment Debtor*.**



**2. Medium of Payment — *α*.** WHERE PAYMENT TO JUDGMENT CREDITOR. — It is the General Rule that, in the absence of any provision to the contrary, all debts are payable in lawful money, but that the creditor may accept anything else of value if he chooses.<sup>1</sup> Thus, the creditor may agree to accept the performance of certain conditions by the debtor in satisfaction of the judgment, and a compliance by the latter will operate to discharge the judgment.<sup>2</sup>

**A Bond Given by a Judgment Debtor** in satisfaction of the judgment, and accepted by the creditor, is in law a payment of it.<sup>3</sup>

**The Taking of Collateral Security** by the creditor, however, will not release the judgment.<sup>4</sup>

**The Delivery of Specific Property** to the creditor of the debtor will not be considered as a satisfaction of the judgment unless such was the intention of the parties, a tender in goods not being good.<sup>5</sup>

**Payment by Negotiable Instrument.** — While the cases are not altogether harmonious, it is the rule in most jurisdictions that the mere giving of a negotiable instrument will not of itself operate to discharge the judgment, unless there is an express agreement between the parties that it shall have that effect.<sup>6</sup> But the creditor may expressly agree to accept such instrument as a satisfaction, and the judgment will be thereby discharged.<sup>7</sup>

**Question for Jury.** — The question whether a note given by the judgment debtor to his creditor was accepted in satisfaction of the judgment or in liqui-

**1. Medium of Payment.** — For a full discussion see the title *PAYMENT*.

**Payment by Deed of Property.** — *Musser v. Gray*, (Cal. 1892) 31 Pac. Rep. 568.

**Claim on Third Person.** — *Pharis v. Leachman*, 20 Ala. 662.

**Mortgage on Debtor's Property.** — *Walker v. Crosby*, 38 Minn. 34.

**Assignment of Debtor's Property in Trust.** — *Hawley v. Mancius*, 7 Johns. Ch. (N. Y.) 174.

**Conditional Appropriation by Auditor.** — Where, in distributing the proceeds of the debtor's real estate, the auditor made a conditional appropriation to a judgment creditor, it was held that the conditions attached to the appropriation not having been fulfilled, and no money having been actually received upon it, the judgment was not extinguished thereby. *Masser v. Dewart*, 46 Pa. St. 534.

**Agreement Not to Enforce Judgment.** — If a plaintiff in execution agrees with the defendant never to enforce his judgment, it operates as a discharge of the judgment; but if he covenants or agrees with the defendant not to enforce his judgment within a limited time, such covenant or agreement does not operate as a release of his right to levy within that time. He may levy his execution, and the defendant is left to his action for a breach of the agreement. *Chambers v. McDowell*, 4 Ga. 185.

**2. Performance of Conditions a Good Satisfaction.** — *Potter v. Hartnett*, 148 Pa. St. 15.

**Failure to Perform — Judgment Unaffected.** — *Terrett v. Brooklyn Imp. Co.*, 87 N. Y. 92.

**3. Debtor's Bond a Satisfaction.** — *Cox v. Reed*, 27 Ill. 434.

**Bond Secured by Mortgage.** — *La Farge v. Herter*, 11 Barb. (N. Y.) 159.

**4. Taking Collateral Security Not a Satisfaction.** — *Chambers v. McDowell*, 4 Ga. 185.

**5. Delivery of Specific Property Not a Satisfaction.** — *Lofland v. McDaniel*, 1 Penn. (Del.) 416.

**Payment in Oil.** — Where under an agree-

ment between the parties that the creditor should take a certain quantity of oil, "of the quality of a sample," in payment of a judgment, and oil of poorer quality was delivered and refused by the creditor, it was held that it did not constitute a credit or payment on the judgment. *Maute v. Gross*, 56 Pa. St. 250.

**6. Negotiable Instrument No Satisfaction unless So Agreed.** — *McCoy v. Hazlett*, 14 Kan. 430; *Riggs v. Goodrich*, 74 Mo. 108. And see *Moss v. Shannon*, 1 Hilt. (N. Y.) 175; *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151. For a full discussion of this subject see the title *PAYMENT*.

**Note Designed to Fix Amount of Payment No Satisfaction.** — *Schneider v. Meyer*, 56 Mo. 475.

**Deposit of Notes as Security.** — *Steffins v. Gurney*, 61 Kan. 292.

**Not Proof of Payment.** — Proof that the judgment creditor accepted his debtor's secured note for the amount of the judgment and ordered the return of the execution issued thereon does not of itself prove payment of the judgment. *Sturdevant Bank v. Peterman*, 21 Mo. App. 512.

**7. Acceptance under Express Agreement.** — *Brewer v. Branch Bank*, 24 Ala. 439; *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Kusler v. Crofoot*, 78 Ind. 597; *Philips v. East*, 16 Ind. 254; *Jones v. Ransom*, 3 Ind. 327; *Bushong v. Taylor*, 82 Mo. 660; *Witherby v. Mann*, 11 Johns. (N. Y.) 518.

**Payment by Check of Third Person.** — *Lyon v. Northrup*, 17 Iowa 314.

**Satisfaction on Payment of Drafts.** — *Woolfolk v. Degelos*, 24 La. Ann. 109.

**Note of Third Person Void for Fraud.** — Where the debtor gives to the creditor a promissory note of third parties in satisfaction of the judgment, if such note is void because of fraud therein, the creditor need not return it before enforcing his judgment by execution. *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151.



dation of the amount due is properly left to the jury.<sup>1</sup>

*b. WHERE PAYMENT TO ATTORNEY OR OFFICER.* — At Attorney at Law has no general authority to receive depreciated currency or anything except lawful money in payment of his client's judgment,<sup>2</sup> and if he does the client is not bound thereby and may proceed either against him or against the debtor,<sup>3</sup> or may compel the sheriff to return the amount in legal currency.<sup>4</sup>

The Burden of Proving that the attorney had authority to receive anything except lawful money is upon the party making the payment,<sup>5</sup> but a failure of the client to signify his dissent within a reasonable time after learning of the transaction will be taken as a ratification of his act.<sup>6</sup>

An Officer authorized by law to receive payment of judgments in his hands cannot, in the absence of special authority, accept anything except lawful money in satisfaction, and his acceptance of anything else will not discharge the judgment.<sup>7</sup>

Banknotes. — Thus the officer cannot without express authority accept banknotes in satisfaction of a judgment.<sup>8</sup>

**3. Effect of Tender.** — The tender of the amount due on a judgment will not operate to satisfy the judgment or discharge its lien, if such tender be not accepted by the creditor.<sup>9</sup> But on a refusal by the creditor to receive the amount due on the judgment upon its being tendered him, the court may direct it to be paid into court and order an entry of satisfaction.<sup>10</sup>

**4. Effect of Payment** — *a. WHEN MADE BY ONE PRIMARILY LIABLE* — (1) *Absolute Satisfaction.* — In the absence of any statute to the contrary, the payment of a judgment by one primarily liable to pay the same is an absolute satisfaction, and the assignment of the judgment to him, or to another for him, will not prevent its extinction.<sup>11</sup>

**1. Question for Jury.** — *Schilling v. Durst*, 42 Pa. St. 126. See also *Pinson v. Puckett*, 35 S. Car. 178. And see the title PAYMENT.

**2. Attorney Can Accept Nothing but Lawful Money.** — *McMurray v. Marsh*, 12 Colo. App. 95; *Nolan v. Jackson*, 16 Ill. 272; *Garthwaite v. Wentz*, 19 La. Ann. 196; *Lewis v. Woodruff*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 539; *Portis v. Ennis*, 27 Tex. 574. See also the title ATTORNEY AND CLIENT, vol. 3, p. 363.

**Cannot Discharge Defendant from Arrest.** — *Simonton v. Barrell*, 21 Wend. (N. Y.) 362; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

**3. May Proceed Against Attorney or Debtor.** — *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508.

**4. May Compel Sheriff to Return Legal Currency.** — *Trumbull v. Nicholson*, 27 Ill. 149.

**5. Burden of Proof on Payor.** — *Portis v. Ennis*, 27 Tex. 574.

**6. Ratification by Failing to Dissent.** — *Benedict v. Smith*, 10 Paige (N. Y.) 126. And see *Kallander v. Neidhold*, 112 Mich. 329.

**7. Officer Can Accept Nothing but Lawful Money.** — *Aicardi v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614; *Bobo v. Thompson*, 3 Stew. & P. (Ala.) 385; *Hooker v. State*, 7 Blackf. (Ind.) 272; *Heald v. Bennett*, 1 Dougl. (Mich.) 513; *Codwise v. Field*, 9 Johns. (N. Y.) 263; *Draper v. State*, 1 Head (Tenn.) 262; *Crutchfield v. Robbins*, 5 Humph. (Tenn.) 15, 42 Am. Dec. 417.

**Payment in Confederate Money.** — A *bona fide* payment of a judgment by a defendant to a sheriff in Confederate treasury notes, which were the only currency in circulation as money at the time of such payment, has in some cases been held to be a satisfaction of the judgment. *Boyd v. Sales*, 39 Ga. 72; *Henly v. Franklin*, 3

*Coldw. (Tenn.)* 472, 91 Am. Dec. 296; *Harvey v. Walden*, 23 La. Ann. 162. But see *Ellis v. Smith*, 42 Ala. 349; *Aicardi v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614; *Moore v. Tate*, 22 Gratt. (Va.) 351. And see generally the title PAYMENT.

**8. Cannot Accept Banknotes.** — *Griffin v. Thompson*, 2 How. (U. S.) 244; *McFarland v. Givin*, 3 How. (U. S.) 717; *Armsworth v. Scotten*, 29 Ind. 495; *Heald v. Bennett*, 1 Dougl. (Mich.) 513. But see *Crutchfield v. Robbins*, 5 Humph. (Tenn.) 15, 42 Am. Dec. 417; *Draper v. State*, 1 Head (Tenn.) 262. See generally the title BANKNOTES, vol. 3, p. 775.

**9. Refused Tender Not a Satisfaction.** — *People v. Beebe*, 1 Barb. (N. Y.) 379; *Jackson v. Law*, 5 Cow. (N. Y.) 248, *affirmed* 9 Cow. (N. Y.) 641; *Lincoln Sav. Bank v. Ewing*, 12 Lea (Tenn.) 598. See generally the title TENDER.

**10. See *infra*, this section, *Grounds for Compelling*.**

**11. Payment by One Primarily Liable.** — *Flagg v. Kirk*, 20 D. C. 335; *Zimmerman v. Gaumer*, 152 Ind. 553; *Montgomery v. Vickery*, 110 Ind. 211, *Klippel v. Shields*, 90 Ind. 81; *Henry, etc., Co. v. Halter*, 58 Neb. 685; *White v. Brown*, 29 N. J. L. 307; *Fowler v. Wood*, 31 S. Car. 398. See also *Vermont L. & T. Co. v. McGregor*, (Idaho 1898) 53 Pac. Rep. 399.

**Fund Charged with Payment of Judgment.** — Where a person having control of the fund primarily charged with the payment of a judgment obtains an assignment thereof, it operates as a satisfaction. *Donk v. St. Louis Glucose, etc., Co.*, 17 Ill. App. 369.

**Assignment to Another Creditor.** — In *Howk v. Kimball*, 2 Blackf. (Ind.) 309, it was held that, where a sum equal to the amount of the judgment was paid by the debtor to the creditor,



**Cannot Be Restored or Kept Alive.** — The judgment is extinguished by such payment and cannot afterwards be restored or kept alive by the parties.<sup>1</sup>

(2) *Where Several Joint Debtors.* — Payment of a judgment by one of several joint judgment debtors satisfies it as to all, and the payor cannot by taking an assignment of the judgment enforce it against his co-debtors.<sup>2</sup>

**Effect of Releasing One Joint Debtor.** — In the absence of any statute to the contrary, the release of one of several joint judgment debtors operates to release all of them.<sup>3</sup>

**Under Statutes in Some States, however,** one joint judgment debtor may be released from liability on the judgment without releasing the others from their ratable portions.<sup>4</sup>

(3) *Cumulative Judgments* — (a) **Against Same Person for Same Cause.** — Where there are several judgments against the same person for the same cause of action, the satisfaction of one judgment will extinguish all.<sup>5</sup>

(b) **Against Different Persons for Same Cause.** — Where several judgments are rendered against different persons for the same cause of action, payment of one

and the debtor caused the judgment to be assigned as a payment to another of his creditors, the judgment was not extinguished thereby, but continued valid in the hands of the assignee.

1. **Judgment Cannot Be Kept Alive.** — *Simpson v. Mercer*, 144 Mass. 413; *Rollins v. Thompson*, 13 Smed. & M. (Miss.) 522; *Henry, etc., Co. v. Halter*, 58 Neb. 685; *Stout v. Vankirk*, 10 N. J. Eq. 78; *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 228; *Conor v. Hernstein*, 6 Robt. (N. Y.) 552; *Booth v. Farmers', etc., Nat. Bank*, 74 N. Y. 228; *Thompson v. Sankey*, 175 Pa. St. 594. See also *Truscott v. King*, 6 N. Y. 147; *Fleming v. Beaver*, 2 Rawle (Pa.) 128; *Milligan's Appeal*, 104 Pa. St. 503.

But see *Peirce v. Black*, 105 Pa. St. 342, wherein it was held that where the rights of third persons were not affected, the parties to a judgment might agree by parol to preserve it as security for another debt notwithstanding its payment.

**A Judgment Which Has Been Fraudulently Kept Open** after it has in fact been paid will not avail against the creditors. *Booth v. Moret*, 1 Brev. (S. Car.) 216.

**Payment Discharges Lien on Land.** — *De La Vergne v. Evertson*, 1 Paige (N. Y.) 181, 19 Am. Dec. 411.

**Judgment for Possession in Ejectment.** — Where payment was made to the judgment creditor of the amount of the judgment upon a conditional verdict in ejectment, it was held that the condition was extinguished and the judgment for possession expired with it. *Riffle's Appeal*, 3 Brews. (Pa.) 94.

2. **Payment by One of Joint Debtors.** — *Tompkins v. Chicago First Nat. Bank*, 53 Ill. 57; *Bones v. Aiken*, 35 Iowa 534; *White v. Brown*, 29 N. J. L. 307; *Gross v. Pennsylvania, etc., R. Co.*, 65 Hun (N. Y.) 191; *Morley v. Stevens*, (Supm. Ct. Spec. T.) 47 How. Pr. (N. Y.) 228; *Salina Bank v. Abbot*, 3 Den. (N. Y.) 181; *Towe v. Felton*, 7 Jones L. (52 N. Car.) 216; *Boyer v. Bolender*, 129 Pa. St. 324. Compare *Owensby v. Platt*, 3 Ind. 459. See also cases cited *infra*, this section, *Against Different Persons for Same Cause*.

For full discussion of the right of the payor of a judgment to be subrogated to the rights of the creditor, see the title SUBROGATION. As

to the right to contribution from the other judgment debtors, see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

**What Not Satisfaction as to All.** — Partial execution of the judgment against one joint tortfeasor is not such satisfaction as will release the judgment against the other, separate judgments having been rendered against them. *McVey v. Manatt*, 80 Iowa 132.

**Defendants Both Regarded as Principals.** — Two defendants in a joint judgment are both regarded as principals unless it is shown by proof that one is surety for the other, and payment by one of them discharges the judgment as to both in the absence of such showing. *Laval v. Rowley*, 17 Ind. 36.

3. **Release of One Joint Debtor Releases All.** — *U. S. v. Thompson*, Gilp. (U. S.) 614; *Whiting v. Beebe*, 12 Ark. 421; *Powell v. Davis*, 60 Ga. 70; *Winslow v. Leland*, 128 Ill. 304; *Booth v. Campbell*, 15 Md. 569; *Weston v. Clark*, 37 Mo. 568; *Baker v. Secor*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 803; *Lewy v. Fox*, 54 N. Y. Super. Ct. 397. And see generally the title RELEASE.

**May Release Lien on Specific Property.** — See *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753.

4. **Release of One Debtor Allowed by Statute.** — *Meixell v. Kirkpatrick*, 29 Kan. 679; *Missouri, etc., R. Co. v. Haber*, 56 Kan. 717; *Beekman v. Sylvester*, 109 Mich. 183; *Marx v. Jones*, 36 Hun (N. Y.) 290; *Irvine v. Milbank*, (N. Y. Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 408.

5. **Cumulative Judgments Against Same Person for Same Cause.** — *Tarver v. Rankin*, 3 Ga. 210; *Mumford v. Stocker*, 1 Cow. (N. Y.) 178; *Bowne v. Joy*, 9 Johns. (N. Y.) 221. See also *McLean v. McLean*, 90 N. Car. 530; *Craft v. Merrill*, 14 N. Y. 456; *Beers v. Hendrickson*, 45 N. Y. 665; *Wheelock v. Godfrey*, (Cal. 1893) 35 Pac. Rep. 315; *Work v. Northern Pac. R. Co.*, 11 Mont. 513; *Tarver v. Rankin*, 3 Ga. 210.

As to the merger of judgments see the title MERGER.

**Judgment Collateral to Debt.** — Where a judgment is merely collateral to a debt, the payment of the debt will discharge the judgment. *Paddock v. Palmer*, 19 Vt. 581.



of the judgments is a satisfaction of all,<sup>1</sup> except as to costs, which may be collected on all the judgments.<sup>2</sup> But it has been held that where one of the judgments is for a less amount than the other the satisfaction of the smaller will not satisfy the larger in full.<sup>3</sup>

3. SUBROGATION OF PAYOR TO RIGHTS OF CREDITOR. — While the cases are not altogether in accord, it is the general rule that where a judgment is paid by a surety, or other person not primarily liable, with the intention that the security shall be kept alive, such payment will not operate to extinguish the judgment, and the payor will be subrogated to the rights of the judgment creditor as in the case of any other assignment.<sup>4</sup>

5. Effect of Part Payment — *a.* COMMON-LAW RULE. — It is an old and well-settled rule of the common law that the payment of a part of a liquidated and undisputed demand or debt, under a parol agreement between the parties that it shall operate to extinguish the debt, will not be given that effect, such agreement being without a sufficient consideration;<sup>5</sup> and this rule applies to judgments as well as to other debts.<sup>6</sup>

Costs. — It has been held that payment by the judgment debtor of the principal and interest due on the judgment will not prevent enforcement of the judgment against his property for the costs.<sup>7</sup> But the party entitled to costs may waive them.<sup>8</sup>

*b.* WHEN RULE NOT APPLICABLE. — The rule is purely technical in its nature, and not very well supported by reason, and in order to prevent its use in violation of good faith, the courts are always disposed to depart from it on

1. Several Judgments for Same Cause Against Different Persons. — *Butler v. Ashworth*, 110 Cal. 614; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Newsom v. McLendon*, 6 Ga. 392; *Indianapolis First Nat. Bank v. Indianapolis Piano Mfg. Co.*, 45 Ind. 5; *Ashcraft v. Knoblock*, 146 Ind. 169; *Boardman v. Acer*, 13 Mich. 77, 87 Am. Dec. 736; *Breslin v. Peck*, 38 Hun (N. Y.) 623; *Cox v. Smith*, 10 Oregon 418; *Sherman v. Brett*, 7 Wis. 139. See also *Shainwald v. Lewis*, 46 Fed. Rep. 839; *Bowser's Appeal*, 101 Pa. St. 466; *Caldwell v. Martin*, 29 S. Car. 22. And see cases cited *supra*, this section, *Where Several Joint Debtors*.

As to the subrogation of the payor to the rights of the judgment creditor see the title SUBROGATION.

Illustration — Separate Judgments Against Maker and Indorser. — *Noonan v. Gray*, 1 Bailey L. (S. Car.) 437; *State Bank v. Mosely*, 1 Strob. L. (S. Car.) 414. Compare *Wilson v. Wright*, 7 Rich. L. (S. Car.) 399.

Dismissal Before Judgment in Second Action. — Where separate actions are instituted against joint wrongdoers, and judgment is recovered against one, a dismissal of the proceeding against the other upon payment of an amount in settlement of costs, and an acknowledgment of satisfaction by the plaintiff, will not operate to discharge the judgment already rendered in the other action, either wholly or *pro tanto*. *Bell v. Perry*, 43 Iowa 368.

Illinois — Effect under Recording Laws. — Where two judgments have been recovered on the same claim in part against different parties, a satisfaction of one is not necessarily a satisfaction of the other, within the meaning of the Illinois recording laws. The records must affirmatively show a satisfaction of both judgments, or there must be an actual satisfaction and discharge of both, before a purchaser may safely buy land of the judg-

ment debtor. *Burgett v. Paxton*, 99 Ill. 288.

2. Costs May Be Collected on All. — *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Frankel v. Stern*, 50 Ill. App. 54; *Indianapolis First Nat. Bank v. Indianapolis Piano Mfg. Co.*, 45 Ind. 5.

3. Payment of Smaller Not Full Satisfaction of Larger Judgment. — *Lumpkin v. Ferguson*, 10 Rich. L. (S. Car.) 424.

Satisfaction *Pro Tanto*. — *Guerry v. Perryman*, 2 Ga. 63.

4. Subrogation of Payor to Rights of Creditor. — See the title SUBROGATION.

5. Part Payment. — See generally the titles ACCORD AND SATISFACTION, vol. I, p. 413; PAYMENT.

6. Part Payment Not Satisfaction in Full. — *The Lulie D.*, 4 Biss. (U. S.) 249; *Deland v. Hiett*, 27 Cal. 611, 87 Am. Dec. 102; *Haggin v. Clark*, 61 Cal. 1; *Madeley v. White*, 2 Colo. App. 408; *Fletcher v. Wurgler*, 97 Ind. 223; *Booth v. Campbell*, 15 Md. 569; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Knight v. Cherry*, 64 Mo. 513; *Moss v. Shannon*, 1 Hilt. (N. Y.) 175; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179. See also *Jackson v. Olmstead*, 87 Ind. 92; *Winter v. Kansas City Cable R. Co.*, 73 Mo. App. 173; *Maxton v. Mount*, 86 Ill. App. 187; *McArthur v. Dane*, 61 Ala. 539.

Judgment for Possession of Specified Articles. — Where, under a judgment for the possession of certain specified articles, the sheriff delivers to the creditor all of such articles as can be found at the time of the delivery, and the creditor accepts them, this will not satisfy the whole judgment. *Black v. Black*, 47 Cal. 520.

7. Payment of Costs May Be Enforced. — *Long v. Walker*, 105 N. Car. 90; *Dorgan v. Piehn*, 84 Iowa 564.

8. May Waive Costs. — *Whitney v. Townsend*, 67 N. Y. 40.



slight and technical distinctions.<sup>1</sup>

**Additional Consideration.** — Thus where, in addition to the part payment, there is any new or collateral consideration, sufficient in law to support a contract, the agreement to accept it in full satisfaction of the judgment will be upheld, notwithstanding such consideration be much less than the whole amount due.<sup>2</sup>

**Failure of Consideration.** — A failure of such additional consideration, as where a specified condition is not performed, will prevent the part payment from operating as a full satisfaction.<sup>3</sup>

**Under Statutes in Some States** the acceptance by a judgment creditor of less than the amount due in full satisfaction will operate to discharge the judgment.<sup>4</sup>

**Release under Seal.** — No consideration being necessary to make effectual an executed contract under seal, a release under seal of a judgment constitutes a full satisfaction although the consideration paid for such release be less than the whole amount of the judgment.<sup>5</sup>

**6. Evidence of Payment** — *a.* **RECORD ENTRY.** — An entry of satisfaction of a judgment upon the record is *prima facie* evidence of payment, and its legal effect is the extinguishment of the judgment debt.<sup>6</sup> Such entry, however, is not conclusive, but is in the nature of a receipt which may be explained, qualified, controlled, or contradicted by parol evidence.<sup>7</sup>

**1. Rule Not Favored.** — *Harper v. Graham*, 20 Ohio 105. See also *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Tarver v. Rankin*, 3 Ga. 210; *Miller v. Lilly*, 84 Ind. 533.

**2. Rule Not Applied Where Additional Consideration.** — *Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784; *Stoutenberg v. Huisman*, 93 Iowa 213; *Atchison, etc., R. Co. v. Johnson*, 29 Kan. 218; *Walrath v. Walrath*, 27 Kan. 395; *Clay v. Hoysradt*, 8 Kan. 74; *Booth v. Campbell*, 15 Md. 569; *Brooks v. White*, 2 Met. (Mass.) 285, 37 Am. Dec. 95; *Hendrick v. Thomas*, 106 Pa. St. 327; *Brown v. Kern*, 21 Wash. 211; *Reid v. Hibbard*, 6 Wis. 175. See also *Haggerty v. Simpson*, 1 E. D. Smith (N. Y.) 67.

**Part Payment by Third Party — Satisfaction in Full.** — *Fowler v. Smith*, 153 Pa. St. 639; *Smith v. Gould*, 84 Hun (N. Y.) 325.

**3. Failure to Perform Condition.** — *St. Louis, etc., R. Co. v. Rierson*, 38 Kan. 359; *Thurmond v. Georgia State Bank*, (Tex. Civ. App. 1894) 27 S. W. Rep. 317.

**4. Part Payment in Full Satisfaction under Statutes.** — *McArthur v. Dane*, 61 Ala. 539; *Penn v. Edwards*, 50 Ala. 63; *Beers v. Hendrickson*, 45 N. Y. 665.

**North Carolina Statute — Part Payment by One of Several Held Sufficient as to Him.** — *Boykin v. Buie*, 109 N. Car. 501.

**5. Release under Seal Satisfies Judgment.** — *Maclary v. Reznor*, 3 Del. Ch. 445; *Braden v. Ward*, 42 N. J. L. 518. For a full discussion see the title **RELEASE**.

**6. Record Entry Prima Facie Proof of Payment** — *Arkansas.* — *Snider v. Greathouse*, 16 Ark. 72, 63 Am. Dec. 54; *Carter v. Adamson*, 21 Ark. 287. But see *Whiting v. Beebe*, 12 Ark. 421.

*California.* — *People v. Burns*, 78 Cal. 645.  
*Illinois.* — *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *Seymour v. Haines*, 104 Ill. 557; *Page v. Benson*, 22 Ill. 484.

*Iowa.* — *Milligan v. Bowman*, 42 Iowa 414.

*Maryland.* — *Parker v. Sedwick*, 5 Md. 281.

*New York.* — *Rochester Distilling Co. v. Devendorf*, 72 Hun (N. Y.) 622; *Packard v. Hill*, 7 Cow. (N. Y.) 434.

*North Carolina.* — *Reynolds v. Magness*, 2 Ired. L. (24 N. Car.) 26.

*Pennsylvania.* — *Kerr's Appeal*, 104 Pa. St. 282; *Landis v. Brackbill*, 7 Lanc. L. Rev. 275.

**Foreign Judgment — Certified Transcript.** — A regularly certified transcript of the record of a judgment of another state, containing an entry of satisfaction by the defendant, is *prima facie* evidence of the payment by him. *Carter v. Adamson*, 21 Ark. 287.

**7. Entry Not Conclusive** — *Arkansas.* — *State v. Martin*, 20 Ark. 629.

*Georgia.* — *Tarver v. Rankin*, 3 Ga. 214.

*Indiana.* — *Krutz v. Craig*, 53 Ind. 561; *Pauley v. Weisart*, 59 Ind. 241; *Stewart v. Armel*, 62 Ind. 593.

*Michigan.* — *McDonald v. Lewis*, 42 Mich. 135; *Dane v. Holmes*, 41 Mich. 661; *Beach v. Botsford*, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

*Missouri.* — *Cohen v. Camp*, 46 Mo. 179; *Winter v. Kansas City Cable R. Co.*, 73 Mo. App. 173.

*New York.* — *Rochester Distilling Co. v. Devendorf*, 72 Hun (N. Y.) 622.

*North Carolina.* — *Reynolds v. Magness*, 2 Ired. L. (24 N. Car.) 26.

*Pennsylvania.* — *Moseby's Appeal*, (Pa. 1886) 4 Cent. Rep. 627.

**Collateral Attack.** — The validity of an entry of satisfaction on a judgment cannot be collaterally attacked before an auditor on distribution. *Bare's Estate*, 5 Lanc. L. Rev. 36. See also *Tabler v. Castle*, 22 Md. 94.

**Where a Satisfaction Piece Is Given**, the presumption arises that it is given upon payment of the judgment, and it will furnish sufficient proof, in the absence of evidence to the contrary, that the party giving it has received the payment of the judgment. *Booth v. Farmers', etc., Nat. Bank*, 50 N. Y. 396.

**Judgment Marked "Satisfied" After Creditor's Death.** — Where a creditor directed his attorney to mark a judgment "satisfied," which direction, through oversight on the part of the attorney, was not followed until after the creditor's death, it was held that the "satisfied" marked on the judgment was sufficient to show satisfaction thereof. *Sullivan v. Latimer*, 38 S. Car. 158.



**b. RECEIPT.** — A receipt which purports to be in full payment of a judgment or decree is *prima facie* evidence of such payment, and can only be overcome by a clear preponderance of evidence.<sup>1</sup>

An Entry or Indorsement on an Execution issued on the judgment which relates to the payment or satisfaction of the judgment is competent evidence of payment.<sup>2</sup>

**c. PAROL EVIDENCE.** — A party claiming that a judgment has been paid is not confined to record evidence, but may prove payment by parol,<sup>3</sup> but such evidence must be strong enough to produce a conviction that the judgment has in fact been paid.<sup>4</sup>

**Acts of Parties Prior to Judgment.** — Evidence of the acts of the parties prior to the rendition of the judgment cannot be introduced to show payment.<sup>5</sup>

**d. BURDEN OF PROOF.** — The burden of proving that a judgment has been paid is upon the person alleging the payment.<sup>6</sup>

**7. Presumption of Satisfaction from Lapse of Time** — **a. ARISES AFTER TWENTY YEARS.** — At common law, after the lapse of twenty years from the rendition of a judgment satisfaction is presumed where there has been no payment or process upon it, nor any acknowledgment of it in the meantime as a subsisting debt, nor any explanation of its so remaining.<sup>7</sup> This presumption applies as well between the parties to the judgment as between the plain-

**1. Receipt Prima Facie Evidence of Payment.** — *Haynes v. Wheat*, 9 Ala. 239 (clerk's receipt); *Neal v. Handley*, 116 Ill. 418, 56 Am. Dec. 784; *Hollenbeck v. Stanberry*, 38 Iowa 325. And see generally the title RECEIPTS.

**2. Entry on Execution Competent Evidence of Payment.** — *Parker v. Sedwick*, 5 Md. 281; *Snider v. Greathouse*, 16 Ark. 72, 63 Am. Dec. 54.

An Indorsement upon the Execution of the Word "Paid," without any evidence that it was paid by the plaintiff, or by some one acting for him, is not sufficient evidence of payment of the judgment. *Bartlett v. Sawyer*, 46 Me. 317.

**Erased Return Held Inadmissible as Evidence.** — *Portis v. Ennis*, 27 Tex. 574.

**3. Payment Proved by Parol.** — *Hollenbeck v. Stanberry*, 38 Iowa 325; *Whiteside v. Hoskins*, 20 Mont. 361. See also *Thayer v. Mowry*, 36 Me. 287. And see generally the title PAYMENT.

**Evidence of Payment to Creditor's Attorneys Competent.** — *Shaffer v. McCrackin*, 90 Iowa 578, 48 Am. St. Rep. 465.

**Testimony that Judgment Not Paid.** — The plaintiff in a creditor's suit may testify that his judgment has never been satisfied. *Whiteside v. Hoskins*, 20 Mont. 361.

**An Account-book of Deceased Attorneys is not of itself competent evidence of the fact that such attorneys did not receive a payment on judgment.** *Shaffer v. McCrackin*, 90 Iowa 578, 48 Am. St. Rep. 465.

**4. Insufficient Proof of Payment.** — For cases in which it was held that the evidence was not sufficient to prove payment of the judgment, see *Flanders v. Sherman*, 19 Wis. 178; *Barrett v. Wilkinson*, 87 Va. 442; *White River Bank v. Downer*, 29 Vt. 332; *Sturdevant Bank v. Peterman*, 21 Mo. App. 512.

**Absence of Execution Unaccounted for, Not Evidence of Satisfaction.** — *Sanders v. Etcherson*, 36 Ga. 404.

**5. Acts of Parties Prior to Judgment.** — *Lofland v. McDaniel*, 1 Penn. (Del.) 416.

**Evidence of Part Payment of Debt Before Judgment Inadmissible to Prove Payment of Judgment.**

— *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635.

**6. Burden of Proof on Party Alleging Payment.** — *Sanders v. Etcherson*, 36 Ga. 404; *Sturdevant Bank v. Peterman*, 21 Mo. App. 512; *Lewis v. Lewis*, 31 Neb. 528. See also *Piatt v. St. Clair*, *Wright (Ohio)* 526.

**7. Presumption of Payment After Twenty Years** — *United States*. — *Gaines v. Miller*, 111 U. S. 395.

*Alabama*. — *Rhodes v. Turner*, 21 Ala. 210. *Arkansas*. — *Woodruff v. Sanders*, 15 Ark. 143.

*Connecticut*. — *Boardman v. De Forest*, 5 Conn. 8.

*Delaware*. — *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536; *Robinson v. Tunnell*, 2 Houst. (Del.) 387; *Morrow v. Robinson*, 4 Del. Ch. 521; *Moore v. Carey*, 1 Marv. (Del.) 401.

*Georgia*. — *Willingham v. Long*, 47 Ga. 545; *Tennessee v. Virgin*, 36 Ga. 390; *Burt v. Casey*, 10 Ga. 178.

*Iowa*. — *Hendricks v. Wallis*, 7 Iowa 224.

*Maine*. — *Jackson v. Nason*, 38 Me. 85; *Noble v. Merrill*, 48 Me. 140.

*New Hampshire*. — *Clark v. Clement*, 33 N. H. 563.

*New York*. — *Miller v. Smith*, 16 Wend. (N. Y.) 425, reversing 14 Wend. (N. Y.) 188.

*Oregon*. — *Beckman v. Hamlin*, 19 Oregon 383, 20 Am. St. Rep. 827.

*Pennsylvania*. — *Cope v. Humphreys*, 14 S. & R. (Pa.) 15; *Biddle v. Girard Nat. Bank*, 109 Pa. St. 349; *Hummel v. Lilly*, 188 Pa. St. 463; *Jenkins v. Anderson*, (Pa. 1887) 11 Atl. Rep. 558.

*South Carolina*. — *Tobin v. Myers*, 18 S. Car. 324; *Pratt v. McLure*, 10 Rich. Eq. (S. Car.) 301; *Stover v. Duren*, 3 Strobb. L. (S. Car.) 448, 51 Am. Dec. 634; *Saigent v. Hayne*, *Riley L. (S. Car.)* 293; *McQueen v. Fletcher*, 4 Rich. Eq. (S. Car.) 152; *Kennedy v. Denoon*, *Treadw. (S. Car.)* 617; *Cohen v. Thomson*, 2 Mill (S. Car.) 146.

For a full discussion see the titles PAYMENT; PRESUMPTIONS; and as to statutes barring this right to enforce judgments after a specific time, see the title LIMITATION OF ACTIONS.



tiff and subsequent creditors;<sup>1</sup> but it seems to be applicable to money judgments only and not to judgments awarding the possession of property.<sup>2</sup>

Evidence Tending to Support the presumption of payment, or to explain and contradict evidence given in rebuttal of such presumption, should be admitted.<sup>3</sup>

Statutes Declaratory of Common Law. — By statute in some states the common law is affirmed.<sup>4</sup>

*b. PRESUMPTION NOT CONCLUSIVE.* — The presumption of satisfaction from the lapse of twenty years is not a conclusive one, but *prima facie* only, and may be rebutted by evidence that there has been no satisfaction in fact.<sup>5</sup> And the common law is affirmed by the statutes of some states in this respect.<sup>6</sup>

*c. EVIDENCE IN REBUTTAL* — (1) *In General.* — The Burden of Proving facts rebutting the presumption of satisfaction is upon the party seeking payment of the judgment.<sup>7</sup>

No Particular Kind of Evidence is required to rebut the presumption of satisfaction. Any legal evidence the effect of which is to produce the conviction that the judgment has not in fact been paid or satisfied is sufficient for that purpose.<sup>8</sup>

Must Be Clear Recognition of Debt. — But there must be proof of some positive and unequivocal recognition of the indebtedness, such as part payment, or a written admission, or at least a clear and well-identified promise, within the period of twenty years.<sup>9</sup>

(2) *Partial Payment.* — Proof of a partial payment made within the twenty years will rebut the presumption.<sup>10</sup>

1. Applies Between Parties to Judgment. — *Van Loon v. Smith*, 103 Pa. St. 238.

2. Not Applicable to Judgment for Possession. — *Van Rensselaer v. Wright*, 121 N. Y. 626.

3. Evidence in Support of Presumption Admissible. — *Van Loon v. Smith*, 103 Pa. St. 238.

Evidence Showing that No Execution Ever Issued Admissible. — *Jacoby v. Stephenson Silver Min. Co.*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 371.

4. Statutes Declaratory of Common Law. — *Brewer v. Thomes*, 28 Me. 81; *Smith v. Miller*, 14 Wend. (N. Y.) 188; *Waddell v. Elmendorf*, 12 Barb. (N. Y.) 585, affirmed 10 N. Y. 170. And see generally the title LIMITATION OF ACTIONS.

5. Presumption Rebuttable. — *Arkansas.* — *Woodruff v. Sanders*, 15 Ark. 143.

*Delaware.* — *Robinson v. Tunnell*, 2 Houst. (Del.) 387.

*Georgia.* — *Burt v. Casey*, 10 Ga. 178.

*Maine.* — *Noble v. Merrill*, 48 Me. 140.

*Massachusetts.* — *Walker v. Robinson*, 136 Mass. 280.

*New Hampshire.* — *Clark v. Clement*, 33 N. H. 563.

*New Jersey.* — *Johnson v. Tuttle*, 9 N. J. Eq. 365.

*New York.* — *Waddell v. Elmendorf*, 12 Barb. (N. Y.) 585, affirmed 10 N. Y. 170.

*Ohio.* — *Bissell v. Jaudon*, 16 Ohio St. 498.

*Pennsylvania.* — *Biddle v. Girard Nat. Bank*, 109 Pa. St. 349.

*Tennessee.* — *Anderson v. Settle*, 5 Sneed (Tenn.) 202; *Thompson v. Thompson*, 2 Head (Tenn.) 405.

6. Presumption Rebuttable under Statutes. — *Bright v. Sexton*, 18 Ind. 186; *Brewer v. Thomes*, 28 Me. 81; *Knight v. Macomber*, 55 Me. 132; *Denny v. Eddy*, 22 Pick. (Mass.) 533. See generally the title LIMITATION OF ACTIONS.

In *New York*, however, under Code Civ. Pro., § 376, a judgment is conclusively pre-

sumed to be paid after the lapse of twenty years from its rendition. This, however, does not apply to a judgment where special proceedings were instituted for its collection before the expiration of the twenty years. *Palen v. Bushnell*, 51 Hun (N. Y.) 423.

7. Burden of Proof on Party Seeking Payment. — *Robinson v. Tunnell*, 2 Houst. (Del.) 387; *Yarnell v. Moore*, 3 Coldw. (Tenn.) 173.

8. Any Evidence Showing Continuing Indebtedness. — *Robinson v. Tunnell*, 2 Houst. (Del.) 387; *Walker v. Robinson*, 136 Mass. 280; *Waddell v. Elmendorf*, 12 Barb. (N. Y.) 585, affirmed 10 N. Y. 170; *Bissell v. Jaudon*, 16 Ohio St. 498; *James v. Jarrett*, 17 Pa. St. 370; *Yarnell v. Moore*, 3 Coldw. (Tenn.) 173; *Hutsonpiller v. Stover*, 12 Gratt. (Va.) 579.

Absence of Debtor from State. — Proof of the absence of the debtor from the state during the twenty years will rebut the presumption; but the absence must in its nature be permanent and not merely occasional. And the absence of one joint debtor, the other remaining solvent and accessible, will not rebut the presumption. *Boardman v. De Forest*, 5 Conn. 8.

9. *Beekman v. Hamlin*, 19 Oregon 383, 20 Am. St. Rep. 827.

Scire Facias Twenty Years Old. — The presumption is not rebutted by a showing that a scire facias to revive the judgment was issued, that the defendants appeared and took defense, and that nothing further was done for more than twenty years. *Van Loon v. Smith*, 103 Pa. St. 238; *Biddle v. Girard Nat. Bank*, 109 Pa. St. 349.

Ex Parte Renewal of Execution. — An *ex parte* renewal of the fi. fa. within the twenty years will not rebut the presumption of payment. *Tobin v. Myers*, 18 S. Car. 324.

10. Partial Payment Rebut Presumption. — *Vaughan v. Marshall*, 1 Houst. (Del.) 604; *Rowe v. Hardy*, 97 Va. 674.



(3) *Poverty or Insolvency of Debtor.* — A mere showing of poverty on the part of the judgment debtor will not alone rebut the presumption of satisfaction,<sup>1</sup> but proof of his insolvency or entire inability to pay during the whole period is sufficient evidence in rebuttal.<sup>2</sup>

Proof of the Insolvency of One of Two Joint Debtors, the other being solvent, will not rebut the presumption.<sup>3</sup>

(1) *Admissions.* — It has been held that in considering admissions relied on to rebut the presumption of payment the same principles are applicable which apply where admissions are relied on to take a case out of the statute of limitations.<sup>4</sup>

d. *QUESTION FOR COURT OR JURY.* — Where there is no proof of circumstances accounting for the delay the question is not an open one for the jury.<sup>5</sup> It is a preliminary question of law for the court to determine whether matters relied upon to rebut the presumption are of sufficient force to accomplish that purpose if established;<sup>6</sup> but it is a question of fact for the jury whether such matters are sufficiently established if controverted.<sup>7</sup>

e. *WHERE LESS THAN TWENTY YEARS HAVE ELAPSED* — (1) *Mere Lapse of Time.* — It is the general rule that the mere lapse of time less than twenty years will not alone raise a presumption that the judgment has been paid;<sup>8</sup> though it seems that in *Tennessee* the presumption arises in a less time.<sup>9</sup>

(2) *Lapse of Time in Connection with Other Circumstances.* — The lapse of a period less than twenty years together with other circumstances tending to show payment may authorize a jury to find that the judgment has been paid, the presumption being stronger or weaker according to the length of time elapsed.<sup>10</sup>

8. *Satisfaction by Set-off.* — There is a power in courts of law as well as in

*Partial Payment by Surety.* — In *Denny v. Eddy*, 22 Pick. (Mass.) 533, proof of a partial payment made on a judgment by a surety within the twenty years, without the knowledge of the principal, was held to be competent evidence as against the principal to rebut the presumption of satisfaction.

1. *Poverty Alone Will Not Rebut Presumption.* — *Taylor v. Megargee*, 2 Pa. St. 225.

*Continued Insolvency Not Inferred from Failure in Business.* — *Jackson v. Nason*, 38 Me. 85.

2. *Proof of Insolvency Will Rebut Presumption.* — *Boardman v. De Forest*, 5 Conn. 8; *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536; *Noble v. Merrill*, 48 Me. 140; *Taylor v. Megargee*, 2 Pa. St. 225. See also *Knight v. Macomber*, 55 Me. 132; *Brewer v. Thomas*, 28 Me. 81.

3. *One of Two Joint Debtors Insolvent.* — *Boardman v. De Forest*, 5 Conn. 8.

4. *Same Principles as Apply to Statute of Limitations.* — *McQueen v. Fletcher*, 4 Rich. Eq. (S. Car.) 152; *Stover v. Duren*, 3 Strobb. L. (S. Car.) 448, 51 Am. Dec. 634. See the title LIMITATION OF ACTIONS.

*Oral Admission Within Twenty Years Admissible.* — *Porter v. Nelson*, 121 Pa. St. 628.

5. *No Proof in Rebuttal, Question Not Open for Jury.* — *Cope v. Humphreys*, 14 S. & R. (Pa.) 15; *Hendricks v. Wallis*, 7 Iowa 224.

6. *Sufficiency of Evidence Question for Court.* — *Porter v. Nelson*, 121 Pa. St. 628.

7. *Question of Payment for Jury.* — *Porter v. Nelson*, 121 Pa. St. 628; *Jenkins v. Anderson*, (Pa. 1887) 11 Atl. Rep. 558.

8. *No Presumption from Time Alone under Twenty Years.* — *Rhodes v. Turner*, 21 Ala. 210; *Breatly v. Peay*, 23 Ark. 172; *Hendricks v. Wallis*, 7 Iowa 224; *Chiles v. Monroe*, 4 Met.

(Ky.) 72; *Cony v. Barrows*, 46 Me. 497; *Thayer v. Mowry*, 36 Me. 287; *Camp v. Hallanan*, 42 Hun (N. Y.) 628; *Murphy v. Philadelphia Trust Co.*, 103 Pa. St. 379; *Wherry v. McCammon*, 12 Rich. Eq. (S. Car.) 337, 91 Am. Dec. 240.

9. *In Tennessee*, if a judgment or decree be permitted to lie dormant for sixteen years, with no demand or payment of interest, nor any attempt to enforce collection, a presumption of satisfaction arises. *McDaniel v. Goodall*, 2 Coldw. (Tenn.) 391; *Yarnell v. Moore*, 3 Coldw. (Tenn.) 173; *Anderson v. Settle*, 5 Sneed (Tenn.) 202; *Thompson v. Thompson*, 2 Head (Tenn.) 405. See also *Blackburn v. Squibb*, Peck (Tenn.) 64; *Husky v. Maples*, 2 Coldw. (Tenn.) 25, 88 Am. Dec. 588; *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97.

10. *Renwick v. Wheeler*, 4 McCrary (U. S.) 119; *Woodruff v. Sanders*, 15 Ark. 143; *Hendricks v. Wallis*, 7 Iowa 224; *Fuller v. Lendrum*, 58 Iowa 353; *Collins v. Fawcett*, (Ky. 1897) 39 S. W. Rep. 250; *Baker v. Stonebraker*, 36 Mo. 338; *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97; *Thompson v. Thompson*, 2 Head (Tenn.) 405; *Husky v. Maples*, 2 Coldw. (Tenn.) 25, 88 Am. Dec. 588. See also *Goldhawk v. Duane*, 2 Wash. (U. S.) 323; *Lough v. Pitman*, 26 Minn. 345; *Blackburn v. Squibb*, Peck (Tenn.) 64; *Wherry v. McCammon*, 12 Rich. Eq. (S. Car.) 337, 91 Am. Dec. 240; *Miller v. Smith*, 16 Wend. (N. Y.) 425.

*Stay Law on Account of War.* — Where, during the period of twenty years, a stay law was enforced on account of the existence of war for five years, it was held that this lapse of time, together with other circumstances, would raise the presumption of satisfaction. *Kinsler v. Holmes*, 2 S. Car. 483.



courts of equity to satisfy judgments by setting off against them judgments rendered by the same or different courts, which power will be exercised in aid of substantial justice.<sup>1</sup>

9. **Satisfaction by Proceedings under Final Process** — *a. EXECUTIONS AGAINST PROPERTY* — (1) *Personal Property*. — By the weight of authority the levy of an execution on personal property is not an absolute, but at most only a *prima facie*, satisfaction of the judgment.<sup>2</sup>

(2) *Real Property*. — As a general rule a levy on real property does not operate even *prima facie* as a satisfaction of the judgment.<sup>3</sup>

(3) *Sale under Execution*. — A sale of the judgment debtor's real or personal property under a valid and subsisting execution operates as a satisfaction of the judgment to the extent of the net amount realized by the sale.<sup>4</sup>

(4) *Effect of Forthcoming or Delivery Bond*. — The mere giving of a forthcoming bond is no satisfaction of the judgment, but where the bond by forfeiture acquires the force and effect of a judgment, the extinguishment of the original judgment follows as a necessary result from the forfeiture. When, however, no such effect is given to the act of forfeiture, the original judgment and its lien still subsist.<sup>5</sup>

*b. EXECUTIONS AGAINST THE PERSON*. — By the weight of authority an execution against the person suspends but does not satisfy the judgment. The discharge with the consent of the plaintiff, of a defendant taken in execution, operates as an absolute satisfaction of the judgment.<sup>6</sup>

10. **Proceedings After Satisfaction in Fact** — *a. COMPELLING ENTRY OF SATISFACTION* — (1) *Power of Court to Compel*. — Where a judgment has been in fact paid or discharged, but the judgment creditor refuses to acknowledge satisfaction and have it entered of record, the court may and should, upon proper application, compel such an entry.<sup>7</sup>

**Satisfaction as to All**. — The court should never entertain jurisdiction of a motion to enter satisfaction as to any of the parties to the judgment, unless it is to be a satisfaction entirely and as to all.<sup>8</sup>

**Judicial Act**. — In ordering satisfaction upon an application therefor, the court acts judicially.<sup>9</sup>

In Minnesota and Montana the court is empowered by statute to compel acknowledgment and entry of satisfaction whenever a judgment is satisfied in fact, otherwise than upon execution.<sup>10</sup>

In Pennsylvania it is held that in the absence of statute the court has no power to order a judgment to be marked satisfied.<sup>11</sup> Such power has, however, been

1. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

2. **Levy on Personal Property**. — See the title EXECUTIONS, vol. II, p. 703.

3. **Levy on Real Property**. — See the title EXECUTIONS, vol. II, p. 711.

4. **Effect of Sale under Execution**. — See the title SHERIFF'S SALES.

5. **Effect of Forthcoming Bond**. — See the titles FORTHCOMING AND DELIVERY BONDS, vol. 13, pp. 1142, 1150; EXECUTIONS, vol. II, p. 708.

6. **Effect of Execution Against Person**. — See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, vol. 16, pp. 49, 53.

7. **Court Has Power to Compel Entry** — *Alabama*. — *Chandler v. Faulkner*, 5 Ala. 567; *Morrison v. Marvin*, 6 Ala. 797; *Childs v. Franklin*, 10 Ala. 79; *Bruce v. Barnes*, 20 Ala. 219; *Hagadon v. Campbell*, 24 Ala. 375; *Lockhart v. McElroy*, 4 Ala. 572.

*Arkansas*. — *State v. Martin*, 20 Ark. 629.

*California*. — *Wood v. Currey*, 49 Cal. 359; *Haggin v. Clark*, 71 Cal. 444; *Carit v. Williams*, 74 Cal. 183.

*Illinois*. — *Morris v. Thomas*, 17 Ill. 112; *Campion v. Friedberg*, 55 Ill. App. 450.

*Minnesota*. — *Woodford v. Reynolds*, 36 Minn. 155; *Lough v. Pitman*, 26 Minn. 345.

*Nebraska*. — *Manker v. Sine*, 47 Neb. 736.

*New York*. — *Briggs v. Thompson*, 20 Johns. (N. Y.) 294.

For matters of procedure connected with the entry of satisfaction and the proceedings to compel such entry, see the article SATISFACTION AND DISCHARGE OF JUDGMENTS, 19 ENCYC. OF PL. AND PR. 117.

**A Justice of the Peace** has the power of compelling the entry of satisfaction. *Creekpaum v. Templeton*, 5 Blackf. (Ind.) 583.

8. **Satisfaction Must Be as to All**. — *Long v. Shackleford*, 25 Miss. 559.

9. **Court Acts Judicially**. — *Lapping v. Duff*, 65 Ind. 229; *State v. Martin*, 20 Ark. 629.

10. **Minnesota and Montana**. — *Ives v. Phelps*, 16 Minn. 451; *Work v. Northern Pac. R. Co.*, 11 Mont. 522.

11. **Pennsylvania** — **No Power in Absence of Statute**. — *Felt v. Cook*, 95 Pa. St. 247; *Horner*



granted by statute,<sup>1</sup> which, it has been held, must be strictly construed as being in derogation of the common law and as depriving a party of trial by jury.<sup>2</sup> As so construed, the act authorizes the court to compel an entry of satisfaction only in cases of actual payment in full,<sup>3</sup> and only then when there is no substantial dispute about the facts.<sup>4</sup> Not everything which could be given under the plea of payment in the trial of a pending suit, can be treated as "actual payment" within the meaning of the act.<sup>5</sup> Independently of this statute, however, and in all cases where the statute does not apply, the court has power to order an issue to try whether or not the judgment has been paid or discharged, and if the jury find that it has, the court may order a perpetual stay of execution,<sup>6</sup> and the defendant may then compel the plaintiff to enter satisfaction under the Act of April 13, 1791.<sup>7</sup>

(2) *Grounds for Compelling.* — Actual Payment or Discharge of a judgment furnishes sufficient ground for compelling a satisfaction of record.<sup>8</sup>

A Tender kept good will in some cases furnish a sufficient ground for compelling a satisfaction of record. Thus upon a tender by the debtor of the amount due and a refusal by the creditor to accept it, the court may direct it to be paid into court and order an entry of satisfaction.<sup>9</sup>

*Grounds Antedating Rendition of Judgment.* — A court cannot order satisfaction of a judgment to be entered because of some matter accruing before such judgment was rendered, and which might have been pleaded in bar of the judgment;<sup>10</sup> nor can a motion to compel satisfaction be resisted upon any ground

*v. Hower*, 39 Pa. St. 126; *Reynolds v. Barnes*, 76 Pa. St. 427; *Shaylor v. Parsons*, 1 Pa. Super. Ct. 281; *McCutcheon v. Allen*, 96 Pa. St. 323.

1. *Power by Statute.* — Act March 14, 1876, *Brightly's Purd.* 2027, P. L.; *Atkinson v. Harrison*, 153 Pa. St. 475.

2. *Strictly Construed.* — *Felt v. Cook*, 95 Pa. St. 247; *Riddle's Appeal*, 104 Pa. St. 174; *Melan v. Smith*, 134 Pa. St. 649.

A *Mechanic's Lien* upon which judgment has not been entered is not within the purview of the *Pennsylvania* statute authorizing courts of common pleas to enter satisfaction upon proof of payment. *Stoke v. McCullough*, 107 Pa. St. 39.

3. *Only Where Payment in Full.* — *Riddle's Appeal*, 104 Pa. St. 171; *Felt v. Cook*, 95 Pa. St. 247; *Lancaster v. Clark*, 12 Lanc. Bar (Pa.) 154; *Salsberg v. Bartikoski*, 6 Kulp (Pa.) 235; *Anderson v. Best*, 176 Pa. St. 498; *Atkinson v. Harrison*, 153 Pa. St. 472; *Melan v. Smith*, 134 Pa. St. 649; *Shaylor v. Parsons*, 1 Pa. Super. Ct. 281.

4. *Only Where No Dispute.* — *Anderson v. Best*, 176 Pa. St. 498; *Salsberg v. Bartikoski*, 6 Kulp (Pa.) 235; *Shaylor v. Parsons*, 1 Pa. Super. Ct. 281; *Riddle's Appeal*, 104 Pa. St. 174; *Horton v. Hopf*, 4 W. N. C. (Pa.) 381; *Felt v. Cook*, 95 Pa. St. 247; *Lancaster v. Clark*, 12 Lanc. Bar (Pa.) 154; *Philadelphia Third Nat. Bank v. Hunsicker*, 8 Pa. Co. Ct. 635; *Horner v. Hower*, 39 Pa. St. 126; *McCutcheon v. Allen*, 96 Pa. St. 323; *Hawk v. Spade*, 24 Pittsb. Leg. J. (Pa.) 200. See also *Hottenstein v. Haverly*, 185 Pa. St. 305.

If There Is Any Doubt as to the facts or the inferences to be drawn from them, the statute does not apply. *Atkinson v. Harrison*, 153 Pa. St. 472.

5. What "Actual Payment." — *Shaylor v. Parsons*, 1 Pa. Super. Ct. 284; *Riddle's Appeal*, 104 Pa. St. 174; *Felt v. Cook*, 95 Pa. St. 247.

6. *Awarding Issue and Staying Execution.* —

*Reynolds v. Barnes*, 76 Pa. St. 427; *Horner v. Hower*, 39 Pa. St. 126; *Schilling v. Durst*, 42 Pa. St. 126; *Felt v. Cook*, 95 Pa. St. 250; *McCutcheon v. Allen*, 96 Pa. St. 319; *Shaylor v. Parsons*, 1 Pa. Super. Ct. 281; *Salsberg v. Bartikoski*, 6 Kulp (Pa.) 235; *Anderson v. Best*, 176 Pa. St. 498. See also *Gray v. Brackenridge*, 2 P. & W. (Pa.) 75; *Hamlin v. Cobb*, 1 Lack. Leg. N. (Pa.) 245; *Lee v. Lindsay*, 13 Pa. Co. Ct. 309.

7. *May Compel Satisfaction.* — *Horner v. Hower*, 39 Pa. St. 126; *Reynolds v. Barnes*, 76 Pa. St. 427.

8. *Payment in Full to Plaintiff's Authorized Attorney Sufficient.* — *Whitney v. McConnell*, 30 Mich. 421.

*Acquiescence of Parties for Nearly Seven Years in Settlement Held Sufficient.* — *Lough v. Pittman*, 26 Minn. 345.

9. *Tender as Ground for Compelling Entry.* — *Campion v. Friedberg*, 55 Ill. App. 450; *Callanan v. Gilman*, 55 N. Y. Super. Ct. 511. See also *Roberts v. Meighen*, 74 Minn. 273; *Rother v. Monahan*, 60 Minn. 186; *Manker v. Sine*, 47 Neb. 736.

10. *Grounds Antedating Rendition of Judgment* — *Alabama.* — *Burt v. Hughes*, 11 Ala. 571; *Matthews v. Robinson*, 20 Ala. 130; *Shackelford v. Cunningham*, 41 Ala. 203. See also *Gravett v. Malone*, 54 Ala. 19; *Werborn v. Pinney*, 74 Ala. 593.

*Arkansas.* — *Stuart v. Peay*, 21 Ark. 117.  
*Illinois.* — *Hawkins v. Harding*, 35 Ill. App. 25.

*Indiana.* — *Johnson v. State*, 80 Ind. 220.  
*Iowa.* — *Brett v. Myers*, 65 Iowa 274.

*Louisiana.* — *Gallagher v. Michel*, 26 La. Ann. 41.

*Maine.* — *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635.

*Missouri.* — *Lowe v. Smith*, 23 Mo. App. 44.  
*North Carolina.* — *Jarman v. Saunders*, 64 N. Car. 367.

*Pennsylvania.* — *McLean v. Bindley*, 114 Pa.



which existed at the time the judgment was rendered, and which might have been urged at the trial.<sup>1</sup>

*b. VACATING ENTRY OF SATISFACTION* — (1) *Power to Vacate.* — A court of law has power on proper application to vacate an entry of satisfaction,<sup>2</sup> or to reverse an erroneous entry and make a correct entry *nunc pro tunc*;<sup>3</sup> and it is not necessary to resort to equity in order to obtain relief.<sup>4</sup>

*Power Inherent.* — This power exists in virtue of the control of the court over its own records,<sup>5</sup> and is inherent in all courts of general jurisdiction.<sup>6</sup>

*Clerk Cannot Vacate Entry.* — The duties of a clerk are ministerial and not judicial, and he has no authority to set aside the levy or sale, or to vacate an entry of satisfaction of a judgment.<sup>7</sup>

(2) *Operation and Effect.* — An entry of satisfaction will not be vacated to the prejudice of a *bona fide* purchaser of the property, who became such while the judgment appeared by the record to be satisfied;<sup>8</sup> but as against rights which have in no manner been prejudiced, either by the entry of satisfaction or by the action of the court in striking it off, the order will operate retrospectively, and carry back the lien of the judgment to the date of the original docket.<sup>9</sup>

(3) *Grounds for Vacating.* — Among the grounds which are considered good and sufficient for vacating the entry of satisfaction may be enumerated: mistake of the clerk or plaintiff in entering satisfaction,<sup>10</sup> duress,<sup>11</sup> undue influ-

St. 559. See also *Braddee v. Brownfield*, 4 Watts (Pa.) 474.

1. *Grounds Available on Trial.* — *Haggin v. Clark*, 71 Cal. 444; *Frankel v. Stern*, 50 Ill. App. 54.

2. *Court of Law Can Vacate.* — *Martin v. State Bank*, 20 Ark. 636; *Turnan v. Temke*, 84 Ill. 286; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746; *Page v. Benson*, 22 Ill. 484; *Farmer v. Sasseen*, 63 Iowa 110; *Waters v. Engle*, 53 Md. 179; *Harrison v. Maxwell*, 44 N. J. L. 316; *Keogh v. Delany*, 40 N. J. L. 97; *Wilson v. Stillwell*, 14 Ohio St. 464; *McKinney v. Fritz*, 2 W. N. C. (Pa.) 173; *Murphy v. Flood*, 2 Grant Cas. (Pa.) 411.

As to matters of procedure in vacating an entry of satisfaction, see the article SATISFACTION AND DISCHARGE OF JUDGMENTS, 19 ENCYC. OF PL. AND PR. 139 *et seq.*

3. *Correct Entry Nunc Pro Tunc.* — *Martin v. State Bank*, 20 Ark. 636; *King v. State Bank*, 9 Ark. 185, 47 Am. Dec. 739; *Arrington v. Conrey*, 17 Ark. 100; *McNeal v. Hunt*, 6 Kan. App. 670.

4. *Resort to Equity Unnecessary.* — *Martin v. State Bank*, 20 Ark. 636; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746.

5. *Power Inherent.* — *Ackerman v. Ackerman*, 44 N. J. L. 173. See also *Keogh v. Delany*, 40 N. J. L. 97.

6. *In All Courts of General Jurisdiction.* — *Tudor v. Taylor*, 26 Vt. 444, *citing* *Mosseaux v. Brigham*, 19 Vt. 460.

*Stipulation of Parties.* — The court has jurisdiction to set aside satisfaction and reinstate a judgment under an agreement by the parties to that effect. *Berdell v. Parkhurst*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 12, *following* *Hatch v. Central Nat. Bank*, 78 N. Y. 487.

A Justice of the Peace has no power to vacate an apparent satisfaction produced by levy and sale. *Ross v. Hicks*, 11 Barb. (N. Y.) 481; *Harris v. Palmer*, 5 Barb. (N. Y.) 105. See also *Piper v. Elwood*, 4 Den. (N. Y.) 165.

7. *Clerk Cannot Vacate Entry.* — *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777, in which

case the court declared that the setting aside of a levy or a sale, or the vacating of an entry of satisfaction of a judgment, was a judicial act, *disapproving* *Frankfort Bank v. Markley*, 1 Dana (Ky.) 373.

8. *Bona Fide Purchaser Protected.* — *Persons v. Shaeffer*, 65 Cal. 79; *Page v. Benson*, 22 Ill. 484; *Ackerman v. Ackerman*, 44 N. J. L. 173; *Faughnar v. Elizabeth*, 58 N. J. L. 309; *Bebee v. State Bank*, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353; *Taylor v. Ranney*, 4 Hill (N. Y.) 619; *McCune v. McCune*, 164 Pa. St. 611; *Bowman v. Forney*, 15 Pa. Co. Ct. 134; *Eckert v. Lewis*, 4 Phila. (Pa.) 224, 17 Leg. Int. (Pa.) 156; *Delta Bldg., etc., Assoc. v. McClune*, 6 Pa. Dist. 569; *Miller v. Preston*, 154 Pa. St. 63; *Downer v. Miller*, 15 Wis. 612.

*Saving Intervening Rights.* — The rights of intervening parties will be saved. *Crouthamel v. Silberman*, 1 W. N. C. (Pa.) 131; *Keogh v. Delany*, 40 N. J. L. 97.

9. *Effect on Priorities.* — See *Taylor v. Ranney*, 4 Hill (N. Y.) 619; *Sims v. Campbell*, 1 McCord Eq. (S. Car.) 53, 16 Am. Dec. 595; *Paul v. Eurich*, 3 Pa. Super. Ct. 299; *McCune v. McCune*, 164 Pa. St. 611.

10. *Mistake* — *Kansas*. — *McNeal v. Hunt*, 6 Kan. App. 670.

*Maryland.* — *Waters v. Engle*, 53 Md. 179.

*Missouri.* — *Cohen v. Camp*, 46 Mo. 179.

*New York.* — *Bensen v. Perry*, 17 Hun (N. Y.) 16, *affirmed* 77 N. Y. 625; *Bernstein v. Demmler*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 285.

*Ohio.* — *Wayne County Bank v. Abernethy*, 9 West. L. J. 43, 1 Ohio Dec. (Reprint) 405.

*Pennsylvania.* — *McCune v. McCune*, 164 Pa. St. 611; *Paul v. Eurich*, 3 Pa. Super. Ct. 299; *Murphy v. Flood*, 2 Grant Cas. (Pa.) 411; *Crouthamel v. Silberman*, 1 W. N. C. (Pa.) 131; *Delta Bldg., etc., Assoc. v. McClune*, 6 Pa. Dist. 569.

*Wisconsin.* — *Flanders v. Sherman*, 18 Wis. 575.

*United States.* — *Hay v. Washington, etc., R. Co.*, 4 Hughes (U. S.) 327.

11. *Duress.* — *Stewart v. Armel*, 62 Ind. 593.



ence,<sup>1</sup> misrepresentation or fraud in procuring such entry,<sup>2</sup> failure of consideration,<sup>3</sup> nonperformance of the conditions on which the entry was made,<sup>4</sup> or want of authority under the circumstances to make the entry,<sup>5</sup> most frequently that of the plaintiff's attorney.<sup>6</sup>

**Where Satisfaction Obtained on Execution.** — Where an execution has been levied but for any reason the levy or sale thereunder is void, an entry of satisfaction will be vacated.<sup>7</sup>

**XIII. ASSIGNMENT OF JUDGMENTS — 1. What Judgments Assignable — a. ASSIGNABILITY AT COMMON LAW — Legal Title Does Not Pass.** — At common law judgments and decrees are not assignable so as to vest the legal title in the assignee, who takes only an equitable interest, the legal title remaining in the judgment creditor subject to the equities passing to the assignee by virtue of the assignment.<sup>8</sup>

**Assignee Cannot Proceed in His Own Name.** — In the absence of statutory authority the assignee cannot in his own name proceed for the collection of the judgment,<sup>9</sup> nor maintain an action thereon;<sup>10</sup> nor can he, in his own name, main-

**1. Undue Influence.** — Voell *v.* Kelly, 64 Wis. 504.

**2. Misrepresentation or Fraud** — *Iowa*. — Darrow *v.* Darrow, 43 Iowa 411.

*Indiana*. — Reish *v.* Thompson, 55 Ind. 34; Dunning *v.* Galloway, 47 Ind. 182.

*Kansas*. — Chapman *v.* Blakeman, 31 Kan. 684; State *v.* Young, 32 Kan. 292.

*Missouri*. — Laughlin *v.* Fairbanks, 8 Mo. 367.

*New Jersey*. — Faughnan *v.* Elizabeth, 58 N. J. L. 309; Ackerman *v.* Ackerman, 44 N. J. L. 173; Keogh *v.* Delany, 40 N. J. L. 97.

*New York*. — Bebee *v.* State Bank, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353; Lee *v.* Vacuum Oil Co., 126 N. Y. 579.

*Pennsylvania*. — Bowman *v.* Forney, 15 Pa. Co. Ct. 134; Murphy *v.* Flood, 2 Grant Cas. (Pa.) 411; McKinney *v.* Fritz, 2 W. N. C. (Pa.) 173; Pettis's Appeal, 126 Pa. St. 420.

*Virginia*. — Bradshaw *v.* Bratton, 96 Va. 577.

*Wisconsin*. — Downer *v.* Miller, 15 Wis. 612.

**Forged Receipt.** — Where the evidence shows that a satisfaction of a judgment was procured upon a forged receipt, the satisfaction should be set aside. Milligan *v.* Bowman, 42 Iowa 414.

**3. Failure of Consideration.** — Bowman *v.* Forney, 15 Pa. Co. Ct. 134.

**4. Nonperformance of Conditions.** — Stuart *v.* Peay, 21 Ark. 117; Dorgan *v.* Piehm, 84 Iowa 564; Waters *v.* Engle, 53 Md. 179; Anderson *v.* Nicholas, 4 Robt. (N. Y.) 630; Fitzsimons *v.* Fitzsimons, 79 Hun (N. Y.) 13.

**Void Mortgage.** — Where a judgment is satisfied in consideration of a mortgage, and subsequently the mortgage is adjudged void for usury, the court will set aside the entry of satisfaction. Russell *v.* Nelson, 99 N. Y. 119.

**5. Want of Authority to Make Entry.** — Aicardi *v.* Robbins, 41 Ala. 541, 94 Am. Dec. 614; Travellers Ins. Co. *v.* Chappelow, 83 Ind. 429; Bullard's Estate, 1 Del. Co. Rep. (Pa.) 425.

**6. Want of Authority in Attorney.** — Moore *v.* Cairo, etc., R. Co., 36 Ark. 262; Turnan *v.* Temke, 84 Ill. 286; Faughnan *v.* Elizabeth, 58 N. J. L. 309; Mitchell *v.* Piqua Club Assoc., (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 366; Maxfield *v.* Carr, 8 Kulp (Pa.) 214; Whitesell *v.* Peck, 165 Pa. St. 571. See also title ATTORNEY AND CLIENT, vol. 3, p. 368.

**7. Where Satisfaction Obtained on Execution.** — See the title EXECUTIONS, vol. II, p. 715, and see the article SATISFACTION AND DISCHARGE OF JUDGMENTS, 19 ENCYC. PL. AND PR. 149 *et seq.*

**8. Legal Title Not Assignable at Common Law** — *United States*. — U. S. *v.* Samperyac, Hempst. (U. S.) 118.

*California*. — Wright *v.* Levy, 12 Cal. 257; Fore *v.* Manlove, 18 Cal. 436.

*Illinois*. — McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449; Hossack *v.* Underwood, 55 Ill. 123; Hughes *v.* Trahern, 64 Ill. 48; Yarnell *v.* Brown, 65 Ill. App. 83.

*Kentucky*. — Elliott *v.* Waring, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69. See also Millar *v.* Field, 3 A. K. Marsh. (Ky.) 104.

*Louisiana*. — Newman *v.* Irwin, 43 La. Ann. 1114.

*Mississippi*. — Vanhouten *v.* Reily, 6 Smed. & M. (Miss.) 440.

*Missouri*. — Chemical Bank *v.* Bulkley, 68 Mo. App. 327.

*South Carolina*. — Duncan *v.* Bloomstock, 2 McCord L. (S. Car.) 318, 13 Am. Dec. 728.

See generally the title ASSIGNMENTS, vol. 2, p. 1007. And for the pleading and practice connected with the subject, see the article EQUITABLE ASSIGNMENTS, 7 ENCYC. OF PL. AND PR. 730.

**Assignment to Secure Payment of Debt.** — Where a judgment creditor assigned his judgment to secure payment of a debt owed by him to the assignee, it was held that after the amount due the assignee had been discharged, his rights in the judgment thereby became determined by operation of law, he having merely the equitable title. Hossack *v.* Underwood, 55 Ill. 123.

**A Judgment Stands upon the Same Footing as a Mortgage as regards the rights of assignees.** Yarnell *v.* Brown, 65 Ill. App. 83.

**9. Assignee Cannot Collect Judgment in His Own Name.** — Moore *v.* Ireland, 1 Ind. 531; Garvin *v.* Hall, 83 Tex. 295.

**10. Cannot Maintain Action in His Own Name.** — Bunnell *v.* Magee, 9 Ala. 433; Smith *v.* Harrison, 33 Ala. 706; Masterson *v.* Gibson, 56 Ala. 56; Lovins *v.* Humphries, 67 Ala. 437; Wolfe *v.* Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Weir *v.* Pennington, 11 Ark. 745; Reid *v.* Ross, 15



tain a summary proceeding against the sheriff for failing to pay over money collected on an execution issued on the judgment.<sup>1</sup>

**Right to Use Assignor's Name.** — But the assignment vests in the assignee the exclusive right to control the judgment and to use the name of the assignor, independently of the latter's consent, either in the issuance of process to collect the judgment,<sup>2</sup> or to prosecute a scire facias for its revival,<sup>3</sup> or in an original suit thereon.<sup>4</sup>

In Equity the assignee, being considered the real party in interest, may sue on the assigned judgment or decree in his own name,<sup>5</sup> but it has been held that the assignor in whose name the judgment or decree was recovered must be made a party to the suit.<sup>6</sup>

**b. ASSIGNABILITY UNDER STATUTES.** — Under statutes in many jurisdictions the assignment of a judgment now passes the legal title to the assignee, who may proceed in his own name for its collection or enforcement,<sup>7</sup> or to

Ind. 265; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Garvin v. Hall*, 83 Tex. 295.

**Alabama — Statute Not Applicable to Actions at Law.** — Code Ala. 1886, §§ 2927, 2928, providing a remedy for assignees of judgments or decrees who seek to enforce them by mesne or final process issued upon the assigned judgment, have no application to actions at law brought on such judgments or decrees. Such actions cannot be brought by the assignee in his own name. *Moorer v. Moorer*, 87 Ala. 545. See also *Johnson v. Martin*, 54 Ala. 271, allowing an amendment substituting the name of the assignor.

**1. Cannot Proceed Against Sheriff in Own Name.** — *Lovins v. Humphries*, 67 Ala. 437.

**2. May Use Assignor's Name to Collect Judgment.** — *Haden v. Walker*, 5 Ala. 86; *Johnson v. Martin*, 54 Ala. 271; *Steele v. Thompson*, 62 Ala. 323; *Weir v. Pennington*, 11 Ark. 745; *Clark v. Moss*, 11 Ark. 736; *Wright v. Levy*, 12 Cal. 257; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Hudson v. Morriss*, 55 Tex. 595. See also the title ASSIGNMENTS, vol. 2, p. 1094.

**Court Will Protect Assignee's Rights.** — The court in which the judgment was rendered will protect the rights of the assignee and will prevent the assignor from interfering with his control over it. No payment made to the assignor after notice of the assignment is valid, and by no release or admission can he impair the equity of the assignee. *Steele v. Thompson*, 62 Ala. 323. See *infra*, this section, *Effect of Notice to Judgment Debtor*.

**3. Scire Facias to Revive Judgment.** — *Macon v. Bibb County Academy*, 7 Ga. 204; *Forbes v. Tiffany*, 4 Ind. 204; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Hudson v. Morriss*, 55 Tex. 595.

**4. May Sue in an Assignor's Name.** — *Johnson v. Martin*, 54 Ala. 271; *Steele v. Thompson*, 62 Ala. 323; *Vanhouten v. Reilly*, 6 Smed. & M. (Miss.) 440; *Chemical Bank v. Bulkley*, 68 Mo. App. 327.

**5. In Equity Suit May Be in Assignee's Name.** — *Moorer v. Moorer*, 87 Ala. 545. See also the title ASSIGNMENTS, vol. 2, p. 1095.

**6. Assignor Must Be Joined.** — *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69. But see *Ritch v. Eichelberger*, 13 Fla. 169, in which a judgment, which was a lien upon property covered by a junior mortgage, was assigned, and afterwards the mortgaged property was improperly sold under execution

issued on such judgment. It was held that in a suit in equity, instituted for the purpose of foreclosing the mortgage and setting aside the sale, the assignor of the judgment was not a necessary party.

**7. Assignee May Proceed in Own Name** — *Indiana*. — *Reid v. Ross*, 15 Ind. 265; *Burson v. Blair*, 12 Ind. 371; *Chicago, etc., R. Co. v. Higgins*, 150 Ind. 329.

*Iowa*. — *Edmonds v. Montgomery*, 1 Iowa 143; *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148.

*Missouri*. — *Baker v. Stonebraker*, 34 Mo. 172; *Benne v. Schnecko*, 100 Mo. 250; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Knapp v. Standley*, 45 Mo. App. 264.

*New York*. — *Murphy v. Cockran*, 1 Hill (N. Y.) 339.

*North Carolina*. — *Moore v. Nowell*, 94 N. Car. 265.

See also *Clark v. Willet*, 59 N. J. L. 308; *Gamble v. Central R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276; *Hughes v. Brewer*, 7 Colo. 583; *Putnam v. Capps*, 6 Tex. Civ. App. 610. And see *infra*, this section, *Statutory Assignments*; also the title ASSIGNMENTS, vol. 2, p. 1097.

**Assignment for Benefit of Surety.** — Where a judgment rendered against principal and surety is paid by the surety and is assigned without consideration to another for the benefit of the surety, the legal title is in the assignee as trustee for the surety, and such assignee is regarded in law as the real party in interest in whose name a proceeding to enforce the collection of the judgment should be brought. *Searing v. Berry*, 58 Iowa 20.

**Defendants Stopped to Dispute Assignment.** — Under Code N. Car., § 188, where a plaintiff claiming as assignee of a judgment obtains leave, after notice and without opposition, to sue out execution in his own name, the defendants cannot, in an action on the judgment, dispute the assignment. *Windley v. Bonner*, 99 N. Car. 54.

**Proceedings in Name of Assignor Void.** — In *Michigan*, where a decree for the foreclosure of land was assigned, it was held that a foreclosure sale in the name of the assignor was void. The assignee, in such cases, must present a petition to the court setting forth the assignment and ask for a sale under the decree. *Moore v. Smith*, 103 Mich. 387.

**In an Action by a Judgment Debtor to Enjoin the Collection of an assigned judgment, the**



revive it by *scire facias*.<sup>1</sup>

*c. JUDGMENT FOR TORT.* — While a cause of action for a tort, which dies with the party and does not survive to his personal representatives, is generally not capable of passing by assignment,<sup>2</sup> yet after such cause has been merged into a judgment it assumes a different footing, and such judgment may be assigned in the same manner as any other.<sup>3</sup>

*d. FUTURE JUDGMENT* — (1) *Where Cause Not Assignable.* — Where a cause of action is in its nature one which is not assignable,<sup>4</sup> the judgment to be recovered in the action cannot be assigned before it comes into being, and an assignment of the verdict before final judgment has been rendered will not pass title to the assignee.<sup>5</sup> But it has been held in some cases that such assignment before judgment gives to the assignee an interest in the judgment, when perfected, which may be enforced in equity.<sup>6</sup>

(2) *Where Cause Assignable.* — Where the cause of action is of an assignable character, the assignment thereof is valid as to the assignor from the day of its execution,<sup>7</sup> and passes to the assignee title to the judgment when recovered.<sup>8</sup>

*e. PARTIAL ASSIGNMENT* — (1) *Necessity for Judgment Debtor's Consent.* — It is the general rule that a judgment creditor cannot, without the consent of the judgment debtor, assign a part of the judgment so that such assignment may be enforced at law,<sup>9</sup> and such partial assignment will not change the legal title to the judgment.<sup>10</sup> Thus the assignee cannot obtain a separate

assignee who seeks to enforce it is the only necessary party. *Ellis v. Kerr*, (Tex. Civ. App. 1893) 23 S. W. Rep. 1050.

*Supersedes to Judgment.* — After the assignment of a superseded judgment with an agreement that the proceeds shall be paid to several parties, the assignee having a beneficial interest in such proceeds may, when a liability arises on the undertaking, bring an action thereon in his own name without joining all the parties entitled to receive a part of the proceeds of the judgment and for whose benefit the action is in part prosecuted. *Walburn v. Chenault*, 43 Kan. 352.

1. *Scire Facias to Revive Judgment.* — *Clark v. Digges*, 5 Gill (Md.) 109; *Murphy v. Cochran*, 1 Hill (N. Y.) 339.

2. See the article ASSIGNMENTS, vol. 2, p. 1020. And as to the assignability of a future judgment for a tort see next subdivision *infra*.

3. *Judgment for Tort Assignable.* — *Moore v. Nowell*, 94 N. Car. 265.

*A Judgment Against a Sheriff for Damages Arising from His Misconduct in office is assignable.* *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148.

*Judgment for Breach of Promise.* — A judgment recovered in an action for breach of promise of marriage may be assigned. *Stewart v. Lea*, (N. H. 1890) 46 Atl. Rep. 31.

4. As to what causes are assignable, see the article ASSIGNMENTS, vol. 2, p. 1014.

5. *Assignment of Verdict Does Not Pass Title.* — *Lawrence v. Martin*, 22 Cal. 173; *Gamble v. Central R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276; *Rice v. Stone*, 1 Allen (Mass.) 566. See also *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Linton v. Hurley*, 104 Mass. 353; *Schubert v. Herzberg*, 65 Mo. App. 578.

*Rights of Creditor of Assignor.* — Where, in an action for personal injuries, the plaintiff assigned his claim after obtaining a verdict, but before the entry of judgment, it was held that a creditor of the plaintiff could maintain

a bill in equity after the entry of judgment to compel payment of his debt from the proceeds of the judgment. *Rice v. Stone*, 1 Allen (Mass.) 566.

6. *Assignee's Interest Enforceable in Equity.* — *North Chicago St. R. Co. v. Ackley*, 58 Ill. App. 572; *Schubert v. Herzberg*, 65 Mo. App. 578; *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362.

7. *Valid as to Assignor.* — *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec. 132.

8. *Passes Title to Assignee.* — *Robinson v. Weeks*, (Supm. Ct. Gen. T.) 6 How. Pr. (N. Y.) 161; *Mackey v. Mackey*, 43 Barb. (N. Y.) 58. See also *Hodgman v. Western R. Corp.*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 492; *Terney v. Wilson*, 45 N. J. L. 282.

*The Transfer of a Negotiable Note upon which suit is pending will convey such an interest in the judgment obtained thereon in the name of the transferrer as will enable the transferee to sue out process of garnishment thereon.* *Dugas v. Mathews*, 9 Ga. 510, 54 Am. Dec. 361.

9. *Consent of Judgment Debtor Necessary.* — *McMurray v. Marsh*, 12 Colo. App. 95; *Love v. Fairfield*, 13 Mo. 300, 53 Am. Dec. 148; *Burnett v. Crandall*, 63 Mo. 410; *Loomis v. Robinson*, 76 Mo. 488; *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362; *Fullmer v. Pine Tp.*, 17 Pa. Co. Ct. 482. See also the title ASSIGNMENTS, vol. 2, p. 1060.

*Ratification by Judgment Debtor.* — By pleading a partial assignment of a judgment as a defense to proceedings by the judgment creditor to enforce it, the judgment debtor thereby ratifies such partial assignment and estops himself from denying that he consented to it. *McMurray v. Marsh*, 12 Colo. App. 95.

10. *Will Not Change Legal Title.* — *Barnum v. Green*, 13 Colo. App. 254; *Hanks v. Harris*, 29 Ark. 323.

*Creates Security.* — Where one joint owner of a decree attempts to assign a part of his interest therein as a payment for property pur-



process to revive or enforce payment of the part assigned; the process must follow the judgment and be for the benefit of all persons interested, any one of whom may use the name of the legal plaintiff for that purpose without the consent of the latter.<sup>1</sup>

**The Reason of the Rule** is that it would be unfair to allow the judgment debtor to be subjected, against his will, to the harassment and annoyance of separate proceedings by different owners to collect a debt which is an entirety.<sup>2</sup>

(2) *As Equitable Assignment.* — In *Missouri* the doctrine has been laid down that the assignment of part of a judgment is enforceable no more in equity than at law;<sup>3</sup> but this rule has not been accepted in other jurisdictions, and the general holding is that such assignment constitutes an equitable assignment *pro tanto*,<sup>4</sup> which conveys to the assignee a property right in the judgment and may be enforced in equity.<sup>5</sup>

**2. Who May Assign** — *a. IN GENERAL* — **Person Having Beneficial Interest.** — It is a general principle that a valid assignment of a judgment can be made only by a person having a beneficial interest in such judgment,<sup>6</sup>

chased by him, the legal effect of such assignment is to create a security, and the assignor's liability is not thereby extinguished. *Hanks v. Harris*, 29 Ark. 323.

**Evidence of Indebtedness.** — An order for part of the amount of a judgment is not an assignment of the judgment, but is evidence of an indebtedness which might be enforced on refusal to accept or pay the order. *Thomas v. Porter*, 3 Bush (Ky.) 177.

**Not Satisfaction of Judgment.** — The assignment of a portion of a judgment by one of the creditors to a third person for a valuable consideration is not a satisfaction of any part of the judgment. *Noble v. Merrill*, 43 Me. 140.

**Assignee Cannot Set Aside Partial Satisfaction.** — The transfer of a judgment "so far as the same now remains unpaid," will not pass to the transferee the right of his transferrer to set aside a partial satisfaction of the judgment. *Adams v. Friedlander*, 37 La. Ann. 350.

**1. Process Must Follow Judgment.** — *Hopkins v. Stockdale*, 117 Pa. St. 365; *Dietrich's Appeal*, 107 Pa. St. 174. As to the use of the legal plaintiff's name see *supra*, this section, *Assignability at Common Law*.

**2. Reason of Rule.** — *McMurray v. Marsh*, 12 Colo. App. 95.

**3. Missouri — Not Enforceable in Equity.** — *Love v. Fairfield*, 13 Mo. 300, 53 Am. Dec. 148; *Burnett v. Crandall*, 63 Mo. 410; *Loomis v. Robinson*, 76 Mo. 488. But see *Schubert v. Herzberg*, 65 Mo. App. 578; *Crecelius v. Bierman*, 72 Mo. App. 355.

**4. Constitutes Equitable Assignment.** — *Moore v. Robinson*, 35 Ark. 293; *North Chicago St. R. Co. v. Ackley*, 58 Ill. App. 572; *Wood v. Wallace*, 24 Ind. 226; *Terney v. Wilson*, 45 N. J. L. 282; *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362.

As to equitable assignments in general, see *infra*, this section, *Equitable Assignments*.

**Where Part of a Money Decree Has Been Assigned**, a subsequent assignment of the decree will entitle the assignee to the remainder only. *Moore v. Robinson*, 35 Ark. 293. But see *Moore's Appeal*, 92 Pa. St. 309, where the judgment creditor assigned parts of the same judgment to different persons successively, and the proceeds of the property bound by the judgment were insufficient to pay all

the judgment in full, and it was held that the assignees should take *pro rata*, and not in order of their assignment.

**The Assignment of a Part of "the Debt and Interest due on within execution,"** was held to transfer to the assignee all interest at that time due on the principal and so much of the principal as sufficed to make up the part assigned. *Godbold v. Kirkpatrick*, 26 S. Car. 607.

**5. Conveys Property Right in Judgment.** — *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362.

**Binding on Assignor.** — As to the assignor a partial assignment of a judgment is binding, although made without the consent of the judgment debtor. *McMurray v. Marsh*, 12 Colo. App. 95. See also *Schubert v. Herzberg*, 65 Mo. App. 578.

**The Judgment Debtor Cannot Compromise with the Assignor** after notice of the assignment and thus defeat the claim of the assignee. *Pittsburg, etc., R. Co. v. Volkert*, 58 Ohio St. 362; *North Chicago St. R. Co. v. Ackley*, 58 Ill. App. 572.

**Set-off Without Notice to Assignee.** — Upon the entry of a judgment an assignment was entered thereon of part of such judgment. Afterwards the judgment debtor was allowed to set off another judgment against the whole of such judgment without notice to the partial assignee. It was held that the matter should be reopened and a hearing granted to the assignee. *Ex p. Wells*, 43 S. Car. 477. But see *Crecelius v. Bierman*, 72 Mo. App. 355, wherein it was held that the right of the judgment debtor to set off a cross judgment against the whole of the plaintiff's judgment was not affected by such partial assignment. See *infra*, this section, *Effect of Assignment on Right of Set-off*.

**Validity Against Creditors Levying on Judgment.** — An assignment of a judgment in part is not valid as against creditors levying thereon, unless the assignment is placed on record as provided by statute. *Wheaton v. Spooner*, 52 Minn. 417.

**6. Plaintiff in Judgment Trustee for Others.** — A person who has no beneficial interest in a judgment, but is plaintiff therein only as trustee for others, cannot make a valid assign-



or by his duly authorized agent.<sup>1</sup>

**Assignment by Bank.** — A judgment recovered by a bank may be assigned by officers authorized to do so;<sup>2</sup> but the official character of the persons making the assignment, or the fact that they were authorized to execute the same in the name of the bank, must be shown. Merely designating them as officers is not sufficient to establish their official character.<sup>3</sup>

**b. ATTORNEY.** — An attorney at law has no implied authority as such to assign a judgment recovered in favor of his client,<sup>4</sup> and an unauthorized assignment made by him confers no rights upon the assignee and impairs none of the rights of the plaintiff in whose behalf the judgment was recovered.<sup>5</sup>

**Power of Attorney.** — Authority to assign a judgment may be conferred by power of attorney,<sup>6</sup> which need not be recorded in order to render the assignment effective as between the parties, the recording of such power being material only where notice to third persons is necessary.<sup>7</sup>

**3. Method and Form of Assignment** — *a. STATUTORY ASSIGNMENTS* — (1) *In General.* — As has been stated heretofore, statutes now exist in many states authorizing the assignment of a judgment so as to pass the legal title to the assignee.<sup>8</sup> In order to pass the legal title under such a statute, the assignment must be made in the manner prescribed thereby.<sup>9</sup>

ment of the judgment. *Brice v. Taylor*, 51 Ark. 75. But see *Seymour v. Smith*, 114 N. Y. 481, 11 Am. St. Rep. 683.

**One of the Members of a Firm** may, in the name of the firm, assign a judgment rendered in favor of the firm so as to pass a good title. *Allen v. Clark*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 338, *affirmed* 141 N. Y. 587.

**A Husband Has the Right to Assign** a money decree rendered in favor of himself and wife. *Moore v. Robinson*, 35 Ark. 293.

**1. Assignment by Agent.** — Where an agent, in his own name, but acting under authority from his principal, made an assignment of a judgment on the margin of the record, it was held to be good, at least to pass the equitable title. *Emory v. Joice*, 70 Mo. 537.

**The Administrator of an Estate** can assign a judgment recovered by his intestate in his lifetime against a person who has since removed to another state. *Low v. Burrows*, 12 Cal. 181.

**Judgment in Favor of State.** — Under the *Maryland* statutes there is no authority for the assignment of a judgment in favor of the state to a surety who has paid the same; and, therefore, the attorney for the state has no power to make such an assignment. *Peacock v. Pembroke*, 8 Md. 348.

**2. Bank May Assign Judgment.** — *Klemme v. McLay*, 68 Iowa 158.

**A National Bank May Assign** a judgment recovered in its favor. *Emory v. Joice*, 70 Mo. 537.

**3. Official Character Must Be Shown.** — *Klemme v. McLay*, 68 Iowa 158.

**4. Attorney Cannot Assign Without Express Authority.** — *Wilson v. Wadleigh*, 36 Me. 496; *Head v. Gervais*, Walk. (Miss.) 431, 12 Am. Dec. 577; *Rice v. Troup*, 62 Miss. 186; *Henry*, etc., R. Co. v. *Halter*, 58 Neb. 685; *Mayer v. Blease*, 4 S. Car. 10; *Noonan v. Gray*, 1 Bailey L. (S. Car.) 437; *Maxwell v. Owen*, 7 Coldw. (Tenn.) 630. See also the article ATTORNEY AND CLIENT, vol. 3, p. 369.

**Payment of Amount to Attorney.** — If an attorney receives the full amount of the judgment for its assignment even if he does not

pay it over to his client, it is payment of the judgment, and execution cannot afterwards issue; the client's only remedy is against the attorney. *Maxwell v. Owen*, 7 Coldw. (Tenn.) 630.

**Assignment for Less than Full Value.** — An attorney has no power, without authority from his client, to assign a judgment for less than its value, but where such payment was accepted, it was held that it must be treated as a credit on the judgment. *Lewis v. Blue*, 110 N. Car. 420.

**Assignment of One Judgment in Satisfaction of Another.** — An attorney has no power without special authority to take an assignment of one judgment in satisfaction of another. *Clark v. Kingsland*, 1 Smed. & M. (Miss.) 248.

**Under Alabama Code**, 1896, § 3888, providing for the assignment to a surety of a judgment paid by him, such assignment may be made by the assignor's attorney in the name of the client or in his own name. *Winslow v. Bracken*, 57 Ala. 368.

**5. Unauthorized Assignment Does Not Affect Rights.** — *Gardner v. Mobile*, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84; *Wilson v. Wadleigh*, 36 Me. 496; *Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641. See also *Fassitt v. Middleton*, 47 Pa. St. 214, 86 Am. Dec. 535.

**Binding Only Where Ratified or Adopted by Client.** — *Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641.

**Authority Inferred from Acquiescence of Client.** — *Gardner v. Mobile*, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84.

**6. Authority Conferred by Power of Attorney.** — *Caley v. Morgan*, 114 Ind. 350.

**7. Not Necessary to Record Power as Between Parties.** — *Boos v. Morgan*, 130 Ind. 305, 30 Am. St. Rep. 237; *Caley v. Morgan*, 114 Ind. 350.

**8. See supra**, this section, *Assignability under Statutes*.

**9. Must Be in Manner Prescribed by Statute.** — *Blackman v. Joiner*, 81 Ala. 344; *Chicago*, etc., R. Co. v. *Higgins*, 150 Ind. 329; *Kelley v. Love*, 35 Ind. 106.



(2) *Statutes Cumulative Only.* — Where a statute providing a mode for the assignment of judgments does not expressly exclude other modes, such statute is regarded as cumulative merely, and will not render invalid an assignment that is sufficient at common law to pass the equitable title.<sup>1</sup>

*b. EQUITABLE ASSIGNMENTS* — (1) *No Particular Form Necessary.* — To constitute an equitable assignment no particular form is necessary,<sup>2</sup> and a person having such evidence of title as, though it does not pass a legal title to enforce the judgment in his own name, yet authorizes him to receive the proceeds thereof, and protects the judgment debtor in making payment to him, is an equitable assignee.<sup>3</sup>

*Intent of the Parties.* — An intent on the part of one party to sell and of the other to buy, at a price agreed, with such conduct as indicates that one relinquishes all control of the judgment and the other assumes to regard it as his own, with notice to the debtor of what has occurred, constitutes a constructive assignment of such judgment, so as to divest the assignor of all his ownership and pass it to the assignee.<sup>4</sup> But where the transaction is not in fact intended as an assignment, it will not be held valid as against creditors of the assignor, although it be in form an absolute assignment.<sup>5</sup>

*Irregularities or Informalities* will not invalidate the assignment where the intent of the parties is clear.<sup>6</sup>

*An Order from the Judgment Creditor* to his attorney to pay to a third party the money collected on the judgment creates, when delivered to the attorney, an

**Missouri — Must Be in Writing.** — Under Mo. Rev. Stat., § 6043, an assignment must be in writing to pass the legal title to the judgment. *Chemical Bank v. Bulkley*, 68 Mo. App. 327.

**1. Statutes Not Exclusive of Equitable Assignments.** — *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84; *Burson v. Blair*, 12 Ind. 371; *Kelley v. Love*, 35 Ind. 106; *Shirts v. Irons*, 54 Ind. 13; *Adams v. Lee*, 82 Ind. 587; *Chicago, etc., R. Co. v. Higgins*, 150 Ind. 329; *Snell v. Maddux*, 20 Ind. App. 169; *Burgess v. Cave*, 52 Mo. 43; *Emory v. Joice*, 70 Mo. 537; *Knapp v. Standley*, 45 Mo. App. 264; *Wise v. Loring*, 54 Mo. App. 258; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Putnam v. Capps*, 6 Tex. Civ. App. 610.

**The Missouri Statute Is Not Applicable to Assignments of Foreign Judgments**, but a written assignment of a judgment of a foreign court can be proved to establish the equitable ownership of the assignee, and show his right to sue on such judgment. *Baker v. Stonebraker*, 34 Mo. 172.

**2. No Particular Form Necessary.** — *Moore v. Robinson*, 35 Ark. 293. See also *Dugas v. Mathews*, 9 Ga. 510, 54 Am. Dec. 361.

An illustration of a contract amounting to an unqualified assignment of a judgment will be found in *Griffin v. Carnack*, 36 Ala. 695, 76 Am. Dec. 344.

For the pleading and practice connected with this subject, see the article *EQUITABLE ASSIGNMENTS*, 7 ENCYC. OF PL. AND PR. 730.

**Need Not State to What Proceeds to Be Devoted.** — In an assignment of a judgment made for a fair and honest consideration it is unnecessary to set out the purpose to which the proceeds are to be devoted by the assignee. *Towanda First Nat. Bank v. Ladd*, 126 Pa. St. 188.

**3. Person Entitled to Receive Payment.** — *Parker v. Bacon*, 26 Miss. 425.

**The Assignment of Part of a Judgment conveys to the assignee a property right which may be**

enforced in equity. See *supra*, this section, *As Equitable Assignment*.

**Payment by Sheriff.** — Where a sheriff who held an execution on a judgment paid the same upon the understanding that the second execution should issue in the plaintiff's name for his benefit, it was held that the transaction amounted to a purchase by the sheriff, and that he was entitled to the second execution. *Hall v. Taylor*, 18 W. Va. 544.

See further on this subject the title *SUBROGATION*.

**4. Constructive Assignment.** — *Dunn v. Snell*, 15 Mass. 481; *Winberry v. Koonce*, 83 N. Car. 351.

**Where an Assignment Is Not Denied**, it matters not whether the assignment has ever been delivered, or whether it rests in parol only. *Baker v. Secor*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 803.

**5. Assignment as Security.** — *Steiner v. Scholze*, 114 Ala. 88. See also *Bender v. Matney*, 122 Mo. 244.

**Assignment for Collection.** — *Vanderpool v. Vanderpool*, 162 Pa. St. 394.

**Where a Judgment Was Assigned on Condition** that the assignee "was to pay for it if he could make anything out of it," it was held that such assignment did not constitute the assignee "the party really interested," under Code Ala., § 2765. *Pike v. Bright*, 29 Ala. 332.

**6. Not Invalidated by Informalities.** — *Aylesworth v. Brown*, 10 Barb. (N. Y.) 167; *Emory v. Joice*, 70 Mo. 537.

**If an Assignment of a Judgment Misdescribe It**, the error must be corrected to make the assignment operative. *Piatt v. St. Clair*, *Wright* (Ohio) 526.

**An Assignment on the Wrong Record** nevertheless amounts to an equitable assignment. *Frybarger v. Andre*, 106 Ind. 337.

**An Irregularity Is Not Available to a Third Person** if the assignor himself makes no objec-



equitable assignment of, and a lien on, the proceeds of the judgment.<sup>1</sup>

An Order on a Court Clerk, however, to pay to a third party the amount due on a judgment does not amount to an assignment, since such order cannot operate until the judgment has been extinguished by payment.<sup>2</sup>

An Executory Agreement to Assign a judgment for a specified price, which agreement is never performed by either party, does not amount to an assignment.<sup>3</sup>

(2) *May Be by Parol.* — The assignment of a judgment need not be under seal.<sup>4</sup> A parol assignment for a valuable consideration is sufficient to pass the equitable title to the assignee.<sup>5</sup>

(3) *Necessity to Record Assignment.* — While it may be desirable that the assignment of a judgment should appear of record, yet an entry thereof on the records of the court rendering it is not usually necessary to complete the assignment.<sup>6</sup> In some jurisdictions, however, recording is necessary as against third persons.<sup>7</sup>

(4) *Proof of Assignment* — (a) *Necessity for.* — While no formality is required in the assignment of a judgment, yet, when the fact of the assignment is called in question, sufficient evidence of title must be produced to protect the judgment debtor in making payment to the assignee as against the assignor.<sup>8</sup> The fact that the assignment has been filed on record with the papers will not dispense with the necessity of calling the subscribing witness to prove it.<sup>9</sup>

Under a New York Statute the assignee of a judgment who seeks to acquire the rights of the purchaser at a sheriff's sale must prove all the assignments of such judgment on oath.<sup>10</sup> But this does not include an assignment by operation of law.<sup>11</sup>

tion thereto. *Ramsey's Appeal*, 2 Watts (Pa.) 228, 27 Am. Dec. 301.

1. *Order to Creditor's Attorney.* — *Hussey v. Culver*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 466; *Stanford v. Connery*, 84 Ga. 731. See also *Rufe v. Commercial Bank*, 99 Fed. Rep. 650.

2. *Order on Clerk to Pay Third Person.* — *Tector v. Abden*, 2 Ind. 183.

3. *Executory Agreement to Assign.* — *Ithaca Agricultural Works v. Eggelston*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 933; *Rufe v. Commercial Bank*, 99 Fed. Rep. 650.

4. *Need Not Be under Seal.* — *Becton v. Ferguson*, 22 Ala. 599; *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Stoddard v. Benton*, 6 Colo. 508; *Ford v. Stuart*, 19 Johns. (N. Y.) 312.

5. *May Be by Parol* — *Alabama.* — *Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Steele v. Thompson*, 62 Ala. 323; *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84.

*Arkansas.* — *Weir v. Pennington*, 11 Ark. 745; *Clark v. Moss*, 11 Ark. 736; *Wright v. Yell*, 13 Ark. 503; *Desha v. Robinson*, 17 Ark. 248; *Brearly v. Norris*, 23 Ark. 169.

*Indiana.* — *Wood v. Wallace*, 24 Ind. 226; *Cravens v. Duncan*, 55 Ind. 347.

*Massachusetts.* — *Dunn v. Snell*, 15 Mass. 481.

*Missouri.* — *Chemical Bank v. Bulkley*, 68 Mo. App. 327.

*New York.* — *Briggs v. Dorr*, 19 Johns. (N. Y.) 95; *Ford v. Stuart*, 19 Johns. (N. Y.) 342.

*North Carolina.* — *Bartlett v. Yates*, 7 Jones L. (52 N. Car.) 615; *Winberry v. Koonce*, 83 N. Car. 351.

*Texas.* — *Garvin v. Hall*, 83 Tex. 295; *Putnam v. Capps*, 6 Tex. Civ. App. 610.

The Statute of Frauds does not require that a judgment constituting a lien on lands should be assigned by a written instrument. *Winberry v. Koonce*, 83 N. Car. 351.

6. *Recording Not Necessary.* — *Steele v. Thomp-*

*son*, 62 Ala. 323; *Winberry v. Koonce*, 83 N. Car. 351.

A Statute Requiring the Record of Assignments Refers Only to Domestic Judgments and does not affect the proof of an assignment of a foreign judgment. *Baker v. Stonebraker*, 34 Mo. 172.

7. *Necessary Against Third Parties.* — *Wheaton v. Spooner*, 52 Minn. 417, construing Minn. Gen. Stat. 1878, c. 66, §§ 282, 283.

Where an assignment of a judgment was not of record, it was held that a subsequent assignment entered of record would pass the title to the judgment as against the first assignment, of which the second purchaser had no notice. *Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641.

8. *Proof of Assignment Necessary.* — *Coffing v. Carnahan*, 122 Ind. 427; *Parker v. Bacon*, 26 Miss. 425. See also *Dugas v. Mathews*, 9 Ga. 510, 54 Am. Dec. 361 (evidence sufficient); *Strauss v. Seamon*, (C. Pl. Gen. T.) 2 N. Y. Supp. 716 (proof insufficient).

*Date.* — An assignment will be presumed to have been executed on the day of its date. *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec. 132.

*Admission of the Assignment*, as by failing to answer and making default, renders further proof unnecessary. *Cravens v. Duncan*, 55 Ind. 347.

9. *Must Call Subscribing Witness.* — *Himes v. Barnitz*, 8 Watts (Pa.) 39.

10. *New York* — *Proof under Oath of Assignee.* — *People v. Fleming*, 2 N. Y. 484. See also *Aylesworth v. Brown*, 10 Barb. (N. Y.) 167.

Where There Is No Subscribing Witness, the assignment may be verified by any person who saw it executed and delivered. Such a person is a witness to the assignment within the meaning of the statute. *People v. Fleming*, 2 N. Y. 484.

11. *Assignment by Operation of Law Not Included.* — *People v. Fleming*, 2 N. Y. 484.



(b) **Parol Evidence to Show Intent.** — It may be shown by parol evidence that an assignment of a judgment, while absolute in form, was not so intended by the parties.<sup>1</sup>

c. **SALE UNDER EXECUTION.** — A judgment being only the evidence of a debt, it follows that, in the absence of statutory authority, it cannot be levied upon and sold under execution in the same manner as personal property capable of manual delivery.<sup>2</sup>

Under the Statutes of Some States, however, it may be transferred in this manner,<sup>3</sup> but, where this is allowed, the sheriff's sale can pass no other or better title than such as passes by an assignment by the judgment creditor, and the purchaser takes as assignee only.<sup>4</sup>

4. **Notice of Assignment** — a. **NECESSITY FOR.** — While in some jurisdictions it has been held that the assignment of a judgment is not complete so as to vest the title absolutely in the assignee until notice to the debtor of the assignment,<sup>5</sup> yet it is the generally accepted rule that such notice is unnecessary except for the purpose of protecting the assignee against the subsequent acts of the parties to the judgment.<sup>6</sup>

b. **RIGHTS OF JUDGMENT DEBTOR BEFORE NOTICE.** — The judgment debtor is not bound by the assignment until he has notice of it,<sup>7</sup> and payment made by him in good faith to the judgment creditor before notice of the assignment will be valid as against the assignee,<sup>8</sup> as will also a release

1. **Intent May Be Shown by Parol.** — Callender v. Drabelle, 73 Iowa 317; Rice v. Troup, 62 Miss. 186; Emory v. Joice, 70 Mo. 537. Compare Evans v. Burns, 67 Iowa 179.

The intent and understanding of the parties may become a question for the jury. Richmond Bldg. Assoc. v. Richmond Bldg. Assoc., 100 Pa. St. 191.

**Parol Evidence Is Admissible to Identify the Judgments Assigned.** — Harper v. Columbus Factory, 35 Ala. 127.

2. **Not Liable to Levy and Sale.** — Wilson v. Matheson, 17 Fla. 640. See also the title EXECUTIONS, vol. II, p. 629.

3. **May Be Levied on in Some States.** — Ochiltree v. Missouri, etc., R. Co., 49 Iowa 150; Wheaton v. Spooner, 52 Minn. 417. See also the title EXECUTIONS, vol. II, p. 629.

**Reached by Garnishment.** — In many jurisdictions a judgment may be reached by process of garnishment served upon the judgment debtor. Hanna v. Bry, 5 La. Ann. 651, 52 Am. Dec. 606; Rightor v. Slidell, 9 La. Ann. 602. See also the title GARNISHMENT, vol. 14, p. 777, for full list of authorities.

4. **Purchaser Takes as Assignee Only.** — Fore v. Manlove, 18 Cal. 436. See *infra*, this section, *Assignee's Title No Better than Assignor's*.

5. **Notice Necessary to Complete Assignment.** — Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; Cole v. Brewer, 4 Lea (Tenn.) 318; Cantrell v. Ford, (Tenn. Ch. 1898) 46 S. W. Rep. 581. See also Drumm v. Sherman, 20 La. Ann. 96. Compare Dinsmore v. Boyd, 6 Lea (Tenn.) 639.

6. **To Protect Assignee Against Acts of Parties.** — Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655; Stoddard v. Benton, 6 Colo. 508; Weire v. Davenport, 11 Iowa 49, 77 Am. Dec. 132; Richardson v. Ainsworth, (Supm. Ct. Gen. T.) 20 How. Pr. (N. Y.) 530; Robinson v. Weeks, (Supm. Ct. Gen. T.) 6 How. Pr. (N. Y.) 161; Countryman v. Boyer, (Supm. Ct.) 3 How. Pr. (N. Y.) 386.

**Notice Held Unnecessary as Against Creditor of Assignor.** — Hutchinson v. Brown, 8 App. Cas. (D. C.) 157. Compare Page v. Benson, 22 Ill. 484. And see the title ASSIGNMENTS, vol. 2, p. 1076.

**Scire Facias by Assignee.** — Where the assignee of a judgment obtains in his own name a writ of scire facias to revive the same, it need not appear that the defendant had notice of the assignment. Murphy v. Cochran, 1 Hill (N. Y.) 339.

7. **Debtor Not Bound Before Notice.** — Knapp v. Standley, 45 Mo. App. 264; Johnson v. Boice, 40 La. Ann. 273, 8 Am. St. Rep. 528. See the title ASSIGNMENTS, vol. 2, pp. 1077, 1099.

8. **Payment to Assignor Before Notice Valid.** — The Lulie D., 4 Biss. (U. S.) 249; Com. v. Burnett, (Ky. 1898) 44 S. W. Rep. 966; Styles v. M'Neil, 6 Mart. N. S. (La.) 296, 17 Am. Dec. 183; Johnson v. Boice, 40 La. Ann. 273, 8 Am. St. Rep. 528; Graham v. Evans, 39 Minn. 382; Dodd v. Brott, 1 Minn. 270, 66 Am. Dec. 541; Frissell v. Haile, 18 Mo. 18; Chemical Bank v. Bulkley, 68 Mo. App. 327; Beebe v. State Bank, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353; Booth v. Farmers', etc., Nat. Bank, 50 N. Y. 396, reversing 4 Lans. (N. Y.) 301; Miller v. Baltimore, etc., R. Co., 60 Ohio St. 374; Clark v. Baltimore, etc., R. Co., 3 Ohio N. P. 172, 4 Ohio Dec. 173; Henry v. Brothers, 48 Pa. St. 70. See also Traphagen v. Lyons, 38 N. J. Eq. 613; Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; and the title ASSIGNMENTS, as in last preceding note.

**Inability to Learn Identity of Assignee.** — Where a judgment debtor, hearing a rumor that the judgment had been assigned, applied to the assignee for information, and the latter refused to inform him who was the assignee, it was held that payment to the judgment creditor would operate to discharge the judgment. The Lulie D., 4 Biss. (U. S.) 249.



obtained by him from the judgment creditor.<sup>1</sup> But a failure to notify the debtor will not subject the assignee to merely equitable claims of the debtor which accrue after the assignment and do not attach to the judgment itself.<sup>2</sup>

**Payment to Third Persons.** — The protection extended to a judgment debtor who makes payment before notice of the assignment applies only where the payment is made to the judgment creditor. When the debtor voluntarily makes payment to a person other than the holder of the legal title, he must see to it that he pays the one to whom he is really indebted, and payment to a third person will not be valid as against the assignee,<sup>3</sup> even though such third person be in equity entitled to require the judgment creditor to account to him, as his agent, for the proceeds of the judgment.<sup>4</sup> But in a case where the payment was made under judgment in a garnishment proceeding, it was held that the liability of the judgment debtor was thereby discharged.<sup>5</sup>

**c. EFFECT OF NOTICE TO JUDGMENT DEBTOR.** — After the judgment debtor has received notice of the assignment, the assignee will be protected in equity against any and all acts of the parties,<sup>6</sup> and a payment made to the judgment creditor thereafter will not discharge the debtor's liability to the assignee,<sup>7</sup> nor will a release given him thereafter by the judgment creditor have that effect.<sup>8</sup> But where an assignment was made for the convenience and benefit of the assignor, it was held that a subsequent settlement between him and the judgment debtor was valid as against the assignee.<sup>9</sup>

**d. WHAT CONSTITUTES NOTICE TO JUDGMENT DEBTOR.** — It is not essential that the judgment debtor receive direct notice of the assignment; if he has information calculated under the circumstances to arrest his attention and put him upon inquiry, it is sufficient.<sup>10</sup>

**Effect of Assignment on Record.** — The assignment of a judgment on the record is

**1. Release Obtained Before Notice Valid.** — *Gallagher v. Caldwell*, 22 Pa. St. 300, 60 Am. Dec. 85.

**Right of Third Persons to Treat Judgment as Satisfied.** — Where the judgment creditor, in a judgment secured by mortgage, entered satisfaction thereof after an unrecorded assignment, it was held that third persons having no notice of the assignment were justified in looking upon the debtor's property as released from the lien of the mortgage. *Page v. Benson*, 22 Ill. 484.

**2. Independent Equity Accruing After Assignment.** — *Terney v. Wilson*, 45 N. J. L. 282. And see *infra*, this section, *Equities Arising from Other Transactions*.

**3. Voluntary Payment to Third Person.** — *Seymour v. Smith*, (Buffalo Super. Ct. Tr. T.) 17 Abb. N. Cas. (N. Y.) 387, 114 N. Y. 481. See also *Johnson v. Webster*, 81 Iowa 581; *Lee v. Delehanty*, 25 Hun (N. Y.) 197.

**Voluntary Payment to the Sheriff on a garnishment process in the sheriff's hands will not protect the judgment debtor who had no notice of the assignment of the judgment.** *Brown v. Ayres*, 33 Cal. 525, 91 Am. Dec. 655; *Robinson v. Weeks*, (Supm. Ct. Gen. T.) 6 How. Pr. (N. Y.) 161; *Richardson v. Ainsworth*, (Supm. Ct. Gen. T.) 20 How. Pr. (N. Y.) 530; *Countryman v. Boyer*, (Supm. Ct.) 3 How. Pr. (N. Y.) 386.

**4. Payment to Person for Whose Benefit Judgment Recovered.** — *Seymour v. Smith*, (Buffalo Super. Ct. Tr. T.) 17 Abb. N. Cas. (N. Y.) 387, 114 N. Y. 481.

**5. Payment under Judgment.** — *Chicago City R. Co. v. Blanchard*, 37 Ill. App. 391. Compare *Noble v. Thompson Oil Co.*, 79 Pa. St.

354, 21 Am. Rep. 66. *Contra*, in the case of a payment in supplementary proceedings, *Lee v. Delehanty*, 25 Hun (N. Y.) 197.

**6. Assignee Protected Against Acts of Parties.** — *Steele v. Thompson*, 62 Ala. 323; *Stoddard v. Benton*, 6 Colo. 508; *Hughes v. Trahern*, 64 Ill. 48. See also the title *ASSIGNMENTS*, vol. 2, pp. 1077, 1099.

**Priority Between Assignments** is in some states determined in favor of the assignee who first gives notice to the judgment debtor. *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157. See also the title *ASSIGNMENTS*, vol. 2, p. 1077.

**7. Payment to Assignor Not Valid Against Assignee.** — *Steele v. Thompson*, 62 Ala. 323; *Guthrie v. Bashline*, 25 Pa. St. 80; *Moore v. Red*, (Miss. 1898) 22 So. Rep. 948. See also *Dunn v. Snell*, 15 Mass. 481; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66.

**8. Release by Judgment Creditor Invalid.** — *Dunn v. Snell*, 15 Mass. 481; *Call v. Foster*, 52 Me. 257; *Bolen v. Crosby*, 49 N. Y. 183. See also *Steele v. Thompson*, 62 Ala. 323.

**9. Assignment for Benefit of Assignor.** — *Baker v. Secor*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 803. See also *infra*, this section, *Good Faith in Assignment*.

**10. Direct Notice Not Essential.** — *Guthrie v. Bashline*, 25 Pa. St. 80.

**Sufficient Notice to Debtor.** — Where a judgment debtor is security for the prosecution of a suit to enjoin the judgment against him, an allegation in the injunction bill of the fact of the assignment of such judgment will be sufficient notice to the debtor of such assignment. *Wilcox v. Morrison*, 9 Lea (Tenn.) 699.



usually held not to be constructive notice thereof to the debtor.<sup>1</sup> But under the *Missouri* statute providing for such assignments, the assignment itself operates as notice to all parties.<sup>2</sup>

*c. DUTY OF SHERIFF AFTER NOTICE OF ASSIGNMENT.*—After the officer to whom an execution is directed is notified that the judgment on which it was issued has been assigned, it becomes his duty to follow the instructions of the assignee and to hold the proceeds of the execution for his use.<sup>3</sup>

**5. Effect of Assignment**—*a. IN GENERAL*—*At Common Law.*—As has been stated hitherto, a judgment is not, at common law, assignable so as to pass the legal title to the assignee. The effect of the assignment is to give the assignee an equitable title, for the enforcement of which he may use the name of the judgment creditor.<sup>4</sup>

Under Statutes in many jurisdictions a judgment may now be assigned so as to pass the legal title.<sup>5</sup>

*Validity in Foreign States.*—A *bona fide* assignment of a judgment in the state in which it was recovered, being valid in that state, is valid everywhere.<sup>6</sup>

*b. IMPLIED WARRANTY*—(1) *That Judgment Subsisting and Unpaid.*—There is an implied warranty on the part of the assignor of a judgment that such judgment is a valid, subsisting obligation against the debtor for the amount specified therein, and has not been paid either in whole or in part.<sup>7</sup> If the assignor does not in fact own the judgment, or if it has been extinguished wholly or partially before the assignment, then the assignee is entitled to recover for the damage resulting to him.<sup>8</sup>

*Assignment "Without Recourse."*—Where the assignment is by the judgment creditor, he cannot, without express agreement, limit his liability on the implied warranty by assigning "without recourse."<sup>9</sup> But where an assignee of a judgment, without knowledge of any defect therein or defense thereto,

1. Assignment of Record Not Constructive Notice. — *Steiner v. Scholze*, 114 Ala. 88; *Chicago City R. Co. v. Blanchard*, 37 Ill. App. 391; *Henry v. Brothers*, 48 Pa. St. 70.

In Ohio an Entry on the Appearance Docket of the assignment does not constitute notice thereof to the judgment debtor. *Miller v. Baltimore, etc., R. Co.*, 60 Ohio St. 374; *Clark v. Baltimore, etc., R. Co.*, 3 Ohio N. P. 172, 4 Ohio Dec. 173.

In Louisiana the mere filing or placing of the assignment of a judgment among the papers of the suit, and the recording of it in the books of the parish recorder, do not constitute notice to the judgment debtor. *Johnson v. Boice*, 40 La. Ann. 273, 8 Am. St. Rep. 528.

2. Missouri—Assignment Notice to All Parties. — *Knapp v. Standley*, 45 Mo. App. 264.

3. Officer Must Follow Instructions of Assignee. — *Bressler v. Beach*, 21 Ill. App. 423; *State v. Herod*, 6 Blackf. (Ind.) 444; *Burgess v. Cave*, 52 Mo. 43; *Owens v. Clark*, 78 Tex. 547; *Clarke v. Hogeman*, 13 W. Va. 718. See also *Millar v. Field*, 3 A. K. Marsh. (Ky.) 104.

Payment to the Creditor's Attorneys has been held binding where the assignee recognized and acquiesced in the acts of such attorneys in issuing execution. *Gill v. Truelsen*, 39 Minn. 373.

4. See *supra*, this section, *Assignability at Common Law*.

5. See *supra*, this section, *Assignability under Statutes*.

6. Validity in Foreign States. — *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66. See also *Baker v. Stonebraker*, 34 Mo. 172.

7. Implied Warranty. — *Hanks v. Harris*, 29 17 C. of L.—56

Ark. 323; *Hurd v. Slaten*, 43 Ill. 348; *Johnson v. Boice*, 40 La. Ann. 273, 8 Am. St. Rep. 528; *Lile v. Hopkins*, 12 Smed. & M. (Miss.) 299, 51 Am. Dec. 115; *Furniss v. Ferguson*, 15 N. Y. 437, affirming 3 Robt. (N. Y.) 269; *Furniss v. Ferguson*, 34 N. Y. 485.

8. Assignee Entitled to Recover. — *Emerson v. Knapp*, 75 Mo. App. 92; *Johnson v. Boice*, 40 La. Ann. 273, 8 Am. St. Rep. 528. See also *infra*, this section, *Effect of Reversal or Vacation After Assignment*.

The Assignee of a Part of a Judgment Is Entitled to Recover the Amount Due to him from the assignor who has received a conveyance of property in satisfaction of the judgment debt. *Barnum v. Green*, 13 Colo. App. 254.

Correction of Judgment After Assignment. — A judgment was entered by a clerical error for too large an amount. It was assigned at its face value by the judgment creditor and two successive assignees to a person who paid full value therefor. Afterward the judgment debtor secured the correction of the mistake in a suit against the last assignee. It was held that the last assignee was entitled to recover from his joint assignees the difference between the original face value and the true value. *Miller v. Dugan*, 36 Iowa 433.

9. "Without Recourse"—Liability Not Limited. — *Miller v. Dugan*, 36 Iowa 433; *Emerson v. Knapp*, 75 Mo. App. 92; *Findley v. Smith*, 42 W. Va. 299.

The Words "Without Recourse" in the Assignment of a Judgment can only have the effect to negative the liability of the assignor to the assignee for damages resulting from the breach of the warranties implied in the assignment; viz., that the judgment is unsatisfied, that the



transfers simply his "right, title, and interest, without recourse," he will not be held liable on such implied warranty.<sup>1</sup>

(2) *No Warranty of Payment.* — On the assignment no implied warranty arises as to the solvency of the judgment debtor,<sup>2</sup> and, in the absence of fraud or express agreement, the assignee cannot come back on the assignor because of his failure to make the amount on the judgment.<sup>3</sup>

*c. WHAT RIGHTS PASS WITH ASSIGNMENT.* — The absolute assignment of a judgment passes all the assignor's assignable rights therein to the assignee, and gives to the latter the right to use every remedy, lien, or security available to the assignor as a means of enforcement or indemnity, unless expressly excepted or reserved in the transfer.<sup>4</sup> Thus the assignment carries with it the debt on which the judgment is founded,<sup>5</sup> so long as such judgment remains unreversed;<sup>6</sup> and also the right to the protection of an appeal bond given in a pending appeal from the judgment,<sup>7</sup> or of a bond given by the defendant in a replevin suit to obtain a return of the property.<sup>8</sup>

*Assignor Loses Control of Judgment.* — After the assignment the assignor loses all control of the judgment.<sup>9</sup> He has no attachable interest therein,<sup>10</sup> even where

assignor has a legal title, and that the judgment is a valid and subsisting obligation for the sum for which it purports to be. Notwithstanding these words, the assignment passes title to the judgment with all incidents and advantages resulting therefrom. *Thompson v. First Nat. Bank*, 102 Ga. 696.

*Limitation of Liability.* — Where, on the assignment of a judgment, there was a stipulation that the assignor warranted his title and power to assign only to the extent of the consideration paid, it was held that this was not a limitation upon the extent of the title warranted, but only upon the liability of the assignor in case of a failure of title. *Furniss v. Ferguson*, 34 N. Y. 485.

*1. Transfer by Assignee — No Warranty Implied.* — *Miller v. Dugan*, 36 Iowa 433; *Scofield v. Moore*, 31 Iowa 241.

*2. No Warranty of Debtor's Solvency.* — *Thompson v. First State Bank*, 102 Ga. 696; *Reid v. Ross*, 15 Ind. 265; *Findley v. Smith*, 42 W. Va. 299.

*3. No Warranty of Payment.* — *Robinson v. White*, 4 Litt. (Ky.) 237; *Mohler's Appeal*, 5 Pa. St. 418, 47 Am. Dec. 413; *Jackson v. Crawford*, 12 S. & R. (Pa.) 165, 14 S. & R. (Pa.) 290.

*No Warranty as to Priority of Lien.* — While every assignment imports a warranty of title, and that the assignor has done no act to defeat recovery, it does not imply a guaranty of collection or of the lien as primary. He is only responsible for the sale of a sound debt, unimpaired by secret defenses, payment, or other matter which would render it invalid. *Fassitt v. Middleton*, 47 Pa. St. 214, 86 Am. Dec. 535.

*4. Passes All Assignable Rights and Remedies of Assignor.* — *Wilson v. Wilson*, 3 Del. Ch. 183; *Applegate v. Mason*, 13 Ind. 75; *Schlieman v. Bowlin*, 36 Minn. 198; *Bolen v. Crosby*, 49 N. Y. 183; *Harmon v. Hope*, 87 N. Y. 10. See also *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Brooks v. Sanders*, 110 Ill. 453; *Burgess v. Cave*, 52 Mo. 43.

*Vendor's Lien.* — The assignment of a judgment recovered by the indorsee upon a note given for the purchase money of land carries with it the vendor's lien. *Griffin v. Camack*, 36 Ala. 695, 76 Am. Dec. 344. See also *Thompson v. First State Bank*, 102 Ga. 696; *Ritter v. Cost*, 99 Ind. 80.

*The Judgment Creditor's Right to Supplementary*

*Proceedings* passes to the assignee on the assignment of judgment. *Burns v. Bangert*, 16 Mo. App. 22.

*Rights Against a Sheriff for Negligence in Care of Property* pass to the assignee. *Citizens' Nat. Bank v. Loomis*, 100 Iowa 266.

*Rights Against the Trustee of a Corporation* for failure to make reports of the corporation's assets and liabilities pass to the assignee. *Allen v. Clark*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 338, affirmed 141 N. Y. 584.

*The Assignee of a Defunct Corporation* may enforce a judgment assigned by it. *Leach v. Thomas*, 27 Ill. 457.

*5. Carries Debt on Which Judgment Rendered.* — *Brown v. Scott*, 25 Cal. 189; *Bolen v. Crosby*, 49 N. Y. 183; *Reed v. Lozier*, 48 Hun (N. Y.) 50; *Elsworth v. Caldwell*, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 20.

*Assignment of Debt to Another.* — The assignee of a judgment of allowance in the probate court based on a note has a better title than a person to whom the note was assigned after judgment had been rendered thereon, and can therefore enforce payment as against him. *Julian v. Calkins*, 85 Mo. 202.

*6. The Reversal or Vacation of the judgment* restores the parties therein to their original positions. See *infra*, this section, *Effect of Reversal or Vacation After Assignment*.

*7. Appeal Bond.* — *Ullmann v. Kline*, 87 Ill. 268; *Burt v. Lustig*, 60 N. Y. Super. Ct. 181, affirmed 137 N. Y. 538.

*8. Replevin — Bond for Return of Property.* — *Schlieman v. Bowlin*, 36 Minn. 198.

*9. Assignor Loses Control of Judgment.* — *Stanford v. Connery*, 84 Ga. 731; *Hewett v. Outland*, 2 Ired. Eq. (37 N. Car.) 438; *Clarke v. Hogeman*, 13 W. Va. 718.

*Money Previously Collected.* — The assignment of a judgment and execution conveys away the plaintiff's interest in the further enforcement of it, but not his interest in money which the sheriff has previously collected on it. *Robinson v. Towns*, 30 Ga. 818.

*Assignment Revokes Attorney's Authority* to control the judgment or to receive the money on the execution. *Trumbull v. Nicholson*, 27 Ill. 140.

*10. Assignor Has No Attachable Interest.* — *Hutchinson v. Brown*, 8 App. Cas. (D. C.) 157;



the attachment is instituted before the assignment is formally completed;<sup>1</sup> and he cannot pass title to it by any subsequent assignment.<sup>2</sup> And the fact that a subsequent assignee has no notice of the prior assignment will not help his title, as he can have no better equity than the first assignee who is prior in point of time.<sup>3</sup>

*d. WHAT RIGHTS DO NOT PASS.* — The rights which pass to the assignee along with the judgment are only such as are vested in the assignor by virtue of that particular judgment,<sup>4</sup> and, of course, rights which the assignor has no power to assign do not pass.<sup>5</sup>

*e. ASSIGNEE'S TITLE NO BETTER THAN ASSIGNOR'S.* — The rule of *caveat emptor* applies as well to the assignment of a judgment as to that of any other personal property. The assignee stands in no better position than the assignor,<sup>6</sup> and if the latter has no title to the judgment, he can convey none to the assignee.<sup>7</sup>

*Ives v. Addison*, 39 Kan. 172; *Knapp v. Standley*, 45 Mo. App. 264; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Bechtel v. Lauer Brewing Co.*, 21 Pa. Co. Ct. 449.

As to the effect of payment by the judgment debtor in garnishment proceedings by creditors of the assignor, see *supra*, this section, *Rights of Judgment Debtor Before Notice*.

*Creditor Bound to Same Extent as Assignor.* — Where a judgment has been assigned for a fair and honest consideration, a subsequent attaching creditor of the assignor is bound by the assignment to the same extent as the assignor. *Towanda First Nat. Bank v. Ladd*, 126 Pa. St. 188.

*Where an Execution Was Levied on a Judgment Debtor's Land* by an assignee, it was held that a subsequent levy on the land by a creditor of the assignor could not prevail against the rights of the assignee, nor render invalid a deed to the land afterwards made to him by the assignor. *Cushman v. Carpenter*, 8 Cush. (Mass.) 388.

*1. Attachment Before Formalities Complied With.* — *Knapp v. Standley*, 45 Mo. App. 264. See also *Bechtel v. Lauer Brewing Co.*, 21 Pa. Co. Ct. 449; *Hutchinson v. Brown*, 8 App. Cas. (D. C.) 157. Compare *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157.

*2. Cannot Pass Title by Subsequent Assignment.* — *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Stanford v. Connery*, 84 Ga. 731; *Pearson v. Talbot*, 4 Litt. (Ky.) 435; *Clarke v. Hogeman*, 13 W. Va. 718. See also *infra*, this section, *Assignee's Title No Better than Assignor's*.

*3. Lack of Notice No Aid to Subsequent Assignee.* — *Mitchell v. Hackett*, 25 Cal. 538, 85 Am. Dec. 151; *Clarke v. Hogeman*, 13 W. Va. 718. But see *Campbell's Appeal*, 29 Pa. St. 401, 72 Am. Dec. 641.

*4. Only Rights Attaching to Judgment Pass.* — *Timberlake v. Powell*, 99 N. Car. 233.

*Separate Judgments Against Two Defendants.* — Where, in an action against two defendants, separate judgments were rendered against each, it was held that the assignee of one of the judgments had no power to release the other defendant. *Whitemore v. Judd Linseed, etc., Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708.

*5. Fraud in Stipulation.* — The assignment will not carry with it a right of action for fraud inducing the judgment creditor to enter into an agreement as to enforcing the judg-

ment; nor is such right of action susceptible of assignment so as to authorize the assignee to sue in his own name. *Borst v. Baldwin*, 30 Barb. (N. Y.) 180.

*Attachment Bond Running to Sheriff.* — In *Michigan* an assignment of a judgment in attachment does not carry with it the legal title to the bond. *Forrest v. O'Donnell*, 42 Mich. 556.

*A Right of Action Against the Clerk for Failure to Index the Judgment Properly* does not pass with the assignment. *Redmond v. Staton*, 116 N. Car. 140.

*6. Assignee Succeeds Only to Rights of Assignor.* — *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Moore v. Robinson*, 35 Ark. 293; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Northam v. Gordon*, 23 Cal. 255; *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Rea v. Forrest*, 88 Ill. 275; *Rider v. Kelso*, 53 Iowa 367; *Walburn v. Chenault*, 43 Kan. 352; *Cox v. Palmer*, 60 Miss. 793; *Towanda First Nat. Bank v. Ladd*, 126 Pa. St. 188; *Sutton v. Sutton*, 26 S. Car. 33; *Weber v. Tschetter*, 1 S. Dak. 205.

As to what equities are binding on the assignee, see *infra*, this section, *Assignee Taking Subject to Equities*.

*Assignment After Satisfaction.* — One who takes an assignment of a judgment after it has been in fact satisfied, but before satisfaction entered on the record, takes subject to the lien of incumbrances which have intervened between the judgment and its assignment. *Traphagen v. Lyons*, 38 N. J. Eq. 613. See also *Beebe v. State Bank*, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353.

*Right to Sue in Federal Court.* — The assignee of a judgment founded on contract cannot maintain any suit thereon in a federal court unless such suit might have been maintained by the assignor. *Walker v. Powers*, 104 U. S. 245.

*7. Assignor Can Convey No Better Title than His Own.* — *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Fore v. Manlove*, 18 Cal. 436; *Stanford v. Connery*, 84 Ga. 731; *Rea v. Forrest*, 88 Ill. 275; *Shields v. Moore*, 84 Ind. 440; *Simpson v. Mercer*, 144 Mass. 413; *Cox v. Palmer*, 60 Miss. 793; *Clarke v. Hogeman*, 13 W. Va. 718. See also *Pearson v. Talbot*, 4 Litt. (Ky.) 435; *Cushman v. Carpenter*, 8 Cush. (Mass.) 388; *Cook v. Armstrong*, 25 Miss. 63; *Childs v. Jones*, 42 N. J. Eq. 458; *Stout v.*



*f.* **GOOD FAITH IN ASSIGNMENT.** — Where the assignment of a judgment is not made in good faith the title will not pass to the assignee.<sup>1</sup>

*g.* **PURCHASE FOR LESS THAN FACE VALUE.** — The fact that the assignee has purchased the judgment for less than its face value will not establish that he was not a purchaser in good faith. Such purchaser has a right to buy as cheaply as he can, and is entitled to recover the full amount of the judgment,<sup>2</sup> unless there are equitable considerations to forbid his doing so.<sup>3</sup>

*h.* **ASSIGNEE TAKING SUBJECT TO EQUITIES** — (1) *General Rule.* — It is a well-settled rule that the assignee of a judgment stands in no better position than his assignor as regards equities existing between the original parties to the judgment, and takes it subject to all the equities and defenses, subsisting at the time of the assignment, which the judgment debtor could have asserted against it in the hands of the judgment creditor, notwithstanding the assignee may have had no notice thereof.<sup>4</sup>

Vankirk, 10 N. J. Eq. 78; Loop v. Gould, 25 Hun (N. Y.) 387; Connor v. Hernstein, 6 Robt. (N. Y.) 552. But see Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641.

**Presumptions in Favor of Prior Assignee.** — Where a party purchases a judgment knowing that there has been a prior assignment of the same, no presumption of law can arise to aid him. The presumptions are in favor of the prior assignee. Stoddard v. Benton, 6 Colo. 508.

**Judgment Fraudulently Revived.** — Where a judgment after it has been satisfied is fraudulently revived, an assignee thereof takes it at his peril. Troup v. Wood, 4 Johns. Ch. (N. Y.) 228.

**Fraudulent Assignment.** — Where an agent has taken an assignment of a judgment against his principal in violation of his duty as agent, he cannot enforce the judgment against his principal, and an assignee of such agent, though without notice of the fraud, stands in no better position than his assignor. Thompson v. Jones, 55 Hun (N. Y.) 268.

**1. Assignment Must Be in Good Faith.** — Empire Land, etc., Co. v. Engley, 18 Colo. 388. See also Frybarger v. Andre, 106 Ind. 337.

**Where a Judgment Creditor Assigned a Judgment to His Attorney for His Own Benefit** it was held that such assignment would not prevent a subsequent settlement by the judgment creditor with his debtor. Baker v. Secor, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 803.

**An Innocent Assignee of a Judgment, Without Notice, actual or constructive, of an injunction, not yet served, against its assignment,** was held entitled to retain the judgment. Robertson v. Segler, 24 S. Car. 387. See also Garland v. Harrison, 17 Mo. 282.

**To Impeach the Validity of an Assignment** the judgment debtor must show not only that there was fraud between the contracting parties, but that he was injured thereby. Long v. Klein, 35 La. Ann. 384.

**Right of Assignor to Rescind for Fraud.** — See Thayer v. Knote, 59 Kan. 181.

**2. Purchase for Less than Face Value.** — Harmon v. Hope, 87 N. Y. 10. See also Inglehart v. Thousand Island Hotel Co., 32 Hun (N. Y.) 377.

**3. Recovery Limited to Amount Paid.** — A person who purchases a judgment at the instance of the judgment debtor, Campion v. Friedberg, 55 Ill. App. 450 (compare Draper v. Gordon, 4

Sandf. Ch. (N. Y.) 210), or who purchases a compromised judgment at the amount agreed on in the compromise, cannot recover from the judgment debtor more than the amount paid for the judgment. Sudden v. Sudden, 26 S. Car. 33.

**4. Assignee Takes Subject to Equities** — *United States.* — U. S. v. Samperyac, Hempst. (U. S.) 118. See also Greene v. Darling, 5 Mason (U. S.) 201.

*Alabama.* — Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611.

*California.* — Wright v. Levy, 12 Cal. 257.

*Delaware.* — Lockwood v. Bates, 1 Del. Ch. 435, 12 Am. Dec. 121.

*Georgia.* — Colquitt v. Bonner, 2 Ga. 155; Rawson v. McJunkins, 27 Ga. 432; Scott v. Harkins, 32 Ga. 302.

*Illinois.* — McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Hughes v. Trahern, 64 Ill. 48; Rea v. Forrest, 88 Ill. 275; Winslow v. Leland, 128 Ill. 304; Yarnell v. Brown, 65 Ill. App. 83.

*Indiana.* — Robeson v. Roberts, 20 Ind. 155, 83 Am. Dec. 308.

*Iowa.* — Burtis v. Cook, 16 Iowa 194; Isett v. Lucas, 17 Iowa 503, 85 Am. Dec. 572; Independent School Dist. v. Schreiner, 46 Iowa 172. See also Edmonds v. Montgomery, 1 Iowa 143.

*Michigan.* — Moore v. Smith, 103 Mich. 387.

*Minnesota.* — Brisbin v. Newhall, 5 Minn. 273.

*New Hampshire.* — Rowe v. Langley, 49 N. H. 395.

*New Jersey.* — Stout v. Vankirk, 10 N. J. Eq. 78; Traphagen v. Lyons, 38 N. J. Eq. 613; Brown v. Hendrickson, 39 N. J. L. 239.

*New York.* — Chamberlin v. Day, 3 Cow. (N. Y.) 353.

*North Carolina.* — Jordan v. Black, 2 Murph. (6 N. Car.) 30.

*Pennsylvania.* — Himes v. Barnitz, 8 Watts (Pa.) 39; Filbert v. Hawks, 8 Watts (Pa.) 443; Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Leonard's Appeal, 94 Pa. St. 168; Mifflin County Nat. Bank's Appeal, 98 Pa. St. 150; Griffiths v. Sears, 112 Pa. St. 523.

*Rhode Island.* — Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564.

*Texas.* — Ellis v. Kerr, (Tex. Civ. App. 1893) 23 S. W. Rep. 1050, 11 Tex. Civ. App. 349; Fleming v. Stansell, 13 Tex. Civ. App. 558; Dutton v. Mason, 21 Tex. Civ. App. 389.



**Assignee Charged with Inspection of Record.** — The assignee is ordinarily charged with the inspection of the record and proceedings in the action in which the judgment was rendered, and is presumed to have notice of all equities disclosed thereby.<sup>1</sup>

**Estoppel of Debtor to Set Up Equity.** — The judgment debtor, however, can estop himself from setting up his equity against the assignee, either by express agreement,<sup>2</sup> or by failing to take advantage of his defense in due time.<sup>3</sup>

(2) *What Equities Not Within the Rule* — (a) **Equities Arising from Other Transactions.** — The rule that the assignee of a judgment takes subject to equities does not apply to equities between the parties to the judgment arising from other and independent transactions.<sup>4</sup>

(b) **Secret Equities of Third Persons.** — So, also, the rule applies only where the equity is asserted by a party to the judgment and is not applicable to the secret equities of third persons.<sup>5</sup> Thus, an assignee who has no notice that his assignor has notice of an unrecorded conveyance made before the rendition of the judgment is not affected by the notice to his assignor.<sup>6</sup>

(3) *Effect of Assignment on Right of Set-off.* — An assignee of a judgment usually takes subject to the judgment debtor's right of set-off against the judgment creditor,<sup>7</sup> and the assignee may use the judgment assigned as a set-off against a judgment held against him by the debtor in the assigned action.<sup>8</sup>

**i. EFFECT OF REVERSAL OR VACATION AFTER ASSIGNMENT — Parties Restored to Original Positions.** — The general rule that on the reversal or vacation of a judgment the parties to the suit are restored to their original rights and liabilities,<sup>9</sup> is not affected by the fact that the judgment is in the hands of an assignee for value. In this regard the assignee occupies no more favorable position than the judgment creditor. The judgment may be attacked in his hands,<sup>10</sup> and on a reversal or vacation thereof the debtor will be restored to his

*Vermont.* — *Downer v. South Royalton Bank*, 39 Vt. 25.

*Wisconsin.* — *Blakesley v. Johnson*, 13 Wis. 530; *Yorton v. Milwaukee, etc.*, R. Co., 62 Wis. 367.

See on the general rule, the title **ASSIGNMENTS**, vol. 2, p. 1080.

It has been held that a judgment debtor cannot have vacated a judgment against him, he having failed to present his defense at the proper time, when he seeks to set aside the judgment after the rights of a *bona fide* assignee have attached. *Le Duc v. Slocumb*, 124 N. Car. 347. See also *Vick v. Pope*, 81 N. Car. 22.

**1. Assignee Presumed to Have Notice of Equities.** — *Hobbs v. Duff*, 23 Cal. 596; *Griffiths v. Sears*, 112 Pa. St. 523.

**Knowledge of Payments on Judgment Binds Assignee.** — *Com. v. Burnett*, (Ky. 1898) 44 S. W. Rep. 966.

**Failure to Inquire as to a Defense Creates Constructive Notice** of the facts which an inquiry would have shown. *Leonard's Appeal*, 94 Pa. St. 168. See also *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121.

**2. Debtor's Certificate of No Defense.** — *Scott's Appeal*, 123 Pa. St. 155. See also *Cook v. McCahill*, 41 N. J. Eq. 69.

**3. Failure to Raise Defense in Time.** — *Doub v. Mason*, 2 Md. 380.

**4. Equities Arising from Other Transactions.** — *Isett v. Lucas*, 17 Iowa 503, 85 Am. Dec. 572; *Davis v. Milburn*, 3 Iowa 163. See also *Le Duc v. Slocumb*, 124 N. Car. 347; *Winton's Appeal*, (Pa. 1886) 5 Atl. Rep. 433.

**5. Not Applicable to Secret Equities of Third**

**Persons.** — *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 35 Am. St. Rep. 210; *Yarnell v. Brown*, 65 Ill. App. 83; *Isett v. Lucas*, 17 Iowa 503, 85 Am. Dec. 572; *Hale v. First Nat. Bank*, 50 Iowa 642; *Garland v. Harrison*, 17 Mo. 282; *Starr v. Haskins*, 26 N. J. Eq. 414; *McCotter v. McCotter*, (N. Y. C. Fl. Gen. T.) 16 Abb. Pr. (N. Y.) 265; *Hendrickson's Appeal*, 24 Pa. St. 363; *Mellon's Appeal*, 96 Pa. St. 475; *Mifflin County Nat. Bank's Appeal*, 98 Pa. St. 150. See also the title **ASSIGNMENTS**, vol. 2, p. 1081.

**6. Assignee Not Affected by Notice to Assignor.** — *Duke v. Clark*, 58 Miss. 465, 59 Miss. 575.

**7. Assignee Takes Subject to Right of Set-off.** — *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76; *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315; *Graves v. Woodbury*, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; *Duncan v. Bloomstick*, 2 McCord L. (S. Car.) 318, 13 Am. Dec. 728. As limiting the right, see *Ramsey's Appeal*, 2 Watts (Pa.) 228, 27 Am. Dec. 301; *Simmons v. Reid*, 31 S. Car. 389, 17 Am. St. Rep. 36.

**For a Full Treatment** of this subject, see the title **SET-OFF, RECOUPMENT, AND COUNTERCLAIM**.

**8. Assignee May Set Off.** — *Brown v. Hendrickson*, 39 N. J. L. 239; *People v. New York Common Pleas*, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495. See for full treatment reference in last note *supra*.

**9. See *supra***, this title, *Direct Attack by Appeal or Writ of Error*.

**10. May Be Vacated in Assignee's Hands.** — *Weber v. Tschetter*, 1 S. Dak. 205.

**An Action to Set Aside a Judgment for Want of Jurisdiction** is maintainable against the assignee



original status.<sup>1</sup>

**Assignee May Recover Consideration.** — Where the judgment is reversed or vacated after assignment, the assignee is entitled to recover the price paid therefor on the ground of failure of consideration.<sup>2</sup>

**XIV. JUDGMENTS IN EVIDENCE.** — This topic falls more appropriately under another title, to which reference is made in the note below.<sup>3</sup>

**JUDICATORY.** — See note 4.

**JUDICIAL.** (See also the titles **BAIL** (IN CIVIL CASES), vol. 3, p. 587; **BAIL AND RECOGNIZANCE** (IN CRIMINAL CASES), vol. 3, p. 651; **CONSTITUTIONAL LAW**, vol. 6, p. 882; **COURTS**, vol. 8, p. 21; **DEPUTY**, vol. 9, p. 368; **DISCRETION**, vol. 9, p. 473; **EMINENT DOMAIN**, vol. 10, p. 1043; **GOVERNOR**, vol. 14, p. 1095; **HABEAS CORPUS**, vol. 15, p. 125; **JUDGE**, *ante*; **JUDICIAL NOTICE**, *post*; **JUDICIAL SALES**, *post*; **JUSTICE OF THE PEACE**; **MANDAMUS**; **PUBLIC OFFICERS**; **SPECIAL ASSESSMENTS**.) — Judicial means of or belonging to a court of justice; of or pertaining to a judge; pertaining to the administration of justice; proper to a court of law; consisting of or resulting from legal inquiry or judgment; as, judicial power or proceedings; a judicial decision, writ, sale, or punishments; determinative; giving judgment.<sup>5</sup>

of the judgment where the person bringing such action is not chargeable with laches. *Magin v. Lamb*, 43 Minn. 80, 19 Am. St. Rep. 215.

**Right of Defendant to Have Default Set Aside.** — The assignee of a judgment by default takes it subject to the right of the defendant to have such default set aside, and to defend the action. *Northam v. Gordon*, 23 Cal. 255.

**1. Debtor Restored to Original Position.** — *Vila v. Weston*, 33 Conn. 42; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Sinclair v. Stanley*, 69 Tex. 718, wherein it was also held that if, after such reversal, the judgment has been re-assigned to the plaintiff therein, he may proceed to a recovery in a new trial unaffected by such assignment.

**Sheriff's Sale Set Aside.** — Where, after the assignment of a judgment under which a sheriff's sale has been made, such judgment is reversed, the sale will be set aside and the property restored to the defendant if no loss or injury will be caused to the assignee thereby. *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.

**2. Assignee May Recover Consideration.** — *Emerson v. Knapp*, 75 Mo. App. 92; *Vila v. Weston*, 33 Conn. 42. See also *supra*, this section, *Implied Warranty*.

But see *Gore v. Poteet*, 101 Tenn. 608, in which it was held that an assignee who had undertaken to assume all risks of collection could not on a reversal of the judgment recover the consideration paid.

**Assignee Not Liable for Costs.** — Where an insolvent plaintiff assigned to his attorney the judgment recovered as security for the attorney's costs, the plaintiff retaining the control and further prosecution of the suit, on an appeal taken by the defendant from such judgment it was held that the attorney was not liable for the costs in case of a reversal. *Wolcott v. Holcomb*, 31 N. Y. 125.

**An Assignment with Power to Compromise a Judgment** has been held to operate as an assignment of the compromise judgment. *Rufe v. Commercial Bank*, 99 Fed. Rep. 650.

**3.** See the title **RECORDS**.

**4. Judicatory.** — The Constitution of *Georgia* provided that the Superior Court should have power to correct errors in inferior *judicatories* by writ of certiorari. In *Macon v. Shaw*, 16 Ga. 185, it was held that the mayor and city council of Macon, in trying and dismissing their marshal under a charge of malpractice in office and neglect of duty by gambling, were acting in the character of a *judicatory*. The court said: "A *judicatory* has been rightly defined to be a court of justice. Was this body acting as a court when it tried the defendant? We think so."

**5. Judicial.** — *Century Dictionary*, quoted in *Yellowstone County v. Northern Pac. R. Co.*, 10 Mont. 420. See also *State v. Judges*, 34 La. Ann. 1116; *Matter of Cooper*, 22 N. Y. 82.

**Judicial Business.** — See the title **SUNDAYS AND HOLIDAYS**.

**Judicial Confessions.** — See the title **CONFESIONS**, vol. 6, pp. 523, 559.

**Judicial Dictum.** — See *Buchner v. Chicago*, etc., R. Co., 60 Wis. 264 (set out under **DICTUM**, vol. 9, p. 452); *Law v. Grommes*, 158 Ill. 492.

**Judicial Discretion.** — See *Faber v. Bruner*, 13 Mo. 541; and **DISCRETION**, vol. 9, p. 473.

**Judicial Duty.** — In *State v. Hathaway*, 115 Mo. 36, it is said: "A *judicial* duty, within the meaning of the constitution, is such a duty as legitimately pertains to an officer in the department designated by the constitution as *judicial*."

**Judicial Errors** are errors growing out of mistaken application of the law to the facts. *Compton v. Cline*, 5 Gratt. (Va.) 139.

**Judicial Mortgage.** — In *Louisiana* a *judicial* mortgage is that which results from judgment. See *Nalle v. Young*, 160 U. S. 624.

**Judicial Officers** are those whose duties relate to the administration of justice, and these must be exercised by the persons appointed for that purpose, and not by a deputy. *Twenty Per Cent. Cases*, 7 Ct. Cl. 293; *State v. Womack*, 4 Wash. 27. See also the title **PUBLIC OFFICERS**.



**Judicial Act.** — A judicial act is defined to be an act involving the exercise of judicial power.<sup>1</sup>

**Judicial and Ministerial.** — The term "judicial" is distinguished from "ministerial" as used in two senses: first, as referring to such bodies or officers as have the power of adjudication upon the rights of persons and property; and, secondly, it is used to express an act of the mind or judgment upon a proposed

**Judicial Opinions — Extra-judicial Opinions.** — In *Warner v. Steamship Uncle Sam*, 9 Cal. 732, it is said: "A *judicial* opinion is one that is on the question before the court; it is the direct, solemn, and deliberate decision of the court upon the issues raised by the record and presented in the argument. \* \* \* An extra-judicial opinion is an opinion given on a question that it was not necessary to decide in the case in which it was given. (*Saunders v. Rowles*, 4 Burr. 2069). Or on a point which was not then the point in question. (*Brown v. Barkham*, 1 Stra. 37). Or, a proposition generally expressed, and which the case, or the circumstances of the case, did not call for. (*Brisbane v. Dacres*, 5 Taunt. 153, 159, 1 E. C. L. 47, 50). Or, an opinion on a point which was not the point argued before the court, or upon which the court pronounced its judgment. (*Polhill v. Walter*, 3 B. & Ad. 122, 23 E. C. L. 41). Or, an opinion not called for by the case, and which it was unnecessary to give. (*Powell v. Lloyd*, 2 Y. & J. 379)." See also *Hagthorp v. Hook*, 1 Gill & J. (Md.) 311; *Phillips v. Pearson*, 27 Md. 255. See further the titles *DICTIONARY*, vol. 9, p. 452; *STARE DECISIS*.

**Judicial Power.** — By the *judicial* power, in respect to the general separation of the departments of government, is generally understood the power to hear and determine controversies between adverse parties and questions in litigation. *Daniels v. People*, 6 Mich. 381. See also *The Fugitive Slave Law*, 1 Blatchf. (U. S.) 635; *Grider v. Tally*, 77 Ala. 424; *People v. Chase*, 165 Ill. 527; *People v. Simon*, 176 Ill. 165; *State v. Hunter*, Cheves L. (S. Car.) 290; and the title *CONSTITUTIONAL LAW*, vol. 6, p. 1053.

**Judicial power** is also defined as the power belonging to or emanating from a judge as such, authority vested in a judge. *Merchants' Nat. Bank v. Jaffray*, 36 Neb. 220.

"*Judicial* power" and "discretionary power" are often used interchangeably. See *DISCRETION*, vol. 9, p. 474, note.

**Same — Distinguished from Jurisdiction.** — In *Silver v. Schuylkill County*, 32 Pa. St. 317, it is said: "Jurisdiction is often confounded with *judicial* power, or its equivalent, *judicial* competence; yet there is a clear distinction between the terms. The *judicial* power of a court extends to all those classes of cases which that court may hear and determine. The jurisdiction of a court is confined to cases actually brought before it, and admits of various degrees; for jurisdiction of a case, as a cause in court, vests the court with authority to call in the parties, and to bring it to a hearing in some form, so as to determine the cause in court, though the determination of the case itself may be beyond its competence. The jurisdiction by which a case may be determined is measured by the *judicial* power of the court, and not by the form in which the case is brought before it."

**Judicial Proceedings.** — As to the provision in the United States Constitution requiring full faith and credit to be given in every state, to *judicial* proceedings of every other state, see the title *FOREIGN JUDGMENTS*, vol. 13, p. 974.

**Same — Canadian Statute.** — An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "*judicial* proceeding" within the meaning of the twenty-ninth section of "The Supreme and Exchequer Courts Act." *King v. Dupuis*, 28 Can. Sup. Ct. 388.

**Judicial Process**, in its largest sense, comprehends all the acts of the court, from the beginning of the proceeding to its end. In a narrower sense it is equivalent to "process," *q. v.* In every sense it is the act of the court. *State v. Guilbert*, 56 Ohio St. 575. See also *Yeager v. Groves*, 78 Ky. 279.

**Judicial Proof** is defined to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a *judicial* manner. *Powell v. State*, 101 Ga. 9.

**Judicial Record.** (See also the title *RECORDS*.) — Blackstone defines a *judicial* record to be where the acts and *judicial* proceedings are enrolled on parchment or paper, for a perpetual memorial and testimony, which rolls are called the records of the court and are of such high supereminent authority that their truth is not to be questioned. 2 Chitty's *Blackstone* 264; *Smith v. Dudley*, 2 Ark. 63.

**A Judicial Trial** means a fair trial, and a verdict given upon a trial rendered unfair by statements or conduct of counsel cannot be sustained. *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596, 37 Am. & Eng. R. Cas. 126.

**Fire Insurance — Change of Title by Judicial Decree** as avoiding policy. See the title *FIRE INSURANCE*, vol. 13, p. 241 *et seq.*

An adjudication of bankruptcy in involuntary proceedings is a change of title by *judicial* decree. *Perry v. Lorillard F. Ins. Co.*, 61 N. Y. 219, 19 Am. Rep. 272.

A foreclosure by advertisement is not. *Loy v. Home Ins. Co.*, 24 Minn. 319.

**1. Judicial Act.** — *Yellowstone County v. Northern Pac. R. Co.*, 10 Mont. 420. See also *Flournoy v. Jeffersonville*, 17 Ind. 170; *Merchants Nat. Bank v. Jaffray*, 36 Neb. 220; *Arkle v. Ohio County*, 41 W. Va. 471.

**Judicial Action** is equivalent to discretion. *People v. Schenectady County*, 35 Barb. (N. Y.) 414. See also *DISCRETION*, vol. 9, p. 473.

**Judicial and Quasi-Judicial.** — In *School Dist. No. Two v. Lambert*, 28 Oregon 209, it is said: "Where the law authorizes a person to hear and determine issues between parties, the granting or refusal of relief demanded therein is a *judicial* act, but where a power vests in judgment or discretion, so that it is of a *judicial* nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer having no authority of a *judicial* character, the expression used is



course of official action, as to an object of corporate power, for the consequences of which the official will not be liable though his act was not well judged, as differing from a ministerial or physical act of an official, for which, if negligently done, he or his superior will be held to answer.<sup>1</sup>

**Judicial and Legislative.** — The distinction between a judicial and legislative act is that the former determines what the law is and what the rights of the parties are, with reference to transactions already had, and the latter prescribes what the law shall be in future cases arising under it.<sup>2</sup>

**Examples.** — In the notes will be found the number of cases in which it is determined whether certain acts are judicial, ministerial, or legislative, whether certain officers are judicial or ministerial officers, whether certain powers are judicial or ministerial, etc.<sup>3</sup>

generally '*quasi-judicial*,' so that where, in the exercise of a power, an officer is vested with a discretion, his act is regarded as *quasi-judicial*. Throop Pub. Off., § 553; U. S. v. Arredondo, 6 Pet. (U. S.) 691; U. S. v. California, etc., Land Co., 148 U. S. 31."

1. Matter of Zborowski, 68 N. Y. 97. And see the titles AGENCY, vol. 1, p. 930; DEPUTY, vol. 9, p. 368; PUBLIC OFFICERS.

**Ministerial and Judicial Distinguished.** — In Land Office v. Smith, 5 Tex. 479, it is said: "The distinction between ministerial and *judicial* and other official acts seems to be that where the law prescribes and defines the duty to be performed, with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial." See also Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 497, 514, 515; Kendall v. U. S., 12 Pet. (U. S.) 524; Brashear v. Mason, 6 How. (U. S.) 100; McElrath v. McIntosh, 1 Hayw. & H. (D. C.) 348, 16 Fed. Cas. No. 8,781; State v. Sullivan, 50 Fed. Rep. 600; *Ex p.* Gist, 26 Ala. 159; Grider v. Tally, 77 Ala. 424; People v. Board of Education, 54 Cal. 375; Reclamation Dist. No. 535 v. Hamilton, 112 Cal. 603; Waldo v. Wallace, 12 Ind. 572; and the title COUNTY COMMISSIONERS, vol. 7, p. 1007.

"In this class of cases the term *judicial* is not used in the sense of appertaining to the judiciary or the administration of justice, but as indicating the exercise of discretion or judgment as distinguished from what is purely ministerial." Gleason v. Peerless Mfg. Co., 1 N. Y. App. Div. 259.

"A ministerial act is that which is done under the orders of a superior — as the sheriff who obeys the mandates of the court. If an officer do an act depending on the exercise of the slightest judgment or discretion on his part, then the act is *judicial* — whatever may be the general functions of the officer." Friedman v. Mathes, 8 Heisk. (Tenn.) 502.

See also MINISTERIAL.

Official action, the result of judgment or discretion — of the exercise of *judicial* power — is a *judicial* act; official action, the result of performing a certain and specific duty arising from fixed and designated facts — from the exercise of a ministerial power — is a ministerial act. Grider v. Tally, 77 Ala. 424.

**Ministerial Acts Performed by Judicial Officer.** — A *judicial* officer may be required by law to

perform ministerial acts, but when performed they do not become *judicial* acts because they were performed by a *judicial* officer. People v. Bush, 40 Cal. 346; Esmeralda County v. Third Judicial Dist. Ct., 18 Nev. 438. See also the title DEPUTY, vol. 9, p. 370 *et seq.*

2. **Judicial and Legislative.** — Sinking-Fund Cases, 99 U. S. 761; People v. Board of Education, 54 Cal. 375; Smith v. Strother, 68 Cal. 197; Wulzen v. San Francisco, 101 Cal. 24; State v. Dews, R. M. Charl. (Ga.) 400; Robertson v. State, 109 Ind. 79; Mabry v. Baxter, 11 Heisk. (Tenn.) 682; Wolfe v. M'Caull, 76 Va. 880. See also Ogden v. Blackledge, 2 Cranch (U. S.) 272; Merrill v. Sherburne, 1 N. H. 203; Bedford v. Shilling, 4 S. & R. (Pa.) 411; and the title CONSTITUTIONAL LAW, vol. 6, pp. 1020, 1053.

**Acts of Legislative Bodies Not Judicial.** — In Spring Valley Water Works v. Bryant, 52 Cal. 133, the passage of a certain preamble in a resolution by the board of supervisors was held not to be an exercise of a *judicial* function, it being an attempt to make law, and not rendering judgment under existing laws.

3. **Allowing a Claim of a County Collector** is not a *judicial* act. Marion County v. Phillips, 45 Mo. 75. See also Matter of Saline County Subscription, 45 Mo. 55.

**Annexation of Territory** to a county and apportioning indebtedness was held not a *judicial* act. Esmeralda County v. Third Judicial Dist. Ct., 18 Nev. 438; People v. Alameda County, 26 Cal. 648.

**An Appeal** is a *judicial* proceeding. Chapell v. Smith, 17 Ga. 69; Jordan v. Hanson, 49 N. H. 199. But compare Tyler v. Alford, 38 Me. 530.

**Appointment and Removal from Office — County Commissioners.** — The board of county supervisors created a certain office and raised the salaries of other officials. It was held that certiorari would lie to review the action of the board. The court says: "When the term *judicial* is applied to the actions of these boards, it is not to be received in the sense usually applied to courts of justice." Robinson v. Sacramento, 16 Cal. 209, citing People v. New York, 5 Barb. (N. Y.) 45; Gillespie v. Broas, 25 Barb. (N. Y.) 378; Onondaga County v. Briggs, 2 Den. (N. Y.) 26; People v. Dutchess County, 9 Wend. (N. Y.) 508. See also the title COUNTY COMMISSIONERS, vol. 7, p. 975, and ENCYC. OF PL. AND PR., vol. 4, p. 1, title CERTIORARI.

In Stern v. People, 102 Ill. 541, it was held that the power to remove a county treasurer conferred on the county board was not a



*judicial* power, but a ministerial or executive power.

An appointment of a member of the board of supervisors by a county judge is a ministerial and not a *judicial* act. *People v. Bush*, 40 Cal. 344.

**Same — Medical and Dental Examiners.** — Appointing a board of medical or dental examiners is not an unconstitutional delegation of *judicial* power. *Wilkins v. State*, 113 Ind. 514; *People v. Hasbrouck*, 11 Utah 291. And see the title CONSTITUTIONAL LAW, vol. 6, p. 1055.

**Same — Police and Fire Officials.** — Their removal was held *judicial* and reviewable by certiorari, in *Gilbert v. Board of Police*, 11 Utah 378.

Power conferred on the governor to remove a police commissioner was held administrative and not *judicial*, in *State v. Hawkins*, 44 Ohio St. 98.

**Same — Supreme Court Commissioner.** — Their appointment was held a *judicial* and not a legislative act, in *State v. Noble*, 118 Ind. 350. See also *People v. Hayne*, 86 Cal. 119; *Striker v. Kelley*, 2 Den. (N. Y.) 323.

**Same — Attorney.** — In admitting attorneys the court acts *judicially*. *Matter of Cooper*, 22 N. Y. 81.

**Same — Process Server.** — The appointment by a justice of the peace, of a process server, was held to be a *judicial* act, in *Ex p. Kellogg*, 6 Vt. 509; *Kelly v. Paris*, 10 Vt. 261; *Ingraham v. Leland*, 19 Vt. 304.

**Same — Clerk of Municipal Court.** — The legislature may authorize the governor to appoint such an official, although the duties of the office are to a certain extent *judicial*. *State v. Le Clare*, 86 Me. 522.

**Same — Hearing Charges Against a Justice of the Peace**, in order, in a proper case, to remove him from office, is an exercise of a *judicial* power. *Arkle v. Ohio County*, 41 W. Va. 471.

**Approving Warrant of Clerk for Salary — Whether Judicial.** — See *State v. Judges*, 34 La. Ann. 1116.

Assessors were held to be *judicial* officers to whom certiorari might issue, in *People v. Walter*, 68 N. Y. 403.

**Allowing an Attachment on a claim not yet due** is a *judicial* act. *Merchants' Nat. Bank v. Jaffray*, 36 Neb. 218. See also *Reid v. Hood*, 2 Nott & M. (S. Car.) 168. *Contra* as to attachment on a debt past due. *Whipple v. Hill*, 36 Neb. 720.

**The Trial of the Right of Property upon Attachment** before a sheriff was held not to be a *judicial* proceeding, in *Rowe v. Bowen*, 28 Ill. 116.

**Auditing and Settling Public Accounts Held Judicial.** — *State v. Staub*, 61 Conn. 554.

**A Board of Education in adopting certain textbooks** exercises legislative not *judicial* power. *People v. Board of Education*, 54 Cal. 375.

**Bond of Trustee.** — In *Tindal v. Drake*, 60 Ala. 177, it was held that a private statute bonding a trustee to execute a trust created by deed was not an exercise of *judicial* functions by the legislature.

**Bond — Taking Bond.** — In *State v. Dunnington*, 12 Md. 340, it was held that the duty imposed upon commissioners, of taking a bond of a collector of taxes, was *judicial* and not ministerial.

**Same — Approving Bond.** — This was held to be a ministerial and not a *judicial* act, in *State v. Lafayette County Ct.*, 41 Mo. 221; *State v. Howard County Ct.*, 41 Mo. 247.

**Same — Clerks of Court.** — Statutes conferring power upon clerks of courts to judge the sufficiency of bonds, do not confer *judicial* power. *People v. Percells*, 8 Ill. 59; *Hawthorn v. People*, 109 Ill. 302.

**Commissioners.** — In *People v. Walter*, 68 N. Y. 403, it was held that the office of town commissioner, under acts authorizing the appointing of certain town commissioners, was strictly ministerial.

In *Downer v. Lent*, 6 Cal. 94, it was held that the board of pilot commissioners was a *quasi-judicial* body.

**Commitment for Crime.** — In *Allor v. Wayne County*, 43 Mich. 76, it was held that the power to examine and commit persons charged with crime beyond the cognizance of a justice of the peace to try, was not in the proper sense of the term *judicial* power.

**Commitment of Children to Industrial School.** — In *Wisconsin Industrial School v. Clark County*, 103 Wis. 662, it was held that the constitutional provision vesting the *judicial* powers of the state in the courts did not prevent the legislature from vesting in a judge at chambers the power to commit children to industrial schools, not as punishment for crime but to furnish the children with needed guardianship. See also the title HOUSES OF REFUGE AND CORRECTION, vol. 15, p. 777.

**Default Judgment.** — In *Kelly v. Van Austin*, 17 Cal. 565, it was held that a clerk entering judgment upon default acted in a merely ministerial capacity and exercised no *judicial* function.

**Docketing Judgment.** — In *In re Worthington*, 7 Biss. (U. S.) 455, 30 Fed. Cas. No. 18,051, a judgment docketed on Christmas Day was held valid on the ground that the act was ministerial and not *judicial*.

**Eminent Domain — Assessment of Damages.** — The assessment of damages for lands taken for public uses is a *judicial* act, but on the principle *stare decisis*, previous cases upholding awards by the commissioners of the board of public works of Chicago were sustained, in *Rich v. Chicago*, 59 Ill. 295.

The assessment may be had before commissioners or special boards or the courts, with or without a jury, as the legislature, within the constitution, may direct. *U. S. v. Jones*, 109 U. S. 519; *Ames v. Lake Superior, etc.*, R. Co., 21 Minn. 241; *Scudder v. Trenton, etc.*, Falls Co., 1 N. J. Eq. 604, 23 Am. Dec. 756; *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Beekman v. Saratoga, etc.*, R. Co., 3 Paige Ch. (N. Y.) 45, 22 Am. Dec. 679.

The assessment when made has the conclusive force of a judgment, and cannot be collaterally attacked. *Charleston, etc.*, R. Co. v. *Hughes*, 105 Ga. 1, 70 Am. St. Rep. 17; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646; *Atchison, etc.*, R. Co. v. *Boerner*, 34 Neb. 240, 33 Am. St. Rep. 637. See also the title EMINENT DOMAIN, vol. 10, p. 1043, and see ENCYC. OF PL. AND PR., same title, vol. 7, p. 544.

A justice of the peace acted ministerially in



appointing freeholders to assess damages sustained by taking land for a public highway, though it was necessary for him to make inquiry as to the fitness of the persons appointed. *Crane v. Camp*, 12 Conn. 464.

**Examining into the Financial Condition of Insurance Companies.**—A statute required the county attorney to examine into the financial condition of insurance companies, and if in his opinion any company did not possess the amount of capital or assets required by law, or in other material things was not complying with the law, to certify the same to the state treasurer. It was held that such action was not the exercise of *judicial* powers, and therefore a writ of prohibition would not issue to restrain the county attorney from making such examination. *Home Ins. Co. v. Flint*, 13 Minn. 244. See also the title *INSURANCE*, vol. 16, p. 824; and see 16 ENCYC. OF PL. AND PR., p. 1093, title *PROHIBITION*.

**Execution.**—In *Kyle v. Evans*, 3 Ala. 482, it was held that the issuance of an execution upon a judgment is an act purely ministerial in its character. See also *People v. Bush*, 40 Cal. 344; *Matter of Rourke*, 13 Nev. 253. But compare *Wertheimer v. Howard*, 30 Mo. 420.

**Where a County Was Attached to Another for Judicial Purposes**, it was held that execution for the purpose of supplementary proceedings, might be issued to the latter county. Said the court: "The language, 'for *judicial* purposes, to enforce civil rights,' manifestly embraces the purpose of enforcing civil rights through a district court, and the issue of an execution to collect a judgment of said court, or to lay a foundation for supplementary proceedings through which to collect the same, clearly falls within this purpose." *Beebe v. Fridley*, 16 Minn. 518.

**Guardians—Further Security.**—The act of a judge in requiring further security from a guardian, is a *judicial* act. *Hamilton v. Williams*, 26 Ala. 527.

**Habeas Corpus.**—Where a statute conferred power on a master commissioner to grant writs of habeas corpus, it was held that this was a *judicial* power, and therefore the statute was unconstitutional. *Shultz v. McPheeters*, 79 Ind. 373.

**Highways.**—In *Nealy v. Brown*, 6 Ill. 10, the laying out and opening of roads by county commissioners was held not to be an exercise of *judicial* powers.

**Infant—Order to Sell Property.**—In *Lemoine v. Ducote*, 45 La. Ann. 857, it was held that an order to sell a minor's property was not a *judicial* act.

**Inquisition of Damages.**—In holding that the writ of inquisition of damages might be executed before a sworn deputy of the sheriff the court, by Kent, C. J., said: "Inquisition is merely an inquest of office, and the act of presiding is ministerial and not *judicial*." *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 70.

**Injunction.**—Granting a temporary injunction is a *judicial* act. *Ex p. Batesville*, etc., R. Co., 39 Ark. 85.

**A Justice of the Peace is a judicial officer.** *Wertheimer v. Howard*, 30 Mo. 420. See also the titles *JUDGE*, *ante*, p. 714; *JUSTICE OF THE PEACE*.

**Land Office.**—As to when the issue of a pat-

ent is ministerial see *General Land Office v. Smith*, 5 Tex. 479.

**License to Foreign Insurance Companies.**—In *State v. Doyle*, 40 Wis. 176, it was held that the acts of the secretary of state in issuing and revoking licenses to foreign insurance companies were ministerial and not *judicial*.

**Liquor License.**—In granting such a license the commissioners act *judicially*. *State v. Tippecanoe County*, 45 Ind. 506. But compare *Grider v. Tally*, 77 Ala. 422.

**Mayor.**—Under the *Indiana* constitution it was held that the mayor of a city was a *judicial* officer, if at the time of his election no order had been made by the city council for the election of a city judge and the mayor acted as such judge. *Waldo v. Wallace*, 12 Ind. 572.

**The Members of a School Board are not judicial officers.** *State v. Womack*, 4 Wash. 27.

**The Service of a Statement for a New Trial is not a judicial business.** *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603.

**Notaries Public.**—In *Chandler v. Nash*, 5 Mich. 409, it was held that, the constitution of *Michigan* having invested the whole *judicial* powers of the state in certain specified courts, the act to provide for the discharge of certain duties required to be performed by Circuit Court commissioners, in so far as it undertook to confer *judicial* powers upon notaries public in certain cases was unconstitutional. See also the title *NOTARIES PUBLIC*.

**Poor Debtor's Oath.**—In *Betts v. Dimon*, 3 Conn. 107, it was held that the determination of the poor debtor's oath was a ministerial and not a *judicial* act.

**Perjury.**—(See also the title *PERJURY*.)—In *M'Gregor v. Thwaites*, 3 B. & C. 24, 10 E. C. L. 6, it was held that a statement made extra-judicially to a magistrate, with a view of asking his advice, was not a *judicial* proceeding.

**Preparatory Action.**—In *Underwood v. McDuffee*, 15 Mich. 361, it is said: "No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed *judicial*. \* \* \* It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes *judicial* power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it."

**Probate Courts.**—For proceedings held to be *judicial* proceedings, see *Fitzsimmons v. Johnson*, 90 Tenn. 416. See also *Overbeck v. Galoway*, 10 Mo. 364; *Cooper County v. Geyer*, 19 Mo. 257; *Bernard v. Calloway County Ct.*, 28 Mo. 37; *St. Louis County v. Lind*, 42 Mo. 348; *Foster v. Dunklin*, 44 Mo. 216.

**Public Buildings—Repairs.**—In holding that the county court has exclusive jurisdiction in the repair of public buildings, the court in *Vitt v. Owens*, 42 Mo. 512, said: "These matters belong to the administrative and ministerial functions of the county courts, and not to the *judicial* branch of their jurisdiction."

**Questions of Fact.**—The determination of questions of fact in equity cases is exercise of *judicial* power, but at law the determination of questions of fact is not a part of *judicial* power. *Callanan v. Judd*, 23 Wis. 349.



**JUDICIALLY.** — Judicially means belonging to or emanating from a judge as such.<sup>1</sup>

**Railroad Commissioners.** — In *State v. New Haven, etc., Co.*, 43 Conn. 352, it was held that the state railroad commissioners were not a *judicial* tribunal and their decision was not a judgment in the sense in which those terms were ordinarily used.

**Record — Making Up Record.** — In *Matthews v. Houghton*, 11 Me. 377, it is said that "a magistrate does not act *judicially* in making up and completing his record."

**The Recorder of the Municipal Court of Bangor** is not a *judicial* officer within the constitution. *Morrison v. McDonald*, 21 Me. 550.

**Referee — Master in Chancery.** — The power to hear causes and report facts or conclusions to the court for its judgment is not *judicial* within the meaning of the constitution. *Shoulitz v. McPheeters*, 79 Ind. 378; *People v. Hayne*, 83 Cal. 111. See also *Tillotson v. Cheetham*, 2 Johns. (N. Y.) 63.

**Seizure.** — The seizure of the books of a distillery by a collector of the internal revenue, upon an order of one of the executive departments of the government, given in the legitimate exercise of its duties, was held not a *judicial* proceeding within section 860 of the Revised Statutes of the United States. *U. S. v. Myers*, 1 Hughes (U. S.) 533.

**Signing Judgment.** — The act of signing a judgment is a ministerial and not a *judicial* act. *Life, etc., Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291.

**Special Assessments.** — A statute authorized the city council to determine the validity of a special assessment. This was held not unconstitutional, as conferring *judicial* power upon the council. *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53. See further the title DRAINS AND SEWERS, vol. 10, p. 220; SPECIAL OR LOCAL ASSESSMENTS.

In *Flournoy v. Jeffersonville*, 17 Ind. 169, it was held that the issuing of a precept for the collection of an assessment for a street improvement was a ministerial and not a *judicial* act.

**Streets.** — In *Patchin v. Brooklyn*, 2 Wend.

(N. Y.) 377, it was held that the action of the judges in the matter of opening streets was *judicial*. See also *Matter of Canal St.*, 11 Wend. (N. Y.) 154; *Matter of Zborowski*, 68 N. Y. 97.

**Subscribing to Railroad Stock.** — In *Matter of Saline County Subscription*, 45 Mo. 52, it was held that the action of the county court in subscribing to railroad stock and issuing bonds for the payment thereof, was a discretionary and not a *judicial* proceeding.

**Summons.** — In *Smith v. Ihling*, 47 Mich. 614, it was held that the issuing of a summons by a justice of the peace was a ministerial act within the Sunday law. See also *Weil v. Geier*, 61 Wis. 414.

**Taxation of Costs** is a *judicial* determination of the matter by officers at law, authorized to adjudicate upon it. *Onondaga County v. Briggs*, 2 Den. (N. Y.) 26.

**Undertaking on Appeal.** — In *State v. California Min. Co.*, 13 Nev. 203, the giving of an undertaking on appeal was held not to be *judicial* business within a Sunday law.

In *Chickering v. Robinson*, 3 Cush. (Mass.) 543, it was held that the taking of a recognizance to prosecute an appeal was a *judicial* act. See also *Way v. Townsend*, 4 Allen (Mass.) 114.

**Waiver of Escheat.** — An act of the legislature waiving escheat is not the exercise of *judicial* power. *Matter of Sticknorth*, 7 Nev. 223.

1. *Com. v. Gane*, 3 Grant Cas. (Pa.) 459.

**Judicially Ascertained.** — A statute provided for individual liability of stockholders, provided that before such liability should occur, all claims against such corporation of the exact amount justly due should be first ascertained. The court said: "The word 'ascertained' in this provision we take to mean '*judicially* ascertained;' and to '*judicially* ascertain' the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount." *Globe Pub. Co. v. State Bank*, 41 Neb. 194.



# JUDICIAL NOTICE.

BY ARCHIBALD R. WATSON.

## I. DEFINITION, 894.

## II. PRELIMINARY OBSERVATIONS, 894.

## III. GENERAL RULE, 895.

1. *Statement of Terms*, 895.
2. *Judicial Notice in Appellate Court*, 896.
3. *Current Terms, Names, Words, Phrases, and Abbreviations*, 896.
  - a. *General Rule*, 896.
  - b. *Current Phrases and Epithets*, 896.
  - c. *Words — Fluctuations of Language*, 896.
  - d. *Abbreviations*, 897.
4. *Elections*, 898.
  - a. *General Elections*, 898.
  - b. *Local Elections*, 898.
5. *Census and Population*, 898.
6. *Facts Relating to Currency and Circulating Medium*, 899.
7. *Weights and Measures*, 900.
8. *Market Values*, 900.
9. *Mortality Tables*, 900.
10. *Public Policy*, 900.
11. *Nature and Characteristics of Domestic Animals*, 900.
12. *Facts Admitted on Demurrer*, 901.

## IV. NECESSITY FOR ACTUAL KNOWLEDGE, 901.

1. *In General*, 901.
2. *Resort to Sources of Information*, 901.

## V. WHETHER JUDICIAL NOTICE CONCLUSIVE, 902.

1. *General Rule*, 902.
2. *Though Evidence Unnecessary, Admission Not Error*, 902.

## VI. FACTS OF USUAL OR UNIFORM OCCURRENCE, 902.

## VII. COURSE OF TIME, NATURE, AND NATURAL PHENOMENA, 903.

1. *In General*, 903.
2. *Coincidence of Days of Week and Month*, 903.
3. *Succession of Seasons*, 904.
4. *Course of Heavenly Bodies*, 904.

## VIII. GEOGRAPHICAL FACTS, 904.

1. *In General*, 904.
2. *Location, Nature, and Navigability of Waters and Watercourses*, 905.
3. *Distances*, 905.
4. *Foreign and Domestic Towns and Cities*, 906.

## IX. HISTORICAL EVENTS, 907.

1. *General Rule*, 907.
2. *Facts Relating to Land Titles*, 907.
3. *War — Existence, History, and Related Transactions*, 907.
4. *Military Occupation, Orders, and Army Lines*, 908.

## X. MATTERS OF ART AND SCIENCE, 909.

1. *General Rule*, 909.
2. *Disputed Theories*, 910.



## JUDICIAL NOTICE.

### XI. SOVEREIGNTY AND SYMBOLS OF SOVEREIGNTY, 910.

### XII. BOUNDARIES — TERRITORIAL EXTENT — CIVIL AND POLITICAL DIVISIONS, 911.

1. *General Rule*, 911.
2. *State Boundaries*, 911.
3. *Division of States into Counties*, 911.
  - a. *In General*, 911.
  - b. *Corporate Existence — Names*, 912.
  - c. *Date of Organization*, 912.
4. *County Boundaries*, 912.
  - a. *In General*, 912.
  - b. *Places Within County*, 912.
5. *Division of Counties into Townships or Towns*, 913
6. *Public Surveys*, 913.
7. *Private Surveys*, 914.

### XIII. PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT, 914.

1. *Generally*, 914.
2. *Departmental Regulations, Proceedings, Records*, 915.
3. *Public Institutions, Commissions, Administrative Boards, etc.*, 916.
4. *Public Officers*, 916.
  - a. *In General*, 916.
  - b. *Particular Officers*, 917.
    - (1) *Sheriffs*, 917.
    - (2) *Justices of the Peace*, 917.
    - (3) *Notaries Public*, 917.
  - c. *Powers, Duties, and Qualifications*, 918.
  - d. *Signatures, Seals, etc.*, 918.
  - e. *Compensation and Terms of Office*, 918.
  - f. *Deputy Officers*, 919.
  - g. *Foreign Officers*, 919.

### XIV. COURTS, COURT OFFICERS, SEALS, RECORDS, AND PROCEEDINGS, 919.

1. *In General*, 919.
2. *Federal Courts — State Courts*, 920.
3. *Courts of Sister States*, 920.
4. *Jurisdiction*, 921.
5. *Terms — Judges — Practice and Procedure*, 921.
6. *Court Officers*, 923.
  - a. *In General*, 923.
  - b. *Attorneys*, 924.
  - c. *Officers of Other Courts*, 924.
7. *Court Seals*, 924.
8. *Records and Proceedings*, 925.
  - a. *In General*, 925.
  - b. *Proceedings in Same Case*, 925.
    - (1) *In General*, 925.
    - (2) *Date of Institution of Suit*, 926.
    - (3) *Tender and Payment into Court*, 926.
    - (4) *Rule in Garnishment Cases*, 926.
  - c. *Proceedings in Other Causes*, 926.

### XV. PUBLIC TREATIES AND RIGHTS THEREUNDER, 928.

### XVI. LAWS AND STATUTES, 928.

1. *In General*, 928.
2. *Public Statutes*, 928.
  - a. *In General*, 928.
  - b. *Legislative Journals*, 930.
3. *What Are Public Statutes Within Rule of Judicial Notice*, 930.
  - a. *In General*, 930.



- b. Statutes Declared to Be Public, 930.*
- c. May Be Local in Application, 931.*
- 4. *Execution of Public Statutes, 931.*
- 5. *Private Statutes, 931.*
- 6. *Constitutional Provisions, 932.*
- 7. *Common Law, 932.*
- 8. *International Law, 933.*
- 9. *Law Merchant, 933.*

## **XVII. PRIVATE CORPORATIONS, 934.**

## **XVIII. MUNICIPAL CORPORATIONS, 936.**

- 1. *In General, 936.*
- 2. *Municipal Powers, 937.*
- 3. *Ordinances, 937.*
- 4. *Officers, 938.*
- 5. *Limits and Subdivisions, 938.*
- 6. *Streets, 939.*
- 7. *Location, 940.*
- 8. *Organization under General Law, 941.*
- 9. *Cities in Other States, 941.*

## **XIX. RAILROADS -- INCORPORATION, CONSTRUCTION, OPERATION, AND RELATED FACTS, 941.**

- 1. *In General, 941.*
- 2. *Incorporation and Corporate Existence, 942.*
- 3. *Construction, 943.*
- 4. *Location, 944.*
- 5. *Operation, 944.*
  - a. In General, 944.*
  - b. Speed, 944.*
  - c. Officers and Agents, 945.*

## **XX. GENERAL AND PARTICULAR CUSTOMS, 945.**

## **XXI. JUDICIAL NOTICE BY STATUTE, 945.**

## **XXII. MISCELLANEOUS, 946.**

- 1. *Things Judicially Noticed, 946.*
- 2. *Things Not Judicially Noticed, 947.*

### **CROSS-REFERENCE.**

*See the title FOREIGN LAWS, vol. 13, p. 1050.*

**I. DEFINITION.** — Judicial notice is the name of a doctrine whereby courts are permitted, in the determination of causes submitted to them, to consider certain facts and regard them as established, without the requirements of allegation and proof.<sup>1</sup>

**II. PRELIMINARY OBSERVATIONS.** — As will be seen hereinafter, the phrase "judicial notice" has frequently been loosely and inaccurately used. But in an article of this nature it is deemed advisable to classify and discuss the subject with reference to the terminology of the cases, rather than to attempt to eliminate all such as upon analysis show an improper use of the term.

1. "The Knowledge Which a Judge Will Officially Take of a fact without proof." And. L. Dict.

Bouvier's Definition. — "A term used to express the doctrine of the acceptance by a court, for the purposes of the case, of the truth of certain notorious facts without requiring proof." Bouv. L. Dict.

Illustration — Leading Case. — Thus in the

leading case of *Brown v. Piper*, 91 U. S. 37, which involved the infringement of a patent, where a material fact in defense of which, however, the court might take judicial notice was not set up by the defendant in his answer, the court said: "The court can take judicial notice of it and give it the same effect as if it had been set up as a defense in the answer and the proof were plenary."



**III. GENERAL RULE — 1. Statement of Terms.** — The general rule in this connection, as nearly as the subject is susceptible of a general rule, is that courts will judicially notice such things as are or should be generally known in their respective jurisdictions.<sup>1</sup>

Courts Will Extend the Scope of Judicial Knowledge so as to keep proper pace with the rapid advance of art, science, and general knowledge. "But there is a prudent limitation to be put upon this principle," it has been said, "so as to confine it to matters of a general and public nature, or such as do not concern individuals or local communities. The facts must be of such age or duration as to have become established as a part of the common knowledge of well-informed persons, at least."<sup>2</sup> It will be observed at the outset that any such rule as that just stated gives wide scope for judicial discretion, with consequent conflict in the cases. Judicial minds differ as to what should be "generally known," and this, in addition to the inaccuracy in the use of the term already adverted to, has produced frequent and irreconcilable contradiction.<sup>3</sup>

**Function to Be Exercised with Caution.** — It has been declared that courts should exercise the function of judicial notice with caution; care must be taken that the requisite notoriety exists, and every reasonable doubt upon the subject should be promptly resolved in the negative.<sup>4</sup>

**It Is Not, of Course, Essential,** in order that courts may exercise the function of judicial notice, that the facts in question should have been formally recorded in any written history or book of science.<sup>5</sup>

**1. General Rule — Statement of Terms — England.** — *Rex v. Woodward*, 1 Moody 323.

*United States.* — *Brown v. Piper*, 91 U. S. 37; *King v. Galloway*, 109 U. S. 99; *Minnesota v. Barber*, 136 U. S. 321; *Whitney v. U. S.*, 167 U. S. 529; *Fowle v. Park*, 48 Fed. Rep. 789; *Terbune v. Phillips*, 99 U. S. 592.

*Alabama.* — *Gordon v. Tweedy*, 74 Ala. 238, 49 Am. Rep. 813; *McDaniel v. State*, 76 Ala. 1. *California.* — *People v. Mayes*, 113 Cal. 618. *Connecticut.* — *State v. Main*, 69 Conn. 133, 61 Am. St. Rep. 30.

*Illinois.* — *Chicago, etc., R. Co. v. Warner*, 108 Ill. 538.

*Iowa.* — *State v. Braskamp*, 87 Iowa 590.

*Maine.* — *White v. Phoenix Ins. Co.*, 83 Me. 279.

*New York.* — *Porter v. Waring*, 69 N. Y. 250; *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615; *Upington v. Corrigan*, 69 Hun (N. Y.) 320; *Matter of Cross*, 85 Hun (N. Y.) 343; *Anderson v. Blood*, 86 Hun (N. Y.) 244.

*Pennsylvania.* — *Kilpatrick v. Com.*, 31 Pa. St. 198.

*Tennessee.* — *Austin v. State*, 101 Tenn. 563.

*Wisconsin.* — *Tewksbury v. Schulenberg*, 41 Wis. 584.

**Matters Beyond Territorial Jurisdiction.** — Judicial notice will not be taken, on appeal, of the existence or operation of telegraph lines of the relator outside of the state in which the court sits. *People v. Tierney*, 57 Hun (N. Y.) 537.

**Political and Social Condition of Country.** — Courts are bound to take judicial notice of the political and social condition of the country which they judicially rule. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113. And see *O'Ferrall v. Davis*, 1 Iowa 560.

**Public Sentiment — Popular Ill Will.** — In an action against a street railway company for damages to property, it was held that the court would take judicial notice of the fact that ex-

treme popular ill will existed towards the defendant, and had but a few weeks before the trial culminated in mob violence. *Geist v. Detroit City R. Co.*, 91 Mich. 446.

**Taxes and Assessment of Taxable Property.** — Courts will take judicial knowledge that land is subject to taxes. *Castro v. Wurzbach*, 13 Tex. 128. And also of the fact that taxable property is not usually assessed at its full value, but only at a percentage of its actual worth. Railroad, etc., *Co. v. Board of Equalizers*, 85 Fed. Rep. 302.

**But the Report of a State Auditor** as to the amounts and various kinds of property in the state subject to taxation is not a document of which the Supreme Court of the United States can take judicial notice. *Wellington First Nat. Bank v. Chapman*, 173 U. S. 295.

**2. Extension of Scope of Judicial Knowledge.** — *Georgia Pac. R. Co. v. Gaines*, 88 Ala. 377; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347.

**Private Concerns Connected with Matters of Public Nature.** — "It is undoubtedly true that judicial notice is not taken of purely private concerns when they are not connected with or necessarily involved in a matter of a public nature; but it is otherwise when they are so connected or involved." *Per Field, J.*, in *Hoyt v. Russell*, 117 U. S. 401.

**3. Practice as Dependent on Particular Circumstances.** — See the opinion in *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615.

**4. Function Exercised with Caution — Doubts Resolved in Negative.** — *Brown v. Piper*, 91 U. S. 37. See also *Miller v. Texas, etc., R. Co.*, 83 Tex. 518, in which case it was observed that there was a growing disposition for the courts to extend the area of judicial knowledge; but they should exercise this power with caution.

**5. Formal Record of Facts Not Essential.** — *Salomon v. State*, 28 Ala. 83; *Austin v. State*, 101 Tenn. 563.



2. **Judicial Notice in Appellate Court.** — It has been held that judicial notice comes in the place of proof and is to be exercised only by a tribunal which has power to pass upon the facts.<sup>1</sup> But the erroneous failure or refusal of the trial court to take judicial notice does not prevent the appellate court from giving proper effect thereto.<sup>2</sup>

3. **Current Terms, Names, Words, Phrases, and Abbreviations** — *a.* **GENERAL RULE.** — The rule is well settled that courts will take judicial notice of the meaning of current terms, names, words, phrases, and abbreviations.<sup>3</sup>

*b.* **CURRENT PHRASES AND EPITHETS.** — Courts will judicially know the meaning and significance of current phrases and epithets.<sup>4</sup>

*c.* **WORDS — FLUCTUATIONS OF LANGUAGE.** — Courts will take judicial notice of the usual and ordinary meaning of words<sup>5</sup> and also of the changes

1. **Judicial Notice in Appellate Court.** — *Wood v. North Western Ins. Co.*, 46 N. Y. 421.

**Act Relating to Inferior Courts — Supreme Court.** — An act which requires the courts of the county in which the articles of an association are recorded to take judicial notice of the existence of corporations formed for such purposes does not, it has been held, require the Supreme Court to take such notice. *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274.

**But Where Private Acts of the Legislature may,** by statute, be judicially noticed, an appellate court may take judicial notice of such acts as appear to have been relied on in the court below. *Hart v. Baltimore*, etc., R. Co., 6 W. Va. 336.

**Opinion of Experts Not Verified by Affidavit.** — An appellate court cannot take judicial notice of the opinion of experts, not verified by affidavit, upon appeal from an order of the court below granting an injunction to restrain a city from discharging sewage into a stream, on the ground that it would pollute the plaintiff's water supply. *Finger v. Kingston*, 56 Hun (N. Y.) 639, 9 N. Y. Supp. 175.

2. **Erroneous Failure or Refusal of Trial Court.** — *Hunter v. New York*, etc., R. Co., 116 N. Y. 615. But *compare Walton v. Stafford*, 14 N. Y. App. Div. 310, where the appellate court refused to take judicial notice of a fact of which the trial court would have taken judicial notice had it been brought to its attention, but was not, as that the first day of a particular month fell on a Sunday.

**Judicial Knowledge of Trial Court Presumed Correct.** — *People v. Mayes*, 113 Cal. 618.

3. **Admissibility of Evidence.** — As courts will take judicial notice of the meaning of ordinary words, terms, and phrases, so evidence explanatory thereof should not be received. *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *Reid v. Piedmont*, etc., L. Ins. Co., 58 Mo. 424; *Koehring v. Muemminghoff*, 61 Mo. 405, 21 Am. Rep. 402; *Fruin v. Crystal R. Co.*, 89 Mo. 404.

4. **Current Phrases and Epithets.** — *Edwards v. San José Printing*, etc., Soc., 99 Cal. 431, 37 Am. St. Rep. 70; *Hoare v. Silverlock*, 12 Q. B. 624, 64 E. C. L. 624; *Grant v. State*, 33 Tex. Crim. 527; *Barker v. State*, 12 Tex. 273.

As to judicial notice of epithets, courts have no right to be ignorant of current phrases which everybody else understands. It was so held in an action by a clergyman for libel, for printing concerning him, while a candidate for Congress, the words, "Then there was that

Iowa Beecher business of his which beat him out of a station at Grass Lake." *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251.

**Billiard Table Distinguished from Other Gaming Tables.** — The court knows judicially what a billiard table is, and that it is not a table at which the game of faro is usually played. *State v. Price*, 12 Gill & J. (Md.) 260, 37 Am. Dec. 81.

**"Faro Bank" — Hawking and Peddling.** — The meaning of the term "faro bank" in a penal statute, and of "hawking and peddling" in a statute requiring a license to pursue that business, will be judicially noticed. *Ward v. State*, 22 Ala. 16; *Sterne v. State*, 20 Ala. 43.

**Playing "Policy."** — But courts will not take judicial notice that playing "policy" is playing a game of chance. *State v. Russell*, 17 Mo. App. 16; *State v. Sellner*, 17 Mo. App. 39.

**"Drawing."** — Nor that the words "drawing" and "Kentucky drawing" designate a game of chance. *State v. Bruner*, 17 Mo. App. 274.

**Nature of Lotteries.** — Courts may take judicial notice of the nature of lotteries and the modes in which they are generally carried on. *Salomon v. State*, 28 Ala. 83.

**"Gift Enterprise."** — The court will take judicial notice that the phrase "gift enterprise" as used in the Revised Statutes of *Indiana* means substantially a scheme for the division or distribution of certain articles of property, to be determined by chance among those who have taken shares in the scheme. *Lohman v. State*, 81 Ind. 15.

5. **Usual Meaning of Words — England.** — *Clementi v. Golding*, 2 Campb. 25.

*Alabama.* — *Watson v. State*, 55 Ala. 158.

*California.* — *Edwards v. San José Printing*, etc., Soc., 99 Cal. 431, 37 Am. St. Rep. 70; *Sinnott v. Colombet*, 107 Cal. 187.

*Illinois.* — *Hill v. Bacon*, 43 Ill. 477.

*Kentucky.* — *Hanns v. Central Kentucky Lunatic Asylum*, (Ky. 1898) 45 S. W. Rep. 890. *Massachusetts.* — *Com. v. Kneeland*, 20 Pick. (Mass.) 239.

*New Jersey.* — *Smith v. Clayton*, 29 N. J. L. 357.

**"Cattle."** — Courts will take notice that the word "cattle" includes horses, mares, etc. *State v. Hambleton*, 22 Mo. 452.

**"Kindergarten."** — The court will judicially know the meaning of the word "kindergarten." *Sinnott v. Colombet*, 107 Cal. 187.

**"Whaling Voyage."** — The meaning of the term "whaling voyage" is not judicially known to the courts, when employed in a pol-



and fluctuations in language and in the import of terms, due to gradual development and evolution.<sup>1</sup>

**d. ABBREVIATIONS.** — Courts will take judicial notice of abbreviations in common use.<sup>2</sup> So, also, courts may judicially recognize the significance of the ordinary contractions or abbreviations of Christian names,<sup>3</sup> as "Thos." for "Thomas,"<sup>4</sup> or "Jas." for "James,"<sup>5</sup> or "Christy" or "Christ." for "Christopher."<sup>6</sup>

**Names in Foreign Language.** — It has been held, however, that the courts of *Minnesota* will not take judicial notice of the spelling or pronunciation of names in the Polish language.<sup>7</sup>

<sup>i</sup>cy of insurance on a vessel, and therefore parol evidence is admissible to show what is the usual scope of such voyages. *Child v. Sun Mut. Ins. Co.*, 3 Sandf. (N. Y.) 26.

**Rule by Statute.** — In *California*, under Code Civ. Pro., § 1875, providing that "courts will take judicial notice of 'the true signification of all English words and phrases, and of all legal expressions,'" courts will take notice that the terms "shafts," "tunnels," "levels," "chutes," "stopes," "uprisers," "crosscuts," "inclines," etc., as applied to mines, are instrumentalities whereby and through which mines are opened, developed, prospected, improved, and worked. *Hines v. Miller*, 122 Cal. 517. And see *Helm v. Chapman*, 66 Cal. 291; *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 512.

**1. Fluctuations and Changes in Language.** — *Vanada v. Hopkins*, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92. Accordingly, in *Langton v. Haggard*, 3 T. B. Mon. (Ky.) 149, the court interpreted the expressions "Kentucky currency" and "currency of the state," which are equivalent in the language used, to mean very different things at different times.

**2. Abbreviations in Common Use.** — *Moseley v. Mastin*, 37 Ala. 216; *Paris v. Lewis*, 85 Ill. 597; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768.

"Adm'r" — "Supt." — Judicial notice may be taken that the abbreviation "adm'r" stands for "administrator." *Moseley v. Mastin*, 37 Ala. 216; and that "supt." stands for "superintendent." *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360.

"C. O. D." — See the title EXPRESS COMPANIES, vol. 12, p. 554.

**Initials Used in Survey and Description of Lands** will be judicially noticed. *Kile v. Yellowhead*, 80 Ill. 208.

"La." — "Mo." — Where an action was brought in Texas on a promissory note payable in New Orleans, but there was no averment in the petition that New Orleans was in Louisiana, it was held that the court could not judicially know that the note was payable in that state. *Andrews v. Hoxie*, 5 Tex. 171. This case was cited in *Ellis v. Park*, 8 Tex. 205, the court in the latter case holding that it could not take judicial notice that "St. Louis, Mo." meant St. Louis in the state of Missouri. In the still later case of *Russell v. Martin*, 15 Tex. 238, it was held that the court could not judicially know that a note made payable in New Orleans, La., was payable in Louisiana, citing and relying on *Ellis v. Park*, 8 Tex. 205. The two latter cases appear to announce a very questionable doctrine, and

are certainly not supported by the earlier case of *Andrews v. Hoxie*, 5 Tex. 171, upon which they apparently rely.

"D. C." — **Dimmit County.** — It has been held that the Texas Court of Appeals would not take judicial notice that "D. C." in a bail bond stood for Dimmit county. *Vivian v. State*, 16 Tex. App. 262.

**Initials of Name of Railroad Company.** — Courts cannot take judicial notice that a railroad company is popularly known by the initial letters of the words constituting its full name; for example, that "C. B. & Q. R. Co." means the Chicago, Burlington & Quincy Railroad Company. *Accola v. Chicago, etc., R. Co.*, 70 Iowa 185. But that judicial notice will be taken that the letters "B. & O." mean the Baltimore & Ohio Railroad Company, see *Ryan v. Baltimore, etc., R. Co.*, 60 Ill. App. 615.

**Printers' Marks.** — In *Johnson v. Robertson*, 31 Md. 476, it was held that courts could not know officially the meaning of printers' marks, "Oct. 3, 4t.," at the foot of an advertisement, or, rather, in the absence of further proof upon the subject, that they would not infer that such marks indicated the date and number of times a notice had been published.

**Vernacular Language — Symbols of Ideas.** — Courts must judicially notice the vernacular language and such abbreviations and symbols of ideas as have been generally adopted and have thereby become a part of the common usage of the language. *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511.

**3. Christian Names.** — *Studstill v. State*, 7 Ga. 2; *Stephen v. State*, 11 Ga. 225; *Fenton v. Perkins*, 3 Mo. 144; *Weaver v. McElhenon*, 13 Mo. 89; *Alsop v. State*, 36 Tex. Crim. 535.

**Contraction, Derivation, Corruption.** — Courts will take judicial notice of the contraction, derivation, and corruption of the names of persons. *Alsop v. State*, 36 Tex. Crim. 535.

**But in an Action to Foreclose a Mortgage** brought by one Edward H. Andrews, in which it was alleged that the defendant made a note and executed the mortgage securing it to E. H. Andrews, it was held that the court would not take judicial notice that E. H. Andrews and the plaintiff were one and the same person, or that E. H. was not the full Christian name of a person. *Andrews v. Wynn*, 4 S. Dak. 40.

4. "Thos." — *Studstill v. State*, 7 Ga. 2.

5. "Jas." — *Stephen v. State*, 11 Ga. 240.

6. "Christy." — *Weaver v. McElhenon*, 13 Mo. 89.

7. **Names in Foreign Language.** — *State v. Johnson*, 26 Minn. 316.



**4. Elections — a. GENERAL ELECTIONS.** — The courts of a state take judicial notice of the general elections held therein, the days for holding them, and the officers to be elected thereat;<sup>1</sup> and also, it has been held, of the results of a general election, the number of votes cast,<sup>2</sup> and the principal political parties having tickets in the field.<sup>3</sup>

**b. LOCAL ELECTIONS.** — It has been held that courts will not take judicial notice of local elections or their results, as the adoption of a local option law, or the adoption of township organization by a county by an election under a general township organization law.<sup>4</sup>

**5. Census and Population.** — The general rule is that courts will take judicial notice of the official census returns.<sup>5</sup> So also, in ascertaining to what class a

**1. General Elections — United States.** — *Mills v. Green*, 159 U. S. 651.

*California.* — *Himmelmenn v. Hoadley*, 44 Cal. 213.

*Illinois.* — *Andrews v. Knox County*, 70 Ill. 65.

*Indiana.* — *State v. Swift*, 69 Ind. 505; *Urmston v. State*, 73 Ind. 175; *Mode v. Beasley*, 143 Ind. 306; *State v. Down*, 148 Ind. 324; *Wampler v. State*, 148 Ind. 557.

*Iowa.* — *Davis v. Best*, 2 Iowa 96; *State v. Minnick*, 15 Iowa 123.

*Kansas.* — *Ellis v. Reddin*, 12 Kan. 306; *Wood v. Bartling*, 16 Kan. 112.

*Minnesota.* — *State v. Stearns*, 72 Minn. 200.

*Missouri.* — *Jackson County v. Arnold*, 135 Mo. 207.

*Nebraska.* — *Kokes v. State*, 55 Neb. 691.

*New York.* — *Rice v. Mead*, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 445.

But the Courts of One State will not take judicial notice of the times of holding the state elections in another state. *Taylor v. Rennie*, 35 Barb. (N. Y.) 272.

**Supplying Omitted Date in Official Commission.** — As courts will take judicial notice of the changes made in the executive department of the government, a commission which omits to show the date of the election of an officer by the legislature may be rendered certain in date by reference to the date of the inauguration of the governor who issued it. *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

**Judicial Notice of Contested Elections.** — See *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816.

**Special Election Called by Executive.** — It seems that the courts may take judicial notice of the fact that on a specified day the executive of a state called a special election for a representative in Congress from a certain district. *U. S. v. Johnson*, 2 Sawy. (U. S.) 482.

**2. Result of Election.** — *Andrews v. Knox County*, 70 Ill. 65; *Mode v. Beasley*, 143 Ind. 306; *State v. Stearns*, 72 Minn. 200.

**Constitutional Amendments.** — Courts will take judicial notice of the fact that an amendment of the state constitution received or failed to receive the requisite number of votes for its adoption at a general election in which it was submitted to the voters. *State v. Swift*, 69 Ind. 505.

But the Ratio that the Number of Voters at an election bears to the whole population in a county or state is not a fact of which the courts can take judicial notice. *Kokes v. State*, 55 Neb. 691.

**3. State v. Downs**, 148 Ind. 324.

**4. Local Option Election.** — See *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Ex p. Reynolds*,

87 Ala. 138; *Whitman v. State*, 80 Md. 410. Compare *contra*, *Rauch v. Com.*, 78 Pa. St. 490.

**Rule by Statute.** — In some states there are statutes providing that the courts may take judicial notice of elections under the local option law. *Puckett v. State*, 71 Miss. 192; *Savage v. Com.*, 84 Va. 582; *Thomas v. Com.*, 90 Va. 92.

**Township Organization.** — See *Rousey v. Wood*, 47 Mo. App. 465.

But that Municipal Corporations Are Authorized by Law to hold elections for municipal officers is a fact within the judicial knowledge of the court. *Gallagher v. State*, 10 Tex. App. 469.

And It Has Been Held that a Custom of Seventh Day Baptists of a certain locality not to vote at an election held on Saturday might receive judicial cognizance. *State v. South Kingstown*, 18 R. I. 258.

**5. Returns of Official Census — California.** — *People v. Williams*, 64 Cal. 87.

*Colorado.* — *In re Constitutionality of Senate Bill No. 293*, 21 Colo. 38.

*Illinois.* — *Worcester Nat. Bank v. Cheney*, 94 Ill. 430; *Chicago, etc., R. Co. v. Baldrige*, 177 Ill. 229.

*Indiana.* — *Kalbrier v. Leonard*, 34 Ind. 497; *Stultz v. State*, 65 Ind. 492; *Hawkins v. Thomas*, 3 Ind. App. 399; *Huntington v. Cast*, 149 Ind. 255.

*Iowa.* — *State v. Braskamp*, 87 Iowa 588; *Bennett v. Marion*, 106 Iowa 628.

*Missouri.* — *State v. Jackson County*, 89 Mo. 237; *State v. Dolan*, 93 Mo. 467; *Savannah v. Dickey*, 33 Mo. App. 522; *State v. Marion County*, 128 Mo. 427.

*Nebraska.* — *Brown v. Lutz*, 36 Neb. 527; *Hornberger v. State*, 47 Neb. 40; *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429; *Kokes v. State*, 55 Neb. 691.

*New York.* — *Merz v. Brooklyn*, 128 N. Y. 617; *Denair v. Brooklyn*, (Brooklyn City Ct. Gen. T.) 5 N. Y. Supp. 835; *Farley v. McConnell*, 7 Lans. (N. Y.) 428.

*Utah.* — *People v. Page*, 6 Utah 353.

**Rule by Statute.** — In some jurisdictions it is expressly provided by statute that judicial notice shall be taken of the census returns. Thus in *Missouri*, by the Act of March 10, 1887, § 15 (Acts 1887, p. 45), it is provided that the courts of the state shall take judicial notice, without proof, of the population of all cities in the state, according to the last enumeration of the inhabitants thereof, state, federal, or municipal, made under any state law or law of the United States. See also *State v. Dolan*, 93 Mo. 467.



county belonged under a classification of counties as required by the constitution for the purpose of regulating the fees and compensation of certain public officers, it was held that the court would take judicial notice of the population of the county according to the preceding United States census.<sup>1</sup>

**State or Federal Census.** — The rule above stated applies whether the census in question is made under the authority of the state or the United States.<sup>2</sup>

**Before Formal Announcement of Results — Public Notoriety.** — Where, though the result of the federal census as to the population of a county had not been formally announced, it had become a matter of public notoriety, it was held that the court would for such reason take cognizance thereof.<sup>3</sup>

**6. Facts Relating to Currency and Circulating Medium.** — The character of the circulating medium and popular language in reference to it are noticed by the courts.<sup>4</sup>

**Value of United States Currency.** — So, also, the courts of the United States will judicially know that the paper bills of United States currency are worth their face value,<sup>5</sup> and that a ten-dollar currency bill of the United States is not and cannot be worth twenty dollars.<sup>6</sup>

So, Also, in an English Case it was held that the court would take judicial notice of the difference in the value of money in the reign of Richard I. and at the present day.<sup>7</sup>

But in Kentucky it was held that the value of the notes of the Bank of the Commonwealth at any particular time would not be judicially noticed.<sup>8</sup>

**1. Population of County.** — *Farley v. McConnell*, 7 Lans. (N. Y.) 428. See also *Worcester Nat. Bank v. Cheney*, 94 Ill. 430.

**2. State or Federal Census.** — *Huntington v. Cast*, 149 Ind. 255.

**School Census.** — The courts of a state will take judicial notice of the school census and its results, taken under the authority of a statute of the state, and by the officers empowered for such purpose. *Kokes v. State*, 55 Neb. 691.

**Municipal Census.** — In *Missouri*, under a statute providing that any city might have a census taken for the purpose of ascertaining its population, it was held that the courts should take judicial notice of the population of Kansas City as shown by its last municipal census. *State v. Dolan*, 93 Mo. 467.

**3. State v. Brskamp**, 87 Iowa 588.

**4. Rule Stated.** — *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149; *Jones v. Overstreet*, 4 T. B. Mon. (Ky.) 547; *Wasson v. Indianapolis First Nat. Bank*, 107 Ind. 206.

**The Following Facts Have Been Judicially Noticed:** *That Coin Is Treated as the Standard of Value in the State.* — *Matter of Sanderson*, 74 Cal. 199.

*The Different Classes of Notes and Bills in Circulation as money at a particular time.* *Hart v. State*, 55 Ind. 599. As that during the civil war gold or silver, or any currency convertible into them, ceased to be a circulating medium in the state. *Riddle v. Hill*, 51 Ala. 224; *Morris v. Morris*, 58 Ala. 443; *Lyon v. Foscue*, 60 Ala. 468.

*The Common Currency of the State at a given time.* *Dillard v. Evans*, 4 Ark. 175.

*That Gold Coin Was Not at the Time Used as Money in the business of the country, but had become an article of merchandise and traffic.* *U. S. v. 4000 American Gold Coin*, 1 Woolw. (U. S.) 217.

*The Currency Demandable on Sale under Execution.* — *Harvey v. Walden*, 23 La. Ann. 163.

*That Contracts Made in 1865 Were Made with*

*Reference to Confederate Money.* — *Buford v. Tucker*, 44 Ala. 89.

*The Value of English Pound Sterling.* — *Butt v. Hoge*, 2 Hilt. (N. Y.) 81.

*The Significance of the Usual Dollar Sign.* — *Fulenwider v. Fulenwider*, 53 Mo. 439.

*Insolvent Condition.* — The courts of *Alabama* will take judicial notice of the fact that the people of that state were, in 1867, in a condition of very great pecuniary embarrassment and insolvency; and that, in consequence thereof, it may not have been practicable for a guardian, at that time, to make a safe loan of a large sum of money without some delay after its receipt. *Ashley v. Martin*, 50 Ala. 537.

**Canadian Currency — Rate of Interest.** — The value of Canada currency and the rate of interest in Canada are not judicially known by courts within the United States. *Kermott v. Ayer*, 11 Mich. 181.

**5. Rule Stated.** — *Gady v. State*, 83 Ala. 51.

**National Currency — Legal Coins — Counterfeiting.** — The courts will recognize the legal coins made at the United States mint pursuant to law and such foreign coins as are made current by law. Hence in prosecutions for counterfeiting it is not necessary to prove that there are genuine coins of which those alleged to have been made are imitations. *U. S. v. Burns*, 5 McLean (U. S.) 23.

**Larceny.** — So, also, the value of American gold and silver coin and of "national currency" notes being fixed by law, no proof of their value is necessary to sustain a conviction for their larceny. *Grant v. State*, 55 Ala. 201.

**6. Value of Ten-dollar Bill.** — *Jones v. State*, 39 Tex. Crim. 387.

**7. English Rule.** — *Bryant v. Foot*, 9 B. & S. 444, L. R. 3 Q. B. 497, 37 L. J. Q. B. 217.

**8. Value of Banknote at Particular Time.** — *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336.

**Depreciation of Paper Currency cannot be judi-**



**Depreciation of Currency During Civil War.** — Nor will judicial notice be taken of the extent of the depreciation of the currency during certain periods of the civil war.<sup>1</sup>

**7. Weights and Measures.** — The legally established standard of weights and measures need not be proved, but is a matter of which courts take judicial cognizance.<sup>2</sup>

**8. Market Values.** — It has been held that a court should take judicial notice of the prices of ordinary labor,<sup>3</sup> but not of the price of grain at any particular date, even though the evidence shows its value within two weeks of the date in question.<sup>4</sup>

**9. Mortality Tables.** — Courts will take judicial notice of the standard mortuary tables, showing the natural expectancy of human life at given ages.<sup>5</sup> But such tables, though admissible on the ground that the court takes judicial notice of their authoritativeness, are not conclusive. Their value in a given case is only analogical.<sup>6</sup>

**10. Public Policy.** — It has been held that courts may take judicial notice of the requirements of public policy, for the purpose of enforcing the observance and preventing the violation thereof.<sup>7</sup>

**11. Nature and Characteristics of Domestic Animals.** — The general rule is

cially known, but must be proved. *Bell v. Waggener*, 7 T. B. Mon. (Ky.) 524.

**"Bank Paper."** — The Court of Appeals cannot *ex officio* notice that damages equal to principal and interest, in a covenant for bank paper dated before the act allowing the recovery in kind, are excessive. *Owens v. Holliday*, 7 T. B. Mon. (Ky.) 297.

**1. Rule Stated.** — *Modawell v. Holmes*, 40 Ala. 391.

But the General Facts connected with the issuing, use, and depreciation of the Confederate currency are matters of general history of which courts should take judicial notice. *Simmons v. Trumbo*, 9 W. Va. 358; *Keppel v. Petersburg R. Co.*, Chase (U. S.) 167.

And that United States Treasury Notes were not equivalent to money in 1868 may be judicially known to the court. *Perrit v. Crouch*, 5 Bush (Ky.) 199.

**2. Weights and Measures.** — *Hockin v. Cooke*, 4 T. R. 314; *Reed v. McWhinnie*, 27 U. C. Q. B. 289; *Mays v. Jennings*, 4 Humph. (Tenn.) 102.

**Various Systems of Measurement.** — It has been held that the court would take judicial notice of the fact that the three customary surveys of logs upon the waters of the Penobscot river, namely, the woods scale, boom scale, and scale below the boom, differ widely from one another. *Putnam v. White*, 76 Me. 551.

**Measurement of Corn — Capacity of Railroad Car.** — But a court cannot take judicial notice of the rule for the measurement of corn in the shuck, nor that a railroad car of given dimensions cannot contain three hundred bushels thereof. *South, etc., Alabama R. Co. v. Wood*, 74 Ala. 449, 49 Am. Rep. 819.

**3. Cost of Clearing Land.** — Where a report of commissioners allowed a cost of twenty-five dollars an acre for clearing land, the court in *Bell v. Barnett*, 2 J. J. Marsh. (Ky.) 516, held that what judicial knowledge it had of the history and topography of the country and of the prices of ordinary labor did not permit it to doubt that such valuation of the cost of clearing was excessively high and palpably unjust.

**4. Price of Grain at Particular Date.** — *Towne v. St. Anthony, etc., Elevator Co.*, 8 N. Dak. 200.

**Market Value of Lead Ore.** — *Cook v. Decker*, 63 Mo. 328.

**Real-property Values.** — It has been held that a court will not take judicial notice that real-property values have been unreasonably increased or diminished under the system adopted for the ultimate equalization of assessments by the state board of equalization. *Dayton v. Multnomah County*, 34 Oregon 239.

**5. Mortality Tables.** — *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Louisville, etc., R. Co. v. Mothershed*, 97 Ala. 261; *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159; *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 518.

**Carlisle Tables.** — For a case in which judicial notice was taken of the Carlisle tables, see *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 518.

**Action on Insurance Policy.** — In an action against an insurance company on a paid-up mutual policy, it was held that mortality tables may be judicially noticed by the court though not offered in evidence. *Abell v. Penn Mut. L. Ins. Co.*, 18 W. Va. 400. But in *Price v. Connecticut Mut. L. Ins. Co.*, 48 Mo. App. 281, it was held that the rule that courts would take judicial notice of ordinary mathematical propositions which experience had rendered axiomatic could not be made applicable to the ascertainment of the present value of a life-insurance policy depending partly on extraneous facts and partly on the accuracy of an intricate computation. *Price v. Connecticut Mut. L. Ins. Co.*, 48 Mo. App. 281.

**6. Not Conclusive.** — *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 518.

**7. Public Policy.** — *French v. Lancaster*, 2 Dak. 346; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767. But compare *Judah v. Vincennes University*, 16 Ind. 56.

**Internal Policy of Foreign State.** — Judicial notice will not be taken of a matter concerning the internal policy of another state. *Pickering v. Fisk*, 6 Vt. 102.



that courts will take judicial notice of the nature and characteristics of domestic animals as being a subject of general and familiar knowledge.<sup>1</sup>

**12. Facts Admitted on Demurrer.** — Although it is generally held that on a demurrer to a pleading all facts well pleaded are admitted to be true, this rule does not apply to allegations which the court judicially knows to be false or erroneous.<sup>2</sup>

**IV. NECESSITY FOR ACTUAL KNOWLEDGE — 1. In General.** — It is not at all necessary to the exercise by the courts of the function of judicial knowledge that the judges should, as individuals, actually know at the time when it is sought to invoke the doctrine the particular fact or facts in question.<sup>3</sup>

**2. Resort to Sources of Information.** — Where the subject is a proper one for judicial notice the judges may, in order accurately to inform themselves, resort to such credible and trustworthy sources of information as are available.<sup>4</sup>

But the Mere Circumstance that Facts Are Stated in Encyclopædias, dictionaries, or other published books of reference does not, it has been held, warrant a court in taking judicial notice thereof, unless they are of such universal notoriety and so generally understood that they may be regarded as "forming part of the common knowledge of every person."<sup>5</sup>

**1. Whether Standing Freight Car Will Frighten Horses.** — *Gilbert v. Flint, etc.*, R. Co., 51 Mich. 488, 47 Am. Rep. 592. And see *Fisk v. Chicago, etc.*, R. Co., 74 Iowa 424.

**Whether Moving Trolley Car Will Frighten Horses.** — *Meyer v. Krauter*, 56 N. J. L. 696.

**Effect of Approaching Train on Cattle Near Track.** — *St. Louis, etc.*, R. Co. v. *Hurst*, 25 Ill. App. 181.

**That a Horse Is "Corporeal Personal Property."** — *Damron v. State*, (Tex. Crim. 1894) 27 S. W. Rep. 7.

**That Mules Are Domestic Animals.** — *State v. Gould*, 26 W. Va. 258.

**Negligence in Management of Horses.** — But in an action for personal injuries caused by being run over by a runaway team, it was held that the question of negligence in the management of the team was for the jury, as the court knew nothing about managing horses. *Chicago City R. Co. v. Smith*, 54 Ill. App. 415.

**Sufficiency of Fence to Restrain Hogs.** — Nor does a court judicially know that a particular fence sufficient to restrain and inclose sheep will also restrain and inclose hogs. *Enders v. McDonald*, 5 Ind. App. 297.

**2. State v. Jarrett**, 17 Md. 309.

**Allegation of Historical Falsehoods.** — *Taylor v. Barclay*, 2 Sim. 213, 7 L. J. Ch. 65.

**Statements in Conflict with Legislative Grant.** — *People v. Oakland Water Front Co.*, 118 Cal. 234.

**Allegation of Invalidity of State Revised Statutes.** — *McLane v. Paschal*, 8 Tex. Civ. App. 398.

**3. Actual Knowledge Unnecessary.** — *Brown v. Piper*, 91 U. S. 37; *Gordon v. Tweedy*, 74 Ala. 238, 49 Am. Rep. 813; *People v. Mayes*, 113 Cal. 618; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560.

**4. Resort to Sources of Information.** — *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.*, 101 U. S. 472; *Jones v. U. S.*, 137 U. S. 202; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *People v. Mayes*, 113 Cal. 618.

**Rule Stated.** — "If the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem

safe and proper." *Per* *Swayne, J.*, in *Brown v. Piper*, 91 U. S. 37.

**Court Records — Histories — Census Enumerations, etc.** — *State v. Wagner*, 61 Me. 178.

**Public Documents.** — *Coffee v. Groover*, 123 U. S. 11.

**President's Messages and Correspondence.** — *Kennett v. Chambers*, 14 How. (U. S.) 47.

**Official Reports and Correspondence of Public Officers.** — *Kirby v. Lewis*, 39 Fed. Rep. 66. And see *U. S. v. Teschmaker*, 22 How. (U. S.) 405; *Romero v. U. S.*, 1 Wall. (U. S.) 742; *Watkins v. Holman*, 16 Pet. (U. S.) 56; *Bryan v. Forsyth*, 19 How. (U. S.) 338; *Gregg v. Forsyth*, 24 How. (U. S.) 179.

**Original Legislative Rolls or Other Official Records.** — *Gardner v. Barney*, 6 Wall. (U. S.) 499; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County*, 105 U. S. 667.

**Inquiries of the Foreign Office or the Department of State.** — *Taylor v. Barclay*, 2 Sim. 226; *Mighell v. Johore*, (1894) 1 Q. B. 149; *The Charkieh*, L. R. 4 A. & E. 59; *Exp. Hitz*, 111 U. S. 766; *In re Baiz*, 135 U. S. 403; *Jones v. U. S.*, 137 U. S. 202; *Underhill v. Hernandez*, 168 U. S. 250. See also *Smith v. U. S.*, 137 U. S. 224; *Key v. U. S.*, 137 U. S. 224.

**Resort to Almanacs.** — *People v. Chee Kee*, 61 Cal. 404; *State v. Morris*, 47 Conn. 179; *Tutton v. Darke*, 5 Hem. & N. 647, 6 Jur. N. S. 983, 29 L. J. Exch. 271, 2 L. T. N. S. 361; *Reg. v. Dyer*, 6 Mod. 41. And see *ALMANAC*, vol. 2, p. 173.

**Rule by Statute.** — The *California Code of Civil Procedure* provides that the court may resort for information upon matters properly within its judicial cognizance, "to appropriate books or documents of reference." See *People v. Mayes*, 113 Cal. 618.

**Date of Organization of County.** — In *Hill v. Grant*, (Tex. Civ. App. 1898) 41 S. W. Rep. 1016, it was held that *Sayles's Early Laws of Texas*, being a work published by private individuals, was not admissible in evidence to show that certain counties were created in whole or in part from another county, or the date of their organization.

**5. Requisites, etc.** — *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444.



Where the Matter Is Not Proper for Judicial Cognizance, even though the judge as an individual may have knowledge thereof, proof of the fact is required.<sup>1</sup>

**V. WHETHER JUDICIAL NOTICE CONCLUSIVE** — 1. General Rule. — The general rule is believed to be that where a court has taken judicial notice of the existence of a fact to which the rule is properly and strictly applicable, such fact may be deemed conclusively established, and all evidence with reference thereto may be rejected.<sup>2</sup>

2. Though Evidence Unnecessary, Admission Not Error. — Although it may be that evidence of a fact proper for judicial cognizance might have been excluded, it has been held that its admission is not error, inasmuch as the parties could not have been prejudiced thereby.<sup>3</sup>

At the Same Time the Usual Practice of the Court Is, and certainly should be, before declaring its judicial knowledge of a fact, to consider all reliable sources of information to which a party in interest may direct the court's attention.<sup>4</sup>

**VI. FACTS OF USUAL OR UNIFORM OCCURRENCE.** — Courts will take judicial notice of the happening of facts of usual and uniform occurrence in the juris-

1. Court's Personal Knowledge. — *Pearson v. Darrington*, 32 Ala. 227; *New Orleans v. Ripley*, 5 La. 121; *Detroit Western Transit, etc., R. Co. v. Crane*, 50 Mich. 182; *State v. Lincoln Gas Co.*, 38 Neb. 33; *State v. School Dist. No. 24*, 38 Neb. 237; *Matter of Van Nostrand*, (Surrogate Ct.) 3 Misc. (N. Y.) 396.

"Of Private and Special Facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge." *Per* Swayne, J., in *Brown v. Piper*, 91 U. S. 37.

In *Ho Ah Kow v. Nunan*, 5 Sawy. (U. S.) 560, however, Mr. Justice Field said. "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know as judges what we see as men." But this, it is believed, was not intended to authorize judicial knowledge of private or particular facts. But see *Robertson v. Meyers*, 7 U. C. Q. B. 423.

On a Motion to Strike a Paper from the Files because never presented to or signed by the judge, it has been held that the judge might act on his personal knowledge of the facts. *Secrist v. Petty*, 109 Ill. 188.

2. Whether Judicial Notice Conclusive — *United States*. — *Schollenberger v. Pennsylvania*, 171 U. S. 1.

*California*. — *Stanley v. McElrath*, (Cal. 1889) 22 Pac. Rep. 673.

*Connecticut*. — *State v. Main*, 69 Conn. 133, 61 Am. St. Rep. 30.

*Illinois*. — *Secrist v. Petty*, 109 Ill. 188.

*Indiana*. — *Madison County v. Burford*, 93 Ind. 383.

*Maine*. — *White v. Phoenix Ins. Co.*, 83 Me. 279.

*Maryland*. — *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1.

*Massachusetts*. — *Com. v. Marzyski*, 149 Mass. 72.

*Michigan*. — *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274.

*New York*. — *Kiernan v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 39; *Steets v. New York El. R. Co.*, 79 Hun (N. Y.) 288.

*Pennsylvania*. — *Lidwinofsky's Petition*, 7 Pa. Dist. 188.

*Tennessee*. — *Austin v. State*, 101 Tenn. 563. *Texas*. — *Galveston, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 428.

Rule by Statute. — Code Civ. Pro. *California*, § 2102, declares that whenever the knowledge of the court is made evidence of a fact by statute, the court is to declare such knowledge to the jury, which is bound to accept it. *People v. Mayes*, 113 Cal. 618.

3. Reception of Evidence Not Error — *United States*. — *Gormley v. Bunyan*, 138 U. S. 623.

*California*. — *People v. Chee Kee*, 61 Cal. 404.

*Connecticut*. — *State v. Morris*, 47 Conn. 179.

*Maryland*. — *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414.

*New York*. — *Case v. Perew*, 46 Hun (N. Y.) 57.

*Pennsylvania*. — *Wilson v. Van Leer*, 127 Pa. St. 371. 14 Am. St. Rep. 854, 24 W. N. C. (Pa.) 289.

It Has Been Intimated that if a court failed to take judicial notice of a fact proper for such cognizance, then the exclusion of evidence to prove it might be error. *White v. Phoenix Ins. Co.*, 83 Me. 281. And see *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522.

4. Evidence Advisory to Court. — See *State v. Main*, 69 Conn. 133, 61 Am. St. Rep. 30; *State v. Wagner*, 61 Me. 178.

Judicial Notice of Lower Court — Effect of Contradictory Affidavits on Appeal. — In *People v. Mayes*, 113 Cal. 618, the court said that as the judicial knowledge of a court does not depend upon the weight of evidence, and is not to be determined upon a consideration of the credibility of witnesses, it is evident that when the court has stated to the jury a fact of which it takes judicial knowledge, the correctness of such statement is not to be controverted or set aside on appeal by affidavits which are merely contradictory of the correctness of such statement.

Estoppel — Admissions by Agreement. — Where the subject is a proper one for judicial cognizance, it will be decided accordingly, irrespective of any question of estoppel or alleged admissions by agreement. *Tucker v. State*, 11 Md. 322.



dictions over which they preside.<sup>1</sup>

**Course of Husbandry.** — A court will take judicial notice of the course of husbandry and agriculture as to the staple crops of the territory of its jurisdiction.<sup>2</sup>

**VII. COURSE OF TIME, NATURE, AND NATURAL PHENOMENA** — 1. In General. — Courts uniformly take judicial notice of the course of time, nature, and natural phenomena.<sup>3</sup>

**2. Coincidence of Days of Week and Month.** — Courts will take judicial notice of the coincidence of the days of the week with the days of the month,<sup>4</sup> as

**1. That Unoccupied Buildings Are More Exposed to Danger from Fire than Occupied Ones.** — *White v. Phoenix Ins. Co.*, 83 Me. 279.

**Insurance.** — That an ordinarily prudent man, having under his control a large manufacturing establishment, will keep the property insured against loss by fire to an amount approximating its actual value. *Hill v. American Surety Co.*, (Wis. 1900) 81 N. W. Rep. 1024.

**Contracts of Purchase of Real Estate.** — The court will take judicial notice that it is not an uncommon occurrence for a party to make a contract to buy real estate, expecting to resell it at a profit before he is compelled to complete under his contract. *Anderson v. Blood*, 86 Hun (N. Y.) 244.

**Effects of Habitual Intoxication.** — *Gurley v. Butler*, 83 Ind. 501.

**That a Fracture of the Skull may produce death**, but does not necessarily have that effect in every case. *McDaniel v. State*, 76 Ala. 1.

**Possession of Mental Faculties — Effect of Illiteracy.** — That persons engaged in business who cannot read and write have the faculty of memory more acutely educated and developed, for the reason that they are compelled to depend on it and cannot rely on written memoranda. *Matter of Cross*, 85 Hun (N. Y.) 356.

**Nature and Character of Cigarettes, and Effect upon Human System.** — *Austin v. State*, 101 Tenn. 563. See also *Matter of Jacobs*, 98 N. Y. 113, 50 Am. Rep. 636.

**2. Course of Husbandry — Alabama.** — *Loeb v. Richardson*, 74 Ala. 311; *Wetzler v. Kelly*, 83 Ala. 440.

**Arkansas.** — *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Tomlinson v. Greenfield*, 31 Ark. 557; *Person v. Wright*, 35 Ark. 169.

**California.** — *Mahoney v. Aurrecochea*, 51 Cal. 429.

**Illinois.** — *Dixon v. Niccolls*, 39 Ill. 373, 89 Am. Dec. 312.

**Indiana.** — *Ross v. Boswell*, 60 Ind. 235.

**Iowa.** — *Raridan v. Central Iowa R. Co.*, 69 Iowa 530.

**Missouri.** — *Garth v. Caldwell*, 72 Mo. 622; *Plano Mfg. Co. v. Cunningham*, 73 Mo. App. 376.

**Washington.** — *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454.

**Precise Date of Maturity.** — The precise date when a given crop reaches maturity is not a proper subject for judicial cognizance. *Culverhouse v. Worts*, 32 Mo. App. 419; *Dixon v. Niccolls*, 39 Ill. 373, 89 Am. Dec. 312.

**But the Courts May Judicially Know whether**, at a particular date, the crops of the country would be matured so as to be severed from the soil. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374.

**That Grass Cannot Be Cut and Made into Hay in**

*Iowa* after the month of September is a fact within common knowledge, and one of which the courts will take judicial notice. *Raridan v. Central Iowa R. Co.*, 69 Iowa 527.

**3. Course of Nature.** — *Rex v. Luffe*, 8 East 202; *Fay v. Prentice*, 9 Jur. 876; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1.

**Course and Computation of Time.** — See *Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111; *Allman v. Owen*, 31 Ala. 167.

**Period of Gestation.** — Courts will judicially notice the ordinary period of human gestation. *Rex v. Luffe*, 8 East 193.

**Death of Ancestor — Age of Heirs.** — Where it is evident from the time of the ancestor's death that his children arrived at full age before suit commenced, the court will take notice of the fact judicially. *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 Am. Dec. 255.

**Growth of Trees.** — A court cannot judicially say that each concentric circle or layer in the trunk of a tree marks a year's growth. *Patterson v. McCausland*, 3 Bland (Md.) 69.

**Human Nature.** — A court must take judicial notice of the general and well-known characteristics of human nature. *Ricks v. Broyles*, 78 Ga. 610, 6 Am. St. Rep. 280.

**4. Coincidence of Days of Week with Month — England.** — *Hanson v. Shackleton*, 4 Dowl. 48, 1 Hurl. & W. 542; *Harvy v. Broad*, 2 Salk. 626; *Page v. Faucet*, Cro. Eliz. 227; *Hoyle v. Cornwallis*, 1 Stra. 387; *Holman v. Burrow*, 2 Ld. Raym. 794.

**Alabama.** — *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674; *Rodgers v. State*, 50 Ala. 102; *Brennan v. Vogt*, 97 Ala. 647.

**Florida.** — *Dawkins v. Smithwick*, 4 Fla. 158.

**Indiana.** — *Swales v. Grubbs*, 126 Ind. 106; *Williamson v. Brandenburg*, 6 Ind. App. 97.

**Iowa.** — *Clough v. Goggins*, 40 Iowa 325; *McIntosh v. Lee*, 57 Iowa 356.

**Maine.** — *Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111.

**Maryland.** — *Sasscer v. Farmers Bank*, 4 Md. 409; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415.

**Mississippi.** — *Morgan v. Burrow*, (Miss. 1894) 16 So. Rep. 432.

**New Jersey.** — *Reed v. Wilson*, 41 N. J. L. 29.

**Pennsylvania.** — *Wilson v. Van Leer*, 127 Pa. St. 371, 14 Am. St. Rep. 854.

**Courts Will Also Take Notice of the correspondence of the year of any particular reign with the calendar year.** *Henry v. Cole*, 2 Ld. Raym. 811, 7 Mod. 104; *R. v. Pringle*, 2 M. & Rob. 276. As that the 26th of August, 13 William III., and the 26th of August, 1701, were the same day. *Holman v. Burrow*, 2 Ld. Raym. 794.



on what day of the week a certain day of the month fell,<sup>1</sup> or that a certain day of the month was Sunday.<sup>2</sup>

**Hours of Day.** — But courts will not take judicial notice of the hours of the days in the calendar.<sup>3</sup>

**3. Succession of Seasons.** — Courts will take judicial notice of the revolution of the seasons and the order of their succession.<sup>4</sup> But courts will not take judicial notice of the vicissitudes of climate or the seasons in any particular year.<sup>5</sup>

**4. Course of Heavenly Bodies.** — The courts will take judicial cognizance of the rising and setting of the sun and moon, and of the time thereof on any particular day.<sup>6</sup>

**VIII. GEOGRAPHICAL FACTS — 1. In General.** — Courts will take judicial notice of the prominent geographical facts and features of the country.<sup>7</sup>

**1. Rule Stateu** *Hanson v. Shackelton*, 4 Dowl. 48, 1 Hun. & W. 542; *Wilson v. Van Leer*, 127 Pa. St. 371, 14 Am. St. Rep. 854.

**2. That Particular Day of Month Was Sunday.** — *Brennan v. Vogt*, 97 Ala. 647; *Clough v. Goggins*, 40 Iowa 325; *McIntosh v. Lee*, 57 Iowa 356; *Morgan v. Burrow*, (Miss. 1894) 16 So. Rep. 432. Compare *Walton v. Stafford*, 14 N. Y. App. Div. 310; *Com. v. Gilbert*, 170 Pa. St. 426.

**Sundays and Holidays — Charge to Jury.** — Courts take judicial notice of the days on which Sundays and holidays fall, and in an action on notes alleged to have been executed on Sunday, the court may charge the jury as to the coincidence of the dates in the notes with the first day of the week. *Swales v. Grubbs*, 126 Ind. 106.

**Presentment of Note.** — Thus in an action on a note dated August 12, at four months, an averment that it was presented for payment on December 14 is sufficient to show a presentment at the proper time, as the court will take judicial notice that December 15 fell on Sunday. *Reed v. Wilson*, 41 N. J. L. 29.

**Legal Days.** — Courts will take judicial notice of what are and what are not legal days. *Schlingmann v. Fiedler*, 3 Mo. App. 577.

**3. Hours of Day.** — *Collier v. Nokes*, 2 C. & K. 1012, 61 E. C. L. 1012. But see *infra*, this section, *Course of Heavenly Bodies*.

**4. Succession of Seasons — Arkansas.** — *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Tomlinson v. Greenfield*, 31 Ark. 557; *Person v. Wright*, 35 Ark. 169.

*California.* — *People v. Mayes*, 113 Cal. 618.

*Illinois.* — *Dixon v. Niccolls*, 39 Ill. 373, 89 Am. Dec. 312.

*Indiana.* — *Ross v. Boswell*, 60 Ind. 235.

*Iowa.* — *Raridan v. Central Iowa R. Co.*, 69 Iowa 527.

*Maryland.* — *Patterson v. M'Causland*, 3 Bland (Md.) 69.

*New York.* — *Hunter v. New York, etc., R. Co.*, 116 N. Y. 622.

*Vermont.* — *Gove v. Downer*, 59 Vt. 139.

**Termination of Pasturing Season.** — Courts will not take judicial notice of any particular day or time on which the pasturing season in any year terminates. *Gove v. Downer*, 59 Vt. 139.

**When Waters Open for Navigation.** — Nor will the Supreme Court of *Michigan* take judicial notice that the weather on April 1 in portions of the northern peninsula is always such that the lakes and streams are not open for the

floating of logs. *Haines v. Gibson*, 115 Mich. 131.

**Insurance Risks.** — Courts will take judicial cognizance that marine-insurance risks in November are greater than those in June. *Barry v. Boston Marine Ins. Co.*, 62 Mich. 424.

**5. Vicissitudes of Climate or Seasons,** like other facts, if relied on as important, must be proved by the party seeking advantage therefrom. *Dixon v. Niccolls*, 39 Ill. 373, 89 Am. Dec. 312.

**6. Course of Heavenly Bodies — Alabama.** — *Louisville, etc., R. Co. v. Brinkerhoff*, 119 Ala. 606.

*California.* — *People v. Chee Kee*, 61 Cal. 404; *People v. Mays*, 113 Cal. 618.

*Connecticut.* — *State v. Morris*, 47 Conn. 180. *New York.* — *Case v. Perew*, 46 Hun (N. Y.) 57.

*Ohio.* — *Lake Erie, etc., R. Co. v. Hatch*, 6 Ohio Cir. Ct. 230, 3 Ohio Cir. Dec. 430.

**7. Geographical Facts — England.** — *Cooke v. Wilson*, 2 Jur. N. S. 1094, 26 L. J. C. Pl. 15, 1 C. B. N. S. 153, 87 E. C. L. 153; *Curtis v. March*, 4 Jur. N. S. 1112.

*United States.* — *In re Bryant, Deady (U. S.)* 118; *The Montello*, 11 Wall. (U. S.) 411.

*Alabama.* — *Trenier v. Stewart*, 55 Ala. 458.

*Indiana.* — *Mossman v. Forrest*, 27 Ind. 233; *Neaderhouser v. State*, 28 Ind. 257. And see *Indianapolis, etc., R. Co. v. Stephens*, 28 Ind. 429.

*Kansas.* — *Carey v. Reeves*, 46 Kan. 578.

*Massachusetts.* — *Com. v. King*, 150 Mass. 224.

*Missouri.* — *Price v. Page*, 24 Mo. 65.

*New Hampshire.* — *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

*Texas.* — *McGhee Irrigating Ditch Co. v. Hudson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 175. And see *Wright v. Hawkins*, 28 Tex. 452.

*Wisconsin.* — *Hinckley v. Beckwith*, 23 Wis. 328.

**Illustrations — Geographical Positions of Islands off Coast of State.** — *State v. Wagner*, 61 Me. 178.

**Location of Colony of Government.** — *Cooke v. Wilson*, 2 Jur. N. S. 1094, 26 L. J. C. Pl. 15, 1 C. B. N. S. 153, 87 E. C. L. 153.

**Change of Geographical Names.** — *Trenier v. Stewart*, 55 Ala. 458.

**Climatic Conditions.** — Judicial notice may in some cases extend to geographical lines and subdivisions, and to certain generally well-known climatic conditions that may exist in certain localities, that are known by virtue of



**2. Location, Nature, and Navigability of Waters and Watercourses.** — The courts will, as a rule, take judicial notice of the principal waters and watercourses within the limits of their respective jurisdictions, and also of the well-known bodies of water throughout the world.<sup>1</sup> But the natural condition of such inland rivers as possess no historic consequence has been held to be a fact to be ascertained by proof, and one of which the courts cannot take judicial notice.<sup>2</sup>

The Navigability of Rivers or Other Bodies of Water is also a fact of which judicial notice is frequently taken.<sup>3</sup>

**3. Distances.** — It has been held that the courts of a state or the United States will take judicial notice of the distance between the well-known cities and geographical points of the United States.<sup>4</sup>

the fact that they are part of the general history of the land, such for instance as those which characterize the desert of Sahara. *McGhee Irrigating Ditch Co. v. Hudson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 175.

**Liability of Land to Floods.** — *Kerns v. Perry*, (Tenn. Ch. 1898) 48 S. W. Rep. 729.

**Places on Admiralty Chart.** — *Birrell v. Dryer*, 9 App. Cas. 345, 51 L. T. N. S. 130, 5 Asp. N. Cas. 267.

**Longitude — Difference in Time.** — The courts will take judicial cognizance that a place lies east or west of Greenwich, and consequently has a time different from that of Greenwich. *Curtis v. March*, 4 Jur. N. S. 1112.

**1. Location and Character of Rivers Within or Adjacent to State.** — *Thurman v. Morrison*, 14 B. Mon. (Ky.) 296; *Cash v. Clark County*, 7 Ind. 227; *State v. Wabash Paper Co.*, 21 Ind. App. 167; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. (Mass.) 45; *Talbot v. Hudson*, 16 Gray (Mass.) 424.

The courts of *Alabama*, it has been held, will know without proof that no part of the Tallapoosa river lies within the corporate limits of the city of Montgomery. *Montgomery v. Montgomery, etc., Plank-Road Co.*, 31 Ala. 76.

**Judicial Notice Will Be Taken of Rivers Mentioned in Public Statutes.** — *De Baker v. Southern California R. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237.

**Lake St. Clair.** — Courts of *Michigan* will take judicial notice of such a body of water as Lake St. Clair. *People v. Brooks*, 101 Mich. 98.

**"Asphaltum Lake."** — It has been held that a court might take judicial notice that there is a lake on the island of Trinidad known as the "asphaltum lake," and also that where, in the specifications for street paving, the words "the best quality of refined lake asphaltum" are used, asphalt taken from the lake in the island of Trinidad is intended. *Conde v. Schenectady*, 29 N. Y. App. Div. 604.

**2. Rule Stated.** — *De Camp v. Thomson*, 16 N. Y. App. Div. 528; *Wood v. Fowler*, 26 Kan. 687, 40 Am. Rep. 330. And see *Buffalo Pipe Line Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 107.

**3. Navigable Waters.** — The *Montello*, 11 Wall. (U. S.) 411; *Lands v. 227 Tons of Coal*, 4 Fed. Rep. 478; *Neaderhouser v. State*, 28 Ind. 257. See *McManus v. Carmichael*, 3 Iowa 1; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Com. v. Desmond*, 103 Mass. 445; *Winnipeg Lake Co. v. Young*, 40 N. H. 420.

**Also of Extent of Navigability.** — *Neaderhouser v. State*, 28 Ind. 257; *Com. v. King*, 150 Mass. 221.

**And of Nonnavigability.** — *Ross v. Faust*, 54 Ind. 471, *Clark v. Cambridge, etc., Irrigation, etc., Co.*, 45 Neb. 798.

**But Courts Will Not Take Judicial Notice** of the navigability of rivers or streams the capacity of which is not historical or traditional, though they may in fact be navigable for portions of the year. *Buffalo Pipe Line Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 107.

**Tidal Waters.** — The courts of the United States take judicial notice of the waters in which the tide ebbs and flows. *Metzger v. Post*, 44 N. J. L. 77. See also *Wood v. Fowler*, 26 Kan. 687, 40 Am. Rep. 330.

**Situation of Cities as to Tidal Waters.** — The United States Supreme Court will judicially notice the situation of New Orleans, for the purpose of determining whether the tide ebbs and flows in the river at that place. *Peyroux v. Howard*, 7 Pet. (U. S.) 324.

It has also been held that an American court might take judicial notice that the water of the river Mersey in England is salt, and that the tide ebbs and flows therein to a great height. *Whitney v. Gauche*, 11 La. Ann. 432.

**Land Not Subject to Location.** — Courts will take judicial notice that certain land is not subject to location because it lies under a navigable lake. *Wilcox v. Jackson*, 109 Ill. 261.

**No Tidal Streams in Inland Countries.** — The court will take judicial notice that there are no tidal streams in the inland county of Jackson, in Alabama. *Walker v. Allen*, 72 Ala. 456.

**4. Distances — United States.** — *Mutual Ben. L. Ins. Co. v. Robison*, 58 Fed. Rep. 723, 19 U. S. App. 266; *Rice v. Montgomery*, 4 Biss. (U. S.) 75.

*Illinois.* — *Bruson v. Clark*, 151 Ill. 495.

*Indiana.* — *Fitzpatrick v. Papa*, 89 Ind. 17.

*Iowa.* — *State v. Seery*, 95 Iowa 652.

*Kentucky.* — *McConnell v. Bowdry*, 4 T. B. Mon. (Ky.) 394.

*Pennsylvania.* — *Pearce v. Langfit*, 101 Pa. St. 507, 47 Am. Rep. 737.

*Tennessee.* — *Park v. Larkin*, 1 Overt. (Tenn.) 17; *Bond v. Perkins*, 4 Heisk. (Tenn.) 364.

*Washington.* — *Blumenthal v. Pacific Meat Co.*, 12 Wash. 331.

*Wisconsin.* — *Hinckley v. Beckwith*, 23 Wis. 328; *Siegbert v. Stiles*, 39 Wis. 534.

**Private Land or Mining Claim.** — Courts will not, it has been held, take judicial notice of the situation of a private claim on land or



**Distances Established by Statute.** — Where the distances between certain enumerated cities are established by statute, the courts of the state will take judicial notice thereof.<sup>1</sup>

**Time Consumed in Travel Between Particular Points.** — Whether judicial notice will be taken of the time necessary to travel from one point to another, is a question on which the courts are not agreed.<sup>2</sup>

**4. Foreign and Domestic Towns and Cities.** — It has been held that courts will take judicial notice of the geographical position of the towns within their jurisdictions,<sup>3</sup> but not as to foreign towns or cities.<sup>4</sup> To this latter rule, however, there have been adjudged exceptions.<sup>5</sup>

mining ground or its distance from the seat of government. It is the duty of those claiming the benefit of any exception to the general application of any statute to make such fact appear by proof. *Russell v. Hoyt*, 4 Mont. 412. But on error from the Supreme Court of the United States it was held that as the question involved was the application of a territorial statute which took effect only at the seat of government on its passage, and in other portions of the territory, allowing fifteen miles from the seat of government for each day, on the question whether this act was in force at the place in question on a certain day the court was bound to take judicial notice of the distance of such place from the seat of government. *Hoyt v. Russell*, 117 U. S. 401.

**Distances Between Places in Same County.** — It has been held that courts are not bound to take judicial notice of the local situations and distances of places within a county from each other. *Goodwin v. Appleton*, 22 Me. 453.

But evidence that a crime was committed in a stated county, three miles west of a named town therein, will support a finding that it was committed in a particular county, since the court will take judicial notice that the western boundary of the county is not reached by going three miles west of the place named. *State v. Pennington*, 124 Mo. 388. And for an almost identical case see *Louisville, etc., R. Co. v. Hixon*, 101 Ind. 337.

**1. Distances Fixed by Statute.** — *Hegard v. California Ins. Co.*, (Cal. 1886) 11 Pac. Rep. 594.

**2. The Court Will Not Take Judicial Notice**, it has been held, of the time it takes for cars to travel from one city to another, nor of the number of mails between the cities. *Wiggins v. Burkham*, 10 Wall. (U. S.) 129.

Nor can courts officially take notice how long it might take an express company to carry a sum of money from one designated city to another. *Rice v. Montgomery*, 4 Biss. (U. S.) 75.

**But in a Connecticut Case** it was held that courts might take judicial knowledge that Ansonia in that state is easily accessible from New York by railroad, that there is frequent communication by mail, and that the telegraph may be used and a reply obtained in half an hour and at a trifling expense. *Morgan v. Farrel*, 58 Conn. 413, 18 Am. St. Rep. 282.

**And in Pennsylvania** it was held that judicial notice may be taken of the distance between well-known cities in the United States, and of the ordinary speed of railway trains between such cities. *Pearce v. Langht*, 101 Pa. St. 507,

47 Am. Rep. 737. If this is the true view, then it follows irresistibly that courts take judicial notice of the ordinary time of travel between such points.

**Ordinary Time of Voyage.** — The court will take judicial notice of the usual duration of voyages across the Atlantic by steam or other packet ships, so far as to determine when the presumption of death has attached to one who is proved to have taken passage on a particular vessel which has not been heard from after a great length of time. *Oppenheim v. Leo Wolf*, 3 Sandf. Ch. (N. Y.) 571.

**3. Rule Stated** — *Alabama*. — *Richardson v. Williams*, 2 Port. (Ala.) 239.

*Delaware*. — See *State v. Tootle*, 2 Harr. (Del.) 541.

*Illinois*. — *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415.

*Indiana*. — *Indianapolis, etc., R. Co. v. Stephens*, 28 Ind. 429; *State v. Wabash Paper Co.*, 21 Ind. App. 167.

*Kansas*. — *Wood v. Fowler*, 26 Kan. 687, 40 Am. Rep. 330.

*Texas*. — *Andrews v. Hoxie*, 5 Tex. 171.

*Wisconsin*. — *Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309.

See also *infra*, this title, *Municipal Corporations* — *Location*.

**4. Foreign Cities.** — *Richardson v. Williams*, 2 Port. (Ala.) 239; *Riggin v. Collier*, 6 Mo. 568; *Andrews v. Hoxie*, 5 Tex. 171; *Whitlock v. Castro*, 22 Tex. 108; *Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309.

**Neither Will Courts Judicially Notice** whether there is only one town of a given name in the state or in the world. *Kearney v. King*, 2 B. & Ald. 301; *Andrews v. Hoxie*, 5 Tex. 171; *Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309.

**5. Situation of Town in Foreign Country.** — In *The Peterhoff*, Blatchf. Prize Cas. 463, it was held that the court will take judicial notice of the situation of a town in a foreign country, and that a bar exists at the mouth of the river at which it lies, which vessels of a peculiar draught cannot cross. And see *Wood v. Fowler*, 26 Kan. 687, 40 Am. Rep. 330.

**It Will Be Judicially Noticed that Two Cities**, one in the state and one out of it, are separated only by a river, and that during the winter season communication between them is frequently carried on over the ice. *Siegbert v. Stiles*, 39 Wis. 533.

**Commercial Centres.** — It has been held that the courts of *New York* state will take judicial notice of the large and universally known commercial centres throughout the country, their geographical positions, and the means of communication therewith. *Parks v. Jacob Dold*



**IX. HISTORICAL EVENTS — 1. General Rule.** — Courts take judicial notice of the events constituting the history of the country, as well as of transactions and objects intimately connected therewith.<sup>1</sup>

**Matters of Private Nature.** — But where, it has been held, the matter is one of a private nature, concerning only a few individuals, or mere local communities, some evidence of it should be adduced.<sup>2</sup>

**2. Facts Relating to Land Titles.** — A frequent application of the rule that courts consider, without proof, matters of general history, is observed in cases where the title to land is in question. A number of illustrations of this will be found in the notes below.<sup>3</sup>

**3. War — Existence, History, and Related Transactions.** — The courts will take judicial notice of the existence of a war in which their country is involved,<sup>4</sup> and of the facts of public history connected with its origin, progress,<sup>5</sup> and

Packing Co., (Buffalo Super. Ct. Gen. T.) 6 Misc. (N. Y.) 570; *Dickinson v. Branch Bank*, 12 Ala. 54; *Boardman v. Ewing*, 3 Stew. & P. (Ala.) 293.

**1. Historical Events — General Rule — United States.** — *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Lamb v. Davenport*, 1 Sawy. (U. S.) 609; *U. S. v. One Thousand Five Hundred Bales Cotton*, 15 Int. Rev. Rec. 137; *Meade v. U. S.*, 9 Wall. (U. S.) 691; *De Celis's Case*, 13 Ct. Cl. 117; *Wright v. Hollingsworth*, 1 Pet. (U. S.) 165; *Augusta Bank v. Earle*, 13 Pet. (U. S.) 519.

*Alabama.* — *Ferdinand v. State*, 39 Ala. 706. *California.* — *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528; *Payne v. Treadwell*, 16 Cal. 220.

*Georgia.* — *Williams v. State*, 67 Ga. 260. *Illinois.* — *Worcester Nat. Bank v. Cheney*, 94 Ill. 430.

*Indiana.* — *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135; *Stout v. Grant County*, 107 Ind. 343; *Henthorn v. Doe*, 1 Blackf. (Ind.) 157.

*Iowa.* — *O'Ferrall v. Davis*, 1 Iowa 560. *Kentucky.* — *Hart v. Bodley*, Hard. (Ky.) 104; *Bell v. Barnett*, 2 J. J. Marsh. (Ky.) 516; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 65.

*Missouri.* — *Douthitt v. Stinson*, 63 Mo. 268; *Holmes v. Kring*, 93 Mo. 452.

*New Mexico.* — *Carter v. Territory*, 1 N. Mex. 317.

*New York.* — *McKinnon v. Bliss*, 21 N. Y. 206; *Howard v. Moot*, 64 N. Y. 262; *Hunter v. New York, etc., R. Co.*, 116 N. Y. 621.

*Texas.* — *Magee v. Chadoin*, 30 Tex. 644. *West Virginia.* — *Simmons v. Trumbo*, 9 W. Va. 358.

**As to the Admission of States into the Union.** — *Wright v. Hollingsworth*, 1 Pet. (U. S.) 165.

**The Cession by Virginia of Northwest Territory.** — *Henthorn v. Doe*, 1 Blackf. (Ind.) 157.

**The History of Six Nations in New York.** — *Howard v. Moot*, 64 N. Y. 262.

**The Abolition of Slavery.** — *Ferdinand v. State*, 39 Ala. 706.

**2. Matters of Private Nature.** — *McKinnon v. Bliss*, 21 N. Y. 206.

**3. As for Instance, the Law under Which a Title to Land Was Acquired, although at such time the land was subject to a foreign sovereignty.** *State v. Sais*, 47 Tex. 309.

**The Grant of Land by United States to State.** — *Smith v. Stevens*, 82 Ill. 554.

**That Certain Lands Are Held under Government.** — *Lewis v. Harris*, 31 Ala. 689.

"Clarke's Grant." — *The Indiana Supreme*

Court takes judicial notice, as a part of the history of Indiana, that the grant of land by the state of Virginia commonly known as "Clarke's Grant" (2 Rev. Stat. 1876, p. 711) was surveyed and located adjacent to the falls of the Ohio river, in the counties of Clarke, Floyd, and Scott; and also that the town of Clarksville was located and laid out abutting thr Ohio river, within such grant, in the counties of Clarke and Floyd. *Carr v. McCampbell*, 61 Ind. 97.

**The Colonial Land Grants in Texas.** — *Hatch v. Dunn*, 11 Tex. 708; *Robertson v. Teal*, 9 Tex. 344; *Chadoin v. Magee*, 20 Tex. 476; *Wheeler v. Moody*, 9 Tex. 372; *Williamson v. Simpson*, 16 Tex. 433.

**The Opening of Land Office.** — *Dobbin v. Bryan*, 5 Tex. 276.

**Extinguishment of Indian Title.** — *People v. Snyder*, 41 N. Y. 397.

**Pueblo Indian Title.** — *U. S. v. Lucero*, 1 N. Mex. 422.

**Notoriety of Place Referred to in Description of Land.** — The court will take judicial notice, without proof, of the notoriety of a place referred to in the description of a tract of land, at the time of such description, a battle connected with the history of the settlement of the state having taken place there one year before the description was made. *Hart v. Bodley*, Hard. (Ky.) 104.

**4. Judicial Notice of War.** — *Rex v. De Berenger*, 3 M. & S. 67; *Alcinous v. Nigreu*, 4 El. & Bl. 217, 82 E. C. L. 217; *Dolder v. Huntingfield*, 11 Ves. Jr. 292; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Prize Cases*, 2 Black (U. S.) 635; *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560.

**War Between United States and Foreign Nation.** — *Ogden v. Lund*, 11 Tex. 688.

**War Between Great Britain and Foreign State.** — *Rex v. De Berenger*, 3 M. & S. 67.

**Existence of Civil War.** — *U. S. v. Greathouse*, 2 Abb. (U. S.) 364. See also *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 Am. Dec. 560.

**War Between Indian Tribes.** — Courts will take judicial notice that at a certain time a general war was raging between Indian tribes. *Yelm Jim v. Territory*, 1 Wash. Ter. 63.

**Alien Enemy.** — The court will take judicial notice that a litigant is an alien enemy. *Beckham's Succession*, 16 La. Ann. 352.

**5. Rule Stated.** — *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169.



conclusion.<sup>1</sup> Judicial notice will also be taken of the principal battles and well-known events of a war<sup>2</sup> and of the general conditions produced by it and occurring during its existence.<sup>3</sup>

**War Between Foreign Countries.** — It has been held that the existence of war between foreign countries must, in general, be proved.<sup>4</sup>

**4. Military Occupation, Orders, and Army Lines.** — The war between the states of the American Union gave rise later to many questions of judicial notice of the occupation during the pendency of hostilities, of particular territory by the troops of one belligerent or the other, and of the military orders issued by the various commanders. The adjudications of the courts upon such subjects are given in the notes below.<sup>5</sup>

**Judicial Notice in Advance of Formal Declaration of War.** — On April 16, 1861, a *Texas* court, in an action on a promissory note, where the defendants pleaded that the real plaintiffs were alien enemies, was asked to take judicial cognizance, from newspaper reports that Fort Sumter had been fired upon on April 12, of the fact that a state of war existed between the United States and the Confederate States. But the court held that if Congress, when it should act, should declare the war to have existed anterior to its declaration, the courts, if the question should be subsequently before them, would follow such decision of Congress and would take judicial notice of the existence of the war from the time thus fixed; but for them to attempt to declare its existence as a matter of legal knowledge before any action had been taken by the war-making power would be a most flagrant violation of duty. *Bishop v. Jones*, 28 Tex. 294.

**States in Insurrection During Civil War.** — The court will take judicial notice of the fact that the state of Louisiana was in a state of insurrection against the United States, and that the state of Indiana maintained a legal adhesion to the Constitution and the Union. *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639. And of the same facts with regard to the state of Virginia. *Brooke v. Filer*, 35 Ind. 402. So also in *Missouri* the court will take judicial notice of the fact that it was not one of the states to join the Confederacy. *Douthitt v. Stinson*, 63 Mo. 268.

**1. End of Civil War.** — It was held that the court would take judicial notice of the ending of the civil war although no proclamation to that effect had been made by the President. *U. S. v. One Thousand Five Hundred Bales Cotton*, 10 *Int. Rev. Rec.* 52.

**Re-establishment of Mails.** — So, also, it has been held, courts of *Alabama* may judicially know that the war of the Rebellion was terminated prior to June 1, 1865, and that the United States mails were re-established between Huntsville and New Orleans prior to Dec. 18, 1865. *Turner v. Patton*, 49 Ala. 406.

**2. As of Sherman's March to the Sea.** — *Williams v. State*, 67 Ga. 260.

**The Organization of the Volunteer Army — Causes of Rejection of Applicants.** — *Austin v. State*, 101 Tenn. 563.

**3. General Condition of the State.** — *Holmes v. Kring*, 93 Mo. 452.

**Disturbed Condition of Business During War.** — *Foscue v. Lyon*, 55 Ala. 440.

**Trading with Blockaded Ports.** — *The Mersey, Blatchf. Prize Cas.* 187.

**States Governed by Military Authority under Reconstruction Acts.** — *Gates v. Johnson County*, 36 Tex. 144.

**4. War Between Foreign Countries.** — *Dolder v. Huntingfield*, 11 Ves. Jr. 292.

But where there has been a civil war or revolution in a foreign state, and the executive department of the domestic government has recognized the revolutionary faction in the foreign state as the true and existing government, then, in a sense, the courts take notice of a foreign war and its results. *Underhill v. Hernandez*, 168 U. S. 250.

**5. Military Occupation.** — It has been held that courts will take judicial notice of the fact that certain localities or portions of a state in insurrection were in the possession and under the custody of the forces of the United States. *Rice v. Shook*, 27 Ark. 137, 11 Am. Rep. 783. So it has been held that the Supreme Court of West Virginia would notice judicially that Greenbrier county was, during all the war, within the lines, and that Confederate money was the general currency in circulation there, *Hix v. Hix*, 25 W. Va. 481; and that at a particular time during the war, as in January, 1865, the county of Kanawha was within the military lines of the federal army, *Dryden v. Stephens*, 19 W. Va. 1.

On the other hand it has been held that whether a particular locality was held by one belligerent or the other at a particular time is a question of fact to be determined by proof, not upon judicial knowledge. *McDonald v. Kirby*, 3 Heisk. (Tenn.) 607.

**Army Lines.** — Nor will the court take judicial notice of the lines of the armies in the field at any particular time during the civil war. *Kelley v. Story*, 6 Heisk. (Tenn.) 202. *Compare Bond v. Perkins*, 4 Heisk. (Tenn.) 364.

**Military Orders.** — Nor, it has been held, of the various orders issued by a military commander in the exercise of the military authority conferred upon him. *Burke v. Miltenberger*, 19 Wall. (U. S.) 519. Thus, it has been held, the court cannot take judicial notice of the military orders extending the time for a stay of execution on judgments. *Johnston v. Wilson*, 29 Gratt. (Va.) 379.

**But the Courts Will Take Judicial Notice of a military order so notorious as to be matter of history.** *Holmes v. Kring*, 93 Mo. 452; *Jeffries v. State*, 39 Ala. 655.

**Military Orders Affecting Proceedings of Courts Judicially Noticed.** — *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658; *Taylor v. Graham*, 18 La. Ann. 656, 89 Am. Dec. 699; *New Orleans*



**X. MATTERS OF ART AND SCIENCE — 1. General Rule.**— Courts will take judicial notice of the familiar and generally recognized principles of art and science.<sup>1</sup> But the mere circumstance that facts are found in dictionaries, encyclopædias, or other books of reference, will not warrant a court in taking judicial notice of them, unless they are of the requisite notoriety, or are so connected with facts of such nature, as to partake in a sense of this characteristic.<sup>2</sup>

**Illustrations.**— Pursuant to the rule above stated and within the limitation indicated, courts will take judicial notice of the art of photography, the general nature and utility of the telephone, the effect of electricity upon animal life, and the nature and power of explosives.<sup>3</sup>

Canal, etc., *Co. v. Templeton*, 20 La. Ann. 141, 96 Am. Dec. 385.

**Courts Closed by Civil War.**— The courts will take judicial notice of the time when the courts in a particular county were closed, civil law was suspended, and military law was substituted during the war between the states. *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546.

**Suspension of Statute of Limitations.**— The courts of *Tennessee* take judicial notice of the suspension of the statute of limitations from May 6, 1861, to Jan. 1, 1867. *East Tennessee Iron Mfg. Co. v. Gaskeli*, 2 Lea (Tenn.) 742.

**Individual Loyalty to Union.**— The court cannot take judicial notice that any inhabitant of a state in insurrection against the government in the civil war maintained a loyal adhesion to the Union and the Constitution, or that any part of such state was occupied and controlled by the forces of the United States, or that any particular person had a license or permit from the President to trade. *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

**1. Matters of Art and Science — United States.**— *Brown v. Piper*, 91 U. S. 37; *Richards v. Chase Elevator Co.*, 158 U. S. 299; *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444; *Heaton Peninsular Button-Fastener Co. v. Schlachtmeyer*, 69 Fed. Rep. 592.

*Alabama.*— *Luke v. Calhoun County*, 52 Ala. 115.

*California.*— *Scanlon v. San Francisco, etc., R. Co.*, (Cal. 1898) 55 Pac. Rep. 694.

*Indiana.*— *Jamieson v. Indiana Natural Gas, etc., Co.*, 128 Ind. 555.

*Kentucky.*— *Bryan v. Bechley*, Litt. Sel. Cas. (Ky.) 91, 12 Am. Dec. 276.

*Missouri.*— *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348; *Price v. Connecticut Mut. L. Ins. Co.*, 48 Mo. App. 295; *State v. Hayes*, 78 Mo. 318. See also *Garth v. Caldwell*, 72 Mo. 622; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 665, 42 Am. Rep. 478.

*New York.*— *Kiernan v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 39.

*Pennsylvania.*— *Udderzook v. Com.*, 76 Pa. St. 340.

**Difference of Time in Different Longitudes** will be noticed. *Curtis v. March*, 4 Jur. N. S. 1112.

**Facts of Natural History — Sheep Culture.**— In a decision involving the construction of that section of the tariff act imposing duties on imports of wool and the classification thereunder of a number of bales of the fleeces of North China unimproved sheep, it was held that the court would take judicial notice of the general facts of natural history, and books on sheep

culture, including the fact that the unimproved native sheep of all countries produce fleeces whose value is depreciated more or less by the quantity of hair growing on the belly, flanks, thighs, and arms of the animals. *Lyon v. Marine*, 55 Fed. Rep. 964.

**Power of Gravitation — Operation under Peculiar Circumstances.**— It is not a matter of which a court can take judicial knowledge that the tendency of an inclined grade is to accelerate the motion of a car moving down the incline, and that the law of friction operates against the acceleration of its motion, and that in some degree of inclination the friction of set brakes would equal and neutralize the motion caused by the descending grade. The effect of these causes must be determined by the jury from the evidence introduced on trial. Nor will a court in such case say whether a car moving down a slight incline with the brakes set, would jump or lurch forward with a sudden acceleration of speed if the brakes were released. *Chicago, etc., R. Co. v. Champion*, (Ind. 1892) 32 N. E. Rep. 874.

**Intoxicating Properties of Liquor.**— That distilled spirits are intoxicating will be judicially noticed. *Carmon v. State*, 18 Ind. 450; *Klare v. State*, 43 Ind. 483; *Eagan v. State*, 53 Ind. 162; *Com. v. Peckham*, 2 Gray (Mass.) 514; *Schlicht v. State*, 56 Ind. 173; *Frese v. State*, 23 Fla. 267. The same as to blackberry brandy. *Fenton v. State*, 100 Ind. 598. So also that lager beer is a malt liquor. *Adler v. State*, 55 Ala. 16; *Watson v. State*, 55 Ala. 158; *State v. Goyette*, 11 R. I. 592. See *Briffitt v. State*, 58 Wis. 39, 46 Am. Rep. 621. See further in this connection the title INTOXICATING LIQUORS, *ante*, p. 189.

**2. Must Be of Requisite Notoriety.**— *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444; *Eclipse Mfg. Co. v. Adkins*, 36 Fed. Rep. 554.

**3. Art of Photography.**— *Luke v. Calhoun County*, 52 Ala. 115.

It will also be judicially noticed that the occupation of an ambrotypist and daguerrotypist is intimately connected with that of a photographic painter. *Barnes v. Ingalls*, 39 Ala. 193.

**Accuracy of Reproduction.**— The art of photography will be judicially recognized as a proper means of producing correct likenesses of persons and objects. *Udderzook v. Com.*, 76 Pa. St. 340.

**Nature and Utility of Telephones Judicially Noticed.**— *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

**Electricity — Effect upon Animal Life.**— A court will take notice that electricity developed



2. **Disputed Theories.** — While courts are bound to take notice without proof of such scientific facts as have been demonstrated by universal experience, judicial notice will not be taken of scientific facts concerning which men eminent in the particular branch of learning widely differ.<sup>1</sup>

**XI. SOVEREIGNTY AND SYMBOLS OF SOVEREIGNTY.** — Courts will take judicial cognizance of the national flag and seal of their own government,<sup>2</sup> and also, as a rule, of the sovereignty and symbols of sovereignty of a foreign nation<sup>3</sup> or sister state.<sup>4</sup>

**Judiciary Not to Anticipate Executive Function.** — But as the recognition of the sovereignty of a foreign state is a function of the executive department of the government, the judiciary is not at liberty to anticipate its exercise by judicial notice in advance thereof.<sup>5</sup>

to a high degree of intensity is exceedingly and even fatally dangerous when brought in contact with persons or animals; but the court has no judicial knowledge of the fact that it is dangerous when used by a street-car company in the ordinary way as a motive power. *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 43 Am. & Eng. R. Cas. 208.

**Nature and Power of Explosives Judicially Noticed.** — *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 527.

**Combustibility of Natural Gas Judicially Noticed.** — *Jamieson v. Indiana Natural Gas, etc., Co.*, 128 Ind. 555. And see *Langigan v. New York Gas-Light Co.*, 71 N. Y. 29. See also *Missis-sinewa Min. Co. v. Patton*, 129 Ind. 472, 28 Am. St. Rep. 203.

**Coal Dust.** — But in an action to recover for injuries resulting from a colliery explosion, the court will not take judicial notice that dry, fine coal dust is a dangerous and explosive element in a coal mine. *Cherokee, etc., Coal, etc., Co. v. Wilson*, 47 Kan. 460.

**Inflammability of Coal Oil Judicially Noticed.** — *State v. Hayes*, 78 Mo. 307.

**Actions on Insurance Policies — Nature and Properties of Kerosene.** — In an action on an insurance policy, however, it has been held that the court would not take judicial notice that kerosene is inflammable. *Wood v. North Western Ins. Co.*, 46 N. Y. 421. Nor are the facts that kerosene oil is a refined coal oil or a refined earth oil to be judicially noticed. *Bennett v. North British, etc., Ins. Co.*, 8 Daly (N. Y.) 471.

**Alcohol.** — So also, where a fire policy forbids the keeping by the assured of benzine, camphene, "or any explosive," it is a question of fact for the jury and not one for the judicial knowledge of the court whether certain alcohol kept in the store of the policy holder was an explosive under the particular circumstances of the case. *Willis v. Germania, etc., F. Ins. Co.*, 79 N. Car. 285.

**Benzine — Carbon Oil.** — Courts will not take judicial notice, in an action on an insurance policy, that benzine is of a like nature with camphene or spirit gas in point of inflammability or explosiveness. *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647, 21 Alb. L. J. 114. Nor that benzine or carbon oil is within the description of burning fluids or chemical oils. *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647.

**Gin and Turpentine.** — Nor will courts take judicial notice that gin and turpentine are inflammable liquids, within the meaning of that

term as it is used in a clause in a policy prohibiting the keeping of inflammable liquids for sale on the premises. *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142.

1. **Disputed Theories.** — *St. Louis Gas Light Co. v. American F. Ins. Co.*, 33 Mo. App. 348.

**Properties of Oleomargarine.** — Courts have no judicial knowledge of the merits or defects of oleomargarine so as to be able to declare its hygienic value. *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381, 55 Am. Rep. 693.

2. **Seal of State.** — The law assumes that the seal of a state is known to all its judicial officers. It is a rule of evidence universally recognized that the courts of a state take judicial notice of its seals and of the signatures of the heads of departments. *Com. v. Dunlop*, 89 Va. 431.

**A Deed Executed under the Seal of a State** requires no other proof. *Chicago, etc., R. Co. v. Keegan*, 152 Ill. 413.

**Judicial Notice of State Seals in United States Courts.** — *U. S. v. Johns*, 4 Dall. (U. S.) 416.

**In Like Manner the Courts of England** take judicial notice of the great and privy seals, and also of the sign manual. *Rex v. Miller*, 2 W. Bl. 797, 1 Leach C. C. 74; *Rex v. Gully*, 1 Leach C. C. 98. See also *Melville's Case*, 29 How. St. Tr. 706.

3. **Foreign Nations — England.** — Anonymous, 9 Mod. 66.

*United States.* — *Jones v. U. S.*, 137 U. S. 202; *Kennett v. Chambers*, 14 How. (U. S.) 47; *Schoerken v. Swift, etc., Co.*, 19 Blatchf. (U. S.) 209.

*Connecticut.* — *Griswold v. Pitcairn*, 2 Conn. 85.

*New Hampshire.* — See *Beach v. Workman*, 20 N. H. 383, where the general rule was recognized, but the court refused to take judicial notice of the private seal of the governor of a province.

*New York.* — *Lincoln v. Battelle*, 6 Wend. (N. Y.) 476.

**Organization of Dominion of Canada.** — The Appellate Court of *Illinois* will take judicial notice of the organization of the Dominion of Canada. *Calhoun v. Ross*, 60 Ill. App. 309.

4. **Sister States.** — *Robinson v. Gilman*, 20 Me. 299; *Coit v. Milliken*, 1 Den. (N. Y.) 376; *Ayres v. Stewart*, 1 Overt. (Tenn.) 221.

5. *Berne v. Bank of England*, 9 Ves. Jr. 347; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610. And see *Taylor v. Barclay*, 2 Sim. 213; *Jones v. U. S.*, 137 U. S. 202; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *Underhill v. Hernandez*, 168 U. S. 250; *Kennett v. Chambers*, 14 How. (U. S.) 38.



**XII. BOUNDARIES — TERRITORIAL EXTENT — CIVIL AND POLITICAL DIVISIONS**

— **1. General Rule.** — The courts of a state or country take judicial notice of the territorial extent of its sovereignty, as well as of its civil and political divisions.<sup>1</sup>

**Precise Boundaries of Local Subdivisions.** — Judicial notice will not be taken of precise boundaries of local subdivisions further than they may be disclosed in public statutes, nor can the courts judicially know the quantity of lands embraced in given courses and distances.<sup>2</sup>

**2. State Boundaries.** — The courts of the several states of the United States will take judicial notice of their own boundaries<sup>3</sup> and of the creation of a new state out of the territory of a pre-existing state.<sup>4</sup> The courts of the United States will also notice the boundary lines between the several states of the Union.<sup>5</sup>

**3. Division of States into Counties** — *a. IN GENERAL.* — Courts will take judicial notice of the division of the state into counties.<sup>6</sup>

**1. Boundaries — Civil and Political Divisions — United States.** — *U. S. v. Jackson*, 104 U. S. 41; *Thorson v. Peterson*, 9 Fed. Rep. 517, U. S. v. Johnson, 2 Sawy. (U. S.) 482.

*Dakota.* — *U. S. v. Beebe*, 2 Dak. 292; *French v. Lancaster*, 2 Dak. 346.

*Illinois.* — *Dickenson v. Breeden*, 30 Ill. 279.

*Maine.* — *Goodwin v. Appleton*, 22 Me. 453; *Martin v. Martin*, 51 Me. 366.

*Massachusetts.* — *Com. v. Desmond*, 103 Mass. 445.

*Michigan.* — *La Grange v. Chapman*, 11 Mich. 499.

*New Hampshire.* — *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

*North Carolina.* — *State v. Ray*, 97 N. Car. 570; *State v. Snow*, 117 N. Car. 774.

*South Carolina.* — *State v. Glasgow, Dudley L. (S. Car.)* 40.

*Texas.* — *Ogden v. Lund*, 11 Tex. 688; *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575.

*Canada.* — *McDonald v. Dicaire*, 1 Chs. Chamb. (Ont.) 34.

**Cession of Territory.** — Judicial notice will be taken of the fact that the western portion of New York state was ceded to Massachusetts. *People v. Snyder*, 41 N. Y. 397.

**Judicial Notice by State Courts.** — The boundaries of the United States will be judicially noticed by the courts of *Texas*, at least so far as they coincide with the boundaries of the state. *Ogden v. Lund*, 11 Tex. 688.

**2. Precise Boundaries of Local Subdivisions.** — *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575; *Edwards v. Davis*, 3 Tex. 321.

**Quantity of Lands in Given Courses.** — *Tison v. Smith*, 8 Tex. 147.

**Inference of Fact Versus Judicial Knowledge.** — Although, it has been held, the courts cannot, as a general proposition, take judicial knowledge that a particular tract of land is within the Mississippi and Pacific railroad reserve created by legislative act, yet from their knowledge of the locality, and the extent of the country within which the land is admitted to lie, and of the locality and extent of the reserve as defined by the act, they may deduce that fact as an inference. *Woods v. Durrett*, 28 Tex. 429.

**3. State Boundaries.** — *Gilbert v. Moline Water Power, etc., Co.*, 19 Iowa 319; *State v. Pennington*, 124 Mo. 388; *Thomas v. Stigers*, 5 Pa. St. 480, 39 Pa. St. 486.

**Penn's Agreement with Lord Baltimore.** — The courts of *Pennsylvania* will judicially notice the agreement between Lord Baltimore and William Penn relative to the boundary line between the two provinces of Maryland and Pennsylvania. *Thomas v. Stigers*, 5 Pa. St. 480.

**Disputed Boundaries.** — In *Harrold v. Arrington*, 64 Tex. 233, it was held that it would be judicially known that the political department of the state has always claimed Greer county as a part of the state, and exercised acts of control over it, and that until that department ceased to exercise such control the courts would treat it as subject to the jurisdiction of Texas. The settlement of the boundary line of Texas is not within the scope of the judicial department.

**4. Separation of Kentucky from Virginia.** — *Delano v. Jopling*, 1 Litt. (Ky.) 117, 417; *Holley v. Holley*, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342.

**Formation of West Virginia.** — *Darrah v. Watson*, 36 Iowa 116.

**5. Boundary Line Between States.** — *Coffee v. Groover*, 123 U. S. 11.

**6. Division of States into Counties — Illinois.** — *Dickenson v. Breeden*, 30 Ill. 279.

*Maine.* — *Goodwin v. Appleton*, 22 Me. 453; *Martin v. Martin*, 51 Me. 366.

*Massachusetts.* — *Com. v. Desmond*, 103 Mass. 445.

*New Hampshire.* — *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

*North Carolina.* — *State v. Ray*, 97 N. Car. 570; *State v. Snow*, 117 N. Car. 774.

*South Carolina.* — *State v. Glasgow, Dudley L. (S. Car.)* 40.

**Parishes — English Rule.** — By the statute 1 Wm. IV., c. 66, § 20, it was made an offense to utter any false writing as and for a copy of an entry in any register of marriage made or kept by the vicar of any parish in England. In a prosecution thereunder it was held that the judge would take judicial notice that the parish of Seighford, in the county of Stafford, was a parish in England. *Reg. v. Sharpe*, 8 C. & P. 436, 34 E. C. L. 468.

And where, in ejectment, the lands were described as lying in the parish of F., which was no parish, but only the name of a district containing two parishes, it was held that the court would take judicial notice thereof and



*b.* CORPORATE EXISTENCE—NAMES. — Judicial cognizance will also be taken of the corporate existence and names of the several counties within the state.<sup>1</sup>

The Character of County Organizations and their relation to the state and its courts are not private, but of necessity must be judicially noticed and recognized by the courts.<sup>2</sup> And the same rule applies, it has been held, to the geographical position<sup>3</sup> and the judicial history of the counties in which a court holds its sessions, in relation to the seat of justice and the time and place of holding courts.<sup>4</sup>

*c.* DATE OF ORGANIZATION. — Judicial notice, it has been held, will not be taken of the date of a county's organization.<sup>5</sup>

**4. County Boundaries** — *a.* IN GENERAL. — It is generally held that the courts of a state will take judicial notice of the county boundaries.<sup>6</sup> But the courts of one state will not judicially notice the division of another into counties, nor the towns and cities of the latter.<sup>7</sup>

*b.* PLACES WITHIN COUNTY. — Courts will not, as a rule, take judicial notice of particular places within a county that are neither recognized in some manner by a public statute nor of the requisite public notoriety.<sup>8</sup>

that an amendment describing the lands accurately was permissible. *Blake v. Saffery*, 5 Taunt. 624, 1 E. C. L. 214.

**1. Corporate Existence.** — *Lyell v. Lapeer County*, 6 McLean (U. S.) 446; *Trammell v. Chambers County*, 93 Ala. 388. See also *Pitts v. Lewis*, 81 Iowa 55.

**Attempted Organization.** — The court will judicially know the invalidity of the attempted organization of a county. *Brown v. Elms*, 10 Humph. (Tenn.) 135.

**Constitutional Limits.** — Courts will take judicial notice not only of the boundaries of counties, but also whether an act of the legislature cutting off part of the county reduces it below its constitutional limits. *Woods v. Henry*, 55 Mo. 560.

**Organization under General Law.** — The Supreme Court of *Indiana* will take judicial notice of a county created by a public statute, but not of one created by county commissioners under a general law. *Buckinghouse v. Gregg*, 19 Ind. 401.

**Names of Counties Judicially Noticed.** — *Gager v. Henry*, 5 Sawy. (U. S.) 237; *Overton v. State*, 60 Ala. 73; *State v. Snow*, 117 N. Car. 774; *Zwickey v. Haney*, 63 Wis. 464.

**2. Character of County Organizations, etc.** — *Pitts v. Lewis*, 81 Iowa 55.

**3. Geographical Position.** — *Bond v. Perkins*, 4 Heisk. (Tenn.) 364. But in a proceeding under a statute entitled "An act to encourage irrigation and to provide for the acquisition of the right to the use of water," etc., it was held that the courts of the state would not judicially know what counties were in the "arid region," no fact being gathered from the geography of the country, or the general history of the state, that informs where the arid region begins and where it ends. *McGhee Irrigating Ditch Co. v. Hudson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 175, 85 Tex. 587.

**4. Judicial History.** — *Ross v. Anstill*, 2 Cal. 183.

**5. Date of Organization.** — *Buckinghouse v. Gregg*, 19 Ind. 401; *Trimble v. Edwards*, 84 Tex. 497; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016. But compare *Ellsworth v. Nelson*, 81 Iowa 57.

**Time of Division of Counties.** — The courts will not take judicial notice of the time of the division of counties and the erection of new ones under general law; such time, if material, must be proved. *Buckinghouse v. Gregg*, 19 Ind. 401.

**6. County Boundaries** — *Alabama.* — *Smitha v. Flournoy*, 47 Ala. 345.

*California.* — *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100.

*Indiana.* — *Jasper County v. Spitler*, 13 Ind. 235; *Indianapolis, etc., R. Co. v. Case*, 15 Ind. 42; *Indianapolis, etc., R. Co. v. Moore*, 16 Ind. 43; *Buckinghouse v. Gregg*, 19 Ind. 401; *Indianapolis, etc., R. Co. v. Lyon*, 48 Ind. 119; *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Steinmetz v. Versailles, etc., Turnpike Co.*, 57 Ind. 457; *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 496 (*overruling Louisville, etc., R. Co. v. Breckenridge*, 64 Ind. 113); *Jackson County v. State*, 147 Ind. 476.

*Kansas.* — *Kansas City, etc., R. Co. v. Burge*, 40 Kan. 736.

*Maine.* — *State v. Jackson*, 39 Me. 291; *State v. Thompson*, 85 Me. 189.

*Missouri.* — *Woods v. Henry*, 55 Mo. 560; *State v. Pennington*, 124 Mo. 388.

*Texas.* — *Wright v. Hawkins*, 28 Tex. 452.

Compare *Com. v. Clauss*, 5 Pa. Dist. 658.

**The Area of Established Counties** will be noticed. *Jasper County v. Spitler*, 13 Ind. 235; *Buckinghouse v. Gregg*, 19 Ind. 401; *Jackson County v. State*, 147 Ind. 476; *Wright v. Hawkins*, 28 Tex. 452.

**7. Division of Foreign State into Counties.** — *Andrews v. Hoxie*, 5 Tex. 171.

**8. Places Within County** — *England.* — *Brunt v. Thompson*, 2 Q. B. 789, 42 E. C. L. 913, 2 Gale & D. 110, 1 C. & M. 34, 41 E. C. L. 24.

*Alabama.* — *Waters v. State*, 117 Ala. 189.

*New Hampshire.* — *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720.

*Pennsylvania.* — *Com. v. Clauss*, 18 Pa. Co. Ct. 381, 5 Pa. Dist. 658.

*Texas.* — *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575; *Vivian v. State*, 16 Tex. App. 262.

**Where an Indictment Mentioning Two Counties** alleged that the crime was committed at a



5. **Division of Counties into Townships or Towns.**—It has been held that courts will take judicial notice of the division of counties into townships, towns, or boroughs,<sup>1</sup> as well as that a certain township is within a particular county of the state.<sup>2</sup> It has been held that a court will not notice judicially whether a county has or has not adopted township organization under a general township organization act.<sup>3</sup>

6. **Public Surveys.**—Judicial notice will be taken of the governmental surveys and the subdivisions of land thereunder.<sup>4</sup> State courts therefore judicially know that the county boundaries include lands coming within the government surveys,<sup>5</sup> and in which county land is situated, where the section,

named place "in said county," it not appearing, however, which of the two counties was referred to, it was held that the court could not take judicial notice that there was such a place as that named in one of such counties and not in the other. *Com. v. Wheeler*, 162 Mass. 429.

**Location of Particular Tract of Land.**—The court cannot take judicial notice that a given tract of land is in a particular county. *Kretschmar v. Meehan*, 74 Minn. 211.

**Location of Post Offices.**—It has been held in *Georgia* that the courts would take judicial notice of towns within the county at which there were post offices. *Central R. Co. v. De Bray*, 71 Ga. 406; *Central R., etc., Co. v. Gamble*, 77 Ga. 584.

1. **Subdivisions of Counties**—*Illinois*.—*Rock Island County v. Steele*, 31 Ill. 543; *People v. Suppiger*, 103 Ill. 434; *Cornshock v. People*, 56 Ill. App. 467; *Gilbert v. National Cash-Register Co.*, 176 Ill. 288.

*Maine*.—*Martin v. Martin*, 51 Me. 366; *State v. Simpson*, 91 Me. 83.

*Michigan*.—See *La Grange v. Chapman*, 11 Mich. 499.

*New Hampshire*.—*Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

*New York*.—*People v. Wood*, 131 N. Y. 617; *Vanderwerker v. People*, 5 Wenl. (N. Y.) 530.

*Pennsylvania*.—*Stroudsburg v. Brown*, 11 Pa. Co. Ct. 272.

**Township Lines.**—Courts will not, as a rule, take judicial notice of township lines, as that a certain city is in a particular township. *Porter v. St. Louis, etc., R. Co.*, 66 Mo. App. 623; *Mayes v. St. Louis, etc., R. Co.*, 71 Mo. App. 140; *Blackenstoe v. Wabash, etc., R. Co.*, 86 Mo. 492. But where the limits of a town appear by its act of incorporation, they will be judicially noticed by the courts of the state. *Martin v. Martin*, 51 Me. 366.

**Names of Townships Composing County.**—But the Supreme Court of *Indiana* cannot take judicial notice of the names of the townships composing a county, as they are formed by the boards of commissioners, and are not created, bounded, and named by the legislature as counties are. *Bragg v. Rush County*, 34 Ind. 406.

2. **That Certain Township in Particular County.**—*Cornshock v. People*, 56 Ill. App. 467; *Martin v. Martin*, 51 Me. 366; *People v. Wood*, 131 N. Y. 617; *Com. v. Kaiser*, 184 Pa. St. 493, 42 W. N. C. (Pa.) 26.

3. **Adoption of Township Organization.**—*State v. Bench*, 68 Mo. 79; *State v. Cleveland*, 80 Mo. 108.

But in an *Illinois* case it was held that the

Supreme Court would take judicial notice of the fact that a county was acting under the township organization law. *Bruner v. Madison County*, 111 Ill. 11.

4. **Public Surveys**—*Alabama*.—*King v. Kent*, 29 Ala. 542; *Lewis v. Harris*, 31 Ala. 689; *Smitha v. Flournoy*, 47 Ala. 345; *Money v. Turnipseed*, 50 Ala. 499; *Webb v. Mullins*, 78 Ala. 111.

*Arkansas*.—*Bittle v. Stuart*, 34 Ark. 224.

*California*.—*Faekler v. Wright*, 86 Cal. 210; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100.

*Illinois*.—*Dickenson v. Breeden*, 30 Ill. 279; *Hill v. Bacon*, 43 Ill. 477; *Gooding v. Morgan*, 70 Ill. 275; *Gardner v. Eberhart*, 82 Ill. 316; *Sever v. Lyons*, 170 Ill. 395.

*Indiana*.—*Hays v. State*, 8 Ind. 425; *Buchanan v. Whitham*, 36 Ind. 257; *Mossman v. Forrest*, 27 Ind. 233; *Glenn v. Porter*, 49 Ind. 500; *Bannister v. Grassy Fork Ditching Assoc.*, 52 Ind. 178; *Murphy v. Hendricks*, 57 Ind. 593; *Carr v. McCampbell*, 61 Ind. 97; *Bryan v. Scholl*, 109 Ind. 367; *White v. Stanton*, 111 Ind. 540; *Peck v. Sims*, 120 Ind. 345; *Richardson v. Hedges*, 150 Ind. 53.

*Iowa*.—*Fogg v. Holcomb*, 64 Iowa 621; *Stoddard v. Sloan*, 65 Iowa 680; *Wright v. Phillips*, 2 Greene (Iowa) 191; *Hypfner v. Walsh*, 3 Greene (Iowa) 509.

*Michigan*.—*Dexter v. Cranston*, 41 Mich. 448.

*Nebraska*.—*Devine v. Burleson*, 35 Neb. 238.

*Utah*.—*McMaster v. Morse*, 18 Utah 21.

*Wisconsin*.—*Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89; *Atwater v. Schenck*, 9 Wis. 160.

*Compare Stanberry v. Nelson*, *Wright* (Ohio) 766.

**Relative Situation of Subdivisions Judicially Noticed.**—*Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89; *Buchanan v. Whitham*, 36 Ind. 257. **Coincidence of Township and Section Lines.**—See *Kile v. Yellowhead*, 80 Ill. 208.

**Area of Government Quarter-section of Land.**—*Quinn v. Windmiller*, 67 Cal. 461; *Meacham v. Sunderland*, 10 Ill. App. 123.

**Military Bounty Grant.**—The court will take judicial notice that the military bounty tract is situated between the *Illinois* and *Mississippi* rivers, and all of it west of the fourth principal meridian. *McNitt v. Turner*, 16 Wall. (U. S.) 352.

5. **County Boundaries**—**Government Surveys.**—*Smitha v. Flournoy*, 47 Ala. 345.

**Land Added to New County.**—It has been held that a court would take judicial notice of the fact that the land described in a mortgage by



township, and range are given.<sup>1</sup>

Direction from Principal Meridian. — Judicial cognizance will also be taken of the fact that all the land in a given county, township, or range lies in a certain direction from the principal meridian.<sup>2</sup>

7. Private Surveys. — Judicial notice will not be taken of private surveys.<sup>3</sup>

### XIII. PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT —

1. Generally. — Courts judicially notice the great offices of state and the incumbents thereof.<sup>4</sup> Thus judicial notice may be taken of the accession or demise of a sovereign<sup>5</sup> and of the prerogatives of the crown and privileges of the royal palaces.<sup>6</sup> So the courts of a state will take judicial notice of their chief executive and of the accession of a new governor,<sup>7</sup> as well as of the abandonment of such office by one party in favor of a contestant therefor.<sup>8</sup>

Co-ordinate Branches of Government. — The judiciary will take judicial notice of the other departments of government, such as the executive and legislative departments,<sup>9</sup> and likewise of the signatures of the heads of departments.<sup>10</sup>

The Executive — Acts and Proclamations. — Courts take judicial notice of the pub-

section, range, and township, according to government survey, had been detached from the county of which it was a part at the time when the mortgage was executed, and added to a new county. *Faekler v. Wright*, 86 Cal. 210.

City Blocks and Lots. — Courts will judicially take notice of the government surveys of land, and also of blocks and lots in towns and cities. *Gardner v. Eberhart*, 82 Ill. 316; *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415. See *Ritchie v. Catlin*, 86 Wis. 109.

1. Rule Stated. — *King v. Kent*, 29 Ala. 542; *Money v. Turnipseed*, 50 Ala. 499; *Webb v. Mullins*, 78 Ala. 111; *Bryan v. Scholl*, 109 Ind. 367; *Richardson v. Hedges*, 150 Ind. 53; *White v. Stanton*, 111 Ind. 540; *Fogg v. Holcomb*, 64 Iowa 621; *Dexter v. Cranston*, 41 Mich. 448; *Devine v. Burleson*, 35 Neb. 238. See also *Cummings v. Winters*, 19 Neb. 719.

That Given Description Applies to But One Township in County. — The court will take judicial notice of the fact that there is but one township of a given description in a county of the state. *Stoddard v. Sloan*, 65 Iowa 680.

Description of Lands by Reference to Survey Numbers. — It has been held that the court would judicially know the meaning of initials used in the description of land in the state, in conveyances, levies of executions, judicial sales, surveys, assessments for taxes, etc., without further proof. *Kile v. Yellowhead*, 80 Ill. 208. Thus, that "sec. 23, 38, 14," means section 23, township 38, range 14. *McChesney v. Chicago*, 173 Ill. 75. But in *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511, it seems to have been decided that a description of lands on the assessment roll as "N W<sup>4</sup>, N W<sup>4</sup> of N E<sup>4</sup>", etc., was insufficient, such letters and figures being not so generally understood as to warrant the courts taking judicial cognizance of their significance.

2. *Muse v. Richards*, 70 Miss. 581; *Chambers v. Ringstaff*, 69 Ala. 140. See also *Kile v. Yellowhead*, 80 Ill. 208. And see *O'Brien v. Krockinski*, 50 Ill. App. 456; *Dawson v. James*, 64 Ind. 162.

3. Private Surveys. — *Campbell v. West*, 86 Cal. 197.

A Special Act of Assembly for the survey of a

particular tract of land is not a public statute which the courts are bound to take judicial notice of and expound without requiring its production. *Allegheny v. Nelson*, 25 Pa. St. 332.

Land Embraced in Particular Patent. — For a statement that judicial notice is not taken that a certain tract of land is or is not included within the boundaries of a particular patent, see *Goodwin v. Scheerer*, 106 Cal. 690.

4. Officers of State. — In *Whaley v. Carlisle*, 17 Ir. C. L. 792, it was held that the court might take judicial notice of the persons who filled the great offices of state so long ago as 1803.

5. Accession or Demise of Sovereign. — *Henry v. Cole*, 2 Ld. Raym. 811, 7 Mod. 103; *Holman v. Burrow*, 2 Ld. Raym. 791, 794, 2 Salk. 658.

6. Royal Prerogatives, etc. — *Elderton's Case*, 2 Ld. Raym. 980. See also *Winter v. Miles*, 1 Campb. 475, note, 10 East 578; *Atty.-Gen. v. Donaldson* 10 M. & W. 117.

7. Notice of State Executive. — *Hizer v. State*, 12 Ind. 330; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575; *Deweese v. Colorado County*, 32 Tex. 570; *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65.

The Signatures and Official Capacity of the Spanish governors of Louisiana have been judicially noticed. *Jones v. Gale*, 4 Mart. (La.) 635.

Date of Inauguration of Governor. — The courts will take judicial notice of the changes in the executive department of the state, and of the date of the inauguration of the governor. *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

8. Contestants for Office. — *State v. Boyd*, 34 Neb. 435.

9. Co-ordinate Departments of Government. — *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325.

10. Signatures of Heads of Departments. — *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575; *Com. v. Dunlop*, 89 Va. 431.

Signature of President of United States. — The state courts will take judicial notice of the signature of the President of the United States and the seal of the federal government. *Yount v. Howell*, 14 Cal. 465, so holding in announcing the proposition that a patent from the United States proves itself.



lic acts of the executive<sup>1</sup> and of the proclamations duly made and published by him.<sup>2</sup>

**Legislative Acts, Journals, Sessions, etc.** — The doctrine of judicial notice of legislative acts is more particularly considered in another place.<sup>3</sup> The courts of *England* take judicial notice of the sessions of Parliament, its prorogations and dissolutions, and of the place where any particular Parliament convened.<sup>4</sup> The state courts of the *United States* take judicial notice of the beginning and close of the sessions of the legislature, as well as of changes in the time of meeting.<sup>5</sup>

**2. Departmental Regulations, Proceedings, Records.** — In some instances the state courts have refused to take judicial notice of the regulations, proceedings, or records of the administrative departments of the federal government.<sup>6</sup> In other cases, however, the doctrine of judicial cognizance has been held applicable.<sup>7</sup> In the federal courts the general rule favors the taking of judicial notice of departmental regulations, etc.<sup>8</sup>

**1. Selection of Land for State University.** — *State v. Gramelspacher*, 126 Ind. 398.

**2. Proclamations of Governor.** — *Dowdell v. State*, 58 Ind. 333; *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286.

And a proclamation issued by the governor of a state will be judicially noticed, though its issuance be in compliance with a special act of the legislature. *Ragland v. Barringer*, 41 Ga. 114.

The Courts of Quebec will take judicial notice of the putting into force of registration cadastres by proclamation of the lieutenant-governor in council. *Théberge v. Danjou*, 12 Quebec 1.

**President's Proclamation of Amnesty and Pardon.** — *Jenkins v. Collard*, 145 U. S. 546; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Greathouse's Case*, 2 Abb. (U. S.) 382; *Armstrong v. U. S.*, 13 Wall. (U. S.) 154.

**Royal Proclamations.** — *Wells v. Williams*, 1 Ld. Raym. 283. But compare *Van Omeron v. Dowick*, 2 Campb. 44.

**3. See *infra*, this title, *Laws and Statutes*.**

**Report of Legislative Committees.** — The court will take judicial notice of a report to the legislature by a committee appointed under a statute to settle with the sureties of the late state treasurer. *State v. Dow*, 53 Me. 305.

**Resolves of Legislature.** — Ordinarily, courts in *Maine* do not take judicial notice of resolves of the legislature. *Simmons v. Jacobs*, 52 Me. 147.

**4. Sessions of Parliament, etc.** — *Rex v. Wild*, 1 Lewin C. C. 296, 2 Keb. 686; *Birt v. Rothwell*, 1 Ld. Raym. 210, 343.

**Customs, Privileges, and Proceedings.** — *Lake v. King*, 1 Saund. 131; *Astley v. Younge*, 2 Burr. 811. See also *Stockdale v. Hansard*, 7 C. & P. 731, 32 E. C. L. 707; *Middlesex Case*, 11 Ad. & El. 273, 39 E. C. L. 80.

And the privilege of legislators exempting them from arrest and service of process will be noticed. *Prentis v. Com.*, 5 Rand. (Va.) 637, 16 Am. Dec. 782; *State v. Polacheck*, 101 Wis. 427.

**5. Sessions of State Legislature.** — *Perkins v. Perkins*, 7 Conn. 564; *Perkins v. Woodfolk*, 8 Baxt. (Tenn.) 411.

**6. Departmental Rules and Proceedings.** — *Hensley v. Tarpey*, 7 Cal. 288; *Moore v. Worthington*, 2 Duv. (Ky.) 308; *Malacr v. Damron*, 31 Ill. App. 572.

**Orders of Council.** — The English courts do not take notice of orders of council without proof. *Atty.-Gen. v. Theakstone*, 8 Price 89; *Reg. v. Bennett*, 1 Ont. 445. See also *Reg. v. Atkinson*, 15 Ont. 110.

**7. Low v. Hanson**, 72 Me. 104; *U. S. v. Williams*, 6 Mont. 379, *Bach, J., dissenting*.

**Business of Patent Office.** — In a case decided in the Supreme Court of *New York* it was held that the court would take judicial notice of the business of the patent office to the extent of knowing without proof that patent No. 543,659 is an issue of later date than No. 186,374. *A. Smith, etc., Carpet Co. v. Skinner*, (Supm. Ct. Gen. T.) 36 N. Y. Supp. 1000, 91 Hun (N. Y.) 641.

**8. General Rule Stated.** — In *Caha v. U. S.*, 152 U. S. 211, the court said that it might be laid down as a general rule that wherever by the express language of any Act of Congress power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which it has a right to participate and by which it is to be controlled, the rules and regulations prescribed in pursuance of such authority become incorporated into that body of public records of which the courts take judicial notice.

**Regulations of Treasury Department — Synopses of Decision, etc.** — *Dominici v. U. S.*, 72 Fed. Rep. 46; *Prather v. U. S.*, 9 App. Cas. (D. C.) 82.

**Regulations of Department of Interior.** — *Caha v. U. S.*, 152 U. S. 211.

**Records of Department of Interior.** — *Knight v. U. S. Land Assoc.*, 142 U. S. 161. But compare *McKeoin v. Northern Pac. R. Co.*, 45 Fed. Rep. 464.

**Persons Presiding over Patent Office.** — *York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30. And see *Wilson v. Rousseau*, 4 How. (U. S.) 686; *Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. (D. C.) 290.

**United States Land Office.** — A District Court of the United States does not judicially know the regulations of the United States land office, their force and effect, and any usage under them. *U. S. v. Bedgood*, 49 Fed. Rep. 54. But a court will take judicial notice of the fact that patents for public lands are frequently dated several years after the payment of the



3. Public Institutions, Commissions, Administrative Boards, etc. — Courts will, as a rule, take judicial notice of public institutions,<sup>1</sup> but not of the proceedings, rules, and regulations of commissions or administrative boards.<sup>2</sup>

4. Public Officers — *a.* IN GENERAL. — Courts will, as a rule, judicially recognize the public officers of the state under whose laws and organization they act.<sup>3</sup>

Statutory Enumeration — Officials Not Included. — Where, however, the statute of a state enumerates all the peace officers known to the law of the state, but

purchase money and the issuance of the certificate of entry. *Bigelow v. Chatterton*, 51 Fed. Rep. 614, 10 U. S. App. 267; *Fisher v. Hallock*, 50 Mich. 463.

1. As the University of Oxford in England. — *Oxford Poor-Rate*, 8 El. & Bl. 185, 92 E. C. L. 185.

Bonded Warehouses. — *U. S. v. Harries*, 2 Bond (U. S.) 311.

State Banks. — *Calloway v. Cossart*, 45 Ark. 81; *Davies v. Hunt*, 37 Ark. 574; *Shaw v. State*, 3 Sneed (Tenn.) 86.

Ferries Established by County Commissioners. — But the existence of ferries, they being established by county commissioners and not by enactment of the legislature, will not be noticed by the court, but in any particular instance must be proved. *State v. Wise*, 7 Ind. 645.

2. Courts Have Refused to Recognize Judicially the following matters in this connection:

*Acts of Railroad Commission*. — *Thompson v. San Antonio, etc.*, R. Co., 11 Tex. Civ. App. 145.

*Rules and Regulations of State Fish Commission*. — *Josh v. Marshall*, 33 N. Y. App. Div. 77. *Marine Subv. and In port's Regulations*. — *The Clara*, 14 U. S. App. 346.

*Rules of Commissioners of Internal Revenue*. — *Com. v. Crane*, 158 Mass. 218.

*Orders of Commissioners in Bankruptcy*. — *Re Ramsden*, 1 Saund. & C. 133, 15 L. J. Q. B. 234, 10 Jur. 879.

Regulations of State Canal Board. — Where a question in a cause depends on the construction of several regulations of the canal board, the court cannot take judicial notice of them unless they are incorporated in the case. *Palmer v. Aldridge*, 16 Barb. (N. Y.) 131.

But Sessions of Boards of County Commissioners are noticed by *Indiana* courts. *Collins v. State*, 58 Ind. 5.

And it was held that on a challenge to the panel of petit jurors, the court would take judicial notice that the county auditor is *ex officio* clerk of the county commissioners. *State v. Gut*, 13 Minn. 341.

Instructions of Surveyor-General. — In the case of *Campbell v. Wood*, 116 Mo. 196, the Supreme Court of *Missouri* took judicial notice of the general instructions issued by the surveyor-general to the deputy surveyors for the states of *Illinois* and *Missouri*.

3. General Rule as to Public Officers — *England*. — *Whaley v. Carlisle*, 17 Ir. C. L. 792.

*Alabama*. — *Coleman v. State*, 63 Ala. 93; *Cary v. State*, 76 Ala. 78; *Sandlin v. Anderson*, 76 Ala. 405; *Whitney v. Jasper Land Co.*, 119 Ala. 497.

*California*. — *Wetherbee v. Dunn*, 32 Cal. 106; *Himmelmänn v. Hoadley*, 44 Cal. 213.

*Illinois*. — *Fisk v. Hopping*, 169 Ill. 105.

*Louisiana*. — *Walden v. Canfield*, 2 Rob. (La.) 466; *Follain v. Lefevre*, 3 Rob. (La.) 13.

*Tennessee*. — *Bennett v. State*, Mart. & Y. (Tenn.) 133; *Mojor v. State*, 2 Sneed (Tenn.) 11.

*Texas*. — *Deweese v. Colorado County*, 32 Tex. 570; *Roach v. Fletcher*, 11 Tex. Civ. App. 225.

Illustrations of Rule — Senators — Cabinet Officers — Foreign Ministers. — *Walden v. Canfield*, 2 Rob. (La.) 466.

Commissioners of Deeds. — *Fisk v. Hopping*, 169 Ill. 105. So, also, courts of *Alabama* will take judicial notice of a commissioner appointed to take an acknowledgment of a deed in another state. *Keller v. Moore*, 51 Ala. 340.

City Marshal — Judicial Notice of by Justice of Peace. — *Fleugel v. Lards*, 108 Mich. 682.

Clerk of City Council. — *Barret v. Godshaw*, 12 Bush (Ky.) 597.

Mustering Officers. — *Chapman Tp. v. Herrold*, 58 Pa. St. 106.

So the courts of *Indiana* will take judicial notice that during and since the civil war the adjutant-general has made records of the muster rolls of the regiments furnished to the United States. *Monroe County v. May*, 67 Ind. 562.

County Registers. — *Fancher v. De Montegre*, 1 Head (Tenn.) 40.

Tax Collectors. — The court will take judicial notice that a tax collector duly appointed is also a sheriff, under the *Texas* Act of June 16, 1840. *Burnett v. Henderson*, 21 Tex. 588.

Tax Collector's Bond. — Where, however, there is no oyer of the bond in writ, and the condition thereof is not upon the pleadings, the court cannot judicially know that it was given by a tax collector. *Upper Alloways Creek Tp. v. String*, 10 N. J. L. 327.

Treasurer of School District. — *State v. Dahl*, 65 Wis. 510.

Writs for Jurors — To What Officers Addressed. — Courts in *New Hampshire* take judicial notice of towns as the public bodies from which jurors are to be drawn and to whose officers their writs for jurors are to be sent. *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489.

Offices of Constitutional Creation. — *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65.

Accounts and Records of Public Officers. — *Pleasant Valley Coal Co. v. Salt Lake County*, 15 Utah 97; *Whitney v. Jasper Land Co.*, 119 Ala. 497.

Official Designations. — *Choen v. State*, 85 Ind. 209; *Monson v. Hunt*, 17 Conn. 570.

Town Constables. — It is not a matter of public notoriety who are chosen constables in the several towns from year to year, and so judicial notice of the incumbents of such office will not be taken. *Broughton v. Blackman*, 1 D. Chip. (Vt.) 109.



includes no such officer as a deputy marshal of the municipal corporation, such functionary is not an officer of whom judicial cognizance can be taken.<sup>1</sup>

**Rule in Circuit Courts — Civil Officers of County.** — It is generally held that a Circuit Court will judicially notice the civil officers of the county in which it holds its sittings.<sup>2</sup>

**b. PARTICULAR OFFICERS — (1) Sheriffs.** — The courts of a state take judicial notice of the sheriffs of the several counties thereof.<sup>3</sup>

**(2) Justices of the Peace.** — The courts of a state will, as a rule, take judicial notice of the justices of the peace therein, and require no proof of their official character.<sup>4</sup>

**(3) Notaries Public.** — Courts will take judicial notice of notaries public appointed by and exercising their functions within the state in which the court sits;<sup>5</sup> also of their terms of office, official signatures, and the extent of their authority.<sup>6</sup>

Where a Notary Acts in Discharge of His Common-law Functions, such as the presenting and protesting of commercial paper, the validity of his certificate, attested by his official seal, may be judicially noticed by the courts of all civilized countries.<sup>7</sup>

**1. Statutory Enumeration.** — *Alford v. State*, 8 Tex. App. 545.

**Correction of Commission to Take Testimony.** — In the courts of *Louisiana* evidence is not required of the official capacity of functionaries commissioned by the state, judicial notice being taken of the offices held by them. But where a commission to take testimony appeared from the record to have been executed by one N. Jackson, it was held that it could not be corrected by the court, acting upon judicial knowledge, so as to read "O. P. Jackson," who was in fact an officer authorized to grant such commission. *Follain v. Lefevre*, 3 Rob. (La.) 13.

**Number of Coroners in County.** — In an action on a replevin bond given to B., one of the coroners of the county, the defendants having moved in arrest of judgment on the ground that the bond was made to and assigned by one coroner, not the coroners, of the county, it was held that the bond being properly set out in the declaration, and no issue or point being raised on the record, the court was not bound to take judicial notice that there were more coroners than one in the county, and the declaration was therefore sustained. *Johnson v. Parke*, 12 U. C. C. P. 179.

**2. Circuit Courts — Civil Officers of County.** — *Stout v. Slattery*, 12 Ill. 162; *Dyer v. Flint*, 21 Ill. 80, 74 Am. Dec. 73; *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98; *Thielmann v. Burg*, 73 Ill. 293; *Scott v. Jackson*, 12 La. Ann. 640.

**3. Sheriffs — Judicial Notice — Alabama.** — *Ingram v. State*, 27 Ala. 17, *Doe v. Riley*, 28 Ala. 164, 65 Am. Dec. 334; *Timberlake v. Brewer*, 59 Ala. 108.

*Illinois.* — *Thompson v. Haskell*, 21 Ill. 215, 74 Am. Dec. 98; *Thielmann v. Burg*, 73 Ill. 293.

*Kentucky.* — *Slaughter v. Barnes*, 3 A. K. Marsh. (Ky.) 412, 13 Am. Dec. 100.

*Wisconsin.* — *Alexander v. Burnham*, 18 Wis. 199; *Martin v. Aultman*, 80 Wis. 150.

**4. The Courts of Louisiana** recognize the signature of justices of the peace appointed for the different parishes by the governor with the consent of the Senate. *Despau v. Swindler*, 3 Mart. N. S. (La.) 705.

**Proof of Signature or Personal Identity Unneces-**

**sary.** — As the state courts take judicial notice of its commissioned officers, the extent of their authority, and the genuineness of their signatures, an execution issued by a justice of the peace is admissible as evidence without any proof of his signature or personal identity. *Sandlin v. Anderson*, 76 Ala. 403.

So, also, an affidavit in which the official character of the justice before whom it is taken does not appear is good. *Ede v. Johnson*, 15 Cal. 53; *Webb v. Kelsey*, 66 Ark. 180.

**Justices of the Peace in Counties where Courts Are Held.** — The Circuit Court will take cognizance of the justices of the peace for the county in which it is held, and will require no proof of their official character unless that particular question is directly in issue. *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89.

**Justices in Other Counties.** — It has been held that when the official acts of a justice of the peace are offered in evidence in a county other than that where he resides, the official character of the justice must be certified by the proper officer. *Chambers v. People*, 5 Ill. 351. And see *Matter of Keeler, Hempst.* (U. S.) 306.

**That a Certain Township Is in a Certain County** and within the jurisdiction of the justice of the peace trying the case, may be determined by him *ex officio*. *Wright v. Phillips*, 2 Greene (Iowa) 191.

**5. Notaries Public — General Rule Stated.** — *Coleman v. State*, 63 Ala. 93; *Cary v. State*, 76 Ala. 78; *Eichenbaum v. Levee*, 78 Ill. App. 610; *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162; *Stoddard v. Sloan*, 65 Iowa 680; *Browne v. Philadelphia Bank*, 6 S. & R. (Pa.) 484, 9 Am. Dec. 463.

**The County Court Will Take Judicial Notice** that a notary public before whom the certificate of publication of a delinquent tax list is sworn to is a notary public of the county, though no venue is stated in the jurat. *Hertig v. People*, 159 Ill. 237, 50 Am. St. Rep. 162.

**6. Official Term, Signature, Powers.** — *Cary v. State*, 76 Ala. 78.

**7. Performance of Common-law Functions — England.** — *Wright v. Barnard*, 2 Esp. 700; *Anonymous*, 12 Mod. 345; *Hutcheon v. Mannington*, 6 Ves. Jr. 823.



**Powers Conferred by Statute.** — But judicial notice is not taken of powers conferred by statute upon a notary in a foreign jurisdiction and not exercised by virtue of the common law.<sup>1</sup>

**c. POWERS, DUTIES, AND QUALIFICATIONS.** — Courts will, as a rule, take judicial notice of the powers, duties, and qualifications of public officers.<sup>2</sup>

**Judicial Notice of Particular Statute.** — And so judicial notice may be taken of a statute passed to enable a particular person to qualify for office.<sup>3</sup>

**d. SIGNATURES, SEALS, ETC.** — The courts will also, in general, notice without proof the signatures and official seals of public officers.<sup>4</sup>

**e. COMPENSATION AND TERMS OF OFFICE.** — The compensation and terms of office of public officers are also subjects of which the courts will take judicial notice.<sup>5</sup>

*United States.* — *Pierce v. Indseth*, 106 U. S. 546; *Yeaton v. Fry*, 5 Cranch (U. S.) 335; *Orr v. Lacy*, 4 McLean (U. S.) 243; *In re Phillips*, 14 Nat. Bankr. Reg. 219; *U. S. v. Libby*, 1 Woodb. & M. (U. S.) 221.

*District of Columbia.* — *Denmead v. Maack*, 2 MacArthur (D. C.) 475.

*Massachusetts.* — *Porter v. Judson*, 1 Gray (Mass.) 175.

*New Hampshire.* — *Beach v. Workman*, 20 N. H. 383.

*New York.* — *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173.

*Pennsylvania.* — *Browne v. Philadelphia Bank*, 6 S. & R. (Pa.) 484, 9 Am. Dec. 463.

**Verification of Affidavit — Release.** — In *Cole v. Sherard*, 11 Exch. 482, it was held that the court would judicially notice the seal on a notarial certificate verifying an affidavit sworn before a magistrate abroad. So also where the execution of a release was attested by a notary in a colony it was held that the court would take judicial notice of the notary's seal and signature. *Brooke v. Brooke*, 50 L. J. Ch. 528, 17 Ch. D. 833, 44 L. T. N. S. 512, 30 W. R. 45.

**1. Powers Conferred by Statute — Illustration.** — Thus the power to administer oaths is not conferred upon a notary by the common law, but by legislative enactment, and the courts of one state cannot take judicial notice of the laws of other states conferring such powers. *Teutonia Loan, etc., Co. v. Turrell*, 19 Ind. App. 469.

But the Supreme Court of the *District of Columbia*, it has been held, will take notice of the authority of a notary public in the state of Maryland to administer an oath to any affidavit to be used in an action pending in the former jurisdiction, the oath being certified by his signature and notarial seal, without any other verification that he was qualified to act as such notary. *Denmead v. Maack*, 2 MacArthur (D. C.) 475. And see also *Cole v. Sherard*, 11 Exch. 482; *Brooke v. Brooke*, 50 L. J. Ch. 528, 17 Ch. D. 833, 44 L. T. N. S. 512, 30 W. R. 45, cited *supra*.

**2. Illustrations — Various Commissioned Officers of State.** — Courts are authorized and required to take judicial notice of the various commissioned officers of the state and to know the extent of their authority. *Coleman v. State*, 63 Ala. 93; *Cary v. State*, 76 Ala. 78; *Sandlin v. Anderson*, 76 Ala. 405.

**Aldermen.** — *Fox v. Com.*, 81\* Pa. St. 511. See also *Com. v. Jeffits*, 14 Gray (Mass.) 19.

**Assistant District Attorney.** — *People v. Lyman*, 2 Utah 30.

**Justices of the Peace.** — See *Coleman v. State*, 63 Ala. 93.

**Probate Judge.** — *State v. Green*, 52 S. Car. 520.

**Special Judge.** — *Bell v. State*, 115 Ala. 25.

**Street Commissioner.** — *St. Louis v. Greely*, 14 Mo. App. 578.

**Superintendent of Schools.** — *State v. Stevens*, 29 Oregon 464.

**Tax Collector.** — *Burnett v. Henderson*, 21 Tex. 588.

**Town and City Marshals.** — *Bixler v. Parker*, 3 Bush (Ky.) 166; *Lynn v. People*, 170 Ill. 527.

**Township Trustees.** — *Inglis v. State*, 61 Ind. 212.

**Officers Having Authority to Administer Oaths.** — In *Dennison v. Story*, 1 Oregon 272, it was declared to be a recognized rule for the courts to take judicial notice of the existence and qualifications of an officer having authority to administer oaths within the particular judicial district in which such officer resided and had authority.

The courts of *England*, it has been held, take judicial notice that the chief justice of a superior court in Ireland is competent to administer an oath, and will, therefore, be satisfied with a mere verification of his handwriting. *French v. Bellew*, 1 M. & S. 302.

**Proper Officer to Prefer Indictments.** — The court takes judicial notice of the proper officer to prefer indictments; and when it appears that he intended to sign officially, will disregard the omission of any or the adding of an improper official designation. *State v. Myers*, 85 Tenn. 203.

**3. Particular Statute.** — *State v. Jarrett*, 17 Md. 309.

**4. Signatures and Official Seals — England.** — Anonymous, 1 W. R. 187; *Ferguson v. Benyon*, 16 W. R. 71.

*Alabama.* — *Cary v. State*, 76 Ala. 78.

*California.* — *Himmelman v. Hoadley*, 44 Cal. 213; *Wetherbee v. Dunn*, 32 Cal. 106.

*Indiana.* — *Choen v. State*, 85 Ind. 209.

*Kentucky.* — *Barret v. Godshaw*, 12 Bush (Ky.) 597.

*Louisiana.* — *Scott v. Jackson*, 12 La. Ann. 640; *Templeton v. Morgan*, 16 La. Ann. 438; *Tunstall v. Madison*, 30 La. Ann. 471.

**5. Official Salary.** — *McKinney v. O'Connor*, 26 Tex. 5.

**Fees.** — *State v. Sanders*, 62 Mo. App. 33, 1 Mo. App. Rep. 713; *State v. Pohlman*, 1 Mo.



*f.* **DEPUTY OFFICERS.** — Courts do not, in general, take judicial notice of persons who are only the deputies of the recognized public officials.<sup>1</sup> It has been held, however, that when provision for the appointment of a deputy is expressly made by law, then the courts should "judicially recognize such deputy and the genuineness of his signature."<sup>2</sup>

*g.* **FOREIGN OFFICERS.** — Courts will not, as a rule, take judicial notice of the officers of a foreign country, unless as representing the sovereignty of the state.<sup>3</sup>

**XIV. COURTS, COURT OFFICERS, SEALS, RECORDS, AND PROCEEDINGS — 1. In General.** — Courts of a state or country will take judicial notice of the existence of other courts therein,<sup>4</sup> and, in a general way, of the existence of courts of

App. Rep. 181; *Benson v. Christian*, 129 Ind. 535.

**Dates of Commissions — Expiration of Term.** — *Cary v. State*, 76 Ala. 78; *Stubbs v. State*, 53 Miss. 437; *Ragland v. Wynn*, 37 Ala. 32; *Doe v. Riley*, 28 Ala. 164, 65 Am. Dec. 334; *State v. Seibert*, 130 Mo. 202.

A Judge of Probate is not an officer of whom and of whose term of office the Supreme Court of a state will take judicial notice. *McCarver v. Herzberg*, 120 Ala. 523.

**1. Deputy Sheriffs and Marshals.** — It has been held that courts will not take judicial notice of the official characters of persons alleged or claiming to be deputy sheriffs or marshals.

*Alabama.* — *Land v. Patteson*, Minor (Ala.) 14.

*Arkansas.* — *State Bank v. Curran*, 10 Ark. 142.

*Kentucky.* — *Slaughter v. Barnes*, 3 A. K. Marsh. (Ky.) 412, 13 Am. Dec. 190.

*New York.* — See *Potter v. Luther*, 3 Johns. (N. Y.) 431.

*Texas.* — *Alford v. State*, 8 Tex. App. 545.

*Wisconsin.* — *Ward v. Henry*, 19 Wis. 76, 88 Am. Dec. 672.

**2. Deputies Appointed by Express Legal Provision.** — *Himmelmänn v. Hoadley*, 44 Cal. 213.

**Deputy Sheriff.** — *Martin v. Aultman*, 80 Wis. 150.

**Deputy Auditor-General.** — *People v. Johr*, 22 Mich. 461.

**Deputy Comptroller of Currency.** — *Davis v. Watkins*, 56 Neb. 288.

**Custodians of Public Books and Records.** — *People v. Palmer*, 6 N. Y. App. Div. 19.

**3. Foreign Officers and Seals.** — The courts of the United States take judicial notice of all other nations and their seals of state, but not of their inferior departments and the officers and seals of these. *Schoerken v. Swift*, etc., Co., 19 Blatchf. (U. S.) 209.

And the courts of *New Hampshire* will not take judicial notice of the private seal of the governor of a province of Canada. *Beach v. Workman*, 20 N. H. 379.

**Jurisdiction of Foreign Officers.** — The courts cannot take judicial notice of the clerks of foreign courts or their forms, and therefore cannot know that an affidavit purporting to have been made and subscribed before the clerk of the Court of Common Pleas of Richland county, Ohio, or his deputy clerk, was taken before that officer, or that he had authority to administer oaths. *Ex p. Jones*, 66 Ala. 202.

**County Judges in Another State — Authority to Administer Oaths.** — The Supreme Court of *Wisconsin*, it has been held, cannot take notice

that there are county judges in New York, or that they are authorized to administer oaths; these facts must appear either by the sealed certificate of a public officer or by a notarial seal. *Fellows v. Menasha*, 11 Wis. 558.

**4. Courts, Court Officers, etc. — England.** — *Tregany v. Fletcher*, 1 Ld. Raym. 154.

*Alabama.* — *Lindsay v. Williams*, 17 Ala. 229; *Bethune v. Hale*, 45 Ala. 522; *Rodgers v. State*, 50 Ala. 102; *White v. Rankin*, 90 Ala. 541.

*Arkansas.* — *State v. Hammett*, 7 Ark. 492.

*California.* — *Ross v. Austill*, 2 Cal. 183.

*Colorado.* — *Van Duzer v. Towne*, 12 Colo. App. 4.

*Illinois.* — *Buckles v. Northern Bank*, 63 Ill. 268; *Hearson v. Graudine*, 87 Ill. 115.

*Indiana.* — *Morgan v. State*, 12 Ind. 448; *Buckinghouse v. Gregg*, 19 Ind. 401; *McGinnis v. State*, 24 Ind. 500; *Dorman v. State*, 56 Ind. 454; *Spencer v. Curtis*, 57 Ind. 221; *Lewis v. Wintrobe*, 76 Ind. 13; *Carmody v. State*, 105 Ind. 546; *Bostwick v. Bryant*, 113 Ind. 448; *Indiana Mut. Bldg., etc., Assoc. v. Paxton*, 18 Ind. App. 304; *Anderson v. Anderson*, 141 Ind. 567.

*Kansas.* — *Dudley v. Barney*, 4 Kan. App. 122; *Scruton v. Hall*, 6 Kan. App. 714.

*Kentucky.* — *Com. v. Pritchett*, 11 Bush (Ky.) 281.

*Massachusetts.* — *Newell v. Newton*, 10 Pick. (Mass.) 472.

*Michigan.* — *Williams v. Hubbard*, 1 Mich. 446.

*Missouri.* — *State v. Broderick*, 70 Mo. 622; *State v. Todd*, 72 Mo. 288; *Harwood v. Toms*, 130 Mo. 225.

*Tennessee.* — *Pugh v. State*, 2 Head (Tenn.) 227.

*Texas.* — *Davidson v. Peticolas*, 34 Tex. 27.

*Wyoming.* — *Donovan v. Territory*, 3 Wyo. 91.

**The English Court of Queen's Bench** takes judicial notice of the law of England as administered in equity. *Sims v. Marryat*, 17 Q. B. 281, 79 E. C. L. 281; and so, also, that "the Exchequer" in Wales is a court, *Tregany v. Fletcher*, 1 Ld. Raym. 154. Likewise, the courts of common law take judicial notice that a bill filed in chancery by a creditor of a deceased testator for the administration of the estate under the direction of the court does not of itself control or suspend the right of the executors to dispose of the property and make a good title thereto. *Neeves v. Burrage*, 14 Q. B. 504, 68 E. C. L. 504, 19 L. J. Q. B. 68.

**Common Law — Admiralty.** — The courts of common law will take judicial notice of the jurisdiction of the Court of Admiralty, though



justice in the civilized countries of the world.<sup>1</sup> So, also, the appellate courts of a state will take judicial notice of the existence of inferior tribunals created by law.<sup>2</sup>

**2. Federal Courts—State Courts.**—The courts of the several states take judicial notice of the courts of the United States,<sup>3</sup> but not of particular proceedings pending therein.<sup>4</sup> So, also, the courts of the United States take judicial notice of the courts of the several states.<sup>5</sup>

**3. Courts of Sister States.**—While the several members of the United States are in some respects foreign to each other, this is not so with reference to judicial notice by the courts of one state of the courts established in another.<sup>6</sup>

**Practice of Courts in Sister State.**—But the courts of one state cannot judicially take notice of the practice of the courts of another.<sup>7</sup>

**Jurisdiction of County Judges.**—Nor will the Supreme Court of a state take judicial notice of the authority of county judges of another as to the administration of oaths.<sup>8</sup>

not of its practice. *Place v. Potts*, 8 Exch. 705, 17 Jur. 1168, 22 L. J. Exch. 269.

**Nonexistence of Court.**—A court of a state, in a proceeding before it, may also take judicial cognizance of the fact that there is no such court as that styled and described in an appeal bond. *Tucker v. State*, 11 Md. 322.

**Number of Courts in Session in Particular City.**—The Supreme Court of *Illinois* will take judicial notice of the fact that a number of courts of original jurisdiction are held in the city of Chicago in as many different rooms and are in session at the same time. *Hearson v. Graudine*, 87 Ill. 115.

**1. All Courts of the United States** take judicial notice that tribunals are established in the several states for the adjudication of controversies and the ascertainment of rights. *Dozier v. Joyce*, 8 Port. (Ala.) 303.

**2. Existence of Inferior Tribunals—England.**—*Reg. v. Whittles*, 13 Q. B. 248, 66 E. C. L. 248, 18 L. J. M. C. 96, 13 Jur. 403.

*Canada.*—*Ex p. Dubois*, 7 Rev. Lég. 430.

*Alabama.*—*Ex p. Peterson*, 33 Ala. 74.

*Illinois.*—*La Salle County v. Milligan*, 143 Ill. 321.

*Iowa.*—*Ellsworth v. Moore*, 5 Iowa 486.

*Maryland.*—*Tucker v. State*, 11 Md. 322; *Cherry v. Baker*, 17 Md. 75.

*Pennsylvania.*—*Kilpatrick v. Com.*, 31 Pa. St. 198.

*Vermont.*—*Hancock v. Worcester*, 62 Vt. 106.

**3. The Supreme Court of a State** takes judicial notice of the Supreme Court of the United States, and of a decision of that tribunal settling the law of the same case. *Alexander v. Gish*, (Ky. 1891) 17 S. W. Rep. 287. But compare *Kilpatrick v. Kansas City, etc., R. Co.*, 38 Neb. 620, 41 Am. St. Rep. 741, 57 Am. & Eng. R. Cas. 398, in which case it was held that a former adjudication in the federal courts on the subject-matter of a controversy cannot be noticed in the state courts unless properly presented by the pleadings and proofs.

**A State Court Will Also Take Judicial Notice of the Circuit Court of the United States, and of the county in which it sits.** *State v. Fraker*, 148 Mo. 113.

**Territorial Courts** are bound to know the officers and enforce the judgments of the United States courts. *Buford v. Hickman*, *Hempst.* (U. S.) 232.

**4. Pendency of Particular Proceedings—Rule**

**Stated.**—*Vassault v. Seitz*, 31 Cal. 226; *Haber v. Klauberg*, 3 Mo. App. 342; *Kilpatrick v. Kansas City, etc., R. Co.*, 38 Neb. 620, 41 Am. St. Rep. 741; *Esterbrook Steel Pen Mfg. Co. v. Ahern*, 30 N. J. Eq. 341.

Compare *Sample v. Hogan*, 27 Cal. 163.

**Proceedings in Bankruptcy.**—A state court is not required to notice judicially that proceedings in bankruptcy have been instituted by or against parties to a suit pending therein. *Esterbrook Steel Pen Mfg. Co. v. Ahearn*, 30 N. J. Eq. 341.

**5. State Circuit Courts.**—*Woodworth v. Spafford*, 2 McLean (U. S.) 168.

**But in a Suit in Equity to Recover Land** for which the defendant had procured a patent by representations, as alleged, that such land was unappropriated, the Supreme Court of the United States would not judicially notice actions between the remote vendor of the complainant and others, in which the Supreme Court of the state held that the land claimed by the complainant was unappropriated. *Stewart v. Masterson*, 131 U. S. 151.

**6. Courts of Sister States.**—*Pagett v. Curtis*, 15 La. Ann. 451; *Shotwell v. Harrison*, 22 Mich. 410; *Morse v. Hewett*, 28 Mich. 481; *Munroe v. Eastman*, 31 Mich. 283; *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560.

**Inferior Courts Not Presumed Courts of Record.**—An affidavit made in Florida and certified by a judge of the County Court before whom it was made, the certificate not stating that his court is a court of record, is not competent evidence in *Alabama*, since the courts of that state cannot judicially know that such foreign court is a court of record. *Holly v. Bass*, 68 Ala. 206.

**Rule under Particular Statute.**—In *West Virginia*, by the Code, c. 13, § 4, the courts may examine the constitutions and codes of other states and take judicial notice thereof. It was held accordingly that the Supreme Court of West Virginia would take judicial notice that the Corporation Court of Lynchburg, Va., was a court of record, although the certificate of the clerk thereof verifying the notary's signature to an affidavit did not so state. *Heffernan v. Harvey*, 41 W. Va. 766.

**7. Rule Stated and Illustration.**—*Newell v. Newton*, 10 Pick. (Mass.) 472.

**8. Notice of Authority to Administer Oath.**—*Fellows v. Menasha*, 11 Wis. 558. But compare



**4. Jurisdiction.** — A court will take judicial notice of the territorial limits of its jurisdiction<sup>1</sup> and of the existence of judicial districts within the state or country.<sup>2</sup>

**Jurisdictional Facts.** — To a certain extent also courts take judicial notice of jurisdictional facts upon which their proper cognizance of a cause depends.<sup>3</sup>

**An Appellate Court Judicially Knows** the jurisdiction of the inferior tribunals in the state.<sup>4</sup>

**5. Terms — Judges — Practice and Procedure.** — A court will take judicial notice of the times fixed by law for its sessions,<sup>5</sup> of the members composing it at any given time,<sup>6</sup> and of the regular course of its practice and procedure.<sup>7</sup>

**Appellate Courts Will as a Rule** take judicial notice of the terms of the inferior courts in the state.<sup>8</sup> This includes cognizance of the dates of the beginning

*Den v. Applegate*, 23 N. J. L. 115, in which case it was held that where the jurat to the official oath of the commissioners in a commission to take the depositions of foreign witnesses was signed "A B, Justice of the Sup. Court of Nova Scotia," the court would intend that he had power to administer an oath, though it was nowhere averred in the proceedings.

**1. Jurisdiction.** — *Rogers v. Cady*, 104 Cal. 290, 43 Am. St. Rep. 100.

**Territory Beyond Jurisdiction of State.** — The *Texas* Court of Appeals has judicial knowledge of the fact that the Indian Territory is beyond the jurisdiction of the state of Texas. *Conner v. State*, 23 Tex. App. 378.

And also that Fort McIntosh is a military post, ceded to the United States government, and that, therefore, crimes committed within such fort are beyond the jurisdiction of the state courts. *Lasher v. State*, 30 Tex. App. 387.

**Governmental Jurisdiction.** — Courts will take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer. *Jones v. U. S.*, 137 U. S. 202.

**2. Courts Take Judicial Notice of Judicial Districts**, and of the counties included therein. *Chicago, etc., R. Co. v. Hyatt*, 48 Neb. 161. So also it will be judicially noticed that a certain judicial district is within a certain county, although it comprises only a portion of the territory of that county. *People v. Robinson*, 17 Cal. 363.

**Judicial Districts of State and Course of Circuit Judges.** — *State v. Ray*, 97 N. Car. 510; *Chicago, etc., R. Co. v. Hyatt*, 48 Neb. 161.

**Chancery Districts.** — *Alabama Gold L. Ins. Co. v. Cobb*, 57 Ala. 547.

**Contiguity of Counties — Distances.** — It has been held that courts might take judicial notice of the contiguity of the several counties composing the judicial district, but not of the distances and facilities of communication between the county-seats of the counties composing such districts. *Boggs v. Clark*, 37 Cal. 236.

**Coincidence of Congressional and Judicial District.** — The United States District Courts will take judicial notice that the congressional district and the judicial district of the state of Oregon are identical in area. *U. S. v. Johnson*, 2 Sawy. (U. S.) 482.

**3. Jurisdictional Facts.** — *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 116 U. S. 472; *Lumley v. Wabash R. Co.*, 71 Fed. Rep. 21; *Beals*

*v. Cobb*, 51 Me. 348; *Wills v. State*, 3 Heisk. (Tenn.) 141; *The Ship Minnie v. Reg.*, 23 Can. Sup. Ct. 478.

**4. Jurisdiction of Justices and Inferior Courts.** — *Masterson v. Matthews*, 60 Ala. 260; *Olmstead v. Thompson*, 91 Ala. 130; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142; *Nelson v. Ladd*, 4 S. Dak. 1.

**The Circuit Court of the United States** will take judicial notice that the District Courts were, under the bankrupt law enforced in 1850, vested with exclusive jurisdiction in such cases. *Lathrop v. Stuart*, 5 McLean (U. S.) 167.

**5. Sessions — Beginning — Duration.** — The Supreme Court will take judicial notice of the time fixed by law for the beginning of its sessions, but not of the duration of any particular session. *Gilliland v. Sellers*, 2 Ohio St. 223.

But in the taxation of costs, in ascertaining what shall be allowed for the attendance of a party, judicial notice, it has been held, may be taken of the number of days the court is in session at each term, and also whether the defendant appeared and answered to the action. So in determining what is to be allowed for travel the court will take notice of the distance and situation of the place where a party entitled to tax for travel resides. *Fabyan v. Russel*, 38 N. H. 84.

**6. Component Members.** — *Gilliland v. Sellers*, 2 Ohio St. 223.

**7. Course of Practice and Procedure.** — *Pugh v. Robinson*, 1 T. R. 118.

**Depositions — Where Returned.** — The Supreme Court will take judicial notice of the towns composing the different counties in the state, and of the times when and the places where its sessions are appointed by law to be held; and where a deposition taken within any county in the state is, by its caption, returnable before the Supreme Court at a time and place appointed by law within such county, it will not presume that such deposition is or may be returnable before any other court in any other county and state, but the contrary presumption will obtain. *Kidder v. Blaisdell*, 45 Me. 461; *Martin v. Martin*, 51 Me. 366.

**8. Terms of Inferior Courts — Alabama.** — *Lindsay v. Williams*, 17 Ala. 229; *Bethune v. Hale*, 45 Ala. 522; *Rodgers v. State*, 50 Ala. 102.

*Arkansas.* — *State v. Hammett*, 7 Ark. 492.

*California.* — *Ross v. Austill*, 2 Cal. 183;

*Boggs v. Clark*, 37 Cal. 236.

*Colorado.* — *Van Duzer v. Towne*, 12 Colo. App. 4.



and ending of the terms, their periods of duration, and the coincidence of the days of the week and month with the days of the term, so as to determine what day of the term any given calendar date is.<sup>1</sup>

**Orders of Commissioner's Court — Terms of Justices.** — It has been held, however, that a superior tribunal will not take judicial notice of the orders of the Commissioners' Court fixing the terms of the justices' courts in the county.<sup>2</sup>

**Distinction Between Beginning and Ending of Terms.** — In some jurisdictions a distinction seems to have been taken between judicial notice of the beginning and judicial notice of the ending of the terms of inferior courts, because, presumably, the former date is fixed by law, but the latter is not so fixed.<sup>3</sup>

**Judges of Lower Courts.** — The appellate court will also, in general, take judicial knowledge of the judges of the subordinate state courts created by public law.<sup>4</sup> But the Supreme Court of a state cannot know that a district judge and a person of the same name appearing as an attorney in the case are one and the same person,<sup>5</sup> nor, in a criminal case where the prosecuting attorney

*Illinois.* — *Norfolk v. People*, 43 Ill. 9; *Buckles v. Northern Bank*, 63 Ill. 268.

*Indiana.* — *Morgan v. State*, 12 Ind. 448; *Backhouse v. Gregg*, 19 Ind. 401; *McGinnis v. State*, 24 Ind. 500; *Dorman v. State*, 56 Ind. 454; *Spencer v. Curtis*, 57 Ind. 221; *Lewis v. Wintode*, 76 Ind. 13; *Carmody v. State*, 105 Ind. 546; *Bostwick v. Bryant*, 113 Ind. 448; *Indiana Mut. Bldg., etc., Assoc. v. Paxton*, 18 Ind. App. 304; *Darre v. Brown*, 7 Ind. App. 127; *Anderson v. Anderson*, 141 Ind. 567.

*Kansas.* — *Scruton v. Hall*, 6 Kan. App. 714.

*Kentucky.* — *Com. v. Pritchett*, 11 Bush (Ky.) 281.

*Michigan.* — *Williams v. Hubbard*, 1 Mich. 446.

*Missouri.* — *State v. Broderick*, 70 Mo. 622; *State v. Todd*, 72 Mo. 288; *Harwood v. Toms*, 130 Mo. 225.

*Ohio.* — *Gilliland v. Sellers*, 2 Ohio St. 223.

*Tennessee.* — *Pugh v. State*, 2 Head (Tenn.) 227.

*Texas.* — *Davidson v. Peticolas*, 34 Tex. 27.

*Wyoming.* — *Donovan v. Territory*, 3 Wyo. 91.

**Court House.** — The Supreme Court will take judicial notice of the manner in which a county court house is constructed. *Golcher v. Brisbin*, 20 Minn. 453.

**1. Beginning, Duration, Ending of Terms — Coincidence of Dates.** — *Bethune v. Hale*, 45 Ala. 522; *Rodgers v. State*, 50 Ala. 102; *Van Duzer v. Towne*, 12 Colo. App. 4; *Dorman v. State*, 56 Ind. 454; *Spencer v. Curtis*, 57 Ind. 221; *Lewis v. Wintode*, 76 Ind. 13; *State v. Broderick*, 70 Mo. 622; *State v. Todd*, 72 Mo. 288; *Pugh v. State*, 2 Head (Tenn.) 227; *Davidson v. Peticolas*, 34 Tex. 27.

**Whether Judgment Rendered in Vacation.** — Where the statute provides that the spring term of the Circuit Court shall begin in a county in the latter part of May and continue six weeks, and as much longer as may be necessary, the Supreme Court cannot judicially know that a judgment rendered on July 18 was rendered in vacation; but, if nothing is shown to the contrary, it will presume that the court was regularly in session. *Bostwick v. Bryant*, 113 Ind. 448. See also *Carmody v. State*, 105 Ind. 546.

**2. Orders of Commissioner's Court — Terms of Justices.** — *Swinborn v. Johnson*, (Tex. Civ. App. 1893) 24 S. W. Rep. 567.

**3. Illustration.** — It has been held for example that the Kansas Court of Appeals will take judicial notice of the time when terms of a District Court begin, *Scruton v. Hall*, 6 Kan. App. 714; but not of the length of their duration, *Dudley v. Barney*, 4 Kan. App. 122. But where the record shows that the District Court was in session on a particular day, the Court of Appeals will know that the term entered upon previously had not then expired. *Scruton v. Hall*, 6 Kan. App. 714. And see *Baker v. Knott*, (Idaho 1893) 35 Pac. Rep. 172.

**4. Judges of Lower Courts — England.** — *Compare*, however, with the rule stated in the text, *Skipp v. Hooke*, 2 Stra. 1080.

*Alabama.* — *Ex p. Peterson*, 33 Ala. 74; *Beggs v. State*, 55 Ala. 108.

*Arkansas.* — *Shropshire v. State*, 12 Ark. 190.

*California.* — *People v. Ebanks*, 120 Cal. 626; *San Joaquin County v. Budd*, 96 Cal. 51.

*Illinois.* — *Russell v. Sargent*, 7 Ill. App. 98; *Vahle v. Brackenseik*, 145 Ill. 231; *People v. McConnell*, 155 Ill. 192.

*Indiana.* — *Cincinnati, etc., R. Co. v. Grames*, 8 Ind. App. 112.

*Iowa.* — *Ellsworth v. Moore*, 5 Iowa 486; *Upton v. Paxton*, 72 Iowa 295.

*Kentucky.* — *Kennedy v. Com.*, 78 Ky. 447.

*Maryland.* — *Tucker v. State*, 11 Md. 322; *Cherry v. Baker*, 17 Md. 75.

*Massachusetts.* — *Compare Ripley v. Warren*, 2 Pick. (Mass.) 596.

*Mississippi.* — *Coleman v. Gordon*, (Miss. 1894) 16 So. Rep. 340.

*New York.* — *People v. Bloedel*, (Buffalo Super. Ct. Gen. T.) 16 N. Y. Supp. 837.

*Pennsylvania.* — *Kilpatrick v. Com.*, 31 Pa. St. 198; *Hibbs v. Blair*, 14 Pa. St. 417.

*Vermont.* — *Hancock v. Worcester*, 62 Vt. 106.

**Election and Qualification of Judges.** — The election and qualification of judges of the Circuit Court are public acts of which the court will take judicial notice. *Russell v. Sargent*, 7 Ill. App. 98.

**Appointment by Governor.** — The *Texas* Court of Criminal Appeals judicially knows the appointment by the governor of a district judge. *De La Rosa v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 192.

**5. Identity of Name — Individuality.** — *Ellsworth v. Moore*, 5 Iowa 486.



who held office when the indictment was found came upon the bench when the case was tried, can the appellate court judicially know that the prosecuting attorney and the presiding judge are the same person.<sup>1</sup>

**Rules of Lower Courts — Practice and Procedure.** — Superior courts do not judicially notice the rules of the subordinate tribunals or the course of practice and procedure therein.<sup>2</sup>

**6. Court Officers** — *a.* IN GENERAL. — Courts will judicially know who are their own officers.<sup>3</sup>

So the court can have no judicial knowledge that the person who is sued upon a promissory note, or made a defendant in an action to recover possession of real estate, and who may have the same name as a judge of the Superior Court, is in fact such official. *San Joaquin County v. Budd*, 96 Cal. 51.

1. Prosecuting Attorney — Presiding Judge — Identity. — *Shropshire v. State*, 12 Ark. 190.

2. Rules of Lower Court — Practice and Procedure — *England*. — *Re Ramsden*, 1 Saund. & C. 133, 10 Jur. 879, 15 L. J. Q. B. 234. See also *Sargent v. Wedlake*, 11 C. B. 732, 73 E. C. L. 732; *Van Sandan v. Turner*, 6 Q. B. 773, 51 E. C. L. 773, 9 Jur. 296.

*California*. — *Cutter v. Caruthers*, 48 Cal. 178; *Sweeney v. Stanford*, 60 Cal. 362.

*Colorado*. — *Kindel v. Le Bert*, 23 Colo. 385, 58 Am. St. Rep. 234.

*Illinois*. — *Kessel v. O'Sullivan*, 60 Ill. App. 548; *Gudgeon v. Casey*, 62 Ill. App. 599.

*Indiana*. — *Rout v. Ninde*, 118 Ind. 123.

*Kentucky*. — *March v. Com.*, 12 B. Mon. (Ky.) 25; *Cornelison v. Foushee*, 101 Ky. 257.

*Louisiana*. — *Bowman v. Flowers*, 2 Mart. N. S. (La.) 267; *Dours v. Cazentre*, McGloin (La.) 251.

*Maryland*. — *Cherry v. Baker*, 17 Md. 75.

**Rule Stated — Exception.** — The Supreme Court will not *ex officio* take notice of the customs, laws, or proceedings of inferior courts of limited jurisdiction, unless when revising their judgments, when it is necessary that they should be judicially noticed. *March v. Com.*, 12 B. Mon. (Ky.) 25. And see *Oliver v. Palmer*, 11 Gill & J. (Md.) 440, in which case it was held that when reviewing the decrees and orders of the Chancery Court, the Court of Appeals was "bound judicially to take notice of its general practice, and rules regulating the proceedings under which such decrees and orders were passed." See also *Contee v. Pratt*, 9 Md. 73.

3. Judicial Notice of Officers — Rule Stated — *United States*. — *Pitkin v. Cowen*, 91 Fed. Rep. 599.

*Arkansas*. — *Yell v. Lane*, 41 Ark. 53.

*California*. — *Alderson v. Bell*, 9 Cal. 315; *Campbell v. West*, 86 Cal. 197; *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57.

*Delaware*. — *Harris v. Buehler*, 1 Penn. (Del.) 346.

*Idaho*. — *People v. Butler*, 1 Idaho 231.

*Illinois*. — *Dyer v. Last*, 51 Ill. 179.

*Indiana*. — *Buell v. State*, 72 Ind. 523; *Hipes v. State*, 73 Ind. 39; *Mounijoy v. State*, 78 Ind. 172; *Choen v. State*, 85 Ind. 209; *Miller v. Evansville Nat. Bank*, 99 Ind. 272; *Hamman v. Mink*, 99 Ind. 279.

*Iowa*. — *State v. Postlewait*, 14 Iowa 446; *State v. Schilling*, 14 Iowa 455.

*Maryland*. — *Miller v. Matthews*, 87 Md. 464.

*Massachusetts*. — *Com. v. Fay*, 126 Mass. 235.

*Michigan*. — *Norvell v. McHenry*, 1 Mich. 227.

*Minnesota*. — *State v. Barrett*, 40 Minn. 65.

*Tennessee*. — *Perkins v. Woodfolk*, 8 Baxt. (Tenn.) 411.

*West Virginia*. — *Central Land Co. v. Calhoun*, 16 W. Va. 362.

*Canada*. — *Fay v. Miville*, 2 Rev. Lég. 333; *Simms v. Quebec, etc.*, R. Co., 22 L. C. Jur. 20, 1 Montreal Leg. N. 151.

But where a complaint in bastardy proceedings appears to have been made before a named party as "justice of the peace," and to have been sworn to before him as such, the fact that a copy of the complaint and the copies of all the other papers are certified by the same party as clerk of the police court of a stated place, does not enable the Superior Court, on appeal, to take judicial notice that he was clerk of that court. *Davis v. McEnaney*, 150 Mass. 451.

**Deputies.** — Where the appointment of deputies by the clerk must be approved by the judge of the District Court, judicial notice will be taken in such tribunal of the signature and official character of all persons so appointed. *State v. Barrett*, 40 Minn. 65.

**Prosecuting Attorneys — Attorneys-General.** — Where, on the trial of an indictment for murder, the record showed that at the time when the indictment was found a certain party was prosecuting attorney, and that when the case was tried a party of the same name presided as judge, it was urged in the Supreme Court that such tribunal could judicially know that the same person filled the two offices at the times referred to. But it was held that though the court might take judicial notice that a person of the name stated was prosecuting attorney when the indictment was found, and that a person of the same name presided as circuit judge when the case was tried, yet it could not have judicial knowledge that the prosecuting attorney and the judge were the same person. *Shropshire v. State*, 12 Ark. 190. And see also, for a somewhat similar case, *Ellsworth v. Moore*, 5 Iowa 486.

**Commissioners.** — It has been held that the Court of Exchequer will not notice judicially who are its commissioners for oaths or inspect the list to see if any particular party is one. *Frost v. Hayward*, 10 M. & W. 673, 2 Dowl. N. S. 566, 12 L. J. Exch. 84, 6 Jur. 1045.

**Resident Jurors — Qualifications.** — It has been held that the Supreme Court of *Oklahoma* territory would take judicial notice that there were no resident freeholders within the Osage and Kansas Indian reservations, qualified to serve as jurors. *Goodson v. U. S.*, 7 Okla. 117.

**Receivers — Federal Question.** — A federal court will take judicial notice that the defend-



Thus an Indictment Signed by a "Special Prosecuting" Attorney is not subject to a motion to quash or to a plea in abatement which does not deny the due appointment of such special prosecuting attorney,<sup>1</sup> the court taking judicial notice of the signatures of its officials,<sup>2</sup> and likewise of their official designations.<sup>3</sup>

*b. ATTORNEYS.* — As licensed and enrolled attorneys, advocates, etc., are in a sense officers of the court, judicial notice is taken of such individuals<sup>4</sup> when acting in their official and professional capacities.<sup>5</sup>

*Value of Attorney's Services.* — But an appellate court will not, by looking at an attorney's argument as shown in the printed reports, take judicial notice of the value of his services.<sup>6</sup>

*c. OFFICERS OF OTHER COURTS.* — It has been held that one court is not required to notice judicially the officers of other courts.<sup>7</sup>

But an Appellate Court, in Reviewing a Judgment of a Lower Court in which the latter tribunal took judicial notice of its own officers, may also take judicial notice of the officers of the lower court, for the purpose of affirming the judgment.<sup>8</sup>

**7. Court Seals.** — The courts of the several states judicially notice the seals of the courts of the other states of the Union,<sup>9</sup> but the seal of the court of a

ants in an action in a state court are receivers of a railroad under the appointment of the former court, and hence that the case involves a federal question, although there is no allegation to such effect in the plaintiff's petition for removal. *Pitkin v. Cowen*, 91 Fed. Rep. 599.

**1. Special Prosecuting Attorney.** — *Choen v. State*, 85 Ind. 209.

**2. Signatures of Court Officials.** — *Alcock v. Whatmore*, 8 Dowl. 615; *Alderson v. Bell*, 9 Cal. 315; *Choen v. State*, 85 Ind. 209; *State v. Postlewait*, 14 Iowa 446; *Wood v. Fitz*, 10 Mart. (La.) 196.

*Signature of Clerk.* — Where the jurat in an affidavit on which an information was based was signed "Rufus P. Wells, C. P. C. C." (clerk of Porter Circuit Court), it was held that the court in which the information was filed would be presumed to know that the signature was that of its clerk. *Buell v. State*, 72 Ind. 523.

And, where the word "clerk" was omitted in the jurat of an affidavit it was decided that the court would judicially know, nevertheless, that the attestation was by its own clerk. *Dyer v. Last*, 51 Ill. 179.

*Clerk's Indorsement on Complaint.* — A court will recognize its clerk's indorsement of the date of filing a complaint. *Yell v. Lane*, 41 Ark. 53.

**3. Official Designations.** — *Campbell v. West*, 86 Cal. 197; *Choen v. State*, 85 Ind. 209.

**4. Attorneys.** — *Ferris v. Commercial Nat. Bank*, 158 Ill. 237; *Symmes v. Major*, 21 Ind. 443; *Ex p. Hore, C. & M.* 211, 3 Dowl. 600; *Ex p. King*, 3 Dowl. 41; *Tremaine v. Tonnancourt*, 2 Rev. Leg. 471; *Strippelman v. Clark*, 11 Tex. 296.

It has been held, however, in *Arizona* that the Supreme Court will not take judicial notice of the fact that a certain firm of attorneys was not licensed to appear in the District Court, on the ground that one court will not take judicial notice of the officers of another. *Clark v. Morrison*, (Ariz. 1898) 52 Pac. Rep. 985.

And in *Lyon v. Boilvin*, 7 Ill. 629, it was held that a party desiring to establish the fact that a person who appeared for him without authority was not an attorney at law must

have the roll of attorneys incorporated into the record.

*Identity of Complainant and Enrolled Attorney.* — The Supreme Court will not notice judicially that the complainant in a bill to enforce a judgment is the same person as one bearing the same name who is an attorney of the court, upon a demurrer setting up a statute prohibiting attorneys from purchasing claims for the purpose of instituting suit thereon. *Belden v. Blackman*, 118 Mich. 448.

**5. Distinction Between Private and Official Acts.** — The judicial recognition by courts, of the signatures of the attorneys of such courts, does not extend beyond professional acts done in performance of their duties as attorneys; and the signature of an attorney admitting service of summons, when he is a defendant in the suit, is a private act of which judicial recognition will not be taken. *Masterson v. Le Claire*, 4 Minn. 163.

*Change of Residence.* — The court will not take judicial notice of the fact that the attorney whose name appears on the roll has changed his residence to another state. *Sutton v. Chicago, etc., R. Co.*, 98 Wis. 157.

*Cessation to Practice.* — It has been held that a court will not take cognizance of the mere fact that an advocate has ceased to practice. *Day v. Decousse*, 12 L. C. Jur. 205.

**6. Value of Attorney's Services.** — *Pearson v. Darrington*, 32 Ala. 227.

**7. Officers of Other Courts.** — *Clark v. Morrison*, (Ariz. 1898) 52 Pac. Rep. 985; *Norvell v. McHenry*, 1 Mich. 227.

*Circuit Courts in Same State.* — It has been held that the Circuit Court of one county in a state should take judicial notice as to whether a person signing an execution issued by a Circuit Court of another county is in fact clerk of that court. *White v. Rankin*, 90 Ala. 541.

**8. Rule in Review of Judgment of Lower Court.** — *Campbell v. West*, 86 Cal. 197.

**9. Seals of Courts — Rule Stated.** — *Mangun v. Webster*, 7 Gill (Md.) 78; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; *Com. v. Snowden*, 1 Brews. (Pa.) 218.

*Seal of Orphans' Court.* — In *Mangun v. Webster*, 7 Gill (Md.) 78, it was held that, the



foreign country must, in general, be proved.<sup>1</sup>

**8. Records and Proceedings** — *a. IN GENERAL.* — A court will always take judicial notice of the genuineness and authenticity of its own records.<sup>2</sup>

*b. PROCEEDINGS IN SAME CASE* — (1) *In General.* — Courts will take judicial notice of their own records with reference to the prior proceedings in the case at bar.<sup>3</sup>

**Statutory Proceeding for Execution Against Stockholder of Corporation.** — A proceeding for execution against a stockholder, under a statute providing for such a

Orphans' Court of Washington county, in the District of Columbia, being created under a public statute of the United States, any judicial tribunal in Maryland, acting under the authority of the Act of 1813, might judicially recognize the seal of such court, without requiring any proof of its genuineness or identity other than that afforded by the inspection thereof.

**Stamp on Order.** — A court will not, however, judicially notice the stamp upon a copy of an order, it not being the seal of the court, but the mark of the judge's clerk. *Barrett Nav. Co. v. Shower*, 8 Dowl. 173.

**1. Seals of Courts of Foreign Countries.** — *Griswold v. Pitcairn*, 2 Conn. 85; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; *Com. v. Snowden*, 1 Brews. (Pa.) 218.

**The Seals of Foreign Municipal Courts**, for example, must be proved by extrinsic evidence. *Griswold v. Pitcairn*, 2 Conn. 85. And see *Henry v. Adey*, 3 East 221; *Collins v. Mathew*, 5 East 473; *Delafield v. Hand*, 3 Johns. (N. Y.) 310.

**2. Court Records — Genuineness and Authenticity.** — *Robinson v. Brown*, 82 Ill. 279; *State v. Postlewait*, 14 Iowa 446; *State v. Schilling*, 14 Iowa 455; *National Bank v. Bryant*, 13 Bush (Ky.) 419.

**The Book of Records of Judgments of a court** proves itself when offered in evidence in that court. *Robinson v. Brown*, 82 Ill. 279.

**3. Records and Proceedings in Same Case — Rule Stated.** — *England.* — *Craven v. Smith*, 38 L. J. Exch. 90, L. R. 4 Exch. 146, 20 L. T. N. S. 400, 17 W. R. 710.

*Arkansas.* — *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154.

*California.* — *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57; *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100.

*Illinois.* — *Dines v. People*, 39 Ill. App. 565; *Secrist v. Petty*, 109 Ill. 188.

*Indian Territory.* — *Bohart v. Hull*, (Indian Ter. 1898) 47 S. W. Rep. 306.

*Iowa.* — *Jordan v. Circuit Ct.*, 69 Iowa 177; *Kenosha Stove Co. v. Shedd*, 82 Iowa 540.

*Kansas.* — *State v. Bowen*, 16 Kan. 475; *State v. Stevens*, 56 Kan. 720.

*Kentucky.* — *National Bank v. Bryant*, 13 Bush (Ky.) 419.

*Louisiana.* — *Minor v. Stone*, 1 La. Ann. 283; *Pagett v. Curtis*, 15 La. Ann. 451.

*Michigan.* — *Leonard v. Woodward*, 34 Mich. 514.

*Missouri.* — *Dawson v. Dawson*, 29 Mo. App. 522; *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172; *Chapman v. Currie*, 51 Mo. App. 40; *State v. Ulrich*, 110 Mo. 350.

*Montana.* — *Fredericks v. Davis*, 6 Mont. 465.

*New York.* — *Farmers' L. & T. Co. v. Hotel Brunswick Co.*, 12 N. Y. App. Div. 628, 42 N. Y. Supp. 693; *People v. Rice*, 80 Hun (N. Y.) 437.

*Pennsylvania.* — *Withers v. Gillespy*, 7 S. & R. (Pa.) 10.

*South Dakota.* — *McClain v. Williams*, 10 S. Dak. 332; *Searls v. Knapp*, 5 S. Dak. 325, 49 Am. St. Rep. 873.

*Texas.* — *Farrar v. Bates*, 55 Tex. 193; *Blum v. Stein*, 68 Tex. 608; *Plowman v. Easton*, 15 Tex. Civ. App. 304; *Engle v. Rowan*, (Tex. Civ. App. 1898) 48 S. W. Rep. 757.

*Wisconsin.* — *Newton v. Allis*, 16 Wis. 197; *Brucker v. State*, 19 Wis. 539; *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644; *Mace v. Roberts*, 97 Wis. 199.

**On a Motion to Strike a Paper from the Files** because it was never presented to or signed by the judge, as required, no proof is necessary, as the judge will judicially know of the omission if it occurred. *Secrist v. Petty*, 109 Ill. 188.

So, also, on an appeal from an unsigned judgment, judicial notice may be taken of the fact that the judgment is unsigned. *Carondelet, etc., Co. v. New Orleans*, 44 La. Ann. 394.

**Depositions — Referee.** — It has been held, however, that a referee should not take judicial notice of depositions filed with the papers of the case, but not offered in evidence. *Myers v. Roberts*, 35 Fla. 255.

**Former and Pending Appeals.** — An appellate court will take judicial notice of its own record on a former appeal. *Gans v. Holland*, 37 Ark. 483; *Bell v. Williams*, 10 La. 514; *Thornton v. Webb*, 13 Minn. 498; *Dawson v. Dawson*, 29 Mo. App. 521. Judicial notice will also be taken of the reversal of former proceedings. *Poole v. Seney*, 70 Iowa 275. Also that an appeal is still pending therein, undisposed of. *McClain v. Williams*, 10 S. Dak. 332.

**The Amount of Costs of Appeal** in any given case, and whether the penalty of the appeal bond is sufficient to cover it, will be judicially noticed by the appellate court. *Walker v. Hunter*, 34 Ala. 204.

**Violation of Certiorari.** — Proceedings to punish a party for disobedience of the stay implied in a writ of certiorari do not form part of the certiorari suit, so as to authorize the court in those proceedings to take judicial notice of the files in the certiorari suit, in the absence of their being put in evidence in the contempt proceedings. *State v. Hudson County Electric Co.*, 61 N. J. L. 114.

**Signature of Parties to Cause.** — Courts will not take judicial notice of the genuineness of the signatures of parties to a cause. *Alderson v. Bell*, 9 Cal. 315; as the signature to an admission of service of process, *Downs v. School Dist. No. 1*, 4 Wash. 309.



course in certain circumstances on judgment rendered against the corporation, has been held to be so connected with the judgment as to enable the court to take judicial notice of such judgment.<sup>1</sup>

(2) *Date of Institution of Suit.* — The court will take judicial notice of the date of the institution of a suit as it appears on the record or from the file mark on the papers.<sup>2</sup>

(3) *Tender and Payment into Court.* — It has been held generally that judicial notice may be taken of the payment of money into court.<sup>3</sup> But on the trial of an appeal from the award of the commissioner in condemnation proceedings, it was held that the court was not bound to take judicial notice that the amount of the award had been deposited with the clerk.<sup>4</sup>

(4) *Rule in Garnishment Cases.* — On proceedings against a garnishee judicial notice may be taken of the case against the principal defendant and the record in the original action.<sup>5</sup>

*c. PROCEEDINGS IN OTHER CAUSES.* — Courts will not, as a rule, take judicial notice of former proceedings before them or of the contents of their own records in other causes.<sup>6</sup>

1. *Statutory Proceeding Against Stockholder.* — *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

2. *Date of Institution of Suit.* — *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57; *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100; *Chapman v. Currie*, 51 Mo. App. 40; *Withers v. Gillespy*, 7 S. & R. (Pa.) 10; *Searls v. Knapp*, 5 S. Dak. 325, 49 Am. St. Rep. 873.

And Where the Date of a Particular Event Is Admitted, the court will take judicial notice how long thereafter an action pending before it was announced. *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100.

*Statute of Limitations.* — In every case where a demurrer is interposed to a complaint upon the ground that the cause of action is barred by the statute of limitations, the court must, and does, for the purpose of passing upon the question presented, take judicial notice of the date at which the action is commenced. *Hollenbach v. Schnabel*, 101 Cal. 312, 40 Am. St. Rep. 57.

So, also, in criminal proceedings, to take the case out of the statute of limitations, judicial notice may be taken of prior proceedings therein, including those before the examining magistrate. *State v. Stevens*, 56 Kan. 720.

*Presumption in Appellate Court.* — When the date of the institution of an action is material in order to sustain a judgment on appeal, and there is no proof in the appellate tribunal as to the time when the summons was served or the action commenced, the latter court will presume that the summons and pleadings in the action were judicially noticed in the court below, and that the point in question was ascertained and correctly decided. *Searls v. Knapp*, 5 S. Dak. 325, 49 Am. St. Rep. 873.

3. *Tender and Payment into Court.* — The court will take notice whether a tender has been paid into court, and need not submit the question to the jury. *Newton v. Allis*, 16 Wis. 197.

*Fund Realized from Sale in Attachment.* — In *Blum v. Stein*, 68 Tex. 608, the plaintiffs brought an action, and wrongfully sued out a writ of attachment, under which the property of the defendant was levied upon, sold,

and the proceeds paid into court. The defendant answered, setting up the wrongful issue of the attachment, asking and recovering damages on account thereof. The court entered judgment without reference to the fund arising from the sale of the attached property, which was, on appeal, held to have been error, on the ground that the court knew judicially that the money was in court, and should therefore have made proper disposition of it.

4. *Deposit in Court of Award in Condemnation Proceedings.* — *Foster v. Chicago, etc., R. Co.*, 10 Tex. Civ. App. 476. It was conceded in this case, however, that where a tender or deposit is made in pursuance of a statute which directs the disposition to be made of it, judicial note will be taken thereof. But the court observed: "We think it would be going too far to hold that the court must take notice of the terms upon which every deposit of money is made with its clerk by one of the parties to the litigation, and make the proper disposition of it in accordance therewith, regardless of the manner in which the knowledge is brought to its attention."

5. *Rule in Garnishment Cases.* — *Kenosha Stove Co. v. Shedd*, 82 Iowa 540; *Farrar v. Bates*, 55 Tex. 193; *Plowman v. Easton*, 15 Tex. Civ. App. 304; *Mace v. Roberts*, 97 Wis. 199.

*Qualification of Rule.* — In *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, the rule in question was limited to cases where the garnishment is in aid of execution, and not where the garnishment proceeding is instituted at the time of the issuance of the summons in the main action. The reason of this is said to be that a garnishment in aid of execution is substantially a continuance of the main action. When the garnishment proceeding is begun contemporaneously with the suit against the principal defendant, or before judgment therein, there are substantially two actions proceeding at the same time.

6. *Records and Proceedings in Other Causes.* — *United States.* — *U. S. v. Manderson*, 3 U. S. App. 199.

*Arkansas.* — *Gibson v. Buckner*, 65 Ark. 84. *California.* — *People v. De La Guerra*, 24



**Rule under Particular Statute.** — Nor does a statute providing that the courts of a state may take judicial notice of the public and private acts of the judicial department authorize a court to take judicial cognizance of its judgment in another cause.<sup>1</sup>

**Connection of Cause with Former Decision.** — The Supreme Court of a state will not take judicial notice that the case before it is connected with one formerly decided by it.<sup>2</sup>

**Branches of Same Proceeding.** — But a court may take judicial notice of its own judgment in a suit which was virtually a portion of the same record.<sup>3</sup>

**And Where the Proceedings in Another Cause Are of Sufficient Public Notoriety,** it seems that judicial notice may be taken thereof on such ground alone.<sup>4</sup>

**A Few Other Cases** in which the general rule stated above as to proceedings in other causes does not seem to have been applied are given in the notes below.<sup>5</sup>

Cal. 73; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Rogers v. Tennant*, 45 Cal. 184; *Stanley v. McElrath*, 86 Cal. 449; *Ralphs v. Hensler*, 97 Cal. 296.

*Georgia.* — *Clifton v. State*, 53 Ga. 241.

*Illinois.* — *Magloughlin v. Clark*, 35 Ill. App. 251.

*Iowa.* — *Baker v. Mygatt*, 14 Iowa 131; *Enix v. Miller*, 54 Iowa 551; *Garretson v. Ferrall*, 92 Iowa 728; *Loomis v. Griffin*, 78 Iowa 482.

*Kansas.* — *Central Branch Union Pac. R. Co. v. Andrews*, 34 Kan. 563; *Bond v. White*, 24 Kan. 48; *Thayer v. Honeywell*, 7 Kan. App. 548.

*Kentucky.* — *National Bank v. Bryant*, 13 Bush (Ky.) 419.

*Louisiana.* — *Bouguille v. Dede*, 9 La. Ann. 292.

*Maryland.* — *Anderson v. Cecil*, 86 Md. 490.

*Michigan.* — *Chittenden v. Witbeck*, 50 Mich. 401.

*Minnesota.* — *Caldwell v. Bruggerman*, 8 Minn. 286.

*Missouri.* — *State v. Edwards*, 19 Mo. 674; *Adler v. Lang*, 26 Mo. App. 226; *Banks v. Burnam*, 61 Mo. 76.

*North Carolina.* — *Branch v. Wilmington*, etc., R. Co., 88 N. Car. 573; *Daniel v. Bellamy*, 91 N. Car. 78.

*South Dakota.* — *Grace v. Ballou*, 4 S. Dak. 333.

*Texas.* — *Armendiaz v. Serna*, 40 Tex. 291.

*Wisconsin.* — *McCormick v. Herndon*, 67 Wis. 648.

**An Appellate Court** cannot take notice of facts in a record before it in deciding another case with which they are involved. *Chittenden v. Witbeck*, 50 Mich. 401.

**Matters Set Out in Counterclaim.** — Judicial notice will not be taken of the affirmative matters set out in a counterclaim as having been formerly adjudicated by the same court in a different action. *Stanley v. McElrath*, 86 Cal. 449, 26 Pac. Rep. 800.

**A Judge Sitting in One County** cannot take judicial notice of a conviction or *nol. pros.* previously had before him in another county. *State v. Edwards*, 19 Mo. 674.

**Adjudications of Insolvency, Bankruptcy, etc.** — The District Court of a state is not bound to take judicial notice of the proceedings of the District Court of another county; and a disregard of an adjudication of insolvency there made, even if properly proven, would amount to no more than error. *State v. Fifth Judicial Dist. Ct.*, 18 Nev. 286.

Nor will a court take judicial notice of proceedings in bankruptcy in another court, affecting the parties before it. Its duty is to proceed, as between the parties, until by some proper pleadings in the case it is informed of the changed relations of any of such parties to the subject-matter of the suit. *Eyster v. Gaff*, 91 U. S. 521, *affirming* 2 Colo. 228.

**On a Hearing by the Board of County Commissioners** of a petition for the incorporation of a town, the board cannot take judicial cognizance of its own orders or judgment in a different case on the same subject. *Grusenmeyer v. Logansport*, 76 Ind. 549.

**1. Rule under Particular Statute.** — *Lake Merced Water Co. v. Cowles*, 31 Cal. 215.

**2. Connection with Former Decision.** — *Banks v. Burnam*, 61 Mo. 76.

**A Mere Reference in a Bill of Complaint** to proceedings in another suit in the same court does not make such proceedings a part of the plaintiff's case, so that judicial notice may be taken of them without the filing of exhibits or the taking of any testimony. *Anderson v. Cecil*, 86 Md. 490.

**3. Branches of Same Proceeding.** — *Minor v. Stone*, 1 La. Ann. 283; *Farrar v. Bates*, 55 Tex. 193.

**A Judgment in the Supreme Court when Enjoined** is part of the record which the judge is bound to notice, and need not be formally introduced in evidence. *Minor v. Stone*, 1 La. Ann. 283.

**4. Matters of Public Notoriety.** — *In re Durant*, 84 Fed. Rep. 314.

**Illustrations** — *Dedication of Street.* — *Story v. Ulman*, 88 Md. 244.

**Tax Sales of Realty Declared Invalid.** — *Allen v. Swoope*, 64 Ark. 576.

**Entry of Village as Town Site.** — *Mankato v. Meagher*, 17 Minn. 265.

**5. Appointment of Receiver.** — It has been held that a court may, in order to determine its power to grant relief in regard to certain property, consider the record of proceedings in that court wherein a receiver was appointed for the property. *Louisville Trust Co. v. Cincinnati*, 76 Fed. Rep. 296, 47 U. S. App. 36.

**And Where an Attorney Was Sued for Negligence** in the conduct of a certain lawsuit, it was held that the court might take judicial notice of a remittitur entered in the course of the proceedings in question. *Gambert v. Hart*, 44 Cal. 549.

**Prosecution Against Juror.** — A judge may take judicial notice of the existence, before his court, of a prosecution for crime against one



**XV. PUBLIC TREATIES AND RIGHTS THEREUNDER.** — The courts of a country take judicial notice of public treaties made and entered into by the proper representatives of the sovereign power of their own government, and of all rights, public and private, acquired thereunder.<sup>1</sup>

**Treaties with Indian Tribes.** — Judicial notice will be taken by the courts of the United States, state and federal, of the treaties made by the federal government with the Indian tribes originally in possession of the soil;<sup>2</sup> but not of acts done under them, as of the exercise by certain named persons of the right to select and settle upon a certain quantity of land.<sup>3</sup>

**XVI. LAWS AND STATUTES — 1. In General.** — The general rule in this connection is that courts will take judicial notice of the general laws in force in the jurisdiction in which they sit.<sup>4</sup>

**2. Public Statutes — a. IN GENERAL.** — Judicial notice will be taken by all the courts of a state or country, of the public statute laws enacted by the law-making body.<sup>5</sup> This includes, it has been held, notice of the time when

called as a juror. *State v. Jackson*, 35 La. Ann. 769.

**1. Public Treaties — United States.** — *Lacroix v. Serrazin*, 15 Fed. Rep. 489; *Callsen v. Hope*, 75 Fed. Rep. 758; *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 103; *U. S. v. Reynes*, 9 How. (U. S.) 127; *Doe v. Braden*, 16 How. (U. S.) 635; *Hauenstein v. Lynham*, 100 U. S. 483.

*Indian Territory.* — *Myers v. Mathis*, (Indian Ter. 1898) 46 S. W. Rep. 178.

*Minnesota.* — *Dole v. Wilson*, 16 Minn. 525.

*North Dakota.* — *Kreuger v. Schultz*, 6 N. Dak. 310.

*Oklahoma.* — *Gay v. Thomas*, 5 Okla. 1.

*Texas.* — *Jones v. Laney*, 2 Tex. 342.

*Wisconsin.* — *Montgomery v. Deeley*, 3 Wis. 709.

**Execution of Authority Conferred by Public Treaties on President.** — Courts will take judicial notice of public laws and treaties, and of the authority conferred by them upon the President of the United States; but not of the fact that authority conferred on him to do an act affecting but a small number of persons, and those not citizens of the United States, has been exercised. *Dole v. Wilson*, 16 Minn. 525.

**2. Treaties with Indians — United States.** — *U. S. v. Payne*, 2 McCreary (U. S.) 289; *Wilson v. Wall*, 6 Wall. (U. S.) 83.

*Indiana.* — *Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448.

*Indian Territory.* — *Myers v. Mathis*, (Indian Ter. 1898) 46 S. W. Rep. 178.

*Minnesota.* — *Dole v. Wilson*, 16 Minn. 525.

*North Dakota.* — *Kreuger v. Schultz*, 6 N. Dak. 310.

*Oklahoma.* — *Gay v. Thomas*, 5 Okla. 1.

**3. Particular Acts — Selection and Settlement.** — *Dole v. Wilson*, 16 Minn. 525.

**Lands Within "Indian Country" — Title, etc.** — Courts take judicial notice that certain lands, particularly described, were within the "Indian country" and in possession of the Indians, and also of the date when the Indian right of occupancy was terminated by treaty. *Kreuger v. Schultz*, 6 N. Dak. 310. Likewise, that the title to lands in the Chickasaw Nation is in the nation, and not in its citizens, and that the only right in such lands that can be acquired by an individual is that of occupancy.

*Myers v. Mathis*, (Indian Ter. 1898) 46 S. W. Rep. 178.

**4. Where in an Action an Indictable Conspiracy** appears to have been committed, the court will take judicial notice of the fact, though it is not pleaded. *Scott v. Brown*, 61 L. J. Q. B. 738, (1892) 2 Q. B. 724, 4 Reports 42, 67 L. T. N. S. 782, 41 W. R. 116, 57 J. P. 213.

**It Has Been Held that the Supreme Court of the United States** will take judicial notice of the facts concerning the pueblo of San Francisco, recited in former decisions of such court, in statutes of the United States and the state of California, and in the records of the department of the interior. *Knight v. U. S. Land Assoc.*, 142 U. S. 161.

**Judicial Notice of Irish Law in English Courts.**

— The appellant, a domiciled Irishwoman, being an infant without legal guardian, married in Ireland, before the passing of the Infants Settlement Act (18 & 19 Vict., c. 43), a domiciled Scotchman. An antenuptial settlement was executed. After the death of her husband she began an action in the Scotch courts to set aside the settlement. No evidence was given as to the capacity of an infant to execute a binding contract by the law of Ireland, but it was held that, the point being raised in the pleadings, the House of Lords must take judicial notice that by the law of Ireland the settlement was not binding on the appellant, without regard to whether any, or what, evidence of the law of Ireland, as a matter of fact, had been given in the court below. *Cooper v. Cooper*, 13 App. Cas. 88, 59 L. T. N. S. 1. See further *infra*, subdivisions of this section and notes thereto.

**5. General Rule as to Public Statutes — England.** — *Cooper v. Cooper*, 13 App. Cas. 88, 59 L. T. N. S. 1; *Partridge v. Strange*, Plowd. 77; *Scott v. Brown*, (1892) 2 Q. B. 724.

*Canada.* — *Girdlestone v. O'Reilly*, 21 U. C. Q. B. 409.

*United States.* — *Elwood v. Flannigan*, 104 U. S. 562; *Hanley v. Donoghue*, 116 U. S. 1; *Hoyt v. Russell*, 117 U. S. 401; *Gormley v. Bunyan*, 138 U. S. 623; *Breed v. Northern Pac. R. Co.*, 35 Fed. Rep. 642; *Newberry v. Robinson*, 36 Fed. Rep. 841; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. Rep. 129; *U. S. v. Chum Shang Yuen*, 57 Fed. Rep. 588; *In re Lintner*, 57 Fed. Rep. 587; *Mer-*



such statutes go into effect, their repeal, and generally notice of everything which may affect the validity, meaning, and proper construction thereof.<sup>1</sup>

chants' Exch. Bank *v.* McGraw, 59 Fed. Rep. 972; *L'Engle v. Gates*, 74 Fed. Rep. 513; *Merrill v. Dawson, Hempst.* (U. S.) 563; *Jasper v. Porter*, 2 McLean (U. S.) 579; *Jones v. Hays*, 4 McLean (U. S.) 521; *Miller v. McQuerry*, 5 McLean (U. S.) 469; *Owings v. Hull*, 9 Pet. (U. S.) 607; *Harpending v. Reformed Protestant Dutch Church*, 16 Pet. (U. S.) 455; *Junction R. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Smith v. Tallapoosa County*, 2 Woods (U. S.) 574.

*Alabama*. — *White v. St. Guirons, Minor* (Ala.) 331, 12 Am. Dec. 56.

*Arkansas*. — *Pritchard v. Woodruff*, 36 Ark. 196; *Williams v. State*, 37 Ark. 463.

*California*. — *Semple v. Hagar*, 27 Cal. 163; *Schwerdtle v. Placer County*, 108 Cal. 589; *Southern Pac. R. Co. v. Painter*, 113 Cal. 253; *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. Rep. 155.

*Georgia*. — *Lane v. Harris*, 16 Ga. 217; *Morris v. Davidson*, 49 Ga. 361.

*Illinois*. — *Gooding v. Morgan*, 70 Ill. 275; *People v. Stuart*, 97 Ill. 123.

*Indiana*. — *Coleman v. Dobbins*, 8 Ind. 156; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Murphy v. Hendricks*, 57 Ind. 593; *Hamilton v. Shoaff*, 99 Ind. 63; *State v. Gramelspacher*, 126 Ind. 398; *Marmon v. White*, 151 Ind. 445.

*Iowa*. — *State v. Clare*, 5 Iowa 509; *Pierson v. Baird*, 2 Greene (Iowa) 235; *Coughran v. Gilman*, 81 Iowa 442.

*Kansas*. — *Topeka v. Tuttle*, 5 Kan. 312; *Division of Howard County*, 15 Kan. 194.

*Kentucky*. — *Laidley v. Cummings*, 83 Ky. 606.

*Louisiana*. — *State v. O'Conner*, 13 La. Ann. 486.

*Maryland*. — *State v. Jarrett*, 17 Md. 309; *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1.

*Michigan*. — *People v. Mahaney*, 13 Mich. 481.

*Minnesota*. — *Duncan v. Cobb*, 32 Minn. 460.

*Missouri*. — *Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541.

*New York*. — *Kessel v. Albetis*, 56 Barb. (N. Y.) 362; *Ottman v. Hoffman*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 714.

*North Carolina*. — *State v. Cooper*, 101 N. Car. 688; *State v. Snow*, 117 N. Car. 774; *Wikel v. Jackson County*, 120 N. Car. 451.

*Pennsylvania*. — *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306; *Com. v. McAndrews*, 8 Kulp (Pa.) 335.

*South Dakota*. — *In re Kirby*, 10 S. Dak. 338.

*Tennessee*. — *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.) 742.

*Texas*. — *Mims v. Swartz*, 37 Tex. 13; *Duren v. Houston, etc., R. Co.*, 86 Tex. 287.

*Utah*. — *People v. Hopt*, 3 Utah 396.

*Virginia*. — *Bayly v. Chubb*, 16 Gratt. (Va.) 284.

*Wisconsin*. — *Berliner v. Waterloo*, 14 Wis. 378.

In Ascertaining the Value of Real Estate for

the purpose of determining whether a decree setting aside a conveyance thereof from the defendant to himself and wife as tenants by entireties would benefit the plaintiffs, creditors of the defendant, it is the duty of the court to take judicial notice of the fact that the defendant's wife is entitled to one-third of such real estate as against general creditors. *Marmon v. White*, 151 Ind. 445.

**Removal of Cloud on Title.** — It is a matter of judicial knowledge that the danger of a cloud on title arising from an assessment which has been held void is removed by a subsequent statute recognizing the invalidity of the assessment and providing for a reassessment. *Byram v. Detroit*, 50 Mich. 56.

**Upon a Covenant to Pay Interest** at ten per cent., made while the statute 16 Vict., c. 80, was in force, and before the statute 22 Vict., c. 85, it was held that the court was bound to notice that by the statute no more than six per cent. could be recovered, though *non est factum* only had been pleaded. *Girdlesone v. O'Reilly*, 21 U. C. Q. B. 409.

**1. The Time When a Public Statute Takes Effect** is a proper subject of judicial notice, as well as its tenor. *Hoyt v. Russell*, 117 U. S. 401; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Pierson v. Baird*, 2 Greene (Iowa) 235; *Duncan v. Cobb*, 32 Minn. 460; *Ottman v. Hoffman*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 714; *State v. Foote*, 11 Wis. 14, 78 Am. Dec. 689; *Berliner v. Waterloo*, 14 Wis. 378.

And in the ascertainment of such fact the court may resort to any reliable sources of information. *Ottman v. Hoffman*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 714.

**Publication.** — Courts take judicial notice of the time at which a statute takes effect by publication. *Duncan v. Cobb*, 32 Minn. 460. And it has also been held that a court would take cognizance of the existence and validity of a statute although it does not affirmatively appear that it was published in compliance with the law of the state providing that statutes shall become operative from the time of their publication. *People v. Hopt*, 3 Utah 396.

**Repeal.** — Courts take judicial notice of the repeal of public statutes, *State v. O'Conner*, 13 La. Ann. 486; *Springfield v. Worcester*, 2 Cush. (Mass.) 52; *Wikel v. Jackson County*, 120 N. Car. 451; or that there has been no repeal of such a statute, *Com. v. Bierman*, 13 Bush (Ky.) 345.

**Also of the Legislative Object and Intent.** — *Austin v. State*, 101 Tenn. 563; *Stout v. Grant County*, 107 Ind. 343; *Smith v. Speed*, 50 Ala. 276.

**Levy of County Tax.** — It has also been held that a federal court may take judicial notice of the public records of a state showing the number of duly elected justices in a county, in order to determine the validity of the levy of the county tax. *Central Trust Co. v. Ashville Land Co.*, 72 Fed. Rep. 365.

**Validity of Law as Dependent on Election of Legislators.** — But the courts cannot take judicial notice of and pass upon the validity of



*b.* **LEGISLATIVE JOURNALS.** — The general rule is believed to be that the courts may *ex officio* take judicial notice of the legislative journals required by law to be kept, to ascertain the validity or construction of a public statute.<sup>1</sup>

In Some Jurisdictions, however, it is held that when the legislative journals are relied on they must be brought before the courts as evidence, though when so offered they prove themselves.<sup>2</sup>

**3. What Are Public Statutes Within Rule of Judicial Notice** — *a.* **IN GENERAL.** — It has been said that a public law of which the courts will take judicial notice is "one which affects the public, either generally or in some classes."<sup>3</sup>

*b.* **STATUTES DECLARED TO BE PUBLIC.** — Statutes which are declared by the legislature at the time of their enactment to be public acts will be judicially noticed by the courts.<sup>4</sup>

elections of members of the legislature for the purpose of declaring a law invalid by reason of the invalidity in such elections. *People v. Mahaney*, 13 Mich. 491.

**Judicial Notice of Matters Affecting Validity, Meaning, or Construction.** — See Division of Howard County, 15 Kan. 195; *Topeka v. Gillett*, 32 Kan. 431. See also *infra*, this section, *Legislative Journals*.

**1. Rule as to Legislative Journals** — *Alabama.* — *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Stein v. Leeper*, 78 Ala. 517.

*Florida.* — *State v. Hocker*, 36 Fla. 358.

*Kansas.* — Division of Howard County, 15 Kan. 195.

*Louisiana.* — *Barnard v. Gall*, 43 La. Ann. 959.

*Michigan.* — *People v. Mahaney*, 13 Mich. 491.

*Mississippi.* — *Green v. Weller*, 32 Miss. 650.

*Missouri.* — *State v. Mason*, (Mo. 1900) 55 S. W. Rep. 636.

*South Dakota.* — *Somers v. State*, 5 S. Dak. 321.

*Utah.* — *Ritchie v. Richards*, 14 Utah 345.

*Wisconsin.* — *McDonald v. State*, 80 Wis. 407; *In re Ryan*, 80 Wis. 414.

**Inconsistent Laws Approved Same Day.** — Where it becomes necessary to know which of two laws approved on the same day, and containing inconsistent provisions, was the later expression of the legislative will, the court may, of its own motion, examine the legislative journals and take judicial notice of what they show. *Somers v. State*, 5 S. Dak. 321.

**Files of Secretary of State.** — In taking judicial notice of a statute, the court may refer to the original act on file in the office of the secretary of state. *State v. Clare*, 5 Iowa 509; *Bowen v. Missouri Pac. R. Co.*, 118 Mo. 541; *People v. Purdy*, 2 Hill (N. Y.) 33.

**2. Illinois Cent. R. Co. v. Wren**, 43 Ill. 77; *Grob v. Cushman*, 45 Ill. 119; *Auditor v. Haycraft*, 14 Bush (Ky.) 284.

**Journals of Houses of Parliament.** — It has been held that courts will not take judicial notice of the journals of either house of Parliament. *Rex v. Knollys*, 1 Ld. Raym. 10.

**Yeas and Nays.** — The courts cannot take judicial notice that the yeas and nays were not entered on the journal on the final passage of an act appropriating money, although the amount claimed under it is not stated therein. *Auditor v. Haycraft*, 14 Bush (Ky.) 284.

**Conflict of Indiana Cases.** — In *Coleman v. Dobbins*, 8 Ind. 156, it was held that the courts would not judicially notice the contents of the

legislative journals, their judicial knowledge not extending to the history of statutes or their passage through the legislature. But see *Coburn v. Dodd*, 14 Ind. 347. And in *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710, it was held that the court would take judicial knowledge of every fact upon which, in any view, depended the question whether a document purporting to be a statute had by legislative action been invested with the force of law. This decision would seem to overrule the cases of *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463, and *Coleman v. Dobbins*, 8 Ind. 156; and it criticises with disapproval *Purdy v. People*, 4 Hill (N. Y.) 384; *People v. Chenango County*, 8 N. Y. 317, and *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77. See also *Madison County v. Burford*, 93 Ind. 383; *Evansville v. State*, 118 Ind. 434.

**3. Public Statutes** — **Judicial Notice.** — *Hart v. Baltimore*, etc., R. Co., 6 W. Va. 349.

**A Statute Amending or Repealing a Public Act** will always be regarded as itself an act of such character that the courts will take judicial notice of it. *Belmont v. Morrill*, 69 Me. 314.

**Acts Recognized in Prior Decisions.** — In *Mower v. Kemp*, 42 La. Ann. 1007, it was held that while it is true that a legislative act authorizing a private corporation to execute a mortgage on lands and franchises which have been donated to it by the state, being a private act, should be introduced in evidence, yet the fact that it has not been so introduced can make no difference when it has been recognized and enforced by the court in another cause, the court being bound to take judicial cognizance of its own decisions.

**Joint Resolutions of State Legislature.** — As holding that the courts will take judicial notice of joint resolutions of the General Assembly, see *McCarver v. Herzberg*, 120 Ala. 523; *State v. Delesdenier*, 7 Tex. 76.

**4. England.** — *Beaumont v. Mountain*, 10 Bing. 404, 25 E. C. L. 183; *Hargreaves v. Lancaster*, etc., R. Co., 1 R. & Can. Cas. 416.

*United States.* — *Case v. Kelly*, 133 U. S. 21; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227; *Beaty v. Knowler*, 4 Pet. (U. S.) 152.

*Arkansas.* — *Hammett v. Little Rock*, etc., R. Co. 20 Ark. 204.

*Illinois.* — *Doyle v. Bradford*, 90 Ill. 416; *Peoria*, etc., R. Co. v. *People*, 116 Ill. 401.

*Indiana.* — *Eel River Draining Assoc. v. Topp*, 16 Ind. 242; *Cincinnati*, etc., R. Co. v. *Clifford*, 113 Ind. 460.

*Iowa.* — *State v. Olinger*, (Iowa 1897) 72 N. W. Rep. 441.



c. MAY BE LOCAL IN APPLICATION. — A statute may be a public act so that judicial notice may be taken thereof although it is not applicable to all parts of the state. It is sufficient if its provisions extend to all persons within described territorial limits or of a particular locality.<sup>1</sup> Thus an act prohibiting the sale of spirituous liquors in certain designated townships in a particular county is a public act and will be judicially noticed.<sup>2</sup> So, also, a statute changing the name of a township is a "public local" statute, of which judicial notice should be taken.<sup>3</sup>

4. **Execution of Public Statutes.** — Courts will not, as a rule, take judicial notice of the execution of a public statute. The various modes in which such statutes are carried into effect by the executive officers of the government are matters of fact, and must be proved as such.<sup>4</sup>

5. **Private Statutes.** — The general rule is that judicial notice is not taken of private and special statutes, whether enacted by the legislature of a state or by Congress.<sup>5</sup> Nor will a court take judicial notice of an act which, by

*Missouri.* — *Bowie v. Kansas City*, 51 Mo. 451.

Where the Constitution of a State declares that every statute shall be a public act, the United States courts will take judicial notice of a statute creating a corporation without its being pleaded or offered in evidence. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

**Supplements to Public Acts.** — Where the charter of a city is declared to be a public act, a supplement to such act will follow the original for the purpose of judicial recognition. *Hawthorne v. Hoboken*, 32 N. J. L. 172.

1. **Statutes Local in Application** — *Arkansas.* — *Bevens v. Baxter*, 23 Ark. 387.

*Connecticut.* — *Griswold v. Gallup*, 22 Conn. 208.

*Indiana.* — *Levy v. State*, 6 Ind. 281.

*Kentucky.* — *Com. v. Bierman*, 13 Bush (Ky.) 345.

*Maine.* — *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537.

*Massachusetts.* — *Burnham v. Webster*, 5 Mass. 266.

*Michigan.* — *Le Roy v. East Saginaw City R. Co.*, 18 Mich. 233, 100 Am. Dec. 162.

*Minnesota.* — *Burlington Mfg. Co. v. Board of Courthouse, etc.*, Com'rs, 67 Minn. 327.

*Missouri.* — *State v. Munch*, 57 Mo. App. 207.

*New York.* — *Bretz v. New York*, 6 Robt. (N. Y.) 325.

*North Carolina.* — *State v. Cooper*, 101 N. Car. 684.

*Pennsylvania.* — *Van Swartow v. Com.*, 24 Pa. St. 131; *Rauch v. Com.*, 78 Pa. St. 490; *Com. v. McAndrews*, 8 Kulp (Pa.) 338.

*Wisconsin.* — *Meshke v. Van Doren*, 16 Wis. 319.

*Canada.* — *Darling v. Hitchcock*, 25 U. C. Q. B. 463.

**Acts Prescribing the Limits of Towns and Counties** are public acts of which the courts will take judicial notice. *Ross v. Reddick*, 2 Ill. 73; *State v. Jackson*, 39 Me. 291.

**The Acts of Congress Confirming Land Titles in Missouri** are public, and will be judicially noticed. *Papin v. Ryan*, 32 Mo. 21; *Wood v. Nortman*, 85 Mo. 298.

**A Statute Operating as a Grant of the Public Domain** and affecting the rights of navigation and fisheries by allowing the making of im-

provements which interfere with the navigation of the water of a certain locality will be judicially noticed by the courts as a public law. *Hammond v. Inloes*, 4 Md. 139.

**Judicial Notice May Also Be Taken** of a law passed to enable a particular public officer to qualify. *State v. Jarrett*, 17 Md. 309.

2. **Act Prohibiting Sale of Liquor.** — *Levy v. State*, 6 Ind. 281; *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537; *State v. Munch*, 57 Mo. App. 207; *State v. Cooper*, 101 N. Car. 688; *Rauch v. Com.*, 78 Pa. St. 490.

The court will notice judicially that there is but one local option law in the state, *State v. Munch*, 57 Mo. App. 207; and that special acts as to the sale of liquors do not take effect until submitted to the vote of the people, *Com. v. Throckmorton*, (Ky. 1895) 32 S. W. Rep. 130.

3. **Changing Name of Township.** — *State v. Cooper*, 101 N. Car. 688.

4. **Execution of Public Statutes** — *California.* — *Schwerdtle v. Placer County*, 108 Cal. 589.

*Indiana.* — *Indianapolis, etc.*, R. Co. v. Caldwell, 9 Ind. 397; *Atkinson v. Mott*, 102 Ind. 431.

*Kentucky.* — *Com. v. Bierman*, 13 Bush (Ky.) 345.

*Maryland.* — *Chesapeake, etc.*, Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

*Missouri.* — *Foster v. Swope*, 41 Mo. App. 137; *State v. Macy*, 72 Mo. App. 427.

**And with Stronger Reason, It Would Seem**, a court cannot judicially know that a sale of land has not been made, because it is bound to know that there is a law providing for such sale. *Bledsoe v. Doe*, 4 How. (Miss.) 13.

5. **Private Statutes** — *United States.* — *Leland v. Wilkinson*, 6 Pet. (U. S.) 317.

*Alabama.* — *Broad St. Hotel Co. v. Weaver*, 57 Ala. 26.

*California.* — *Ellis v. Eastman*, 32 Cal. 447.

*Illinois.* — *Lavalle v. People*, 6 Ill. App. 157.

*Kansas.* — *Atchison, etc.*, R. Co. v. Blackshire, 10 Kan. 477.

*Kentucky.* — *Halbert v. Skyles*, 1 A. K. Marsh. (Ky.) 368; *Rudd v. Deposit Bank*, (Ky. 1899) 49 S. W. Rep. 971; *Collier v. Baptist Education Soc.*, 8 B. Mon. (Ky.) 68.

*Louisiana.* — *Workmen's Bank v. Converse*, 33 La. Ann. 963.

*New Jersey.* — *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367.



repealing a repealing clause, revives a private act.<sup>1</sup> But where a public act recognizes and amends a private act, judicial notice may be taken of the existence and duties of an office created by the latter.<sup>2</sup>

**6. Constitutional Provisions.** — State courts judicially know the provisions of their own constitutions and of the Constitution of the United States.<sup>3</sup> So, also, federal courts take judicial notice of the constitutions of the several states in addition to the Constitution of the United States.<sup>4</sup> For some purposes, it seems, the courts of one state may know without proof the provisions of the constitution of a sister state.<sup>5</sup>

**7. Common Law.** — The courts of a state may take judicial notice of the common law thereof, and what it would be unaffected by legislation.<sup>6</sup> It has also been held that the courts of a state may know that the common law prevails in the states which were originally colonized from England, the states formed from the territory of such colonies, and in other states which have adopted this system as the foundation of their jurisprudence.<sup>7</sup> But, that the

*New Mexico.* — Denver, etc., R. Co. v. U. S., 9 N. Mex. 389.

*Pennsylvania.* — Com. v. County Com'rs, 1 Pittsb. (Pa.) 249; *Allegheny v. Nelson*, 25 Pa. St. 332; *Clarion First Nat. Bank v. Gruber*, 87 Pa. St. 468, 30 Am. Rep. 378; *Timlow v. Philadelphia, etc., R. Co.*, 99 Pa. St. 284.

*Texas.* — *Holmes v. Anderson*, 59 Tex. 481; *Hailes v. State*, 9 Tex. App. 170.

*Virginia.* — *Somerville v. Wimbish*, 7 Gratt. (Va.) 205; *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324.

**What Is a Private Statute.** — It has been said that a private law of which the courts will not take judicial notice is one which relates to private matters which do not concern the public at large. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 349.

**Judicial Notice by Statute.** — When, by act of legislature, it is required that private statutes shall be judicially noticed by the courts, they will be so received. *People v. Hagar*, 52 Cal. 171; *Mullan v. State*, 114 Cal. 578; *Bixler v. Parker*, 3 Bush (Ky.) 166; *Halbert v. Skyles*, 1 A. K. Marsh. (Ky.) 368; *Collier v. Baptist Education Soc.*, 8 B. Mon. (Ky.) 68; *Nichols v. Bardwell Lodge No. 179*, (Ky. 1898-99) 48 S. W. Rep. 426, 1091; *Somerville v. Wimbish*, 7 Gratt. (Va.) 205. Compare *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

In West Virginia it is provided by statute that the acts and resolutions of the legislature, though local or private, may be given in evidence without being specially pleaded, and an appellate court must take judicial notice of such as appear to have been relied upon in the court below. *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336.

It may be doubted, however, if a provision merely that a private act may be given in evidence without being specially pleaded is equivalent to a provision for judicial notice of such an act. See *Broad St. Hotel Co. v. Weaver*, 57 Ala. 26; *Nichols v. Bardwell Lodge No. 179*, (Ky. 1898-99) 48 S. W. Rep. 426, 1091; *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324. But compare *Halbert v. Skyles*, 1 A. K. Marsh. (Ky.) 368.

**1. Repeal Reviving Private Act.** — Com. v. County Com'rs, 1 Pittsb. (Pa.) 249.

**2. Recognition and Amendment by Public Act.** — *Lavalle v. People*, 6 Ill. App. 157.

**3. Judicial Notice of State Constitution.** — See *Conlin v. San Francisco*, 99 Cal. 17, 37 Am. St. Rep. 17; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570.

And where the Supreme Court of a state had adjudged unconstitutional an act of the General Assembly which established a county, it was held that the circuit judge had the right, in the trial of a cause, to declare to the jury his judicial knowledge of such decision of the court in the specified case, and the result of such decision in fixing the boundaries of counties. *Cash v. State*, 10 Humph. (Tenn.) 111.

**Amendments to United States Constitution.** — *Graves v. Keaton*, 3 Coldw. (Tenn.) 8.

**4. Rule in Federal Courts.** — *Mills v. Green*, 159 U. S. 651.

**5. As, for Instance, in Regard to Jurisdiction of Courts.** — *Dodge v. Coffin*, 15 Kan. 277; *Buffum v. Stimpson*, 5 Allen (Mass.) 591, 81 Am. Dec. 767; *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 Am. Dec. 446.

**6. Judicial Notice of Common Law.** — *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176.

The Courts of England will take judicial notice of the fact that the common law of England extends to Ireland. *In re Nesbitt*, 2 Dowl. & L. 529, 14 L. J. M. C. 30.

**Death by Wrongful Act.** — That the right to recover damages for causing a death is given by statute, and that the common law does not give the remedy sought, must be noticed by the court, even if the point was not made at the trial or in assignments of error. *Yoakum v. Selph*, 83 Tex. 607.

**Common Law in Federal Courts.** — The courts of the United States do not require that the common law as received in each state shall be proved like the laws of foreign countries. Their statute books and judicial precedents are received as evidence without proof of witnesses. *Evans v. Cleveland, etc., R. Co.*, 5 Phila. (Pa.) 512, 21 Leg. Int. (Pa.) 29.

*7. Holmes v. Mallett*, 1 Morr. (Iowa) 82; *Copley v. Sanford*, 2 La. Ann. 335; *Stokes v. Macken*, 62 Barb. (N. Y.) 145.

The Courts of Louisiana will judicially know that the common law is the basis of the jurisprudence of the state of Mississippi. The provisions of the common law need not be proved as facts by the testimony of witnesses, but the



courts of one state shall know as a fact in a particular case what the common law of some other state is, such law must be proved as any other fact.<sup>1</sup>

**8. International Law.** — The courts of all civilized countries take judicial notice of the law of nations.<sup>2</sup>

**9. Law Merchant.** — Judicial notice is taken by the courts of that body of rules, usages, and customs constituting the law merchant.<sup>3</sup> But commercial

court will ascertain for itself what that law is by the examination of commentaries on it. *Copley v. Sanford*, 2 La. Ann. 335. And see *Kling v. Sejour*, 4 La. Ann. 129.

**Criminal Acts.** — Acts which are criminal by the common law and the laws of civilized countries will be presumed to be contrary to the laws of every state in the Union. *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; *Poe v. Grever*, 3 Sneed (Tenn.) 668.

**Contra — Texas.** — It has been held, on the contrary, that the courts of Texas will not take judicial notice that the common law prevails in Tennessee, but will require proof of the fact, though slight proof will be sufficient. *Bradshaw v. Mayfield*, 18 Tex. 21. But when it is proved or admitted that the rights in controversy accrued in a state where the common law is in force, the courts of Texas will take notice of the principles of the common law, including equity, which apply to the case. *Nimmo v. Davis*, 7 Tex. 26.

**1. Common Law in Particular Case.** — *Billingsley v. Dean*, 11 Ind. 331; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176.

**Functions of Common-law Receiver.** — It has been doubted whether the extent of the functions of a common-law receiver can be judicially noticed, as the authority of such officers is not of uniform capacity, being graduated to the occasion. *Hurd v. Elizabeth*, 40 N. J. L. 220.

**Common Law of Foreign Country.** — The unwritten or common law of a foreign country must be proved as a fact. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

**2. International Law.** — *Chandler v. Grieves*, 2 H. Bl. 606, note *a*; *Talbot v. Seeman*, 1 Cranch (U. S.) 1; *The Scotia*, 14 Wall. (U. S.) 170; *Ocean Ins. Co. v. Francis*, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; *Bock v. Lauman*, 24 Pa. St. 435.

**The Seal of a Court of Admiralty**, like a national seal, proves itself. It was held, therefore, that the record of a decree of the court of vice-admiralty in Bermuda, purporting to be certified by the deputy registrar, under the seal of the court, was admissible in evidence without further proof of authenticity. *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168.

**Maritime Law.** — It has been held that the courts of the United States could not take judicial notice of the maritime law of Great Britain, in certain respects peculiar and differing from the maritime law of the United States and of Europe. *The Scotland*, 105 U. S. 24.

**Prize Causes.** — Prize courts, it has been held, administering the law of nations, should take judicial notice of a rule of international law exempting fishing vessels from capture as prize. *The Paquete Habana*, 175 U. S. 677.

So, also, where a cargo is captured as prize, for an alleged attempt to violate a blockade, the court will take judicial notice that the shipper is a person who is shown by the records of

the court to have been actually engaged in trading to and from the blockaded ports. *The Minna*, Blatchf. Prize Cas. 333.

**3. Law Merchant — England.** — *Edie v. East-India Co.*, 2 Burr. 1222; *Brandao v. Barnett*, 12 Cl. & F. 805.

*Alabama.* — *Jewell v. Center*, 25 Ala. 498; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275; *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520.

*Arkansas.* — *Davis v. Hanly*, 12 Ark. 645.

*Illinois.* — *Munn v. Burch*, 25 Ill. 35.

*Iowa.* — *British, etc., Mortg. Co. v. Tibballs*, 63 Iowa 468.

*Louisiana.* — *Bradford v. Cooper*, 1 La. Ann. 325.

*Maryland.* — *Sasscer v. Farmers Bank*, 4 Md. 409.

*New Jersey.* — *Reed v. Wilson*, 41 N. J. L. 29.

*Virginia.* — *Branch v. Burnley*, 1 Call (Va.) 159.

**Illustrations of Rule — Ordinary Business Methods.** — *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390.

**Business Changes and Progress.** — *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347.

**Custom of Mutual Credits by Merchants.** — *Cameron v. Blackman*, 39 Mich. 108.

**Usages of Inland Commerce.** — *Gibson v. Stevens*, 8 How. (U. S.) 384.

**Customary Manner of Storing Wheat in General Commercial Elevators.** — *Davis v. Kobe*, 36 Minn. 214, 1 Am. St. Rep. 663.

**Authority of Mining Superintendents or General Agents in Charge of Mines.** — *Adams Min. Co. v. Senter*, 26 Mich. 73.

**Interest.** — Judicial notice will be taken of the value of the use of money. *O'Ferrall v. Davis*, 1 Iowa 560. And also of the rate of interest in China where it has been recognized as a commercial usage in prior judicial decisions. *Consequa v. Willings, Pet. (C. C.)* 225.

**Interest on Accounts.** — The custom of merchants to charge interest on their accounts after six months will be judicially noticed. *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Watt v. Hoch*, 25 Pa. St. 411.

**Bills of Exchange — Protests, etc.** — *Fleming v. McClure*, 1 Brev. (S. Car.) 428, 2 Am. Dec. 671.

**Presentment of Negotiable Notes.** — *Columbia Bank v. Fitzhugh*, 1 Har. & G. (Md.) 230.

**Functions and Nature of the Business of Mercantile Agencies.** — *Wilmot v. Lyon*, 7 Ohio Cir. Dec. 394; *Holmes v. Harrington*, 20 Mo. App. 561.

**Common Course of the Banking Business.** — *Birmingham First Nat. Bank v. Newport First Nat. Bank*, 116 Ala. 520; *Munn v. Burch*, 25 Ill. 35; *British, etc., Mortg. Co. v. Tibballs*, 63 Iowa 468; *American Nat. Bank v. Bushey*,



usages of a local and particular character, or of a nature fluctuating and uncertain, are not proper subjects of judicial cognizance. Thus, judicial notice will not be taken of the rules of a board of brokers, the current rate of exchange, or the customary rates of commission and discount in particular transactions.<sup>1</sup>

**XVII. PRIVATE CORPORATIONS.** — Whether a court will take judicial notice of an act of incorporation depends upon whether such act is of a public or a private nature, determinable upon considerations elsewhere discussed.<sup>2</sup> Courts therefore take judicial notice of the existence of a domestic corporation created by public act;<sup>3</sup> but judicial notice cannot be taken of the character

45 Mich. 135; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434; *Bowman v. Spokane First Nat. Bank*, 9 Wash. 614, 43 Am. St. Rep. 870.

**The General Lien of Bankers.** — *Brandao v. Barnett*, 12 Cl. & F. 787, 3 C. B. 519, 54 E. C. L. 519.

**That Banknotes Are Payable on Demand.** — *Mobile Bank v. Meagher*, 33 Ala. 622.

**And that a Difference in the Facility of Procuring Payment of different bank bills, on account of the remoteness or proximity of the issuing bank, may create a difference in their value, is a subject of judicial notice.** *Jones v. Fales*, 4 Mass. 252.

**A Custom of Merchants May Be First a Matter of Fact, to be proved by evidence as such. But when once legal decisions are made thereon, it becomes thereby a part of the law of the land, of which the courts will take judicial notice.** *Branch v. Burnley*, 1 Call (Va.) 159. And see *Consequa v. Willings, Pet.* (C. C.) 225.

**1. Rules of Board of Brokers.** — A court will not take judicial notice of the rules of a board of brokers unless they are such rules of trade or commerce as would be judicially recognized without their adoption by any particular board or association. *Goldsmith v. Sawyer*, 46 Cal. 209.

**Current Rates of Exchange.** — *Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742.

**A Charge for Commission or Discount on a bill received in payment must be proved; courts will not take judicial notice of a mercantile usage to allow it.** *Ward v. Everett*, 1 Dana (Ky.) 429. Nor will a court take judicial notice of what are the fair and usual commissions on acceptances paid without funds. *Seymour v. Marvin*, 11 Barb. (N. Y.) 80.

**In an Action on a Promissory Note, made payable at the office of an insurance company, the court cannot judicially know that such insurance company is a banking house.** *Winter v. Cox*, 41 Ala. 207.

2. See *supra*, this title, *Laws and Statutes*.

**3. Rule as to Private Corporations.** — *United States*. — *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

*Alabama*. — *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489.

*Illinois*. — *Peoria, etc., R. Co. v. People*, 116 Ill. 401.

*Indiana*. — *Russell v. Branham*, 8 Blackf. (Ind.) 277; *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266.

*South Carolina*. — *Parker v. Carolina Sav. Bank*, 53 S. Car. 583.

**An Act Amending the Charter of a Guaranty and Trust Company, and authorizing it to be-**

come sole surety of bonds and undertakings otherwise required by law to have two or three sureties, has been held "so far public as not to require it to be offered in evidence to enable the courts to take cognizance of it." *Miller v. Matthews*, 87 Md. 464.

**An Act Exempting from Taxation the personal property of mutual insurance companies is of such a general and public nature that the court will take judicial notice of its provisions.** *People v. Tax Com'rs*, 144 N. Y. 483, reversing 83 Hun (N. Y.) 11.

**In an Action by a Draining Association to recover an assessment for benefit to land by drainage, it is not necessary that the complaint should set out the organization of the association, as by statute the existence of such a corporation must be judicially noticed by the courts of the county where the articles are recorded.** *Herod v. Rodman*, 16 Ind. 241; *Eel River Draining Assoc. v. Topp*, 16 Ind. 242.

**Names of Chartered Companies.** — It has been held that the court will take judicial notice of the names of all companies chartered by the legislature. So where an indictment charged that an order, directed to the treasurer of the "Eagle and Phenix Manufacturing Columbus," was altered, it was held fatally defective because there was no such company. *Jackson v. State*, 72 Ga. 28. So the courts of *Kentucky* may know judicially that the Lexington Manufacturing Company must exist within the state, but it cannot be known judicially that its members are citizens. *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256. But in connection with the latter part of the foregoing proposition, see *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231, holding that a *Michigan* court may well take notice judicially that the stockholders of the mining corporations of the state are nonresidents and beyond its jurisdiction for rendering personal judgments.

**Rule by Statute.** — Where a statute of a state provides that every law shall be deemed a public law unless otherwise expressly provided therein, judicial notice will, of course, be taken of the act of incorporation of a drawbridge company. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

**Construction of Particular Statute.** — An act which requires the courts of the county in which the articles of association are recorded, to take judicial notice of the existence of corporations formed for the construction of levees and drains, does not require the Supreme Court to take such judicial notice. *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274.

**State Statute — Federal Courts.** — Where, under a state statute, acts of incorporation are



of the charter of a private corporation nor of its corporate power or capacity if it derives its existence from a special and private act,<sup>1</sup> unless there is a statute making provision to the contrary.<sup>2</sup>

**General Incorporation Laws.** — Judicial notice is also taken of the general laws which authorize the formation and define the powers of corporations,<sup>3</sup> but not of the organization of any particular corporate body under the general laws.<sup>4</sup>

**Bank Charters.** — It has been held that bank charters are public acts of which the courts will take judicial notice.<sup>5</sup>

**Foreign Corporations.** — The courts of one state will not, as a rule, take judicial notice of the existence of a corporation created by the laws of another state.<sup>6</sup>

judicially noticed, a corporation created by the state will be judicially noticed by the federal courts. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

1. *Alabama*. — *Broad St. Hotel Co. v. Weaver*, 57 Ala. 26; *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489.

*Indiana*. — *Danville, etc., Plank-road Co. v. State*, 16 Ind. 456.

*New Jersey*. — *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367.

*North Carolina*. — *Saunders v. Hathaway*, 3 Ired. L. (25 N. Car.) 402; *Taylor v. Wilmington, etc., R. Co.*, 4 Jones L. (49 N. Car.) 277; *Carrow v. Washington Toll Bridge Co., Phil. L.* (61 N. Car.) 118.

**The Charter of a Bridge Company**, being a private act, will not be judicially noticed by the courts. *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367.

2. See *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227; *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346; *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274.

3. *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489; *Danville, etc., Plank-road Co. v. State*, 16 Ind. 456.

4. *Danville, etc., Plank-road Co. v. State*, 16 Ind. 456; *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97.

**By-law of Association.** — A court cannot take judicial notice of a by-law of a benevolent insurance association. *Portage Lake Miners', etc., Benev. Soc. v. Phillips*, 36 Mich. 22. See also *Piper v. Chappell*, 14 M. & W. 624; *Gerhard v. Bates*, 2 El. & El. 476, 75 E. C. L. 476, 1 C. L. R. 868, 22 L. J. Q. B. 364, 17 Jur. 1097, 1 W. R. 383.

**Corporate Seal.** — Where a corporation executes an appeal bond by an attorney in fact, and it is copied into the record with a scrawl attached, the Supreme Court will not take judicial notice of the fact that the corporation has a seal further than the scrawl. *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35.

5. **Bank Charters** — *Georgia*. — *Davis v. Fulton Bank*, 31 Ga. 69; *Terry v. Merchants', etc., Bank*, 66 Ga. 177.

*Indiana*. — *Gordon v. Montgomery*, 19 Ind. 110.

*South Carolina*. — *Newberry Bank v. Greenville, etc., R. Co.*, 9 Rich. L. (S. Car.) 495.

*Tennessee*. — *Shaw v. State*, 3 Sneed (Tenn.) 86.

*Vermont*. — *Buell v. Warner*, 33 Vt. 570.

*Virginia*. — *Hays v. Northwestern Bank*, 9 Gratt. (Va.) 127.

*West Virginia*. — *Farmers' Bank v. Willis*, 7 W. Va. 31.

**Presence of Banks in Particular Town.** — That the courts cannot take notice of the presence or absence of banks in a town, see *Bartholomew v. Everett First Nat. Bank*, 18 Wash. 683.

**Assignment of Assets — Appointment of Trustee.** — The court, while taking judicial notice of the Act of 1866, requiring the president and directors of the Bank of Tennessee to execute an assignment of its effects, could not judicially know that when this action was brought in 1866 the assignment had been made, and one Samuel Watson had been appointed trustee, and that he had accepted the trust, given bond, and duly qualified. *Topp v. Watson*, 12 Heisk. (Tenn.) 411.

But in *Douglass v. Branch Bank*, 19 Ala. 659, it was held that the courts in *Alabama* would take judicial notice that the assets of the state bank and branches had been placed in the hands of commissioners who were authorized to sell or lease its real estate and to appoint assistant commissioners to aid in the adjustment and settlement of its affairs.

So, also, it has been held that the Acts of February 13, 1843, for the final settlement of the affairs of the Planters and Merchants Bank of Mobile, and of January 24, 1845, amendatory thereof, were public acts and would be judicially noticed, though not specially pleaded. *Jemison v. Planters, etc., Bank*, 17 Ala. 754; *Crawford v. Planters, etc., Bank*, 6 Ala. 289.

**National Banks — Federal Courts.** — The federal courts take judicial notice of the organization of all national banks and their existence. *U. S. v. Williams*, 4 Biss. (U. S.) 302.

**Bank in Foreign State.** — A court of one state cannot take judicial notice that a bank located in another state is in an insolvent condition. *Market Nat. Bank v. Pacific Nat. Bank*, 27 Hun (N. Y.) 465.

**In a Pennsylvania Case, However**, it was held that a bank was a private corporation and that its charter was a private act of which the court would not take judicial notice. *Clarion First Nat. Bank v. Gruher*, 87 Pa. St. 468, 30 Am. Rep. 378.

6. **Foreign Corporations.** — *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232. Compare, however, *State v. McCullough*, 3 Nev. 202, in which case it was held that the existence of corporations created in other states will be recognized by the *Nevada* courts. But it is not believed that this means that judicial notice will be taken of the existence of foreign corporations, any more than judicial notice will be taken of foreign laws. But in *Augusta Bank v. Earle*, 13 Pet. (U. S.) 590, Chief Justice Taney, delivering the opinion of the court,



**XVIII. MUNICIPAL CORPORATIONS—1. In General.**—Courts take judicial notice of the acts of incorporation and charters of municipal corporations.<sup>1</sup> The same rule applies with reference to the repeal of an act incorporating a town, or a section of a municipal charter,<sup>2</sup> as well as to enactments of the legislature amendatory of such acts.<sup>3</sup>

**Where Declared to Be Public Law.**—The rule above stated is obviously applicable where the act of incorporation is declared in terms to be a public law,<sup>4</sup> and in some instances the doctrine of judicial notice has been limited to cases where there is such a provision.<sup>5</sup> But the better rule, sustained by the weight of authority, is believed to be that judicial notice is taken of municipal charters

said that it was "a matter of history, which this court is bound to notice, that corporations created in this country have been in the open practice, for many years past, of making contracts in England of various kinds, and to very large amounts."

**Conduct of Interstate Business.**—It has been held that a court will not take judicial notice that a particular corporation conducts an interstate business extending beyond the territorial limits of the jurisdiction of the court. *People v. Tierney*, 57 Hun (N. Y.) 357, 589.

**1. Municipal Corporations—United States.**—*Fauntleroy v. Hannibal*, 1 Dill. (U. S.) 118. See also *Gordon v. Hobart*, 2 Sumn. (U. S.) 401.

*Alabama.*—*Smoot v. Wetumpka*, 24 Ala. 112; *Case v. Mobile*, 30 Ala. 538; *Smith v. Flournoy*, 47 Ala. 346; *Perryman v. Greenville*, 51 Albritton v. Huntsville, 60 Ala. 486, 31 Am. Rep. 46; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Montgomery v. Hughes*, 65 Ala. 201; *Selma v. Perkins*, 68 Ala. 145; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

*California.*—*Pasadena v. Stimson*, 91 Cal. 238; *Bituminous Lime Rock Paving, etc., Co. v. Fulton*, (Cal. 1893) 33 Pac. Rep. 1117.

*Illinois.*—*Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.

*Indiana.*—*Johnson v. Indianapolis*, 16 Ind. 227; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 239; *Pennsylvania Co. v. Horton*, 132 Ind. 189; *Thorntown v. Fugate*, 21 Ind. App. 537.

*Iowa.*—*Stier v. Oskaloosa*, 41 Iowa 353; *Hard v. Decorah*, 43 Iowa 313.

*Kansas.*—*Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Solomon v. Hughes*, 24 Kan. 211.

*Maine.*—*Belmont v. Morrill*, 69 Me. 314.

*Massachusetts.*—*Harris v. Quincy*, 171 Mass. 472.

*Minnesota.*—*Burfenning v. Chicago, etc., R. Co.*, 46 Minn. 20.

*Missouri.*—*Bowie v. Kansas City*, 51 Mo. 454; *Nutter v. Chicago, etc., R. Co.*, 22 Mo. App. 323; *Savannah v. Dickey*, 33 Mo. App. 522; *Trenton v. Devorss*, 70 Mo. App. 8.

*Tennessee.*—*State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *East Tennessee, etc., R. Co. v. Morristown*, (Tenn. Ch. 1895) 35 S. W. Rep. 771. Compare, however, *Tilford v. Woodbury*, 7 Humph. (Tenn.) 190, in which the court said: "The charter of a town is a private law, and should be proved."

*Texas.*—*Taylor v. Hoya*, 9 Tex. Civ. App. 312.

*Vermont.*—*Briggs v. Whipple*, 7 Vt. 15;

*Winooski v. Gokey*, 49 Vt. 282; *French v. Barre*, 58 Vt. 567.

*West Virginia.*—*Beasley v. Beckley*, 28 W. Va. 81.

*Wisconsin.*—*Janesville v. Milwaukee, etc., R. Co.*, 7 Wis. 484; *State v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 135; *Terry v. Milwaukee*, 15 Wis. 490; *Alexander v. Milwaukee*, 16 Wis. 247; *Swain v. Comstock*, 18 Wis. 463; *Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309.

**Names of Municipalities.**—It has been held that courts must judicially notice that there is a city of a specified name in the state. *Woodward v. Chicago, etc., R. Co.*, 21 Wis. 309.

But where a general law was passed for the incorporation of cities, not prescribing by what name existing municipalities adopting its provisions should be known, the court cannot judicially know the corporate name of a city so organized. *Johnson v. Indianapolis*, 16 Ind. 227.

**2. Repeal of Section of Incorporating Act.**—*Belmont v. Morrill*, 69 Me. 314.

**Unincorporated Village.**—Judicial notice will be taken of the fact that a certain village is not incorporated. *French v. Barre*, 58 Vt. 567.

**3. Hornberger v. State, 47 Neb. 40; *Janesville v. Milwaukee, etc., R. Co.*, 7 Wis. 484; *State v. Lean*, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 135; *Terry v. Milwaukee*, 15 Wis. 490; *Alexander v. Milwaukee*, 16 Wis. 247; *Swain v. Comstock*, 18 Wis. 463.**

**4. When Declared to Be Public Law.**—*Gormley v. Day*, 114 Ill. 185; *Bowie v. Kansas City*, 51 Mo. 454; *Butler v. Robinson*, 75 Mo. 192; *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419; *Wisdom v. Wabash, etc., R. Co.*, 19 Mo. App. 324; *Hornberger v. State*, 47 Neb. 40; *Storrie v. Cortes*, 90 Tex. 283.

**5. Apitz v. Missouri Pac. R. Co.**, 17 Mo. App. 419; *Wisdom v. Wabash, etc., R. Co.*, 19 Mo. App. 324; *Bowie v. Kansas City*, 51 Mo. 454; *Butler v. Robinson*, 75 Mo. 192. But where the material allegations of an information in the nature of a quo warranto were founded upon a city charter and the act incorporating the city was pleaded by its title, it was held that the court, under section 40 of the Practice Act in force in 1868, could take judicial notice of its provisions. *State v. Sherman*, 42 Mo. 210. And at the present time, in this state, courts judicially notice, by statute, cities of specified classes. See *Savannah v. Dickey*, 33 Mo. App. 522; *Billings v. Dunaway*, 54 Mo. App. 1; *Clarence v. Patrick*, 54 Mo. App. 462; *Trenton v. Devorss*, 70 Mo. App. 12.



because of their inherent nature as public laws, and irrespective of a provision in the charter or by other legislative enactment to such effect.<sup>1</sup>

**2. Municipal Powers.** — Courts will take judicial notice of the general municipal powers conferred by the charter on a municipal corporation,<sup>2</sup> such as the power to enact ordinances and by-laws,<sup>3</sup> to make contracts,<sup>4</sup> to improve its streets,<sup>5</sup> and to erect and maintain waterworks.<sup>6</sup>

**Execution of Municipal Powers.** — As a general rule, however, judicial notice is not taken of the execution of municipal powers.<sup>7</sup>

**3. Ordinances.** — The general rule is that state courts of general jurisdiction will not take judicial notice of municipal ordinances. A municipal ordinance is not regarded in the light of a public law, of which the courts should take judicial notice, but the party relying thereupon must allege and prove it as matter of fact.<sup>8</sup> But while courts of general jurisdiction do not notice

1. *Fauntleroy v. Hannibal*, 1 Dill. (U. S.) 118; *Binkert v. Jansen*, 94 Ill. 283; *Hornberger v. State*, 47 Neb. 40.

2. **Municipal Powers.** — *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349. See *Sherrell v. Murray*, 49 Mo. App. 233. See also *Payne v. Treadwell*, 16 Cal. 221.

**An Act Relating Only to the Powers of a Single Municipal Corporation** is nevertheless public in its nature, and the courts will take judicial notice of it. *Fauntleroy v. Hannibal*, 1 Dill. (U. S.) 118.

**Municipal History — Public and Private Enterprises.** — In a proceeding to determine the constitutionality of an act of the legislature authorizing a city to construct a street railroad located wholly within the limits of the city (Laws N. Y. 1891, c. 4), judicial notice may be taken, as part of the city's history, of the fact that efforts to construct such railroad system by private enterprise had failed for want of capital, and that the needs of the city were constantly increasing. *Sun Printing, etc., Assoc. v. New York*, 8 N. Y. App. Div. 230.

**3. Ordinances and By-laws — Power to Enact.** — *Case v. Mobile*, 30 Ala. 538; *Sherrell v. Murray*, 49 Mo. App. 233.

**Power to Enact Particular Ordinances.** — A court will take judicial notice of the power of a city by ordinance to restrain the running at large of hogs and other animals. *Sherrell v. Murray*, 49 Mo. App. 233.

**4. Power to Make Particular Contract.** — As an act creating a municipal corporation is a public act, it has been held that the powers of such a corporation thereunder, even with reference to the making of a particular contract, would be judicially noticed by the courts. *Aldermen, etc. v. Finley*, 10 Ark. 423.

**5. Power to Improve Streets.** — *Macey v. Titcombe*, 19 Ind. 135.

**6. Erection and Maintenance of Waterworks.** — *North Platte Water-Works Co. v. North Platte*, 50 Neb. 853.

**In an Action Against a City for Personal Injuries** alleged to have resulted from defective construction of waterworks, judicial notice will be taken of a statute vesting the entire control of the works in a commission. *Gross v. Portsmouth*, 68 N. H. 266.

7. See *infra*, this section, *Ordinances*.

**8. Municipal Ordinances — Alabama.** — *Case v. Mobile*, 30 Ala. 538; *Smitha v. Flournoy*, 47 Ala. 346; *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247.

*Colorado.* — *Garland v. Denver*, 11 Colo. 534; *Greeley v. Hamman*, 12 Colo. 94; *McIntosh v. Pueblo*, 9 Colo. App. 460.

*Idaho.* — *People v. Buchanan*, 1 Idaho 681.

*Illinois.* — *Chicago West Div. R. Co. v. Klauber*, 9 Ill. App. 613; *Weaver v. Snow*, 60 Ill. App. 624; *O'Hare v. Lieb*, 66 Ill. App. 549.

*Iowa.* — *Garvin v. Wells*, 8 Iowa 286; *State v. Leiber*, 11 Iowa 407; *Goodrich v. Brown*, 30 Iowa 291; *Wolf v. Keokuk*, 48 Iowa 129. And see *Laporte City v. Goodfellow*, 47 Iowa 572.

*Kansas.* — *McPherson v. Nichols*, 48 Kan. 430; *Watt v. Jones*, 60 Kan. 201.

*Kentucky.* — *Lucker v. Com.*, 4 Bush (Ky.) 440.

*Louisiana.* — *State v. Jackson*, 6 La. Ann. 593; *Hassard v. Municipality No. Two*, 7 La. Ann. 495; *New Orleans v. Labatt*, 33 La. Ann. 107; *Laviosa v. Chicago, etc., R. Co.*, McGloin (La.) 299, 4 Am. & Eng. R. Cas. 128.

*Maryland.* — *Shanfelter v. Baltimore*, 80 Md. 483; *Central Sav. Bank v. Baltimore*, 71 Md. 515; *Field v. Malster*, 88 Md. 691.

*Minnesota.* — *Winona v. Burke*, 23 Minn. 254.

*Missouri.* — *Cox v. St. Louis*, 11 Mo. 431; *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576; *State v. Sherman*, 42 Mo. 210; *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419; *Wisdom v. Wabash, etc., R. Co.*, 19 Mo. App. 324; *St. Louis v. Roche*, 128 Mo. 541.

*New York.* — *Porter v. Waring*, 69 N. Y. 250; *People v. Casegeanda*, (N. Y. Gen. Sess.) 15 Misc. (N. Y.) 325.

*Ohio.* — *Toledo v. Libbie*, 8 Ohio Cir. Dec. 589.

*South Carolina.* — *Charleston v. Ashley Phosphate Co.*, 34 S. Car. 541.

*Tennessee.* — *Tilford v. Woodbury*, 7 Humph. (Tenn.) 190.

*Texas.* — *Austin v. Walton*, 68 Tex. 507; *Wilson v. State*, 16 Tex. App. 497.

*Wisconsin.* — *Pettit v. May*, 34 Wis. 666; *Stittgen v. Rundle*, 99 Wis. 78.

**Judicial Notice Erroneously Taken — Judgment of Conviction Reversed.** — *Winona v. Burke*, 23 Minn. 254. And see *St. Louis v. Roche*, 128 Mo. 541.

**Where Charter Provides that Printed Ordinances Shall Be Received in Evidence.** — The charter of a city prescribed that the ordinances, when printed and published by authority of the corporate power, should be received in evidence in all courts and places without further proof. This provision was held, however, not to re-



municipal ordinances, a city court will so recognize them, because it stands in the same attitude towards the municipal laws of the city that a state court occupies in reference to the public laws of the state.<sup>1</sup> So, also, in an action before a mayor of a city, brought for a violation of a municipal ordinance, such functionary is authorized to take judicial notice thereof.<sup>2</sup>

On Appeal from the Decision of a Mayor or a City Court the appellate tribunal takes judicial notice of municipal ordinances in the same manner as the lower court might have done,<sup>3</sup> even though, it has been held, it is provided by statute that such trials, on appeal, shall be *de novo*.<sup>4</sup> On the other hand, some courts have decided that where the proceedings in the higher court are *de novo*, the general rule excluding judicial notice of municipal ordinances prevails, although the proceedings are on appeal from the decision of a municipal tribunal.<sup>5</sup>

**4. Officers.**— Courts may take judicial notice of the fact that a municipal corporation is empowered to elect officers, who manage its business and administer municipal affairs.<sup>6</sup>

**5. Limits and Subdivisions.**— Courts will, in general, take judicial notice of the limits or boundaries of municipal corporations, as established by general law,<sup>7</sup> and also, it has been held, of the subdivision of the land embraced

lease a party who relies on an ordinance from the necessity of introducing it to the knowledge of the court. *Cox v. St. Louis*, 11 Mo. 431.

**Nor Does an Agreement Between the Parties** that city ordinances shall be considered in evidence without a formal offer dispense with the necessity of referring to them in the transcript for an appellate court. *Central Sav. Bank v. Baltimore*, 71 Md. 515.

**Repeal of Ordinances.**— Under the general rule as stated in the text, courts cannot take judicial notice of the repeal of a city ordinance. *Field v. Malster*, 88 Md. 691.

**It Has Been Intimated** that if directed by charter provision, or by statute, the courts would take judicial notice of municipal ordinances. *Charleston v. Ashley Phosphate Co.*, 34 S. Car. 541. But on the contrary this has been doubted. *Petit v. May*, 34 Wis. 666.

**Rule under Statute.**— It has been held that a public law providing that when the by-laws or ordinances of any city have been printed or published by authority of the corporation they shall be received in evidence in all courts and places without further proof, does not require the court to take judicial notice of the existence of an ordinance without any proof whatever. *Winona v. Burke*, 23 Minn. 254.

It has also been held that a statute (Laws N. Y. 1832, c. 158, § 1) authorizing the reading in evidence in all courts of ordinances of the common council of the city of New York, relates to their introduction on trial and not in an appellate tribunal. *Porter v. Waring*, 69 N. Y. 250.

**1. Judicial Notice by City Court— Iowa.**— *State v. Leiber* 11 Iowa 407; *Laporte City v. Goodfellow*, 47 Iowa 572.

*Kansas.*— *Solomon v. Hughes*, 24 Kan. 211; *Downing v. Miltonvale*, 36 Kan. 740; *McPherson v. Nichols*, 48 Kan. 430.

*Ohio.*— *Keck v. Cincinnati*, 4 Ohio Dec. 324, 3 Ohio N. P. 253.

*West Virginia.*— *Moundsville v. Velton*, 35 W. Va. 217.

**2. Judicial Notice of Ordinance by Mayor.**— *Conboy v. Iowa City*, 2 Iowa 90.

**The Rule that the Mayor of a City or incorporated town may properly take judicial notice of the ordinances thereof was not, it was held, changed by a code provision applying to proceedings before a mayor "the rules of law regulating proceedings before a justice of the peace."** *Laporte City v. Goodfellow*, 47 Iowa 572.

**3. Judicial Notice on Appeal from Mayor or City Court.**— *Solomon v. Hughes*, 24 Kan. 211; *Downing v. Miltonvale*, 36 Kan. 740; *Keck v. Cincinnati*, 4 Ohio Dec. 324, 3 Ohio N. P. 253; *Moundsville v. Velton*, 35 W. Va. 217.

**4. Where Trial on Appeal De Novo.**— *Moundsville v. Velton*, 35 W. Va. 217. And see *Solomon v. Hughes*, 24 Kan. 211.

**5. When Judicial Notice Not Taken.**— *McIntosh v. Pueblo*, 9 Colo. App. 460.

**6. See Jones v. Lake View**, 151 Ill. 663; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349.

**Rule of Federal Courts.**— It has been held that the courts of the United States would take judicial notice that, by the law of a state, the mayor of a certain city is a magistrate. *Gordon v. Hobart*, 2 Sumn. (U. S.) 401.

**Expiration of Term of Particular Officer.**— In the *Missouri* Court of Appeals it was held, however, that that court would not take judicial notice that the term of a particular city auditor had expired, and that he had been succeeded in office by another person. *State v. Brown*, 72 Mo. App. 651.

**7. Boundaries Established by General Law— United States.**— *Griffing v. Gibb*, 2 Black (U. S.) 519.

*California.*— *Payne v. Treadwell*, 16 Cal. 221; *De Baker v. Southern California R. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237.

*Minnesota.*— *Burfenning v. Chicago, etc., R. Co.*, 46 Minn. 20.

*Missouri.*— *In re Independence Ave. Boulevard*, 128 Mo. 272.

*Wisconsin.*— *Houlton v. Chicago, etc., R. Co.*, 86 Wis. 59.

**Land Selected for Town Site— Pre-emption.**— A court will take judicial notice of the fact that land surrounding the harbor of Seattle, in Washington, had been for many years selected



therein into blocks and lots.<sup>1</sup>

**6. Streets.** — Where the streets of a particular city are established by an act of the legislature, courts of the state may take judicial notice of them, their relations to each other, and the directions in which they run.<sup>2</sup> But a court will never, by judicial knowledge, determine whether the space set apart upon a map for a street is correctly located upon the ground, or, when the line of such street as a boundary is disputed, fix it without evidence.<sup>3</sup> Nor will judicial notice be taken of the streets of a city which are established, opened, or adopted by municipal ordinance or acts of dedication. When this is the

for and known as the site of a city, though not all improved, and that it was unfit for agricultural purposes, and therefore not subject to the pre-emption laws, so as to exclude the idea that an individual could acquire title to a farm simply because he lived on it and improved it. *Ex p. Davidson*, 57 Fed. Rep. 883.

**Judicial Notice Will Be Taken by a State Court** of the fact that lands which it is sought to acquire under the pre-emption laws of the United States are within the corporate limits of a city, and not subject to pre-emption under Rev. Stat. U. S., § 2258. *Houlton v. Chicago*, etc., R. Co., 86 Wis. 59.

But though a court may judicially know that a particular town is the county-seat of a county, yet in trespass to try title to a lot in such town the plaintiff cannot recover simply by showing title derived from the state in the county-seat, and a conveyance from the county to him, as such evidence does not negative the fact that the county-seat may embrace other land, and that the plaintiff's lot is located on such other land. *Jones v. Fancher*, 61 Tex. 698.

**That Limits of City are Co-extensive with County.** — *Reg. v. St. Maurice*, 16 Q. B. 908, 71 E. C. L. 908, 20 L. J. M. C. 221, 15 Jur. 559.

**Precise Limits.** — In an *Indiana* case it was held that the courts would take judicial notice of the existence and names of cities and towns, and in some general sense of their locations, but not of their exact limits or boundaries. Whether, it was declared, a given location or described territory is within the limits of any town or city in the state, is a matter of averment and proof. *Grusenmeyer v. Logansport*, 76 Ind. 549. And see *Indianapolis*, etc., R. Co. v. *Stephens*, 28 Ind. 429; *Stultz v. State*, 65 Ind. 492.

1. *Brumagim v. Bradshaw*, 39 Cal. 24.

**Where a Person Entitled to a Homestead Exemption** is the owner of more than one lot, the court will take judicial notice of the subdivision of town and city property into separate blocks and lots, for the purpose of determining what land is covered by the exemption. *Sever v. Lyons*, 170 Ill. 395.

But the Supreme Court of *Michigan*, it has been held, has no judicial knowledge of the contents of Detroit plats or the location of Detroit lands, except as identified or affected by legislation or other public action. *Cicotte v. Anciaux*, 53 Mich. 227.

**On the Trial of an Action in Ejectment** in which a deed is offered in evidence describing the premises conveyed as lot five in block one in Haley's addition to the city of Monmouth, the Supreme Court of Illinois, it was held, would

take judicial notice that the city of Monmouth is in Warren County, in Illinois, and presume the lot to be in that city of Monmouth. *Harding v. Strong*, 42 Ill. 148, 89 Am. Dec. 415.

**Location and Names of Suburbs.** — In *Poland v. Dreyfous*, 48 La. Ann. 83, it was held that courts of the state would take notice of the names and location of the suburbs from time to time brought within the limits of New Orleans.

**Surveys and Plots.** — But to the effect that judicial notice will not be taken of surveys and plats of lots and blocks in cities, see *Williams v. Langevin*, 40 Minn. 180.

**2. Municipal Streets.** — *Whiting v. Quackenbush*, 54 Cal. 306; *Brady v. Page*, 59 Cal. 55; *Diggins v. Hartshorne*, 108 Cal. 154. See *Poland v. Dreyfous*, 48 La. Ann. 83; *Skelly v. New York El. R. Co.*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 88.

So in *Canavan v. Stuyvesant*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 113, it was held that the court would take judicial notice of the fact that the streets of New York city were numbered east and west from Fifth avenue, and that the odd numbers were uniformly on the north side of the street.

**3. Illustrations of Rule — Disputed Boundaries.** — *Diggins v. Hartshorne*, 108 Cal. 154.

**Width of Streets and Sidewalks.** — *Porter v. Waring*, 69 N. Y. 250.

**Distances Between Streets.** — *North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318.

**Point of Intersection of Street with Railroad Track.** — *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

**Particular Street in Certain County.** — *Humphreys v. Budd*, 9 Dowl. 1000, 5 Jur. 630. See *Reg. v. Holborn Union*, 6 El. & Bl. 715, 88 E. C. L. 715, 25 L. J. M. C. 110, 2 Jur. N. S. 571, 4 W. R. 606.

**Location of Justice's Office — Street Number.** — *Allen v. Scharringhausen*, 8 Mo. App. 229.

**In Landlord and Tenant Proceedings in a District Court** the locality of the streets and avenues and their termini, and the street numbers of houses situated thereon, are not matters of judicial notice, though the boundaries of the several judicial districts are within the supposed judicial knowledge of the courts. *People v. Callahan*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 372, 23 Hun (N. Y.) 581.

**Extent of Use of Street.** — It has been held that a court cannot take judicial cognizance as to how much a particular street in a city is used. *Cleveland v. Newsom*, 45 Mich. 62. But in *Wordin's Appeal*, 71 Conn. 531, it was decided that a court might take judicial notice of the usual effect of time and use on asphalt in the streets of a populous city.



case, the question is one of fact to be determined upon evidence.<sup>1</sup> But a court may take judicial notice of the fact that the streets of a city are public highways,<sup>2</sup> and also of long-established and well-known streets in the city in which the court holds its sessions, as a matter of public notoriety and general information.<sup>3</sup>

7. **Location.** — As a general rule, judicial notice of municipal corporations has been held to include cognizance of their location.<sup>4</sup> It has been held accordingly that the courts of a state will take judicial notice of the location of a city within the state,<sup>5</sup> or, more particularly, within a certain county of the state,<sup>6</sup>

1. **Streets Established by Ordinance — Dedication.** — *Diggins v. Hartshorne*, 108 Cal. 154; *Porter v. Waring*, 69 N. Y. 250.

2. **That City Streets Are Public Highways.** — *Porter v. Waring*, 69 N. Y. 250; *Whittaker v. Eighth Ave. R. Co.*, 5 Robt. (N. Y.) 650.

3. **When Matter of Public Notoriety and General Information.** — *State v. Ruth*, 14 Mo. App. 226. In this case the court said: "We will not take judicial notice of all the streets of the city in which this court holds its sessions. But we need have no difficulty in judicially recognizing the fact that Washington avenue, Morgan street, and Christy avenue are old, established, and well-known streets of St. Louis — the city in which we sit as a court — and that this knowledge prevails generally throughout the city."

4. **Rule Stated — Location — United States.** — *Gager v. Henry*, 5 Sawy. (U. S.) 237.

*Alabama.* — *King v. Kent*, 29 Ala. 542; *Smith v. Flournoy*, 47 Ala. 345.

*Arkansas.* — *Forehand v. State*, 53 Ark. 46.

*California.* — *People v. Faust*, 113 Cal. 172; *Cole v. Segraves*, 88 Cal. 103; *People v. Etting*, 99 Cal. 577.

*Connecticut.* — *State v. Powers*, 25 Conn. 48.

*Georgia.* — *Clayton v. May*, 67 Ga. 769; *Central R. Co. v. De Bray*, 71 Ga. 406; *Central R. Co. v. Gamble*, 77 Ga. 584.

*Illinois.* — *People v. Suppiger*, 103 Ill. 434; *Sullivan v. People*, 122 Ill. 385; *Huston v. People*, 53 Ill. App. 501; *Linck v. Litchfield*, 141 Ill. 469.

*Indiana.* — *Luck v. State*, 96 Ind. 16.

*Iowa.* — *State v. Laffer*, 38 Iowa 422; *State v. Reader*, 60 Iowa 527.

*Massachusetts.* — *Com. v. Desmond*, 103 Mass. 445.

*Michigan.* — *People v. Curley*, 99 Mich. 238.

*Minnesota.* — *Baumann v. Granite Sav. Bank*, 66 Minn. 227; *Kretschmar v. Meehan*, 74 Minn. 211.

*Missouri.* — *State v. Pennington*, 124 Mo. 388; *Stone v. Halstead*, 62 Mo. App. 136.

*Texas.* — *Terrell v. State*, 41 Tex. 463; *Solyer v. Romanet*, 52 Tex. 562; *Carson v. Dalton*, 59 Tex. 500; *Jones v. Fancher*, 61 Tex. 698; *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575; *Lewis v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 903; *Monford v. State*, 35 Tex. Crim. 237; *Hambel v. Davis*, 89 Tex. 256.

*Washington Territory.* — *Schilling v. Territory*, 2 Wash. Ter. 283.

*West Virginia.* — *Beasley v. Beckley*, 28 W. Va. 81.

*Wisconsin.* — *Woodward v. Chicago*, etc., R. Co., 21 Wis. 309.

In Texas it has been held that general statutes which recognize the location of a given town will authorize judicial knowledge

of such location. But in the absence of such statutes courts will not take judicial cognizance that a particular town is in a particular county of the state. *Hoffman v. State*, 12 Tex. App. 406; *Fields v. State*, (Tex. Crim. 1893) 24 S. W. Rep. 407; *Cain v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 1119.

5. **Cities Within State — Alabama.** — *King v. Kent*, 29 Ala. 542.

*Massachusetts.* — *Com. v. Desmond*, 103 Mass. 445.

*Minnesota.* — *Baumann v. Granite Sav. Bank*, 66 Minn. 227.

*Oregon.* — *Marx v. Croisan*, 17 Oregon 393.

*Texas.* — *Solyer v. Romanet*, 52 Tex. 562; *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575.

*Wisconsin.* — *Woodward v. Chicago*, etc., R. Co., 21 Wis. 309.

**Other Cities of Same Name in Other States.** — Where the injuries for which an action is brought are alleged to have occurred "in the city of Janesville" the court will take judicial notice of the fact that it was in a city of that name in Wisconsin, though there are other cities of the same name in other states. *Woodward v. Chicago*, etc., R. Co., 21 Wis. 309.

**State Capital.** — That courts of Oregon will take judicial notice that Salem is the capital of that state, see *Marx v. Croisan*, 17 Oregon 393.

But see *supra*, this title, *Geographical Facts — Foreign and Domestic Towns and Cities.*

6. **City in Particular County — Georgia.** — *Central R., etc., Co. v. Gamble*, 77 Ga. 584.

*Illinois.* — *Sullivan v. People*, 122 Ill. 385. See also *Linck v. Litchfield*, 141 Ill. 469.

*Indiana.* — *Luck v. State*, 96 Ind. 16.

*Iowa.* — *State v. Reader*, 60 Iowa 527.

*Maine.* — *Martin v. Martin*, 51 Me. 366.

*Michigan.* — *People v. Curley*, 99 Mich. 238.

*Minnesota.* — *Baumann v. Granite Sav. Bank*, 66 Minn. 227; *Kretschmar v. Meehan*, 74 Minn. 211.

*New York.* — *Vanderwerker v. People*, 5 Wend. (N. Y.) 530.

*Oregon.* — *Marx v. Croisan*, 17 Oregon 393.

*Texas.* — *Terrell v. State*, 41 Tex. 463; *Solyer v. Romanet*, 52 Tex. 562; *Lewis v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 903; *Monford v. State*, 35 Tex. Crim. 237.

*Washington Territory.* — *Schilling v. Territory*, 2 Wash. Ter. 283.

*West Virginia.* — *Beasley v. Beckley*, 28 W. Va. 81.

**The Fact that a City Is Within a County of the Same Name** will be judicially noticed. *Solyer v. Romanet*, 52 Tex. 562.

**Location of City with Reference to County Lines.** — It has been held that the location of a city with reference to the boundary lines of the county in which it is situated is a matter of



and especially that a named town is a county-seat.<sup>1</sup>

When, However, a Settlement or Village Is Not Incorporated, the court will not take judicial notice of its location on proof merely of the name by which it is known.<sup>2</sup>

**8. Organization under General Law.** — While the courts will take judicial notice of general laws with reference to the incorporation of towns and villages,<sup>3</sup> judicial notice will not, as a rule, be taken of the organization of any particular municipality under a general incorporation law,<sup>4</sup> unless, of course, there is a statute so providing.<sup>5</sup>

**9. Cities in Other States.** — As a general rule, the courts of one state do not take judicial notice of the incorporated towns and cities of another state.<sup>6</sup> Such notice of foreign municipalities would never be taken on the ground of establishment by public law, because the courts of one jurisdiction have no knowledge of the laws of another. It is believed, however, that judicial notice of foreign cities might be taken where their existence and geographical location are matters of public and general information. The courts of a state, however, uniformly notice municipal corporations created by the territorial legislature before the admission of the state into the Union, or established by a prior government or sovereignty.<sup>7</sup>

**XIX. RAILROADS — INCORPORATION, CONSTRUCTION, OPERATION, AND RELATED FACTS** — **1. In General.** — The facts that railroad companies are common carriers<sup>8</sup> and that they make a practice of transporting passengers for hire<sup>9</sup>

public notoriety, and a proper subject, therefore, of judicial notice by the courts. *Forehand v. State*, 53 Ark. 46.

**That a Town Is in a County under Township Organization** will be judicially noticed. *Jones v. Lake View*, 151 Ill. 663.

**Incorporated City in County—Railroad Terminus — Post Office.** — It has been held that the Probate Court of Barbour county, *Alabama*, might take judicial notice of the facts that Eufaula is an incorporated city in such county, that it is a railroad terminus, and the location of a post office, the only one by that name in the state. *Smitha v. Flournoy*, 47 Ala. 345.

**Rule by Statute.** — In *California* it has been held that the courts would take judicial notice that the town in which certain premises were described as being was in a particular county, under the provision of Code Civ. Pro., § 1875, subdiv. 2, that courts shall take judicial notice of whatever is established by law. *Cole v. Segraves*, 88 Cal. 103.

**1. Judicial Notice of County-seat** — *United States*. — *Gager v. Henry*, 5 Sawy. (U. S.) 237.

*California*. — *People v. Etting*, 99 Cal. 577; *People v. Faust*, 113 Cal. 172.

*Connecticut*. — *State v. Powers*, 25 Conn. 48. *Iowa*. — *State v. Laffer*, 38 Iowa 422.

*Missouri*. — *State v. Pennington*, 124 Mo. 388.

*Oregon*. — *Marx v. Croisan*, 17 Oregon 393.

*Texas*. — *Carson v. Dalton*, 59 Tex. 500; *Jones v. Fancher*, 61 Tex. 698; *Whitener v. Belknap*, 89 Tex. 273; *Hambel v. Davis*, 89 Tex. 256.

But compare *Sipe v. Holliday*, 62 Ind. 4, in which case it seems to have been held that a court cannot take judicial notice that the county-seat of a county is an incorporated town.

**2. Unincorporated Villages.** — *Huston v. People*, 53 Ill. App. 501. And see *Latham v. State*, 19 Tex. App. 305.

**3. In Proceedings by a Town to Condemn Land across a railroad for the purpose of opening a**

street, it was held, in accordance with the rule laid down in the text, that the courts would take judicial notice of the rights and powers conferred by a general law on towns becoming incorporated thereunder, but not of the fact that a particular town had availed itself of the privileges of such law and become incorporated. *Hopkins v. Kansas City, etc., R. Co.*, 79 Mo. 98. See also authorities cited in the note immediately following.

**4. Rule Stated.** — *Hard v. Decorah*, 43 Iowa 313; *Hopkins v. Kansas City, etc., R. Co.*, 79 Mo. 98; *Temple v. State*, 15 Tex. App. 304, 49 Am. Rep. 200.

**Names of Towns or Cities Adopting General Incorporation Law.** — The Supreme Court of *Indiana* cannot judicially know the names of towns or cities which adopted the Act of 1852, concerning incorporation, etc., as their charter. *Johnson v. Indianapolis*, 16 Ind. 227.

**5. See Rock Island v. Cuinely**, 26 Ill. App. 178; *Jones v. Lake View*, 151 Ill. 663; *Doyle v. Bradford*, 90 Ill. 416.

**6. Woodward v. Chicago, etc., R. Co.**, 21 Wis. 309; *Andrews v. Hoxie*, 5 Tex. 171. See also *supra*, this title, *Geographical Facts — Foreign and Domestic Towns and Cities*.

**7. Cities Established by Prior Sovereignty.** — *Prell v. McDonald*, 7 Kan. 426, 12 Am. Rep. 423; *Payne v. Treadwell*, 16 Cal. 220; *Swain v. Comstock*, 18 Wis. 463.

**The Courts of California** will take judicial notice of the existence, powers, rights, general boundaries, and jurisdiction of the pueblo of San Francisco, as created by the former sovereignty of the Mexican government. *Payne v. Treadwell*, 16 Cal. 221.

**8. That Railroads Are Common Carriers.** — *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550; *Boyle v. Great Northern R. Co.*, 13 Wash. 383.

**9. Transportation of Passengers for Hire.** — *Condran v. Chicago, etc., R. Co.*, 32 U. S. App. 182.



are proper subjects of judicial notice. Various matters and facts in this connection are indicated in the notes below.<sup>1</sup>

**General Features of Railroad Business — Ordinary Incidents of Travel.** — It has also been held that the manner in which railroad companies conduct their business has been so long followed, and with such a degree of uniformity, that courts are bound to take judicial notice of its general features, and of the ordinary incidents of railway travel with which every one is familiar.<sup>2</sup>

**2. Incorporation and Corporate Existence.** — Judicial notice is taken of the provisions of the general railroad law, and when it went into effect.<sup>3</sup> It has been held, also, that special acts creating railroad corporations are public in their nature, and judicial notice of them is taken accordingly.<sup>4</sup>

**On the Other Hand, the Doctrine Has Been Declared** — and such is the weight of authority — that a railroad charter is a private act, operating upon particular persons and private concerns, and as such will not be judicially noticed.<sup>5</sup>

**Earnings — Source Whence Derived.** — It has been held a matter of common knowledge that the earnings of a railroad are mainly derived from freight and passenger traffic which neither begins nor ends with that particular road. *Hart v. Ogdensburg, etc., R. Co.*, 69 Hun (N. Y.) 378.

But a court will not take judicial cognizance of the net earnings of railroad companies, and cannot assume, without proof, that an act limiting the maximum rate (Sess. Laws Neb. 1893, c. 24) is confiscatory legislation. *Nebraska Telephone Co. v. Cornell*, (Neb. 1900) 82 N. W. Rep. 1.

**1. Act Giving to County Authority to Subscribe for Stock.** — *Smith v. Tallapoosa County*, 2 Woods (U. S.) 574.

**Act Authorizing Railroad Company to Guarantee Certain Bonds.** — *Timlow v. Philadelphia, etc., R. Co.*, 99 Pa. St. 284.

**Grant of Land to Railroad.** — *Mathis v. Tennessee, etc., R. Co.*, 83 Ala. 411; *Elling v. Thexton*, 7 Mont. 330.

**Railroad Reservation.** — *Woods v. Durrett*, 28 Tex. 429; *Wright v. Hawkins*, 28 Tex. 452.

**Ownership of Particular Train.** — *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92.

**Act Authorizing Sale of Road — Fact of Sale.** — *Shea v. Knoxville, etc., R. Co.*, 6 Baxt. (Tenn.) 277.

**Cultivation of Right of Way.** — *Ward v. Wilmington, etc., R. Co.*, 109 N. Car. 358, 49 Am. & Eng. R. Cas. 540.

**Report of Railroad Commissioner.** — *Cincinnati, etc., R. Co. v. Hoffhines*, 46 Ohio St. 643.

**On Appeal from Act of Railroad Commission Fixing Rates.** — *Steenerson v. Great Northern R. Co.*, 69 Minn. 353.

**Negligence of Passenger.** — See *Downey v. Hendrie*, 46 Mich. 498, 41 Am. Rep. 177.

**2. General Features of Railroad Business.** — *Siner v. Great Western R. Co.*, L. R. 4 Exch. 123; *Dublin, etc., R. Co. v. Slattery*, 3 App. Cas. 1155; *Atchison, etc., R. Co. v. Headland*, 18 Colo. 477; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; *Downey v. Hendrie*, 46 Mich. 498, 41 Am. Rep. 177.

**System of Checking Baggage.** — *Isaacson v. New York Cent., etc., R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142.

**Comparative Length and Amount of Traffic over Different Roads.** — *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627, 39 Am. & Eng. R. Cas. 562.

**Effect of Elevated Railroad on Street Traffic.** — *Bookman v. New York El. R. Co.*, 137 N. Y. 302; *Sloane v. New York El. R. Co.*, 137 N. Y. 595; *Steets v. New York El. R. Co.*, 79 Hun (N. Y.) 288.

**Change from Horse Cars to Trolley.** — In *Meyer v. Krauter*, 56 N. J. L. 696, it was held that a court would take judicial notice of the fact that in the city of Newark trolley street-car lines had not superseded horse cars at a particular date.

**3. General Railroad Law.** — *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 349.

**Performance of Condition Precedent.** — Though the courts may take judicial notice of a public act creating a railroad corporation, yet if the act prescribes the performance of a condition precedent to the existence of the corporation, judicial notice will not be taken of the performance of the condition. *Hammelt v. Little Rock, etc., R. Co.*, 20 Ark. 204.

**Compliance with Terms of Statute.** — The question whether there has been compliance with the terms of a statute authorizing a change of name by a railroad company upon the making of certain subscriptions authorized by the same act is, where pertinent, a proper subject of allegation and proof, not of judicial notice. *Cincinnati, etc., R. Co. v. Hoffhines*, 46 Ohio St. 643, 40 Am. & Eng. R. Cas. 221.

**4. Railroad Charters Public Acts — United States.** — *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673.

*Virginia.* — *Baltimore, etc., R. Co. v. Sherman*, 30 Gratt. (Va.) 602, followed in *Norfolk, etc., R. Co. v. Harman*, 83 Va. 553.

*West Virginia.* — *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336; *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803; *Douglass v. Kanawha, etc., R. Co.*, 44 W. Va. 267.

**5. Railroad Charter Private Act — Not Judicially Noticed — Alabama.** — *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413, 28 Am. Rep. 740; *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489. *Illinois.* — *Logansport, etc., R. Co. v. Caldwell*, 38 Ill. 280.

*Indiana.* — *Ohio, etc., R. Co. v. Ridge*, 5 Blackf. (Ind.) 78.

*Kansas.* — *Atchison, etc., R. Co. v. Blackshire*, 10 Kan. 477.



**Where Declared to Be Public Law.** — As a matter of course, where the charter of a railroad company is declared to be a public act, the court will take judicial notice of its provisions, as of any other public statute.<sup>1</sup>

**3. Construction.** — It has been held that courts may take judicial notice that railroad routes are marked out and grades are fixed by the companies' engineers.<sup>2</sup> So, also, a federal court will take judicial notice of the fact that

*North Carolina.* — *Durham v. Richmond*, etc., R. Co., 108 N. Car. 399.

*Pennsylvania.* — *Handy v. Philadelphia*, etc., R. Co., 1 Phila. (Pa.) 31, 7 Leg. Int. (Pa.) 26.

*Texas.* — *Conley v. Columbus Tap R. Co.*, 44 Tex. 579.

**Corporate Seal.** — The court cannot take judicial cognizance of the fact that a railroad company has a seal other than a scrawl, purporting to be a seal, which appears on an appeal bond filed by it. *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35.

**Cessation of Corporate Existence.** — The courts will not take judicial notice of the cessation of the corporate existence of a company whose charter has not expired by limitation, or that the corporation has successors. *Shea v. Knoxville*, etc., R. Co., 6 Baxt. (Tenn.) 277.

**The Statutes of Another State** chartering a railroad company will not be judicially noticed. *Carey v. Cincinnati*, etc., R. Co., 5 Iowa 357.

**1. Where Declared to Be Public Law** — *England.* — *Hargreaves v. Lancaster*, etc., R. Co., 1 R. & Can. Cas. 416.

*United States.* — *Case v. Kelly*, 133 U. S. 21, 43 Am. & Eng. R. Cas. 1, *affirming* 13 Am. & Eng. R. Cas. 70.

*Illinois.* — *Peoria*, etc., R. Co. *v. People*, 116 Ill. 401.

*Indiana.* — *Cincinnati*, etc., R. Co. *v. Clifford*, 113 Ind. 460, 33 Am. & Eng. R. Cas. 81.

**Where It Is Declared by Statute that All Railroad Corporations Are Public**, judicial notice will, of course, be taken of a railroad company's charter. *Hall v. Brown*, 58 N. H. 93.

**Existence Recognized in Public Act.** — Where the corporate existence of a railroad is recognized in a general act of the legislature, the court will take judicial knowledge of the existence of the corporation. *Frazier v. East Tennessee*, etc., R. Co., 88 Tenn. 138; *Houston*, etc., R. Co. *v. Knapp*, 51 Tex. 569.

**Reference in Railroad Charter to Earlier Public Act.** — Where an act incorporating a railroad company referred to an earlier act incorporating another company, and gave to the former all the powers, privileges, immunities, and benefits granted by the earlier act of incorporation, which contained a provision that it should be deemed and taken to be a public act, it was held that the later act would also be deemed a public act of which the courts would take judicial notice. *Hammett v. Little Rock*, etc., R. Co., 20 Ark. 204.

**Annual Distribution of Laws.** — Even though, it has been held, the charter of a railroad corporation might be considered a private act, yet where by statute there was an annual distribution of all acts, public and private, required by law, to each of the judges and to each clerk of the Supreme Court, with equal evidence of authenticity and authority, such provision would seem to signify a legislative intent that the courts might take equal notice

of both public and private acts, including the charters of railroad corporations. *Hall v. Brown*, 58 N. H. 93.

**2. Establishment of Routes and Grades.** — *Alabama Midland R. Co. v. Coskry*, 92 Ala. 254.

**Spark-arresting Device on Engines.** — In *Fraze v. New York*, etc., R. Co., 143 N. Y. 182, it was held that the court might take judicial notice of the fact that diamond-stack and straight-stack spark-arresters are in very general use upon the railroads of the country, and that they are both well-known systems for arresting sparks, while no system that has yet been invented can wholly prevent the emission of live sparks from an engine under all circumstances.

**Stations.** — It has been held that a court will notice judicially that a certain town is a station on the defendant's road in the county in which it is in fact located. *Louisville*, etc., R. Co. *v. McAfee*, 15 Ind. App. 442.

**Crossings.** — The court may take judicial notice of the fact that in a large city where two city railroad tracks are laid down in a long avenue, requiring nearly an hour to traverse it, the crossings where the cars stop to take on the passengers are much frequented, even though the street, considered as a whole, may not be. *Haggerty v. Brooklyn City*, etc., R. Co., 6 Abb. N. Cas. (N. Y.) 129 note, 61 N. Y. 624.

**Gates and Gatekeepers.** — Judicial notice may be taken of the fact that the maintenance of gates and a gatekeeper at railroad crossings tends to the safety of travelers upon the highway. *Richmond Union Pass. R. Co. v. Richmond*, etc., R. Co., 96 Va. 670.

**Burning Rubbish on Right of Way.** — Judicial notice may be taken of the fact that at certain seasons of the year railroad section men are in the habit of clearing the railroad right of way of rubbish by setting fire to the accumulations thereof. *Baxter v. Great Northern R. Co.*, 73 Minn. 189.

**Consolidated Roads.** — A court will not take judicial knowledge that the line of a consolidated railroad, if completed according to the original charters, would form a continuous or unbroken line. *Georgia Pac. R. Co. v. Gaines*, 88 Ala. 377, 44 Am. & Eng. R. Cas. 1.

**Fences.** — Nor can a court take judicial knowledge without evidence that a railway is not fenced at a certain point. *Texas Cent. R. Co. v. Childress*, 64 Tex. 346.

**Eminent Domain — Acquisition of Particular Land.** — The court will not take judicial notice of the fact that a railroad company under its charter condemned or acquired title to any particular land or strip of land. *Chapman v. Pittsburgh*, etc., R. Co., 18 W. Va. 184.

**Negligence.** — The construction and operation of a railroad without blocking its frogs and switches is not negligence *per se* of which a court will take judicial knowledge. *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.



a railroad company is authorized by an Act of Congress to build and maintain a bridge over navigable waters.<sup>1</sup>

**4. Location.** — It has been held to be a matter of public history that important lines of railway, once established, have remained fixed and permanent in their course; and when this is the case their locality becomes so notorious and indisputable that courts take notice thereof.<sup>2</sup> But a court will not take judicial notice of the fact that a railroad will not run through or near certain places which have subscribed to its capital stock, where it is simply chartered between certain designated termini.<sup>3</sup>

**5. Operation** — *a. IN GENERAL.* — Courts may take judicial notice of the manner in which the great railroads of the country are managed in matters pertaining to their usual and ordinary operation and intercourse with the public.<sup>4</sup>

**Illustrations.** — Thus, judicial notice may be taken of the usual custom of railroads to separate freight and passenger trains;<sup>5</sup> and, with reference to a street railway, the habit of passengers to ride on the platform has been held to be so common and notorious as to be entitled to judicial notice.<sup>6</sup>

*b. SPEED.* — It has been held that courts will take judicial notice of the ordinary speed of railway trains and of the public statutes regulating the rate of speed.<sup>7</sup>

**1. Authority to Build Bridge over Navigable Waters.** — *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 37 Fed. Rep. 120.

**Construction, Operation, Leasing.** — A federal court, it has been held, will take judicial notice of the acts providing for the construction, operation, and leasing of a state railroad, such acts being of the class generally regarded as public acts. *Western, etc., R. Co. v. Roberston*, 61 Fed. Rep. 592.

**2. Locality — Where Matter of General Notoriety.** — *Gulf, etc., R. Co. v. State*, 72 Tex. 410, 13 Am. St. Rep. 815; *Miller v. Texas, etc., R. Co.*, 83 Tex. 518.

**Railroad Partly in One State and Partly in Another.** — *Hobbs v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 873.

**Railroads Between Same Points — Competing Lines.** — *Gulf, etc., R. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815. But see *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306.

**Railroad Terminus.** — *Smith v. Flournoy*, 47 Ala. 346; *Texas, etc., R. Co. v. Black*, 87 Tex. 160.

**Horse Railroads — Use and Occupation of Streets.** — *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61.

**Situs of Corporation.** — *Hart v. Baltimore, etc., R. Co.*, 6 W. Va. 336; *Henen v. Baltimore, etc., R. Co.*, 17 W. Va. 381.

**3. Route Between Designated Points.** — *Phillips v. Albany*, 28 Wis. 340.

**Nor Will the Courts Notice Judicially whether a railroad company owns and operates a road through a particular county, when there is no law prohibiting it from doing so.** *Indianapolis, etc., R. Co. v. Stephens*, 28 Ind. 429; nor that a designated railway is part of a certain system, where the court has no knowledge of the contract under which the system was created, *Miller v. Texas, etc., R. Co.*, 83 Tex. 518. But it has been declared a matter of common notoriety and judicial knowledge that the "Missouri Pacific Railway System" operates and controls the Texas and Pacific Railway Company. *Texas, etc., R. Co. v. Logan*, 3 Tex. App. Civ. Cas., § 188; *Missouri Pac. R. Co. v. Graves*, 2 Tex. App. Civ. Cas., § 679; *Missouri Pac. R. Co. v. White*, 3 Tex. App. Civ. Cas., § 163.

*souri Pac. R. Co. v. White*, 3 Tex. App. Civ. Cas., § 163.

**Filing Map Showing Route.** — A court cannot notice judicially whether the Northern Pacific Railroad Company filed its map of the fixed or the general routes of its road on a particular date or at any other time, or whether at that or at any other time it selected the definite route of its road. The court might take judicial notice, perhaps, of an executive act of the secretary of the interior in connection with the filing of such map, but filing it by the company is not such an act as the court will notice judicially. *McKeoin v. Northern Pac. R. Co.*, 45 Fed. Rep. 464.

**4. Operation of Railroads — Rule Stated.** — *South, etc., Alabama R. Co. v. Pilgreen*, 62 Ala. 305; *Cleveland, etc., R. Co. v. Jenkins*, 174 Ill. 308; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627.

**Direction and Control of Trains.** — *South, etc., Alabama R. Co. v. Pilgreen*, 62 Ala. 305; *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92.

**Inspection of Railroads.** — *Smith v. Potter*, 46 Mich. 258, 41 Am. Rep. 161.

**Transfer of Cars for Continuous Transportation.** — *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477.

**Also of the Process by Which Loaded Cars are Transferred from the tracks of a railroad upon one side of a river to those of the railroad upon the other side without breaking bulk.** *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 5 Mo. App. 347.

**Telegraph Lines — Use in Connection with Railroads.** — *State v. Indiana, etc., R. Co.*, 133 Ind. 60.

**Concussions — Coupling Cars.** — *Moore v. Saginaw, etc., R. Co.*, 115 Mich. 103. See also *Jonas v. Long Island R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 306.

**5. Separation of Freight and Passenger Trains.** — *Atchison, etc., R. Co. v. Headland*, 18 Colo. 477.

**6. Habit of Passengers to Ride on Platform.** — *Metropolitan R. Co. v. Snashall*, 3 App. Cas. (D. C.) 420.

**7. Ordinary Speed.** — *Rice v. Montgomery*, 4



c. OFFICERS AND AGENTS. — It has been held that courts will not take judicial notice of the officers and agents of railroad companies.<sup>1</sup> According to the doctrine of some decisions, however, judicial notice is taken of the officers and agents of railroads who represent the company in its ordinary dealings with the public, and, in a general way, of the duties of such officers and agents and the scope of their authority.<sup>2</sup>

**XX. GENERAL AND PARTICULAR CUSTOMS.** — Where a custom or usage is of such notoriety and obtains so extensively as to be a matter of general knowledge and common information, judicial notice is taken thereof by the courts.<sup>3</sup> But a particular usage or custom, having a circumscribed and limited application, is not so noticed, but must be supported by proof.<sup>4</sup>

**XXI. JUDICIAL NOTICE BY STATUTE.** — In some states laws have been enacted

Biss. (U. S.) 75; *Pearce v. Langfit*, 101 Pa. St. 511, 47 Am. Rep. 737.

**Statutes Regulating Speed.** — *Horn v. Chicago*, etc., R. Co., 38 Wis. 463.

**Acts Prescribing Precautions at Crossings.** — The *Illinois* act requiring railroad companies to ring a bell or sound a whistle before passing over a highway with a train is a public statute of which the courts will take judicial notice. *Chicago, etc., R. Co. v. Dillon*, 123 Ill. 570, 32 Am. & Eng. R. Cas. 1, *affirming* 24 Ill. App. 203.

**1. Officers and Agents — Doctrine that Judicial Notice Not Taken** — *Georgia*. — *Southern R. Co. v. Hagan*, 103 Ga. 564.

*Indiana*. — *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

*Iowa*. — *Wood v. Chicago, etc., R. Co.*, 59 Iowa 196.

*Missouri*. — *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528; *Brown v. Missouri, etc., R. Co.*, 67 Mo. 122.

See also *Seaman v. Koehler*, 122 N. Y. 646.

**But to the Effect that Courts Will Take Judicial Notice of the duties of railroad conductors**, pointed out by statute, see *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421.

**2. Doctrine that Judicial Notice Taken — Ticket Agents — Conductors.** — *Dye v. Virginia Midland R. Co.*, 20 D. C. 63; *Dailey v. Preferred Masonic Mut. Acc. Assoc.*, 102 Mich. 289; *Condran v. Chicago, etc., R. Co.*, 32 U. S. App. 182.

**Engineers and Firemen — Post of Duty.** — While judicial notice may be taken of the proper place of the engineer and fireman on a moving train of cars, it is not matter of common knowledge and general notoriety that "the footboard in front of a shifting engine is the post of duty of the yardmaster and conductor." *Highland Ave., etc., R. Co. v. Walters*, 91 Ala. 435.

**General Manager.** — *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

**Section Foreman.** — *Mobile, etc., R. Co. v. Stinson*, 74 Miss. 453.

**Superintendent.** — *Sacalaris v. Eureka, etc., R. Co.*, 18 Nev. 155, 16 Am. & Eng. R. Cas. 580.

**Clearance Card.** — Judicial notice may be taken of the fact that a clearance card is a document given to an employee of a railroad company at the end of his service, showing the cause of discharge or voluntary quitance, length of service, capacity, etc. *Cleveland, etc., R. Co. v. Jenkins*, 174 Ill. 398.

**3. General Customs and Usages — England.** — *Turley v. Thomas*, 8 C. & P. 103, 34 E. C. L. 312.

*United States.* — *Von Mumm v. Wittemann*, 85 Fed. Rep. 966; *Consequa v. Willings, Pet.* (C. C.) 225.

*Idaho.* — See *People v. Owyhee Lumber Co.*, 1 Idaho 420.

*Illinois.* — *Munn v. Burch*, 23 Ill. 35.

*Maine.* — *State v. Intoxicating Liquors*, 73 Me. 278.

*Maryland.* — *Columbia Bank v. Fitzhugh*, 1 Har. & G. (Md.) 239.

*Michigan.* — *Pfeiffer v. Board of Education*, 118 Mich. 560.

*Minnesota.* — *Duby v. Jackson*, 69 Minn. 342.

*New York.* — *Livingston v. Spero*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 243.

*North Dakota.* — *Mathews v. Great Northern R. Co.*, 7 N. Dak. 81.

And see *supra*, this title, *Laws and Statutes — Law Merchant*.

**4. Particular Customs — England.** — *Stainton v. Jones*, 2 Selw. N. P. (13th ed.) 1205.

*United States.* — *Meydenbauer v. Stevens*, 78 Fed. Rep. 787; *Wilson v. Owens*, 86 Fed. Rep. 571.

*Colorado.* — *Sullivan v. Hense*, 2 Colo. 424.

*Indiana.* — *Mueller v. State*, 76 Ind. 310, 40 Am. St. Rep. 245.

*Kentucky.* — *Longes v. Kennedy*, 2 Bibb (Ky.) 607.

*Maryland.* — *Columbia Bank v. Fitzhugh*, 1 Har. & G. (Md.) 239.

*Mississippi.* — *Turner v. Fish*, 28 Miss. 306.

*Nevada.* — *Ponjade v. Ryan*, 21 Nev. 449.

*New York.* — *Youngs v. Ransom*, 31 Barb. (N. Y.) 49.

*Oregon.* — *Lewis v. McClure*, 8 Oregon 273.

*Washington.* — *Cady v. Case*, 11 Wash. 124.

*Compare Isaacs v. Barber*, 10 Wash. 124, 45 Am. St. Rep. 772.

**What the Cost-book Principle Is** cannot be, it has been held, judicially taken notice of by the court. It must be proved in the cause, as any other particular custom. *Matter of Penant, etc., Consol. Lead Min. Co.*, 2 Eq. Rep. 944, 4 DeG. M. & G. 285, 22 L. J. Ch. 692, *affirming* 1 Eq. Rep. 244; *In re Great Cambrian Min., etc., Co.*, 4 W. R. 224, 2 Kay & J. 253, 25 L. J. Ch. 221, 2 Jur. N. S. 85; *In re Bodmin United Mines Co.*, 23 Beav. 370, 3 Jur. N. S. 350, 26 L. J. Ch. 570.

**Local Usages of a Foreign Country** are not the subject of judicial notice. See *Dempster v. Stephen*, 63 Ill. App. 126.



with reference to the rule of judicial notice, and whenever a question arises in such connection the practitioner should first look for statutes on the subject.<sup>1</sup> A notable example of legislative change is the provision frequently met with that private statutes shall be judicially noticed.<sup>2</sup> And in some jurisdictions the laws of other states are made matters of judicial cognizance.<sup>3</sup>

**XXII. MISCELLANEOUS — 1. Things Judicially Noticed.** — Courts have judicial knowledge of the general nature of the occupations classed as professions;<sup>4</sup> that the Masonic order is a charitable or eleemosynary organization;<sup>5</sup> that the carrying on of business by a barber on Sunday is not a necessity;<sup>6</sup> of the height of the human body;<sup>7</sup> of the general nature and characteristics of children;<sup>8</sup> and of other miscellaneous matters referred to in the notes.<sup>9</sup>

**Judicial Notice by Board of Excise.** — It has also been held that in a proceeding by a board of excise to revoke a license issued, judicial notice of the premises

**1. California.** — For instance, Code Civ. Pro. Cal., § 1875, subdiv. 8, provides that the court will take judicial knowledge of the laws of nature, the measure of time, and the geographical divisions and political history of the world. See *People v. Mayes*, 113 Cal. 618.

**Courts of Law — Chancery.** — It has been held that a statute dispensing with the necessity of pleading a private act of the legislature in the courts of law does not affect the rule of judicial notice in proceedings in chancery. *Perry v. New Orleans, etc., R. Co.*, 55 Ala. 413, 28 Am. Rep. 740.

**Statute as Applying to Case Already Decided.** — Under a statute providing that the Court of Appeals may take judicial notice of the private or local statutes that were relied on in the court below, this may be done accordingly whether the case in review was decided in the court below before or after the statute went into effect. *Somerville v. Wimbish*, 7 Gratt. (Va.) 205.

**2. See *supra*, this title *Laws and Statutes — Private Statutes*.**

**3. See the title FOREIGN LAWS, vol. 13, p. 1050.**

**4. Knowledge of Professions.** — *Pennock v. Fuller*, 41 Mich. 153, 32 Am. Rep. 148.

**5. Nature of Masonic Order — Jurors.** — A Freemason is a competent juror in a cause to which his lodge is a party, the court taking judicial notice that such order is a charitable or eleemosynary body. *Burdine v. Grand Lodge, etc.*, 37 Ala. 478. And see the title FREEMASONS, vol. 14, p. 543.

**6. Barber Carrying On Business on Sunday.** — *State v. Frederick*, 45 Ark. 347.

**Natural Gas — Necessity — Eminent Domain.** — Courts will take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipes. *Citizens' Gas, etc., Co. v. Elwood*, 114 Ind. 332; *State v. Indiana, etc., Oil, etc., Co.*, 120 Ind. 575; *Jamieson v. Indiana Natural Gas, etc., Co.*, 128 Ind. 564.

**7. Height of Human Body.** — *Hunter v. New York, etc., R. Co.*, 116 N. Y. 615, 41 Am. & Eng. R. Cas. 248, reversing 42 Hun (N. Y.) 657, 5 N. Y. St. Rep. 64.

**Loss of Arm — Diminution of Earning Capacity.** — *Chicago, etc., R. Co. v. Warner*, 108 Ill. 538, 18 Am. & Eng. R. Cas. 100.

**8. General Nature and Characteristics of Children.** — The court will take judicial notice of

the fact that a pile of lumber is likely to tempt children to play about it. *Spengler v. Williams*, 67 Miss. 1.

**Services of Which Infant Capable.** — In an action by a parent to recover damages for the death of a minor child, the gist of the action being the loss of service, it was held that the court would take judicial notice of the fact that an infant twenty months old was incapable of rendering services of pecuniary value. *Southern R. Co. v. Covenia*, 100 Ga. 46. So, also, as to a child three years of age. *Atlanta Consol. St. R. Co. v. Arnold*, 100 Ga. 566.

**9. Negligence.** — *Lake Shore, etc., R. Co. v. Miller* 25 Mich. 274.

**Existence of Slavery.** — *Miller v. McQuerry*, 5 McLean (U. S.) 469.

**Materials of Threshing Machine.** — *J. I. Case Threshing-Mach. Co. v. Haven*, 65 Iowa 359.

**Fence Pole.** — The fact that a "fence pole" is a heavy club will be judicially noticed. *Baker v. Hope*, 49 Cal. 598.

**Beans — Pulse.** — The judges will take notice that "beans" are "pulse." *Rex v. Woodward*, 1 Moody 323.

**Adjutant General's Muster Rolls of Soldiers.** — *Monroe County v. May*, 67 Ind. 562. See also *Wayland v. Ware*, 104 Mass. 46; *Hanson v. South Scituate*, 115 Mass. 336.

**Uncollected Taxes in Assessment Roll.** — *Mullen v. Sackett*, 14 Wash. 100.

**That Pneumonia Is a "Disease."** — *Kiernan v. Metropolitan L. Ins. Co., (C. Pl. Gen. T.)* 13 Misc. (N. Y.) 39.

**But Not that Glanders Is for Human Beings a Contagious Disease.** — *State v. Fox*, 79 Md. 514, 47 Am. St. Rep. 424.

**Infectious Disease of Cattle.** — In *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, overruling *Bradford v. Floyd*, 80 Mo. 207, it was held that courts will take judicial notice of the fact that Texas cattle have some contagious or infectious disease communicable to native cattle.

**"Peach Yellows" — Existence and Nature of Disease.** — *State v. Main*, 69 Conn. 135, 61 Am. St. Rep. 30.

**Undertaker's Establishment.** — A court may take judicial notice of the objectionable character of an undertaker's establishment, including a room for storing and dissecting dead bodies, in a residential portion of a city. *Rowland v. Miller*, 139 N. Y. 93.



licensed may be taken by the board.<sup>1</sup>

**2. Things Not Judicially Noticed.** — A court will not take judicial cognizance of the general organization and administration of religious denominations,<sup>2</sup> unless so connected with the history of the country or of such public notoriety as to warrant the application of the rule.<sup>3</sup> Nor will judicial notice be taken of the number of newspapers in a county,<sup>4</sup> or of the other various subjects set forth below.<sup>5</sup>

**JUDICIAL RECORD.** (See also the title *RECORDS*.) — A judicial record is defined to be a record of official entry or files of the proceedings in a court of justice.<sup>6</sup>

**1. Judicial Notice by Board of Excise.** — *People v. Board of Excise*, (County Ct.) 17 Misc. (N. Y.) 98.

**2. Methodist Episcopal Church.** — See *Sarahass v. Armstrong*, 16 Kan. 192.

**Church Doctrine, Discipline, Government.** — So where a right of property is dependent upon a question of church doctrine, discipline, or government, it was held that the civil courts of *New York* would treat the determination of such question, made by the highest tribunal within the church organization having jurisdiction to determine such questions, as controlling; but that beyond this there would be no recognition of the jurisdiction or judicial power of any ecclesiastical court, and judicial notice would be taken of the fact that no such court can have jurisdiction to determine the civil rights of parties. *Baxter v. McDonnell*, 155 N. Y. 83, *reversing* 18 N. Y. App. Div. 235.

**3. Thus the Separation of the Methodist Episcopal Church**, in 1844, into two organizations of the same name, the one north and the other south of a common boundary line, was an event that connected itself with and formed a part of the history of the country, and from its notoriety courts will take judicial notice of it without proof. *Humphrey v. Burnside*, 4 Bush (Ky.) 215. See also *Goode v. McPherson*, 51 Mo. 126.

**That Individuals Who Attend the Services of Any Particular Church Are Not Limited to Members of that church**, but are an indefinite and varying number of persons, see *McAlister v. Burgess*, 161 Mass. 269.

**Unincorporated Religious Societies.** — It has

been held a matter of common knowledge and therefore of judicial notice by the Supreme Court of *Illinois* that there have been in existence in that state many unincorporated religious societies. *Alden v. St. Peter's Parish*, 158 Ill. 631.

**Contents of Bible — Doctrines of Religious Belief.** — The courts will take judicial notice of the contents of the Bible, that the religious world is divided into numerous sects, and of the general doctrines maintained by each sect. *State v. School Dist. No. Eight*, 76 Wis. 177, 20 Am. St. Rep. 41. *Quare* whether this statement is not too broad in that it should properly be limited to the principal religious denominations.

**4. Number of Newspapers in County.** — Judicial notice will not be taken of the number of newspapers published in a county, or whether any newspaper is published therein. *Atkeson v. Lay*, 115 Mo. 538.

**5. Nature of Proof in Particular Cases.** — *Casidy v. McFarland*, 139 N. Y. 201.

**Names — Assumption of Citizenship.** — *State v. Travelers Ins. Co.*, 70 Conn. 590.

**Military Headquarters.** — *Bell v. State*, 1 Tex. App. 81.

**Patents for Inventions.** — *Bottle Seal Co. v. De La Vergne Bottle, etc., Co.*, 47 Fed. Rep. 59. See generally the title *PATENTS*.

**Records in Register's Office.** — *Williams v. Langevin*, 40 Minn. 180.

**Identity of Trust.** — *Tapp v. Corey*, 64 Tex. 594.

**Venue of Property.** — *Two Hundred Thousand Feet of Logs v. Sias*, 43 Mich. 356.

**6. Tustin v. Gaunt**, 4 Oregon 309.



# JUDICIAL SALES.

BY JOSEPH WALKER MAGRATH.

- I. DEFINITION AND NATURE, 953.
- II. SCOPE OF ARTICLE, 956.
- III. JURISDICTION, 956.
- IV. IN WHAT ACTION OR PROCEEDING SALE MAY BE ORDERED, 957.
- V. UNDER WHAT CIRCUMSTANCES SALE MAY BE ORDERED, 957.
  - 1. *Scope of Section*, 957.
  - 2. *Ascertainment of Liens and Priorities*, 957.
  - 3. *Removal of Cloud upon Title or Other Impediment to Fair Sale*, 958.
  - 4. *Debt Must Exceed Five Years' Rents and Profits of Land*, 958.
  - 5. *Sale Before Final Decree*, 959.
- VI. WHAT MAY BE SOLD, 959.
- VII. WHO MAY MAKE SALE, 960.
  - 1. *In General*, 960.
  - 2. *Sale by Less than Whole Number of Persons Appointed to Sell*, 961.
  - 3. *Person Interested in Proceeding*, 961.
  - 4. *Sale by Auctioneer or Agent*, 962.
  - 5. *Whether Bond and Oath Required*, 962.
  - 6. *Removal of Commissioners Appointed to Sell*, 962.
- VIII. WHO MAY PURCHASE, 963.
  - 1. *Parties or Attorneys*, 963
  - 2. *Witnesses*, 963.
  - 3. *Judge Ordering Sale*, 964
  - 4. *Person Appointed to Sell*, 964.
  - 5. *Auctioneer Employed to Conduct Sale*, 965.
  - 6. *Appraiser*, 965.
  - 7. *Fiduciary*, 965.
  - 8. *Tenant*, 965.
  - 9. *Tenant for Life*, 965.
  - 10. *Reversioner*, 966
  - 11. *Residuary Legatee*, 966.
  - 12. *Agent*, 966.
  - 13. *Stockholder*, 966.
- IX. CONDUCT OF SALE, 966.
  - 1. *Advertisement or Notice*, 966.
    - a. *Necessity for*, 966.
    - b. *How Method and Time of Advertisement or Notice Determined*, 966.
    - c. *Methods of Advertising*, 967.
      - (1) *The Usual Methods*, 967.
      - (2) *Publication in Newspaper*, 967
      - (3) *Posting Notices*, 967.
      - (4) *What the Notice or Advertisement Should Contain*, 968
        - (a) *Time of Sale*, 968.
        - (b) *Place of Sale*, 968.
        - (c) *Terms of Sale*, 968.
        - (d) *Description of Property*, 968.
        - (e) *Names of Parties*, 969.
        - (f) *Amount of Decree*, 969.
        - (g) *Signature*, 969.



## JUDICIAL SALES.

- d. *Time of Advertising*, 969.
  - (1) *In General*, 969.
  - (2) *Publication for a Specified Number of Weeks*, 969.
  - (3) *Whether Publication Must Be Continued Up to Day of Sale*, 969.
  - (4) *Number of Insertions*, 969.
  - (5) *Restrictions on Time of Sale as Affecting Time of Advertising*, 970.
- e. *Notice of Postponed Sale or Resale*, 970.
- f. *Notice of Adjournment of Sale*, 970.
- g. *Presumption that Proper Notice Was Given*, 970.
- h. *Evidence of Notice*, 970.
- i. *Effect of Failure to Give Proper Notice*, 971.
2. *Time*, 971.
  - a. *How Determined*, 971.
  - b. *Sale Should Be on Day Named in Notice*, 972.
  - c. *Adjournment or Postponement*, 972.
  - d. *Election Day*, 972.
  - e. *Sundays and Holidays*, 973.
  - f. *Jewish Sabbath*, 973.
  - g. *Statute of Limitations*, 973.
  - h. *Sale During Financial Depression*, 973.
  - i. *Hour of Sale*, 973.
  - j. *Presumption that Sale Was Made at Proper Time*, 973.
3. *Place*, 973.
  - a. *How Determined*, 973.
  - b. *Court House Door*, 974.
  - c. *Sale of Land on the Premises*, 974.
  - d. *Presumption that Sale Was Made at Proper Place*, 974.
4. *Mode of Sale*, 974.
  - a. *In General*, 974.
  - b. *Public or Private Sale*, 975.
  - c. *Sale En Masse or in Parcels*, 975.
    - (1) *In General*, 975.
    - (2) *Order of Selling Different Lots*, 976.
    - (3) *When Sale En Masse Is Proper*, 977.
    - (4) *Offering in Both Methods and Sale at Highest Bid*, 977.
    - (5) *Sale Must Be Pursuant to Notice*, 977.
  - d. *Sales of Personalty*, 977.
5. *Bids*, 977.
  - a. *Manner of Making*, 977.
    - (1) *Bid Through Agent*, 977.
    - (2) *Bid Received by Letter*, 978.
    - (3) *Bidding by Private Signal*, 978.
  - b. *Limitation of Time for Bidding*, 978.
  - c. *Announcement of Name of Bidder*, 978.
  - d. *Rejection of Bids*, 978.
  - e. *Right of Bidder to Withdraw Bid*, 979.
  - f. *Bidder Released from Liability by Acceptance of Higher Bid*, 979.
6. *Withdrawal of Property from Sale*, 979.
7. *Course Pursued Where Same Bid Claimed by Two Persons*, 979.
8. *Resale upon Failure of Successful Bidder to Comply with Bid*, 979.
9. *Reserved Price*, 979.
10. *Puffing*, 980.
11. *Suppression of Competition or Chilling Bidding*, 980.

## X. TERMS OF SALE, 981.

1. *How Prescribed*, 981.
2. *Debt or Contract under Which Property Sold as Affecting Terms*, 982.
3. *Requiring Deposit*, 982.



## JUDICIAL SALES.

4. *Effect of Provision for Allowance Out of Purchase Money of Taxes and Assessments Due*, 982.
5. *Officer Must Sell on Terms Prescribed*, 982.
6. *Conformity to Advertisement*, 983.
7. *Adjudications as to Propriety of Cash or Credit Sales*, 983.

### XI. PURCHASE MONEY, 983.

1. *To Whom Payment Should Be Made*, 983.
  - a. *Officer Making Sale*, 983.
  - b. *Payment to Person Not Authorized to Receive It*, 984.
  - c. *Payment of Purchase Money into Court*, 984.
2. *Method of Payment*, 984.
  - a. *In General*, 984.
  - b. *Payment in Confederate Money*, 985.
3. *Bond or Security for Purchase Money*, 985.
  - a. *In General*, 985.
  - b. *Penalty of Bond*, 986.
  - c. *Taking One Bond for Aggregate Amount Realized by Sale in Parcels*, 986.
  - d. *Effect of Failure of Commissioner to Return Bonds into Court*, 986.
  - e. *Requiring New Security*, 986.
  - f. *Enforcement of Bond*, 986.
4. *Lien for Purchase Money*, 987.
5. *Interest*, 987.
6. *Discounting Credit Payments*, 987.
7. *Effect of Failure to Make Payments at Proper Time*, 988.
8. *Purchaser Acquires No Title or Right to Deed until Compliance with Terms of Sale*, 988.
9. *Abatement of Price*, 988.
  - a. *For Deficiency in Quantity of Land Sold*, 988.
  - b. *For Outstanding Taxes or Other Liens*, 989.
  - c. *Taxes and Interest on Incumbrances Becoming Due After Confirmation*, 989.

### XII. CONFIRMATION, 989.

1. *Necessity for*, 989.
2. *Who May Proceed for Confirmation*, 991.
3. *Who May Confirm Sale*, 991.
4. *Time for Confirmation*, 991.
5. *Form of Confirmation*, 991.
6. *Discretion of Court*, 992.
7. *Imposition of Terms or Conditions*, 993.
8. *Review in Appellate Court*, 993.
9. *Effect of Confirmation*, 993.
  - a. *Completing Sale*, 993.
  - b. *Retroaction*, 993.
  - c. *Curing of Irregularities*, 993.

### XIII. OBJECTIONS AND SETTING ASIDE, 995.

1. *Policy of Upholding Judicial Sales*, 995.
2. *Who May Object*, 995.
  - a. *In General*, 995.
  - b. *Effect of Failure to Object to Confirmation*, 996.
  - c. *Effect of Claiming Proceeds of Sale*, 996.
3. *Right of Purchaser to Be Heard*, 996.
4. *Grounds of Objection*, 996.
  - a. *In General*, 996.
  - b. *Fraud*, 996.
  - c. *Surprise, Accident, or Mistake*, 997.
  - d. *Irregularities*, 999.
  - e. *Misconduct of Officer*, 999.



## JUDICIAL SALES.

- f. Defect of Title, 1000.*
- g. Incumbrances, 1000.*
- h. Nonpayment by Purchaser, 1000.*
- i. Scarcity of Bidders, 1000.*
- j. Inadequacy of Price, 1000.*
  - (1) General Rule, 1000.*
  - (2) Gross Inadequacy, 1002.*
  - (3) Inadequacy of Price in Connection with Other Circumstances, 1003.*
  - (4) Distinction Depending upon Whether Objection Raised Before or After Confirmation, 1004.*
  - (5) Evidence, 1004.*
- k. Sale in Violation of Order Staying Same, 1004.*
- l. Judgment Directing Sale Superseded, 1005.*
- m. Objections to Judgment or Proceedings Leading Up to Order of Sale, 1005.*
- 5. Time for Objecting, 1005.*
- 6. Whether Offer of Advance Price Is Necessary, 1006.*
- 7. Waiver of Objections, 1006.*
- 8. Offer of Advance Price as a Ground for Opening Biddings, 1006.*
  - a. In England and Canada, 1006.*
  - b. In the United States, 1007.*
    - (1) Extent to Which Practice Prevails, 1007.*
    - (2) Who May Make Advance Offer, 1007.*
    - (3) What Advance Will Cause Biddings to Be Opened, 1007.*
    - (4) Advance Must Be Secured, 1008.*
    - (5) Advance Bid Cannot Be Withdrawn, 1008.*
    - (6) Whether Notice of Opening Biddings Is Necessary, 1008.*
    - (7) Whether Biddings May Be Opened More than Once, 1008.*
    - (8) Biddings Opened to All, 1009.*
    - (9) When Person Offering Advance Bid Becomes Purchaser, 1009.*
    - (10) Terms of Payment on Resale, 1009.*
    - (11) Original Purchaser Entitled to Return of Purchase Money When Biddings Opened, 1009.*
    - (12) When Biddings Will Not Be Opened, 1009.*
      - (a) In General, 1009.*
      - (b) Advance Offer Made Through Malice or Prejudice, 1009.*
      - (c) Conditional Application, 1010.*
      - (d) Advance Offer Made After Confirmation of Sale, 1010.*

## XIV. RIGHTS AND LIABILITIES OF PURCHASERS, 1010.

- 1. Title Acquired, 1010.*
  - a. As Against Parties, 1010.*
  - b. As Against Third Persons, 1010.*
- 2. Caveat Emptor, 1010.*
- 3. Rules Concerning Liens and Incumbrances, 1012.*
- 4. Right to a Conveyance, 1013.*
- 5. Right to Possession, 1014.*
  - a. In General, 1014.*
  - b. Where Person in Possession Not a Party to Proceeding, 1014.*
  - c. Effect of Appeal from Order of Confirmation, 1014.*
  - d. Effect of Right of Redemption, 1015.*
  - e. English Rule as to When Purchaser Is Entitled to Possession, 1015.*
  - f. Compensation for Being Kept Out of Possession, 1015.*
- 6. Right to Rents and Profits, 1015.*
- 7. Rights as to Growing Crops, 1015.*
- 8. Liability on Bid, 1016.*



## JUDICIAL SALES.

9. *Protection Afforded by Judgment or Decree of Sale*, 1016.
  - a. *General Rule*, 1016.
  - b. *When the Rule Does Not Apply*, 1018.
    - (1) *Defect of Parties*, 1018.
    - (2) *Property Sold Not That of Defendant*, 1018.
    - (3) *Reversal of Decree of Confirmation*, 1018.
    - (4) *Fraud on Part of Purchaser*, 1018.
    - (5) *Purchase by Party Procuring Sale or by His Attorney*, 1019.
10. *Appreciation or Depreciation in Value of Property Between Time of Sale and Confirmation*, 1020.
11. *As to Application of Proceeds of Sale*, 1020.
12. *Circumstances Entitling Purchaser to Be Relieved from Purchase*, 1020.
  - a. *Sale or Proceedings Leading Up Thereto Void*, 1020.
  - b. *Lack of Jurisdiction*, 1021.
  - c. *Decree Inadequate to Transfer Title*, 1021.
  - d. *Purchaser Unable to Obtain Possession by Virtue of Decree*, 1021.
  - e. *Land Not Subject to Sale*, 1021.
  - f. *Deficiency in Quantity of Land Sold*, 1021.
  - g. *Defect in Title or Incumbrances*, 1021.
    - (1) *In England and Canada*, 1021.
    - (2) *In the United States*, 1022.
    - (3) *Rule as to Title by Adverse Possession*, 1023.
  - h. *Delay in Completion of Sale*, 1023.
  - i. *Irregularities*, 1023.
  - j. *Purchaser Must Make Out Plain Case for Relief*, 1023.
13. *Rights upon Setting Aside of Sale*, 1024.
  - a. *Reimbursement*, 1024.
  - b. *Compensation for Improvements*, 1024.
14. *Liabilities upon Setting Aside of Sale*, 1025.

### XV. ENFORCEMENT OF BID, 1025.

1. *Summary Proceedings in General*, 1025.
2. *Resale at Bidder's Risk*, 1026.
  - a. *In General*, 1026.
  - b. *Motion for Resale*, 1027.
  - c. *Rule to Show Cause Against Resale at Bidder's Risk*, 1027.
  - d. *Terms of Resale*, 1027.
  - e. *Surplus on Resale*, 1028.
  - f. *Report and Confirmation of First Sale*, 1028.
  - g. *Staying Resale*, 1028.
3. *Attachment for Contempt*, 1028.
4. *Independent Action to Recover Amount of Bid*, 1028.

### XVI. THE DEED, 1029.

1. *Necessity for*, 1029.
2. *By Whom Executed*, 1029.
3. *To Whom Executed*, 1030.
4. *Time for Making Deed*, 1031.
5. *Requisites and Valiaity of Deed*, 1032.
6. *Acknowledgment*, 1033.
7. *Revenue Stamp*, 1033.

### XVII. COLLATERAL IMPEACHMENT, 1033.

### XVIII. REDEMPTION, 1034.

1. *Right of Redemption Based on Statute*, 1034.
2. *Court May Allow Redemption in Absence of Statute*, 1035.
3. *Right May Be Based on Contract*, 1035.
4. *Who May Redeem*, 1035.
5. *Against Whom Redemption May Be Made*, 1035.
6. *Time and Manner of Redeeming*, 1036.
7. *Effect of Redemption*, 1036.



## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 12, p. 2.

As to *Execution and Sheriffs' Sales*, see the title *SHERIFFS' SALES*.

As to *Sales by Fiduciaries under Order of Court*, see the titles *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 1068; *GUARDIAN AND WARD*, vol. 15, p. 16; *TRUSTS AND TRUSTEES*.

As to *Partition Sales*, see the title *PARTITION*.

As to *Sales by Receivers*, see the title *RECEIVERS*.

As to *Sales for Taxes*, see the title *TAX SALES*.

As to *Sales under Powers*, see the title *TRUST DEEDS AND POWER OF SALE MORTGAGES*.

And for other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 776; *INSANITY*, vol. 16, p. 558; *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 630; *MORTGAGES*; *PUBLIC OFFICERS*; *SALES*.

**I. DEFINITION AND NATURE.**—A judicial sale is a sale made under the process of a court having competent authority to order it, by an officer duly appointed and commissioned to sell,<sup>1</sup> which sale, as a general rule, becomes absolute only upon confirmation by the court.<sup>2</sup> It is therefore a sale made *pendente lite*,<sup>3</sup> wherein the court is the real vendor and the person appointed to conduct the sale is a mere agent of the court.<sup>4</sup>

**1. Definition.**—*Williamson v. Berry*, 8 How. (U. S.) 495; *Texas*, etc., *R. Co. v. Gay*, 86 Tex. 571. See also *Terry v. Coles*, 80 Va. 695; *Hess v. Rader*, 26 Gratt. (Va.) 746; *Alexander v. Howe*, 85 Va. 198.

**Sales Held to Be Not Judicial.**—See *Rowland v. McGuire*, 67 Ark. 320; *Doyle v. African Methodist Church*, 43 Ga. 400; *Christian v. Cabell*, 22 Gratt. (Va.) 82. See also *Ware v. Starkey*, 80 Va. 191.

**2. Sale Becomes Absolute Only upon Confirmation by the Court**—*England*.—*Atty.-Gen. v. Day*, 1 Ves. 218; *Ex p. Minor*, 11 Ves. Jr. 559.

*United States*.—*Williamson v. Berry*, 8 How. (U. S.) 495; *Blossom v. Milwaukee*, etc., *R. Co.*, 3 Wall. (U. S.) 196.

*California*.—*Halleck v. Guy*, 9 Cal. 182, 70 Am. Dec. 643.

*Illinois*.—*Southern Bank v. Humphreys*, 47 Ill. 227; *Bozza v. Rowe*, 30 Ill. 198; *Ayers v. Baumgarten*, 15 Ill. 444; *Rawlings v. Bailey*, 15 Ill. 178; *Young v. Keogh*, 11 Ill. 642.

*Indiana*.—*Lawson v. De Bolt*, 78 Ind. 563.

*Kentucky*.—*Forman v. Hunt*, 3 Dana (Ky.) 614; *Watson v. Violet*, 2 Duv. (Ky.) 332.

*Maryland*.—*Andrews v. Scotton*, 2 Bland (Md.) 629; *Schindel v. Keedy*, 43 Md. 413; *Harrison v. Harrison*, 1 Md. Ch. 331; *Bolgiano v. Cooke*, 19 Md. 375; *Wagner v. Cohen*, 6 Gill (Md.) 97, 46 Am. Dec. 660.

*Missouri*.—*Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572.

*North Carolina*.—*McKee v. Lineberger*, 69 N. Car. 217; *Ashbee v. Cowell*, Busb. Eq. (45 N. Car.) 158.

*Tennessee*.—*Lasell v. Powell*, 7 Coldw. (Tenn.) 277.

*Texas*.—*Yerby v. Hill*, 16 Tex. 377. See also *Texas*, etc., *R. Co. v. Gay*, 86 Tex. 571.

**3. A Sale Pendente Lite.**—*Alexander v. Howe*,

85 Va. 198. See also *Terry v. Coles*, 80 Va. 695.

**4. Court the Real Vendor—Person Appointed to Make Sale a Mere Agent of Court**—*England*.—*Ex p. Minor*, 11 Ves. Jr. 561; *Savile v. Savile*, 1 P. Wms. 747.

*United States*.—*Williamson v. Berry*, 8 How. (U. S.) 495.

*Arkansas*.—*State Nat. Bank v. Neel*, 53 Ark. 110; *Thomason v. Craighead*, 32 Ark. 391; *Sessions v. Peay*, 23 Ark. 39. See also *Penn v. Tolleson*, 20 Ark. 652.

*District of Columbia*.—*Fitzgerald v. Fitzgerald*, 7 D. C. 240.

*Illinois*.—*Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184.

*Kentucky*.—*Forman v. Hunt*, 3 Dana (Ky.) 614; *Dawson v. Litsey*, 10 Bush (Ky.) 408; *Dale v. Shirley*, 5 B. Mon. (Ky.) 494; *Egard v. Chearnly*, 1 Bush (Ky.) 13; *Miller v. Hall*, 1 Bush (Ky.) 229; *Campbell v. Johnston*, 4 Dana (Ky.) 177; *Busey v. Hardin*, 2 B. Mon. (Ky.) 411.

*Maryland*.—*Schindel v. Keedy*, 43 Md. 413; *Harrison v. Harrison*, 1 Md. Ch. 331; *Hurt v. Stull*, 4 Md. Ch. 391; *Andrews v. Scotton*, 2 Bland (Md.) 629; *Wagner v. Cohen*, 6 Gill (Md.) 97; *Bolgiano v. Cooke*, 19 Md. 375; *Sewall v. Costigan*, 1 Md. Ch. 208; *Latrobe v. Herbert*, 3 Md. Ch. 375; *Dawes v. Thomas*, 4 Gill (Md.) 333; *Iglehart v. Armiger*, 1 Bland (Md.) 519.

*Mississippi*.—*Cocks v. Simmons*, 57 Miss. 183. See also *Tooley v. Kane, Smed. & M. Ch. (Miss.)* 518.

*Missouri*.—*Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572.

*Nebraska*.—*Parrat v. Neligh*, 7 Neb. 456.

*North Carolina*.—*McKee v. Lineberger*, 69 N. Car. 217; *Williams v. Council*, 8 Jones L. (53 N. Car.) 229.



**Not Within Statute of Frauds.** — It is generally considered that a judicial sale is not within the statute of frauds.<sup>1</sup>

**What Sales Are Judicial.** — The term "judicial sale" is one of broad import, and has been held to include a foreclosure sale,<sup>2</sup> a tax sale,<sup>3</sup> a sale in partition<sup>4</sup> or admiralty proceedings,<sup>5</sup> a sale by a receiver,<sup>6</sup> an assignee for benefit of creditors,<sup>7</sup> or a register in bankruptcy,<sup>8</sup> and a sale by an executor or administrator.<sup>9</sup>

*Pennsylvania.* — *Armor v. Cochrane*, 66 Pa. St. 308.

*South Carolina.* — *Keith v. Gray*, Rich. Eq. Cas. (S. Car.) 227.

*Tennessee.* — See *Deaderick v. Smith*, 6 Humph. (Tenn.) 138.

*Texas.* — *Texas, etc., R. Co. v. Gay*, 86 Tex. 571.

*Virginia.* — *Long v. Weller*, 29 Gratt. (Va.) 317.

*Wisconsin.* — *Hill v. Hoover*, 5 Wis. 354.

**1. Judicial Sale Not Within Statute of Frauds** — *England.* — *Atty.-Gen. v. Day*, 1 Ves. 221.

*United States.* — *Smith v. Arnold*, 5 Mason (U. S.) 414.

*California.* — *Halleck v. Guy*, 9 Cal. 182, 70 Am. Dec. 643.

*Delaware.* — *Pennington v. Chandler*, 5 Harr. (Del.) 394.

*Kentucky.* — *Watson v. Violet*, 2 Duv. (Ky.) 332; *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush (Ky.) 463.

*Maryland.* — *Warfield v. Dorsey*, 39 Md. 299, 17 Am. Rep. 562. See also *Harrison v. Harrison* 1 Md. Ch. 331.

*Pennsylvania.* — *King v. Gunnison*, 4 Pa. St. 171; *Fulton v. Moore*, 25 Pa. St. 468.

*New York.* — See *Hegeman v. Johnson*, 35 Barb. (N. Y.) 200; *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431.

*North Carolina.* — *Hudson v. Coble*, 97 N. Car. 260. See also *Trice v. Pratt*, 1 Dev. & B. Eq. (21 N. Car.) 626.

*South Carolina.* — *Gordon v. Saunders*, 2 McCord Eq. (S. Car.) 164.

*Virginia.* — See *Brent v. Green*, 6 Leigh (Va.) 24.

But compare *Wingate v. Herschauer*, 42 Iowa 506; *Stewart v. Garvin*, 31 Mo. 36; *Bicknell v. Byrnes*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486.

**Sale Within Statute until Confirmation.** — *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297, explaining *Simonds v. Catlin*, 2 Cal. (N. Y.) 61.

In *Illinois* it has been held that a sale of real estate at auction, by an administrator, under a license of the court, is within the statute of frauds. *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184.

**Parol Transfer by Purchaser Before Confirmation to Him.** — Where one who has purchased land at a judicial sale has, before any conveyance to him, verbally transferred his purchase to another, and an order of court has recited such transfer and directed the deed to be made to the transferee, this is sufficient to take the transaction out of the statute of frauds and perjuries. *Howard v. Howard*, 96 Ky. 445.

**2. Foreclosure Sale** — *Iowa.* — *Sturdevant v. Norris*, 30 Iowa 65.

*Maryland.* — *Sewall v. Costigan*, 1 Md. Ch. 208; *Hurt v. Stull*, 4 Md. Ch. 391; *Iglehart v. Armiger*, 1 Bland (Md.) 519.

*Texas.* — *Texas, etc., R. Co. v. Gay*, 86 Tex. 571.

**3. Tax Sale.** — See *State v. Sargent*, 12 Mo. App. 228.

**4. Partition Sale** — *Alabama.* — *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Cates v. Johnson*, 109 Ala. 126.

*California.* — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167.

*Illinois.* — *Speck v. Pullman Palace Car Co.*, 121 Ill. 33.

*Mississippi.* — *Gulf Coast Canning Co. v. Foster*, (Miss. 1895) 17 So. Rep. 683.

*Missouri.* — *Burden v. Taylor*, 124 Mo. 12. See also *Hewitt v. Lally*, 51 Mo. 93.

*Nevada.* — *Dazet v. Landry*, 21 Nev. 291.

*Pennsylvania.* — *Sackett v. Twining*, 18 Pa. St. 199, 57 Am. Dec. 599; *Girard L. Ins., etc., Co. v. Farmers', etc., Nat. Bank*, 57 Pa. St. 388.

**5. Sale in Admiralty Proceedings.** — *The Ruby*, 38 Fed. Rep. 622; *Griffith v. Fowler*, 18 Vt. 390.

**6. Sale by Receiver.** — *In re Illinois Third Nat. Bank*, 9 Biss. (U. S.) 535; *Rome, etc., R. Co. v. Sibert*, 97 Ala. 393; *Campbell v. Parker*, (N. J. 1900) 45 Atl. Rep. 116; *Matter of Denison*, 114 N. Y. 621.

**7. Sale by Assignee for the Benefit of Creditors.** — *Dresbach v. Stein*, 41 Ohio St. 70. See also *Lawson v. De Bolt*, 78 Ind. 563.

That such a sale is a judicial sale is established by statute in *Nebraska*. Comp. Stat. Neb. (1899), title Assignments, c. 6, § 20.

**8. A Conveyance by a Register in Bankruptcy** of the real estate of an adjudged bankrupt, to his assignee, is considered, in *Indiana*, to be a judicial sale. *Ketchum v. Schicketanz*, 73 Ind. 137; *McCracken v. Kuhn*, 73 Ind. 149; *Roberts v. Shroyer*, 68 Ind. 64.

**9. Sale by Executor or Administrator** — *United States.* — *Chew v. Hyman*, 7 Fed. Rep. 7; *Grignon v. Astor*, 2 How. (U. S.) 319; *May v. Logan County*, 30 Fed. Rep. 250; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157.

*Alabama.* — *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Bland v. Bowle*, 53 Ala. 152; *McCully v. Chapman*, 58 Ala. 325; *Pryor v. Davis*, 109 Ala. 117; *Worthington v. McRoberts*, 9 Ala. 297.

*Arkansas.* — *Thorn v. Ingram*, 25 Ark. 52.

*California.* — *Horton v. Jack*, 115 Cal. 29; *Halleck v. Guy*, 9 Cal. 182, 70 Am. Dec. 643; *Cal. Code Civ. Pro.*, § 1517.

*Florida.* — *Myers v. Nourse*, 5 Fla. 516.

*Hawaii.* — *Unauna v. Armstrong*, 3 Hawaii 705. Compare *Kauwa v. Dowsett*, 3 Hawaii 625.

*Illinois.* — *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184.

*Louisiana.* — *Howard v. Zeyer*, 18 La. Ann. 407; *Lalanne v. Moreau*, 13 La. Ann. 433.

*Michigan.* — *Averill v. Jackson City Bank*, 114 Mich. 20.



trustee,<sup>1</sup> guardian,<sup>2</sup> or commissioner in insanity,<sup>3</sup> when made under order of court and requiring confirmation by the court.

**A Sale Made by Order of a Probate or Orphans' Court** is considered to be a judicial sale.<sup>4</sup>

**A Sale in Attachment Proceedings or under a Creditor's Bill** is subject to all the rules and limitations applicable to judicial sales.<sup>5</sup>

*Minnesota*. — Culver v. Hardenbergh, 37 Minn. 225.

*Mississippi*. — Maynard v. Cocke, (Miss. 1895) 18 So. Rep. 374.

*Missouri*. — Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572. But compare Agan v. Shannon, 103 Mo. 661.

*Nebraska*. — Maul v. Hellman, 39 Neb. 322; Motley v. Motley, 53 Neb. 375.

*New York*. — Delaplaine v. Lawrence, 3 N. Y. 301.

*North Carolina*. — Mason v. Osgood, 64 N. Car. 467; Thompson v. Cox, 8 Jones L. (53 N. Car.) 311; Mauney v. Pemberton, 75 N. Car. 219.

*Pennsylvania*. — Armstrong's Appeal, 68 Pa. St. 409; Vandever v. Baker, 13 Pa. St. 126; King v. Gunnison, 4 Pa. St. 171; Moore v. Shultz, 13 Pa. St. 98, 53 Am. Dec. 446; Bickle v. Biddle, 33 Pa. St. 276. See also Bashore v. Whistler, 3 Watts (Pa.) 490; Fox v. Mensch, 3 W. & S. (Pa.) 444.

*Texas*. — Dowling v. Duke, 20 Tex. 181; Wells v. Mills, 22 Tex. 302; Yerby v. Hill, 16 Tex. 377; Williams v. McDonald, 13 Tex. 322; Poor v. Boyce, 12 Tex. 440; Lynch v. Baxter, 4 Tex. 432, 51 Am. Dec. 735; Pace v. Fishback, 10 Tex. Civ. App. 450.

*Utah*. — Matter of Walker, 6 Utah 369.

*Virginia*. — Terry v. Coles, 80 Va. 695.

**Sale by Public Administrator in Executing Order of Probate Court Held a Judicial Sale.** — Estes v. Alexander, 90 Mo. 453.

**1. Sale by Trustee.** — See *Bolgiano v. Cooke*, 19 Md. 375.

**2. Sale by Guardian.** — See the following cases:

*United States*. — U. S. Bank v. Ritchie, 8 Pet. (U. S.) 129.

*Arkansas*. — Guynn v. McCauley, 32 Ark. 97; Alexander v. Hardin, 54 Ark. 480; Ambleton v. Dyer, 53 Ark. 224; Reid v. Hart, 45 Ark. 41.

*Illinois*. — Rogers v. Higgins, 48 Ill. 215; Young v. Dowling, 15 Ill. 482; Ayers v. Baumgarten, 15 Ill. 444; Young v. Keogh, 11 Ill. 642; Spring v. Kane, 86 Ill. 580; Mulford v. Stalzenback, 46 Ill. 303; Chapin v. Curtenius, 15 Ill. 427; Rawlings v. Bailey, 15 Ill. 178; Musgrave v. Conover, 85 Ill. 374; Matter of Harvey, 16 Ill. 127; Miller v. McMannis, 104 Ill. 421; Hart v. Burch, 130 Ill. 426.

*Indiana*. — Maxwell v. Campbell, 45 Ind. 360. But compare Davidson v. Koehler, 76 Ind. 399.

*Iowa*. — Ordway v. Smith, 53 Iowa 589; Dohms v. Mann, 76 Iowa 723; McMannis v. Rice, 48 Iowa 362; Wade v. Carpenter, 4 Iowa 365.

*Michigan*. — Jenness v. Smith, 58 Mich. 280; Winslow v. Jenness, 64 Mich. 84.

*Mississippi*. — State v. Cox, 62 Miss. 786.

*Missouri*. — Bone v. Tyrrell, 113 Mo. 175; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec.

566; Henry v. McKerlie, 78 Mo. 416. But compare Robert v. Casey, 25 Mo. 584; McVey v. McVey, 51 Mo. 407; Fenix v. Fenix, 80 Mo. 32.

*New Jersey*. — Titman v. Riker, 43 N. J. Eq. 122.

*New York*. — Battell v. Torrey, 65 N. Y. 294; Stilwell v. Swarthout, 81 N. Y. 109; Rea v. M'Eachron, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471; Ellwood v. Northrup, 106 N. Y. 172; Aldrich v. Funk, 48 Hun (N. Y.) 367.

*North Carolina*. — Dula v. Seagle, 98 N. Car. 458; *In re* Dickerson, 111 N. Car. 108; Mebane v. Mebane, 80 N. Car. 34; Latta v. Vickers, 82 N. Car. 501; Brown v. Coble, 76 N. Car. 391; England v. Garner, 90 N. Car. 197.

*Ohio*. — Foresman v. Haag, 36 Ohio St. 104. But see Stall v. Macalester, 9 Ohio 19.

*Texas*. — Graham v. Hawkins, 38 Tex. 628; Harrison v. Ilgner, 74 Tex. 86; Swenson v. Seale, (Tex. Civ. App. 1894) 28 S. W. Rep. 143.

**3. Sale by Commissioner in Insanity.** — Stone v. Cromie, 87 Ky. 173. See also McKenzie v. Bacon, 40 La. Ann. 157.

**4. Sale by Order of Probate Court.** — Bland v. Bowie, 53 Ala. 152; Lumpkins v. Johnson, 61 Ark. 80; Apel v. Kelsey, 47 Ark. 413; Sturdy v. Jacoway, 19 Ark. 499; Halleck v. Guy, 9 Cal. 182, 70 Am. Dec. 643; *reconciling* Abell v. Calderwood, 4 Cal. 90; Smith v. Denson, 2 Smed. & M. (Miss.) 326; Castleman v. Relfe, 50 Mo. 583; Estes v. Alexander, 90 Mo. 453; Swenson v. Seale, (Tex. Civ. App. 1894) 28 S. W. Rep. 143; Yerby v. Hill, 16 Tex. 377. See also Grignon v. Astor, 2 How. (U. S.) 319; Sargeant v. Indiana State Bank, 12 How. (U. S.) 386; Worthington v. McRoberts, 9 Ala. 300; Jones v. Read, 1 La. Ann. 200; King v. Gunnison, 4 Pa. St. 172; Robb v. Mann, 11 Pa. St. 300, 51 Am. Dec. 551; Lynch v. Baxter, 4 Tex. 437, 51 Am. Dec. 735. And see also cases cited in preceding section.

**Sale by Order of Orphans' Court.** — Worthington v. McRoberts, 9 Ala. 297; Van Dyke v. Johns, 1 Del. Ch. 93; King v. Gunnison, 4 Pa. St. 171; Bashore v. Whistler, 3 Watts (Pa.) 490; Fox v. Mensch, 3 W. & S. (Pa.) 444; Sackett v. Twinning, 18 Pa. St. 199, 57 Am. Dec. 599; Greenough v. Small, 137 Pa. St. 132, 21 Am. St. Rep. 859; Vandever v. Baker, 13 Pa. St. 121; Moore v. Shultz, 13 Pa. St. 98, 53 Am. Dec. 446.

**5. Sale in Attachment Proceedings.** — Graff v. Louis, 71 Fed. Rep. 591; Freeman v. Watkins, 52 Ark. 446; Helmer v. Rehm, 14 Neb. 219; Hall v. Lowther, 22 W. Va. 570. But compare Webster v. Daniel, 47 Ark. 141; Beard v. Wilson, 52 Ark. 290.

**Sale under Creditors' Bill.** — Hudgin v. Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124; Utterbach v. Mehler, 86 Va. 62.

**A Sale of Succession Property** made under an order of court to pay debts on the application of creditors is a judicial sale. Macias's Succession, 36 La. Ann. 444.



Execution or Sheriffs' Sales are not, properly speaking, judicial sales.<sup>1</sup> They differ from judicial sales in that they are made by a ministerial officer who sells in conformity with existing laws and is not required to report his proceedings to the court;<sup>2</sup> and lack the distinguishing feature of requiring confirmation by the court in order to become absolute.<sup>3</sup> Nevertheless, such sales are subject to many of the same rules and principles which govern judicial sales, and in a number of jurisdictions the distinctions between the three classes of sales above mentioned are abolished.<sup>4</sup>

**II. SCOPE OF ARTICLE.** — It would be an undesirable departure from the encyclopædic method to treat here of all matters appertaining to the various kinds of sales which may properly be denominated judicial. Therefore, this article will be confined to a discussion of such general principles as are applicable to all judicial sales, leaving those matters which relate to the particular classes of sales to be discussed in their appropriate places elsewhere in this work.<sup>5</sup>

**III. JURISDICTION.** — In order to constitute a valid judicial sale by virtue of which the purchaser can acquire title to the property sold, it is absolutely necessary that the court ordering the sale should have had power to take cognizance of the matters brought before it in the proceeding in which the sale was ordered, and should have acquired jurisdiction in the particular case by one of the various methods recognized by law.<sup>6</sup>

**1. Execution or Sheriffs' Sales Not Judicial.** — *Hershy v. Latham*, 42 Ark. 305; *Hastings First Nat. Bank v. Rogers*, 22 Minn. 224; *Bachle v. Webb*, 11 Neb. 423. See also *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush (Ky.) 463; *Parrat v. Neligh*, 7 Neb. 456; *Childs v. Alexander*, 22 S. Car. 169.

**2. Distinction Between Judicial and Execution or Sheriffs' Sales.** — See the following cases:

*Kentucky.* — *Dawson v. Litsey*, 10 Bush (Ky.) 408; *Forman v. Hunt*, 3 Dana (Ky.) 614.

*Maryland.* — *Andrews v. Scotton*, 2 Bland (Md.) 637.

*Mississippi.* — *Gowan v. Jones*, 10 Smed. & M. (Miss.) 164. See also *Redus v. Hayden*, 43 Miss. 614.

*Missouri.* — *Noland v. Barrett*, 122 Mo. 190, 43 Am. St. Rep. 572.

*Nebraska.* — *Bachle v. Webb*, 11 Neb. 427.

*North Carolina.* — *McKee v. Lineberger*, 69 N. Car. 240.

*South Carolina.* — See *Bailey v. Bailey*, 9 Rich. Eq. (S. Car.) 392.

*Tennessee.* — *Lasell v. Powell*, 7 Coldw. (Tenn.) 282.

**3. Execution and Sheriffs' Sales Do Not Require Confirmation.** — *Hershy v. Latham*, 42 Ark. 305; *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572; *Bachle v. Webb*, 11 Neb. 423; *Lasell v. Powell*, 7 Coldw. (Tenn.) 277; *Griffith v. Fowler*, 18 Vt. 390.

**4. Sales Governed by Same Rules — Distinctions Abolished.** — *United States.* — *Griffith v. Bogert*, 18 How. (U. S.) 158; *Young v. De Putron*, 37 Fed. Rep. 46.

*Indiana.* — *Jackman v. Nowling*, 69 Ind. 188; *Taylor v. Stockwell*, 66 Ind. 505.

*Iowa.* — *Jensen v. Woodbury*, 16 Iowa 515.

*Missouri.* — See *Hewitt v. Lally*, 51 Mo. 93.

*Nebraska.* — *Burkett v. Clark*, 46 Neb. 466; *Parrat v. Neligh*, 7 Neb. 456. But see *Bachle v. Webb*, 11 Neb. 423, *infra* this note.

*New Jersey.* — In New Jersey this is true to a limited degree only. *Tulane v. Dean*, 4 N. J. L. J. 23.

*Ohio.* — *Curtis v. Norton*, 1 Ohio 278; *Harland v. Newcombe*, 2 Ohio Cir. Ct. 330, 1 Ohio Cir. Dec. 514.

*Oregon.* — *Leinenweber v. Brown*, 24 Oregon 548.

*South Carolina.* — See *Bailey v. Bailey*, 9 Rich. Eq. (S. Car.) 392.

*South Dakota.* — *Baxter v. O'Leary*, 10 S. Dak. 150.

*Tennessee.* — *Eakin v. Herbert*, 4 Coldw. (Tenn.) 116.

**When Execution Sales Are Considered as Judicial Sales.** — "There are some cases and text writers which seem to hold, or at least intimate, that in those states where execution sales are required by statute to be reported to the court for confirmation, such sales thereby become judicial sales." *Bachle v. Webb*, 11 Neb. 423. In this case, the court did not, however, consider that the distinction between sheriffs' sales and judicial sales had been abolished by the statutes of *Nebraska*.

**Extent to Which Cases on Execution or Sheriffs' Sales Will Be Used in This Article.** — It follows naturally from what has been said in the text that the citation in this article of some cases which relate to execution or sheriffs' sales will not be out of place, and in some instances will be necessary. But these cases will be used only where they serve to support or explain some general principle relating to judicial sales proper, and then only so far as is deemed necessary, without any attempt to collect all the cases, or even the citation of all which have been examined, the object being always to exclude, as far as is possible, all matter which must appear in the title **SHERIFFS' SALES**.

**5. See the table of cross-references given at the beginning of this article.**

**6. Court Must Have Had Jurisdiction.** — *United States.* — *Shriver v. Lynn*, 2 How. (U. S.) 43. See also *Grignon v. Astor*, 2 How. (U. S.) 319.

*District of Columbia.* — *Stansbury v. Inglehart*, 20 D. C. 134; *Contee v. Lyons*, 19 D. C. 207.



**IV. IN WHAT ACTION OR PROCEEDING SALE MAY BE ORDERED.** — While judicial sales are usually ordered in some proceeding *in rem* brought for the purpose of obtaining a sale of some particular property, a court of chancery has power to order a sale of property, which is the subject of litigation, whenever such a measure becomes necessary to preserve the interests of the parties or further the attainment of justice,<sup>1</sup> and this although the bill was not framed nor brought for the purpose of obtaining a sale,<sup>2</sup> and the proceeding is personal in its nature and not *in rem*.<sup>3</sup>

But This View Does Not Seem to Prevail in California, for in that state an order of sale made in an injunction suit has been held improper.<sup>4</sup>

**V. UNDER WHAT CIRCUMSTANCES SALE MAY BE ORDERED** — 1. **Scope of Section.** — A discussion of the circumstances which may or may not authorize judicial sales in particular cases will be found in the various specific titles throughout this work, where such matter logically belongs. The object of this section is merely to treat some matters which do not belong to any such titles and can properly appear only in a general article on judicial sales.

2. **Ascertainment of Liens and Priorities.** — In *Virginia* and *West Virginia* it is considered improper to order a sale of land to satisfy or discharge liens and incumbrances thereon until after the amounts of all such liens and incumbrances and the priorities between them shall have been ascertained and settled;<sup>5</sup> but it is not so in *Ohio*, the court there having a discretion in such

*Illinois.* — *Chambers v. Jones*, 72 Ill. 275.

*Kentucky.* — *Brownfield v. Dyer*, 7 Bush (Ky.) 505; *Yocum v. Foreman*, 14 Bush (Ky.) 404. See also *Haynes v. Payne*, 5 Ky. L. Rep. 242; *Cooley v. Rea*, 7 Ky. L. Rep. 298; *Earl v. Porter*, 2 Ky. L. Rep. 316; *Judah v. Bickel*, 4 Ky. L. Rep. 715; *Scott v. Estill*, 7 Ky. L. Rep. 222; *Wilson v. Taylor*, 4 Ky. L. Rep. 437.

*Maryland.* — See *Newbold v. Schlens*, 66 Md. 585.

*New York.* — *Weidersum v. Naumann*, (Supm. Ct. Eq. T.) 62 How. Pr. (N. Y.) 369.

*South Carolina.* — *Federal v. Bouknight*, 25 S. Car. 275.

*Tennessee.* — *Mason v. Tinsley*, 1 Tenn. Ch. 154; *Rucker v. Moore*, 1 Heisk. (Tenn.) 726. See also *McGavock v. Bell*, 3 Coldw. (Tenn.) 512; *Ex p. Kirkman*, 3 Head. (Tenn.) 517; *Frazier v. Pankey*, 1 Swan (Tenn.) 75; *Davidson v. Bowden*, 5 Sneed (Tenn.) 129; *Rogers v. Clark*, 5 Sneed (Tenn.) 668; *Jones v. Sharp*, 9 Heisk. (Tenn.) 660; *Ex p. Reid*, 2 Sneed (Tenn.) 375.

*Texas.* — *Texas, etc., R. Co. v. Gay*, 86 Tex. 571; *French v. Grenet*, 57 Tex. 273.

*Canada.* — See *Kerr v. Gildersleeve*, 3 L. C. Jur. 304, 8 L. C. Rep. 267.

*Compare Bank v. Trapier*, 2 Hill Eq. (S. Car.) 25.

**Burden of Proof as to Lack of Jurisdiction.** — Where a decree of sale, by its recitals, shows jurisdiction in the court making the same, the party denying such jurisdiction must assume the burden of proof, and must produce the best evidence in his power. *Kilgour v. Gockley*, 83 Ill. 109.

1. **Sale May Be Ordered When Necessary to Preserve Interest of Parties.** — *Crane v. Ford*, Hopk. (N. Y.) 114; *Whitley v. Davis*, 1 Swan (Tenn.) 333. See also *Dorsey v. Garey*, 30 Md. 489; *Dorsey v. Dorsey*, 30 Md. 522, 96 Am. Dec. 633; *Fox v. Reynolds*, 50 Md. 564; *Kinports v. Rawson*, 36 W. Va. 237.

2. **Sale May Be Ordered Though Not Specifically Prayed for.** — *Apperson v. Bargett*, 33 Ark. 328;

*Crane v. Ford*, Hopk. (N. Y.) 114; *Whitley v. Davis*, 1 Swan (Tenn.) 333; *Cralle v. Meem*, 8 Gratt. (Va.) 496. See also *Cassey v. Cassey*, 15 Grant. Ch. (U. C.) 399.

3. **Sale May Be Ordered in Proceeding in Personam.** — *Crane v. Ford*, Hopk. (N. Y.) 114.

4. **Order of Sale in Injunction Suit Held Improper in California.** — See *Weber v. San Francisco*, 1 Cal. 455.

5. **Liens and Priorities Must Be First Ascertained** — *Virginia.* — *Adkins v. Edwards*, 83 Va. 300; *Sims v. Tyrer*, 96 Va. 14; *Bristol Iron, etc., Co. v. Caldwell*, 95 Va. 47, *overruling*, so far as in conflict with this point, *Bristol Iron, etc., Co. v. Thomas*, 93 Va. 396; *Cole v. M'Rae*, 6 Rand. (Va.) 644; *Horton v. Bond*, 28 Gratt. (Va.) 815; *Shultz v. Hansbrough*, 33 Gratt. (Va.) 567; *Effinger v. Kenney*, 79 Va. 551; *Lipscombe v. Rogers*, 20 Gratt. (Va.) 658; *Hoge v. Junkin*, 79 Va. 220; *Daingerfield v. Smith*, 83 Va. 81; *Cralle v. Meem*, 8 Gratt. (Va.) 496; *Simmons v. Lyles*, 27 Gratt. (Va.) 928; *Kennerly v. Swartz*, 83 Va. 704; *Alexander v. Howe*, 85 Va. 198; *Buchanan v. Clark*, 10 Gratt. (Va.) 164. See also *Smith v. Flint*, 6 Gratt. (Va.) 40; *Fidelity L. & T. Co. v. Dennis*, 93 Va. 504; *Kendrick v. Whitney*, 28 Gratt. (Va.) 646; *Thomas v. Thomas*, 81 Va. 17; *Max Meadows Land, etc., Co. v. McGavock*, 96 Va. 131. *Compare Karn v. Rorer Iron Co.*, 86 Va. 754; *Crawford v. Weller*, 23 Gratt. (Va.) 835.

*West Virginia.* — *Beard v. Arbuckle*, 19 W. Va. 135; *Lough v. Michael*, 37 W. Va. 679; *McClaskey v. O'Brien*, 16 W. Va. 791; *Trimble v. Herold*, 20 W. Va. 602; *Rohrer v. Travers*, 11 W. Va. 146; *Marling v. Robrecht*, 13 W. Va. 440; *Payne v. Webb*, 23 W. Va. 558; *Parsons v. Thornburg*, 17 W. Va. 356. See also *McCleary v. Grantham*, 29 W. Va. 301; *Bock v. Bock*, 24 W. Va. 586. *Compare Long v. Perine*, 41 W. Va. 314.

**Parties to the Suit May Waive Compliance with This Requirement**, and cannot, if they do so, subsequently complain of its omission. *Parsons v. Thornburg*, 17 W. Va. 356.



matters.<sup>1</sup> And in *South Carolina* it has been held that where the priorities between the various classes of creditors entitled to share in the proceeds of the sale of a railroad have been ascertained, it would be going to an unreasonable extent to postpone the sale until it had been ascertained by judicial orders what particular individuals composed these classes.<sup>2</sup>

**3. Removal of Cloud upon Title or Other Impediment to Fair Sale.** — Before a judicial sale is decreed any cloud on the title to the property or any impediment of any kind to a fair sale ought to be removed as far as it is practicable to do so, in order that the land may be sold to the best advantage.<sup>3</sup>

**4. Debt Must Exceed Five Years' Rents and Profits of Land.** — In *Virginia* and *West Virginia* a sale of land to satisfy debts or liens can be validly ordered only after it has been ascertained that the debts or liens cannot be satisfied by the rents or profits which the land would produce in a term of five years.<sup>4</sup> This insufficiency of the rents and profits may be shown by the pleadings, by the admissions of the parties,<sup>5</sup> by evidence taken or by report of a commissioner on inquiry ordered,<sup>6</sup> or by a failure to obtain the requisite amount upon an offer to rent the lands under a decree for that purpose.<sup>7</sup>

**When Sale of Land Before Taking Account of Debts and Liabilities Will Not Be Set Aside.** — See *Wallace v. Treakle*, 27 Gratt. (Va.) 479.

**A Sale of Chattels Before Taking an Account of Debts, etc., of the Owner Might Be Proper.** — *Cole v. M'Rae*, 6 Rand. (Va.) 644.

**1. Ohio Rule — Discretion of Court.** — *Dayton, etc., v. R. Co. v. Lewton*, 20 Ohio St. 401.

In *Kentucky* the ascertainment of the amount of indebtedness does not seem to be always necessary. See *Bristow v. Peters*, 6 Ky. L. Rep. 300.

**2. South Carolina Rule — Ascertainment of Priorities Between Various Classes of Creditors Sufficient.** — *Hand v. Savannah, etc., R. Co.*, 13 S. Car. 467.

**3. Cloud on Title or Other Impediment to Fair Sale Should Be Removed Before Sale Is Decreed.** — *Fishburne v. Smith*, 34 S. Car. 330; *Lucas v. Moore*, 2 Lea (Tenn.) 1; *Thomas v. Farmers Nat. Bank*, 86 Va. 291; *Brown v. Lawson*, 86 Va. 284; *Peers v. Barnett*, 12 Gratt. (Va.) 410; *McDonald v. Gordon*, 2 Ch. Chamb. (Ont.) 125. See also *Piers v. Piers*, *Sausse & Sc.* 414, affirmed by 1 Dr. & Wal. 265; *Bennett v. Wheeler*, 1 Ir. Eq. 19; *Lahey v. Bell*, 6 Ir. Eq. 122; *Horton v. Bond*, 28 Gratt. (Va.) 815; *Rossett v. Fisher*, 11 Gratt. (Va.) 492; *Terry v. Fitzgerald*, 32 Gratt. (Va.) 843; *Lane v. Tidball*, *Gilmer (Va.)* 130; *Gay v. Hancock*, 1 Rand. (Va.) 72; *Miller v. Argyle*, 5 Leigh (Va.) 460; *Max Meadows Land, etc., Co. v. McGavock*, 96 Va. 131.

**Where the Title Is So Questionable as to Prevent a Sale for a Fair Price** it is error to decree a sale of the property. *Skillman v. Hamilton*, 1 Bush (Ky.) 248.

**Sale of Equitable Title to Land Held Improper.** — See *Goare v. Beuhring*, 6 Leigh (Va.) 585; *Tremble v. Simpson*, 6 Ir. Eq. 98.

**Trustee Appointed to Sell Should Endeavor to Remove Cloud on Title.** — *Schindel v. Keedy*, 43 Md. 413.

**Cloud on Title Which Cannot Be Removed by Trustee.** — Where, from the nature of the doubt as to the title of property which has been ordered to be sold, no diligence on the part of the trustee appointed to sell could remove it, he may proceed to sell, and the parties may refer its solution to the judgment of the court. *Cunningham v. Schley*, 6 Gill (Md.) 207.

**When Sale May Be Ordered Though Litigation Affecting Property Pending in Another Jurisdiction.** — See *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752.

**4. Land Can Be Sold Only After Ascertaining that Rents and Profits for Five Years Will Not Satisfy Debt — Virginia.** — *Compton v. Tabor*, 32 Gratt. (Va.) 121; *Muse v. Friedenwald*, 77 Va. 57; *Price v. Thrash*, 30 Gratt. (Va.) 515; *Johnson v. Wagner*, 76 Va. 587; *Dillard v. Krise*, 86 Va. 410; *Etter v. Scott*, 90 Va. 762; *Horton v. Bond*, 28 Gratt. (Va.) 815; *Mustain v. Pannill*, 86 Va. 33. See also *Mann v. Flinn*, 10 Leigh (Va.) 97; *Ewart v. Saunders*, 25 Gratt. (Va.) 203; *M'Clung v. Beirne*, 10 Leigh (Va.) 410, 34 Am. Dec. 739; *Cooper v. Daugherty*, 85 Va. 343; *Tennent v. Patton*, 6 Leigh (Va.) 196; *Crawford v. Weller*, 23 Gratt. (Va.) 835.

*West Virginia.* — *Dunfee v. Childs*, 45 W. Va. 155.

**5. Where Insufficiency of Rents and Profits Alleged and Not Denied Sale May Be Decreed Without Inquiry.** — *Muse v. Friedenwald*, 77 Va. 57; *Barr v. White*, 30 Gratt. (Va.) 531. See also *Horton v. Bond*, 28 Gratt. (Va.) 815; *Etter v. Scott*, 90 Va. 762. But compare *Johnson v. Wagner*, 76 Va. 587, citing *Mann v. Flinn*, 10 Leigh (Va.) 97, and *Ewart v. Saunders*, 25 Gratt. (Va.) 209.

**6. Insufficiency of Rents and Profits May Be Shown by Evidence Taken or Report of Commissioner on Inquiry Ordered.** — *Horton v. Bond*, 28 Gratt. (Va.) 815. See also *Etter v. Scott*, 90 Va. 762.

**Inquiry Necessary Where Insufficiency of Rents Neither Alleged Nor Denied.** — *Muse v. Friedenwald*, 77 Va. 57; *Price v. Thrash*, 30 Gratt. (Va.) 515; *Etter v. Scott*, 90 Va. 762. See also *Dillard v. Krise*, 86 Va. 410.

**Where None of the Parties Ask for an Inquiry as to Rents and Profits** a sale may be decreed without it. See *Ewart v. Saunders*, 25 Gratt. (Va.) 203; *Brengle v. Richardson*, 78 Va. 416. And see also *M'Clung v. Beirne*, 10 Leigh (Va.) 410, 34 Am. Dec. 739; *Mann v. Flinn*, 10 Leigh (Va.) 97. An examination of these cases will show that they are not necessarily inconsistent with those cited just above.

**7. The Court May Cause the Land to Be Offered for Rent**, in order to ascertain whether the rents and profits for five years will pay the debt



**5. Sale Before Final Decree.** — The statutes of *Maryland* authorize a sale of either real or personal property before final decree in all cases where a suit is instituted for such sale, or where from the nature of the case a sale is the proper mode of relief,<sup>1</sup> if the court is satisfied clearly by proof that at the final hearing of the case a sale will be ordered.<sup>2</sup>

**VI. WHAT MAY BE SOLD.** — It has been held that trust property<sup>3</sup> or a defeasible fee<sup>4</sup> may be the subject of a judicial sale. And the interest of a debtor in a tract of land may be sold before being set apart.<sup>5</sup> But the court of *Virginia* has considered it error to decree a sale of the interest of an heir in the real estate of his ancestor before directing a settlement of the administrator's account.<sup>6</sup>

**A Patent Right** may be sold by the order of a court having jurisdiction of the owner.<sup>7</sup>

**Land Held in Adverse Possession.** — It has been held in *Kentucky* and in *New York* that statutes making void sales of land which, at the time of sale, are in actual possession of a person claiming under a title adverse to that of the grantor, do not apply to judicial sales.<sup>8</sup>

**Property the Sale of Which Is Forbidden by Will.** — The Code of *Tennessee* provides that "in no case shall property be sold if it be claimed under a will which expressly directs otherwise."<sup>9</sup> It has been held that this provision does not prohibit a sale of property which the owner by his will devised to be equally "divided" among his children.<sup>10</sup> And it has been intimated that a chancery court, by virtue of its inherent power might in a proper case decree a sale contrary to this provision.<sup>11</sup>

or not. *Compton v. Tabor*, 32 Gratt. (Va.) 121.

**The Court Should Decree First for Renting**, and if the rent should prove insufficient this should be reported to the court for further proceedings to be had before sale. *Compton v. Tabor*, 32 Gratt. (Va.) 121; *Daingerfield v. Smith*, 83 Va. 81.

Therefore, it is error to decree simultaneously for renting and selling the land, the land to be sold in case a sufficient amount cannot be realized from the rent. *Daingerfield v. Smith*, 83 Va. 81.

**How Land Should Be Offered.** — See *Compton v. Tabor*, 32 Gratt. (Va.) 121.

**Offer to Rent Improperly Made.** — See *Mustain v. Pannill*, 86 Va. 33.

**A Decree for Renting May Be Set Aside, and an Order for Sale Entered in Its Stead**, where it appears to the court, after the decree for the renting of land has been entered, that the rents and profits will not pay in five years all the liens proven before the commissioner. *Kennery v. Swartz*, 83 Va. 704.

**1. Sale May Be Ordered Before Final Decree.** — Pub. Gen. Laws, Md. (1888), art. 16, § 192; *Washington City, etc., R. Co. v. Southern Maryland R. Co.*, 55 Md. 153; *Dorsey v. Thompson*, 37 Md. 25.

**Similar Rule in England.** — See *Davis v. Ashwin*, 47 L. J. Ch. 70, 26 W. R. 139; *Martin v. Hadlow*, 1 W. R. 101.

**2. It Must Appear Clearly and Beyond a Reasonable Doubt that a Sale Must Inevitably Be Decreed at the Final Hearing.** — *Cornell v. McCann*, 37 Md. 89; *Donohue v. Daniel*, 58 Md. 595; *Dorsey v. Garey*, 30 Md. 489.

**All Parties Who May Be Affected by the Sale Should Have an Opportunity to Be Heard.** — See *Cornell v. McCann*, 37 Md. 89; *Kelly v. Gilbert*, 78 Md. 431.

**For Circumstances Authorizing Interlocutory Order of Sale**, under statute cited above, see *Donohue v. Daniel*, 58 Md. 595; *Dorsey v. Dorsey*, 30 Md. 522, 96 Am. Dec. 633.

**Interlocutory Order of Sale Appealable.** — *Dorsey v. Garey*, 30 Md. 489. See also *Kelly v. Gilbert*, 78 Md. 431.

**But the Rescission of an Interlocutory Order of Sale Furnishes No Ground of Appeal.** — *Washington City, etc., R. Co. v. Southern Maryland R. Co.*, 55 Md. 153.

**3. A Chancellor Can Sell Trust Property** and pass a perfect title to the purchaser. *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673.

**4. A Defeasible Fee may**, under the statutes of *Kentucky*, be sold in proceedings instituted by the holder of such title. *Newman v. Ecton*, (Ky. 1893) 21 S. W. Rep. 526.

**5. Debtor's Interest in Land May Be Sold Before Being Set Apart.** — *Trabue v. Connors*, 84 Ky. 285; *Thomas v. Farmers Nat. Bank*, 86 Va. 291. See also *Bridgeford v. Beck*, 11 Bush (Ky.) 539.

**6. Interest of Heir in Real Estate of Decedent Cannot Be Sold Before Directing Settlement of Administrator's Account.** — *Bowden v. Parrish*, 86 Va. 67, 19 Am. St. Rep. 873.

**7. Patent Right.** — *Wilson v. Martin Wilson Automatic F. Alarm Co.*, 151 Mass. 515. See generally the title PATENTS.

**8. Statutes Making Void Sales of Land Held in Adverse Possession Not Applicable to Judicial Sales.** — See the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 842.

**9. Tennessee Statute.** — Code 1896, § 5089.

**10. Sale of Land Directed by Will to Be Divided Not Prohibited.** — *Hawkins v. England*, 3 Head (Tenn.) 652.

**11. Chancery Court May Decree a Sale Contrary to Statutory Provision.** — See *Hurt v. Long*, 90 Tenn. 445; *Porter v. Porter*, 1 Baxt. (Tenn.) 299.



In *Virginia*, however, it is considered that the power to sell is withheld from the courts where the will expressly directs that the property shall not be sold.<sup>1</sup>

**Only Such Property or Estate as Order of Sale Authorizes May Be Sold.** — An officer appointed to make a judicial sale must keep within the powers given him by the order or decree under which he acts, and cannot lawfully sell or agree to convey any property or estate other than such as the order or decree will authorize.<sup>2</sup>

**Where One of Several Tracts of Land Is Charged with a Specific Lien**, exceeding in amount the value of such tract and having priority over all other liens thereon, the court may properly, it has been held, decree a sale of the other lands of the debtor without decreeing a sale of such tract, although the liens under which a sale is sought are a charge on that tract also.<sup>3</sup>

**Rule as to Amount of Real Estate to Be Sold.** — When a sale of real estate to satisfy a debt or lien is decreed, only so much as shall be necessary for this purpose should be sold,<sup>4</sup> unless from the indivisible character of the estate, or from some other cause, a sale of the whole should appear to be more advantageous to the owner, or unless he should assent to such sale.<sup>5</sup>

**VII. WHO MAY MAKE SALE** — 1. **In General.** — Judicial sales are usually made by some officer of the court ordering the sale.<sup>6</sup> In many jurisdictions

1. **Virginia Doctrine that Courts Cannot Sell Property of Which Sale Is Forbidden by Will.** — But where there is no absolute prohibition the testator must be regarded as having left the matter to the general authority conferred by the law. *Talley v. Starke*, 6 Gratt. (Va.) 339.

2. **Officer Cannot Sell Property or Estate Other than Decree for Sale Authorized.** — *Smith v. Burnes*, 8 Kan. 198; *Bright's Succession*, 38 La. Ann. 141; *Prior v. Scott*, 87 Mo. 303; *Melton v. Fitch*, 125 Mo. 281; *Ryan v. Dox*, 25 Barb. (N. Y.) 440, *reversed* on another point 34 N. Y. 307, 90 Am. Dec. 696. See also *Dickey v. Beatty*, 14 Ohio St. 389; *Peirce v. Graham*, 85 Va. 227.

**A Sale of Property Which the Decree Does Not Authorize to Be Sold Is Void** and passes no title to such property. *Braddock First Nat. Bank v. Hyer*, 46 W. Va. 13.

**Sale to Be Subject to Contingent Right of Dower.** — *Robinson v. Robinson*, 11 Bush (Ky.) 174.

**Decree of Confirmation Must Be Restricted to the Scope of Decree of Sale.** — *State v. Mercantile Bank*, 95 Tenn. 212.

**Sale by Receiver Giving Purchaser Right to Buy Other Lands Not Ordered to Be Sold.** — *Lake Superior Iron Co. v. Brown*, 44 Fed. Rep. 539.

3. **Land Charged with a Specific Lien Exceeding Its Value Need Not Be Sold under Junior Liens.** — *McCleary v. Grantham*, 29 W. Va. 301.

4. **Only So Much as Is Necessary to Satisfy Decree Should Be Sold** — *Indiana*. — *Piel v. Brayer*, 30 Ind. 332, 95 Am. Dec. 699. See also *Knarr v. Conaway*, 42 Ind. 260.

*Kentucky*. — *Doyle v. Sleeper*, 1 Dana (Ky.) 531; *Starks v. Curd*, 88 Ky. 164; *Skaggs v. Hill*, (Ky. 1890) 14 S. W. Rep. 363, 12 Ky. L. Rep. 382; *Eby v. Lovelace*, 4 Ky. L. Rep. 449; *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553. See also *Buchanan v. Crucible Steel, etc., Co.*, 5 Ky. L. Rep. 178; *McLaughlin v. Schmied*, (Ky. 1890) 12 S. W. Rep. 1061, 11 Ky. L. Rep. 648; *Holland v. Holman*, (Ky. 1899) 50 S. W. Rep. 1102.

*Mississippi*. — *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373.

**Sale of More Land than Is Necessary Held Void.** — *Blakey v. Abert*, 1 Dana (Ky.) 185; *Gathwright v. Hazard*, 17 B. Mon. (Ky.) 557. See also *Piel v. Brayer*, 30 Ind. 332, 95 Am. Dec. 699. But *compare Beatty v. Wilson*, 4 Ky. L. Rep. 827; *Brown v. Wallace*, 4 Gill & J. (Md.) 479, cited *infra* this note.

**A Matter of Discretion.** — *Johnson v. Wagner*, 76 Va. 587; *Long v. Weller*, 29 Gratt. (Va.) 347; *Vanbussum v. Maloney*, 2 Met. (Ky.) 551.

**Circumstances under Which Sale of Whole Is Proper.** — See *Nelson v. Brown*, 20 Ind. 74. See also *Fowler v. Kallam*, 4 Ky. L. Rep. 988.

**A Liberal Margin Should Be Allowed.** — *Beatty v. Radenhurst*, 3 Ch. Chamb. (Ont.) 344.

**Purchaser Cannot Object.** — *Brown v. Wallace*, 4 Gill & J. (Md.) 479.

5. **When Whole May Be Sold.** — *Piel v. Brayer*, 30 Ind. 332, 95 Am. Dec. 699; *Doyle v. Sleeper*, 1 Dana (Ky.) 531; *Long v. Weller*, 29 Gratt. (Va.) 347. See also *Earl v. Porter*, 2 Ky. L. Rep. 316.

6. **Officer Making Sale.** — See *Dabney v. Manning*, 3 Ohio 321, 17 Am. Dec. 597; *Mechanics' Sav., etc., Assoc. v. O'Conner*, 29 Ohio St. 651; *Seaman v. Northwestern Mut. L. Ins. Co.*, 86 Fed. Rep. 493; *Pemberton v. Barnes*, L. R. 13 Eq. 349, 41 L. J. Ch. 209, 26 L. T. N. S. 389.

**Expiration of Term of Office.** — Where a sale is ordered to be made by an officer, but before the sale is actually made the officer's term of office expires, the sale should be made by his successor. *Keith v. Gray*, Rich. Eq. Cas. (S. Car.) 227; *Norton v. Gray*, 1 West. L. Month. 408, 2 Ohio Dec. (Reprint) 118. But *compare Hunt v. Elliott*, Bailey Eq. (S. Car.) 90.

**Officer of District Other than That in Which Land Is Situated.** — *Norton v. Citizens' Bank*, 28 La. Ann. 354; *Bank v. Trapier*, 2 Hill Eq. (S. Car.) 25.

**When an Officer Will Not Be Appointed.** — The court will not appoint any one of its own officers, or any other officer, to be trustee to make a sale, where the discharge of the official duties of such officer may be incompatible with a proper attention to his duties as trustee. *Gibson's Case*, 1 Bland (Md.) 138.



there are statutes prescribing what person or officer should be appointed for this purpose,<sup>1</sup> but such statutes are considered as directory merely and not mandatory,<sup>2</sup> and the general rule is that the court ordering a sale may appoint any person whom it deems proper to conduct the same whether or not such person be an officer of the court.<sup>3</sup> The sale must, however, invariably be conducted by the officer or other person appointed for that purpose.<sup>4</sup>

**2. Sale by Less than Whole Number of Persons Appointed to Sell.** — It has been held in a late case that when two or more persons were appointed to make a sale, the fact that one was not present at the sale is no ground for setting it aside,<sup>5</sup> but a text writer has asserted that in such case one alone or less than the whole number is not sufficient to make a valid sale if there be nothing in the decree or the statute authorizing a sale by a less number than the whole.<sup>6</sup>

**3. Person Interested in Proceeding.** — In several *American* cases it has been considered that a judicial sale should not be made by a person who is a party to the proceeding in which such sale is ordered,<sup>7</sup> or is otherwise interested therein.<sup>8</sup> But a different view has been asserted in *Virginia*,<sup>9</sup> and in many of the earlier *English* cases the conduct of the sale was given to one of the parties or his attorney.<sup>10</sup>

**1. Statutes.** — Under S. Car. Code Civ. Proc., § 307 (Code 1893, § 306), and Rev. Stat. 1893, § 746, the sheriff is the proper officer to make sales in counties where the office of master does not exist. *Childs v. Alexander*, 22 S. Car. 169. See also *Adams v. Kleckley*, 1 S. Car. 142.

But it is, of course, perfectly competent for the court to order a sale to be made by the clerk, where he is also directed to make the title to the purchaser. *Fort v. Assmann*, 38 S. Car. 253.

**2. Statutes Directory Merely and Not Mandatory.** — *Rome, etc., R. Co. v. Sibert*, 97 Ala. 393.

**3. Any Person May Be Appointed to Make Sale** — *Alabama*. — *Rome, etc., R. Co. v. Sibert*, 97 Ala. 393.

*Maryland*. — *Gibson's Case*, 1 Bland (Md.) 138.

*Nebraska*. — *Omaha L. & T. Co. v. Bertrand*, 51 Neb. 508; *American Invest. Co. v. Nye*, 40 Neb. 720; *State v. Holliday*, 35 Neb. 327.

*North Carolina*. — *McNeill v. Morrison*, 63 N. Car. 508.

*Ohio*. — *Mayer v. Wick*, 15 Ohio St. 548.

*South Carolina*. — *Meetez v. Padgett*, 1 S. Car. 127; *Adams v. Kleckley*, 1 S. Car. 142.

**A Sheriff or His Deputy May Sell Land under a Decree.** — *Craig v. Fox*, 16 Ohio 563. See also *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609.

**A Woman May Be Appointed to Make a Judicial Sale.** — See *Gibson's Case*, 1 Bland (Md.) 138.

**Where One of the Trustees Appointed to Make a Sale Has Died**, the court has power to appoint a new one in his place. *Shepherd v. Pepper*, 133 U. S. 626. See also *Covas v. Bertoulin*, 45 La. Ann. 160.

**An Infant, Feme Covert, or Nonresident Will Not Be Appointed to Make a Sale.** — See *Gibson's Case*, 1 Bland (Md.) 138.

**Person Selected by Parties.** — Under the statutes of *Kentucky*, the parties or their attorneys may be permitted by the court to select a receiver or commissioner to make the sale. *Phelps v. Jones*, 91 Ky. 244. See also *Gibson's Case*, 1 Bland (Md.) 138, in which case the

court said further that if the parties were silent the plaintiff's solicitor was usually appointed. And see *Watt v. Crawford*, 11 Paige (N. Y.) 470, affirmed *Ferris v. Crawford*, 2 Den. N. (Y.) 595.

**Number of Commissioners.** — Where the number of commissioners was left to the discretion of the court, a sale by three commissioners was valid. *Beck v. Simmons*, 7 Ala. 71.

**4. Sale Must Be Conducted by Officer or Person Appointed for That Purpose.** — See *infra*, this section, *Sale by Auctioneer or Agent*.

**5. Absence of One Trustee No Ground for Setting Aside Sale.** — *Hopper v. Hopper*, 79 Md. 400.

**6. Sale by Less Number than Whole Not Proper in Absence of Express Authority.** — *Rorer on Judicial Sales* (2d ed.), § 75, citing *Gross v. Percy*, 2 Patt. & H. (Va.) 483. See also *Quarles v. Lacy*, 4 Munf. (Va.) 251.

**Express Provision for Sale by Less than Whole Number.** — Where the decree for sale appoints three commissioners but provides that one or more giving bond may sell alone, a sale by two after the death of the third is valid. *Strayer v. Long*, 89 Va. 471.

**Sale Made by All the Commissioners — Refusal of One to Join in Report of Sale Does Not Vitiates Sale.** — *Hildreth v. Turner*, 89 Va. 858.

**7. Sale by Party to Proceedings.** — *Smith v. Harrigan*, (Supm. Ct.) 27 Abb. N. Cas. (N. Y.) 322.

**8. Sale by Attorney for Plaintiff.** — *Adkinson v. Randle*, 93 Ky. 310. Compare *Gibson's Case*, 1 Bland (Md.) 138.

**Advice of Complainant's Solicitor — To What Extent Obligatory on Officer.** — See *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196.

**9. Person Interested in Suit May Make Sale.** — *Teel v. Yancey*, 23 Gratt. (Va.) 691.

**10. English Cases Giving Conduct of Sale to Party or Attorney.** — See *Dalby v. Pullen*, 1 Russ. & M. 296, 8 L. J. Ch. 74; *Cobden v. Maynard*, 1 N. R. 354; *Dale v. Hamilton*, 10 Hare (appendix) vii; *Knott v. Cottee*, 27 Beav. 33; *Dixon v. Pyner*, 14 Jur. 217, 7 Hare 331, 19 L. J. Ch. 402; *Drought v. Jones*, Flan. & Kel. 316; *Ennis v. Casey*, Flan. & Kel. 319, note; *In re Gar-meson*, 21 W. R. 98.



**4. Sale by Auctioneer or Agent.** — The general rule is that a judicial sale should be made by the person designated in the decree or under his immediate direction and supervision,<sup>1</sup> but he may employ an auctioneer to conduct the sale, if it be made in his presence.<sup>2</sup> And it has been considered that a commissioner who was unavoidably absent from a sale might ratify the action of an auctioneer appointed by him who made a fair and properly conducted sale in his absence, so as to authorize the confirmation of such sale.<sup>3</sup>

**5. Whether Bond and Oath Required.** — The better doctrine seems to be that the person who is appointed to make a judicial sale should be required to give a bond for the faithful performance of his duties,<sup>4</sup> and should be sworn,<sup>5</sup> but an omission to require such bond or oath is a mere irregularity which is cured by confirmation of the sale.<sup>6</sup>

**Sale by Officer of Court.** — Where the person appointed to sell is an officer of court who has taken and filed his oath and bond as such officer, he need not take or file any additional oath or bond unless this is required by statute or by the decree under which he acts.<sup>7</sup>

**6. Removal of Commissioners Appointed to Sell.** — Where special commissioners are appointed under a decree of court to make a sale of lands, and an unusual delay occurs on their part in carrying out said decree and making their report, the court will ordinarily award a rule against them, requiring them to account for the delay, before removing them and appointing other commissioners to execute the decree.<sup>8</sup>

**1. Sale Must Be Made by or under Direction of Person Designated in Decree.** — *Blossom v. Milwaukee etc., R. Co.*, 3 Wall. (U. S.) 196; *Noland v. Noland*, 12 Bush (Ky.) 426; *Meyer v. Bishop*, 27 N. J. Eq. 141, *affirmed* *Meyer v. Patterson*, 28 N. J. Eq. 239. See also *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154; *Ellis v. Molloy*, 2 Hog. 255; *Twombly v. Kimbrough*, 24 Ark. 459; *Bock v. Bock*, 24 W. Va. 586; *Chambers v. Jones*, 72 Ill. 275; *Sebastian v. Johnson*, 72 Ill. 282.

**2. Auctioneer May Be Employed to Conduct Sale.** — *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196; *Williamson v. Berry*, 8 How. (U. S.) 495; *Noland v. Noland*, 12 Bush (Ky.) 426; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154. See also *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

**Personal Supervision of Person Appointed to Make Sale Necessary.** — *Noland v. Noland*, 12 Bush (Ky.) 426.

**3. Ratification of Sale Made During Unavoidable Absence of Commissioner.** — *Swan v. Smith*, 58 Miss. 875.

**4. Bond Required.** — *Phelps v. Jones*, 91 Ky. 244. See also *Lockhart v. John*, 7 Pa. St. 137; *McClaskey v. O'Brien*, 16 W. Va. 791.

**The Bond Which the Virginia Statute (Code, § 3398) Requires of a special commissioner must be given before the court or judge ordering the sale, or before the clerk of such court.** *Southwest Virginia Mineral Co. v. Chase*, 95 Va. 50.

**Penalty of Bond Rests in Discretion of Court.** — *Dawes v. Thomas*, 4 Gill (Md.) 333. But it should be sufficient to cover at least the probable amount of the whole purchase money or rent. *Southwest Virginia Mineral Co. v. Chase*, 95 Va. 50.

**Sale by Two Commissioners of Whom Only One Has Given Bond — Sale Valid When Decree Authorized the Commissioner Giving Bond to Act Alone.** — *Strayer v. Long*, 89 Va. 471.

**Failure of Decree to Provide that Commissioner**

**Shall Give Bond Required by Statute, Not Reversible Error.** — *Cooper v. Daugherty*, 85 Va. 343; *McAllister v. Bodkin*, 76 Va. 809.

**When Bond Is Not Necessary.** — Where neither the law nor the courts require a guardian to give a bond before making a sale, no bond is necessary. *Morton v. Carroll*, 68 Miss. 699. See also *Vanderburg v. Williamson*, 52 Miss. 233; *Talley v. Starke*, 6 Gratt. (Va.) 339.

**5. Oath Required.** — *Phelps v. Jones*, 91 Ky. 244.

**Form of Oath and Time of Taking Same.** — See *Montour v. Purdy*, 11 Minn. 384, 88 Am. Dec. 88.

**Bond and Oath Are Not Required in Nebraska of a special master appointed by a District Court.** *Omaha L. & T. Co. v. Bertrand*, 51 Neb. 508.

But even if these things were necessary, it would be presumed, in the absence of a showing to the contrary, that the oath was taken and the bond filed. *Omaha L. & T. Co. v. Bertrand*, 51 Neb. 508; *Toscan v. Devries*, 57 Neb. 276. See also *Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117; *Dayton v. Johnson*, 69 N. Y. 419.

**6. Omission to Require Bond an Irregularity Merely.** — See *Lockhart v. John*, 7 Pa. St. 137; *Nicholl v. Nicholl*, 8 Paige (N. Y.) 349.

**Bond and Oath Not Indispensable.** — See *Mayer v. Wick*, 15 Ohio St. 548; *Sommerville v. Sommerville*, 26 W. Va. 479.

**Bond in Penalty Less than That Required by Decree of Sale, but Approved by Court, Held Not Fatal.** — *Dawes v. Thomas*, 4 Gill (Md.) 333. See also *Dungan v. Vondersmith*, 49 Md. 249.

**7. Sale by Officer of Court.** — *Elgutter v. Northwestern Mut. L. Ins. Co.*, 86 Fed. Rep. 500; *Seaman v. Northwestern Mut. L. Ins. Co.*, 86 Fed. Rep. 493; *Swofford v. Garmon*, 51 Miss. 348.

**8. Commissioners Will Be Ruled to Account for Delay Before Being Removed.** — *Connell v. Wilhelm*, 36 W. Va. 598.



**VIII. WHO MAY PURCHASE — 1. Parties or Attorneys.** — In the *United States* the rule is that property offered at judicial sale may be purchased by either party to the suit in which such sale was ordered,<sup>1</sup> or by the attorney for either party.<sup>2</sup> But in *England* and *Canada* there are numerous cases holding that neither the parties nor their attorneys can become purchasers without having previously obtained permission of the court to bid at such sale.<sup>3</sup> This rule is, however, probably due to the fact that at one time it was customary to give the conduct of the sale to one of the parties or to his attorney,<sup>4</sup> in which case it would be eminently improper for one person to combine the two characters of buyer and seller.<sup>5</sup>

**2. Witnesses.** — In *Tennessee* the purchase of land of infants or married women at judicial sale by a witness in the cause in which such sale was ordered is prohibited by statute.<sup>6</sup> But the statute has been held to be intended merely to prevent a purchase by a witness who had given evidence tending to show the necessity of the sale,<sup>7</sup> and not to prohibit a purchase by a witness whose testimony consisted of a simple admission that he had agreed to pur-

**1. Parties May Become Purchasers — United States.** — *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Richards v. Holmes*, 18 How. (U. S.) 143; *Smith v. Black*, 115 U. S. 308; *Allen v. Gillette*, 127 U. S. 589; *Smith v. Arnold*, 5 Mason (U. S.) 414.

*Alabama.* — See *Phillips v. Benson*, 82 Ala. 500.

*Georgia.* — *Kilgo v. Castleberry*, 38 Ga. 512, 95 Am. Dec. 406.

*Illinois.* — See *Chillicothe Paper Co. v. Wheeler*, 68 Ill. App. 343.

*Kentucky.* — See *Clark v. Farrow*, 10 B. Mon. (Ky.) 446, 52 Am. Dec. 552.

*Maryland.* — *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381.

*Mississippi.* — *Robinson v. Parker*, 3 Smed. & M. (Miss.) 114, 41 Am. Dec. 614.

*New York.* — *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431; *Neilson v. Neilson*, 5 Barb. (N. Y.) 565. See also *Nichols v. Ketchum*, 19 Johns. (N. Y.) 84; *King v. Platt*, 37 N. Y. 155; *Brown v. Frost*, 10 Paige (N. Y.) 243.

*North Carolina.* — *Robinson v. Clark*, 7 Jones L. (52 N. Car.) 562, 78 Am. Dec. 265.

*Texas.* — See *Blum v. Rogers*, 71 Tex. 668.

*Wisconsin.* — *Lane v. White*, 12 Wis. 381.

**Purchase May Be for Benefit of Defendant Who Is Alien Enemy.** — *Crutcher v. Hord*, 4 Bush (Ky.) 360.

**2. Attorneys May Become Purchasers.** — *The Ruby*, 38 Fed. Rep. 622; *Saunders v. Gould*, 134 Pa. St. 445; *Le Conte v. Irwin*, 19 S. Car. 554. See also *Phillips v. Benson*, 82 Ala. 500. Compare *Busey v. Hardin*, 2 B. Mon. (Ky.) 407.

**Sales to Attorneys Not Favored.** — *Burke v. Daly*, 14 Mo. App. 542. See also *Busey v. Hardin*, 2 B. Mon. (Ky.) 407; *McCelvey v. Thomson*, 7 S. Car. 185.

**A Purchase by an Attorney, if at a Greatly Inadequate Price, Should Cause "Vigilant Scrutiny"** into anything which might affect the fairness or unfairness of the sale. *The Ruby*, 38 Fed. Rep. 622.

**Attorney for Administrator.** — In *Grayson v. Weddle*, 63 Mo. 523, it was held that an attorney for an administrator might become the purchaser at a sale by the administrator under an order of the probate court. But this was denied in *West v. Waddill*, 33 Ark. 575.

**3. English and Canadian Rule that Parties Can-**

**not Purchase Without Leave of Court — England.** — *Guest v. Smythe*, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. N. S. 563, 18 W. R. 742; *Byrne v. Lafferty*, 8 Ir. Eq. 47; *Elworthy v. Billing*, 10 Sim. 98, 10 L. J. Ch. 176; *Clarke v. Dobbin*, 8 Ir. Eq. 111. See also *Talbot v. Minnett*, 6 Ir. Eq. 83; *Dixon v. Pyner*, 14 Jur. 217, 7 Hare 331, 19 L. J. Ch. 402; *Drought v. Jones*, Flan. & Kel. 316; *Ennis v. Casey*, Flan. & Kel. 319, note; *Munn v. Feris*, 11 Ir. Eq. 203; *Wilson v. Greenwood*, 10 Sim. 101, note; *O'Connor v. Richards*, Sausse & Sc. 246.

*Canada.* — *Bowman v. Fox*, 2 U. C. L. J. N. S. 302; *Re Laycock*, 8 Ont. Pr. 548. See also *Phillips v. Conger*, 1 U. C. Q. B. O. S. 583. **Solicitors of Parties Cannot Become Purchasers Without Leave of Court.** — *Guest v. Smythe*, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. N. S. 563, 18 W. R. 742; *Coaks v. Boswell*, 11 App. Cas. 232, 55 L. J. Ch. 761, 55 L. T. N. S. 32.

**Application for Leave to Bid Must Be upon Notice.** — *Clarke v. Dobbin*, 8 Ir. Eq. 111.

**Circumstances under Which Parties Will Be Given Leave to Bid.** — *Edmunds v. Foley*, 7 Jur. N. S. 1268, 30 L. J. Ch. 887, 9 W. R. 859; *Spaight v. Patterson*, 9 Ir. Eq. 149.

**Next Friend of Plaintiff Who Has Conduct of Sale Cannot Purchase.** — *Denison v. Denison*, 4 Ch. Chamb. (Ont.) 37.

**Party or Attorney May Be Held to His Purchase.** — See *Sidny v. Ranger*, 12 Sim. 118. See also *Nelthorpe v. Pennyman*, 14 Ves. Jr. 517, in which case a solicitor who had bought in the property in order to prevent a sale at an undervalue was held to his purchase.

**4. See *supra*, this article, *Who May Make Sale — Person Interested in Proceeding.***

**5. Impropriety of Purchase by Person Conducting Sale.** — See *infra*, this section, *Person Appointed to Sell*.

**Plaintiff, by Obtaining Liberty to Bid, Waives Right to Conduct Sale.** — *Dixon v. Pyner*, 14 Jur. 217, 7 Hare 331, 19 L. J. Ch. 402. See also *Drought v. Jones*, Flan. & Kel. 316; *Ennis v. Casey*, Flan. & Kel. 319, note.

**6. Tennessee Statute.** — Code of Tennessee (1896), § 5088.

**7. Witness Who Gave Evidence Tending to Show Necessity of Sale Cannot Purchase.** — *Starkey v. Hammer*, 1 Baxt. (Tenn.) 439; *Hunt v. Glenn*, 11 Lea (Tenn.) 16.



chase, and was willing, with the approval of the court, to purchase at a specified price, leaving the court to find from other sources whether the facts authorizing a sale under the law existed.<sup>1</sup>

3. **Judge Ordering Sale.** — The judge who ordered a sale cannot become the purchaser thereof, either directly or indirectly.<sup>2</sup>

4. **Person Appointed to Sell.** — The person appointed to make a judicial sale of property cannot become the purchaser thereof at his own sale,<sup>3</sup> either directly or through the intervention of another person as nominal purchaser.<sup>4</sup> But where this is done the sale seems to be regarded as merely voidable and not void.<sup>5</sup>

In *North Carolina*, where the person making a judicial sale of land, himself purchases directly, the sale is void. But if he purchases through an agent, who afterwards conveys to him, the legal title passes, subject to the

1. **Witness Who Testified Merely as to His Willingness to Purchase May Become Purchaser.** — *Hunt v. Glenn*, 11 Lea (Tenn.) 16.

2. **Judge Ordering Sale Cannot Become Purchaser.** — *Livingston v. Cochran*, 33 Ark. 294; *Hoskinson v. Jaquess*, 54 Ill. App. 59; *Walton v. Torrey*, Harr. (Mich.) 259.

3. **Person Appointed to Make Sale Cannot Become Purchaser.** — *England*. — *Tennant v. Trenchard*, 38 L. J. Ch. 661. See also *Geldard v. Randall*, 9 Jur. 1085; *Dixon v. Pyner*, 14 Jur. 217, 7 Hare 331, 19 L. J. Ch. 402; *Drought v. Jones*, Flan. & Kel. 316; *Ennis v. Casey*, Flan. & Kel. 319, note.

*Canada.* — See *Crawford v. Boyd*, 6 Ont. Pr. 278.

*Georgia.* — *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435.

*Illinois.* — *McConnell v. Gibson*, 12 Ill. 128.

*Kansas.* — See *Spicer v. Rowland*, 39 Kan. 740.

*Kentucky.* — *Price v. Thompson*, 84 Ky. 219; *Bagby v. Eversole*, 6 Ky. L. Rep. 365. See also *Adams v. McClary*, 6 Ky. L. Rep. 517; *Stapp v. Toler*, 3 Bibb (Ky.) 450.

*Maryland.* — See *Mason v. Martin*, 4 Md. 124; *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381; *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293; *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500.

*Massachusetts.* — See *Walker v. Walker*, 101 Mass. 169.

*Mississippi.* — See *McGowan v. McGowan*, 48 Miss. 553.

*Missouri.* — *Shotwell v. Munroe*, 42 Mo. App. 669. See also *Briant v. Jackson*, 99 Mo. 585.

*New Jersey.* — See *Smith v. Drake*, 23 N. J. Eq. 302.

*New York.* — See *Sheldon v. Saenz*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 377; *Ward v. Smith*, 3 Sandf. Ch. (N. Y.) 592; *De Caters v. De Chaumont*, 3 Paige (N. Y.) 178.

*North Carolina.* — *Sumner v. Sessoms*, 94 N. Car. 371. See also *Branch v. Griffin*, 99 N. Car. 173.

*Ohio.* — See *Sheldon v. Newton*, 3 Ohio St. 494.

*South Carolina.* — *McKelvey v. Thomson*, 7 S. Car. 185. See also *Black v. Childs*, 14 S. Car. 312.

*Texas.* — See *Hamblin v. Warnecke*, 31 Tex. 91.

*Vermont.* — See *Chandler v. Moulton*, 33 Vt. 245.

*Virginia.* — *Howery v. Helms*, 20 Gratt. (Va.) 1; *Teel v. Yancey*, 23 Gratt. (Va.) 691. See also *Hurt v. Jones*, 75 Va. 341; *Quarles v. Lacy*, 4 Munf. (Va.) 251.

*West Virginia.* — *Ayers v. Blair*, 26 W. Va. 559; *Winans v. Winans*, 22 W. Va. 678; *Walker v. Ruffner*, 32 W. Va. 297; *Newcomb v. Brooks*, 16 W. Va. 32.

See also cases cited in title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1144, note 6.

**Purchase by Commissioner Appointed to Make Resale Sustained.** — *Hurt v. Jones*, 75 Va. 341.

4. **Purchase Through Another as Nominal Purchaser Improper.** — *McConnell v. Gibson*, 12 Ill. 128; *Bagby v. Eversole*, 6 Ky. L. Rep. 365; *McKelvey v. Thomson*, 7 S. Car. 185. *Howery v. Helms*, 20 Gratt. (Va.) 1; *Winans v. Winans*, 22 W. Va. 678. See also *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500; *Sumner v. Sessoms*, 94 N. Car. 371; *Teel v. Yancey*, 23 Gratt. (Va.) 691; *Hurt v. Jones*, 75 Va. 341; *Downing v. Lyford*, 57 Vt. 507; *Ayers v. Blair*, 26 W. Va. 559; *Walker v. Ruffner*, 32 W. Va. 297. See also cases cited in title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1145, note 1.

**Acquisition of Interest After Sale Does Not Affect Sale.** — *Adams v. McClary*, 6 Ky. L. Rep. 517.

5. **Purchase by Person Appointed to Sell Not Void but Voidable.** — *McConnell v. Gibson*, 12 Ill. 128; *Black v. Childs*, 14 S. Car. 312; *Howery v. Helms*, 20 Gratt. (Va.) 1; *Walker v. Ruffner*, 32 W. Va. 297; *Winans v. Winans*, 22 W. Va. 678; *Newcomb v. Brooks*, 16 W. Va. 32. See also *Harris v. Parker*, 41 Ala. 604; *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146; *Walker v. Walker*, 101 Mass. 169; *Smith v. Drake*, 23 N. J. Eq. 302; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Ward v. Smith*, 3 Sandf. Ch. (N. Y.) 592; *Sheldon v. Newton*, 3 Ohio St. 494; *McKelvey v. Thomson*, 7 S. Car. 185; *Ex p. Wiggins*, 1 Hill Eq. (S. Car.) 353; *Farr v. Sims*, Rich. Eq. Cas. (S. Car.) 138, 24 Am. Dec. 396; *Huger v. Huger*, 9 Rich. Eq. (S. Car.) 217; *Ayers v. Blair*, 26 W. Va. 559.

**Acquiescence in a Purchase by the Person Appointed to Sell May Be Presumed** from the absence of any complaint for an unreasonable length of time after the circumstances of the sale are known. *McConnell v. Gibson*, 12 Ill. 128. See also *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500.

**The Purchaser Cannot Avoid the Sale**, for he should not be allowed to complain of his own fraud or misconduct. *McConnell v. Gibson*, 12 Ill. 128.



right of the parties interested to divest it by a proper proceeding.<sup>1</sup>

5. **Auctioneer Employed to Conduct Sale.** — It would seem that an auctioneer employed to conduct a sale cannot become the purchaser,<sup>2</sup> though a mere crier may.<sup>3</sup>

6. **Appraiser.** — It is held in some jurisdictions that a person who has acted as one of the appraisers of property preparatory to a judicial sale of the same, cannot become the purchaser thereof at such sale.<sup>4</sup>

7. **Fiduciary.** — A person occupying a fiduciary relation towards the owner of property cannot purchase the same at a judicial sale.<sup>5</sup>

8. **Tenant.** — In *Nebraska* it has been held that a tenant purchasing property of his landlord at a judicial sale prior to surrendering possession will be presumed to make such purchase for the purpose of protecting his possession, and not to acquire a title adverse to that of his landlord;<sup>6</sup> but the court of *Kansas* has recognized an adverse title, acquired by a tenant, by a purchase at a tax sale.<sup>7</sup>

9. **Tenant for Life.** — A tenant for life may become the purchaser of an estate sold in the master's office.<sup>8</sup>

1. **North Carolina Rule.** — *Sumner v. Sessoms*, 94 N. Car. 371.

2. **Auctioneer Cannot Become Purchaser.** — See *Galbraith v. Drought*, 24 Kan. 592; *Terwilliger v. Brown*, 44 N. Y. 237; *Smith v. Harrigan*, (Supm. Ct.) 27 Abb. N. Cas. (N. Y.) 324; *Brock v. Rice*, 27 Gratt. (Va.) 812.

3. **Crier May Purchase.** — See *Swires v. Brotherline*, 41 Pa. St. 135, 80 Am. Dec. 601; *Crook v. Williams*, 20 Pa. St. 342.

4. **Appraiser Cannot Purchase.** — *Reno v. Hale*, 28 Neb. 646; *McKeighan v. Hopkins*, 14 Neb. 361, 19 Neb. 33.

**Sale to Appraiser Is Void as Against Judgment Debtor.** — But third persons who have no interest in the matter cannot object. *Reno v. Hale*, 28 Neb. 646.

**Purchase by Appraiser Voidable Mere Not Void.** — *Terrill v. Auchauer*, 14 Ohio St. 30.

5. **Fiduciary Cannot Purchase** — *United States*. — See *Pewabic Min. Co. v. Mason*, 145 U. S. 349.

*California.* — See *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146.

*Illinois.* — *McCreedy v. Mier*, 64 Ill. 495. See also *Nelson v. Hayner*, 66 Ill. 487.

*Kentucky.* — See *Mitchell v. Berry*, 1 Met. (Ky.) 602.

*Maryland.* — See *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293; *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500.

*Massachusetts.* — See *Walker v. Walker*, 101 Mass 169.

*New Jersey.* — *Smith v. Drake*, 23 N. J. Eq. 302.

*New York.* — *Torrey v. Orleans Bank*, 9 Paige (N. Y.) 649; *Case v. Carroll*, 35 N. Y. 385; *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223. See also *Metropolitan El. R. Co. v. Manhattan R. Co.*, (C. Pl. Spec. T.) 14 Abb. N. Cas. (N. Y.) 252; *Ward v. Smith*, 3 Sandf. Ch. (N. Y.) 592; *De Caters v. De Chaumont*, 3 Paige (N. Y.) 178.

*North Carolina.* — *Froneberger v. Lewis*, 70 N. Car. 456.

*Pennsylvania.* — *Musselman v. Eshleman*, 10 Pa. St. 394, 51 Am. Dec. 493.

*Tennessee.* — *Tynes v. Grimstead*, 1 Tenn.

Ch. 508; *Collins v. Smith*, 1 Head. (Tenn.) 251.

And see the titles EXECUTORS AND ADMINISTRATORS, vol. II, p. 1144 *et seq.*; TRUSTS AND TRUSTEES.

**A Guardian Ad Litem May Purchase** at a partition sale made in the suit in which he acts. *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Jackson v. Woolsey*, 11 Johns. (N. Y.) 455.

**Fiduciary Having Personal Interest in Property Sold for Partition May Buy.** — *Hopper v. Hopper*, 79 Md. 400.

**Tennessee Doctrine.** — Section 5088 of the Tennessee Code of 1896 provides that when the land of infants or married women is sold by the court, no guardian or next friend in such a cause shall purchase at such sale or at any time afterwards until five years from the removal of the existing disability. See *Starkey v. Hammer*, 1 Baxt. (Tenn.) 439; *Collins v. Smith*, 1 Head (Tenn.) 251. But the court has expressed the opinion, without deciding the question, that such provision refers only to sales made under the chapter in which the section is found, that is, the sale of property of persons under disability, and does not prohibit a guardian from purchasing in a sale made for partition under the provisions of the preceding chapter of the code. *Hawkins v. England*, 3 Head (Tenn.) 652. And it has been held that in the absence of some statutory prohibition a guardian may purchase, provided such purchase is fairly made and subject to no exceptions upon scrupulous and jealous examination. *Hawkins v. England*, 3 Head (Tenn.) 652; *Elrod v. Lancaster*, 2 Head (Tenn.) 571, 75 Am. Dec. 749; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 439.

**Right to Avoid Sale Not Personal to Beneficiary of Trust.** — *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223.

6. **Tenant Purchasing at Judicial Sale Does Not Acquire Title Adverse to Landlord.** — *Lausman v. Drahos*, 10 Neb. 172, 35 Am. Rep. 468.

7. **Adverse Title Acquired by Tenant Purchasing at Tax Sale.** — *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204.

8. **Tenant for Life.** — *Williams v. Attenborough, T. & R.* 70, 23 Rev. Rep. 186, 1 L. J. Ch. 138.



10. **Reversioner.** — A reversioner may also become the purchaser of such an estate.<sup>1</sup>

11. **Residuary Legatee.** — The same is true of a residuary legatee.<sup>2</sup>

12. **Agent.** — There would seem to be no reason why property offered at judicial sale may not be purchased by an agent, whether his principal be disclosed<sup>3</sup> or undisclosed.<sup>4</sup>

13. **Stockholder.** — Nor, in the case of a sale of corporate property, does there seem to be any reason why stockholders should not purchase.<sup>5</sup>

**IX. CONDUCT OF SALE — 1. Advertisement or Notice — a. NECESSITY FOR.** — In all cases of judicial sales there should be some advertisement or notice thereof,<sup>6</sup> and it has been said that there is no more important part of the conduct of a sale than the time and method of advertising it.<sup>7</sup>

**b. HOW METHOD AND TIME OF ADVERTISEMENT OR NOTICE DETERMINED.** — The method and time of the advertisement or notice of a judicial sale are usually fixed by statute,<sup>8</sup> or determined by the order of the court by virtue of which the sale is to be made,<sup>9</sup> and in either case the directions so given must be followed.<sup>10</sup>

1. **Reversioner.** — *Williams v. Attenborough*, T. & R. 70, 23 Rev. Rep. 186, 1 L. J. Ch. 138.

2. **Residuary Legatee.** — *Williams v. Attenborough*, T. & R. 70, 23 Rev. Rep. 186, 1 L. J. Ch. 138.

3. **Agent Recognized as Such Not Personally Liable as Purchaser.** — *Frazier v. Hendren*, 80 Va. 265. Compare *Hobhouse v. Hamilton*, 1 Hog. 401.

4. **Agent for Undisclosed Principal May Purchase.** — *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Turner v. Indianapolis*, etc., R. Co., 8 Biss. (U. S.) 380; *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431.

5. **Stockholders.** — See *Pewabic Min. Co. v. Mason*, 145 U. S. 349.

6. **Necessity for Notice.** — *Rucker v. Moore*, 1 Heisk. (Tenn.) 726. Compare *Jackson v. Irwin*, 10 Wend. (N. Y.) 442.

**The Person Making the Sale Is Bound to Due Diligence in Giving Full and Proper Notice**, so as to invite full and fair competition at the sale. *Bank of Commerce v. Lanahan*, 45 Md. 396.

**Person Appointed to Sell Should Himself Attend to Advertising the Sale**, and not delegate that duty to others. *Price v. Simpson*, 8 Ky. L. Rep. 327.

**Notice of Private Sale Held Not Necessary.** — *Rice v. Cleghorn*, 21 Ind. 80; *Worthington v. Dunkin*, 41 Ind. 515; *Maxwell v. Campbell*, 45 Ind. 360.

7. **Importance of Advertisement.** — *Dean v. Wilson*, 10 Ch. D. 136, 48 L. J. Ch. 148, 27 W. R. 377. See also *Glenn v. Wootten*, 3 Md. Ch. 514.

8. **Notice Regulated by Statute — United States.** — See *Elgutter v. Northwestern Mut. L. Ins. Co.*, 86 Fed. Rep. 500.

*Kansas.* — *Winton v. Wilson*, 44 Kan. 146. See also *Wheatley v. Terry*, 6 Kan. 427.

*Mississippi.* — See *Hanks v. Neal*, 44 Miss. 212.

*Missouri.* — *Melton v. Fitch*, 125 Mo. 281.

*Nebraska.* — *Parrat v. Neligh*, 7 Neb. 456; *Drew v. Kirkham*, 8 Neb. 477.

*New Jersey.* — *Parsons v. Lanning*, 27 N. J. Eq. 70. See also *Coxe v. Halsted*, 2 N. J. Eq. 311; *Cummins v. Little*, 16 N. J. Eq. 48.

*New York.* — See *Denning v. Smith*, 3 Johns. Ch. (N. Y.) 332.

*Ohio.* — *Craig v. Fox*, 16 Ohio 563.

*South Carolina.* — See *Ex p. Alexander*, 35 S. Car. 409.

*Tennessee.* — See *Howell v. Donaldson*, 7 Heisk. (Tenn.) 206.

*Texas.* — See *Thulemeyer v. Jones*, 37 Tex. 560.

*Wisconsin.* — *Kopmeier v. O'Neil*, 47 Wis. 593.

**Statute Not Retrospective.** — See *Central Trust Company v. Sheffield*, etc., Coal, etc., Co., 60 Fed. Rep. 9.

9. **Notice Regulated by Order of Court — United States.** — See *New Orleans v. Peake*, 2 U. S. App. 403.

*Illinois.* — *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753.

*Kentucky.* — *O'Doherty v. Lewis*, 4 Ky. L. Rep. 621. See also *Harris v. Gunnell*, (Ky. 1888) 9 S. W. Rep. 376; *Williams v. Woodruff*, 1 Dav. (Ky.) 257; *Vanbussum v. Maloney*, 2 Met. (Ky.) 551; *Barnes v. Jackson*, 85 Ky. 407; *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769.

*Maryland.* — *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Glenn v. Wootten*, 3 Md. Ch. 514; *Conroy v. Carroll*, 82 Md. 127. See also *Farmers' Bank v. Clarke*, 28 Md. 145.

*Tennessee.* — *Ailen v. Kerr*, 13 Lea (Tenn.) 256; *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

**Rule of Court Intended Only for Cases to Which Statute Does not Apply.** — *Romaine v. McMillen*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 318.

**Direction as to Notice Merely Supplementary to Statutory Provision.** — *Spring v. Sandford*, 7 Paige (N. Y.) 550.

**Decree Directing Specified Notice and "Such Other Notice" as Trustees "Think Proper."** — See *Farmers' Bank v. Clarke*, 28 Md. 145.

10. **Directions Must Be Followed — Illinois.** — See *Dow v. Seely*, 29 Ill. 495.

*Kansas.* — *Evans v. Bushnell*, 59 Kan. 160. See also *Jones v. Carr*, 41 Kan. 329; *Means v. Rosevear*, 42 Kan. 377; *Wood v. Drury*, 56 Kan. 409.

*Kentucky.* — See *Williams v. Woodruff*, 1 Duv. (Ky.) 257; *Slaughter v. Graham*, 5 Ky. L. Rep. 324; *Cofer v. Miller*, 7 Bush (Ky.) 546; *Jarboe v. Colvin*, 4 Bush (Ky.) 71; *Hahn v. Pindell*, 1 Bush (Ky.) 539.



**Designation by Counsel.** — In an early case in *Mississippi*, however, it was said that where a decree of sale of property was made, it was generally left for counsel to designate the length of time and mode of publication of the sale, the court not interfering therein or prescribing any limit, beyond seeing that the notice was reasonable and fair.<sup>1</sup>

**c. METHODS OF ADVERTISING** — (1) *The Usual Methods.* — The usual methods of advertising judicial sales are, by publishing notice thereof in a newspaper or newspapers,<sup>2</sup> or by posting notices of the sale in conspicuous places,<sup>3</sup> or by the use of both of these methods;<sup>4</sup> which will now be treated in detail.

(2) *Publication in Newspaper.* — While statutes often designate, in a general way, in what newspaper or papers notices of sale should be published,<sup>5</sup> the selection of the particular paper or papers, in which notice of an individual sale shall be published, is usually left to the discretion of the court ordering the sale,<sup>6</sup> or the officer or person appointed to make the same.<sup>7</sup> In every case, however, the paper or papers selected should be such as to give general publicity to the fact that the sale is about to occur, so as to invite competition.<sup>8</sup>

(3) *Posting Notices.* — While statutes in reference to posting notices or orders of sale usually designate in a general way the places where such notices shall be put up, a great deal is necessarily left to the discretion of the officer or person appointed to make the sale, and when that discretion is fairly exercised, the courts will not lightly interfere with its exercise,<sup>9</sup> but they will guard against its abuse.<sup>10</sup>

*Maryland.* — *Conroy v. Carroll*, 82 Md. 127.  
**Notice for Longer Time than Required by Decree Unimportant.** — *Morton v. Carroll*, 68 Miss. 699. See also *Tooke v. Newman*, 75 Ill. 215; *Taylor v. Reid*, 103 Ill. 349; *Gantz v. Toles*, 40 Mich. 725; *Wilson v. Scott*, 29 Ohio St. 636.

1. **Designation by Counsel.** — *Guise v. Middleton*, Smed. & M. Ch. (Miss.) 89.

2. **Posting of Notices Unnecessary in Nebraska Where Sale Advertised in Newspaper.** — *Elgutter v. Northwestern Mut. L. Ins. Co.*, 86 Fed. Rep. 500; *Parrot v. Neligh*, 7 Neb. 456. See also *Drew v. Kirkham*, 8 Neb. 477.

**A Notice by Handbills Only Is Irregular** where there is a newspaper published in the county in which land is to be sold. *Curd v. Lackland*, 49 Mo. 451.

3. **When Posting Notices Is the Proper Method of Advertising.** — See *Goddard v. Cox*, 1 Lea (Tenn.) 112.

**When Advertisement by Posting Notices Only Is Improper.** — *Harlan v. Stout*, 22 Ind. 488.

4. **Construction of Wisconsin Statute.** — *Kopmeier v. O'Neil*, 47 Wis. 593.

**Posting May Be Dispensed With.** — Where the law provides for advertisement both by publication and posting of notices, the court may dispense with the posting of notices. See *Melton v. Fitch*, 125 Mo. 281.

5. **Construction of Statute.** — A statute requiring notice of sale to be published "in the newspaper printed nearest to the real estate" is complied with by publication in a newspaper printed in the city or town nearest to such real estate, although there be another newspaper in the same town, whose building, in which the printing is done, is located about one hundred feet nearer to the real estate. *Rutenfranz v. Stacer*, 58 Ind. 467.

6. **Discretion of Court.** — *Sessions v. Peay*, 23 Ark. 39. See also *State v. Holliday*, 35 Neb. 327.

7. **Plaintiff Not Entitled to Designate Paper.** — A sheriff holding an order for the sale of real estate cannot be required, by a writ of mandamus, to publish the notice of sale in a newspaper selected by the plaintiff. *Winton v. Wilson*, 44 Kan. 146.

8. **Papers Selected Should Be Such as to Give General Publicity to Sale.** — *State v. Holliday*, 35 Neb. 327.

Though the letter of the statute may have been complied with in giving notice of a judicial sale, yet if the court is satisfied that the notice was published in a paper not of general circulation in the county, it may refuse to confirm the sale. *Craig v. Fox*, 16 Ohio 563.

**Notice Sufficiently General.** — Where a sale of property in *Michigan* is advertised not only in the local, but also in the *Detroit*, *New York*, *Boston*, and *Chicago* papers, there can be no pretense of a lack of notice, personal or general. *Pewabic Min. Co. v. Mason*, 145 U. S. 349.

**General Circulation in Any Particular City or Portion of the County Not Necessary.** — The statute providing for notice of sales of land upon execution or foreclosure does not require that the newspaper in which such notice is published shall have a general circulation in any particular city or portion of the county. *Smith v. Foxworthy*, 39 Neb. 214.

**Paper Selected Need Not Be One Authorized to Publish Laws of the State.** — *Fritz v. Lewis*, 4 N. J. L. J. 185.

9. **Discretion of Officer.** — *Cummins v. Little*, 16 N. J. Eq. 48.

**What Are Proper Places for Posting Notices.** — *Cummins v. Little*, 16 N. J. Eq. 48; *Coxe v. Halsted*, 2 N. J. Eq. 311.

10. **Abuse of Discretion Will Be Guarded Against.** — *Cummins v. Little*, 16 N. J. Eq. 48.

**Improper Posting.** — See *Vanbussum v. Maloney*, 2 Met. (Ky.) 551.



(4) *What the Notice or Advertisement Should Contain* — (a) *Time of Sale*. — The notice or advertisement of sale should state the time when such sale will be made,<sup>1</sup> and a notice is insufficient if there is a mistake therein of such a nature as to mislead the public,<sup>2</sup> but it is otherwise where the mistake is obvious and not of such a character as to mislead.<sup>3</sup>

*Hour of Sale*. — The notice should also designate the time of day at which the sale will commence,<sup>4</sup> and it is proper and convenient to the parties and the public that an advertisement for a judicial sale should name some particular hour,<sup>5</sup> but this is not necessary to the validity of the sale, as it is sufficient for the notice to state that the sale will be made between certain named hours in the business portion of the day.<sup>6</sup>

(b) *Place of Sale*. — The notice should also state the place where the sale will be made.<sup>7</sup>

(c) *Terms of Sale*. — While it has been said that the advertisement is not the contract of the parties, and it is the constant practice of trustees to introduce other terms of sale at the time of sale,<sup>8</sup> it would seem eminently proper for an advertisement of sale to set forth, as far as possible, the terms of sale, and it has been held that if it was intended to withdraw parcels not required to be sold, this should be stated in the advertisement.<sup>9</sup>

(d) *Description of Property*. — The notice or advertisement should contain some description of the property to be sold,<sup>10</sup> but it is not necessary that the advertisement should fully describe the land by metes and bounds.<sup>11</sup>

1. *Notice Should State Time of Sale*. — Blodgett v. Hitt, 29 Wis. 169.

*Date of Sale Sufficient — Mentioning Day of Week Surplusage*. — Languedoc v. Whyte, 2 Rev. Leg. 472.

2. *Effect of Mistake in Advertisement*. — Hendrix v. Nesbitt, 96 Ky. 652. See also Fenner v. Tucker, 6 R. I. 551.

3. *An Obvious Clerical Error in a notice of a judicial sale will not affect it*. Long v. Perine, 44 W. Va. 243. See also Chandler v. Cook, 2 MacArthur (D. C.) 176; Gray v. Shaw, 14 Mo. 341; Mowry v. Sanborn, 68 N. Y. 153; Jensen v. Weinlander, 25 Wis. 477.

4. *Time of Day Should Be Designated*. — School Trustees v. Snell, 19 Ill. 156, 68 Am. Dec. 586.

5. *Propriety of Naming Particular Hour*. — School Trustees v. Snell, 19 Ill. 156, 68 Am. Dec. 586; Cox v. Halsted, 2 N. J. Eq. 311. See also Menard v. Crowe, 20 Minn. 448.

6. *Designation of Hours Between Which Sale Will Be Made Sufficient*. — School Trustees v. Snell, 19 Ill. 156, 68 Am. Dec. 586; Cox v. Halsted, 2 N. J. Eq. 311. See also Burr v. Borden, 61 Ill. 389; Northrop v. Cooper, 23 Kan. 432.

7. *Notice Should State Place of Sale*. — Blodgett v. Hitt, 29 Wis. 169.

*Designation of Particular Room in Building Having Numerous General Rooms Advisable*. — Kellogg v. Howell, 62 Barb. (N. Y.) 280.

8. *Terms Not in Advertisement Made Known at Sale*. — Farmers, etc., Bank v. Martin, 3 Md. Ch. 224.

It is the duty of the officer making a foreclosure sale if the terms of sale are not contained in the notice, to announce such terms at the time and place of sale. Bicknell v. Byrnes, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486.

9. *Advertisement Should State Intention to Withdraw Parcels Not Required to Be Sold*. — Beaty v. Radenhurst, 3 Ch. Chamb. (Ont.) 344.

10. *Property Should Be Described*. — If there be

no description in the notice of the property to be sold, the sale is illegal and should be set aside. Wheatley v. Terry, 6 Kan. 427; Griswold v. Fuller, 33 Mich. 205. See also Terry v. Swinford, (Ky. 1897) 41 S. W. Rep. 553.

*Failure of Notice to Properly Describe the Property Is a Mere Irregularity and does not deprive the court of jurisdiction to make the sale*. Fitzwilliams v. Davie, 18 Tex. Civ. App. 81. See also Davis v. Touchstone, 45 Tex. 497; Robertson v. Johnson, 57 Tex. 64.

*Notice Sufficient if Property Described as in Decree*. — Miller v. Lanham, 35 Neb. 886.

*Ontario's Doctrine — Advantages Should Be Set Forth*. — Thus the advertisement should mention the fact that there is a valuable house on a part of the lot. Heward v. Ridout, 1 Ch. Chamb. (Ont.) 244; Baxter v. Finlay, 1 Ch. Chamb. (Ont.) 230. Or that the premises are advantageously leased. McAlpine v. Young, 2 Ch. Chamb. (Ont.) 171.

But a failure to set forth the advantages of the property will not be sufficient to warrant a setting aside of the sale. McAlpine v. Young, 2 Ch. Chamb. (Ont.) 171. Unless in a very strong case. Creswick v. Thompson, 6 Ont. Pr. 52; Crooks v. Crooks, 2 Ch. Chamb. (Ont.) 29.

*Puffing in Advertisement Improper*. — Heward v. Ridout, 1 Ch. Chamb. (Ont.) 244; Baxter v. Finlay, 1 Ch. Chamb. (Ont.) 230.

*New Jersey View that Improvements Need Not Be Described*. — Guarantee Trust, etc., Co. v. Jenkins, 40 N. J. Eq. 451. In this case the court said that if the price at which the lots were sold was grossly inadequate, then the want of a full description of the premises, besides courses and distances, might properly be an element of consideration.

11. *Advertisement Need Not Fully Describe Land by Metes and Bounds*. — Calvert v. Alexander, 10 Ky. L. Rep. 119; Baxter v. Finlay, 1 Ch. Chamb. (Ont.) 230.

*When Description Identifies the Property, Incor-*



**Incumbrances.** — It is not necessary for the advertisement of sale to set forth the several incumbrances upon the property which is to be sold.<sup>1</sup>

(e) **Names of Parties.** — It has been held that in an advertisement of a judicial sale it is sufficient to insert the short style of the cause in which the decree of sale was rendered,<sup>2</sup> and that it is not necessary to state the full names of all the parties.<sup>3</sup>

(f) **Amount of Decree.** — In *Nebraska* it is considered that while it is proper in a notice of sale of real estate under a decree of foreclosure to state the amount of the decree, such statement is not essential to the validity of the notice.<sup>4</sup>

(g) **Signature.** — The advertisements or notices must be signed by the officer appointed to make the same, so that the public may understand that they are made by due authority, but it is not necessary that they should be signed by such officer in his own handwriting. It is quite sufficient that the name of the officer be printed, or signed by another in his behalf and by his authority and direction.<sup>5</sup>

**d. TIME OF ADVERTISING** — (1) *In General.* — The time of advertising judicial sales is controlled by statutes which vary in different jurisdictions, or by directions of court which vary in individual cases.<sup>6</sup> It has been said, however, that in the absence of any direction reasonable notice should be given.<sup>7</sup>

(2) *Publication for a Specified Number of Weeks.* — In some jurisdictions it is considered that a requirement that a notice of sale be published for a specified number of weeks successively, or for a certain number of successive weeks, means that the full number of days contained in the number of weeks named shall elapse between the time of the first advertisement and the time of sale,<sup>8</sup> while in others the doctrine is that a publication during the number of weeks named is sufficient, though the time between the first publication and the sale is less than the number of weeks designated.<sup>9</sup> This question has also been raised in many cases not relating to judicial sales, which will be fully discussed elsewhere in this work.<sup>10</sup>

(3) *Whether Publication Must Be Continued Up to Day of Sale.* — In *Missouri* it has been held that a law requiring a notice of sale to be published for four weeks does not require that such notice should be continued up to the day of sale.<sup>11</sup>

(4) *Number of Insertions.* — Where the time during which a sale must be advertised is given in weeks, it would seem that a publication once a week for

rect Description of Metes and Bounds Held Not Fatal. — *Kotch v. Sieplein*, 1 Cleve. L. Rep. 17, 4 Ohio Dec. (Reprint) 88.

1. **Incumbrances Need Not Be Set Forth.** — *Cunningham v. Schley*, 6 Gill (Md.) 207; *Gibbs v. Cunningham*, 1 Md. Ch. 44. See also *Farmers, etc., Bank v. Martin*, 3 Md. Ch. 224.

2. **Short Style of Cause Sufficient.** — *Ray v. Oliver*, 6 Paige (N. Y.) 489; *Baxter v. Finlay*, 1 Ch. Chamb. (Ont.) 230.

3. **Names of Parties Need Not Be Stated.** — *Cunningham v. Schley*, 6 Gill (Md.) 207; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Ray v. Oliver*, 6 Paige (N. Y.) 489.

4. **Amount of Decree.** — *Stratton v. Reisdorph*, 35 Neb. 314.

5. **Signature.** — *Coxe v. Halsted*, 2 N. J. Eq. 311.

6. **Thirty Days' Notice Required.** — *Gernon v. Bestick*, 15 La. Ann. 697; *Wyant v. Tuthill*, 17 Neb. 495; *Miller v. Lefever*, 10 Neb. 77.

Where more than thirty days have intervened between the day of the first publication of the notice and the day of the sale, this is sufficient. *Von Dorn v. Mengedoht*, 41 Neb. 525.

**Six Weeks.** — In *Wisconsin* notice of a foreclosure sale must be published for six weeks before the sale. *Kopmeier v. O'Neil*, 47 Wis. 593. See also *Eaton v. Lyman*, 33 Wis. 34.

7. **Reasonable Notice Should Be Given** where the judgment does not prescribe how long a notice there shall be. See *Malcomb v. Suter*, 8 Ky. L. Rep. 782.

8. **Full Number of Days Contained in Number of Weeks Named Must Elapse Between Advertisement and Sale.** — *Bacon v. Kennedy*, 56 Mich. 329; *Parsons v. Lanning*, 27 N. J. Eq. 70.

9. **Publication During Number of Weeks Named Sufficient.** — *Garrett v. Moss*, 20 Ill. 549; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Ex p. Alexander*, 35 S. Car. 409.

10. **For a Further Discussion** of the question discussed in the text, see the titles NOTICE; SERVICE OF PROCESS; SHERIFF'S SALES; TAX SALES; TIME (COMPUTATION OF); TRUST DEEDS AND POWER OF SALE MORTGAGES.

11. **Publication Need Not Be Continued Up to Day of Sale.** — *Melton v. Fitch*, 125 Mo. 281. In this case the last publication was more than a month before the sale.



the required time is sufficient,<sup>1</sup> but in a case where an order directed a notice of twenty days, it was said that where the publication is ordered in a daily paper the presumption would be that the advertisement should be published until the day of sale in each edition of the paper, unless otherwise directed.<sup>2</sup>

(5) *Restrictions on Time of Sale as Affecting Time of Advertising.* — A prohibition against taking any step for a sale, until the expiration of a certain time after the judgment, applies to the publication of notice of sale;<sup>3</sup> but the fact that notice was published before the expiration of such time does not render the sale void.<sup>4</sup>

*e. NOTICE OF POSTPONED SALE OR RESALE.* — Where a judicial sale of property is postponed, or a resale is necessary, such postponed sale or resale should be advertised,<sup>5</sup> and it has been held that in such case notice should be given for the same time as was prescribed by the decree for the first sale.<sup>6</sup> In *Canada* it has been said that when a judicial sale is put off the expense and delay of a fresh advertisement should not be incurred, but a note at the foot of the old advertisement, stating the postponement, should suffice.<sup>7</sup>

*f. NOTICE OF ADJOURNMENT OF SALE.* — It has been held, however, that notice of an adjournment of a judicial sale need not be published,<sup>8</sup> a public proclamation of such adjournment at the time fixed for the sale in the original notices being all that is necessary.<sup>9</sup> In *Wisconsin*, the court, without directly advertent to the question whether notice of an adjournment must necessarily be published at all, has held a publication of such notice at the foot of the original notice of sale sufficient, though not dated.<sup>10</sup>

*g. PRESUMPTION THAT PROPER NOTICE WAS GIVEN.* — The presumption is that the officer or person who made a judicial sale gave proper notice thereof,<sup>11</sup> especially where he has reported to the court that he gave notice as required by law,<sup>12</sup> or the judgment under which the sale was made;<sup>13</sup> and a person who excepts to such sale, on the ground that no notice or no proper notice was given, assumes the burden of proving these matters.<sup>14</sup>

*h. EVIDENCE OF NOTICE.* — In *Kentucky* the fact that proper notice of sale was given may be proved by the testimony of the commissioner who

1. When Publication Once a Week Sufficient. — *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

2. When Daily Publication Required. — *Allen v. Kerr*, 13 Lea (Tenn.) 256. But compare *White v. Malcolm*, 15 Md. 529.

3. Prohibition Applies to Publication of Notice. — *Northwestern Mut. L. Ins. Co. v. Neeves*, 46 Wis. 147; *Kopmeier v. O'Neil*, 47 Wis. 593.

4. Publication Before Time Has Expired Does Not Render Sale Void. — *Northwestern Mut. L. Ins. Co. v. Neeve*, 46 Wis. 147; *Kopmeier v. O'Neil*, 47 Wis. 593. See also *Strayer v. Long*, 89 Va. 471.

5. Necessity for Advertisement of Postponed Sale or Resale. — *Bicknell v. Byrnes*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486.

6. Same Notice as Prescribed for First Sale Should Be Given. — *Glenn v. Wootten*, 3 Md. Ch. 514. But compare *Hilliard v. Wilson*, 76 Tex. 180.

7. Note at Foot of Old Advertisement, Stating Postponement, Sufficient. — *Thompson v. Milliken*, 15 Grant Ch. (U. C.) 197.

8. Notice of Adjournment of Sale Need Not Be Published. — *Coxe v. Halsted*, 2 N. J. Eq. 311. See also *La Farge v. Wagenen*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 54.

9. Public Proclamation of Adjournment All That Is Necessary. — *Allen v. Cole*, 9 N. J. Eq. 286, 59 Am. Dec. 418, citing *Coxe v. Halsted*, 2 N. J. Eq. 311.

Party Responsible for Failure to Make Statement of Day to Which Sale Is Adjourned Cannot Take Advantage of His Own Wrongful Conduct. — *La Farge v. Van Wagenen*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 54.

10. Notice of Adjournment at Foot of Original Notice. — *Pier v. Storm*, 37 Wis. 247.

11. Presumption of Proper Notice. — *Soniat v. Miles*, 32 La. Ann. 164.

12. Where Officer Reports that He Has Given Notice as Required by Law. — *Childress v. Harrison*, 1 Baxt. (Tenn.) 410.

Return Held to Mean that Notice Was Published as Required by Law. — *Drew v. Kirkham*, 8 Neb. 477.

13. Where Report States that Sale Was Advertised as Required by Judgment. — *Harris v. Gunnell*, (Ky. 1888) 9 S. W. Rep. 376, 10 Ky. L. Rep. 419. See also *Zazio v. Samuels*, 4 Ky. L. Rep. 987; *Slaughter v. Graham*, 5 Ky. L. Rep. 324.

A Report Stating that Property Was Advertised as Required in Decree Is Sufficient though the master does not state the length of time he advertised it. — *Dow v. Seely*, 29 Ill. 495.

Evidence Rebutting Presumption. — See *Harris v. Gunnell*, (Ky. 1888) 9 S. W. Rep. 376, 10 Ky. L. Rep. 419; *Zazio v. Samuels*, 4 Ky. L. Rep. 987.

14. Person Excepting to Sale Assumes Burden of Proof. — *Bolgiano v. Cooke*, 19 Md. 375; *Childress v. Harrison*, 1 Baxt. (Tenn.) 410. See also *Soniat v. Miles*, 32 La. Ann. 164.



made the sale.<sup>1</sup> And in *Massachusetts* it has been held that the fact that a statute provides a mode of proof that sales of real estate were properly advertised, does not preclude a party from proving it *aliunde* by competent evidence.<sup>2</sup>

2. **EFFECT OF FAILURE TO GIVE PROPER NOTICE.** — While there are cases holding that a failure to give proper notice is fatal to a judicial sale,<sup>3</sup> the preponderance of authority supports the view that this is merely an irregularity<sup>4</sup> which renders the sale voidable, but not void;<sup>5</sup> and while it may afford a sufficient reason for a refusal to confirm the sale,<sup>6</sup> especially if the price realized was inadequate,<sup>7</sup> it cannot be made a ground of objection to the sale afterwards.<sup>8</sup> And some cases have gone so far as to refuse to set aside a sale for irregularities in the notice, even when objection was made before confirmation, where such irregularities were in no way prejudicial to either the parties or the purchaser.<sup>9</sup>

2. **Time** — *a.* **HOW DETERMINED.** — In some jurisdictions the time for making judicial sales is regulated by statute.<sup>10</sup> In the absence of some such regulation the court ordering a sale may fix the time at which it is to be made,<sup>11</sup> either by specifying some particular day or designating the time in

1. **Giving of Proper Notice May Be Proved by Testimony of Commissioner Who Made Sale.** — *Middleton v. Davis*, 15 Ky. L. Rep. 239; *Ison v. Kinnaid*, (Ky. 1891) 17 S. W. Rep. 633, 13 Ky. L. Rep. 569.

2. **Statutory Mode of Proof Not Exclusive of Other Mode.** — *Thomas v. Le Baron*, 8 Met. (Mass.) 355.

3. **Failure to Give Proper Notice Fatal to Sale.** — *Wheatley v. Terry*, 6 Kan. 427; *Curley's Succession*, 18 La. Ann. 728; *Thomas v. Le Baron*, 8 Met. (Mass.) 355; *Blodgett v. Hitt*, 29 Wis. 169. See also *Gernon v. Bestick*, 15 La. Ann. 697.

**Failure to Give Any Notice, in Connection with Other Improprieties**, was held to render a sale absolutely void, in *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

4. **Failure to Advertise for Proper Length of Time a Mere Irregularity.** — *Ex p. Alexander*, 35 S. Car. 409. Compare *Bailey v. Bailey*, 9 Rich. Eq. (S. Car.) 392.

5. **Irregularity in Notice Renders Sale Voidable Merely, Not Void.** — *McBride v. Gwynn*, 33 Fed. Rep. 402; *Moffitt v. Moffitt*, 69 Ill. 641; *Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Melton v. Fitch*, 125 Mo. 281. See also *Minor v. Natchez*, 4 Smed. & M. (Miss.) 619, 43 Am. Dec. 486; *McNair v. Hunt*, 5 Mo. 301.

**Title of Bona Fide Purchaser Not Affected.** — *Hanks v. Neal*, 44 Miss. 212; *Lum v. Reed*, 53 Miss. 73. See also *Boland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Stevenson v. McReary*, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102; *Minor v. Natchez*, 4 Smed. & M. (Miss.) 602, 43 Am. Dec. 488; *Mitchell v. Nodaway County*, 80 Mo. 257.

6. **Failure to Give Proper Notice a Sufficient Reason for Refusal to Confirm a Sale.** — *McBride v. Gwynn*, 33 Fed. Rep. 402; *Glenn v. Wootten*, 3 Md. Ch. 514; *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553; *Wyant v. Tuthill*, 17 Neb. 495; *Miller v. Lefever*, to Neb. 77. See also *Watson v. Violet*, 2 Duv. (Ky.) 332.

7. **Sale Without Proper Notice for Inadequate Price Should Not Be Confirmed.** — *Williams v. Woodruff*, 1 Duv. (Ky.) 257; *Clark v. Bell*, 4 Dana (Ky.) 15; *Conroy v. Carroll*, 82 Md. 127; *Newland v. Gaines*, 1 Heisk. (Tenn.) 720. See also *Evans v. Bushnell*, 59 Kan. 160.

8. **Sale Will Not Be Set Aside After Confirmation Because of Want of Proper Notice.** — *Wyant v. Tuthill*, 17 Neb. 495.

**Sale Will Not Be Set Aside After a Lapse of Two Years** because notice was published for a day less than it should have been. *McBride v. Gwynn*, 33 Fed. Rep. 402.

**Sale Cannot Be Attacked Collaterally for Irregularity in Notice.** — *Doe v. Jackson*, 51 Ala. 514; *Melton v. Fitch*, 125 Mo. 281. See also *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *McNair v. Hunt*, 5 Mo. 301.

**Purchaser Not Relieved from Liability.** — The failure of the commissioner to advertise the sale at one of the designated places cannot relieve a purchaser from liability on his bid, where such failure did him no wrong. *Watson v. Violet*, 2 Duv. (Ky.) 332.

9. **Sale Confirmed Though Notice Irregular.** — *New Orleans v. Peake*, 2 U. S. App. 403; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281.

**Ontario Rule — Approval of Master.** — In *Ontario* it has been held that a sale at which a fair price was obtained, and of which the master approved, would be confirmed, although the advertisement did not appear the number of times directed by the master. *Cayley v. Colbert*, 2 Ch. Chamb. (Ont.) 455.

But it is otherwise where the master has refused to approve of the sale on account of an irregularity in the newspaper advertisement, consisting of a statement that the sale would take place an hour later than the time fixed by the master and named in the posters. *Thomas v. McCrae*, 2 Ch. Chamb. (Ont.) 456.

10. **Time for Sale Fixed by Statute.** — See *Title Guarantee, etc., Co. v. Holverson*, 95 Ga. 707; *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313. And see further the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1103.

**Wisconsin — No Sale of Mortgaged Premises Until One Year After Judgment.** — *Northwestern Mut. L. Ins. Co. v. Neeves*, 46 Wis. 147; *Kopmeier v. O'Neil*, 47 Wis. 593.

**No Day Fixed by Law for Judicial Sales in West Virginia.** — *McClaskey v. O'Brien*, 16 W. Va. 791. See also *Long v. Perine*, 41 W. Va. 314.

11. **Court May Fix Time in Absence of Statutory Regulation.** — *Sessions v. Peay*, 23 Ark. 39; *Tompkins v. Tompkins*, 39 S. Car. 537.



some general way and leaving the particular day to be selected by the person appointed to make the sale,<sup>1</sup> and such directions of the court must be adhered to.<sup>2</sup> It has been held that if the decree does not fix the time for sale this is left to the discretion of the officer or other person appointed to make it.<sup>3</sup>

**b. SALE SHOULD BE ON DAY NAMED IN NOTICE.** — As a general rule it is considered that a judicial sale made on a day other than that named in the notice of sale is illegal and should be set aside,<sup>4</sup> but it has been considered in *Illinois* that such a sale is not void.<sup>5</sup>

**c. ADJOURNMENT OR POSTPONEMENT.** — It is usually considered that the officer or person appointed to make a judicial sale has the power to adjourn<sup>6</sup> or postpone<sup>7</sup> the same, if he deems it proper or for the best interest of all concerned to do so.<sup>8</sup> And his discretion in granting or refusing an adjournment will not be overruled unless it be shown to have been abused.<sup>9</sup> But when it is shown to the court, before the time fixed for the sale, that an adjournment would be either proper or injurious, it may order accordingly.<sup>10</sup>

**d. ELECTION DAY.** — While the fact that a judicial sale was made on

The Judgment Should Be Explicit in regard to the time of sale so that the commissioner should not be required to look to any other paper or order for directions. *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769. See also *Lawless v. Barger*, 9 Bush (Ky.) 665.

**Court May Extend Time for Sale.** — *Newcomb v. Harland*, 23 Cinc. L. Bul. 110. This case was reversed as *Harland v. Newcombe*, 1 Ohio Cir. Dec. 514, 2 Ohio Cir. Ct. 330, but the supreme court reversed the decision of the circuit court, and affirmed that of the common pleas without report; see 23 Cinc. L. Bul. 75.

**Sales Need Not Be on a Court Day in West Virginia.** — *Long v. Perine*, 41 W. Va. 314.

**Likewise in the City of Covington and the County of Kenyon.** — *Wade v. Covington City Nat. Bank*, 2 Ky. L. Rep. 231.

**Circumstances Warranting Change in Directions.** — See *Porte v. Irwin*, 8 Ont. Pr. 40.

**1. General Designation.** — In ordering a sale the court should fix the time of sale and not leave that to the commissioner. "We do not mean to decide that, in orders of sale, a particular day must be named; but if that is not done there should be some general designation that the sale should be on the first day of some county or circuit court day." *Perry v. Seitz*, 2 Duv. (Ky.) 122. See also *Barnes v. Jackson*, 85 Ky. 407.

**2. Directions of Court, as to Time of Sale, Must Be Adhered to.** — *Tompkins v. Tompkins*, 39 S. Car. 537; *Long v. Perine*, 41 W. Va. 314. See also *Talley v. Starke*, 6 Gratt. (Va.) 339.

A trustee appointed to make a judicial sale has no power to agree to delay the sale, and such an agreement cannot be enforced. *Ward v. Hollins*, 14 Md. 158.

**3. Discretion of Person Appointed to Sell Where Decree Does Not Fix Time.** — *Long v. Perine*, 41 W. Va. 314.

**Discretion of Officer Making Sale Not Controlled Except in Case of Abuse.** — *Myers v. James*, 4 Lea (Tenn.) 370.

**4. Sale on Day Other than That Named in Notice Illegal.** — *McConnel v. Gibson*, 12 Ill. 128; *Wheatley v. Terry*, 6 Kan. 427. See also *Conover v. Musgrave*, 68 Ill. 58; *Hendrix v. Nesbitt*, 96 Ky. 652; *La Farge v. Van Wagenen*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 54.

This, of course, does not apply to lawful and

proper adjournments or postponements. See the next section.

**5. Sale Not Void — Innocent Purchaser Protected.** — *Conover v. Musgrave*, 68 Ill. 58.

**6. Sale May Be Adjourned — United States.** — *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196.

*Kentucky.* — *Head v. Clark*, 88 Ky. 362.

*Mississippi.* — *Mitchell v. Harris*, 43 Miss. 314.

*New Jersey.* — *Bethlehem Iron Co. v. Philadelphia, etc., R. Co.*, 49 N. J. Eq. 356.

*New York.* — *Haines v. Taylor*, (Supm. Ct. 3 How. Pr. (N. Y.) 206; *Bicknell v. Byrnes*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486.

*Virginia.* — *Quarles v. Lacy*, 4 Munf. (Va.) 251.

*Wisconsin.* — *Pier v. Storm*, 37 Wis. 247; *Strong v. Catton*, 1 Wis. 471.

**Adjournment by Vendor's Solicitor Without Approval of Master Not Sanctioned.** — *O'Connor v. Woodward*, 6 Ont. Pr. 223.

**7. Sale May Be Postponed.** — See *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Hilliard v. Wilson*, 76 Tex. 180; *Pier v. Storm*, 37 Wis. 247.

**8. When It Is Proper to Adjourn Sale.** — It is proper to adjourn a sale when it seems likely that a fair price cannot be obtained for the property at the time originally fixed for the sale, because of the small number of bidders present. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196; *Bicknell v. Byrnes*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486; a lack of bidders. *Head v. Clark*, 88 Ky. 362; *Mitchell v. Harris*, 43 Miss. 314; sham bidding. *Head v. Clark*, 88 Ky. 362, 10 Ky. L. R. 917; or any other sufficient cause, for the officer should not unnecessarily sacrifice the property. *Bicknell v. Byrnes*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486.

**Circumstances under Which Adjournment or Postponement Was Properly Refused.** — See *Haines v. Taylor*, (Supm. Ct. 3 How. Pr. (N. Y.) 206; *Pewabic Min. Co. v. Mason*, 145 U. S. 349.

**9. Discretion Not Overruled Except in Case of Abuse.** — *Bethlehem Iron Co. v. Philadelphia, etc., R. Co.*, 49 N. J. Eq. 356. See also *Annin v. Jones*, 2 N. J. L. J. 22.

**10. Court May Order Adjournment.** — *Farmers Loan Co. v. Oxford Iron Co.*, 5 N. J. L. J. 241.

**Adjournment May Be Forbidden.** — *Bailey v. Ellis*, 2 N. J. L. J. 6.



election day does not render such sale void,<sup>1</sup> nor even, of itself, constitute sufficient ground for setting it aside,<sup>2</sup> it may, in connection with other circumstances, afford sufficient grounds for vacating the sale.<sup>3</sup>

*e.* SUNDAYS AND HOLIDAYS. — On general principles it would appear that a judicial sale should not be made on a Sunday or a legal holiday.<sup>4</sup>

*f.* JEWISH SABBATH. — In one case in *Maryland* it has been intimated that where one of the parties interested in the sale is a Jew, he may, by a timely application, prevent a sale on the Jewish sabbath.<sup>5</sup>

*g.* STATUTE OF LIMITATIONS. — It has been held that the statute of limitations applies only to final judgments and decrees and cannot operate upon an interlocutory decree, such as an order for the sale of land, and hence a delay for more than the statutory period in executing an order of sale, the court meanwhile retaining its jurisdiction over the cause, does not prevent a valid sale.<sup>6</sup>

*h.* SALE DURING FINANCIAL DEPRESSION. — The courts cannot interpose to prevent creditors from enforcing their claims or set aside judicial sales to satisfy debts because of depression in business or financial stringency,<sup>7</sup> and it does not lie in the mouth of one who, by strenuous and protracted resistance, has delayed a sale for years, to claim still further delay on account of the depressed financial condition of the country.<sup>8</sup>

*i.* HOUR OF SALE. — The person appointed to sell is ordinarily left to select the time in the day when he will sell,<sup>9</sup> but where the hours between which sales must be held are fixed by law<sup>10</sup> the sale cannot properly be held at any other time,<sup>11</sup> and even without such a statute it is considered that sales should be held during reasonable business hours, and any unusual departure from this rule will be sufficient ground for setting a sale aside.<sup>12</sup> The sale must be held at the hour designated in the notice,<sup>13</sup> and a sale made before the time advertised is improper and may be set aside.<sup>14</sup> But the person making the sale may, in the absence of some regulation in the decree, adjourn the sale to another hour in order to obtain a fair price.<sup>15</sup>

*j.* PRESUMPTION THAT SALE WAS MADE AT PROPER TIME. — After confirmation it will be presumed that a judicial sale was made at the proper time.<sup>16</sup>

3. Place — *a.* HOW DETERMINED. — The place where judicial sales shall be held is by some jurisdictions prescribed by statute.<sup>17</sup> In the absence of

1. Sale on Election Day Not Void. — *King v. Platt*, 37 N. Y. 155.

2. Fact that Sale Was Made on Election Day Not of Itself Sufficient Ground for Setting Aside. — *Bank of Commerce v. Lanahan*, 45 Md. 396.

3. Other Circumstances in Connection with Fact of Sale Being Made on Election Day. — In *King v. Platt*, 37 N. Y. 155.

4. Sale Made on Election Day for Inadequate Price Set Aside. — *Banning v. Pendery*, 4 Cinc. L. Bul. 912, 7 Ohio Dec. (Reprint) 677. Compare *Bank of Commerce v. Lanahan*, 45 Md. 396.

5. See the title SUNDAYS AND HOLIDAYS. Judicial Sale Made on Sunday Would Not Be Void. — See *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117.

6. Jewish Sabbath. — See *Cohen v. Wagner*, 6 Gill (Md.) 236.

7. Delay for More than Statutory Period Does Not Prevent Valid Sale. — *Epperson v. Robertson*, 91 Tenn. 408. See also *Ex p. Spence*, 6 Lea (Tenn.) 391; *Hamer v. Cook*, 118 Mo. 476.

8. Courts Cannot Set Aside Judicial Sales Because Made in Time of Financial Stringency. — *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281.

9. Party Who Has Delayed Sale Cannot Claim Further Delay Because of Financial Depression in

Country. — *Pewabic Min. Co. v. Mason*, 145 U. S. 349.

9. Discretion as to Hour of Sale. — *Head v. Clark*, 88 Ky. 362.

10. See *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753.

11. Sale Must Be Made Between Hours Fixed by Statute. — See *Cole v. Porter*, 4 Greene (Iowa) 510; *Grace v. Garnett*, 38 Tex. 157.

12. Sale Should Be Held During Reasonable Business Hours. — See *Russell v. Stoeckel*, 5 Houst. (Del.) 464; *Rigney v. Small*, 60 Ill. 416; *School Trustees v. Snell*, 19 Ill. 156, 68 Am. Dec. 586; *McNaughton v. McLean*, 73 Mich. 250; *Carrick v. Myers*, 14 Barb. (N. Y.) 9.

13. Compliance with Notice. — *McGovern v. Union Mut. L. Ins. Co.*, 109 Ill. 151.

14. Sale Before Hour Advertised Improper. — *Williams v. Jones*, 1 Bush (Ky.) 621. See also *Pickett v. Pickett*, 31 Kan. 727.

15. Sale May Be Adjourned to Another Hour. — *Head v. Clark*, 88 Ky. 362.

16. Presumption that Sale Was Made at Proper Time. — *Tate v. Bush*, 62 Miss. 145.

17. Place for Holding Judicial Sales Prescribed by Statute. — *Massey v. Bowles*, 99 Ga. 216; *Smith v. Burnes*, 8 Kan. 197; *Kane v. McCown*, 55



some such statute the court ordering the sale has power to designate some place at which it shall be held, and usually does so.<sup>1</sup> If there be any such designation, either by statute or by the court, it must be followed,<sup>2</sup> but if there be none the matter is left to the sound discretion of the officer or person appointed to make the sale.<sup>3</sup> The sale should always, however, be made at a convenient and public place, accessible to bidders.

*b. COURT HOUSE DOOR.* — A very usual place for the making of judicial sales is at the door of the court house of the county in which the property is situated.<sup>4</sup> The court house in this connection is the building where the sittings of the court are held, rather than a building erected as a court house but not in use as such.<sup>5</sup> And a sale made by one who, on account of bad weather, stands inside the court house building, but in full view of persons at the door, is substantially a sale at the court house door.<sup>6</sup>

*c. SALE OF LAND ON THE PREMISES.* — It is also quite usual to direct that a sale of land shall be made on the premises to be sold,<sup>7</sup> and where such a direction is given a sale elsewhere is irregular;<sup>8</sup> though where such sale is only a short distance beyond the boundary, and some of those present believe they are actually on the premises, the sale will not be set aside if it is regular in other respects and no fraud appears.<sup>9</sup>

*d. PRESUMPTION THAT SALE WAS MADE AT PROPER PLACE.* — After confirmation it will be presumed that a judicial sale was made at the proper place.<sup>10</sup>

**4. Mode of Sale — a. IN GENERAL.** — In the absence of some statutory restriction, it is within the power of the court decreeing a sale to direct the mode in which the sale shall be made,<sup>11</sup> and all such directions must be adhered to by the officer or person making the sale,<sup>12</sup> who must also see that

Mo. 181; *Haines v. Taylor*, (Supm. Ct.) 3 How. Pr. (N. Y.) 206. See also *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769. See also next section.

**1. Power of Court to Designate Place of Sale.** — *Sessions v. Peay*, 23 Ark. 39. See also *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769; *Winter v. Eckert*, 93 N. Y. 367, *affirming* 4 N. Y. L. Bul. 86; *Macdonald v. Foster*, 6 Ch. D. 193, 37 L. T. N. S. 296, 25 W. R. 687. Compare *Nash v. Worcester Imp. Com'rs*, 1 Jur. N. S. 973. See also next two sections.

The Judgment Should Be Explicit in regard to the place of sale so that the commissioner should not be required to look to any other paper or order for directions. *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769. See also *Lawless v. Barger*, 9 Bush (Ky.) 665.

**Discretion of Court Controlled by Deed of Trust.** — *Campbell v. Johnston*, 4 Dana (Ky.) 177.

**2. Directions of Court as to Place of Sale Must Be Followed.** — *Long v. Perine*, 41 W. Va. 314. See also *Talley v. Starke*, 6 Gratt. (Va.) 339.

**What Constitutes Compliance with Statute.** — A sale at the court house door is sufficient under a statute providing for sales at the court house. *Smith v. Burnes*, 8 Kan. 197.

**Confirmation of Sale Not Made at Proper Place Not Void.** — *Revill v. Claxon*, 12 Bush (Ky.) 558.

**3. Discretion of Person Appointed to Make Sale in Absence of Directions.** — *Long v. Peirne*, 41 W. Va. 314.

**Discretion of Officer Making Sale Within Statutory Limits.** — *Hanes v. Taylor*, (Supm. Ct.) 3 How. Pr. (N. Y.) 206.

**4. Sale at Court House Door.** — See *Revill v. Claxon*, 12 Bush (Ky.) 558; *Barnes v. Jackson*, 85 Ky. 407; *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769.

**Discretion of Court to Order Sale at Court House of County Other than That in Which Lands Are Situated.** — *Sessions v. Peay*, 23 Ark. 39.

**5. Building Where Sittings of Court Are Held.** — *Kane v. McCown*, 55 Mo. 181.

**6. Sale by Commissioner Standing Inside of Court House.** — *Patterson v. Reynolds*, 19 Ind. 148. See also *The Ruby*, 38 Fed. Rep. 622.

**7. Sale of Land on the Premises.** — *Sessions v. Peay*, 23 Ark. 39.

A sale of land may properly be made on the premises, where the decree of the court so directs, and such decree is authorized by the existing law. *Mitchell v. Berry*, 1 Met. (Ky.) 602.

**8. After Direction to Sell on Land, Sale Elsewhere Improper.** — *Talley v. Starke*, 6 Gratt. (Va.) 339.

**9. Such a Short Distance Beyond Boundary of Land.** — *Ferguson v. Franklins*, 6 Munf. (Va.) 305.

**10. Presumption that Sale Was Made at Proper Place.** — *Tate v. Bush*, 62 Miss. 145.

**11. Court Ordering Sale May Prescribe Mode.** — *Sessions v. Peay*, 23 Ark. 39; *Long v. Perine*, 41 W. Va. 314. See also *Talley v. Starke*, 6 Gratt. (Va.) 339.

If the Decree Does Not Fix the Manner of Sale it is left to the sound discretion of the commissioner or officer making it. *Long v. Perine*, 41 W. Va. 314.

**12. Directions Must Be Adhered to.** — *Langsdale v. Mills*, 32 Ind. 380; *Long v. Perine*, 41 W. Va. 314. See also *Talley v. Starke*, 6 Gratt. (Va.) 339; *Quarles v. Lacy*, 4 Munf. (Va.) 251.

**Formalities of the Law Must Be Strictly Complied With.** — *Patterson v. Gaines*, 6 How. (U. S.) 550.

**When Directions May Be Departed From.** — A



the sale is made in the mode indicated in the advertisement or notice,<sup>1</sup> and conduct all the proceedings leading up to the sale, and the sale itself, in a fair and impartial manner, so that the property may bring the best price possible.<sup>2</sup>

**Presumption that Sale Was Made in Proper Manner.** — After confirmation, it will be presumed that a judicial sale was made in the proper manner.<sup>3</sup>

**b. PUBLIC OR PRIVATE SALE.** — A judicial sale may be either public or private,<sup>4</sup> according to the directions of the statute regulating the matter, if there be one,<sup>5</sup> or of the court ordering the sale.<sup>6</sup> Such directions should properly be followed,<sup>7</sup> and in some instances a failure to follow them has been held fatal to the sale;<sup>8</sup> but in *Maryland* it is considered that a departure from such directions may be proper, if there be a good reason therefor,<sup>9</sup> in which case the sale may be confirmed,<sup>10</sup> which will, of course, cure the irregularity.<sup>11</sup> And this view has received recognition in *England* also.<sup>12</sup>

**c. SALE EN MASSE OR IN PARCELS** — (1) *In General.* — It is presumed that, where property can be divided and sold in lots, a sale in that manner

departure from the regulations of the decree in any essential respect, without first attempting to sell in conformity with them, will always prevent a ratification, if objection be made. But after the trustee has once offered the property in the market, in the mode prescribed by the decree, and has been unable to sell it, he may dispose of it in a different mode, and then it is for the court to say whether it will ratify the sale or not. *Glenn v. Wootten*, 3 Md. Ch. 514. See also *Andrews v. Scotton*, 2 Bland (Md.) 629; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346.

**1. Sale Must Be Made in Mode Indicated in Advertisement or Notice.** — See *Hahn v. Pindell*, 1 Bush (Ky.) 539; *Jarboe v. Colvin*, 4 Bush (Ky.) 70; *Cofer v. Miller*, 7 Bush (Ky.) 545.

**2. Sale and Proceedings Leading Up Thereto Must Be Conducted Fairly and Impartially.** — *State v. Holliday*, 35 Neb. 327. See also *Baring v. Moore*, 5 Paige (N. Y.) 48.

**3. Presumption that Sale Was Made in Proper Manner.** — *Tate v. Bush*, 62 Miss. 145.

**4. Judicial Sale May Be Either Public or Private.** — *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Williams Case*, 3 Bland (Md.) 186; *Matter of Denison*, 114 N. Y. 621, 22 N. Y. St. Rep. 964; *Jackson v. Irwin*, 10 Wend. (N. Y.) 442; *Hess v. Rader*, 26 Gratt. (Va.) 746; *Cox v. Price*, (Va. 1895) 22 S. E. Rep. 512. See also *The Haytian Republic*, 64 Fed. Rep. 214.

**5. Statutory Regulation.** — See *Luttrell v. Wells*, 97 Ky. 84.

**6. Power of Court to Direct Either Public or Private Sale.** — *Rice v. Cleghorn*, 21 Ind. 80; *Worthington v. Dunkin*, 41 Ind. 515; *Maxwell v. Campbell*, 45 Ind. 360; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Williams Case*, 3 Bland (Md.) 186; *Cox v. Price*, (Va. 1895) 22 S. E. Rep. 512.

**Court May Modify Order for Public Sale So as to Authorize Private Sale.** — And this may be done on the day of sale. *Tutt v. Zenier*, 51 Mo. 431.

**Decree for Private Sale with Consent of Owner — Consent Cannot Be Withdrawn.** — *Hudgins v. Lanier*, 23 Gratt. (Va.) 494.

**7. Private Sale Improper Where Decree Ordered Public Sale.** — *Peirce v. Graham*, 85 Va. 227. See also *Raymond v. Webb*, *Lofft*, 66; *Latrobe v. Herbert*, 3 Md. Ch. 375; *Kelso v. Jessop*, 59 Md. 119; *Berry v. Gibbons*, L. R. 15 Eq. 150, 42 L. J. Ch. 231.

**Communication of Limit as to Price Does Not Make Sale a Private One.** — *Cohen v. Wagner*, 6 Gill (Md.) 236.

**Order for Private Sale Does Not Authorize Public Sale.** — *Mallard v. Dejan*, 45 La. Ann. 1270.

**8. Where Statute Requires Public Sale, Private Sale Invalid.** — *Hutchinson v. Cassidy*, 46 Mo. 431.

**Even Though Made Pursuant to Order of Court.** — *Luttrell v. Wells*, 97 Ky. 84.

**Or Approved by the Court.** — *Ellet v. Paxson*, 2 W. & S. (Pa.) 418.

**Purchaser at Public Sale Cannot Be Compelled to Accept Title Where Court Ordered Private Sale.** — *Mallard v. Dejan*, 45 La. Ann. 1270.

**9. Directions May Be Departed From Where There Are Good Reasons Therefor.** — *Andrews v. Scotton*, 2 Bland (Md.) 643; *Cunningham v. Schley*, 6 Gill (Md.) 207; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346.

**Private Sale After Fruitless Efforts to Sell at Public Sale Sustained.** — *Gibbs v. Cunningham*, 1 Md. Ch. 44. See also *Cunningham v. Schley*, 6 Gill (Md.) 207; *Latrobe v. Herbert*, 3 Md. Ch. 375; *Kelso v. Jessop*, 59 Md. 114.

**10. Sale Contrary to Directions May Be Confirmed.** — *Andrews v. Scotton*, 2 Bland (Md.) 643; *Cunningham v. Schley*, 6 Gill (Md.) 207; *Latrobe v. Herbert*, 3 Md. Ch. 375; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Tyson v. Mickle*, 2 Gill (Md.) 376; *Speed v. Smith*, 4 Md. Ch. 299. See also *Kelso v. Jessop*, 59 Md. 114.

**Court May Ratify Private Sale of Decedent's Land Though Will Directs Public Sale.** — *Kelso v. Jessop*, 59 Md. 114.

**Deviation from Terms Prescribed Gives Greater Force to Other Objections to Ratification.** — See *Kelso v. Jessop*, 59 Md. 114; *Latrobe v. Herbert*, 3 Md. Ch. 377.

**Circumstances under Which Private Sale Will Not Be Ratified.** — See *Kelso v. Jessop*, 59 Md. 114.

**11. Irregularity Cured by Confirmation.** — See *infra*, this article, *Confirmation*.

**12. Private Sale for Reserved Price Upheld After Failure to Realize Same at Public Sale.** — *Bonsfield v. Hodges*, 33 Beav. 90. Even though the reserved price was divulged in violation of express instructions. *Else v. Barnard*, 28 Beav. 228, 29 L. J. Ch. 729, 6 Jur. N. S. 621, 2 L. T. N. S. 203.



will realize the best price.<sup>1</sup> Therefore it is considered, as a general rule, that property should be so sold when practicable,<sup>2</sup> and this rule is established in some jurisdictions by constitutional or statutory provisions.<sup>3</sup>

**Discretion of Court.** — In the absence of some such provision, whether the sale shall be made *en masse* or in parcels is a matter which rests in the sound discretion of the court ordering the sale,<sup>4</sup> and its ruling in this respect will not be set aside by an appellate court, unless plainly erroneous.<sup>5</sup>

**Discretion of Officer Making Sale.** — The determination of the manner of sale in this respect may also be and sometimes is left to the discretion of the officer or person directed or appointed to make the sale,<sup>6</sup> who must in such case sell in the manner which he deems calculated to produce the best price.<sup>7</sup>

(2) *Order of Selling Different Lots.* — Where property to be sold is divided or divisible into lots or parcels, the court ordering the sale may direct in what

**1. Presumption that Best Price Will Be Obtained by Sale in Parcels.** — *Meeker v. Evans*, 25 Ill. 322; *Burnett v. Eaton*, 29 N. J. Eq. 466.

**2. Sale Should Be in Parcels When Practicable.** — *Meeker v. Evans*, 25 Ill. 322; *Sebree v. Coleman*, (Ky. 1893) 22 S. W. Rep. 852; *Jackson v. Irwin*, 10 Wend. (N. Y.) 442. See also *Bronger v. Hoover*, 12 Ky. L. Rep. 750; *National Bank v. Sprague*, 20 N. J. Eq. 159; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Merchants Ins. Co. v. Hinman*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 455.

**Separate Sales of Adjoining Pieces of Property May Be Sustained.** — *McCall's Succession*, 28 La. Ann. 713.

**Objection to Sale En Masse Must Be Made in Apt Time.** — *Williams v. Rhodes*, 81 Ill. 571.

**3. Constitutional Requirement of Sale in Parcels.** — *Truxillo's Succession*, 24 La. Ann. 454; *Loyd v. Loyd*, 23 La. Ann. 231; *Borde v. Erskine*, 33 La. Ann. 873; *Swofford v. Garmon*, 51 Miss. 348; *Fisk v. Varnell*, 39 Tex. 73.

**Statutory Requirement of Sale in Parcels.** — *Vanmeter v. Vanmeter*, 88 Ky. 448; *Ficener v. Bott*, (Ky. 1895) 29 S. W. Rep. 639, 16 Ky. L. Rep. 519.

**Provision for Sale in Lots Held Mandatory.** — *Norton v. Citizens' Bank*, 28 La. Ann. 354.

**A Provision that Lands Shall Be Divided into Tracts Not to Exceed a Certain Amount, is not contravened by a sale by subdivision into much smaller lots.** *Swofford v. Garmon*, 51 Miss. 348.

**Special Survey for Purposes of Sale Not Necessary.** — *Walker v. Kimbrough*, 27 La. Ann. 518; *Duckworth v. Vaughan*, 27 La. Ann. 599.

**Sale of One Lot with Privilege to Purchaser of Taking the Others at the Same Price Not a Separate Sale.** — *Borde v. Erskine*, 33 La. Ann. 873.

**Constitutional Provision Not Retrospective.** — *Duckworth v. Payne*, 26 La. Ann. 683.

**Sale in Violation of Constitutional Requirement Not Annulled on Relation of Plaintiff.** — The fact that the property was not divided into lots of fifty acres or less, according to Article 132 of the Constitution, is not sufficient cause for annulling the sale on the relation of the plaintiff, who complains of the illegality of the executory proceeding under which it took place. *Stevens v. Pinneo*, 26 La. Ann. 617.

**4. Discretion of Court.** — *Gregory v. Campbell*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 417; *Reynolds v. Telfair*, 5 N. Y. L. Bul. 21; *Ross v. Carroll*, 33 S. Car. 202; *Long v. Weller*, 29 Gratt. (Va.) 347.

**Order of Court Must Be Followed.** — *Babcock v. Perry*, 8 Wis. 277.

**Courts Should Direct Form and Manner of Division.** — A court directing the sale of so much of the mortgaged premises as might be necessary to satisfy the debt due should, after finding that the premises are susceptible of division, designate the form and manner of division. *Brugh v. Darst*, 16 Ind. 79.

**Reference Not Necessary Before Directing Sale En Masse.** — *Tallman v. Truesdell*, 3 Wis. 443.

**Time for Objecting to Sale En Masse According to Decree.** — Where a tract of land is decreed to be sold as one tract the owner, if he wishes it to be sold in subdivisions, should ask the court to so order, or the master to so offer it. He cannot remain silent with regard to the matter until the sale is made, and afterwards be permitted to insist upon it by way of objection to confirming the sale. *Nix v. Draughon*, 56 Ark. 240. See also *Hartshorne v. Reeder*, 3 Wkly. L. Gaz. 245, 3 Ohio Dec. (Reprint) 109. Especially where there is no offer by any one to pay a higher price for any parcel, or for the whole, than the sale realized, in case the bidding should be reopened. *Central Trust Co. v. Sheffield, etc., Coal, etc., Co.*, 60 Fed. Rep. 9.

**5. Ruling Not Set Aside unless Plainly Erroneous.** — *Long v. Weller*, 29 Gratt. (Va.) 347. See also *Haly v. Buckley*, 7 Ky. L. Rep. 673.

**6. Discretion of Officer — Maryland.** — *Hopper v. Hopper*, 79 Md. 400. See also *Carroll v. Hutton*, 88 Md. 676.

**New Jersey.** — *Kelly v. Neshanic Min. Co.*, 7 N. J. Eq. 579; *National Bank v. Sprague*, 20 N. J. Eq. 159.

**New York.** — *Whitbeck v. Rowe*, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 403; *Suffern v. Johnson*, 1 Paige (N. Y.) 450, 19 Am. Dec. 440.

**Ohio.** — See *Stall v. Macalester*, 9 Ohio 19.

**West Virginia.** — *Rose v. Brown*, 17 W. Va. 649.

See also *Lucas v. Moore*, 2 Lea (Tenn.) 1.

**Presumption that Officer Will Act Fairly.** — *Kelly v. Neshanic Min. Co.*, 7 N. J. Eq. 579.

**If the Discretion of the Officer Was Fairly Exercised, the Sale Will Not Be Set Aside** because the court may think that a better price would have been realized by a different mode. *National Bank v. Sprague*, 20 N. J. Eq. 159.

**7. Officer Must Sell in Manner Calculated to Produce Best Price.** — *Suffern v. Johnson*, 1 Paige (N. Y.) 450, 19 Am. Dec. 440; *Rose v. Brown*, 17 W. Va. 649.



order such lots should be sold.<sup>1</sup> In case no such direction be given, the order of sale is left to the discretion of the officer making the sale,<sup>2</sup> but the defendant or owner of such lots, while he has not the right to determine the order of sale, has a right to be heard on the subject and have his suggestions considered, and, if for the best, followed.<sup>3</sup>

(3) *When Sale En Masse Is Proper.* — It is considered proper to sell *en masse*, without attempting any subdivision, when the property to be sold is indivisible,<sup>4</sup> or is of such a nature that its value might obviously be impaired by a division into parcels.<sup>5</sup> And it has also been considered that where property has been offered for sale in parcels, as required by statute or order of court, and no bid has been received, it may then be proper to sell the property as a whole.<sup>6</sup>

(4) *Offering in Both Methods and Sale at Highest Bid.* — As it is desirable in judicial sales to realize the best price possible, property is sometimes offered first in parcels and then *en masse*, or *vice versa*, and the sale made for the highest price which has been bid in either manner.<sup>7</sup>

(5) *Sale Must Be Pursuant to Notice.* — A sale must be made pursuant to the notice, and a sale *en masse* after an advertisement of a sale in parcels, or *vice versa*, is improper.<sup>8</sup>

*d. SALES OF PERSONALTY.* — A judicial sale of personalty is not invalid because the property sold was not present nor on view at the place where and time when the sale was made,<sup>9</sup> nor because a printed catalogue was not furnished to bidders,<sup>10</sup> nor because a short time only was allowed for the removal of the property by the buyer.<sup>11</sup>

**5. Bids** — *a. MANNER OF MAKING* — (1) *Bid Through Agent.* — A bid

**1. Court May Direct Order of Sale.** — Long v. Weller, 29 Gratt. (Va.) 347.

In Indiana it is considered to be the duty of the court to direct the order of sale. Brugh v. Darst, 16 Ind. 79; Knarr v. Conaway, 42 Ind. 260. See also Houston v. Houston, 67 Ind. 276. And it has been held error to give to the plaintiff the power to direct the order in which the several parcels should be sold, as this might result in great injustice and oppression. Knarr v. Conaway, 42 Ind. 260.

**Order of Selling Mortgaged Premises Conveyed to Third Persons by Mortgagor.** — See Houston v. Houston, 67 Ind. 276.

**Sale Not Void Because Lots Not Sold in Order Directed by Court.** — McGavock v. Bell, 3 Coldw. (Tenn.) 513. See also Beard v. Morris, 14 Ky. L. Rep. 97, (Ky. 1892) 19 S. W. Rep. 598.

**2. Discretion of Officer.** — Head v. Clark, 88 Ky. 362. See also Perry v. Torian, 5 Ky. L. Rep. 427; King v. Platt, 37 N. Y. 155.

**3. Right of Owner to Have Suggestions Considered.** — King v. Platt, 37 N. Y. 155.

**4. Description of Property Not Showing It to Consist of Separate Tracts.** — In the absence of evidence it will not be inferred that land described as the "north one-third of lots five and six" constitutes separate tracts which should be sold separately. La Selle v. Nicholls, 56 Neb. 458.

**5. Sale May Be Made En Masse Where Value Would Be Impaired by Division.** — Firestone v. Klick, 67 Ind. 309; Shelby v. Harrison, 84 Ky. 144. See also Edgeworth v. Edgeworth, 12 Ir. Eq. 81; Meeker v. Evans, 25 Ill. 322; Ficenser v. Bott, (Ky. 1895) 29 S. W. Rep. 639.

**Illustrative Cases in Which Sales En Masse Have Been Held Proper** — *England.* — Cook v. Collieridge, 3 Russ. 520.

*United States.* — Hill v. Farmers', etc., Nat.

Bank, 97 U. S. 450; Elgutter v. Northwestern Mut. L. Ins. Co., 86 Fed. Rep. 500.

*Alabama.* — Parker v. Bluffton Car Wheel Co., 108 Ala. 140.

*Kentucky.* — Burns v. Ingersoll, 6 Ky. L. Rep. 742.

*Nebraska.* — Craig v. Stevenson, 15 Neb. 362.

*New Jersey.* — Guarantee Trust, etc., Co. v. Jenkins, 40 N. J. Eq. 451. See also National Bank v. Sprague, 20 N. J. Eq. 159.

*New York.* — Whitbeck v. Rowe, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 403; Gregory v. Campbell, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 417. See also American Ins. Co. v. Oakley, 9 Paige (N. Y.) 259.

*Virginia.* — Gibert v. Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

**Sale of Remainder and Life Estate Together.** — See Cranmer v. McSwords, 26 W. Va. 412.

**6. Sale En Masse After Offer in Parcels with No Bids.** — Van Valkenburg v. School Trustees, 66 Ill. 103, following Phelps v. Conover, 25 Ill. 309; Martin v. Hargardine, 46 Ill. 322.

**7. Offering in Both Methods.** — See Vanmeter v. Vanmeter, 88 Ky. 448; Terry v. Swinford, (Ky. 1897) 41 S. W. Rep. 553; Person v. Leathers, 67 Miss. 548; Bradley v. Villere, 66 Miss. 399; Moore v. Triplett, 96 Va. 603.

**8. Sale Must Be Pursuant to Notice.** — Hahn v. Pindell, 1 Bush (Ky.) 539; Jarboe v. Colvin, 4 Bush. (Ky.) 70.

**9. Sale Not Invalid Because Personalty Not Present.** — Morrow v. McGregor, 49 Ark. 67; National Bank v. Sprague, 20 N. J. Eq. 159; Winter v. Eckert, 93 N. Y. 367, affirming 4 N. Y. L. Bul. 86.

**10. Printed Catalogue Not Furnished to Bidders.** — National Bank v. Sprague, 20 N. J. Eq. 159.

**11. Short Time Allowed for Removal of Property.** — National Bank v. Sprague, 20 N. J. Eq. 159.



at a judicial sale may be made through an agent,<sup>1</sup> and the sale will be valid whether the agent bids in his own name and is set down as the purchaser, or the bid is made in the name of his principal.<sup>2</sup>

(2) *Bid Received by Letter.* — Where a bid has been received by letter, it is the better course for the person appointed to make the sale to announce such bid at the commencement thereof, but it is not ground for setting aside the sale that such bid was announced after three or four other bids had been made, and the property struck off to the bidder whose bid was so announced, where the announcement of the bid was open and the sale was fairly conducted, and ample time was given for an advance to be made on the bid so announced.<sup>3</sup>

(3) *Bidding by Private Signal.* — It is not proper for the auctioneer at a judicial sale to allow a person to bid by means of a preconcerted private signal.<sup>4</sup>

*b. LIMITATION OF TIME FOR BIDDING.* — While the court would discourage a limitation of the time for bidding prescribed to the bidders, which would prevent a fair sale of the property for the most it would bring at the time of auction, yet in a case where the limitation was only resorted to after the land had been cried for a considerable time, and was even then repeatedly done away with and the sale continued, the court refused to set aside such sale, considering that the only effect of the limitation must have been to quicken and excite the bidders.<sup>5</sup>

*c. ANNOUNCEMENT OF NAME OF BIDDER.* — It is not necessary or usual in crying a bid to announce the name of the bidder, nor is it necessary that this be known.<sup>6</sup>

*d. REJECTION OF BIDS.* — Ordinarily the officer making a judicial sale is bound to accept all bids and sell the property to the highest bidder.<sup>7</sup> But in order that the object of the sale may not be defeated, the court may order that the bids of some persons be not received, or be received only upon conditions,<sup>8</sup> and the officer making the sale may decline to receive the bids of persons who give no satisfactory assurance of their ability and willingness to comply with such bids,<sup>9</sup> or, if he has reason to doubt the good faith of a bidder, he may demand an immediate compliance with the terms of sale and, if there be no such compliance, at once proceed to resell the property.<sup>10</sup>

*Conditional Bids.* — And no bids need be entertained which are coupled with conditions not in conformity with the terms of the decree,<sup>11</sup> or the advertise-

In this case the hotel in which the property, consisting of furniture, was, had been sold immediately before the sale of the furniture, and it appeared that a necessity existed for a prompt delivery of possession of the building to the purchaser thereof.

1. *Bid May Be Made Through an Agent.* — *Quigley v. Breckenridge*, 180 Ill. 627; *Ingalls v. Rowell*, 149 Ill. 163; *Gibbs v. Davies*, 168 Ill. 205; *Den v. Lambert*, 13 N. J. L. 182. See also *Gray v. Veirs*, 33 Md. 18; *Silver v. Campbell*, 25 N. J. Eq. 465; *National Bank v. Sprague*, 20 N. J. Eq. 159.

*Bid by Agent in Excess of Amount to Which He Is Authorized to Go Properly Rejected.* — *Gray v. Veirs*, 33 Md. 18.

2. *Sale Valid Whether or Not Principal Disposed.* — *Den v. Lambert*, 13 N. J. L. 182. See also *supra*, this title, *Who May Purchase—Agent*.

3. *Announcement of Bid Received by Letter.* — *Wenner v. Thornton*, 98 Ill. 156.

4. *Bid by Private Signal Improper.* — *Conover v. Walling*, 15 N. J. Eq. 173.

5. *Limitation of Time.* — *Fairfax v. Muse*, 4 Munf. (Va.) 124.

6. *Name of Bidder Need Not Be Announced.* — *Cohen v. Wagner*, 6 Gill (Md.) 236.

7. *All Bids Should Be Accepted.* — *Morton v. Moore*, 4 Ky. L. Rep. 717. See also *Creutz v. Knecht*, 9 Ky. L. Rep. 772, (Ky. 1888) 6 S. W. Rep. 717.

*Where a Judicial Sale Is to Be Made Without Reserve*, it is not open to the vendors, having once offered the property for sale, to refuse a bid, however small. *O'Connor v. Woodward*, 6 Ont. Pr. 223.

8. *Court May Order that Bids of Some Persons Be Not Received, or Received on Conditions Only.* — *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381.

9. *Officer May Decline to Receive Bids of Persons Who Give No Assurance of Ability to Comply Therewith.* — *Hildreth v. Turner*, 89 Va. 858. See also *Gray v. Veirs*, 33 Md. 18; *Maryland Permanent Land, etc., Soc. v. Smith*, 41 Md. 516; *Thomson v. Ritchie*, 80 Md. 247.

10. *Officer May Demand Immediate Compliance with Terms of Sale and in Default Thereof Resell Property at Once.* — *Irby v. Irby*, 11 Lea (Tenn.) 165. See also *Merritt v. Borden*, 2 Disney (Ohio) 503, 3 Wkly. L. Gaz. 348, 3 Ohio Dec. (Reprint) 140.

11. *Conditions Not in Conformity with Terms of Decree.* — *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281.



ment of sale,<sup>1</sup> or which cannot be complied with.<sup>2</sup>

*e.* **RIGHT OF BIDDER TO WITHDRAW BID.** — A bidder at a judicial sale made at public auction may withdraw his bid at any time before the acceptance thereof has been signified by the falling of the hammer,<sup>3</sup> but thereafter the contract is binding and cannot be withdrawn or changed except under such circumstances as would justify the rescission or reformation of other contracts.<sup>4</sup>

*f.* **BIDDER RELEASED FROM LIABILITY BY ACCEPTANCE OF HIGHER BID.** — A bidder at a judicial sale is released from all liability on his bid by a higher bid being accepted and called out; and therefore upon the failure of the highest bidder to comply with his bid, the next highest bidder cannot be held.<sup>5</sup>

**6. Withdrawal of Property from Sale.** — In *South Carolina* it is considered that property which has been offered at judicial sale may be withdrawn after a bid has been made,<sup>6</sup> but a contrary doctrine prevails in *Ontario*.<sup>7</sup>

**7. Course Pursued Where Same Bid Claimed by Two Persons.** — Where two or more persons each claim to have made the bid at which the property was knocked down, and there is good ground for dispute as to who is really entitled to it, it is proper for the person making the sale to reoffer the property at once, crying it out at the amount of the last bid.<sup>8</sup>

**8. Resale upon Failure of Successful Bidder to Comply with Bid.** — In a good many jurisdictions it is the rule that where the highest bidder at a judicial sale fails to comply with his bid by paying cash down for the property, or giving bonds for the purchase money according to the terms of the sale, the officer conducting the sale may proceed to resell the property without any further order of court for that purpose.<sup>9</sup>

**9. Reserved Price.** — Where a judicial sale is made, not for the payment of debts, but merely to effect a division or to convert the property for the interest and advantage of infants or persons *non compos mentis*, the courts of *England* and *Maryland* have recognized the propriety of having a reserved price, below which the property will not be sold,<sup>10</sup> and in the latter jurisdiction the

1. Conditions Not in Conformity with Advertisement of Sale. — *Moore v. Owsley*, 37 Tex. 603.

2. Conditions Which Cannot Be Complied with. — *Irbv v. Irby*, 11 Lea (Tenn.) 165. The bid in this case was conditioned on the bidder being "assured of acquiring a good title to the property under his purchase."

3. Bid May Be Withdrawn Before Hammer Has Fallen. — *Grotenkemper v. Achtermeyer*, 11 Bush (Ky.) 222; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *National Bank v. Sprague*, 20 N. J. Eq. 159. See also *Hibernia Sav., etc., Soc. v. Behnke*, 121 Cal. 339.

Master May Refuse to Allow Puffer to Withdraw His Bid. — *National Bank v. Sprague*, 20 N. J. Eq. 159.

4. Bid Cannot Be Withdrawn or Changed After Acceptance. — *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281.

5. Bidder Released from Liability by Acceptance of Higher Bid. — *Dazet v. Landry*, 21 Nev. 291; *Thompson v. McManama*, 2 Disney (Ohio) 215.

6. Property May Be Withdrawn. — See *Miller v. Law*, 10 Rich. Eq. (S. Car.) 320, 73 Am. Dec. 92.

7. Ontario Rule — Property Cannot Be Withdrawn After Bid Has Been Made. — *McAlpine v. Young*, 2 Ch. Chamb. (Ont.) 85, 171; *O'Connor v. Woodward*, 6 Ont. Pr. 223.

8. Proper Course Where Two or More Persons Claim the Same Bid. — *Head v. Clark*, 88 Ky. 362; *Conover v. Walling*, 15 N. J. Eq. 173.

9. Resale on Failure of Successful Bidder to Comply with Bid. — *The Haytian Republic*, 64 Fed. Rep. 214; *Hughes v. Swope*, 88 Ky. 254; *Swafford v. Howard*, (Ky. 1899) 50 S. W. Rep. 43; *Wilson v. Thorn*, 11 Ky. L. Rep. 945; *Dobard v. Bayhi*, 36 La. Ann. 134; *Jones v. Null*, 9 Neb. 254; *Dazet v. Landry*, 21 Nev. 291; *Bicknell v. Byrnes*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 486; *Hewlett v. Davis*, 3 Edw. (N. Y.) 338; *Sauer v. Steinbauer*, 14 Wis. 70; *Lane v. White*, 12 Wis. 381. See also *Phelps v. Jackson*, 31 Ark. 272; *Ruckle v. Barbour*, 48 Ind. 274; *Head v. Clark*, 88 Ky. 362; *Thompson v. Dimond*, 3 Edw. (N. Y.) 298.

Time Allowed for Compliance with Bid Dependent upon Circumstances. — *Hughes v. Swope*, 88 Ky. 254.

The Officer Cannot Wait until the Sale Is Closed and the Bidders Have Departed before again offering the property for sale. *Jones v. Null*, 9 Neb. 254.

But He Should Not Be in Unreasonable Haste to reoffer it. *Lane v. White*, 12 Wis. 381. See also *Converse v. Clay*, 86 Mich. 375.

South Carolina Doctrine that Resale Cannot Be Made Without Another Order of Court. — *Ex p. Knight*, 28 S. Car. 481.

Failure to Sell Through Want of Bidders — Resale Without Further Order. — *Sherwood v. Campbell*, 1 Ch. Chamb. (Ont.) 299.

10. Propriety of Fixing Reserved Price. — *Jervoise v. Clarke*, 1 Jac. & W. 389; *Else v. Bar-*



court has even considered it proper to employ a by-bidder in order to get the property up to such reserved price.<sup>1</sup>

**10. Puffing.** — A contract having for its object the puffing of bidding at a judicial sale is illegal,<sup>2</sup> and a purchaser is entitled to be relieved from his purchase where his bid has been increased in consequence of puffing,<sup>3</sup> but it would seem that the fact of a puffer having bid at a sale will not avoid the sale, if after the bid of the puffer there was a *bona fide* bid before the bid at which the property was knocked down.<sup>4</sup>

**11. Suppression of Competition or Chilling Bidding.** — As a general rule, any arrangement made for the purpose of reducing or suppressing competition at a judicial sale, or any device, trickery, agreement, or contrivance to chill the bidding thereat, is fraudulent and void,<sup>5</sup> and will furnish sufficient ground for setting aside the sale,<sup>6</sup> or even, it has been held in some cases, render the

nard, 28 Beav. 228, 29 L. J. Ch. 729, 6 Jur. N. S. 621, 2 L. T. N. S. 203; Bousfield v. Hodges, 33 Beav. 90; Tennant v. Trenchard, 41 L. J. Ch. 770, 20 W. R. 785; Notley v. Salmon, 1 W. R. 240; Williams's Case, 3 Bland (Md.) 186. See also Conolly v. Parsons, 3 Ves. Jr. 625, note e; Smith v. Clarke, 12 Ves. Jr. 477; Brooker v. Collier, 3 Russ. 369.

**Only One Reserved Bidding Can Be Fixed.** — Notley v. Salmon, 1 W. R. 240. See also Jervoise v. Clarke, 1 Jac. & W. 389. Unless the property is sold in lots, in which case there may be one reserved bidding for each lot. Jervoise v. Clarke, 1 Jac. & W. 389.

**1. Employment of By-Bidder.** — Williams's Case, 3 Bland (Md.) 186. But see next subdivision.

**2. Contract for Puffing Sales Illegal.** — See the title *ILLEGAL CONTRACTS*, vol. 15, p. 950.

**3. Purchaser Entitled to Be Relieved from Purchase.** — Veazie v. Williams, 8 How. (U. S.) 153; Moncrieff v. Goldsborough, 4 Har. & M. (Md.) 281; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; National Bank v. Sprague, 20 N. J. Eq. 159; Morris v. Woodward, 25 N. J. Eq. 32; Staines v. Shore, 16 Pa. St. 200, 55 Am. Dec. 492; Pennock's Appeal, 14 Pa. St. 449, 53 Am. Dec. 561; Donaldson v. M'Roy, 1 Browne (Pa.) 346; Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

**Bad Faith of Bids Must Be Proved.** — Robinson v. Robinson, 11 Bush (Ky.) 174.

**Election After Full Knowledge and Inquiry to Abide by Purchase — Sale Sustained in Equity.** — Robinson v. Robinson, 11 Bush (Ky.) 174.

**4. Bona Fide Bid After Bid of Puffer.** — National Bank v. Sprague, 20 N. J. Eq. 159.

**5. Chilling Bidding.** — See the title *ILLEGAL CONTRACTS*, vol. 15, p. 950, note 1.

**6. Sale May Be Set Aside** — *United States*. — Cocks v. Izard, 7 Wall. (U. S.) 559.

*Alabama.* — See Costillo v. Thompson, 9 Ala. 937.

*District of Columbia.* — Horsey v. Beveridge, 4 Mackey (D. C.) 291.

*Georgia.* — Barnes v. Mays, 88 Ga. 696.

*Illinois.* — Loyd v. Malone, 23 Ill. 43, 74 Am. Dec. 179; Coffey v. Coffey, 16 Ill. 142; Quigley v. Breckenridge, 180 Ill. 627; Garrett v. Moss, 20 Ill. 549; Mathison v. Prescott, 86 Ill. 493; Barling v. Peters, 134 Ill. 606; Ingalls v. Rowell, 149 Ill. 163; Meeker v. Evans, 25 Ill. 322. See also Wilson v. Kellogg, 77 Ill. 47; Stoker v. Greenup, 18 Ill. 27; Longwith v. Butler, 8 Ill. 32; Mapps v. Sharpe, 32 Ill. 13; Devine v. Harkness, 117 Ill. 145.

*Kansas.* — Benz v. Hines, 3 Kan. 390, 89 Am. Dec. 594; White-Crow v. White-Wing, 3 Kan. 276.

*Kentucky.* — Mills v. Rogers, 2 Litt. (Ky.) 217, 13 Am. Dec. 263; Martin v. Blight, 4 J. J. Marsh. (Ky.) 491, 20 Am. Dec. 226; Myers v. Sanders, 7 Dana (Ky.) 506; Baldwin v. Kendall, 14 Ky. L. Rep. 302.

*Mississippi.* — Mitchell v. Harris, 43 Miss. 314; Pattison v. Josselyn, 43 Miss. 373; Swoford v. Garmon, 51 Miss. 348.

*Missouri.* — Wooton v. Hinkle, 20 Mo. 290; Hook v. Turner, 22 Mo. 333; Stewart v. Nelson, 25 Mo. 309; Miltenberger v. Morrison, 39 Mo. 72; Stewart v. Severance, 43 Mo. 322, 97 Am. Dec. 392; Durfee v. Moran, 57 Mo. 374; Bailey v. Smock, 61 Mo. 213; Massey v. Young, 73 Mo. 260; Beedle v. Mead, 81 Mo. 297.

*Nebraska.* — Taylor v. Courtney, 15 Neb. 190.

*New Hampshire.* — Jones v. Portsmouth, etc., R. Co., 32 N. H. 544.

*New Jersey.* — Morris v. Woodward, 25 N. J. Eq. 32.

*New York.* — Howell v. Mills, 53 N. Y. 322.

*Ohio.* — Dudley v. Little, 2 Ohio 504, 15 Am. Dec. 575. See also Saxton v. Seiberling, 48 Ohio St. 554; Seymour v. Milford, etc., Turnpike Co., 10 Ohio 477.

*Rhode Island.* — Fenner v. Tucker, 6 R. I. 551.

*South Carolina.* — Johnston v. La Motte, 6 Rich. Eq. (S. Car.) 347; Barrett v. Bath Paper Co., 13 S. Car. 128; Herndon v. Gibson, 38 S. Car. 357, 37 Am. St. Rep. 765. See also Carson v. Law, 2 Rich. Eq. (S. Car.) 296.

*Texas.* — See Allen v. Stephanes, 18 Tex. 658.

*Wisconsin.* — Cleveland v. Southard, 25 Wis. 479.

**Clear Proof Required.** — Wilson v. Kellogg, 77 Ill. 47. See also Wood v. Wood, (Ky. 1897) 38 S. W. Rep. 709; Crutchfield v. Thurman, 4 Bush (Ky.) 498; Schlater v. Brusle, 49 La. Ann. 1704; Whitbeck v. Rowe, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 403.

**Relief Barred by Laches.** — Baggott v. Sawyer, 25 S. Car. 405.

**Decree of Confirmation Not Set Aside at Instance of Party to Fraud.** — Harrell v. Wilson, 108 N. Car. 97.

**Agreement Conditional on Purchase at a Specified Price, but Not Restrictive of Competition, Does Not Invalidate.** — Simrall v. Jacob, 14 B. Mon. (Ky.) 403.

**Abstaining from Bidding on Account of Sympa-**



sale void.<sup>1</sup>

**Lawful Combinations to Purchase.** — But there is nothing improper in an honest combination or association of several persons, entered into in order to enable them to bid at a judicial sale, and become the purchasers of property which singly they could not purchase.<sup>2</sup>

**Agreement Not to Bid for Protection of Existing Interest in Property.** — And it has been held that a person who has an existing interest in property to be sold at judicial sale may, for the protection of such interest, agree not to bid at the sale.<sup>3</sup>

**X. TERMS OF SALE -- 1. How Prescribed.** — In some jurisdictions the terms upon which judicial sales shall be made are fixed by law,<sup>4</sup> and where this is the case, the terms so fixed must invariably be adhered to;<sup>5</sup> but in the absence of some absolute statutory provision the matter is addressed to the discretion of the court ordering the sale, which may prescribe such terms as it sees fit,<sup>6</sup>

thy with Debtor's Family Does Not Vitiates. — *Alms, etc., Co. v. Gates*, (Ky. 1895) 32 S. W. Rep. 1088.

**1. Suppression of Competition or Chilling Bidding Renders Sale Void — England.** — See *Fuller v. Abrahams*, 6 Moo. C. Pl. 316, 3 Brod. & B. 116, 23 Rev. Rep. 626. But compare *In re Carew*, 26 Beav. 187, 28 L. J. Ch. 218, 4 Jur. N. S. 1290, 7 W. R. 81.

*Arkansas.* — *Penn v. Tolleson*, 20 Ark. 652.

*Iowa.* — *Kerwer v. Allen*, 31 Iowa 578; *Fleming v. Hutchinson*, 36 Iowa 519.

*Michigan.* — See *Alldrich v. Maitland*, 4 Mich. 205; *Dohm v. Haskin*, 88 Mich. 144.

*Nebraska.* — *Goble v. O'Connor*, 43 Neb. 49.

*Pennsylvania.* — *Phelps v. Benson*, 161 Pa. St. 418. See also *Abbey v. Dewey*, 25 Pa. St. 413; *Hogg v. Wilkins*, 1 Grant Cas. (Pa.) 67.

*Virginia.* — *Underwood v. McVeigh*, 23 Gratt. (Va.) 409.

**2. Lawful Combination.** — *Johns v. Slack*, 2 Hughes (U. S.) 467. See also the following cases:

*Georgia.* — *Buckner v. Chambliss*, 30 Ga. 652.

*Illinois.* — *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723.

*Kansas.* — *Capital Bank v. Huntoon*, 35 Kan. 577.

*Kentucky.* — *Young v. Smith*, 10 B. Mon. (Ky.) 293.

*Michigan.* — *Norman v. Olney*, 64 Mich. 553.

*Mississippi.* — See *Allen v. Martin*, 61 Miss. 78.

*Missouri.* — *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392.

*Nebraska.* — *Gulick v. Webb*, 41 Neb. 706, 43 Am. St. Rep. 720.

*Pennsylvania.* — *Slingluff v. Eckel*, 24 Pa. St. 472; *Young v. Snyder*, 3 Grant Cas. (Pa.) 151.

*South Carolina.* — *Barrett v. Bath Paper Co.*, 13 S. Car. 128.

And see further the title **ILLEGAL CONTRACTS**, vol. 15, p. 591, note 3.

**3. Owner of Existing Interest in Property May, for Protection of Such Interest, Agree Not to Bid.** — *De Baum v. Brand*, 61 N. J. L. 624.

**4. Terms of Sale Fixed by Law.** — *Welch v. Hicks*, 27 Ark. 292; *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373. See also *January v. January*, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211; *Hooper v. Castetter*, 45 Neb. 67; *Sauer v. Steinhauer*, 14 Wis. 70.

**Statutes Leaving Matter to the Discretion of the Court Within Fixed Limits.** — Under the *Arkansas* statute, judicial sales of real property

should be on a credit of not less than three nor more than six months, or in instalments equivalent to not more than 'four months' credit on the whole. *Fry v. Street*, 37 Ark. 39; *Worsham v. Freeman*, 34 Ark. 55; *Williams v. Ewing*, 31 Ark. 292; *Welch v. Hicks*, 27 Ark. 292; *Hunt v. Curry*, 37 Ark. 100; *Jackman v. Beck*, 37 Ark. 125.

Under the *Kentucky* statute, every sale made under an order of court must be "upon reasonable credits to be fixed by the court, not less than three months for personal nor six months for real property." *Meyer v. Covington*, (Ky. 1898) 45 S. W. Rep. 769; *Barnes v. Jackson*, 85 Ky. 407; *McKensie v. Salyer*, (Ky. 1897) 43 S. W. Rep. 450; *Willett v. Johnson*, 84 Ky. 411. A former *Kentucky* statute provided for a credit of not less than three nor more than twelve months. *Dunn v. Salter*, 1 Duv. (Ky.) 342. See also *Salter v. Dunn*, 1 Bush (Ky.) 311.

**Statute Not Retrospective.** — An act of the legislature directing the sales under decrees in chancery to be on credit, cannot operate on sales to enforce contracts made before its passage so as to make the credit longer than that provided for by the contract, as this would be unconstitutional. *January v. January*, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211.

**5. Terms Fixed by Statute Must Be Adhered to.** — *Jackman v. Beck*, 37 Ark. 125; *McKensie v. Salyer*, (Ky. 1897) 43 S. W. Rep. 450; *Morse v. Clayton*, 13 Smed. & M. (Miss.) 373; *Hooper v. Castetter*, 45 Neb. 67.

**Under Arkansas Statute Decree Must Expressly Direct Sale for Credit and Fix the Credit to Be Given.** — Otherwise it amounts to a direction for a cash sale, and is therefore erroneous. *Fry v. Street*, 37 Ark. 39; *Hunt v. Curry*, 37 Ark. 100.

**Arkansas Statute Does Not Apply to Sales by Executors and Administrators**, but in such cases the credit to be given is left to the sound discretion of the court. *Grider v. Apperson*, 38 Ark. 388.

**6. Discretion of Court Ordering Sale — United States.** — *The Haytian Republic*, 64 Fed. Rep. 214.

*Arkansas.* — See *Sessions v. Peay*, 23 Ark. 39.

*Nevada.* — *Dazet v. Landry*, 21 Nev. 291.

*New York.* — See *Walrath v. Abbott*, 75 Hun (N. Y.) 445.

*South Carolina.* — *Singleton v. Herriott*, Dudley L. (S. Car.) 254. See also *M'Call v. Elliott*, Dudley L. (S. Car.) 250; *Lowndes v. Chisholm*,



provided they be reasonable.<sup>1</sup>

**2. Debt or Contract under Which Property Sold as Affecting Terms.** — In *West Virginia* it has been held error to decree a sale of land on terms which made the payments fall due more rapidly than the instalments of the debt, for which the land was sold, became payable,<sup>2</sup> and in *Virginia* it is considered that the court, in decreeing a sale under a mortgage or deed of trust, is not authorized to vary the terms of sale from the terms prescribed in the instrument without the consent of the creditor.<sup>3</sup>

**3. Requiring Deposit.** — It is quite usual and perfectly proper, where property of large value is sold on credit, to require a cash deposit to be made by the purchaser at the time of the sale,<sup>4</sup> or even to require each bidder to make a deposit in order to show his responsibility.<sup>5</sup>

**4. Effect of Provision for Allowance Out of Purchase Money of Taxes and Assessments Due.** — A provision in the terms of sale that "all taxes and assessments, duly confirmed and payable, which at the time of the sale are liens or incumbrances upon said premises, will be allowed by the referee out of the purchase money," includes only the taxes and assessments which were confirmed and payable and had become liens upon the property at the time of the auction sale; for it would seem that the word "sale" applies to the auction sale at which the property was knocked down to the purchaser, and not to the formal delivery of the deed by which the legal title was vested in him.<sup>6</sup>

**5. Officer Must Sell on Terms Prescribed.** — The officer making a judicial sale must sell on the terms prescribed by law, or by the decree ordering the sale.<sup>7</sup>

2 McCord Eq. (S. Car.) 455, 16 Am. Dec. 667; McPherson v. Lynah, 14 Rich. Eq. (S. Car.) 121.

*Tennessee.* — Campbell v. Atwood, (Tenn. Ch. 1897) 47 S. W. Rep. 168.

*West Virginia.* — See Long v. Perine, 41 W. Va. 314.

Under the *Virginia* statute, the fixing of the terms of sale is left to the discretion of the court ordering the same. Dickinson v. Clement, 87 Va. 41; Brien v. Pittman, 12 Leigh (Va.) 379; Kyles v. Tait, 6 Gratt. (Va.) 44; Pairo v. Bethell, 75 Va. 828; Tennent v. Patton, 6 Leigh (Va.) 196; Haffey v. Birchetts, 11 Leigh (Va.) 85; Yost v. Porter, 80 Va. 855; Talley v. Starke, 6 Gratt. (Va.) 339. And the terms fixed by it will not be interfered with in the absence of a showing that the property would probably have commanded a better price if the sale had been made on other terms. Yost v. Porter, 80 Va. 855.

**The Judgment Should Be Explicit** in regard to the terms of sale, so that the commissioner should not be required to look to any other paper or order for directions. Meyer v. Covington, (Ky. 1898) 45 S. W. Rep. 769. See also Lawless v. Barger, 9 Bush (Ky.) 665.

**Credit Analogous to That Allowed on Execution Sales.** — See Oldham v. Halley, 2 J. J. Marsh. (Ky.) 113. But compare Wells v. Porter, 5 B. Mon. (Ky.) 416.

**Power of Court to Change Terms.** — So long as a sale has not been confirmed, the property and the sale are under the power of the court, which has the power to make a change in the terms of sale. Tebbs v. Lee, 76 Va. 744.

**1. Terms Held Reasonable.** — See Dickinson v. Clement, 87 Va. 41.

**Terms Held Not Reasonable.** — See Willett v. Johnson, 84 Ky. 411.

**2. Conformity of Terms to Maturity of Debt for Which Land Sold.** — Gates v. Cragg, 11 W. Va. 300.

**3. Conformity to Terms of Deed of Trust.** — Pairo v. Bethell, 75 Va. 825; Fultz v. Davis, 26 Gratt. (Va.) 903; Hogan v. Duke, 20 Gratt. (Va.) 244.

**4. Deposit by Purchaser.** — Turner v. Indianapolis, etc., R. Co., 8 Biss. (U. S.) 380; Maryland Permanent Land, etc., Soc. v. Smith, 41 Md. 516; Hand v. Savannah, etc., R. Co., 13 S. Car. 467.

In *England* and *Ireland*, the purchaser at a judicial sale is required to make a deposit, which may be forfeited if he does not complete the purchase. Hobbouse v. Hamilton, 1 Hog. 401; Newman v. Fitzgerald, 6 Ir. Eq. 258. And this although there has not been any report upon or reference as to the title. Newman v. Fitzgerald, 6 Ir. Eq. 258. But compare Warren v. Bateman, Flan. & Kel. 189.

**5. Deposit by Each Bidder.** — Turner v. Indianapolis, etc., R. Co., 8 Biss. (U. S.) 380; National Bank v. Sprague, 20 N. J. Eq. 159. But compare Hand v. Savannah, etc., R. Co., 13 S. Car. 467.

**6. Effect of Provision for Allowance Out of Purchase Money of Taxes and Assessments Due.** — Ainslie v. Hicks, 13 N. Y. App. Div. 388, affirmed 153 N. Y. 643.

**7. Officer Must Sell on Terms Prescribed — United States.** — The Haytian Republic, 64 Fed. Rep. 214.

*Alabama.* — Chilton v. Alabama Gold L. Ins. Co., 74 Ala. 290.

*Arkansas.* — Phelps v. Jackson, 31 Ark. 272.

*Georgia.* — See Taylor v. James, 109 Ga. 327, which was a case of a sale of a homestead by the owner thereof, under an order of court.

*Kentucky.* — Bethel v. Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655; Cofer v. Miller, 7 Bush (Ky.) 546; Musgrave v. Parrish, 11 Ky. L. Rep. 573; Luttrell v. Wells, 97 Ky. 84. See also Riley v. Wiley, 3 Dana (Ky.) 75.

*Mississippi.* — Alsobrook v. Eggleston, 69 Miss. 833.



But a Slight Variation May Be Overlooked where the court is satisfied that no injury has resulted therefrom.<sup>1</sup>

**6. Conformity to Advertisement.** — The sale must be made upon the terms set forth in the advertisement of sale.<sup>2</sup>

**7. Adjudications as to Propriety of Cash or Credit Sales.** — A few adjudications in the various states upon the question whether sales should be made for cash or on credit, which are not of general application nor in support of any general principle, are set out in the note.<sup>3</sup>

**XI. PURCHASE MONEY — 1. To Whom Payment Should Be Made — a. OFFICER MAKING SALE.** — As a general rule, the officer making the sale is authorized<sup>4</sup> or required<sup>5</sup> to collect the purchase money; and the purchaser must pay the same to him.<sup>6</sup>

*Nebraska.* — Hooper *v.* Castetter, 45 Neb. 67; Nebraska L. & T. Co. *v.* Hamer, 40 Neb. 281.

*Virginia.* — Miller *v.* Smoot, 86 Va. 1050. See also Talley *v.* Starke, 6 Gratt. (Va.) 339.

*West Virginia.* — Long *v.* Perine, 41 W. Va. 314.

*Wisconsin.* — Sauer *v.* Steinbauer, 14 Wis. 70. See also M'Call *v.* Elliott, Dudley L. (S. Car.) 250; Singleton *v.* Herriott, Dudley L. (S. Car.) 254; Keenan *v.* Ahern, 34 La. Ann. 885.

**Terms Cannot Be Changed by Agreement of Parties or Counsel Not Incorporated into the Record.** — Nebraska L. & T. Co. *v.* Hamer, 40 Neb. 281. See also Walrath *v.* Abbott, 75 Hun (N. Y.) 445.

**1. Slight Variations Immaterial.** — Johnson *v.* Campbell, 52 Ark. 316; Chilton *v.* Alabama Gold L. Ins. Co., 74 Ala. 290; Sheldon *v.* Pruessner, 52 Kan. 593. See also Ruckle *v.* Barbour, 48 Ind. 274. But compare The Haytian Republic, 64 Fed. Rep. 254.

**2. Conformity to Advertisement.** — Cofer *v.* Miller, 7 Bush. (Ky.) 516.

**Meaning of Notice that Sale Will Be for Cash.** — A notice in an advertisement of sale that it will be for cash means that the sale will be for ready money, in contradistinction to credit. Cash does not necessarily mean coin, and therefore where, after an advertisement of sale for cash, it is announced immediately before the sale that payment will be received in United States treasury notes, there is no variance from the published terms of sale. Meng *v.* Houser, 13 Rich. Eq. (S. Car.) 210.

**3. Credit Sales Preferred in Virginia.** — Under the discretion vested by the Virginia statute in the courts, real property of value should, as a general rule, be sold on reasonable credit, rather than for cash, unless under very peculiar circumstances. Brien *v.* Pittman, 12 Leigh (Va.) 379; Kyles *v.* Tait, 6 Gratt. (Va.) 44; Pairo *v.* Bethell, 75 Va. 825. See also Haffey *v.* Birchetts, 11 Leigh (Va.) 85; Tennent *v.* Patton, 6 Leigh (Va.) 196.

**Sale on Credit in Louisiana Where Creditors Did Not Request Sale for Cash.** — An objection that the property was adjudicated for less than its appraised value on twelve months' credit, without having been previously offered for cash, cannot be sustained, where the sale was made to pay debts, and the creditors did not require it to be made for cash. Norton *v.* Citizens' Bank, 28 La. Ann. 354.

**Ohio Rule in Absence of Direction by Court.** — In Ohio it is considered that, in the absence of an order of court requiring the sale to be for

cash, one-third of the purchase money is payable on the day of sale and the balance in two annual instalments, with interest. Collins *v.* Skillen, 16 Ohio St. 382, 88 Am. Dec. 458.

**Terms on Resale.** — The chancellor has power, after the failure of the purchaser of property sold by his order to pay for it, to order a resale which should be for cash, but may be on credit, as the chancellor may deem most proper. Page *v.* Hughes, 9 B. Mon. (Ky.) 115.

A resale on account of the failure of the purchaser at the first sale to meet his payments may be for cash. Lucas *v.* Moore, 2 Lea (Tenn.) 1.

**Sale Must Be for Cash unless Otherwise Directed.** — An officer selling property under a decree in equity has no authority to sell on credit unless, by the express terms of the decree or the statute, he is so authorized. Hooper *v.* Castetter, 45 Neb. 67.

**All Sales under Order of Court Must Be for Cash in Indiana.** — Ruckle *v.* Barbour, 48 Ind. 274.

**4. Authority of Officer to Collect Purchase Money** — Brown *v.* Coble, 76 N. Car. 391; Matthews *v.* Thompson, 2 Heisk. (Tenn.) 588. See also Broughton *v.* Haywood, Phil. L. (61 N. Car.) 380; State *v.* Cox, 62 Miss. 786; Fearing *v.* Shafner, 62 Miss. 791; Pool *v.* Ellis, 64 Miss. 555; Finney *v.* Edwards, 75 Va. 44.

**Until Confirmation of the Sale,** the person making the sale has no legal authority to receive the purchase money, and if he does so he holds it as the mere depository of the purchaser. State *v.* Cox, 62 Miss. 786; Fearing *v.* Shafner, 62 Miss. 791; Pool *v.* Ellis, 64 Miss. 555.

**5. Duty of Officer Making Sale to Collect Proceeds.** — Studebaker *v.* Johnson, 41 Kan. 326; Dent *v.* Maddox, 4 Md. 522. See also Ferguson *v.* Tutt, 8 Kan. 370.

**6. Purchase Money Must Be Paid to Officer Who Made Sale.** — Clark, etc., Invest. Co. *v.* Way, 52 Neb. 204; Fire Assoc. *v.* Ruby, 58 Neb. 730.

**Purchaser Cannot Discharge Liens Out of Purchase Money.** — Clark, etc., Invest. Co. *v.* Way, 52 Neb. 204.

**In West Virginia a Special Commissioner Cannot Collect or Sue on Bonds Without Special Authority.** — Clarke *v.* Shanklin, 24 W. Va. 30; Blair *v.* Core, 20 W. Va. 265, 29 W. Va. 477.

**Implied Authority to Collect Sale Bonds.** — See Blair *v.* Core, 29 W. Va. 477.

**In Virginia Commissioner Cannot Without Special Authority Collect Bonds Directed to Be Returned to Court.** — Omohundro *v.* Omohundro, 27 Gratt. (Va.) 824.



**b. PAYMENT TO PERSON NOT AUTHORIZED TO RECEIVE IT.** — The purchaser must at his peril see that the person to whom he pays the purchase money is authorized to receive the same,<sup>1</sup> for he is not relieved from liability by a payment to a person not authorized to receive it,<sup>2</sup> such as a commissioner of sale or a receiver who has not given the bond required by law in order to authorize him to receive payment,<sup>3</sup> or whose bond has not been approved;<sup>4</sup> unless there are some exceptional circumstances making it just that the purchaser should be protected.<sup>5</sup>

**Commissioner Liable to Purchaser.** — A commissioner who has received payment of purchase money without authority is liable to the purchaser therefor,<sup>6</sup> even though he acted in good faith and without negligence, and the money was lost through the failure of the bank in which he deposited it.<sup>7</sup>

**c. PAYMENT OF PURCHASE MONEY INTO COURT.** — The *English* and *Canadian* practice is for the purchaser to pay the purchase money into court.<sup>8</sup> He will not, however, be ordered or permitted to do so until he has accepted the title,<sup>9</sup> unless under special circumstances.<sup>10</sup>

**2. Method of Payment — a. IN GENERAL.** — As a general rule, the successful bidder at a judicial sale cannot satisfy his bid in any way except by the payment of lawful money, unless this be expressly authorized by the terms

**1. Purchaser Bound to See that He Pays Purchase Money to Person Authorized to Receive It.** — *Woods v. Ellis*, 85 Va. 471.

**2. Purchaser Not Relieved from Liability by Payment to Unauthorized Person.** — *Herndon v. Lancaster*, 6 Bush (Ky.) 483.

**When Payment to Unauthorized Person May Be Subsequently Sanctioned.** — In cases where the payment has been made to a person whom the court might have ordered to receive payment, the court may afterwards sanction and approve such payment, but it is otherwise where payment is made to a person who could not have been authorized to receive it. *Herndon v. Lancaster*, 6 Bush (Ky.) 483.

**3. Payment to Commissioner or Receiver Who Has Not Given Required Bond — Virginia.** — *Hess v. Rader*, 26 Gratt. (Va.) 746; *Tyler v. Toms*, 75 Va. 116; *Woods v. Ellis*, 85 Va. 471; *Whitehead v. Bradley*, 87 Va. 676; *Shumate v. Williams*, (Va. 1895) 22 S. E. Rep. 808. See also *Lloyd v. Erwin*, 29 Gratt. (Va.) 598; *Eggleton v. Whittle*, 84 Va. 163; *Eggleton v. Dinsmore*, 84 Va. 858.

*West Virginia.* — *Donahue v. Fackler*, 21 W. Va. 124.

**The Subsequent Giving of a Bond by the Officer to whom the purchaser has made his payment does not change the liability of the purchaser.** *Woods v. Ellis*, 85 Va. 471.

**The Fact that the Commissioner Was the Attorney for the Judgment Creditor Does Not Exonerate the Purchaser.** — *Shumate v. Williams*, (Va. 1895) 22 S. E. Rep. 808.

**4. Payment to Commissioner Whose Bond Has Not Been Approved.** — *Lloyd v. Erwin*, 29 Gratt. (Va.) 598.

**Parties Entitled to Proceeds of Sale Not Bound to Proceed First Against Commissioner, or Sureties on Unapproved Bond.** — *Lloyd v. Erwin*, 29 Gratt. (Va.) 598. See also *Eggleton v. Whittle*, 84 Va. 163.

**5. When Purchaser Is Protected — Misleading Advertisement of Sale.** — *Whitehead v. Bradley*, 87 Va. 676 (Va. Acts 1883-4, p. 213, Code, § 3399). In this case, however, the statute did not apply.

**Order of Court for Collection by Unbonded Commissioner.** — *Dixon v. McCue*, 21 Gratt. (Va.) 373.

**6. Commissioner Liable to Purchaser.** — *Tyler v. Toms*, 75 Va. 116; *Eggleton v. Dinsmore*, 84 Va. 858; *Donahue v. Fackler*, 21 W. Va. 124.

**Extent of Liability.** — The extent of the liability of the commissioner to the purchaser is to make good the loss which he has sustained, with interest. *Eggleton v. Dinsmore*, 84 Va. 858; *Donahue v. Fackler*, 21 W. Va. 124.

**7. Commissioner Liable Though He Acted in Good Faith and Without Negligence.** — *Tyler v. Toms*, 75 Va. 116.

**8. Purchase Money Paid into Court — England.** — *Bennett v. Hamill*, 2 Sch. & Lef. 581; *Bulmer v. Alison*, 15 L. J. Ch. 11, affirming 8 Jur. 440; *Davenport v. Davenport*, 9 Hare appendix i, 22 L. J. Ch. 11, 16 Jur. 988, 1 W. R. 12; *Watters v. Jones*, 6 Jur. N. S. 530, 2 L. T. N. S. 205; *Biggs v. Bree*, 51 L. J. Ch. 263, 46 L. T. N. S. 8, 30 W. R. 278; *Lyon v. Colvill*, 6 Jur. 680. See also *Darkin v. Marye*, 1 Anstr. 22; *Gibbons v. Berry*, Sausse & Sc. 158; *Anonymous*, 8 Ir. Eq. 158; *O'Connor v. Richards*, Sausse & Sc. 160; *Hutchinson v. Cathcart*, Jones & C. 260, 1 Ir. Eq. 452; *Gower v. Hill*, Hayes & J. 127; *Lineham v. Cotter*, 8 Ir. Eq. 104; *In re Page*, 1 Dr. & Wal. 34; *Hill v. Kirwan*, 1 Heg. 357; *Wilson v. Poe*, 8 Ir. Eq. 139.

*Canada.* — *Crooks v. Glenn*, 1 Ch. Chamb. (Ont.) 354.

**9. Payment into Court Not Ordered or Permitted until Title Accepted.** — *Rutter v. Marriott*, 10 Beav. 33; *Hutton v. Mansell*, 2 Beav. 260; *Denning v. Henderson*, 1 De G. & Sm. 689, 16 L. J. Ch. 178, 11 Jur. 687; *De Visme v. De Visme*, 1 Macn. & G. 336, 1 Hall & T. 408, 19 L. J. Ch. 52, 13 Jur. 1037; *Marfell v. Rudge*, 2 Y. & C. Exch. 566, 2 Jur. 78; *McDermid v. McDermid*, 8 Ont. Pr. 28; *Crooks v. Street*, 1 Ch. Chamb. (Ont.) 95.

**10. Under Special Circumstances Purchase Money May Be Paid into Court Without Prejudice to Acceptance of Title.** — *Dempsey v. Dempsey*, 1 De G. & Sm. 691; *Morris v. Bull*, 17 L. J. Ch. 9,



of the decree or the law in force.<sup>1</sup> Thus he cannot ordinarily discharge his liability by satisfying a lien or claim which he holds against the property,<sup>2</sup> especially where this would operate to the disadvantage of non-consenting creditors<sup>3</sup> whose claims are entitled to priority over his.<sup>4</sup>

But the Court May Allow a Bid to Be Discharged in This Manner where, if the creditor were to pay the amount of his bid in cash, it would have to be immediately paid back to him to satisfy his lien or claim.<sup>5</sup>

**b. PAYMENT IN CONFEDERATE MONEY.** — As a general rule it is considered that where a sale of property in the seceding states was made for Confederate money, or payments of purchase money becoming due during the civil war were made in Confederate notes, the only currency then in circulation in that part of the country, the sale is valid and the purchaser is discharged from liability.<sup>6</sup> But in *North Carolina*, where a commissioner, appointed by a court of equity to sell land for "cash," in conformity with a representation that it would be best to sell for "ready money," received payment in Confederate treasury notes, the sale was set aside, the court considering that it was not made in compliance with the order.<sup>7</sup>

**Improper Sale for Cash and Receipt of Payment in Confederate Money.** — In a *Mississippi* case where a commissioner was appointed to make a sale which by law should have been upon a credit of six months, but such commissioner sold for cash and received Confederate money in payment, which he retained in his hands until after the overthrow of the Confederacy, and then reported his action and brought the worthless funds into court, it was held that the purchaser acquired no title.<sup>8</sup>

**3. Bond or Security for Purchase Money** — *a. IN GENERAL.* — It is usual in the case of judicial sales on credit to take from the purchaser a bond or security for the credit portion of the purchase money,<sup>9</sup> and where the law or the decree ordering a sale requires the officer making the sale to take security for the

12 Jur. 4; *Rutley v. Gill*, 3 De G. & Sm. 640; *In re Stewart*, 1 Ch. Chamb. (Ont.) 243. See also *Man v. Ricketts*, 5 De G. & Sm. 116.

**1. Bid Cannot Be Satisfied Except by Payment of Lawful Money.** — *Hooper v. Castetter*, 45 Neb. 67; *Frazier v. Hendren*, 80 Va. 265.

**Requirement of Payment in "Good Current Bank Money."** — See *Womack v. Eacker*, Phil. Eq. (62 N. Car.) 161.

**2. Bid Cannot Be Discharged by Satisfying Claim or Lien Against Property.** — *Brooks v. Walker*, 3 La. Ann. 150; *McGinnis's Succession*, 18 La. Ann. 268; *Prescott v. Gordon*, 22 La. Ann. 250; *Hooper v. Castetter*, 45 Neb. 67; *Fishburne v. Smith*, 34 S. Car. 330. See also *Edwards v. Backas*, 8 Ir. Eq. 585; *Mercer v. Lobit*, 10 La. Ann. 47; *De Kay v. Hackensack Water Co.*, 7 N. J. L. J. 368.

**Strict Construction of Statutory Exception.** — *Prescott v. Gordon*, 22 La. Ann. 250, *distinguishing Dorvin v. Wiltz*, 11 La. Ann. 517.

**3. Nonconsent of Other Creditors.** — *Frazier v. Hendren*, 80 Va. 265.

**4. Where Prior Lienholders Would Be Injured.** — *Patterson v. Crawford*, 97 Va. 661.

**5. When Bid May Be Satisfied by Discharging Liens.** — *Patterson v. Crawford*, 97 Va. 661.

**Bidder Must Be True Owner of Judgments Which He Claims to Satisfy.** — *Campbell v. Atwood*, (Tenn. Ch. 1897) 47 S. W. Rep. 168.

**6. Payment in Confederate Notes** — *Louisiana.* — *Hastings v. Brantley*, 23 La. Ann. 610; *Tilson v. Haine*, 27 La. Ann. 228.

*South Carolina.* — *McPherson v. Lynah*, 14 Rich. Eq. (S. Car.) 121.

*Tennessee.* — *Matthews v. Thompson*, 2 Heisk.

(Tenn.) 588. See also *Touchstone v. Touchstone*, 2 Heisk. (Tenn.) 513.

*Virginia.* — *Dixon v. McCue*, 21 Gratt. (Va.) 373; *Mead v. Jones*, 24 Gratt. (Va.) 347; *Finney v. Edwards*, 75 Va. 44; *Crawford v. Weller*, 23 Gratt. (Va.) 835; *Dickinson v. Helms*, 29 Gratt. (Va.) 462.

See also *Teel v. Yancey*, 23 Gratt. (Va.) 691. But compare *Peters v. Neville*, 26 Gratt. (Va.) 549; *Myers v. Nelson*, 26 Gratt. (Va.) 729; *Crockett v. Sexton*, 29 Gratt. (Va.) 46; *Omo-hundro v. Omohundro*, 27 Gratt. (Va.) 824.

**Order of Purchaser for Confederate Money Not Paid — Purchaser Liable for Scale Value.** — *Finney v. Edwards*, 75 Va. 44.

**Officer Who Received Confederate Notes and Failed to Disburse Them Held Liable.** — *Touchstone v. Touchstone*, 2 Heisk. (Tenn.) 513.

**Sale During Civil War — Credit Portion Payable in Currency in Circulation When Due.** — *Teel v. Yancey*, 23 Gratt. (Va.) 691.

**7. Sale for Confederate Notes Not a Sale for "Cash" or "Ready Money."** — *McNeill v. Shaw*, Phil. Eq. (62 N. Car.) 91.

**8. Improper Receipt of Confederate Money in Payment.** — *Alsobrook v. Eggleston*, 69 Miss. 833.

**9. Purchaser May Be Required to Give Bond.** — *Brassfield v. Burgess*, 10 Ky. L. Rep. 660, (Ky. 1888) 10 S. W. Rep. 122.

**Bond May Be Required Though There Are Unsatisfied Liens on Property.** — *Cornwall v. Falls City Bank*, 92 Ky. 381.

**To Whom Bond Should Be Payable.** — Where a deputy sheriff has been appointed commissioner to make a judicial sale, the fact that the



purchase money, his failure to do so is a good ground of exception to the sale.<sup>1</sup>

*b. PENALTY OF BOND.* — In *Mississippi* it has been held that a statute requiring the purchase money to be secured by bond in double its amount was directory and not mandatory, and therefore a sale was not void because the penalty of the bond given by the purchaser was only equal to the amount of the purchase money.<sup>2</sup>

*c. TAKING ONE BOND FOR AGGREGATE AMOUNT REALIZED BY SALE IN PARCELS.* — Where land is sold in separate parcels, but the commissioner has taken one bond for the aggregate amount of the purchase money, this arrangement being preferred by the purchasers and the court approving the bond as taken, such arrangement does not invalidate the bond.<sup>3</sup>

*d. EFFECT OF FAILURE OF COMMISSIONER TO RETURN BONDS INTO COURT.* — The sale will not be set aside after confirmation on account of the failure of the commissioner making the sale to return the purchase money bonds into court, as it was his duty to do, for his default cannot be visited on the purchaser, and the parties in interest should have moved the court to compel such return.<sup>4</sup>

*e. REQUIRING NEW SECURITY.* — An officer making a sale cannot demand another bond after he has accepted the one first given by the purchaser and attested the same, as required by law;<sup>5</sup> but if, after the purchaser has completed his purchase by the execution of the required bond and its acceptance by the court's officer, it turns out that the surety is not good, the court may, upon a suggestion of that fact, hear proof and refuse to confirm and accept the purchaser's bid until the amount thereof is amply secured by a sufficient bond.<sup>6</sup>

*f. ENFORCEMENT OF BOND.* — No execution can rightfully issue upon a bond for the purchase money at a judicial sale unless the order or decree of sale contains some provision such as that the purchase money bond shall have the force and effect of a replevin bond. The payment of the bond can be enforced by the chancellor by rule and attachment, or he can remit the parties entitled to the benefit of the bond to their legal remedy by an action at law thereon.<sup>7</sup>

bond for the purchase money is made payable to him as deputy sheriff, and not as commissioner as required by the order of court, does not affect the validity of the bond executed by the purchaser. *Leavitt v. Goggin*, 11 B. Mon. (Ky.) 229.

A partition sale is not void because the purchase money bonds were made payable to the commissioner making the sale and not to the parties in interest. *Tate v. Bush*, 62 Miss. 145.

*Where Trustees Making Sale Cannot Agree as to Security.* — Where the trustees appointed to make a judicial sale have been unable to agree as to the security to be given by the purchaser, and the matter is submitted to the court upon their respective reports, the court may order that the purchaser give security satisfactory to one of the trustees only. *Hopper v. Williams*, 75 Md. 191.

*Where Court Does Not Direct Nature of Security.* — In an early case in *South Carolina* it was held that where a master in equity sold land under a decree which did not contain any direction as to the nature of the security for the purchase money, such master was not responsible for a loss resulting from the security taken by him proving insufficient, and the land depreciating in value. *Fenwicke v. Gibbes*, 2 Desaus. (S. Car.) 629.

*Fee for Registry of Mortgage.* — A purchaser

should pay the fees for registry of a mortgage given by him to secure the balance of his purchase money. *Sweetnam v. Sweetnam*, 6 Ont. Pr. 83.

*1. Failure of Officer to Take Required Security a Good Ground of Exception to Sale.* — *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553.

*Rule Otherwise Where Purchaser Was Always Ready to Give Security.* — *Young v. Teague*, Bailey Eq. (S. Car.) 13.

*Officer Not Bound to Take Security Where Matter Left to His Judgment.* — *Thompson v. Wagner*, 3 Desaus. (S. Car.) 94.

*2. Sale Not Void Because Penalty of Bond Not Double the Amount of Purchase Money.* — *Tate v. Bush*, 62 Miss. 145.

*3. One Bond May Be Taken for Aggregate Amount Realized by Sale in Parcels.* — *Preston v. Breckinridge*, 86 Ky. 619.

*4. Sale Not Set Aside on Account of Failure of Commissioner to Return Bonds into Court.* — *Tate v. Bush*, 62 Miss. 145; *Nebbett v. Cunningham*, 27 Miss. 292.

*5. Officer After Accepting and Attesting Bond Cannot Demand Another Bond.* — *Reamer v. Judah*, 13 Bush (Ky.) 206.

*6. Court May Require New Bond.* — *Reamer v. Judah*, 13 Bush (Ky.) 206.

*7. Method of Enforcing Bond.* — *Leavitt v. Goggin*, 11 B. Mon. (Ky.) 229. In this case



**4. Lien for Purchase Money.** — A vendor's lien<sup>1</sup> may be retained against property sold at judicial sale,<sup>2</sup> or may exist without being expressly retained, where no other security is taken or provided, or where the law or the intention of the parties is that the land shall be charged with the payment of the purchase money;<sup>3</sup> but it is otherwise where the law has provided for an independent collateral security for the purchase money, and there is no express provision that a lien shall be retained on the land.<sup>4</sup>

**5. Interest.** — As a general rule, the purchaser at a judicial sale is required to pay interest on deferred payments of purchase money.<sup>5</sup>

**Time from Which Interest Runs.** — In the *United States* this interest begins to run from the day of the sale,<sup>6</sup> but in *England* and *Canada* it runs only from the time when the title is accepted, or a report of good title is made, so that the purchaser may safely take possession.<sup>7</sup>

**6. Discounting Credit Payments.** — Purchasers at sales on credit may, with the consent of the defendant, be allowed by the court to pay the purchase money immediately and be allowed a discount thereon,<sup>8</sup> but the officer who has made a sale and received interest-bearing notes for the purchase money cannot receive payment before the notes become due and deduct interest, and if he does so he is responsible for the loss.<sup>9</sup>

the court did not decide, but merely conceded that the chancellor had power to direct that bonds taken upon a sale of property by his order should have the force and effect of replevin bonds.

1. For a full treatment of this subject, see the title VENDORS' LIENS.

2. Vendor's Lien May Be Retained. — *Ex p.* Spence, 6 Lea (Tenn.) 391; Glenn v. Blackford, 23 W. Va. 182. See also Bryant v. McCollum, 4 Heisk. (Tenn.) 511; Ferguson v. Shepherd, 58 Miss. 804.

Lien May Be Enforced After Purchaser Has Conveyed Property to Third Persons Who Have Conveyed It to Others. — Glenn v. Blackford, 23 W. Va. 182.

3. When Vendor's Lien May Exist Without Being Expressly Retained. — Mims v. Macon, etc., R. Co., 3 Ga. 333; Iglehart v. Armiger, 1 Bland (Md.) 519; Andrews v. Scotton, 2 Bland (Md.) 629; Murrill v. Humphrey, 88 N. Car. 138. See also Anderson v. Foulke, 2 Har. & G. (Md.) 346; Tate v. Bush, 62 Miss. 145; Tooley v. Gridley, 3 Smed. & M. (Miss.) 493, 41 Am. Dec. 628; Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44.

Land Sold under Decree of Court Is Held in Custodia Legis as Security for the Purchase Money. — Flenning v. Roberts, 84 N. Car. 532.

4. When There Is No Vendor's Lien. — Tate v. Bush, 62 Miss. 145.

5. Purchaser Must Pay Interest on Deferred Payments of Purchase Money — *England*. — Twigg v. Fifield, 13 Ves. Jr. 517; Wilson v. Poe, 8 Ir. Eq. 139; Hutchinson v. Cathcart, Jones & C. 260, 1 Ir. Eq. 452. See also Anonymous, 8 Ir. Eq. 158; O'Connor v. Richards, Sausse & Sc. 160; Ferguson v. Eyre, Sausse & Sc. 160, note; Gibbons v. Berry, Sausse & Sc. 158.

*Canada*. — Harrison v. Joseph, 8 Ont. Pr. 293; Rae v. Geddes, 3 Ch. Chamb. (Ont.) 404; Montreal Bank v. Fox, 6 Ont. Pr. 217. See also *In re Thompson*, 2 Ch. Chamb. (Ont.) 196.

*District of Columbia*. — Huntington v. Walker, 2 MacArthur (D. C.) 479.

*Louisiana*. — Morris v. Cain, 39 La. Ann. 712.

*Maryland*. — Brown v. Wallace, 4 Gill & J.

(Md.) 479; Wagner v. Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660.

*Ohio*. — Collins v. Skillen, 16 Ohio St. 382, 88 Am. Dec. 458.

*Virginia*. — See Dickinson v. Clement, 87 Va. 41.

Purchaser Must Pay Interest Though No Notes Given for Purchase Money. — McNairy v. McNairy, 1 Shannon Tenn. Cas. 329.

Vendor's Delay in Consummating Sale — No Interest Allowed Where Amount More than Rents and Profits. — Montreal Bank v. Fox, 6 Ont. Pr. 217.

6. Rule in United States — Interest Runs from Day of Sale. — Huntington v. Walker, 2 MacArthur (D. C.) 479; Brown v. Wallace, 4 Gill & J. (Md.) 479; Wagner v. Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660. See also Dickinson v. Clement, 87 Va. 41.

Whether Obtaining Possession Is a Condition Precedent to Liability for Interest. — In Brown v. Wallace, 4 Gill & J. (Md.) 479, it was held that the general rule as to sales under decrees of chancery was that the purchaser must pay interest according to the terms of the decree from the day of sale, whether he got possession or not.

But in Barnum v. Raborg, 2 Md. Ch. 516, when the defendant refused to give the purchaser possession interest was disallowed.

7. English and Canadian Rule. — Hutchinson v. Cathcart, Jones & C. 260, 1 Ir. Eq. 452; Rae v. Geddes, 3 Ch. Chamb. (Ont.) 404. See also *In re Thompson*, 2 Ch. Chamb. (Ont.) 196; Harrison v. Joseph, 8 Ont. Pr. 293.

Interest May Be Charged from Day of Sale Where So Stipulated in Conditions of Sale. — *In re Thompson*, 2 Ch. Chamb. (Ont.) 196. But compare Harrison v. Joseph, 8 Ont. Pr. 293.

Rule Where Annuity Is Sold. — See Twigg v. Fifield, 13 Ves. Jr. 517.

8. Discounting Credit Payments. — Sitwell v. Sitwell, 4 Madd. 183.

9. Officer Cannot Allow Advance Payment of Notes and Deduct Interest. — Touchstone v. Touchstone, 2 Heisk. (Tenn.) 513. See also Walker v. Walker, 4 Coldw. (Tenn.) 310.



7. **Effect of Failure to Make Payments at Proper Time.** — As a general rule the failure of the purchaser to make his payments at the proper time will destroy his right to specific performance of the contract of sale,<sup>1</sup> but under exceptional circumstances it may be otherwise.<sup>2</sup>

8. **Purchaser Acquires No Title or Right to Deed until Compliance with Terms of Sale.** — The purchaser acquires no title and no right to a deed of conveyance until he has complied with the terms of his purchase<sup>3</sup> by either paying the purchase money, in the case of a sale for cash,<sup>4</sup> or giving the security therefor which is required by law or by the decree of sale, in the case of a sale on credit. And a conveyance to him before the sale is ratified by the court, and the terms thereof so complied with, has been held to be an absolute nullity.<sup>5</sup> But, on the other hand, it has been considered that title may be vested in the purchaser before the purchase money is paid, a lien to secure the same being retained, though the usual practice is not to vest title until the purchase money has been paid.<sup>6</sup>

9. **Abatement of Price** — *a.* **FOR DEFICIENCY IN QUANTITY OF LAND SOLD.** — The general rule is that where the land is sold at a certain price per acre, or where a material part of the contract of sale is a representation that the land contains a certain number of acres, and it turns out that the land contains less than was represented or supposed at the time of sale, the purchaser may be entitled to a corresponding abatement of the purchase money;<sup>7</sup> but where the property has been sold in gross and there is no representation

1. **Effect of Failure to Make Payment at Proper Time.** — *Davis v. McDuffie*, 18 S. Car. 495.

2. **Circumstances Excusing Failure to Make Payment.** — See *Dixon v. McCue*, 21 Gratt. (Va.) 373.

3. **Purchaser Acquires No Title or Rights to Deed until Terms of Sale Are Complied With.** — *McGoldrick v. McGoldrick*, 2 Tenn. Ch. 541. See also *Garlington v. Copeland*, 32 S. Car. 57; *Deaderick v. Watkins*, 8 Humph. (Tenn.) 520.

4. **Purchase Money Must Be Paid** — *Alabama*. — *Corbitt v. Clenny*, 52 Ala. 480. See also *Worthington v. McRoberts*, 9 Ala. 297.

*Arkansas*. — *Phelps v. Jackson*, 31 Ark. 272.

*Indiana*. — *Swain v. Morserly*, 17 Ind. 99.

*Kentucky*. — See *Penn v. Fightmaster*, (Ky. 1891) 17 S. W. Rep. 334.

*Louisiana*. — See *McKenzie v. Bacon*, 40 La. Ann. 157; *Losee v. Sauton*, 24 La. Ann. 370.

*Maryland*. — *Johnson v. Hines*, 61 Md. 122.

*Mississippi*. — *Jones v. Hooper*, 50 Miss. 510.

*North Carolina*. — *Burgin v. Burgin*, 82 N. Car. 196; *Barnes v. Morris*, 4 Ired. Eq. (39 N. Car.) 22. See also *Brown v. Coble*, 76 N. Car. 391; *Flemming v. Roberts*, 81 N. Car. 532.

*Tennessee*. — *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511. See also *Blair v. Blair*, (Tenn. Ch. 1896) 41 S. W. Rep. 1078.

*West Virginia*. — *Glenn v. Blackford*, 23 W. Va. 182.

*Canada*. — *Lamaire v. Filiatrault*, 16 Quebec Super. Ct. 334.

**Purchase of Two Tracts.** — Where, at a judicial sale, a person purchased two tracts of land and had fully paid for one of them, but had obtained a conveyance of the other before fully paying therefor, and had reconveyed it, it was held that he was not entitled to a conveyance of the lot for which he had paid in full until he completed paying for the other lot. *McGoldrick v. McGoldrick*, 2 Tenn. Ch. 541.

**Purchaser Not Required to Pay Purchase Money until Steps Necessary to Make Sale Valid and Bind-**

**ing Have Been Taken.** — See *Huber v. Armstrong*, 7 Bush (Ky.) 590.

5. **Deed Executed Before Ratification of Sale or Payment of Purchase Money a Nullity.** — *Corbitt v. Clenny*, 52 Ala. 480; *Phelps v. Jackson*, 31 Ark. 272; *Johnson v. Hines*, 61 Md. 122.

6. **Title May Be Vested Before Purchase Money Paid, Lien Being Retained to Secure Same.** — *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

7. **When Price May Be Abated for Deficiency in Quantity.** — *Brown v. Wallace*, 4 Gill & J. (Md.) 479; *State v. Keller*, 11 Lea (Tenn.) 403; *Myers v. Lindsay*, 5 Lea (Tenn.) 331; *Watson v. Hoy*, 28 Gratt. (Va.) 698. See also *Lyles v. Haskell*, 35 S. Car. 391; *Gray v. Todd*, 3 Rev. Lég. 456; *Thomas v. Murphy*, 8 Rev. Lég. 231; *Quebec Bldg. Soc. v. Jones*, 11 L. C. Rep. 430.

**River Through Land.** — Where land is sold by the acre, the purchaser is not entitled to credit upon the price for that portion of the land which forms the bed of a river, which river was shown on a plat of the land exhibited at the sale, and contains obstructions to navigation at the place where it runs through the tract sold, but is navigable for boats both above and below that place. *Shands v. Triplet*, 5 Rich. Eq. (S. Car.) 76.

**Kentucky Rule as to Equitable Relief.** — In Kentucky the court has never refused to grant equitable relief in those cases where a purchaser has been deceived by the action of the court, or the misrepresentations of its agents as to the number of acres or amount of land sold, whether this relief was sought before or after the confirmation of the sale; but the purchaser is not entitled, as a matter of right, to elect to stand by a sale and have credit for the deficiency in land purchased in cases where he fails to get the amount of land which he supposed he was buying. *Trigg v. Jones*, (Ky. 1897) 42 S. W. Rep. 848.

**The Maryland Rule** seems to be to allow an abatement for any deficiency. *Carmody v.*



as to the quantity of land, or such representation is merely a matter of description, a deficiency will not entitle the purchaser to any abatement of the price,<sup>1</sup> unless it be so great as to affect materially the value of the land,<sup>2</sup> or to lead to the conclusion that had the truth been known it could not reasonably be conceived that the contract would have been made.<sup>3</sup>

**b. FOR OUTSTANDING TAXES OR OTHER LIENS.** — As a general rule the purchaser is not entitled to an abatement of the purchase money on account of outstanding taxes or other liens against the property sold,<sup>4</sup> even though such liens were unknown to the plaintiff at whose instance the property was sold, or to the purchaser.<sup>5</sup> The *Tennessee* court, however, has made a distinction depending upon the purpose for which the sale is made, considering that where property is sold for the benefit of creditors the purchaser cannot abate the purchase price by the amount of unpaid taxes, although he has a remedy against the original owner therefor, but that it is otherwise when the sale is made merely for the purpose of converting the interest of the owners into money, or for some similar purpose.<sup>6</sup>

**c. TAXES AND INTEREST ON INCUMBRANCES BECOMING DUE AFTER CONFIRMATION.** — The title of the purchaser where there is an appeal from the order of confirmation relates back on affirmance, or dismissal of the appeal, at least as far as the order of confirmation, and he is not entitled to deduct from the amount of his bid sums which he has paid on account of taxes becoming liens on the property, and interest accruing on a senior mortgage, subject to which he bought, between the time of confirmation and the time of affirmance of the order of confirmation, or dismissal of the appeal therefrom.<sup>7</sup>

**XII. CONFIRMATION — 1. Necessity for.** — It is well established as a general rule, that a judicial sale is not complete, and a successful bidder is not entitled to a deed to the property, until the sale has been confirmed;<sup>8</sup> and this rule

Brooks, 40 Md. 240; Connaughton v. Bernard, 84 Md. 577; Anderson v. Foulke, 2 Har. & G. (Md.) 346. See also Penniman v. Cole, 41 Md. 609. But the claim may be forfeited by laches. Brown v. Wallace, 4 Gill & J. (Md.) 479.

**1. When No Abatement Will Be Allowed.** — Close v. Brown, (N. J. 1890) 20 Atl. Rep. 674; Ohio L. Ins., etc., Co. v. Goodin, 10 Ohio St. 557; Lyles v. Haskell, 35 S. Car. 391; Shields v. Thompson, 4 Baxt. (Tenn.) 227; Jones v. Tatum, 19 Gratt. (Va.) 720.

**Failure of Title as to Part of Land.** — Where the purchaser has obtained the title which the court proposed to sell, he cannot claim an abatement of purchase money because he does not get a clear title to all the property purchased. Preston v. Breckinridge, 86 Ky. 619. Compare Aiken v. Underwood, 11 Ky. L. Rep. 757, (Ky. 1890) 12 S. W. Rep. 1061.

**2. Deficiency So Great as Materially to Affect Value.** — Lyles v. Haskell, 35 S. Car. 391.

**3. Where Purchaser Would Not Have Purchased Had He Known the Truth.** — Close v. Brown, (N. J. 1890) 20 Atl. Rep. 674.

**4. No Abatement on Account of Outstanding Tax or Other Liens.** — Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270; Farmers', etc., Bank v. Peter, 13 Bush (Ky.) 591; Farmers', etc., Bank v. Martin, 3 Md. Ch. 224; Vaughn v. Clark, 5 Neb. 238. See also Osterberg v. Union Trust Co., 93 U. S. 424; Knott v. Johnson, 3 Ky. L. Rep. 330; Kenton v. Cormick, 11 Ky. L. Rep. 487; Kincaid v. Kincaid, 6 Ont. Pr. 93; Miller v. Pridden, 3 Jur. N. S. 78.

**5. Liens Unknown to Plaintiff Who Procured**

**Sale, or to Purchaser.** — Farmers' Bank v. Peter, 13 Bush (Ky.) 591.

**6. Tennessee Rule.** — Staunton v. Harris, 9 Heisk. (Tenn.) 579.

**7. Taxes and Interest Becoming Due After Confirmation Cannot Be Deducted.** — Clark, etc., Invest. Co. v. Way, 52 Neb. 204.

**8. Necessity for Confirmation — England.** — Ex p. Minor, 11 Ves. Jr. 559; Vincent v. Going, 3 Dr. & War. 75, note. See also Millican v. Vanderplank, 11 Hare 136. 1 Eq. R. 429, 17 Jur. 986, 1 W. R. 364; Anonymous, 2 Ves. Jr. 335.

**Canada.** — Stephenson v. Bain, 8 Ont. Pr. 258, reversing 8 Ont. Pr. 166. See also Hus v. Joseph, 9 Rev. Leg. 56.

**United States.** — Mayhew v. West Virginia Oil, etc., Co., 24 Fed. Rep. 205; Blossom v. Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196. See also Tennessee v. Quintard, 80 Fed. Rep. 829; U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128; Williamson v. Berry, 8 How. (U. S.) 496.

**Alabama.** — Phillips v. Benson, 82 Ala. 500; Sayre v. Elyton Land Co., 73 Ala. 85; Cargile v. Ragan, 65 Ala. 287; Bland v. Bowie, 53 Ala. 152; Rome, etc., R. Co. v. Sibert, 97 Ala. 393; Haralson v. George, 56 Ala. 295. See also Ex p. Branch, 63 Ala. 383; Cruikshank v. Luttrell, 67 Ala. 318; Wallace v. Hall, 19 Ala. 367; Bonner v. Greenlee, 6 Ala. 411.

**Arkansas.** — Wells v. Rice, 34 Ark. 346; Lumpkins v. Johnson, 61 Ark. 80; Apel v. Kelsey, 47 Ark. 413; Sessions v. Peay, 23 Ark. 41; Stotts v. Brookfield, 55 Ark. 307; Bell v. Green, 38 Ark. 78; Troiter v. Neal, 50 Ark.



applies in the case of a private sale as well as a sale at public auction.<sup>1</sup>

**Cases Holding Confirmation Not Necessary.** — There are, however, a few cases in which confirmation has been held not necessary; but these depend upon the particular circumstances, the terms of the order of sale, or some statute dispensing with confirmation.<sup>2</sup>

340; Greer v. Anderson, 62 Ark. 213. See also Ambleton v. Dyer, 53 Ark. 224; Neal v. Andrews, 53 Ark. 445; Neal v. Wideman, 59 Ark. 5.

*California.* — Horton v. Jack, 115 Cal. 29.

*Delaware.* — See Caulk v. Caulk, 3 Houst. (Del.) 81.

*District of Columbia.* — Fraser v. Prather, 1 MacArthur (D. C.) 206.

*Florida.* — See Allred v. McGahagan, 39 Fla. 118.

*Illinois.* — Quigley v. Breckenridge, 180 Ill. 627; Jennings v. Dunphy, 174 Ill. 86; Garrett v. Moss, 20 Ill. 549; Harwood v. Cox, 26 Ill. App. 375. See also Rawlings v. Bailey, 15 Ill. 178; Ayers v. Baumgarten, 15 Ill. 444.

*Indiana.* — See Maxwell v. Campbell, 45 Ind. 360; Laverty v. Chamberlain, 7 Blackf. (Ind.) 556.

*Iowa.* — Central Trust Co. v. Gate City Electric St. R. Co., 96 Iowa 646. See also Wade v. Carpenter, 4 Iowa 361.

*Kansas.* — Mills v. Ralston, 10 Kan. 206.

*Kentucky.* — Busey v. Hardin, 2 B. Mon. (Ky.) 407; Dickerson v. Talbot, 14 B. Mon. (Ky.) 60; Morris v. Mann, 4 Ky. L. Rep. 734; Tonnesley v. Mobberly, 5 Ky. L. Rep. 249; Elliott v. Bush, 3 Ky. L. Rep. 466; Campbell v. Johnston, 4 Dana (Ky.) 177; Forman v. Hunt, 3 Dana (Ky.) 622; Dale v. Shirley, 5 B. Mon. (Ky.) 494; Egard v. Chearnly, 1 Bush (Ky.) 13; Neal v. Louisville, 6 Ky. L. Rep. 300; Vanbussum v. Maloney, 2 Met. (Ky.) 552; Taylor v. Gilpin, 3 Met. (Ky.) 546; Stump v. Martin, 9 Bush (Ky.) 289; Brown v. Berkley, 3 Ky. L. Rep. 469. See also Forman v. Hunt, 3 Dana (Ky.) 614; Hughes v. Swope, 88 Ky. 254; Penn v. Fightmaster, (Ky. 1891) 17 S. W. Rep. 334.

*Maryland.* — Schindel v. Keedy, 43 Md. 413; Wagner v. Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660. See also Hunting v. Walter, 33 Md. 60.

*Mississippi.* — Alsobrook v. Eggleston, 69 Miss. 833; Gowan v. Jones, 10 Smed. & M. (Miss.) 164; Tooley v. Kane, Smed. & M. Ch. (Miss.) 518; Fearing v. Shafner, 62 Miss. 791; Allen v. Poole, 54 Miss. 323; Swafford v. Garmon, 51 Miss. 348; Mitchell v. Harris, 43 Miss. 314; Canpe v. Saucier, 68 Miss. 278, 24 Am. St. Rep. 273, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 219; Tooley v. Gridley, 3 Smed. & M. (Miss.) 493, 41 Am. Dec. 628; Sanders v. Dowell, 7 Smed. & M. (Miss.) 206; Coulter v. Herrod, 27 Miss. 685; Redus v. Hayden, 43 Miss. 614. See also Henderson v. Herrod, 23 Miss. 434; Brooks v. Kelly, 63 Miss. 616; Adler v. Meyer, 73 Miss. 863; Cocks v. Simmons, 57 Miss. 183.

*Missouri.* — Bone v. Tyrrell, 113 Mo. 175. See also Robert v. Casey, 25 Mo. 584; State v. Towl, 48 Mo. 148; Castleman v. Relfe, 50 Mo. 583; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566.

*New Jersey.* — Den v. Lambert, 13 N. J. L. 182; Titman v. Riker, 43 N. J. Eq. 122.

*New York.* — See Requa v. Rea, 2 Paige (N. Y.) 339; Battell v. Torrey, 65 N. Y. 209; Rea v. M'Eachron, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471.

*North Carolina.* — Miller v. Feezor, 82 N. Car. 192; Vass v. Arrington, 89 N. Car. 10; Foushee v. Durham, 84 N. Car. 56. See also Atty.-Gen. v. Roanoke Nav. Co., 86 N. Car. 408; Dula v. Seagle, 98 N. Car. 458; Hudson v. Coble, 97 N. Car. 260; Mason v. Osgood, 64 N. Car. 467.

*Pennsylvania.* — Greenough v. Small, 137 Pa. St. 132, 21 Am. St. Rep. 859. See also Watt v. Scott, 3 Watts (Pa.) 79.

*South Carolina.* — Crotwell v. Boozer, 1 S. Car. 271.

*Tennessee.* — Armstrong v. McClure, 4 Heisk. (Tenn.) 80; Johnson v. Johnson, 2 Heisk. (Tenn.) 522; *Ex p.* Kirkman, 3 Head (Tenn.) 517; Eakin v. Herbert, 4 Coldw. (Tenn.) 116; Reese v. Copeland, 6 Lea (Tenn.) 192; Parsons v. McNickle, 1 Shannon Tenn. Cas. 264; *Ex p.* Moore, 3 Head (Tenn.) 171; Childress v. Hurt, 2 Swan (Tenn.) 487; Jones v. Hollingsworth, 10 Heisk. (Tenn.) 653. See also Graves v. Keaton, 3 Coldw. (Tenn.) 8; Atkison v. Murfree, 1 Tenn. Ch. 51; Webster v. Hill, 3 Sneed (Tenn.) 333; Griffith v. Phillips, 9 Lea (Tenn.) 417; Owen v. Owen, 5 Humph. (Tenn.) 355; Hyder v. O'Brien, (Tenn. Ch. 1898) 48 S. W. Rep. 262; Blair v. Blair, (Tenn. Ch. 1896) 41 S. W. Rep. 1078.

*Texas.* — Texas, etc., R. Co. v. Gay, 86 Tex. 571.

*Virginia.* — Todd v. Gallego Mills Mfg. Co., 84 Va. 591; Tyler v. Toms, 75 Va. 116; Brock v. Rice, 27 Gratt. (Va.) 816; Hildreth v. Turner, 89 Va. 858; Terry v. Coles, 80 Va. 695; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108; Brien v. Pittman, 12 Leigh (Va.) 379; Cooper v. Hepburn, 15 Gratt. (Va.) 551; Hess v. Rader, 26 Gratt. (Va.) 746. See also Miller v. Smoot, 86 Va. 1050.

*West Virginia.* — Thompson v. Cox, 42 W. Va. 566; Hartley v. Roffe, 12 W. Va. 401; Kable v. Mitchell, 9 W. Va. 492. See also Marling v. Robrecht, 13 W. Va. 440.

**Presumption that Sale Has Been Confirmed.** — See Shilknecht v. Eastburn, 2 Gill & J. (Md.) 114; Tipton v. Powell, 2 Coldw. (Tenn.) 19.

**Possession of Purchaser Before Confirmation Not Unlawful.** — Wagner v. Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660.

**Prior to Confirmation Purchaser Has Equitable Title.** — Hughes v. Swope, 88 Ky. 254.

**1. The Necessity for Confirmation Is the Same Whether the Sale Be Public or Private.** — Cooper v. Hepburn, 15 Gratt. (Va.) 551.

**2. When Confirmation Not Necessary.** — See Matter of Denison, 114 N. Y. 621, 22 N. Y. St. Rep. 964; Young v. Teague, Bailey Eq. (S. Car.) 13; Stall v. Macalester, 9 Ohio 19. See also Kimple v. Conway, 75 Cal. 413; Robert v. Casey, 25 Mo. 584; Miller v. McMannis, 104 Ill. 421.



**Confirmation in Pais.** — In *Mississippi* it is considered that where the parties interested in the sale have so acted in reference to it as to show that they regard it as an accomplished fact, this will amount to a confirmation *in pais* and will be as effectual to complete the sale as the judicial act of the court, for in such case a rule that confirmation by the court should nevertheless be essential would be purely technical and founded in no broad views of policy or reason.<sup>1</sup>

**2. Who May Proceed for Confirmation.** — A motion may be made or proceedings may be instituted for the confirmation of a judicial sale by any of the parties to the cause in which the sale was ordered,<sup>2</sup> or by the bidder to whom the property was knocked down at the sale.<sup>3</sup> Or the court may confirm the sale on its own motion.<sup>4</sup>

**3. Who May Confirm Sale — Judge in Chambers.** — Under the *Nebraska* statutes a judicial sale may be confirmed by a district judge sitting in chambers.<sup>5</sup>

**Confirmation by Chancellor of Sale Made under Judgment of Vice-Chancellor.** — Where, under the law existing in reference to a chancery court, the vice-chancellor disposed of such matters as the chancellor submitted to him, there was no reason why the chancellor could not confirm a sale made under a judgment rendered by the vice-chancellor.<sup>6</sup>

**Judge Interested in Subject Matter.** — But a judge having an interest in the subject-matter of a sale cannot confirm the sale.<sup>7</sup>

**Special Judge.** — And it has been held in *Arkansas* that an order of confirmation emanating from a person acting as a special judge, without other authority than the consent of the parties, was void.<sup>8</sup>

**4. Time for Confirmation.** — It has been held that an order of confirmation may be made at an adjourned<sup>9</sup> or special<sup>10</sup> term; and a statute providing that a report of sale "shall be subject to the approval or rejection of the court at the first term thereof after filing the same," has been held to refer not to the term in which the report was filed, but to the next term thereafter.<sup>11</sup>

**5. Form of Confirmation.** — No precise form of words is necessary to be

**1. Confirmation in Pais.** — *Redus v. Hayden*, 43 Miss. 614; *Swofford v. Garmon*, 51 Miss. 348; *Mitchell v. Harris*, 43 Miss. 314; *Johnson v. Cooper*, 56 Miss. 608; *Henderson v. Herrod*, 23 Miss. 434. See also *Brooks v. Kelly*, 63 Miss. 616; *Alsobrook v. Eggleston*, 69 Miss. 833.

**Where Exceptions to a Report of Sale Are Filed, and No Further Steps Are Taken,** the inference is that the sale is abandoned, not the exceptions. *Alsobrook v. Eggleston*, 69 Miss. 833.

**Acts of Stranger to Title Cannot Effect Confirmation in Pais.** — *Brooks v. Kelly*, 63 Miss. 616.

**2. Parties May Proceed for Confirmation.** — *Galbreath v. Drought*, 29 Kan. 711; *Redus v. Hayden*, 43 Miss. 614.

**3. Successful Bidder May Proceed for Confirmation.** — *Haralson v. George*, 56 Ala. 295; *Redus v. Hayden*, 43 Miss. 614; *Allen v. Martin*, 61 Miss. 78; *Mayer v. Wick*, 15 Ohio St. 548; *Crooks v. Glenn*, 1 Ch. Chamb. (Ont.) 354.

**4. Court May Confirm Sale on Its Own Motion.** — *Galbreath v. Drought*, 29 Kan. 711.

**5. Confirmation by District Judge Sitting in Chambers.** — *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900. See also *McMurtly v. Tuttle*, 13 Neb. 232.

**6. Confirmation by Chancellor of Sale Made Under Judgment of Vice-Chancellor.** — *Dunn v. German Security Bank*, (Ky. 1887) 3 S. W. Rep. 425, 8 Ky. L. Rep. 777.

**7. Judge Interested in Subject Matter Cannot Confirm Sale.** — *Satcher v. Satcher*, 41 Ala. 26,

91 Am. Dec. 498; *Wilson v. Wilson*, 36 Ala. 655; *Heydenfeldt v. Towns*, 27 Ala. 423.

**8. Person Acting as Special Judge Without Authority Other than Consent of Parties.** — *Trotter v. Neal*, 50 Ark. 340. See also *Dansby v. Beard*, 39 Ark. 254; *Gaither v. Wasson*, 42 Ark. 126; *Hyllis v. State*, 45 Ark. 480.

**9. An Order of Confirmation May Be Made at an Adjourned Term of court,** and at any reasonable time after the return of the order of sale, even though such return be made before the expiration of the full period permitted for that purpose. *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281.

**10. Confirmation at Special Term.** — A court may confirm at a special term a report of sale which was duly filed before the time for the commencement of a regular term which should have been, but was not, held previously. *Harman v. Copenhaver*, 89 Va. 836.

**11. Confirmation at Term Succeeding That in Which Report of Sale Was Filed.** — *Highley v. Barron*, 49 Mo. 103.

**Effect of Premature Approval of Sale.** — In *Missouri*, when the sale has been prematurely approved in the circuit court, as this is a court of general jurisdiction, the sale is valid and the equity of the purchaser is for a valid title, and will defeat recovery in ejectment. When the sale has been prematurely approved in the probate court, this fact was by the earlier decisions regarded as equivalent to no approval at all. But, by the most recent decisions of



employed in confirming a judicial sale, but anything which expresses the approbation of the court is sufficient.<sup>1</sup>

6. Discretion of Court. — Whether a sale shall be confirmed or set aside is a matter resting largely in the discretion of the court.<sup>2</sup> This discretion is, however, not an arbitrary, but a sound legal discretion,<sup>3</sup> which must be exercised in subordination to the established rules of practice and the principles of law,<sup>4</sup> and as the circumstances and justice of the particular case may require.<sup>5</sup> In determining how this discretion shall be exercised, regard to the stability of judicial sales has necessarily a large influence;<sup>6</sup> but there is a higher policy, that of maintaining the purity of judicial sales and of preserving the public confidence in their entire fairness, and when there has been fraud, accident, mistake, or unfairness in the sale, the court should not hesitate to withhold its approval.<sup>7</sup>

the supreme court, this doctrine has been overruled, and such sales are now held to be valid as if the approval had been in the circuit court. *Henry v. McKerlie*, 78 Mo. 416. The court reviews the earlier decisions referred to.

1. Anything Expressing Approbation of Court Sufficient. — *Worthington v. McRoberts*, 9 Ala. 297. See also *Mayhew v. West Virginia Oil, etc., Co.*, 24 Fed. Rep. 205.

In *Henry v. McKerlie*, 78 Mo. 416, the court said: "The approval of the sale by the court need not necessarily appear by formal entry of an order. It is sufficient if the approval can be gathered from the whole record. The equity for a title is then complete. *Jones v. Manly*, 58 Mo. 559; *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin, Min., etc., Co.*, 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42."

2. Discretion of Court — *United States*. — *Tennessee v. Quintard*, 80 Fed. Rep. 829.

*Alabama*. — *Phillips v. Benson*, 82 Ala. 500; *Sayre v. Elyton Land Co.*, 73 Ala. 85; *Eatman v. Eatman*, 83 Ala. 478; *Cargile v. Ragan*, 65 Ala. 287. See also *Bland v. Bowie*, 53 Ala. 152.

*Georgia*. — *Walters v. Hargrove*, 61 Ga. 267.

*Illinois*. — *Garrett v. Moss*, 20 Ill. 549; *Quigley v. Breckenridge*, 180 Ill. 627; *Sowards v. Pritchett*, 37 Ill. 518. See also *Coffey v. Coffey*, 16 Ill. 141; *Jennings v. Dunphy*, 174 Ill. 86.

*Iowa*. — *Central Trust Co. v. Gate City Electric St. R. Co.*, 96 Iowa 646.

*Kentucky*. — *Taylor v. Gilpin*, 3 Met. (Ky.) 544. See also *Forman v. Hunt*, 3 Kana (Ky.) 614; *Campbell v. Johnston*, 4 Dana (Ky.) 186.

*Michigan*. — *Nugent v. Nugent*, 54 Mich. 557.

*Mississippi*. — *Mitchell v. Harris*, 43 Miss. 314. See also *Henderson v. Herrod*, 23 Miss. 431.

*New York*. — See *Atty.-Gen. v. Continental L. Ins. Co.*, 94 N. Y. 199.

*Ohio*. — *Craig v. Fox*, 16 Ohio 563; *Harland v. Newcombe*, 2 Ohio Cir. Ct. 330, 1 Ohio Cir. Dec. 514. See also *Ohio L. Ins., etc., Co. v. Goodin*, 10 Ohio St. 557.

*Tennessee*. — *Lasell v. Powell*, 7 Coldw. (Tenn.) 277. See also *Owen v. Owen*, 5 Humph. (Tenn.) 355; *Young v. Shumate*, 3 Sneed (Tenn.) 369.

*Virginia*. — *Hildreth v. Turner*, 89 Va. 858; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586; *Brock v. Rice*, 27 Gratt. (Va.) 816; *Coles v. Coles*, 83 Va. 525.

*West Virginia*. — *Marling v. Robrecht*, 13 W. Va. 440.

3. Court Must Exercise Not an Arbitrary but a Sound Legal Discretion — *United States*. — *Tennessee v. Quintard*, 80 Fed. Rep. 829; *In re Illinois Third Nat. Bank*, 9 Biss. (U. S.) 535.

*Illinois*. — *Quigley v. Breckenridge*, 180 Ill. 627. See also *Ayers v. Baumgarten*, 15 Ill. 444.

*Kansas*. — *New England Mortg. Security Co. v. Smith*, 25 Kan. 622; *Cowdin v. Cowdin*, 31 Kan. 528; *Adams v. Devalley*, 40 Kan. 486. See also *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451; *Challiss v. Wise*, 2 Kan. 193; *White-Crow v. White-Wing*, 3 Kan. 276; *Moore v. Pye*, 10 Kan. 246.

*Kentucky*. — *Hughes v. Swope*, 88 Ky. 254.

*Mississippi*. — *Mitchell v. Harris*, 43 Miss. 314. See also *Henderson v. Herrod*, 23 Miss. 434.

*Nebraska*. — *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567.

*Virginia*. — *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 591; *Moore v. Triplett*, 96 Va. 603. See also *Brock v. Rice*, 27 Gratt. (Va.) 816; *Taylor v. Cooper*, 10 Leigh (Va.) 327; *Daniel v. Leitch*, 13 Gratt. (Va.) 195; *Roudabush v. Miller*, 32 Gratt. (Va.) 454; *Berlin v. Melhorn*, 75 Va. 639; *Hansucker v. Walker*, 76 Va. 755; *Langyher v. Patterson*, 77 Va. 470; *Effinger v. Kenney*, 79 Va. 553; *Terry v. Coles*, 80 Va. 695; *Coles v. Coles*, 83 Va. 525.

*West Virginia*. — *Hartley v. Roffe*, 12 W. Va. 401; *Marling v. Robrecht*, 13 W. Va. 440; *Hilleary v. Thompson*, 11 W. Va. 113. See also *Hughes v. Hamilton*, 19 W. Va. 366.

4. Discretion Governed by Established Rules of Practice and Principles of Law. — *Quigley v. Breckenridge*, 180 Ill. 627; *Mitchell v. Harris*, 43 Miss. 314. See also *Ayers v. Baumgarten*, 15 Ill. 444; *Henderson v. Herrod*, 23 Miss. 434.

5. Sale Must Be Confirmed or Set Aside as the Circumstances and Justice of the Case May Require. — *Thomason v. Craighead*, 32 Ark. 391; *Sessions v. Peay*, 23 Ark. 39; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66; *Marling v. Robrecht*, 13 W. Va. 440; *Hartley v. Roffe*, 12 W. Va. 401. See also *Tennessee v. Quintard*, 80 Fed. Rep. 829; *Penn v. Tolleson*, 26 Ark. 652; *Schindel v. Keedy*, 43 Md. 413; *Bolgiaño v. Cooke*, 19 Md. 375; *Hunting v. Walter*, 33 Md. 60; *Tooley v. Kane*, Smed. & M. Ch. (Miss.) 522; *Deaderick v. Smith*, 6 Humph. (Tenn.) 146.

6. Regard for Stability of Judicial Sales May Influence Exercise of Discretion. — *Garrett v. Moss*, 20 Ill. 549; *Harwood v. Cox*, 26 Ill. App. 375.

7. Court Should Disapprove Sale Where There



**7. Imposition of Terms or Conditions.** — While the right of the court to impose terms upon which the sale shall be confirmed has been recognized,<sup>1</sup> the weight of authority supports the view that the court must either confirm the sale absolutely, or set it aside, and cannot make its confirmation conditional, or modify the terms of the sale.<sup>2</sup>

**8. Review in Appellate Court.** — An order confirming or setting aside a judicial sale is a final order, and, as such, may be reviewed by an appellate court on an appeal or writ of error.<sup>3</sup>

**9. Effect of Confirmation** — *a.* **COMPLETING SALE.** — The confirmation of a sale of real estate has the effect of completing the sale.<sup>4</sup> It does not pass the legal title,<sup>5</sup> but vests the full equitable title to the property in the purchaser, although the deed executed in pursuance thereof be irregular, or no deed whatever be made.<sup>6</sup>

*b.* **RETROACTION.** — The confirmation of a judicial sale retroacts and relates back to the time when the sale was actually made, so that the purchaser is regarded as the owner from that time.<sup>7</sup>

*c.* **CURING OF IRREGULARITIES.** — The confirmation of a judicial sale cures all irregularities in the proceedings leading up to or the conduct of the sale.<sup>8</sup>

**Has Been Fraud, Accident, Mistake, or Unfairness.** — *Garrett v. Moss*, 20 Ill. 549; *Harwood v. Cox*, 26 Ill. App. 375.

**1. Right to Impose Terms Recognized.** — *State Nat. Bank v. Neel*, 53 Ark. 110. See also *Allen v. Martin*, 61 Miss. 78; *Irby v. Irby*, 11 Lea (Tenn.) 165.

**2. Court Cannot Make Confirmation Conditional or Modify Terms of Sale.** — *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594; *Kinnear v. Lee*, 28 Md. 488; *Green v. State Bank*, 9 Neb. 105; *Fitch v. Minshall*, 15 Neb. 328; *Griffith v. Jenkins*, 50 Neb. 719; *Ohio L. Ins., etc., Co. v. Goodin*, 10 Ohio St. 557.

**3. Review in Appellate Court** — *Arkansas*. — *State Nat. Bank v. Neel*, 53 Ark. 110.

*California*. — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167.

*District of Columbia*. — See *Edwards v. Maupin*, 18 D. C. 39.

*Illinois*. — *Quigley v. Breckenridge*, 180 Ill. 627. See also *Ayers v. Baumgarten*, 15 Ill. 444; *Barling v. Peters*, 134 Ill. 606.

*Kentucky*. — *Dawson v. Lisey*, 10 Bush (Ky.) 408; *Allen v. Graves*, 3 Bush (Ky.) 492. See also *Todd v. Dowd*, 1 Met. (Ky.) 281.

*Mississippi*. — *Allen v. Martin*, 61 Miss. 78.

*Missouri*. — See *Henry v. McKerlie*, 78 Mo. 416.

*Nebraska*. — *Parrat v. Neligh*, 7 Neb. 456. See also *State Nat. Bank v. Scofield*, 9 Neb. 499; *Creighton University v. Riley*, 50 Neb. 341; *Clark, etc., Invest. Co. v. Way*, 52 Neb. 204.

*New Jersey*. — *Mutual L. Ins. Co. v. Sturges*, 33 N. J. Eq. 328.

*Ohio*. — *Kern v. Foster*, 16 Ohio 274; *Reeves v. Skenett*, 13 Ohio St. 574.

*West Virginia*. — *Marling v. Robrecht*, 13 W. Va. 440. See also *Dick v. Robinson*, 19 W. Va. 159; *Kalle v. Mitchell*, 9 W. Va. 492.

**Purchaser May Appeal.** — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167; *Mutual L. Ins. Co. v. Sturges*, 33 N. J. Eq. 328.

**Confirmation in Appellate Court of Sale Rejected Below.** — In *Allen v. Martin*, 61 Miss. 78, the court said: "We have found only one case in which a sale rejected by the chancellor has been confirmed by the appellate court, that of

*Comstock v. Purple*, 49 Ill. 158; but because it has not been done is no reason why it shall not be done in a proper case."

**Decree of Court Below on Conflicting Evidence Will Not Be Reversed.** — *Hopper v. Hopper*, 79 Md. 400.

**4. Confirmation Completes Sale.** — *Webster v. Hill*, 3 Sneed (Tenn.) 333.

**Terms Cannot Be Changed After Confirmation.** — *Wampler v. Shipley*, 3 Bland (Md.) 182.

**Subsequent Revocation.** — An order of confirmation is in its nature so far final that a purchaser from the party to whom a deed has regularly issued pursuant to such order is not bound by a subsequent revocation thereof upon proceedings commenced after he has acquired title. *Hollister v. Mann*, 40 Neb. 572.

**5. Mere Confirmation Does Not Pass Legal Title.** — *Webster v. Hill*, 3 Sneed (Tenn.) 333.

**6. Confirmation Vests Equitable Title in Purchaser.** — *Stang v. Redden*, 28 Fed. Rep. 11; *Henry v. McKerlie*, 78 Mo. 416. See also *Grayson v. Weddle*, 63 Mo. 523; *Long v. Joplin Min., etc., Co.*, 68 Mo. 422; *Gilbert v. Cooksey*, 69 Mo. 42.

**7. Retroactive Effect of Confirmation.** — *Brown v. Isbell*, 11 Ala. 1009; *Caulk v. Caulk*, 3 Houst. (Del.) 81; *Galbreath v. Drought*, 29 Kan. 711; *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57; *Hughes v. Swope*, 88 Ky. 254; *Neal v. Louisville*, 6 Ky. L. Rep. 300; *Wagner v. Cohen*, 6 Gill (Md.) 97, 46 Am. Dec. 660; *Vass v. Arrington*, 89 N. Car. 10; *Taylor v. Cooper*, 10 Leigh (Va.) 327; *Cale v. Shaw*, 33 W. Va. 299. See also *Anson v. Towgood*, 1 Jac. & W. 617; *Jashenosky v. Volrath*, 59 Ohio St. 540.

**8. Confirmation Cures Irregularities** — *Alabama*. — *Cargile v. Ragan*, 65 Ala. 287.

*Kentucky*. — See *Wrightson v. Cline*, 5 Ky. L. Rep. 57; *Todd v. Dowd*, 1 Met. (Ky.) 281.

*Maryland*. — *Harrison v. Harrison*, 1 Md. Ch. 331. See also *Anderson v. Foulke*, 2 Har. & G. (Md.) 346.

*Mississippi*. — See *Tate v. Bush*, 62 Miss. 145.

*Missouri*. — *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572; *Jackson v. Magruder*, 51



But it cannot cure jurisdictional defects<sup>1</sup> or otherwise validate a void sale.<sup>2</sup>

### XIII. OBJECTIONS AND SETTING ASIDE — 1. Policy of Upholding Judicial Sales.

— Public policy requires that there should be stability in judicial sales,<sup>3</sup> and therefore every reasonable presumption should be indulged in favor of sustaining them,<sup>4</sup> and they should not be disturbed for slight causes,<sup>5</sup> nor should the courts be astute in finding out objections to them.<sup>6</sup> On the other hand,

Mo. 55; *Cunningham v. Anderson*, 107 Mo. 371, 28 Am. St. Rep. 417. See also *Hughes v. McDivitt*, 102 Mo. 77.

*Nebraska*. — *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426; *McKeighan v. Hopkins*, 19 Neb. 33; *Link v. Connell*, 48 Neb. 574; *Watson v. Tromble*, 33 Neb. 450, 29 Am. St. Rep. 492; *Neigh v. Keene*, 16 Neb. 407; *Crowell v. Johnson*, 2 Neb. 146; *O'Brien v. Gaslin*, 20 Neb. 347; *Day v. Thompson*, 11 Neb. 123; *Wilcox v. Raben*, 24 Neb. 368, 8 Am. St. Rep. 207; *Trumble v. Williams*, 18 Neb. 144.

*Ohio*. — *Merritt v. Borden*, 2 Disney (Ohio) 503, 3 Wkly. L. Gaz. 348, 3 Ohio Dec. (Reprint) 150; *Mayer v. Wick*, 15 Ohio St. 548; *Mechanics' Sav., etc., Assoc. v. O'Conner*, 29 Ohio St. 651. See also *White v. Raymond*, 1 Cleve. L. Rep. 6, 4 Ohio Dec. (Reprint) 79.

*Pennsylvania*. — See *Lockhart v. John*, 7 Pa. St. 137.

*Texas*. — See *Arnold v. Hodge*, 20 Tex. Civ. App. 211.

*Virginia*. — *Robertson v. Smith*, 94 Va. 250; *Langyher v. Patterson*, 77 Va. 470. See also *Hickson v. Rucker*, 77 Va. 135; *Berlin v. Melhorn*, 75 Va. 639; *Thomas v. Davidson*, 76 Va. 333; *Karn v. Rorer Iron Co.*, 86 Va. 754; *Long v. Weller*, 29 Gratt. (Va.) 347; *Watson v. Hoy*, 28 Gratt. (Va.) 698; *Cralle v. Meem*, 8 Gratt. (Va.) 496.

*West Virginia*. — See *Ironton Second Nat. Bank v. Ewing*, 21 W. Va. 208; *Park v. Petroleum Co.*, 25 W. Va. 109; *Hughes v. Hamilton*, 19 W. Va. 368; *Dick v. Robinson*, 19 W. Va. 159.

*Wisconsin*. — *Hill v. Hoover*, 9 Wis. 16.

**Sales Grossly Irregular.** — In *Russell v. Pew*, 12 Mont. 509, the court said: "If the sale was grossly irregular, so as to make it voidable upon a proper showing thereof, the fact of confirmation would not cure such irregularities."

**When Mistake May Be Corrected.** — Where a tract of land not in fact sold, and for which no consideration was paid or intended to be paid, is, by mistake, included in the report of sale, such mistake may be corrected in equity, as against the purchaser or his heirs, even after confirmation and deed in pursuance thereof. *Stites v. Wiedner*, 35 Ohio St. 555, reversing 1 Cinc. L. Bul. 140, 7 Ohio Dec. (Reprint) 134.

**1. Confirmation Cannot Cure Jurisdictional Defects.** — *Langyher v. Patterson*, 77 Va. 470. See also *Cuyler v. Cuyler*, 5 Mackey (D. C.) 569.

**2. Confirmation Cannot Validate a Void Sale.** — *Cunningham v. Anderson*, 107 Mo. 371, 28 Am. St. Rep. 417.

**3. Public Policy Requires Stability in Judicial Sales.** — *United States*. — *The Ruby*, 38 Fed. Rep. 622.

*District of Columbia*. — *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

*Illinois*. — *Quigley v. Breckenridge*, 180 Ill. 627; *Conover v. Musgrave*, 68 Ill. 58; *Barling v. Peters*, 134 Ill. 627.

*Kentucky*. — *U. S. Bank v. Carrol*, 4 B. Mon. (Ky.) 49; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102; *Stump v. Martin*, 9 Bush (Ky.) 289; *Thornton v. McGrath*, 1 Duv. (Ky.) 354. See also *Lawson v. Hill*, (Ky. 1889) 11 S. W. Rep. 606; *Scott v. Scott*, 85 Ky. 385; *Dorsey v. Kendall*, 8 Bush (Ky.) 294.

*Missouri*. — *Strouse v. Drennan*, 41 Mo. 289; *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *Hewitt v. Weatherby*, 57 Mo. 276; *Jones v. Manly*, 58 Mo. 559; *Snodgrass v. Emery*, 66 Mo. App. 462; *State v. Sargent*, 12 Mo. App. 228.

*New York*. — *Haines v. Taylor*, (Supm. Ct.) 3 How. Pr. (N. Y.) 206. See also *Merges v. Ringler*, 34 N. Y. App. Div. 415, affirming 24 Misc. (N. Y.) 317, affirmed 158 N. Y. 701.

*South Carolina*. — *Tederall v. Bouknight*, 25 S. Car. 275.

*Virginia*. — *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108. See also *Langyher v. Patterson*, 77 Va. 470; *Coles v. Coles*, 83 Va. 525; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586.

**4. Presumptions Indulged in Favor of Sustaining Sales.** — *United States*. — See *Moore v. Greene*, 19 How. (U. S.) 69.

*District of Columbia*. — *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

*Illinois*. — *Whitman v. Fisher*, 74 Ill. 147.

*Kentucky*. — *Calloway v. Green*, 2 Ky. L. Rep. 309.

*Louisiana*. — *Bacchus v. Moreau*, 4 La. Ann. 313; *Erwin v. Chaffe*, 51 La. Ann. 41.

*Maryland*. — *Farmers' Bank v. Clarke*, 28 Md. 145; *Cockey v. Cole*, 28 Md. 276, 92 Am. Dec. 683; *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646. See also *Connaughton v. Bernard*, 84 Md. 577.

*Missouri*. — *Evans v. Robberson*, 92 Mo. 192, 1 Am. St. Rep. 701; *Agan v. Shannon*, 103 Mo. 661; *Cabell v. Grubbs*, 48 Mo. 353; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566; *Strouse v. Drennan*, 41 Mo. 289. See also *Downing v. Still*, 43 Mo. 309.

*Pennsylvania*. — *Barton v. Hunter*, 101 Pa. St. 406; *Craig's Appeal*, 77 Pa. St. 448. See also *Snyder v. Boring*, 4 Pa. Super. Ct. 196, 40 W. N. C. (Pa.) 275.

*Tennessee*. — *Puckett v. Jenkins*, 2 Baxt. (Tenn.) 484. See also *Jones v. Sharp*, 9 Heisk. (Tenn.) 660; *Kindell v. Titus*, 9 Heisk. (Tenn.) 727.

**5. Judicial Sales Not Disturbed for Slight Causes.** — *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Conover v. Musgrave*, 68 Ill. 58; *Strouse v. Drennan*, 41 Mo. 289; *Stewart v. Severance*, 43 Mo. 322, 97 Am. Dec. 392; *Hewitt v. Weatherby*, 57 Mo. 276; *Jones v. Manly*, 58 Mo. 559. See also *Weems v. Brewer*, 2 Har. & G. (Md.) 390.

**6. Courts Not Astute in Finding Out Objections to Judicial Sales.** — *Cunningham v. Schley*, 6 Gill (Md.) 207; *Gibbs v. Cunningham*, 1 Md. Ch. 44.



however, where the courts see that injustice will result from sustaining a sale, they will not hesitate to refuse to confirm it, or, under proper circumstances, to set it aside after confirmation.<sup>1</sup>

**2. Who May Object** -- *a.* IN GENERAL. — As a general rule, objections to the sale may be urged either before or after confirmation by any person having or claiming an interest in the property which is or may be injuriously affected by the sale thereof,<sup>2</sup> whether or not such person is a party to the suit in which such sale has been ordered and made.<sup>3</sup>

**Successful Bidder.** — The bidder to whom the property is knocked down acquires such an interest therein by the acceptance of his bid as will entitle him to oppose the confirmation of the sale or invoke the action of the court to set it aside.<sup>4</sup> If, however, the successful bidder does not object to the sale, the surety on his purchase money notes cannot attack it.<sup>5</sup>

**Person Not Interested or Prejudiced.** — A person not interested in the property sold cannot be heard in objection to the sale,<sup>6</sup> and the person attacking the

**1. Sale Will Be Set Aside Where Sustaining It Would Result in Injustice.** — See *The Ruby*, 38 Fed. Rep. 622; *Connaughton v. Bernard*, 84 Md. 577; *Farmers' Bank v. Clarke*, 28 Md. 145; *Merges v. Ringler*, 34 N. Y. App. Div. 415, *affirming* 24 Misc. (N. Y.) 317, *affirmed* 158 N. Y. 701. And see *infra*, this section, for the various grounds which will authorize the setting aside of sales.

**Power of Court to Set Aside Sale.** — *Bean v. Haffendorfer*, 84 Ky. 685; *Hughes v. Swope*, 88 Ky. 254; *Clayton v. Glover*, 3 Jones Eq. (56 N. Car.) 371; *Strong v. Catton*, 1 Wis. 471; *Downer v. Cross*, 2 Wis. 371; *Lupton v. Almy*, 4 Wis. 242.

**2. Any Person Interested in Property May Oppose Sale** — *Alabama*. — *Mobile Cotton Press*, etc., *Co. v. Moore*, 9 Port. (Ala.) 679; *Aderholt v. Henry*, 82 Ala. 541.

*District of Columbia.* — *Edwards v. Maupin*, 18 D. C. 39.

*Illinois.* — *Cohen v. Menard*, 136 Ill. 130; *Flynn v. Wilkinson*, 56 Ill. App. 239.

*Kansas.* — *Galbreath v. Drought*, 29 Kan. 712.

*Kentucky.* — *Yocum v. Foreman*, 14 Bush (Ky.) 404.

*New York.* — *Gould v. Mortimer*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 167; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Fuller v. Brown*, 35 Hun (N. Y.) 162.

*North Carolina.* — *Clayton v. Glover*, 3 Jones Eq. (56 N. Car.) 371.

*Virginia.* — *Brock v. Rice*, 27 Gratt. (Va.) 812.

**A Decree of Confirmation Founded on a False Report of Sale** may be impeached by an interested party guiltless of culpable fraud or neglect. *Springston v. Morris*, (W. Va. 1899) 34 S. E. Rep. 766.

**Judgment Creditor.** — *Beckwith v. King's Mountain Min. Co.*, 87 N. Car. 155; *Cravens v. Wilson*, 48 Tex. 324. But *compare Johnson v. Murray*, 112 Ind. 154, 2 Am. St. Rep. 174, in which it was held that a judgment creditor could not avail himself of a mere irregularity.

**Person Claiming Ownership of Land Sold.** — A person who claims that he owns part of a tract of land sold to satisfy the debts of another, should be allowed to file his pleading opposing the confirmation of such sale. *Swofford v. Howard*, (Ky. 1899) 50 S. W. Rep. 43. *Contra*, *Glassell v. Wilson*, 4 Wash. (U. S.) 59.

**Party Who Has Been Guilty of Laches Not Entitled to Have Sale Opened.** — *Hall v. Urquhart*, 11 N. J. Eq. 318.

**Where Party Objecting Caused Irregularity, Court Will Not Aid Him.** — *Green v. Corson*, 50 Kan. 624.

**3. Persons Interested May Object, Whether or Not They Are Parties** — *Illinois.* — *Cohen v. Menard*, 136 Ill. 130.

*Kansas.* — *Adams v. Devalley*, 40 Kan. 486; *Treptow v. Buse*, 10 Kan. 170; *Wilson County v. McIntosh*, 30 Kan. 234; *Green v. McMurtry*, 20 Kan. 193; *Cowdin v. Cowdin*, 31 Kan. 528; *Harrison v. Andrews*, 18 Kan. 535; *Rice v. Poynter*, 15 Kan. 264.

*New York.* — *Gould v. Mortimer*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 167; *Kellogg v. Howell*, 62 Barb (N. Y.) 280; *Fuller v. Brown*, 35 Hun (N. Y.) 162.

*Texas.* — *Cravens v. Wilson*, 48 Tex. 340; *Flanagan v. Pearson*, 50 Tex. 383.

**Persons Not Parties and Claiming No Interest in Proceedings May Not Object.** — *Griffith v. Hammond*, 45 Md. 85.

**4. Successful Bidder May Object to Sale.** — *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196; *Allen v. Graves*, 3 Bush (Ky.) 492; *Cooper v. Hill*, 6 Ky. L. Rep. 742; *Handy v. Waxter*, 75 Md. 517; *Mayer v. Wick*, 15 Ohio St. 548; *Brock v. Rice*, 27 Gratt. (Va.) 812. See also *Read v. Fite*, 8 Humph. (Tenn.) 328.

**One Who Has Purchased from the Successful Bidder** at a judicial sale with constructive notice that no duplicate of the certificate of purchase has been filed for record and that the sale has never been confirmed by the court, has no right to object to the court's approving or disapproving the sale as may be right and equitable. *Harwood v. Cox*, 26 Ill. App. 375.

**An Unsuccessful Bidder** at a judicial sale, who is not a party and has no interest in the property, cannot apply to have the sale set aside on the ground of irregularity. *Hughes v. Lipscombe*, 6 Hare 142.

**5. Surety on Purchase Money Notes.** — *Lillard v. Puckett*, 9 Baxt. (Tenn.) 568. *Compare Majors v. McNeilly*, 7 Heisk. (Tenn.) 294.

**6. Person Not Interested Cannot Object to Sale** — *Alabama.* — *McLaughlin v. Bradford*, 82 Ala. 431.

*Louisiana.* — *Monition of Johnson*, 3 La. Ann. 656; *Fortier v. Zimpel*, 6 La. Ann. 53;



sale must be able to show injury resulting to him therefrom.<sup>1</sup>

**b. EFFECT OF FAILURE TO OBJECT TO CONFIRMATION.** — Where objections which might defeat confirmation are known to the purchaser, or to a party, but he fails to urge them, he cannot, after the confirmation, object to the sale on the same grounds,<sup>2</sup> unless he was prevented from making his objections in due time by misrepresentation, surprise, or fraud, resulting from some act or conduct of the officer making the sale, or of interested parties.<sup>3</sup>

**c. EFFECT OF CLAIMING PROCEEDS OF SALE.** — A party who claims the proceeds of the sale, judicially affirms the validity thereof, and cannot afterwards attack the sale for nullity unless it be shown that the judicial admission was made through an error of fact.<sup>4</sup>

**3. Right of Purchaser to Be Heard.** — A person who bids off the property and pays the deposit in good faith is considered as having acquired inchoate rights which entitle him to a hearing upon the question whether the sale shall be set aside.<sup>5</sup>

**4. Grounds of Objection — a. IN GENERAL.** — It is not possible to specify all the grounds which will justify a court in withholding its approval of a judicial sale,<sup>6</sup> or in setting it aside after confirmation; nor, on the other hand, to formulate any general rule covering all cases of objection which are not sufficient to defeat the sale. Speaking generally it may be stated that after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside except for fraud,<sup>7</sup> mistake, surprise,<sup>8</sup> or other cause for which equity would give relief if the sale had been made directly by the parties in interest instead of by the court.<sup>9</sup>

**b. FRAUD.** — Fraud, unfairness, misrepresentation, or imposition is always a good ground of objection to a sale, and, when clearly made out,<sup>10</sup> will war-

Stockton v. Downey, 6 La. Ann. 581; Gilmer v. Nicholson, 21 La. Ann. 589.

Nebraska. — Bachle v. Webb, 11 Neb. 429.

New York. — Frink v. Morrison, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 80.

**1. Person Attacking Sale Must Be Able to Show Injury Resulting to Him Therefrom.** — Gilmer v. Nicholson, 21 La. Ann. 589; Stockton v. Downey, 6 La. Ann. 581. See also Brackman v. Allison, 1 Ky. L. Rep. 278.

**Owner of Property Cannot Complain of Irregularities Not Prejudicial to Him.** — Wilson v. Scott, 29 Ohio St. 636.

**2. Effect of Failure to Object to Confirmation.** — Huber v. Armstrong, 7 Bush (Ky.) 590; Fishback v. Columbian Bldg. Assoc., (Ky. 1898) 47 S. W. Rep. 575; Cooper v. Hill, 6 Ky. L. Rep. 742; Vaughn v. Robertson, 7 Ky. L. Rep. 827; White v. Raymond, 1 Cleve. L. Rep. 6, 4 Ohio Dec. (Reprint) 79; Spence v. Armour, 9 Heisk. (Tenn.) 167; Long v. Weller, 29 Gratt. (Va.) 347. See also Bland v. Bowie, 53 Ala. 152; Threlkelds v. Campbell, 2 Gratt. (Va.) 198, 44 Am. Dec. 384.

**Failure to Object to Confirmation May Bar Right to Have Mistake Corrected.** — Shirley v. Rice, 79 Va. 442.

**3. Where Purchaser Was Prevented from Objecting in Due Time by Fraud, etc.** — Brown v. Gilmer, 8 Md. 322.

**4. Effect of Claiming Proceeds of Sale.** — Massie v. Brady, 41 La. Ann. 553. See also Tarleton v. Kennedy, 21 La. Ann. 500; Herber v. Thompson, 46 La. Ann. 186.

**Rule Does Not Apply to Protect a Purchaser Who Knew that Proceedings and Sale Were Simulated.** — Herber v. Thompson, 46 La. Ann. 186.

**5. Purchaser Entitled to Hearing upon Question**

**of Setting Aside Sale.** — Connell v. Wilhelm, 36 W. Va. 598; Hughes v. Hamilton, 19 W. Va. 368; Kable v. Mitchell, 9 W. Va. 492. See also Coger v. Coger, 2 Dana (Ky.) 271.

**Rule the Same Whether Sale Be Public or Private.** — Cooper v. Hepburn, 15 Gratt. (Va.) 551.

**6. Not Possible to Specify All Grounds Which Will Justify Court in Withholding Its Approval.** — See Marling v. Robrecht, 13 W. Va. 440; Hartley v. Roffe, 12 W. Va. 401.

**7. Fraud.** — See *infra*, this section, *Fraud*.

**8. Mistake — Surprise.** — See *infra*, this section, *Surprise, Accident, or Mistake*.

**9. There Must Be Cause for Equitable Relief.** — Karn v. Rorer Iron Co., 86 Va. 754; Allison v. Allison, 88 Va. 328; Berlin v. Melhorn, 75 Va. 639; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108; Hickson v. Rucker, 77 Va. 135; Harman v. Copenhaver, 89 Va. 836. See also Langyher v. Patterson, 77 Va. 470.

**The Equities Must Be Clear and Strong** to warrant opening a judicial sale at the instance of the purchaser, where the probabilities of serious loss, if the sale be opened, are very great. Ledyard v. Phillips, 32 Mich. 13.

**10. Fraud Must Be Clearly Shown — England.** — Bowen v. Evans, 2 H. L. Cas. 257, *affirming* 1 J. & La T. 178, 6 Ir. Eq. 569.

**Canada.** — See Ricker v. Ricker, 27 Grant Ch. (U. C.) 576.

**Iowa.** — Wallace v. Berger, 25 Iowa 456.

**Kentucky.** — Stump v. Martin, 9 Bush (Ky.) 285.

**Michigan.** — Egan v. Grece, 79 Mich. 629.

**Missouri.** — Briant v. Jackson, 99 Mo. 585.

**Nebraska.** — Robinson Notion Co. v. Foot, 42 Neb. 156.



rant the setting aside of the sale either before or after confirmation.<sup>1</sup>

*c. SURPRISE, ACCIDENT, OR MISTAKE.* — A judicial sale may also be set

*New York.* — See *Moscowitz v. Homberger*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 429.

*North Carolina.* — See *Adderton v. Surratt*, 5 Jones Eq. (58 N. Car.) 119.

*Pennsylvania.* — *Potts v. Wright*, 82 Pa. St. 498. See also *Barton v. Hunter*, 101 Pa. St. 411; *Snyder v. Boring*, 4 Pa. Super. Ct. 196, 40 W. N. C. (Pa.) 275.

*Virginia.* — *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272. See also *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108.

**Evidence Insufficient to Establish Fraud.** — See *Lawn v. Moorman*, 85 Va. 880.

**1. Sale May Be Set Aside for Fraud — England.**

— See *Fergus v. Gore*, 1 Sch. & Lef. 350; *Morice v. Durham*, 11 Ves. Jr. 57; *Delves v. Delves*, L. R. 20 Eq. 77, 23 W. R. 499; *In re Bartlett*, 16 Ch. D. 561, 50 L. J. Ch. 205, 44 L. T. N. S. 17, 29 W. R. 279.

*Canada.* — *Ouimet v. Senecal*, 4 L. C. Jur. 133, 3 L. C. Jur. 35.

*Alabama.* — *Phillips v. Benson*, 82 Ala. 500; *Aderholt v. Henry*, 82 Ala. 541; *Fore v. McKenzie*, 58 Ala. 115.

*Arkansas.* — *Jennings v. Carter*, 53 Ark. 242.

*Illinois.* — *Ayers v. Baumgarten*, 15 Ill. 447; *Coffey v. Coffey*, 16 Ill. 147; *Garrett v. Moss*, 20 Ill. 549; *Watt v. McGalliard*, 67 Ill. 518; *Barling v. Peters*, 134 Ill. 606; *Quigley v. Breckenridge*, 180 Ill. 627. See also *Le Crone v. Worman*, 63 Ill. App. 120.

*Indiana.* — *Hamilton v. Burch*, 28 Ind. 233.

*Iowa.* — *Sioux City, etc., Town Lot, etc., Co. v. Walker*, 78 Iowa 476.

*Kansas.* — *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594.

*Kentucky.* — *Forman v. Hunt*, 3 Dana (Ky.) 620; *Sutor v. Miles*, 2 B. Mon. (Ky.) 497; *Vanbussum v. Maloney*, 2 Met. (Ky.) 551; *Stump v. Martin*, 9 Bush (Ky.) 285; *Stone v. Cromie*, 87 Ky. 173. See also *Hayden v. Smith*, 5 Ky. L. Rep. 243; *Alms, etc., Co. v. Gates*, (Ky. 1895) 32 S. W. Rep. 1088; *Williams v. Glenn*, 87 Ky. 87, 12 Am. St. Rep. 461; *Henning v. Sweeney*, 4 Ky. L. Rep. 986.

*Maryland.* — *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Cunningham v. Schley*, 6 Gill (Md.) 207; *Andrews v. Scotton*, 2 Blend (Md.) 629; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Bank of Commerce v. Lanahan*, 45 Md. 396; *Tomlinson v. McKaig*, 5 Gill (Md.) 256.

*Mississippi.* — *Turnbull v. Endicott*, 3 Smed. & M. (Miss.) 302; *Henderson v. Herrod*, 23 Miss. 445; *Mitchell v. Harris*, 43 Miss. 314; *Redus v. Hayden*, 43 Miss. 614; *Hopton v. Swan*, 50 Miss. 548; *Swofford v. Garmon*, 51 Miss. 348; *Hall v. Moore*, 68 Miss. 527; *Tooley v. Kane*, Smed. & M. Ch. (Miss.) 522.

*Missouri.* — *Neal v. Stone*, 20 Mo. 295; *Stewart v. Severance*, 43 Mo. 323, 97 Am. Dec. 392; *Silver v. McNeil*, 52 Mo. 518; *Keiser v. Garmon*, 95 Mo. 217; *Kean v. Newell*, 1 Mo. 754 14 Am. Dec. 321; *Stewart v. Nelson*, 25 Mo. 309.

*Nebraska.* — *McKeighan v. Hopkins*, 19 Neb. 33. See also *Norton v. Nebraska L. & T. Cas.*, 35 Neb. 466, 37 Am. St. Rep. 441; *Paulett v. Peabody*, 3 Neb. 196; *Aldrich v.*

*Lewis*, 28 Neb. 502; *Butler v. Fitzgerald*, 43 Neb. 192, 47 Am. St. Rep. 741.

*New Hampshire.* — *Concord Bank v. Gregg*, 14 N. H. 331; *Hoitt v. Holcomb*, 23 N. H. 535.

*New Jersey.* — See *Barker v. Richardson*, 41 N. J. Eq. 656; *Morrisse v. Inglis*, 46 N. J. Eq. 306; *Woodward v. Bullock*, 27 N. J. Eq. 507.

*New York.* — *Duncan v. Dodd*, 2 Paige (N. Y.) 99; *Requa v. Rea*, 2 Paige (N. Y.) 339; *Veeder v. Fonda*, 3 Paige (N. Y.) 94; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Billington v. Forbes*, 10 Paige (N. Y.) 487; *May v. May*, 11 Paige (N. Y.) 201; *Laight v. Pell*, 1 Edw. (N. Y.) 577; *Woodhull v. Osborne*, 2 Edw. (N. Y.) 616. See also *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

*North Carolina.* — *Wood v. Parker*, 63 N. Car. 379; *Trull v. Rice*, 92 N. Car. 572.

*Ohio.* — See *White v. Raymond*, 1 Cleve. L. Rep. 6, 4 Ohio Dec. (Reprint) 79.

*Pennsylvania.* — *Grindrod's Estate*, 140 Pa. St. 161. See also *Potts v. Wright*, 82 Pa. St. 498.

*South Carolina.* — *Farr v. Sims*, Rich. Eq. Cas. (S. Car.) 122, 24 Am. Dec. 396.

*Tennessee.* — *Wood v. Morgan*, 4 Humph. (Tenn.) 372; *Owen v. Owen*, 5 Humph. (Tenn.) 355; *Houston v. Aycock*, 5 Sneed (Tenn.) 406, 73 Am. Dec. 131; *Spence v. Armour*, 9 Heisk. (Tenn.) 167. See also *Bradford v. Hamilton*, 3 Tenn. Ch. 344; *Coffin v. Corruith*, 1 Coldw. (Tenn.) 194; *Henderson v. Lowry*, 5 Verg. (Tenn.) 240; *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511; *McMinn v. Phipps*, 3 Sneed (Tenn.) 196; *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228; *Gaugh v. Henderson*, 2 Head (Tenn.) 628; *Moore v. Watson*, 4 Coldw. (Tenn.) 64; *Horn v. Denton*, 2 Sneed (Tenn.) 125.

*Texas.* — *Able v. Chandler*, 12 Tex. 88, 62 Am. Dec. 518.

*Virginia.* — *Brock v. Rice*, 27 Gratt. (Va.) 812; *Watson v. Hoy*, 28 Gratt. (Va.) 698; *Long v. Weller*, 29 Gratt. (Va.) 347; *Merchants Bank v. Campbell*, 75 Va. 455; *Berlin v. Melhorn*, 75 Va. 639; *Hickson v. Rucker*, 77 Va. 135; *Karn v. Rorer Iron Co.*, 86 Va. 754; *Allison v. Allison*, 88 Va. 328; *Harman v. Copenhaver*, 89 Va. 836; *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108; *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272. See also *Langhyer v. Patterson*, 77 Va. 470.

*West Virginia.* — *Hilleary v. Thompson*, 11 W. Va. 113; *Hartley v. Roffe*, 12 W. Va. 401.

*Wisconsin.* — *Encking v. Simmons*, 28 Wis. 272.

See generally the title FRAUD AND DECEIT, vol. 14, p. 12.

**Sale Will Be Set Aside for Collusion Between Purchaser and Officer Making Sale.** — *Johnson v. Garrett*, 16 N. J. Eq. 31.

**Agreement Not Per Se Fraudulent.** — It has been held that where the purchaser agreed with the creditor to hold him harmless if he would consent to the setting aside of the sale, this was not such a contract as to be *per se* a fraud upon the due administration of justice. *Wick v. Dawson*, 42 W. Va. 43.



aside on the ground of surprise,<sup>1</sup> accident,<sup>2</sup> or mistake,<sup>3</sup> in the absence of laches, acquiescence, or waiver on the part of the person claiming to have been injuriously affected by the sale.<sup>4</sup> But this power will not be exercised to

**1. Surprise** — *Illinois*. — Barling v. Peters, 134 Ill. 606; Quigley v. Breckenridge, 180 Ill. 627.

*Kentucky*. — See Alms, etc., Co. v. Gates, (Ky. 1895) 32 S. W. Rep. 1088.

*Maryland*. — Bank of Commerce v. Lanahan, 45 Md. 396.

*Mississippi*. — Swofford v. Garmon, 51 Miss. 348; Mitchell v. Harris, 43 Miss. 314; Hopton v. Swan, 50 Miss. 548; Redus v. Hayden, 43 Miss. 614.

*New Jersey*. — Barker v. Richardson, 41 N. J. Eq. 656.

*New York*. — Woodhull v. Osborne, 2 Edw. (N. Y.) 616; Williamson v. Dale, 3 Johns. Ch. (N. Y.) 290. See also Lefevre v. Laraway, 22 Barb. (N. Y.) 167; Whitbeck v. Rowe, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 403.

*Virginia*. — Karn v. Rorer Iron Co., 86 Va. 754; Berlin v. Melhorn, 75 Va. 639; Allison v. Allison, 88 Va. 328; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108; Hickson v. Rucker, 77 Va. 135. See also Langyher v. Patterson, 77 Va. 470.

*Canada*. — Rodgers v. Rodgers, 13 Grant Ch. (U. C.) 143.

**2. Accident** — *Illinois*. — Garrett v. Moss, 20 Ill. 511.

*Kentucky*. — Kincaid v. Tutt, 88 Ky. 392.

*Mississippi*. — Mitchell v. Harris, 43 Miss. 326; Redus v. Hayden, 43 Miss. 614; Hopton v. Swan, 50 Miss. 548; Swofford v. Garmon, 51 Miss. 348.

*New Jersey*. — See Morris v. Inglis, 46 N. J. Eq. 306.

*Tennessee*. — Houston v. Aycock, 5 Sneed (Tenn.) 406, 73 Am. Dec. 131; Spence v. Armour, 9 Heisk. (Tenn.) 167. See also Moore v. Watson, 4 Coldw. (Tenn.) 64; Henderson v. Lowry, 5 Verg. (Tenn.) 511; Horn v. Denton, 2 Sneed (Tenn.) 125; McMinn v. Phipps, 3 Sneed (Tenn.) 196; Mound City Mut. L. Ins. Co. v. Hamilton, 3 Tenn. Ch. 228; Bradford v. Hamilton, 3 Tenn. Ch. 344; Gaugh v. Henderson, 2 Head (Tenn.) 628.

*Virginia*. — Harman v. Copenhaver, 89 Va. 836.

**3. Mistake** — *England*. — Delves v. Delves, L. R. 20 Eq. 77, 23 W. R. 499.

*Alabama*. — Branch of State Bank v. Hunt, 8 Ala. 876.

*California*. — Thompson v. San Francisco, 119 Cal. 538.

*Georgia*. — See Clay v. Kagelmacher, 98 Ga. 149.

*Illinois*. — Garrett v. Moss, 20 Ill. 549; Barling v. Peters, 134 Ill. 606; Quigley v. Breckenridge, 180 Ill. 627.

*Iowa*. — See Mt. Pleasant First Nat. Bank v. Conger, 37 Iowa 474.

*Kentucky*. — Forman v. Hunt, 3 Dana (Ky.) 620. See also Alms, etc., Co. v. Gates, (Ky. 1895) 32 S. W. Rep. 1088; Goodman v. Connelly, (Ky. 1899) 51 S. W. Rep. 427.

*Maryland*. — Anderson v. Foulke, 2 Har. & G. (Md.) 346; Cunningham v. Schley, 6 Gill (Md.) 207; Gibbs v. Cunningham, 1 Md. Ch. 44; Andrews v. Scotton, 2 Bland (Md.) 629;

Bolgiano v. Cooke, 19 Md. 375; Tomlinson v. McKaig, 5 Gill (Md.) 256.

*Mississippi*. — See Mitchell v. Harris, 43 Miss. 314.

*Missouri*. — Goode v. Crow, 51 Mo. 212.

*Nebraska*. — See Butler v. Fitzgerald, 43 Neb. 192, 47 Am. St. Rep. 741; Norton v. Nebraska L. & T. Co., 35 Neb. 466, 37 Am. St. Rep. 441.

*New Jersey*. — See Morris v. Inglis, 46 N. J. Eq. 306; Sullivan v. Jennings, 44 N. J. Eq. 11.

*New York*. — Mutual L. Ins. Co. v. O'Donnell, 146 N. Y. 275, 48 Am. St. Rep. 796; Vingut v. Vingut, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 159; Dunn v. Herbs, 56 Hun (N. Y.) 457. See also Lefevre v. Laraway, 22 Barb. (N. Y.) 167; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 259; Mulks v. Allen, 12 Wend. (N. Y.) 253; Collier v. Whipple, 13 Wend. (N. Y.) 224; Tripp v. Cook, 26 Wend. (N. Y.) 143; Ames v. Lockwood, (Supm. Ct.) 13 How. Pr. (N. Y.) 555; Requa v. Rea, 2 Paige (N. Y.) 339.

*North Carolina*. — Wood v. Parker, 63 N. Car. 379.

*Ohio*. — Hey v. Schooley, 7 Ohio (pt. ii.) 48; Fallis v. Loughhead, 11 Cinc. L. Bul. 56, 9 Ohio Dec. (Reprint) 128.

*Tennessee*. — Spence v. Armour, 9 Heisk. (Tenn.) 167; Houston v. Aycock, 5 Sneed (Tenn.) 406, 73 Am. Dec. 131. See also Bryant v. McCollum, 4 Heisk. (Tenn.) 511; Henderson v. Lowry, 5 Verg. (Tenn.) 240; Moore v. Watson, 4 Coldw. (Tenn.) 64; Mound City Mut. L. Ins. Co. v. Hamilton, 3 Tenn. Ch. 228; Bradford v. Hamilton, 3 Tenn. Ch. 344; Gaugh v. Henderson, 2 Head (Tenn.) 628; McMinn v. Phipps, 3 Sneed (Tenn.) 196; Horn v. Denton, 2 Sneed (Tenn.) 125.

*Texas*. — See Interstate Nat. Bank v. O'Dwyer, 15 Tex. Civ. App. 33.

*Virginia*. — Brock v. Rice, 27 Gratt. (Va.) 812; Long v. Weller, 29 Gratt. (Va.) 347; Berlin v. Melhorn, 75 Va. 639; Hickson v. Rucker, 77 Va. 135; Karn v. Rorer Iron Co., 86 Va. 754; Allison v. Allison, 88 Va. 328; Harman v. Copenhaver, 89 Va. 836; Merchants Bank v. Campbell, 75 Va. 455; Redd v. Dyer, 83 Va. 331, 5 Am. St. Rep. 272; Watson v. Hoy, 28 Gratt. (Va.) 698. See also Langyher v. Patterson, 77 Va. 470; Talley v. Starke, 6 Gratt. (Va.) 339; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108.

*West Virginia*. — Hilleary v. Thompson, 11 W. Va. 113; Hartley v. Roffe, 12 W. Va. 401.

**Biddings Opened for Mistake in Connection with Other Circumstances.** — See Gower v. Gower, 2 Eden 340.

**Mistake Not Sufficient to Authorize Setting Aside Sale.** — Mountcastle v. Moore, 11 Heisk. (Tenn.) 481; Morris v. Inglis, 46 N. J. Eq. 306; Mechanics' Sav., etc., Assoc. v. O'Conner, 29 Ohio St. 651. See also O'Grady v. Brady, 11 Ir. Eq. 440; Le Crane v. Worman, 63 Ill. App. 120; Goodman v. Connelly, (Ky. 1899) 51 S. W. Rep. 427; Ledyard v. Phillips, 32 Mich. 13; Cowan v. Anderson, 7 Coldw. (Tenn.) 284.

**4. There Must Be an Absence of Laches, Acquiescence, or Waiver,** or other circumstances rendering relief inequitable. Branch of State



relieve a party or other person from the consequences of his own inexcusable neglect.<sup>1</sup>

*d. IRREGULARITIES.* — Irregularities in the proceedings leading up to or in the conduct of a judicial sale may, when prejudicial to the party complaining thereof,<sup>2</sup> furnish sufficient ground for a refusal to confirm the sale;<sup>3</sup> but they do not render the sale invalid,<sup>4</sup> and will not suffice to set it aside after confirmation.<sup>5</sup>

*e. MISCONDUCT OF OFFICER.* — A judicial sale may be set aside on account of misconduct or misrepresentations of the officer making the sale, which have been prejudicial to the interests of the party complaining thereof.<sup>6</sup>

*Bank v. Hunt*, 8 Ala. 876; *Long v. Weller*, 29 Gratt. (Va.) 347.

**1. No Relief from Consequences of Inexcusable Neglect** — *Illinois*. — *Barling v. Peters*, 134 Ill. 606; *Quigley v. Breckenridge*, 180 Ill. 627.

*Maryland*. — *Bank of Commerce v. Lanahan*, 45 Md. 396. See also *Kauffman v. Walker*, 9 Md. 229.

*Nebraska*. — See *Norton v. Nebraska L. & T. Co.*, 35 Neb. 466, 37 Am. St. Rep. 441; *Butler v. Fitzgerald*, 43 Neb. 192, 47 Am. St. Rep. 741.

*New York*. — *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Woodhull v. Osborne*, 2 Edw. (N. Y.) 616.

*Texas*. — *Interstate Nat. Bank v. O'Dwyer*, 15 Tex. Civ. App. 33.

*Virginia*. — *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272.

**By Whom Surprise or Mistake Must Have Been Caused.** — The surprise or mistake must have been caused by or be capable of being traced to the purchaser, the officer making the sale, or some person interested therein.

*Illinois*. — *Barling v. Peters*, 134 Ill. 606; *Quigley v. Breckenridge*, 180 Ill. 627.

*Maryland*. — *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Bank of Commerce v. Lanahan*, 45 Md. 396. See also *Mahoney v. Mackubin*, 52 Md. 367.

*Mississippi*. — *Mitchell v. Harris*, 43 Miss. 314.

*New York*. — *Woodhull v. Osborne*, 2 Edw. (N. Y.) 616. See also *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167.

*South Carolina*. — *Young v. Teague*, *Bailey Eq.* (S. Car.) 13.

**2. Irregularities Must Be Prejudicial to Party Complaining.** — A judicial sale will not be set aside for irregularities or errors not prejudicial to the party complaining. *Miller v. Lanham*, 35 Neb. 886. See also *Meeker v. Evans*, 25 Ill. 322; *Bean v. Meguiar*, (Ky. 1898) 47 S. W. Rep. 771; *McKnight v. Jacob*, 5 Ky. L. Rep. 176; *Wrightson v. Cline*, 5 Ky. L. Rep. 57; *Stryker v. Storm*, (Supm. Ct. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 424.

**Ontario Doctrine that Vendor Must Show Absence of Injury at His Own Expense.** — *Royal Canadian Bank v. Dennis*, 4 Ch. Chamb. (Ont.) 68.

**3. Confirmation May Be Refused on Ground of Irregularities** — *Illinois*. — See *Meeker v. Evans*, 25 Ill. 322.

*Mississippi*. — *Swofford v. Garmon*, 51 Miss. 348; *Mitchell v. Harris*, 43 Miss. 326; *Redus v. Hayden*, 43 Miss. 614; *Hopton v. Swan*, 50 Miss. 548.

*New Jersey*. — *Barker v. Richardson*, 41 N. J. Eq. 656.

*South Carolina*. — *Bailey v. Bailey*, 9 Rich. Eq. (S. Car.) 392; *Tompkins v. Tompkins*, 39 S. Car. 537.

*Virginia*. — *Carr v. Carr*, 88 Va. 735.

*Canada*. — See *Thomas v. McCrae*, 2 Ch. Chamb. (Ont.) 456.

**When Irregular Sale Will Be Confirmed.** — An irregular sale may be confirmed where this would promote the interests of the parties, some of whom are minors; and the purchaser's title will be perfected by divestiture of title. *Swan v. Newman*, 3 Head (Tenn.) 288.

**4. Irregularities Do Not Render Sale Invalid** — *England*. — *Calvert v. Godfrey*, 6 Beav. 97.

*Canada*. — *Beaty v. Radenhurst*, 3 Ch. Chamb. (Ont.) 344.

*Alabama*. — See *Worthington v. McRoberts*, 9 Ala. 297.

*Kentucky*. — *Weller v. Bissell*, 3 Ky. L. Rep. 759; *Layne v. Davidson*, 3 Ky. L. Rep. 621.

*Louisiana*. — See *Byrne's Succession*, 38 La. Ann. 518.

*Maryland*. — *Speed v. Smith*, 4 Md. Ch. 299; *Dungan v. Vondersmith*, 49 Md. 249; *Slothower v. Gordon*, 23 Md. 1.

*Missouri*. — *Pattee v. Thomas*, 58 Mo. 163.

*Nebraska*. — See *Empkie v. McLean*, 15 Neb. 629.

*New York*. — See *Duer v. Dowdney*, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 301.

*Ohio*. — *Wilkins v. Huse*, 9 Ohio 154.

*South Carolina*. — *Federal v. Bouknight*, 25 S. Car. 275.

*Tennessee*. — *Ridgely v. Bennett*, 13 Lea (Tenn.) 210; *Mason v. Tinsley*, 1 Tenn. Ch. 154. See also *Swan v. Newman*, 3 Head (Tenn.) 288; *Tipton v. Powell*, 2 Coldw. (Tenn.) 19; *Coal Creek Min., etc., Co. v. Ross*, 12 Lea (Tenn.) 1; *Lucas v. Moore*, 2 Lea (Tenn.) 1; *McGavock v. Bell*, 3 Coldw. (Tenn.) 512; *Ex p. Kirkman*, 3 Head (Tenn.) 517.

*Texas*. — See *Patton v. Collier*, 13 Tex. Civ. App. 544; *Moore v. Perry*, 13 Tex. Civ. App. 204.

*Wisconsin*. — See *Bunker v. Rand*, 19 Wis. 253.

**5. Sale Will Not Be Set Aside After Confirmation for Irregularities.** — See *Stockmeyer v. Tobin*, 139 U. S. 176; *Nalle v. Young*, 160 U. S. 624; *Bland v. Bovie*, 53 Ala. 152; *Thomas v. Davidson*, 76 Va. 338. And see generally *supra*, this title, *Confirmation* — *Curing of Irregularities*.

**6. Sale May Be Set Aside for Misconduct of Officer.** — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167; *Passmore v. Moore*, (Ky. 1893) 22 S. W. Rep. 325, 15 Ky. L. Rep. 107; *Cohen v. Wagner*, 6 Gill (Md.) 236; *Angel v. Clark*, 21 N. Y. App. Div. 339; *Haue's Estate*, 14 Pa. Co. Ct. 574, 3 Pa. Dist. 267; *Hartley v.*



*f.* DEFECT OF TITLE. — It has been considered that, before confirmation, a judicial sale may be set aside at the instance of the purchaser on account of a defect in the title to the land sold.<sup>1</sup> But, in the absence of fraud, mistake, or some other like matter, the sale cannot be set aside after confirmation, for this cause.<sup>2</sup>

*g.* INCUMBRANCES. — It has been held that, before the court has lost control of the order of confirmation, it may be rescinded and the sale set aside on account of the existence of liens unknown to the purchaser at the time of sale.<sup>3</sup> But on the other hand it has been asserted that where no false representations as to title have been made, and no fraud or imposition has been practiced by the officer appointed to make the sale, it will not be set aside because an incumbrance upon the property is subsequently found to exist.<sup>4</sup> And where the purchaser knew that the property offered was encumbered by other liens of equal and perhaps prior rank to the liens under which the sale was made, confirmation will not be refused on account of such liens where the holders thereof are not complaining and are otherwise able to take care of themselves.<sup>5</sup>

*h.* NONPAYMENT BY PURCHASER. — In one case it has been held that the failure of the purchaser to pay the amount of the bid prior to confirmation does not render the sale void;<sup>6</sup> and in another case it was considered that, under the particular circumstances, the court would not refuse confirmation of the sale because the purchaser had not complied with the terms thereof.<sup>7</sup>

*i.* SCARCITY OF BIDDERS. — The fact that only a few bidders were present at the sale is not usually considered sufficient cause for setting aside the sale, where the proceedings have been regular, and the small number of bidders did not result from the fault of either the purchaser or the party for whose benefit the sale was made.<sup>8</sup>

*j.* INADEQUACY OF PRICE — (1) *General Rule.* — It is well established

Roffe, 12 W. Va. 401; Koop v. Burris, 95 Wis. 301.

*Intention of Officer Not Material.* — Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167. See also Talley v. Starke, 6 Gratt. (Va.) 339.

*Misconduct of Predecessor.* — The misconduct of an original trustee cannot avail to set aside a sale made by his successor. Dungan v. Vondersmith, 49 Md. 249.

*1. Sale May Be Set Aside Before Confirmation for Defect of Title.* — Farmers Bank v. Peier, 13 Bush (Ky.) 591; Mitchell v. Kinnard, (Ky. 1895) 29 S. W. Rep. 309; Bolgiano v. Cooke, 19 Md. 375. See also Parisen v. Parisen, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 385, 1 Thomp. & C. (N. Y.) 642; Watson v. Hoy, 28 Gratt. (Va.) 698; Thomas v. Davidson, 76 Va. 338; Hickson v. Rucker, 77 Va. 135.

*2. Sale Will Not Be Set Aside After Confirmation.* — Farmers Bank v. Peter, 13 Bush (Ky.) 591; Watson v. Hoy, 28 Gratt. (Va.) 698; Thomas v. Davidson, 76 Va. 338; Hickson v. Rucker, 77 Va. 135. See also Threlkelds v. Campbell, 2 Gratt. (Va.) 197, 44 Am. Dec. 384; Young v. McClung, 9 Gratt. (Va.) 336; Daniel v. Leitch, 13 Gratt. (Va.) 195.

*3. When Sale May Be Set Aside Because of Incumbrances.* — Schlosser v. Murnan, (Ky. 1899) 49 S. W. Rep. 421; Hunting v. Walter, 33 Md. 60.

*4. Sale Not Set Aside in the Absence of False Representations as to Title or Other Fraud or Imposition.* — Fitzgerald v. Fitzgerald, 7 D. C. 240. And see Speed v. Smith, 4 Md. Ch. 299.

*5. Liens Known to Purchaser — Lienholders Not*

*Complaining.* — Central Trust Co. v. Sheffield, etc., Coal, etc., Co., 60 Fed. Rep. 9. In this case the court said that the known existence of such liens in part accounted for the price brought at the sale.

*6. Failure of Purchaser to Pay Prior to Confirmation Does Not Render Sale Void.* — Gosmunt v. Gloe, 55 Neb. 709.

*7. When Confirmation Will Not Be Refused Because of Nonpayment.* — Fidelity Ins., etc., Co. v. Roanoke Iron Co., 84 Fed. Rep. 752.

*But in Louisiana* it is held that infant owners may sue for dissolution of the sale where the purchaser fails to pay the price. Jones v. Crocker, 1 La. Ann. 440.

*And in Maryland* where the purchaser paid nothing for several years, but after the estate has increased in value considerably paid the purchase price, the court refused confirmation. Billingslea v. Baldwin, 23 Md. 85.

*8. Scarcity of Bidders Not Alone Sufficient to Require Setting Aside of Sale.* — Mitchell v. Berry, 1 Met. (Ky.) 602; Hudgins v. Lanier, 23 Gratt. (Va.) 494. See also Pate v. Hinson, 104 Ala. 599; Equitable Trust Co. v. Shrope, 73 Iowa 297; Learned v. Geer, 139 Mass. 31; Power v. Larabee, 3 N. Dak. 502; Swires v. Brotherline, 41 Pa. St. 135, 80 Am. Dec. 601.

*But When the Weather Was So Inclement as to Prevent Parties from Attending* who desired to attend and purchase, and there was only one bidder present, the sale was set aside. Roberts v. Roberts, 13 Gratt. (Va.) 639, 70 Am. Dec. 435. See also Johnson v. Crawl, 55 Tex. 571.



that, as a general rule, a judicial sale will not be set aside on account of mere inadequacy in the price realized thereat.<sup>1</sup>

**1. Sale Will Not Be Set Aside on Account of Mere Inadequacy of Price** — *England*. — See *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Ware v. Watson*, 7 De G. M. & G. 739.

*Canada*. — *O'Connor v. Woodward*, 6 Ont. Pr. 223. See also *Creswick v. Thompson*, 6 Ont. Pr. 52.

*United States*. — *Graffam v. Burgess*, 117 U. S. 180; *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Turner v. Indianapolis, etc.*, R. Co., 8 Biss. (U. S.) 380; *Magann v. Segal*, 92 Fed. Rep. 252; *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26; *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752; *Fidelity Ins., etc., Co. v. Roanoke St. R. Co.*, 98 Fed. Rep. 475; *The Ruby*, 38 Fed. Rep. 622. See also *Walker v. Derby*, 5 Biss. (U. S.) 134; *Lake Superior Iron Co. v. Brown*, 44 Fed. Rep. 539; *Blackburn v. Selma R. Co.*, 3 Fed. Rep. 689.

*Alabama*. — *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140. See also *Glennon v. Mittemight*, 86 Ala. 455.

*Arkansas*. — *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Fry v. Street*, 44 Ark. 502; *Nix v. Draughon*, 56 Ark. 240; *Hersh v. Du Val*, 47 Ark. 93. See also *Neel v. Carson*, 47 Ark. 421.

*Colorado*. — *Conway v. John*, 14 Colo. 30.

*Delaware*. — See *Booth v. Webster*, 5 Harr. (Del.) 129; *Cowen v. Stevens*, 3 Harr. (Del.) 494; *Cowgill v. Cahoon*, 3 Harr. (Del.) 23; *Roger v. Ocheltree*, 4 Houst. (Del.) 452.

*District of Columbia*. — See *Anderson v. White*, 2 App. Cas. (D. C.) 408; *Hitz v. National L. Ins. Co.*, 3 MacArthur (D. C.) 170.

*Florida*. — *Lawyers' Co-operative Pub. Co. v. Bennett*, 34 Fla. 302; *Coker v. Dawkins*, 20 Fla. 141.

*Illinois*. — *Hopper v. Davies*, 70 Ill. App. 682; *Badling v. Peters*, 134 Ill. 606; *Connelly v. Rue*, 145 Ill. 207; *Ayers v. Baumgarten*, 15 Ill. 444; *Quigley v. Breckenridge*, 180 Ill. 627; *McMullen v. Gable*, 47 Ill. 67; *Chearnly v. Purple*, 49 Ill. 158; *Duncan v. Sanders*, 50 Ill. 475; *Watt v. McGalliard*, 67 Ill. 513; *Heberer v. Heberer*, 67 Ill. 253; *Dutcher v. Leake*, 44 Ill. 398.

*Indiana*. — *Sowle v. Champion*, 16 Ind. 165.

*Iowa*. — *Wood v. Young*, 38 Iowa 102.

*Kansas*. — *Babcock v. Canfield*, 36 Kan. 437; *Northrup v. Cooper*, 23 Kan. 432; *McGeorge v. Lease*, 32 Kan. 387. See also *Means v. Rose veear*, 42 Kan. 377.

*Kentucky*. — *Stump v. Martin*, 9 Bush (Ky.) 285; *Alms, etc., Co. v. Gates*, (Ky. 1895) 32 S. W. Rep. 1088; *Ison v. Kinnaird*, (Ky. 1891) 17 S. W. Rep. 633; 13 Ky. L. Rep. 569; *Slaughter v. Graham*, 5 Ky. L. Rep. 324; *Egard v. Chearnly*, 1 Bush (Ky.) 13; *Harris v. Gunnell*, (Ky. 1888) 9 S. W. Rep. 376; *Bean v. Haffendorfer*, 84 Ky. 685; *Passmore v. Moore*, (Ky. 1893) 22 S. W. Rep. 325; 15 Ky. L. Rep. 107; *Terry v. Swinford*, (Ky. 1897) 41 S. W. Rep. 553; *Robb v. Hannah*, (Ky. 1890) 14 S. W. Rep. 360; 12 Ky. L. Rep. 361; *Reiley v. Young*, 5 Ky. L. Rep. 692; *Lusk v. Miller*, 3 Ky. L. Rep. 337; *Owens v. Owens*, (Ky. 1899) 52 S. W. Rep. 822. See also *Byrne v. Henderson*, (Ky. 1890) 13 S. W. Rep. 909.

*Maryland*. — *Cohen v. Wagner*, 6 Gill (Md.) 236; *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Bank of Commerce v. Lanahan*, 45 Md. 412; *Garritte v. Popplein*, 73 Md. 322; *Latrobe v. Herbert*, 3 Md. Ch. 375; *House v. Walker*, 4 Md. Ch. 62; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1. See also *Thomson v. Ritchie*, 80 Md. 247; *Pressman v. Mason*, 68 Md. 78; *Gould v. Chappell*, 42 Md. 473; *Warfield v. Ross*, 38 Md. 92; *Mahoney v. Mackubin*, 52 Md. 366; *Loeber v. Eckes*, 55 Md. 3; *Dircks v. Logsdon*, 59 Md. 178. Compare *Andrews v. Scotton*, 2 Bland (Md.) 629.

*Mississippi*. — *Allen v. Martin*, 61 Miss. 78; *Mitchell v. Harris*, 43 Miss. 314; *Swofford v. Garmon*, 51 Miss. 348; *Redus v. Hayden*, 43 Miss. 614. But see *infra*, this note.

*Missouri*. — *Phillips v. Stewart*, 59 Mo. 491; *Wagner v. Phillips*, 51 Mo. 117; *Briant v. Jackson*, 99 Mo. 585; *Hammond v. Scott*, 12 Mo. 8; *Gordon v. O'Neil*, 96 Mo. 350; *Warder-Bushnell-Glessner Co. v. Allen*, 63 Mo. App. 456. See also *Cubbage v. Franklin*, 62 Mo. 364; *Rogers, etc., Hardware Co. v. Cleveland Bldg. Co.*, (Mo. 1895) 32 S. W. Rep. 1.

*Nevada*. — See *Dazet v. Landry*, 21 Nev. 291.

*New Jersey*. — *Bethlehem Iron Co. v. Philadelphia, etc.*, R. Co., 49 N. J. Eq. 356; *Cummins v. Little*, 16 N. J. Eq. 48; *Eberhart v. Gilchrist*, 11 N. J. Eq. 167; *Marlatt v. Warwick*, 18 N. J. Eq. 108; *Morrisse v. Inglis*, 46 N. J. Eq. 306. See also *National Bank v. Sprague*, 20 N. J. Eq. 159.

*New York*. — *Whitbeck v. Rowe*, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 403; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Livingston v. Byrne*, 11 Johns. (N. Y.) 555; *Duncan v. Dodd*, 2 Paige (N. Y.) 99; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Clafin v. Clark*, 22 N. Y. Wkly. Dig. 137; *Kellogg v. Howell*, 62 Barb. (N. Y.) 280. See also *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513; *Tripp v. Cook*, 26 Wend. (N. Y.) 143.

*North Carolina*. — See *Ashbee v. Cowell*, Busb. Eq. (45 N. Car.) 158.

*Pennsylvania*. — *Carson v. Ambrose*, 183 Pa. St. 88; *Carson's Sale*, 6 Watts (Pa.) 140. See also *Herr's Estate*, 12 Pa. Co. Ct. 622; *Sipp v. Insurance Co. of North America*, 8 Pa. Dist. 283.

*South Carolina*. — *Ex p. Alexander*, 35 S. Car. 409; *White v. Floyd*, Spears Eq. (S. Car.) 351. See also *Ex p. Knight*, 28 S. Car. 481.

*Tennessee*. — *Smith v. Miller*, (Tenn. Ch. 1897) 42 S. W. Rep. 182; *Myers v. James*, 4 Lea (Tenn.) 370.

*Texas*. — *Allen v. Stephanes*, 18 Tex. 658; *Pridgen v. Adkins*, 25 Tex. 388; *Baker v. Clepper*, 26 Tex. 629, 84 Am. Dec. 591; *O'Brien v. Hilburn*, 22 Tex. 616.

*Virginia*. — *Harman v. Copenhaver*, 89 Va. 836; *Hazlewood v. Forrer*, 94 Va. 703; *Effinger v. Ralston*, 21 Gratt. (Va.) 430; *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108. See also *Curtis v. Thompson*, 29 Gratt. (Va.) 474; *Forde v. Herron*, 4 Munt. (Va.) 316; *Coles v. Coles*, 83 Va. 525.

*West Virginia*. — *Bradford v. McConihay*, 15 W. Va. 732. See also *Moran v. Clark*, 30 W. Va. 359, 8 Am. St. Rep. 66; *Connell v. Wilhelm*, 36 W. Va. 598.



(2) *Gross Inadequacy*. — But, on the other hand, it is well recognized that a sale may be set aside where the inadequacy is so gross as to shock the conscience,<sup>1</sup> or raise a presumption of fraud, unfairness, or mistake.<sup>2</sup>

**Rule Applies Though Assurance Given that Larger Sum Will Be Offered on Resale.** — See *Glennon v. Mittenight*, 86 Ala. 455.

**Rule Applies Only in Favor of Bona Fide Purchaser.** — *Fuller v. Brown*, 35 Hun (N. Y.) 162, citing *Billington v. Forbes*, 10 Paige (N. Y.) 487; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259; *Burchell v. Voorhis*, (Supm. Ct.) 49 How. Pr. (N. Y.) 247.

**Sale of Insane Person's Estate — Sale for Fair Price May Be Disapproved Because Resale Will Be Beneficial.** — See *Jennings v. Dunphy*, 174 Ill. 86.

**Mississippi Statute.** — Act Miss. Feb. 28, 1884, (Annot. Code Miss. 1892, § 600) provides that "the party who objects to a sale under a decree because of the inadequacy of the bid, or any person interested therein, may prevent the confirmation thereof by entering into a bond \* \* \* conditioned to pay all costs of a resale and that the property shall bring thereat an advance of not less than twenty per centum upon the bid, exclusive of the costs of resale." See *Mason v. Martin*, 64 Miss. 572.

**1. Sale May Be Set Aside Where Inadequacy So Gross as to Shock the Conscience — England.** — See *Gwynne v. Heaton*, 1 Bro. C. C. 1.

*United States.* — *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26; *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752; *Fidelity Ins., etc., Co. v. Roanoke St. R. Co.*, 98 Fed. Rep. 475; *Magann v. Segal*, 92 Fed. Rep. 252; *Walker v. Derby*, 5 Biss. (U. S.) 134; *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380.

*Alabama.* — *Cockrell v. Coleman*, 55 Ala. 583. But see *infra*, this note.

*Delaware.* — See *Oldham v. Hossenger*, 5 Houst. (Del.) 434.

*Kansas.* — See *Dewey v. Linscott*, 20 Kan. 684.

*Kentucky.* — See *Bean v. Haffendorfer*, 84 Ky. 685.

*Maryland.* — *Garritee v. Popplein*, 73 Md. 322; *Farmers' Bank v. Clarke*, 28 Md. 145; *Gould v. Chappell*, 42 Md. 466; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *House v. Walker*, 4 Md. Ch. 63.

*Minnesota.* — *Johnson v. Avery*, 60 Minn. 262, 51 Am. St. Rep. 529.

*Missouri.* — *Mitchell v. Jones*, 50 Mo. 438; *Holden v. Vaughan*, 64 Mo. 588; *Sheehan v. Stackhouse*, 10 Mo. App. 469; *Bobb v. Graham*, 15 Mo. App. 289.

*New Jersey.* — *Cummins v. Little*, 16 N. J. Eq. 48; *Daly v. Ely*, 51 N. J. Eq. 104.

*New York.* — See *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 413; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513.

*North Carolina.* — See *Wood v. Parker*, 63 N. Car. 379.

*Virginia.* — *Coles v. Coles*, 83 Va. 525.

*West Virginia.* — *Hughes v. Hamilton*, 19 W. Va. 366; *Beaty v. Veon*, 18 W. Va. 291; *Sinnett v. Cralle*, 4 W. Va. 600; *Hyman v. Smith*, 13 W. Va. 744; *Kable v. Mitchell*, 9 W. Va. 492; *Connell v. Wilhelm*, 36 W. Va. 598; *Tracey v. Shumate*, 22 W. Va. 474; *Hartley v. Roffe*, 12 W. Va. 401. See also *Bradford v. McConihay*, 15 W. Va. 732.

**Where Property Has Brought More than Two Thirds of Its Appraised Value, the sale will not be disturbed on the ground of inadequacy of price, if no fraud be shown.** *Wilson v. Taylor*, 4 Ky. L. Rep. 437. Or if there is no advanced bid. *Byrne v. Henderson*, (Ky. 1890) 13 S. W. Rep. 909, 11 Ky. L. Rep. 986.

**Whether Sale at Greatly Inadequate Price Will Be Confirmed or Set Aside, Rests in Discretion of Court.** — *Hughes v. Hamilton*, 19 W. Va. 366.

**Gross Inadequacy Held Not Sufficient Ground for Setting Aside Sale in the Absence of Unfairness or Surprise.** — *Parker v. Bluffton Car-Wheel Co.*, 108 Ala. 140; *Littell v. Zuntz*, 2 Ala. 256, 36 Am. Dec. 415; *Glennon v. Mittenight*, 86 Ala. 455.

**2. Sale May Be Set Aside Where Inadequacy So Gross as to Raise Presumption of Fraud, etc.** — *England.* — See *Ware v. Watson*, 7 De G. M. & G. 739; *Gwynne v. Heaton*, 1 Bro. C. C. 1.

*Canada.* — *O'Connor v. Woodward*, 6 Ont. Pr. 223. See also *Creswick v. Thompson*, 6 Ont. Pr. 52.

*United States.* — *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380; *The Ruby*, 38 Fed. Rep. 622.

*Illinois.* — *Barling v. Peters*, 134 Ill. 606; *Quigley v. Breckenridge*, 180 Ill. 627; *Connely v. Rue*, 148 Ill. 207. See also *Heberer v. Heberer*, 67 Ill. 253.

*Kentucky.* — *Stump v. Martin*, 9 Bush (Ky.) 285; *Alms, etc., Co. v. Gates*, (Ky. 1895) 32 S. W. Ren. 1088; *Lawson v. Hill*, (Ky. 1889) 11 S. W. Rep. 606; *Slaughter v. Graham*, 5 Ky. L. Rep. 324. See also *Harris v. Gunnell*, (Ky. 1888) 9 S. W. Rep. 376.

*Maryland.* — *Cohen v. Wagner*, 6 Gill (Md.) 236; *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Gould v. Chappell*, 42 Md. 466; *Farmers' Bank v. Clarke*, 28 Md. 145; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *House v. Walker*, 4 Md. Ch. 63.

*Minnesota.* — *Johnson v. Avery*, 60 Minn. 262, 51 Am. St. Rep. 529.

*Mississippi.* — *Swofford v. Garmon*, 51 Miss. 348; *Mitchell v. Harris*, 43 Miss. 314; *Allen v. Martin*, 61 Miss. 78.

*Missouri.* — *Walters v. Hermann*, 99 Mo. 529.

*New Jersey.* — See *Cummins v. Little*, 16 N. J. Eq. 48.

*New York.* — *Whitbeck v. Rowe*, (Supm. Ct. Gen. T.) 25 How. Pr. (N. Y.) 403; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259. See also *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513; *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 413.

*West Virginia.* — See *Bradford v. McConihay*, 15 W. Va. 732.

**Compare** *Ricker v. Ricker*, 27 Grant Ch. (U. C.) 576, in which case the court said: "It is difficult to see how a sale at a low price at a public auction would establish fraud in the absence of any collusive or fraudulent arrangements prior to it."

**Inadequacy Must Be So Gross as to Indicate Want of Reasonable Judgment.** — *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1.



(3) *Inadequacy of Price in Connection with Other Circumstances.* — It is also true that inadequacy of price should be considered together with other circumstances affording objections to the sale, and which may have conduced to the inadequacy,<sup>1</sup> and may, in this connection, cause the sale to be set aside,<sup>2</sup> although the other circumstances are such that alone they would not have this effect.<sup>3</sup> But it is not to be inferred that the courts will invariably set aside a sale even though there be both an inadequacy of price and other

1. *Inadequacy of Price Should Be Considered in Connection with Other Circumstances.* — *Wagner v. Phillips*, 51 Mo. 117; *Hammond v. Scott*, 12 Mo. 8; *Gordon v. O'Neil*, 96 Mo. 350; *Briant v. Jackson*, 99 Mo. 585; *Warder-Bushnell-Glessner Co. v. Allen*, 63 Mo. App. 456; *O'Brien v. Hilburn*, 22 Tex. 616. See also *Cummins v. Little*, 16 N. J. Eq. 48; *Cunningham v. Schley*, 6 Gil (Md.) 207; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1.

*Inadequacy of Price May Corroborate Charges of Fraud or Irregularity.* — See *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497.

2. *Inadequacy of Price, in Connection with Other Circumstances, May Cause Setting Aside of Sale — England.* — See *Prideaux v. Prideaux*, 1 Bro. C. C. 287, 1 Cox Ch. 34.

*Canada.* — *Commercial Mut. Bldg. Soc. v. McIver*, 3 Montreal Leg. N. 357; *Jones v. Clarke*, 1 Grant Ch. (U. C.) 368.

*United States.* — *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26; *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752; *Graffam v. Burgess*, 117 U. S. 180; *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Magann v. Segal*, 92 Fed. Rep. 252; *Hunt v. Fisher*, 29 Fed. Rep. 801. See also *Surget v. Byers*, *Hempst.* (U. S.) 715.

*Alabama.* — *Morton v. Underwood*, 49 Ala. 419.

*Arkansas.* — *Thomason v. Craighead*, 32 Ark. 391.

*Delaware.* — *Broomall v. Reybold*, 5 Houst. (Del.) 435. See also *Cowen v. Stevens*, 3 Harr. (Del.) 494; *Booth v. Webster*, 5 Harr. (Del.) 129.

*Florida.* — *Lawyers' Co-operative Pub. Co. v. Bennett*, 34 Fla. 302.

*Illinois.* — *Meeker v. Evans*, 25 Ill. 322; *Bach v. May*, 163 Ill. 549; *Parker v. Shannon*, 137 Ill. 376; *Dutcher v. Leake*, 44 Ill. 398. See also *Thomas v. Hebenstreit*, 68 Ill. 115.

*Indiana.* — *Harlan v. Stout*, 22 Ind. 488. See also *Seller v. Lingerian*, 24 Ind. 264.

*Kansas.* — *Wood v. Drury*, 56 Kan. 409. See also *Evans v. Bushnell*, 59 Kan. 160.

*Kentucky.* — *Adams v. McClary*, 4 Ky. L. Rep. 615; *Lusk v. Miller*, 3 Ky. L. Rep. 337; *Yountsey v. Jones*, 4 Ky. L. Rep. 443; *Morton v. Morton*, 7 Ky. L. Rep. 762; *Taylor v. Gilpin*, 3 Met. (Ky.) 546; *Adkinson v. Randle*, 93 Ky. 310; *Dale v. Shirley*, 5 B. Mon. (Ky.) 496; *Bean v. Haffendorfer*, 84 Ky. 685. See also *Calvert v. Alexander*, (Ky. 1888) 8 S. W. Rep. 696, 10 Ky. L. R. 119; *Evans v. English*, (Ky. 1889) 10 S. W. Rep. 626, 10 Ky. L. Rep. 742; *Busey v. Hardin*, 2 B. Mon. (Ky.) 409.

*Maryland.* — *Latrobe v. Herbert*, 3 Md. Ch. 375; *Glenn v. Clapp*, 11 Gill & J. (Md.) 1. See also *Hintze v. Stengel*, 1 Md. Ch. 283; *Warfield v. Ross*, 38 Md. 92; *Cohen v. Wagner*, 6 Gill (Md.) 236.

*Minnesota.* — See *Johnson v. Avery*, 56 Minn. 12.

*Mississippi.* — *Pattison v. Josselyn*, 43 Miss. 373; *Mitchell v. Harris*, 43 Miss. 314; *Kirkland v. Texas Express Co.*, 57 Miss. 316.

*Missouri.* — *Durfee v. Moran*, 57 Mo. 374; *Briant v. Jackson*, 99 Mo. 585. See also *McPike v. Allman*, 53 Mo. 551.

*New Jersey.* — *Conover v. Walling*, 15 N. J. Eq. 173.

*New York.* — *Gould v. Gager*, (Supm. Ct. Gen. T.) 18 Abb. Pr. (N. Y.) 32, 24 How. Pr. (N. Y.) 440; *King v. Morris*, (Supm. Ct. Gen. T.) 2 Abb. Pr. (N. Y.) 296; *Griffith v. Hadley*, 10 Bosw. (N. Y.) 587; *Marsh v. Ridgway*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 262. See also *Fuller v. Brown*, 35 Hun (N. Y.) 162; *Larkin v. Brouty*, 60 Hun (N. Y.) 585, 15 N. Y. Supp. 509.

*South Carolina.* — See *Ex p. Knight*, 28 S. Car. 481.

*Tennessee.* — *Newland v. Gaines*, 1 Heisk. (Tenn.) 720.

*Texas.* — See *Pearson v. Flanagan*, 52 Tex. 280; *Cameron v. Owens*, (Tex. Civ. App. 1894) 25 S. W. Rep. 986; *Pearson v. Hudson*, 52 Tex. 352; *O'Brien v. Hilburn*, 22 Tex. 616; *McKennon v. McGown*, (Tex. 1889) 11 S. W. Rep. 532; *Vernon v. Montgomery*, (Tex. Civ. App. 1895) 33 S. W. Rep. 606.

*West Virginia.* — *Hilleary v. Thompson*, 11 W. Va. 113.

*Wisconsin.* — *Kemp v. Hein*, 48 Wis. 32.

**Private Sale under Decree Directing Public Sale.**

— Inadequacy of price is a stronger objection to a private than to a public sale, where the decree directs a public sale. See *Latrobe v. Herbert*, 3 Md. Ch. 375.

3. **Slight Additional Circumstances May Authorize Setting Aside Sale Where Price Grossly Inadequate** — *United States.* — See *Schroeder v. Young*, 161 U. S. 334.

*Illinois.* — *Dutcher v. Leake*, 44 Ill. 398. See also *Dickerman v. Burgess*, 20 Ill. 266.

*Kansas.* — *Means v. Rosevear*, 42 Kan. 377. See also *Iona Sav. Bank v. Blair*, 56 Kan. 430.

*Kentucky.* — *Bean v. Haffendorfer*, 84 Ky. 685; *Johnson v. Rowe*, 1 Ky. L. Rep. 274. See also *Busey v. Hardin*, 2 B. Mon. (Ky.) 470.

*Missouri.* — *Warder-Bushnell-Glessner Co. v. Allen*, 63 Mo. App. 456. See also *Nelson v. Brown*, 23 Mo. 13; *Gordon v. O'Neil*, 96 Mo. 350.

*Pennsylvania.* — See *Sipp v. Insurance Co. of North America*, 8 Pa. Dist. 283.

*Texas.* — *Allen v. Stephanes*, 18 Tex. 658; *McKennon v. McGown* (Tex. 1889) 11 S. W. Rep. 532.

And the greater such inadequacy of price, the slighter need be the circumstances of fraud, accident, or mistake. *McKennon v. McGown*, (Tex. 1889) 11 S. W. Rep. 532. See also *Kauffman v. Morris*, 60 Tex. 119.

**There Must Be a Considerable Inadequacy of price to warrant a court in setting aside a judicial sale on account of a mere irregularity.**



circumstances militating against the sale.<sup>1</sup>

(4) *Distinction Depending upon Whether Objection Raised Before or After Confirmation* — It may be considered as well established that inadequacy of price will have a greater influence towards inducing a court to set aside a judicial sale, where the objection is urged in opposition to confirmation, than where it is urged as a ground for setting aside the sale after confirmation.<sup>2</sup>

(5) *Evidence*. — It is to be presumed that property sold at judicial sale realized an adequate price,<sup>3</sup> and an allegation to the contrary must be sustained by clear proof.<sup>4</sup> This proof may be made by affidavits, or depositions, or otherwise,<sup>5</sup> but evidence consisting merely of the opinions of witnesses is not sufficient to establish that the price was inadequate.<sup>6</sup>

*Offer of Larger Price*. — The fact that a greatly larger price is offered for the property and such price is secured, or offered to be secured, is strong evidence that the price at which the sale was made was inadequate.<sup>7</sup>

*k. SALE IN VIOLATION OF ORDER STAYING SAME*. — A sale made in direct violation of an order granted by a judge of competent jurisdiction staying such sale, is irregular and improper, and may be set aside even after confirmation.<sup>8</sup> But it has been held that where the order staying a foreclosure

See *Barlow v. McClintock*, (Ky. 1889) 11 S. W. Rep. 20, 10 Ky. L. Rep. 894.

1. *Sale Will Not Invariably Be Set Aside*. — See the following cases:

*United States*. — *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26.

*Delaware*. — *Cowgill v. Cahoon*, 3 Harr. (Del.) 23.

*Kansas*. — *Babcock v. Canfield*, 36 Kan. 437; *McGeorge v. Sease*, 32 Kan. 387.

*Maryland*. — *Cunningham v. Schley*, 6 Gill (Md.) 207.

*Mississippi*. — *Allen v. Martin*, 61 Miss. 78.

*New Jersey*. — *Fiske v. Weigel*, (N. J. 1891) 21 Atl. Rep. 452.

*Texas*. — *McKennon v. McGown*, (Tex. 1889) 11 S. W. Rep. 532; *Allen v. Pierson*, 60 Tex. 604.

*West Virginia*. — *Bradford v. McConihay*, 15 W. Va. 732; *Martin v. Smith*, 25 W. Va. 580.

Where the Person Complaining Has Been Guilty of Laches, in taking no steps to have the sale set aside or defend the suit until eight months or more thereafter, the sale will not be set aside. *Horne v. Kimbell*, (Tex. Civ. App. 1897) 42 S. W. Rep. 325.

2. *Distinction Dependent upon Whether Question Raised Before or After Confirmation*. — See *Jennings v. Dunphy*, 174 Ill. 86; *Vanbussum v. Maloney*, 2 Met. (Ky.) 552.

In *North Carolina*, the rule is that inadequacy of price may be good cause for refusing to confirm a sale, but after confirmation it can furnish no ground for setting aside and annulling the sale. *Branch v. Griffin*, 99 N. Car. 173; *Sumner v. Sessoms*, 94 N. Car. 371.

In *Allison v. Allison*, 88 Va. 328, *Hinton, J.*, said that he very much doubted whether it could be admitted that gross inadequacy of price was a ground for setting aside a sale duly made and confirmed.

And see further, cases cited *supra*, this section.

Owners Estopped from Claiming that Price Was Inadequate Where They Did Not Oppose Confirmation on That Ground. — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167.

3. *Presumption that Price Realized Was Adequate*. — Where a sale has been confirmed with

out objection by any one, the presumption is that the property brought its full value. *Karn v. Rorer Iron Co.*, 86 Va. 754.

*Price Realized the Test of Value*. — The price at which mortgaged premises were sold on foreclosure must, so long as the sale stands, be taken as a conclusive test of the value of the premises. *Mount v. Manhattan Co.*, 43 N. J. Eq. 25.

4. *Proof Must Be Clear*. — *Tracey v. Shumate*, 22 W. Va. 474; *Connell v. Wilhelm*, 36 W. Va. 598.

*Facts Not Showing Gross Inadequacy*. — See *Elgutter v. Northwestern Mut. L. Ins. Co.*, 86 Fed. Rep. 500; *Fitzwilliams v. Davie*, 18 Tex. Civ. App. 81.

5. *How Proof May Be Made*. — *Kable v. Mitchell*, 9 W. Va. 492; *Connell v. Wilhelm*, 36 W. Va. 598. See also *Vass v. Arrington*, 89 N. Car. 10; *Ladd v. Ladd*, 121 Ala. 583.

6. *Opinions*. — Where land sold at judicial sale for more than its assessed value, the mere opinions of witnesses are not sufficient to show that the price was inadequate. *Tucker v. Tucker*, 86 Va. 679.

A sale *bona fide* made, will not be set aside because of a diversity of opinion among witnesses as to the value of the property, unless it appear that the price reported is so grossly inadequate as to do injury to parties not in default. *Farmers' Bank v. Clarke*, 28 Md. 145.

*Speculative Opinions as to Value of Property Should Not Be Regarded* on a motion to set aside a sale. The appraisement and the active competition of bidders at the sale may furnish a criterion for determining the value. *Bristow v. Peters*, 6 Ky. L. Rep. 300.

7. *Offer of Larger Price*. — *Kable v. Mitchell*, 9 W. Va. 492; *Connell v. Wilhelm*, 36 W. Va. 598. See also *Cockrell v. Coleman*, 55 Ala. 583; *Dewey v. Linscott*, 20 Kan. 684.

8. *Sale in Direct Violation of Order Staying It May Be Set Aside*. — *Campbell v. Smith*, 9 Wis. 305. See also *Gray v. Federal Bank*, 83 Mich. 365; *Burt v. Thomas*, 49 Mich. 462; *Canfield v. Shear*, 49 Mich. 313; *State Bank v. Green*, 10 Neb. 130; *Jones v. Dow*, 15 Wis. 582; *Basen v. Eilers*, 11 Wis. 277; *Spaulding v. Milwaukee, etc., R. Co.*, 11 Wis. 157.



sale was not served upon, nor any notice thereof received by, either the officer making the sale or the solicitor of the mortgagee, until after the sale had actually taken place, and the sale was subsequently confirmed, the rights of innocent third persons who were *bona fide* purchasers at such sale should be protected.<sup>1</sup>

1. JUDGMENT DIRECTING SALE SUPERSEDED. — It is error to confirm a sale made pursuant to a judgment which has been suspended by the execution of a supersedeas bond on appeal, or by an appeal which operates as a supersedeas without any bond.<sup>2</sup> But it is no objection to a sale that at the time it was made a bill was pending to vacate the decree, where the grounds for impeaching it are not stated, and it does not appear that any order was passed to restrain the proceedings of the trustee appointed to sell.<sup>3</sup>

m. OBJECTIONS TO JUDGMENT OR PROCEEDINGS LEADING UP TO ORDER OF SALE. — A judicial sale cannot be set aside merely because the judgment or order authorizing or directing the sale is erroneous;<sup>4</sup> and objections tending to impeach the validity of the judgment or decree or the regularity of the proceedings leading up to the order of sale cannot be raised in opposition to confirmation or on motion to set aside after confirmation.<sup>5</sup>

5. Time for Objecting. — Objections to a judicial sale, in order to have the effect of setting the same aside, must, as a general rule, be urged within a reasonable time, otherwise the person objecting will be held to have forfeited his right to relief by laches, acquiescence, or waiver.<sup>6</sup> But under exceptional

1. Sale Made Without Notice of Stay — Rights of Innocent Purchasers Protected. — *Monell v. Lawrence*, 12 Johns. (N. Y.) 521.

2. Superseded Judgment. — *Rulo v. Murphy*, (Ky. 1899) 51 S. W. Rep. 312; *Chesapeake Bank v. McClellan*, 1 Md. Ch. 328; *Ashley v. Hull*, 18 Ohio Cir. Ct. 614, 9 Ohio Cir. Dec. 664.

3. Sale During Pendency of Bill to Vacate Decree Good Where Proceedings by Trustee Appointed to Sell Not Restrained. — *Glenn v. Clapp*, 11 Gill & J. (Md.) 1.

4. Sale Cannot Be Set Aside Because Judgment or Order Erroneous. — *Helmer v. Rehm*, 14 Neb. 219; *Vanbussan v. Maloney*, 2 Met. (Ky.) 550. See also *Dungan v. Vondersmith*, 49 Md. 249.

5. Objections Tending to Impeach Validity of Judgment or Decree or Regularity of Proceedings Leading Up to Order of Sale Not Admissible — *District of Columbia*. — *Cox v. Cox*, 18 D. C. 1.

*Florida*. — *Mann v. Jennings*, 25 Fla. 730.

*Illinois*. — See *Swift v. Yanaway*, 153 Ill. 197.

*Kansas*. — *McGeorge v. Sease*, 32 Kan. 387.

*Michigan*. — *Farmers' Bank v. Quick*, 71 Mich. 534, 15 Am. St. Rep. 280.

*Minnesota*. — *Curran v. Kuby* 37 Minn. 330.

*Nebraska*. — *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281; *Stratton v. Reisdorff*, 35 Neb. 314; *Kimbro v. Clark*, 17 Neb. 403; *State Nat. Bank v. Scofield*, 9 Neb. 499.

*New Jersey*. — *Shultz v. Sanders*, 38 N. J. Eq. 154; *Eisberg v. Shultz*, 38 N. J. Eq. 293.

*North Carolina*. — *Carter v. Rountree*, 193 N. Car. 32.

6. Objections Must Be Made Promptly — *England*. — *Price v. North*, 2 Y. & C. Exch. 620, 7 L. J. Exch. Eq. 9; *Bowen v. Evans*, 1 J. & La T. 178, 6 Ir. Eq. 569. See also *Lightburn v. Swift*, 2 Ball. & B. 207; *Townsend v. Warren*, 1 J. & La. T. 221, 6 Ir. Eq. 620, cited in *Bowen v. Evans*, 2 H. L. Cas. 278, note 1.

*Canada*. — See *Berard v. Barrette*, 5 Rev. Leg. 703.

*United States*. — *Slicer v. Pittsburg Bank*, 16 How. (U. S.) 571; *Johns v. Slack*, 2 Hughes (U. S.) 467; *McBride v. Gwynn*, 33 Fed. Rep. 402.

*Alabama*. — See *Worthington v. McRoberts*, 9 Ala. 297.

*District of Columbia*. — *Cuyler v. Cuyler*, 5 Mackey (D. C.) 568.

*Illinois*. — *McConnel v. Gibson*, 12 Ill. 128; *Bush v. Sherman*, 80 Ill. 160; *Goodbody v. Goodbody*, 95 Ill. 456; *Ingalls v. Rowell*, 149 Ill. 163; *Connelly v. Rue*, 148 Ill. 207.

*Indiana*. — *Stehman v. Crull*, 26 Ind. 436; *Cassel v. Cassel*, 26 Ind. 90. See also *Hatfield v. Jackson*, 50 Ind. 507.

*Kentucky*. — *Mitchell v. Berry*, 1 Met. (Ky.) 602.

*Maryland*. — *Shartzer v. Mountain Lake Park Assoc.*, 86 Md. 335; *Dunnington v. Evans*, 79 Md. 83; *Davis v. Simpson*, 5 Har. & J. Md.) 147, 9 Am. Dec. 500.

*Michigan*. — *Goodwin v. Burns*, 21 Mich. 211. See also *Bullard v. Green*, 10 Mich. 268; *Leonard v. Taylor*, 12 Mich. 398.

*New York*. — *Clasflin v. Clark*, 22 N. Y. Wkly. Dig. 137.

*North Carolina*. — See *Harris v. Brown*, 123 N. Car. 419.

*Pennsylvania*. — *Lockhart v. John*, 7 Pa. St. 137.

*South Carolina*. — *Baggott v. Sawyer*, 25 S. Car. 405.

*Tennessee*. — See *Lasell v. Powell*, 7 Coldw. (Tenn.) 277; *Ward v. West*, (Tenn. Ch. 1895) 35 S. W. Rep. 563; *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

*West Virginia*. — *Walker v. Ruffner*, 32 W. Va. 297; *Williams v. Maxwell*, 45 W. Va. 297. See also *Newcomb v. Brooks*, 16 W. Va. 32.

Construction of Mississippi Statute. — The provision of § 2693 of the Mississippi Code of 1880, that "no action shall be brought to recover any property thereafter sold by order of a chancellor's court, where the sale is made in



circumstances the courts have overlooked a considerable delay.<sup>1</sup>

**6. Whether Offer of Advance Price Is Necessary.** — There is no reason why it should be necessary in order to obtain the setting aside of a judicial sale and a resale of the property when a good cause therefor exists, that it should be asked that the biddings be opened at a substantial advance upon the price reported.<sup>2</sup> But it would certainly seem that when inadequacy of price is one of the objections, and especially where it may be the one which turns the scale against sustaining the original sale, the court should require some advance bid or at least a guaranty that there will be no loss upon the resale.<sup>3</sup>

**7. Waiver of Objections.** — A purchaser who, after confirmation, accepts a conveyance executed in pursuance of the sale, its confirmation, and the order of the court, and who applies to and obtains from the court an order for a writ of possession for such property, thereby waives all errors and irregularities which occurred in the making of such sale and all objections and exceptions to the court's order of confirmation.<sup>4</sup>

**8. Offer of Advance Price as a Ground for Opening Biddings** — *a. IN ENGLAND AND CANADA.* — It was formerly the *English* practice where, after a judicial sale had been made, but before the purchase had been finally completed,<sup>5</sup> there was an offer of an advance bid or a higher price than that realized at the sale, to open the biddings and order a resale commencing at such advance bid, although there was no claim that there had been any fraud or impropriety about the conduct of the original sale.<sup>6</sup> This practice was, however, looked upon with disapproval by the courts,<sup>7</sup> and has been abolished.<sup>8</sup>

good faith and the purchase money paid, unless brought within two years after possession taken by the purchaser under such sale of such property," applies to sales which are void because the land was not divided into tracts and sold separately as required by the constitution, and cures such sales if suit to recover the land is not brought within the specified time. *Bradley v. Villere*, 66 Miss. 399.

**1. Special Circumstances Excusing Delay.** — *Sayre v. Elyton Land Co.*, 73 Ala. 85. See also *Bush v. Sherman*, 80 Ill. 160; *Goodbody v. Goodbody*, 95 Ill. 456; *Morrow v. Wessell*, 8 Ky. L. Rep. 261, (Ky. 1886) 1 S. W. Rep. 439; *Fuller v. Brown*, 35 Hun (N. Y.) 162.

**Circumstances Constituting Such "Inevitable Accident or Misfortune" as to Excuse Delay.** — See *Yowell v. Gaines*, 2 Bush (Ky.) 211.

**Objection Questioning Power of Court to Make Sale** may be entertained at a later day than other objections would be. *Cuyler v. Cuyler*, 5 Mackey (D. C.) 568.

**2. Offer of Advance Price Not Necessary.** — *Roberts v. Roberts*, 13 Gratt. (Va.) 639, 70 Am. Dec. 435. See also *Penn v. Tolleson*, 20 Ark. 652.

**3. When Advance Price Should Be Offered or Guaranty Against Loss on Resale Given.** — *Turner v. Indianapolis, etc.*, R. Co., 8 Biss. (U. S.) 380; *Quigley v. Breckenridge*, 180 Ill. 627; *Ayers v. Baumgarten*, 15 Ill. 444; *Allen v. Shepard*, 87 Ill. 314; *Murphy's Estate*, 11 W. N. C. (Pa.) 419; *Herr's Estate*, 12 Pa. Co. Ct. 622; *In re Chartiers Coal Co.*, 1 Pittsb. (Pa.) 87; *Effinger v. Ralston*, 21 Gratt. (Va.) 430. See also *Jennings v. Dunphy*, 174 Ill. 86; *Max Meadows Land, etc., Co. v. McGavock*, 96 Va. 131.

**4. When Objections Are Waived.** — *Hooper v. Castetter*, 45 Neb. 67.

**5. Biddings Not Opened After Confirmation of Sale Merely upon Offer of Advance Price.** — *Boyer*

*v. Blackwell*, 3 Anstr. 656; *Vincent v. Thwaites*, 5 Ir. Eq. 526; *Scott v. Nesbit*, 3 Bro. C. C. 475; *Morice v. Durham*, 11 Ves. Jr. 57. See also *Fergus v. Gore*, 1 Sch. & Lef. 350; *Ex p. Partington*, 1 Ball & B. 209.

**Circumstances Which, in Addition to Offer of Advance Price, Authorize Opening of Biddings After Confirmation of Sale.** — *O'Connor v. Richards*, *Sausse & Sc. 246*; *Gower v. Gower*, 2 Eden 340; *Watson v. Birch*, 2 Ves. Jr. 51, 4 Bro. C. C. 172.

**6. Early Rule that Biddings Might Be Opened on Offer of Advance Price.** — *Colebrook v. Clarke*, 9 L. J. Ch. 130; *Anonymous*, 6 Ves. Jr. 513; *Manners v. Furze*, 17 L. J. Ch. 485; *Ford v. Head*, 1 Hog. 93; *Banks v. Banks*, 16 Beav. 380, 1 W. R. 511; *Filder v. Bellingham*, 1 Coll. Ch. Cas. 526, 9 Jur. 8; *Rex v. Hilton*, 1 Clel. 595; *Archdall v. Montgomery*, Vern. & S. 302; *D'Oyley v. Powis*, 1 Cox Ch. 206, 2 Bro. C. C. 33; *Ambrose v. Ambrose*, 1 Cox 194; *Lovegrove v. Cooper*, 9 Hare 279; *In re Jones*, 1 Giff. 284, 29 L. J. Ch. 139, 5 Jur. N. S. 1243, 1 L. T. N. S. 186, 8 W. R. 56; *Bridger v. Penfold*, 1 Kay & J. 28, 3 Eq. R. 141; *Ware v. Watson*, 7 De G. M. & G. 739, 25 L. J. Ch. 199, 2 Jur. N. S. 129, 4 W. R. 233; *Aubrey v. Denny*, 2 Molloy 508; *Templer v. Sweet*, 8 Beav. 464, 14 L. J. Ch. 424; *Waterhouse v. Wilkinson*, 1 Hem. & M. 636, 3 N. R. 369, 9 L. T. N. S. 799, 12 W. R. 336.

**7. Practice of Opening Biddings Disapproved.** — *Barlow v. Osborne*, 6 H. L. Cas. 556; *McRoberts v. Durie*, 1 Ch. Chamb. (Ont.) 211; *Crooks v. Crooks*, 2 Ch. Chamb. (Ont.) 29; *Creswick v. Thompson*, 6 Ont. Pr. 52. See also *Dickey v. Heron*, 1 Ch. Chamb. (Ont.) 149; *Brock v. Saul*, 2 Ch. Chamb. (Ont.) 145.

**8. Practice of Opening Biddings Abolished** — *England.* — Sales of Land by Auction Act, 1867 (30 & 31 Vict., c. 48). See *In re Bartlett*, 16 Ch. D. 561, 50 L. J. Ch. 205, 44 L. T. N. S. 17,



*b. IN THE UNITED STATES — (1) Extent to Which Practice Prevails.* — In the United States the courts have, for the most part, refused to adopt the practice of opening the biddings on an offer of an advance price,<sup>1</sup> but there are several states which have adopted this practice.<sup>2</sup> A brief review of the decisions in these states is therefore necessary.

(2) *Who May Make Advance Offer.* — It is usually considered that any person may make an advance offer in order to have the biddings opened, and it is not important that the person making such offer should be a party to the cause.<sup>3</sup> But it has been said that one who was a bidder at the sale by himself or by an agent, or was present and had the opportunity to bid, would not, as a general rule, be permitted to put in an upset bid.<sup>4</sup>

(3) *What Advance Will Cause Biddings to Be Opened.* — Whether or not a sale shall be set aside and the biddings opened upon an offer of an advance price, is a matter resting in the sound legal discretion of the court to which

29 W. R. 279; *Griffiths v. Jones*, L. R. 15 Eq. 279; *Delves v. Delves*, L. R. 20 Eq. 77, 23 W. R. 499; *Brown v. Oakshott*, 38 L. J. Ch. 717.

*Canada.* — *Mitchell v. Mitchell*, 6 Ont. Pr. 232, citing General Order 388; *McDonald v. Gordon*, 2 Ch. Chamb. (Ont.) 125.

**1. Practice of Opening Biddings on Advance Offer Not Adopted — United States.** — *Pewabic Min. Co. v. Mason*, 145 U. S. 349 (a Michigan case); *In re Illinois Third Nat. Bank*, 9 Biss. (U. S.) 535 (an Illinois case).

*Alabama.* — *Parker v. Bluffton Car-wheel Co.*, 108 Ala. 141.

*Arkansas.* — *Penn v. Tolleson*, 20 Ark. 652.

*Illinois.* — *Ayers v. Baumgarten*, 15 Ill. 444; *Coffey v. Coffey*, 16 Ill. 141.

*Kentucky.* — *Harris v. Gunnell*, (Ky. 1888) 9 S. W. Rep. 376, 10 Ky. L. Rep. 419; *Alms, etc., Co. v. Gates*, (Ky. 1895) 32 S. W. Rep. 1088; *Bean v. Johnson*, (Ky. 1891) 16 S. W. Rep. 140, 13 Ky. L. Rep. 36; *Forman v. Hunt*, 3 Dana (Ky.) 619; *Stump v. Martin*, 9 Bush (Ky.) 289.

*Maryland.* — *Cohen v. Wagner*, 6 Gill (Md.) 236; *Andrews v. Scotton*, 2 Bland (Md.) 629. See also *Kelso v. Jessop*, 59 Md. 114.

*Mississippi.* — *Mitchell v. Harris*, 43 Miss. 314; *Allen v. Martin*, 61 Miss. 78. But compare *Wright v. Cantzon*, 31 Miss. 514. And see next note.

*New Jersey.* — *Conover v. Walling*, 15 N. J. Eq. 173; *Morrisse v. Inglis*, 46 N. J. Eq. 306; *Bethlehem Iron Co. v. Philadelphia, etc., R. Co.*, 49 N. J. Eq. 356.

*New York.* — *Lefevre v. Laraway*, 22 Barb. (N. Y.) 167. See also *Wesson v. Chapman*, 76 Hun (N. Y.) 592; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290; *Duncan v. Dodd*, 2 Paige (N. Y.) 99; *People v. Bond St. Sav. Bank*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 337.

*South Carolina.* — *Tompkins v. Tompkins*, 39 S. Car. 537. See also *Young v. Teague*, *Bailey Eq. (S. Car.)* 13.

*Wisconsin.* — *Adams v. Haskell*, 10 Wis. 123. See also *Kneeland v. Smith*, 13 Wis. 591.

**An Advance Offer Is a Strong Auxiliary Argument for Opening the Bids**, even after confirmation, where there are other grounds for setting the sale aside. *Mitchell v. Harris*, 43 Miss. 314.

**2. States Which Have Adopted the Practice — North Carolina.** — *Trull v. Rice*, 92 N. Car. 572; *Dula v. Seagle*, 98 N. Car. 458; *Atty.-Gen.*

*v. Roanoke Nav. Co.*, 86 N. Car. 408; *Vass v. Arrington*, 8 N. Car. 10; *Pritchard v. Askew*, 80 N. Car. 89.

*Tennessee.* — *Click v. Burris*, 6 Heisk. (Tenn.) 539; *Lasell v. Powell*, 7 Coldw. (Tenn.) 277; *Lucas v. Moore*, 2 Lea (Tenn.) 7; *Parsons v. McNickle*, 1 Shannon Tenn. Cas. 265; *Mabry v. Churchwell*, 9 Lea (Tenn.) 488; *Atkison v. Murfree*, 1 Tenn. Ch. 52; *Allen v. East*, 4 Baxt. (Tenn.) 308; *Reese v. Copeland*, 6 Lea (Tenn.) 193; *Wilson v. Shields*, 3 Baxt. (Tenn.) 65. See also *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228; *Chase v. Joiner*, 88 Tenn. 761; *Donaldson v. Young*, 7 Humph. (Tenn.) 266; *Childress v. Hurt*, 2 Swan (Tenn.) 487; *Owen v. Owen*, 5 Humph. (Tenn.) 352; *Morton v. Sloan*, 11 Humph. (Tenn.) 278; *Coffin v. Corruith*, 1 Coldw. (Tenn.) 194; *Mann v. McDonald*, 10 Humph. (Tenn.) 275.

*Virginia.* — *Coles v. Coles*, 83 Va. 525; *Rondabush v. Miller*, 32 Gratt. (Va.) 454; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586; *Ewald v. Crockett*, 85 Va. 299. See also *Efinger v. Ralston*, 21 Gratt. (Va.) 430; *Max Meadows Land, etc., Co. v. McGavock*, 96 Va. 131; *Cleek v. McGuffin*, 89 Va. 324; *Corneal v. Lynch*, 91 Va. 114, 50 Am. St. Rep. 819.

*West Virginia.* — *Stewart v. Stewart*, 27 W. Va. 168; *National Bank v. Jarvis*, 28 W. Va. 805.

See also cases cited in remainder of this section.

**In Mississippi** the courts at first refused to adopt the practice under discussion. (See preceding note.) But it is now provided by statute (Annot. Code 1892, § 600), that any party or interested person may prevent confirmation on the ground of inadequacy of price by entering into a bond that the property shall realize a specified advance upon a resale. See *Mason v. Martin*, 64 Miss. 572.

This statute has been held constitutional. *Chaffe v. Aaron*, 62 Miss. 29.

**3. Person Making Advance Bid Need Not Be a Party to Cause.** — *Wilson v. Shields*, 3 Baxt. (Tenn.) 65.

**4. Person Who Was a Bidder or Had Opportunity to Bid Cannot Put in Advance Bid.** — He must bid at the sale, in open competition with all others, what he is willing to give for the property. A different rule would have a pernicious effect upon judicial sales. *Moore v. Triplett*, 96 Va. 603.



the advance offer is made,<sup>1</sup> and no inflexible rule can be laid down as to how large an advance will cause the biddings to be opened.<sup>2</sup> It is, however, the usual custom to open the biddings upon an advance of ten per cent. upon the price realized at the sale,<sup>3</sup> or more;<sup>4</sup> and to refuse to open them upon a very trifling advance.<sup>5</sup>

(4) *Advance Must Be Secured.* — The person offering the advance is required to secure to the satisfaction of the court the amount offered, and this for the obvious reason that otherwise an actual purchaser, whose bid is secured, might be lost for a mere promise.<sup>6</sup> The amount may be secured either by the applicant complying with the terms of his offer by accompanying the application with the necessary money and notes, or by entering into a written application with good security to comply with the terms of his offer if so ordered by the court.<sup>7</sup>

(5) *Advance Bid Cannot Be Withdrawn.* — The person making an advance bid is bound thereby and cannot, after a resale has been ordered, withdraw his proposition.<sup>8</sup>

(6) *Whether Notice of Opening Biddings Is Necessary.* — The general rule is that where the biddings have been reopened after a sale reported, the chancellor should order a readvertisement of the property, or that public notice be given of the fact that the biddings are opened and stand open for all bidders.<sup>9</sup> But the chancellor may, in his discretion, in a proper case, merely let the biddings remain open in the master's office and receive such bids as may be offered, and confirm the sale when reported by the master.<sup>10</sup>

(7) *Whether Biddings May Be Opened More than Once.* — In *North Carolina* it has been held that the biddings may be opened more than once upon advance offers.<sup>11</sup> But in *Tennessee* it is considered that the biddings should not be opened a second time upon a second advance offer,<sup>12</sup> except under

1. *Whether Biddings Shall Be Opened Is Within Discretion of Court to Which Advance Offer Is Made.* — *Trull v. Rice*, 92 N. Car. 572; *Owen v. Owen*, 5 *Humph. (Tenn.)* 352; *Roudabush v. Miller*, 32 *Gratt. (Va.)* 454; *Hansucker v. Walker*, 76 *Va.* 753; *Moore v. Triplett*, 96 *Va.* 603. See also *Vaughan v. Gooch*, 92 N. Car. 524; *Berlin v. Melhorn*, 75 *Va.* 642.

2. *No Fixed Rule Can Be Laid Down as to What Advance Will Cause Biddings to Be Opened.* — *Hansucker v. Walker*, 76 *Va.* 753.

3. *Biddings May Be Opened upon Advance Bid of Ten Per Cent.* — *North Carolina.* — *Atty.-Gen. v. Roanoke Nav. Co.*, 86 N. Car. 408; *Vass v. Arrington*, 89 N. Car. 10; *Dula v. Seagle*, 98 N. Car. 458; *Trull v. Rice*, 92 N. Car. 572; *Pritchard v. Askew*, 80 N. Car. 86; *Marsh v. Nimocks*, 122 N. Car. 478.

*Tennessee.* — *Click v. Burris*, 6 *Heisk. (Tenn.)* 539; *Collins v. Wood*, 88 *Tenn.* 779; *Mabry v. Churchwell*, 9 *Lea (Tenn.)* 488.

*Virginia.* — *Ewald v. Crockett*, 85 *Va.* 299; *Todd v. Gallego Mills Mfg. Co.*, 84 *Va.* 586; *Hansucker v. Walker*, 76 *Va.* 753.

4. *Biddings Should Be Opened on Advance of Twelve and One-half Per Cent.* — *Teel v. Yancey*, 23 *Gratt. (Va.)* 691.

*Of Sixteen Per Cent.* — *Stewart v. Stewart*, 27 *W. Va.* 168.

*Of Thirty Per Cent.* — *Coles v. Coles*, 83 *Va.* 525.

5. *Biddings Not Opened upon Very Trifling Advance.* — A private judicial sale for five thousand dollars will not be set aside and a resale ordered upon an advance bid of one hundred dollars more. *Hudgins v. Lanier*, 23 *Gratt. (Va.)* 494.

6. *Advance Bid Must Be Secured.* — *Mabry v. Churchwell*, 9 *Lea (Tenn.)* 488; *Childress v. Harrison*, 1 *Baxt. (Tenn.)* 410; *Glenn v. Glenn*, 7 *Heisk. (Tenn.)* 367; *McClintic v. Wise*, 25 *Gratt. (Va.)* 448, 18 *Am. Rep.* 694.

7. *How Amount May Be Secured.* — *Mabry v. Churchwell*, 9 *Lea (Tenn.)* 488; *Allen v. East*, 4 *Baxt. (Tenn.)* 308; *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 *Tenn. Ch.* 228; *Atkison v. Murfree*, 1 *Tenn. Ch.* 51.

*Time Allowed to Perfect Advance Bid.* — In *Ewald v. Crockett*, 85 *Va.* 299, it was held not error, under the circumstances of the case, to allow the bidder offering an advance bid twenty days in which to perfect such bid by depositing the money.

8. *Person Making Advance Bid Cannot Withdraw Same.* — *Allen v. East*, 4 *Baxt. (Tenn.)* 308.

9. *General Rule that Notice Should Be Given.* — *Dupuy v. Gorman*, 9 *Lea (Tenn.)* 144; *Click v. Burris*, 6 *Heisk. (Tenn.)* 545.

10. *Notice May Be Dispensed With.* — *Dupuy v. Gorman*, 9 *Lea (Tenn.)* 144.

11. *Biddings May Be Opened More than Once upon Advance Offers.* — *Atty.-Gen. v. Roanoke Nav. Co.*, 86 N. Car. 408.

12. *Biddings Will Not Be Opened a Second Time upon a Second Advance Offer.* — *Collins v. Wood*, 88 *Tenn.* 779; *Click v. Burris*, 6 *Heisk. (Tenn.)* 539. See also *Glenn v. Glenn*, 7 *Heisk. (Tenn.)* 367.

*Purchasers at Resale Required to Increase Their Bid to Amount of Second Advance.* — When, after the biddings have once been opened on the offer of an advance and a resale has been had, and subsequently another offer of an advance



extraordinary circumstances.<sup>1</sup>

(8) *Biddings Opened to All.* — It is usual, when an advance offer is made, to open the biddings to all,<sup>2</sup> rather than to decree a sale at the advance price to the person offering the same.<sup>3</sup>

(9) *When Person Offering Advance Bid Becomes Purchaser.* — When a resale has been ordered on an offer of an advance bid, the commissioner should start the sale at the amount of the advance bid, and in default of any other bid the person making the advance bid should be declared to be the purchaser at such price, and compliance with the bid may be enforced against him.<sup>4</sup>

(10) *Terms of Payment on Resale.* — Ordinarily where the biddings are opened, the purchaser should be required, in the absence of any controlling equity requiring a different course to be adopted, to execute his purchase money notes as of the date of the original sale.<sup>5</sup> The terms of the resale should also be the same,<sup>6</sup> except that the deferred payments should not be extended beyond the time provided for in the first decree of sale.<sup>7</sup>

(11) *Original Purchaser Entitled to Return of Purchase Money When Biddings Opened.* — The successful bidder who has made the required cash payment is entitled to have it returned when an advance bid is accepted and the sale opened, and if he chooses to allow it to remain in the hands of the commissioner who made the first sale, abiding the result of the advance bid and resale, it is at his own risk.<sup>8</sup>

(12) *When Biddings Will Not Be Opened* — (a) *In General.* — It has been held that where, at the original sale in a suit to enforce a lien on the property sold, the owner purchased the same at an amount sufficient to pay the debt due the complainant and all costs, the court properly refused to order a resale upon an advance bid;<sup>9</sup> and that where land had been sold in parcels and a person had purchased several parcels some of which were desirable to him only in connection with others, the court would not open the biddings upon an advance bid for some of the parcels which would be advantageous to him, as this would work injustice to the purchaser by leaving on his hands parcels which he might not have purchased at all save for their use to him in connection with such other parcels.<sup>10</sup>

(b) *Advance Offer Made Through Malice or Prejudice.* — It has also been said that a fair judicial sale should not be set aside and the biddings opened upon

of ten per cent. is made, the court may require the purchasers at the first resale to increase their bid to the amount thus offered, and confirm the resale to them at such advance. *Irby v. Irby*, 11 Lea (Tenn.) 165.

1. *Biddings May Be Opened a Second Time under Extraordinary Circumstances.* — *Click v. Burris*, 6 Heisk. (Tenn.) 539; *Atchison v. Murfree*, 3 Tenn. Ch. 728.

As where a reasonable excuse is shown for failing to make the advance within the time originally prescribed. *Vaughn v. Smith*, 3 Tenn. Ch. 368; *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228; *Mayo v. Harding*, 3 Tenn. Ch. 237.

2. *Biddings Open to All.* — *Wood v. Parker*, 63 N. Car. 379; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586; *Ewald v. Crockett*, 85 Va. 299. See also *Dupuy v. Gorman*, 9 Lea (Tenn.) 144; *Click v. Burris*, 6 Heisk. (Tenn.) 545.

3. *Court Should Not Decree Sale at Advance Price to Person Offering Same.* — *Wood v. Parker*, 63 N. Car. 379.

4. *When Person Offering Advance Bid Becomes Purchaser.* — *Marsh v. Nimocks*, 122 N. Car. 478.

5. *Purchase Money Notes Should Be Dated as of*

*Time of Original Sale.* — *Mabry v. Churchwell*, 9 Lea (Tenn.) 488.

6. *Terms Should Be Same as on Original Sale.* — *Mabry v. Churchwell*, 9 Lea (Tenn.) 488; *Yost v. Porter*, 80 Va. 855.

7. *Time When Deferred Payments Will Become Due Should Not Be Extended.* — *Yost v. Porter*, 80 Va. 855.

8. *Original Purchaser Leaves Cash Paid by Him in Hands of Commissioner at His Own Risk.* — Therefore, if he becomes the purchaser at the resale, he cannot require the parties beneficially interested to accept this as part payment on the resale or to look to the commissioner's estate or his bondsmen for payment, where such money has been lost or tied up by the death of the commissioner and the insolvency of his estate. *Head v. Moore*, 96 Tenn. 358.

9. *Where Owner Has Purchased Property at Amount Sufficient to Pay Debt.* — *Bright v. Bright*, 12 Lea (Tenn.) 630. See also *Mayo v. Harding*, 3 Tenn. Ch. 237.

10. *Where Acceptance of Advance Bid for Some Parcels Would Work Injustice to the Purchaser of Such Parcels and Others.* — *Moore v. Triplett*, 96 Va. 603.



an advance offer which is made through malice or prejudice against the purchaser.<sup>1</sup>

(c) **Conditional Application.** — An application to open biddings based upon a condition that cannot be complied with should not be entertained.<sup>2</sup>

(d) **Advance Offer Made After Confirmation of Sale.** — After confirmation of the sale the biddings cannot, as a rule, be opened upon an advance offer being made.<sup>3</sup>

**XIV. RIGHTS AND LIABILITIES OF PURCHASERS** — 1. **Title Acquired** — *a.* **AS AGAINST PARTIES.** — In a judicial sale the court undertakes to sell only the title, such as it is, of the parties to the suit, and nothing more.<sup>4</sup> But the sale is effectual to pass all the title which is in the party or parties whose title is thereby sought to be divested.<sup>5</sup>

*b.* **AS AGAINST THIRD PERSONS.** — A judicial sale cannot affect the rights of persons, not parties to the proceeding in which the sale was ordered, as to the property sold, nor give to the purchaser any rights as against such third persons.<sup>6</sup>

2. **Caveat Emptor.** — It is well established as a general rule that where property is sold at judicial sale there is no warranty as to either the title or the

1. **Advance Offer Made Through Malice or Prejudice Against Purchaser.** — *Roadabush v. Miller*, 32 Gratt. (Va.) 454; *Coles v. Coles*, 83 Va. 525.

2. **Conditional Application.** — *Irby v. Irby*, 11 Lea (Tenn.) 165; *Lucas v. Moore*, 2 Lea (Tenn.) 1.

3. **After Confirmation of Sale Biddings Cannot Be Opened upon Advance Offer** — *North Carolina.* — *Trull v. Rice*, 92 N. Car. 572.

*Tennessee.* — *Click v. Burris*, 6 Heisk. (Tenn.) 539; *Houston v. Aycock*, 5 Sneed (Tenn.) 406, 73 Am. Dec. 131; *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228; *Humph. v. Phipps*, 3 Sneed (Tenn.) 196; *Moore v. Watson*, 4 Coldw. (Tenn.) 64; *Horn v. Denton*, 2 Sneed (Tenn.) 125; *Gaugh v. Henderson*, 2 Head (Tenn.) 628; *Henderson v. Lowry*, 5 Yerg. (Tenn.) 240; *Bradford v. Hamilton*, 3 Tenn. Ch. 344; *Owen v. Owen*, 5 Humph. (Tenn.) 352; *Coffin v. Corruith*, 1 Coldw. (Tenn.) 194; *Donaldson v. Young*, 7 Humph. (Tenn.) 266; *Mann v. McDonald*, 10 Humph. (Tenn.) 275; *Wilson v. Shields*, 3 Baxt. (Tenn.) 65; *Childress v. Hurt*, 2 Swan (Tenn.) 487; *Atkison v. Murfree*, 1 Tenn. Ch. 51; *Lasell v. Powell*, 7 Coldw. (Tenn.) 277; *Reese v. Copeland*, 6 Lea (Tenn.) 192.

*Virginia.* — *Langyher v. Patterson*, 77 Va. 470; *Yost v. Porter*, 80 Va. 855. See also *Coles v. Coles*, 83 Va. 525.

**Advance Bid After Confirmation but at Same Term.** — In *West Virginia* where a judicial sale was confirmed and on a subsequent day of the same term an advance bid of twenty per cent. was offered, it was held that the court properly set aside the order of confirmation and ordered a resale. *National Bank v. Jarvis*, 28 W. Va. 805.

4. **Courts Undertake to Sell Only Title of Parties** — *United States.* — *Roe v. Dowson*, 5 Cranch (C. C.) 514.

*Delaware.* — *Caulk v. Caulk*, 3 Houst. (Del.) 81.

*Illinois.* — *Bishop v. O'Conner*, 69 Ill. 431.

*Kentucky.* — *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; *Simpson v. Hawkins*, 1 Dana (Ky.) 313.

*Maryland.* — *Brown v. Wallace*, 4 Gill & J. (Md.) 479; *Andrews v. Scotton*, 2 Bland (Md.)

629; *Bolgiano v. Cooke*, 19 Md. 375; *Duvall v. Speed*, 1 Md. Ch. 229; *Tongue v. Morton*, 6 Har. & J. (Md.) 21.

*South Carolina.* — *Smith v. Winn*, 38 S. Car. 188.

*Virginia.* — *Long v. Weller*, 29 Gratt. (Va.) 347; *Smith v. Wortham*, 82 Va. 937; *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272; *Hickson v. Rucker*, 77 Va. 135; *Watson v. Hoy*, 28 Gratt. (Va.) 698.

*Canada.* — *Hamilton v. Kelly*, 3 Rev. Lég. 564, 16 L. C. Jur. 320; *Wilson v. Caldwell*, 3 Rev. Lég. 476.

**The Purchaser Is Chargeable with Notice of Such Material Facts as the Record Discloses.** — *Webber v. Clark*, 136 Ill. 256. See also *Smith v. Huntoon*, 134 Ill. 24, 23 Am. St. Rep. 646.

5. **All the Title of Parties Passes** — *Kansas.* — *Andrews v. Alcorn*, 13 Kan. 361; *Mills v. Ralston*, 10 Kan. 206.

*Kentucky.* — See *O'Neal v. Bannon*, 4 Bush (Ky.) 23.

*Maryland.* — *Long v. Long*, 62 Md. 33; *Harryman v. Starr*, 56 Md. 63. See also *Neal v. Hopkins*, 87 Md. 19; *Drovers', etc., Nat. Bank v. Hughes*, 83 Md. 355.

*Nebraska.* — *Young v. Brand*, 15 Neb. 601.

*New York.* — *Chautauque County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442. See also *Holden v. Sackett*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 473; *Jackson v. Edwards*, 7 Paige (N. Y.) 386, affirmed 22 Wend. (N. Y.) 498.

*North Carolina.* — See *Sinclair v. Williams*, 8 Ired. Eq. (43 N. Car.) 235; *Irvin v. Clark*, 98 N. Car. 437.

*Virginia.* — *Zollman v. Moore*, 21 Gratt. (Va.) 313.

*Wisconsin.* — *Tallman v. Ely*, 6 Wis. 244.

**Sale Void as to Some Parties.** — Although a sale may be void as to remaindermen, the purchaser may nevertheless acquire the title of a life tenant. *Loeb v. Struck*, (Ky. 1897) 42 S. W. Rep. 401.

6. **Rights of Third Persons Not Affected.** — *Cockey v. Milne*, 16 Md. 200; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762; *Murphy v. Farwell*, 9 Wis. 102; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709; *Straight v. Harris*,



condition of the property.<sup>1</sup> The purchaser has no right to rely upon the representations of the agent or officer making the sale,<sup>2</sup> but must inquire for himself,<sup>3</sup> and see that he is getting what he considers that he is bargaining for, as the rule of *caveat emptor* applies in full force.<sup>4</sup> Therefore, the purchaser

14 Wis. 509. See also *McConnel v. Smith*, 39 Ill. 279; *Vick v. Vicksburg*, 1 How. (Miss.) 379.

**The Purchaser Is Conclusively Held to Have Notice** of all facts touching the rights of others in property sold disclosed by record. *Williamson v. Jones*, 43 W. Va. 562.

**1. No Warranty in Judicial Sales — England.** — See *Toulmin v. Steere*, 3 Meriv. 223, 17 Rev. Rep. 67.

*Alabama.* — *Perkins v. Winter*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Hickson v. Lingold*, 47 Ala. 449; *Bland v. Bowie*, 53 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Boykin v. Cook*, 61 Ala. 472; *Lovelace v. Webb*, 62 Ala. 271.

*District of Columbia.* — *Guntton v. Zantzinger*, 3 MacArthur (D. C.) 262.

*Illinois.* — *Bishop v. O'Conner*, 69 Ill. 431.

*Indiana.* — *Terre Haute, etc., R. Co. v. Norman*, 22 Ind. 63; *Brunner v. Brennan*, 49 Ind. 98; *State v. Prime*, 54 Ind. 450; *Neal v. Gillaspay*, 56 Ind. 451, 26 Am. Rep. 37; *Weaver v. Guyer*, 59 Ind. 195; *Morgan v. Fencer*, 1 Blackf. (Ind.) 10.

*Kentucky.* — *Farmers Bank v. Peter*, 13 Bush (Ky.) 591; *Humphrey v. Wade*, 84 Ky. 391; *Taylor v. Woodford Bank*, 4 Ky. L. Rep. 437; *Taylor v. Helm*, 5 Ky. L. Rep. 324; *Fearons v. Gallagher*, 7 Ky. L. Rep. 298; *Elkin v. Gill*, 9 Ky. L. Rep. 971; *Schlosser v. Murnan*, (Ky. 1899) 49 S. W. Rep. 421.

*Maryland.* — *Brown v. Wallace*, 2 Bland (Md.) 585, 4 Gill & J. (Md.) 479.

*Mississippi.* — *Storm v. Smith*, 43 Miss. 497.

*Missouri.* — *Throckmorton v. Pence*, 121 Mo. 50; *Wheeler v. Ball*, 26 Mo. App. 443; *Ranney v. Meisenheimer*, 61 Mo. App. 434.

*New York.* — *Wallace v. Berdell*, 41 Hun (N. Y.) 444, affirmed 105 N. Y. 7. Compare *Herring v. Berrian*, 55 N. Y. Super. Ct. 110, affirmed 107 N. Y. 632.

*Pennsylvania.* — *Freeman v. Caldwell*, 10 Watts (Pa.) 9; *Fox v. Mensch*, 3 W. & S. (Pa.) 444.

*Tennessee.* — See *Irby v. Irby*, 11 Lea (Tenn.) 165; *Kearly v. Duncan*, 1 Head (Tenn.) 397, 73 Am. Dec. 179.

*Virginia.* — *Hoge v. Currin*, 3 Gratt. (Va.) 192.

**Purchaser Not Entitled to Demand Covenants of General Warranty.** — *Goddin v. Vaughn*, 14 Gratt. (Va.) 102.

**2. Purchaser Cannot Rely on Representations of Agent or Officer Making Sale.** — *Fore v. McKenzie*, 58 Ala. 115. See also *Vandever v. Baker*, 13 Pa. St. 121.

**3. Purchaser Must Inquire for Himself.** — *Fore v. McKenzie*, 58 Ala. 115; *Christian v. Cabell*, 22 Gratt. (Va.) 82; *Long v. Weller*, 29 Gratt. (Va.) 347; *Hickson v. Rucker*, 77 Va. 135; *Smith v. Wortham*, 82 Va. 937; *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272.

**4. Rule of Caveat Emptor Applies to Judicial Sales — United States.** — *The Monte Allegre*, 9 Wheat. (U. S.) 648.

*Alabama.* — *Perkins v. Winter*, 7 Ala. 855; *Worthington v. McRoberts*, 9 Ala. 297; *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Hickson v. Lingold*, 47 Ala. 449; *Bland v. Bowie*, 53 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Boykin v. Cook*, 61 Ala. 472; *Lovelace v. Webb*, 62 Ala. 271; *Turner v. Teague*, 73 Ala. 554; *Ezzell v. Brown*, 121 Ala. 150.

*Arkansas.* — *Guynn v. McCauley*, 32 Ark. 97; *Black v. Walton*, 32 Ark. 321.

*California.* — *Halleck v. Guy*, 9 Cal. 182; *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167.

*District of Columbia.* — *Thaw v. Ritchie*, 4 Mackey (D. C.) 347. See also *Guntton v. Zantzinger*, 3 MacArthur (D. C.) 262.

*Illinois.* — *England v. Clark*, 5 Ill. 486; *U. S. v. Duncan*, 12 Ill. 523; *McManus v. Keith*, 49 Ill. 388; *Bassett v. Lockard*, 60 Ill. 164; *Bishop v. O'Conner*, 69 Ill. 431; *Chambers v. Jones*, 72 Ill. 275; *Holmes v. Shaver*, 78 Ill. 578; *Wing v. Dodge*, 80 Ill. 564; *Tilley v. Bridges*, 105 Ill. 336, affirming *Bridges v. Tilley*, 11 Ill. App. 353; *Borders v. Hodges*, 154 Ill. 498; *McCully v. Hardy*, 13 Ill. App. 631. See also *Roberts v. Hughes*, 81 Ill. 130, 25 Am. Rep. 270; *Meyer v. Mintonye*, 106 Ill. 414.

*Indiana.* — *Willson v. Brown*, 82 Ind. 471; *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40.

*Kentucky.* — *Farmers Bank v. Peter*, 13 Bush (Ky.) 591; *Humphrey v. Wade*, 84 Ky. 391; *Williams v. Glenn*, 87 Ky. 87, 12 Am. St. Rep. 461; *Trigg v. Jones*, (Ky. 1897) 42 S. W. Rep. 848; *Schlosser v. Murnan*, (Ky. 1899) 49 S. W. Rep. 421; *Taylor v. Helm*, 5 Ky. L. Rep. 324; *Fearons v. Gallagher*, 7 Ky. L. Rep. 298; *Elkin v. Gill*, 9 Ky. L. Rep. 971. See also *Huber v. Armstrong*, 7 Bush (Ky.) 591.

*Maryland.* — *Brown v. Wallace*, 2 Bland (Md.) 585; *Andrews v. Scotton*, 2 Bland (Md.) 629; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Bolgiano v. Cooke*, 19 Md. 375; *Slothower v. Gordon*, 23 Md. 1; *Farmers, etc., Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350.

*Minnesota.* — *Barron v. Mullin*, 21 Minn. 374; *Hastings First Nat. Bank v. Rogers*, 22 Minn. 224.

*Mississippi.* — *Miller v. Palmer*, 55 Miss. 323.

*Missouri.* — *Cravens v. Gordon*, 53 Mo. 287; *Estes v. Alexander*, 90 Mo. 453; *Throckmorton v. Pence*, 121 Mo. 50.

*Nebraska.* — *Frasher & Ingham*, 4 Neb. 531; *Norton v. Nebraska L. & T. Co.*, 35 Neb. 466, 37 Am. St. Rep. 441, 40 Neb. 394; *Butler v. Fitzgerald*, 43 Neb. 192, 47 Am. St. Rep. 741. See also *Nye, etc., Co. v. Fahrenholz*, 49 Neb. 276, 59 Am. St. Rep. 540.

*New Jersey.* — *Buck v. Backarack*, 45 N. J. Eq. 557; *Boorum v. Tucker*, 51 N. J. Eq. 135, 52 N. J. Eq. 587; *Campbell v. Parker*, (N. J. 1900) 45 Atl. Rep. 116. See also *Hayes v. Stiger*, 29 N. J. Eq. 196.

*New York.* — *Wallace v. Berdell*, 41 Hun (N. Y.) 444, affirmed by 105 N. Y. 7.



has no ground of complaint if the title prove valueless,<sup>1</sup> and cannot be relieved from the payment of the purchase money because of any defect or want of title,<sup>2</sup> nor can he have a decree against the land for the purchase money paid upon failure of title.<sup>3</sup>

**Remedy Against Debtor.** — While, as has been shown above, the doctrine of *caveat emptor* has its proper application to the purchaser at a judicial sale, and puts him on inquiry as to the extent and character of the title which he obtains, so that he can have no recourse against the party for whose benefit the sale has been made, its application is not such as to cut off all remedy against the debtor whose debt is extinguished, if the sale prove entirely invalid and is set aside.<sup>4</sup>

**3. Rules Concerning Liens and Incumbrances.** — It is within the power of the court ordering a judicial sale to direct that the property be sold subject to incumbrances,<sup>5</sup> or that it be sold free from incumbrances, and the incumbrances be paid out of the proceeds of sale.<sup>6</sup>

*North Carolina.* — See *Ellis v. Adderton*, 88 N. Car. 472; *Eccles v. Timmons*, 95 N. Car. 540.

*Ohio.* — *Corwin v. Benham*, 2 Ohio St. 36; *Creps v. Baird*, 3 Ohio St. 277; *Dickey v. Beatty*, 14 Ohio St. 389.

*Oregon.* — *House v. Fowle*, 22 Oregon 303.

*Pennsylvania.* — *Fox v. Mensch*, 3 W. & S. (Pa.) 444; *Bashore v. Whisler*, 3 Watts (Pa.) 490; *King v. Gunnison*, 4 Pa. St. 171; *Vandever v. Baker*, 13 Pa. St. 121. See also *Crosson's Appeal*, 125 Pa. St. 380; *Johnson's Appeal*, 114 Pa. St. 132; *Schug's Appeal*, 14 W. N. C. (Pa.) 50; *Morgan's Estate*, 9 Pa. Co. Ct. 119.

*South Carolina.* — *Parker v. Partlow*, 12 Rich. L. (S. Car.) 679; *Robinson v. Cooper*, 1 Hill L. (S. Car.) 286. See also *Latimer v. Wharton*, 41 S. Car. 508, 44 Am. St. Rep. 739.

*Tennessee.* — *Hously v. Lindsay*, 10 Heisk. (Tenn.) 651; *Myers v. Lindsay*, 5 Lea (Tenn.) 334; *Pigeon River Lumber, etc., Co. v. Mims*, (Tenn. Ch. 1897) 48 S. W. Rep. 385. See also *Chandler v. Jobe*, 5 Lea (Tenn.) 595; *Moses v. Wallace*, 7 Lea (Tenn.) 413; *McMurray v. Brasfield*, 10 Heisk. (Tenn.) 529; *Mountcastle v. Moore*, 11 Heisk. (Tenn.) 481; *Foster v. Bradford*, 1 Tenn. Ch. 400.

*Utah.* — *Kimball v. Salisbury*, 19 Utah 161. *Virginia.* — *Hoge v. Currin*, 3 Gratt. (Va.) 192; *Watson v. Hoy*, 28 Gratt. (Va.) 698; *Long v. Weller*, 29 Gratt. (Va.) 347; *Hickson v. Rucker*, 77 Va. 135; *Smith v. Wortham*, 82 Va. 937; *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272. See also *Young v. McClung*, 9 Gratt. (Va.) 336; *Boyce v. Strother*, 76 Va. 862.

*West Virginia.* — *Capehart v. Dowery*, 10 W. Va. 130. See also *Braddock First Nat. Bank v. Hyer*, 46 W. Va. 13.

**1. Purchaser Has No Ground of Complaint if Title Proves Valueless.** — *Perkins v. Winter*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Fore v. McKenzie*, 58 Ala. 115.

**2. Purchaser Cannot Be Relieved from Payment of Purchase Money on Account of Defect or Want of Title.** — *Humphrey v. Wade*, 84 Ky. 391; *Williams v. Glenn*, 87 Ky. 87, 12 Am. St. Rep. 461; *Taylor v. Helm*, 5 Ky. L. Rep. 324; *Fearons v. Gallagher*, 7 Kv. L. Rep. 298; *Elkin v. Gill*, 9 Ky. L. Rep. 971; *Capehart v. Dowery*, 10 W. Va. 130. See also *Worthington v. McRoberts*, 9 Ala. 297; *Boyce v. Strother*, 76 Va. 862.

**3. Purchaser Not Entitled to Decree Against Land for Purchase Money upon Failure of Title.** — *Chambers v. Jones*, 72 Ill. 275; *Bishop v. O'Conner*, 69 Ill. 431.

**4. Remedy Against Debtor.** — *Willson v. Brown*, 82 Ind. 471. See also *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40.

**5. Property May Be Sold Subject to Incumbrances.** — *Shields v. Harrison*, 77 N. Car. 115; *Nowry's Estate*, 20 Pa. Co. Ct. 76, 3 Lack. Leg. N. (Pa.) 331; *Vandever v. Baker*, 13 Pa. St. 121. See also *Wylie's Estate*, 7 Pa. Dist. 748.

**Purchaser Cannot Deny Knowledge of Incumbrances** when land is so sold. *Shields v. Harrison*, 77 N. Car. 115.

**Purchaser at Judicial Sale Subject to a Mortgage** takes subject to all liens prior to such mortgage. *Wylie's Estate*, 7 Pa. Dist. 748.

**6. Court May Decree Sale Free of Incumbrances.** — *Dickinson v. Dickinson*, 30 W. R. 887; *McLaughlin v. Barnum*, 31 Md. 425. See also *Guntton v. Zantlinger*, 3 MacArthur (D. C.) 262; *Southwick v. Grenzenbach*, (Ky. 1890) 14 S. W. Rep. 344; *Farmers, etc., Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350; *Lenihan v. Hamann*, (Supm. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 274.

**When a Sale Is Made for the Payment of Debts a Mortgage Included in the List of Debts is discharged.** *Moore v. Shultz*, 13 Pa. St. 98, 53 Am. Dec. 446.

**The Burden of Proving** that the property was sold free from incumbrances is upon the purchaser. *Farmers, etc., Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350.

**Where a Judgment Erroneously Directed a Sale Free from a Lien** it was held that, upon a reversal of the judgment, the title of the purchaser was not affected nor did the holder of the lien have any remedy against him in his capacity of purchaser, but in his capacity of plaintiff procuring the sale of the land he was liable to the holder of the lien, in whose favor a personal judgment should have been rendered, for the amount thereof. *Stewart v. Hoskins*, (Ky. 1887) 3 S. W. Rep. 124.

**When a Sale Free from a Lien Is Not Authorized**, the purchaser's remedy, if ignored, is by an application to vacate the sale and again offer the premises for sale. He cannot be compelled to pay the amount of the lien over and above his bid. *Hotchkiss v. Clifton Air Cure*, 2 Abb. App. Dec. (N. Y.) 406.



In the Absence of Any Specific Provision in the Decree the general rule seems to be that the sale does not destroy prior liens or incumbrances upon the property held by persons not parties to the action,<sup>1</sup> and that the purchaser takes the property subject thereto.<sup>2</sup> But this rule is not recognized as of general application in *Pennsylvania* and *Louisiana*.<sup>3</sup>

**Purchaser Not Personally Liable.** — A purchaser at judicial sale of property subject to a lien does not become personally liable for payment of such lien, unless there is some specific agreement or stipulation to that effect,<sup>4</sup> but the property only can be resorted to for its satisfaction.<sup>5</sup>

**Lien to Satisfy Which Sale Made Discharged.** — The purchaser at a judicial sale takes the property free from the lien to satisfy which the sale was ordered and made.<sup>6</sup>

**4. Right to a Conveyance.** — The purchaser at a judicial sale, who has complied with the terms of his purchase, has a right, which the courts will enforce by the proper order or decree, to a conveyance of the property which he has purchased.<sup>7</sup>

**1. Prior Incumbrances Not Destroyed** — *Alabama*. — State v. Vincent, 78 Ala. 233.

*Indiana*. — Wood v. Winings, 58 Ind. 322.

*Kentucky*. — Thomas v. Feese, (Ky. 1899) 51 S. W. Rep. 150.

*Maryland*. — Farmers' Bank v. Thomas, 37 Md. 246; Duvall v. Speed, 1 Md. Ch. 229.

*New York*. — See Jackson v. Edwards, 7 Paige (N. Y.) 386.

*Pennsylvania*. — Schwartz v. Kleber, (Pa. 1886) 7 Atl. Rep. 209.

*South Carolina*. — Barber v. McAliley, 4 S. Car. 49.

"**Maritime Liens**, in respect to the mode in which they may be discharged, vary from other liens. A judicial sale will divest them, in whatever jurisdiction it may be decreed." Finney v. Steamboat Fayette, 10 Mo. 612. See also Case v. Woolley, 6 Dana (Ky.) 17, 32 Am. Dec. 54.

**Lien Held by Party but Not Asserted, Cut Off by Sale.** — See Cincinnati v. Lingo, 7 Ohio Cir. Dec. 356, 13 Ohio Cir. Ct. 334.

**2. Purchaser Takes Subject to Prior Liens and Incumbrances** — *England*. — See Steele v. Phillips, 1 Hog. 49.

*United States*. — See Osterberg v. Union Trust Co., 93 U. S. 424.

*District of Columbia*. — Guntton v. Zantzinger, 3 MacArthur (D. C.) 262.

*Illinois*. — Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270.

*Indiana*. — See Loudon v. Robertson, 5 Blackf. (Ind.) 276.

*Maryland*. — Duvall v. Speed, 1 Md. Ch. 229; Farmers, etc., Bank v. Martin, 3 Md. Ch. 224.

*Missouri*. — Jackson v. Magruder, 51 Mo. 55.

*Nebraska*. — Vaughn v. Clark, 5 Neb. 238; Filley v. Duncan, 1 Neb. 145; Hammond v. Chamberlain Banking House, 58 Neb. 445. See also Nye, etc., Co. v. Fahrenholz, 49 Neb. 276, 59 Am. St. Rep. 540.

*New Jersey*. — Campbell v. Parker, (N. J. 1900) 45 Atl. Rep. 116; Krueger v. Ferry, 41 N. J. Eq. 432. See also Murch v. J. O. Smith Mfg. Co., 47 N. J. Eq. 193. Compare Steen v. Clayton, 32 N. J. Eq. 121.

*Ohio*. — Corwin v. Benham, 2 Ohio St. 36.

*Pennsylvania*. — See Green v. Watrous, 17 S. & R. (Pa.) 393.

*South Carolina*. — Barber v. McAliley, 4 S. Car. 49; McAliley v. Barber, 4 S. Car. 45.

*Tennessee*. — Staunton v. Harris, 9 Heisk. (Tenn.) 579. See also State v. Hill, 87 Tenn. 638; Williams v. Whitmore, 9 Lea (Tenn.) 262.

**Judgment Obtained After Decree of Sale** but before sale does not affect the title of a purchaser at the sale. Davis v. Landcraft, 10 W. Va. 718.

**Tennessee Rule as to Tax Liens.** — Under the Tennessee statute the court should direct the payment of taxes which are a lien upon the property out of the purchase money, and if it fails to do this of its own motion the purchaser may cause so much of the purchase money as may be necessary to be so applied. But if no order for such payment be made the lien will continue against the property. State v. Hill, 87 Tenn. 638. See also Williams v. Whitmore, 9 Lea (Tenn.) 262.

**3. In Pennsylvania and Louisiana** the general rule is that incumbrances are transferred from the land to the proceeds of sale which become the representative thereof. Loomis's Appeal, 22 Pa. St. 312; Nowry's Estate, 20 Pa. Co. Ct. 76, 3 Lack. Leg. N. (Pa.) 331; Lobach's Case, 6 Watts (Pa.) 167; Abbott v. Remington, 4 Phila. (Pa.) 34, 17 Leg. Int. (Pa.) 108; Condon's Succession, 28 La. Ann. 755; Girardey's Succession, 42 La. Ann. 497. Compare Schwartz v. Kleber, (Pa. 1886) 7 Atl. Rep. 209.

**Liens Which Will Not Be Divested.** — In both these states, however, there are certain classes of liens which will not be divested by subsequent judicial sales. See Bonebrake v. Summers, 8 Pa. Super. Ct. 55; Rohn v. Odenwelder, 162 Pa. St. 346; Ringrose v. Ringrose, 170 Pa. St. 593; Girardey's Succession, 42 La. Ann. 497; Zeigler v. His Creditors, 49 La. Ann. 144; Bertol v. Citizens' Bank, 1 La. Ann. 110.

**4. Purchaser Not Personally Liable.** — Myers v. O'Neal, 130 Ind. 370; Houston, etc., R. Co. v. State, (Tex. Civ. App. 1897) 41 S. W. Rep. 157.

**5. Only the Property Can Be Resorted to for Satisfaction of Lien.** — Myers v. O'Neal, 130 Ind. 370.

**6. Purchaser Takes Free from Lien to Satisfy Which Sale Was Made.** — Carson v. Dundas, 39 Neb. 503. See also Woods v. Ellis, 85 Va. 471; Amory v. Reilly, 9 Ind. 490.

**7. Right to a Conveyance.** — District of Columbia v. McBlair, 124 U. S. 320; Phillips v. Dawley 1 Neb. 320; Morton v. Sloan, 11 Humph. (Tenn.) 278. See also Redus v. Hayden, 43 Miss. 614.



5. **Right to Possession** — *a.* IN GENERAL. — The purchaser at a judicial sale has a clear right to possession of the property sold, as against all parties to the proceeding in which the sale is made,<sup>1</sup> and this right the courts will summarily enforce by writ of assistance or in some other appropriate manner.<sup>2</sup>

*b.* WHERE PERSON IN POSSESSION NOT A PARTY TO PROCEEDING. — But where the person in possession is not a party to the suit, nor a *pendente lite* purchaser, and holds the property adversely, he cannot be deprived of possession in this summary way.<sup>3</sup>

*c.* EFFECT OF APPEAL FROM ORDER OF CONFIRMATION. — The right of a purchaser at a foreclosure sale to possession of the property is not affected by the fact that the mortgagor has appealed from the order of confirmation and filed an undertaking on appeal to become bound for damages, costs, and

1. **Purchaser Entitled to Possession** — *England.* — See *Thomas v. Buxton*, L. R. 8 Eq. 120.

*Kentucky.* — *Robb v. Hannah*, 12 Ky. L. Rep. 361, (Ky. 1890) 14 S. W. Rep. 360.

*Maryland.* — See *Barnum v. Raborg*, 2 Md. Ch. 516.

*Mississippi.* — *Redus v. Hayden*, 43 Miss. 614.

*New York.* — *Kopp v. Kopp*, 48 Hun (N. Y.) 532.

*Oregon.* — *British Columbia Bank v. Harlow*, 9 Oregon 338.

*Tennessee.* — *Shields v. Thompson*, 4 Baxt. (Tenn.) 227; *Lowry v. M'Durmott*, 5 Yerg. (Tenn.) 225; *Latta v. Piere*, 11 Lea (Tenn.) 267; *Paul v. Williams*, 12 Lea (Tenn.) 215.

*Virginia.* — See *Hudgins v. Marchant*, 28 Gratt. (Va.) 177.

**Purchaser Entitled to Possession from Day of Sale.** — *British Columbia Bank v. Harlow*, 9 Oregon 338.

**Purchaser Entitled to Possession from Confirmation.** — *Hyder v. O'Brien*, (Tenn. Ch. 1898) 48 S. W. Rep. 262; *Shields v. Thompson*, 4 Baxt. (Tenn.) 227; *Lowry v. M'Durmott*, 5 Yerg. (Tenn.) 225.

**Purchaser Entitled to Be Put into Possession When He Accepts the Conveyance and Pays the Purchase Price.** — *Remsen v. Reese*, 72 Hun (N. Y.) 370.

**As Against Heirs at Law** improperly omitted as parties, the purchaser is entitled to possession, but such heirs may require a resale and a reappropriation of the money. *Isler v. Koonce*, 81 N. Car. 378.

2. **Courts Will Enforce Purchaser's Right to Possession** — *United States.* — *Oneale v. Caldwell*, 3 Cranch (C. C.) 312.

*Alabama.* — *Creighton v. Paine*, 2 Ala. 158; *Trammel v. Simmons*, 8 Ala. 271.

*Arkansas.* — *Bright v. Pennywit*, 21 Ark. 130.

*District of Columbia.* — *Condon v. Gray*, 6 Mackey (D. C.) 330.

*Florida.* — *Keil v. West*, 21 Fla. 508.

*Kentucky.* — *Preston v. Breckinridge*, 86 Ky. 619; *Stultz v. Farthing*, 13 Ky. L. Rep. 172.

*Maryland.* — *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381; *Gowan v. Sumwalt*, 1 Gill & J. (Md.) 511; *Oliver v. Caton*, 2 Md. Ch. 297; *Applegarth v. Russell*, 25 Md. 317. See also *Meloy v. Squires*, 42 Md. 378.

*Mississippi.* — *Jones v. Hooper*, 50 Miss. 510. See also *Gibson v. Marshall*, 64 Miss. 72.

*New Jersey.* — *Thomas v. De Baum*, 14 N. J. Eq. 37.

*New York.* — *Connor v. Schaeffel*, (N. Y. City Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 344. See also *Remsen v. Reese*, 72 Hun (N. Y.) 370.

*North Carolina.* — *Knight v. Houghtalling*, 94 N. Car. 408.

*Ohio.* — *Tetterbach v. Meyer*, 19 Cinc. L. Bul. 221, 10 Ohio Dec. (Reprint) 212.

*Tennessee.* — *Planters' Bank v. Fowlkes*, 4 Sneed (Tenn.) 461.

*Canada.* — *Sewell v. Bronk*, 4 Quebec 246, 2 Montreal Leg. N. 252. See also *Manson v. Manson*, 10 Ont. Pr. 155.

**A Court Has Power to Put a Purchaser in Possession** without any express reservation thereof in the judgment. *Preston v. Breckinridge*, 86 Ky. 619.

**Power Will Not Be Exercised on Behalf of Surety of Purchaser Who Has Paid Purchase Money.** — *Gowan v. Sumwalt*, 1 Gill & J. (Md.) 511.

**Where Crops Are Growing on Land.** — In a case where the original owner of the land had crops growing thereon, when a sale thereof was confirmed, the court limited the purchaser's right of entry to so much of the land as was not under actual cultivation, and required the original owner to pay rent for the remainder. *Robb v. Hannah*, 12 Ky. L. Rep. 361, (Ky. 1890) 14 S. W. Rep. 360.

**Court Will Put Purchaser's Grantee in Possession at Instance of Purchaser.** — *Gibson v. Marshall*, 64 Miss. 72.

**Writ of Assistance May Be Granted to Purchaser Who Has Sold the Property** by warranty deed, so that he may be enabled to deliver possession to his grantee. *Tetterbach v. Meyer*, 19 Cinc. L. Bul. 221, 10 Ohio Dec. (Reprint) 212.

3. **Person Holding Adversely** — **No Summary Disposition** — *England.* — See *Anderson v. Barry*, 2 Jones Ir.) 631.

*Alabama.* — *Trammel v. Simmons*, 8 Ala. 271.

*Arkansas.* — *Bright v. Pennywit*, 21 Ark. 130.

*Illinois.* — *Paine v. Root*, 121 Ill. 77, affirming *Root v. Paine*, 22 Ill. App. 349.

*Kentucky.* — *Preston v. Breckinridge*, 86 Ky. 619.

*Maryland.* — *Frazer v. Palmer*, 2 Har. & G. (Md.) 469.

*New Jersey.* — *Thomas v. De Baum*, 14 N. J. Eq. 37.

*New York.* — *Kopp v. Kopp*, 48 Hun (N. Y.) 532.

**Purchaser Who Takes a Vesting Order**, takes upon himself the responsibility of getting possession. *Bull v. Harper*, 6 Ont. Pr. 36.



disbursements, and for the value of the use and occupation of the premises in case the order of confirmation should be affirmed.<sup>1</sup>

*d. EFFECT OF RIGHT OF REDEMPTION.* — In *Oregon* and *Tennessee* the rule is that the purchaser at a judicial sale is entitled to possession notwithstanding the land is subject to redemption.<sup>2</sup> But in *California* it has been asserted that a purchaser at foreclosure sale acquires no right to the possession of the property, but, until the time for redemption from such sale has expired, the judgment debtor, or his successor in interest, is entitled to possession.<sup>3</sup>

*e. ENGLISH RULE AS TO WHEN PURCHASER IS ENTITLED TO POSSESSION.* — In *England* the rule is that a purchaser is not entitled to possession of the property until he has approved or accepted the title thereto.<sup>4</sup>

*f. COMPENSATION FOR BEING KEPT OUT OF POSSESSION.* — The purchaser being entitled to possession, he has a right to be compensated or indemnified where he has been wrongfully kept out of possession.<sup>5</sup>

**6. Right to Rents and Profits.** — The purchaser of land at judicial sale is entitled to the rents and profits thereof.<sup>6</sup> In some jurisdictions this right takes effect from the day of sale,<sup>7</sup> and in others only from the date of confirmation.<sup>8</sup> In *England* the purchasers have been held entitled to rents from the date of an order of reference as to whether their offer was beneficial, the master having reported in favor of the purchase.<sup>9</sup>

Where the Purchaser's Right of Possession Is Postponed by the Decree, he is, it has been held, entitled to rents and profits only from the time when his right of possession accrues.<sup>10</sup>

**7. Rights as to Growing Crops.** — Where, in a judicial sale, there is any stipulation regarding crops growing upon the land, such stipulation will govern.<sup>11</sup>

**1. Purchaser Entitled to Possession as Against Mortgagee Appealing, etc.** — *British Columbia Bank v. Harlow*, 9 *Oregon* 338.

**2. Property Subject to Redemption.** — *British Columbia Bank v. Harlow*, 9 *Oregon* 338; *Lowry v. M'Durmott*, 5 *Yerg. (Tenn.)* 225.

**3. California.** — *Purser v. Cady*, 120 *Cal.* 214. See generally *infra*, this title, *Redemption*.

**4. No Possession until Title Accepted.** — *Morris v. Bull*, 12 *Jur.* 4, 17 *L. J. Ch.* 9; *Dempsey v. Dempsey*, 1 *De G. & Sm.* 691; *Rutter v. Marriott*, 10 *Beav.* 33; *Hutton v. Mansell*, 2 *Beav.* 260; *Williams v. Shaw*, 3 *Russ.* 178, note *a*, 3 *L. J. Ch.* 157.

**5. Right to Be Indemnified or Compensated.** — *Barnum v. Raborg*, 2 *Md. Ch.* 516.

**Purchaser Entitled to Compensation Though Vesting Order Was Taken.** — See *Barber v. Barber*, 11 *Ont. Pr.* 137. But compare *Bull v. Harper*, 6 *Ont. Pr.* 36.

**6. Purchaser Entitled to Rents and Profits.** — As a general rule, the purchaser is entitled to rent which did not become due until after title vested in him. *Albin v. Riegel*, 40 *Ohio St.* 339.

Where there Was Delay in Making Title, in charging the vendor with rents, the amount for which the vendee might have rented the premises should not be considered, nor should the vendor be charged with an occupation rent, unless there is evidence of occupation. *Dudley v. Berczy*, 2 *Ch. Chamb. (Ont.)* 364.

A Colliery is always considered as a trade, the profits accruing from day to day, as in all trading concerns, and a sale of a colliery is not like the sale of a landed estate. *Williams v. Attenborough*, T. & R. 70, 23 *Rev. Rep.* 186,

1 *L. J. Ch.* 138. See also the title MINES AND MINING.

**Defaulting Purchaser.** — A purchaser at a judicial sale, who fails to complete his purchase or comply with the terms of sale, in consequence of which a resale at his risk is made, is not entitled to rents accruing during the interval between the two sales. *Chase v. Joiner*, 88 *Tenn.* 761.

**7. Rents from Day of Sale.** — *Huntington v. Walker*, 2 *MacArthur (D. C.)* 479; *Wagner v. Cohen*, 6 *Gill (Md.)* 97, 46 *Am. Dec.* 660; *Devonill v. Stokern*, 9 *N. J. L. J.* 304; *Jashenovsky v. Volrath*, 59 *Ohio St.* 540; *Taylor v. Cooper*, 10 *Leigh (Va.)* 327.

**8. Rents from Confirmation.** — *Kentucky.* — *Taliaferro v. Gay*, 78 *Ky.* 496; *Breckinridge v. Carrico*, 3 *Ky. L. Rep.* 533; *Cass v. Smith*, 7 *Ky. L. Rep.* 298; *Morris v. Mann*, 4 *Ky. L. Rep.* 734; *Tonnesley v. Mobberly*, 5 *Ky. L. Rep.* 249; *Ball v. Covington First Nat. Bank*, 80 *Ky.* 501; *Elliott v. Bush*, 3 *Ky. L. Rep.* 466; *Brown v. Berkley*, 3 *Ky. L. Rep.* 469.

*Tennessee.* — *Shields v. Thompson*, 4 *Baxt. (Tenn.)* 227; *Latta v. Pierce*, 11 *Lea (Tenn.)* 267; *Paul v. Williams*, 12 *Lea (Tenn.)* 215; *Armstrong v. McClure*, 4 *Heisk. (Tenn.)* 80; *Hyder v. O'Brien*, (*Tenn. Ch.* 1898) 48 *S. W. Rep.* 262.

**9. Right to Rents Dating from Order of Reference.** — *Cheetham v. Sturtevant*, 3 *De G. & Sm.* 468.

**10. Where Right of Possession Postponed by Decree.** — *Latta v. Pierce*, 11 *Lea (Tenn.)* 267. See also *Garrick v. Camden*, 2 *Cox Ch.* 231, 2 *Rev. Rep.* 37.

**11. Stipulations as to Crops Govern.** — See Volume XVII.



But in the absence of any such stipulation, it is generally held that such crops pass with the land and become the property of the purchaser.<sup>1</sup>

**8. Liability on Bid.** — The highest bidder at a judicial sale is liable on his bid after acceptance, and compliance therewith may be enforced against him.<sup>2</sup>

**9. Protection Afforded by Judgment or Decree of Sale** — *a. GENERAL RULE.* — The general rule is that a purchaser at a judicial sale will be chargeable with notice whether the court had jurisdiction to pronounce the judgment or decree under which the sale was made,<sup>3</sup> but if the court had jurisdiction, the purchaser is protected by the judgment or decree ordering the sale, and is not compelled to go behind it and investigate the facts upon which it was rendered, or the regularity of every step in the proceedings.<sup>4</sup> Therefore his

*Bruner v. Ramsburg*, 43 Md. 560; *Stewart v. Hunter*, 2 Ch. Chamb. (Ont.) 335. Also the title *CROPS*, vol. 8, p. 304.

**1. Crops Pass to Purchaser Where No Reservation in Reference Thereto.** — *Hancock v. Caskey*, 8 S. Car. 282. See also the title *CROPS*, vol. 8, p. 305, where many cases are collected. *Contra in Ohio*, *Cassilly v. Rhodes*, 12 Ohio 88; *Houts v. Showalter*, 10 Ohio St. 125; *Albin v. Riegel*, 49 Ohio St. 339; *Herron v. Herron*, 47 Ohio St. 548, 21 Am. Ins. Rep. 854. See also *Foss v. Marr*, 40 Neb. 559; *Robb v. Hannah*, 12 Ky. L. Rep. 361, (Ky. 1890) 14 S. W. Rep. 360.

**2. Liability on Bid.** — *Manl v. Hellman*, 39 Neb. 322; *Allen v. U. S. Bank*, 20 N. J. L. 620; *Rogers v. McLean*, 31 Barb. (N. Y.) 304, 10 Abb. Pr. (N. Y.) 306; *Matter of Cavanagh*, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 258; *Matter of Browning*, 2 Paige (N. Y.) 64; *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431; *Jenkins v. Hogg*, 2 Treadw. (S. Car.) 821; *Vanbibber v. Sawyers*, 10 Humph. (Tenn.) 81, 51 Am. Dec. 694. See also *supra*, this title, *Right to Withdrawal*.

Where property is sold on a credit under a decree in chancery, the decree is satisfied to the extent of the amount of the sale, and a new contract is made between the purchaser and the complainant, and the purchaser is bound by the terms of that contract. *Shotwell v. Webb*, 23 Miss. 375.

**When Assignee of Purchaser May Be Compelled to Complete Purchase.** — *Archer v. Archer*, 84 Hun (N. Y.) 297.

**When Assignee of Purchaser Cannot Be Compelled to Complete Purchase.** — *Weaver v. Nelson*, (Miss. 1893) 12 So. Rep. 597.

**Method of Enforcing Liability.** — See *infra*, this article *Enforcement of Bid*.

**When Purchaser May Be Discharged.** — In *Hodder v. Ruffin*, 1 Ves. & B. 544, a purchaser was discharged upon motion upon an affidavit stating that since the confirmation of the report the purchaser was imprisoned for debt and had become wholly insolvent and incapable of completing the purchase, and the court ordered a resale.

**3. Purchaser Chargeable With Notice Whether Court Had Jurisdiction.** — *United States*. — *Thompson v. Tolmie*, 2 Pet. (U. S.) 157.

*Arkansas*. — See *Fleming v. Johnson*, 26 Ark. 421.

*Illinois*. — *Chambers v. Jones*, 72 Ill. 275.

*Louisiana*. — *Theze's Succession*, 44 La. Ann. 47. See also *Macias's Succession*, 36 La. Ann. 444.

*Maryland*. — See *Bolgiano v. Cooke*, 19 Md. 375.

*North Carolina*. — *Fowler v. Poor*, 93 N. Car. 466; *Grimes v. Taft*, 98 N. Car. 193.

*Pennsylvania*. — See *McPherson v. Cunliff*, 11 S. & R. (Pa.) 429, 14 Am. Dec. 642.

*South Carolina*. — *Tompkins v. Tompkins*, 39 S. Car. 537.

*Tennessee*. — See *Winchester v. Winchester*, 1 Head (Tenn.) 460.

*Texas*. — *Stegall v. Huff*, 54 Tex. 193.

*Virginia*. — *Zirkle v. McCue*, 26 Gratt. (Va.) 517.

**4. Purchaser Protected by Judgment or Decree** — *England*. — See *Bennett v. Hamill*, 2 Sch. & Lef. 566.

*United States*. — *Beauregard v. New Orleans*, 18 How. (U. S.) 497; *Grignon v. Astor*, 2 How. (U. S.) 319; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157; *Central Trust Co. v. Wabash, etc., R. Co.*, 30 Fed. Rep. 332.

*Arkansas*. — *Fleming v. Johnson*, 26 Ark. 421.

*District of Columbia*. — *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260; *Thaw v. Ritchie*, 5 Mackey (D. C.) 200.

*Illinois*. — *Chambers v. Jones*, 72 Ill. 275.

*Indiana*. — *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210, 12 Am. Dec. 225; *Frakes v. Brown*, 2 Blackf. (Ind.) 205.

*Louisiana*. — *Macias's Succession*, 36 La. Ann. 444; *Massie v. Brady*, 41 La. Ann. 553; *Munday v. Kaufman*, 48 La. Ann. 591; *Theze's Succession*, 44 La. Ann. 47; *Weil v. Schwartz*, 51 La. Ann. 1547. See also *Ferrari v. Lambeth*, 11 La. 101; *Brosnahan v. Turner*, 16 La. 442; *Beard v. Morancy*, 3 Rob. (La.) 122; *Nesom v. Weis*, 34 La. Ann. 1010; *Duckworth v. Vaughan*, 27 La. Ann. 599; *Vaughn's Succession*, 26 La. Ann. 150; *Wright v. Cummings*, 19 La. Ann. 353; *Gurney's Succession*, 14 La. Ann. 632; *McCullough v. Minor*, 2 La. Ann. 466; *Lalance v. Moreau*, 13 La. 431; *Pintard v. Deyris*, 3 Mart. N. S. (La.) 32.

*Maryland*. — *Sloan v. Safe Deposit, etc., Co.*, 73 Md. 239; *Bolgiano v. Cooke*, 19 Md. 375; *Shartzer v. Mountain Lake Park Assoc.*, 86 Md. 335. See also *Newbold v. Schlens*, 66 Md. 588; *Gregory v. Lenning*, 54 Md. 56.

*Michigan*. — *Browning v. Howard*, 19 Mich. 323.

*Nebraska*. — *Hubermann v. Evans*, 46 Neb. 784.

*North Carolina*. — *Grimes v. Taft*, 98 N. Car. 193; *Fowler v. Poor*, 93 N. Car. 466.

*Pennsylvania*. — See *McPherson v. Cunliff*, 11 S. & R. (Pa.) 429, 14 Am. Dec. 642.

*South Carolina*. — *Tompkins v. Tompkins*, 39 S. Car. 537; *Henry v. Ferguson*, 1 Bailey L. (S. Car.) 512; *Barkley v. Screven*, 1 Nott & M. (S. Car.) 408.



title is not affected by errors or irregularities in such judgment or decree,<sup>1</sup> and the sale is not invalidated, nor is the title of the purchaser or his grantor divested, by a subsequent reversal or vacation of such judgment or decree.<sup>2</sup>

*Tennessee*. — *Winchester v. Winchester*, 1 Head (Tenn.) 460; *Blanz v. Bain*, 95 Tenn. 87. See also *Anderson v. Ammonett*, 9 Lea (Tenn.) 1; *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435; *Stokes v. Acklen*, (Tenn. Ch. 1898) 46 S. W. Rep. 316.

*Virginia*. — *Efinger v. Hall*, 81 Va. 94. See also *Zirkle v. McCue*, 26 Gratt. (Va.) 517.

**Purchaser Must See that Terms on Which Power to Sell Depend Have Been Complied With.** — *Strouse v. Drennan*, 41 Mo. 289.

**Circumstances Under Which Purchaser Not Protected.** — See *Central Trust Co. v. Hubinger*, 87 Fed. Rep. 3.

**1. Title of Purchaser Not Affected by Errors or Irregularities in Judgment or Decree** — *England*. — *Bennett v. Hamill*, 2 Sch. & Lef. 566. See also *Lloyd v. Johnes*, 9 Ves. Jr. 37.

*Canada*. — *Beaty v. Radenhurst*, 3 Ch. Chamb. (Ont.) 344. See also *Dickey v. Heron*, 1 Ch. Chamb. (Ont.) 149; *Collins v. Denison*, 2 Ch. Chamb. (Ont.) 465; *Gunn v. Doble*, 15 Grant Ch. (U. C.) 655.

*United States*. — *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.) 479; *U. S. Bank v. Voorhees*, 1 McLean (U. S.) 221. See also *Whiting v. U. S. Bank*, 13 Pet. (U. S.) 6.

*Alabama*. — *Garrett v. Lynch*, 45 Ala. 204; *Sweeney v. Bixler*, 69 Ala. 539; *Ivie v. Stringfellow*, 82 Ala. 545. See also *Hickson v. Linggold*, 47 Ala. 449; *Martin v. Truss*, 50 Ala. 95.

*District of Columbia*. — See *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260.

*Georgia*. — *Tucker v. Harris*, 13 Ga. 1; *Walker v. Morris*, 14 Ga. 323.

*Illinois*. — *Swift v. Yanaway*, 153 Ill. 197. See also *Wadhams v. Gay*, 73 Ill. 415; *Sibert v. Thorp*, 77 Ill. 43.

*Indiana*. — *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315; *Splahn v. Gillespie*, 48 Ind. 397. See also *Maxwell v. Campbell*, 45 Ind. 360.

*Kansas*. — *Smith v. Burnes*, 8 Kan. 197.

*Kentucky*. — *Haynes v. Payne*, 5 Ky. L. Rep. 242; *Dorsey v. Kendall*, 8 Bush (Ky.) 294; *Bess v. Hagan*, 7 Ky. L. Rep. 298; *Bailey v. Fanning Orphan School*, 12 Ky. L. Rep. 644, (Ky. 1890) 14 S. W. Rep. 908; *Weller v. Bissell*, 3 Ky. L. Rep. 759; *Lusk v. Salter*, 2 Bush (Ky.) 201. See also *Wilson v. Taylor*, 4 Ky. L. Rep. 437; *Clarey v. Marshall*, 4 Dana (Ky.) 99; *Botto v. Botto*, 6 Ky. L. Rep. 663.

*Louisiana*. — *Wisdom v. Parker*, 31 La. Ann. 52; *Byrne's Succession*, 38 La. Ann. 518. See also *Kaiser's Succession*, 22 La. Ann. 175.

*Maryland*. — *Dunnington v. Evans*, 79 Md. 83; *Schley v. Baltimore*, 29 Md. 34; *Rieman v. Von Kapff*, 76 Md. 417; *Newbold v. Schlens*, 66 Md. 585; *Dorsey v. Garey*, 30 Md. 489. See also *Bolignano v. Cooke*, 19 Md. 375; *Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519; *Gregory v. Lenning*, 54 Md. 52.

*Mississippi*. — *Storm v. Smith*, 43 Miss. 497; *Davis v. Watson*, 54 Miss. 679.

*Nebraska*. — *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358; *Hubermann v. Evans*, 46 Neb. 784.

*New Jersey*. — See *Shultz v. Sanders*, 38 N. J. Eq. 154; *Eisberg v. Shultz*, 38 N. J. Eq. 293.

*New York*. — *Alvord v. Beach*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 451. See also *Jackson v. Robins*, 16 Johns. (N. Y.) 582.

*North Carolina*. — *England v. Garner*, 90 N. Car. 197; *Sutton v. Schonwald*, 86 N. Car. 198, 41 Am. Rep. 455.

*Ohio*. — *Piatt v. Piatt*, 9 Ohio 37. See also *Stites v. Wiedner*, 35 Ohio St. 555, reversing 1 Cinc. L. Bul. 140, 7 Ohio Dec. (Reprint) 134.

*South Carolina*. — *Tederall v. Bouknight*, 25 S. Car. 275.

*Texas*. — *Seguin v. Maverick*, 24 Tex. 526, 76 Am. Dec. 117; *Harle v. Langdon*, 60 Tex. 555; *Huckins v. Kapf*, (Tex. App. 1889) 14 S. W. Rep. 1016.

*Virginia*. — *Marrow v. Brinkley*, 85 Va. 55.

*West Virginia*. — *Sinnett v. Cralle*, 4 W. Va. 600.

**2. Reversal or Vacation of Judgment Does Not Invalidate Sale nor Divest Title of Purchaser** — *England*. — *Bennett v. Hamill*, 2 Sch. & Lef. 566. See also *Lloyd v. Johnes*, 9 Ves. Jr. 65.

*United States*. — *Galpin v. Page*, 1 Sawy. (U. S.) 309. See also *U. S. Bank v. Washington Bank*, 6 Pet. (U. S.) 8; *Gray v. Brignardello*, 1 Wall. (U. S.) 627; *Whiting v. U. S. Bank*, 13 Pet. (U. S.) 6; *Central Trust Co. v. Hubinger*, 87 Fed. Rep. 3; *U. S. Bank v. Voorhees*, 1 McLean (U. S.) 221.

*Alabama*. — *Morton v. Underwood*, 49 Ala. 419; *Lesslie v. Richardson*, 60 Ala. 563; *Marks v. Cowles*, 61 Ala. 299; *Sweeney v. Bixler*, 69 Ala. 539; *Phillips v. Benson*, 82 Ala. 500, 85 Ala. 416; *Ivie v. Stringfellow*, 82 Ala. 545.

*Arkansas*. — *Moore v. Woodall*, 40 Ark. 42; *Boyd v. Roane*, 49 Ark. 397.

*Colorado*. — *Cheever v. Minton*, 12 Colo. 557, 13 Am. St. Rep. 258; *Stout v. Gully*, 13 Colo. 604.

*District of Columbia*. — *Fraser v. Prather*, 1 MacArthur (D. C.) 206.

*Florida*. — *Garvin v. Watkins*, 29 Fla. 151.

*Georgia*. — *Tucker v. Harris*, 13 Ga. 1.

*Illinois*. — *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217; *Hobson v. Ewan*, 62 Ill. 146; *Smith v. Brittenham*, 109 Ill. 540. See also *Whitman v. Fisher*, 74 Ill. 147; *Mulvey v. Gibbons*, 87 Ill. 367; *Buckmaster v. Jackson*, 4 Ill. 104.

*Indiana*. — *Crain v. Parker*, 1 Ind. 374; *Doe v. Swiggett*, 5 Blackf. (Ind.) 328.

*Kansas*. — *Hubbard v. Ogden*, 22 Kan. 671; *Sheldon v. Pruessner*, 52 Kan. 593.

*Kentucky*. — *Campbell v. Johnston*, 4 Dana (Ky.) 177; *Clark v. Beil*, 4 Dana (Ky.) 20; *Singleton v. Cogar*, 7 Dana (Ky.) 481; *Dunn v. Salter*, 1 Duv. (Ky.) 342; *Amos v. Stockton*, 5 J. J. Marsh. (Ky.) 638; *Yocum v. Foreman*, 14 Bush (Ky.) 494; *Clark v. Farrow*, 10 B. Mon. (Ky.) 446, 52 Am. Dec. 552; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 237, 68 Am. Dec. 723; *Baker v. Baker*, 87 Ky. 462; *Payne v. Johnson*, 95 Ky. 175; *Dunn v. German Security Bank*, 8 Ky. L. Rep. 777, (Ky. 1887) 3 S. W. Rep. 425; *Earl v. Porter*, 2 Ky. L. Rep. 316; *Judah v. Bickel*, 4 Ky. L. Rep. 715; *Dudley v. Beatty*, 5 Ky. L. Rep. 773; *Scott v. Estill*, 7



**Sale Pending Appeal.** — And this rule has been held to apply in the case of a sale made during the pendency of an appeal, where such appeal did not operate as a supersedeas,<sup>1</sup> even though the purchaser knew of the pendency of the appeal.<sup>2</sup>

**b. WHEN THE RULE DOES NOT APPLY — (1) Defect of Parties.** — It has been held that the rule stated above does not apply when there has been a defect of parties to the action in which the sale was ordered and made.<sup>3</sup>

(2) *Property Sold Not That of Defendant.* — It has also been held that the rule does not apply where the property sold did not belong to the defendant, and the sale was based upon a supposed indebtedness which has been finally adjudged not to exist.<sup>4</sup>

(3) *Reversal of Decree of Confirmation.* — Where a decree confirming a judicial sale is reversed for error in it, the purchaser's title falls whether he is a party or not.<sup>5</sup>

(4) *Fraud on Part of Purchaser.* — The protection afforded to a *bona fide* purchaser at a judicial sale against errors in the decree, will not be extended to a purchaser who has been guilty of unfair conduct in relation to the sale in

Ky. L. Rep. 222; *Cooley v. Rea*, 7 Ky. L. Rep. 298; *Seale v. Langden*, 16 Ky. L. Rep. 398. See also *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 255, 13 Am. Dec. 153; *Miller v. Hall*, 1 Bush (Ky.) 229; *Clarey v. Marshall*, 4 Dana (Ky.) 95; *Vanmeter v. Vanmeter*, 88 Ky. 448; *Bailey v. Fanning Orphan School*, (Ky. 1890) 14 S. W. Rep. 908; *Taylor v. Fitzsimmons*, (Ky. 1897) 41 S. W. Rep. 263.

*Maryland.* — *Wampler v. Wolfinger*, 13 Md. 337; *Ward v. Hollins*, 14 Md. 158; *Dorsey v. Thompson*, 37 Md. 25; *Newbold v. Schlens*, 66 Md. 585; *Benson v. Yellott*, 76 Md. 159. See also *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519; *Johnson v. Robertson*, 34 Md. 165; *Gregory v. Lenning*, 54 Md. 52.

*Minnesota.* — *Lord v. Hawkins*, 39 Minn. 73; *Brantley v. Dambly*, 69 Minn. 282.

*Missouri.* — See *Lindell Real Estate Co. v. Lindell*, 142 Mo. 61.

*Nebraska.* — *Watson v. Ulbrich*, 18 Neb. 186; *Hollister v. Mann*, 40 Neb. 572; *Manfull v. Graham*, 55 Neb. 645. See also *Keene v. Saltenbach*, 15 Neb. 200; *Warren v. Dick*, 17 Neb. 241.

*New Jersey.* — *Shultz v. Sanders*, 38 N. J. Eq. 154; *Eisberg v. Shultz*, 38 N. J. Eq. 293.

*Nevada.* — See *Hastings v. Burning Moscow Gold, etc.*, Min. Co., 2 Nev. 100.

*New York.* — *Holden v. Sackett*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 473; *Hening v. Punnett*, 4 Daly (N. Y.) 543. See also *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474; *Wood v. Jackson*, 8 Wend. (N. Y.) 9; *Jackson v. Robins*, 16 Johns. (N. Y.) 582; *Blakeley v. Calder*, 15 N. Y. 617.

*North Carolina.* — *Sutton v. Schonwald*, 86 N. Car. 198, 41 Am. Rep. 455; *Harrison v. Hargrove*, 120 N. Car. 96, 58 Am. St. Rep. 781.

*Ohio.* — *Hubbell v. Broadwell*, 8 Ohio 120; *Irwin v. Jeffers*, 3 Ohio St. 389; *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383. *But compare Dabney v. Manning*, 3 Ohio 321, 17 Am. Dec. 597.

*Tennessee.* — *Micou v. Davis*, 16 Lea (Tenn.) 257.

*Texas.* — *Huckins v. Kapf*, (Tex. App. 1889) 14 S. W. Rep. 1016. See also *Harle v. Langdon*, 60 Tex. 555.

*Virginia.* — *Cooper v. Hepburn*, 15 Gratt. (Va.) 551; *Dixon v. McCue*, 21 Gratt. (Va.) 373; *Quesenberry v. Barbour*, 31 Gratt. (Va.) 491; *Garland v. Pamplin*, 32 Gratt. (Va.) 305; *Lancaster v. Barton*, 92 Va. 615. See also *Frazier v. Frazier*, 77 Va. 775. *But compare Effinger v. Kennev*, 92 Va. 245.

*West Virginia.* — *Capehart v. Dowery*, 10 W. Va. 130; *Underwood v. Pack*, 23 W. Va. 704; *Dunfee v. Childs*, 45 W. Va. 155; *Frederick v. Cox*, (W. Va. 1899) 34 S. E. Rep. 958.

**Opening Judgment.** — Under the *Wisconsin* statute the validity of a judicial sale of the property of a nonresident is not affected by the defendant being subsequently let in to answer pursuant to statute. See *Power v. Catlin*, 10 Wis. 26.

**Reversal of Judgment Before Confirmation of Sale** would not of itself be sufficient to set aside the sale. *Musgrave v. Parrish*, (Ky. 1889) 12 S. W. Rep. 709, 11 Ky. L. Rep. 573.

**1. Rule Applies to Sale Made Pending Appeal Which Did Not Operate as Supersedeas — Alabama.** — *Marks v. Cowles*, 61 Ala. 299. See also *Morton v. Underwood*, 49 Ala. 419.

*Kentucky.* — *State Bank v. Vanmeter*, 10 B. Mon. (Ky.) 68; *Rankin v. Eastin*, 2 Ky. L. Rep. 427.

*Maryland.* — *Brendel v. Zion Church*, 71 Md. 83; *Garritee v. Popplein*, 73 Md. 322.

*New York.* — *Hening v. Punnett*, 4 Daly (N. Y.) 543.

**2. Knowledge of Purchaser that Appeal Was Pending.** — *Harle v. Langdon*, 60 Tex. 555. See also *Clarey v. Marshall*, 4 Dana (Ky.) 99.

**3. Rule Does Not Apply Where There Has Been a Defect of Parties.** — *Payne v. Johnson*, 95 Ky. 175; *Underwood v. Pack*, 23 W. Va. 704; *Turk v. Skiles*, 38 W. Va. 404; *Dunfee v. Childs*, 45 W. Va. 155; *Peck v. Chambers*, 44 W. Va. 270. See also *Bennett v. Hamill*, 2 Sch. & Lef. 566; *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260; *Tompkins v. Tompkins*, 39 S. Car. 537; *Zirkle v. McCue*, 26 Gratt. (Va.) 517.

**4. Property Sold Not That of Defendant.** — *Baker v. Baker*, 87 Ky. 462.

**5. Purchaser's Title Falls When Decree of Confirmation Reversed.** — *Dunfee v. Childs*, 45 W. Va. 155. See also *Vanmeter v. Vanmeter*, 88 Ky. 448; *Capehart v. Dowery*, 10 W. Va. 130.



order to prevent competition and secure the property at an adequate price.<sup>1</sup>

(5) *Purchase by Party Procuring Sale or by His Attorney.* — It is usually considered that the party at whose instance a judicial sale has been made must be cognizant of any errors or irregularities in the proceedings, and therefore, if he becomes the purchaser at such sale, the rule protecting *bona fide* purchasers in case of the reversal of the judgment has no application, but his title will fall with the judgment;<sup>2</sup> and the same view has been taken of purchases by the attorney of such party,<sup>3</sup> or any other person in privity with him.<sup>4</sup> In *Kentucky*, however, the rule protecting purchasers, upon the reversal of the judgment, is held to apply to parties or attorneys as well as to third persons,<sup>5</sup> and this view has also been asserted in *New York*.<sup>6</sup>

**Purchase by Defendant Lienholder.** — In *Ohio* it has been held that where lands encumbered by various liens are sold in judicial proceedings at the suit of one of the lienholders, and on cross petitions of the different defendant lienholders, and are purchased at such judicial sale by a defendant lienholder, and the proceeds of sale are distributed among the several incumbrancers, by order of court, agreeably to their ascertained priorities, such purchaser, though a party to the suit, is entitled to the protection which the policy of the statute affords to purchasers at judicial sales, upon the reversal of the judgment or decree under which the sale was made.<sup>7</sup>

**1. Purchaser Guilty of Fraud or Unfairness.** — *Dutcher v. Leake*, 44 Ill. 398.

**2. Party Purchasing at Sale Procured by Him Not Protected upon Reversal of Judgment.** — *United States.* — See *Galpin v. Page*, 1 Sawy. (U. S.) 309; *Alabama, etc., Mfg. Co. v. Robinson*, 72 Fed. Rep. 708, 30 U. S. App. 683, *affirming* *Robinson v. Alabama, etc., Mfg. Co.*, 67 Fed. Rep. 189.

*Alabama.* — *McDonald v. Mobile L. Ins. Co.*, 65 Ala. 358; *Ivie v. Stringfellow*, 82 Ala. 545; *Marks v. Cowles*, 61 Ala. 299; *Phillips v. Benson*, 85 Ala. 416.

*Arkansas.* — *Fishback v. Weaver*, 34 Ark. 569; *Millington v. Hill*, 54 Ark. 239.

*Illinois.* — *Smith v. Brittenham*, 109 Ill. 540. See also *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217; *Hobson v. Ewan*, 62 Ill. 146; *M'Lagan v. Brown*, 11 Ill. 519; *Fergus v. Woodworth*, 44 Ill. 374; *Mason v. Thomas*, 24 Ill. 285; *Dickerman v. Burgess*, 20 Ill. 266.

*Minnesota.* — See *Branley v. Dambly*, 69 Minn. 282.

*Nevada.* — See *Hastings v. Burning Moscow Gold, etc.*, Min. Co., 2 Nev. 100.

*New York.* — *Wambaugh v. Gates*, 8 N. Y. 138.

*Ohio.* — See *Hubbell v. Broadwell*, 8 Ohio 120. *Tennessee.* — *Welker v. Staples*, 88 Tenn. 49, 17 Am. St. Rep. 869. See also *Micou v. Davis*, 16 Lea (Tenn.) 257.

*Texas.* — *Adams v. Odom*, 74 Tex. 206, 15 Am. St. Rep. 827. See also *Huckins v. Kapf*, (Tex. App. 1889) 14 S. W. Rep. 1016.

*Virginia.* — See *Buchanan v. Clark*, 10 Gratt. (Va.) 104.

*West Virginia.* — *Dunfee v. Childs*, 45 W. Va. 175. See also *Frederick v. Cox*, (W. Va. 1890) 34 S. E. Rep. 958.

**Assignee of Judgment or Decree, Who Purchases at Sale Thereunder, Not Protected upon Reversal.** — *McDonald v. Mobile L. Ins. Co.*, 65 Ala. 358.

**Third Person Purchasing for Judgment Creditor Not Protected.** — *Phillips v. Benson*, 85 Ala. 416; *Sheldon v. Pruessner*, 52 Kan. 593.

**Assignee of Party Who Has Purchased at Sale**

**Procured by Him Not Protected.** — *Marks v. Cowles*, 61 Ala. 299; *Phillips v. Benson*, 82 Ala. 500.

**Upon a Purchase by a Mortgagee and the Subsequent Reversal of the Proceedings a Mortgagor May Redeem.** — *Hubbell v. Broadwell*, 8 Ohio 120.

**3. Purchase by Attorney of Party Procuring Sale — Purchaser Not Protected.** — *Phillips v. Benson*, 82 Ala. 500; *Smith v. Brittenham*, 109 Ill. 540. See also *M'Lagan v. Brown*, 11 Ill. 519; *Dickerman v. Burgess*, 20 Ill. 266; *Mason v. Thomas*, 24 Ill. 285; *Fergus v. Woodworth*, 44 Ill. 374.

**Person to Whom Attorney Has Transferred His Bid Not Protected — Remedy Against Such Person.** — See *Phillips v. Benson*, 82 Ala. 500.

**4. Privies Not Protected.** — *Welcher v. Staples*, 88 Tenn. 49, 17 Am. St. Rep. 869. See also *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217; *Hobson v. Ewan*, 62 Ill. 146.

**Purchase by Wife of Complainant.** — See *Ivie v. Stringfellow*, 82 Ala. 545.

**5. Kentucky Rule.** — *Parker v. Anderson*, 5 T. B. Mon. (Ky.) 445; *Clark v. Farrow*, 10 B. Mon. (Ky.) 446, 52 Am. Dec. 552; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 237, 68 Am. Dec. 723; *Yocum v. Foreman*, 14 Bush (Ky.) 494; *Amos v. Stockton*, 5 J. J. Marsh. (Ky.) 638; *Clark v. Bell*, 4 Dana (Ky.) 20; *Singleton v. Cogar*, 7 Dana (Ky.) 481; *Baker v. Baker*, 87 Ky. 462; *Dunn v. German Security Bank*, (Ky. 1887) 3 S. W. Rep. 425, 8 Ky. L. Rep. 777; *Earl v. Porter*, 2 Ky. L. Rep. 316; *Rankin v. Eastin*, 2 Ky. L. Rep. 427; *Judah v. Bickel*, 4 Ky. L. Rep. 715; *Dudley v. Beatty*, 5 Ky. L. Rep. 773; *Scott v. Estill*, 7 Ky. L. Rep. 222; *Seale v. Langden*, 16 Ky. L. Rep. 398. But compare *Miller v. Hall*, 1 Bush (Ky.) 229; *Salter v. Dunn*, 1 Bush (Ky.) 317.

**6. New York.** — *Hening v. Punnett*, 4 Daly (N. Y.) 543, *citing* *Parker v. Anderson*, 5 T. B. Mon. (Ky.) 445. But compare *Wambaugh v. Gates*, 8 N. Y. 138.

**7. Defendant Lienholder Protected in His Purchase.** — *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383.



10. **Appreciation or Depreciation in Value of Property Between Time of Sale and Confirmation.** — There are many cases in which it has been held that the purchaser at a judicial sale is bound by his contract as of the date of the sale, and that he is entitled to the benefit of any appreciation in the value of the property between that time and the confirmation of the sale,<sup>1</sup> and must bear the loss if there be a depreciation in value or a total destruction of the property within such period.<sup>2</sup> But on the other hand, there is a considerable number of cases in which the contrary doctrine has been asserted.<sup>3</sup>

11. **As to Application of Proceeds of Sale.** — The purchaser at a judicial sale has performed his whole duty in the premises when he has paid the purchase money to the proper person, and is not bound to see to the proper disposition of the money so paid, nor is he concerned in such disposition.<sup>4</sup>

12. **Circumstances Entitling Purchaser to Be Relieved from Purchase —**  
*a. SALE OR PROCEEDINGS LEADING UP THERETO VOID.* — A purchaser under a void decree acquires no title<sup>5</sup> or rights which the courts will protect.<sup>6</sup> Therefore it follows naturally that a purchaser will not be forced to comply with his bid, where he shows that the sale or the proceedings leading up to the sale are void.<sup>7</sup>

1. **Purchaser Entitled to Benefit of Appreciation in Value.** — *Haralson v. George*, 56 Ala. 295; *Vance v. Foster*, 9 Bush (Ky.) 389; *Tyson v. Mickle*, 2 Gill (Md.) 376; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Farmers Bank v. Clarke*, 28 Md. 145.

2. **Purchaser Must Bear Loss in Case of Depreciation.** — *Haralson v. George*, 56 Ala. 295; *Vance v. Foster*, 9 Bush (Ky.) 389; *Walters v. Blevin*, 3 Ky. L. Rep. 386; *Farmers' Bank v. Clarke*, 28 Md. 145; *Tyson v. Mickle*, 2 Gill (Md.) 376; *Gibbs v. Cunningham*, 1 Md. Ch. 44.

If the Purchaser Has Not Assumed the Responsibility of Protecting the Property, by taking possession of it, any loss that may be sustained by its injury or deterioration in the interval between the sale and final ratification falls upon the vendor. *Wagner v. Cohen*, 6 Gill (Md.) 97, 46 Am. Dec. 660.

3. **View that Purchaser Is Entitled to Relief in Case of Depreciation in Value or Destruction of Property — England.** — *Ex p. Minor*, 11 Ves. Jr. 559, 8 Rev. Rep. 247.

*Canada.* — *Stephenson v. Bain*, 8 Ont. Pr. 258, reversing 8 Ont. Pr. 166.

*New York.* — See *Harrigan v. Golden*, 41 N. Y. App. Div. 423.

*North Carolina.* — *Miller v. Feezor*, 82 N. Car. 192.

*Virginia.* — *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108. See also *Taylor v. Cooper*, 10 Leigh (Va.) 327.

In Tennessee the doctrine has been laid down that the purchaser is not liable for the depreciation in the value of real property, and cannot be compelled to complete its purchase. *Eakin v. Herbert*, 4 Coldw. (Tenn.) 116; *Parsons v. McNickle*, 1 Shannon Cas. (Tenn.) 264.

And the same rule has been asserted as to personal property, mostly slaves. *Johnson v. Johnson*, 2 Heisk. (Tenn.) 522; *Jones v. Hollingsworth*, 10 Heisk. (Tenn.) 653; *Graves v. Keaton*, 3 Coldw. (Tenn.) 8.

Other cases, however, declare that the loss in case of personal property must be borne by the purchaser. *Curd v. Bonner*, 4 Coldw. (Tenn.) 632; *Polk v. Pledge*, 5 Coldw. (Tenn.) 384; *Newman v. Sloan*, 5 Coldw. (Tenn.) 390;

*Saunders v. Stallings*, 5 Heisk. (Tenn.) 65; *Queener v. Trew*, 6 Heisk. (Tenn.) 59.

Some of these cases may be distinguished on the ground that the purchaser took possession of the property before confirmation.

4. **Purchaser Not Bound to See to Proper Disposition of Proceeds — England.** — *Curtis v. Price*, 12 Ves. Jr. 89, 8 Rev. Rep. 303; *Blake v. Blake*, 5 Ir. Eq. 596. But compare *Lloyd v. Baldwin*, 1 Ves. Jr. 173.

*United States.* — *Stuart v. Gay*, 127 U. S. 518. See also *Knotis v. Stearns*, 91 U. S. 638.

*District of Columbia.* — See *Marshall v. Wheeler*, 18 D. C. 414.

*Kentucky.* — See *O'Neal v. Bannon*, 4 Bush (Ky.) 24.

*Maryland.* — *Brown v. Wallace*, 4 Gill & J. (Md.) 479; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236. See also *Rousculp v. Kershner*, 49 Md. 516; *Duvall v. Speed*, 1 Md. Ch. 229.

*Missouri.* — See *Exendine v. Morris*, 8 Mo. App. 383.

*North Carolina.* — *Wilkinson v. Brinn*, 124 N. Car. 723.

*South Carolina.* — *Spencer v. Godfrey*, Bailey Eq. (S. Car.) 468; *Farrington v. Duval*, 32 S. Car. 590.

*Tennessee.* — See *Beaumont v. Beaumont*, 7 Heisk. (Tenn.) 226.

*Virginia.* — *Jones v. Tatum*, 19 Gratt. (Va.) 720. See also *Gill v. Barbour*, 80 Va. 11.

5. **Purchaser at Sale under Void Decree Acquires No Title.** — *Garvin v. Watkins*, 29 Fla. 151; *Grigsby v. Barr*, 14 Bush (Ky.) 330. See also *Morton v. Underwood*, 49 Ala. 419; *Lesslie v. Richardson*, 60 Ala. 563.

6. **Assignee of Purchaser under Void Decree Not Protected.** — *Hoback v. Miller*, 44 W. Va. 635.

7. **Compliance Not Enforced Where Sale or Proceedings Void.** — *Dumestre's Succession*, 40 La. Ann. 571; *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

**Ratification or Rescission Compelled.** — It is competent for the purchaser, at any time after he discovers that the proceedings for the sale of the land of a decedent are void, to resort to a court of equity to compel the heir or devisee to elect the ratification or the rescission of the



*b. LACK OF JURISDICTION.* — A purchaser is entitled to be relieved from his purchase where the decree of sale is irregular against some of the defendants for want of jurisdiction apparent upon the record.<sup>1</sup>

*c. DECREE INADEQUATE TO TRANSFER TITLE.* — A bidder at a judicial sale bids for the title of the decree or judgment debtor. If he discovers before complying with the bid, that the decree or judgment is inadequate to transfer such title, he may decline to complete the purchase.<sup>2</sup>

*d. PURCHASER UNABLE TO OBTAIN POSSESSION BY VIRTUE OF DECREE.* — In *New York* it has been said that a purchaser at a judicial sale must be able to get possession of the property by virtue of the decree, and if independent proceedings are necessary to obtain possession he should not be required to complete his purchase.<sup>3</sup>

*e. LAND NOT SUBJECT TO SALE.* — A purchaser at a judicial sale who, upon a rule to show cause why he refuses to comply with his contract, shows that the land was not subject to sale, is entitled to be relieved from his purchase, as in such case he cannot get such a title as he has a right to expect.<sup>4</sup>

*f. DEFICIENCY IN QUANTITY OF LAND SOLD.* — A purchaser will not ordinarily be relieved from compliance with his bid on account of a deficiency in the quantity of land sold,<sup>5</sup> unless it be very great,<sup>6</sup> or has been knowingly concealed.<sup>7</sup>

*g. DEFECT IN TITLE OR INCUMBRANCES.* — (1) *In England and Canada*, the courts undertake to sell a good title,<sup>8</sup> and the custom is to allow the purchaser at a judicial sale time to examine the title of the property,<sup>9</sup> and in case he cannot obtain a good title thereto, he may be discharged from his purchase.<sup>10</sup>

contract of purchase. *Bland v. Bowie*, 53 Ala. 152.

1. **Purchaser Entitled to Be Relieved Where Lack of Jurisdiction Apparent.** — *Fox v. Reynolds*, 50 Md. 564; *Alvord v. Beach*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 451. See generally the title JURISDICTION, *infra*.

2. **Purchaser May Decline to Complete Purchase Where Decree Inadequate to Transfer Title.** — *Tilton v. Pearson*, 67 Ill. App. 372, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 229.

3. **Purchaser Should Not Be Required to Complete Where Independent Proceedings Necessary to Obtain Possession.** — *Kopp v. Kopp*, 48 Hun (N. Y.) 532.

4. **Where Land Not Subject to Sale.** — *Stewart v. Brady*, 3 Bush (Ky.) 624.

5. **Deficiency in Quantity of Land.** — *Williams v. Duncan*, 92 Ky. 125; *Ish v. Finlay*, 34 Neb. 419; *Dennerlein v. Dennerlein*, 111 N. Y. 518, 46 Hun (N. Y.) 561; *Carneal v. Lynch*, 91 Va. 114. See also *Dickey v. Sanderson*, 15 Ky. L. Rep. 558, (Ky. 1894) 24 S. W. Rep. 608.

6. **Where Deficiency Great.** — *Pope v. Erdman*, (Ky. 1891) 17 S. W. Rep. 145.

7. **Where Deficiency Has Been Knowingly Concealed.** — *Veeder v. Fonda*, 3 Paige (N. Y.) 94.

8. **Purchaser Entitled to Clear and Unencumbered Title.** — See *Grey-Coat Hospital v. Westminster Imp. Com'rs*, 1 De G. & J. 531, 26 L. J. Ch. 843, 3 Jur. N. S. 1188, 5 W. R. 855. See also *In re Dare*, 21 Ch. D. 41, 51 L. J. Ch. 671, 46 L. T. N. S. 755, 30 W. R. 556; *Bentley v. Craven*, 1 W. R. 401; *Street v. Hallett*, 6 Ont. Pr. 312.

A purchaser at a judicial sale has a right to require proof that the persons whose estates were sold were in existence at the time of the sale, before accepting a vesting order. *Slater v. Fiskin*, 1 Ch. Chamb. (Ont.) 1.

**Purchaser Not Compelled to Accept Equitable Title Without Legal Estate Being Got In.** — *Freeland v. Pearson*, L. R. 7 Eq. 246.

9. **Delay in Demanding Abstract Held to Amount to Acceptance of Title.** — *Ontario Bank v. Sirr*, 6 Ont. Pr. 216.

10. **Purchaser May Be Discharged Where Title Defective.** — *England.* — *Dalby v. Pullen*, 1 Russ. & M. 296, 3 Sim. 29, 8 L. J. Ch. 74, 30 Rev. Rep. 123; *Else v. Else*, L. R. 13 Eq. 196, 41 L. J. Ch. 213, 25 L. T. N. S. 927, 20 W. R. 286; *M'Culloch v. Gregory*, 1 Kay & J. 286, 3 Eq. R. 495, 24 L. J. Ch. 246, 3 W. R. 231; *Johnson v. Reardon*, 3 Ir. Eq. 200; *Mullins v. Hussey*, L. R. 1 Eq. 488, 35 L. J. Ch. 348; *Atty.-Gen. v. Newark*, 8 Sim. 71; *Reynolds v. Blake*, 2 Sim. & St. 117; *Anonymous*, 3 L. J. Ch. 88; *Smith v. Nelson*, 2 Sim. & St. 557, 4 L. J. Ch. 175, 25 Rev. Rep. 266; *Hyde v. Hyde*, 3 L. J. Ch. 130; *Feely v. Kilkenny, Flan. & Kel.* 456; *Barton v. Downes, Flan. & Kel.* 633, 4 Ir. Eq. 607. See also *Lewis v. Lewis*, 9 L. J. Ch. 176; *Lineham v. Cotter*, 7 Ir. Eq. 176; *Palmer v. Goren*, 4 W. R. 688; *Lachlan v. Reynolds*, Kay 52, 2 Eq. R. 713, 23 L. J. Ch. 8, 2 W. R. 49; *Magennis v. Fallon*, 2 Molloy 561; *Taylor v. Martindale*, 1 Y. & C. Ch. 658; *Kirby v. O'Shee*, 1 Jones (Ir.) 164; *Fraser v. Wood*, 8 Beav. 339, 14 L. J. Ch. 220; *Osborn v. Osborn*, 18 W. R. 421; *Brown v. Lynch*, 4 Ir. Eq. 59; *Camden v. Benson*, 1 Keen 671; *Holland v. King*, 1 W. R. 80; *Goffe v. Mitchell*, 2 Molloy 508; *Perkins v. Ede*, 16 Beav. 268.

*Canada.* — *Keefer v. McKay*, 10 Ont. Pr. 345.

**Purchaser May Be Discharged Where Title Can Be Obtained to Only One Half of Property.** — *Ward v. Trathen*, 14 Sim. 82, 8 Jur. 303; *Roffey v. Shallcross*, 4 Madd. 227, 20 Rev. Rep. 293.



**Waiver of Right to Object to Title.** — The purchaser is not, however, entitled to possession until he has accepted the title,<sup>1</sup> and if he takes possession before such time, without any order of court, or otherwise than according to the conditions of sale, or obtains a vesting order, this is tantamount to an acceptance of the title,<sup>2</sup> unless he has previously obtained the consent of the court to his taking possession without waiving his right to object to the title.<sup>3</sup>

(2) *In the United States.* — Notwithstanding the well-established rule that *caveat emptor* applies to judicial sales, there are many cases in the United States in which it has been held that a purchaser at a judicial sale may defeat an attempt to force him to comply with his bid, by showing that since the sale he has discovered a defect in the title to, or an incumbrance upon, the property sold;<sup>4</sup> but it is otherwise where, at the time of the sale, the purchaser knew or was chargeable with notice of the true state of the title.<sup>5</sup>

**Objections Which May Properly Be Made to the Title** should be removed by the person having the conduct of the sale. *Street v. Hallett*, 6 Ont. Pr. 312.

If the Objection Cannot Be Removed, the purchaser is entitled to be discharged and have his deposit refunded. *Street v. Hallett*, 6 Ont. Pr. 312.

**Incumbrance Acquired by Purchaser in Order to Create Obstacle to Completion of Sale** will not entitle him to discharge. *Fraser v. Gunn*, 8 Ont. Pr. 278.

1. See *supra*, this section, *English Rule as to When Purchaser Is Entitled to Possession*.

2. Taking Possession Tantamount to Acceptance of Title. — *Wilden v. Andrews*, 4 L. J. Ch. 208; *Patterson v. Robb*, 6 Ont. Pr. 114. But compare *Currie v. Rapid City Farmers' Elevator Co.*, 12 Manitoba 105.

**Purchaser Taking Vesting Order Waives All Objections to Title.** — *Bull v. Harper*, 6 Ont. Pr. 36.

**Discovery of Tax Sale After Taking Vesting Order.** — In a case where the purchaser at a judicial sale took a vesting order, and subsequently discovered that the land had been sold for taxes, it was held that he was entitled to a payment out of court of the amount required to redeem the lot. *Turrill v. Turrill*, 7 Ont. Pr. 142.

3. Obtaining Permission of Court to Take Possession Without Waiving Right to Object to Title. — *Marfell v. Rudge*, 2 Y. & C. Exch. 566, 2 Jur. 78; *Patterson v. Robb*, 6 Ont. Pr. 114.

4. Purchaser May Be Relieved from Compliance With Bid on Account of Defect in Title or Incumbrances — *District of Columbia*. — *American Security, etc., Co. v. Muse*, 4 App. Cas. (D. C.) 12. See also *Cox v. Cox*, 18 D. C. 1.

*Kentucky*. — See *Bird v. Smith*, 101 Ky. 205. *Louisiana*. — *Nash's Succession*, 48 La. Ann. 1573. See also *Byrne's Succession*, 38 La. Ann. 518.

*Maryland*. — *Earle v. Turton*, 26 Md. 23; *Bolgiano v. Cooke*, 19 Md. 375.

*New Jersey*. — See *Simon v. Townsend*, 27 N. J. Eq. 302.

*New York*. — *Graham v. Bleakie*, 2 Daly (N. Y.) 55; *People v. Globe Mut. L. Ins. Co.*, 33 Hun (N. Y.) 393; *Morris v. Mowatt*, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; *Fales v. Storm*, 33 N. Y. App. Div. 611, affirmed by 157 N. Y. 705; *Matter of Whitlock*, 32 Barb. (N. Y.) 48, 10 Abb. Pr. (N. Y.) 316, 19 How. Pr. (N. Y.) 380; *Mahoney v. Allen*, (Supm. Ct. Spec. T.) 18

Misc. (N. Y.) 134; *People v. Knickerbocker L. Ins. Co.*, (Supm. Ct.) 66 How. Pr. (N. Y.) 115. See also *Matter of Cavanagh*, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 261; *Knee v. Kunkendall*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 1; *Murray v. Murray*, Daily Reg. (N. Y.) April 6, 1887; *Ray v. Adams*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 664; *Toole v. Toole*, 112 N. Y. 333, 8 Am. St. Rep. 750, 22 Abb. N. Cas. (N. Y.) 392; *Fleming v. Burnham*, 100 N. Y. 1, reversing 36 Hun (N. Y.) 456.

*North Carolina*. — See *Edney v. Edney*, 80 N. Car. 81; *Miller v. Feezor*, 82 N. Car. 192; *Smith v. Brittain*, 3 Ired. Eq. (38 N. Car.) 347, 42 Am. Dec. 175; *Eccles v. Timmons*, 95 N. Car. 540.

*Pennsylvania*. — *Kostenbader v. Spotts*, 80 Pa. St. 430; *Morgan's Estate*, 9 Pa. Co. Ct. 119.

*South Carolina*. — See *Monaghan v. Small*, 6 S. Car. 177.

*Tennessee*. — See *Mullins v. Aiken*, 2 Heisk. (Tenn.) 535.

*Virginia*. — *Etter v. Scott*, 90 Va. 762.

*Washington*. — *Matter of Box*, 11 Wash. 90.

Compare *Kirk v. Jones*, 8 Heisk. (Tenn.) 829.

**Purchaser May Be Relieved After Ratification of Sale if Purchase Money Has Not Been Paid.** — *Ridgeley v. M'Laughlin*, 3 Har. & M. (Md.) 220.

**Purchaser Entitled to Relief** where on a mortgage represented to be not due for eighteen months foreclosure proceedings have already begun. *Bradley v. Leahy*, 54 Hun (N. Y.) 390.

**Objection to Title Must Be Substantial.** — *Dunham v. Minard*, 4 Paige (N. Y.) 441. And see *Oakley v. Briggs*, 63 Hun (N. Y.) 629, 17 N. Y. Supp. 751; *Holden v. Sackett*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 473.

**Supplying Defect.** — A reasonable time must be allowed for supplying a defect in the title. *Ormsby v. Terry*, 6 Bush (N. Y.) 553.

5. **No Relief if Purchaser Knew or Was Chargeable With Notice of True State of Title.** — *Stewart v. Devries*, 81 Md. 525; *Hooper v. Castetter*, 45 Neb. 67; *Norton v. Nebraska L. & T. Co.*, 35 Neb. 466, 37 Am. St. Rep. 441, 40 Neb. 394; *Blanck v. Sadlier*, 5 N. Y. App. Div. 81, affirmed by 153 N. Y. 551; *Eccles v. Timmons*, 95 N. Car. 540; *Smith v. Winn*, 38 S. Car. 188. See also *Maul v. Hellman*, 39 Neb. 322; *Fales v. Storm*, 33 N. Y. App. Div. 611, affirmed by 157 N. Y. 705.

The purchaser must take such title as an examination of the proceedings will show that



**Easements.** — Thus a purchaser may be relieved of his purchase where the property sold was subject to an easement of which he had no notice,<sup>1</sup> but relief has been refused where the purchaser had notice of the easement,<sup>2</sup> or it was of such an open and visible nature that an inspection of the property could not have failed to disclose its existence, as in the case of a street railway in front of the property,<sup>3</sup> or a railroad right of way through it.<sup>4</sup>

**Relief After Payment of Purchase Money.** — In *Maryland* it has been held that a purchaser may have relief on account of a defect of title, even after payment of the purchase money, if the money has not passed out of the control of the court.<sup>5</sup>

Where the Terms of Sale Provide for the Payment of Liens Out of the Purchase Money, objections based upon the existence of incumbrances will not avail to relieve the purchaser from his purchase.<sup>6</sup>

(3) **Rule as to Title by Adverse Possession.** — It has been held that a purchaser may be compelled to take a title based upon adverse possession for a sufficient length of time to bar any action for the recovery of the land.<sup>7</sup>

*h.* **DELAY IN COMPLETION OF SALE.** — It has also been held that where, without the fault of the purchaser at a judicial sale, a completion of the sale has been unreasonably delayed, he should not be thereafter compelled to comply with his bid.<sup>8</sup>

*i.* **IRREGULARITIES.** — A purchaser is not entitled to be relieved from complying with his bid on account of irregularities in the proceedings, which do not affect his title to the property purchased.<sup>9</sup>

*j.* **PURCHASER MUST MAKE OUT PLAIN CASE FOR RELIEF.** — A purchaser at a judicial sale claiming to be discharged from his contract, must make out a fair and plain case for relief. It is not every defect in the subject sold, or variation from the description, that will avail him. Chancery weighs the object and inducement of the purchaser, and looking to the merits and substantial justice of each particular case, if the sale be fair, relieves or not

he will get. *Boorum v. Tucker*, 51 N. J. Eq. 135.

1. **Purchaser May Be Relieved Where He Had No Notice of Easement.** — *Morgan's Estate*, 9 Pa. Co. Ct. 119.

2. **No Relief on Account of Easement of Which Purchaser Had Notice.** — *Connaughton v. Bernard*, 84 Md. 577.

3. **Street Railway in Front of Property.** — *Koepe v. Bradley*, 3 N. Y. App. Div. 391.

4. **Railroad Right of Way Through Property.** — *Ex p. Alexander*, 122 N. Car. 727.

5. **Purchaser May Be Relieved if Proceeds Have Not Passed Out of Control of Court.** — *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Preston v. Fryer*, 38 Md. 221.

**No Relief After Proceeds of Sale Have Been Distributed.** — *Glenn v. Clapp*, 11 Gill & J. (Md.) 1.

6. **Where Terms of Sale Provide for Payment of Liens Out of Purchase Money.** — *Lenihan v. Hamann*, (Supm. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 274.

**An Unauthorized Agreement to Apply the Proceeds to the Discharge of Incumbrances cannot be alleged where the decree or order under which real estate was sold expressly provided that it should be sold subject to the incumbrances.** *Maul v. Hellman*, 39 Neb. 322.

7. **Title Based upon Adverse Possession.** — *Scott v. Nixon*, 2 Cow. & Law 185, 3 Dr. & War. 388, 6 Ir. Eq. 8; *Cox v. Cox*, 18 D. C. 1; *Rieman v. Wagner*, 74 Md. 478.

When mere possession for the prescribed time is shown and parol evidence to be fur-

nished in the future may be essential to establish its adverse character, a purchaser will not be compelled to take such title. *Gorman v. Gorman*, 40 N. Y. App. Div. 225, affirmed by 159 N. Y. 571. See also *Heller v. Cohen*, 154 N. Y. 299; *Moot v. Business Men's Invest. Assoc.*, 157 N. Y. 201; *Wilhelm v. Feder-green*, 2 N. Y. App. Div. 483, affirmed by 157 N. Y. 713; *Ruess v. Ewen*, 34 N. Y. App. Div. 484.

8. **Purchaser Not Compellable to Complete Purchase After Unreasonable Delay.** — *Myers v. Nourse*, 5 Fla. 516 (nearly ten years' delay); *Arnett v. Anderson*, 12 Ky. L. Rep. 897, (Ky. 1891) 15 S. W. Rep. 855; *Toole v. Toole*, 112 N. Y. 333, 8 Am. St. Rep. 750, 22 Abb. N. Cas. (N. Y.) 392; *Jackson v. Edwards*, 7 Paige (N. Y.) 386, affirmed by 22 Wend. (N. Y.) 498, holding also that unreasonable delay on the purchaser's part will defeat his purchase. See also *Remsen v. Reese*, 72 Hun (N. Y.) 370.

**Not Necessary that Purchaser Should Have Been Damaged by Delay.** — *Toole v. Toole*, 112 N. Y. 333, 8 Am. St. Rep. 750, 22 Abb. N. Cas. (N. Y.) 392.

**Eight Months Delay in Obtaining Possession Not Sufficient.** — *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

9. **Irregularities Not Entitling to Relief.** — *Baker v. Sowter*, 10 Beav. 343, 16 L. J. Ch. 333; *Calvert v. Godfrey*, 6 Beav. 97, 12 J. L. Ch. 305; *Vissman v. Bryant*, (Ky. 1893) 12 S. W. Rep. 759.



from the purchase, according as the character of the transaction and circumstances may appear to require.<sup>1</sup>

**13. Rights upon Setting Aside of Sale — a. REIMBURSEMENT.** — It is very generally considered that where a judicial sale turns out to be void or is set aside, the purchaser is entitled, if he has acted in good faith, to have the purchase money returned to him,<sup>2</sup> with interest,<sup>3</sup> and to be reimbursed for what he has expended on the property,<sup>4</sup> as by paying taxes,<sup>5</sup> or incumbrances thereon.<sup>6</sup>

**b. COMPENSATION FOR IMPROVEMENTS.** — A purchaser at a judicial sale, or his assignee, who has in good faith and believing that he has acquired a good title taken possession of and improved the property, is entitled to compensation for his improvements when the sale is subsequently declared void or set aside.<sup>7</sup>

**1. Purchaser Must Make Out Plain Case for Relief.** — *Weems v. Brewer*, 2 Har. & G. (Md.) 397.

**2. Right of Purchaser to Return of Purchase Money — England.** — *Mackay v. Orr*, 2 Ir. Eq. 499; *Powell v. Powell*, L. R. 19 Eq. 422, 44 L. J. Ch. 311, 32 L. T. N. S. 148, 23 W. R. 482.

*Illinois.* — *Chambers v. Jones*, 72 Ill. 275.

*Indiana.* — *Bunts v. Cole*, 7 Blackf. (Ind.) 265; *Taylor v. Conner*, 7 Ind. 115; *Arnold v. Cord*, 16 Ind. 177; *Willson v. Brown*, 82 Ind. 471.

*Kentucky.* — *Miller v. Hall*, 1 Bush (Ky.) 229; *Salter v. Dunn*, 1 Bush (Ky.) 321; *Forst v. Davis*, (Ky. 1897) 41 S. W. Rep. 27. See also *Hays v. Bradley*, (Ky. 1893) 23 S. W. Rep. 372.

*Maryland.* — *Eichelberger v. Hawthorne*, 33 Md. 588.

*Mississippi.* — *Cole v. Johnson*, 53 Miss. 94.

*Missouri.* — *Valle v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557; *Henry v. McKerlie*, 78 Mo. 416; *Bone v. Tyrrell*, 113 Mo. 175. See also *Foote v. Sanders*, 72 Mo. 616.

*Nebraska.* — *Goble v. O'Connor*, 43 Neb. 49.

*New Jersey.* — *Wilson v. Bellows*, 30 N. J. Eq. 282.

*New York.* — *Rogers v. McLean*, 31 Barb. (N. Y.) 304, 10 Abb. Pr. (N. Y.) 306.

*South Carolina.* — *Tompkins v. Tompkins*, 39 S. Car. 537.

*Tennessee.* — *Campbell v. Bryant*, 2 Shannon Tenn. Cas. 146, 1 Leg. Rep. 134; *Jones v. McKenna*, 4 Lea (Tenn.) 641; *Caldwell v. Palmer*, 6 Lea (Tenn.) 654.

*Texas.* — *French v. Grenet*, 57 Tex. 273; *Elam v. Donald*, 58 Tex. 316; *Smithwick v. Kelly*, 79 Tex. 564; *Whitney v. Krapf*, 8 Tex. Civ. App. 304. See also *Ruddell v. Sparks*, 79 Tex. 308.

*Virginia.* — *Abernathy v. Phillips*, 82 Va. 769.

*West Virginia.* — *Charleston L. & M. Co. v. Brockmeyer*, 23 W. Va. 635; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800.

*Wisconsin.* — *Cook v. Berlin Woolen Mill Co.*, 56 Wis. 643.

**Purchaser Not Entitled to Claim Return of Purchase Money Where Sale Declared Void or Set Aside Because of His Fraud.** — *Elam v. Donald*, 58 Tex. 316; *Storer v. Lane*, 1 Tex. Civ. App. 250.

**When Owner Cannot Be Required to Refund Purchase Money to Purchaser.** — If the demand for which the property was ordered to be sold was sought to be established in the first instance by judgment of a court which did not

have jurisdiction, then the alleged debtor whose property had been sold should not be required to refund the purchase money. *French v. Grenet*, 57 Tex. 273; *Stegall v. Huff*, 54 Tex. 193. See also *Kenaday v. Waggaman*, 3 App. Cas. (D. C.) 412; *Grigsby v. Barr*, 14 Bush. (Ky.) 330; *Abernathy v. Phillips*, 82 Va. 769.

**3. Interest on Purchase Money — England.** — *Gower v. Hill*, *Hayes & J.* 127; *Linehan v. Cotter*, 8 Ir. Eq. 104; *Kirwan v. Blake*, 2 Molloy 506, 1 Hog. 151; *Hutchinson v. Cathcart*, *Jones & C.* 260, 1 Ir. Eq. 452; *Pleasants v. Roberts*, 2 Molloy 507.

*Illinois.* — See *Devine v. Harkness*, 117 Ill. 145.

*Indiana.* — *Taylor v. Conner*, 7 Ind. 115; *Arnold v. Cord*, 16 Ind. 177.

*Kentucky.* — *Forst v. Davis*, 101 Ky. 343.

*Maryland.* — *Eichelberger v. Hawthorne*, 33 Md. 588.

*New York.* — *Rogers v. McLean*, 31 Barb. (N. Y.) 304, 10 Abb. Pr. (N. Y.) 306.

*Virginia.* — *Abernathy v. Phillips*, 82 Va. 769.

*West Virginia.* — *Charlestown L. & M. Co. v. Brockmeyer*, 23 W. Va. 635.

*Wisconsin.* — *Cook v. Berlin Woolen Mill Co.*, 56 Wis. 643.

**When Purchaser Not Entitled to Interest.** — *M'Culloch v. Gregory*, 1 Kay & J. 286, 3 Eq. R. 495, 24 L. J. Ch. 246, 3 W. R. 231.

**4. Purchaser Entitled to Return of Moneys Expended by Him on the Property.** — *Goble v. O'Connor*, 43 Neb. 49.

**Purchaser Not Entitled to Allowance for Repairs.** — *Cook v. Berlin Woolen Mill Co.*, 56 Wis. 643.

**5. Purchaser Is Entitled to Be Reimbursed What He Has Paid for Taxes.** — *Chambers v. Jones*, 72 Ill. 275; *Cook v. Berlin Woolen Mill Co.*, 56 Wis. 643. See also *Charleston L. & M. Co. v. Brockmeyer*, 23 W. Va. 635.

**6. Purchaser Who Bought in Dower Interest Allowed Credit Therefor.** — *Taylor v. Walker*, 1 Heisk. (Tenn.) 735.

**7. Right to Compensation for Improvements — Georgia.** — See *Iverson v. Saulsbury*, 65 Ga. 724.

*Kentucky.* — *Forst v. Davis*, 101 Ky. 343; *Hayden v. Smith*, 5 Ky. L. Rep. 243. See also *Hendrix v. Nesbitt*, (Ky. 1899) 49 S. W. Rep. 963.

*Maryland.* — *Eichelberger v. Hawthorne*, 33 Md. 588; *Long v. Long*, 62 Md. 33.



**14. Liabilities upon Setting Aside of Sale.** — A purchaser at a void judicial sale or one which is subsequently set aside is usually held liable for the rents and profits of the land during the time that he was in possession,<sup>1</sup> but in a *South Carolina* case, where the purchaser had sold the land to another, he was held liable to account for the enhanced price at which it had been sold, but was released from liability for rents and profits.<sup>2</sup> And in a case where a purchaser of railroad property had so dealt with it as practically to destroy its identity, and aliened it, and rendered a restoration thereof as an entirety impossible, he was held liable in a personal action, upon the setting aside of the sale on an appeal to which he was made a party, for the fair market value of the property at the time he took possession, less the amount of prior liens which he had paid off, or which had been paid with the purchase money.<sup>3</sup>

**XV. ENFORCEMENT OF BID — 1. Summary Proceedings in General.** — It is a well-recognized rule that the successful bidder at a judicial sale becomes a *quasi* party to the proceedings in which the sale was ordered so as to give the court jurisdiction by summary proceedings to compel the performance of his purchase.<sup>4</sup> Where, however, the sale is on credit, and a bond for the deferred

*Missouri.* — Henry *v.* McKerlie, 78 Mo. 416.  
*Ohio.* — See Sellers *v.* Corwin, 5 Ohio 398, 24 Am. Dec. 301.

*South Carolina.* — Williman *v.* Holmes, 4 Rich. Eq. (S. Car.) 475.

*Texas.* — French *v.* Grenet, 57 Tex. 273.

*West Virginia.* — Williamson *v.* Jones, 43 W. Va. 562.

See generally the title IMPROVEMENTS, vol. 16, p. 62, and specifically the matter on pages 94 and 95.

Where Confirmation of the Sale Is Refused the purchaser is not entitled to compensation for his improvements, because he acquired no title prior to confirmation. McGee *v.* Allen, 12 Ky. L. Rep. 465.

**1. Purchaser Liable for Rents and Profits — Arkansas.** — Jefferson *v.* Edrington, 53 Ark. 545; Millington *v.* Hill, 54 Ark. 239.

*Indiana.* — Taylor *v.* Conner, 7 Ind. 115; Arnold *v.* Cord, 16 Ind. 177.

*Maryland.* — Wagner *v.* Cohen, 6 Gill (Md.) 97, 46 Am. Dec. 660.

*West Virginia.* — Charleston L. & M. Co. *v.* Brockmeyer, 23 W. Va. 635.

*Wisconsin.* — Lupton *v.* Almy, 4 Wis. 242.

**Purchaser Not Liable for Rents Which, Without His Fault, He Did Not Receive.** — Bath, etc., Paper Co. *v.* Langley, 23 S. Car. 129.

**2. Purchaser Held Liable for Enhanced Price at Which Land Sold, but Not for Rents.** — Mars *v.* Conner, 9 S. Car. 70.

**3. Liability of Purchaser Who Has Rendered Restoration of Property Impossible.** — Central Trust Co. *v.* Hubinger, 87 Fed. Rep. 3.

**4. Successful Bidder a Quasi Party — England.** — Lansdown *v.* Elderton, 14 Ves. Jr. 513; Cunningham *v.* Williams, 2 Anstr. 344; *Ex p.* Gould, 1 Glyn & J. 231; *Ex p.* Sidebotham, 2 Mont. & A. 146.

*United States.* — Camden *v.* Mayhew, 129 U. S. 73; Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196.

*Alabama.* — Lamkin *v.* Crawford, 8 Ala. 153; Green *v.* Jordan, 83 Ala. 220, 3 Am. St. Rep. 711; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47; Bell *v.* Owen, 8 Ala. 312.

*Arkansas.* — Porter *v.* Hanson, 36 Ark. 591.

*District of Columbia.* — Cox *v.* Cox, 18 D. C. 1.

*Florida.* — Allred *v.* McGahagan, 39 Fla. 118.

*Georgia.* — Sharman *v.* Walker, 68 Ga. 148; Cureton *v.* Wright, 73 Ga. 8; Barlow *v.* Toole, 80 Ga. 9.

*Illinois.* — Hill *v.* Hill, 58 Ill. 239.

*Indiana.* — Hunt *v.* Gregg, 8 Blackf. (Ind.) 105.

*Kentucky.* — Williams *v.* Glenn, 87 Ky. 87, 12 Am. St. Rep. 461; Avritt *v.* Bricken, (Ky. 1897) 38 S. W. Rep. 1090; Vance *v.* Foster, 9 Bush (Ky.) 389.

*Louisiana.* — McKenzie *v.* Bacon, 40 La. Ann. 157; Miltenberger *v.* Hill, 17 La. Ann. 52.

*Maryland.* — Bolgiano *v.* Cooke, 19 Md. 375; Farmers', etc., Bank *v.* Martin, 7 Md. 342, 61 Am. Dec. 350; Schaefer *v.* O'Brien, 49 Md. 253; Andrews *v.* Scotton, 2 Bland (Md.) 629; Richardson *v.* Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293.

*Massachusetts.* — Cobb *v.* Wood, 8 Cush. (Mass.) 228.

*Mississippi.* — Mason *v.* Martin, 54 Miss. 572; Adams *v.* Griffin, 3 Smed. & M. (Miss.) 556; Mount *v.* Brown, 33 Miss. 566, 69 Am. Dec. 362; Camp *v.* Saucier, 68 Miss. 278, 24 Am. St. Rep. 273.

*Missouri.* — Reed *v.* Shepperd, 38 Mo. 464; Gray *v.* Case, 51 Mo. 463; Wimer *v.* Obear, 23 Mo. 242.

*Nebraska.* — Clark, etc., Invest. Co. *v.* Way, 52 Neb. 204; McKinley-Lanning L. & T. Co. *v.* Hamer, 52 Neb. 709; Nye, etc., Co. *v.* Fahrenholz, 49 Neb. 276, 59 Am. St. Rep. 540; Phillips *v.* Dawley, 1 Neb. 320; Hooper *v.* Castetter, 45 Neb. 67; Jones *v.* Null, 9 Neb. 254; Maul *v.* Hellman, 39 Neb. 322; Gregory *v.* Tingley, 18 Neb. 318.

*Nevada.* — Sweeney *v.* Hawthorne, 6 Nev. 129.

*New Jersey.* — Townshend *v.* Simon, 38 N. J. L. 239; Shinn *v.* Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Silver *v.* Campbell, 25 N. J. Eq. 465; McCarter *v.* Finch, 55 N. J. Eq. 245.

*New York.* — Chappell *v.* Dann, 21 Barb. (N. Y.) 17; Toole *v.* Toole, 112 N. Y. 333, 8 Am. St. Rep. 750; Wallace *v.* Berdell, 105 N. Y. 7; Hegeman *v.* Johnson, 35 Barb. (N. Y.) 200; Goodwin *v.* Simonson, 74 N. Y. 133; Brasher *v.* Cortlandt, 2 Johns. Ch. (N. Y.) 505; Cazet *v.* Hubbell, 36 N. Y. 677; Archer *v.*



payments is given as required by the terms of sale, and the sale is confirmed, this constitutes a legal contract to be enforced at law, and the purchaser and his sureties on the bond upon default cannot be compelled to pay the bond in a summary way by order of court.<sup>1</sup>

**2. Resale at Bidder's Risk** — *a. IN GENERAL.* — The usual method for the enforcement of the purchaser's bid is for the court on motion, and after rule to show cause has been served on the purchaser, to order a resale of the property at the purchaser's risk, and the purchaser will be required to make good any deficiency arising thereon, and the cost of the proceedings therefor,<sup>2</sup> an

Archer, 155 N. Y. 475, *affirming* 84 Hun (N. Y.) 297.

*North Carolina.* — Matter of Yates, 6 Jones Eq. (59 N. Car.) 212; McKee v. Lineberger, 69 N. Car. 217; Hudson v. Coble, 97 N. Car. 260; Isler v. Andrews, 66 N. Car. 552; Flemming v. Roberts, 84 N. Car. 532.

*Ohio.* — Bisbee v. Hall, 3 Ohio 449.

*Pennsylvania.* — Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Freeman v. Husband, 77 Pa. St. 389; Gaskell v. Morris, 7 W. & S. (Pa.) 32.

*Rhode Island.* — Stimson v. Mead, 2 R. I. 541.

*Tennessee.* — Deaderick v. Watkins, 8 Humph. (Tenn.) 520; Blackmore v. Barker, 2 Swan (Tenn.) 340; Still v. Boon, 5 Sneed (Tenn.) 380; Deaderick v. Smith, 6 Humph. (Tenn.) 138; Mosby v. Hunt, 9 Heisk. (Tenn.) 675; Munson v. Payne, 9 Heisk. (Tenn.) 672.

*Utah.* — Kershaw v. Dyer, 6 Utah 239.

*Virginia.* — Hildreth v. Turner, 89 Va. 858; Redd v. Dyer, 83 Va. 331, 5 Am. St. Rep. 272; Woods v. Ellis, 85 Va. 471; Clarkson v. Read, 15 Gratt. (Va.) 288; Williams v. Blakey, 76 Va. 254; Long v. Weller, 29 Gratt. (Va.) 347; Mosby v. Withers, 80 Va. 82; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 17 Am. St. Rep. 108; Robertson v. Smith, 94 Va. 250.

*West Virginia.* — Glenn v. Blackford, 23 W. Va. 182.

*Wisconsin.* — Ogilvie v. Richardson, 14 Wis. 158.

**Assignee of Purchaser.** — In Archer v. Archer, 155 N. Y. 475, *affirming* 84 Hun (N. Y.) 297, an assignee of the purchaser's rights was held by his conduct to have submitted himself to the jurisdiction of the court so as to subject him to its orders for the enforcement of the purchase.

**Execution Against Purchaser on Motion.** — If the purchaser at a judicial sale fails to pay the purchase money, or any part of it, at the time it becomes due, the court may, upon motion and without any notice to him, enter judgment and award execution against him, for the purchase money remaining unpaid. Blackmore v. Barker, 2 Swan (Tenn.) 340; Still v. Boon, 5 Sneed (Tenn.) 380. See also Puckett v. Jenkins, 2 Baxt. (Tenn.) 484; Tompkins v. Lillard, 2 Baxt. (Tenn.) 397.

**1. Bond for Deferred Payments.** — Richardson v. Jones, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293; Anthony v. Kasey, 83 Va. 338, 5 Am. St. Rep. 277. See also Louisville v. Kaye, (Ky. 1888) 8 S. W. Rep. 869.

**2. Resale at Bidder's Risk** — *England.* — Gray v. Gray, 1 Beav. 199; Harding v. Harding, 4 Myl. & C. 514; Hodder v. Ruffin, 1 Ves. & B. 544; Saunders v. Gray, 4 Myl. & C. 515, note *a*; Tanner v. Radford, 4 Myl. & C. 515, note.

*Canada.* — Lavoie v. Plante, 12 L. C. Rep.

207; Crooks v. Crooks, 4 Grant Ch. (U. C.) 376; *Re Heely*, 1 Ch. Chamb. (Ont.) 54; Delisle v. Souche, 26 L. C. Jur. 162.

*United States.* — Fidelity Ins., etc., Co. v. Roanoke Iron Co., 84 Fed. Rep. 752; Mayhew v. West Virginia Oil, etc., Co., 24 Fed. Rep. 205; Camden v. Mayhew, 129 U. S. 73; Stuart v. Gay, 127 U. S. 518.

*Arkansas.* — Harder v. Sayle-Stegall Commission Co., 61 Ark. 66 (*construing* Mansf. Dig., §§ 3058, 3059).

*California.* — Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167.

*Georgia.* — Barlow v. Toole, 80 Ga. 9.

*Illinois.* — Hill v. Hill, 58 Ill. 239.

*Kentucky.* — Tyler v. Guthrie, (Ky. 1896) 33 S. W. Rep. 934; Cabell v. Miller, 5 Ky. L. Rep. 253; Lloyd v. Wagner, 93 Ky. 644; Dean v. Gritton, (Ky. 1891) 15 S. W. Rep. 1061; Layne v. Loar, 3 Ky. L. Rep. 618; Napper v. Mutual L. Ins. Co., (Ky. 1899) 53 S. W. Rep. 288; Louisville v. Kaye, 10 Ky. L. Rep. 160, (Ky. 1888) 8 S. W. Rep. 869; Helm v. Dameron, 10 Ky. L. Rep. 450; Watson v. Violet, 2 Duv. (Ky.) 332.

*Louisiana.* — Miltenberger v. Hill, 17 La. Ann. 52.

*Maryland.* — Brundage v. Morrison, 56 Md. 407; Capron v. Devries, 83 Md. 220; Mullikin v. Mullikin, 1 Bland (Md.) 538; Simmons v. Tongue, 3 Bland (Md.) 341; Schaefer v. O'Brien, 49 Md. 253; Stephens v. Magruder, 31 Md. 168; Anderson v. Foulke, 2 Har. & G. (Md.) 346; Andrews v. Scotton, 2 Bland (Md.) 629.

*Massachusetts.* — Cobb v. Wood, 8 Cush. (Mass.) 228.

*Mississippi.* — Campe v. Saucier, 68 Miss. 278, 24 Am. St. Rep. 273; Mason v. Martin, 64 Miss. 572.

*Nebraska.* — Jones v. Null, 9 Neb. 254.

*Nevada.* — Sweeney v. Hawthorne, 6 Nev. 129.

*New Jersey.* — Townshend v. Simon, 38 N. J. L. 239.

*New York.* — Miller v. Collyer, 36 Barb. (N. Y.) 250.

*North Carolina.* — *Ex p.* Pettillo, 80 N. Car. 50. Compare Grier v. Yontz, 5 Jones L. (50 N. Car.) 371.

*South Carolina.* — Haig v. Confiscated Estates, 1 Desaus. (S. Car.) 144. See also Minter v. Dent, 2 Bailey L. (S. Car.) 291.

*Tennessee.* — Munson v. Payne, 9 Heisk. (Tenn.) 672; Mosby v. Hunt, 9 Heisk. (Tenn.) 675; Rucker v. Moore, 1 Heisk. (Tenn.) 726; Fulton v. Davidson, 3 Heisk. (Tenn.) 614; Chase v. Joiner, 88 Tenn. 761; Lucas v. Moore, 2 Lea (Tenn.) 1.

*Utah.* — Kershaw v. Dyer, 6 Utah 239.



original and independent suit to ascertain the amount of the deficiency on resale is not required.<sup>1</sup> The right of the court on motion to order a resale exists also when default is made by the purchaser in deferred payments, provided the rights of third persons have not intervened.<sup>2</sup> The fact that by statute the liability of the purchaser and his sureties may be enforced by execution does not take away the right of the court to direct a resale at the purchaser's risk, the statutory remedy being considered as cumulative.<sup>3</sup>

**b. MOTION FOR RESALE.** — The motion for a resale may be made by any party to the suit interested in the distribution of the proceeds.<sup>4</sup>

**c. RULE TO SHOW CAUSE AGAINST RESALE AT BIDDER'S RISK.** — As a general rule a purchaser at a judicial sale, to be held liable for the difference between his bid and the amount for which the property is sold for on the resale, must be served with a rule, awarded after the sale is reported, to show cause why he should not complete his purchase, or in default the property is to be resold at his expense and risk.<sup>5</sup>

**d. TERMS OF RESALE.** — In order that the bidder may be held liable for a deficiency on a resale, it is essential that the resale shall be upon the same terms as the first, or at least upon terms equally beneficial to the first purchaser, and if without the consent of the bidder the resale is made upon different and less beneficial terms, he cannot be held for any deficiency.<sup>6</sup> So also it seems that if there is any unreasonable delay in the resale the purchaser will also be relieved from liability for the deficiency.<sup>7</sup> If the purchaser

*Virginia.* — *Mosby v. Withers*, 80 Va. 82; *Clarkson v. Read*, 15 Gratt. (Va.) 288; *Whitehead v. Bradley*, 87 Va. 676; *Tyler v. Toms*, 75 Va. 116; *Virginia F. & M. Ins. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108; *Hurt v. Jones*, 75 Va. 341; *Long v. Weller*, 29 Gratt. (Va.) 347.

*West Virginia.* — *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 339, 56 Am. St. Rep. 843, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 234. See also *Cowgill v. Wooden*, 2 Blackf. (Ind.) 332; *Wilson v. Loring*, 7 Mass. 392; *Hughes v. Miller*, 186 Pa. St. 375.

*Compare* *Corcoran v. Pacific Bldg. Assoc.*, 5 Cinc. L. Bul. 712, 8 Ohio Dec. (Reprint) 111.

**A Deficiency on a Resale May Be Set Off** against an amount due the purchaser for improvements. *Ontario Bank v. Sirr*, 6 Ont. Pr. 277.

**A Statute Providing for a Decree for a Deficiency on a Resale is constitutional.** *Capron v. Devries*, 83 Md. 220.

**Application of Deposit to Deficiency on Resale.** — *Willets v. Van Alst*, (Supm. Ct.) 26 How. Pr. (N. Y.) 325.

**Upon the Death of a Purchaser after Part Payment**, his executor may be ordered to pay the balance, or an order of resale at the risk of the estate may be granted. *Brundige v. Morrison*, 56 Md. 407; *Ontario Bank v. Sirr*, 6 Ont. Pr. 277.

**Sureties Held Liable for Deficiency on Resale.** — *Napper v. Mutual L. Ins. Co.*, (Ky. 1899) 53 S. W. Rep. 28.

**A False Bid on a Resale Does Not Affect the Liability of the Purchaser**, but a second sale may be ordered and the first purchaser held liable for the deficiency thereon. *Blais v. Learmonth*, 4 Quebec 251.

1. *Camden v. Mayhew*, 129 U. S. 73.

2. *Stuart v. Gay*, 127 U. S. 518; *Stephens v. Magruder*, 31 Md. 168. See also *Koontz v. Northern Bank*, 16 Wall. (U. S.) 196.

3. *Helm v. Dameron*, 10 Ky. L. Rep. 450.

4. *Ex p. Pettillo*, 80 N. Car. 50.

5. **Purchaser Entitled to Show Cause** — *United States*. — *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 622.

*California.* — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167.

*Illinois.* — *Greenwalt v. McClure*, 7 Ill. App. 152; *Hill v. Hill*, 58 Ill. 239.

*Maryland.* — *Schaefer v. O'Brien*, 49 Md. 253; *Andrews v. Scotton*, 2 Bland (Md.) 629.

*North Carolina.* — *Matter of Yates*, 6 Jones Eq. (59 N. Car.) 212.

*Ohio.* — *Galpin v. Lamb*, 29 Ohio St. 529.

*Tennessee.* — *Sharp v. Hess*, 1 Shannon Tenn. Cas. 603; *Williams v. Whitmore*, 1 Shannon Tenn. Cas. 241.

*Virginia.* — *Boyce v. Strother*, 76 Va. 862.

*West Virginia.* — *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 339, 56 Am. St. Rep. 843.

*Canada.* — *Baker v. Young, Pyke (L. C.)* 22; *Lafond v. Guibord*, 10 L. C. Jur. 139; *Dickinson v. Bourque*, 4 L. C. Jur. 119; *Guy v. Clarkson*, 1 L. C. Jur. 193; *Jarry v. Upper Canada Trust, etc., Co.*, 9 L. C. Jur. 300; *McDonald v. McLean*, 11 L. C. Rep. 6; *Jordan v. Ladriere*, 12 L. C. Rep. 33; *Delisle v. Souche*, 26 L. C. Jur. 162; *Martin v. Purdy*, 1 Ch. Chamb. (Ont.) 263.

*Compare* *Griel v. Randolph*, 108 Ala. 601; *Fenley v. Tyler*, (Ky. 1896) 37 S. W. Rep. 679.

6. **Resale Must Be Upon Terms Equally Beneficial** — *Alabama*. — *Howison v. Oakley*, 118 Ala. 215.

*California.* — *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167.

*Georgia.* — *Smith v. Roberts*, 106 Ga. 109.

*Louisiana.* — *Labauve v. McCabe*, 34 La. Ann. 183.

*New Jersey.* — *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636.

*New York.* — *Riggs v. Pursell*, 74 N. Y. 370.

*Pennsylvania.* — *Freeman v. Husband*, 77 Pa. St. 389; *Hare v. Bedell*, 98 Pa. St. 485.

*Canada.* — *Evans v. Nichols*, 1 L. C. Rep. 151.

7. *Howison v. Oakley*, 118 Ala. 215.



consents to a change of the terms of the first sale, he of course cannot escape liability for the deficiency because of such change.<sup>1</sup>

**Repurchase by First Bidder.** — The rule that the resale must be upon the same terms as the first sale, in order to render the first bidder liable for any deficiency, has been held to apply though the first purchaser was also the purchaser at the resale.<sup>2</sup>

**c. SURPLUS ON RESALE.** — If, instead of a deficiency arising, there is a surplus more than sufficient to pay the costs of the resale, it has been held that the purchaser at whose risk the resale was made is not entitled to such surplus.<sup>3</sup> the better doctrine, however, seems to be that, as the property on the resale is sold as the property of the first purchaser, he becomes entitled to any surplus arising,<sup>4</sup> and if the purchaser has paid part of his bid his failure to complete the purchase does not forfeit such payment, and on a resale the first purchaser is to be credited with that payment and the amount realized on the second sale, and if this results in a surplus he would be entitled to the return of his first payment, to the extent of the surplus.<sup>5</sup>

**f. REPORT AND CONFIRMATION OF FIRST SALE.** — Until the sale is reported by the officer conducting it, and confirmed by the court, the bid of the highest bidder is merely an unaccepted proposition to buy, and therefore if a resale is directed without a report and confirmation of the first sale, the bidder at the first sale incurs no liability for a deficiency arising on the resale.<sup>6</sup>

**g. STAYING RESALE.** — After a resale has been ordered at the bidder's risk, he may stay and annul the proceeding for the resale by paying the purchase money and the costs incurred in the proceedings for resale,<sup>7</sup> and in directing the resale it is customary to expressly allow the bidder a certain time within which to pay the amount of his bid and avoid the resale.<sup>8</sup>

**3. Attachment for Contempt.** — A purchaser failing to comply with his bid and complete the purchase is considered as in contempt, and the court may order him to comply with the terms of the sale and enforce such order by attachment and commitment after rule;<sup>9</sup> this course, though rarely resorted to, is clearly within the court's power.<sup>10</sup>

**4. Independent Action to Recover Amount of Bid.** — The officer conducting the sale may maintain an independent action against the purchaser to recover

1. *Brundige v. Morrison*, 56 Md. 407, where the resale was at a private sale to which the first bidder consented.

2. *Howison v. Oakley*, 118 Ala. 215.

3. *Surplus on Resale.* — *Miltenerberger v. Hill*, 17 La. Ann. 52; *Chase v. Joiner*, 88 Tenn. 761;

4. *Entitled to Surplus.* — *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *Hurt v. Jones*, 75 Va. 341; *Whitehead v. Bradley*, 87 Va. 676. See also *Smith v. Arden*, 5 Cranch (C. C.) 485; *Mealey v. Page*, 41 Md. 172.

5. *When Purchaser Has Paid Part.* — *Anonymous*, *Hayes & J.* 719; *Chancellor v. Gummere*, 39 N. J. Eq. 582; *Brundige v. Morrison*, 56 Md. 407; *Stephens v. Magruder*, 31 Md. 163; *Feike v. Cincinnati, etc., R. Co.*, 3 Ohio Cir. Ct. 72, 2 Ohio Cir. Dec. 41. See also *Tilt v. Knapp*, 9 Ont. Pr. 314.

6. *Necessity of Confirmation.* — *Howison v. Oakley*, 118 Ala. 215; *Dills v. Jasper*, 33 Ill. 263; *Makemson v. Braun*, 100 Ky. 88; *Andrews v. Scotton*, 2 Bland (Md.) 629; *Randall v. Swann*, 10 Gill & J. (Md.) 313; *Pool v. Ellis*, 64 Miss. 555; *Campe v. Saucier*, 68 Miss. 278, 24 Am. St. Rep. 273; *Leslie v. Goodhue*, 69 Hun (N. Y.) 71; *Smith v. Harrigan*, (Supm. Ct.) 27 Abb. N. Cas. (N. Y.) 322; *Ex p. Pettillo*, 80 N. Car. 50; *Stout v. Philippi Mfg., etc., Co.*,

41 W. Va. 339, 56 Am. St. Rep. 843. Compare *Camden v. Mayhew*, 129 U. S. 73.

7. *Resale Stayed by Payment.* — *Langevin v. Garon*, 2 L. C. Rep. 125; *Nye v. Potter*, 5 L. C. Jur. 23.

8. *Long v. Weller*, 29 Gratt. (Va.) 347; *Munson v. Payne*, 9 Heisk. (Tenn.) 672; *Mosby v. Hunt*, 9 Heisk. (Tenn.) 675.

9. *Attachment for Contempt.* — *In re Studdert*, 1 Hog. 320; *Wood v. Mann*, 3 Sumn. (U. S.) 318; *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Bowne v. Ritter*, 26 N. J. Eq. 456; *Silver v. Campbell*, 25 N. J. Eq. 465; *Cazet v. Hubbell*, 36 N. Y. 677; *Brasher v. Cortlandt*, 2 Johns. Ch. (N. Y.) 505.

If the purchaser is responsible, the court may order him to show cause why he should not complete the purchase; and on failure to show cause, may direct an attachment to issue against him. The latter is the proper course where there is collusion on the part of the purchaser and mortgagor to frustrate the sale. *Graham v. Bleakie*, 2 Daly (N. Y.) 55.

A purchaser cannot be attached for not completing his purchase until the master has reported that a good title can be made out. *Dick v. Barrett*, 1 Hog. 351.

10. *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 339, 56 Am. St. Rep. 843.



the amount of his bid,<sup>1</sup> or to enforce the securities given for the purchase price,<sup>2</sup> and, after a resale under order of court, may maintain an independent action against the purchaser for breach of his contract, and may recover as damages the cost of the resale and any deficiency in price obtained on the resale;<sup>3</sup> and it has been held that if the purchaser refuses to complete his bid the parties interested in the sale may, in case there is no resale, recover their actual damages, that is, the difference between the amount of the bid and the market value of the land.<sup>4</sup>

**XVI. THE DEED — 1. Necessity For.** — In a few cases it has been held that on a judicial sale the title passes to the purchaser on his compliance with the terms of the sale, though no deed has been executed to him,<sup>5</sup> and that in judicial sales of personal property the title passes to the purchaser by delivery without the execution of a bill of sale.<sup>6</sup> As a general rule, however, the purchaser acquires no more than an equitable title prior to the execution of a proper deed.<sup>7</sup>

**2. By Whom Executed.** — The early practice was to require the parties whose

**1. Independent Action.** — *Sharman v. Walker*, 68 Ga. 148; *Trustees', etc., Ins. Corp. v. Bowling*, 2 Kan. App. 770; *Fowler v. Jacob*, 62 Md. 326; *Campe v. Sousier*, 68 Miss. 278, 24 Am. St. Rep. 273, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 243; *Jones v. Null*, 9 Neb. 254; *Townshend v. Simon*, 38 N. J. L. 239; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636; *Chappell v. Dann*, 21 Barb. (N. Y.) 17.

The claim for the purchase money does not necessarily follow the land sold, and the judgment in an action for the amount of the purchaser's bid should be made a special lien on the land. *Trustees, etc., Ins. Corp. v. Bowling*, 2 Kan. App. 770.

**Bill by Officer for Specific Performance.** — *Bowne v. Ritter*, 26 N. J. Eq. 456.

A distinction is taken between sheriff's sales and sales under order of a court of equity. In the former case the sheriff may maintain an action against the purchaser in his own name, for it is only by virtue of the contract of sale that the relation of debtor and creditor subsists. In the latter case the remedy is by motion in the cause alone, unless the action in which the sale was made has been closed by final judgment. *McKee v. Lineberger*, 69 N. Car. 217; *Marsh v. Nimocks*, 122 N. Car. 478.

**2. To Enforce Securities.** — *Harrison v. Halum*, 5 Coldw. (Tenn.) 525; *Barthe v. Armstrong*, 1 Rev. Lég. 47. See also *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293.

**3. Action for Damages.** — *Griel v. Randolph*, 108 Ala. 601; *Howison v. Oakley*, 118 Ala. 215; *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297. See also *Robinson v. Garth*, 6 Ala. 204.

**4. Howison v. Oakley**, 118 Ala. 215.

**5. Joutet v. Mortimer**, 29 La. Ann. 206. See also *Stevens v. Ferry*, 48 Fed. Rep. 7; *Onorato's Interdiction*, 46 La. Ann. 73; *Scott v. Burch*, 6 Har. & J. (Md.) 67; *Whitlock v. Johnson*, 87 Va. 323.

**Sale under Fieri Facias.** — *Remington v. Linthicum*, 14 Pet. (U. S.) 81; *Boring v. Lemmon*, 5 Har. & J. (Md.) 225; *Barney v. Patterson*, 6 Har. & J. (Md.) 204.

**Mortgage Foreclosure — Purchase by Mortgagee.** — Where the mortgagee purchases under the decree of sale, a deed by the com-

missioner is not necessary to vest the legal title in him, as such title became vested by the mortgage. *Monroe v. Stephens*, 80 Ky. 155.

**6. Conger v. Robinson**, 4 Smed. & M. (Miss.) 210.

**7. Only Equitable Title Prior to Execution of Deed** — *United States*, — *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 207; *Williamson v. Berry*, 8 How. (U. S.) 496.

*Alabama.* — *Cummings v. McCullough*, 5 Ala. 324; *Doe v. Hardy*, 52 Ala. 292; *Doe v. Jackson*, 51 Ala. 514; *Barclay v. Plant*, 50 Ala. 509; *Wallace v. Hall*, 19 Ala. 367.

*California.* — *People v. Mayhew*, 26 Cal. 656.

*Colorado.* — *Hayes v. New York Gold Min. Co.*, 2 Colo. 273.

*Illinois.* — *Rawlings v. Bailey*, 15 Ill. 178.

*Indiana.* — *Stout v. McPheeters*, 84 Ind. 585; *Deputy v. Mooney*, 97 Ind. 463; *Goss v. Meadors*, 78 Ind. 528.

*Kansas.* — *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451.

*Maryland.* — *Sanders v. McDonald*, 63 Md. 503.

*Massachusetts.* — *Macy v. Raymond*, 9 Pick. (Mass.) 285.

*Missouri.* — *Strain v. Murphy*, 49 Mo. 337.

*New York.* — *Smith v. Colvin*, 17 Barb. (N. Y.) 157; *Farmers' Bank v. Merchant*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 10; *Ainslie v. Hicks*, 13 N. Y. App. Div. 388, affirmed 153 N. Y. 643.

*North Carolina.* — *McMillan v. Edwards*, 75 N. Car. 81.

*Pennsylvania.* — *Robinson's Appeal*, 62 Pa. St. 216; *Leshey v. Gardner*, 3 W. & S. (Pa.) 314, 38 Am. Dec. 764.

*South Carolina.* — *Holmes v. McMaster*, 1 Rich. Eq. (S. Car.) 340.

*Tennessee.* — *Childress v. Hurt*, 2 Swan (Tenn.) 487; *Edwards v. Miller*, 4 Heisk. (Tenn.) 314.

*Texas.* — *Leland v. Wilson*, 34 Tex. 79; *Sypert v. McCowen*, 28 Tex. 636.

In the case of a sale of land under the order of the orphans' court, the title remains in the heirs until a deed is made, notwithstanding the approval of the bond given for the purchase money. *Cummings v. McCullough*, 5 Ala. 324.



title was conveyed themselves to join in the deed of conveyance,<sup>1</sup> but at the present time the conveyance or deed is generally executed under the direction of the court by the person conducting the judicial sale.<sup>2</sup> The power to execute the conveyance cannot be delegated by the officer conducting the sale to an agent.<sup>3</sup>

**Deputies.** — In case of sale by sheriffs and similar officers the conveyance may be executed by a deputy in the name of his principal.<sup>4</sup> The deputy, however, should not execute the conveyance in his own name.<sup>5</sup>

**Expiration of Officer's Term.** — Where, after the report and confirmation of the sale, the term of office of the officer conducting the sale expires, he may still execute the deed,<sup>6</sup> or in case of his death the court may appoint some one else to execute the conveyance.<sup>7</sup> The statutes in some jurisdictions authorize the successor in office to execute the conveyance.<sup>8</sup>

**3. To Whom Executed.** — As a general rule the conveyance is, of course, to be executed to the purchaser,<sup>9</sup> and in case of joint purchasers the officer has no authority to execute a deed to one only;<sup>10</sup> though in *Louisiana* it has been held that where the property is bought by several persons, each being entitled by agreement amongst themselves to a certain undivided portion, any one of the purchasers, on payment of his share of the purchase money, is entitled to demand a deed of sale of his undivided portion.<sup>11</sup> Where the purchase is made by an agent for his principal, and the sale is reported and confirmed as made

**1. Parties Holding Title to Join.** — *Dawley v. Brown*, 65 Barb. (N. Y.) 107; *Jackson v. Edwards*, 7 Paige (N. Y.) 404; *Ex p. State Bank*, 1 Dev. & B. Eq. (21 N. Car.) 75.

**2. Deed Executed by Person Conducting Sale.** — *Ex p. Holland*, 4 Madd. 483; *Ross v. Steele*, 1 Ch. Chamb. (Ont.) 94; *Miller v. Sherry*, 2 Wall. (U. S.) 237; *Sanders v. McDonald*, 63 Md. 503; *Henry v. Atkison*, 50 Mo. 266; *Texas, etc., v. R. Co. v. Gay*, 86 Tex. 571.

**Deed in Commissioner's Individual Name Upheld.** — See *Exum v. Baker*, 118 N. Car. 545.

**Confirmation by Court of Deed Executed Without Authority.** — *Evans v. Spurgin*, 6 Gratt. (Va.) 107, 52 Am. Dec. 105.

**3. Agent.** — *Gridley v. Phillips*, 5 Kan. 349. See also *Rugle v. Webster*, 55 Mo. 246.

**4. Deputy** — *England*, — *Parker v. Kett*, 1 Salk. 95.

*Alabama*. — *McGee v. Eastis*, 3 Stew. (Ala.) 307.

*California*. — *Lewes v. Thompson*, 3 Cal. 266.

*Georgia*. — *Ansley v. Hart*, 77 Ga. 42.

*Iowa*. — *Carr v. Hunt*, 14 Iowa 206.

*Kentucky*. — *Young v. Smith*, 10 B. Mon. (Ky.) 293.

*Missouri*. — *Samuels v. Shelton*, 48 Mo. 444; *Evans v. Wilder*, 7 Mo. 359.

*New York*. — *Jackson v. Davis*, 18 Johns. (N. Y.) 8; *Jackson v. Bush*, 10 Johns. (N. Y.) 223.

*Ohio*. — *Anderson v. Brown*, 9 Ohio 151; *Haines v. Lindsey*, 4 Ohio 88, 19 Am. Dec. 586.

*Tennessee*. — *Glasgow v. Smith*, 1 Overt, (Tenn.) 144.

*Texas*. — *Terrell v. Martin*, 64 Tex. 121.

**5. Samuels v. Shelton**, 48 Mo. 449. Compare *Carr v. Hunt*, 14 Iowa 207. See generally the title DEPUTY, vol. 9, p. 381.

**6. After Term May Still Execute Deed.** — *Head v. Daniels*, 38 Kan. 1; *Lemon v. Craddock*, Litt. Sel. Cas. (Ky.) 251, 12 Am. Dec. 301. See also *Anthony v. Wessel*, 8 Cal. 103; *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331.

**7. People v. Boring**, 8 Cal. 406, 68 Am. Dec. 331; *Covas v. Bartoulin*, 45 La. Ann. 160.

**8. Successor in Office** — *United States*. — *Lone Jack Min. Co. v. Megginson*, 82 Fed. Rep. 92. *Illinois*. — *Kruse v. Wilson*, 79 Ill. 233.

*Iowa*. — *Conger v. Converse*, 9 Iowa 554.

*Kentucky*. — *Thomas v. Thomas*, 87 Ky. 343; *Phillips v. Jamison*, 14 B. Mon. (Ky.) 466.

*Mississippi*. — *Thornton v. Boyd*, 25 Miss. 598.

*Missouri*. — *Fortune v. Fife*, 105 Mo. 433; *Porter v. Mariner*, 50 Mo. 364; *In re Guenzler*, 70 Mo. 39.

*Nebraska*. — *Phillips v. Dawley*, 1 Neb. 320.

*Oregon*. — *Faull v. Cooke*, 19 Oregon 455, 20 Am. St. Rep. 836; *Moore v. Willamette Transp., etc., Co.*, 7 Oregon 359.

*Pennsylvania*. — *Woods v. Lane*, 2 S. & R. (Pa.) 53.

*South Carolina*. — *McElmurray v. Ardis*, 3 Strobb. L. (S. Car.) 215.

*Tennessee*. — *Wortham v. Cherry*, 3 Head (Tenn.) 469.

*Wisconsin*. — *Prescott v. Everts*, 4 Wis. 314.

**9. To the Purchaser.** — *Carpenter v. Sherfy*, 71 Ill. 427; *Davis v. M'Vickers*, 11 Ill. 327; *Johnson v. Adleman*, 35 Ill. 265; *Kinney v. Knoebel*, 47 Ill. 417; *Kingman v. Appleget*, 20 Neb. 605; *Banta v. School Dist. No. 3*, 39 N. J. Eq. 123; *Matter of Eleventh Ave.*, 81 N. Y. 436; *Chautauque County Bank v. Risley*, 4 Den. (N. Y.) 480.

**Making Title to Surety.** — It is never the practice of the court, where land is sold by a clerk and master in equity, to order the title to be made to the surety upon the payment by him of the purchase money, unless it is shown that the principal is insolvent. *Dawkins v. Dawkins*, 93 N. Car. 283; *Egerton v. Alley*, 6 Ired. Eq. (41 N. Car.) 188; *Green v. Crockett*, 2 Dev. & B. Eq. (22 N. Car.) 390.

**10. Joint Purchasers.** — *Rice v. Smith*, 18 N. H. 369.

**11. Montross v. Jamison**, 30 La. Ann. 172.



to the agent, the court will, upon the application of the principal, direct the deed to be made to him.<sup>1</sup> The defendant whose property is sold at the judicial sale has no standing to object that the conveyance was executed to the wrong person.<sup>2</sup>

**Assignee of Certificate of Purchase.** — The certificate of purchase is recognized as assignable, and where it is assigned the conveyance should be executed to the assignee.<sup>3</sup>

**Death of Purchaser.** — The interest of a purchaser of realty at judicial sale, who is entitled to a deed, is recognized as real estate, and upon his death, without a conveyance having been executed, it is to be executed to his heirs.<sup>4</sup>

**4. Time for Making Deed.** — The deed is not to be executed until after the sale is reported and confirmed by the court,<sup>5</sup> and irrespective of whether the sale is for cash or credit, the deed is as a general rule to be executed only after the purchase money has been paid.<sup>6</sup>

**Statutory Limitation as to Time.** — In some jurisdictions the statutes in regard to particular judicial sales expressly limit the time within which the deed must be executed, and after the lapse of such time a deed cannot be lawfully executed,<sup>7</sup> and in the absence of an express statutory enactment it was held that the lapse of twenty years from the date of the sale and certificate of purchase was an insuperable bar to the execution of a deed.<sup>8</sup>

**Redemption Period.** — Where a period of redemption is allowed after the sale, the deed should not be executed to the purchaser until after the expiration of such period.<sup>9</sup>

**Necessity for Payment of Taxes.** — In some jurisdictions the statutes prohibit the

**1. Purchase by Agent, Deed to Principal.** — *Lisle v. Lisle*, 4 Ky. L. Rep. 990. See also *Brown v. Bristow*, 7 Ky. L. Rep. 599.

**2. Defendant Cannot Object that the Conveyance Was to Wrong Person.** — *Gibbs v. Davies*, 168 Ill. 205.

**3. Assignment of Certificate.** — *Parler v. Johnson*, 81 Ga. 254; *Carpenter v. Sherfy*, 71 Ill. 427; *Johnson v. Adleman*, 35 Ill. 265; *Davis v. M'Vickers*, 11 Ill. 327; *Splahn v. Gillespie*, 48 Ind. 397; *Turner v. Madison First Nat. Bank*, 78 Ind. 19; *In re Guenzler*, 70 Mo. 39; *Proctor v. Farnam*, 5 Paige (N. Y.) 614; *Campbell v. Baker*, 6 Jones L. (51 N. Car.) 255; *Williams v. Harrington*, 11 Ired. L. (33 N. Car.) 616, 53 Am. Dec. 421; *Den v. Kelly*, 3 Murph. (7 N. Car.) 507; *Morgan v. Hannah*, 11 Humph. (Tenn.) 122. See also *Ward v. Lownds*, 96 N. Car. 367. Compare *Den v. Lambert*, 13 N. J. L. 182.

**4. Death of Purchaser.** — *Swink v. Thompson*, 31 Mo. 336.

**5. Deed Made After Sale Reported and Confirmed.** — *Johnson v. Hines*, 61 Md. 122; *Miller v. Smoot*, 86 Va. 1050; *Brien v. Pittman*, 12 Leigh (Va.) 379.

**6. Executed Only After Purchase Money Paid.** — *Alabama.* — *Corbitt v. Clenny*, 52 Ala. 480; *Wallace v. Nichols*, 56 Ala. 321; *Bogart v. Bell*, 112 Ala. 412. See also *Cruikshank v. Luttrell*, 67 Ala. 318.

*Illinois.* — *Argo v. Oberschlake*, 48 Ill. App. 289.

*Indiana.* — *Chabman v. Harwood*, 8 Blackf. (Ind.) 83.

*Maryland.* — *Johnson v. Hines*, 61 Md. 122.

*Mississippi.* — *Campe v. Saucier*, 68 Miss. 278, 24 Am. St. Rep. 273, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 219; *Tooley v. Gridley*, 3 Smed. & M. (Miss.) 493, 41 Am.

Dec. 628; *Sanders v. Dowell*, 7 Smed. & M. (Miss.) 206; *Gowan v. Jones*, 10 Smed. & M. (Miss.) 164; *Coulter v. Herrod*, 27 Miss. 685; *Mitchell v. Harris*, 43 Miss. 314; *Redus v. Hayden*, 43 Miss. 614.

*North Carolina.* — *Hyman v. Jarnigan*, 65 N. Car. 96; *Barnes v. Morris*, 4 Ired. Eq. (39 N. Car.) 22.

*Virginia.* — *Lloyd v. Erwin*, 29 Gratt. (Va.) 598.

*West Virginia.* — *Glenn v. Blackford*, 23 W. Va. 182.

The authority conferred on a commissioner to make a deed to land sold under decree of court, retaining title until the payment of the purchase money, can only be exercised when the same is actually paid — not when it is secured by note. *Matter of Macay*, 84 N. Car. 59.

**7. Cannot Be Executed After Statutory Time.** — *McBride v. Gwynn*, 33 Fed. Rep. 402; *Peterson v. Emmerson*, 135 Ill. 55; *Ryhiner v. Frank*, 105 Ill. 326; *Brown v. Ridenhower*, 161 Ill. 239; *Seeberger v. Weinberg*, 151 Ill. 369; *Marr v. Hobson*, 22 Me. 321; *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573; *Poor v. Larrabee*, 58 Me. 543; *Macy v. Raymond*, 9 Pick. (Mass.) 285; *Jewett v. Jewett*, 10 Gray (Mass.) 31. Compare *Howard v. Moore*, 2 Mich. 226; *Osman v. Traphagen*, 23 Mich. 80.

**8. Rucker v. Dooley**, 49 Ill. 377, 95 Am. Dec. 614.

**9. Deed Not Executed Until After Period for Redemption.** — *Woodbury v. Nevada Southern R. Co.*, 120 Cal. 463; *Perham v. Kuper*, 61 Cal. 331; *Bernal v. Gleim*, 33 Cal. 668; *Gross v. Fowler*, 21 Cal. 393; *Delahay v. McConnel*, 5 Ill. 157; *Conner v. Long*, 63 Iowa 295; *Gorham v. Wing*, 10 Mich. 486.



officer conducting certain judicial sales, under penalty of fine, from executing a deed to the purchaser until all taxes in arrear on the property are first paid,<sup>1</sup> but it has been held that a deed executed in violation of such a statute was not void.<sup>2</sup>

**Execution of Deed Without Order of Court.** — In *North Carolina* it is held that after the payment of the purchase money an order that the master make a deed to the purchaser is not necessary, and a deed without such order passes the title.<sup>3</sup>

**5. Requisites and Validity of Deed — Construction of Statutory Requirements.** — The statutes often require certain recitals in deeds on judicial sales; such requirements are generally held directory merely instead of mandatory, and therefore a failure strictly to follow the statutory requirements will not invalidate the deed.<sup>4</sup>

**Recitals as to Grantor's Character.** — The deed should show the character in which the officer executing the deed acts.<sup>5</sup>

**Recitals of Authority to Convey.** — It should also contain recitals showing the authority under which the officer executes the deed,<sup>6</sup> but a complete recital of the entire proceedings authorizing the conveyance is not required.<sup>7</sup>

**Words of Grant.** — The deed must of course contain words of grant as any other deed.<sup>8</sup>

**Description of Property Conveyed.** — It must also describe the property sold and conveyed with sufficient certainty to identify it without extrinsic aid.<sup>9</sup> The deed may, however, expressly refer to another instrument to aid in the description.<sup>10</sup>

**1. Taxes Must Be Paid.** — *Montross v. Jamison*, 30 La. Ann. 172.

**2. Joutet v. Mortimer**, 29 La. Ann. 206.

**3. Deed Executed Without Order Therefor.** — Without such an order the master and the purchaser take on themselves the risk of determining that the case is one in which such an order would be fit and proper. If the case be really such, then the order, being of course, will be presumed to have been made, and its actual entry of record is unnecessary. *Brown v. Coble*, 76 N. Car. 391; *Flemming v. Roberts*, 84 N. Car. 532.

**4. Recitals Required — Arkansas.** — *Bettison v. Budd*, 17 Ark. 557.

*California.* — *Clark v. Sawyer*, 48 Cal. 139.

*Illinois.* — *Holman v. Gill*, 107 Ill. 475.

*Maine.* — *Williamson v. Woodman*, 73 Me. 163.

*Massachusetts.* — *Thomas v. Le Baron*, 8 Met. (Mass.) 355.

*Missouri.* — *Davis v. Kline*, 76 Mo. 310; *Moore v. Wingate*, 53 Mo. 398.

*Ohio.* — *Perkins v. Dibble*, 10 Ohio 437, 36 Am. Dec. 97; *Armstrong v. McCoy*, 8 Ohio 128, 31 Am. Dec. 435; *Glover v. Ruffin*, 6 Ohio 255.

*Oregon.* — *Wright v. Young*, 6 Oregon 87.

*Compare French v. Edwards*, 13 Wall. (U. S.) 514.

**5. Menage v. Jones**, 40 Minn. 254; *Mills v. Herndon*, 60 Tex. 353. See also *Cooper v. Robinson*, 2 Cush. (Mass.) 184.

**6. Lockwood v. Sturdevant**, 6 Conn. 385; *Griswold v. Bigelow*, 6 Conn. 258; *Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773; *Tanner v. Stine*, 18 Mo. 580, 59 Am. Dec. 320; *Ladd v. Shippie*, 57 Mo. 523.

**7. Watson v. Watson**, 10 Conn. 87; *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534.

**8. Words of Grant.** — *Johnson v. Bantock*, 38

Ill. 112. And see the title DEEDS, vol. 9, p. 137.

**9. Description of Property — United States.** — *Boardman v. Reed*, 6 Pet. (U. S.) 345.

*Alabama.* — *Deloach v. State Bank*, 27 Ala. 437; *Bromberg v. Yukers*, 108 Ala. 577.

*Arkansas.* — *Tatum v. Croom*, 60 Ark. 487. See also *Schattler v. Cassinelli*, 56 Ark. 175.

*Connecticut.* — *Wright v. Pond*, 10 Conn. 256.

*Georgia.* — *Parler v. Johnson*, 81 Ga. 254.

*Illinois.* — *Borders v. Hodges*, 154 Ill. 498; *Hughes v. Streeter*, 24 Ill. 648, 76 Am. Dec. 777.

*Indiana.* — *Bowen v. Wickersham*, 124 Ind. 404, 19 Am. St. Rep. 106; *Lewis v. Owen*, 64 Ind. 446.

*Maryland.* — *Neel v. Hughes*, 10 Gill & J. (Md.) 8.

*Missouri.* — *Hammond v. Johnston*, 93 Mo. 198; *Greene v. Holt*, 76 Mo. 677; *Clemens v. Rannells*, 34 Mo. 579; *Henry v. Mitchell*, 32 Mo. 512; *Jones v. Carter*, 56 Mo. 403.

*North Carolina.* — *Perry v. Scott*, 109 N. Car. 374; *Hinton v. Roach*, 95 N. Car. 106; *Wharton v. Eborn*, 88 N. Car. 344; *Dickens v. Barnes*, 79 N. Car. 490; *Grier v. Rhyne*, 69 N. Car. 346; *Edmundson v. Hooks*, 11 Ired. L. (33 N. Car.) 373.

*Ohio.* — *Winkler v. Higgins*, 9 Ohio St. 600.

*Texas.* — *Harris v. Shafer*, 86 Tex. 314; *Dwyre v. Speer*, 8 Tex. Civ. App. 88; *Giddings v. Day*, 84 Tex. 605; *Overand v. Menezes*, 83 Tex. 122; *Allday v. Whitaker*, 66 Tex. 669.

See generally the title BOUNDARIES, vol. 4, p. 756.

**10. Reference to Another Instrument.** — *Cadwalader v. Nash*, 73 Cal. 45; *Crosby v. Dowd*, 61 Cal. 602; *Parler v. Johnson*, 81 Ga. 254; *Hays v. Perkins*, 109 Mo. 102; *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 284; *Brown v. Elmendorf*, (Tex. Civ. App. 1894) 25 S. W. Rep. 145; *Wright v. Lassiter*, 71 Tex. 640.



**Effect of Informalities.** — Mere irregularities or technical defects will not ordinarily invalidate the deed.<sup>1</sup>

**6. Acknowledgment.** — Unless expressly required by statute, an acknowledgment of the deed by the officer executing the same is not essential to its validity,<sup>2</sup> though such acknowledgment is necessary to entitle the deed to record.<sup>3</sup> In a number of jurisdictions the statutes expressly require that the deed shall be acknowledged.<sup>4</sup>

**7. Revenue Stamp.** — The officer executing the deed should attach thereto the revenue stamp required by the recent United States War Tax Act, and the court at the instance of the purchaser will compel him to do so.<sup>5</sup>

**XVII. COLLATERAL IMPEACHMENT — General Rule.** — It is well established that where property has been sold under the order of a court having the necessary jurisdiction,<sup>6</sup> neither the sale, the proceedings leading up thereto, nor the order of confirmation is subject to any collateral impeachment or attack on the ground of errors or irregularities.<sup>7</sup>

See also the title INTERPRETATION, etc., *ante*, p. 10.

**1. Informalities** — *Alabama*. — *Henley v. Branch Bank*, 16 Ala. 552; *Doe v. Riley*, 28 Ala. 174.

*Florida*. — *Adams v. Higgins*, 23 Fla. 13.

*Georgia*. — *Brooks v. Rooney*, 11 Ga. 423.

*Illinois*. — *Kruse v. Wilson*, 79 Ill. 233; *Gibbs v. Davies*, 168 Ill. 205; *Keith v. Keith*, 104 Ill. 397; *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357.

*Indiana*. — *Carpenter v. Russell*, 129 Ind. 571.

*Kentucky*. — *Hildebrand v. Bunnschu*, (Ky. 1897) 40 S. W. Rep. 920.

*Louisiana*. — *Carroll v. Scheen*, 34 La. Ann. 423.

*Maine*. — *Wing v. Burgis*, 13 Me. 111.

*Massachusetts*. — *Cooper v. Robinson*, 2 Cush. (Mass.) 184; *Thomas v. Le Baron*, 8 Met. (Mass.) 355.

*Michigan*. — *Johnson v. Crispell*, 39 Mich. 82.

*Missouri*. — *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Hall v. Klepzig*, 99 Mo. 83; *Davis v. Kline*, 76 Mo. 310; *Karnes v. Alexander*, 92 Mo. 660; *Evans v. Robberson*, 92 Mo. 192, 1 Am. St. Rep. 701; *Chandler v. Bailey*, 89 Mo. 641; *Lewis v. Morrow*, 89 Mo. 174; *Perkins v. Quigley*, 62 Mo. 498; *Allen v. Sales*, 56 Mo. 28; *Moore v. Wingate*, 53 Mo. 398; *Wilhite v. Wilhite*, 53 Mo. 71 (*overruling* *Crittenden v. Leitensdorfer*, 35 Mo. 239); *Union Bank v. McWhartters*, 52 Mo. 34; *Strain v. Murphy*, 49 Mo. 337; *Groner v. Smith*, 49 Mo. 318; *Foulk v. Colburn*, 48 Mo. 225; *Buchanan v. Tracy*, 45 Mo. 437; *State Bank v. Bates*, 17 Mo. 583; *Matney v. Graham*, 50 Mo. 559; *Garner v. Tucker*, 61 Mo. 427; *Agan v. Shannon*, 103 Mo. 661.

*Nebraska*. — *Lamb v. Sherman*, 19 Neb. 681.

*Nevada*. — *Zabriskie v. Meade*, 2 Nev. 285.

*New Jersey*. — *Den v. Sayre*, 16 N. J. L. 532.

*New York*. — *Dyger v. Pletts*, 25 Wend. (N. Y.) 402; *Jackson v. Robert*, 11 Wend. (N. Y.) 422.

*North Carolina*. — *Exum v. Baker*, 118 N. Car. 545; *Wilson v. Taylor*, 98 N. Car. 275; *Gifford v. Alexander*, 84 N. Car. 330; *Jones v. Scott*, 71 N. Car. 192; *Den v. Kelly*, 3 Murph. (7 N. Car.) 507; *Miller v. Miller*, 89 N. Car. 402; *Smith v. Fort*, 105 N. Car. 446.

*Ohio*. — *Armstrong v. McCoy*, 8 Ohio 128, 31 Am. Dec. 435.

*Tennessee*. — *Rogers v. Cawood*, 1 Swan (Tenn.) 143, 55 Am. Dec. 729.

*Texas*. — *Jones v. Taylor*, 7 Tex. 240, 56 Am. Dec. 48.

See also *ante*, the title INTERPRETATION, etc., p. 1 and *passim*.

**2. Acknowledgment.** — *Hutchinson v. Kelly*, 10 Ark. 178; *Doe v. Naylor*, 2 Blackf. (Ind.) 32; *Dixon v. Doe*, 5 Blackf. (Ind.) 107; *Ogden v. Walters*, 12 Kan. 282; *Clark v. Akers*, 16 Kan. 166; *Gray v. Ulrich*, 8 Kan. 118; *Grover v. Fox*, 36 Mich. 461; *Matter of Smith*, 4 Nev. 254, 97 Am. Dec. 531. And see the title ACKNOWLEDGMENTS, vol. 1, p. 483.

**3.** *Grover v. Fox*, 36 Mich. 467.

**4.** *Cook v. Foster*, 96 Mich. 610; *Bray v. Marshall*, 75 Mo. 327; *Lincoln v. Thompson*, 75 Mo. 613; *Adams v. Buchanan*, 49 Mo. 64; *Ryan v. Carr*, 46 Mo. 483; *Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621; *Oviatt's Estate*, 3 Pa. Dist. 620.

**Sufficiency of Acknowledgment.** — *Agan v. Shannon*, 103 Mo. 661; *Samuels v. Shelton*, 48 Mo. 444.

**5. Revenue Stamp.** — *Loring v. Chase*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 318.

**6. Collateral Attack Permissible Where Jurisdiction Lacking.** — *Stansbury v. Inglehart*, 20 D. C. 134; *Long v. Long*, 62 Md. 33; *Williams v. St. Louis*, etc., R. Co., 8 Mo. App. 135; *Starkey v. Hammer*, 1 Baxt. (Tenn.) 438. See also cases cited in next note.

**7. Rule Against Collateral Impeachment — United States.** — *May v. Logan County*, 30 Fed. Rep. 250; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157. See also *Voorhees v. Jackson*, 10 Pet. (U. S.) 451.

*Arkansas*. — See *Wells v. Rice*, 34 Ark. 346.

*Delaware*. — *Pennington v. Chandler*, 5 Harr. (Del.) 394.

*District of Columbia*. — *Duncanson v. Manson*, 3 App. Cas. (D. C.) 260, *affirmed* by 166 U. S. 583.

*Illinois*. — *Wing v. Dodge*, 80 Ill. 564.

*Indiana*. — *Wilkins v. De Pauw*, 10 Ind. 159.

*Kansas*. — *Paine v. Spratley*, 5 Kan. 525; *Bowman v. Cockrill*, 6 Kan. 311.

*Kentucky*. — *Dawson v. Litsey*, 10 Bush (Ky.) 408. See also *Bustard v. Gates*, 4 Dana (Ky.) 440; *Dorsey v. Kendall*, 8 Bush (Ky.) 299.

*Louisiana*. — *Whitaker v. Ashbey*, 43 La. Ann. 117; *Fontelius' Succession*, 28 La. Ann.



**XVIII. REDEMPTION — 1. Right of Redemption Based on Statute.** — The general right to redeem from judicial sales is purely a statutory right,<sup>1</sup> and the question of the right to redeem is to be decided by the law in force at the time of the sale.<sup>2</sup>

**Courts Cannot Bar Statutory Right of Redemption.** — If the statute gives the right of

639; *Dixey v. Mandell*, 23 La. Ann. 499; *Anderson v. Carroll*, 23 La. Ann. 175; *Doherty v. Leake*, 24 La. Ann. 224.

*Maryland*. — *Long v. Long*, 62 Md. 33.

*Mississippi*. — *Morton v. Carroll*, 68 Miss. 699.

*Missouri*. — *Reed v. Austin*, 9 Mo. 722, 45 Am. Dec. 336; *Adams v. Larrimore*, 51 Mo. 130; *Hewitt v. Weatherby*, 57 Mo. 276; *Rogers v. Johnson*, 125 Mo. 202; *Sachse v. Clingsmith*, 97 Mo. 406; *Dutcher v. Hill*, 29 Mo. 271, 77 Am. Dec. 572; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366.

*Nebraska*. — *Wilcox v. Raben*, 24 Neb. 368, 8 Am. St. Rep. 207; *Phillips v. Dawley*, 1 Neb. 320; *Neligh v. Keene*, 16 Neb. 407; *Crowell v. Johnson*, 2 Neb. 146; *Trumble v. Williams*, 18 Neb. 144; *Day v. Thompson*, 11 Neb. 123; *O'Brien v. Gaslin*, 20 Neb. 347; *Taylor v. Coots*, 32 Neb. 30, 29 Am. St. Rep. 426; *McKeighan v. Hopkins*, 14 Neb. 361; *Larimer v. Wallace*, 36 Neb. 444; *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627.

*New Jersey*. — *State v. Jersey City*, 35 N. J. L. 381. See also *Clark v. Costello*, 59 N. J. L. 234.

*New York*. — *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534; *Nicholl v. Nicholl*, 8 Paige (N. Y.) 349.

*North Carolina*. — *McGlawhorn v. Worthington*, 98 N. Car. 199; *Sumner v. Sessoms*, 94 N. Car. 371.

*Ohio*. — *Herbst v. Bates*, 13 Cinc. L. Bul. 565, 9 Ohio Dec. (Reprint) 444.

*Oregon*. — *McCulloch v. Estes*, 20 Oregon 349.

*Pennsylvania*. — See *Benninghoff v. Stephenson*, 161 Pa. St. 440.

*South Carolina*. — *Lyles v. Haskell*, 35 S. Car. 391.

*Tennessee*. — *Greenlaw v. Greenlaw*, 16 Lea (Tenn.) 435; *Kindell v. Titus*, 9 Heisk. (Tenn.) 727; *Starkey v. Hammer*, 1 Baxt. (Tenn.) 438.

*Virginia*. — *Wilcher v. Robertson*, 78 Va. 602; *Quesenberry v. Barbour*, 31 Gratt. (Va.) 491. See also *Culbertson v. Stevens*, 82 Va. 406.

*Wisconsin*. — *Anderson v. Chicago Title, etc., Co.*, 101 Wis. 385.

**Title of Purchaser Cannot Be Collaterally Attacked** — *United States*. — *Boyd v. Wyley*, 18 Fed. Rep. 355.

*Indiana*. — *McLead v. Applegate*, 127 Ind. 349.

*Louisiana*. — *O'Hara v. Booth*, 29 La. Ann. 817. See also *McCall v. Irion*, 41 La. Ann. 1126.

*Missouri*. — *Strouse v. Drennan*, 41 Mo. 289; *Buller v. Woods*, 43 Mo. App. 494.

*Texas*. — See *Riley v. Pool*, 5 Tex. Civ. App. 346.

**Collateral Attack on Report of Sale.** — In *Bagby v. Warren Deposit Bank*, (Ky. 1899) 49 S. W. Rep. 177, the court said: "It has been held frequently that the verity of the report of sale may be questioned on confirmation, and we

see no reason to hold that the report is free from attack in a collateral matter, if the effect of that attack is not to impeach or impair the judgment of confirmation."

**1. General Right to Redeem Dependent on Statute** — *California*. — *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 516.

*Colorado*. — *Conway v. John*, 14 Colo. 30.

*Illinois*. — *Hyman v. Bogue*, 135 Ill. 9; *Little v. People*, 43 Ill. 188; *Durley v. Davis*, 69 Ill. 133; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231; *McCullough v. Rose*, 4 Ill. App. 149; *Farasworth v. Strasler*, 12 Ill. 482; *West v. Flemming*, 18 Ill. 248, 68 Am. Dec. 539; *Link v. Architectural Iron Works*, 24 Ill. 551.

*Kentucky*. — *Columbia Bank v. Carter*, 12 Ky. L. Rep. 969, (Ky. 1891) 15 S. W. Rep. 1056; *Miles v. Lyon*, (Ky. 1899) 50 S. W. Rep. 15; *Graves v. Long*, 87 Ky. 441.

*Minnesota*. — *Stone v. Bassett*, 4 Minn. 298.

*Nebraska*. — *Cosmunt v. Gloe*, 55 Neb. 709.

*New York*. — *Crisfield v. Murdock*, 127 N. Y. 315; *Silliman v. Wing*, 7 Hill (N. Y.) 159.

*Tennessee*. — *White v. Bates*, 89 Tenn. 570.

**Redemption from Sheriff's Sales.** — See the title SHERIFF'S SALES.

**Redemption from Tax Sales.** — See the title TAX SALES.

**Sales of Decedent's Lands to Pay Debts.** — This right to redeem applies to sales under judgments in actions to sell lands to pay the debts of a decedent. *Cantrill v. Perry*, 7 Ky. L. Rep. 446.

**When Sales Are "for the Payment of Money,"** the right of redemption exists, under some statutes. *Hyman v. Bogue*, 135 Ill. 9; *Stone v. Bassett*, 4 Minn. 298.

In *Tennessee* there is no right of redemption after a sale of land to pay alimony. *White v. Bates*, 89 Tenn. 570.

In *Colorado* no right to redeem from judicial sales of personality exists. *Conway v. John*, 14 Colo. 30.

**The Law of Illinois**, giving the right of redemption of real estate sold on foreclosure of mortgages, does not apply to railroad property sold under foreclosure proceedings in a federal court in Illinois. *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380.

**Resale on Purchaser's Default.** — Where a purchaser at judicial sale, whether he be the defendant or a stranger, fails to pay his sale bonds, and a second sale is made to satisfy them, he has no right to redeem the land from the second sale. *McKee v. Stein*, 91 Ky. 240.

**2. Law in Force at Time of Sale Governs.** — *Moor v. Seaton*, 31 Ind. 11; *Patterson v. Cox*, 25 Ind. 261.

**Impairing Obligation of Contract.** — A statute passed subsequently to the time the obligation was incurred, giving the right to redeem from sales for enforcement of such obligation, has been held unconstitutional. *Collins v. Collins*, 79 Ky. 88. See also *Movar v. Crawley*, 7 Ky.



redemption from a judicial sale, a clause in the decree ordering the sale, that declares that the sale shall be absolute, will not bar the right of redemption; that portion of the decree will be regarded as inoperative, and a redemption will be ordered as in other cases.<sup>1</sup>

**Redemption from Order of Sale.** — In some jurisdictions a court, in decreeing the sale of lands for the enforcement of a charge thereon, is required to give the defendant a day to redeem from the order of sale by paying the amount charged.<sup>2</sup>

**Construction of Statutes.** — Redemption laws are looked upon with favor, and where no injury is to follow, a liberal construction should be given to them, to the end that the property of the debtor may pay as many of his debts as possible.<sup>3</sup>

**2. Court May Allow Redemption in Absence of Statute.** — The court still has power, before confirmation of the sale, to set the sale aside and allow a redemption;<sup>4</sup> and courts of equity, even in the absence of statutory provisions, have, in particular cases, decreed that redemption may be made.<sup>5</sup>

**3. Right May Be Based on Contract.** — So also the right to redeem may be given by contract between the parties.<sup>6</sup>

**4. Who May Redeem.** — When the right of redemption is purely statutory, the question as to who may redeem depends solely upon the provisions of the statute, and unless the person seeking to redeem comes within the provisions of the statute he has no right to redeem.<sup>7</sup>

**Classes upon Whom the Right Is Conferred.** — The statutes generally confer the right of redeeming upon three classes of persons, to wit: (1) the debtor whose lands are sold, and his successors in interest; (2) persons holding liens upon the property, such as mortgagees, etc.; (3) judgment creditors of the debtor whose lands are sold.<sup>8</sup>

**Acceptance by Purchaser of Redemption Money from Person Not Authorized to Redeem.** — A redemption of land from a judicial sale may be made by one having no legal right to redeem, where the purchaser accepts the redemption money.<sup>9</sup>

**5. Against Whom Redemption May Be Made.** — The right to redeem is gen-

L. Rep. 372; *Vaughn v. Robertson*, 7 Ky. L. Rep. 827. And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1056.

**1. Decree Cannot Bar Statutory Right of Redemption.** — *Fitch v. Wetherbee*, 110 Ill. 475. See also *McBride v. Hoffman*, 7 Ky. L. Rep. 673; *Turner v. Argo*, 89 Tenn. 443.

**2. Required to Give a Day to Redeem.** — *Harkins v. Forsyth*, 11 Leigh (Va.) 306; *Crawford v. Weller*, 23 Gratt. (Va.) 835; *Strayer v. Long*, 89 Va. 471; *Pairo v. Bethell*, 75 Va. 825; *Hansucker v. Walker*, 76 Va. 753; *Rose v. Brown*, 11 W. Va. 123; *Rohrer v. Travers*, 11 W. Va. 146.

Though the time allowed for such redemption be only thirty days, an appellate court will nevertheless presume that the discretion of the court below was properly exercised, if no application appears to have been made to that court for an extension of time. Upon such application, if refused, the reasons of the court should appear, and the appellate tribunal could then decide whether the discretion had been abused. *Harkins v. Forsyth*, 11 Leigh (Va.) 306.

**3. Liberal Construction of Statutes.** — *Schuck v. Gerlach*, 101 Ill. 338; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231.

**4. Redemption before Confirmation.** — *Haskell v. State*, 31 Ark. 91.

**5. Redemption by Court of Equity.** — *Taggart v. Rogers*, 49 Hun (N. Y.) 265; *Crane v. Mc-*

*Donald*, (Supm. Ct. Gen. T.) 2 N. Y. St. Rep. 150; *Cassery v. Witherbee*, 119 N. Y. 522. See also *Crisfield v. Murdock*, 127 N. Y. 315, reversing 55 Hun (N. Y.) 143.

**6. Right Based on Contract.** — *Sebree v. Green*, (Ky. 1897) 41 S. W. Rep. 290; *Kueborth v. Mead*, 3 Ky. L. Rep. 533; *Howard v. White*, 8 Ky. L. Rep. 690, (Ky. 1887) 2 S. W. Rep. 776; *Hale v. Powell*, 7 Ky. L. Rep. 672; *Fishback v. Green*, 87 Ky. 107; *Haywood v. Ensley*, 8 Humph. (Tenn.) 460. See also the title IMPLIED TRUSTS, vol. 15, p. 1119, in regard to implied trusts arising from such agreements.

Redemption must be within the time agreed upon. *Pigg v. Jordan*, 7 Ky. L. Rep. 372. Compare *Fishback v. Green*, 87 Ky. 107.

Where a parol agreement was made, that one person should purchase property at a chancery sale, and permit a redemption, and no time was fixed at which the right to redeem should expire, it was held that it would be decreed in equity if asserted in a reasonable time. *Haywood v. Ensley*, 8 Humph. (Tenn.) 460.

**7. Person Seeking to Redeem Must Base Right on Statute.** — *Owen v. Kilpatrick*, 96 Ala. 421.

**8. To Whom Right of Redemption Extends.** — *Owen v. Kilpatrick*, 96 Ala. 421; *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369. See the local statutes.

**9. Acceptance by Purchaser of Redemption Money from Person Not Authorized to Redeem.** — *Smith v. Jackson*, 153 Ill. 399; *Smith v. Mace*, 137



erally enforceable by express statutory provision against the purchaser, his vendee, and all claiming under him.<sup>1</sup> A person, however, exercising the right of redemption conferred upon him, is not a person claiming under the purchaser, so as to entitle another person authorized to redeem in the first instance, to redeem against such redemptioner.<sup>2</sup>

**6. Time and Manner of Redeeming.** — One who seeks to redeem from a judicial sale must, as a general rule, comply fully and strictly with the statute conferring the right,<sup>3</sup> though a court of equity may, where the attempt to redeem has been made in good faith, grant relief where through mistake the redemptioner failed to comply strictly with the statute.<sup>4</sup>

**7. Effect of Redemption.** — A redemption from a judicial sale by the former owner of the land invests him with the title and determines the estate of the purchaser,<sup>5</sup> and in such case the purchaser has been held liable for rents and profits for the time he was in possession.<sup>6</sup>

**JUDICIOUSLY.** — To act judiciously is to exercise good judgment; to act skilfully, with discretion or wisdom; prudently.<sup>7</sup>

**JUDICIUM.** — See note 8.

**JUGGLER.** — A juggler is one who practices or exhibits tricks by sleight of hand; one who makes sport by tricks which make a false show of extraordinary dexterity.<sup>9</sup>

**JUN.** (See also **JUNIOR**, *post*) — Jun. is sometimes used as an abbreviation of junior.<sup>10</sup>

**JUNCTION.** — A junction in the ordinary acceptation of the term as applied to railroads, is the point or locality where two or more lines of railway meet; two lines of distinct companies, or separate roads of the same company, or the main line and a branch road of the same company, may have points of union or meeting styled junctions, but this can hardly be predicated of a single company's road from one point to another.<sup>11</sup>

**JUNIOR.** (See also the titles **ABBREVIATIONS**, vol. 1, p. 97; **ELECTIONS**, vol. 10, p. 724; **NAME**.) — The addition of Junior or Jr. to a name is a mere

Ill. 68; *Pearson v. Pearson*, 131 Ill. 464; *Meyer v. Mintonye*, 106 Ill. 414; *Massey v. Westcott*, 40 Ill. 160.

1. *Morris v. Beebe*, 54 Ala. 300. See the local statutes.

2. **Second Redemption Not Permitted.** — *Owen v. Kilpatrick*, 96 Ala. 421.

**Taking Assignment of Certificate of Purchase by a person entitled to redeem is not a redemption so as to prevent a subsequent redemption by other parties.** *Boynton v. Pierce*, 151 Ill. 197. See also *Keller v. Coman*, 162 Ill. 117.

3. **Statutory Requirements Must Be Complied With.** — *Hyman v. Bogue*, 135 Ill. 9; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231; *Layne v. Davidson*, 3 Ky. L. Rep. 621; *White v. Rathbone*, 73 Minn. 236; *Ex p. Monroe Bank*, 7 Hill (N. Y.) 177, 42 Am. Dec. 61; *Wood v. Morgan*, 4 Hunph. (Tenn.) 371; *Simmons v. Marable*, 11 Humph. (Tenn.) 436; *Maupin v. Blanton*, 93 Tenn. 422.

**Amount to Be Paid for Redemption.** — *Campbell v. Atwood*, (Tenn. Ch. 1897) 47 S. W. Rep. 168.

**Taxes Paid by Purchaser.** — *Davis v. Dale*, 150 Ill. 239, *affirming* 51 Ill. App. 328.

**Right Must Be Exercised Within Time Prescribed.** — *Traeger v. Mutual Bldg., etc., Assoc.*, 63 Ill. App. 286; *Henderson v. Craig*, 179 Ill. 395; *Stevens v. Irwin*, 76 Ill. 604; *Gosmunt v. Gloe*, 55 Neb. 709.

**Limitation Begins to Run** where an irregular order of confirmation is modified only from the time of the second order of confirmation. *Barbee v. Fox*, 79 Ky. 588.

**Purchaser Who by Contract Extends Time for Redemption May Impose His Own Terms.** — *Ross v. Sutherland*, 81 Ill. 275.

**Specific Performance of Agreement Extending Time for Redemption.** — *Clark v. Renaker*, 14 Ky. L. Rep. 465. See the title **SPECIFIC PERFORMANCE**.

4. **Relief of Redemptioner Who Has Failed to Comply with Statute.** — *Moore v. Bishop*, (Ky. 1899) 49 S. W. Rep. 957.

5. **Effect of Redemption.** — *Morris v. Beebe*, 54 Ala. 300.

6. **Purchaser Chargeable with Rents and Profits.** — *Freeland v. Harris*, 3 Sneed (Tenn.) 264.

7. *Cotes v. Davenport*, 9 Iowa 236. This case arose upon the charge of the court below upon the duty of a municipal corporation in the construction of public works.

8. **Judicium.** — *Judicium* is a proceeding before an adjudicatory or judge. *State v. Whitford*, 54 Wis. 157.

9. *Thurber v. Sharp*, 13 Barb. (N. Y.) 628.

10. *Brainard v. Stilphin*, 6 Vt. 9.

11. *U. S. v. Oregon, etc., R. Co.*, 164 U. S. 526.



matter of description, which forms no part of the name. It is generally used to distinguish between a father and son who reside at the same place.<sup>1</sup>

**1. No Part of Name — England.** — Gledhill v. Crowther, 23 Q. B. D. 136.

**California.** — Carleton v. Townsend, 28 Cal. 222.

**Connecticut.** — Coit v. Starkweather, 8 Conn. 293.

**Illinois.** — Headley v. Shaw, 39 Ill. 354.

**Indiana.** — Ross v. State, 116 Ind. 495; Geraghty v. State, 110 Ind. 104.

**Kentucky.** — Johnson v. Ellison, 4 T. B. Mon. (Ky.) 526.

**Maryland.** — Weber v. Fickey, 52 Md. 512.

**Massachusetts.** — Kincaid v. Howe, 10 Mass. 203; Com. v. Perkins, 1 Pick. (Mass.) 388; Cobb v. Lucas, 15 Pick. (Mass.) 9; Simpson v. Dix, 131 Mass. 179.

**Minnesota.** — Bidwell v. Coleman, 11 Minn. 78.

**New Hampshire.** — State v. Weare, 38 N. H. 314.

**Compare State v. Vitum, 9 N. H. 522.**  
**New York.** — People v. Cook, 14 Barb. (N. Y.) 299; Padgett v. Lawrence, 10 Paige (N. Y.) 177.

**North Carolina.** — State v. Best, 108 N. Car. 747.

**Vermont.** — Brainard v. Stilphin, 6 Vt. 9; Isaacs v. Wiley, 12 Vt. 677; Prentiss v. Blake, 34 Vt. 460; Jameson v. Isaacs, 12 Vt. 613.

**Alteration of Deed.** — Inserting the word *junior* in a deed after it had been executed was held an immaterial alteration. Coit v. Starkweather, 8 Conn. 294.

**Assignment of a Note.** — One to whom a note is assigned, without the addition of *jun.*, may assign it to another with it, and his assignee may maintain a petition in the usual form. Johnson v. Ellison, 4 T. B. Mon. (Ky.) 527.

**Indictment.** — Where an indictment alleges that the defendant, at, etc., committed adultery with one L. W., without any further designation, and it appears that there are in that town two individuals of that name, father and son, and that the latter uses the addition of *junior* to his name, and is thereby well known and distinguished from his father; the respondent has the right to understand that the offense is charged to have been committed with the father, and evidence of adultery with L. W., *junior*, cannot be admitted under such indictment. State v. Vitum, 9 N. H. 519. But, as supporting the general rule that *junior* is no part of the name, see Ross v. State, 116 Ind. 495; Geraghty v. State, 110 Ind. 104; State v. Best, 108 N. Car. 747.

**A Mortgage** was given by "Alexander Eaton, *junior*," to "O. P. Ramsdell." A bill was filed to foreclose it, by Orrin P. Ramsdell against Alexander Eaton. The bill was in the usual form, but contained no allegation that the parties to the suit were identical with the parties to the mortgage. Eaton suffered the bill to be taken as confessed; but a successful defense being interposed by another defendant who was improperly made a party, the court dismissed the bill as to all, for want of such allegation of identity. It was held that this was erroneous. The question of identity was open to proof, if disputed, and the *pro confesso* admitted it as against the mortgagor. Ramsdell v. Eaton, 12 Mich. 117.

**Summons and Declaration — Record of Judgment.** — The word *junior* is no part of a name, and where a plaintiff in the summons and declaration affixed the letters "Jr." to his name, the omission of those letters in the record of judgment is immaterial. Loveland v. Sears, 1 Colo. 433.

But in De Kentland v. Somers, 2 Root (Conn.) 437, it was held that where, to an action of debt on judgment, a plea was put in that there was no such record, the omission of *junior* in the description of one of the judgment debtors was fatal. See also Stubbs v. Cook, Hob. 330, Cro. Jac. 623. **Compare,** however, Coit v. Starkweather, 8 Conn. 294.

**Return.** — An alternative mandamus was directed to a town clerk, commanding him to record the survey of a road, or show cause. The clerk returned that he did not record the survey because one of the commissioners had signed the survey by the name of "Zaccheus Higby," whereas he was elected by the name of "Zaccheus Higby, *junior*." It was held that the return was insufficient, as the addition of *junior* to a name is a mere description of the person, and the omission of it does not affect or invalidate any act or proceeding done by the same person. People v. Collins, 7 Johns. (N. Y.) 549.

**Elections.** — To add *junior* to a signature of the nominator at a county council election, if that be his ordinary mode of signing, does not invalidate the signature. Gledhill v. Crowther, 23 Q. B. D. 136.

**Rebutting Presumption.** — In Padgett v. Lawrence, 10 Paige (N. Y.) 177, it is said: "Where the word *Jr.* is left out, it is only presumptive evidence that the oldest person of the name, and who will answer the other matters of description in the deed, was the grantee intended; and the presumption may be rebutted by showing that the grantor intended to convey to the son." See also Prentiss v. Blake, 34 Vt. 460; Lepiot v. Browne, 1 Salk. 7.

**Second.** — In Cobb v. Lucas, 15 Pick. (Mass.) 9, the court said that the addition of "second" would as clearly distinguish one from an older person of the same name, as *junior*.

**Senior.** — In Fleet v. Youngs, 11 Wend. (N. Y.) 524, it is said: "The addition of 'senior' to a name is mere matter of description, and forms no part of the name."

**Younger.** — In Blake v. Tucker, 12 Vt. 45, the court said: "The mere fact that at one time the addition 'younger' is affixed to a name, and not at another, raises no reasonable doubt of its designating the same person, especially when the person does not, at both times, reside in the same town."

**Junior Assistant.** — Where, under the Victorian Public Service Act 1883, § 49, every school teacher employed in a state school at the date of the Act was directed to be classified as in the Act provided, and the classifiers thereunder assigned to the respondent the status of a *junior* assistant, it was held that, according to the true construction of the Act, the respondent not being in point of fact at the date of the Act a *junior* assistant, could not legally be classified as such; but that, having had at that



**JUNK SHOP.** — A junk shop is a place where junk is bought and sold; a place where odds and ends are purchased and sold; a store where old metals, ropes, rags, etc., are bought and sold.<sup>1</sup>

**JURAT.** (See also the title AFFIDAVIT, 1 ENCYCLOPÆDIA OF PLEADING AND PRACTICE 338.) — An affidavit must be certified by the officer before whom it was taken, and such certificate is commonly called the jurat.<sup>2</sup>

time a definite status as assistant teacher, she was entitled to be classified accordingly. The term "*junior* assistant" was not interpreted by the Act, and did not denote any denomination of teacher existing at its date, and there was no power under the Act to apply the term to the respondent so as to alter her position. *Main v. Stark*, 15 App. Cas. 384.

1. **License.** (See also the title OCCUPATION, PRIVILEGE, AND BUSINESS TAXES.) — *Duluth v. Bloom*, 55 Minn. 97, citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 243. And in that case it was held that a store in which furniture, both new and second-hand, was exclusively dealt in, was not a *junk shop* within an ordinance requiring a license for *junk shops*.

A store where old metals, ropes, rags, etc., are bought and sold is a *junk shop*, within the meaning of a license act. *Charleston v. Gold-*

*smith*, 12 Rich. L. (S. Car.) 470.

**Store.** — A *junk shop* or place at which are accumulated for shipment and occasional sales old iron, glass, ropes, wool, hides, fur, cotton, old paper, and the like, is within *Mississippi* Code 1892, § 3390, imposing a state privilege tax on each "store," and, under § 3412, a municipality cannot impose thereon a tax greater than fifty per cent. of the state tax. *Pitts v. Vicksburg*, 72 Miss. 181.

2. *U. S. v. McDermott*, 140 U. S. 153; *Lutz v. Kinney*, 23 Nev. 279.

**Body of the Certificate.** — In *Hanson v. Cochran*, 9 Houst. (Del.) 192, it is said: "A *jurat* means that the affiant swore before the officer taking the affidavit; this can be as well certified in the body of the certificate, as is the case here, as at the foot of it. For here, as in most cases, the affidavit and certificate are united."



# JURISDICTION.

BY THEODOR MEGAARDEN.

## I. DEFINITION, 1041.

## II. JURISDICTION AND EXERCISE OF JURISDICTION DISTINGUISHED, 1042.

## III. EFFECT OF POSSESSION AND WANT OF JURISDICTION, 1042.

1. *General Rules*, 1042.
2. *Application of the Rules in General*, 1049.
3. *Decrees in Equity*, 1049.
4. *Foreign Judgments*, 1050.
5. *Proceedings by Attachment*, 1050.
6. *Garnishment Proceedings*, 1050.
7. *Proceedings in Execution*, 1051.
8. *Bankruptcy and Insolvency Proceedings*, 1052.
9. *Proceedings under Poor Debtor Law*, 1052.
10. *Foreclosure Proceedings*, 1052.
11. *Eminent Domain Proceedings*, 1052.
12. *Tax Proceedings*, 1053.
13. *Orders and Decrees of Probate Courts*, 1053.
14. *Guardians' Sales*, 1055.
15. *Courts of General and of Special Jurisdiction*, 1055.
16. *Justices' Courts*, 1055.
17. *Awards of Arbitrators*, 1055.
18. *Proceedings of Courts Martial*, 1056.
19. *Special Tribunals*, 1056.
20. *Land Officers' Rulings and Decisions*, 1056.
21. *Statutory Proceedings*, 1056.
22. *Adoption Proceedings*, 1057.
23. *Partition Proceedings*, 1057.
24. *Divorce Proceedings*, 1057.
25. *As Affecting the Question of Res Judicata*, 1057.
26. *As Affecting the Right to Bring Suit Upon or Revive a Judgment*, 1057.
27. *As Affecting the Right to a Writ of Prohibition*, 1058.
28. *As Affecting the Right to Enjoin the Collection of a Judgment*, 1058.
29. *As Affecting the Liability of a Party Prosecuting an Action*, 1058.
30. *As Affecting the Liability of Judges and Judicial Officers*, 1058.
31. *As Affecting the Liability of Officers Levying Executions*, 1059.
32. *As Affecting the Liability for Contempt*, 1059.
33. *As Affecting the Right to a Writ of Habeas Corpus*, 1059.

## IV. ESSENTIAL CONSTITUENTS OF JURISDICTION, 1059.

1. *In General*, 1059.
2. *Jurisdiction of the Subject Matter*, 1060.
3. *Jurisdiction of the Person*, 1060.
4. *Jurisdiction over the Res or Property*, 1060.

## V. SOURCES AND MODES OF ACQUIRING JURISDICTION, 1060.

1. *Jurisdiction over the Subject Matter*, 1060.
2. *Effect of Consent to Give Jurisdiction*, 1060.
  - a. *General Rule*, 1060.
  - b. *Appellate Courts*, 1061.
3. *Waiver of Defects of Jurisdiction*, 1062.
4. *Change of Venue*, 1063.
5. *Contracts to Deprive Courts of Jurisdiction*, 1063.



## JURISDICTION.

### 6. *Jurisdiction of the Person*, 1063.

a. *In General*, 1063.

b. *Jurisdiction by Consent and Waiver of Objections to Jurisdiction*, 1064.

### 7. *Jurisdiction of the Res*, 1065.

## VI. ERRORS, IRREGULARITIES, AND JURISDICTIONAL DEFECTS, 1065.

### 1. *In General*, 1065.

### 2. *Defects in Jurisdiction over the Particular Case*, 1066.

### 3. *Disqualification of Judge*, 1066.

### 4. *Service of Process*, 1067.

a. *In General*, 1067.

b. *Want of Service*, 1067.

c. *Irregular Service*, 1068.

d. *Service by Publication*, 1068.

### 5. *Irregularities in Return*, 1069.

### 6. *Irregular Process*, 1069.

### 7. *Defects in the Pleading, Form, and Manner of Procedure*, 1069.

a. *In General*, 1069.

b. *Defects in Pleadings*, 1069.

c. *Improper Form of Action*, 1070.

d. *Trial Without a Jury*, 1070.

e. *Irregular Adjournment*, 1070.

f. *Death of Party*, 1070.

g. *Insanity of Party*, 1070.

h. *Infancy of Party*, 1071.

i. *Coverture of Party*, 1071.

### 8. *Absence or Insufficiency of Findings*, 1071.

### 9. *Errors or Irregularities in the Judgment*, 1071.

### 10. *Errors or Irregularities in Taxation of Costs*, 1073.

### 11. *Irregularities in Setting Aside or Vacating Judgments*, 1073.

### 12. *Errors or Irregularities in Execution Process*, 1073.

## VII. PRESUMPTION OF JURISDICTION. 1073.

### 1. *Domestic Courts*, 1073.

#### a. *Courts of General Jurisdiction*, 1073.

##### (1) *Cases Involving Exercise of General Powers*, 1073.

(a) *Rule Stated*, 1073.

(b) *Record Recitals as to Jurisdictional Facts*, 1077.

(c) *Persons Not Within Territorial Limits of Jurisdiction*, 1078.

##### (2) *Cases Involving Exercise of Special Statutory Powers*, 1079.

(a) *Presumption of Jurisdiction Generally*, 1079.

(b) *Proceedings According to Course of Common Law*, 1079.

(c) *Proceedings Not According to Course of Common Law*, 1079.

##### (3) *Conclusiveness of Presumption*, 1080.

#### b. *Courts of Special or Inferior Jurisdiction*, 1082.

##### (1) *No Presumption of Jurisdiction*, 1082.

##### (2) *What Are Courts of Special or Inferior Jurisdiction*, 1084.

##### (3) *Recital of Jurisdictional Facts*, 1084.

(a) *Jurisdiction Dependent on Collateral Matters*, 1084.

(b) *Jurisdiction Involving Gist of Proceeding*, 1085.

### 2. *Foreign Courts*, 1085.

## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *JURISDICTION*, vol. 12, p. 114.

As to the *Jurisdiction of Consular Courts*, see the title *CONSULS*, vol. 7, p. 6.

As to the *Jurisdiction of Federal Courts*, see the titles *CONSOLIDATION OF CORPORATIONS*, vol. 6, p. 800; *COPYRIGHT*, vol. 7, p. 508; *PATENTS*; *TRADE MARKS*; *UNITED STATES COURTS*.



- As to Admiralty Jurisdiction, see the title ADMIRALTY JURISDICTION, vol. 1, p. 645, and references there given.*
- As to Equity Jurisdiction, see the title EQUITY, vol. 11, p. 145, and references there given.*
- As to Probate Jurisdiction, see the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720; FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 13, p. 915; PROBATE COURTS.*
- As to the Jurisdiction of Municipal Courts, see the titles MUNICIPAL COURTS; ORDINANCES.*
- As to the Jurisdiction of Justice Courts, see the title JUSTICE OF THE PEACE.*
- As to the Jurisdiction of Courts Martial, see the title MILITARY LAW.*
- As to Concurrent Jurisdiction, see the title COURTS, vol. 8, p. 21.*
- As to Conflicts of Jurisdiction, see the titles CONSTITUTIONAL LAW, vol. 6, p. 882; HABEAS CORPUS, vol. 15, p. 125; INTERNATIONAL LAW, vol. 16, p. 1121; PARTITION.*
- As to Jurisdiction of the Offenses of an Accessory, see the title ACCESSORY, vol. 1, p. 271.*
- As to Jurisdiction over Assignments for the Benefit of Creditors, see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 1.*
- As to Jurisdiction over General Average Causes, see the title GENERAL AVERAGE, vol. 14, p. 952.*
- As to Jurisdiction to Adjudicate Homestead Rights, see the title HOMESTEAD, vol. 15, p. 516.*
- As to Jurisdiction over Impeachment Proceedings, see the title IMPEACHMENT, vol. 15, p. 1063.*
- As to Jurisdiction over Indians, see the title INDIANS, vol. 16, p. 212.*
- For other matters relating to Jurisdiction, see the following titles: COPYRIGHT, vol. 7, p. 508; COVENANTS, vol. 8, p. 44; DIVORCE, vol. 9, p. 723; ELECTIONS, vol. 10, p. 552; FORGERY, vol. 13, p. 1081; HABEAS CORPUS, vol. 15, p. 125; INSANITY, vol. 16, p. 558; INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630; INTERSTATE COMMERCE, ante, p. 34; INTERVENTION, ante, p. 180; INTOXICATING LIQUORS, ante, p. 189; JUDGE, ante, p. 714; JUDGMENTS AND DECREES, ante, p. 756; MECHANICS' LIENS; NAVIGABLE WATERS; PATENTS; POSTAL LAWS; RES JUDICATA; REVENUE LAWS; SEARCHES AND SEIZURES; SPANISH LAND GRANTS; TRADE MARKS.*

**I. DEFINITION.** — Of the various definitions of jurisdiction<sup>1</sup> perhaps the most satisfactory is as follows: Jurisdiction is authority to hear and determine a cause.<sup>2</sup> Since jurisdiction is the power to hear and determine, it does

**1. Definitions of Jurisdiction.** — There is perhaps no word in English law that has been more frequently defined than this of "jurisdiction." From the earliest times we find the question of its proper definition engaging the attention of jurists. Thus we find the following: "And jurisdiction is nothing else than to have the authority of judging, that is, of pronouncing judgment, between parties in actions, against persons or things according as they have been brought into judgment by an authority either ordinary or delegated, concerning which we have spoken above concerning the powers of those who judge." Bracton De Legibus Angliæ (Master of Rolls' ed. 1883), vol. 6, p. 159, or lib. 5, tract. 5, fol. 400 v. "*Jurisdictio est potestas de publico introducta cum necessitate iurisdicendi.*" 1 Bulst. 210, The Case of the Marshalsea, 10 Coke 73a; or, as translated by Mr. Burrill: "Jurisdiction is a power introduced of common right (by public authority or for the common benefit), arising out of the necessity of declaring the law."

"The right by which judges exercise their power." Hale's Anal., § 11. "The power of hearing and determining causes, and of doing justice, in matters of complaint." Halifax Anal., v. 3, c. 8, num. 4.

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case." Reynolds v. Stockton, 140 U. S. 268; St. Louis, etc., R. Co. v. State, 55 Ark. 205; Falls v. Wright, 55 Ark. 565; Munday v. Vail, 34 N. J. L. 418.

Jurisdiction is defined to be the authority or power which a man hath to do justice in causes of complaint brought before him. Tomlins L. Dict.; Bucky v. Willard, 16 Fla. 332.

**2. Approved Definition — United States.** — Daniels v. Tearney, 102 U. S. 418; Applegate v. Lexington, etc., Min. Co., 117 U. S. 267; Simmons v. Saul, 138 U. S. 454; Holmes v. Oregon, etc., R. Co., 5 Fed. Rep. 534, 9 Fed. Rep. 232, 6 Sawy. (U. S.) 285; 7 Sawy. (U. S.) 385; Grignon v. Astor, 2 How. (U. S.) 338; U.



not, as will be pointed out later, depend either upon the regularity of the exercise of that power<sup>1</sup> or upon the rightfulness of the decisions made.<sup>2</sup>

**II. JURISDICTION AND EXERCISE OF JURISDICTION DISTINGUISHED.** — Jurisdiction should therefore be distinguished from the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction.<sup>3</sup> When there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.<sup>4</sup>

**III. EFFECT OF POSSESSION AND WANT OF JURISDICTION** — 1. **General Rules.** — While it is often very difficult to determine whether a court does or does not have jurisdiction of a particular cause, the effect of the possession or want of jurisdiction upon the validity of the judgment is well settled.

**Effect of Possession of Jurisdiction.** — While, of course, a judgment may be directly attacked for errors or irregularities,<sup>5</sup> this can only be done in a direct proceeding either before the same court to set it aside or in an appellate court; if a court has jurisdiction it is altogether immaterial, where its judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings and decisions may have been.<sup>6</sup>

*S. v. Arredondo*, 6 Pet. (U. S.) 691; *Decatur v. Paulding*, 14 Pet. (U. S.) 599; *In re Bogart*, 2 Sawy. (U. S.) 401, 3 Fed. Cas. No. 1,596; *Le Roy v. Clayton*, 2 Sawy. (U. S.) 499, 15 Fed. Cas. No. 8,268; *Riggs v. Johnson County*, 6 Wall. (U. S.) 187; *McNitt v. Turner*, 16 Wall. (U. S.) 366; *Cornett v. Williams*, 20 Wall. (U. S.) 249.

*Alabama.* — *Wightman v. Karsner*, 20 Ala. 455; *Ex p. Maxwell*, 37 Ala. 363, 79 Am. Dec. 62; *Smith v. Flournoy*, 47 Ala. 361; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

*Arkansas.* — *Borden v. State*, 11 Ark. 544, 54 Am. Dec. 235; *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1.

*California.* — *Hickman v. O'Neal*, 10 Cal. 292; *Irwin v. Scriber*, 18 Cal. 507; *Ex p. Bennett*, 44 Cal. 88; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 326; *Schroeder v. Wittram*, 66 Cal. 641; *Bruner v. San Francisco*, 92 Cal. 251.

*Illinois.* — *Bush v. Hanson*, 70 Ill. 480; *Schroeder v. Merchants, etc., Ins. Co.*, 104 Ill. 71; *Kelly v. People*, 115 Ill. 584.

*Indiana.* — *Weston v. Lumley*, 83 Ind. 495; *Clay County v. Markle*, 46 Ind. 110; *Coolman v. Fleming*, 82 Ind. 123.

*Kansas.* — *J. B. Watkins Land Mortg. Co. v. Mullen*, (Kan. 1900) 61 Pac. Rep. 386.

*Louisiana.* — *State v. Lazarus*, 39 La. Ann. 142.

*Minnesota.* — *Montour v. Purdy*, 11 Minn. 405, 88 Am. Dec. 92; *Wood v. Myrick*, 16 Minn. 502.

*Missouri.* — *Babb v. Bruere*, 23 Mo. App. 606.

*Nebraska.* — *State v. Nelson*, 21 Neb. 572.

*New Jersey.* — *Ritter v. Kunkle*, 39 N. J. L. 262.

*New York.* — *People v. Sturtevant*, 9 N. Y. 267, 59 Am. Dec. 538; *Bumstead v. Read*, 31 Barb. (N. Y.) 661; *King v. Poole*, 36 Barb. (N. Y.) 242.

*Ohio.* — *Sheldon v. Newton*, 3 Ohio St. 494.

*Texas.* — *Brownsville v. Basse*, 43 Tex. 440; *Ex p. Degener*, 30 Tex. App. 574.

*Vermont.* — *Vaughn v. Congdon*, 56 Vt. 127, 48 Am. Rep. 758.

*Wisconsin.* — *State v. Whitford*, 54 Wis. 150; *Winnebago Furniture Mfg. Co. v. Wisconsin*

*Midland R. Co.*, 81 Wis. 393; *Minard v. Burtis*, 83 Wis. 269.

"Jurisdiction is the authority to hear and decide a legal controversy." *Lantz v. Maffett*, 102 Ind. 28.

"Jurisdiction is defined to be the power to hear and determine the particular case involved." *Rorer on Jud. Sales*, §§ 59, 31, quoted with approval in *Gray v. Bowles*, 74 Mo. 423.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Riggs v. Johnson County*, 6 Wall. (U. S.) 187; *Borden v. State*, 11 Ark. 544, 54 Am. Dec. 235; *Babb v. Bruere*, 23 Mo. App. 606; *Ritter v. Kunkle*, 39 N. J. L. 262; *Fisher v. Hepburn*, 48 N. Y. 52; *Vaughn v. Congdon*, 56 Vt. 127, 48 Am. Rep. 758.

Jurisdiction is the authority by which judicial officers take cognizance of and decide causes; the power to hear and determine a cause; the right of a court or judge to pronounce a sentence of the law on a case or issue before him, acquired through due process of law. *Perry v. Morse*, 57 Vt. 509; *State v. Wakefield*, 60 Vt. 618.

1. *Ex p. Bennett*, 44 Cal. 88.

2. *Sherer v. Superior Court*, 96 Cal. 653.

3. **Distinction Between Jurisdiction and Its Exercise.** — *Decatur v. Paulding*, 14 Pet. (U. S.) 600; *Chase v. Christianson*, 41 Cal. 253; *Babb v. Bruere*, 23 Mo. App. 606; *Hagerman v. Sutton*, 91 Mo. 519.

4. *Gray v. Bowles*, 74 Mo. 423.

5. See, in this work, the title JUDGMENTS AND DECREES, ante, p. 756. And see ENCYC. OF PL. AND PR., articles APPEALS, vol. 2, p. 1; ERROR, WRIT OF, vol. 7, p. 817; CERTIORARI, vol. 4, p. 1; OPENING, VACATING, AND AMENDING JUDGMENTS, vol. 15, p. 202.

6. **When There Is Jurisdiction Judgments May Not Be Collaterally Attacked** — *England.* — *Brittain v. Kinnaird*, 1 Brod. & B. 432, 5 E. C. L. 137; *Doswell v. Impey*, 1 B. & C. 163, 8 E. C. L. 70, 1 Chit. Pl. 181; *Marshalsea's Case*, 10 Coke 68; *Noell v. Wells*, 1 Lev. 235; *Raine's Case*, 1 Ld. Raym. 262; *Rex v. Vincent*, 1



**Reason for the Rule.** — The rule against the collateral attack of judgments rendered or orders made by a court, with jurisdiction of the subject matter and the parties, has its foundation in sound considerations of public policy, and is

*Stra.* 481; *Rex v. Rhodes*, 1 *Stra.* 703; *Ladbroke v. James*, *Willes* 200; *Sollers v. Lawrence*, *Willes* 413.

*United States.* — *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 661; *Tilton v. Cofield*, 93 U. S. 165; *Keyes v. U. S.*, 109 U. S. 340; *White v. Crow*, 110 U. S. 183; *Herron v. Dater*, 120 U. S. 464; *Doolan v. Carr*, 125 U. S. 618; *Huling v. Kaw Valley R., etc., Co.*, 130 U. S. 559; *Cuddy, Petitioner*, 131 U. S. 280; *Veich v. Rice*, 131 U. S. 298; *Simmons v. Saul*, 138 U. S. 439; *New Orleans v. Gaines*, 138 U. S. 595; *Keny v. Lake Superior Ship Canal R., etc., Co.*, 144 U. S. 75; *Lytle v. Lansing*, 147 U. S. 59; *Dowell v. Applegate*, 152 U. S. 327; *Laing v. Rigney*, 160 U. S. 531; *McArthur v. Allen*, 3 Fed. Rep. 321; *Nettleton v. Mosier*, 3 Fed. Rep. 387; *May v. Logan County*, 30 Fed. Rep. 255; *In re Haynes*, 30 Fed. Rep. 770; *Walker v. Sturbans*, 38 Fed. Rep. 300; *Dunlevy v. Dunlevy*, 38 Fed. Rep. 459; *Needham v. Wilson*, 47 Fed. Rep. 97; *Bigelow v. Chatterton*, 51 Fed. Rep. 614; *Capwell v. Sipe*, 51 Fed. Rep. 667, *affirmed* in *Sipe v. Copwell*, 59 Fed. Rep. 970; *In re Eaton*, 51 Fed. Rep. 804; *Reinach v. Atlantic, etc., R. Co.*, 58 Fed. Rep. 43; *Elder v. Richmond Gold, etc., Min. Co.*, 58 Fed. Rep. 536; *Foltz v. St. Louis, etc., R. Co.*, 60 Fed. Rep. 320; *U. S. v. Debs*, 64 Fed. Rep. 739; *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. Rep. 790, *affirmed* in 76 Fed. Rep. 1005; *Foster v. Givens*, 67 Fed. Rep. 684; *Murray v. American Surety Co.*, 70 Fed. Rep. 341; *Rice v. Adler-Goldman Commission Co.*, 71 Fed. Rep. 151; *McLeod v. Receveur*, 71 Fed. Rep. 455, 34 U. S. App. 533; *Loyd v. Waller*, 74 Fed. Rep. 601; *State Nat. Bank v. Ellison*, 75 Fed. Rep. 354; *Lake County v. Platt*, 79 Fed. Rep. 567, 49 U. S. App. 216; *Foster v. Crawford*, 80 Fed. Rep. 991, *affirmed* in 83 Fed. Rep. 975; *Amory v. Amory*, 1 Fed. Cas. No. 334, 3 Biss. (U. S.) 270; *Delaware R. Co. v. Prettyman*, 17 Int. Rev. Rec. 99, 7 Fed. Cas. No. 3,767; *In re Osterhaus*, 6 Am. L. T. 519, 18 Fed. Cas. No. 10,609; *Pullan v. Kinsinger*, 2 Abb. (U. S.) 103, 20 Fed. Cas. No. 11,463; *Thompson v. Phillips*, *Bald.* (U. S.) 271, 23 Fed. Cas. No. 13,974; *Drury v. Ewing*, 1 Bond (U. S.) 544, 7 Fed. Cas. No. 4,095; *Derby v. Jacques*, 1 Cliff. (U. S.) 437, 7 Fed. Cas. No. 3,817; *Kempe v. Kennedy*, 5 Cranch (U. S.) 173; *Salisbury v. Sands*, 2 Dill. (U. S.) 270, 21 Fed. Cas. No. 12,251; *Smith v. Pomeroy*, 2 Dill. (U. S.) 414, 22 Fed. Cas. No. 13,092; *Grignon v. Astor*, 2 How. (U. S.) 319; *U. S. Bank v. Moss*, 6 How. (U. S.) 31; *Huff v. Hutchinson*, 14 How. (U. S.) 588; *Beauregard v. New Orleans*, 18 How. (U. S.) 503; *Sumner v. Moore*, 2 McLean (U. S.) 63, 23 Fed. Cas. No. 13,610; *Lincoln v. Tower*, 2 McLean (U. S.) 473; *Westerwelt v. Lewis*, 2 McLean (U. S.) 511; *Biggs v. Blue*, 5 McLean (U. S.) 150, 3 Fed. Cas. No. 1,403; *Farmers' L. & T. Co. v. McKinney*, 6 McLean (U. S.) 9, 8 Fed. Cas. No. 4,667; *Forsythe v. Ballance*, 6 McLean (U. S.) 567, 9 Fed. Cas. No. 4,951; *Cassels v. Vernon*, 5 Mason (U. S.) 335, 5 Fed. Cas. No. 2,503; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157;

*Ex p. Watkins*, 3 Pet. (U. S.) 203; *Voorhees v. Jackson*, 10 Pet. (U. S.) 471, *affirming* U. S. Bank v. Voorhees, 1 McLean (U. S.) 224, 2 Fed. Cas. No. 939; *Starr v. Stark*, 2 Sawy. (U. S.) 620, 642, 22 Fed. Cas. No. 13,317; *Tompkins v. Tompkins*, 1 Story (U. S.) 553, 24 Fed. Cas. No. 14,091; *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *McGoon v. Scales*, 9 Wall. (U. S.) 23; *Cooper v. Reynolds*, 10 Wall. (U. S.) 316; *McNitt v. Turner*, 16 Wall. (U. S.) 352; *Cornett v. Williams*, 20 Wall. (U. S.) 226; *Otis v. The Rio Grande*, 1 Woods (U. S.) 279. See also *Cocke v. Halsey*, 16 Pet. (U. S.) 87.

*Alabama.* — *McCartney v. Calhoun*, 11 Ala. 110; *Cole v. Conolly*, 16 Ala. 271; *Ex p. Maxwell*, 37 Ala. 363, 79 Am. Dec. 62; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Wymann v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Ryder v. Innerarity*, 4 Stew. & P. (Ala.) 14.

*Arkansas.* — *Evans v. Percifull*, 5 Ark. 429; *Borden v. State*, 11 Ark. 548, 54 Am. Dec. 238; *Fleming v. Johnson*, 26 Ark. 421; *Adams v. Thomas*, 44 Ark. 267; *Apel v. Kelsey*, 47 Ark. 413; *Currie v. Franklin*, 51 Ark. 338; *Alexander v. Hardin*, 54 Ark. 480.

*California.* — *Matter of Warfield*, 22 Cal. 64, 83 Am. Dec. 51.

*Colorado.* — *Corrigan v. Jones*, 14 Colo. 311. *District of Columbia.* — *U. S. Electric Lighting Co. v. Leiter*, 19 D. C. 575.

*Florida.* — *Sessions v. Stevens*, 1 Fla. 241, 46 Am. Dec. 341; *Ponder v. Moseley*, 2 Fla. 267, 48 Am. Dec. 194; *Price v. Winter*, 15 Fla. 106.

*Georgia.* — *Stell v. Glass*, 1 Ga. 486; *Bostwick v. Perkins*, 4 Ga. 47; *Rodgers v. Evans*, 8 Ga. 143, 52 Am. Dec. 390; *Preston v. Clark*, 9 Ga. 244; *Mobley v. Mobley*, 9 Ga. 250; *Tucker v. Harris*, 13 Ga. 8, 58 Am. Dec. 492; *Bradwell v. Spencer*, 16 Ga. 378; *Crutchfield v. State*, 24 Ga. 335; *Duer v. Thweatt*, 39 Ga. 578. See also *Robinson v. Lane*, 19 Ga. 397.

*Illinois.* — *Rigg v. Cook*, 9 Ill. 349; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Chesnut v. Marsh*, 12 Ill. 173; *Buckmaster v. Ryder*, 12 Ill. 207; *Lane v. Bommelmanner*, 17 Ill. 95; *Weiner v. Heintz*, 17 Ill. 259; *Horton v. Critchfield*, 18 Ill. 133, 65 Am. Dec. 701; *Cody v. Hough*, 20 Ill. 43; *Iverson v. Loberg*, 26 Ill. 179, 79 Am. Dec. 364; *Stow v. Kimball*, 28 Ill. 93; *Fitzgibbon v. Lake*, 29 Ill. 165; *Harris v. Lester*, 30 Ill. 307; *Bowen v. Bond*, 80 Ill. 351; *Wimberly v. Hurst*, 33 Ill. 166, 83 Am. Dec. 295; *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217; *Moore v. Neil*, 39 Ill. 261; *Wight v. Wallbaum*, 39 Ill. 554; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Huls v. Buntin*, 47 Ill. 396; *Feaster v. Fleming*, 56 Ill. 457; *Thomson v. Morris*, 57 Ill. 333; *Gartside v. Outley*, 58 Ill. 210, 11 Am. Rep. 59; *Hobson v. Ewan*, 62 Ill. 146; *Moffitt v. Moffitt*, 69 Ill. 641; *Nichols v. Mitchell*, 70 Ill. 258; *Whitman v. Heneberry*, 73 Ill. 109; *Mulford v. Stalzenback*, 46 Ill. 303; *Wing v. Dodge*, 80 Ill. 564; *Hernandez v. Drake*, 81 Ill. 34; *Richards v. People*, 81 Ill. 551; *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 343; *Murphy v. Williamson*, 85 Ill. 149; *Spring v. Kane*, 86 Ill. 583; *Hunter v. Stone-*



intended to give permanency to all judicial transactions and to rights acquired thereunder. If judgments and decrees of courts of competent jurisdiction could be collaterally avoided, there would be no certainty, no security in judi-

burner, 92 Ill. 75; *Gardner v. Maroney*, 95 Ill. 552; *Wenner v. Thornton*, 98 Ill. 156; *Allman v. Taylor*, 101 Ill. 185; *Thompson v. Frew*, 107 Ill. 478; *St. Louis, etc., Coal, etc., Co. v. Sandoval Coal, etc., Co.*, 111 Ill. 32; *Matthews v. Hoff*, 113 Ill. 90; *Reid v. Morton*, 119 Ill. 118; *Commercial Nat. Bank v. Burch*, 141 Ill. 527; *Schott v. Youree*, 142 Ill. 233, *affirming* 41 Ill. App. 476; *Swift v. Yanaway*, 153 Ill. 197; *Reedy v. Camfield*, 159 Ill. 254; *Fitzpatrick v. Rutter*, 160 Ill. 282, *affirming* 58 Ill. App. 532; *Field v. Peeples*, 180 Ill. 376; *McCormick v. Kimmel*, 4 Ill. App. 121; *French v. Baker*, 21 Ill. App. 432; *Maple v. Havenhill*, 37 Ill. App. 311; *Paulissen v. Look*, 38 Ill. App. 510; *Johnson v. Miller*, 50 Ill. App. 60, 55 Ill. App. 168; *Magnusson v. Cronholm*, 51 Ill. App. 473; *Buckmaster v. Jackson*, 4 Ill. 104; *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418.

*Indiana*. — *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 358; *Ziegenhager v. Doe*, 1 Ind. 296; *Dequindre v. Williams*, 31 Ind. 444; *Doe v. Smith*, 1 Ind. 451; *Doe v. Harvey*, 3 Ind. 104; *Evans v. Ashby*, 22 Ind. 15; *Hawkins v. Hawkins*, 28 Ind. 66; *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213; *Davidson v. Koehler*, 76 Ind. 398; *Weston v. Lumley*, 33 Ind. 486; *Oppenheim v. Pittsburgh, etc., R. Co.*, 85 Ind. 471; *Dowell v. Lahr*, 97 Ind. 146; *Lantz v. Maffett*, 102 Ind. 23; *Exchange Bank v. Ault*, 102 Ind. 322; *Baltimore, etc., R. Co. v. North*, 103 Ind. 486; *Sims v. Gay*, 109 Ind. 501; *Walker v. Hill*, 111 Ind. 223; *Ely v. Morgan County*, 112 Ind. 361; *Ray v. Doughty*, 4 Blackf. (Ind.) 115; *Doe v. Harvey*, 5 Blackf. (Ind.) 487.

*Iowa*. — *Mampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 118; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Pursley v. Hayes*, 22 Iowa 11, 92 Am. Dec. 350; *Farmers, etc., Bank v. Mather*, 30 Iowa 283; *Moore v. Jeffers*, 53 Iowa 202; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Johnson v. Carson*, 3 Greene (Iowa) 499; *Shaffer v. Bolander*, 4 Greene (Iowa) 201.

*Kansas*. — *Mills v. Ralston*, 10 Kan. 206.

*Louisiana*. — *Lalanne v. Moreau*, 13 La. 431; *Orr v. Thomas*, 3 La. Ann. 584; *Jeannet v. Ricker*, 10 La. Ann. 67; *Hebrard's Succession*, 18 La. Ann. 494; *Mitchell v. Levi*, 23 La. Ann. 630; *Pinniger's Succession*, 25 La. Ann. 53; *Wisdom v. Parker*, 31 La. Ann. 52; *Folger v. Slaughter*, 33 La. Ann. 341; *Crawford v. Binion*, 46 La. Ann. 1261; *Dufour v. Camfranc*, 11 Mart. (La.) 607, 13 Am. Dec. 360.

*Maine*. — *Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134; *Granger v. Clark*, 22 Me. 128; *Smith v. Keen*, 26 Me. 411.

*Maryland*. — *Ranoul v. Griffie*, 3 Md. 54; *Wilson v. Ireland*, 4 Md. 444; *Cook v. Carroll*, 6 Md. 104; *Edelen v. Edelen*, 6 Md. 295; *Deal v. Harris*, 8 Md. 43, 63 Am. Dec. 687; *Groome v. Lewis*, 23 Md. 137, 87 Am. Dec. 563; *Cockey v. Cole*, 28 Md. 276, 92 Am. Dec. 686; *Schley v. Baltimore*, 29 Md. 34; *Dorsey v. Garey*, 30 Md. 489; *Manton v. Hoyt*, 43 Md. 264; *State v. Ramsburg*, 43 Md. 325; *Dohohue v. Daniel*, 58 Md. 595; *Long v. Long*, 62 Md. 33; *Hunter v. Hatton*, 4 Gill (Md.) 115, 45 Am. Dec. 117;

*Lloyd v. Burgess*, 4 Gill (Md.) 187; *Powles v. Dilley*, 9 Gill (Md.) 222; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Taylor v. Phelps*, 1 Har. & G. (Md.) 492; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42; *Fishwick v. Sewell*, 4 Har. & J. (Md.) 393; *Barney v. Patterson*, 6 Har. & J. (Md.) 182.

*Massachusetts*. — *Perkins v. Fairfield*, 11 Mass. 227; *Jacobs v. Hull*, 12 Mass. 24; *Homer v. Fish*, 1 Pick. (Mass.) 435, 11 Am. Dec. 218.

*Michigan*. — *Osman v. Traphagen*, 23 Mich. 80; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

*Minnesota*. — *Kipp v. Fullerton*, 4 Minn. 473; *Simpson v. Cook*, 24 Minn. 180; *Davis v. Hudson*, 29 Minn. 27; *Culver v. Hardenbergh*, 37 Minn. 225.

*Mississippi*. — *Hardy v. Gholson*, 26 Miss. 70; *Wall v. Wall*, 28 Miss. 409; *Cason v. Cason*, 31 Miss. 578; *Pollock v. Buie*, 43 Miss. 140; *Kelly v. Harrison*, 69 Miss. 856; *Gillespie v. Hauenstein*, 72 Miss. 838; *Byrd v. State*, 1 How. (Miss.) 163; *Gildart v. Staike*, 1 How. (Miss.) 450; *A. B. Smith Co. v. Holmes County Bank*, (Miss. 1895) 18 So. Rep. 847; *Vicksburg Grocery Co. v. Brennan*, (Miss. 1896) 20 So. Rep. 845.

*Missouri*. — *Perryman v. State*, 8 Mo. 208; *McNair v. Biddle*, 8 Mo. 257; *Jones v. Talbot*, 9 Mo. 121; *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133; *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Chouteau v. Nuckolls*, 20 Mo. 442; *Hendrickson v. St. Louis, etc., R. Co.*, 34 Mo. 188, 84 Am. Dec. 76; *O'Reilly v. Nicholson*, 45 Mo. 160; *Massey v. Scott*, 49 Mo. 278; *Ellis v. Jones*, 51 Mo. 180; *Adams v. Larrimore*, 51 Mo. 130; *Jeffries v. Wright*, 51 Mo. 215; *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183; *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484; *Gray v. Bowles*, 74 Mo. 419; *State v. Evans*, 83 Mo. 319; *State v. Donegan*, 83 Mo. 374; *Yeoman v. Younger*, 83 Mo. 424; *Lewis v. Morrow*, 89 Mo. 174; *Rosenheim v. Hartsock*, 90 Mo. 357; *Camden v. Plain*, 91 Mo. 117; *Hagerman v. Sutton*, 91 Mo. 519; *Keith, etc., Coal Co. v. Bingham*, 97 Mo. 196; *Postlewaite v. Ghieslin*, 97 Mo. 420; *McClanahan v. West*, 100 Mo. 309; *McClellan v. St. Louis, etc., R. Co.*, 103 Mo. 295; *Murphy v. De France*, 105 Mo. 53; *Gibbs v. Southern*, 116 Mo. 204; *Macey v. Stark*, 116 Mo. 481; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646; *Charley v. Kelley*, 120 Mo. 134; *Munday v. Leeper*, 120 Mo. 417; *Kopp v. Blessing*, 121 Mo. 391; *Rogers v. Johnson*, 125 Mo. 202; *Lovitt v. Russell*, 138 Mo. 474; *Chrisman v. Divinia*, 141 Mo. 122; *State v. Wear*, 145 Mo. 162; *McKenzie v. Donnell*, 151 Mo. 431; *Cox v. Boyce*, 152 Mo. 576; *De Graw v. De Graw*, 7 Mo. App. 121; *Babb v. Bruere*, 23 Mo. App. 604; *Black v. Ross*, 37 Mo. App. 250; *Kansas City v. Winner*, 58 Mo. App. 299.

*Montana*. — *Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557.

*Nebraska*. — *Smiley v. Sampson*, 1 Neb. 56; *Watson v. Ulbrich*, 18 Neb. 186; *Van Sant v. Butler*, 19 Neb. 354; *State v. Nelson*, 21 Neb.



cial actions. No confidence could be reposed in titles acquired through judicial proceedings, for no protection would be afforded to innocent purchasers. If the validity of a judgment could be contested collaterally, a second judg-

572; *Connelly v. Edgerton*, 22 Neb. 82; *Lininger v. Glenn*, 33 Neb. 187; *Yeatman v. Yeatman*, 35 Neb. 422; *Gandy v. Jolly*, 35 Neb. 711, 37 Am. St. Rep. 460; *Schroeder v. Wilcox*, 39 Neb. 136; *Wheeler v. Barker*, 51 Neb. 846.

*Nevada*. — *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742.

*New Hampshire*. — *Gorrill v. Whitier*, 3 N. H. 265; *Kittredge v. Emerson*, 15 N. H. 261; *Weld v. Locke*, 18 N. H. 141; *Morse v. Presby*, 25 N. H. 299; *State v. Richmond*, 26 N. H. 232; *Nichols v. Smith*, 26 N. H. 298; *Lamprey v. Nudd*, 29 N. H. 299; *Claggett v. Simes*, 31 N. H. 56; *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342; *White v. Landaff*, 35 N. H. 128; *State v. Rye*, 35 N. H. 368; *Moulton v. Wendell*, 37 N. H. 406; *Gay v. Smith*, 38 N. H. 171; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111; *Brown v. Brown*, 50 N. H. 538; *Fowler v. Brooks*, 64 N. H. 423; *State v. Kennedy*, 65 N. H. 247; *Sherman v. Hanno*, 66 N. H. 160; *Pendexter v. Cate*, 66 N. H. 270; *Fowler v. Beckman*, 66 N. H. 424; *Holland v. Laconia Bldg., etc., Assoc.*, 68 N. H. 480; *Robertson v. Hale*, 68 N. H. 538.

*New Jersey*. — *Diehl v. Page*, 3 N. J. Eq. 143; *Pittinger v. Pittinger*, 3 N. J. Eq. 156; *McCahill v. Equitable L. Assur. Co.*, 26 N. J. Eq. 531; *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 52 N. J. Eq. 58; *Den v. Zellers*, 7 N. J. L. 153; *Harshorne v. Johnson*, 7 N. J. L. 108; *Den v. O'Hanlon*, 21 N. J. L. 582; *Den v. Newark India Rubber Co.*, 24 N. J. L. 467; *Den v. Gaston*, 24 N. J. L. 818; *Stokes v. Middleton*, 28 N. J. L. 32; *Russell v. Work*, 35 N. J. L. 316; *Thompson v. Board of Education*, 57 N. J. L. 628.

*New York*. — *Wesson v. Chamberlain*, 3 N. Y. 331; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *People v. Scurtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Skinnion v. Kelley*, 18 N. Y. 355; *Bascom v. Smith*, 31 N. Y. 595; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Buffalo etc. R. Co. v. Erie County*, 48 N. Y. 99; *Hallock v. Dominy*, 69 N. Y. 238; *Delafield v. Brady*, 108 N. Y. 524; *Cherry Creek v. Becker*, 123 N. Y. 161; *Bolton v. Schriever*, 135 N. Y. 65; *Matter of Stilwell*, 139 N. Y. 337; *Hunting v. Blun*, 143 N. Y. 511; *Roerber v. Dawson*, (N. Y. City Ct. Gen. T.) 22 Abb. N. Cas. (N. Y.) 73, 14 Civ. Pro. (N. Y.) 354, 15 Civ. Pro. (N. Y.) 417; *Welde v. Henderson*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 176; *Gilmore v. Ham*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 48; *Gomez v. Gomez*, 81 Hun (N. Y.) 566 affirmed in 147 N. Y. 195; *Farrington v. New York*, 83 Hun (N. Y.) 124; *O'Connor v. Felix*, 87 Hun (N. Y.) 179, affirmed in 147 N. Y. 614; *Dreyfuss v. Seale*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 551; *Conant v. Wright*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 321; *Trowbridge v. Hayes*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 234; *Hennessey v. Sweeney*, (Municipal Ct.) 28 Civ. Pro. (N. Y.) 332; *Miller v. Brinkerhoff*, 4 Den. (N. Y.) 118, 47 Am. Dec. 242; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Cole v. Hall*, 2 Hill (N. Y.) 625; *Brooks v. New York*, 57 Hun (N. Y.) 104; *Ontario v. Andes First Nat. Bank*, 59 Hun (N.

Y.) 29; *Anderson v. Carr*, 65 Hun (N. Y.) 179, affirmed in 137 N. Y. 565; *Platner v. Best*, 11 Johns. (N. Y.) 530; *Holmes v. Remsen*, 20 Johns. (N. Y.) 268, 11 Am. Dec. 269; *Brown v. Crowl*, 5 Wend. (N. Y.) 298.

*North Carolina*. — *Grier v. Rhyne*, 67 N. Car. 338; *Grantham v. Kennedy*, 91 N. Car. 148; *Fowler v. Poor*, 93 N. Car. 466; *Hare v. Hollomon*, 94 N. Car. 14; *Sumner v. Sessoms*, 94 N. Car. 371; *Burgess v. Kirby*, 94 N. Car. 575; *Ward v. Lowndes*, 96 N. Car. 367; *Albertson v. Williams*, 97 N. Car. 264; *Brittain v. Mull*, 99 N. Car. 483; *Knott v. Taylor*, 99 N. Car. 511, 6 Am. St. Rep. 547; *Spencer v. Credle*, 102 N. Car. 68; *Tyson v. Belcher*, 102 N. Car. 112; *Thomas v. Hunsucker*, 108 N. Car. 720; *Williams v. Whitaker*, 110 N. Car. 393; *State v. Ridley*, 114 N. Car. 827; *Bender v. Askew*, 3 Dev. L. (14 N. Car.) 149, 22 Am. Dec. 714; *Pigot v. Davis*, 3 Hawks (10 N. Car.) 25; *Burke v. Elliott*, 4 Ired. L. (26 N. Car.) 355, 42 Am. Dec. 142; *Williams v. Harrington*, 11 Ired. L. (33 N. Car.) 616, 53 Am. Dec. 421; *Craige v. Neely*, 6 Jones L. (51 N. Car.) 170; *Cheshire v. McCoy*, 7 Jones L. (52 N. Car.) 376.

*Ohio*. — *Dabney v. Manning*, 3 Ohio 321, 17 Am. Dec. 597; *Ludlow v. Johnston*, 3 Ohio 560, 17 Am. Dec. 609; *Ewing v. Higby*, 7 Ohio (pt. i.) 198, 28 Am. Dec. 633; *Doe v. Dugan*, 8 Ohio 107, 31 Am. Dec. 432; *Pillsbury v. Dugan*, 9 Ohio 117, 34 Am. Dec. 427; *Paine v. Mooreland*, 15 Ohio 435, 45 Am. Dec. 585; *Boswell v. Sharp*, 15 Ohio 447; *Robb v. Irwin*, 15 Ohio 689; *Newnam v. Cincinnati*, 18 Ohio 323; *Snevely v. Lowe*, 18 Ohio 368; *Morgan v. Burnett*, 18 Ohio 535; *Fowler v. Whiteman*, 2 Ohio St. 270; *Sheldon v. Newton*, 3 Ohio St. 494; *Benson v. Cilley*, 8 Ohio St. 604; *Shroyer v. Richmond*, 16 Ohio St. 455; *Rayl v. Lapham*, 27 Ohio St. 452; *Heckman v. Adams*, 50 Ohio St. 305; *Arrowsmith v. Harmoning*, 42 Ohio St. 254, affirmed in 118 U. S. 194; *McCurdy v. Baughman*, 43 Ohio St. 78; *Slagle v. Entrekin*, 44 Ohio St. 637; *Root v. Davis*, 51 Ohio St. 29; *Osseforth v. Bussman*, 8 Ohio Cir. Ct. 694, 4 Ohio Cir. Dec. 391; *Righter v. Thornton*, 6 Ohio Dec. 7.

*Oregon*. — *Cason v. Stone*, 1 Oregon 39; *Warner v. Myers*, 3 Oregon 218; *Harper v. Harding*, 3 Oregon 361; *Dolph v. Barney*, 5 Oregon 192; *McRae v. Daviner*, 8 Oregon 63; *Woodward v. Baker*, 10 Oregon 493; *Nicklin v. Hobin*, 13 Oregon 406; *Morrill v. Morrill*, 20 Oregon 96, 23 Am. St. Rep. 95; *Leinenweber v. Brown*, 24 Oregon 548; *Clinton v. Portland*, 26 Oregon 410; *State v. Thompson*, 28 Oregon 296.

*Pennsylvania*. — *Davidson v. Thornton*, 7 Pa. St. 128; *Dickerson's Appeal*, 7 Pa. St. 255; *Miltimore v. Miltimore*, 40 Pa. St. 155; *Wilkinson's Appeal*, 65 Pa. St. 189; *Verner v. Carson*, 66 Pa. St. 440; *Sheetz v. Wynkoop*, 74 Pa. St. 198; *Murray v. Weigle*, 118 Pa. St. 159; *Com. v. Royer*, 161 Pa. St. 351; *Brundred v. Egbert*, 164 Pa. St. 615; *Eichman v. Hersker*, 170 Pa. St. 402; *Brooks's Estate*, 8 Pa. Co. Ct. 514, affirmed in 140 Pa. St. 84; *Cockley v. Rehr*, 12 Pa. Co. Ct. 343, 2 Pa. Dist. 331; *Heister v.*



ment, avoiding the effect of the first without a direct or express annulment of it, would be subject to a like attack, and there would be no termination of litigation by a final decision.

**Effect of Want of Jurisdiction.** — But while this is the effect which is to be given to judgments, orders, or decrees of courts with jurisdiction, if, on the other hand, a court does not have jurisdiction, it is wholly unimportant how precisely certain and technically correct its proceedings and decision may have been; its judgments and orders are mere nullities, and may not only be set aside at any time by the court in which they were rendered,<sup>1</sup> but they may be declared to be void by every court in which they are presented.<sup>2</sup>

*Fortner*, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; *Hecker v. Jarret*, 3 Binn. (Pa.) 404; *Com. v. Western Union Tel. Co.*, 2 Dauphin Co. Rep. (Pa.) 30; *Lewis v. Smith*, 2 S. & R. (Pa.) 142; *McPherson v. Cunliff*, 11 S. & R. (Pa.) 422, 14 Am. Dec. 642; *Stewart v. Stocker*, 13 S. & R. (Pa.) 199, 15 Am. Dec. 589, 1 *Watts* (Pa.) 135; *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509; *Hauer's Appeal*, 5 W. & S. (Pa.) 473; *Meason's Estate*, 4 *Watts* (Pa.) 347; *Tarbox v. Hays*, 6 *Watts* (Pa.) 398, 31 Am. Dec. 478; *Snyder v. Markel*, 8 *Watts* (Pa.) 416.

*South Carolina.* — *Ex p. Bond*, 9 S. Car. 80, 30 Am. Rep. 20; *Martin v. Bowie*, 37 S. Car. 102; *Kirk v. Duren*, 45 S. Car. 597; *Brown v. Gibson*, 1 *Nott & M.* (S. Car.) 326; *State v. Wakely*, 2 *Nott & M.* (S. Car.) 410.

*Tennessee.* — *Hurt v. Long*, 90 *Tenn.* 445; *Walker v. Cottrell*, 6 *Baxt.* (Tenn.) 257; *McGavock v. Bell*, 3 *Coldw.* (Tenn.) 512; *Wells v. Griffin*, 2 *Head* (Tenn.) 568; *Stanley v. Sharp*, 1 *Heisk.* (Tenn.) 417; *Barry v. Frayser*, 10 *Heisk.* (Tenn.) 206; *Thacker v. Chambers*, 5 *Humph.* (Tenn.) 313, 42 Am. Dec. 431; *Britain v. Cowen*, 5 *Humph.* (Tenn.) 315; *Stevenson v. McLean*, 5 *Humph.* (Tenn.) 332; *Lee v. Crossna*, 6 *Humph.* (Tenn.) 281; *Kilcrease v. Blythe*, 6 *Humph.* (Tenn.) 378; *Reams v. McNail*, 9 *Humph.* (Tenn.) 542; *Greenlaw v. Kernahan*, 4 *Sneed* (Tenn.) 371.

*Texas.* — *Sutherland v. DeLeon*, 1 *Tex.* 250, 46 Am. Dec. 100; *Yates v. Houston*, 3 *Tex.* 433; *Lynch v. Baxter*, 4 *Tex.* 431, 51 Am. Dec. 735; *Neill v. Hodge*, 5 *Tex.* 487; *Smith v. State*, 5 *Tex.* 578; *Toliver v. Hubbell*, 6 *Tex.* 166; *Dancy v. Stricklinge*, 15 *Tex.* 557, 65 Am. Dec. 179; *Bowers v. Chaney*, 21 *Tex.* 363; *Thouvenin v. Rodrigues*, 24 *Tex.* 468; *Giddings v. Steele*, 28 *Tex.* 732; *Boggess v. Howard*, 40 *Tex.* 153; *Gillenwaters v. Scott*, 62 *Tex.* 670; *Roberts v. McCamant*, 70 *Tex.* 743; *Hopkins v. Cravey*, 85 *Tex.* 189; *Moore v. Blagge*, 91 *Tex.* 151; *Maddox v. Summerlin*, 92 *Tex.* 483; *Galveston, etc., R. Co. v. McTigue*, 1 *Tex. App. Civ. Cas.*, § 457; *McClesky v. State*, 4 *Tex. Civ. App.* 322; *Corley v. Anderson*, 5 *Tex. Civ. App.* 213; *Bordages v. Higgins*, (Tex. 1892) 19 S. W. Rep. 446; *McSpadden v. Farmer*, (Tex. Civ. App. 1893) 23 S. W. Rep. 814; *Bouldin v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 133; *Halbert v. De Bode*, (Tex. Civ. App. 1894) 28 S. W. Rep. 58; *Brooks v. Powell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 809; *Moore v. Perry*, 13 *Tex. Civ. App.* 204; *Stone v. Ellis*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1077; *Thorpe v. Gordon*, (Tex. Civ. App. 1897) 43 S. W. Rep. 323; *Rowlett v. Williamson*, 18 *Tex. Civ. App.* 28; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016; *Johnson v. State*, 39 *Tex. Crim.* 625.

*Utah.* — *Ducheneau v. Ireland*, 5 *Utah* 110; *Matter of Amy*, 12 *Utah* 309.

*Vermont.* — *Walbridge v. Hall*, 3 *Vt.* 114; *Ex p. Kellog*, 6 *Vt.* 509; *Egerton v. Hart*, 8 *Vt.* 207; *Darling v. Bowen*, 10 *Vt.* 148; *Collamer v. Page*, 35 *Vt.* 387; *Wheeler v. Winn*, 38 *Vt.* 128; *Carleton v. Taylor*, 50 *Vt.* 220.

*Virginia.* — *Pennybacker v. Switzer*, 75 *Va.* 671; *Woodhouse v. Fillbates*, 77 *Va.* 317; *Wimbish v. Breeden*, 77 *Va.* 324; *Perkins v. Lane*, 82 *Va.* 59; *Allan v. Hoffman*, 83 *Va.* 129; *Lawson v. Moorman*, 85 *Va.* 880; *Pugh v. McCue*, 86 *Va.* 475; *Lemmon v. Herbert*, 92 *Va.* 653; *Harman v. Stearns*, 95 *Va.* 58; *Cox v. Thomas*, 9 *Gratt.* (Va.) 323; *Cline v. Catron*, 22 *Gratt.* (Va.) 378; *Lancaster v. Wilson*, 27 *Gratt.* (Va.) 624.

*Washington.* — *Webster v. Seattle Trust Co.*, 7 *Wash.* 642; *King v. Miller*, 10 *Wash.* 274.

*West Virginia.* — *Smith v. Henning*, 10 *W. Va.* 596; *Hall v. Hall*, 12 *W. Va.* 1; *Patton v. Merchants' Bank*, 12 *W. Va.* 587; *Keystone Bridge Co. v. Summers*, 13 *W. Va.* 476; *North Western Bank v. Hays*, 37 *W. Va.* 475; *Withrow v. Smithson*, 37 *W. Va.* 757; *Braddock First Nat. Bank v. Hyer*, 46 *W. Va.* 13. See also *Miller v. White*, 46 *W. Va.* 67.

*Wisconsin.* — *Wanzer v. Howland*, 10 *Wis.* 8; *Tallman v. McCarty*, 11 *Wis.* 401; *Sitzman v. Pacquette*, 13 *Wis.* 291; *Arnold v. Booth*, 14 *Wis.* 180; *Allie v. Schmitz*, 17 *Wis.* 169; *Gale v. Best*, 20 *Wis.* 48; *Iowa County v. Mineral Point R. Co.*, 24 *Wis.* 95; *Amory v. Amory*, 26 *Wis.* 152; *State v. Gary*, 33 *Wis.* 93; *Scott v. Reese*, 38 *Wis.* 636; *Salter v. Hilgen*, 40 *Wis.* 363; *Pier v. Amory*, 40 *Wis.* 571; *Geisinger v. Beyl*, 44 *Wis.* 258; *Salisbury v. Chadbourne*, 45 *Wis.* 74; *Egan v. Sengpiel*, 46 *Wis.* 703; *Oakes v. Buckley*, 49 *Wis.* 592; *Schobacher v. Germantown Farmers' Mut. Ins. Co.*, 59 *Wis.* 86; *Frankfurth v. Anderson*, 61 *Wis.* 107; *Newman v. Waterman*, 63 *Wis.* 612; *State v. Sloan*, 65 *Wis.* 651; *State v. Ozaukee County*, 71 *Wis.* 595; *Johnson v. Iron Belt Min. Co.*, 78 *Wis.* 159, *citing* 12 *AM. AND ENG. ENCYC. OF LAW* (1st ed.), p. 147, note 8; *Smith v. Wilson*, 87 *Wis.* 14; *Day v. Mertlock*, 87 *Wis.* 577; *Voelz v. Voelz*, 88 *Wis.* 461; *F. Mayer Boot, etc., Co. v. Falk*, 89 *Wis.* 216; *Ashland Nat. Bank v. Gregory*, 94 *Wis.* 455; *Jackson v. Astor*, 1 *Pin.* (Wis.) 137, 39 *Am. Dec.* 294, *affirmed* in *Grignon v. Astor*, 2 *How.* (U. S.) 319.

**1. Effect of Want of Jurisdiction.** — See the title OPENING, AMENDING, AND VACATING JUDGMENTS, ENCYC. OF PL. AND PR., vol. 15, p. 202.

**2. Judgments and Decrees Without Jurisdiction Void in All Courts.** — *England.* — *Ferguson v. Mahon*, 11 *Ad. & El.* 179, 39 *E. C. L.* 38; *Briscoe v. Stephens*, 2 *Bing.* 213, 9 *E. C. L.* 387;



**Distinction Between Void and Voidable Judgments.** — The void or voidable character of a judgment depends, then, upon whether the court by which it was rendered did or did not have jurisdiction. In other words, the distinction turns

*Ex p. Kinning*, 4 C. B. 525, 56 E. C. L. 525; *Brown v. Compton*, 8 F. & R. 424; *Buchanan v. Rucker*, 9 East 192; *Atty.-Gen. v. Hotham*, T. & R. 209; *Perkins v. Proctor*, 2 Wils. C. Pl. 383.

*United States.* — *Pennoyer v. Neff*, 95 U. S. 714; *Settlemyer v. Sullivan*, 97 U. S. 444; *In re Sawyer*, 124 U. S. 200; *Rich v. Mentz Tp.*, 134 U. S. 632; *Guaranty Trust Co. v. Green Cove R. Co.*, 139 U. S. 147; *Hovey v. Elliott*, 167 U. S. 409; *Moore v. Edgefield*, 32 Fed. Rep. 498; *Swift v. Meyers*, 37 Fed. Rep. 37; *Murray v. American Surety Co.*, 70 Fed. Rep. 341; *Shuford v. Cain*, 1 Abb. (U. S.) 302, 22 Fed. Cas. No. 12,823; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. (U. S.) 27, 1 Fed. Rep. 665; *Shriver v. Lynn*, 2 How. (U. S.) 43; *Hickey v. Stewart*, 3 How. (U. S.) 762; *Shelton v. Tiffin*, 6 How. (U. S.) 163; *Williamson v. Berry*, 8 How. (U. S.) 541; *Webster v. Reid*, 11 How. (U. S.) 437; *Dynes v. Hoover*, 20 How. (U. S.) 65; *Polk v. Steamer J. W. French*, 5 Hughes (U. S.) 432, *sub nom.* *The J. W. French*, 13 Fed. Rep. 919; *Lincoln v. Tower*, 2 McLean (U. S.) 473; *Westerwelt v. Lewis*, 2 McLean (U. S.) 511; *Elliott v. Peirsol*, 1 Pet. (U. S.) 328; *Thompson v. Tolmie*, 2 Pet. (U. S.) 163; *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466; *Thornhill v. Louisiana Bank*, 1 Woods (U. S.) 5, 23 Fed. Cas. No. 13,992; *Adams v. Terrell*, 4 Woods (U. S.) 341, 4 Fed. Rep. 800.

*Alabama.* — *McCartney v. Calhoun*, 11 Ala. 110; *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Bishop v. Hampton*, 15 Ala. 761; *Rood v. Eslava*, 17 Ala. 433; *Wightman v. Karsner*, 20 Ala. 446; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Lamar v. Marshall County*, 21 Ala. 772; *Ex p. Hill v. Confederate States*, 38 Ala. 452; *Lamar v. Gunter*, 39 Ala. 324; *Moody v. Bibb*, 50 Ala. 248; *Jones v. Ritter*, 56 Ala. 270; *Lewis v. Allred*, 57 Ala. 628; *Watts v. Frazer*, 80 Ala. 186; *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280.

*Arkansas.* — *McKnight v. Smith*, 5 Ark. 409; *Pelham v. Page*, 6 Ark. 148; *Jordan v. Jennings*, 7 Ark. 95; *Hall v. Fowlks*, 8 Ark. 176; *Ex p. Pile*, 9 Ark. 337; *McLain v. Taylor*, 9 Ark. 358; *Danley v. Rector*, 10 Ark. 225; *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Grimmett v. Askew*, 48 Ark. 151.

*California.* — *Whitwell v. Barbier*, 7 Cal. 54; *Gray v. Hawes*, 8 Cal. 562; *McMinn v. Whelan*, 27 Cal. 300; *King v. Randlett*, 33 Cal. 318; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *People v. O'Neil*, 47 Cal. 110; *Fraser v. Freelon*, 53 Cal. 644; *Ex p. Hollis*, 59 Cal. 407.

*Colorado.* — *Clayton v. Clayton*, 4 Colo. 410.

*Connecticut.* — *Grumoa v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Strong v. Strong*, 8 Conn. 412; *Holcomb v. Phelps*, 16 Conn. 137; *Sears v. Terry*, 26 Conn. 280.

*Delaware.* — *Green v. Clawson*, 5 Houst. (Del.) 159; *Frankel v. Satterfield*, 9 Houst. (Del.) 201.

*District of Columbia.* — *Stansbury v. Inglehart*, (D. C.) 19 Wash. L. Rep. 594; *Tenney v. Taylor*, 1 App. Cas. (D. C.) 223.

*Florida.* — *McGehee v. Wilkins*, 31 Fla. 83.

*Georgia.* — *Towns v. Springer*, 9 Ga. 130; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Central Bank v. Gibson*, 11 Ga. 453; *Macou R. Co. v. Davis*, 13 Ga. 68.

*Illinois.* — *Pardon v. Divire*, 23 Ill. 572; *White v. Jones*, 38 Ill. 160; *Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293; *Miller v. Handy*, 40 Ill. 448; *Campbell v. McCahan*, 41 Ill. 45; *Chase v. Dana*, 44 Ill. 262; *Huls v. Buntin*, 47 Ill. 396; *Botsford v. O'Conner*, 57 Ill. 72; *Haywood v. Collins*, 60 Ill. 328; *Grand Tower Min., etc., Co. v. Schirmer*, 64 Ill. 106; *Johnson v. Logan*, 68 Ill. 313; *Chambers v. Jones*, 72 Ill. 275; *Munroe v. People*, 102 Ill. 406; *St. Louis, etc., Coal, etc., Co. v. Sandoval Coal, etc., Co.*, 111 Ill. 32; *McCartney v. Osburn*, 118 Ill. 403; *Gardner v. Bunn*, 132 Ill. 403; *People v. Seelye*, 146 Ill. 189, *citing* AM. AND ENG. ENCY. OF LAW (1st ed.), p. 311; *Dickey v. Chicago*, 152 Ill. 468; *Payson v. People*, 175 Ill. 270, *citing* 12 AM. AND ENG. ENCY. OF LAW (1st ed.), p. 311; *Buckmaster v. Jackson*, 4 Ill. 104; *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418; *Bannon v. People*, 1 Ill. App. 496; *Baldwin v. Freyendall*, 10 Ill. App. 106, *affirmed in* Freyendall v. Baldwin, 103 Ill. 325.

*Indiana.* — *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 355; *Babbitt v. Doe*, 4 Ind. 355; *Miller v. Snyder*, 6 Ind. 1; *Cox v. Matthews*, 17 Ind. 367; *Mitchell v. Gray*, 18 Ind. 123; *Rice v. Loomis*, 28 Ind. 399; *Nicholson v. Stephens*, 47 Ind. 186; *Packard v. Mendenhall*, 42 Ind. 598; *Webb v. Carr*, 78 Ind. 455; *Chicago, etc., R. Co. v. Summers*, 113 Ind. 10, 3 Am. St. Rep. 650; *Louisville, etc., R. Co. v. Hubbard*, 116 Ind. 193; *Bliss v. Wilson*, 4 Blackf. (Ind.) 169; *Bryan v. Blythe*, 4 Blackf. (Ind.) 250; *Smith v. Myers*, 5 Blackf. (Ind.) 223; *Wort v. Finley*, 8 Blackf. (Ind.) 335.

*Iowa.* — *Long v. Burnett*, 13 Iowa 28, 81 Am. Dec. 420; *Osborn v. Cloud*, 23 Iowa 104, 92 Am. Dec. 413; *Melhop v. Doane*, 31 Iowa 397, 7 Am. Rep. 147; *Clark v. Little*, 41 Iowa 497; *Kline v. Kline*, 52 Iowa 386, 42 Am. Rep. 47; *Reed v. Wright*, 2 Greene (Iowa) 15; *Scott v. Babcock*, 3 Greene (Iowa) 133; *Seely v. Reid*, 3 Greene (Iowa) 374.

*Kansas.* — *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 Am. Dec. 446; *Hargis v. Morse*, 7 Kan. 415; *North v. Moore*, 8 Kan. 143; *Shields v. Miller*, 9 Kan. 390; *Foreman v. Carter*, 9 Kan. 674; *Matter of Dill*, 32 Kan. 691; *Looney v. Reeves*, 5 Kan. App. 279.

*Kentucky.* — *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; *Dorsey v. Kendall*, 8 Bush (Ky.) 294.

*Louisiana.* — *McDonough v. Gravier*, 9 La. 531; *Edwards v. Edwards*, 21 La. Ann. 611; *Beckham v. Henderson*, 23 La. Ann. 446; *Bledsoe v. Erwin*, 33 La. Ann. 615; *Lowry v. Erwin*, 6 Rob. (La.) 205.

*Maine.* — *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589.

*Maryland.* — *Clark v. Bryan*, 16 Md. 174; *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec.



upon a defective or wrongful execution of the power to hear and determine a cause, which renders the judgment merely voidable, and a lack of power to hear the cause at all, which renders the judgment void. In the one case the court is invested with the power to determine the rights of the parties, and

686; *Cockey v. Cole*, 28 Md. 276, 92 Am. Dec. 686; *Dorsey v. Garey*, 30 Md. 489. See also *U. S. Bank v. Merchants Bank*, 7 Gill (Md.) 429.

*Massachusetts*. — *Wales v. Willard*, 2 Mass. 120; *Sumner v. Parker*, 7 Mass. 79.

*Michigan*. — *Montgomery v. Henry*, 10 Mich. 19; *Perkins v. Perkins*, 16 Mich. 162; *Willard v. Fralick*, 31 Mich. 431; *Ehlers v. Stoeckle*, 37 Mich. 260; *Jewett v. Morris*, 41 Mich. 689; *Austin v. Curtis*, 41 Mich. 723; *Eberstein v. Oswalt*, 47 Mich. 254; *Durfee v. Abbott*, 50 Mich. 279; *Noyes v. Hillier*, 65 Mich. 636; *Hamilton v. Rogers*, 67 Mich. 135; *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Buck v. Sherman*, 2 Dougl. (Mich.) 176; *Greenvault v. Farmers'*, etc., Bank, 2 Dougl. (Mich.) 498.

*Minnesota*. — *Matter of Mosseau*, 30 Minn. 202.

*Mississippi*. — *Foute v. McDonald*, 27 Miss. 611; *Jenkins v. State*, 33 Miss. 382; *Tarleton v. Cox*, 45 Miss. 430; *Brown v. Board of Levee Com'rs*, 50 Miss. 468; *Cary v. Dixon*, 51 Miss. 593; *Ex p. Wimberly*, 57 Miss. 438; *Vick v. Vicksburg*, 1 How. (Miss.) 379, 31 Am. Dec. 167; *Campbell v. Brown*, 6 How. (Miss.) 106, 230; *Ex p. Heyfron*, 7 How. (Miss.) 127; *Gwin v. McCarroll*, 1 Smed. & M. (Miss.) 351; *Prentiss v. Mellen*, 1 Smed. & M. (Miss.) 521; *Zecharie v. Bowers*, 1 Smed. & M. (Miss.) 584, 40 Am. Dec. 111, 3 Smed. & M. (Miss.) 641. See also *Enos v. Smith*, 7 Smed. & M. (Miss.) 85; *Commercial Bank v. Martin*, 9 Smed. & M. (Miss.) 613.

*Missouri*. — *State v. Stephenson*, 12 Mo. 178; *State v. St. Gemme*, 31 Mo. 230; *Fithian v. Monks*, 43 Mo. 502; *Stamps v. Bridwell*, 57 Mo. 22; *Hewitt v. Weatherby*, 57 Mo. 276; *Brown v. Woody*, 64 Mo. 547; *Russell v. Grant*, 122 Mo. 161, 43 Am. St. Rep. 563; *Fischer v. Siekmann*, 125 Mo. 165; *Harness v. Cravens*, 126 Mo. 233; *State v. St. Louis*, 1 Mo. App. 503; *Jones v. Pharis*, 59 Mo. App. 254.

*Nebraska*. — *Johnson v. Parrotte*, 46 Neb. 51. *Nevada*. — *Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 738.

*New Hampshire*. — *Smith v. Knowlton*, 11 N. H. 194; *Kittredge v. Emerson*, 15 N. H. 227; *Sanborn v. Fellows*, 22 N. H. 473; *Morse v. Presby*, 25 N. H. 299; *State v. Richmond*, 26 N. H. 232; *Nichols v. Smith*, 26 N. H. 300; *Eaton v. Badger*, 33 N. H. 228; *Haywood v. Charlestown*, 34 N. H. 23; *Carleton v. Washington Ins. Co.*, 35 N. H. 162; *Thompson v. Carroll*, 36 N. H. 21; *Smith v. Northumberland*, 36 N. H. 38; *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470; *Gay v. Smith*, 38 N. H. 174; *Cate v. Cate*, 44 N. H. 211; *Batchelder v. Currier*, 45 N. H. 460; *Manning v. Cogan*, 49 N. H. 331; *Wilbur v. Abbot*, 60 N. H. 40; *Eastman v. Dearborn*, 63 N. H. 364.

*New Jersey*. — *Young v. Ribstone*, 16 N. J. Eq. 227, 84 Am. Dec. 153; *Buckley v. Perrine*, 54 N. J. Eq. 285; *Moulin v. Trenton Mut. L., etc., Ins. Co.*, 24 N. J. L. 222.

*New York*. — *Staples v. Fairchild*, 3 N. Y.

41; *Hastings v. Farmer*, 4 N. Y. 293; *Miller v. Adams*, 52 N. Y. 409; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 216; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Craig v. Andes*, 93 N. Y. 405; *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447; *Beardslee v. Dolge*, 143 N. Y. 160, 42 Am. St. Rep. 707; *Losey v. Stanley*, 147 N. Y. 560; *Miller v. Amsterdam*, 149 N. Y. 288; *Warren v. Union Bank*, 157 N. Y. 259; *O'Donoghue v. Boies*, 159 N. Y. 87; *Matter of Radde*, 2 Connolly (N. Y.) 293; *McGill v. Weill*, (County Ct.) 19 Civ. Pro. (N. Y.) 43; *Bonnet v. Lachman*, 65 Hun (N. Y.) 554; *Latham v. Edgerton*, 9 Cow. (N. Y.) 227; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37, 4 Am. Dec. 321; *Jackson v. Brown*, 3 Johns. (N. Y.) 459; *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; *Mills v. Martin*, 19 Johns. (N. Y.) 33; *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; *Denning v. Corwin*, 11 Wend. (N. Y.) 648.

*North Carolina*. — *McKee v. Angel*, 90 N. Car. 60; *Spillman v. Williams*, 91 N. Car. 483; *Stancill v. Gay*, 92 N. Car. 462; *Springer v. Shavender*, 116 N. Car. 12, 47 Am. St. Rep. 791; *Balk v. Harris*, 122 N. Car. 64; *Burke v. Elliott*, 4 Ired. L. (26 N. Car.) 555, 42 Am. Dec. 142; *Deaver v. Keith*, 5 Ired. L. (27 N. Car.) 374; *Stallings v. Gully*, 3 Jones L. (48 N. Car.) 344; *Perry v. Mendenhall*, 4 Jones Eq. (57 N. Car.) 157; *Matter of Ambrose*, Phil. L. (61 N. Car. 91; *Armstrong v. Harshaw*, 1 Dev. L. (12 N. Car.) 187; *Skinner v. Moore*, 2 Dev. & B. L. (19 N. Car.) 138, 30 Am. Dec. 155. See also *Burgess v. Kirby*, 94 N. Car. 579; *Spencer v. Credle*, 102 N. Car. 73; *Hooks v. Moses*, 8 Ired. L. (30 N. Car. 88).

*Ohio*. — *Moore v. Starks*, 1 Ohio St. 369; *Gilliland v. Sellers*, 2 Ohio St. 223; *Buchanan v. Roy*, 2 Ohio St. 251; *Sheldon v. Newton*, 3 Ohio St. 499; *Dayton, etc., R. Co. v. Marshall*, 11 Ohio St. 501; *Adams v. Jeffries*, 12 Ohio 253, 40 Am. Dec. 478; *Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197; *Scobey v. Gano*, 35 Ohio St. 550; *Dengenhart v. Cracraft*, 36 Ohio St. 549; *Wehrle v. Wehrle*, 39 Ohio St. 365; *Spoors v. Coen*, 44 Ohio St. 497.

*Oregon*. — *Norman v. Zieber*, 3 Oregon 197; *Northcut v. Lemery*, 8 Oregon 317; *Odell v. Campbell*, 9 Oregon 298; *Woodward v. Baker*, 10 Oregon 493; *Victor v. Davis*, 11 Oregon 447; *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808.

*Pennsylvania*. — *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Gordon's Appeal*, 93 Pa. St. 361; *Fowler v. Eddy*, 110 Pa. St. 117; *Wall v. Wall*, 123 Pa. St. 545, 10 Am. St. Rep. 549; *Cassel v. Seibert*, 1 Dauphin Co. Rep. (Pa.) 16; *Camp v. Wood*, 10 Watts (Pa.) 118.

*South Carolina*. — *James v. Smith*, 2 S. Car. 188; *Lyles v. Bolles*, 8 S. Car. 258; *Adams v. Agnew*, 15 S. Car. 36; *Turner v. Malone*, 24 S.



no irregularity or error in the execution of the power can prevent its judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication; while in the other, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction, of law.

**2. Application of the Rules in General.** — The application of these rules will be found illustrated in a great number of titles in this work,<sup>1</sup> and only a few of the more usual instances will be here given.

**3. Decrees in Equity.** — The rules which determine the validity of judgments when rendered with or without jurisdiction are applied not only to judgments at law but to all kinds of decrees in equity,<sup>2</sup> such as injunction decrees,<sup>3</sup> decrees quieting title,<sup>4</sup> decrees reforming or canceling instruments,<sup>5</sup> decrees in suits for specific performance,<sup>6</sup> decrees in receivership

Car. 401; *Agnew v. Adams*, 26 S. Car. 101; *Stanley v. Stanley*, 35 S. Car. 94; *Hill v. Robertson*, 1 Strobh. L. (S. Car.) 1.

*South Dakota.* — *Griffith v. Hubbard*, 9 S. Dak. 15.

*Tennessee.* — *Starkey v. Hammer*, 1 Baxt. (Tenn.) 438; *Williams v. Harris*, 4 Sneed (Tenn.) 332.

*Texas.* — *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Harris v. Graves*, 26 Tex. 577; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Hollingsworth v. Bagley*, 35 Tex. 345; *Morris v. Halbert*, 36 Tex. 19; *Walker v. Myers*, 36 Tex. 203; *Glass v. Smith*, 66 Tex. 548; *Paul v. Willis*, 69 Tex. 261; *Bender v. Damon*, 72 Tex. 92; *Roller v. Ried*, 87 Tex. 69; *Mitchell v. Runkle*, 25 Tex. Supp. 132; *Witt v. Kaufman*, 25 Tex. Supp. 384; *Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 457; *Caplen v. Compton*, 5 Tex. Civ. App. 410. See also *McCarthy v. Burtis*, 3 Tex. Civ. App. 439.

*Utah.* — *Kenyon v. Kenyon*, 3 Utah 435.

*Vermont.* — *State v. Wakefield*, 60 Vt. 618; *Barrett v. Crane*, 16 Vt. 246; *Driscoll v. Place*, 44 Vt. 252; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758.

*Virginia.* — *Wade v. Hancock*, 76 Va. 620; *Lavell v. McCurdy*, 77 Va. 763; *Dillard v. Central Virginia Iron Co.*, 82 Va. 734; *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 262; *Anthony v. Kasey*, 83 Va. 338, 5 Am. St. Rep. 277; *Gresham v. Ewell*, 85 Va. 1; *Blanton v. Carroll*, 86 Va. 539; *Staunton Perpetual Bldg., etc., Co. v. Haden*, 92 Va. 201; *Underwood v. McVeigh*, 23 Gratt. (Va.) 418; *Gray v. Stuart*, 33 Gratt. (Va.) 351.

*West Virginia.* — *Houston v. McCluney*, 8 W. Va. 135; *Fowler v. Lewis*, 36 W. Va. 112; *Hoback v. Miller*, 44 W. Va. 635.

*Wisconsin.* — *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269; *Falkner v. Guild*, 10 Wis. 563; *Pollard v. Wegener*, 13 Wis. 569; *Carr v. Commercial Bank*, 16 Wis. 52; *Gibbs v. Shaw*, 17 Wis. 197, 84 Am. Dec. 737; *Fladland v. Delaplaine*, 19 Wis. 459; *Frederick v. Pacquette*, 19 Wis. 541; *Bresee v. Stiles*, 22 Wis. 120; *Blodgett v. Hitt*, 29 Wis. 169; *Chase v. Ross*, 36 Wis. 267; *Bohlman v. Green Bay, etc., R. Co.*, 40 Wis. 157; *Ruth v. Oberbrunner*, 40 Wis. 238.

1. In addition to the titles specifically referred to in the subsequent pages of this division see the following: *BOARDS OF HEALTH*, vol. 4, p. 596; *CITIZENSHIP*, vol. 6, p. 24; *CLOUD*

*ON TITLE*, vol. 6, p. 162; *COUNTY COMMISSIONERS*, vol. 7, p. 975; *COUNTY SEAT*, vol. 7, p. 1011; *ESCAPE*, vol. 11, p. 258; *ESCHEAT*, vol. 11, p. 315; *FALSE IMPRISONMENT*, vol. 12, p. 719; *FENCES*, vol. 12, p. 1037; *FINAL JUDGMENTS AND DECREES*, vol. 13, p. 23; *FOREIGN EXECUTORS AND ADMINISTRATORS*, vol. 13, p. 915; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *GUARDIAN AD LITEM*, vol. 15, p. 2; *HIGHWAYS*, vol. 15, p. 343; *IMPROVEMENTS*, vol. 16, p. 62; *JEOPARDY, ante*, p. 580; *JUDICIAL SALES, ante*, p. 948; *LIBEL AND SLANDER*; *PERJURY*; *RECEIVERS*; *SHERIFFS' SALES*; *STREETS AND SIDEWALKS*.

**2. Decrees in Equity** — *United States.* — *Tilton v. Cofield*, 93 U. S. 165.

*Alabama.* — *Goodman v. Winter*, 64 Ala. 431, 38 Am. Rep. 13.

*Illinois.* — *Magnusson v. Cronholm*, 51 Ill. App. 473; *Hernandez v. Drake*, 81 Ill. 34.

*Maryland.* — *Cockey v. Cole*, 28 Md. 276, 92 Am. Dec. 686; *Schley v. Baltimore*, 29 Md. 34; *Dorsey v. Garey*, 30 Md. 489; *State v. Rambsburg*, 43 Md. 335; *Hunter v. Hatton*, 4 Gill (Md.) 115, 45 Am. Dec. 117.

*New York.* — *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

*Tennessee.* — *Thacker v. Chambers*, 5 Humph. (Tenn.) 313, 42 Am. Dec. 431; *Britain v. Cowen*, 5 Humph. (Tenn.) 315; *Kilcrease v. Blythe*, 6 Humph. (Tenn.) 378; *McGavock v. Bell*, 3 Coldw. (Tenn.) 512; *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 371; *Barry v. Frayser*, 10 Heisk. (Tenn.) 206.

*Virginia.* — *Pugh v. McCue*, 86 Va. 475; *Lemmon v. Herbert*, 92 Va. 653.

In *Cook v. Carroll*, 6 Md. 112, it was held that where a patent to lands purchased of the state was issued by a court of chancery which had jurisdiction to grant the patent, the chancellor in granting the patent acted judicially, and his act could not be collaterally reviewed.

**3. Same — Injunctions.** — *Drury v. Ewing*, 1 Bond. (U. S.) 544, 7 Fed. Cas. No. 4,095; *State v. Kennedy*, 65 N. H. 247; *Fowler v. Beckman*, 66 N. H. 424. See the title *INJUNCTIONS*, vol. 16, p. 339.

**4. Same — Decrees Quieting Title.** — *Watson v. Ulbrich*, 18 Neb. 186.

**5. Same — Decrees Reforming or Canceling Instruments.** — *Patton v. Merchants' Bank*, 12 W. Va. 587. See the title *REFORMATION AND CANCELLATION*.

**6. Same — Decrees in Suits for Specific Performance.** — *Sexson v. Barker*, 172 Ill. 361; *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 358; *Boswell*



proceedings,<sup>1</sup> decrees in sequestration proceedings,<sup>2</sup> decrees relating to the enforcement of trusts,<sup>3</sup> etc.

4. **Foreign Judgments.** — The rule governing the effect of the possession and want of jurisdiction is applicable to foreign judgments, judgments of sister states, to judgments of federal courts when presented in state courts and *vice versa*,<sup>4</sup> so that when the court rendering the judgment in question had jurisdiction the judgment cannot be attacked collaterally for errors or irregularities,<sup>5</sup> but if there was a want of jurisdiction the judgment will be given no effect.<sup>6</sup>

5. **Proceedings by Attachment.** — Where the court has jurisdiction, a judgment in an attachment suit cannot be collaterally attacked for errors or irregularities in the proceedings.<sup>7</sup> But where the court does not have jurisdiction the judgment is void and no title can be acquired under the sale.<sup>8</sup>

6. **Garnishment Proceedings.** — The rules governing the effect of the posses-

*v. Sharp*, 15 Ohio 447. See the title SPECIFIC PERFORMANCE.

1. **Same — Decrees in Receivership Proceedings.** — *Eichman v. Hersker*, 170 Pa. St. 402. See the title RECEIVERS.

2. **Same — Decrees in Sequestration Proceedings.** — *Whittlesey v. Frantz*, 74 N. Y. 457; *Hunting v. Blun*, 143 N. Y. 511. See the title SEQUESTRATION.

3. **Decrees in Proceedings Relating to Trusts.** — See the title TRUSTS AND TRUSTEES.

The rule that a decree rendered by a court with jurisdiction cannot be collaterally attacked has been applied in favor of a decree of a court of chancery authorizing trustees to make leases, (*Gomez v. Gomez*, 81 Hun (N. Y.) 566, *affirmed* in 147 N. Y. 195), a decree of sale made in a suit to set aside a deed of trust as fraudulent and void, (*Jones v. Talbot*, 9 Mo. 121), a decree authorizing a trustee to sell trust property (*State v. Ramsbury*, 43 Md. 325; *Dorsey v. Garey*, 30 Md. 489), and a decree rendered in a proceeding for the accounting and discharge of trustees by a court with jurisdiction, allowing them commissions on the trust estate. *Conant v. Wright*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 321.

4. **Application of Rules to Foreign Judgments.** — See the title FOREIGN JUDGMENTS, vol. 13, p. 971.

5. **United States.** — *McGoon v. Scales*, 76 U. S. 30; *Lytle v. Lansing*, 147 U. S. 59; *Walker v. Sturbans*, 38 Fed. Rep. 300.

**New York.** — *Gray v. Delaware, etc., Canal Co.*, (Supm. Ct.) 5 Abb. N. Cas. (N. Y.) 135; *Ontario v. Andes First Nat. Bank*, 59 Hun (N. Y.) 29.

**North Carolina.** — *Pigot v. Davis*, 3 Hawks (10 N. Car.) 25.

**Ohio.** — *Rayl v. Lapham*, 27 Ohio St. 452.

**Pennsylvania.** — *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66.

**Virginia.** — *Harman v. Stearns*, 95 Va. 58.

6. **Connecticut.** — *Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151.

**New Hampshire.** — *Thurber v. Blackbourne*, 1 N. H. 246.

**New York.** — *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172.

**Ohio.** — *Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197.

**Pennsylvania.** — *Benton v. Burgot*, 10 S. & R. (Pa.) 240.

7. **Judgments in Attachment Suits — United States.** — *Tilton v. Cofield*, 93 U. S. 165; *Needham v. Wilson*, 47 Fed. Rep. 97; *Bigelow v. Chatterton*, 51 Fed. Rep. 614; *Elder v. Richmond Gold, etc., Min. Co.*, 58 Fed. Rep. 536; *Rice v. Adler-Goldman Commission Co.*, 71 Fed. Rep. 151; *Huff v. Hutchinson*, 14 How. (U. S.) 588; *U. S. Bank v. Voorhees*, 1 McLean (U. S.) 221, *affirmed* in *Voorhees v. Jackson*, 10 Pet. (U. S.) 471; *McGoon v. Scales*, 9 Wall. (U. S.) 23; *Cooper v. Reynolds*, 10 Wall. (U. S.) 316.

**Illinois.** — *Hernandez v. Drake*, 81 Ill. 34.

**Indiana.** — *Ziegenhager v. Doe*, 1 Ind. 301.

**Maryland.** — *Manton v. Hoyt*, 43 Md. 264; *Barney v. Patterson*, 6 Har. & J. (Md.) 182.

**Missouri.** — *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183.

**Nebraska.** — *Connelly v. Edgerton*, 22 Neb. 82.

**New Jersey.** — *Diehl v. Page*, 3 N. J. Eq. 143; *Hartshorne v. Johnson*, 7 N. J. L. 108.

**New York.** — *Skinnion v. Kelley*, 18 N. Y. 355; *Bascom v. Smith*, 31 N. Y. 595.

**North Carolina.** — *Grier v. Rhyne*, 67 N. Car. 338; *Skinner v. Moore*, 2 Dev. & B. L. (19 N. Car.) 138, 30 Am. Dec. 155.

**Ohio.** — *Paine v. Mooreland*, 15 Ohio 435, 45 Am. Dec. 585.

**Tennessee.** — *Walker v. Cottrell*, 6 Baxt. (Tenn.) 257.

**Texas.** — *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100; *Bowers v. Chaney*, 21 Tex. 363.

**Virginia.** — *Allan v. Hoffman*, 83 Va. 129; *Lancaster v. Wilson*, 27 Gratt. (Va.) 624.

**West Virginia.** — *Hall v. Hall*, 12 W. Va. 1.

The rule has been applied to a judgment of confirmation of sale under a writ of foreign attachment. *Voorhees v. Jackson*, 10 Pet. (U. S.) 449.

8. **Staples v. Fairchild**, 3 N. Y. 41; *Miller v. Brinkerhoff*, 4 Den. (N. Y.) 118, 47 Am. Dec. 242; *Stanley v. Stanley*, 35 S. Car. 94; *Houston v. McCluney*, 8 W. Va. 135.

In *Haywood v. Collins*, 60 Ill. 328, deeds to property sold in attachment proceedings were set aside, on bill filed, on the ground that the judgment in the attachment proceedings was void for want of jurisdiction.



sion and want of jurisdiction are applicable to orders and judgments in garnishment proceedings.<sup>1</sup> Accordingly, where the court had jurisdiction, a judgment against the defendant cannot be collaterally attacked by the garnishee,<sup>2</sup> nor can a decree against the garnishee be collaterally attacked by the defendant.<sup>3</sup> But where the garnishment proceedings are void for want of jurisdiction, they will not protect the garnishee in paying the money sought to be garnished,<sup>4</sup> and he may attack the judgment against the defendant.<sup>5</sup>

**7. Proceedings in Execution.**—Where a court has jurisdiction, the title acquired by a purchaser at an execution sale cannot be defeated on the ground of such errors or irregularities in the proceedings in the action as would be cause for a reversal of the judgment,<sup>6</sup> nor for mere error or irregularity in the execution proceedings.<sup>7</sup> But a judgment which is void for want of jurisdiction cannot be the basis of an execution, and no title can be divested or transferred by an execution sale based thereon.<sup>8</sup> Where property is taken under an execution upon a judgment which is void for want of jurisdiction an action

**1. Orders and Judgments in Garnishment Proceedings.**—See the title GARNISHMENT, vol. 14, p. 731.

**2. Coleman v. McAnulty**, 16 Mo. 173, 57 Am. Dec. 229.

**3. Sessions v. Stevens**, 1 Fla. 233, 46 Am. Dec. 341; *Oppenheim v. Pittsburgh*, etc., R. Co., 85 Ind. 471; *Taylor v. Phelps*, 1 Har. & G. (Md.) 492; *Groome v. Lewis*, 23 Md. 137, 87 Am. Dec. 563; *Russell v. Work*, 35 N. J. L. 316; *Root v. Davis*, 51 Ohio St. 29.

**4. Balk v. Harris**, 122 N. Car. 64.

**5. Littlestone v. Goldenberg**, 66 Ill. App. 673.

**6. Executions—Effect of Errors or Irregularities in the Action—Illinois.**—*Guiteau v. Wisely*, 47 Ill. 434.

*Louisiana.*—*Dufour v. Camfrance*, 11 Mart. (La.) 607, 13 Am. Dec. 360.

*Maine.*—*Smith v. Keen*, 26 Me. 411.

*Maryland.*—*Ranoul v. Griffie*, 3 Md. 54.

*Missouri.*—*Chouteau v. Nuckolls*, 20 Mo. 445; *Hendrickson v. St. Louis*, etc., R. Co., 34 Mo. 188, 84 Am. Dec. 76; *Massey v. Scott*, 49 Mo. 278; *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484; *Yeoman v. Younger*, 83 Mo. 424; *Lewis v. Morrow*, 89 Mo. 174.

*New Hampshire.*—*Fowler v. Brooks*, 64 N. H. 423.

*New Jersey.*—*Den v. Zellers*, 7 N. J. L. 153; *Den v. Gaston*, 24 N. J. L. 818.

*North Carolina.*—*Thomas v. Hunsucker*, 108 N. Car. 720; *Burke v. Elliott*, 4 Ired. L. (26 N. Car.) 355, 42 Am. Dec. 142.

*Oregon.*—*Dolph v. Barney*, 5 Oregon 192; *McRae v. Daviner*, 8 Oregon 63.

*Pennsylvania.*—*Tarbox v. Hays*, 6 Watts (Pa.) 398, 31 Am. Dec. 478.

*South Carolina.*—*Martin v. Bowie*, 37 S. Car. 102.

*Texas.*—*Thouvenin v. Rodrigues*, 24 Tex. 468; *Brooks v. Powell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 809.

*Wisconsin.*—*Arnold v. Booth*, 14 Wis. 180.

Money recovered under execution upon a judgment entered by a court with jurisdiction cannot be recovered in an action for money had and received because of errors or irregularities. *Lewis v. Smith*, 2 S. & R. (Pa.) 142.

**7. Same—Effect of Errors or Irregularities in the Execution Proceedings—United States.**—*Thompson v. Phillips*, *Baldw.* (U. S.) 271, 23 Fed. Cas. No. 13,974; *Sumner v. Moore*, 2 McLean (U. S.) 63, 23 Fed. Cas. No. 13,610.

*Indiana.*—*Evans v. Ashby*, 22 Ind. 15.

*Iowa.*—*Shaffer v. Bolander*, 4 Greene (Iowa) 201.

*Maine.*—*Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134.

*Oregon.*—*Leinenweber v. Brown*, 24 Oregon 548.

*Pennsylvania.*—*Sheetz v. Wynkoop*, 74 Pa. St. 198; *Stewart v. Stocker*, 1 Watts (Pa.) 135, 13 S. & R. (Pa.) 199, 15 Am. Dec. 589.

*Tennessee.*—*Lee v. Crossna*, 6 Humph. (Tenn.) 281; *Trotter v. Nelson*, 1 Swan (Tenn.) 7.

*Texas.*—*Bogges v. Howard*, 40 Tex. 153.

**8. Executions Based on Void Judgments—United States.**—*Settlemier v. Sullivan*, 97 U. S. 444; *Swift v. Meyers*, 37 Fed. Rep. 37.

*Delaware.*—*Frankel v. Satterfield*, 9 Houst. (Del.) 201.

*Florida.*—*McGehee v. Wilkins*, 31 Fla. 83.

*Illinois.*—*Pardon v. Dwire*, 23 Ill. 572;

*Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293; *White v. Jones*, 38 Ill. 160; *Chase v. Dana*, 44 Ill. 262.

*Indiana.*—*Bliss v. Wilson*, 4 Blackf. (Ind.) 169.

*Iowa.*—*Reed v. Wright*, 2 Greene (Iowa) 15.

*Kentucky.*—*Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

*Louisiana.*—*McDonough v. Gravier*, 9 La. 531; *Bledsoe v. Erwin*, 33 La. Ann. 615.

*Mississippi.*—*Foute v. McDonald*, 27 Miss. 610; *Cary v. Dixon*, 51 Miss. 593; *Kramer v. Holster*, 55 Miss. 243.

*Missouri.*—*Janney v. Spedden*, 38 Mo. 395.

*Nevada.*—*Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 387.

*New Hampshire.*—*Eaton v. Badger*, 33 N. H. 228.

*New York.*—*Hastings v. Farmer*, 4 N. Y. 293.

*Oregon.*—*Odell v. Campbell*, 9 Oregon 298.

*Pennsylvania.*—*Camp v. Wood*, 10 Watts (Pa.) 118.

*South Carolina.*—*Adams v. Agnew*, 15 S. Car. 36; *Agnew v. Adams*, 26 S. Car. 101.

*Texas.*—*Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145; *Hollingsworth v. Bagley*, 35 Tex. 345; *Bender v. Damon*, 72 Tex. 92.

*Wisconsin.*—*Falkner v. Guild*, 10 Wis. 563. See the title EXECUTIONS, vol. 11, p. 604.



of conversion will lie.<sup>1</sup> And so will an action of replevin<sup>2</sup> and of trespass.<sup>3</sup>

**8. Bankruptcy and Insolvency Proceedings.** — The rules are applicable to bankruptcy and insolvency proceedings,<sup>4</sup> and where the court had jurisdiction a collateral attack will not be permitted of either a judgment of bankruptcy<sup>5</sup> or a decree of discharge in bankruptcy.<sup>6</sup> But an adjudication in bankruptcy may be collaterally attacked for want of jurisdiction in the court to make the decree.<sup>7</sup>

**9. Proceedings Under Poor Debtor Law.** — The rules are also applicable to proceedings under the poor debtor law.<sup>8</sup>

**10. Foreclosure Proceedings.** — Where a decree of foreclosure is rendered and a sale of the mortgaged property made thereunder, the title thus acquired cannot be attacked and overthrown collaterally for mere error or irregularity in the proceedings even though the errors or irregularities may be such that a reviewing court, on appeal, would have reversed the decree.<sup>9</sup> But a decree of foreclosure rendered without jurisdiction is void and does not support a title acquired under the sale.<sup>10</sup> These rules are applicable to decrees in proceedings to foreclose mechanics'<sup>11</sup> and other liens.<sup>12</sup>

**11. Eminent Domain Proceedings.** — The rule that a judgment rendered by a court without jurisdiction cannot be collaterally attacked for errors or irregularities has been applied to proceedings to condemn land under the right of eminent domain in favor of decisions of the appraisers, judgments assessing benefits, judgments of condemnation, etc.<sup>13</sup> On the other hand, it has been held that the decision of commissioners appointed in eminent domain proceedings to appraise land is void if they do not have jurisdiction.<sup>14</sup>

1. *Bonnet v. Lachman*, 65 Hun (N. Y.) 554. See the title TROVER AND CONVERSION.

2. See the title REPLEVIN.

3. See the title TRESPASS.

4. *Decrees and Orders in Bankruptcy and Insolvency Proceedings.* — See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630.

5. *Ex p. Wieland*, L. R. 5 Ch. 489; *Revell v. Blake*, L. R. 7 C. P. 308; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 661, 13 Nat. Bankr. Reg. 390; *Way v. Howe*, 108 Mass. 503, 11 Am. Rep. 386; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 15.

6. *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133; *Weld v. Locke*, 18 N. H. 141; *Morse v. Presby*, 25 N. H. 299.

7. *Adams v. Terrell*, 4 Woods (U. S.) 341, 4 Fed. Rep. 800.

8. *Discharge under Poor Debtor Law.* — See the title POOR DEBTORS.

In *Manning v. Cogan*, 49 N. H. 331, it was held that the taking of the poor debtor's oath before a magistrate without jurisdiction was no defense to an action upon his bond to take the oath.

9. *Decrees of Mortgage Foreclosure — United States.* — *Farmers' L. & T. Co. v. McKinney*, 6 McLean (U. S.) 9, 8 Fed. Cas. No. 4,667; *Salisbury v. Sands*, 2 Dill. (U. S.) 270, 21 Fed. Cas. No. 12,251; *Smith v. Pomeroy*, 2 Dill. (U. S.) 420, 22 Fed. Cas. No. 13,092.

*Alabama.* — *Cole v. Conolly*, 16 Ala. 271.

*Illinois.* — *Reedy v. Camfield*, 159 Ill. 254.

*Indiana.* — *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213; *Dowell v. Lahr*, 97 Ind. 146.

*Iowa.* — *Moore v. Jeffers*, 53 Iowa 202.

*Maryland.* — *Cockey v. Cole*, 28 Md. 276, 92 Am. Dec. 686.

*Missouri.* — *McNair v. Biddle*, 8 Mo. 257; *Hagerman v. Sutton*, 91 Mo. 519; *Kopp v. Blessing*, 121 Mo. 391.

*New Hampshire.* — *Holland v. Laconia Bldg., etc., Assoc.*, 68 N. H. 480.

*New York.* — *O'Connor v. Felix*, 87 Hun (N. Y.) 179; *Trowbridge v. Hayes*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 234.

*Ohio.* — *Newnam v. Cincinnati*, 18 Ohio 323; *Morgan v. Burnet*, 18 Ohio 535.

*Oregon.* — *Harper v. Harding*, 3 Oregon 361.

*Pennsylvania.* — *Brundred v. Egbert*, 164 Pa. St. 615.

*Wisconsin.* — *Salisbury v. Chadbourne*, 45 Wis. 74.

A decree rendered by a court with jurisdiction, directing the surplus proceeds of a mortgage foreclosure sale to be paid into court, cannot be collaterally attacked. *Matter of Stilwell*, 139 N. Y. 337.

10. *Shields v. Miller*, 9 Kan. 390; *Fithian v. Monks*, 43 Mo. 502; *Moore v. Starks*, 1 Ohio St. 369; *Fladland v. Delaplaine*, 19 Wis. 459.

11. *Decrees of Foreclosure of Mechanics' and Other Liens.* — *Russell v. Grant*, 122 Mo. 161, 43 Am. St. Rep. 563; *Welde v. Henderson*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 176. See the title MECHANICS' LIENS.

12. See the title LIENS.

A decree of an admiralty court foreclosing a maritime lien can only be attacked for want of jurisdiction to make the decree. *Otis v. The Rio Grande*, 1 Woods (U. S.) 279.

13. *Decisions and Judgments in Eminent Domain Proceedings.* — *Foltz v. St. Louis, etc., R. Co.*, 60 Fed. Rep. 320; *Huling v. Kaw Valley R., etc., Co.*, 130 U. S. 559; *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646; *Lovitt v. Russell*, 138 Mo. 474; *Farrington v. New York*, 83 Hun (N. Y.) 124; *Hopkins v. Cravey*, 85 Tex. 189.

14. *Bohlman v. Green Bay, etc., R. Co.*, 40 Wis. 157.



**12. Tax Proceedings.**—The rule is applied to tax proceedings.<sup>1</sup> Thus where jurisdiction existed the courts will not permit the collateral attack for error or irregularity of a tax assessment,<sup>2</sup> the action of a state board of equalization in estimating the value of property for taxation,<sup>3</sup> a judgment in proceedings to collect or enforce taxes,<sup>4</sup> a judgment of confirmation in a special tax assessment proceeding,<sup>5</sup> a decree confirming a tax title to land,<sup>6</sup> or a decree declaring land redeemed from forfeiture for taxes.<sup>7</sup> But if an assessment is made without jurisdiction it is void and may be attacked collaterally.<sup>8</sup> And this is true of a judgment rendered in proceedings to collect taxes.<sup>9</sup>

**13. Orders and Decrees of Probate Courts.**—The rule has frequently been applied to the orders and decrees of probate courts.<sup>10</sup>

**Same — With Jurisdiction.**—Thus the rule that a judgment cannot, where the court had jurisdiction, be collaterally attacked for errors or irregularities, has frequently been applied in favor of a decree admitting a will to probate,<sup>11</sup> revoking the probate of a will,<sup>12</sup> or setting a will aside,<sup>13</sup> a decree granting letters testamentary or of administration,<sup>14</sup> an order or decree directing the sale of the real estate of a decedent for the payment of his debts<sup>15</sup> or for other pur-

**1. Tax Proceedings.**—See the title TAXATION.

**2. Assessment of Taxes.**—*Delaware R. Co. v. Prettyman*, 17 Int. Rev. Rec. 9, 7 Fed. Cas. No. 3,767; *Dickey v. People*, 160 Ill. 633; *Tucker v. Sellers*, 130 Ind. 514; *Farmington v. Downing*, 67 N. H. 441; *Van Rensselaer v. Cottrell*, 7 Barb. (N. Y.) 129.

The act of an assessor of internal revenue in determining what persons and things are subject to taxation, cannot, if he had jurisdiction of the case as to subject matter and as to persons, be attacked collaterally for irregularity or mistake as to judgment; the assessment cannot be resisted by injunction process. *Delaware R. Co. v. Prettyman*, 17 Int. Rev. Rec. 99, 7 Fed. Cas. No. 3,767.

**3. Action of State Board of Equalization.**—*McLeod v. Receveur*, 71 Fed. Rep. 455.

**4. Judgments in Tax Proceedings.**—*Gray v. Bowles*, 74 Mo. 423; *Gibbs v. Southern*, 116 Mo. 204; *Charley v. Kelley*, 120 Mo. 134; *Kansas City v. Winner*, 58 Mo. App. 299; *Woodward v. Baker*, 10 Oregon 493; *Com. v. Western Union Tel. Co.*, 2 Dauphin Co. Rep. (Pa.) 30; *Bordages v. Higgins*, (Tex. 1892) 19 S. W. Rep. 446.

**5. Larson v. People**, 170 Ill. 93.

**6. Evans v. Percifull**, 5 Ark. 429.

**7. Harvey v. Tyler**, 2 Wall. (U. S.) 328.

**8. Miller v. Amsterdam**, 149 N. Y. 288; *Clinton v. Portland*, 26 Oregon 410.

**9. Harness v. Cravens**, 126 Mo. 233; *Williams v. Harris*, 4 Sneed (Tenn.) 332.

**10. Decrees and Orders of Probate Courts with Jurisdiction.**—See the titles EXECUTORS AND ADMINISTRATORS, vol. II, p. 720.

**11. Decrees Admitting Wills to Probate—England.**—*Raine's Case*, 1 Ld. Raym. 262; *Rex v. Vincent*, 1 Stra. 481; *Rex v. Rhodes*, 1 Stra. 703.

*United States.*—*Cassels v. Vernon*, 5 Mason (U. S.) 332, 5 Fed. Cas. No. 2,503; *Tompkins v. Tompkins*, 1 Story (U. S.) 553 24 Fed. Cas. No. 14,091.

*California.*—*Matter of Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

*Colorado.*—*Corrigan v. Jones*, 14 Colo. 311.

*Mississippi.*—*Wall v. Wall*, 28 Miss. 409.

*New York.*—*Bolton v. Schriever*, 135 N. Y. 65.

*Texas.*—*McSpadden v. Farmer*, (Tex. Civ. App. 1893) 23 S. W. Rep. 814; *Halbert v. De Bode*, (Tex. Civ. App. 1894) 28 S. W. Rep. 58.

*West Virginia.*—*Smith v. Henning*, 10 W. Va. 596.

*Wisconsin.*—*Newman v. Waterman*, 63 Wis. 612.

**12. Decrees Revoking Probate of Wills.**—*Brown v. Gibson*, 1 Nott & M. (S. Car.) 326.

**13. Decrees Setting Aside Wills.**—*McArthur v. Allen*, 3 Fed. Rep. 321.

**14. Decrees Granting Letters Testamentary of Administration — United States.**—*Loyd v. Waller*, 74 Fed. Rep. 601.

*Alabama.*—*Ex p. Maxwell*, 37 Ala. 362, 79 Am. Dec. 62.

*Illinois.*—*Duffin v. Abbott*, 48 Ill. 17.

*Indiana.*—*Ray v. Doughty*, 4 Blackf. (Ind.) 115.

*Maryland.*—*Wilson v. Ireland*, 4 Md. 444; *Edelen v. Edelen*, 6 Md. 288; *Donohue v. Daniel*, 58 Md. 595; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42; *Fishwick v. Sewell*, 4 Har. & J. (Md.) 393.

*Minnesota.*—*Culver v. Hardenbergh*, 37 Minn. 225.

*Missouri.*—*Howell v. Jump*, 140 Mo. 441.

*New Hampshire.*—*Ela's Appeal*, 68 N. H. 35.

*Ohio.*—*Slagle v. Entreklin*, 44 Ohio St. 637.

*Texas.*—*Giddings v. Steele*, 28 Tex. 732.

*Wisconsin.*—*Oakes v. Buckley*, 49 Wis. 592.

**15. Orders or Decrees Directing Sale of Decedent's Property — United States.**—*Grignon v. Astor*, 2 How. (U. S.) 319; *Forsythe v. Ballance*, 6 McLean (U. S.) 562, 9 Fed. Cas. No. 4,951; *Florentine v. Barton*, 2 Wall. (U. S.) 210; *McNitt v. Turner*, 16 Wall. (U. S.) 352.

*Arkansas.*—*Adams v. Thomas*, 44 Ark. 267.

*Florida.*—*Price v. Winter*, 15 Fla. 106.

*Illinois.*—*Moore v. Neil*, 39 Ill. 261; *Hobson v. Ewan*, 62 Ill. 146; *Moffitt v. Moffitt*, 69 Ill. 641; *Gage v. Schroder*, 73 Ill. 44; *Bowen v. Bond*, 80 Ill. 351; *Matthews v. Hoff*, 113 Ill. 90.

*Indiana.*—*Doe v. Harvey*, 3 Ind. 104, 5 Blackf. (Ind.) 487; *Lantz v. Maffett*, 102 Ind. 23; *Sims v. Gay*, 109 Ind. 501.

*Louisiana.*—*Mitchell v. Levi*, 23 La. Ann. 630.

*Massachusetts.*—*Perkins v. Fairfield*, 11 Mass. 227.



poses,<sup>1</sup> an order allowing or disallowing claims against the estate of a decedent,<sup>2</sup> a decree of distribution,<sup>3</sup> an order allowing a final settlement by and discharging an executor or administrator,<sup>4</sup> a decree appointing<sup>5</sup> or removing<sup>6</sup> a guardian, and to various other orders and decrees of courts invested with probate jurisdiction.<sup>7</sup>

Same — Without Jurisdiction. — On the other hand, the rule as to judgments by courts without jurisdiction has been applied in holding void, among other

*Missouri*. — *Adams v. Larrimore*, 51 Mo. 130; *Macey v. Stark*, 116 Mo. 481; *Rogers v. Johnson*, 125 Mo. 202.

*Nebraska*. — *Schroeder v. Wilcox*, 39 Neb. 136.

*New Jersey*. — *Pittinger v. Pittinger*, 3 N. J. Eq. 156.

*New York*. — *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299.

*North Carolina*. — *Fowler v. Poor*, 93 N. Car. 466; *Hare v. Hollomon*, 94 N. Car. 14; *Sumner v. Sessoms*, 94 N. Car. 371; *Burgess v. Kirby*, 94 N. Car. 575; *Brittain v. Mull*, 99 N. Car. 483.

*Ohio*. — *Ludlow v. Johnston*, 3 Ohio 560, 17 Am. Dec. 609; *Ewing v. Higby*, 7 Ohio (pt. i.) 198, 28 Am. Dec. 633; *Robb v. Irwin*, 15 Ohio 689; *Snevely v. Lowe*, 18 Ohio 368; *Sheldon v. Newton*, 3 Ohio St. 494; *Benson v. Cilley*, 8 Ohio St. 604.

*Pennsylvania*. — *McPherson v. Canliff*, 11 S. & R. (Pa.) 422, 14 Am. Dec. 642; *Snyder v. Markel*, 8 Watts (Pa.) 416.

*Texas*. — *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Corley v. Anderson*, 5 Tex. Civ. App. 213.

*Virginia*. — *Woodhouse v. Fillbates*, 77 Va. 317.

*Wisconsin*. — *Sitzman v. Pacquette*, 13 Wis. 291; *Jackson v. Astor*, 1 Pin. (Wis.) 161, 39 Am. Dec. 294, *affirmed* in *Grignon v. Astor*, 2 How. (U. S.) 319.

For additional cases see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1120.

In *Lalanne v. Moreau*, 13 La. 431, a decree of a probate court with jurisdiction directing the sale of land inherited by minors to pay debts of the ancestor, was sustained against a collateral attack.

1. *Dancy v. Stricklinge*, 15 Tex. 557, 65 Am. Dec. 179; *Giddings v. Steele*, 28 Tex. 732.

The Rule Has Been Applied in Favor of the Following Proceedings:

Proceedings by an administrator with the will annexed, to sell lands of the testator in accordance with the directions of his will. *Wenner v. Thornton*, 98 Ill. 156.

A rule by an administrator where the real estate could not be fairly, equitably, and beneficially divided among the heirs and devisees thereof. *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677.

Sale of lands by an administrator or trustee under statutes authorizing such sale where it is deemed for the best interest of the parties concerned or necessary to wind up the administration. *May v. Logan County*, 30 Fed. Rep. 255; *Tucker v. Harris*, 13 Ga. 8, 58 Am. Dec. 492; *Schley v. Baltimore*, 29 Md. 34.

Judgment Confirming Administrator's Sale. — A judgment of an orphans' court with jurisdiction confirming an administrator's sale, as

long as it stands unimpeached, is a direct adjudication that the sale was legally made, and cannot be impeached collaterally. *Den v. Newark India Rubber Co.*, 24 N. J. L. 467.

2. Orders Allowing or Disallowing Claims Against Estate of Decedent — *Missouri*. — *Murphy v. De France*, 105 Mo. 53; *Munday v. Leeper*, 120 Mo. 417; *Clark v. Bettelheim*, 144 Mo. 258.

*Nebraska*. — *Yeatman v. Yeatman*, 35 Neb. 422.

*Texas*. — *Toliver v. Hubbell*, 6 Tex. 166; *Moore v. Hillebrant*, 14 Tex. 312, 65 Am. Dec. 118.

*Wisconsin*. — *Gale v. Best*, 20 Wis. 46.

3. Decrees of Distribution. — *Paullissen v. Loock*, 38 Ill. App. 510; *Wheeler v. Barker*, 51 Neb. 846; *Webster v. Seattle Trust Co.*, 7 Wash. 642.

4. Orders Allowing Settlement by and Discharging Executors or Administrators. — *Mobley v. Mobley*, 9 Ga. 251; *Simpson v. Cook*, 24 Minn. 180; *Hardy v. Gholson*, 26 Miss. 70; *Cason v. Cason*, 31 Miss. 578; *Neill v. Hodge*, 5 Tex. 487.

5. Decrees Appointing or Removing Guardians. — *Nettleton v. Mosier*, 3 Fed. Rep. 387; *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; *Davis v. Hudson*, 29 Minn. 27; *Gillespie v. Hauenstein*, 72 Miss. 838; *Cox v. Boyce*, 152 Mo. 576; *Heckman v. Adams*, 50 Ohio St. 305. See the title GUARDIAN AND WARD, vol. 15, p. 37, note 5.

6. *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742.

A decree declaring a ward restored to sanity and discharging him from custody cannot be collaterally attacked if the court had jurisdiction to make the decree. *McKenzie v. Donnell*, 151 Mo. 431.

7. Orders and Decrees of Probate Generally — *United States*. — *Herron v. Dater*, 120 U. S. 464; *Veach v. Rice*, 131 U. S. 293; *Simmons v. Saul*, 138 U. S. 439; *Loyd v. Waller*, 74 Fed. Rep. 601.

*Michigan*. — *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

*Mississippi*. — *Gildart v. Starke*, 1 How. (Miss.) 450.

*Missouri*. — *Camden v. Plain*, 91 Mo. 117; *Macey v. Stark*, 116 Mo. 481; *Munday v. Leeper*, 120 Mo. 417; *McKenzie v. Donnell*, 151 Mo. 431.

*New Jersey*. — *Den v. O'Hanlon*, 21 N. J. L. 582; *Den v. Hammel*, 18 N. J. L. 73; *Hess v. Cole*, 23 N. J. L. 121.

*Pennsylvania*. — *Brooks's Estate*, 8 Pa. Co. Ct. 514, *affirmed* in 140 Pa. St. 84.

*Texas*. — *Yates v. Houston*, 3 Tex. 433; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.



decrees of probate courts,<sup>1</sup> the following: Decrees admitting wills to probate,<sup>2</sup> granting letters of administration,<sup>3</sup> orders or decrees directing an administrator or executor to sell property,<sup>4</sup> orders of distribution,<sup>5</sup> and orders appointing guardians.<sup>6</sup>

**14. Guardians' Sales.**<sup>7</sup> — Where the court which directs a guardian's sale has jurisdiction, the sale is not void by reason of irregularities and errors in the proceedings in the course of which the sale is directed.<sup>8</sup> But no title can be acquired under a guardian's sale if the court ordering the sale does not have jurisdiction.<sup>9</sup>

**15. Courts of General and of Special Jurisdiction.** — While there is a difference between courts of general jurisdiction and those of limited or special jurisdiction, with respect to the presumption of the jurisdiction which is applicable to their proceedings,<sup>10</sup> there is no distinction in point of conclusiveness of their decisions; the rules which determine the effect of the possession and want of jurisdiction are applicable to the proceedings of all judicial and quasi-judicial tribunals.<sup>11</sup>

**16. Justices' Courts.** — The rule has frequently been applied to orders and judgments of justices of the peace.<sup>12</sup>

**17. Awards of Arbitrators.**<sup>13</sup> — An award of arbitrators with jurisdiction can-

**1. Decrees and Orders of Probate Courts without Jurisdiction.** — *Smith v. Rice*, 11 Mass. 507; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; *State v. Stephenson*, 12 Mo. 178; *Springer v. Shavender*, 116 N. Car. 12, 47 Am. St. Rep. 791; *Hurt v. Horton*, 12 Tex. 285; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Walker v. Myers*, 36 Tex. 203; *Paul v. Willis*, 69 Tex. 261; *Chase v. Ross*, 36 Wis. 267.

**2. Decrees Admitting Wills to Probate.** — *Matter of Mousseau*, 30 Minn. 202; *Wall v. Wall*, 123 Pa. St. 545, 10 Am. St. Rep. 549.

**3. Decrees Granting Letters of Administration.** — *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. (U. S.) 27, 1 Fed. Rep. 665; *Wales v. Willard*, 2 Mass. 120; *Vick v. Vicksburg*, 1 How. (Miss.) 379, 31 Am. Dec. 167; *Frederick v. Pacquette*, 19 Wis. 541.

**4. Decrees Directing Sale of Property** — *Alabama*. — *McCartney v. Calhoun*, 11 Ala. 110; *Bishop v. Hampton*, 15 Ala. 761.

*Illinois*. — *Huls v. Buntin*, 47 Ill. 396.

*Massachusetts*. — *Heath v. Wells*, 5 Pick. (Mass.) 140, 16 Am. Dec. 383.

*Ohio*. — *Adams v. Jeffries*, 12 Ohio 253, 40 Am. Dec. 477; *Wehrle v. Wehrle*, 39 Ohio St. 365; *Ludlow v. McBride*, 3 Ohio 240.

*Tennessee*. — *Starkey v. Hammer*, 1 Baxt. (Tenn.) 438.

*Texas*. — *Harris v. Graves*, 26 Tex. 577; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Morris v. Halbert*, 36 Tex. 19.

*Wisconsin*. — *Gibbs v. Shaw*, 17 Wis. 197, 84 Am. Dec. 737; *Frederick v. Pacquette*, 19 Wis. 541; *Blodgett v. Hitt*, 29 Wis. 169.

**5. Orders of Distribution.** — *Cox v. Matthews*, 17 Ind. 367; *Bresee v. Stiles*, 22 Wis. 120; *Ruh v. Oberbrunner*, 40 Wis. 238.

**6. Orders Appointing Guardians.** — *Eslava v. Lepretre*, 21 Ala. 522, 56 Am. Dec. 266; *Moody v. Bibb*, 50 Ala. 248; *Scobey v. Gano*, 35 Ohio St. 550. See the title GUARDIAN AND WARD, vol. 15, p. 37, n. 4.

In the case of *Chase v. Hathaway*, 14 Mass. 223, it was held that the decree of a court of probate appointing a guardian to a person

who had been adjudged and certified by the selectmen of the town in which he resided, to be incapable of taking care of himself, was absolutely void, no notice having been given to him before the final adjudication in that court.

**7. Guardians' Sales.** — See the title GUARDIAN AND WARD, vol. 15, p. 16.

**8. Currie v. Franklin**, 51 Ark. 338; *Reid v. Morton*, 119 Ill. 118; *Field v. Peeples*, 180 Ill. 376; *Dequindre v. Williams*, 31 Ind. 444; *Hunter v. Hatton*, 4 Gill (Md.) 115, 45 Am. Dec. 117; *Arrowsmith v. Harmoning*, 42 Ohio St. 254, affirmed in 118 U. S. 194; *Bouldin v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 113; *Stone v. Ellis*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1077.

This principle is applied in the case of the sale of land by the conservator of a lunatic. *Wing v. Dodge*, 80 Ill. 564; *Gardner v. Maroney*, 95 Ill. 552; *Cline v. Catron*, 22 Gratt. (Va.) 378.

The order of a court with jurisdiction directing the investment of funds by a guardian cannot be collaterally attacked for error or irregularities in the proceedings. *Stell v. Glass*, 1 Ga. 486.

**9. Cooper v. Sunderland**, 3 Iowa 114, 66 Am. Dec. 61; *Dengenhart v. Cracraft*, 36 Ohio St. 549.

Where the court has no jurisdiction of proceedings to mortgage the property of an infant, the proceedings and mortgage are open to collateral attack for that reason. *Warren v. Union Bank*, 157 N. Y. 259; *Losey v. Stanley*, 147 N. Y. 560.

**10. See infra**, this title, the division *Presumption of Jurisdiction*.

**11. Thompson v. Board of Education**, 57 N. J. L. 628.

**12. Fowler v. Brooks**, 64 N. H. 423; *McKeen v. Converse*, 68 N. H. 173; *Wesson v. Chamberlain*, 3 N. Y. 331; *Bascom v. Smith*, 31 N. Y. 595; *McCurdy v. Baughman*, 43 Ohio St. 78; *Root v. Davis*, 51 Ohio St. 29; *Righter v. Thornton*, 6 Ohio Dec. 7.

**13. Awards of Arbitrators.** — See the title ARBITRATION AND AWARD, vol. 2, p. 533.



not be collaterally impeached for errors or irregularities in the proceedings.<sup>1</sup> But where there is no legal submission and the arbitrators act without jurisdiction, the decree is void and may be collaterally impeached.<sup>2</sup>

**18. Proceedings of Courts Martial.** — Applying the rules governing the effect of the possession and want of jurisdiction to the proceedings of courts martial,<sup>3</sup> it is held that the sentences of such courts cannot be collaterally attacked for errors or irregularities in their proceedings when they have cognizance of the charge made and jurisdiction of the person of the defendant,<sup>4</sup> but that their proceedings are void if they do not have jurisdiction.<sup>5</sup>

**19. Special Tribunals.** — The general rule has frequently been applied to special tribunals through which the authority of the state is exercised. Whenever any person is given authority to hear and determine any question, such determination is in effect a judgment having all the properties of a judgment pronounced in a legally created court of limited jurisdiction.<sup>6</sup> Accordingly the rule has been applied to proceedings of selectmen to enforce the repair of mills, dams, etc.,<sup>7</sup> or in laying out highways,<sup>8</sup> to the proceedings of commissioners appointed pursuant to statute in laying out highways,<sup>9</sup> to the orders of county commissioners,<sup>10</sup> to the decision of a state superintendent of schools reinstating a teacher who had been removed,<sup>11</sup> and to the decision of a board of election canvassers.<sup>12</sup>

**20. Land Officers' Rulings and Decisions.** — The register and receiver of a local land office and their superiors in the land department form a special tribunal to whose rulings and decisions the rules governing the effect of the possession and want of jurisdiction are applicable.<sup>13</sup> If these officials have jurisdiction over a particular controversy and of the parties, their decisions cannot be collaterally attacked for error.<sup>14</sup> But it is otherwise where they do not have jurisdiction.<sup>15</sup>

**21. Statutory Proceedings.** — The application of the rule is not limited to proceedings according to the common law; it also extends to proceedings that

1. *White Water Valley Canal Co. v. Henderson*, 3 Ind. 3; *Hough v. Beard*, 8 Blackf. (Ind.) 158; *Elmendorf v. Harris*, 5 Wend. (N. Y.) 516; *Preston v. Whitcomb*, 11 Vt. 47.

2. *Rice v. Loomis*, 28 Ind. 399; *Rumsey v. Leek*, 5 Wend. (N. Y.) 20; *Bierly v. Williams*, 5 Leigh (Va.) 700.

3. *Sentences and Judgments of Courts Martial.* — See the title *MILITARY LAW*.

4. *Ex p. Reed*, 100 U. S. 13; *Keyes v. U. S.*, 109 U. S. 340; *Darling v. Bowen*, 10 Vt. 148.

5. *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Barrett v. Crane*, 16 Vt. 246.

6. *Special Tribunals — United States.* — *McLeod v. Receveur*, 71 Fed. Rep. 455.

*Indiana.* — *Ft. Wayne v. Cody*, 43 Ind. 197; *Ricketts v. Spraker*, 77 Ind. 371; *O'Boyle v. Shannon*, 80 Ind. 159; *Garvin v. Daussman*, 114 Ind. 436, 5 Am. St. Rep. 637; *Jackson v. Smith*, 120 Ind. 520; *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405; *Patoka Tp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417; *Cole v. State*, 131 Ind. 591.

*New Jersey.* — *Thompson v. Board of Education*, 57 N. J. L. 628.

*New York.* — *Morewood v. New York*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 386; *Lawrence v. Houghton*, 5 Johns. (N. Y.) 129; *Van Wormer v. Albany*, 15 Wend. (N. Y.) 262.

*Oregon.* — *Warner v. Myers*, 3 Oregon 218.

7. *Roberts v. Peavey*, 27 N. H. 477.

8. *Highway Officials.* — *Haywood v. Charles-town*, 34 N. H. 23; *Proctor v. Andover*, 42 N.

H. 348; *Clement v. Burns*, 43 N. H. 609; *Brown v. Brown*, 50 N. H. 538; *Horne v. Rochester*, 62 N. H. 347; *Bryant v. Tamworth*, 68 N. H. 483.

9. *State v. Richmond*, 26 N. H. 232; *Dana v. Craddock*, 66 N. H. 593; *Beardsley v. Dodge*, 143 N. Y. 160, 42 Am. St. Rep. 707. See the title *HIGHWAYS*, vol. 15, p. 343.

10. *County Commissioners.* — See the title *COUNTY COMMISSIONERS*, vol. 15, p. 975.

An order of county commissioners allowing the claim of a town against a county for the support of a pauper has been sustained against collateral attack. *Salisbury v. Merrimack County*, 59 N. H. 359.

The errors or irregularities of a board of county commissioners in refusing to call a county seat election cannot be corrected by mandamus to compel the election. *State v. Nelson*, 21 Neb. 572.

11. *Superintendent of Schools.* — *Thompson v. Board of Education*, 57 N. J. L. 628.

12. *Board of Election Canvassers.* — *Warner v. Myers*, 3 Oregon 218.

13. *Decisions of the Land Office.* — See the title *PUBLIC LANDS*.

14. *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Ryder v. Innerarity*, 4 Stew. & P. (Ala.) 14; *Smiley v. Sampson*, 1 Neb. 56; *Vansant v. Butler*, 19 Neb. 351.

15. A patent of the United States to land is void for want of power in the land officers to issue it. *Doolan v. Carr*, 125 U. S. 618. See also the title *SPANISH LAND GRANTS*.



are directed by statute.<sup>1</sup>

**22. Adoption Proceedings.** — The decree of a court with jurisdiction declaring the adoption of a child cannot be collaterally attacked for errors or irregularities in the proceedings.<sup>2</sup> But if the court rendering the decree does not have jurisdiction the decree is void and may be so declared in any collateral proceeding.<sup>3</sup>

**23. Partition Proceedings.** — Applying the rule to partition proceedings<sup>4</sup> it follows that a decree of partition rendered by a court with jurisdiction cannot be collaterally attacked for errors or irregularities in the proceedings,<sup>5</sup> but if the court did not have jurisdiction the decree is void and will be denied effect whenever assailed either directly or collaterally.<sup>6</sup>

**24. Divorce Proceedings.** — A decree of divorce rendered by a court with jurisdiction cannot be collaterally attacked for errors or irregularities.<sup>7</sup> But if it was rendered by a court without jurisdiction it is void for every purpose;<sup>8</sup> it is not a defense to a prosecution for adultery,<sup>9</sup> for bigamy,<sup>10</sup> or to an action for divorce.<sup>11</sup>

**25. As Affecting the Question of Res Judicata.** — While a decision rendered by a court with jurisdiction is a bar to another action between the same parties upon the same cause of action,<sup>12</sup> a judgment which is void for want of jurisdiction is not, of course, a bar to another suit, either at law or in equity.<sup>13</sup>

**26. As Affecting the Right to Bring Suit Upon or Revive a Judgment.** — Mere irregularities in the proceedings or error in the judgment rendered cannot be

1. **Statutory Proceedings.** — *Kemp v. Kennedy*, 5 Cranch (U. S.) 173; *Wilmurt v. Morgan*, opinion of Chancellor Williamson, quoted in *Pittinger v. Pittinger*, 3 N. J. Eq. 156.

2. **Decrees of Adoption.** — *State v. Thompson*, 28 Oregon 296. See the title ADOPTION OF CHILDREN, vol. I, p. 736, n. 2.

3. *Furgeson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808.

4. **Decrees of Partition.** — See the title PARTITION.

5. *United States*. — *Thompson v. Tolmie*, 2 Pet. (U. S.) 157.

*Florida*. — *Price v. Winter*, 15 Fla. 106.

*Illinois*. — *Whitman v. Heneberry*, 73 Ill. 109; *Murphy v. Williamson*, 85 Ill. 149; *Hunter v. Stoneburner*, 92 Ill. 75; *Thompson v. Frew*, 107 Ill. 478.

*Indiana*. — *Doe v. Smith*, 1 Ind. 451.

*Iowa*. — *Wright v. Marsh*, 2 Greene (Iowa) 94; *Johnson v. Carson*, 3 Greene (Iowa) 499.

*Louisiana*. — *Pinniger's Succession*, 25 La. Ann. 53; *Crawford v. Binion*, 46 La. Ann. 1261.

*Maryland*. — *Long v. Long*, 62 Md. 33.

*Missouri*. — *O'Reilly v. Nicholson*, 45 Mo. 160; *McClanahan v. West*, 100 Mo. 309; *Christman v. Divinia*, 141 Mo. 122.

*New Jersey*. — *Stokes v. Middleton*, 28 N. J. L. 32.

*New York*. — *Cole v. Hall*, 2 Hill (N. Y.) 625.

*North Carolina*. — *Grantham v. Kennedy*, 91 N. Car. 148; *Armheld v. Moore*, Busb. L. (44 N. Car.) 157.

*Ohio*. — *Dabney v. Manning*, 3 Ohio 321, 17 Am. Dec. 597; *Doe v. Dugan*, 8 Ohio 87, 31 Am. Dec. 434; *Pillsbury v. Dugan*, 9 Ohio 117, 34 Am. Dec. 427.

*Oregon*. — *Morrill v. Morrill*, 20 Oregon 96, 23 Am. St. Rep. 95.

*Texas*. — *Yates v. Houston*, 3 Tex. 433; *Moore v. Blagge*, 91 Tex. 151.

*Wisconsin*. — *Tallman v. McCarty*, 11 Wis. 401.

6. *Illinois*. — *Chambers v. Jones*, 72 Ill. 275. *Missouri*. — *Fischer v. Siekmann*, 125 Mo. 165.

*New Jersey*. — *Young v. Rathbone*, 16 N. J. Eq. 224, 84 Am. Dec. 151.

*New York*. — *O'Donoghue v. Boies*, 159 N. Y. 87; *Jackson v. Brown*, 3 Johns. (N. Y.) 459; *Denning v. Corwin*, 11 Wend. (N. Y.) 647.

*Texas*. — *Roller v. Ried*, 87 Tex. 69.

*Wisconsin*. — *Falkner v. Guild*, 10 Wis. 563.

7. **Decrees of Divorce** — *United States*. — *Amory v. Amory*, 3 Biss. (U. S.) 270, 1 Fed. Cas. No. 334.

*Missouri*. — *De Graw v. De Graw*, 7 Mo. App. 121.

*Montana*. — *Edgerton v. Edgerton*, 12 Mont. 122, 33 Am. St. Rep. 557.

*New York*. — *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447; *De lafield v. Brady*, 108 N. Y. 524.

*Pennsylvania*. — *Miltimore v. Miltimore*, 40 Pa. St. 155.

*Utah*. — *Matter of Amy*, 12 Utah 309.

*Washington*. — *King v. Miller*, 10 Wash. 274.

8. *Borden v. Fitch*, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; *Northcut v. Lemety*, 8 Oregon 317.

9. See the title ADULTERY, vol. I, p. 750, n. 2.

10. *Davis v. Com.*, 13 Bush (Ky.) 318; *State v. Armington*, 25 Minn. 29; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274. But see *Squire v. State*, 46 Ind. 459.

11. See the title DIVORCE, vol. 9, p. 748, n. 4.

12. **Res Judicata.** — *Hopkins v. Lee*, 6 Wheat. (U. S.) 109; *Brooks v. New York*, 57 Hun (N. Y.) 104. See the title RES JUDICATA.

13. *Green v. Clawson*, 5 Houst. (Del.) 159; *Packard v. Mendenhall*, 42 Ind. 598; *Smith v. Myers*, 5 Blackf. (Ind.) 223; *Smith v. Knowlton*, 11 N. H. 198. See also *Estill v. Taul*, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498.



set up to defeat either an action of debt on the judgment <sup>1</sup> or an action to revive it.<sup>2</sup> But an action of debt cannot be maintained upon a judgment rendered by a court without jurisdiction,<sup>3</sup> nor can a proceeding to revive the judgment be so maintained.<sup>4</sup>

27. **As Affecting the Right to a Writ of Prohibition.** — A writ of prohibition<sup>5</sup> does not lie to restrain the proceedings of a court acting within its jurisdiction.<sup>6</sup> But a judgment which is void for want of jurisdiction may be reached by this remedy.<sup>7</sup>

28. **As Affecting the Right to Enjoin the Collection of a Judgment.** — The right to enjoin the collection of a judgment depends upon whether the court by which it was rendered did or did not have jurisdiction.<sup>8</sup> If there was jurisdiction, the collection of a judgment will not be enjoined for errors or irregularities in the proceedings.<sup>9</sup> But the collection of a judgment which was rendered without jurisdiction may, at least in some jurisdictions, be enjoined.<sup>10</sup>

29. **As Affecting the Liability of a Party Prosecuting an Action.** — Where a person is arrested in a civil action, an action of false imprisonment will not lie against the person who prosecuted the action merely because of errors or irregularities in the proceedings.<sup>11</sup> Nor will the plaintiff in a cause over which the court had jurisdiction be liable, merely because of errors or irregularities in its proceedings, for the taking of the defendant's property in execution.<sup>12</sup> But a person who applies for the arrest of another will be liable to an action of false imprisonment if the court does not have jurisdiction.<sup>13</sup> And a plaintiff who causes a defendant's goods to be taken in execution on a judgment which is void for want of jurisdiction is liable as a trespasser.<sup>14</sup>

30. **As Affecting the Liability of Judges and Judicial Officers.** — The possession or want of jurisdiction is also of importance in determining the liability of judicial officers.<sup>15</sup> Ordinarily a judicial officer is not liable for a judicial act in a matter within his jurisdiction.<sup>16</sup> But if he acts without jurisdiction he

1. **Right to Bring Suit Upon or Revive Judgment.** — *Granger v. Clark*, 22 Me. 128; *Jacobs v. Hull*, 12 Mass. 24; *Nichols v. Smith*, 26 N. H. 298; *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342; *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111; *Pendexter v. Cate*, 66 N. H. 270.

2. *Foster v. Crawford*, 80 Fed. Rep. 991, affirmed in 83 Fed. Rep. 975; *Folger v. Slaughter*, 33 La. Ann. 341; *Jeffries v. Wright*, 51 Mo. 215.

3. *Buchanan v. Rucker*, 9 East 192; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Carleton v. Washington Ins. Co.*, 35 N. H. 162; *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470; *Wilbur v. Abbot*, 60 N. H. 40; *Eastman v. Dearborn*, 63 N. H. 364; *Kilburn v. Woodworth*, 5 Johns. (N. Y.) 37, 4 Am. Dec. 321; *Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197. See the title DEBT, vol. 5, ENCYC. OF PL. AND PR., p. 905.

Since a judgment rendered in a proceeding against the property of a nonresident debtor is rendered without any jurisdiction from the person of the defendant, an action of debt cannot be maintained thereon. *Easterly v. Goodwin*, 35 Conn. 273; *Eastman v. Wadleigh*, 65 Me. 251, 20 Am. Rep. 695.

4. *Lavell v. McCurdy*, 77 Va. 763. See the title SCIRE FACIAS.

5. **Right to Writ of Prohibition.** — See the title PROHIBITION.

6. *State v. Wakely*, 2 Nott & M. (S. Car.) 410; *State v. Gary*, 33 Wis. 93.

7. *Gresham v. Ewell*, 85 Va. 1.

8. **Right to Enjoin the Collection of Judgments.** — See the title INJUNCTIONS, vol. 16, p. 337.

9. *A. B. Smith Co. v. Holmes County Bank*, (Miss. 1895) 18 So. Rep. 847; *Posthwaite v. Ghiselin*, 97 Mo. 420; *Vantilburg v. Black*, 3 Mont. 459; *Lininger v. Glenn*, 33 Neb. 187; *Nicklin v. Hobin*, 13 Oregon 406; *Roberts v. McCamant*, 70 Tex. 743; *Rowlett v. Williamson*, 18 Tex. Civ. App. 28.

10. *Grand Tower Min., etc., Co. v. Schirmer*, 64 Ill. 106; *Nicholson v. Stephens*, 47 Ind. 186; *Tarleton v. Cox*, 45 Miss. 438; *Jones v. Pharis*, 59 Mo. App. 254; *Glass v. Smith*, 66 Tex. 548.

11. **Liability of Persons Prosecuting Actions.** — *Hallock v. Dominy*, 69 N. Y. 238; *Brown v. Crowl*, 5 Wend. (N. Y.) 298; *Walbridge v. Hall*, 3 Vt. 114. See the title FALSE IMPRISONMENT, vol. 12, p. 754.

12. *Kipp v. Fullerton*, 4 Minn. 473. See the title TRESPASS.

13. *Miller v. Adams*, 52 N. Y. 409; *Palmer v. Foley*, 71 N. Y. 109, Matter of Bradner, 87 N. Y. 176; *Marks v. Townsend*, 97 N. Y. 598.

14. *Rex v. Danser*, 6 T. R. 245.

**Liability of Impounder.** — It has been held that a person who takes cattle damage feasant and sells them under a warrant of sale issued by a magistrate without jurisdiction is liable as a trespasser. *Cate v. Cate*, 44 N. H. 211. See the title IMPOUNDING, vol. 16, p. 4.

15. **Liability of Judicial Officers.** — See the titles CORONERS, vol. 7, p. 598; JUDGE, ante, p. 714; JUSTICE OF THE PEACE.

16. *Jones v. Brown*, 54 Iowa 78, 37 Am. Rep. 185; *Ross v. Griffin*, 53 Mich. 9; *Robertson v. Hale*, 68 N. H. 538; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80.

A military officer in imposing a fine acts in



may be liable to the party injured.<sup>1</sup>

**31. As Affecting the Liability of Officers Levying Executions.** — Applying the rules which govern the effect of the want or possession of jurisdiction in determining the liability of officers charged with the execution of process,<sup>2</sup> it is held that where the court has jurisdiction of a cause, errors or irregularities in the proceedings will neither render the officer who is charged with the levying of an execution liable as a trespasser<sup>3</sup> nor justify him in failing to make the levy.<sup>4</sup> But a judgment or order which is void for want of jurisdiction, as a general rule, constitutes no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.<sup>5</sup> And an officer is not liable for a failure to execute process based upon a void judgment.<sup>6</sup>

**32. As Affecting the Liability for Contempt.**<sup>7</sup> — If the court making an order has jurisdiction, errors or irregularities in the procedure or in the order cannot be set up to defeat a conviction for contempt in disobeying the order.<sup>8</sup> But if there was no authority to make the order disobeyed, an order of committal for contempt is void.<sup>9</sup> These rules find frequent application in contempt proceedings based on the violation of injunctions.<sup>10</sup>

**33. As Affecting the Right to a Writ of Habeas Corpus.**<sup>11</sup> — A conviction and sentence for a criminal offense cannot be collaterally attacked in habeas corpus proceedings for errors and irregularities not affecting the jurisdiction.<sup>12</sup> But if a person is restrained of his liberty under an order or judgment which is void for want of jurisdiction, habeas corpus will lie.<sup>13</sup>

**IV. ESSENTIAL CONSTITUENTS OF JURISDICTION** — **1. In General.** — To render the jurisdiction of a court complete it must have jurisdiction over the subject

a judicial capacity, and if he has jurisdiction he is not liable as a trespasser because he renders an erroneous decision. *Darling v. Bowen*, 10 Vt. 148. See the title MILITARY LAW.

**1.** *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758.

**2. Liability of Sheriffs and Constables.** — See the title SHERIFFS, MARSHALS, AND CONSTABLES.

**3.** *Camp v. Moseley*, 2 Fla. 171; *Deal v. Harris*, 8 Md. 43, 63 Am. Dec. 686; *Skinnion v. Kelley*, 18 N. Y. 355; *Beach v. Furman*, 9 Johns. (N. Y.) 229; *Hecker v. Jarret*, 3 Binn. (Pa.) 470.

Where the court had jurisdiction an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence. *Dynes v. Hoover*, 20 How. (U. S.) 65.

Where an assessor of taxes acts within his jurisdiction, the assessment cannot be questioned collaterally, and a collector acting thereunder is protected from being held liable in damages for so doing. *Delaware R. Co. v. Prettyman*, 17 Ind. Rev. Rec. 99, 7 Fed. Cas. No. 3,767; *Van Rensselaer v. Cottrell*, 7 Barb. (N. Y.) 129.

**4.** *Vicksburgh Grocery Co. v. Brennan*, (Miss. 1896) 20 So. Rep. 845; *Perryman v. State*, 8 Mo. 208; *Stevenson v. McLean*, 5 Humph. (Tenn.) 332; *Reams v. McNail*, 9 Humph. (Tenn.) 542.

**5.** *United States*. — *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Bell v. Ohio L. & T. Co.*, 1 Biss. (U. S.) 270, 3 Fed. Cas. No. 1,260.

*Iowa*. — *Reed v. Wright*, 2 Greene (Iowa) 36.

*Massachusetts*. — *Stetson v. Packer*, 7 Cush. (Mass.) 564.

*New Hampshire*. — *Batchelder v. Currier*, 45 N. H. 460.

*New York*. — *Savacool v. Boughton*, 5 Wend. (N. Y.) 179, 21 Am. Dec. 188.

*Ohio*. — *Adams v. Jeffries*, 12 Ohio 253, 40 Am. Dec. 477.

*Vermont*. — *Driscoll v. Place*, 44 Vt. 252.

Where a regimental court martial does not have jurisdiction its imposition of a fine for non-performance of military duty is void and the officer who executes the process is liable in trespass for false imprisonment. *Barrett v. Crane*, 16 Vt. 246.

**6.** *Lyles v. Bolles*, 8 S. Car. 258.

**7. Liability for Contempt.** — See the title CONTEMPT, vol. 7, p. 25.

**8.** *U. S. v. Debs*, 64 Fed. Rep. 739; *Drury v. Ewing*, 1 Bond (U. S.) 544, 7 Fed. Cas. No. 4,095; *Ketchum v. Edwards*, 6 N. Y. App. Div. 160.

**9.** *In re Sawyer*, 124 U. S. 200; *James v. Smith*, 2 S. Car. 188.

**10.** *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536. See the title INJUNCTIONS, vol. 16, p. 337.

**11. Right to Writ of Habeas Corpus.** — See the title HABEAS CORPUS, vol. 15, p. 125.

**12.** *Cuddy*, Petitioner, 131 U. S. 280; *In re Haynes*, 30 Fed. Rep. 770; *In re Eaton*, 51 Fed. Rep. 804; *Ex p. Watkins*, 3 Pet. (U. S.) 203; *Ex p. Holman*, 28 Iowa 178; *Ex p. Bond*, 9 S. Car. 80, 30 Am. Rep. 20.

**13.** *Miller v. Snyder*, 6 Ind. 1; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 216; *Norman v. Zeiber*, 3 Oregon 197; *Griffith v. Hubbard*, 9 S. Dak. 15.



matter,<sup>1</sup> and, in actions *in personam*, over the person,<sup>2</sup> or, in proceedings *in rem*, over the *res* or property in contest.<sup>3</sup>

2. Jurisdiction of the Subject Matter. — Jurisdiction of the subject matter is the power to deal with the general subject involved in the action.<sup>4</sup>

3. Jurisdiction of the Person. — Jurisdiction of the person is ordinarily understood to mean the power, obtained by the service of a summons or other proper notice or by an appearance, to render a personal judgment.<sup>5</sup>

4. Jurisdiction over the Res or Property. — Jurisdiction over the *res* or property is the power of a court over the thing, the subject matter before it, without regard to the persons who may be interested therein.<sup>6</sup>

V. SOURCES AND MODES OF ACQUIRING JURISDICTION — 1. Jurisdiction over the Subject Matter. — Jurisdiction over the subject matter is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.<sup>7</sup>

2. Effect of Consent to Give Jurisdiction — *a.* GENERAL RULE. — Jurisdic-

1. Jurisdiction of the Subject Matter Essential to Jurisdiction — *United States*. — *Hickey v. Stewart*, 3 How. (U. S.) 762; *Cooper v. Reynolds*, 10 Wall. (U. S.) 319.

*Alabama*. — *Lamar v. Marshall County*, 21 Ala. 772.

*Mississippi*. — *Foute v. McDonald*, 27 Miss. 610.

*Missouri*. — *Fithian v. Monks*, 43 Mo. 502.

*New York*. — *Matter of Radde*, 2 Connoly (N. Y.) 293.

*Ohio*. — *Wehrle v. Wehrle*, 39 Ohio St. 365.

*Pennsylvania*. — *Fowler v. Eddy*, 110 Pa. St. 117.

*Texas*. — *Galveston, etc., R. Co. v. McTigue*, 1 Tex. Civ. App. Cas., § 457.

2. Jurisdiction of the Person Essential to Jurisdiction in Personal Actions — *Florida*. — *McGehee v. Wilkins*, 31 Fla. 86.

*Illinois*. — *Campbell v. McCahan*, 41 Ill. 45; *Haywood v. Collins*, 60 Ill. 328; *Gardner v. Bunn*, 132 Ill. 410.

*Indiana*. — *Bliss v. Wilson*, 4 Blackf. (Ind.) 169; *Wort v. Finley*, 8 Blackf. (Ind.) 335.

*Iowa*. — *Farmers', etc., Bank v. Mather*, 30 Iowa 283.

*Michigan*. — *Clark v. Holmes*, 1 Dougl. (Mich.) 390; *Palmer v. Oakley*, 2 Dougl. (Mich.) 492.

*New Hampshire*. — *State v. Richmond*, 26 N. H. 211; *Eaton v. Badger*, 33 N. H. 228.

*New Jersey*. — *Buckley v. Perrine*, 54 N. J. Eq. 285.

*New York*. — *Oakley v. Aspinwall*, 4 N. Y. 513.

*Texas*. — *Glass v. Smith*, 66 Tex. 548; *Roller v. Ried*, 87 Tex. 69.

Jurisdiction in Adoption Proceedings. — It has been said that to give a decree of adoption any force or effect, jurisdiction must have been acquired by the court, 1, over the persons seeking to adopt the child; 2, over the child; and 3, over the parents of the child. *Ferguson v. Jones*, 17 Oregon 204, 11 Am. St. Rep. 808. See the title ADOPTION OF CHILDREN, vol. 1, p. 726.

3. Jurisdiction of the Res Essential to Jurisdiction in Actions in Rem. — *Grignon v. Astor*, 2 How. (U. S.) 341; *Cooper v. Reynolds*, 10 Wall. (U. S.) 317. See *infra*, this title, the

division, *Sources and Modes of Acquiring Jurisdiction*.

4. Definition of Jurisdiction of the Subject Matter — *Indiana*. — *Jackson v. Smith*, 120 Ind. 522; *State v. Wolever*, 127 Ind. 315; *McGuffey v. McClain*, 130 Ind. 327; *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 415; *McCoy v. Able*, 131 Ind. 420.

*Missouri*. — *Fithian v. Monks*, 43 Mo. 502; *Fields v. Maloney*, 78 Mo. 184; *Rosenheim v. Hartsock*, 90 Mo. 365; *Posthewaite v. Chiselin*, 97 Mo. 424; *State v. Southern R. Co.*, 100 Mo. 61; *Dowdy v. Wamble*, 110 Mo. 284.

*New Jersey*. — *Munday v. Vail*, 34 N. J. L. 422.

*New York*. — *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Yates v. Lansing*, 5 Johns. (N. Y.) 282.

*Texas*. — *Galveston, etc., R. Co. v. McTigue*, 1 Tex. App. Civ. Cas., § 457.

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought." *Cooper v. Reynolds*, 10 Wall. (U. S.) 316.

Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court by the law of its organization to deal with the abstract question. *Foltz v. St. Louis, etc., R. Co.*, 19 U. S. App. 581.

5. Definition of Jurisdiction of the Person. — *Grignon v. Astor*, 2 How. (U. S.) 319; *Dearing v. Charleston Bank*, 5 Ga. 518, 48 Am. Dec. 316; *Johnson v. Miller*, 50 Ill. App. 67, 55 Ill. App. 168; *Newell v. Newton*, 10 Pick. (Mass.) 470; *Palmer v. Oakley*, 2 Dougl. (Mich.) 489, 47 Am. Dec. 67.

6. Definition of Jurisdiction over the Res or Property. — See *Grignon v. Astor*, 2 How. (U. S.) 341.

7. Sources of Jurisdiction over the Subject Matter. — *Cooper v. Reynolds*, 10 Wall. (U. S.) 316; *Hall v. Hall*, 12 W. Va. 15. See the titles CONSTITUTIONAL LAW, vol. 6, p. 882; COURTS, vol. 8, p. 21, and cross-references.



tion of the subject matter is given only by law and cannot be conferred by consent.<sup>1</sup>

*b. APPELLATE COURTS.* — When a cause is not within the jurisdiction which is given to an appellate court by statute no authority to hear and determine the cause can be given by the parties.<sup>2</sup> Accordingly, where an appel-

**1. Rule Against Jurisdiction of Subject Matter by Consent** — *England.* — Lawrence v. Wilcock, 11 Ala. & El. 941, 39 E. C. L. 280; Reg. v. Judge, 20 Q. B. D. 248, 57 L. J. Q. B. 143; *In re Aylmer*, 20 Q. B. D. 262, 57 L. J. Q. B. 168.

*United States.* — Nazro v. Cragin, 3 Dill. (U. S.) 474; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 451.

*Alabama.* — Taliferro v. Bassett, 3 Ala. 670; Winn v. Freele, 19 Ala. 171; Jeffries v. Harbin, 20 Ala. 387; Fields v. Walker, 23 Ala. 155; Wyatt v. Judge, 7 Port. (Ala.) 37.

*Arkansas.* — Jacks v. Moore, 33 Ark. 31; Dansby v. Beard, 39 Ark. 254; Gaither v. Wason, 42 Ark. 126; Hyllis v. State, 45 Ark. 478.

*California.* — Feillett v. Engler, 8 Cal. 77.

*Colorado.* — Haverly Invincible Min. Co. v. Howcutt, 6 Colo. 574; McGarvey v. Hall, 7 Colo. App. 426.

*Illinois.* — Hoagland v. Creed, 81 Ill. 506; Bishop v. Nelson, 83 Ill. 601; Cobb v. People, 84 Ill. 511; Leigh v. Mason, 2 Ill. 249.

*Indiana.* — Doctor v. Hartman, 74 Ind. 221; McClure v. State, 77 Ind. 287; Herbster v. State, 80 Ind. 484; Smith v. Myers, 109 Ind. 1, 58 Am. Rep. 375.

*Iowa.* — Chapman v. Morgan, 2 Greene (Iowa) 374; Wright v. Boon, 2 Greene (Iowa) 458; Winchester v. Ayres, 4 Greene (Iowa) 104.

*Kentucky.* — Lindsey v. McClelland, 1 Bibb (Ky.) 252; Banks v. Fowler, 3 Litt. (Ky.) 332.

*Massachusetts.* — Santom v. Ballard, 133 Mass. 465; Vose v. Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750.

*Mississippi.* — Hurd v. Tombes, 7 How. (Miss.) 229.

*Missouri.* — Dodson v. Scroggs, 47 Mo. 285; McIlwrath v. Hollander, 73 Mo. 114, 39 Am. Rep. 484.

*New Hampshire.* — State v. Richmond, 26 N. H. 241; Haywood v. Charlestown, 34 N. H. 23; Batchelder v. Currier, 45 N. H. 464, citing People v. White, 24 Wend. (N. Y.) 520; Heyer v. Burger, Hoff. (N. Y.) 1, and Blatchley v. Moser, 15 Wend. (N. Y.) 215.

*New Jersey.* — Falkenburgh v. Cramer, 1 N. J. L. 35; North Hudson County R. Co. v. Flanagan, 57 N. J. L. 236; Collins v. Keller, 58 N. J. L. 429; Bayles v. Newton, 51 N. J. L. 553.

*New York.* — Dudley v. Mayhew, 3 N. Y. 9; Wheelock v. Lee, 74 N. Y. 495; Matter of Radde, 2 Connoly (N. Y.) 293.

*North Carolina.* — Skinner v. Moore, 2 Dev. & B. L. (19 N. Car.) 138, 30 Am. Dec. 155.

*Ohio.* — Torbet v. Coffin, 6 Ohio 33; Place v. Welch, 3 West. L. Month. 611, 2 Ohio Dec. (Reprint) 542; Gilliland v. Sellers, 2 Ohio St. 223; McCleary v. McLain, 2 Ohio St. 368.

*Pennsylvania.* — Taylor v. Knipe, 2 Pearson (Pa.) 151; Morrison v. Weaver, 4 S. & R. (Pa.) 190; Stoy v. Yost, 12 S. & R. (Pa.) 385; Small's Appeal, 23 W. N. C. (Pa.) 20.

*Tennessee.* — Glasgow v. State, 9 Baxt.

(Tenn.) 485; Agee v. Dement, 1 Humph. (Tenn.) 332.

*Vermont.* — Thayer v. Montgomery, 26 Vt. 491; Glidden v. Elkins, 2 Tyler (Vt.) 218.

*Virginia.* — Randolph v. Kinney, 3 Rand. (Va.) 394.

*Wisconsin.* — Wanzer v. Howland, 10 Wis. 8.

The consent of parties can give the court no authority to render an extra-judicial judgment in the premises. Cottrell v. Thompson, 15 N. J. L. 344.

In *Pennsylvania*, however, a justice of the peace may enter a judgment by confession for a sum in excess of his jurisdictional limit, but only when the parties voluntarily appear. Borland v. Ealy, 43 Pa. St. 111; Powell v. Shank, 3 Watts (Pa.) 235; Camp v. Wood, 10 Watts (Pa.) 118.

**2. Same — Application of the Rule to Appellate Courts** — *United States.* — Shankland v. Washington, 5 Pet. (U. S.) 390; Sampson v. Welsh, 24 How. (U. S.) 207; Mills v. Brown, 16 Pet. (U. S.) 525.

*Alabama.* — Benford v. Daniels, 20 Ala. 445; Mabry v. Dickens, 31 Ala. 243.

*Colorado.* — County Com'rs v. Sloan, 4 Colo. 128; Bernard v. Boggs, 4 Colo. 73; Thorne v. Ornauer, 6 Colo. 39.

*Illinois.* — Moore v. Bolin, 5 Ill. App. 556; Sternberg v. Strauss, 41 Ill. App. 147; Ginn v. Rogers, 9 Ill. 131; Fleischman v. Walker, 91 Ill. 318; Richards v. Lake Shore, etc., R. Co., 124 Ill. 516.

*Indiana.* — Shroyer v. Lawrence, 9 Ind. 322; Davis v. Davis, 36 Ind. 160; Doctor v. Hartman, 74 Ind. 221; Flory v. Wilson, 83 Ind. 391; Tucker v. Sellers, 130 Ind. 514; Tucker v. O'Neal, 130 Ind. 597, 30 N. E. Rep. 533; Jeffersonville, etc., R. Co. v. Harrold, 3 Ind. App. 592.

*Louisiana.* — Robonam v. Robonam, 12 La. 73; Gee v. Thompson, 39 La. Ann. 310; State v. Voorhies, 41 La. Ann. 540.

*Michigan.* — Spear v. Carter, 1 Mich. 19, 48 Am. Dec. 688; Wilson v. Davis, 1 Mich. 156; Farrand v. Bentley, 6 Mich. 281; Allen v. Carpenter, 15 Mich. 25; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Beach v. Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45; Clark v. Holmes, 1 Dougl. (Mich.) 390.

*Missouri.* — Moore v. Wabash R. Co., 51 Mo. App. 504; Cones v. Ward, 47 Mo. 289; Pearce v. Calhoun, 59 Mo. 272; Tippack v. Briant, 63 Mo. 580; Brown v. Woody, 64 Mo. 547; Abernathy v. Moore, 83 Mo. 65; State v. Bulling, 100 Mo. 87.

*Ohio.* — Wasson v. Heffner, 13 Ohio St. 573.

*Virginia.* — Clarke v. Conn, 1 Munf. (Va.) 160.

*Wisconsin.* — Walker v. Rogan, 1 Wis. 597; Clark v. Bowers, 2 Wis. 123; Verbeck v. Verbeck, 6 Wis. 159; Miles v. Chamberlain, 17 Wis. 447; Felt v. Felt, 19 Wis. 193; Ohse v. Bruss, 45 Wis. 442; Palmer v. Peterson, 46 Wis. 402; Fleming v. Appleton 55 Wis. 90;



late court does not have jurisdiction to review the action of a court below, it cannot obtain jurisdiction by consent of the parties.<sup>1</sup> Neither can a court with only appellate jurisdiction be invested, by consent of the parties, with original jurisdiction.<sup>2</sup>

**3. Waiver of Defects of Jurisdiction.** — In consequence of the rule that jurisdiction of the subject matter cannot be conferred by consent the objection that a court is not given such jurisdiction by law cannot, of course, be waived by the parties.<sup>3</sup>

*Watson v. Appleton*, 62 Wis. 267; *Plano Mfg. Co. v. Rasey*, 69 Wis. 246; *Vogel v. Antigo*, 81 Wis. 642.

**Same — Appeal from Decree Entered in Court Below by Consent.** — In *Darden v. Lines*, 2 Fla. 573, it was held that the supreme court had no jurisdiction of a cause brought up by appeal from a decree entered *pro forma* in the court below by consent of the parties.

**1. Same — Appellate Jurisdiction Cannot Be Extended by Consent — United States.** — *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Merrill v. Petty*, 16 Wall. (U. S.) 338.

*Alabama* — *Benford v. Daniels*, 20 Ala. 445; *Maby v. Dickens*, 31 Ala. 243; *Little v. Fitts*, 33 Ala. 343.

*Arkansas* — *Hamilton v. Buxton*, 5 Ark. 400.

*Illinois* — *People v. Royal*, 2 Ill. 557; *Peak v. People*, 71 Ill. 278; *Fleischman v. Walker*, 91 Ill. 318.

*Massachusetts* — *Smith v. Brown*, 136 Mass. 416.

*Missouri* — *Tippack v. Briant*, 63 Mo. 580.

*Nevada* — *Phillips v. Welch*, 11 Nev. 187.

*Pennsylvania* — *McFee v. Harris*, 25 Pa. St. 102.

*Virginia* — *M'Call v. Peachy*, 1 Call (Va.) 55.

*Wisconsin* — *Mathie v. McIntosh*, 40 Wis. 120.

**2 Same — Original Jurisdiction Cannot Be Given by Consent.** — When a court has only appellate jurisdiction, there must be some decision, judgment, decree or order entered in the court below before such appellate court can acquire jurisdiction of the case. Thus it has been held that where there is no appeal, but a mere agreement of the parties to refer the matters in dispute to the judgment of the superior court, this does not give the superior court jurisdiction. *Knox v. Beirne*, 4 Ark. 460.

And it has been held that where parties agreed that the jury in the lower court should render a verdict for the plaintiff, but that judgment should be entered only in favor of him whom the appellate court should decide to be entitled to it, the appellate court had not jurisdiction to give judgment in such a case, and consent would not give it jurisdiction. *Ames v. Boland*, 1 Minn. 365. To the same effect are *Ginn v. Rogers*, 8 Ill. 131, and *Dicks v. Hatch*, 10 Iowa 380. But the contrary was held in a case where the appellate court had original jurisdiction over the subject matter of the action. *Danforth v. Thompson*, 34 Iowa 243. And in another case it was decided that although the judgment of a court not having jurisdiction of the subject matter is void, yet if on appeal from such court to a court having original jurisdiction of the subject matter, the parties voluntarily appear and consent to a trial, the judgment in the latter court will be binding. *Randolph County v. Ralls*, 18 Ill. 29.

*Compare Osgood v. Thurston*, 23 Pick. (Mass.) 110.

**3. Want of Jurisdiction of the Subject Matter Cannot Be Waived — Alabama.** — *Taliferro v. Bassett*, 3 Ala. 670; *Winn v. Freele*, 19 Ala. 171; *Jeffries v. Harbin*, 20 Ala. 387; *Benford v. Daniels*, 20 Ala. 445; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Fields v. Walker*, 23 Ala. 155; *McClure v. Lay*, 30 Ala. 208; *Little v. Fitts*, 33 Ala. 343; *Wyatt v. Judge*, 7 Port. (Ala.) 37; *Merrill v. Jones*, 8 Port. (Ala.) 554.

*California* — *People v. O'Neil*, 47 Cal. 109; *In re Grove Street*, 61 Cal. 438; *Mastick v. Superior Ct.*, 94 Cal. 347.

*Colorado* — *Derry v. Ross*, 5 Colo. 295; *Haverly Inviacible Min. Co. v. Howcutt*, 6 Colo. 574.

*Connecticut* — *Wildman v. Rider*, 23 Conn. 172.

*Dakota* — *Murry v. Burris*, 6 Dak. 170.

*Florida* — *Livingston v. Webster*, 26 Fla. 325.

*Georgia* — *Central Bank v. Gibson*, 11 Ga. 453; *Crane v. Barry*, 47 Ga. 476; *Castleberry v. State*, 68 Ga. 49.

*Idaho* — *People v. Du Rell*, 1 Idaho 44; *Tootle v. French*, 2 Idaho 745.

*Illinois* — *Stout v. Cook*, 41 Ill. 447; *Way v. Way*, 64 Ill. 406; *Hoagland v. Creed*, 81 Ill. 506; *Richards v. Lake Shore, etc.*, R. Co., 124 Ill. 519.

*Indiana* — *Brownfield v. Weicht*, 9 Ind. 395; *Justice v. State*, 17 Ind. 56; *Riley v. Butler*, 36 Ind. 51; *Lane v. Taylor*, 40 Ind. 495; *Herbster v. State*, 80 Ind. 484; *McCoy v. Able*, 131 Ind. 419.

*Iowa* — *Walters v. The Steamboat Mollie Dozier*, 24 Iowa 192, 95 Am. Dec. 722; *Orcutt v. Hanson*, 71 Iowa 514; *Marquardt v. Thompson*, 78 Iowa 158.

*Kansas* — *Rice v. State*, 3 Kan. 141; *Foreman v. Carter*, 9 Kan. 674.

*Kentucky* — *Lindsey v. McClelland*, 1 Bibb (Ky.) 262; *Fidler v. Hall*, 2 Met. (Ky.) 461.

*Louisiana* — *Darte v. Lege*, 28 La. Ann. 640; *Dupee v. Greffin*, 1 Mart. N. S. (La.) 200; *Greiner v. Thielen*, 6 Rob. (La.) 365; *Fleming v. Hiligsberg*, 11 Rob. (La.) 77.

*Maine* — *Chase v. Palmer*, 25 Me. 341.

*Massachusetts* — *Martin v. Com.*, 1 Mass. 347; *Riley v. Lowell*, 117 Mass. 76; *Custy v. Lowell*, 117 Mass. 78; *Cheshire v. Adams, etc.*, *Reservoir Co.*, 119 Mass. 356; *Richardson v. Welcome*, 6 Cush. (Mass.) 333; *Elder v. Dwight Mfg. Co.*, 4 Gray (Mass.) 201; *Simonds v. Parker*, 1 Met. (Mass.) 508.

*Michigan* — *Farrand v. Bentley*, 6 Mich. 281; *Moore v. Ellis*, 18 Mich. 77; *Atty.-Gen. v. Moliter*, 26 Mich. 444; *Woodruff v. Ives*, 34 Mich. 320; *Thompson v. Michigan Mut. Ben. Assoc.*, 52 Mich. 522.



**4. Change of Venue.** — A change of venue cannot be made by consent to a court which does not have jurisdiction.<sup>1</sup> But, though a change of venue ordinarily puts an end to the jurisdiction of the first court, *ipso facto*, its jurisdiction may be restored by consent.<sup>2</sup>

**5. Contracts to Deprive Courts of Jurisdiction.** — Jurisdiction of a court over a cause cannot be taken away by consent, and contracts ousting courts of jurisdiction are illegal and void.<sup>3</sup>

**6. Jurisdiction of the Person** — *a.* IN GENERAL. — Jurisdiction of the person is acquired either by the service of process within the territorial limits of

*Mississippi.* — *Yalabusha County v. Carby*, 3 Smed. & M. (Miss.) 529; *Buckingham v. Bailey*, 4 Smed. & M. (Miss.) 538; *Bell v. Tombigbee R. Co.*, 4 Smed. & M. (Miss.) 549; *Holloman v. Holloman*, 5 Smed. & M. (Miss.) 559; *Green v. Creighton*, 10 Smed. & M. (Miss.) 163.

*Missouri.* — *Henderson v. Henderson*, 55 Mo. 534; *Graves v. McHugh*, 58 Mo. 499; *Bray v. Marshall*, 66 Mo. 122; *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69.

*Nebraska.* — *Brondberg v. Babbolt*, 14 Neb. 517; *Union Pacific R. Co. v. Ogilvy*, 18 Neb. 639.

*New Jersey.* — *School Dist. No. 28 v. Stocker*, 42 N. J. L. 115; *Collins v. Keller*, 58 N. J. L. 429.

*New York.* — *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232; *Pitt v. Davison*, 37 Barb. (N. Y.) 97; *Feist v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 25 Civ. Pro (N. Y.) 257, 13 Misc. (N. Y.) 240; *McCarty v. Parker*, (N. Y. Super. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 235; *Delafield v. Illinois*, 2 Hill (N. Y.) 159.

*North Carolina.* — *Hawkins v. Hughes*, 87 N. Car. 115; *Randleman Mfg. Co. v. Simmons*, 97 N. Car. 89; *Whitehurst v. Pettipher*, 105 N. Car. 40.

*Ohio.* — *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; *Evans v. Iles*, 7 Ohio St. 233; *Steamboat General Buell v. Long*, 18 Ohio St. 521; *Hamilton v. Merrill*, 37 Ohio St. 684; *State v. Turner*, *Wright* (Ohio) 21.

*Pennsylvania.* — *Collins v. Collins*, 37 Pa. St. 387; *Musselman's Appeal*, 101 Pa. St. 169; *Stearly's Appeal*, 3 Grant Cas. (Pa.) 270; *Taylor v. Knipe*, 2 Pearson (Pa.) 151.

*South Carolina.* — *State v. Penny*, 19 S. Car. 218; *Segler v. Coward*, 24 S. Car. 122; *Ware v. Henderson*, 25 S. Car. 385.

*South Dakota.* — *Wayne v. Caldwell*, 1 S. Dak. 486, 36 Am. St. Rep. 750.

*Tennessee.* — *Agee v. Dement*, 1 Humph. (Tenn.) 332; *Dixon v. Caruthers*, 9 Yerg. (Tenn.) 30.

*Texas.* — *Able v. Bloomfield*, 6 Tex. 263; *Hardeman v. Morgan*, 48 Tex. 103; *Mawthe v. Crozier*, 50 Tex. 153; *Heidenheimer v. Marx*, 1 Tex. App. Civ. Cas., § 171; *Billingsly v. State*, 3 Tex. App. 686.

*Vermont.* — *Southwick v. Merrill*, 3 Vt. 320; *Stoughton v. Mott*, 13 Vt. 175; *Shepherd v. Beede*, 24 Vt. 40; *Thayer v. Montgomery*, 26 Vt. 491; *French v. Holt*, 57 Vt. 187; *Niles v. Howe*, 57 Vt. 388; *Lamson v. Worcester*, 58 Vt. 381; *Eaton v. Houghton*, 1 Aik. (Vt.) 380; *Chittenden v. Hurlbut*, 1 D. Chip. (Vt.) 384; *Glidden v. Elkins*, 2 Tyler (Vt.) 218.

*Virginia.* — *Poindexter v. Burwell*, 82 Va. 507; *Beckley v. Palmer*, 11 Gratt. (Va.) 625.

*Washington.* — *Tolmie v. Dean*, 1 Wash. Ter. 46.

*Wisconsin.* — *Pollard v. Wegener*, 13 Wis. 569; *Damp v. Dane*, 29 Wis. 419; *Butler v. Wagner*, 35 Wis. 54; *Mathie v. McIntosh*, 40 Wis. 120; *Henckel v. Wheeler*, etc., Mfg. Co., 51 Wis. 363; *Dewey v. Hyde*, 1 Pin. (Wis.) 469.

The failure to appear and object to a court's want of jurisdiction of the subject matter in a suit is not a waiver of the objection. *Talladega County v. Thompson*, 18 Ala. 694.

In *Pennsylvania*, however, it has been held by a divided court that if a justice of the peace has no jurisdiction of the subject matter, but no objection is taken by the defendant, who appeals from the judgment entered to a court that would have had jurisdiction of the matter, he cannot, after judgment in such appellate court, object to the jurisdiction of the justice. *Montgomery v. Heilman*, 96 Pa. St. 44.

**1. Consent to Change of Venue.** — *Ex p. Williams*, 4 Yerg. (Tenn.) 579; *Dykeman v. Budd*, 3 Wis. 640. *Contra*, *Salter v. Salter*, 6 Bush (Ky.) 624.

**2. Taylor v. Atlantic**, etc., R. Co., 68 Mo. 397.

**3. Illegality of Contracts Ousting Courts of Jurisdiction.** — *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445, reversing 30 Wis. 496; *Hobbs v. Manhattan Ins. Co.*, 56 Me. 419; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.) 185; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596; *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518. See *Boynton v. Middlesex Mut. F. Ins. Co.*, 4 Met. (Mass.) 212.

An agreement in articles of copartnership and in contracts for work, etc., to refer all matters in dispute to arbitrators, cannot oust the courts of their jurisdiction. *Pearl v. Harris*, 121 Mass. 390; *Gray v. Wilson*, 4 Watts (Pa.) 39; *Hart v. Lauman*, 29 Barb. (N. Y.) 410; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350.

Agreements not to appeal cannot divest the appellate court of jurisdiction. *Muldrow v. Norris*, 2 Cal. 74; *Fahs v. Darling*, 82 Ill. 142. *Contra* *Townsend v. Masterson*, etc., *Stone Dressing Co.*, 15 N. Y. 587; *Bingham v. Guthrie*, 19 Pa. St. 418; *Watson v. Wetter*, 91 Pa. St. 385; *Hostetter's Appeal*, 92 Pa. St. 132.

But an agreement not to appeal, to be enforced, must be indubitable. *Stedeker v. Bernard*, 93 N. Y. 589.

An agreement not to appeal does not preclude a writ of error. *Putnam v. Churchill*, 4 Mass. 516.

See also the references given in vol. 15, p. 981, note 6.



the jurisdiction, upon the defendant personally, or by his voluntary appearance either in person or by attorney.<sup>1</sup>

*b. JURISDICTION BY CONSENT AND WAIVER OF OBJECTIONS TO JURISDICTION.* — It therefore necessarily follows not only that jurisdiction of the person may be acquired, or restored, if lost, by consent,<sup>2</sup> but that defects of jurisdiction arising from irregularities in the commencement of the proceedings, defective process or even the absence of process may be waived by a failure to make seasonable objections.<sup>3</sup>

**1. Modes of Acquiring Jurisdiction of the Person.** — *Cooper v. Reynolds*, 10 Wall. (U. S.) 316; *Gardner v. Bunn*, 132 Ill. 410; *Wagner, J.*, in *Fithian v. Monks*, 43 Mo. 515; *Glass v. Smith*, 66 Tex. 550; *Hall v. Hall*, 12 W. Va. 15.

See the titles APPEARANCES, ENCYC. OF PL. AND PR., vol. 2, p. 588; SERVICE OF PROCESS AND PAPERS, vol. 19, p. 567. As to the effect of an appearance by attorney, see also the title ATTORNEY AND CLIENT, vol. 3, p. 349, of this work.

**2. Consent May Give Jurisdiction of the Person** — *United States*. — *Whyte v. Gibbs*, 20 How. (U. S.) 541; *M'Lean v. Lafayette Bank*, 3 McLean (U. S.) 587.

*Arkansas*. — *Grimmett v. Askew*, 48 Ark. 151.

*California*. — *Smith v. Curtis*, 7 Cal. 584.

*Georgia*. — *Central Bank v. Gibson*, 11 Ga. 453.

*Illinois*. — *Kenney v. Greer*, 13 Ill. 432.

*Massachusetts*. — *Brown v. Webber*, 6 Cush. (Mass.) 560.

*New York*. — *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

*North Carolina*. — *McMinn v. Hamilton*, 77 N. Car. 300.

*Ohio*. — *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; *Gilliland v. Sellers*, 2 Ohio St. 223; *Allen v. Miller*, 11 Ohio St. 374.

*Tennessee*. — *Agee v. Dement*, 1 Humph. (Tenn.) 332.

*Texas*. — *Campbell v. Wilson*, 6 Tex. 379.

Where, however, a statute provides that no one shall be permitted to elect any other domicile or residence than his own for the purpose of being sued, he cannot by consent give jurisdiction over himself to another court. *State v. Judge*, 21 La. Ann. 258.

**Same — Appeals.** — Where an appeal from a court which had no jurisdiction over the subject matter is taken to a court which had original jurisdiction of such matter, consent of the parties will give jurisdiction to such appellate court to try the case. *Randolph County v. Ralls*, 18 Ill. 29. Compare *Osgood v. Thurston*, 23 Pick. (Mass.) 110; *White v. Buchanan*, 6 Coldw. (Tenn.) 32.

If a trial court fails to acquire jurisdiction of the person of the defendant, if the defendant perfects an appeal that will give the appellate court jurisdiction. *Wasson v. Cone*, 86 Ill. 46; *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563.

**Jurisdiction of the Person Restored by Consent.** — If the court once have jurisdiction of a cause and have exercised it so that their power is gone, consent can restore it. *Gager v. Doe*, 29 Ala. 341; *Brown v. Crow*, Hard. (Ky.) 451; *Taylor v. Atlantic*, etc., R. Co., 68 Mo. 397.

**3. Waiver of Jurisdictional Defects** — *United States*. — *Harkness v. Hyde*, 98 U. S. 476;

*Eddy v. Lafayette*, 49 Fed. Rep. 807; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 718.

*Alabama*. — *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Hatter v. Eastland*, 22 Ala. 688; *Walker v. Chapman*, 22 Ala. 116; *Stanley v. Mobile Bank*, 23 Ala. 652; *Lampley v. Beavers*, 25 Ala. 534; *Gager v. Doe*, 29 Ala. 341; *Aderhold v. Anrison*, 99 Ala. 521; *Wyatt v. Judge*, 7 Port. (Ala.) 37; *Merrill v. Jones*, 8 Port. (Ala.) 554.

*Arkansas*. — *Heilman v. Martin*, 2 Ark. 163; *Ex p. Woods*, 3 Ark. 532; *Frank v. Hedrick*, 18 Ark. 308.

*Colorado*. — *Smith v. Arapahoe County*, 4 Colo. 235.

*Connecticut*. — *Payne v. Farmers', etc., Bank*, 29 Conn. 416; *Hotchkiss's Appeal*, 32 Conn. 355; *Haussman v. Burnham*, 59 Conn. 136.

*Delaware*. — *Townsend v. Steward*, 4 Harr. (Del.) 94.

*Florida*. — *Jackson v. Relf*, 26 Fla. 465.

*Georgia*. — *Perseverance Min. Co. v. Bisener*, 87 Ga. 193.

*Illinois*. — *Yaeger v. Henry*, 39 Ill. App. 22; *Callender v. Gates*, 45 Ill. App. 374; *Baldwin v. Murphy*, 82 Ill. 485; *Kreitz v. Behrensmeyer*, 125 Ill. 141.

*Indiana*. — *Clark v. State*, 4 Ind. 268; *Templeton v. Hunter*, 10 Ind. 380; *Ringle v. Bickle*, 17 Ind. 325; *Indianapolis, etc., R. Co. v. Renner*, 17 Ind. 135; *Jocelyn v. Barrett*, 18 Ind. 128; *Beddinger v. Jocelyn*, 18 Ind. 325; *Brady v. Richardson*, 18 Ind. 1; *Test v. Small*, 21 Ind. 127; *Judah v. Vincennes University*, 23 Ind. 272; *Cox v. Pruitt*, 25 Ind. 90; *Smith v. Jeffries*, 25 Ind. 376; *Garner v. Board*, 27 Ind. 323; *Nesbit v. Long*, 37 Ind. 300; *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Davis v. Brinker*, 50 Ind. 25; *Mayes v. Goldsmith*, 58 Ind. 94; *Harbin v. State*, 133 Ind. 698, 33 N. E. Rep. 635; *Ledgerwood v. State*, 134 Ind. 81.

*Iowa*. — *Marquardt v. Thompson*, 78 Iowa 158; *German Bank v. American F. Ins. Co.*, 83 Iowa 491, 32 Am. St. Rep. 316; *Schrader v. Hoover*, 87 Iowa 654.

*Kentucky*. — *Howe v. Stevenson*, 84 Ky. 576.

*Louisiana*. — *Marqueze v. Le Blanc*, 29 La. Ann. 194; *Mix v. His Creditors*, 39 La. Ann. 624.

*Maine*. — *Buckfield Branch R. Co. v. Benson*, 43 Me. 374.

*Massachusetts*. — *Carlisle v. Weston*, 21 Pick. (Mass.) 535.

*Michigan*. — *Crane v. Hardy*, 1 Mich. 56; *Pardee v. Smith*, 27 Mich. 33; *Greeley v. Stilson*, 27 Mich. 153; *Manhard v. Schott*, 37 Mich. 235; *Payment v. Church*, 38 Mich. 776; *Maxwell v. Deens*, 46 Mich. 35; *Thompson v. Michigan Mut. Ben. Assoc.*, 52 Mich. 522.



**7. Jurisdiction of the Res.** — As a general rule, jurisdiction of the *res* is obtained by a seizure under process of the court whereby it is held to abide such order as the court may make.<sup>1</sup> But, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing and in effect subject it to the dominion of the court. Among this latter class of cases is the levy of a writ of attachment or seizure of real estate, which, being incapable of removal and lying within the territorial jurisdiction of the court, is for all practical purposes brought within the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court.<sup>2</sup> And the writ of garnishment or attachment or other form of service on a party holding a fund which becomes the subject of litigation brings the fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court.<sup>3</sup> Various other illustrations of the mode of acquiring jurisdiction in proceedings *in rem* and *quasi in rem* will be found under appropriate titles, to which reference is made in the note below.<sup>4</sup>

**VI. ERRORS, IRREGULARITIES, AND JURISDICTIONAL DEFECTS — 1. In General.** — It follows from what has been said in the section of this article dealing with the effect of the possession and want of jurisdiction,<sup>5</sup> that defects in the proceedings of courts fall under two classes — those which render the proceedings void, and those which render them merely voidable. But whether a particular defect belongs to the one or the other of these classes is a matter which is frequently very difficult to determine. It may, however, be said that those defects which relate to the jurisdiction over the subject matter are generally of the class which render the proceedings void.<sup>6</sup> On the other hand, there

*Minnesota.* — *Anderson v. Southern Minnesota R. Co.*, 21 Minn. 30; *State v. Fitzgerald*, 51 Minn. 534; *In re Ellis*, 55 Minn. 401.

*Missouri.* — *Sheehan, etc., Transp. Co. v. Sims*, 36 Mo. App. 224; *Kincaid v. Storz*, 52 Mo. App. 564; *Henderson v. Henderson*, 55 Mo. 534; *Snitjer v. Downing*, 80 Mo. 588; *Leonard v. Sparks*, 117 Mo. 103, 38 Am. St. Rep. 646.

*Nebraska.* — *Johnson v. Jones*, 2 Neb. 135; *Gandy v. Jolly*, 35 Neb. 711, 37 Am. St. Rep. 460.

*New Jersey.* — *Funck v. Smith*, 46 N. J. L. 484; *North Hudson County R. Co. v. Flanagan*, 57 N. J. L. 236.

*New York.* — *Clapp v. Graves*, 26 N. Y. 418; *Hovey v. McDonald*, 45 N. Y. Super. Ct. 606; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Ross v. Konor*, 49 Hun (N. Y.) 610, 17 N. Y. St. Rep. 465; *Crowley v. Royal Exch. Shipping Co.*, 10 Daly (N. Y.) 409; *Burling v. Freeman*, 2 Hun (N. Y.) 661; *People v. Brennan*, 3 Hun (N. Y.) 666; *Matter of Budlong*, 54 Hun (N. Y.) 131, 18 Civ. Pro. (N. Y.) 18; *Bunker v. Langs*, 76 Hun (N. Y.) 543; *Matter of Blum*, (Supm. Ct.) 9 Misc. (N. Y.) 571; *Cushingham v. Phillips*, 1 E. D. Smith (N. Y.) 416; *Davis v. Packard*, 6 Wend. (N. Y.) 327.

*Ohio.* — *Thompson v. Steamboat Julius D. Morton*, 2 Ohio St. 26; *Steamboat General Buell v. Long*, 18 Ohio St. 521.

*Oregon.* — *White v. Northwest Stage Co.*, 5 Oregon 99.

*Pennsylvania.* — *Dewart v. Purdy*, 29 Pa. St. 113; *Schenley v. Com.*, 36 Pa. St. 29, 78 Am. Dec. 359; *Larkin v. Scranton City*, 162 Pa. St. 289.

*South Dakota.* — *Wayne v. Caldwell*, 1 S. Dak. 483, 36 Am. St. Rep. 750.

*Tennessee.* — *Agee v. Dement*, 1 Humph. (Tenn.) 332; *Hartley v. U. S.*, 3 Hayw. (Tenn.) 45; *Chester v. Embree*, Peck. (Tenn.) 370; *Holcomb v. Canady*, 2 Heisk. (Tenn.) 610.

*Texas.* — *Brooks v. Chatham*, 57 Tex. 31; *Douglas v. Baker*, 79 Tex. 505.

*Vermont.* — *Blood v. Crandall*, 28 Vt. 396; *Lyman v. Central Vermont R. Co.*, 59 Vt. 167; *Eaton v. Houghton*, 1 Ark. (Vt.) 380, 25 Vt. 349, note.

*Wisconsin.* — *Blackwood v. Jones*, 27 Wis. 498; *Atkins v. Fraker*, 32 Wis. 510; *Ruthe v. Green Bay, etc.*, R. Co., 37 Wis. 344; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 347.

**1. Mode of Acquiring Jurisdiction over the Res.** — *Cooper v. Reynolds*, 10 Wall. (U. S.) 317; *Hall v. Hall*, 12 W. Va. 15.

**2.** See the title ATTACHMENT, vol. 3, p. 181. See also the ENCYCLOPEDIA OF PLEADING AND PRACTICE, title ATTACHMENT, vol. 3, p. 1.

**3.** See the title GARNISHMENT, vol. 14, p. 731. See also the ENCYCLOPEDIA OF PLEADING AND PRACTICE, vol. 9, p. 805.

**4.** See the titles DIVORCE, vol. 9, p. 723; FORECLOSURE OF MORTGAGES, vol. 13, p. 776; NON-RESIDENT; PARTITION. And see the ENCYC. OF PLEADING AND PRACTICE, titles DIVORCE, vol. 7, p. 49; FORECLOSURE OF MORTGAGES, vol. 9, p. 84; PUBLICATION, vol. 17, p. 26.

**5. Character and Effect of Defects in Judicial Proceedings.** — See *supra*, this title, the division *Effect of Possession and Want of Jurisdiction*.

**6.** *Nichols v. Smith*, 26 N. H. 300.



are few defects in the proceedings of a court of justice which render the proceedings void, in the strict sense of that word, where the court has jurisdiction of the subject matter of the suit.<sup>1</sup>

**Defects Treated as Mere Irregularities in Doubtful Cases.** — In doubtful cases, as the safer course, the courts are inclined to treat defects as errors or irregularities rather than jurisdictional defects.<sup>2</sup>

**Test to Determine Character of Defect.** — Amendability has sometimes been declared to be the *experimentum crucis* of legal validity, and it has been held that a judgment or decree cannot be collaterally attacked for a defect which might have been cured by amendment.<sup>3</sup>

**2. Defects in Jurisdiction over the Particular Case.** — A court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will be so treated when it comes in question either directly or collaterally.<sup>4</sup>

**Exceeding Jurisdictional Amount.** — Where the sum sued for is larger than the amount over which the court has jurisdiction, the judgment is, of course, void.<sup>5</sup>

**Trial in Wrong County.** — Where a suit is brought and tried in the wrong county, there is not a want of jurisdiction over the subject matter, but only an irregularity in the process, and the judgment is not subject to collateral attack.<sup>6</sup>

**3. Disqualification of Judge.** — Upon the question whether the disqualification of a judge, by reason of interest or relationship to the parties, to sit in a cause is merely an irregularity or a jurisdictional defect, there is considerable conflict of authority.<sup>7</sup> Some cases hold that it is merely an error or irregularity rendering the judgment voidable but not void,<sup>8</sup> while others hold that

1. *Lamprey v. Nudd*, 29 N. H. 292.

2. *Salter v. Hilgen*, 40 Wis. 365.

3. *Amendability as a Test of Validity* — *United States*. — *Cooper v. Reynolds*, 10 Wall. (U. S.) 308.

*California*. — *Hunt v. Loucks*, 38 Cal. 372.

*Georgia*. — *Baker v. Thompson*, 75 Ga. 164.

*Missouri*. — *Hardin v. Lee*, 51 Mo. 241; *Rosenheim v. Hartsock*, 90 Mo. 357.

*New Hampshire*. — *Holland v. Laconia Bldg., etc., Assoc.*, 68 N. H. 480.

*New York*. — *Parmelee v. Hitchcock*, 12 Wend. (N. Y.) 96.

*Texas*. — *Moore v. Perry*, 13 Tex. Civ. App. 204.

4. **Case Not Within the Class over Which Court Has Jurisdiction.** — *Foltz v. St. Louis, etc., R. Co.*, 19 U. S. App. 584; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Wilcox v. Jackson*, 13 Pet. (U. S.) 511; *The Confiscation Cases*, 20 Wall. (U. S.) 107; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Risley v. Phenix Bank*, 83 N. Y. 337, 38 Am. Rep. 421.

Thus, if a justice of the peace should assume jurisdiction over a bill in equity, or a court of probate should try a real action, or if a private individual should take upon him to try any action except when acting as an arbitrator, their proceedings and judgments would be simply void. *Nichols v. Smith*, 26 N. H. 300.

In *Hickey v. Stewart*, 3 How. (U. S.) 750, a decree by a state court of chancery establishing the validity of a Spanish grant over which no power had ever been conferred upon that court, was held void and its exercise of jurisdiction declared to be a mere usurpation of judicial power.

Where the police judge of the city of Lincoln, Nebraska, brought suit against the mayor and councilmen of that city in the federal court to enjoin them from enforcing a judgment against him for misfeasance in office, but it was not within the power of the federal court, sitting in equity in any case, or under any circumstances, to determine such a controversy and to grant the injunction there sought, its decree to that effect was held to be a nullity. *In re Sawyer*, 124 U. S. 200.

**Unconstitutionality of Statute Investing Court with Jurisdiction.** — Where a statute which invests a court with jurisdiction is unconstitutional, a judgment rendered in the exercise of the powers granted by such statute is void. *Whitehead v. Arkansas, etc., R. Co.*, 28 Ark. 460.

**Appeal from Order Not Appealable.** — Where a writ of error is brought on an order which is not appealable, the decree of the reviewing court is void and may be collaterally attacked. *Johnson v. Parrotte*, 46 Neb. 51.

5. **Amount of Suit Larger than Jurisdictional Limit.** — *Smith v. Knowlton*, 11 N. H. 191; *Camp v. Wood*, 10 Watts (Pa.) 118. See the title *AMOUNT IN CONTROVERSY*, vol. 1 *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, p. 114.

6. **Suit Brought in Wrong County.** — *Hall v. Gilmore*, 40 Me. 578; *Ellis v. Ellis*, 55 Minn. 401, 43 Am. St. Rep. 514; *Collamer v. Page*, 35 Vt. 387. See the title *VENUE*.

7. **Judge's Disqualification.** — For a discussion of this matter see the title *JUDGE*, *ante*, p. 714.

8. *Rogers v. Felker*, 77 Ga. 46; *Wilson v. Smith*, (Ky. 1897) 38 S. W. Rep. 870; *State v. Ross*, 118 Mo. 23; *Gorrill v. Whittier*, 3 N. H. 269; *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425.



it is a jurisdictional defect rendering the judgment absolutely void and subject to collateral attack.<sup>1</sup>

**4. Service of Process** — *a.* IN GENERAL. — With respect to service of process in a cause, a broad distinction is to be noted between cases where no service on the defendant appears and those in which there is service which is in some respects defective or irregular.<sup>2</sup>

*b.* WANT OF SERVICE. — In a personal action actual service of process upon the defendant is necessary to complete the jurisdiction of the court, and if no such service is had the judgment will be void and subject to collateral attack<sup>3</sup> unless such service is waived by voluntary appearance or otherwise.<sup>4</sup>

**1.** North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 266.

In Russell v. Perry, 14 N. H. 155, a judgment by a justice of another state in a case in which he was interested was held to be void.

In Sanborn v. Fellows, 22 N. H. 473, it was held, where a fence viewer was disqualified to act by reason of his relationship to one of the parties, that proceedings before him were *coram non judice* and void.

**Judge Sitting Outside of His Judicial District.** — In Gresham v. Ewell, 85 Va. 1, a judgment rendered by a judge sitting in another than his own district was held void.

**2. Distinction Between Want of Service and Irregular Service.** — See Harrington v. Wofford, 46 Miss. 31; Leonard v. Sparks, 117 Mo. 103, 38 Am. St. Rep. 646.

**3. Personal Judgment Void Without Service of Process** — *England.* — Buchanan v. Rucker, 9 East 192; Douglas v. Forrest, 4 Bing. 686, 15 E. C. L. 113; Becquet v. MacCarthy, 2 B. & Ad. 951, 22 E. C. L. 220.

*United States.* — Lincoln v. Tower, 2 McLean (U. S.) 473; Westerwelt v. Lewis, 2 McLean (U. S.) 511; Freeman v. Alderson, 119 U. S. 188; St. Clair v. Cox, 106 U. S. 353; Picquet v. Swan, 5 Mason (U. S.) 35.

*Connecticut.* — Kibbe v. Kibbe, Kirby (Conn.) 119.

*Florida.* — Flint River Steam Boat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178.

*Georgia.* — Dozier v. Lamb, 59 Ga. 461.

*Illinois.* — Anderson v. Hawhe, 115 Ill. 33.

*Indiana.* — Nicholson v. Stephens, 47 Ind. 186; Horner v. Doe, 1 Ind. 130, 48 Am. Dec. 355; Dobbins v. McNamara, 113 Ind. 54, 3 Am. St. Rep. 626.

*Iowa.* — Gerrish v. Seaton, 73 Iowa 15.

*Kansas.* — Case v. Hannahs, 2 Kan. 490; Kansas Pac. R. Co. v. Streeter, 8 Kan. 133; McNeill v. Edie, 24 Kan. 108; Foreman v. Carter, 9 Kan. 674.

*Louisiana.* — First Municipality v. Christ Church, 3 La. Ann. 453.

*Maine.* — Lovejoy v. Albee, 33 Me. 416.

*Maryland.* — Clark v. Bryan, 16 Md. 177.

*Massachusetts.* — Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Eliot v. McCormick, 144 Mass. 11.

*Mississippi.* — Harrington v. Wofford, 46 Miss. 31.

*Missouri.* — Jasper County v. Mickey, (Mo. 1837) 4 S. W. Rep. 424; Fischer v. Siekmann, 125 Mo. 165.

*Nevada.* — Coffin v. Bell, 22 Nev. 169, 58 Am. St. Rep. 738.

*New Hampshire.* — Wilbur v. Abbot, 60 N. H. 40; Winship v. Conner, 42 N. H. 346; Eaton v. Badger, 33 N. H. 228.

*New York.* — Borden v. Fitch, 15 Johns. (N. Y.) 142, 8 Am. Dec. 225; Kilburn v. Woodworth, 5 Johns. (N. Y.) 41; Robinson v. Ward, 8 Johns. (N. Y.) 90, 5 Am. Dec. 327; Fenton v. Garlick, 8 Johns. (N. Y.) 197; Pawling v. Willson, 13 Johns. (N. Y.) 192; Bonnet v. Lachman, 65 Hun (N. Y.) 554; Bell v. Bell, 4 N. Y. App. Div. 527; Dutton v. Smith, 10 N. Y. App. Div. 566, 4 N. Y. Annot. Cas. 25; Weeks v. Merritt, 5 Robt. (N. Y.) 610; American Aquol etc., Paint Co. v. Smith, (Supm. Ct. Gen. T.) 35 N. Y. Supp. 723, 90 Hun (N. Y.) 609.

*North Carolina.* — Bernhardt v. Brown, 118 N. Car. 700.

*Ohio.* — Moore v. Starks, 1 Ohio St. 369; Kingsborough v. Tousley, 56 Ohio St. 450.

*Pennsylvania.* — Phelps v. Holker, 1 Dall. (Pa.) 264.

*South Carolina.* — Wyman v. Hoover, 10 S. Car. 135; Stanley v. Stanley, 35 S. Car. 94.

*Texas.* — McCarthy v. Burtis, 3 Tex. Civ. App. 439.

*Virginia.* — Gray v. Stuart, 33 Gratt. (Va.) 351; Underwood v. McVeigh, 23 Gratt. (Va.) 418; Wade v. Hancock, 76 Va. 620; Lavell v. McCurdy, 77 Va. 763; Ferguson v. Teel, 82 Va. 690; Dillard v. Central Virginia Iron Co., 82 Va. 734; Blanton v. Carroll, 86 Va. 539; Staunton Perpetual Bldg., etc., Co. v. Haden, 92 Va. 201.

*West Virginia.* — Capehart v. Cunningham, 12 W. Va. 750; Fowler v. Lewis, 36 W. Va. 112, 126.

*Wisconsin.* — Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Falkner v. Guild, 10 Wis. 563; Pollard v. Wegener, 13 Wis. 566.

See Story on Conflict of Laws, §§ 21, 539, 546, 549, 550, 556.

If process has not been served upon any person upon whom the statute authorizes the service of process in suits against corporations, no jurisdiction is acquired, and the judgment is void. Carr v. Commercial Bank, 16 Wis. 50.

**Service upon Party by Wrong Name.** — Service of a summons upon a party by a wrong name does not give the court jurisdiction over his person, and his appearance cannot be compelled. Cole v. Hindson, 6 T. R. 234; McGill v. Weill, (County Ct.) 19 Civ. Pro. (N. Y.) 43.

**Effect of Want of Service of Order of Arrest.** — A judgment authorizing the arrest of a defendant in a civil action is void if no order of arrest was served upon him. Griffith v. Hubbard, 9 S. Dak. 15.

**4.** See the title APPEARANCE, 2 ENCYC. OF PLEADING AND PRACTICE 644.

**Appearance by Guardian Ad Litem.** — It has been held that, where an infant defendant is not served with process, the decree rendered



*c.* **IRREGULAR SERVICE.** — Where there has been personal service upon a defendant but the service is irregular, jurisdiction attaches, subject to be defeated by objections to the irregularity, seasonably interposed in some direct manner; the irregularity, however, does not render the judgment void and subject to collateral attack.<sup>1</sup>

**Failure to Serve Copy of Pleadings.** — A failure to serve a copy of the complaint or bill is a mere irregularity which may be waived by failure to object at the proper time, and does not render the judgment void.<sup>2</sup>

*d.* **SERVICE BY PUBLICATION.** — Similar principles are to be applied to cases in which the service is by publication. A publication may be so radically defective as not to give the court jurisdiction, in which case the judgment will, of course, be void and subject to collateral attack.<sup>3</sup> But a judgment is not necessarily void because the publication is irregular; where there is some notice a mere irregularity in the publication must be taken advantage of directly and does not render the judgment void.<sup>4</sup>

in the cause is not therefore void, if a guardian *ad litem* was appointed who proceeded in the cause. *Day v. Kerr*, 7 Mo. 426; *Hare v. Hollomon*, 94 N. Car. 14; *Sumner v. Sessoms*, 94 N. Car. 371.

**1. Judgment Not Void Because of Merely Irregular Service** — *United States*. — *Capwell v. Sipe*, 51 Fed. Rep. 667; *Sipe v. Copwell*, 59 Fed. Rep. 970, 16 U. S. App. 704.

*Arkansas*. — *St. Louis, etc., R. Co. v. State*, 55 Ark. 200.

*California*. — *Peck v. Strauss*, 33 Cal. 678; *Drake v. Duvenick*, 45 Cal. 455.

*Georgia*. — *Frazer v. Sibley*, 50 Ga. 96.

*Indiana*. — *Michigan Southern, etc., R. Co. v. Shannon*, 13 Ind. 171; *Muncey v. Joest*, 74 Ind. 409; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Stout v. Woods*, 79 Ind. 108; *Cavanaugh v. Smith*, 84 Ind. 380; *Oppenheim v. Pittsburgh, etc., R. Co.*, 85 Ind. 471; *McCormick v. Webster*, 89 Ind. 105; *Terre Haute v. Beach*, 96 Ind. 143; *Brown v. Goble*, 97 Ind. 86; *Dowell v. Lahr*, 97 Ind. 146; *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662; *Hobbs v. Tipton County*, 103 Ind. 575; *Jackson v. State*, 104 Ind. 516; *McMullen v. State*, 105 Ind. 334; *Freeman v. Paul*, 105 Ind. 451; *Pickering v. State*, 106 Ind. 228; *Brosemer v. Kelsey*, 106 Ind. 504; *Huff v. Lafayette*, 108 Ind. 14; *Peters v. Griffie*, 108 Ind. 121; *Laverty v. State*, 109 Ind. 217; *Kennedy v. State*, 109 Ind. 236; *Wishmier v. State*, 110 Ind. 523; *Hollingsworth v. State*, 111 Ind. 289; *Kleyla v. Haskett*, 112 Ind. 515; *Marquis v. Davis*, 113 Ind. 219; *Hackett v. State*, 113 Ind. 532; *Prezinger v. Harness*, 114 Ind. 491; *Wells County v. Gruver*, 115 Ind. 224; *Jones v. Jones*, 115 Ind. 504; *Montgomery v. Wasem*, 116 Ind. 343; *Johnson v. State*, 116 Ind. 374; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578; *Essig v. Lower*, 120 Ind. 239; *Bass v. Ft. Wayne*, 121 Ind. 389; *Cicero Tp. v. Shirk*, 122 Ind. 572; *Hawkins v. McDougal*, 126 Ind. 539; *Goodell v. Starr*, 127 Ind. 198; *Bowen v. Stewart*, 128 Ind. 507; *Schissel v. Dickson*, 129 Ind. 139; *Moyer v. Bucks*, 2 Ind. App. 571, 50 Am. St. Rep. 251.

*Iowa*. — *Thomson v. Lee County*, 22 Iowa 206; *Cheever v. Lane*, 3 Iowa 296; *Shawhan v. Loffer*, 24 Iowa 226; *Shea v. Quintin*, 30 Iowa 58; *Myers v. Davis*, 47 Iowa 325; *Bunce v. Bunce*, 59 Iowa 533; *Irions v. Keystone Mfg.*

*Co.*, 61 Iowa 406; *Fanning v. Krapf*, 68 Iowa 244; *Schee v. La Grange*, 78 Iowa 101.

*Kansas*. — *Friend v. Green*, 43 Kan. 167; *Dutton v. Hobson*, 7 Kan. 196; *Foreman v. Carter*, 9 Kan. 674.

*Michigan*. — *Low v. Mills*, 61 Mich. 35.

*Mississippi*. — *Harrington v. Wofford*, 46 Miss. 31.

*Missouri*. — *Skelton v. Sackett*, 91 Mo. 377.

*Minnesota*. — *Millette v. Mehmke*, 26 Minn. 306.

*Nebraska*. — *Gandy v. Jolly*, 35 Neb. 712, 37 Am. St. Rep. 460; *Campbell Printing Press, etc., Co. v. Marner*, 50 Neb. 283, 61 Am. St. Rep. 573.

*New Hampshire*. — *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111.

*New York*. — *Myers v. Overton*, (C. Pl. Gen. T.) 2 Abb. Pr. (N. Y.) 344; *Barnes v. Harris*, 4 N. Y. 374.

*Pennsylvania*. — *Cockley v. Rehr*, 12 Pa. Co. Ct. 343, 2 Pa. Dist. 331.

*Tennessee*. — *State v. Hood*, 16 Lea (Tenn.) 235; *Harlan v. Harlan*, 14 Lea (Tenn.) 107.

*Texas*. — *Cave v. Houston*, 65 Tex. 619.

*Utah*. — *Amy v. Amy*, 12 Utah 318.

*Vermont*. — *Ex p. Kellogg*, 6 Vt. 509.

*Virginia*. — *Staunton Perpetual Bldg., etc., Co. v. Haden*, 9 Va. 204.

**2. Failure to Accompany Summons with Copy of Complaint.** — *Salisbury v. Sands*, 2 Dill. (U. S.) 276; *Millette v. Mehmke*, 26 Minn. 306, *overruling* *Tuller v. Caldwell*, 3 Minn. 117; *Munch v. McLaren*, 9 Wash. 676.

**3. Effect of Radically Defective Publication.** — *People v. Pearson*, 76 Cal. 400; *People v. Mullan*, 65 Cal. 396; *Hyde v. Redding*, 74 Cal. 493; *Schissel v. Dickson*, 129 Ind. 139; *Little v. Currie*, 5 Nev. 90; *O'Malley v. Fricke*, 104 Wis. 280.

**4. Effect of Mere Irregularity in Publication** — *United States*. — *Salisbury v. Sands*, 2 Dill. (U. S.) 270, 21 Fed. Cas. No. 12,251; *Bigelow v. Chatterton*, 51 Fed. Rep. 614.

*Arkansas*. — *Scott v. Pleasants*, 21 Ark. 364; *Webster v. Daniel*, 47 Ark. 131.

*Illinois*. — *Bickerdike v. Allen*, 157 Ill. 95.

*Indiana*. — *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662; *Essig v. Lower*, 120 Ind. 239.

*Indiana*. — *Dowell v. Lahr*, 97 Ind. 146.



**5. Irregularities in Return.** — If notice of a suit is actually given and the return, though irregular, establishes that fact, the defect in the return is not jurisdictional so as to render the judgment void.<sup>1</sup>

**6. Irregular Process.** — There is an obvious distinction between a want of service and the case of irregular or defective process, for, in the latter case, the party has notice in part and may, if he will, appear and object to or waive the irregularity. It is accordingly held that a judgment is not rendered void by a mere irregularity in the process,<sup>2</sup> such, for example, as making the notice to the defendant shorter than the notice prescribed by law,<sup>3</sup> or absence of the seal of the court.<sup>4</sup> If, however, the process is so defective as not to give the defendant notice of the action against him, a judgment in the cause will be void.<sup>5</sup> The courts have sometimes made the character and effect of the defect depend upon whether it may or may not be amended.<sup>6</sup>

**7. Defects in the Pleadings, Form and Manner of Procedure** — *a. IN GENERAL.* — A court having acquired jurisdiction of the subject-matter and of the parties, all questions relating to the pleadings and to the form and manner of the procedure are matters of regularity merely for which a judgment cannot be questioned collaterally.<sup>7</sup>

*b. DEFECTS IN PLEADINGS.* — According to the authorities a judgment is not void because of defects in the pleadings,<sup>8</sup> such, for example, as the failure of a complaint or petition to state a cause of action,<sup>9</sup> a defective verifica-

*Iowa.* — *Gregg v. Thompson*, 17 Iowa 107.

*Kansas.* — *Williams v. Moorehead*, 33 Kan. 609; *Garrett v. Struble*, 57 Kan. 508.

*Kentucky.* — *Jeffrey v. Callis*, 4 Dana (Ky.) 465; *Hardin v. Strader*, 1 B. Mon. (Ky.) 286.

*Missouri.* — *Hagerman v. Sutton*, 91 Mo. 526; *Coombs v. Crabtree*, 105 Mo. 292; *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549.

*New York.* — *Denman v. McGuire*, 101 N. Y. 161; *George v. Fitzpatrick*, (Supm. Ct. Spec. T.) 25 Civ. Pro. (N. Y.) 383.

*Ohio.* — *Boswell v. Sharp*, 15 Ohio 447.

*South Carolina.* — *Hunter v. Ruff*, 47 S. Car. 525, 58 Am. St. Rep. 907.

*Texas.* — *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80.

*Virginia.* — *Wilcher v. Robertson*, 78 Va. 602.

**1. Effect of Irregularities in Return** — *Illinois.* — *Tewalt v. Irwin*, 164 Ill. 592.

*Indiana.* — *Cavanaugh v. Smith*, 84 Ind. 380.

*Iowa.* — *Baker v. Jamison*, 73 Iowa 698.

*Kansas.* — *Friend v. Green*, 43 Kan. 167.

*Michigan.* — *Evans v. Calman*, 92 Mich. 427.

*Mississippi.* — *Loughridge v. Bowland*, 52 Miss. 546; *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485.

*Missouri.* — *Perryman v. State*, 8 Mo. 208.

*Nebraska.* — *Gandy v. Jolly*, 35 Neb. 711, 37 Am. St. Rep. 460; *Campbell Printing Press, etc., Co. v. Marder*, 50 Neb. 287, 61 Am. St. Rep. 573.

*Pennsylvania.* — *Brundred v. Egbert*, 164 Pa. St. 615.

See also *Sargeant v. Mead*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 589; *Isley v. Boon*, 113 N. Car. 249; *Strong v. Barnhart*, 6 Oregon 93.

**2. Effect of Mere Irregularities in the Process.**

— *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466;

*Matter of James*, 99 Cal. 374; *Keybers v. McComber*, 67 Cal. 395; *Kimball v. Castagnio*, 8

Colo. 525; *Hollingsworth v. State*, 111 Ind. 289; *Kelly v. Harrison*, 69 Miss. 856; *Jasper*

*County v. Wadlow*, 82 Mo. 172; *North Pac.*

*Cycle Co. v. Thomas*, 26 Oregon 381, 46 Am.

St. Rep. 636; *Moore v. Perry*, 13 Tex. Civ. App. 204; *Miller v. Zeigler*, 3 Utah 17.

The fact that an original writ in an action before a justice was not signed by the justice has been held not to be a jurisdictional defect. *Nichols v. Smith*, 26 N. H. 298.

**3.** *Ballinger v. Tarbell*, 16 Iowa 492, 85 Am. Dec. 527.

**4.** *Boyd v. Fitch*, 71 Ind. 306; *Moore v. Perry*, 13 Tex. Civ. App. 204.

**5. Effect of Radical Irregularities in the Process.** — *Atchison, etc., R. Co. v. Nicholls*, 8 Colo. 188; *Alexander v. Leland*, 1 Idaho 425; *Pickering v. State*, 106 Ind. 228; *Kitsmiller v. Kitchen*, 24 Iowa 163; *Newman v. Bowers*, 72 Iowa 465.

In the case of *Witt v. Kaufman*, 25 Tex. Supp. 385, a judgment was held void, as upon no service, where the defendant, who was a resident of Parker county, was served in Parker county, by a deputy sheriff of that county, with process addressed to an officer of Dallas county.

**6. Character and Effect of Defect Determined by Amendability.** — *Baker v. Thompson*, 75 Ga. 164; *Moore v. Perry*, 13 Tex. Civ. App. 204.

**7. Irregularities in Pleadings, Form and Manner of Procedure.** — *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 660; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132.

**8. Objections to Pleadings.** — *Shearer v. City Nat. Bank*, 115 Ala. 352.

The insufficiency of the averment as to the citizenship of parties to a suit brought in a federal court does not render the judgment void. *Skirving v. National L. Ins. Co.*, 59 Fed. Rep. 742; *Rice v. Adler-Goldman Commission Co.*, 71 Fed. Rep. 151.

Nor is a judgment void and subject to collateral attack because the plaintiff failed to allege its incorporation. *McFall v. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468.

**9. California.** — *Matter of James*, 99 Cal. 374.

*Missouri.* — *Winningham v. Trueblood*, 149 Mo. 572; *Babb v. Bruere*, 23 Mo. App. 604.

*Oregon.* — *Norman v. Zieber*, 3 Oregon 197;



tion,<sup>1</sup> or a defective prayer for relief.<sup>2</sup> Even the absence of pleadings has been held not to render a judgment void.<sup>3</sup>

c. **IMPROPER FORM OF ACTION.** — The fact that the form of action adopted was not the proper one does not render a judgment void.<sup>4</sup>

d. **TRIAL WITHOUT A JURY.** — The fact that the trial in a civil action was had by the court without the intervention of a jury does not render the judgment void.<sup>5</sup>

e. **IRREGULAR ADJOURNMENT.** — At least in civil cases, an irregularity in the adjournment of a cause may be waived and does not render the judgment void.<sup>6</sup> But there is a difference of opinion as to the effect of an irregular adjournment of a criminal cause. It has been held, on the one hand, that the objection is waived where the defendant goes to trial without objection,<sup>7</sup> and, on the other, that he may take advantage of the irregularity even after verdict.<sup>8</sup>

f. **DEATH OF PARTY.** — A judgment rendered in favor of a plaintiff who had died before the institution of the suit<sup>9</sup> or before the rendition of the judgment<sup>10</sup> is merely irregular and not void. And a judgment rendered without the substitution of the representatives of the defendant who dies before the entry of judgment is not void.<sup>11</sup>

g. **INSANITY OF PARTY.** — It has been held that a judgment is not void, but merely voidable, because of the insanity of the plaintiff at the time it was rendered.<sup>12</sup> And a judgment against an insane defendant, though irregular, is not void.<sup>13</sup>

*Altman v. School Dist. No. 6*, 35 Oregon 85; *North Pac. Cycle Co. v. Thomas*, 26 Oregon 381, 46 Am. St. Rep. 636.

*Wisconsin.* — *Frankfurth v. Anderson*, 61 Wis. 107.

1. *Frankfurth v. Anderson*, 61 Wis. 107; *F. Mayer Boot, etc., Co. v. Falk*, 89 Wis. 216.

\* 2. *Amory v. Amory*, 26 Wis. 152.

The omission from a bill in chancery of any prayer for relief, except that for process, may be taken advantage of by demurrer, or perhaps at the hearing; but it is not a jurisdictional defect. *Iowa County v. Mineral Point R. Co.*, 24 Wis. 93.

3. A judgment taken without a narr. filed is not void. *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509.

Nor does the absence of a reply render a judgment void. *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132. But see *Spoors v. Coen*, 44 Ohio St. 497.

A formal complaint has been held necessary to confer a jurisdiction in a criminal cause. *State v. Wakefield*, 60 Vt. 618. See the titles *JEOPARDY*, *ante*, p. 588; *JURY AND JURY TRIAL*, *post*.

4. **Objections to Form of Action.** — *Weaver v. Toney*, (Ky. 1899) 54 S. W. Rep. 732; *Aubrey v. Almy*, 4 Ohio St. 524.

5. **Objections to Mode of Trial.** — *Dolph v. Barney*, 5 Oregon 192. As to the effect of a waiver of jury trial see the title *JURY AND JURY TRIAL*.

6. **Objections to Adjournment — In Civil Cases.** — *Hoye v. State*, 39 Ga. 724; *Lining v. Glenn*, 33 Neb. 187.

7. **Same — In Criminal Cases.** — *Smurr v. State*, 105 Ind. 125; *Henslie v. State*, 3 Heisk. (Tenn.) 206.

8. *Hoye v. State*, 39 Ga. 724. See also *Finnegan v. State*, 57 Ga. 427.

9. **Death of Plaintiff.** — *Thouvenin v. Rodrigues*, 24 Tex. 468.

10. *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229.

11. **Death of the Defendant** — *United States*. — *New Orleans v. Gaines*, 138 U. S. 595.

*Illinois.* — *Aldrich v. Housh*, 71 Ill. App. 607.

*North Carolina.* — *Knott v. Taylor*, 99 N. Car. 511, 6 Am. St. Rep. 547.

*Pennsylvania.* — *Warder v. Tainter*, 4 Watts (Pa.) 278.

*Virginia.* — See *Pugh v. McCue*, 86 Va. 475.

But in *M. T. Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. App. 665, it was held that a judgment rendered in an action to subject land to a lien against a defendant who was dead at the time of the commencement of the action was void.

12. **Insanity of Plaintiff.** — *Thomas v. Hunsucker*, 108 N. Car. 720.

13. **Insanity of Defendant** — *England*. — *Beverley's Case*, 4 Coke 123; *Mansfield's Case*, 12 Coke 124.

*Alabama.* — *Walker v. Clay*, 21 Ala. 807.

*California.* — *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737.

*Georgia.* — *Foster v. Jones*, 23 Ga. 168; *Newell v. Smith*, 23 Ga. 170.

*Illinois.* — *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131.

*Indiana.* — *Dickerson v. Davis*, 111 Ind. 433; *Boyer v. Berryman*, 123 Ind. 451.

*Kentucky.* — *Allison v. Taylor*, 6 Dana (Ky.) 87, 32 Am. Dec. 68; *Shirleys v. Taylor*, 5 B. Mon. (Ky.) 99.

*Maine.* — *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614.

*Maryland.* — *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317.

*Missouri.* — *Heard v. Sack*, 81 Mo. 610.

*New Hampshire.* — *Lamprey v. Nudd*, 29 N. H. 303.



*h. INFANCY OF PARTY.* — A judgment taken against an infant, who appears by attorney, is not void, but only erroneous; it is liable to be reversed, but is valid until reversed.<sup>1</sup> Much less will the irregular appointment of a guardian *ad litem* for an infant defendant render the judgment void.<sup>2</sup>

*i. COVERTURE OF PARTY.* — There is a direct conflict of authority as to the effect of a judgment against a married woman. In some of the United States a judgment against a married woman is deemed to be in effect the same as a judgment rendered by a court having no jurisdiction.<sup>3</sup> But the preponderance of authority seems to be in favor of the rule that a judgment against a married woman, though voidable, is not void so as to be subject to collateral attack.<sup>4</sup>

**8. Absence or Insufficiency of Findings.** — While the absence or insufficiency of findings of facts may render the judgment erroneous, it does not render it void and subject to collateral attack for the want of jurisdiction.<sup>5</sup>

**9. Errors or Irregularities in the Judgment** — **Erroneous Judgment.** — The fact that an erroneous or wrong judgment is rendered does not render the judg-

*New York.* — *Sternbergh v. Schoolcraft*, 2 Barb. (N. Y.) 153.

*North Carolina.* — *Brittain v. Mull*, 99 N. Car. 483.

*Ohio.* — *Johnson v. Pomeroy*, 31 Ohio St. 247.

*Oregon.* — *Harper v. Harding*, 3 Oregon 361.

*Pennsylvania.* — *Wood v. Bayard*, 63 Pa. St. 320.

*Texas.* — *Ewing v. Wilson*, 63 Tex. 88.

*Washington.* — *Pollock v. Horn*, 13 Wash. 626.

*West Virginia.* — *Withrow v. Smithson*, 37 W. Va. 757.

*Wyoming.* — *White v. Hinton*, 3 Wyo. 753.

**1. Infancy of Defendant.** — *Charley v. Kelley*, 120 Mo. 134; *Morgan v. Burnet*, 18 Ohio 535; *Turner v. Douglass*, 72 N. Car. 127; *England v. Garner*, 90 N. Car. 197; *Fowler v. Poor*, 93 N. Car. 466; *Burgess v. Kirby*, 94 N. Car. 575; *Syme v. Trice*, 96 N. Car. 243; *Marshall v. Fisher*, 1 Jones L. (46 N. Car.) 111. See the title GUARDIAN AD LITEM. vol. 15, p. 9.

**2. Greenlaw v. Kernahan**, 4 Sneed (Tenn.) 371.

**3. Coverture of Defendant** — *United States*. — *Norton v. Meader*, 4 Sawy. (U. S.) 603.

*Kentucky.* — *Parsons v. Spencer*, 83 Ky. 305; *Stevens v. Deering*, (Ky. 1888) 9 S. W. Rep. 292.

*Louisiana.* — *Bowman v. Kaufman*, 30 La. Ann. 1021.

*Maryland.* — *Griffith v. Clarke*, 18 Md. 457.

*Massachusetts.* — *Morse v. Toppan*, 3 Gray (Mass.) 411.

*Mississippi.* — *Cary v. Dixon*, 51 Miss. 593; *Griffin v. Ragan*, 52 Miss. 78; *Magruder v. Buck*, 56 Miss. 314.

*Missouri.* — *Higgins v. Peltzer*, 49 Mo. 152; *Wernecke v. Wood*, 58 Mo. 352; *Lincoln v. Rowe*, 64 Mo. 138; *Weil v. Simmons*, 66 Mo. 617; *Corrigan v. Bell*, 73 Mo. 53; *Asbury v. Odell*, 83 Mo. 264. But see *Von Schrader v. Taylor*, 7 Mo. App. 361.

*Pennsylvania.* — *Dorrance v. Scott*, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592; *Graham v. Long*, 65 Pa. St. 383; *Swayne v. Lyon*, 67 Pa. St. 436; *Hecker v. Haak*, 88 Pa. St. 238; *Vandyke v. Wells*, 103 Pa. St. 49.

*South Carolina.* — *Wallace v. Rippon*, 2 Bay (S. Car.) 112.

*West Virginia.* — *Stockton v. Farley*, 10 W. Va. 171, 27 Am. Rep. 566; *Carey v. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790; *Tavener v. Barrett*, 21 W. Va. 658; *White v. Foote Lumber, etc., Co.*, 29 W. Va. 385, 6 Am. St. Rep. 650.

**4. England.** — *Moses v. Richardson*, 8 B. & C. 421, 15 E. C. L. 254; *Dick v. Tolhausen*, 4 H. & N. 695.

*Alabama.* — *Winter v. Montgomery*, 79 Ala. 481.

*California.* — *Gambette v. Brock*, 41 Cal. 78.

*Georgia.* — *Glover v. Moore*, 60 Ga. 189; *Mashburn v. Gouge*, 61 Ga. 512; *Wingfield v. Rhea*, 73 Ga. 477.

*Indiana.* — *McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, 40 Ind. 300; *Wagner v. Ewing*, 44 Ind. 441; *Landers v. Douglas*, 46 Ind. 522; *Long v. Dixon*, 55 Ind. 352; *Burk v. Hill*, 55 Ind. 419; *Wright v. Wright*, 97 Ind. 444; *Lieb v. Lichtenstein*, 121 Ind. 483.

*Iowa.* — *Wolff v. Van Metre*, 19 Iowa 134, 23 Iowa 397; *Guthrie v. Howard*, 32 Iowa 54.

*Kansas.* — *Keith v. Keith*, 26 Kan. 26.

*Kentucky.* — *Spalding v. Wathen*, 7 Bush (Ky.) 659.

*Michigan.* — *Wilson v. Coolidge*, 42 Mich. 112.

*Montana.* — *Vantilburg v. Black*, 3 Mont. 459.

*North Carolina.* — *Vick v. Pope*, 81 N. Car. 22; *Nicholson v. Cox*, 83 N. Car. 44, 35 Am. Rep. 556; *Grantham v. Kennedy*, 91 N. Car. 148; *Green v. Branton*, 1 Dev. Eq. (16 N. Car.) 504.

*Ohio.* — *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *McCurdy v. Baughman*, 43 Ohio St. 78.

*Rhode Island.* — *Smith v. Borden*, 17 R. I. 220, 33 Am. St. Rep. 867.

*Tennessee.* — *Howell v. Hale*, 5 Lea (Tenn.) 405; *Chatterton v. Young*, 2 Tenn. Ch. 768.

*Texas.* — *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Taylor v. Harris*, 21 Tex. 438; *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *Phelps v. Brackett*, 24 Tex. 236.

*Virginia.* — *McCullough v. Dashiell*, 85 Va. 37.

**5. Objections with Respect to Findings.** — *Connelly v. Edgerton*, 22 Neb. 82; *Maryott v. Gardner*, 50 Neb. 320; *Dolph v. Barney*, 5 Oregon 192.



ment void; while it may be reversed by a proper proceeding in the cause, it cannot be attacked collaterally.<sup>1</sup>

**Irregular Entry of Judgment.** — A mere irregularity in the entry of a judgment does not render it void and subject to collateral attack.<sup>2</sup>

**Premature Entry of Judgment.** — The premature entry of a judgment, as, for example, before the expiration of the time to answer, is merely voidable; it is not void and subject to collateral attack.<sup>3</sup>

**1. Erroneous Judgment** — *United States*. — Chicago, etc., R. Co. v. Sturm, 174 U. S. 710; Foltz v. St. Louis, etc., R. Co., 60 Fed. Rep. 320; Ryan v. Staples, 76 Fed. Rep. 721, 40 U. S. App. 427; Lake County v. Platt, 79 Fed. Rep. 567; New Dunderberg Min. Co. v. Old, 79 Fed. Rep. 598, 49 U. S. App. 201.

*California*. — Forbes v. Hyde, 31 Cal. 350; Dusy v. Helm, 59 Cal. 190.

*Colorado*. — Steinhauer v. Colmar, 11 Colo. App. 494.

*Kansas*. — Gillett v. Thiebold, 9 Kan. 435.

*Missouri*. — Hendrickson v. St. Louis, etc., R. Co., 34 Mo. 188; O'Reilly v. Nicholson, 45 Mo. 160; Hagerman v. Sutton, 91 Mo. 519; Kansas City v. Winner, 58 Mo. App. 299.

*Nebraska*. — Brandhoefer v. Bain, 45 Neb. 781.

*New Hampshire*. — Kittredge v. Emerson, 15 N. H. 260; Pendexter v. Cate, 66 N. H. 270; Caouette v. Young, 67 N. H. 159.

*New Jersey*. — Van Doren v. Horton, 25 N. J. L. 205.

*New York*. — Wesson v. Chamberlain, 3 N. Y. 331; Chemung Canal Bank v. Judson, 8 N. Y. 254; People v. Sturtevant, 9 N. Y. 266, 59 Am. Dec. 538; Skinnion v. Kelley, 18 N. Y. 356; Whittlesey v. Frantz, 74 N. Y. 457; Hunting v. Blun, 143 N. Y. 511; Anderson v. Carr, 65 Hun (N. Y.) 179, 137 N. Y. 565; Miller v. Brinkerhoff, 4 Den. (N. Y.) 118, 47 Am. Dec. 242; Van Alstyne v. Erwine, 11 N. Y. 331; Sheldon v. Wright, 5 N. Y. 497; Brown v. Crowl, 5 Wend. (N. Y.) 298.

*Ohio*. — Boswell v. Sharp, 15 Ohio 447.

*Oregon*. — Nicklin v. Hobin, 13 Oregon 406; Morrill v. Morrill, 20 Oregon 96.

*Pennsylvania*. — Gibson, C. J., in Ulrich v. Voneida, 1 P. & W. (Pa.) 245; Martin v. Rex, 6 S. & R. (Pa.) 296.

*South Carolina*. — Ex p. Bond, 9 S. Car. 80, 30 Am. Rep. 20.

*Tennessee*. — Hurt v. Long, 90 Tenn. 445; Starkey v. Hammer, 1 Baxt. (Tenn.) 438; Dornan v. Benham Furniture Co., 102 Tenn. 303; Hyder v. Smith, (Tenn. Ch. 1899) 52 S. W. Rep. 884.

*Texas*. — Maddox v. Summerlin, 92 Tex. 483; Bordages v. Higgins, (Tex. 1892) 19 S. W. Rep. 446; Benson v. Cahill, (Tex. Civ. App. 1896) 37 S. W. Rep. 1088.

*Washington*. — Christofferson v. Pfennig, 16 Wash. 491.

*West Virginia*. — Braddock First Nat. Bank v. Hyer, 46 W. Va. 13.

*Wisconsin*. — Salisbury v. Chadbourne, 45 Wis. 74.

**Unconstitutionality of the Law Authorizing Recovery.** — Where an action has been brought for the violation of a penalty of a statute, plaintiff recovered. Subsequently in an action to recover property taken by execution upon this judgment it was contended by the plain-

tiff that the act giving the penalty was unconstitutional and that therefore the judgment upon which the execution was based was void. But it was held that while the judgment was erroneous the unconstitutionality of the law did not render it void and subject to collateral attack. Arnold v. Booth, 14 Wis. 180.

**2. Irregularity in Entry of Judgment** — *Michigan*. — Griffin v. McGavin, 117 Mich. 372.

*Minnesota*. — West Duluth Land Co. v. Bradley, 75 Minn. 275.

*Missouri*. — Massey v. Scott, 49 Mo. 278; Winston v. Affalter, 49 Mo. 267; Hagerman v. Sutton, 91 Mo. 527; Black v. Ross, 37 Mo. App. 250.

*New Jersey*. — Den v. Gaston, 24 N. J. L. 818; Clapp v. Ely, 27 N. J. L. 555.

*New York*. — White v. Bogart, 73 N. Y. 256; Roeber v. Dawson, (N. Y. City Ct. Gen. T.) 22 Abb. N. Cas. (N. Y.) 73, 14 Civ. Pro. (N. Y.) 354; Gilmore v. Ham, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 48; Dreyfuss v. Seale, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 551; Bulger v. Rosa, 47 Hun (N. Y.) 436.

*Ohio*. — Ewing v. Higby, 7 Ohio 198.

*Pennsylvania*. — Brundred v. Egbert, 164 Pa. St. 615; Campbell v. Kent, 3 P. & W. (Pa.) 72; Martin v. Rex, 6 S. & R. (Pa.) 296; Lewis v. Smith, 2 S. & R. (Pa.) 142.

*Wisconsin*. — Gorman v. Ball, 18 Wis. 24; Aetna L. Ins. Co. v. McCormick, 20 Wis. 265; Bonnell v. Gray, 36 Wis. 574; Salter v. Hilgen, 40 Wis. 363; Geisinger v. Beyl, 44 Wis. 258; Lindauer v. Clifford, 44 Wis. 597; Bread v. Ketchum, 51 Wis. 164; Schobacher v. Germantown Farmers' Mut. Ins. Co., 59 Wis. 86; Pormann v. Frede, 72 Wis. 226.

**3. Effect of Premature Entry of Judgment** — *United States*. — White v. Crow, 110 U. S. 183.

*California*. — Alderson v. Bell, 9 Cal. 315; Whitwell v. Barbier, 7 Cal. 54.

*Illinois*. — Perisho v. Perisho, 71 Ill. App. 222; Lyons v. Cooledge, 89 Ill. 529; Fitzpatrick v. Rutter, 160 Ill. 282.

*Indiana*. — Essig v. Lower, 120 Ind. 239.

*Kansas*. — Mitchell v. Aten, 37 Kan. 33, 1 Am. St. Rep. 231; Green v. Tower, 49 Kan. 302.

*Louisiana*. — Anheuser-Busch Brewing Assoc. v. McGowan, 49 La. Ann. 630.

*Minnesota*. — Kipp v. Fullerton, 4 Minn. 473.

*Ohio*. — Righter v. Thornton, 6 Ohio Dec. 7.

*Oregon*. — Altman v. School Dist. No. 6, 35 Oregon 85; Woodward v. Baker, 10 Oregon 493.

*Tennessee*. — Glover v. Holman, 3 Heisk. (Tenn.) 519.

*Utah*. — Ducheneau v. Ireland, 5 Utah 110.

*Washington*. — Belles v. Miller, 10 Wash. 259.

*Wisconsin*. — Egan v. Sengpiel, 46 Wis. 703; Pier v. Amory, 40 Wis. 571; Salter v. Hilgen, 40 Wis. 363; Mitchell v. Rolison, 52 Wis. 155; Voelz v. Voeltz, 88 Wis. 468.



**Irregularity in Form of Judgment.** — A mere irregularity in the form of a judgment will not render it void.<sup>1</sup>

**Entry Otherwise than in Open Court.** — But judgments not entered in open court, as required by law, have been void.<sup>2</sup>

**Entry Outside of Term.** — And it has been held that the entry of a judgment outside of the term renders the judgment void.<sup>3</sup>

**10. Errors or Irregularities in Taxation of Costs.** — A judgment cannot be collaterally impeached for errors or irregularities in the taxing of costs.<sup>4</sup>

**11. Irregularities in Setting Aside or Vacating Judgments.** — Where a judgment rendered in favor of nonresident parties was set aside, on motion, after the term in which it was rendered, without notice to the judgment plaintiffs, it was held that the order was void and subject to collateral attack.<sup>5</sup>

**12. Errors or Irregularities in Execution Process.** — If an execution be so defective as not to identify the court from which it issues, or the suit in which it issues, in these and the like cases of substantive and material defects, the execution will be void.<sup>6</sup> But where execution process, though erroneous or irregular, is not so radically defective, it may of course be set aside, but is usually not void.<sup>7</sup>

**VII. PRESUMPTION OF JURISDICTION — 1. Domestic Courts — a. COURTS OF GENERAL JURISDICTION — (1) Cases Involving Exercise of General Powers — (a) Rule Stated.** — A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in

**1. Judgment of Irregular Form — Georgia.** — *Marshall v. Charland*, 109 Ga. 306.

*Nebraska.* — *Hough v. Stover*, 46 Neb. 588; *Ayres v. Duggan*, 57 Neb. 750.

*Nevada.* — *Ronnnow v. Delmoe*, 23 Nev. 29.

*New Mexico.* — *Union Trust Co. v. Atchison*, etc., R. Co., 8 N. Mex. 159.

*Tennessee.* — *Wells v. Griffin*, 2 Head (Tenn.) 568.

**2. Effect of Not Entering Judgment in Open Court.** — *Lyles v. Bolles*, 8 S. Car. 258; *Adams v. Agnew*, 15 S. Car. 36; *Agnew v. Adams*, 26 S. Car. 101.

**3. Effect of Entering Judgment Outside of Term.** — *Brown v. Compton*, 8 T. R. 424; *Wightman v. Karsner*, 20 Ala. 455; *Cullum v. Casey*, 1 Ala. 351; *Galusha v. Butterfield*, 3 Ill. 227; *Goodsell v. Boynton*, 2 Ill. 555; *Archer v. Allen County*, 3 Blackf. (Ind.) 501; *White v. Riggs*, 27 Me. 114.

**Entry of Judgment in Vacation.** — Where a judgment is entered in vacation, without proof being filed of the execution of a power of attorney to enter the judgment, there is no jurisdiction of the person and the judgment is void. *Gardner v. Bann*, 132 Ill. 403.

**4. Effect of Erroneous or Irregular Taxation of Costs.** — *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Mott v. State*, 145 Ind. 353; *Small v. Benfield*, 66 N. H. 206; *Crosby v. Stephan*, 97 N. Y. 606; *Nicklin v. Hobin*, 13 Oregon 406.

**5. Effect of Setting Aside a Judgment After the Term and Without Notice.** — *Porter v. Orient Ins. Co.*, 72 Conn. 519. See the title OPENING, AMENDING, AND VACATING JUDGMENTS, vol. 15, ENCYC. OF PL. AND PR. 202.

**6. Validity of Irregular or Erroneous Executions.** — *Parsons v. Loyd*, 3 Wils. C. Pl. 342; *Trotter v. Nelson*, 1 Swan (Tenn.) 7; *Maxwell v. King*,

3 Yerg. (Tenn.) 460; *Jennings v. Pray*, 8 Yerg. (Tenn.) 87.

**7. Lowber's Appeal**, 8 W. & S. (Pa.) 387, 42 Am. Dec. 302; *North Western Bank v. Hays*, 37 W. Va. 483. See the title EXECUTIONS AGAINST PROPERTY, 8 ENCYC. OF PL. AND PR. 303.

**Executions Prematurely Issued.** — Thus an execution prematurely issued has been held not to be void. *Waldrop v. Friedman*, 90 Ala. 157, 24 Am. St. Rep. 775; *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46; *Steele v. Tutwiler*, 68 Ala. 107; *Lynch v. Kelly*, 41 Cal. 232; *Bacon v. Cropsey*, 7 N. Y. 195.

**Execution Issued Before Expiration of Stay.** — An execution issued before the stay of execution has expired is irregular, but not void. *Stewart v. Stocker*, 13 S. & R. (Pa.) 199, 15 Am. Dec. 589; *Wilkinson's Appeal*, 65 Pa. St. 189; *Sheetz v. Wynkoop*, 74 Pa. St. 198.

**Execution Issued Against Part Only of Judgment Debtors.** — Execution issued against two only of three judgment debtors is voidable, but not void. *Lee v. Crossna*, 6 Humph. (Tenn.) 281.

**Execution Issued After Time Limited by Law.** — If an execution issue after a year and a day from the rendition of the judgment without a scire facias, it is erroneous and voidable only; it is not void. *Jackson v. Robins*, 16 Johns. (N. Y.) 537; *Woodcock v. Bennett*, Lock. Rev. Cas. (N. Y.) 66; *Waite v. Dolby*, 8 Humph. (Tenn.) 409.

**Executions Based on Dormant Judgments** have been held to be erroneous and voidable, but not void. *Boggess v. Howard*, 40 Tex. 153.

**Variance Between Execution and Judgment.** — A slight variance between the execution and judgment does not render the execution void. *Jackson v. Page*, 4 Wend. (N. Y.) 586; *Trotter v. Nelson*, 1 Swan (Tenn.) 7.



which the judgment is given, but of the parties also.<sup>1</sup> It will accordingly be presumed that all the facts necessary to give the court jurisdiction to render

**1. Presumption in Favor of Courts of General Jurisdiction** — *England*. — *Peacock v. Bell*, 1 Saund. 74.

*United States*. — *Skilern v. May*, 6 Cranch (U. S.) 267; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157; *Voorhees v. Jackson*, 10 Pet. (U. S.) 449; *Grignon v. Astor*, 2 How. (U. S.) 319; *Nations v. Johnson*, 24 How. (U. S.) 203; *Harvey v. Tyler*, 2 Wall. (U. S.) 342; *McGoon v. Scales*, 9 Wall. (U. S.) 23; *Galpin v. Page*, 1 Sawy. (U. S.) 319, 18 Wall. (U. S.) 350; *Cornett v. Williams*, 20 Wall. (U. S.) 250; *White v. Crow*, 110 U. S. 189; *Applegate v. Lexington*, etc., Min. Co., 117 U. S. 269; *Nelson v. Moon*, 3 McLean (U. S.) 319; *Sprague v. Litherberry*, 4 McLean (U. S.) 450, 22 Fed. Cas. No. 13,251; *Biggs v. Blue*, 5 McLean (U. S.) 150, 3 Fed. Cas. No. 1,403; *Farmers' L. & T. Co. v. McKinney*, 6 McLean (U. S.) 9, 8 Fed. Cas. No. 4,667; *In re Wilson*, 18 Fed. Rep. 37; *Elder v. Richmond Gold*, etc., Min. Co., 53 Fed. Rep. 536, 19 U. S. App. 120; *Bump v. Butler County*, 93 Fed. Rep. 290.

*Alabama*. — *Goodman v. Winter*, 64 Ala. 431, 38 Am. Rep. 13.

*California*. — *Crane v. Brannan*, 3 Cal. 193; *Drake v. Duenick*, 45 Cal. 455; *Broder v. Conklin*, 98 Cal. 360, 35 Am. St. Rep. 176; *Eichhoff v. Eichhoff*, 101 Cal. 600.

*Colorado*. — *Cochrane v. Parker*, 12 Colo. App. 169.

*Connecticut*. — *Fox v. Hoyt*, 12 Conn. 491, 31 Am. Dec. 760.

*Georgia*. — *Richardson v. Conn*, 100 Ga. 39.

*Idaho*. — *Ollis v. Orr*, (Idaho 1899) 56 Pac. Rep. 162.

*Illinois*. — *Dunbar v. Hollowell*, 34 Ill. 170, 85 Am. Dec. 304; *Clark v. Thompson*, 47 Ill. 26, 95 Am. Dec. 457; *Pensoncau v. Heinrich*, 51 Ill. 271; *Botsford v. O'Conner*, 57 Ill. 72; *Haywood v. Collins*, 60 Ill. 328; *Swearengen v. Gulick*, 67 Ill. 210; *Moffitt v. Moffitt*, 69 Ill. 611; *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 342; *Matthews v. Hoff*, 113 Ill. 97; *Barnard v. Barnard*, 119 Ill. 92; *Reedy v. Camfield*, 159 Ill. 254; *People v. Seelye*, 146 Ill. 189, affirming 40 Ill. App. 449, and citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 311; *Field v. Peeples*, 180 Ill. 376; *Bannon v. People*, 1 Ill. App. 496; *Law v. Grommes*, 55 Ill. App. 312.

*Indiana*. — *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 358; *Ferrand v. McClearse*, 1 Ind. 87; *Craig v. Glass*, 1 Ind. 89; *Doe v. Smith*, 1 Ind. 451; *Doe v. Harvey*, 3 Ind. 104; *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 355; *Alexander v. Frary*, 9 Ind. 481; *Waltz v. Borroway*, 25 Ind. 380; *Hawkins v. Hawkins*, 28 Ind. 66; *Dequindre v. Williams*, 31 Ind. 444; *Comparet v. Hanna*, 34 Ind. 76; *Gavin v. Graydon*, 41 Ind. 559; *Hays v. Ford*, 55 Ind. 52; *Dwiggins v. Cook*, 71 Ind. 579; *State v. Ennis*, 74 Ind. 17; *Iles v. Watson*, 76 Ind. 359; *Crane v. Kimmer*, 77 Ind. 215; *Albertson v. State*, 95 Ind. 370; *Pickering v. State*, 106 Ind. 228; *Cassady v. Miller*, 106 Ind. 69; *Sims v. Gay*, 109 Ind. 503; *Bateman v. Miller*, 118 Ind. 345; *Gates v. Newman*, 18 Ind. App. 392.

*Indian Territory*. — *Barbee v. Shannon*, (Indian Ter. 1897) 40 S. W. Rep. 584.

*Iowa*. — *Reed v. Wright*, 2 Greene (Iowa) 33; *Wright v. Marsh*, 2 Greene (Iowa) 111; *Cooper v. Sunderland*, 3 Iowa 124, 66 Am. Dec. 52; *Seely v. Reid*, 3 Greene (Iowa) 374; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Campbell v. Ayres*, 6 Iowa 339; *State v. Elgin*, 11 Iowa 216; *Suiter v. Turner*, 10 Iowa 517; *Boker v. Chapline*, 12 Iowa 204; *Toliver v. Morgan*, 75 Iowa 619; *American Emigrant Co. v. Fuller*, 83 Iowa 599; *Day v. Goodwin*, 104 Iowa 374; *Co-operative Sav., etc., Assoc. v. McIntosh*, 105 Iowa 697.

*Kansas*. — *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 Am. Dec. 446; *Head v. Daniels*, 38 Kan. 13.

*Kentucky*. — *Bustard v. Gates*, 4 Dana (Ky.) 435; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; *Sorell v. Samuels*, (Ky. 1899) 49 S. W. Rep. 762.

*Louisiana*. — *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 Am. Dec. 556.

*Maine*. — *Blaisdell v. Pray*, 68 Me. 269; *Treat v. Maxwell*, 82 Me. 76.

*Maryland*. — *U. S. Bank v. Merchants' Bank*, 7 Gill (Md.) 429; *Powles v. Dilley*, 9 Gill (Md.) 222; *Raborg v. Hammond*, 2 Har. & G. (Md.) 50.

*Massachusetts*. — *White v. Palmer*, 4 Mass. 147; *Brown v. Wood*, 17 Mass. 68.

*Michigan*. — *Belcher v. Curtis*, 119 Mich. 1.

*Minnesota*. — *Kipp v. Fullerton*, 4 Minn. 473; *Skillman v. Greenwood*, 15 Minn. 102; *Davis v. Hudson*, 29 Minn. 27; *Hersey v. Walsh*, 38 Minn. 521, 8 Am. St. Rep. 689.

*Mississippi*. — *Byrd v. State*, 1 How. (Miss.) 173.

*Missouri*. — *Crowley v. Wallace*, 12 Mo. 143; *State v. Rogers*, 36 Mo. 138; *Freeman v. Thompson*, 53 Mo. 183; *Huxley v. Harrold*, 62 Mo. 523; *Wellshear v. Kelley*, 69 Mo. 343; *Allen v. McCabe*, 93 Mo. 138; *Jones v. Driskill*, 94 Mo. 190; *McClanahan v. West*, 100 Mo. 309; *Charley v. Kelley*, 120 Mo. 134; *Hamill v. Talbott*, 72 Mo. App. 22.

*Montana*. — *Edgerton v. Edgerton*, 12 Mont. 122.

*Nebraska*. — *Mead v. Weaver*, 42 Neb. 149; *Holt County Bank v. Holt County*, 53 Neb. 827.

*Nevada*. — *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742.

*New Hampshire*. — *Wingate v. Haywood*, 40 N. H. 437.

*New Jersey*. — *McCahill v. Equitable L. Assurance Soc.*, 26 N. J. Eq. 531.

*New York*. — *Chemung Canal Bank v. Judson*, 8 N. Y. 254; *Ferguson v. Crawford*, 70 N. Y. 259, 26 Am. Rep. 593; *White v. Bogart*, 73 N. Y. 256; *People v. Bradner*, 107 N. Y. 1; *Gridley v. St. Francis Xavier College*, 137 N. Y. 327; *Bloom v. Burdick*, 1 Hill (N. Y.) 141, 37 Am. Dec. 299 (overruling *Denning v. Corwin*, 11 Wend. (N. Y.) 647, so far as the doctrine is asserted that the judgment of a superior court will be void if the record does not show jurisdiction); *Butler v. New York*, 1 Hill (N. Y.) 489; *Bromley v. Smith*, 2 Hill (N. Y.) 517; *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 205; *Foot v. Stevens*, 17 Wend. (N. Y.) 483; *Hart v. Seixas*, 21 Wend. (N. Y.) 40, overruling



the particular judgment were duly found.<sup>1</sup> Thus, to illustrate the rule, unless the contrary appears, it will be presumed that the cause of action had accrued at the time the suit was brought;<sup>2</sup> that there was due service of process or appearance by the parties;<sup>3</sup> that an appearance by an attorney was

*Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Mills v. Martin*, 19 Johns. (N. Y.) 7.

*North Carolina*.—*Bernhardt v. Brown*, 118 N. Car. 700.

*Ohio*.—*Robb v. Irwin*, 15 Ohio 689; *Sheldon v. Newton*, 3 Ohio St. 494.

*Oregon*.—*Colfax Bank v. Richardson*, 34 Oregon 519.

*South Carolina*.—*Reese v. Meetze*, 51 S. Car. 333.

*South Dakota*.—*Stoddard Mfg. Co. v. Matice*, 10 S. Dak. 253.

*Tennessee*.—*Brien v. Hart*, 6 Humph. (Tenn.) 131; *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Reinhardt v. Nealis*, 101 Tenn. 169.

*Texas*.—*Burdett v. Silsbee*, 15 Tex. 618; *Alexander v. Maverick*, 18 Tex. 197, 67 Am. Dec. 693; *Bowers v. Chaney*, 21 Tex. 363; *Lawler v. White*, 27 Tex. 254; *Withers v. Patterson*, 27 Tex. 492, 86 Am. Dec. 643; *Guilford v. Love*, 49 Tex. 715; *Murchison v. White*, 54 Tex. 78; *Kramer v. Breedlove*, (Tex. 1887) 3 S. W. Rep. 561; *Martin v. Burns*, 80 Tex. 676; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80; *Woolley v. Sullivan*, 92 Tex. 28; *Higgins v. Bordages*, (Tex. Civ. App. 1894) 28 S. W. Rep. 350; *Stephens v. Turner*, 9 Tex. Civ. App. 623; *Parlin v. Cantrell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 415.

*Utah*.—*Hoagland v. Hoagland*, 19 Utah 103.

*Virginia*.—*Devaughn v. Devaughn*, 19 Gratt. (Va.) 564.

*Washington*.—*Christofferson v. Pfennig*, 16 Wash. 491.

*West Virginia*.—*Gilchrist v. West Virginia Oil, etc., Land Co.*, 21 W. Va. 118, 45 Am. Rep. 557.

*Wisconsin*.—*Falkner v. Guild*, 10 Wis. 563; *Sommermeier v. Schwartz*, 89 Wis. 66.

**Jurisdiction of State Courts in Patent Cases.**—On collateral attack of a judgment of a state court, determining conflicting claims to letters patent, it will be presumed that the court had jurisdiction, because the rule is that where the cause of action depends primarily on some contract of the parties, jurisdiction exists in the state courts, though the validity of the patent may arise incidentally. *Shoemaker v. South Bend Spark Arrester Co.*, 135 Ind. 471. And see generally the title **PATENTS**.

**Though the Record Shows that There Was No Appearance** by the defendant, either in person or by an attorney, it will nevertheless be presumed that the court had jurisdiction of his person. *Weaver v. Brown*, 87 Ala. 533.

**1. Presumption as to Finding of Jurisdictional Facts Generally.**—*United States*.—*Grignon v. Astor*, 2 How. (U. S.) 343; *U. S. Bank v. Moss*, 6 How. (U. S.) 40; *Erwin v. Lowry*, 7 How. (U. S.) 172; *Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 269; *Lincoln v. Tower*, 2 McLean (U. S.) 477, 15 Fed. Cas. No. 8,355; *Sprague v. Litherberry*, 4 McLean (U. S.) 442; *Galpin v. Page*, 1 Sawy. (U. S.) 325, 9 Fed. Cas. No. 5,205; *Graff v. Louis*, 71 Fed. Rep. 595.

*Alabama*.—*Wyatt v. Steele*, 26 Ala. 639; *Pettus v. McClannahan*, 52 Ala. 55; *Weaver v. Brown*, 87 Ala. 533.

*California*.—*Clary v. Hoagland*, 6 Cal. 685; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *People v. Hagar*, 52 Cal. 171; *In re Grove St.*, 61 Cal. 438.

*Connecticut*.—*Fox v. Hoyt*, 12 Conn. 496, 31 Am. Dec. 762.

*Illinois*.—*Reddick v. State Bank*, 27 Ill. 145; *Timmerman v. Phelps*, 27 Ill. 496; *Banks v. Banks*, 31 Ill. 162; *Rivard v. Gardner*, 39 Ill. 125; *Logan v. Williams*, 76 Ill. 183.

*Indiana*.—*Ney v. Swinney*, 36 Ind. 454; *Exchange Bank v. Ault*, 102 Ind. 322; *Jackson v. State*, 104 Ind. 516; *Osborn v. Sutton*, 108 Ind. 443; *Sims v. Gay*, 109 Ind. 501; *Hiatt v. Darlington*, 152 Ind. 570.

*Iowa*.—*Seely v. Reid*, 3 Greene (Iowa) 374; *Shawhan v. Loffer*, 24 Iowa 217.

*Kansas*.—*Butcher v. Brownsville Bank*, 2 Kan. 70, 83 Am. Dec. 446.

*Kentucky*.—*Newcomb v. Newcomb*, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

*Mississippi*.—*Henderson v. Winchester*, 31 Miss. 294.

*Missouri*.—*Huxley v. Harrold*, 62 Mo. 516; *Vosler v. Brock*, 84 Mo. 574; *Hammond v. Gordon*, 93 Mo. 223; *State v. Smith*, 105 Mo. 6; *Lingo v. Burford*, 112 Mo. 155.

*New York*.—*People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283; *Roderigas v. East River Sav. Inst.*, 63 N. Y. 464, 20 Am. Rep. 555.

*Pennsylvania*.—*Cummisky v. Cummisky*, 109 Pa. St. 1.

*Rhode Island*.—*Thornton v. Baker*, 15 R. I. 553, 2 Am. St. Rep. 925.

*Texas*.—*Withers v. Patterson*, 27 Tex. 496, 86 Am. Dec. 643.

**2. Presumption as to Accrual of Cause of Action.**—Where a judgment has been recovered for a debt, it will be presumed, on collateral attack, that the debt was due and payable. *Austin v. Austin*, 43 Ill. App. 488.

**3. Presumption as to Service of Process or Appearance.**—*Arkansas*.—*McConnell v. Day*, 61 Ark. 464.

*Georgia*.—*Mayer v. Hover*, 81 Ga. 308.

*Illinois*.—*Benefield v. Albert*, 132 Ill. 665; *Nickrans v. Wilk*, 161 Ill. 76.

*Indiana*.—*Cosby v. Powers*, 137 Ind. 694; *Indianapolis First Nat. Bank No. 2,556 v. Hanna*, 12 Ind. App. 240.

*Missouri*.—*Hamer v. Cook*, 118 Mo. 476.

*New York*.—*Sloane v. Martin*, 77 Hun (N. Y.) 249.

*South Dakota*.—*Stoddard Mfg. Co. v. Matice*, 10 S. Dak. 253.

*Texas*.—*Lyle v. Horstman*, (Tex. Civ. App. 1894) 25 S. W. Rep. 802, *distinguishing* *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370.

And see *infra*, this section, *Persons Not Within Territorial Limits of Jurisdiction*.

**If Service Is Made by the Coroner instead of the Sheriff**, as may be done under the *Kentucky*



authorized;<sup>1</sup> and that the land, when land is the subject of the suit, was situated within the territorial limits of the jurisdiction of the court.<sup>2</sup>

**What Are Courts of General Jurisdiction.** — The subject of courts of general jurisdiction, as distinguished from courts of special or limited jurisdiction, has been considered in another part of this work.<sup>3</sup>

**United States Courts,** though possessing only such jurisdiction as may be conferred on them by statute, are regarded as courts of general jurisdiction within the rule of presumption referred to above.<sup>4</sup>

**Courts of Probate.** — According to the preponderance of authority, though courts of probate are limited in their sphere to matters pertaining to the settlement of decedents' estates, their jurisdiction is not special or inferior, but, within that sphere, is general, unlimited, and exclusive, so that such courts are entitled to the same presumption of jurisdiction as are the courts of general law and equity powers.<sup>5</sup> There are some authorities, however, which

statute, in certain cases, it will be presumed that one of the conditions specified by the statute existed. *Russell v. Durham*, (Ky. 1895) 29 S. W. Rep. 16.

**1. Presumption as to Authority of Attorney to Enter Appearance.** — *United States.* — *Florentine v. Barton*, 2 Wall. (U. S.) 210.

*California.* — *Carpentier v. Oakland*, 30 Cal. 439.

*Georgia.* — *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407.

*Massachusetts.* — *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665.

*Michigan.* — *Morton v. Crane*, 39 Mich. 526.

*Missouri.* — *Baker v. Stonebraker*, 34 Mo. 175; *Cochran v. Thomas*, 131 Mo. 278.

*Nevada.* — *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742.

*New York.* — *Brown v. Nichols*, 42 N. Y. 26.

*Ohio.* — *Richards v. Skiff*, 8 Ohio St. 586.

See also the title ATTORNEY AND CLIENT, vol. 3, p. 375, note 4.

Compare *Wiley v. Pratt*, 23 Ind. 635.

**2. Presumption as to Situs of Land.** — *Foster v. Givens*, 67 Fed. Rep. 684, 31 U. S. App. 626. Compare *Rogers v. Cady*, 104 Cal. 288.

3. See the title COURTS, vol. 8, p. 21.

**4. Presumption of Jurisdiction Applicable to United States Courts.** — *Turner v. Bank of North America*, 4 Dall. (U. S.) 8; *Cuddy, Petitioner*, 131 U. S. 280; *Dowell v. Applegate*, 152 U. S. 327, reversing 15 Oregon 513; *Evers v. Watson*, 156 U. S. 527; *In re Eaton*, 51 Fed. Rep. 805; *Skirving v. National L. Ins. Co.*, 59 Fed. Rep. 742; *Turrell v. Warren*, 25 Minn. 9; *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390; *Goodsell v. Delta, etc., Co.*, 72 Miss. 580; *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133. See also the title UNITED STATES COURTS.

**Cause Removed from State Court.** — Where a cause is removed from a state court to a federal court, the judgment of the federal court therein is not subject to collateral attack because the facts authorizing the removal are not shown by the record. *Pullman's Palace-Car Co. v. Washburn*, 66 Fed. Rep. 790, affirmed 76 Fed. Rep. 1005, 33 U. S. App. 628; *Dexter v. Sayward*, 84 Fed. Rep. 300.

**Collateral Attack in State Courts.** — State courts have the right to examine collaterally into the alleged defects of judgments rendered by United States courts of original jurisdiction. *Pasteur v. Lewis*, 39 La. Ann. 5.

**5. Courts of Probate Held Courts of General**

**Jurisdiction.** — *Arkansas.* — *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Currie v. Franklin*, 51 Ark. 338, following *Redmond v. Anderson*, 18 Ark. 449; *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183.

*Georgia.* — *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; *Bush v. Lindsey*, 24 Ga. 245, 71 Am. Dec. 117.

*Illinois.* — *Young v. Lorain*, 11 Ill. 625, 52 Am. Dec. 463; *Propst v. Meadows*, 13 Ill. 157; *Hanna v. Yocum*, 17 Ill. 387; *Botsford v. O'Conner*, 57 Ill. 72; *Von Kettler v. Johnson*, 57 Ill. 109; *Hobson v. Ewan*, 62 Ill. 146; *Housh v. People*, 66 Ill. 178; *Moffitt v. Moffitt*, 69 Ill. 641; *Barnett v. Wolf*, 70 Ill. 76; *People v. Gray*, 72 Ill. 343; *Bostwick v. Skinner*, 80 Ill. 147; *People v. Seelye*, 146 Ill. 189, affirming 40 Ill. App. 449, and citing 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 311; *People v. Medart*, 166 Ill. 348, affirming 63 Ill. App. 111. See also *Unknown Heirs v. Baker*, 23 Ill. 484.

*Indiana.* — *Doe v. Smith*, 1 Ind. 451; *Doe v. Wise*, 5 Blackf. (Ind.) 402; *Doe v. Harvey*, 5 Blackf. (Ind.) 487, 3 Ind. 104; *Doe v. Smith*, 1 Ind. 451, explaining *Brown v. McQueen*, 6 Blackf. (Ind.) 208, and *West v. Thornburgh*, 6 Blackf. (Ind.) 542; *Babbitt v. Doe*, 4 Ind. 355.

*Iowa.* — See *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122.

*Minnesota.* — *Davis v. Hudson*, 29 Minn. 27; *Jacobs v. Fouse*, 23 Minn. 51.

*Mississippi.* — *Hardy v. Gholson*, 26 Miss. 70; *Frisby v. Harrison*, 30 Miss. 452; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49; *Donald v. McWhorter*, 40 Miss. 231; *Pollock v. Buie*, 43 Miss. 140; *State v. Bowen*, 45 Miss. 347; *Gillespie v. Hauenstein*, 72 Miss. 838.

*Missouri.* — *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 282; *Camden v. Plain*, 91 Mo. 117; *Rowden v. Brown*, 91 Mo. 429; *Price v. Springfield Real-Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595; *Murphy v. De France*, 105 Mo. 53; *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399; *Macey v. Stark*, 116 Mo. 481; *Cox v. Boyce*, 152 Mo. 576.

*Nevada.* — *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742.

*New Hampshire.* — *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213.

*New Jersey.* — *Den v. Hammel*, 18 N. J. L. 73; *Pittenger v. Pittenger*, 3 N. J. Eq. 156.

*New York.* — *Murzynowski v. Delaware, etc., R. Co.*, (Buffalo Super Ct. Tr. T.) 15 N. Y. Supp. 841; *Bearns v. Gould*, 77 N. Y. 455;



hold that Probate Courts are courts of special or limited jurisdiction, and that their orders or decrees do not raise any presumption of jurisdiction unless the jurisdictional facts appear on the face of the proceeding.<sup>1</sup>

**Special Proceedings in Probate Court.** — In regard to matters not within the ordinary probate jurisdiction, but involving the exercise of special statutory powers, such as the sale of a decedent's real estate for the payment of debts, it has been held that the presumption of jurisdiction does not obtain, but the court, as concerns such matters, is a court of special jurisdiction. The rule is the same as where a court of general jurisdiction exercises special statutory powers.<sup>2</sup> Some cases hold, however, that even in this respect courts of probate are courts of general jurisdiction.<sup>3</sup>

**Justices' Courts** have been held to be courts of general jurisdiction within the limits prescribed by law, but the cases so holding are opposed to the weight of authority.<sup>4</sup>

(b) **Record Recitals as to Jurisdictional Facts.** — The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. When the record states the evidence or makes an averment showing a want of jurisdiction, it will not be presumed in support of the judgment that there was other or different evidence respecting the fact, or that the fact was otherwise than averred.<sup>5</sup> And so, too, if the jurisdiction of the court appears

*Harrison v. Clark*, 87 N. Y. 572; *Jackson v. Crawford*, 12 Wend. (N. Y.) 533. And see *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555.

*Ohio*. — *Sheldon v. Newton*, 3 Ohio St. 494; *Shroyer v. Richmond*, 16 Ohio St. 455; *King v. Bell*, 36 Ohio St. 460; *Cincinnati, etc., R. Co. v. Belle Centre*, 48 Ohio St. 273.

*Pennsylvania*. — *Singerly v. Swain*, 33 Pa. St. 102, 75 Am. Dec. 581.

*South Dakota*. — *Matson v. Swenson*, 5 S. Dak. 191.

*Tennessee*. — *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70, 94 Am. Dec. 185; *Brien v. Hart*, 6 Humph. (Tenn.) 131.

*Texas*. — *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Giddings v. Steele*, 28 Tex. 750, 91 Am. Dec. 336; *Guilford v. Love*, 49 Tex. 716; *Murchison v. White*, 54 Tex. 83; *Martin v. Robinson*, 67 Tex. 368; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Dickson v. Moore*, 9 Tex. Civ. App. 514; *Grant v. Hill*, (Tex. Civ. App. 1894) 30 S. W. Rep. 952. Compare *Alexander v. Maverick*, 18 Tex. 179, 67 Am. Dec. 693.

*Vermont*. — *Holden v. Scanlin*, 30 Vt. 177.

*Virginia*. — *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335.

*Wisconsin*. — See *Sitzman v. Pacquette*, 13 Wis. 318.

See also the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 785, note 6, and p. 1115, note 4.

1. Probate Courts Considered Courts of Inferior Jurisdiction. — See *infra*, this section, *Courts of Special or Inferior Jurisdiction*.

2. Probate Court Exercising Special Statutory Powers. — *Planters Bank v. Johnson*, 7 Smed. & M. (Miss.) 449; *Commercial Bank v. Martin*, 9 Smed. & M. (Miss.) 613; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49. And see *infra*, this section, *Cases Involving Exercise of Special Statutory Powers*.

In *Holden v. Scanlin*, 30 Vt. 177, it was held

that while a court of probate is a court of general jurisdiction in regard to the settlement of estates of deceased persons, yet where power is given to it to appoint guardians for insane persons, spendthrifts, etc., it is in that respect a court of special jurisdiction.

3. *Apel v. Kelsey*, 52 Ark. 341, 20 Am. St. Rep. 183 (sale of real estate); *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213 (appointment of guardian). See also *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; *Camden v. Plain*, 91 Mo. 117; *Rowden v. Brown*, 91 Mo. 429; *Price v. Springfield Real Estate Assoc.*, 101 Mo. 107, 20 Am. St. Rep. 595.

4. Rule as to Justices' Courts. — See *infra*, this section, *Courts of Special or Inferior Jurisdiction*.

5. No Presumption Where Record Shows Want of Jurisdiction — *United States*. — *Elliot v. Peirsol*, 1 Pet. (U. S.) 328; *Hickey v. Stewart*, 3 How. (U. S.) 750; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Settemier v. Sullivan*, 97 U. S. 449; *Moore v. Edgefield*, 32 Fed. Rep. 501.

*Alabama*. — *Falkner v. Christian*, 51 Ala. 495.

*California*. — *Whitwell v. Barbier*, 7 Cal. 54.

*Delaware*. — *Frankel v. Satterfield*, 9 Houst. (Del.) 204.

*Illinois*. — *Goudy v. Hall*, 30 Ill. 109; *Miller v. Handy*, 40 Ill. 448; *Clark v. Thompson*, 47 Ill. 26, 95 Am. Dec. 457; *Osgood v. Blackmore*, 59 Ill. 261; *Haywood v. Collins*, 60 Ill. 328; *Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, 80 Ill. 307; *Law v. Grommes*, 158 Ill. 492, reversing 55 Ill. App. 312; *Bannon v. People*, 1 Ill. App. 504.

*Minnesota*. — *Davis v. Hudson*, 29 Minn. 27; *Matter of Mousseau*, 30 Minn. 202; *Culver v. Hardenbergh*, 37 Minn. 225.

*Missouri*. — *Freeman v. Thompson*, 53 Mo. 183.

*New York*. — *Stuyvesant v. Weil*, 41 N. Y. App. Div. 551, 29 Civ. Pro. (N. Y.) 319, reversing 26 Misc. (N. Y.) 445.



by the record, it is conclusive as to that fact.<sup>1</sup>

(c) **Persons Not Within Territorial Limits of Jurisdiction.** — Jurisdiction of the person of a defendant is presumed in support of the judgment only when he is within the territorial limits of the court, and if he is not within such limits, the record must show service on him.<sup>2</sup>

**When Service by Publication Is Authorized** for the purpose of giving jurisdiction to render a judgment which may be enforced against property situated within reach of the process of the court,<sup>3</sup> the probably invariable rule is that the record must show that there was a publication.<sup>4</sup> But if the judgment or decree recites the fact of publication, though the record shows nothing further in respect thereto, it is generally held that such recital will raise at least a *prima facie* presumption that all the statutory requirements were complied with.<sup>5</sup>

*Pennsylvania.* — *Messinger v. Kintner*, 4 Binn. (Pa.) 97; *Wall v. Wall*, 123 Pa. St. 545, 10 Am. St. Rep. 549.

*South Carolina.* — *Miller v. Miller*, 1 Bailey L. (S. Car.) 244; *James v. Smith*, 2 S. Car. 188.

*Texas.* — *Withers v. Patterson*, 27 Tex. 501, 86 Am. Dec. 643.

1. See *infra*, this section, *Conclusiveness of Presumption*.

2. **Persons Not Within Territorial Limits.** — *Galpin v. Page*, 18 Wall. (U. S.) 350; *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149.

3. **Jurisdiction Acquired by Publication.** — See *supra*, this title, *Sources and Modes of Acquiring Jurisdiction*.

4. **No Presumption of Publication** — *United States.* — *Hartley v. Boynton*, 5 McCrary (U. S.) 453; *Cissell v. Pulaski County*, 3 McCreary (U. S.) 446; *Neff v. Pennoyer*, 3 Sawy. (U. S.) 274; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Gray v. Larrimore*, 2 Abb. (U. S.) 542.

*Alabama.* — *Hartley v. Bloodgood*, 16 Ala. 233; *Beavers v. Davis*, 19 Ala. 82; *Coster v. Georgia Bank*, 24 Ala. 37; *Keiffer v. Barney*, 31 Ala. 192; *Brinsfield v. Austin*, 39 Ala. 227; *Paulling v. Creagh*, 63 Ala. 398; *Diston v. Hood*, 83 Ala. 331, 3 Am. St. Rep. 746.

*California.* — *McMinn v. Whelan*, 27 Cal. 300.

*Colorado.* — *O'Rear v. Lazarus*, 8 Colo. 608; *Frybarger v. McMillen*, 15 Colo. 349.

*Illinois.* — *Vairin v. Edmonson*, 10 Ill. 270; *Randall v. Songer*, 16 Ill. 27; *Haywood v. McCrory*, 33 Ill. 459; *Baldwin v. Ferguson*, 35 Ill. App. 393; *Star Brewery v. Otto*, 63 Ill. App. 40.

*Iowa.* — *Lot Two v. Swetland*, 4 Greene (Iowa) 465; *McGahan v. Carr*, 6 Iowa 331, 71 Am. Dec. 421; *Abell v. Cross*, 17 Iowa 171; *Miller v. Corbin*, 46 Iowa 150.

*Kentucky.* — *Brownfield v. Dyer*, 7 Bush (Ky.) 505; *Grigsby v. Barr*, 14 Bush (Ky.) 330; *Gale v. Clark*, 4 Bibb (Ky.) 416; *Mims v. Mims*, 3 J. J. Marsh. (Ky.) 103. But see *Newcomb v. Newcomb*, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

*Michigan.* — *Adams v. Hosmer*, 98 Mich. 51.

*Minnesota.* — *Godfrey v. Valentine*, 39 Minn. 336, 12 Am. St. Rep. 657.

*Missouri.* — *State v. Horine*, 63 Mo. App. 1.

*Montana.* — *Palmer v. McMaster*, 8 Mont. 156.

*Nebraska.* — *Atkins v. Atkins*, 9 Neb. 491.

*New York.* — *Hallett v. Righters*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 43.

*North Carolina.* — *Spillman v. Williams*, 91 N. Car. 483.

*Oregon.* — *Northcut v. Lemery*, 8 Oregon 316.

5. **Recital of Publication — Presumption of Regularity** — *United States.* — *Galpin v. Page*, 1 Sawy. (U. S.) 309; *Applegate v. Lexington*, etc., Min. Co., 117 U. S. 255; *Foster v. Givens*, 67 Fed. Rep. 684; *Beattie v. Wilkinson*, 36 Fed. Rep. 646. But see *Hartley v. Boynton*, 5 McCrary (U. S.) 453.

*Arkansas.* — *McLain v. Duncan*, 57 Ark. 49.

*California.* — *Crew v. Pratt*, 119 Cal. 139; *Matter of Newman*, 75 Cal. 213; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *McCauley v. Fulton*, 44 Cal. 355. See also *Kahn v. Matthal*, 115 Cal. 689.

*Illinois.* — *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303.

*Indiana.* — *Essig v. Lower*, 120 Ind. 239; *Goodell v. Starr*, 127 Ind. 198.

*Iowa.* — *Fanning v. Krapfl*, 68 Iowa 244; *Wright v. Marsh*, 2 Greene (Iowa) 94.

*Kansas.* — *Haynes v. Cowen*, 15 Kan. 645.

*Mississippi.* — *Saffarans v. Terry*, 12 Smed. & M. (Miss.) 690. See also *Bowen v. Seale*, 45 Miss. 30.

*Missouri.* — *Kane v. McCown*, 55 Mo. 181; *Brawley v. Ranney*, 67 Mo. 280; *Charley v. Kelley*, 120 Mo. 134; *Roberts v. St. Louis Merchants' Land Imp. Co.*, 126 Mo. 460.

*Nebraska.* — *Miller v. Finn*, 1 Neb. 254; *Eays v. Nason*, 54 Neb. 143.

*Ohio.* — *Buchanan v. Roy*, 2 Ohio St. 251; *Fowler v. Whiteman*, 2 Ohio St. 270; *Boswell v. Sharp*, 15 Ohio 447; *Laughlin v. Vogelsong*, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200.

*Tennessee.* — *Gilliland v. Cullum*, 6 Lea (Tenn.) 521; *Walker v. Cottrell*, 6 Baxt. (Tenn.) 257.

*Texas.* — *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80; *Traylor v. Lide*, (Tex. 1887) 7 S. W. Rep. 58; *Stewart v. Anderson*, 70 Tex. 588; *Treadway v. Eastburn*, 57 Tex. 209; *Lawler v. White*, 27 Tex. 250; *Buse v. Bartlett*, 1 Tex. Civ. App. 335; *Sloan v. Thompson*, 4 Tex. Civ. App. 419.

*Utah.* — *Amy v. Amy*, 12 Utah 278.

*Virginia.* — *Wilcher v. Robertson*, 78 Va. 602.

In *Hammond v. Davenport*, 16 Ohio St. 177, it was held that defendants on whom no service of process was had otherwise than by publication would not be allowed, in a collateral proceeding, to draw in question the jurisdiction of the court rendering the decree by proving



(2) *Cases Involving Exercise of Special Statutory Powers* — (a) *Presumption of Jurisdiction Generally*. — Some authorities hold that the presumption of jurisdiction in favor of the judgments and decrees of courts of general jurisdiction applies where such courts have exercised special statutory powers as well as in other cases.<sup>1</sup>

(b) *Proceedings According to Course of Common Law*. — Where special statutory powers are to be exercised by the usual common-law or chancery practice, the authorities seem to be agreed that the proceedings and judgments will have all the characteristics of the proceedings and judgment in other cases, including the presumption of jurisdiction.<sup>2</sup>

(c) *Proceedings Not According to Course of Common Law*. — A distinction, however, is generally made between special statutory powers which are exercised according to the course of the common law and those which are exercised in a special manner as prescribed by the statute; and it is held that where such powers are exercised in a special statutory manner no presumption of jurisdiction arises, the court being, *quoad hoc*, one of special or inferior jurisdiction, but the record must show compliance with the statute, else the judgment or decree will be held void on collateral attack;<sup>3</sup> though it has been said that this

that at the commencement and during the pendency of the proceeding they were residents of the state. And see *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448.

In Texas, where a judgment rendered against a nonresident on attachment and service by publication is collaterally attacked, the same presumptions as to jurisdiction and regularity of proceedings are indulged in favor thereof as in favor of a judgment on personal service. *Buse v. Bartlett*, 1 Tex. Civ. App. 335; *Meade v. Bartlett*, 1 Tex. Civ. App. 342; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80; *Stewart v. Anderson*, 70 Tex. 588; *Treadway v. Eastburn*, 57 Tex. 209; *Lawler v. White*, 27 Tex. 250. See also *Traylor v. Lide*, (Tex. 1887) 7 S. W. Rep. 58; *Hambel v. Davis*, 89 Tex. 256, 59 Am. St. Rep. 46.

1. *Exercise of Special Statutory Powers — Presumption of Jurisdiction Generally — United States*. — *Elliott v. Peirsol*, 1 Pet. (U. S.) 328; *Thompson v. Tolmie*, 2 Pet. (U. S.) 157; *Ex p. Watkins*, 3 Pet. (U. S.) 193; *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Voorhees v. Jackson*, 10 Pet. (U. S.) 450; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. (U. S.) 448; *Grignon v. Astor*, 2 How. (U. S.) 319; *Barney v. Saunders*, 16 How. (U. S.) 535.

*Indiana*. — *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Lawrence County v. Hall*, 70 Ind. 469; *Reynolds v. Faris*, 80 Ind. 14; *Hilton v. Mason*, 92 Ind. 157; *Knox County v. Montgomery*, 106 Ind. 517; *Strieb v. Cox*, 111 Ind. 299; *Hill v. Probst*, 120 Ind. 528; *McEneney v. Sullivan*, 125 Ind. 407; *Tucker v. Sellers*, 130 Ind. 514.

*Massachusetts*. — *Perkins v. Fairfield*, 11 Mass. 227.

*New Jersey*. — *Diehl v. Page*, 3 N. J. Eq. 143; *Pittenger v. Pittenger*, 3 N. J. Eq. 156.

*Pennsylvania*. — *McPherson v. Cunliff*, 11 S. & R. (Pa.) 422, 14 Am. Dec. 642.

*Tennessee*. — *Hamilton v. Burum*, 3 Yerg. (Tenn.) 355; *Dulles v. Read*, 6 Yerg. (Tenn.) 53; *Ferrel v. Finch*, 8 Yerg. (Tenn.) 432.

2. *Statutory Powers Exercised According to Course of Common Law — United States*. — *Voorhees v. Jackson*, 10 Pet. (U. S.) 449; *Harvey*

*v. Tyler*, 2 Wall. (U. S.) 342; *Galpin v. Page*, 18 Wall. (U. S.) 350.

*Illinois*. — *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217; *Farmers, etc., Ins. Co. v. Buckles*, 49 Ill. 482; *Nichols v. Mitchell*, 70 Ill. 258.

*Iowa*. — *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52.

*Missouri*. — See *Brown v. Walker*, 11 Mo. App. 226, 85 Mo. 262.

*New York*. — *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Striker v. Kelly*, 7 Hill (N. Y.) 9, *reversed* on other points in 2 Den. (N. Y.) 323; *Denning v. Corwin*, 11 Wend. (N. Y.) 647.

*Virginia*. — *Pulaski County v. Stuart*, 28 Gratt. (Va.) 879.

*Compare Falkner v. Guild*, 10 Wis. 563.

*Order Granting Trustee Leave to Sell*. — An order passed by a judge of the Superior Court, granting an application presented by a trustee for leave to sell property held by him in trust, has all the sanctity which attaches to a formal judgment rendered by a court of general jurisdiction, and accordingly every presumption in favor of its validity is to be indulged. *Reinhart v. Blackshear*, 105 Ga. 799.

In *Administering the Affairs of a Minor* the Chancery Court of *Mississippi* is not one of limited or inferior jurisdiction, and its decree appointing the clerk guardian cannot be collaterally attacked by showing that the minor did not live within the county where the court was held, though the record is silent as to the residence of the minor. *Ames v. Williams*, 72 Miss. 760, *overruling Farrer v. Clark*, 29 Miss. 195.

3. *Statutory Powers Not Exercised According to Course of Common Law — United States*. — *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Galpin v. Page*, 18 Wall. (U. S.) 350.

*Alabama*. — *Foster v. Glazener*, 27 Ala. 391; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785; *Janney v. Buell*, 55 Ala. 408, 28 Am. St. Rep. 729; *Phillips v. Ash*, 63 Ala. 414; *Chandler v. Hanna*, 73 Ala. 390.

*California*. — *McDonald v. Katz*, 31 Cal. 167; *Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742.

*Illinois*. — *Haywood v. Collins*, 60 Ill. 328; *Donlin v. Hettinger*, 57 Ill. 348; *Wenner v.*



distinction is probably a question of authority more than of reason, because it is doubtful if there is any principle of reason or justice which decides either way.<sup>1</sup>

**Recitals of Judgment or Decree.** — If the judgment or decree recites a compliance with the statute, it will be conclusively presumed that the court acted on sufficient evidence of the facts recited.<sup>2</sup>

**A General Recital in the Judgment or Decree** that the statutory requirements have been fulfilled is sufficient, though the facts are not set out in the record.<sup>3</sup> But if the facts are set out in the record, and it appears therefrom that the statute has not been complied with, the recital of the judgment or decree will not avail.<sup>4</sup>

(3) *Conclusiveness of Presumption.* — According to some authorities, the presumption in favor of superior courts may be overcome only by recitals in the record showing affirmatively that the court was without jurisdiction in respect to either the parties or the subject-matter.<sup>5</sup> Other authorities hold

Thornton, 98 Ill. 168; Gibbon v. Bryan, 3 Ill. App. 238; Joiner v. Drainage Com'rs, 17 Ill. App. 607; Burns v. Nash, 23 Ill. App. 552; Foley v. Foley, 61 Ill. App. 577.

*Indiana.* — See White County v. Gwin, 136 Ind. 562.

*Iowa.* — Wright v. Marsh, 2 Greene (Iowa) 95; Tiffany v. Glover, 3 Greene (Iowa) 402; Cooper v. Sunderland, 3 Iowa 135, 66 Am. Dec. 52.

*Kentucky.* — Newcomb v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

*Maryland.* — Bend v. Susquehanna Bridge, etc., Co., 6 Har. & J. (Md.) 130; Boarman v. Patterson, 1 Gill (Md.) 372; Risewick v. Davis, 19 Md. 91; Mears v. Adreon, 31 Md. 232.

*Mississippi.* — Stampely v. King, 51 Miss. 728; Root v. McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

*Missouri.* — Bell v. Brinkmann, 123 Mo. 270; Werz v. Werz, 11 Mo. App. 26; Creason v. Wabash, etc., R. Co., 17 Mo. App. 111; Vaughn v. Missouri Pac. R. Co., 17 Mo. App. 4; Sedalia v. Missouri, etc., R. Co., 17 Mo. App. 105; Babb v. Bruere, 23 Mo. App. 604. But see Leonard v. Sparks, 117 Mo. 103, 38 Am. St. Rep. 646; Union Depot Co. v. Frederick, 117 Mo. 138.

*New Hampshire.* — Eaton v. Badger, 33 N. H. 228; Sanborn v. Fellows, 22 N. H. 473; Morse v. Presby, 25 N. H. 299; Haywood v. Charlestown, 34 N. H. 26; Carleton v. Washington Ins. Co., 35 N. H. 162.

*Ohio.* — Adams v. Jeffries, 12 Ohio 272; Maxsom v. Sawyer, 12 Ohio 195.

*Oregon.* — Johns v. Marion County, 4 Oregon 46; Northcut v. Lemery, 8 Oregon 317; Furgeson v. Jones, 17 Oregon 204, 11 Am. St. Rep. 808; Odell v. Campbell, 9 Oregon 298.

*Tennessee.* — Jones v. Read, 1 Humph. (Tenn.) 335; Whitmore v. Johnson, 10 Humph. (Tenn.) 610; Kindell v. Titus, 9 Heisk. (Tenn.) 727.

*Texas.* — Williams v. Ball, 52 Tex. 603, 36 Am. Rep. 730.

*Virginia.* — Pulaski County v. Stuart, 28 Gratt. (Va.) 874.

And see the title GARNISHMENT, vol. 14, p. 885.

As to the effect of the recital of jurisdictional facts in the judgments and decrees of superior courts when exercising their general powers, and inferior courts, respectively, see *infra*,

this section, *Conclusiveness of Presumption* paragraph *Jurisdiction Appearing of Record*; and also *infra*, this section, *Courts of Special or Inferior Jurisdiction* — *Recital of Jurisdictional Facts*.

**Proceedings Supplementary to Execution** are not special statutory proceedings in the sense that facts conferring jurisdiction of the matter must be affirmatively proved whenever questioned in a collateral proceeding; they are simply a new remedy in an action in which the court is possessed of general jurisdiction, and where the acts of the officers named are entitled to all the presumptions of regularity which belong to the proceedings of courts of general jurisdiction. Wright v. Nostrand, 94 N. Y. 31.

**1. Distinction Matter of Authority and Not of Reason.** — Cooper v. Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

**2. Recitals of Judgment or Decree.** — Harris v. Lester, 80 Ill. 307; Sloan v. Graham, 85 Ill. 26; Wenner v. Thornton, 98 Ill. 156; Reedy v. Camfield, 159 Ill. 254; Boyer v. Robertson, 140 Ind. 74; Gillon v. Wear, 9 Tex. Civ. App. 44. And see Moore v. Neil, 39 Ill. 256, 89 Am. Dec. 303; Donlin v. Heutinger, 57 Ill. 348; Miller v. Handy, 40 Ill. 448; Bowen v. Bond, 80 Ill. 351.

**3. General Recitals — Facts Not Appearing of Record.** — McLain v. Duncan, 57 Ark. 49. See also *infra*, this section, *Conclusiveness of Presumption*, paragraph *Jurisdiction Appearing of Record*.

**4. Recitals Contradicted by Record.** — Newman v. Crowls, 60 Fed. Rep. 220, 23 U. S. App. 89; Cox v. Matthews, 17 Ind. 367.

**5. Evidence Aliunde Generally Held Not Admissible to Rebut Presumption — England.** — Peacock v. Bell, 1 Saund. 74; Gosset v. Howard, 10 Q. B. 411, 59 E. C. L. 411.

*United States.* — Grignon v. Astor, 2 How. (U. S.) 319.

*Alabama.* — Lightsey v. Harris, 20 Ala. 409.

*California.* — Carpentier v. Oakland, 30 Cal. 447; Forbes v. Hyde, 31 Cal. 342; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

*Connecticut.* — Bowler v. Eldridge, 18 Conn. 13; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244.

*Indiana.* — Horner v. Doe, 1 Ind. 131, 48 Am. Dec. 355.

*Iowa.* — Seely v. Reid, 3 Greene (Iowa) 374; Wright v. Marsh, 2 Greene (Iowa) 94; Prince



that the fact may be shown by evidence *aliunde* the record.<sup>1</sup>

**Jurisdiction Appearing of Record.** — If a superior court of general jurisdiction expressly finds the existence of the jurisdictional facts, or they otherwise appear of record, they are conclusively established thereby, and cannot be questioned in a collateral proceeding.<sup>2</sup> This is in accordance with the general

*v. Griffin*, 16 Iowa 552; *Day v. Goodwin*, 104 Iowa 374.

*Maine*. — *Granger v. Clark*, 22 Me. 128; *Penobscot R. Co. v. Weeks*, 52 Me. 456.

*Maryland*. — *Clark v. Bryan*, 16 Md. 171.

*Massachusetts*. — *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665; *Cook v. Darling*, 18 Pick. (Mass.) 393.

*Michigan*. — *Wilcox v. Kassick*, 2 Mich. 165. But see *Palmer v. Oakley*, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

*Minnesota*. — *Kipp v. Fullerton*, 4 Minn. 473; *Gulickson v. Bodkin*, (Minn. 1899) 80 N. W. Rep. 783.

*Mississippi*. — *Ames v. Williams*, 72 Miss. 775.

*Missouri*. — *Montgomery v. Farley*, 5 Mo. 233; *McDonald v. Leewright*, 31 Mo. 29, 77 Am. Dec. 631; *State v. Mackin*, 51 Mo. App. 299.

*Nebraska*. — *Johnson v. Jones*, 2 Neb. 126; *German Nat. Bank v. Kautter*, 55 Neb. 103; *Eays v. Nason*, 54 Neb. 143.

*Ohio*. — *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Cincinnati, etc., R. Co. v. Belle Centre*, 48 Ohio St. 273.

*Pennsylvania*. — *Kennedy v. Baker*, 159 Pa. St. 146, 33 W. N. C. (Pa.) 498.

*South Carolina*. — *Parr v. Lindler*, 40 S. Car. 193; *Reese v. Meetze*, 51 S. Car. 333.

*Tennessee*. — *Reinhardt v. Nealis*, 101 Tenn. 169.

*Texas*. — *Crawford v. McDonald*, 88 Tex. 626; *Templeton v. Ferguson*, 89 Tex. 47; *Gilbough v. Stahl Bldg. Co.*, 91 Tex. 621.

But a judgment of a justice's court may be impeached by evidence *aliunde* that the defendant was not served with process, though in *Texas* a justice's court is considered a court of general jurisdiction. *Wilkerson v. Schoonmaker*, 77 Tex. 615.

**1. Evidence Aliunde Sometimes Held Admissible to Rebut Presumption.** — *Demerit v. Lyford*, 27 N. H. 541; *Adams v. Washington, etc., R. Co.*, 10 N. Y. 328, reversing 11 Barb. (N. Y.) 414; *Ferguson v. Crawford*, 70 N. Y. 259, 26 Am. Rep. 593; *People v. New York County*, 100 N. Y. 26, reversing 34 Hun (N. Y.) 393; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *People v. Cassels*, 5 Hill (N. Y.) 164; *Boiton v. Jacks*, 6 Robt. (N. Y.) 166; *Porter v. Bronson*, (C. Pl. Gen. T.) 29 How. Pr. (N. Y.) 292; *Hayes v. Kerr*, 19 N. Y. App. Div. 91; *Pennywit v. Foote*, 27 Ohio St. 618, 22 Am. Rep. 351. And see *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149; *Thorn v. Salmonson*, 37 Kan. 441; *Hambel v. Davis*, (Tex. Civ. App. 1895) 33 S. W. Rep. 251.

**2. Effect of Finding Jurisdictional Facts — United States.** — *Sargeant v. Indiana State Bank*, 12 How. (U. S.) 386; *Hall v. Law*, 102 U. S. 464; *Smith v. Pomeroy*, 2 Dill. (U. S.) 420, 22 Fed. Cas. No. 13,092; *Holmes v. Oregon, etc., R. Co.*, 9 Fed. Rep. 245; *U. S. v. Gayle*, 45 Fed. Rep. 107; *Colt v. Colt*, 48 Fed.

Rep. 385, affirmed 111 U. S. 566; *Reinach v. Atlantic, etc., R. Co.*, 58 Fed. Rep. 42.

*Alabama*. — *Wyatt v. Steele*, 26 Ala. 639; *Hunt v. Ellison*, 32 Ala. 194; *Goodman v. Winter*, 64 Ala. 410, 38 Am. St. Rep. 13; *Perry v. King*, 117 Ala. 533.

*Delaware*. — *Pritchett v. Clark*, 5 Harr. (Del.) 63.

*Georgia*. — *Flannery v. Baldwin Fertilizer Co.*, 94 Ga. 696.

*Illinois*. — *Fitzgibbon v. Lake*, 29 Ill. 165, 81 Am. Dec. 302; *Goudy v. Hall*, 30 Ill. 109; *Moore v. Neil*, 39 Ill. 256, 98 Am. Dec. 303; *Miller v. Handy*, 40 Ill. 448; *Finch v. Sink*, 46 Ill. 169, 92 Am. Dec. 246; *Donlin v. Hettinger*, 57 Ill. 348; *Osgood v. Blackmore*, 59 Ill. 261; *Hobson v. Ewan*, 62 Ill. 146; *Barnett v. Wolf*, 70 Ill. 76; *Searle v. Galbraith*, 73 Ill. 269; *Senichka v. Lowe*, 74 Ill. 274; *Bostwick v. Skinner*, 80 Ill. 153; *Harris v. Lester*, 80 Ill. 307; *Bowen v. Bond*, 80 Ill. 351; *Wing v. Dodge*, 80 Ill. 564; *People v. Cole*, 84 Ill. 327; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196; *Swift v. Yenaway*, 153 Ill. 197; *Goodkind v. Bartlett*, 153 Ill. 419; *Reedy v. Camfield*, 159 Ill. 254; *Casey v. People*, 165 Ill. 49; *Young v. People*, 171 Ill. 299, distinguishing *McChesney v. People*, 145 Ill. 614, 148 Ill. 221; *Larson v. Chicago*, 172 Ill. 298; *Law v. Grommes*, 55 Ill. App. 312; *Ward v. White*, 66 Ill. App. 155.

*Indiana*. — *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Dequindre v. Williams*, 31 Ind. 444; *Dowell v. Lahr*, 97 Ind. 146; *Jackson v. State*, 104 Ind. 516; *Pickering v. State*, 106 Ind. 228; *Spencer v. McGonagle*, 107 Ind. 410, *Sims v. Gay*, 109 Ind. 503; *Kleyla v. Haskett*, 112 Ind. 515; *McEneney v. Sullivan*, 125 Ind. 407; *Tucker v. Sellers*, 130 Ind. 517.

*Iowa*. — *Gregg v. Thompson*, 17 Iowa 109, 85 Am. Dec. 546; *Shawhan v. Loffer*, 24 Iowa 226; *Tharp v. Brennenman*, 41 Iowa 253; *Woodbury v. Maguire*, 42 Iowa 342; *Farmers', Ins. Co. v. Highsmith*, 44 Iowa 330; *Lees v. Wetmore*, 58 Iowa 177; *Stanley v. Noble*, 59 Iowa 669; *Bunce v. Bunce*, 59 Iowa 535; *Fanning v. Krapfl*, 68 Iowa 248; *Ketchum v. White*, 72 Iowa 193; *Gray v. Wolf*, 77 Iowa 631; *Rotch v. Humboldt College*, 89 Iowa 480. Compare *Willenburg v. Hersey*, 104 Iowa 699, in which it was said that if extrinsic evidence can be received to contradict a recital of jurisdiction, such evidence must be clear and positive.

*Kentucky*. — *Dorsey v. Kendall*, 8 Bush (Ky.) 294; *Newcomb v. Newcomb*, 13 Bush (Ky.) 562, 26 Am. Rep. 222; *Wilson v. Teague*, 95 Ky. 47; *Sears v. Sears*, 95 Ky. 173, 44 Am. St. Rep. 213.

*Michigan*. — *Allured v. Voller*, 112 Mich. 357.

*Missouri*. — *Raley v. Guinn*, 76 Mo. 272.

*New Jersey*. — *Fairchild v. Fairchild*, 53 N. J. Eq. 678.



rule that the record of a court imports such absolute verity that no person is allowed to contradict it in a collateral proceeding.<sup>1</sup> But a finding of the court on the question of jurisdiction is not conclusive where the record itself shows that the finding is not true,<sup>2</sup> because it is also a rule in regard to the effect of records as evidence that one part of a record may be impeached by another part.<sup>3</sup>

*b. COURTS OF SPECIAL OR INFERIOR JURISDICTION* — (1) *No Presumption of Jurisdiction.* — The rule with respect to courts of special and limited authority is that their jurisdiction is never presumed, but must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face,<sup>4</sup> but this rule applies only to ques-

*New York.* — See *Steinhardt v. Baker*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 470.

*North Carolina.* — *Sledge v. Elliott*, 116 N. Car. 712.

*Ohio.* — *Richards v. Skiff*, 8 Ohio St. 586; *Shroyer v. Richmond*, 16 Ohio St. 455; *Wine-miller v. Laughlin*, 51 Ohio St. 421.

*South Carolina.* — *Prince v. Dickson*, 39 S. Car. 477.

*Texas.* — *Brockenborough v. Melton*, 55 Tex. 503; *Heck v. Martin*, 75 Tex. 469, 16 Am. St. Rep. 915; *Williams v. Haynes*, 77 Tex. 283, 19 Am. St. Rep. 752; *Moore v. Perry*, 13 Tex. Civ. App. 204; *Mills v. Terry*, 22 Tex. Civ. App. 277.

*Utah.* — *Amy v. Amy*, 12 Utah 326; *Hoagland v. Hoagland*, 19 Utah 103.

*Virginia.* — *Cox v. Thomas*, 9 Gratt. (Va.) 312; *Pugh v. McCue*, 86 Va. 475.

*Washington.* — *Kizer v. Caulfield*, 17 Wash. 417.

As to the effect of the recital of jurisdictional facts in the judgments and decrees of courts of superior jurisdiction when exercising special statutory powers, and inferior courts, respectively, see *supra*, this section, *Cases Involving Exercise of Special Statutory Powers* — *Proceedings Not According to Course of Common Law*; and *infra*, this section, *Courts of Special or Inferior Jurisdiction* — *Recital of Jurisdictional Facts*.

1. See the title **RECORDS**.

2. **Finding Contradicted by Record.** — *Goudy v. Hall*, 30 Ill. 109; *Davis v. Hamilton*, 53 Ill. App. 94; *Laney v. Garbee*, 105 Mo. 355; *Cloud v. Pierce City*, 86 Mo. 358; *Bell v. Brinkman*, (Mo. 1893) 24 S. W. Rep. 205. See also *Milner v. Shipley*, 94 Mo. 106; *Adams v. Cowles*, 95 Mo. 506, 6 Am. St. Rep. 74; *Crow v. Meyer-sieck*, 88 Mo. 415; *McClanahan v. West*, 100 Mo. 321; *Blodgett v. Schaffer*, 94 Mo. 671; *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370. Compare *Glasscock v. Price*, (Tex. Civ. App. 1898) 45 S. W. Rep. 415.

3. **One Part of Record Impeachable by Other Parts.** — See the title **RECORDS**.

4. **No Presumption in Favor of Jurisdiction of Inferior Courts.** — *England.* — *Peacock v. Bell*, 1 Saund. 73; *Rex v. Liverpool*, 4 Burr. 2244; *Rex v. All Saints*, 7 B. & C. 785, 14 E. C. L. 129; *Rowland v. Veale*, 1 Cowp. 19; *Dempster v. Purnell*, 3 M. & G. 375, 42 E. C. L. 201; *Turner v. Beale*, 2 Salk. 521; *Ladbroke v. James*, Willes 199.

*United States.* — *Kempe v. Kennedy*, 5 Cranch (U. S.) 173, Pet. (C. C.) 36; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Walker v.*

*Turner*, 9 Wheat. (U. S.) 541; *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Turner v. Bank of North America*, 4 Dall. (U. S.) 11.

*Alabama.* — *Wyman v. Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Bates v. Planters'*, etc., Bank, 8 Port. (Ala.) 99; *Lever v. Planters'*, etc., Bank, 8 Port. (Ala.) 104; *Lister v. Vivian*, 8 Port. (Ala.) 375; *Taliferro v. Bassett*, 3 Ala. 670; *McCartney v. Calhoun*, 11 Ala. 110; *Bishop v. Hampton*, 15 Ala. 767; *Commissioner's Ct. v. Thompson*, 18 Ala. 694; *Owen v. Jordan*, 27 Ala. 608; *Nowlin v. McCalley*, 31 Ala. 678; *State v. Ely*, 43 Ala. 568; *Pettus v. McClannahan*, 52 Ala. 55; *Whorton v. Moragne*, 62 Ala. 201; *Joiner v. Winston*, 68 Ala. 129.

*Arkansas.* — *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *McClure v. Hill*, 36 Ark. 268.

*California.* — *Van Etten v. Jilson*, 6 Cal. 19; *Whitwell v. Barbier*, 7 Cal. 54; *Swain v. Chase*, 12 Cal. 283; *Lowe v. Alexander*, 15 Cal. 296; *Doll v. Feller*, 16 Cal. 432; *King v. Randlett*, 33 Cal. 318; *Jolley v. Foltz*, 34 Cal. 321; *Hahn v. Kelly*, 34 Cal. 409; *Ex p. Kearny*, 55 Cal. 212; *Keybers v. McComber*, 67 Cal. 395.

*Connecticut.* — *Sears v. Terry*, 26 Conn. 282; *Culver's Appeal*, 48 Conn. 165.

*Delaware.* — *Carey v. Russel*, 2 Harr. (Del.) 280; *Proctor v. State*, 5 Harr. (Del.) 387.

*Florida.* — *Hays v. McNealy*, 16 Fla. 409; *Donald v. McKinnon*, 17 Fla. 746; *Jacksonville v. L'Engle*, 20 Fla. 344; *Epping v. Robinson*, 21 Fla. 36; *McGehee v. Wilkins*, 31 Fla. 86.

*Georgia.* — *Gray v. McNeal*, 12 Ga. 424; *Perkins v. Attaway*, 14 Ga. 27.

*Illinois.* — *Trader v. McKee*, 2 Ill. 558; *Dowling v. Stewart*, 4 Ill. 195; *Wells v. Mason*, 5 Ill. 84; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Galena, etc., R. Co. v. Pound*, 22 Ill. 390; *White v. Primm*, 36 Ill. 416; *Shufeldt v. Buckley*, 45 Ill. 223; *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 696, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 453; *People v. Seelye*, 146 Ill. 189, *affirming* 40 Ill. App. 449, and *citing* 12 AM. AND ENG. ENCYC. OF LAW (1st ed.) 311; *Spooner v. Warner*, 2 Ill. App. 240.

*Indiana.* — *State v. Gachenheimer*, 30 Ind. 63; *Ohio, etc., R. Co. v. Shultz*, 31 Ind. 150; *Jolly v. Ghering*, 40 Ind. 139; *Nicholson v. Stephens*, 47 Ind. 186; *Wilkinson v. Moore*, 79 Ind. 400; *Hopper v. Lucas*, 86 Ind. 43; *Newman v. Manning*, 89 Ind. 422; *Lewis v. Rowland*, 131 Ind. 103; *State v. Rogers*, 131 Ind. 458; *Smith v. Clausmeier*, 136 Ind. 115.



tions of jurisdiction as to the subject-matter, for wherever the jurisdiction has once vested as to the subject-matter, the rules which govern its exercise as to

*Iowa.* — *Cooper v. Suderland*, 3 Iowa 124, 66 Am. Dec. 52; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Mills County v. Hamaker*, 11 Iowa 206; *Goodrich v. Brown*, 30 Iowa 291; *State v. Waterman*, 79 Iowa 360; *Tiffany v. Glover*, 3 Greene (Iowa) 387; *Rowan v. Lamb*, 4 Greene (Iowa) 468.

*Kentucky.* — *Tompert v. Lithgow*, 1 Bush (Ky.) 176.

*Maryland.* — *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Shivers v. Wilson*, 5 Har. & J. (Md.) 130, 9 Am. Dec. 497; *Fahey v. Mottu*, 67 Md. 250.

*Massachusetts.* — *Williams v. Blunt*, 2 Mass. 213; *Hunt v. Hapgood*, 4 Mass. 122; *Bridge v. Ford*, 4 Mass. 641; *Albee v. Ward*, 8 Mass. 86; *Smith v. Rice*, 11 Mass. 513; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438; *Rossier v. Peck*, 3 Gray (Mass.) 538.

*Michigan.* — *Wight v. Warner*, 1 Dougl. (Mich.) 384; *Rash v. Whitney*, 4 Mich. 495; *Chandler v. Nash*, 5 Mich. 409; *Platt v. Stewart*, 10 Mich. 260; *Goodrich v. Burdick*, 26 Mich. 39; *Saunders v. Tioga Mfg. Co.*, 27 Mich. 520; *Denison v. Smith*, 33 Mich. 155; *Gadsby v. Stimer*, 79 Mich. 260.

*Minnesota.* — *Ullman v. Lion*, 8 Minn. 381, 83 Am. Dec. 783.

*Mississippi.* — *Stockett v. Nicholson*, Walk. (Miss.) 75; *Cason v. Cason*, 31 Miss. 578; *Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101; *Byrd v. State*, 1 How. (Miss.) 163; *Saffarans v. Terry*, 12 Smed. & M. (Miss.) 690; *Scott v. Porter*, 44 Miss. 364; *Bolivar County v. Coleman*, 71 Miss. 832.

*Missouri.* — *Caldwell v. Lockridge*, 9 Mo. 362; *State v. Stephenson*, 12 Mo. 178; *State v. Metzger*, 26 Mo. 65; *Bersch v. Schneider*, 27 Mo. 101; *Edmonson v. Kite*, 143 Mo. 176; *Hansberger v. Pacific R. Co.*, 43 Mo. 196; *Schell v. Leland*, 45 Mo. 289; *Iba v. Hannibal*, etc., R. Co., 45 Mo. 469; *McCloon v. Beattie*, 46 Mo. 391; *Jeffries v. Wright*, 51 Mo. 221; *Cunningham v. Pacific R. Co.*, 61 Mo. 33; *Gibson v. Vaughan*, 61 Mo. 418; *Haggard v. Atlantic*, etc., R. Co., 63 Mo. 302; *Rohland v. St. Louis*, etc., R. Co., 89 Mo. 180; *State v. St. Louis*, 1 Mo. App. 503; *Wise v. Loring*, 54 Mo. App. 258.

*Montana.* — *Deer Lodge County v. At*, 3 Mont. 171.

*New Hampshire.* — *Sanborn v. Fellows*, 22 N. H. 473; *Morse v. Presby*, 25 N. H. 299; *Goulding v. Clark*, 34 N. H. 148; *Eastern R. Co. v. Concord*, etc., R. Co., 47 N. H. 111; *Manning v. Cogan*, 49 N. H. 338.

*New Jersey.* — *Snediker v. Quick*, 13 N. J. L. 306; *State v. Van Geison*, 15 N. J. L. 339; *New Jersey R., etc., Co. v. Suydam*, 17 N. J. L. 25; *Price v. Bray*, 21 N. J. L. 13; *Perrine v. Farr*, 22 N. J. L. 356; *State v. Williamstown*, etc., Turnpike Co., 24 N. J. L. 547; *State v. Van Winkle*, 25 N. J. L. 73; *Bergen Turnpike Co. v. State*, 25 N. J. L. 554; *State v. Lord*, 26 N. J. L. 140; *Graham v. Whitely*, 26 N. J. L. 254; *Carron v. Martin*, 26 N. J. L. 594, 69 Am. Dec. 584; *Nixon v. Ruple*, 30 N. J. L. 58; *State v. Orange*, 32 N. J. L. 54; *State v. Union*, 32 N. J. L. 343; *Hopper v. Chamberlain*, 34 N. J. L. 220; *State v. Jersey City*, 36 N. J. L. 188.

*New York.* — *Staples v. Fairchild*, 3 N. Y. 41; *Frees v. Ford*, 6 N. Y. 176; *People v. New York County*, 100 N. Y. 26; *Jones v. Reed*, 1 Johns. Cas. (N. Y.) 20; *Service v. Heermance*, 1 Johns. (N. Y.) 91; *Powers v. People*, 4 Johns. (N. Y.) 292; *Yates v. Lansing*, 9 Johns. (N. Y.) 407; *Mills v. Martin*, 19 Johns. (N. Y.) 33; *Foot v. Stevens*, 17 Wend. (N. Y.) 488, *distinguishing* *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Brown v. Cady*, 19 Wend. (N. Y.) 477; *Hart v. Seixas*, 21 Wend. (N. Y.) 40; *Seaman v. Duryea*, 10 Barb. (N. Y.) 523; *Stephens v. Ely*, 6 Hill (N. Y.) 609; *Latham v. Edgerton*, 9 Cow. (N. Y.) 227; *Beaudrias v. Hogan*, 16 N. Y. App. Div. 38.

*North Carolina.* — *State v. Magness*, 4 Ired. L. (26 N. Car.) 217.

*Ohio.* — *Edmiston v. Edmiston*, 2 Ohio 251; *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459.

*Oregon.* — *Thompson v. Multnomah County*, 2 Oregon 35; *Johns v. Marion County*, 4 Oregon 46; *State v. Officer*, 4 Oregon 183; *Dick v. Wilson*, 10 Oregon 490.

*Pennsylvania.* — *State v. Hinchman*, 27 Pa. St. 479.

*South Carolina.* — *McKenzie v. Ramsay*, 1 Bailey L. (S. Car.) 459; *Harvey v. Huggins*, 2 Bailey L. (S. Car.) 267.

*Tennessee.* — *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Lipe v. Mitchell*, 2 Yerg. (Tenn.) 400; *Hamilton v. Burum*, 3 Yerg. (Tenn.) 355; *Brien v. Hart*, 6 Humph. (Tenn.) 131; *Kilcrease v. Blythe*, 6 Humph. (Tenn.) 378.

*Texas.* — *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 148; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Easley v. McClinton*, 33 Tex. 288; *Walker v. Myers*, 36 Tex. 252; *Mitchell v. Runkle*, 25 Tex. Supp. 136; *Bohl v. Brown*, 2 Tex. App. Civ. Cas., § 539.

*Utah.* — *Matter of Wiseman*, 1 Utah 39.

*Vermont.* — *Clapp v. Beardsley*, 1 Aik. (Vt.) 168; *Hendrick v. Cleaveland*, 2 Vt. 329; *Walbridge v. Hall*, 3 Vt. 114; *Hewes v. Andover*, 16 Vt. 510.

*Virginia.* — *Hill v. Pride*, 4 Call (Va.) 107; *Ballard v. Thomas*, 19 Gratt. (Va.) 14; *Devaughn v. Devaughn*, 19 Gratt. (Va.) 556; *Western Union Tel. Co. v. Bright*, 90 Va. 778.

*West Virginia.* — *Mayer v. Adams*, 27 W. Va. 245.

*Wisconsin.* — *Bridge v. Bracken*, 3 Pin. (Wis.) 73, 3 Chand. (Wis.) 75; *Crawford County v. Le Clerc*, 3 Pin. (Wis.) 325, 4 Chand. (Wis.) 56.

**Rule that Jurisdiction Must Appear of Record.** — In some states the rule is that the jurisdiction of an inferior court must appear by the record. *Jolley v. Foltz*, 34 Cal. 321; *Liss v. Wilcoxon*, 2 Colo. 85; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Van Deusen v. Sweet*, 51 N. Y. 378.

**Rule that Jurisdiction of Inferior Court May Be Shown by Extrinsic Evidence.** — In other states it is held that evidence may be produced *aliunde* of any of the facts required to give jurisdiction to an inferior court in any case. *English v. Sprague*, 33 Me. 440; *King v. Bates*, 80 Mich. 367, 20 Am. St. Rep. 518; *Anderson v. Binford*, 2 Baxt. (Tenn.) 310.



the person, with respect to process, evidence, etc., are generally the same as those applicable to courts of general jurisdiction.<sup>1</sup>

(2) *What Are Courts of Special or Inferior Jurisdiction.*—A court of special or inferior jurisdiction is one which has only a special jurisdiction for a particular purpose, or is clothed with special powers for the performance of specified duties, beyond which it has no authority of any kind.<sup>2</sup> In this class are all tribunals created for the purpose of adjudicating in particular cases, under the various names of commissioners, committees, overseers, and the like.<sup>3</sup>

Justices' Courts are generally held to be of this description.<sup>4</sup>

Courts of Probate, also, are regarded by some authorities as courts of special or inferior jurisdiction,<sup>5</sup> but the general rule is the other way, except in respect to such powers as may be specially conferred on them by statute, and do not exist as a part of the ordinary probate jurisdiction.<sup>6</sup>

(3) *Recital of Jurisdictional Facts*—(a) *Jurisdiction Dependent on Collateral Matters.*—Where the jurisdiction depends on some collateral fact which can be decided without going into the case on its merits, then the jurisdiction may be questioned collaterally and disproved, even though the jurisdictional fact be

1. *Limitation of Rule—Jurisdiction of Person.*—Cason *v.* Cason, 31 Miss. 578; Cannon *v.* Cooper, 39 Miss. 784, 80 Am. Dec. 101; Scott *v.* Porter, 44 Miss. 364.

2. *Special or Inferior Jurisdiction Defined.*—See Den *v.* Hammel, 18 N. J. L. 73; Grignon *v.* Astor, 2 How. (U. S.) 341. See generally the title COURTS, vol. 8, p. 38.

3. *Quasi-judicial Bodies.*—Den *v.* Hammel, 18 N. J. L. 73; Carron *v.* Martin, 26 N. J. L. 594, 69 Am. Dec. 584.

Thus, Arbitrators appointed under the Georgia statute of 1847 to assess damages for injuries done to property by railroad companies are analogous to courts of limited jurisdiction, and the facts showing jurisdiction must affirmatively appear on the face of their proceedings. Macon, etc., R. Co. *v.* Davis, 13 Ga. 68.

A Board of Aldermen acting as a court to try charges against a city officer is a court of limited jurisdiction. Tompert *v.* Lithgow, 1 Bush (Ky.) 176.

4. *Justices' Courts Held Courts of Inferior Jurisdiction—Arkansas.*—Reeves *v.* Clarke, 5 Ark. 27; Webster *v.* Daniel, 47 Ark. 131; Dunnagan *v.* Shaffer, 48 Ark. 476.

*California.*—Van Eiten *v.* Jilson, 6 Cal. 19; Lowe *v.* Alexander, 15 Cal. 296; Rowley *v.* Howard, 23 Cal. 402.

*Illinois.*—Evans *v.* Bouton, 85 Ill. 579.

*Indiana.*—Straughan *v.* Inge, 5 Ind. 157; Willey *v.* Strickland, 8 Ind. 453; Jolly *v.* Ghering, 40 Ind. 139; Wilkinson *v.* Moore, 79 Ind. 397; Hopper *v.* Lucas, 86 Ind. 43; Goodwine *v.* Barnett, 2 Ind. App. 16; Louisville, etc., R. Co. *v.* Parish, 6 Ind. App. 89.

*Kentucky.*—Stewart *v.* Thomson, (Ky. 1895) 31 S. W. Rep. 133.

*Maine.*—State *v.* Hartwell, 35 Me. 129; Matter of Hersom, 39 Me. 476; Lane *v.* Crosby, 42 Me. 327; State *v.* Hall, 49 Me. 412; Inman *v.* Whiting, 70 Me. 445.

*Maryland.*—Fahey *v.* Mottu, 67 Md. 250.

*Massachusetts.*—Bridge *v.* Ford, 4 Mass. 641; Com. *v.* Fay, 126 Mass. 236.

*Michigan.*—Wight *v.* Warner, 1 Dougl. (Mich.) 384; Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688.

*Missouri.*—Kellogg *v.* Linger, 60 Mo. App.

571, 1 Mo. App. Rep. 235; McQuoid *v.* Lamb, 19 Mo. App. 153.

*Nevada.*—Paul *v.* Armstrong, 1 Nev. 82; Mallett *v.* Uncle Sam Gold, etc., Min. Co., 1 Nev. 188; McDonald *v.* Prescott, 2 Nev. 109; Little *v.* Currie, 5 Nev. 90; Victor Mill, etc., Co. *v.* Justice Ct., 18 Nev. 21.

*New York.*—Stone *v.* Miller, 62 Barb. (N. Y.) 430.

*Tennessee.*—Gibbs *v.* Bourland, 6 Verg. (Tenn.) 481.

*Rule Contra in Texas.*—In Texas it has been said that "the rule is well recognized in this state that justice courts, being created by the constitution, are, within their defined limits, tribunals of general jurisdiction, and as such all reasonable presumptions should be indulged in support of the validity of their judgments." Heck *v.* Martin, 75 Tex. 469, 16 Am. St. Rep. 915, citing Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730, and Holmes *v.* Buckner, 67 Tex. 107. See also Hambel *v.* Davis, (Tex. Civ. App. 1895) 33 S. W. Rep. 251; Bumpus *v.* Fisher, 21 Tex. 561.

5. *Courts of Probate Sometimes Held Courts of Inferior Jurisdiction—Alabama.*—Bruce *v.* Strickland, 47 Ala. 196; Goodwin *v.* Sims, 86 Ala. 102, 11 Am. St. Rep. 21.

*Connecticut.*—Wattles *v.* Hyde, 9 Conn. 10; Sears *v.* Terry, 26 Conn. 273.

*Maine.*—Overseers of Poor *v.* Gullifer, 49 Me. 360, 77 Am. Dec. 265; Fowle *v.* Coe, 63 Me. 245.

*Massachusetts.*—Wales *v.* Willard, 2 Mass. 120; Sumner *v.* Parker, 7 Mass. 82; Cutts *v.* Haskins, 9 Mass. 543; Smith *v.* Rice, 11 Mass. 507; Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87; Hathaway *v.* Clark, 5 Pick. (Mass.) 490; Coffin *v.* Cottle, 9 Pick. (Mass.) 287; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

*Rhode Island.*—People's Sav. Bank *v.* Wilcox, 15 R. I. 258, 2 Am. St. Rep. 894. Compare Angell *v.* Angell, 14 R. I. 541.

See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1115, note 1.

6. *Probate Courts Usually Considered Courts of General Jurisdiction.*—See *supra*, this section, *Courts of General Jurisdiction.*



averred of record, and was actually found on evidence by the court rendering the judgment.<sup>1</sup>

(b) **Jurisdiction Involving Gist of Proceeding.** — But on the other hand, where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the merits of the case, then the judgment is collaterally conclusive, because the question of jurisdiction cannot be retried without partly, at least, retrying the case on its merits, which is not permissible in a collateral proceeding<sup>2</sup> unless other parts of the record show affirmatively that the finding cannot be true.<sup>3</sup>

**2. Foreign Courts.** — The rules of presumption in favor of the jurisdiction of foreign courts are stated in another part of this work.<sup>4</sup>

**1. Recital of Jurisdictional Facts Not Involving Merits** — *England*. — *Chew v. Holroyd*, 8 Exch. 249; *Bunbury v. Fuller*, 9 Exch. 111; *Welch v. Nash*, 8 East 394; *Reg. v. Bolton*, 1 Q. B. 66, 41 E. C. L. 439.

*Alabama*. — *Miller v. Jones*, 26 Ala. 247; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89, *overruling Wyatt v. Steele*, 26 Ala. 639.

*Connecticut*. — *Sears v. Terry*, 26 Conn. 273; *Culver's Appeal*, 48 Conn. 165.

*Iowa*. — *Salladay v. Bainhill*, 29 Iowa 555.

*Louisiana*. — *Burns v. Van Loan*, 29 La. Ann. 560.

*Maine*. — *Fowle v. Coe*, 63 Me. 245.

*Massachusetts*. — *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20, 16 Am. Dec. 372.

*Michigan*. — *Clark v. Holmes*, 1 Dougl. (Mich.) 390.

*Missouri*. — *Ex p. O'Brien*, 127 Mo. 491.

*New Hampshire*. — *Tebbetts v. Tilton*, 31 N. H. 273.

*New York*. — *Sire v. Merrick*, 15 Daly (N. Y.) 346, 17 Civ. Pro. (N. Y.) 325.

*North Carolina*. — *Johnson v. Corpenning*, 4 Ired. Eq. (39 N. Car.) 216, 44 Am. Dec. 106.

*Ohio*. — *Anderson v. Hamilton County*, 12 Ohio St. 645.

*Rhode Island*. — *Brown v. Foster*, 6 R. I. 564; *People's Sav. Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894.

*South Carolina*. — *Moore v. Smith*, 11 Rich. L. (S. Car.) 569, 73 Am. Dec. 122.

*Tennessee*. — *Wilson v. Frazier*, 2 Humph. (Tenn.) 30.

*Wisconsin*. — *Wanzer v. Howland*, 10 Wis. 8.

As to the effect of the recital of jurisdictional facts in the judgments and decrees of courts of general and superior jurisdiction, see *supra*, this section, *Cases Involving Exercise of Special Statutory Powers — Proceedings Not According to Course of Common Law; and Conclusiveness of Presumption*, paragraph *Jurisdiction Appearing of Record*.

**2. Jurisdictional Facts Involving Merits** — *England*. — *Brittain v. Kinnaird*, 1 Brod. & B. 432, 5 E. C. L. 137; *Basten v. Carew*, 3 B. & C. 649, 10 E. C. L. 211; *Cave v. Mountain*, 1 M. & G. 257, 39 E. C. L. 432; *Reg. v. Bolton*, 1 Q. B. 66, 41 E. C. L. 439; *Mould v. Williams*, 5 Q. B. 469, 48 E. C. L. 469; *Revell v. Blake*, L. R. 7 C. P. 300.

*Alabama*. — *Goodwin v. Sims*, 86 Ala. 102, 11 Am. St. Rep. 21; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89, *overruling Wyatt v. Steele*, 26 Ala. 639.

*California*. — *In re Grove St.*, 61 Cal. 453; *Ex p. Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251. See also *Matter of Cent. Irrigation Dist.*, 117 Cal. 382; *Stow (v. Schiefferly)*, 120 Cal. 609.

*Colorado*. — *Bateman v. Reitler*, 19 Colo. 547.

*Illinois*. — *Davis v. Dresback*, 81 Ill. 393.

*Indiana*. — *Clay County v. Markle*, 46 Ind. 96; *Muncey v. Joest*, 74 Ind. 412; *Stoddard v. Johnson*, 75 Ind. 31; *Reed v. Whitton*, 78 Ind. 579; *Pressler v. Turner*, 57 Ind. 56; *Mavity v. Eastridge*, 67 Ind. 211; *Oppenheim v. Pittsburgh, etc.*, R. Co., 85 Ind. 476.

*Iowa*. — *Pursley v. Hayes*, 22 Iowa 32; *Woodbury v. Maguire*, 42 Iowa 339.

*New York*. — *Staples v. Fairchild*, 3 N. Y. 41; *Dyckman v. New York*, 5 N. Y. 434; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Wright v. Douglass*, 10 Barb. (N. Y.) 111; *Vail v. Owen*, 19 Barb. (N. Y.) 22.

*Rhode Island*. — *Angell v. Robbins*, 4 R. I. 493; *People's Sav. Bank v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894.

*Tennessee*. — *Harris v. McClanahan*, 11 Lea (Tenn.) 181; *Anderson v. Binford*, 2 Baxt. (Tenn.) 310.

**3. Findings Contradicted by Record.** — *Bannon v. People*, 1 Ill. App. 496.

**4. Presumptions as to Jurisdiction of Foreign Courts.** — See the title *FOREIGN JUDGMENTS*, vol. 13, p. 995.



# JURY AND JURY TRIAL.

BY H. T. TIFFANY AND B. A. MILBURN.

- I. NATURE AND CLASSIFICATION OF JURIES, 1095.
- II. RIGHT TO JURY TRIAL, 1097.
- III. WAIVER AND LOSS OF RIGHT TO JURY TRIAL, 1097.
  - 1. *Power to Waive Trial by Jury*, 1097.
    - a. *Civil Cases*, 1097.
    - b. *Criminal Proceedings*, 1097.
  - 2. *Power to Waive Legal Number of Jurors*, 1098.
    - a. *Civil Cases*, 1098.
    - b. *Criminal Proceedings*, 1098.
  - 3. *Mode of Waiver*, 1099.
    - a. *In General*, 1099.
    - b. *Contract Previous to Litigation*, 1100.
    - c. *Nonappearance at Trial*, 1100.
    - d. *Consent in Civil Cases*, 1100.
      - (1) *In General*, 1100.
      - (2) *In United States Circuit Courts*, 1101.
    - e. *Reference of Cause*, 1102.
    - f. *Legal and Equitable Issues and Proceedings*, 1102.
    - g. *Requesting Direction of Verdict*, 1103.
    - h. *Knowledge that Jury Cannot Be Procured*, 1103.
    - i. *Failure to Demand Jury*, 1104.
      - (1) *In General*, 1104.
      - (2) *Sufficiency of Demand*, 1105.
      - (3) *Time of Demand*, 1106.
      - (4) *Withdrawal of Demand*, 1107.
    - j. *Nonpayment of Jury Fees*, 1107.
    - k. *Preventing Procurement of Jurors*, 1108.
  - 4. *Effect of Waiver*, 1108.
    - a. *In General*, 1108.
    - b. *Change of Issues*, 1108.
    - c. *Subsequent Term or Trial*, 1108.
    - d. *Disregard of Waiver by Court*, 1108.
  - 5. *Withdrawal of Waiver*, 1109.
  - 6. *Presumption of Waiver on Appeal*, 1109.
- IV. SELECTION OF JURY LIST, 1110.
- V. DRAWING OF PANEL, 1110.
- VI. PROCURING ATTENDANCE OF MEMBERS OF PANEL, 1110.
- VII. CHALLENGES TO THE ARRAY, 1111.
  - 1. *General Considerations*, 1111.
  - 2. *Grounds*, 1111.
    - a. *At Common Law*, 1111.
    - b. *Irregularities in Selecting List or Drawing Panel*, 1111.
    - c. *Bias or Misconduct of Summoning Officer*, 1112.
    - d. *Misconduct of Parties*, 1112.
    - e. *Exclusive Statutory Grounds*, 1112.
    - f. *Excusing Jurors*, 1113.
    - g. *Cause Affecting Part of Panel*, 1113.
  - 3. *Waiver of Right of Challenge*, 1113.



## JURY AND JURY TRIAL.

4. *Withdrawal of Challenge*, 1114.
5. *Effect of Sustaining Challenge*, 1114.

### VIII. FORMATION OF TRIAL JURY, 1115.

1. *General Considerations*, 1115.
2. *Challenges and Exclusion for Cause*, 1115.
  - a. *Right and Power in General*, 1115.
  - b. *Causes of General Character*, 1116.
    - (1) *Disqualification by Reason of Sex*, 1116.
    - (2) *Disqualification by Reason of Age*, 1116.
    - (3) *Physical Incapacity*, 1117.
    - (4) *Mental Defects*, 1117.
    - (5) *Ignorance of English Language*, 1117.
    - (6) *Lack of Education*, 1117.
    - (7) *Criminality or Immorality*, 1118.
    - (8) *Alienage*, 1118.
    - (9) *Lack of Property Qualification*, 1118.
    - (10) *Lack of Household Qualification*, 1119.
    - (11) *Nonpayment of Taxes*, 1120.
    - (12) *Lack of Electoral Qualifications*, 1120.
    - (13) *Disqualification by Nonresidence*, 1120.
    - (14) *Occupancy of Public Office*, 1121.
    - (15) *Previous Service as Juror*, 1122.
    - (16) *Party to Pending Suit*, 1123.
    - (17) *Disloyalty*, 1123.
    - (18) *Want of Religious Belief*, 1124.
  - c. *Causes Peculiar to Particular Case*, 1124.
    - (1) *Prejudice as Regards Parties or Persons Interested in Case*, 1124.
      - (a) *Relationship*, 1124.
        - aa. *General Rule of Exclusion*, 1124.
        - bb. *Relationship by Marriage*, 1124.
        - cc. *Relationship to Person Interested but Not Party*, 1125.
        - dd. *Relationship to Counsel*, 1126.
      - (b) *Business Relations in General*, 1127.
      - (c) *Relation of Master and Servant*, 1127.
      - (d) *Relation of Landlord and Tenant*, 1128.
      - (e) *Friendship or Hostility to Party*, 1128.
      - (f) *Sympathy with Party*, 1128.
      - (g) *Opinion as to Party's Character*, 1128.
      - (h) *Prejudice as to Party's Business*, 1129.
      - (i) *Prejudice Against Corporations*, 1129.
      - (j) *Bias For or Against Counsel*, 1130.
      - (k) *Belief as to Credibility of Party or Witness*, 1130.
      - (l) *Race Prejudice*, 1131.
      - (m) *Previous Service on Trial of Same Defendant*, 1131.
      - (n) *Membership in Same Corporation or Association*, 1131.
    - (2) *Interest and Prejudice as Regards Matters Involved*, 1131.
      - (a) *Direct Pecuniary Interest*, 1131.
      - (b) *Membership in Corporate Party or Association*, 1132.
      - (c) *Residence in Municipality Interested in Suit*, 1133.
      - (d) *Prejudice Against Capital Punishment*, 1134.
      - (e) *Prejudice Against Circumstantial Evidence*, 1136.
      - (f) *Membership in Society to Suppress Crime*, 1136.
      - (g) *Abstract Moral and Legal Opinions*, 1137.
        - aa. *Prejudice Against Crime*, 1137.
        - bb. *Prejudice Against Particular Class of Actions*, 1137.
        - cc. *Opinion as to Propriety of Law*, 1137.
        - dd. *Legal Opinion*, 1137.



## JURY AND JURY TRIAL.

- ee. Views as to Burden of Proof, 1138.*
- ff. Aversion to Plea of Insanity, 1138.*
- (h) Pecuniary Interest in Same or Similar Question, 1139.*
- (i) Political Affiliations, 1139.*
- (3) Knowledge or Opinion as to Case, 1139.*
  - (a) Opinion as to Merits of Case, 1139.*
    - aa. As Ground of Challenge and Exclusion in General, 1139.*
    - bb. Nature of Opinion, 1140.*
      - (aa) General Considerations, 1140.*
      - (bb) Conditional and Hypothetical Opinions, 1143.*
      - (cc) Source of Information on Which Based, 1143.*
        - aaa. Rumor, Hearsay, and Newspaper Reports, 1143.*
        - bbb. Furor's Direct Knowledge of Facts, 1145.*
        - ccc. Information from Person Having Direct Knowledge, 1145.*
        - ddd. Evidence on Former Trial or Proceeding, 1146.*
        - (dd) Opinions Removable Only by Evidence, 1147.*
        - (ee) Opinion as to Particular Elements of Case, 1148.*
        - (ff) Opinions on Extraneous Matters, 1148.*
    - cc. Expression of Opinion, 1148.*
      - (aa) Necessity for Purpose of Disqualification, 1148.*
      - (bb) Particular Statements Indicating Bias, 1149.*
      - dd. Statements by Furor on Voir Dire, 1150.*
        - (aa) Effect as Showing Opinion in General, 1150.*
        - (bb) Conclusiveness of Statement as to Impartiality, 1152.*
      - (b) Member of Grand Jury Indicting Defendant, 1153.*
      - (c) Witness in Case, 1153.*
      - (d) Previous Jury Service in Same Case, 1154.*
      - (e) Service as Arbitrator in Case, 1155.*
      - (f) Service as Furor in Case Involving Same Facts, 1155.*
        - aa. In General, 1155.*
        - bb. Trial of Codefendant, 1155.*
        - (g) Knowledge Without Opinion, 1155.*
  - d. General Power of Court to Exclude Furor, 1156.*
    - (1) Action by Court of Its Own Motion, 1156.*
    - (2) Discretion as to Grounds, 1156.*
    - (3) For Reasons Personal to Furor, 1157.*
    - (4) Time of Exercising Power, 1159.*
  - e. Waiver of Objection to Furor, 1160.*
    - (1) Failure to Challenge Before Acceptance of Furor, 1160.*
    - (2) Failure to Challenge Before Swearing of Furor, 1160.*
    - (3) Failure to Challenge Before Verdict, 1161.*
      - (a) Previous Knowledge of Disqualification, 1161.*
      - (b) Previous Ignorance of Disqualification, 1163.*
        - aa. New Trial Not Granted, 1163.*
        - bb. New Trial Granted, 1165.*
      - (c) Constructive Knowledge, 1166.*



*JURY AND JURY TRIAL.*

- aa. Ignorance Resulting from Negligence, 1166.
    - bb. Knowledge of Counsel, 1169.
  - f. New Trial for Disqualification of Furor, 1169.
    - (1) Necessity of Prejudice, 1169.
    - (2) Quantum of Evidence Necessary, 1169.
    - (3) Discretion of Court, 1170.
  - g. Arrest of Judgment for Disqualification of Furor, 1171.
  - h. Conclusiveness of Decision as to Acceptance or Exclusion of Juror, 1171.
    - (1) Decision by Court, 1171.
      - (a) In General, 1171.
      - (b) Exclusion of Juror, 1174.
    - (2) Decision by Triers, 1175.
- 3. Exemptions from Jury Service, 1175.
  - a. In General, 1175.
  - b. Powers of Legislature, 1176.
  - c. Exemption Not Cause for Challenge, 1177.
- 4. Service by Person Not on Panel, 1177.
- 5. Peremptory Challenges, 1178.
  - a. Definition and Nature, 1178.
  - b. General Rules, 1179.
    - (1) In Criminal Cases, 1179.
      - (a) Rights of Accused, 1179.
      - (b) Rights of State, 1179.
    - (2) In Civil Cases, 1180.
  - c. Power of Legislature, 1180.
  - d. Number Allowed, 1181.
    - (1) In General, 1181.
    - (2) Joint Parties, 1182.
      - (a) In Civil Actions, 1182.
      - (b) In Criminal Prosecutions, 1182.
        - aa. Rights of Defendants, 1182
        - bb. Rights of State, 1183.
        - cc. Rights of Defendants Inter Se, 1184.
  - (3) Several Counts in Indictment, 1184.
  - (4) Substitution of Furors During Trial, 1184.
  - (5) United States Courts, 1184.
  - e. Impairment of Right, 1185.
  - f. Waiver of Right, 1186.
  - g. Withdrawal of Challenge, 1186.
  - h. Right of Peremptory Challenge as Curing Erroneous Rulings, 1187.
    - (1) Wrongful Acceptance of Furor, 1187.
    - (2) Wrongful Exclusion of Furor, 1189.
- 6. Standing Furors Aside, 1190.
  - a. Nature and Origin of Right, 1190.
  - b. Practice in United States, 1190.
  - c. Effect of Right of Peremptory Challenge, 1190.
  - d. In What Cases Right Exists, 1190.
  - e. Limit as to Number, 1191.
  - f. Assignment of Cause of Challenge, 1191.
- 7. Talesmen and Additional Furors, 1191.
  - a. In General, 1191.
  - b. Statutory Enlargement of Powers of Court, 1192.
  - c. Conditions Which Will Authorize, 1192.
    - (1) No Regular Panel in Attendance, 1192.
    - (2) Exhaustion of Panel, 1193.
    - (3) Regular Panel Otherwise Engaged, 1194.
    - (4) Insufficient Number Summoned, 1194.
    - (5) Quashal of Venire, 1194.
    - (6) Presumption of Existence of Conditions, 1194.



## JURY AND JURY TRIAL.

- d. Anticipation of Requirement, 1194.*
- e. Number of Talesmen or Additional Jurors, 1195.*
- f. Qualifications, 1195.*

### IX. SPECIAL AND STRUCK JURIES, 1195.

- 1. *In England, 1195.*
- 2. *In the United States, 1196.*
- 3. *Powers of Legislature, 1197.*
- 4. *Application, 1197.*
- 5. *Discretion in Granting, 1198.*
- 6. *Mode of Striking Jury, 1198.*

### X. CUSTODY AND CONDUCT OF JURY, 1199.

- 1. *Custody of Officer, 1199.*
  - a. Necessity, 1199.*
  - b. Who May Be Custodian, 1199.*
  - c. Oath of Custodian, 1200.*
  - d. Conduct of Custodian, 1201.*
    - (1) *In General, 1201.*
    - (2) *Allowing Recreation to Jury, 1202.*
    - (3) *Presence in Jury Room, 1203.*
    - (4) *Communicating with Jury, 1203.*
- 2. *Misconduct of Jury, 1204.*
  - a. General Considerations, 1204.*
    - (1) *Remedies, 1204.*
    - (2) *Necessity of Prejudice, 1204.*
    - (3) *Presumptions, 1206.*
      - (a) *Against Misconduct, 1206.*
      - (b) *Of Prejudice, 1206.*
    - (4) *Waiver of Objections, 1206.*
    - (5) *Conclusiveness of Decision of Lower Court, 1209.*
    - (6) *Punishment for Misconduct, 1210.*
  - b. Communications with Outsiders, 1210.*
    - (1) *In General, 1210.*
    - (2) *Necessity of Prejudice, 1210.*
    - (3) *Communications Concerning Case, 1211.*
    - (4) *Presumptions, 1212.*
    - (5) *Communications by and with Prevailing Party, 1213.*
      - (a) *In General, 1213.*
      - (b) *By and with Counsel, 1214.*
      - (c) *By and with Partisans, 1214.*
    - (6) *Communications by and with Witnesses, 1215.*
    - (7) *Communications by Judge, 1215.*
    - (8) *Delivery of Letters to Jurors, 1216.*
  - c. Separation of Jurors, 1216.*
    - (1) *Criminal Cases, 1216.*
      - (a) *Separation Generally Allowed, 1216.*
      - (b) *Separation Without Prejudice, 1218.*
      - (c) *Manner and Purpose of Separation, 1221.*
        - aa. In General, 1221.*
        - bb. Separation in Charge of Officer, 1221.*
        - cc. Sleeping Accommodations, 1222.*
        - dd. Going to Meals, 1222.*
        - ee. Separation for Necessary Purpose, 1222.*
      - (d) *Time of Separation, 1223.*
        - aa. Before Completion of Jury, 1223.*
        - bb. After Submission of Case to Jury, 1223.*
        - cc. After Agreement on Verdict, 1224.*
      - (e) *Consent to Separation, 1225.*
      - (f) *Remedy for Improper Separation, 1226.*



## JURY AND JURY TRIAL.

- (2) *Civil Cases*, 1227.
    - (a) *In General*, 1227.
    - (b) *After Submission of Cause to Jury*, 1227.
    - (c) *After Agreement on Verdict*, 1228.
  - (3) *Admonition on Separation*, 1229.
  - d. *Bribery and Conferring of Favors*, 1230.
  - e. *Remarks and Discussions in Hearing of Jury*, 1230.
  - f. *Outsider in Jury Room*, 1231.
  - g. *Refreshments for Jury*, 1231.
    - (1) *Food*, 1231.
      - (a) *Early Doctrine*, 1231.
      - (b) *Modern Doctrine*, 1232.
    - (2) *Intoxicating Liquors*, 1232.
      - (a) *In General*, 1232.
      - (b) *Use for Medicinal Purposes*, 1234.
      - (c) *Intoxication and Excessive Use*, 1234.
    - (3) *Refreshments Furnished by or in Behalf of Prevailing Party*, 1235.
      - (a) *In General*, 1235.
      - (b) *Entertainment by Counsel*, 1236.
      - (c) *Entertainment by Partisans*, 1236.
  - h. *Receiving Evidence Out of Court*, 1237.
    - (1) *In General*, 1237.
    - (2) *Testimony of Jurors*, 1237.
    - (3) *Private Examination of Witnesses*, 1238.
    - (4) *Unauthorized View of Locus in Quo*, 1238.
    - (5) *Inspection of Articles*, 1239.
    - (6) *Making Experiments*, 1239.
  - i. *Papers in Jury Room*, 1239.
    - (1) *Papers in Evidence*, 1239.
    - (2) *Depositions*, 1241.
    - (3) *Papers Not in Evidence or Record*, 1242.
      - (a) *In General*, 1242.
      - (b) *Exceptions to Rule of Exclusion*, 1242.
      - (c) *Papers Partly in Evidence*, 1243.
      - (d) *Notes by Jurors*, 1243.
      - (e) *Judge's Minutes*, 1243.
    - (4) *Pleadings*, 1243.
    - (5) *Written Instructions*, 1244.
    - (6) *Records and Papers in Previous Proceedings*, 1244.
    - (7) *Effect of Papers Improperly in Jury Room*, 1245.
  - j. *Books in Jury Room*, 1247.
    - (1) *Legal Works*, 1247.
    - (2) *Other Books*, 1247.
  - k. *Objects and Articles in Jury Room*, 1247.
  - l. *Reading of Newspapers*, 1248.
  - m. *Sleeping During Trial*, 1249.
  - n. *Expression or Intimation of Opinion*, 1249.
  - o. *Miscellaneous Questions as to Misconduct*, 1250.
3. *Illness of Juror*, 1251.

## XI. DISCHARGE OF JURY AND JURORS, 1251.

- 1. *Power to Discharge*, 1251.
  - a. *In General*, 1251.
  - b. *In Whom Power Vested*, 1253.
  - c. *Presence of Accused*, 1253.
- 2. *Grounds Authorizing Discharge*, 1253.
  - a. *In General*, 1253.
  - b. *Defective Indictment*, 1254.
  - c. *Absence of Evidence*, 1254.



## JURY AND JURY TRIAL.

- d. Absence of Defendant*, 1254.
- e. Absence of Furor*, 1254.
- f. Misconduct of Fury*, 1254.
- g. Inability to Agree*, 1254.
  - (1) *In General*, 1254.
  - (2) *Time for Deliberations of Fury*, 1256.
- h. End of Term*, 1257.
- i. Illness or Death*, 1257.
  - (1) *Of Furor*, 1257.
  - (2) *In Furor's Family*, 1258.
  - (3) *Of Accused*, 1258.
  - (4) *Of Court or Counsel*, 1259.
- j. Conclusiveness of Decision of Trial Court*, 1259.
- 3. *Discharge and Substitution of Individual Furors*, 1260.
- 4. *Effect of Consent*, 1261.
- 5. *Effect of Discharge*, 1261.

### XII. GRAND JURIES, 1262.

- 1. *Power of Court to Summon or Impanel Grand Fury*, 1262.
- 2. *Qualifications, Grounds of Challenge, and Exemptions*, 1262.
  - a. In General*, 1262.
  - b. Statutory Provisions*, 1263.
  - c. Infants*, 1264.
  - d. Aliens*, 1264.
  - e. Residents of State*, 1265.
  - f. Residents of County*, 1265.
  - g. Qualified Electors*, 1265.
  - h. Taxpayers*, 1265.
  - i. Freeholders or Householders*, 1265.
  - j. Prior Fury Service*, 1266.
  - k. Impartiality — Prior Knowledge or Opinion*, 1266.
    - (1) *In General*, 1266.
    - (2) *Prosecutor or Complainant — Victim of Crime*, 1266.
    - (3) *Interest in Defendant's Favor*, 1267.
    - (4) *Prior Knowledge or Opinion of Guilt*, 1267.
  - l. Exemptions*, 1267.
    - (1) *Statutory Provisions*, 1267.
    - (2) *Exemption Not Disqualification*, 1268.
  - m. Effect of Disqualification of One or More Grand Furors*, 1268.
    - (1) *In General*, 1268.
    - (2) *Objections Waived*, 1269.
  - n. Presumption as to Qualification — Burden of Proof*, 1269.
- 3. *Number of Grand Furors Impaneled*, 1269.
  - a. At Common Law*, 1269.
  - b. In United States*, 1270.
  - c. Excessive Number of Grand Furors*, 1270.
  - d. Number of Grand Furors Insufficient*, 1271.
- 4. *Foreman of Grand Fury*, 1271.
  - a. Necessity for Appointment of Foreman*, 1271.
  - b. By Whom Foreman Appointed*, 1271.
  - c. Qualifications of Foreman*, 1271.
  - d. Temporary Foreman*, 1271.
  - e. Powers and Duties of Foreman*, 1272.
- 5. *Attendance upon Grand Fury*, 1272.
- 6. *Charge of Court to Grand Fury*, 1272.
- 7. *General Control of Court over Grand Fury*, 1273.
- 8. *Interference of Executive with Grand Fury*, 1273.
- 9. *Excusal of Grand Furors*, 1274.
  - a. Excusal by Grand Fury*, 1274.
  - b. Power of Court to Excuse Grand Furors*, 1274.



## JURY AND JURY TRIAL.

- (1) *In General*, 1274.
- (2) *Statutory Provisions*, 1274.
- c. *Discretion of Court*, 1275.
- d. *Grounds of Excusal*, 1275.
- e. *Presumptions as to Excusal*, 1275.
- f. *Recalling Grand Furor Excused by Mistake*, 1275.
- 10. *Power of Court to Fill Vacancies*, 1275.
- 11. *Terms of Court and Sessions of Grand Fury*, 1276.
  - a. *In General*, 1276.
  - b. *At What Time During Term Grand Fury May Be Organized*, 1276.
  - c. *Power of Court to Postpone Attendance of Grand Fury*, 1276.
  - d. *Adjournments*, 1276.
    - (1) *Effect of Temporary Adjournment of Court*, 1276.
    - (2) *Power of Grand Fury to Adjourn*, 1276.
    - (3) *Expiration of Term of Court*, 1276.
  - e. *Special Terms of Court*, 1277.
  - f. *Term of Court to Which Defendant Has Been Bound Over*, 1277.
- 12. *Duties of Grand Furies*, 1277.
- 13. *Powers of Grand Furies*, 1278.
  - a. *In General*, 1278.
  - b. *What Crimes They May Investigate*, 1278.
  - c. *Inquisitorial Powers*, 1279.
    - (1) *In General*, 1279.
    - (2) *Statutory Provisions*, 1279.
  - d. *Hearing Volunteer Witnesses*, 1280.
  - e. *Making Presentments—Acting on Its Own Knowledge*, 1280.
  - f. *Pending Preliminary Examination or Other Proceedings*, 1280.
  - g. *As to Finding Indictment in Whole or in Part*, 1281.
  - h. *Ouster of Jurisdiction of Other Tribunals*, 1281.
  - i. *Termination of Powers*, 1281.
  - j. *Special Statutory Powers*, 1281.
- 14. *Number of Grand Furors Necessary to Constitute a Quorum*, 1281.
- 15. *Notice to Accused—Presence Before Grand Fury*, 1282.
- 16. *Evidence Before Grand Furies*, 1282.
  - a. *Admissibility or Competency of Evidence*, 1282.
    - (1) *In General*, 1282.
    - (2) *Statutory Provisions*, 1282.
    - (3) *Depositions of Witnesses Examined by Committing Magistrates*, 1283.
    - (4) *Evidence in Behalf of Accused Persons*, 1283.
    - (5) *Submission of Doubtful Questions to Court*, 1283.
    - (6) *Effect of Reception of Inadmissible or Incompetent Evidence*, 1283.
  - b. *Weight and Sufficiency of Evidence*, 1284.
    - (1) *Requisite Evidence upon Which to Base Indictment*, 1284.
    - (2) *Indictment on Knowledge of Grand Fury*, 1284.
    - (3) *On Resubmission of Case to Same Grand Fury*, 1285.
    - (4) *Review of Sufficiency of Evidence*, 1285.
    - (5) *Disregard by Grand Fury of Sufficient Evidence*, 1286.
  - c. *Minutes of Evidence*, 1286.
- 17. *Witnesses Before Grand Furies*, 1287.
  - a. *Competency*, 1287.
  - b. *How and by Whom Summoned*, 1287.
  - c. *Oath of Witnesses*, 1287.
  - d. *Examination of Witnesses*, 1288.
  - e. *Self-crimination*, 1288.
    - (1) *In General*, 1288.
    - (2) *Voluntary Self-crimination*, 1288.



## JURY AND JURY TRIAL.

- (3) *Statutory Immunity of Witnesses*, 1289.
- (4) *Use of Self-criminating Testimony on Trial*, 1289.
- f. *Control of Court over Witnesses*, 1289.
  - (1) *In General*, 1289.
  - (2) *Power of Court to Recognize Witnesses*, 1289.
  - (3) *Punishment of Contempt*, 1289.
- g. *Fees of Witnesses*, 1290.
- 18. *View by Grand Jury*, 1290.
- 19. *Number of Grand Jurors That Must Concur in Finding Indictment*, 1290.
- 20. *Secrecy as to Proceedings of Grand Juries*, 1291.
  - a. *Pending Proceedings in Jury Room*, 1291.
    - (1) *In General*, 1291.
    - (2) *Presence and Advice of Persons Not Members of Grand Jury*, 1292.
      - (a) *Outsiders in General*, 1292.
      - (b) *Judge of Court*, 1292.
      - (c) *Prosecuting and Other Attorneys*, 1292.
      - (d) *Stenographers*, 1293.
      - (e) *Sheriff or Bailiff*, 1293.
      - (f) *Presence of One Witness During Examination of Another*, 1294.
  - b. *Evidence as to What Occurred in Grand-Jury Room*, 1294.
    - (1) *In General*, 1294.
    - (2) *Statutory Provisions Permitting Grand Jurors to Testify*, 1294.
    - (3) *In Support of Indictment*, 1295.
    - (4) *Impeachment of Indictment*, 1295.
    - (5) *As to How Grand Jurors Voted*, 1295.
    - (6) *As to Number of Grand Jurors Concurring*, 1296.
    - (7) *Admissions and Confessions Made Before Grand Jury*, 1296.
    - (8) *On Prosecution for Perjury of Witness Before Grand Jury*, 1296.
    - (9) *Testimony of Grand Jurors to Impeach Witnesses*, 1296.
    - (10) *In Civil Actions*, 1297.
- 21. *Misconduct of Grand Jurors*, 1297.
- 22. *Discharge of Grand Juries*, 1298.
- 23. *Effect of Investigation of Offense by Grand Jury*, 1298.
  - a. *Resubmission of Charge to Grand Jury*, 1298.
    - (1) *After Return of Ignoramus*, 1298.
    - (2) *After Quashal of Indictment*, 1298.
  - b. *Power of Grand Jury to Bring In Indictment Pending Another*, 1298.
  - c. *Leave to File Information Where Grand Jury Does Not Indict*, 1298.
- 24. *Record as to Grand Juries and Their Proceedings*, 1298.
  - a. *In General*, 1298.
  - b. *As to Impanelment of Grand Jury*, 1299.
    - (1) *Necessity to Show Impanelment*, 1299.
    - (2) *How Impanelment Shown*, 1299.
  - c. *Number of Grand Jurors*, 1300.
  - d. *Names of Grand Jurors*, 1300.
  - e. *Qualifications of Grand Jurors*, 1300.
  - f. *As to Grand Jurors Being Sworn*, 1300.
    - (1) *Necessity to Show that Grand Jurors Were Sworn*, 1300.
    - (2) *How Swearing of Grand Jurors Shown*, 1300.
  - g. *Appointment of Foreman*, 1300.
  - h. *Finding, Return, and Filing of Indictment*, 1301.
    - (1) *Necessity to Show Finding of Indictment*, 1301.
    - (2) *Necessity to Show Return of Indictment*, 1301.



- i. Amendments, 1301.*
- j. Conclusiveness of Record, 1301.*
- k. Supplying Lost Record, 1302.*
- 25. *Special Grand Juries, 1302.*
  - a. Power of Court to Impanel Special Grand Jury, 1302.*
  - b. Powers of Special Grand Jury, 1302.*
- 26. *Fees and Compensation of Grand Jurors, 1302.*
- 27. *Liability of Grand Jurors, 1302.*
- 28. *Constitutional Law as Affecting Grand Juries, 1303.*
  - a. Necessity for Indictment or Presentment by Grand Jury, 1303.*
    - (1) *In General, 1303.*
    - (2) *Provisions of Magna Charta, 1303.*
    - (3) *In United States Courts, 1303.*
    - (4) *In State Courts, 1303.*
      - (a) *Provisions Modeled after Magna Charta, 1303.*
      - (b) *Provisions Dispensing with Grand Jury, 1303.*
      - (c) *Applicability of United States Constitution to States, 1304.*
        - aa. Fifth Amendment, 1304.*
        - bb. Fourteenth Amendment, 1304.*
    - (5) *In Territorial Courts, 1304.*
    - (6) *Offenses to Which Constitutions Apply, 1305.*
      - (a) *In General, 1305.*
      - (b) *Capital or Otherwise Infamous Offenses, 1305.*
      - (c) *Misdemeanors, 1305.*
      - (d) *Quasi-criminal Offenses, 1305.*
      - (e) *Contempts, 1305.*
      - (7) *Jurisdiction to Try Offender Without Indictment, 1306.*
  - b. Requisites of Grand Jury — Number, Qualifications of Grand Jurors, etc., 1306.*
    - (1) *In General, 1306.*
    - (2) *Number of Grand Jurors, 1306.*
    - (3) *Qualifications of Grand Jurors, 1307.*
  - c. Number of Grand Jurors That Must Concur in Finding Indictment, 1307.*
  - d. Restriction upon Right of Challenge and Appeal, 1307.*
  - e. Local Statutes as to Grand Juries, 1308.*
  - f. Curative Statutes, 1308.*
  - g. Requisites of Indictment under Constitution, 1308.*
  - h. Power of Court to Amend Indictment Without Concurrence of Grand Jury, 1308.*

## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 12, p. 223.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CORONERS*, vol. 7, p. 598; *JEOPARDY*, ante; *JUSTICES OF THE PEACE*; *QUESTIONS OF LAW AND FACT*; *VERDICT*.

**I. NATURE AND CLASSIFICATION OF JURIES.** — A jury has been defined as "a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them."<sup>1</sup>

1. **Definition of Jury.** — *Bouv. L. Dict.* See also *Slaughter v. State*, 100 Ga. 323; *Hunrel v. State*, 86 Ind. 434; *State v. Voorhies*, 12 Wash. 53.

"Jury" Means Twelve Men when used in a statute or constitution, in the absence of anything to show the contrary.

*United States.* — *Thompson v. Utah*, 170 U. S. 343.

*Illinois.* — *Bibel v. People*, 67 Ill. 172; *McManus v. McDonough*, 107 Ill. 104.

*Mississippi.* — *Wolfe v. Martin*, 1 How. (Miss.) 31; *Carpenter v. State*, 4 How. (Miss.) 166.



**Classes of Juries.** — The term “jury,” when used alone or without anything in the context to show that a different meaning is intended, refers to a jury which is called to try the questions in issue and to pass finally upon the proof of such facts, in a trial in a court of justice, such jury being sometimes distinguished by the title “petit jury” or “trial jury.”<sup>1</sup> Such petit or trial jury may be drawn in the usual and regular manner, in which case it may be termed a “common” jury; or in certain cases it may be selected with a view to obtaining jurors particularly fitted to try the case, or by the assistance of the parties or with particular formalities, in which case it is termed a “special” or a “struck” jury.<sup>2</sup> A grand jury is a body organized for certain preliminary purposes, its chief function being to determine whether the evidence in support of an accusation is sufficient to warrant a criminal trial.<sup>3</sup> The term “jury” is also occasionally applied to other bodies of men chosen for the purpose of passing upon different classes of facts, as in the case of the coroner’s jury<sup>4</sup> or sheriff’s jury.<sup>5</sup>

**Jury de Medietate Linguae.** — It was provided by an early *English* statute<sup>6</sup> that when either party was an alien born, the jury should consist of an equal number of aliens and citizens. The right to demand such a jury has now been taken away in England.<sup>7</sup> In the *United States* the right to such a jury has been recognized in some cases<sup>8</sup> and denied in others;<sup>9</sup> but even where it was formerly recognized, it has now generally been abolished, expressly or impliedly, by statute.<sup>10</sup> In *Kentucky*, however, such a jury is still expressly recognized by statute.<sup>11</sup>

**Jury of Matrons.** — By the common law a jury of matrons might be impaneled, generally on a writ *de ventre inspiciendo*, to determine the question whether a woman was with child.<sup>12</sup> There are few modern reported cases in regard to such a jury, and probably at the present time the simpler expedient of a resort to the opinion of medical experts would be generally adopted.<sup>13</sup>

*Nevada.* — *State v. McClear*, 11 Nev. 39.

*New Jersey.* — *Brown v. State*, 62 N. J. L. 666.

*New York.* — *Cancemi v. People*, 18 N. Y. 128; *People v. Kennedy*, (Supm. Ct.) 2 Park. Crim. (N. Y.) 312; *Knight v. Campbell*, 62 Barb. (N. Y.) 33.

*Ohio.* — *Lamb v. Lane*, 4 Ohio St. 179; *Smith v. Atlantic, etc.*, R. Co., 25 Ohio St. 102.

*Vermont.* — *State v. Peterson*, 41 Vt. 522.

*West Virginia.* — *Barlow v. Daniels*, 25 W. Va. 520.

*Wisconsin.* — *Norval v. Rice*, 2 Wis. 22.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 986.

**The Term Juror**, when used in a statute, may be construed as including only persons who have been sworn as jurors, *Marsh v. U. S.*, 88 Fed. Rep. 882; *State v. Voorhies*, 12 Wash. 53; or it may be construed as embracing likewise persons who have been summoned as jurors merely, *State v. Williams*, 136 Mo. 293. The term may also include a grand juror when used in the statute. *Clawson v. U. S.*, 114 U. S. 483.

1. **Classes of Juries.** — *Bouv. L. Dict.*; *And. L. Dict.*

2. See *infra*, this title, *Special and Struck Juries*.

3. See *infra*, this title, *Grand Juries*.

4. See the title CORONERS, vol. 7, pp. 606, 607.

5. See *Soens v. Racine*, 10 Wis. 271. And see the title SHERIFFS, MARSHALS, AND CONSTABLES.

6. **Jury de Medietate Linguae.** — 28 Edw. III., c. 13. See 3 Black. Com. 360; 2 Hawk. P. C., c. 43, §§ 34, 46; *Vin. Abr.*, tit. Trial, *N. b.* 7.

The right to such a jury has been recognized in the following cases in *England* and *Canada*: *Reg. v. Manning*, 1 Den. C. C. 467, 13 Jur. 962; *Rex v. Giorgetti*, 4 F. & F. 546; *Sidoli's Case*, 1 Lewin C. C. 244; *Levinger v. Reg.*, L. R. 3 P. C. 282; *Reg. v. Miller*, 8 L. C. Jur. 280; *Rex v. Vonhoff*, 10 L. C. Jur. 292; *Reg. v. Chamailard*, 18 L. C. Jur. 149; *Reg. v. Dougall*, 18 L. C. Jur. 85; *Reg. v. Sheehan*, 6 Quebec Q. B. 139.

7. 33 & 34 Vict., c. 14, § 5. See 4 Steph. Com. (13th ed.) 378.

8. **United States — Right Recognized.** — *U. S. v. Carnot*, 2 Cranch (C. C.) 469; *U. S. v. Carriacho*, 25 Fed. Cas. No. 14,738; *People v. McLean*, 2 Johns. (N. Y.) 381; *Respublica v. Mesca*, 1 Dall. (Pa.) 73; *Richards v. Com.*, 11 Leigh (Va.) 723; *Brown v. Com.*, 11 Leigh (Va.) 745.

9. **Right Denied.** — *U. S. v. McMahon*, 4 Cranch (C. C.) 573; *People v. Chin Mook Sow*, 51 Cal. 597; *State v. Fuentes*, 5 La. Ann. 427; *State v. Sloan*, 97 N. Car. 499; *State v. Antonio*, 4 Hawks (11 N. Car.) 200.

10. See the statutes of the various states.

11. **Right Subsisting in Kentucky.** — *Stat. Ky.* (1894), § 2254.

12. **Jury of Matrons.** — 2 Hale P. C. 413; 3 Black. Com. 362; *Reg. v. Wycherley*, 8 C. & P. 262, 34 E. C. L. 381; *Webster's Case*, 9 Cent. L. J. 94; *Hunt's Case*, 2 Cox C. C. 261; *State v. Arden*, 1 Bay (S. Car.) 489. See the very full article upon the subject in 3 Law Notes 104. See also DE VENTRE INSPICIENDO, vol. 8, p. 832.

13. See 39 Alb. L. J. 161, 326.



**II. RIGHT TO JURY TRIAL.** — The preservation of the common-law right to trial by jury is guaranteed by the United States Constitution as well as by the fundamental law of the several states. These constitutional provisions are construed as preserving the right in substance as it existed at the time of the adoption of the constitution and in the classes of cases to which it was then applicable. The consideration of what constitutes such common-law right and to what classes of cases the constitutional guaranty extends will be found elsewhere in this work.<sup>1</sup>

**III. WAIVER AND LOSS OF RIGHT TO JURY TRIAL** — 1. **Power to Waive Trial by Jury** — *a. CIVIL CASES.* — It is generally conceded that in civil actions and proceedings, and in the absence of constitutional or statutory inhibition, the right of a party to have the issues of fact in a cause determined by a jury is a privilege of such a nature that he may waive it if he chooses.<sup>2</sup>

*b. CRIMINAL PROCEEDINGS.* — Upon the question whether the defendant in a criminal case may waive his right to a trial by jury, the cases are not in accord. The weight of authority is perhaps to the effect that there is no such right of waiver, at least in the absence of statutory authority therefor.<sup>3</sup> The denial of the power to waive a jury trial is frequently based upon the ground that there is no law authorizing the court in a particular jurisdiction to find on issues of fact on the trial of a criminal case.<sup>4</sup> It has accordingly,

1. **Right to Jury Trial.** — See the title **CONSTITUTIONAL LAW**, vol. 6, p. 974.

2. **Waiver in Civil Proceedings** — *United States.* — *Burr v. Des Moines R., etc., Co.*, 1 Wall. (U. S.) 102; *Moncure v. Zunts*, 11 Wall. (U. S.) 416; *Kearney v. Case*, 12 Wall. (U. S.) 275; *Henderson's Distilled Spirits*, 14 Wall. (U. S.) 44; *Richmond v. Smith*, 15 Wall. (U. S.) 429; *U. S. v. Rathbone*, 2 Paine (U. S.) 578; *Parsons v. Armor*, 3 Pet. (U. S.) 425; *Guild v. Frontin*, 18 How. (U. S.) 135; *Suydam v. Williamson*, 20 How. (U. S.) 427; *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Campbell v. Boyreau*, 21 How. (U. S.) 223; *Bamberger v. Terry*, 103 U. S. 40; *Perego v. Dodge*, 163 U. S. 160. *California.* — *Exline v. Smith*, 5 Cal. 112.

*Georgia.* — *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

*Illinois.* — *Kreuchi v. Dehler*, 50 Ill. 176; *Whipple v. Eddy*, 161 Ill. 114; *Claussenius v. Claussenius*, 179 Ill. 545.

*Iowa.* — *Wilkins v. Treynor*, 14 Iowa 391.

*Missouri.* — *Merrill v. St. Louis*, 12 Mo. App. 466, affirmed 83 Mo. 244; *Chicago, etc., R. Co. v. Randolph Town Site Co.*, 103 Mo. 451; *O'Day v. Conn.*, 131 Mo. 321.

*New York.* — *Tubbs v. Embree*, 89 Hun (N. Y.) 475; *Chase v. Chase*, (Supm. Ct. Spec. T.) 19 N. Y. Supp. 268.

*Wisconsin.* — *Norval v. Rice*, 2 Wis. 22; *May v. Milwaukee, etc., R. Co.*, 3 Wis. 219.

So in **Condemnation Proceedings** a jury may be waived. *Chicago, etc., R. Co. v. Hock*, 118 Ill. 587; *Borgman v. Detroit*, 102 Mich. 261.

In an **Action for Violation of an Ordinance**, a jury may be waived, it being merely a civil action for a penalty. *Sutton v. McConnell*, 46 Wis. 269.

The Word "Shall," in a Statute, providing that certain issues shall be tried by the jury, does not prevent a waiver of trial by the jury, since the word is to be construed in the sense of "may." *Whipple v. Eddy*, 161 Ill. 114; *Chicago, etc., R. Co. v. Hock*, 118 Ill. 587.

Where the Constitution authorizes the parties to a civil case to dispense with a jury, a stat-

ute prohibiting a waiver of a jury by a party acting in a fiduciary capacity is invalid. *Lumis v. Big Sandy Land, etc., Co.*, 188 Pa. St. 27.

3. **No Right of Waiver** — *Michigan.* — *Hill v. People*, 16 Mich. 351; *Swart v. Kimball*, 43 Mich. 443.

*Missouri.* — *Neales v. State*, 10 Mo. 498.

*New York.* — *Grant v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 527; *Cancemi v. People*, 18 N. Y. 128.

*North Carolina.* — *State v. Stewart*, 89 N. Car. 563; *State v. Holt*, 90 N. Car. 749, 47 Am. Rep. 544; *State v. Scruggs*, 115 N. Car. 805.

*Wisconsin.* — *State v. Lockwood*, 43 Wis. 403. See also *Sanders v. State*, 55 Ala. 43.

**Contrary Decisions** — *United States.* — *U. S. v. Rathbone*, 2 Paine (U. S.) 578.

*Louisiana.* — *State v. White*, 33 La. Ann. 1218; *State v. Askins*, 33 La. Ann. 1253.

*Minnesota.* — *State v. Woodling*, 53 Minn. 142; *State v. Bannock*, 53 Minn. 419.

*New York.* — *People v. Wandell*, 21 Hun (N. Y.) 515.

And see *Sloncen v. People*, 58 Ill. App. 315; *State v. Potter*, 16 Kan. 80.

If the Court Has No Power to Impanel a Jury, the waiver of a jury trial by one brought up for trial therein is a nullity, and does not validate his trial without a jury. *U. S. v. Herzog*, 20 D. C. 430; *U. S. v. Jackson*, 20 D. C. 424.

4. **Absence of Statute** — *Arkansas.* — *Wilson v. State*, 16 Ark. 601; *Oliver v. State*, 17 Ark. 508; *Bond v. State*, 17 Ark. 290.

*Connecticut.* — *State v. Maine*, 27 Conn. 281. *Illinois.* — *Harris v. People*, 128 Ill. 585, 15 Am. St. Rep. 153.

*Indiana.* — *Wartner v. State*, 102 Ind. 51.

*Iowa.* — *State v. Carman*, 63 Iowa 130, 50 Am. Rep. 741; *State v. Larrigan*, 66 Iowa 426; *State v. Tucker*, 96 Iowa 276; *State v. Douglass*, 96 Iowa 308; *State v. Ill.*, 74 Iowa 441.

*Michigan.* — *People v. Smith*, 9 Mich. 193.

*Ohio.* — *Craig v. State*, 49 Ohio St. 419.

*Virginia.* — *Mays v. Com.*, 82 Va. 550; *Ford v. Com.*, 82 Va. 553.



in conformity with this view of the matter, been decided in a number of cases that a statute authorizing a waiver of a trial by jury is valid, and that the power may be exercised thereunder.<sup>1</sup>

**Different Degrees of Crime.** — In this regard a distinction has been taken in some cases as between felonies and other crimes, the power to waive being treated as existent in the latter class of cases only,<sup>2</sup> while in others such a distinction is repudiated.<sup>3</sup> In still other cases a distinction has been stated to exist between minor offenses and higher grades of crime;<sup>4</sup> and in one case it is stated that the jury may be waived in all cases other than capital.<sup>5</sup>

**2. Power to Waive Legal Number of Jurors** — *a. CIVIL CASES.* — It follows, from the fact that in civil cases a jury may be waived *in toto*, that a litigant may submit to trial by less than twelve men.<sup>6</sup> And so the objection that the jury was composed of more than twelve men may be waived.<sup>7</sup>

*b. CRIMINAL PROCEEDINGS.* — In regard to the right of a defendant in criminal proceedings to waive a jury of twelve men, the cases are at variance. In some cases it is held that such right of waiver exists generally in criminal proceedings,<sup>8</sup> while in a larger number of cases such power of waiver is denied.<sup>9</sup>

**1. Statute Authorizing Waiver** — *Alabama.* — *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34; *McClellan v. State*, 118 Ala. 122.

*California.* — *People v. Noll*, 20 Cal. 164.

*District of Columbia.* — *Belt v. U. S.*, 4 App. Cas. (D. C.) 25.

*Indiana.* — *Murphy v. State*, 97 Ind. 579.

*Louisiana.* — *State v. Robinson*, 43 La. Ann.

383, *affirming State v. White*, 33 La. Ann. 1218.

*Maryland.* — *League v. State*, 36 Md. 257.

*Michigan.* — *Ward v. People*, 30 Mich. 116.

*Minnesota.* — *State v. Woodling*, 53 Minn. 142.

*Missouri.* — *State v. Larger*, 45 Mo. 510.

*New Hampshire.* — *State v. Almy*, 67 N. H.

274. *New Jersey.* — *Edwards v. State*, 45 N. J. L. 419.

*Ohio.* — *Dailey v. State*, 4 Ohio St. 57; *Dillingham v. State*, 5 Ohio St. 280; *Craig v. State*, 49 Ohio St. 419.

*Pennsylvania.* — *Lavery v. Com.*, 101 Pa. St. 560.

*Texas.* — *Langbein v. State*, 37 Tex. 162.

*West Virginia.* — *State v. Grigg*, 34 W. Va. 78; *State v. Denoon*, 34 W. Va. 139. And see *State v. Cottrill*, 31 W. Va. 162.

*Wisconsin.* — *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285.

See also *Hallinger v. Davis*, 146 U. S. 314.

**2. Felonies and Misdemeanors** — *California.* — *In re Fife*, 110 Cal. 8.

*Georgia.* — *Logan v. State*, 86 Ga. 268.

*Illinois.* — *Darst v. People*, 51 Ill. 286; *Morgan v. People*, 136 Ill. 161.

*Nebraska.* — *Arnold v. State*, 38 Neb. 752, *overruling State v. Priebnow*, 16 Neb. 131.

*Ohio.* — *Williams v. State*, 12 Ohio St. 622.

3. *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27; *State v. Tucker*, 96 Iowa 276; *State v. Woodling*, 53 Minn. 142; *State v. Lockwood*, 43 Wis. 403; *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285.

4. **Minor Offenses.** — *Billigheimer v. State*, 32 Ohio St. 435; *Williams v. State*, 12 Ohio St. 622.

5. **Capital Cases.** — *Brown v. State*, 16 Ind. 496.

6. **Waiver of Legal Number** — *California.* — *Mahoney v. San Francisco*, etc., R. Co., 110 Cal. 471. Compare *Gillespie v. Benson*, 18 Cal. 409.

*Illinois.* — *Kreuchi v. Dehler*, 50 Ill. 176.

*Indiana.* — *Brown v. State*, 16 Ind. 496.

*Iowa.* — *Cowles v. Buckman*, 6 Iowa 161.

*Kentucky.* — *Cravins v. Gant*, 4 T. B. Mon. (Ky.) 126.

*Minnesota.* — *Young v. Otto*, 57 Minn. 307.

*Missouri.* — *Vaughn v. Scade*, 30 Mo. 600; *Essex Ave. v. Mermod*, 121 Mo. App. 98.

*New York.* — *Carman v. Newell*, 1 Den. (N. Y.) 25.

*South Dakota.* — *Huron v. Carter*, 5 S. Dak. 4.

*Virginia.* — *Roach v. Blakey*, 89 Va. 767.

**Failure to Object.** — It has been held that the failure to object that the number of jurors was less than twelve was a waiver of the irregularity. *Evans v. Gee*, 11 Pet. (U. S.) 80; *Ship Milwaukee v. Hale*, 1 Dougl. (Mich.) 306; *Sappington v. Elrod*, 9 Mo. App. 581. But see *Cowles v. Buckman*, 6 Iowa 161; *Oldham v. Hill*, 5 J. J. Marsh. (Ky.) 300.

**A Motion for a Verdict upon the findings of eleven jurors is not a waiver of an objection previously made to proceeding in the absence of the twelfth juror.** *Eshelman v. Chicago*, etc., R. Co., 67 Iowa 296.

**7. Excessive Number of Jurors.** — *Berry v. Kenny*, 5 B. Mon. (Ky.) 122; *Ross v. Neal*, 7 T. B. Mon. (Ky.) 408; *Tillman v. Ailles*, 5 Smed. & M. (Miss.) 373, 43 Am. Dec. 520. Compare *Wolfe v. Martin*, 1 How. (Miss.) 30.

**8. Waiver as to Number in Criminal Proceedings.** — *State v. Cox*, 8 Ark. 436; *State v. Kaufman*, 51 Iowa 578, 33 Am. Rep. 148; *State v. Grossheim*, 79 Iowa 75; *State v. Sackett*, 39 Minn. 69; *State v. Wright*, 45 La. Ann. 57. And see *Warwick v. State*, 47 Ark. 568.

**A Request by the Prosecuting Attorney, made of the accused, that he consent to proceed to trial with less than the legal number, even if consented to by the defendant, is not sufficient to constitute a waiver, since the defendant is not free to refuse.** *State v. Davis*, 66 Mo. 684, 27 Am. Rep. 387. See also *Rex v. Woolf*, 1 Chit. 401, 18 E. C. L. 115.

**Consent by Counsel in the absence of the defendant to proceeding with eleven men has been held to be insufficient.** *U. S. v. Shaw*, 59 Fed. Rep. 110.

**9. No Power of Waiver** — *Alabama.* — *Bell v. State*, 44 Ala. 393.



In other cases a distinction is taken between prosecutions for felonies and misdemeanors in this regard, it being held that the power of waiver exists in the latter cases and not in the former.<sup>1</sup>

**3. Mode of Waiver** — *a.* IN GENERAL. — Since a trial by jury is a constitutional right, every reasonable presumption will be made against its waiver,<sup>2</sup> and in order to create a waiver by implication, unequivocal acts are necessary.<sup>3</sup>

**Statutory Provisions.** — It is held in a number of cases that where the statute prescribes modes of waiver, these will be treated as exclusive, and the right to a jury can be waived in no other way.<sup>4</sup> In other cases, however, a contrary view is adopted.<sup>5</sup> While the submission of the case on an agreed statement of facts dispenses with the necessity of a trial by jury,<sup>6</sup> an admission of the facts on which a motion to dismiss is founded cannot be considered as a waiver of a jury trial.<sup>7</sup> By a demurrer to the evidence a party loses all

*California.* — *People v. O'Neil*, 48 Cal. 257.  
*Indiana.* — *Brown v. State*, 16 Ind. 496;  
*Allen v. State*, 54 Ind. 461.

*Michigan.* — *Hill v. People*, 16 Mich. 351.  
*Mississippi.* — *Hunt v. State*, 61 Miss. 577.  
*New York.* — *Cancemi v. People*, 18 N. Y. 128. But see *People v. Graham*, 13 Wend. (N. Y.) 352, note.

*North Carolina.* — *State v. Scruggs*, 115 N. Car. 805.

*Ohio.* — *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Williams v. State*, 12 Ohio St. 622.

That a Statute Authorizes Waiver of a Jury Trial by a defendant has been held not to authorize him to consent to a trial by a jury of less than twelve men. *Allen v. State*, 54 Ind. 461; *Moore v. State*, 72 Ind. 358; *Wartner v. State*, 102 Ind. 53.

**1. Felonies and Misdemeanors** — *United States.* — *U. S. v. Shaw*, 59 Fed. Rep. 110.

*Kentucky.* — *Murphy v. Com.*, 1 Met. (Ky.) 365; *Tyra v. Com.*, 2 Met. (Ky.) 2.

*Missouri.* — *State v. Mansfield*, 41 Mo. 471. Compare *State v. Robertson*, 71 Mo. 446.

*Montana.* — *Territory v. Ah Wah*, 4 Mont. 149, 47 Am. Rep. 341.

*Nevada.* — *State v. Borowsky*, 11 Nev. 119.

*New Mexico.* — *Territory v. Ortiz*, 8 N. Mex. 154.

In *Com. v. Dailey*, 12 Cush. (Mass.) 80, Shaw, C. J., decided that such right of waiver existed in cases of misdemeanor, and was apparently of the opinion that it existed also in cases of felony.

In *Arkansas*, by statute, on a trial for a misdemeanor, the accused may be tried by less than twelve men, but the mere failure to object to a jury of less than twelve men will not operate as a waiver of the right to the requisite number. *Warwick v. State*, 47 Ark. 568.

**2. Presumption Against Waiver.** — *Hodges v. Easton*, 106 U. S. 408; *U. S. v. Rathbone*, 2 Paine (U. S.) 578; *Pontiac, etc., Plank-Road Co. v. Hopkinson*, 69 Mich. 10.

**3. Waiver by Implication Must Clearly Appear.** — *Stedham v. Stedham*, 32 Ala. 525; *Smith v. Polack*, 2 Cal. 92; *St. Paul, etc., R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334; *Hinchly v. Machine*, 15 N. J. L. 476; *Wheelock v. Lee*, 74 N. Y. 495.

**4. Statutory Modes of Waiver Exclusive** — *California.* — *Biggs v. Lloyd*, 70 Cal. 447; *Swasey v. Adair*, 88 Cal. 179; *Farwell v. Murray*, 104 Cal. 464.

*Illinois.* — *Swan v. Mulherin*, 67 Ill. App. 77.  
*Indiana.* — *Shaw v. Kent*, 11 Ind. 80; *Whites-town Milling Co. v. Zahn*, 9 Ind. App. 270.

*North Carolina.* — *Chasteen v. Martin*, 81 N. Car. 51.

*Ohio.* — *Slocum v. Swan*, 4 Ohio St. 161; *Longstreth, etc., Mfg. Co. v. Halsey*, 4 Ohio Cir. Ct. 307, 2 Ohio Cir. Dec. 563.

*Oregon.* — *American Morig. Co. v. Hutchinson*, 19 Oregon 334.

*South Carolina.* — *Sale v. Meggett*, 25 S. Car. 72.

*Washington.* — *Meeker v. Gilbert*, 3 Wash. Ter. 369.

**5. Contrary Decisions.** — *Kearney v. Case*, 12 Wall. (U. S.) 275; *Perego v. Dodge*, 163 U. S. 160; *Mackellar v. Rogers*, 109 N. Y. 468; *Boyd v. Boyd*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 119.

**Constitutional Provisions** allowing the right of waiver in civil cases in the manner prescribed by law will not preclude courts from holding parties to have waived, by their conduct or silence, the right to a jury trial, although the case is not provided for by statute. *Greason v. Keteltas*, 17 N. Y. 491; *Barlow v. Scott*, 24 N. Y. 40; *West Point Iron Co. v. Reymert*, 45 N. Y. 705; *Baird v. New York*, 74 N. Y. 386.

**Consolidation of Actions.** — One having a constitutional right to a trial by jury of the issues in an action wherein there has been a civil arrest does not lose or waive his right merely by agreeing that his suit may be consolidated with a habeas corpus proceeding, and that the two cases may be tried together. *Orr v. Miller*, 98 Ind. 436.

**Inconsistent Provisions of Express Waiver.** — A paper reading: "The defendant, H. L., being in open court, waives arraignment and a trial by jury, pleads not guilty, and puts himself upon the country," is not vitiated as a waiver because, through inadvertence, the words "puts himself upon the country" appear therein. *Logan v. State*, 86 Ga. 266.

**Waiver of Objections to Trial by Jury.** — See *Danziger v. Metropolitan El. R. Co.*, 81 Hun (N. Y.) 5; *Tubbs v. Embree*, 89 Hun (N. Y.) 475; *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351; *Louisville, etc., R. Co. v. Trent*, 16 Lea (Tenn.) 419.

**6. Submission on Agreed Case.** — See the title AGREED CASE, 1 ENCYC. OF PL. AND PR. 385.

**7. Admitting Facts on Which Motion Is Based.** — *Moore v. Helms*, 74 Ala. 368.



right to have any questions submitted to the jury.<sup>1</sup>

*b. CONTRACT PREVIOUS TO LITIGATION.* — A right to a jury trial may be waived by a contract or other act previous to the beginning of any litigation, as by making a note negotiable at a bank which is authorized to collect debts by a summary proceeding,<sup>2</sup> or by becoming surety on an appeal bond on which a summary judgment may be rendered.<sup>3</sup> So the execution of a power of attorney to confess judgment involves a waiver of the right to a jury trial,<sup>4</sup> and, on the same theory, it is stated that acceptance of an office under a law authorizing removal by the governor involves a waiver of a trial by jury on the question of cause for removal.<sup>5</sup>

*c. NONAPPEARANCE AT TRIAL.* — In some states the statute provides that upon the failure of a party to appear at the trial, the court may proceed without the intervention of a jury,<sup>6</sup> and the same effect of waiver is apparently to be given to such nonappearance even in the absence of statute;<sup>7</sup> but a failure to appear which was not the result of negligence has been held not to have such effect.<sup>8</sup> It has likewise been held that the failure to be present at the calling of the case will not have this effect when the party has previously demanded a jury and paid the fees therefor,<sup>9</sup> or where the statute requires an express waiver.<sup>10</sup>

*d. CONSENT IN CIVIL CASES* — (1) *In General.* — The right to a jury trial may be waived by the consent of both of the parties to a civil action or proceeding,<sup>11</sup> and counsel have power to give such consent without special authority

1. *Demurrer to Evidence.* — *Hopkins v. Nashville, etc., R. Co.*, 96 Tenn. 409; *Galveston, etc., R. Co. v. Templeton*, 87 Tex. 42.

2. *Contract Previous to Litigation.* — *Columbia Bank v. Okely*, 4 Wheat. (U. S.) 235.

3. *Hiriart v. Ballou*, 9 Pet. (U. S.) 156; *Johnston v. Atwood*, 2 Stew. (Ala.) 225.

4. *Power to Confess Judgment.* — *Johnston v. Atwood* 2 Stew. (Ala.) 225. And see the title *WARRANT OF ATTORNEY*. See also the title *JUDGMENTS*, II ENCYC. OF PL. AND PR. 975 *et seq.*

5. *Caldwell v. Wilson*, 121 N. Car. 425, 480, 61 Am. St. Rep. 672.

6. *Failure to Appear at Trial* — *California.* — *Waltham v. Carson*, 10 Cal. 178; *Doll v. Feller*, 16 Cal. 432; *McGuire v. Drew*, 83 Cal. 225; *Towle v. Clunie*, (Cal. 1890) 23 Pac. Rep. 314.

*Colorado.* — *Leahy v. Dunlap*, 6 Colo. 552. But see *Taylor v. McLaughlin*, 2 Colo. 375.

*Indiana.* — *Love v. Hall*, 76 Ind. 326.

*Kansas.* — *Green v. Bulkley*, 23 Kan. 130; *Weems v. McDavitt*, 49 Kan. 260.

*Kentucky.* — *Burgess v. Jacobs*, 14 B. Mon. (Ky.) 415. Compare *Clarke v. Seaton*, 18 B. Mon. (Ky.) 229.

*Missouri.* — *Jones v. St. Joseph F. & M. Ins. Co.*, 55 Mo. 342; *Dilly v. Omaha, etc., R. Co.*, 55 Mo. App. 123; *Gullett v. Swinney*, 61 Mo. App. 226.

7. *Willeys v. Ridgway*, 9 Ind. 367; *Kilpatrick v. Carr*, (C. Pl. Gen. T.) 3 Abb. Pr. (N. Y.) 117; *Helmick v. Churchill*, 92 Hun (N. Y.) 524; *Harris v. Kellum, etc., Invest. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1027. And see *Clute v. Hazleton*, 51 Iowa 355.

The Filing of an Insufficient Plea is not a failure to appear within the meaning of the statute. *Burgess v. Jacobs*, 14 B. Mon. (Ky.) 415.

A Trial with Less than Twelve Jurors is not authorized by a failure to appear. *Gillespie v. Benson*, 18 Cal. 409.

Sending a Telegram demanding a jury will

not be a substitute for actual appearance. *McGuire v. Drew*, 83 Cal. 225.

8. *Excusable Nonappearance.* — *Burrows v. Rust*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1019.

Where the Case Was Wrongfully Placed on the Equity Calendar, without the defendant's knowledge, he does not, by a failure to appear, waive his right to a jury. *Sweeney v. Stanford*, 60 Cal. 362.

9. *Previous Demand and Payment for Jury.* — *Boatz v. Berg*, 51 Mich. 8.

Where, by the plaintiff's demand for a jury, the defendant has become entitled to a jury trial as a matter of right, he does not waive such right by the mere absence from the courtroom of himself or his attorney when the case is called. *Jones v. Hamby*, (Tex. Civ. App. 1895) 29 S. W. Rep. 75.

10. *Statutory Requirement of Express Waiver.* — *Slocum v. Swan*, 4 Ohio St. 161.

11. *Consent in Civil Cases* — *Alabama.* — *Stein v. Jackson*, 31 Ala. 24.

*California.* — *Polack v. Gurnee*, 66 Cal. 266; *Hawes v. Clark*, 84 Cal. 272.

*Illinois.* — *Kreuchi v. Dehler*, 50 Ill. 176.

*Indiana.* — *Goodwine v. Hedrick*, 24 Ind. 121.

*Louisiana.* — *Warfield v. Hamlet*, 28 La. Ann. 815.

*Massachusetts.* — *Bearce v. Bowker*, 115 Mass. 129.

*Michigan.* — *Ward v. People*, 30 Mich. 116.

*Nebraska.* — *Gregory v. Lincoln*, 13 Neb. 352; *Boslow v. Shenberger*, 52 Neb. 164.

*New York.* — *Hosford v. Carter*, (C. Pl. Gen. T.) 10 Abb. Pr. (N. Y.) 452; *Phelps v. New York*, 61 Hun (N. Y.) 521.

*South Carolina.* — *State v. Pacific Guano Co.*, 28 S. Car. 63.

*Wisconsin.* — *Sutton v. McConnell*, 46 Wis. 269.

A Stipulation that a Stenographer's Fees Be Taxed as Costs will be taken as a submission to the court as to the amount which should be



to that effect.<sup>1</sup> It is sometimes provided by statute,<sup>2</sup> and it is otherwise a proper practice,<sup>3</sup> that a formal consent or stipulation in writing, clearly showing the intention to waive a jury, should be entered into and filed.

**Oral Agreement in Open Court.** — A jury may also be dispensed with by an oral agreement to that effect in open court.<sup>4</sup>

**Entry of Record.** — The statute generally requires that in case of oral waiver, the fact of waiver must appear by a sufficient entry on the record.<sup>5</sup>

(2) *In United States Circuit Courts.* — It is provided by statute that issues of fact in civil cases may be determined by the Circuit Courts of the United States when the parties file a stipulation in writing waiving a jury, and that in such case the finding of the court on the facts shall have the same effect as the verdict of a jury, and its rulings may be reviewed on error or appeal.<sup>6</sup> Before this act was passed, though a waiver of a trial by jury in the Circuit Court was valid, there was no authority to review its decision upon any question of law growing out of the evidence.<sup>7</sup> And since its passage, while a waiver of a jury in another mode is valid,<sup>8</sup> no greater right of review exists than before its passage, unless the record shows such a waiver as the statute requires.<sup>9</sup>

**Sufficiency of Showing in Record.** — The most appropriate evidence of a compliance with the statute is a copy of the stipulation filed with the clerk;<sup>10</sup> but it may be shown by a statement in the record that a stipulation was made in writing.<sup>11</sup> A statement that the jury had been waived in writing has been

allowed, and as an implied waiver of a jury. *Trail v. Somerville*, 22 Mo. App. 1.

1. **Authority of Counsel.** — *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270; *Stevenson v. Felton*, 99 N. Car. 58.

2. **Stipulation in Writing.** — See *Bamberger v. Terry*, 103 U. S. 40; *Heyman v. McBurney*, 66 Ala. 511; *Sloncen v. People*, 58 Ill. App. 315; *Loring v. Whittemore*, 13 Gray (Mass.) 228; *Martindale v. State*, 2 Ohio Cir. Ct. 2, 1 Ohio Cir. Dec. 328.

3. *Henderson's Distilled Spirits*, 14 Wall. (U. S.) 44; *Chapline v. Robertson*, 44 Ark. 202.

4. **Oral Agreement in Open Court** — *California*. — *Hawes v. Clark*, 84 Cal. 272.

*Indiana*. — *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270; *Hauser v. Roth*, 37 Ind. 89.

*Nebraska*. — *Gregory v. Lincoln*, 13 Neb. 352; *Boslow v. Shenberger*, 52 Neb. 164.

*New York*. — *Chase v. Chase*, (Supm. Ct. Spec. T.) 19 N. Y. Supp. 268; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274.

**Sufficiency of Inquiry by Court.** — In *People v. Weeks*, 99 Mich. 86, on inquiry by the court as to whether he wanted a jury, the defendant, by his attorney, answered that the court could do as it chose about a jury, as he, the accused, would put in no defense, and on a like inquiry of the prosecuting attorney, the latter answered that he did not wish a jury. It was held that a jury was waived.

5. **Entry of Record** — *Arkansas*. — *Chapline v. Robertson*, 44 Ark. 202.

*California*. — *Farwell v. Murray*, 104 Cal. 464.

*Indiana*. — *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270; *Goodwin v. Hedrick*, 24 Ind. 121.

*Missouri*. — *Bruner v. Marcum*, 50 Mo. 405; *Tower v. Moore*, 52 Mo. 118.

*Ohio*. — *Bonewitz v. Bonewitz*, 50 Ohio St. 373.

*West Virginia*. — *King v. Burdett*, 12 W. Va. 688.

*Wisconsin*. — *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285.

6. **United States Circuit Courts.** — Rev. Stat. U. S., §§ 649, 700. See *Phillips v. Moore*, 100 U. S. 208.

The act does not apply to the District Courts. *Blair v. Allen*, 3 Dill. (U. S.) 101.

7. *Guild v. Frontin*, 18 How. (U. S.) 135; *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Campbell v. Boyreau*, 21 How. (U. S.) 223; *Flanders v. Tweed*, 9 Wall. (U. S.) 425.

8. *Kearney v. Case*, 12 Wall. (U. S.) 275; *Perego v. Dodge*, 163 U. S. 160. Compare *Hearn v. New England Mut. Marine Ins. Co.*, 3 Cliff. (U. S.) 320; *Morgan v. Gay*, 19 Wall. (U. S.) 81.

9. **Compliance with Statute Necessary for Review.** — *Flanders v. Tweed*, 9 Wall. (U. S.) 425; *Kearney v. Case*, 12 Wall. (U. S.) 275; *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603; *Madison County v. Warren*, 106 U. S. 622; *Alexander County v. Kimball*, 106 U. S. 623, note; *Dundee Mortg., etc., Co. v. Hughes*, 124 U. S. 157; *Spalding v. Manasse*, 131 U. S. 65; *Merrill v. Floyd*, 5 U. S. App. 224, 53 Fed. Rep. 172; *Branch v. Texas Lumber Mfg. Co.*, 2 U. S. App. 623, 53 Fed. Rep. 840; *Bowden v. Burnham*, 19 U. S. App. 448, 59 Fed. Rep. 753; *Cudahy Packing Co. v. Sioux Nat. Bank*, 32 U. S. App. 600, 69 Fed. Rep. 782; *Wilson v. Pauly*, 72 Fed. Rep. 129; *Duncan v. Atchison, etc., R. Co.*, 72 Fed. Rep. 810; *Bond v. Dustin*, 112 U. S. 604.

10. **Sufficiency of Showing in Record.** — *Bond v. Dustin*, 112 U. S. 604.

11. *Kearney v. Case*, 12 Wall. (U. S.) 283; *Dickinson v. Planters' Bank*, 16 Wall. (U. S.) 250.

An order expressed to be made "by consent of parties" that the case be referred, when the court has authority to refer a case upon consent in writing only, necessarily implies that there was a consent in writing sufficient to



held to be sufficient;<sup>1</sup> but a mere statement that a jury was waived, or the equivalent, is insufficient.<sup>2</sup>

*e.* REFERENCE OF CAUSE. — The right to a jury trial may also be waived by consent to a trial by a referee, auditor, or other like officer,<sup>3</sup> or by failure to object to an order for that mode of trial, or acquiescence therein.<sup>4</sup>

*f.* LEGAL AND EQUITABLE ISSUES AND PROCEEDINGS. — That legal and equitable causes of action are joined will not, of itself, deprive the defendant of the right of trial by jury.<sup>5</sup> And although a plaintiff entitled to either legal or equitable relief may waive a jury trial by bringing an action of a strictly equitable character,<sup>6</sup> the defendant does not stand in the same position, and is not deprived of his right to a jury because the plaintiff has chosen to ask for equitable instead of legal relief.<sup>7</sup> One intervening in an equitable proceeding waives his right to a trial by jury,<sup>8</sup> as does a defendant who allows equitable issues to be made up by cross-complaints filed by his codefendants.<sup>9</sup>

The Interposition of an Equitable Defense will not defeat the right to a jury trial.<sup>10</sup>

fulfil the requirement of the statute. *Boogher v. New York L. Ins. Co.*, 103 U. S. 90. See also *U. S. v. Harris*, 106 U. S. 629.

1. *Fleitas v. Cockrem*, 101 U. S. 301.

2. *Madison County v. Warren*, 106 U. S. 622; *Alexander County v. Kimball*, 106 U. S. 623, note; *Bond v. Dustin*, 112 U. S. 604; *Rush v. Newman*, 58 Fed. Rep. 158.

**A Judgment upon an Agreed Statement of Facts or Case Stated**, signed by the parties or their counsel, and entered of record, leaving nothing but questions of law to be tried, may, since the statute as before, be reviewed on error. *Wayne County v. Kennicott*, 103 U. S. 554; *U. S. v. Eliason*, 16 Pet. (U. S.) 291; *Burr v. Des Moines R., etc., Co.*, 1 Wall. (U. S.) 99.

3. **Consent to Reference**—*United States*. — *Boogher v. New York L. Ins. Co.*, 103 U. S. 90. *Florida*. — *Rivas v. Summers*, 33 Fla. 539.

*Indian Territory*. — *Walsh v. Tyler*, (Indian Ter. 1898) 47 S. W. Rep. 308.

*Iowa*. — *Hewitt v. Egbert*, 34 Iowa 485.

*Kansas*. — *Smith v. Burlingham*, 44 Kan. 487.

*Louisiana*. — *Hatch v. Watkins*, 1 Mart. N. S. (La.) 154.

*Minnesota*. — *Deering v. McCarthy*, 36 Minn. 302.

*Missouri*. — *Koerner v. Leathe*, 149 Mo. 361.

*New Jersey*. — *Beattie v. David*, 40 N. J. L. 102.

*New York*. — *McKinney v. London*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 564; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624.

*North Carolina*. — *Green v. Castlebury*, 70 N. Car. 20; *State v. Brown*, 70 N. Car. 27; *State v. Roseman*, 70 N. Car. 34; *Atkinson v. Whitehead*, 77 N. Car. 418; *Overby v. Fayetteville Bldg., etc., Assoc.*, 81 N. Car. 56; *Grant v. Reese*, 82 N. Car. 72; *Harris v. Shaffer*, 92 N. Car. 30; *Carr v. Askew*, 94 N. Car. 194; *Grant v. Hughes*, 96 N. Car. 177; *Nissen v. Genesee Gold Min. Co.*, 104 N. Car. 309; *Collins v. Young*, 118 N. Car. 265.

*South Carolina*. — *Rhodes v. Russell*, 32 S. Car. 585; *Gregory v. Cohen*, 50 S. Car. 502.

4. **Failure to Object to Reference**—*United States*. — *U. S. v. Rathbone*, 2 Paine (U. S.) 578.

*Illinois*. — *Garrity v. Hamburger Co.*, 136 Ill. 499, affirming 35 Ill. App. 309.

*Indiana*. — *Hauser v. Roth*, 37 Ind. 89.

*Indian Territory*. — *Walsh v. Tyler*, (Indian Ter. 1898) 47 S. W. Rep. 308.

*New York*. — *Baird v. New York*, 74 N. Y. 382.

*North Carolina*. — *Atkinson v. Whitehead*, 66 N. Car. 296; *Grant v. Hughes*, 96 N. Car. 177; *Smith v. Hicks*, 108 N. Car. 248; *Key-stone Driller Co. v. Worth*, 117 N. Car. 515.

*Ohio*. — *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372.

*Oklahoma*. — *Blevins v. Morledge*, 5 Okla. 141.

*South Carolina*. — *Trenholm v. Morgan*, 28 S. Car. 268; *Rhodes v. Russell*, 32 S. Car. 585.

*Washington*. — *Wheeler v. Ralph*, 4 Wash. 617.

**Where the Statute Requires a Written Consent to a reference, a waiver of the right to a trial by jury by consent to a reference cannot be presumed because the record fails to show any objection.** *Shaw v. Kent*, 11 Ind. 80.

5. **Joinder of Legal and Equitable Causes of Action**. — *Bradley v. Aldrich*, 40 N. Y. 511, 100 Am. Dec. 528; *Wheelock v. Lee*, 74 N. Y. 495; *Van Deventer v. Van Deventer*, 32 N. Y. App. Div. 578. See also *Toplitz v. Bauer*, 26 N. Y. App. Div. 125.

6. **Effect of Bringing Equitable Action**—*United States*. — *Book v. Justice Min. Co.*, 58 Fed. Rep. 827; *North British, etc., Ins. Co. v. Lathrop*, 63 Fed. Rep. 508.

*California*. — *Russell v. Elliott*, 2 Cal. 245; *McLaughlin v. Del Re*, 64 Cal. 472; *Churchill v. Baumann*, 104 Cal. 369.

*New York*. — *Shenfield v. Bernheimer*, (Supm. Ct. Gen. T.) 43 N. Y. St. Rep. 383, 63 Hun (N. Y.) 630; *Davison v. Jersey Co.*, 71 N. Y. 333; *Cogswell v. New York, etc., R. Co.*, 105 N. Y. 321.

7. *Marshall v. Gilman*, 47 Minn. 131; *Davison v. Jersey Co.*, 71 N. Y. 333.

8. **Intervening in Equitable Proceeding**. — *Flippin v. Kimball*, 87 Fed. Rep. 258.

9. **Making Up Equitable Issuer** — *Frye v. Hill*, 14 Wash. 83.

10. **Interposition of Equitable Defense**. — *Petty v. Malier*, 15 B. Mon. (Ky.) 592; *Wolff v. Schaeffer*, 4 Mo. App. 367, 74 Mo. 154; *Carter v. Prior*, 78 Mo. 222, *Moline Plow Co. v. Hartman*, 84 Mo. 610; *Smith v. St. Louis Beef Canning Co.*, 14 Mo. App. 522.



If, however, its effect is to convert the case into an equity proceeding, it will be triable by the court;<sup>1</sup> and generally the equitable issues raised, as distinct from the legal issues, are to be tried by the court alone.<sup>2</sup>

**Agreeing to Trial in Equity.** — A waiver of a jury is shown by consent to a trial in equity<sup>3</sup> or by failure to object to trial in that forum.<sup>4</sup> But consent to the placing on the equity calendar of a cause wherein the facts require both equitable and legal relief does not waive the right to a jury trial of the legal issues.<sup>5</sup>

**g. REQUESTING DIRECTION OF VERDICT.** — Where, at the close of the evidence, both parties ask for the direction of a verdict, it will be assumed that they intend to waive the right of submission to the jury, unless the party whose request is refused asks to go to the jury upon the questions of fact.<sup>6</sup>

**h. KNOWLEDGE THAT JURY CANNOT BE PROCURED.** — The right to a jury may be lost by setting the cause down for trial, or making the demand for a jury, at a term or time at which there is no reason to expect that a jury can be procured,<sup>7</sup> or by placing the cause on the "jury waived" list or otherwise designating it as a cause to be tried by the court.<sup>8</sup>

1. *Allen v. Logan*, 96 Mo. 598, *O'Day v. Conn*, 131 Mo. 321; *Dinley v. McCullagh*, 92 Hun (N. Y.) 454.

2. **Equitable Issues Triable by Court** — *United States*. — *Quinby v. Conlan*, 104 U. S. 420.

*California*. — *Estrada v. Murphy*, 19 Cal. 248. *Dakota*. — *Suessenbach v. First Nat. Bank*, 5 Dak. 477.

*Iowa*. — *Van Orman v. Spafford*, 16 Iowa 186. *Nebraska*. — *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5.

*Nevada*. — *South End Min. Co. v. Tinney*, 22 Nev. 19.

*South Carolina*. — *Sloan v. Courtenay*, 54 S. Car. 314.

See also the title **EQUITABLE DEFENSES**, 7 ENCYC. OF PL. AND PR. 810.

**Pleading Legal Defenses in an equitable action** does not entitle the defendant to a trial by jury if those defenses are not separate and distinct from the plaintiff's equitable cause of action. *McLaurin v. Hodges*, 43 S. Car. 189. And see *Ryman v. Lynch*, 76 Iowa 587.

3. **Consent to Trial in Equity.** — *Sprague v. Pritchard*, 108 Ind. 491, *Smith v. Moberly*, 15 B. Mon. (Ky.) 74; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274.

**Noticing the Cause for trial by a judge sitting in equity** is a waiver of a jury. *Mackellar v. Rogers*, 109 N. Y. 468, *affirming* 52 N. Y. Super. Ct. 468; *Collins v. Collins*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 28, *affirmed* 131 N. Y. 648; *Boyd v. Boyd*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 119, 2 N. Y. Annot. Cas. 30.

**Notice by the Plaintiff Merely, for trial at an equity term, does not preclude the defendant from demanding a jury trial.** *Bradley, etc., Co. v. Herter*, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 408.

4. **Failure to Object** — *United States*. — *Perego v. Dodge*, 163 U. S. 160; *North British, etc., Ins. Co. v. Lathrop*, 63 Fed. Rep. 508.

*Arkansas*. — *Love v. Bryson*, 57 Ark. 589.

*Iowa*. — *Gibbs v. Coonrod*, 54 Iowa 736; *Lothian v. Lothian*, 88 Iowa 396.

*Kentucky*. — *Tabler v. Anglo-American Assoc.*, (Ky. 1895) 32 S. W. Rep. 602.

*New York*. — *O'Brien v. McCarthy*, 71 Hun (N. Y.) 427, *affirmed* 145 N. Y. 602.

5. **Both Legal and Equitable Issues Involved.** — *Wheelock v. Lee*, 74 N. Y. 495; *Underhill v. Manhattan R. Co.*, (Supm. Ct. Spec. T.) 27 Abb. N. Cas. (N. Y.) 478, 21 Civ. Pro. (N. Y.) 441. And see *Hudson v. Caryl*, 44 N. Y. 553.

6. **Request for Direction of Verdict.** — *Green v. Shute*, 15 Daly (N. Y.) 358; *Reilly v. Lee*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 313, 61 Hun (N. Y.) 627; *Riley v. Black*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 288; *Carr v. Sullivan*, 68 Hun (N. Y.) 246; *Banker v. Knibloe*, 69 Hun (N. Y.) 539; *Reynolds v. Miller*, 79 Hun (N. Y.) 113; *Coleman v. Pickett*, 82 Hun (N. Y.) 287; *Barnes v. Perine*, 12 N. Y. 18; *Howell v. Wright*, 122 N. Y. 667, 34 N. Y. St. Rep. 212; *Grigsby v. Western Union Tel. Co.*, 5 S. Dak. 561. See also the title **DIRECTING VERDICT**, 6 ENCYC. OF PL. AND PR. 667.

7. **Knowledge that Jury Cannot Be Procured.** — *Odell v. Reynolds*, 40 Mich. 21; *Boyd v. Boyd*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 119; *Collins v. Collins*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 28, *affirmed* 131 N. Y. 648; *Mackellar v. Rogers*, 109 N. Y. 468; *Cole v. Terrell*, 71 Tex. 549. And see *supra*, this section, *Legal and Equitable Issues and Proceedings*.

**Contrary View.** — In *Platt v. Havens*, 119 Cal. 244, it was held that an agreement to set a cause down for trial in a certain department of the court which was not in the habit of hearing jury cases was not a waiver of the right to a jury trial.

**In Texas a valid demand for a jury trial cannot be made after the jury for the term has been discharged.** *Cushman v. Flanagan*, 50 Tex. 389; *Cole v. Terrell*, 71 Tex. 549; *Petri v. Fond du Lac First Nat. Bank*, 83 Tex. 424, 29 Am. St. Rep. 657, *Petri v. Lincoln Nat. Bank*, 84 Tex. 113; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223; *Denton Lumber Co. v. Fond du Lac First Nat. Bank*, (Tex. 1892) 18 S. W. Rep. 962.

8. **Designation for Trial by Court.** — *Walcott v. O'Connor*, 163 Mass. 21; *Stevens v. McDonald*, 173 Mass. 382; *St. Paul Distilling Co. v. Pratt*, 45 Minn. 215; *Webster v. White*, 8 S. Dak. 479.

**Demand After Issue of Venire for Less than Desired.** — A demand by the defendant for a jury trial by twelve men comes too late after a



*i. FAILURE TO DEMAND JURY*—(1) *In General*.—It is a general rule, frequently made a matter of statutory provision, that the failure to demand a jury or the entry on a trial by the court without objection is in effect a waiver of the right to a jury trial.<sup>1</sup> The legislature has power to provide that a demand shall be necessary.<sup>2</sup> Courts have no authority to make rules in regard to demand for a jury in derogation of constitutional or statutory provisions.<sup>3</sup>

venire for six jurors has issued on the plaintiff's demand. *Bullard v. Spoor*, 2 Cow. (N. Y.) 431. See also *Strong v. Beardslee*, 18 Johns. (N. Y.) 130.

**1. Failure to Demand Jury**—*United States*.—*Perego v. Dodge*, 163 U. S. 160; *Mayhew v. Thatcher*, 6 Wheat. (U. S.) 129; *Deadrick v. Harrington*, *Hempst. (U. S.)* 50; *Bond v. Brown*, 12 How. (U. S.) 254; *Kerney v. Case*, 12 Wall. (U. S.) 275.

*Alabama*.—*Blankenship v. Nimmo*, 50 Ala. 506; *Cawthorn v. State*, 63 Ala. 157; *Wren v. State*, 70 Ala. 1; *Knight v. Farrell*, 113 Ala. 258.

*Arkansas*.—*Love v. Bryson*, 57 Ark. 589.

*California*.—*Smith v. Brannan*, 13 Cal. 107; *Baker v. Joseph*, 16 Cal. 173; *Pfister v. Dascey*, 65 Cal. 403; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Ferrea v. Chabot*, 121 Cal. 233; *Towle v. Clunie*, (Cal. 1890) 23 Pac. Rep. 314; *McGuire v. Drew*, 83 Cal. 225.

*Georgia*.—*Sutton v. Gunn*, 86 Ga. 652; *Taffe v. State*, 90 Ga. 459.

*Illinois*.—*Heacock v. Hosmer*, 109 Ill. 245; *Jensen v. Fricke*, 133 Ill. 171; *Belford v. Beatty*, 145 Ill. 414; *Chicago Driving Park v. West*, 35 Ill. App. 496.

*Indiana*.—*Lane v. Leet*, 2 Ind. 535; *Madison, etc., v. R. Co. v. Whiteneck*, 8 Ind. 227; *Sheets v. Bray*, 125 Ind. 33; *Crim v. Fleming*, 123 Ind. 438.

*Iowa*.—*State v. Craig*, 58 Iowa 238; *State v. Ill.* 74 Iowa 441; *Lothian v. Lothian*, 88 Iowa 396.

*Kansas*.—*Wiscomb v. Cubberly*, 51 Kan. 580.

*Kentucky*.—*Frazer v. Naylor*, 1 Met. (Ky.) 596; *Tabler v. Anglo American Assoc.*, (Ky. 1895) 32 S. W. Rep. 602.

*Louisiana*.—*Bouquevalte v. Young*, 5 Rob. (La.) 162; *Foulhouse v. Gaines*, 26 La. Ann. 86; *Le Blanc v. Johns*, 4 Mart. N. S. (La.) 635; *Wallace v. Smith*, 8 La. Ann. 374.

*Massachusetts*.—*Vitrified Wheel, etc., Co. v. Edwards*, 135 Mass. 591; *Greene v. Milford*, 139 Mass. 69; *Walcott v. O'Connor*, 163 Mass. 21; *Graham v. Lord*, 170 Mass. 1; *Davis v. Carpenter*, 172 Mass. 167.

*Michigan*.—*O'Flynn v. Holmes*, 8 Mich. 95; *Van Sickle v. Kellogg*, 19 Mich. 49; *People v. Judge*, 41 Mich. 31; *Roberts v. Tremayne*, 61 Mich. 264; *Hudson v. Roos*, 72 Mich. 363; *People v. Weeks*, 99 Mich. 86. *Compare Ward v. People*, 30 Mich. 116.

*Minnesota*.—*Peterson v. Ruhnke*, 46 Minn. 115; *Smith v. Barclay*, 54 Minn. 47; *Banning v. Hall*, 70 Minn. 89.

*Missouri*.—*Brown v. Home Sav. Bank*, 5 Mo. App. 1.

*New Jersey*.—*Wanser v. Atkinson*, 43 N. J. L. 571; *Joy, etc., Co. v. Blum*, 55 N. J. L. 518.

*New York*.—*People v. Green*, (Supm. Ct. Spec. T.) 4 N. Y. Crim. 442; *Dayharsh v. Enos*, 5 N. Y. 531; *Blanchard v. Richly*, 7

*Johns. (N. Y.)* 198; *Eysaman v. Small*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 288, *Greason v. Keteltas*, 17 N. Y. 491; *Rogers v. Straub*, 75 Hun (N. Y.) 264; *Lewis v. Mott*, 36 N. Y. 395; *Shannon v. Kennedy*, 1 E. D. Smith (N. Y.) 348; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Hand v. Kennedy*, 83 N. Y. 149; *Pegram v. New York El. R. Co.*, 147 N. Y. 135; *Moffat v. Moffat*, 10 Bosw. (N. Y.) 468, 17 Abb. Pr. (N. Y.) 4; *Hutchins v. Smith*, 63 Barb. (N. Y.) 251.

*North Carolina*.—*Harris v. Shaffer*, 92 N. Car. 30; *Grant v. Hughes*, 96 N. Car. 177.

*Ohio*.—*Ellithorpe v. Buck*, 17 Ohio St. 72; *Latimer v. Motter*, 26 Ohio St. 480; *Bonewitz v. Bonewitz*, 50 Ohio St. 373; *Longstreth, etc., Mfg. Co. v. Halsey*, 4 Ohio Cir. Ct. 307, 2 Ohio Cir. Dec. 563.

*South Carolina*.—*State v. Mays*, 24 S. Car. 194; *Aultman v. Salinas*, 44 S. Car. 299. But see *De Walt v. Kinard*, 19 S. Car. 286.

*Tennessee*.—*Griffith v. Griffith*, (Tenn. Ch. 1898) 46 S. W. Rep. 340.

*Texas*.—*Langbein v. State*, 37 Tex. 162; *Bumpass v. Morrison*, 70 Tex. 756; *Connellee v. Drake*, (Tex. App. 1890) 16 S. W. Rep. 175.

*Washington*.—*Keane v. Brygger*, 3 Wash. 338.

*Wisconsin*.—*Leonard v. Rogan*, 20 Wis. 540; *State v. Clark*, 67 Wis. 229.

**Ignorance of the Statutory Requirement of demand** on the part of a citizen of another state bringing suit does not excuse his failure to make the demand. *Coulter v. Weed Sewing Mach. Co.*, 3 Lea (Tenn.) 115.

**Failure to Demand Compulsory**.—Where the obtaining of a jury trial would necessitate the committal of the defendant by the magistrate until the next term of court, a failure to demand a jury cannot be regarded as a waiver of the right to a jury. *Danner v. State*, 89 Md. 220.

**A Constitutional Provision** that the right to a jury trial shall be deemed waived if not demanded in the manner prescribed by law is inoperative where no method is prescribed by law or the execution of the provision is rendered impossible by existing conditions. *Odell v. Reynolds*, 40 Mich. 21.

**2. Validity of Statutes**.—*Sutton v. Gunn*, 86 Ga. 652; *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438; *Lawrance v. Borm*, 86 Pa. St. 225; *Garrison v. Hollins*, 2 Lea (Tenn.) 684; *McGuire v. North Carolina, etc., R. Co.*, 95 Tenn. 707.

**The Disregard of a Demand** properly made in due season is cause for reversal. *Nooe v. Garner*, 70 Ala. 443; *Biggs v. Lloyd*, 70 Cal. 447; *Woods v. Tanquary*, 3 Colo. App. 515.

**Intentional Delay**.—That the object of the application is to delay the trial, is no ground for refusal. *Reynolds v. Mahle*, 12 La. 424.

**3. Regulation by Courts**.—*Biggs v. Lloyd*, 70 Cal. 447; *Ten Eyck v. Farlee*, 16 N. J. L. 348;



(2) *Sufficiency of Demand.* — The demand should clearly show the desire of the demandant that the cause be submitted to the jury.<sup>1</sup> Generally any statutory requirement as to the form or mode of demand must be complied with;<sup>2</sup> and if it is required that the cause be placed on a special jury docket, this must be done.<sup>3</sup> In *Tennessee* it has been decided that the demand must be made of the court, and that a notice to the clerk is insufficient.<sup>4</sup> A demand by one of two defendants jointly liable does not, it has been held, inure to the benefit of the other.<sup>5</sup> Generally, however, since trial by a jury is favored by the courts, doubts as to the sufficiency of the demand will be resolved in favor of the party making it.<sup>6</sup>

*Cases Involving Different Classes of Issues.* — Where issues triable by a jury are united in one case with issues triable by the court, a demand for a jury trial of the whole action is insufficient; the demand must be in terms limited to the issues properly triable by a jury.<sup>7</sup> Conversely it has been decided that a request to submit a particular question to a jury is a waiver of the right to a jury to try the case generally.<sup>8</sup>

*Demand in Pleading.* — A requirement that the demand shall be made in the pleading must be complied with;<sup>9</sup> but a requirement that an election in writing for a jury trial be filed was held not to be satisfied by a prayer for a jury trial incorporated in the declaration.<sup>10</sup>

*Repetition of Demand.* — If a jury trial has been properly demanded and refused,

*Hinchly v. Machine*, 15 N. J. L. 476. See also *Woods v. Tanquary*, 3 Colo. App. 515; *Bradley, etc., Co. v. Herter*, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 408.

*Payment of Jury Fee.* — A rule of court requiring a party to pay a jury fee as a condition of obtaining a jury trial is valid. *Conneau v. Geis*, 73 Cal. 178; *Lassen County Bank v. Sherer*, 108 Cal. 513.

1. *Sufficiency of Demand.* — *Ellis v. Bonner*, 7 Tex. Civ. App. 539. And see *Poyer v. New York Cent., etc., R. Co.*, (C. Pl. Gen. T.) 7 Abb. N. Cas. (N. Y.) 371.

2. *Statutory Requirements to Be Followed* — *California.* — *Doll v. Anderson*, 27 Cal. 248.

*Louisiana.* — *Foster v. Levinson*, 10 La. Ann. 584; *Amado v. Breda*, 16 La. 257; *Gallot v. McCluskey*, 18 La. Ann. 260; *Letten v. Durbidge*, 18 La. Ann. 129; *Williams v. Boozeman*, 18 La. Ann. 532; *Smith v. Scott*, 3 Rob. (La.) 258; *Kennard v. Gustine*, 9 Rob. (La.) 170; *Hennen v. Bourgeat*, 12 Rob. (La.) 522.

*Massachusetts.* — *Greene v. Milford*, 139 Mass. 69.

*New York.* — *Powens v. Jones*, (County Ct.) 10 Abb. N. Cas. (N. Y.) 458.

3. *Placing on Special Docket.* — *Travis v. Louisville, etc., R. Co.*, 9 Lea (Tenn.) 231; *McGuire v. North Carolina, etc., R. Co.*, 95 Tenn. 707.

4. *Demand of Clerk Insufficient.* — *East Tennessee, etc., R. Co. v. Martin*, 85 Tenn. 134, *overruling Louisville, etc., R. Co. v. Gross*, 16 Lea (Tenn.) 720. And see *McGuire v. North Carolina, etc., R. Co.*, 95 Tenn. 707.

In *North Carolina*, where the statute provides that though a compulsory reference is granted, a party may demand a trial of the issues of fact by a jury, the right to a jury trial is waived if the exceptions to the referee's report fail to set forth specifically the points upon which a jury trial is demanded. *Keystone Driller Co. v. Worth*, 117 N. Car. 517, 118 N. Car. 746; *Taylor v. Smith*, 118 N. Car. 127.

5. *Demand by One Codefendant.* — *Smith v.*

*Scott*, 3 Rob. (La.) 258; *Mulholland v. Henderson*, 3 Rob. (La.) 297.

6. *Presumption in Favor of Demand.* — *Bayon v. Rivet*, 2 Mart. (La.) 148; *Davis v. Prevost*, 6 Mart. N. S. (La.) 265; *Poyer v. New York Cent., etc., R. Co.*, (C. Pl. Gen. T.) 7 Abb. N. Cas. (N. Y.) 371. See also *Port Huron, etc., R. Co. v. Callanan*, 61 Mich. 12; *Pontiac, etc., Plank-Road Co. v. Hopkinson*, 69 Mich. 10.

7. *Demand Improperly Inclusive of Legal Issues.* — *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276; *Greenleaf v. Egan*, 30 Minn. 316; *Judd v. Dike*, 30 Minn. 380; *Chadbourne v. Zilsdorf*, 34 Minn. 43; *Lace v. Fixen*, 39 Minn. 46.

8. *Demand Limited to One Issue.* — *Spencer v. Robbins*, 106 Ind. 580.

9. *Demand in Pleading.* — *Ex p. Ansley*, 107 Ala. 613; *Arlington Ins. Co. v. Caldwell*, 88 Tenn. 758; *Franklin v. McCorkle*, 11 Lea (Tenn.) 190; *Travis v. Louisville, etc., R. Co.*, 9 Lea (Tenn.) 231; *Gleaves v. Davidson*, 85 Tenn. 380. And see *Nixon v. Killiam*, 90 Ala. 484.

10. *Election for Jury in Declaration.* — *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 349.

An indorsement on the outside cover of the declaration, consisting of a separate sheet, made under a separate entitling of the case and the court, and ordering the clerk to enter the case on the jury docket, was held to be sufficient. *Condon v. Gore*, 89 Md. 230.

*Demand in Supplementary Pleading.* — A jury may be prayed for in a supplemental answer; but its allowance is discretionary and will be refused where the jurors have been discharged for the term, and the trial would be delayed. *Davis v. Prevost*, 6 Mart. N. S. (La.) 265; *Green v. Boudurant*, 7 Mart. N. S. (La.) 230; *Hooper v. Hyams*, 1 Rob. (La.) 90.

*Indorsement of a Demand on the Appeal Bond* may be sufficient to entitle one to a jury trial on appeal from a justice. *Freeman v. Bridges*, (Ala. 1899) 26 So. Rep. 512.



a repetition of the demand is usually unnecessary<sup>1</sup> unless the demand is to be treated as referring exclusively to the term or the time at which it is made.<sup>2</sup>

(3) *Time of Demand.*—It is sometimes provided by statute that the demand shall be made when the case, coming up in its regular order, is set down for trial on a particular day,<sup>3</sup> and sometimes that it shall be made before joinder of issue<sup>4</sup> or within a prescribed time thereafter.<sup>5</sup>

*Demand At or Near Beginning of Term.*—It is sometimes required by statute that the demand for a jury shall be made on the first day of the term.<sup>6</sup> Sometimes the statute provides for demand within the first three days of the term<sup>7</sup> or a certain number of days before the beginning of the term.<sup>8</sup>

*Demand After Beginning of Trial.*—The time for demanding a jury has also been fixed at the time when the cause is called for trial.<sup>9</sup> And without a statutory provision fixing the time it has been held that the demand must be made before trial.<sup>10</sup> It has also been provided by statute that the demand shall be previous to any inquiry into the merits of the case;<sup>11</sup> and generally a demand for a jury will be unavailing after the taking of testimony is to some extent completed.<sup>12</sup>

1. *Repetition of Demand.*—*Swasey v. Adair*, 88 Cal. 179; *Matter of Robinson*, 106 Cal. 493. And see *Arlington Ins. Co. v. Caldwell*, 88 Tenn. 758; *Fraedrich v. Flieth*, 64 Wis. 184.

2. *Davidson v. Wright*, 46 Iowa 383, where it was held that a demand refused at one term of court must be repeated at a subsequent term to which the cause was continued. See also *Green v. Locke*, 31 La. Ann. 656.

*Rules of Court* the effect of which is to require a party to make repeated demands are oppressive and unauthorized. *Ten Eyck v. Farlee*, 16 N. J. L. 348.

3. *When Cause Is Set Down for Trial.*—*State Bank v. Duplessis*, 2 La. Ann. 651; *Morgan v. Police Jury*, 11 La. 162; *Menefee v. Johnson*, 2 Rob. (La.) 274; *Brooks v. Walker*, 3 La. Ann. 150; *Wood v. Lyle*, 4 La. Ann. 145; *Wheelless v. Fisk*, 28 La. Ann. 731.

*The Time Must Be Fixed When the Demand Is Made*, and the fact that it has previously been fixed on a date which has passed without trial is insufficient. *State Bank v. Duplessis*, 2 La. Ann. 651; *Gallagher v. Hebrew Cong.*, 34 La. Ann. 526.

4. *Before Joinder of Issue.*—*Hall v. Chicago*, etc., R. Co., 65 Iowa 258; *McGivern v. Wilson*, 160 Mass. 370; *Mason v. Campbell*, 1 Hilt. (N. Y.) 291. See also *Meech v. Brown*, (C. Pl. Gen. T.) 4 Abb. Pr. (N. Y.) 19; *Bayless v. Crany*, 1 Cow. (N. Y.) 86.

5. *Within Fixed Time After Joinder of Issues.*—*Bailey v. Joy*, 132 Mass. 356; *McGivern v. Wilson*, 160 Mass. 370; *Odell v. Reynolds*, 40 Mich. 21; *Bradley, etc., Co. v. Herter*, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 408.

*Extension of the Time for Pleading* in favor of a defendant in default will not extend the time within which a demand for a jury must be filed under a statute requiring its filing within a specified time after answer or plea. *Graham v. Lord*, 170 Mass. 1.

6. *Demand on First Day of Term.*—*McGuire v. North Carolina, etc., R. Co.*, 95 Tenn. 707; *McFaddin v. Preston*, 54 Tex. 403; *Cruger v. McCracken*, (Tex. Civ. App. 1894) 26 S. W. Rep. 282; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223.

*In Texas* a failure to comply with such requirement is held to preclude a party from

obtaining a jury only when compliance with his demand made at a later date would necessitate a delay in the trial of the cause in order to obtain a jury. *Cook v. Cook*, 5 Tex. Civ. App. 30; *Cushman v. Flanagan*, 50 Tex. 389; *Cole v. Terrell*, 71 Tex. 549; *Petri v. Fond du Lac First Nat. Bank*, 83 Tex. 424, 29 Am. St. Rep. 657; *Petri v. Lincoln Nat. Bank*, 84 Tex. 153; *Cabell v. Hamilton Brown Shoe Co.*, 81 Tex. 104; *Denton Lumber Co. v. Fond du Lac First Nat. Bank*, (Tex. 1892) 18 S. W. Rep. 962; *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 279.

*In Attachment Proceedings* it has been held that a statutory provision that the demand be made on the first day of the term does not render it necessary for the defendant to make the demand at that time, but he may wait until served with the notice required as a foundation of a general judgment for the debt. *Sutton v. Gunn*, 86 Ga. 652.

*Absence of the Judge* on the first day of the term is sufficient reason for not demanding a jury. *Hays v. Hays*, 66 Tex. 606.

*Demand at Subsequent Term.*—See *Rogers v. Morton*, 51 Iowa 709; *Arlington Ins. Co. v. Caldwell*, 88 Tenn. 758; *Swink v. McKnight*, 88 Tenn. 765.

7. *Demand on First Three Days of Term.*—*McClellan v. State*, 118 Ala. 122; *East Tennessee, etc., R. Co. v. Martin*, 85 Tenn. 134.

8. *Before Commencement of Term.*—*Doll v. Anderson*, 27 Cal. 248.

9. *Call for Trial.*—*State v. Clark*, 67 Wis. 229.

10. *Before Trial.*—*Poyer v. New York Cent., etc., R. Co.*, (C. Pl. Gen. T.) 7 Abb. N. Cas. (N. Y.) 371; *Marshall v. De Cordova*, 26 N. Y. App. Div. 615; *Koehler v. New York El. R. Co.*, 159 N. Y. 218, *affirming* 9 N. Y. App. Div. 449; *Tauszky v. Blatchford*, 1 Cinc. L. Bull. 110, 7 Ohio Dec. (Reprint) 99.

11. *Inquiry into Merits.*—*Olney v. Bacon*, 1 Johns. (N. Y.) 142; *Gale v. Barnes*, 1 Cow. (N. Y.) 235; *Bayless v. Crany*, 1 Cow. (N. Y.) 86.

12. *After Testimony Is Taken.*—*New York.*—*Pegram v. New York El. R. Co.*, 147 N. Y. 135.

*Pennsylvania.*—*Wilkes-Barre Second Nat. Bank v. Pennsylvania Anthracite Coal Co.*, 140 Pa. St. 628.



(4) *Withdrawal of Demand.* — It has been held that if one party demands and procures a jury, he cannot withdraw such demand without the consent of the adverse party;<sup>1</sup> but a different view has been taken under a particular statute.<sup>2</sup>

*j. NONPAYMENT OF JURY FEES.* — The legislature has power to require payment of a reasonable jury fee by one demanding a jury trial, and to provide that a failure to make such payment shall constitute a waiver of the right to a jury;<sup>3</sup> and it has been held that a requirement that the jury fee shall be deposited in advance may be imposed by rule of court.<sup>4</sup>

*Delay in Payment.* — While failure to pay the fee at the time fixed by statute has been occasionally stated to involve a waiver of the right to a jury,<sup>5</sup> a strict compliance with the requirement in this regard has generally been excused when the delay in payment did not result in prejudice to the opposite party or inconvenience to the court.<sup>6</sup> Failure to comply with an order of the court requiring the deposit of jury fees on the day of the application for a jury was held to render the application nugatory;<sup>7</sup> and where a case was transferred to the "court" docket on nonpayment of the fee, it was held that it could not be retransferred on a payment of the fee at the moment of trial.<sup>8</sup> It has been held that a payment at the time of the demand for a jury is not necessary.<sup>9</sup>

*Subsequent Trial.* — The payment of the fees for one trial will not dispense with their payment on a subsequent trial;<sup>10</sup> and it has been decided that the fact that there was a jury trial in a justice's court will not give a right to a jury on appeal without payment of the statutory fees.<sup>11</sup>

*South Carolina.* — *State v. Mays*, 24 S. Car. 194.

*South Dakota.* — *Webster v. White*, 8 S. Dak. 479.

*Wisconsin.* — *Siebrecht v. Hogan*, 99 Wis. 437.

*Rhode Island Judiciary Act — Effect of Decision on Subsequent Claim for Jury Trial.* — See *Lavelle v. Kimball*, 18 R. I. 786; *White v. Eddy*, 19 R. I. 108.

1. *Withdrawal of Demand.* — *Sweeny v. Barbin*, 2 Mart. (La.) 48; *Lewis v. Klotz*, 39 La. Ann. 259; *Warren v. Scudder Gale Grocery Co.*, 96 Tenn. 574.

The statute may so provide. *Jones v. Hamly*, (Tex. Civ. App. 1895) 29 S. W. Rep. 75.

2. *New York Dyeing, etc., Establishment v. Fox*, 6 Daly (N. Y.) 467.

At a Subsequent Term a jury may be waived though demanded at the previous term. *Dean v. Sweeney*, 51 Tex. 242; *Brown v. Chenoworth*, 51 Tex. 469.

*Continuing Cause on Nonjury Docket.* — A demand for a jury may be waived by allowing the continuance of a case for several terms on the nonjury docket and failing to insist upon the demand at the proper time. *Coulter v. Weed Sewing Mach. Co.*, 3 Lea (Tenn.) 115.

3. *Payment of Jury Fees.* — *Venine v. Archibald*, 3 Colo. 163; *Adams v. Corriston*, 7 Minn. 456; *People v. Van Tassel*, 13 Utah 9. And see *Pleyte v. Pleyte*, 1 Colo. App. 70; *Woods v. Tanquary*, 3 Colo. App. 515; *Pitkin County v. Aspen First Nat. Bank*, 6 Colo. App. 423; *Doll v. Mundine*, 7 Tex. Civ. App. 96.

4. *Rule of Court.* — *Conneau v. Geis*, 73 Cal. 176; *Lassen County Bank v. Sherer*, 108 Cal. 513.

As to the Power of a Justice to require the advance payment of fees of the constable and jurors, see *Powens v. Jones*, (County Ct.) 10

*Abb. N. Cas. (N. Y.) 458; Moriarity v. Devine*, 1 Ohio Cir. Ct. 82, 1 Ohio Cir. Dec. 49.

A Voluntary Withdrawal by a Party of a jury fee deposited by him deprives him of the right to a jury. *Harris v. Kellum, etc., Invest. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1027.

5. *Failure to Pay at Statutory Time.* — *Kilpatrick v. Carr*, (C. Pl. Gen. T.) 3 Abb. Pr. (N. Y.) 117; *New York Dyeing, etc., Establishment v. Fox*, 6 Daly (N. Y.) 467. And see *Fields v. Crescent Ins. Co.*, 3 Tex. App. Civ. Cas., § 125.

6. *Not Necessarily Ground for Refusing Jury.* — *Wilson v. Alabama State Bank*, 3 La. Ann. 196; *Equitable Gas Light Co. v. French*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 749; *Hardin v. Blackshear*, 60 Tex. 132; *Berry v. Texas, etc., R. Co.*, 60 Tex. 654; *Gallagher v. Goldfrank*, 63 Tex. 474; *Allyn v. Willis*, 65 Tex. 65; *Allen v. Plummer*, 71 Tex. 547; *Western Union Tel. Co. v. Everheart*, 10 Tex. Civ. App. 468. Compare *Cabell v. Hamilton Brown Shoe Co.*, 81 Tex. 104.

7. *Failure to Comply with Order.* — *Green v. Locke*, 31 La. Ann. 656.

8. *Payment at Time of Trial.* — *Daniels v. Andrews*, 7 Rob. (La.) 160.

9. *Payment at Time of Demand.* — *Odell v. Reynolds*, 40 Mich. 21; *Pontiac, etc., Plank-Road Co. v. Hopkinson*, 69 Mich. 10.

Under a statute requiring one demanding a jury in a justice's court to pay the fees in advance, it was said that the payment should accompany the demand, or at least should be made on request. *Rollins v. Nolting*, 53 Minn. 232.

10. *Subsequent Trial.* — *McGraw v. Sturgeon*, 29 Mich. 426; *Schultz v. Bower*, 66 Minn. 281.

11. *Wood v. Gamble*, (Tex. Civ. App. 1895) 32 S. W. Rep. 368.

Fees on Removal from County Court to District



**Effect of Nonpayment on Judgment.** — If the payment of the fee is not a condition precedent to the rendition of judgment, its nonpayment is not cause for a refusal of judgment;<sup>1</sup> nor will its nonpayment affect the validity of the judgment.<sup>2</sup>

The Record on Appeal should show that the demand for a jury was accompanied by payment of the jury fee, in order to authorize a reversal for refusing the demand.<sup>3</sup>

*k.* PREVENTING PROCUREMENT OF JURORS. — A party may be precluded from having a trial by jury, by having attempted to defeat measures taken to procure jurors.<sup>4</sup>

**4. Effect of Waiver** — *a.* IN GENERAL. — The effect of a waiver of a jury trial is to submit to the presiding judge the questions involved in the case and to substitute him as the trier of the facts.<sup>5</sup>

*b.* CHANGE OF ISSUES. — A waiver of a jury has been held not to be applicable in case the pleading is amended so as to present new and different issues;<sup>6</sup> but the case is different if the amendments do not change the issues,<sup>7</sup> even though a new party is thereby added.<sup>8</sup>

*c.* SUBSEQUENT TERM OR TRIAL. — In *Texas*, in the absence of any statutory regulation or special circumstances authorizing a different conclusion, an agreement to waive a jury is held not to apply to a term subsequent to that at which it was made,<sup>9</sup> but in *Illinois* the contrary is held.<sup>10</sup> Nor, according to the weight of authority, does such agreement apply to a subsequent trial.<sup>11</sup>

*d.* DISREGARD OF WAIVER BY COURT. — Where the court has power to have the trial by a jury, it may so direct, although no jury has been demanded, or even though a trial by jury has been expressly waived.<sup>12</sup>

**Court for Disqualification of Judge.** — See *Warner v. Crosby*, 75 Tex. 295.

**1. Effect of Nonpayment on Judgment.** — *Robinson v. Kiouss*, 4 Ohio St. 594.

**2.** *Pitkin County v. Brown*, 2 Colo. App. 473. See also *Gore v. Pettit*, 2 B. Mon. (Ky.) 25; *Stevens v. Breatheven*, *Wright* (Ohio) 733.

**3.** *McGeagh v. Nordberg*, 53 Minn. 235.

**4. Preventing Procurement of Jurors.** — *Daniels v. Scott*, 12 N. J. L. 27; *Coon v. Snyder*, 19 Johns. (N. Y.) 384; *Babcock v. Hill*, 35 Barb. (N. Y.) 52. Compare *Sebring v. Wheeldon*, 8 Johns. (N. Y.) 460.

**Defeating Formation of Jury.** — In *Fountain County v. Loeb*, 68 Ind. 29, it was held that where a party to an action against a municipality persistently challenged jurors because they were residents and taxpayers, and refused to apply for a change of venue, the court could regard this as a waiver of trial by jury by such party. This decision was, however, questioned in *Orange County v. Hon*, 87 Ind. 356.

**5. Effect of Waiver.** — *Loring v. Whittemore*, 13 Gray (Mass.) 228.

**6. Change of Issues.** — *Gage v. Commercial Nat. Bank*, 86 Ill. 371; *McGeagh v. Nordberg*, 53 Minn. 235; *Nashville. etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351.

**7.** *Hanchett v. Ives*, 171 Ill. 122.

**8.** *Foster v. Hinson*, 75 Iowa 291; *Graham v. Lord*, 170 Mass. 1.

**A Prayer for a Jury Trial**, filed by the plaintiff with the original declaration, is not withdrawn by the filing of an amended declaration. *Condon v. Gore*, 89 Md. 230.

In *Massachusetts*, if one fails to file a notice of his desire for a trial by jury within the statutory time, it is within the discretion of

the court to allow him to file such notice upon a change of the issues by amendment. *Cleverly v. O'Connell*, 156 Mass. 88.

**9. Whether Waiver Applicable to Subsequent Term.** — *Dean v. Sweeney*, 51 Tex. 242; *Brown v. Chenoworth*, 51 Tex. 469; *Noel v. Denman*, 76 Tex. 306.

**10.** *Heacock v. Lutukee*, 108 Ill. 641.

In *Boslow v. Shenberger*, 52 Neb. 164, it was presumed on appeal that a waiver at a previous term was general, and not confined to the term at which it was made, the contrary not appearing from the record.

**11. Subsequent Trial** — *United States*. — *Burnham v. North Chicago St. R. Co.*, 88 Fed. Rep. 627, 60 U. S. App. 225.

*Alabama.* — *Martin v. King*, 72 Ala. 354; *Cross v. State*, 78 Ala. 430. Compare *Brock v. Louisville, etc., R. Co.*, (Ala. 1899) 26 So. Rep. 335.

*Georgia.* — *Brown v. State*, 89 Ga. 340.

*Illinois.* — *Carthage v. Buckner*, 8 Ill. App. 152.

*Louisiana.* — *State v. Touchet*, 33 La. Ann. 1154.

**Contra.** — *Park v. Mighell*, 7 Wash. 304, waiver by assent to reference.

**Subordinate Issue.** — In *State v. Pacific Guano Co.*, 28 S. Car. 63, it was held that where both parties consent to the trial of the case by the court, it was improper to order a trial of a subordinate issue by a jury after the chief issue had been tried by the court.

**12. Disregard of Waiver** — *California.* — *Doll v. Anderson*, 27 Cal. 248; *Bullock v. Consumers' Lumber Co.*, (Cal. 1892) 31 Pac. Rep. 367.

*Louisiana.* — *Davis v. Prevost*, 6 Mart. N. S. (La.) 265; *Burke v. Breazeale*, 1 Rob. (La.) 73.



**5. Withdrawal of Waiver.** — In some cases it is regarded as proper to allow a party to withdraw his waiver of a jury if this can be done without injury to the other side and without causing inconvenience to the court.<sup>1</sup> In other cases, however, the absolute right to withdraw a waiver is denied.<sup>2</sup>

**6. Presumption of Waiver on Appeal.** — If the record on appeal fails to contain any showing in regard to the waiver of a jury, it will be presumed, in aid of a judgment rendered without a jury, that a jury was waived.<sup>3</sup> But in order that this presumption may obtain, it must appear, it seems, that the complaining party was present, by himself or counsel, so as to be in position to waive a jury.<sup>4</sup> So it has been held that a waiver will be presumed if the record fails to show that any objection was made or exception taken to proceeding with the trial without a jury.<sup>5</sup> Likewise the presumption has been

*Michigan.* — Van Sickle v. Kellogg, 19 Mich. 49.

*Missouri.* — McCarthy v. Missouri R. Co., 15 Mo. App. 385.

*New York.* — New York Small Stock Co. v. Third Ave. R. Co., (Supm. Ct. App. T.) 16 Misc. (N. Y.) 64.

It is within the discretion of the trial court to grant a demand for a jury not made in due time. Van Sickle v. Kellogg, 19 Mich. 49; Schehan v. Malone, 71 N. Car. 440.

**Protest Against Trial by Jury.** — A statute providing that the court shall try the case if the accused does not demand a jury has been construed to give the right of being tried in either way, so that the accused cannot be tried by a jury if he prefers to be tried by the court. People v. Steele, 94 Mich. 437, *distinguishing* Grand Rapids v. Bateman, 93 Mich. 135. But see *contra*, Taffe v. State, 90 Ga. 459.

**1. Withdrawal of Waiver.** — Burnham v. North Chicago St. R. Co., 88 Fed. Rep. 627; Ferrea v. Chabot, 121 Cal. 233; Brown v. State, 89 Ga. 340; Butler v. State, 97 Ga. 404; Cain v. State, 102 Ga. 610; State v. Robinson, 43 La. Ann. 383.

**Before Expiration of the Time for Demanding a Jury,** an express waiver which was unnecessarily made at the time of filing a plea can be withdrawn by the defendant. People v. Molinet, (Ct. Sess.) 13 Misc. (N. Y.) 301.

**2. No Right of Withdrawal** — *Alabama.* — McClellan v. State, 118 Ala. 122.

*Massachusetts.* — Thompson v. King, 173 Mass. 439, *citing* Bailey v. Joy, 132 Mass. 356, and Dennie v. Williams, 135 Mass. 28.

*North Carolina.* — Stevenson v. Felton, 99 N. Car. 58; Collins v. Young, 118 N. Car. 265.

*Ohio.* — Hauser v. Metzger, 1 Cinc. Super. Ct. 164.

*Tennessee.* — Warren v. Scudder Gale Grocery Co., 96 Tenn. 574.

The right to a jury having been waived, it cannot be asserted when the cause is called for trial. Rice v. Hodge, 26 Kan. 164; State v. Bannock, 53 Minn. 419; St. Paul Distilling Co. v. Pratt, 45 Minn. 215.

**A Waiver in Consideration of an Agreement** by the opposite party to transfer a cause to another department cannot be withdrawn. Hawes v. Clark, 84 Cal. 272.

**After Waiver and Trial by the Court in Accordance Therewith** a party cannot complain that the court tried the case without a jury. Judge v. French, 3 Stew. & P. (Ala.) 263; Jensen v. Fricke, 133 Ill. 171; State v. Robinson, 43 La. Ann. 383; Lee v. Tillotson, 24 Wend. (N. Y.)

337, 35 Am. Dec. 624; Phelps v. New York, 61 Hun (N. Y.) 521; Stepp v. National L., etc., Assoc., 37 S. Car. 417; Aultman v. Salinas, 44 S. Car. 299.

**Effect of Award of Jury.** — After a jury has been awarded at the instance of either party, or by the court of its own motion, the consent of both parties is necessary in order that the case be tried by the court. Livadais v. Spear, 10 La. Ann. 24; Lewis v. Klotz, 39 La. Ann. 259; Mills v. Noles, 1 Ohio 534.

**3. Presumption of Waiver** — *Alabama.* — Evans v. State Bank, 15 Ala. 81. See also Heyman v. McBurney, 66 Ala. 518.

*Arkansas.* — Wilson v. Light, 4 Ark. 158; Chapline v. Robertson, 44 Ark. 202.

*California.* — Boston Tunnel Co. v. McKenzie, 67 Cal. 490; Leadbetter v. Lake, 118 Cal. 515; Montgomery v. Sayre, 91 Cal. 206.

*Illinois.* — Henrichsen v. Mudd, 33 Ill. 476; Heacock v. Hosmer, 109 Ill. 245; Miller v. People, 156 Ill. 113.

*Iowa.* — Cooper v. Sunderland, 3 Iowa 120; State v. Craig, 58 Iowa 238; Hawkins v. Rice, 40 Iowa 435; Saum v. Jones County, 1 Greene (Iowa) 165; McGuire v. Kemp, 3 Greene (Iowa) 219.

*Louisiana.* — Huppenbauer v. Durlin, 26 La. Ann. 540.

*Missouri.* — State v. Larger, 45 Mo. 510.

*Nebraska.* — Davis v. Snyder, 45 Neb. 415.

*New York.* — Barlow v. Scott, 24 N. Y. 40; Hartman v. Manhattan R. Co., 82 Hun (N. Y.) 531.

*Ohio.* — Latimer v. Motter, 26 Ohio St. 480; Billigheimer v. State, 32 Ohio St. 435.

**In Maryland,** however, it has been decided that the record must affirmatively show a waiver. Desche v. Gies, 56 Md. 135.

**Statutory Requirement.** — In State v. Larger, 45 Mo. 510, it was stated that when a statute requires the entry on the record of the fact of waiver, it is necessary that the record or minutes should show affirmatively the fact of waiver.

**4. Presence of Complaining Party.** — Kearney v. Case, 12 Wall. (U. S.) 275; Ware v. Nottinger, 35 Ill. 375; Paul v. People, 82 Ill. 82.

**Where the Jury by Special Verdict Found Part of the Facts,** it will not be presumed on appeal that there was a waiver of a trial by jury as to the other facts, so as to justify a finding by the court in regard to them. Hodges v. Easton, 106 U. S. 408. And see Montgomery v. Sayre, 91 Cal. 207.

**5. Absence of Objection Below** — *Alabama.* — Heyman v. McBurney, 66 Ala. 511.



indulged that a trial with but eleven jurors was by consent.<sup>1</sup>

**Sufficiency of Record.** — A statement in the record that the plaintiff waived his right to a jury trial has been held to be conclusive on the appellate court.<sup>2</sup> And it has also been held that a waiver was shown by a statement that an issue was "made to the court on law and fact by consent of parties,"<sup>3</sup> and also by a statement that "neither party demanded or waived the interposition of a jury, but without objection submitted the cause to the court;"<sup>4</sup> but it was held that compliance with the statutory requirement of a formal written waiver was not satisfied by a mere statement that the parties submitted the case to the court for trial without a jury.<sup>5</sup>

**IV. SELECTION OF JURY LIST.** — At common law the sheriff selected and summoned the twelve men to form the jury for the trial of a particular case; but the modern practice is entirely different, it being the custom for a jury list to be made up annually, or sometimes less frequently, from which list the panel for each term of court is drawn, and from this panel the jury for a particular trial is obtained. The mode of selecting the names for the jury list is wholly prescribed by statute, both in *England* and in the *United States*, and the construction and effect of such statutes are considered elsewhere.<sup>6</sup>

**V. DRAWING OF PANEL.** — The time and method of drawing the panel of jurors for a particular term of court are likewise prescribed by statute, the usual method being for the officer named in the statute to draw the required number of names from a box containing the names on the jury list previously prepared.<sup>7</sup>

**VI. PROCURING ATTENDANCE OF MEMBERS OF PANEL.** — At common law the writ of *venire facias*, commanding the sheriff to procure a certain number of persons to serve as jurors, was indispensable; and under the modern statutes, such a process or an equivalent one is generally prescribed. Its form and issuance should substantially comply with the statutory provisions, but absence of such compliance, and irregularities on the part of the officer charged with summoning the jury, are not now generally regarded as ground for challenge to the array or for subsequent objection on motion for new trial or appeal, unless such irregularities are of the most substantial character or the result of fraud on the part of the officer.<sup>8</sup>

*Iowa.* — *State v. Craig*, 58 Iowa 238.

*Louisiana.* — *Huppenbauer v. Durlin*, 26 La. Ann. 541.

*Michigan.* — *Hudson v. Roos*, 72 Mich. 363. *Compare People v. Treadway*, 17 Mich. 480.

*Missouri.* — *Brown v. Home Sav. Bank*, 5 Mo. App. 1; *Pike v. Martindale*, 91 Mo. 268.

*New Jersey.* — *State v. Blum*, 55 N. J. L. 518.

*New York.* — *Eysaman v. Small*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 288; *Barlow v. Scott*, 24 N. Y. 40; *Sayles v. Sims*, 73 N. Y. 551. *Compare Meech v. Brown*, (C. Pl. Gen. T.) 4 Abb. Pr. (N. Y.) 19.

*North Carolina.* — *Crump v. Thomas*, 85 N. Car. 272; *White v. Morris*, 107 N. Car. 92.

*South Carolina.* — *Marshall v. Marshall*, 42 S. Car. 436. *Compare Marshall v. Pitts*, 39 S. Car. 390.

*Washington.* — *Keane v. Brygger*, 3 Wash. 338; *Stetson, etc., Mill Co. v. McDonald*, 5 Wash. 496.

An Objection to a Trial by the Court expressly based on the ground that the question is one of fact, although insufficient, since questions of fact are often triable by the court, precludes an objection on another ground, although the party be entitled to a jury trial. *McKeon v. See*, 51 N. Y. 300.

**Waiver of Error in Refusing Jury Trial.** — One is not precluded from objecting on appeal that a jury trial was denied, by the fact that he failed to make a second demand for the jury trial after such refusal, *Swasey v. Adair*, 88 Cal. 179; or by going to trial after refusal of the demand, *Matter of Robinson*, 106 Cal. 493.

**1. Waiver of Full Number of Jurors.** — *Hitchcock v. Caruthers*, 82 Cal. 523. But see *Oldham v. Hill*, 5 J. J. Marsh (Ky.) 300.

**2. Sufficiency of Statement in Record.** — *Henry v. Beers*, 48 Mo. 366.

**3. Saum v. Jones County**, 1 Greene (Iowa) 165. See also *Maxwell v. Maxwell*, 70 N. Car. 267.

**4. Bonewitz v. Bonewitz**, 50 Ohio St. 373. See also *Dailey v. State*, 4 Ohio St. 57.

**5. Compliance with Statutory Requirement.** — *Swan v. Mulherin*, 67 Ill. App. 77.

As to the Requirements of the United States Statutes, and a showing in the record of compliance therewith, see *supra*, this section, *Consent in Civil Cases* — *In United States Circuit Courts*.

**6. Selection of Jury List.** — See the title JURY, 12 ENCYC. OF PL. AND PR. 273 *et seq.*

**7. Drawing of Panel.** — See the title JURY, 12 ENCYC. OF PL. AND PR. 296.

**8. Procuring Attendance of Jurors.** — See the title JURY, 12 ENCYC. OF PL. AND PR. 317 *et seq.*



**VII. CHALLENGES TO THE ARRAY — 1. General Considerations.** — The regularity or proper organization of the panel is generally questioned by a challenge to the array,<sup>1</sup> which is defined as "an exception to the whole panel in which the jury are arrayed or set in order by the sheriff in his return."<sup>2</sup> An objection of this character has, in various states, a different name with apparently the same signification, such as "challenge to the panel,"<sup>3</sup> "motion to set aside the panel,"<sup>4</sup> or motions "to quash the array,"<sup>5</sup> the "venire,"<sup>6</sup> or the "panel."<sup>7</sup>

The Legislature May Abolish or Limit the right of challenge to the array.<sup>8</sup>

**2. Grounds — a. AT COMMON LAW.** — At common law a challenge to the array of jurors was an objection to all the jurors returned by the sheriff, collectively, and was founded on some partiality or default in the sheriff, or his under officer, or the clerk who arrayed the panel.<sup>9</sup>

**b. IRREGULARITIES IN SELECTING LIST OR DRAWING PANEL.** — In modern practice the grounds which will support a challenge to the array or an objection of a similar character usually embrace those recognized at the common law and those specially designated by the statute, and it may be stated generally that objections to the array will be sustained for any material departure from the prescribed mode of selecting, listing, or drawing jurors.<sup>10</sup>

**1. Challenge to Array — Alabama.** — *Hornsby v. State*, 94 Ala. 55.

*Illinois.* — *Mueller v. Rebhan*, 94 Ill. 147; *Borrelli v. People*, 164 Ill. 549.

*Louisiana.* — *State v. Da Rocha*, 20 La. Ann. 356; *State v. Morgan*, 20 La. Ann. 442.

*Nebraska.* — *Brown v. State*, 9 Neb. 157.

*North Carolina.* — *State v. Douglass*, 63 N. Car. 500; *State v. Underwood*, 6 Ired. L. (28 N. Car.) 96.

*Pennsylvania.* — *McDermott v. Hoffman*, 70 Pa. St. 31.

*Texas.* — *Ray v. State*, 4 Tex. App. 450.

**2. 3 Black. Com. 359.**

**3. Challenge to Panel.** — *People v. Durrant*, 116 Cal. 179; *State v. Davis*, 41 Iowa 311; *Baker v. The Steamboat Milwaukee*, 14 Iowa 214.

**4. Motion to Set Aside Panel.** — *Anderson v. State*, 5 Ark. 445; *Hurley v. State*, 29 Ark. 17.

**5. Motion to Quash Array.** — *State v. Windsor*, 5 Harr. (Del.) 512; *Kittanning Ins. Co. v. Adams*, 110 Pa. St. 553.

**6. Motion to Quash Venire.** — *Brazier v. State*, 44 Ala. 387; *Furlow v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 938; *Coleman v. Com.*, 84 Va. 1.

**7. Motion to Quash Panel.** — *State v. Dusenberry*, 112 Mo. 277; *State v. Moore*, 120 N. Car. 70.

**8. Abolition or Limitation of Right.** — *Hare v. State*, 4 How. (Miss.) 187; *Cavitt v. State*, 15 Tex. App. 190. And see *Williams v. State*, 24 Tex. App. 32; *McCamant v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 610; *Arnold v. State*, 38 Tex. Crim. 5.

**9. Grounds of Challenge — At Common Law — England.** — *Rex v. Sheppard*, 1 Leach C. C. 101. See also 3 Black. Com. 358, 359; Co. Litt. 156-158; 1 Archbold's Crim. Pr. and Pl. (8th ed.) 163, note.

*United States.* — *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434.

*Connecticut.* — *State v. Bradley*, 48 Conn. 535.

*Louisiana.* — *State v. Kane*, 32 La. Ann. 999.

*Maine.* — *State v. Knight*, 43 Me. 11.

*Massachusetts.* — *Com. v. Walsh*, 124 Mass.

32.

*Mississippi.* — *Woodside v. State*, 2 How. (Miss.) 665.

*New York.* — *People v. M'Kay*, 18 Johns. (N. Y.) 212; *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *Morgan v. Dyer*, 9 Johns. (N. Y.) 255; *Pringle v. Huse*, 1 Cow. (N. Y.) 432.

*Pennsylvania.* — *Munshower v. Patton*, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678.

*Wisconsin.* — *Conkey v. Northern Bank*, 6 Wis. 447.

**10. Irregularities in Selecting List or Drawing Panel — United States.** — *Turner v. U. S.*, 66 Fed. Rep. 280; *U. S. v. Coit*, 25 Fed. Cas. No. 14,829.

*Alabama.* — *Brazier v. State*, 44 Ala. 387.

*Arkansas.* — *Freel v. State*, 21 Ark. 212.

*California.* — *People v. Ah Lee Doon*, 97 Cal. 171; *People v. Davis*, 73 Cal. 355.

*Illinois.* — *Nealon v. People*, 39 Ill. App. 481; *Borrelli v. People*, 164 Ill. 549.

*Indiana.* — *Mitchell v. Likens*, 3 Blackf. (Ind.) 258; *Mitchell v. Denbo*, 3 Blackf. (Ind.) 259; *Jones v. State*, 3 Blackf. (Ind.) 37; *Wright v. Stuart*, 5 Blackf. (Ind.) 120.

*Iowa.* — *Baker v. The Steamboat Milwaukee*, 14 Iowa 214; *Buford v. McGetchie*, 60 Iowa 298.

*Kansas.* — *State v. Jenkins*, 32 Kan. 477.

*Michigan.* — *Gott v. Brigham*, 45 Mich. 424; *People v. Harding*, 53 Mich. 49, 51 Am. Rep. 95; *People v. Labadie*, 66 Mich. 702.

*New York.* — *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *Gardner v. Turner*, 9 Johns. (N. Y.) 260; *McCloskey v. People*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 308; *Powell v. People*, 5 Hun (N. Y.) 169.

*North Carolina.* — *State v. Boon*, 80 N. Car. 461; *State v. Speaks*, 94 N. Car. 865.

*Pennsylvania.* — *Com. v. Shew*, 8 Pa. Dist. 484; *Brown v. Com.*, 73 Pa. St. 321, 13 Am. Rep. 740; *Kittanning Ins. Co. v. Adams*, 110 Pa. St. 553.

*Texas.* — *Anderson v. State*, 34 Tex. Crim. 96.

**Venire for Insufficient Number.** — That a venire issues for an insufficient number of jurors is ground for challenge to the array or panel. *Baker v. The Steamboat Milwaukee*, 14 Iowa



c. **BIAS OR MISCONDUCT OF SUMMONING OFFICER.** — A challenge to the array or panel will lie for the bias, partiality, or irregular action of the summoning officer.<sup>1</sup> So it has been held ground for challenge to the array that such officer was a party to the cause,<sup>2</sup> was related to a party,<sup>3</sup> or was his counsel.<sup>4</sup> That some of the persons named in the venire were not summoned because they could not be found, or were dead, is not, however, a ground for such a challenge.<sup>5</sup>

d. **MISCONDUCT OF PARTIES.** — Interference with the selection or return of the jury by either party to the cause is a good ground of challenge to the array.<sup>6</sup>

e. **EXCLUSIVE STATUTORY GROUNDS.** — In some states the statute provides the grounds upon which a challenge to the array shall be allowed, and these grounds are regarded as exclusive.<sup>7</sup>

214; *People v. Tweed*, (Supm. Ct.) 50 How. Pr. (N. Y.) 262.

The *Misnomer of Veniremen* has been held not to be ground for challenge to the array. *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96; *McKee v. State*, 82 Ala. 32; *Floyd v. State*, 55 Ala. 61; *Hubbard v. State*, 72 Ala. 164; *Jackson v. State*, 76 Ala. 26. See also *Clawson v. State*, 59 N. J. L. 434.

Under a former statute in *Ohio* providing that the array might be challenged "for the misnomer of a juror or jurors" it was held that a refusal to sustain a challenge for such ground was not cause for reversal unless prejudice was shown. *McHugh v. State*, 42 Ohio St. 154.

Consent to Irregularities in the formation of the panel is a waiver of the right to object thereto. *Watkins v. Weaver*, 10 Johns. (N. Y.) 107, citing *Co. Litt.* 126a. And see *Inman v. State*, 72 Ga. 269.

1. **Partiality or Irregular Action of Summoning Officer** — *England*. — *Reg. v. Burke*, 10 Cox C. C. 519.

*California*. — *People v. Coyodo*, 40 Cal. 586; *People v. Ryan*, 108 Cal. 581; *People v. Fellows*, 122 Cal. 233.

*Connecticut*. — *Quinebaug Bank v. Tarbox*, 20 Conn. 510. *Compare Dutton v. Tracy*, 4 Conn. 79.

*Mississippi*. — *King v. State*, 5 How. (Miss.) 730.

*Missouri*. — *State v. Weeden*, 133 Mo. 70.

*North Carolina*. — *State v. Murph*, 1 Winst. L. (60 N. Car.) 129; *State v. Douglass*, 63 N. Car. 500.

*Compare Clark v. Com.*, 123 Pa. St. 555.

2. **Officer Party to Cause.** — *Cowgill v. Wooden*, 2 Blackf. (Ind.) 332; *Woods v. Rowan*, 5 Johns. (N. Y.) 133; *Legaux v. Wells*, 4 Yeates (Pa.) 43.

3. **Relationship to Party.** — *Vanauken v. Bee-mer*, 4 N. J. L. 364; *Vannoy v. Givens*, 23 N. J. L. 201; *Munshower v. Patton*, 10 S. & R. (Pa.) 334, 13 Am. Dec. 678; *Rector v. Hudson*, 20 Tex. 234.

4. **Counsel for Party.** — *Baylis v. Lucas*, 1 Comp. 112; *Watkins v. Weaver*, 10 Johns. (N. Y.) 107. *Compare Miles v. Pulver*, 3 Den. (N. Y.) 84.

**Determining Qualifications at Wrong Time.** — In *State v. Moore*, 120 N. Car. 570, the erroneous action of the judge in determining the qualifications of jurors as the names were drawn from the jury box was stated to be ground for challenge to the array.

5. **Persons Not Summoned** — *England*. — *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 23 Rev. Rep. 350.

*United States*. — *Pullman's Palace-Car Co. v. Harkins*, 55 Fed. Rep. 932.

*Alabama*. — *Ezell v. State*, 102 Ala. 101; *Daughdrill v. State*, 113 Ala. 7.

*New Jersey*. — *Smith v. Smith*, 52 N. J. L. 207.

*North Carolina*. — *State v. Speaks*, 94 N. Car. 865; *State v. Hensley*, 94 N. Car. 1021; *State v. Whitt*, 113 N. Car. 716; *State v. Stanton*, 118 N. Car. 1182.

*Pennsylvania*. — *Showers v. Com.*, 120 Pa. St. 573.

*South Carolina*. — *State v. Derrick*, 44 S. Car. 344.

*Texas*. — *Smith v. State*, 21 Tex. App. 277.

The **Intentional Omission of a Sheriff** to summon a juror, duly drawn, is sometimes made a cause of challenge to the array, by express provision of the statute. *People v. Armstrong*, 2 Idaho 275; *People v. Jackson*, 111 N. Y. 362.

**Failure to Summon Certain Class.** — That the officer in summoning the panel intentionally excluded members belonging to the defendant's church, is not ground for challenge to the array, an unobjectionable panel being obtained. *People v. Hampton*, 4 Utah 258.

6. *McDonald v. Shaw*, 1 N. J. L. 6; *State v. Johnson*, 1 N. J. L. 253. See also *Boyles v. M'Ewen*, 3 N. J. L. 253.

7. **Exclusive Statutory Grounds** — *California*. — *People v. Welch*, 49 Cal. 174; *People v. Ah Chung*, 54 Cal. 398; *People v. Lopez*, 59 Cal. 362; *People v. Darr*, 61 Cal. 554; *People v. Davis*, 73 Cal. 355; *People v. Vincent*, 95 Cal. 425; *People v. Wallace*, 101 Cal. 281.

*Louisiana*. — *State v. Saintes*, 46 La. Ann. 547.

*Mississippi*. — *Thomas v. State*, 5 How. (Miss.) 20; *Rolls v. State*, 52 Miss. 391.

*Nevada*. — *State v. Raymond*, 11 Nev. 98.

*New York*. — *People v. Jackson*, 111 N. Y. 362, 6 N. Y. Crim. 393; *People v. Packenham*, 115 N. Y. 200.

*Texas*. — *Bowman v. State*, 41 Tex. 417; *Mitchell v. State*, 43 Tex. 513; *Williams v. State*, 44 Tex. 34; *Roundtree v. Gilroy*, 57 Tex. 176; *Swofford v. State*, 3 Tex. App. 88; *Harris v. State*, 6 Tex. App. 97; *Tuttle v. State*, 6 Tex. App. 556; *Coker v. State*, 7 Tex. App. 83; *Woodard v. State*, 9 Tex. App. 412; *Arnold v. State*, 38 Tex. Crim. 5; *Carter v. State*, 39 Tex. Crim. 345; *Sanchez v. State*, 39 Tex. Crim. 389.



*f. EXCUSING JURORS.* — That certain jurors are discharged from the panel and excused from further service is not ground for a challenge to the array<sup>1</sup> unless so many are excused that enough to make a full jury are not left.<sup>2</sup>

*g. CAUSE AFFECTING PART OF PANEL.* — A challenge or objection to the array or panel must be for a cause which affects all the jurors alike, and not for a cause which affects the competency of an individual juror or a portion of the panel only.<sup>3</sup> And it must, it seems, be based on some ground involving the form and manner of making up the panel; the fact that all the individual members of the panel are disqualified for the same cause is not sufficient.<sup>4</sup>

**3. Waiver of Right of Challenge.** — Irregularities which would vitiate the array will be deemed to be waived if there is a failure to call attention to them in due season by challenge or other proper objection. If the statute requires the making of such an objection at a certain time, it must be made at that time,<sup>5</sup> except, perhaps, under unusual circumstances.<sup>6</sup> But independently of statute, objections of this character should be promptly made after learning the facts on which they are based.<sup>7</sup> It has been held that the challenge must be interposed before entering on the formation of the jury;<sup>8</sup> before the interposition of a challenge to the polls;<sup>9</sup> before the jury has been

**1. Excusing Juror.** — *People v. Young*, 108 Cal. 8; *Fulton County v. Amorous*, 89 Ga. 614; *State v. White*, 7 La. Ann. 532; *People v. Packenham*, 115 N. Y. 200.

**2. Smith v. Clayton**, 29 N. J. L. 357.

**3. Causes Affecting Part of Panel** — *Alabama*. — *Hall v. State*, 40 Ala. 698; *Birdsong v. State*, 47 Ala. 68; *Fields v. State*, 52 Ala. 348; *Woodley v. State*, 103 Ala. 23; *Jones v. State*, 104 Ala. 30.

*California*. — *People v. Vincent*, 95 Cal. 425; *People v. Durrant*, 116 Cal. 179.

*Connecticut*. — *State v. Hogan*, 67 Conn. 581.

*Georgia*. — *Eberhart v. State*, 47 Ga. 598; *Dumas v. State*, 65 Ga. 475; *Blackman v. State*, 80 Ga. 785; *Schnell v. State*, 92 Ga. 459; *Fulton County v. Amorous*, 89 Ga. 614.

*Illinois*. — *Cleary v. Stanley*, 34 Ill. App. 338.

*Kansas*. — *Atchison, etc., R. Co. v. Davis*, 34 Kan. 199, *distinguishing State v. Jenkins*, 32 Kan. 477.

*Maryland*. — *Young v. State*, (Md. 1900) 45 Atl. Rep. 531.

*Massachusetts*. — *Com. v. Walsh*, 124 Mass. 32.

*Mississippi*. — *Woodsides v. State*, 2 How. (Miss.) 655.

*Missouri*. — *State v. Clark*, 121 Mo. 500.

*Nevada*. — *State v. Raymond*, 11 Nev. 98.

*New York*. — *Dolan v. People*, 64 N. Y. 485.

*North Carolina*. — *State v. Hensley*, 94 N. Car. 1021.

*Pennsylvania*. — *Foust v. Com.*, 33 Pa. St. 338.

*Texas*. — *Mitchell v. State*, 43 Tex. 513; *Veramendi v. Hutchins*, 56 Tex. 414; *McCannant v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 610.

*Virginia*. — *Prince v. Com.*, 89 Va. 330.

*West Virginia*. — *State v. Cartright*, 20 W. Va. 32.

*Wisconsin*. — *Conkey v. Northern Bank*, 6 Wis. 447.

*Compare Peck v. Chosen Freeholders*, 21 N. J. L. 656; *State v. Dale*, 8 Oregon 229.

**4. Same Cause Affecting Individual Members.** — That all the members of the panel were prejudiced or had formed opinions based on a state-

ment made in their presence in the courtroom, or on evidence given in their presence, is not ground for a challenge to the array. *Jones v. State*, 90 Ga. 616; *Brown v. State*, 97 Ga. 215; *Humphries v. State*, 100 Ga. 260; *Thompson v. State*, 109 Ga. 272.

That the jury had tried a former action against the same defendant, based on the same act, is a ground for a challenge to the polls and not to the array. *Baker v. Harris*, 1 Winst. L. (60 N. Car.) 277.

**5. Statutory Time for Challenging Array.** — *State v. Thomas*, 32 La. Ann. 349; *State v. Given*, 32 La. Ann. 782; *State v. Coudier*, 36 La. Ann. 291; *State v. Collins*, 48 La. Ann. 1454; *State v. Pruett*, 49 La. Ann. 283; *State v. Britton*, 50 La. Ann. 261; *State v. Labauve*, 46 La. Ann. 548.

**6. State v. Vance**, 31 La. Ann. 398; *State v. Sterling*, 41 La. Ann. 680; *State v. Ashworth*, 41 La. Ann. 683; *State v. Strickland*, 41 La. Ann. 513; *State v. Simmons*, 43 La. Ann. 991.

**7. Objection to Be Promptly Made.** — *Klemmer v. Mt. Penn Gravity R. Co.*, 163 Pa. St. 521; *Wallace v. Jameson*, 179 Pa. St. 98.

**8. Challenge Before Formation of Jury.** — *Gropp v. People*, 67 Ill. 154; *Mueller v. Rebhan*, 94 Ill. 147; *Goodman v. Goetz*, (C. Pl. Gen. T.) 36 N. Y. St. Rep. 731; *Ickes v. State*, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442; *Jackson v. State*, 4 Tex. App. 292.

**Announcement of Readiness by One Party.** — A motion by the defendant to quash the venire is not too late when made after a demurrer to the indictment which is overruled, a plea of not guilty, and an announcement of readiness for trial by the prosecution, but before a similar announcement by the defendant. *Peters v. State*, 100 Ala. 10.

**9. Challenge to Array Before Challenge to Polls** — *England*. — *Co. Litt.* 158a; *Bac. Abr.*, tit. *Juries*, E. 11.

*California*. — *People v. Roberts*, 6 Cal. 214.

*Illinois*. — *Gropp v. People*, 67 Ill. 154.

*Iowa*. — *State v. Bryan*, 40 Iowa 379; *State v. Davis*, 41 Iowa 311.



completed<sup>1</sup> or has been sworn;<sup>2</sup> and before entering on the trial.<sup>3</sup> An objection to the array cannot be made, as a general rule, after verdict;<sup>4</sup> but if the defect is one apparent on the record, it may, it seems, be first questioned by motion in arrest of judgment.<sup>5</sup>

**4. Withdrawal of Challenge.** — A challenge to the array may be withdrawn,<sup>6</sup> even after it has been sustained.<sup>7</sup>

**5. Effect of Sustaining Challenge.** — On sustaining a challenge to the array it is proper to discharge all the jurors drawn for the term.<sup>8</sup> The mode of summoning a new jury after such discharge is a matter generally dependent on the statute.<sup>9</sup> It has been held that members of the panel which has been quashed may be drawn on the new jury.<sup>10</sup>

*Kansas.* — *State v. Wright*, 45 Kan. 136; *State v. Egle*, 45 Kan. 138.

*Missouri.* — *State v. Clark*, 121 Mo. 500; *State v. Taylor*, 134 Mo. 109; *State v. Powers*, 136 Mo. 194.

*Nevada.* — *State v. Davis*, 14 Nev. 448, 33 Am. Rep. 563.

*New York.* — *New York v. Mason*, 4 E. D. Smith (N. Y.) 143. *Compare People v. M'Kay*, 18 Johns. (N. Y.) 213.

*Texas.* — *Cooley v. State*, 38 Tex. 636.

**Challenge to Array Based on Objection to Individuals.** — A challenge in form to the array which was really a challenge to certain individuals was held to be a challenge to the polls, and so to preclude a subsequent challenge to the array. *State v. Clark*, 121 Mo. 500.

**A Challenge to the Array Which Is Overruled is not waived by challenges to the polls.** *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434. But see *contra*, *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139.

**1. Challenge Before Completion of Jury.** — *Eberhart v. State*, 47 Ga. 598.

**2. Challenge Before Swearing** — *England.* — *Brunskill v. Giles*, 2 Moo. & S. 41, 9 Bing. 13, 23 E. C. L. 246, 11 L. J. C. Pl. 143.

*Illinois.* — *Gropp v. People*, 67 Ill. 154; *St. Louis, etc., R. Co. v. Casner*, 72 Ill. 384.

*Iowa.* — *Settle v. Batie*, 1 Iowa 141.

*New Jersey.* — *Smith v. Clayton*, 29 N. J. L. 357.

*New York.* — *New York v. Mason*, 4 E. D. Smith (N. Y.) 142, 1 Abb. Pr. (N. Y.) 344.

*Pennsylvania.* — *McDermott v. Hoffman*, 70 Pa. St. 31.

*Texas.* — *Carter v. State*, 39 Tex. Crim. 345.

**3. Before Entering on Trial.** — *State v. Turner*, 25 La. Ann. 573. And see *De Kalb, etc., R. Co. v. Rowell*, 74 Ill. App. 191.

**4. Objection After Verdict** — *England.* — *Rex v. Sheppard*, 1 Leach C. C. 101.

*United States.* — *Turner v. U. S.*, 66 Fed. Rep. 280.

*Arkansas.* — *Brown v. State*, 12 Ark. 623; *Freel v. State*, 21 Ark. 213.

*California.* — *People v. Ah Lee Doon*, 97 Cal. 171.

*Colorado.* — *Solander v. People*, 2 Colo. 48.

*Georgia.* — *Kelly v. State*, 19 Ga. 425; *Mad-dox v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500; *Moon v. State*, 68 Ga. 695.

*Illinois.* — *Stone v. People*, 3 Ill. 326.

*Kentucky.* — *Kennedy v. Com.*, 14 Bush (Ky.) 340.

*Louisiana.* — *Vidal v. Thompson*, 11 Mart. (La.) 23.

*Maine.* — *Walker v. Green*, 3 Me. 215.

*Massachusetts.* — *Amherst v. Hadley*, 1 Pick. (Mass.) 38.

*Michigan.* — *Robinson v. Mulder*, 81 Mich. 75.

*Minnesota.* — *Steele v. Maloney*, 1 Minn. 347.

*Missouri.* — *Samuels v. State*, 3 Mo. 68;

*State v. Marshall*, 36 Mo. 400; *State v. Klinger*, 46 Mo. 224; *State v. Waters*, 62 Mo. 197; *State v. Ward*, 74 Mo. 253; *State v. Collins*, 86 Mo. 245; *State v. Gilmore*, 95 Mo. 554; *State v. Smith*, 114 Mo. 406; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125; *State v. Sansone*, 116 Mo. 1; *Boteler v. Roy*, 40 Mo. App. 234.

*New Mexico.* — *Territory v. Abeita*, 1 N. Mex. 545.

*New York.* — *Bergman v. Wolff*, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 591.

*North Carolina.* — *State v. Douglass*, 63 N. Car. 500; *State v. Boon*, 82 N. Car. 637; *State v. Underwood*, 6 Ired. L. (28 N. Car.) 96.

*Texas.* — *Buie v. State*, 1 Tex. App. 452; *Ray v. State*, 4 Tex. App. 450; *Yanez v. State*, 6 Tex. App. 429, 32 Am. Rep. 591; *Caldwell v. State*, 12 Tex. App. 302; *McMahon v. State*, 17 Tex. App. 321; *Jones v. State*, 37 Tex. Crim. 433.

**5. Motion in Arrest of Judgment.** — *People v. M'Kay*, 18 Johns. (N. Y.) 212; *State v. Stephens*, 11 S. Car. 319; *State v. Williams*, 1 Rich. L. (S. Car.) 188; *State v. Dozier*, 2 Spears L. (S. Car.) 211. And see *State v. Jennings*, 15 Rich. L. (S. Car.) 42; *State v. Pratt*, 15 Rich. L. (S. Car.) 47.

**6. Withdrawal of Challenge.** — *Cox v. People*, 80 N. Y. 500.

**7. Pierson v. People**, 79 N. Y. 424, 35 Am. Rep. 524.

**8. Effect of Sustaining Challenge.** — *Robinson v. Mulder*, 81 Mich. 75, *Muscoe v. Com.*, 87 Va. 463.

But where the court erroneously allowed a motion to discharge a jury because of the disqualification of an officer to act in the drawing, it was held that a party to another suit at the same term might insist on a trial by such jury, and could not be compelled to go to trial before a new jury. *Hight v. Langdon*, 53 Ind. 81.

**9. Summoning of New Jury.** — *State v. Skinner*, 34 Kan. 256; *Williams v. Com.*, 91 Pa. St. 493. As to the practice in justices' courts, see *Bloomington v. Adler* (C. Pl. Gen. T.) 7 Misc. Rep. (N. Y.) 182.

**10. Members of Old Panel May Be Drawn.** — *State v. Degonia*, 69 Mo. 485; *Com. v. Clemmer*, 190 Pa. St. 202. And see *State v. Wiley*, 109 Mo. 439; *Arnold v. State*, 38 Tex. Crim. 5. See also *infra*, this title, *Formation of Trial*



**VIII. FORMATION OF TRIAL JURY — 1. General Considerations.** — The mode of forming the trial jury from the panel is prescribed by statute, the usual method being to call the members of the panel summoned as their names are drawn from a box or other receptacle. Challenges, either peremptory<sup>1</sup> or for cause,<sup>2</sup> may then be made, and the court may at that time exercise its discretionary power of excluding jurors for proper cause or excusing them at their request.<sup>3</sup> At some time before the trial is actually entered on, the members of the jury must be sworn, but the practice as to the time of swearing differs in different jurisdictions, or even in different classes of cases, the oath being sometimes administered to each juror as selected, and sometimes not until the whole jury has been chosen; and in one or two cases it has even been held sufficient to administer one general oath for the whole term.<sup>4</sup>

**2. Challenges and Exclusion for Cause — a. RIGHT AND POWER IN GENERAL.** — Either party has the right to challenge a juror for cause<sup>5</sup> without limit as to the number of such challenges;<sup>6</sup> and it has been held that the legislature cannot withdraw such right.<sup>7</sup>

**Principal Challenges and Challenges to Favor.** — At common law challenges were divided into principal challenges, or challenges for principal cause, which were based upon alleged facts from which, if proved to be true, disqualification or incapacity to serve was conclusively presumed, and challenges to the favor, which were based upon facts which, while not necessarily rendering the juror incompetent, might show such a state of mind on his part as to justify his exclusion.<sup>8</sup> At the present time this division of challenges does not generally exist, but the theory on which it is based is still recognized,<sup>9</sup> and is adopted in a number of states by statutes distinguishing between challenges for "implied bias," corresponding in a great measure to principal challenges, and those for "actual bias," corresponding to challenges to the favor.

**Mode of Trial of Challenges.** — At common law challenges for principal cause were tried by the court, while those to the favor were tried by triers specially appointed. At the present day all classes of challenges are generally made triable by the court alone, though in some jurisdictions triers are still appointed.<sup>10</sup>

**Competency as of Time of Trial.** — The competency of the juror is to be deter-

*Jury — Talesmen and Additional Jurors — Qualifications.*

**Contra.** — *Combs v. Slaughter*, Hard. (Ky.) 67.

**1. Formation of Trial Jury.** — See *infra*, this section, *Peremptory Challenges*.

**2. See *infra*, this section, *Challenges and Exclusion for Cause*.**

**3. See *infra*, this section, *Challenges and Exclusion for Cause — General Power of Court to Exclude Juror*.**

**4. See the title JURY, 12 ENCYC. OF PL. AND PR. 515.**

**5. Right to Challenge for Cause.** — *U. S. v. Burr*, 25 Fed. Cas. No. 14,693; *U. S. v. Blodgett*, 30 Fed. Cas. No. 18,312; *Edelen v. Gough*, 8 Gill (Md.) 87; *Bloomington v. Adler*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 182; *Boileau v. Life Ins. Co.*, 9 Phila. (Pa.) 218, 31 Leg. Int. (Pa.) 340; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Com. v. Marrow*, 3 Brews. (Pa.) 402, 8 Phila. (Pa.) 440.

**6. No Limit as to Number.** — *Reg. v. Geach*, 9 C. & P. 499, 38 E. C. L. 195; *Alexander v. Dunn*, 5 Ind. 122; *People v. Beckwith*, 108 N. Y. 67; *Cooley v. State*, 38 Tex. 636.

**7. Legislature Cannot Impair Right.** — *Kundinger v. Saginaw*, 59 Mich. 355.

A law depriving parties of the right to challenge for actual bias is invalid. *State v. McClear*, 11 Nev. 39.

**8. Principal Challenges and Challenges to the Favor — England.** — *Co. Litt.* 156b.

*Illinois.* — *Coughlin v. People*, 144 Ill. 140.

*Michigan.* — *Stephens v. People*, 38 Mich. 739.

*New Hampshire.* — *State v. Howard*, 17 N. H. 171.

*New Jersey.* — *Vanauken v. Beemer*, 4 N. J. L. 416; *State v. Spencer*, 21 N. J. L. 196; *Mann v. Glover*, 14 N. J. L. 195.

*New York.* — *Carnal v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 273.

*West Virginia.* — *Thompson v. Douglass*, 35 W. Va. 337.

*Wisconsin.* — *Schoeffler v. State*, 3 Wis. 823.

**9. See *Solander v. People*, 2 Colo. 48; *Greenfield v. People*, 74 N. Y. 277; *Butler v. Glens Falls, etc.*, R. Co., 121 N. Y. 112.**

**10. Mode of Trial of Challenges.** — See *Brewer v. Jacobs*, 22 Fed. Rep. 242; *State v. Potter*, 18 Conn. 166; *Rowell v. Boston, etc.*, R. Co., 58 N. H. 514; *Carter v. Territory*, 3 Wyo. 193. And see the title JURY, 12 ENCYC. OF PL. AND PR. 462 *et seq.*, where the matter is fully treated.



mined as of the time at which the trial occurs, and not as of the time at which the veniremen are selected.<sup>1</sup>

**Presumptions and Burden of Proof.** — The burden of showing the incompetency of a juror is stated to be upon the challenging party;<sup>2</sup> but on the other hand it is frequently stated that where, after examination of the juror, it is doubtful whether he is qualified, the benefit of the doubt is to be given to the challenging party, and the juror should be excluded.<sup>3</sup>

**b. CAUSES OF GENERAL CHARACTER** — (1) *Disqualification by Reason of Sex.* — In the language of the original *venire facias* requiring the juror to be *liber et legalis homo*, the word *homo*, though a name given to both sexes, was regarded as applying to males only.<sup>4</sup> And jury service has always been restricted to males, and the statute generally so provides, at least by implication. In *Washington* it has been decided that women are not competent jurors under an act making all qualified electors competent, though a later act made women qualified electors;<sup>5</sup> and in *Wyoming* it has been decided that even if the constitutional provision that both male and female citizens shall equally enjoy all civil and political rights and privileges conferred on a woman prosecuted criminally a right to have women on the jury, a male defendant has no such right.<sup>6</sup>

(2) *Disqualification by Reason of Age.* — It is generally required that a juror shall be of full age, or over a certain age named in the statute.<sup>7</sup> And the statute generally names an age at which persons shall cease to be liable to jury service. While the fact that one is over such age is generally made merely a ground for exempting him from service at his own request,<sup>8</sup> in some cases the statute makes this a cause of disqualification.<sup>9</sup>

**1. Competency to Be Determined as of Time of Trial.** — *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Thompson v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 467; *State v. Williams*, 2 Hill L. (S. Car.) 381; *Garrett v. Weinberg*, 54 S. Car. 127; *Conway v. Clinton*, 1 Utah 215. See also *McGuffie v. State*, 17 Ga. 498. Compare *People v. Shafer*, 1 Utah 260.

**2. Presumptions and Burden of Proof.** — *Alexander v. Dunn*, 5 Ind. 122; *Hart v. State*, 14 Neb. 572; *Mann v. State*, 3 Head (Tenn.) 377; *Cartwright v. State*, 12 Lea (Tenn.) 620; *King v. State*, 91 Tenn. 617; *Hammond v. Noble*, 57 Vt. 193; *Keenan v. State*, 8 Wis. 132.

**3. Juror Excluded in Case of Doubt — California.** — *People v. Brotherton*, 43 Cal. 530; *Asevado v. Orr*, 100 Cal. 293.

*Iowa.* — *May v. Elam*, 27 Iowa 365; *State v. Hudson*, (Iowa 1899) 80 N. W. Rep. 232.

*Kansas.* — *Missouri*, etc., *R. Co. v. Munkers*, 11 Kan. 223.

*Maine.* — *Snow v. Weeks*, 75 Me. 105.

*Massachusetts.* — *Com. v. Livermore*, 4 Gray (Mass.) 18.

*Michigan.* — *Holt v. People*, 13 Mich. 224.

*Mississippi.* — *Mabry v. State*, 71 Miss. 716.

*Missouri.* — *State v. Chatham Nat. Bank*, 10 Mo. App. 482, 80 Mo. 626.

*Nebraska.* — *Omaha*, etc., *R. Co. v. Cook*, 37 Neb. 435; *Richards v. State*, 36 Neb. 17.

*Nevada.* — *State v. Kelly*, 1 Nev. 224.

*New York.* — *Lowenberg v. People*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 414; *Freeman v. People*, 4 Den. (N. Y.) 35, 47 Am. Dec. 216; *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Doherty v. Lord*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 227; *People v. Spiegel*, 75 Hun (N. Y.) 161.

*Tennessee.* — *Henry v. State*, 4 Humph. (Tenn.) 270; *Conatser v. State*, 12 Lea (Tenn.)

436; *Moses v. State*, 10 Humph. (Tenn.) 456.

*Texas.* — *Dreyer v. State*, 11 Tex. App. 631; *Black v. State*, 42 Tex. 378; *State v. McCracken*, 42 Tex. 383.

*Virginia.* — *Dejarnette v. Com.*, 75 Va. 867.

**4. Women as Jurors.** — 3 Black. Com. 362.

**5. Harland v. Territory**, 3 Wash. Ter. 131, overruling *Hayes v. Territory*, 2 Wash. Ter. 286.

**6. McKinney v. State**, 3 Wyo. 719.

**7. Juror Must Be of Full Age — District of Columbia.** — *U. S. v. Angney*, 6 Mackey (D. C.) 66.

*Kentucky.* — *Combs v. Com.*, 97 Ky. 24.

*Louisiana.* — *State v. Craig*, 43 La. Ann. 365; *State v. Nash*, 45 La. Ann. 1137; *State v. Button*, 50 La. Ann. 1071.

*Maryland.* — *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722.

*Massachusetts.* — *Wassum v. Feeney*, 121 Mass. 95, 23 Am. Rep. 258.

*Missouri.* — *State v. Slover*, 134 Mo. 607.

*North Carolina.* — *State v. Lambert*, 93 N. Car. 618.

*Tennessee.* — *Hines v. State*, 8 Humph. (Tenn.) 597.

*Virginia.* — *Hite v. Com.*, 96 Va. 489.

**8. Exclusion of Persons Over Certain Age.** — See *infra*, this section, *Exemptions from Jury Service*.

**9. Williams v. State**, 67 Ala. 183; *U. S. v. Angney*, 6 Mackey (D. C.) 66; *Burroughs v. State*, 33 Ga. 403; *North Chicago Electric R. Co. v. Moosman*, 82 Ill. App. 172; *State v. Brooks*, 92 Mo. 542; *Sutton v. Petty*, 5 N. J. L. 581; *Seacord v. Burling*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 175. See also *Cohron v. State*, 20 Ga. 752; *Thomas v. State*, 27 Ga. 287; *Magee v. Troy*, 48 Hun (N. Y.) 383.



(3) *Physical Incapacity*. — It is proper for the court to exclude one incapacitated by defective hearing from properly performing his duties,<sup>1</sup> even without the prisoner's consent;<sup>2</sup> and the judge may properly give more weight to a test of the juror in this regard, made in court, than to affidavits on the subject.<sup>3</sup> So one whose eyesight was so defective as to be unable to observe the demeanor or facial expression of the witnesses, or clearly to see articles introduced in evidence, was held to be incompetent.<sup>4</sup>

(4) *Mental Defects*. — A mental defect or disease is ground for disqualification,<sup>5</sup> but its existence must, it seems, be clearly shown.<sup>6</sup> Lack of sufficient intelligence to act properly is stated to be a disqualification.<sup>7</sup>

*Drunkenness* likewise is cause for exclusion.<sup>8</sup>

(5) *Ignorance of English Language*. — It is generally agreed that the court has full power to exclude a juror who is too ignorant of the English language to understand the proceedings.<sup>9</sup> In *Colorado* this is not considered a disqualification rendering a juror subject to challenge for cause;<sup>10</sup> but generally knowledge of the language is regarded as necessary, and ignorance thereof is a ground for challenge,<sup>11</sup> and it is sometimes so provided by statute.<sup>12</sup> In *Texas* this is stated to be a necessary result of the constitutional guaranty of a fair trial by due course of law.<sup>13</sup> The requirement does not, however, involve an understanding of every word that may be used in connection with the trial, but merely requires the juror to understand substantially the testimony and argument.<sup>14</sup>

(6) *Lack of Education*. — Inability to read or write, or other lack of education, is not a ground of disqualification at common law.<sup>15</sup> In some states,

1. *Defective Hearing*. — *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *Ickes v. State*, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442; *Mitchell v. State*, 36 Tex. Crim. 278. And see *Anderson v. Green*, 46 Ga. 361.

2. *Jesse v. State*, 20 Ga. 156.

3. *Sullivan v. State*, 101 Ga. 800.

4. *Defective Eyesight*. — *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429.

5. *Mental Defects*. — *Hogshead v. State*, 6 Humph. (Tenn.) 59; *Caldwell v. State*, 41 Tex. 87.

6. *Mackin v. People*, 115 Ill. 312, 56 Am. Rep. 167; *State v. Howard*, 118 Mo. 127; *State v. Scott*, 1 Hawks. (8 N. Car.) 24.

Where one of the jurors became insane during the trial, and consequently did not join in the verdict, the judgment was reversed. *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413.

7. *Lack of Intelligence*. — *State v. Rountree*, 32 La. Ann. 1145; *State v. Williams*, 34 La. Ann. 959.

Whether a juror fulfils a statutory requirement that he be "intelligent" is a question within the sound discretion of the lower court. *People v. McLaughlin*, 2 N. Y. App. Div. 419.

8. *Drunkenness*. — *Thomas v. State*, 27 Ga. 287; *Torrent v. Yager*, 52 Mich. 506; *Bullard v. Spoor*, 2 Cow. (N. Y.) 431; *Hogshead v. State*, 6 Humph. (Tenn.) 59. See also *infra*, this title, *Custody and Conduct of Jury — Misconduct of Jury — Refreshments for Jury — Intoxicating Liquors — Intoxication and Excessive Use*.

9. *Ignorance of English Language*. — *Alabama*. — *State v. Marshall*, 3 Ala. 302; *Long v. State*, 86 Ala. 36.

*California*. — *People v. Arceo*, 32 Cal. 40.

*Colorado*. — *Trinidad v. Simpson*, 5 Colo. 65.

*Louisiana*. — *State v. Offutt*, 38 La. Ann. 364; *State v. Anderson*, 52 La. Ann. 101.

*Michigan*. — *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560.

*Minnesota*. — *State v. Ring*, 29 Minn. 78.

*New York*. — *People v. Spiegel*, 75 Hun (N. Y.) 161.

*Virginia*. — *Montague v. Com.*, 10 Gratt. (Va.) 767.

*Wisconsin*. — *Sutton v. Fox*, 55 Wis. 531, 42 Am. Rep. 744.

10. *Colorado Rule*. — *Trinidad v. Simpson*, 5 Colo. 65; *In re Allison*, 13 Colo. 525.

11. *Ignorance Ground of Challenge*. — *Indiana*. — *Lafayette Plankroad Co. v. New Albany*, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246.

*Louisiana*. — *State v. Gay*, 25 La. Ann. 472; *State v. Tazwell*, 30 La. Ann. 884; *State v. Push*, 23 La. Ann. 14.

*Minnesota*. — *State v. Madigan*, 57 Minn. 425.

*Ohio*. — *Dokes v. Soards*, 9 Cinc. L. Bul. 76, 8 Ohio Dec. (Reprint) 621.

*Pennsylvania*. — *Com. v. Jones*, 12 Phila. (Pa.) 550, 34 Leg. Int. (Pa.) 148; *Fisher v. Philadelphia, 4 Brews. (Pa.) 395*.

Whether a juror can read, write, or understand the English language, is a question for the trial court. *State v. Gindry*, 28 La. Ann. 630.

12. See *State v. Pickett*, 103 Iowa 714.

13. *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38; *Yanez v. State*, 6 Tex. App. 429, 32 Am. Rep. 591; *Etheridge v. State*, 8 Tex. App. 133.

14. *Extent of Knowledge Necessary*. — *State v. Ford*, 42 La. Ann. 255; *State v. Dent*, 41 La. Ann. 1082; *State v. Duestrow*, 137 Mo. 44. In the two last cases it was held that the juror was not disqualified because he did not understand the terms "bias" and "prejudice."

15. *Lack of Education*. — *Campbell v. State*, 48 Ga. 353; *Citizens' Bank v. Strauss*, 26 La. Ann. 736; *State v. Lewis*, 28 La. Ann. 84;



however, it is expressly provided by statute that jurors must be able to read and write, and such a provision has been held not to deprive one of the constitutional right of trial by jury.<sup>1</sup> Such a requirement is not satisfied by a mere ability to write one's own name<sup>2</sup> or to read and write some language other than English.<sup>3</sup> And the fact that the constitution requires every elector to be able to read does not conclusively show that one who is a registered elector satisfies such a statutory requirement as to jurors.<sup>4</sup>

(7) *Criminality or Immorality*. — At the common law one was disqualified if he had been convicted of treason, felony, perjury, or conspiracy, or if he had been condemned to a corporal punishment such as would render him infamous.<sup>5</sup> In the *United States* the existence of such a disqualification apart from statute appears not to have been considered, partly, no doubt, because there is usually a statute on the subject. Such statutes generally disqualify from service persons accused or convicted of crime of a certain character;<sup>6</sup> and the statute may properly provide that persons guilty of certain offenses, although not actually prosecuted therefor, shall be ineligible.<sup>7</sup> One was held to be properly excluded when he had grossly misbehaved himself as a juror on previous occasions.<sup>8</sup> But it was held not to be a ground of challenge that on other trials he had not found a verdict for the crown.<sup>9</sup>

(8) *Alienage*. — The fact that a proposed juror is an alien has always been regarded as ground of challenge.<sup>10</sup> One is presumed to be a citizen and so qualified, though born an alien,<sup>11</sup> but such presumption was held to be rebutted by proof of naturalization after the rendition of the verdict.<sup>12</sup>

A Juror Cannot Object to Serve, it has been held, on the ground of alienage;<sup>13</sup> and this would seem to be the correct view, as grounds of disqualification are not generally available to the juror. In *Illinois*, however, it is stated that an alien can claim exemption from service.<sup>14</sup>

(9) *Lack of Property Qualification*. — It seems that at common law it was

*State v. Casey*, 44 La. Ann. 969; *American L. Ins. Co. v. Mahone*, 56 Miss. 180; *Com. v. Winnemore*, 1 Brews. (Pa.) 356.

**Element to Be Considered by Jury Commissioner.** — In *State v. Chase*, 37 La. Ann. 165, it was held that where the statute required a juror to be an "intelligent person," it was proper for the jury commissioners under some conditions to determine the question of intelligence by ability to read and write.

**The Employment of Extraordinary Educational Tests** in the examination of jurors should not, it is stated, be encouraged. *People v. McLaughlin*, 150 N. Y. 365.

1. **Statutory Provisions.** — *State v. Welsor*, 117 Mo. 570.

2. *Johnson v. State*, 21 Tex. App. 368.

3. *Wright v. State*, 12 Tex. App. 163; *Campbell v. State*, 30 Tex. App. 645. And see *Nolen v. State*, 9 Tex. App. 419.

**That the County Is Thinly Populated** is not ground for dispensing with the statutory test of ability to read and write. *Garcia v. State*, 12 Tex. App. 335.

4. **Presumption in Case of Elector.** — *Mabry v. State*, 71 Miss. 716.

5. **Criminals and Immoral Persons.** — 3 Black. Com. 363; Co. Litt. 158a.

6. **Conviction or Accusation of Crime** — *Alabama*. — *Crockett v. State*, 38 Ala. 387.

*Florida*. — *Ellis v. State*, 25 Fla. 702.

*Louisiana*. — *State v. Tazwell*, 30 La. Ann. 884; *State v. Smith*, 33 La. Ann. 1414; *State v. Jackson*, 35 La. Ann. 769.

*South Carolina*. — *Garrett v. Weinberg*, 54 S. Car. 127.

*Texas*. — *Sewell v. State*, 15 Tex. App. 56.

*Virginia*. — *Puryear v. Com.*, 83 Va. 51.

**Moral Unfitness.** — The judge may strike from the panel a person whom he knows to be morally unfit. *State v. Lartigue*, 29 La. Ann. 642.

7. **Guilty Persons Not Prosecuted.** — *Jenkins v. State*, 99 Tenn. 569.

So an Act of Congress provided that, on a prosecution for bigamy or polygamy, one living in a state of bigamy or polygamy should not be competent. *Reynolds v. U. S.*, 98 U. S. 145; *U. S. v. Bassett*, 5 Utah 131.

But a provision that no polygamist shall hold "any office or place of public trust, honor, or emolument," was held not to exclude such a person from service on a jury. *People v. Hopt*, 3 Utah 396.

8. **Misbehavior on Previous Trials.** — *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308.

9. *Reg. v. Sawdon*, 2 Lewin C. C. 117.

10. See the title ALIENS, vol. 2, p. 69.

11. **Presumption of Citizenship.** — *Jordan v. State*, 22 Ga. 546; *Schuster v. State*, 80 Wis. 107. Compare *State v. Salge*, 1 Nev. 455.

12. *Richards v. Moore*, 60 Vt. 449.

**Who Are Aliens.** — See *Judson v. Eslava*, Minor (Ala.) 2; *O'Connor v. State*, 9 Fla. 215. And see generally the title ALIENS, vol. 2, p. 64.

13. **Juror's Right to Object.** — *Lingan v. Marbury*, 1 Cranch (C. C.) 365.

14. *Chase v. People*, 40 Ill. 352.



necessary that the jurors should possess a freehold qualification of some sort.<sup>1</sup> In the *United States* statutes have quite frequently, either expressly or by implication, contained a requirement to this effect.<sup>2</sup> But the requirement is not as frequent now as formerly.<sup>3</sup> A requirement that the juror shall be a freeholder has been held not to require that he own land in the particular county in which he is summoned and resides.<sup>4</sup> In *England*, however, it appears to have been necessary that the freehold be in the county in which the court was held;<sup>5</sup> and the same rule applies in *North Carolina*.<sup>6</sup> The requirement is satisfied if one have an equitable estate to the extent of a freehold;<sup>7</sup> and accordingly a mortgagor in possession is competent,<sup>8</sup> while the holder of a mortgage merely is not.<sup>9</sup> Any kind of freehold estate is sufficient;<sup>10</sup> and a tenant by the curtesy initiate is within the requirement.<sup>11</sup> Where a law required a juror to be the "owner" of real estate, it was held to be sufficient that he was in possession, or had a qualified interest.<sup>12</sup>

(10) *Lack of Household Qualification*. — It is sometimes required by statute that a juror be a householder<sup>13</sup> or that he be either a freeholder or a householder.<sup>14</sup> The term "householder" refers to the civil status of a person, not to his property; and consequently such a requirement does not conflict with a constitutional prohibition of property qualifications in the case of jurors,<sup>15</sup> and one is not a householder merely because he is a freeholder.<sup>16</sup> To be a householder one need not be married;<sup>17</sup> but he must be the head of a domestic establishment of some sort, and consequently a mere boarder or lodger is not within the requirement.<sup>18</sup>

**1. Freehold Qualification.** — *Byrd v. State*, 1 How. (Miss.) 163, citing *Bac. Abr.*, tit. *Juries*, E. 3; 4 *Black. Com.* 302; *Co. Litt.*, § 464. See also 3 *Black. Com.* 362; *Thomas's Case*, 1 *Dyer* 99 b; 2 *Hawk. P. C.*, c. 43, § 12.

In 20 *Am. L. Reg. N. S.* 438 *et seq.*, the early English authorities from the Year Books down are considered at length.

In *Rex v. Higgins*, T. Raym. 485, and *Rex v. Russel*, 2 *Show.* 310, it was decided that this requirement did not extend to cities and boroughs.

**2. Statutes in United States** — *United States*. — *U. S. v. Johnston*, 1 *Cranch* (C. C.) 237.

*Alabama*. — *Ezell v. State*, 102 *Ala.* 101, 103 *Ala.* 8; *Williams v. State*, 109 *Ala.* 64.

*Colorado*. — *Colorado Cent. R. Co. v. Humphrey*, 16 *Colo.* 34.

*Mississippi*. — *Byrd v. State*, 1 *How.* (Miss.) 163; *New Orleans, etc., R. Co. v. Hemphill*, 35 *Miss.* 17.

*North Carolina*. — *State v. Whitley*, 88 *N. Car.* 691; *State v. Powell*, 94 *N. Car.* 965.

*Virginia*. — *Com. v. Stephen*, 4 *Leigh* (Va.) 679; *Dowdy v. Com.*, 9 *Gratt.* (Va.) 727, 60 *Am. Dec.* 314; *Wash v. Com.*, 16 *Gratt.* (Va.) 530.

**3. Freehold Not Necessary.** — In the following cases the statutes were construed as not requiring the juror to be a freeholder:

*Connecticut*. — *Ladd v. Prentice*, 14 *Conn.* 109.

*Illinois*. — *Kerwin v. People*, 96 *Ill.* 206.

*New York*. — *Friery v. People*, 2 *Abb. App. Dec.* (N. Y.) 215.

*North Carolina*. — *State v. Wincroft*, 76 *N. Car.* 38; *State v. Freeman*, 100 *N. Car.* 429.

*South Carolina*. — *State v. Massey*, 2 *Hill L.* (S. Car.) 379; *State v. Williams*, 2 *Hill L.* (S. Car.) 381.

*Texas*. — *Maloy v. State*, 33 *Tex.* 599.

**4. Freehold in Other County.** — *New Orleans,*

*etc., R. Co. v. Hemphill*, 35 *Miss.* 17; *State v. Bryant*, 10 *Yerg.* (Tenn.) 527.

**5. Day v. Com.**, 3 *Gratt.* (Va.) 599, citing *Bac. Abr.*, tit. *Juries*, E. 3; 2 *Hawk. P. C.*, c. 43, § 13. In this particular case the statute required the sheriff to summon "freeholders of his bailiwick," and this was held to refer to the county.

**6. State v. Cooper**, 83 *N. Car.* 671.

**7. Equitable Estate Sufficient.** — *Hawk. P. C.*, c. 43, § 13; *Co. Litt.*, § 464; *Com. v. Carter*, 2 *Va. Cas.* 319; *Moore v. Com.*, 9 *Leigh* (Va.) 639; *Com. v. Burcher*, 2 *Rob.* (Va.) 826; *Com. v. Helmondollor*, 4 *Gratt.* (Va.) 536.

**8. State v. Ragland**, 75 *N. Car.* 12.

**9. Kelley v. People**, 55 *N. Y.* 565, 14 *Am. Rep.* 342.

**10. Quantity of Freehold.** — *Hawk. P. C.*, c. 43, § 12.

**11. State v. Mills**, 91 *N. Car.* 581.

**12. "Owners" of Real Estate.** — *Territory v. Young*, 2 *N. Mex.* 93.

**13. Householders.** — *Lafayette Plankroad Co. v. New Albany, etc., R. Co.*, 13 *Ind.* 90, 74 *Am. Dec.* 246; *Byrd v. State*, 1 *How.* (Miss.) 163; *Redford v. Spokane St. R. Co.*, 15 *Wash.* 419; *State v. Lattin*, 19 *Wash.* 57; *State v. Holedger*, 15 *Wash.* 443.

**14. Ezell v. State**, 102 *Ala.* 101; *Williams v. State*, 109 *Ala.* 64.

**15. Meaning of Term.** — *Nelson v. State*, 57 *Miss.* 286, 34 *Am. Rep.* 444.

**16. Carpenter v. Dame**, 10 *Ind.* 125; *Bradford v. State*, 15 *Ind.* 347.

**17. Marriage Unnecessary.** — *Hall v. State*, 6 *Baxt.* (Tenn.) 522; *Lester v. State*, 2 *Tex. App.* 433.

**18. Head of Family.** — *Aron v. State*, 37 *Ala.* 106; *Maines v. State*, 35 *Tex. Crim.* 109; *Lane v. State*, 29 *Tex. App.* 310, *disapproving* *Robles v. State*, 5 *Tex. App.* 346; *Parmeles Case*, 2 *Mart.* (La.) 313. And see *Rondeau v. New*



(11) *Nonpayment of Taxes.* — The statute sometimes requires that jurors shall be persons paying taxes,<sup>1</sup> but a nonpayment not resulting from the default of the juror will not disqualify.<sup>2</sup>

**Name on Assessment Roll.** — It is sometimes provided that the juror's name must appear on the assessment roll,<sup>3</sup> but there is no such requirement in the absence of statute.<sup>4</sup>

(12) *Lack of Electoral Qualifications.* — It is quite frequently provided that one must be an elector or have the qualifications of an elector in order to be competent as a juror.<sup>5</sup>

(13) *Disqualification by Nonresidence.* — At common law it was required that the jury be returned from the neighborhood of the place where the cause of the action was laid or the crime was committed, and this requirement was held to be satisfied if the jury came from the same county.<sup>6</sup> The question of the existence and effect of such a requirement in the *United States* has

Orleans Imp., etc., Co., 15 La. 160, as to the requirement that a juror be a housekeeper.

One is not a householder because he has a rented store in which he sleeps. *Brown v. State*, 57 Miss. 424.

The status of a person as a householder is not affected by the fact that the title to property on which he lives with his family is in his wife's name. *Sylvester v. State*, 72 Ala. 201.

**1. Payment of Taxes.** — *State v. Carland*, 90 N. Car. 668; *State v. Haywood*, 94 N. Car. 847; *State v. Hargrave*, 100 N. Car. 484; *State v. Gardner*, 104 N. Car. 739; *State v. Davis*, 109 N. Car. 780; *State v. Sherman*, 115 N. Car. 773; *Sellers v. Sellers*, 98 N. Car. 13.

A requirement that persons shall have paid their taxes for the preceding year refers to the previous fiscal year, and not to the year preceding the trial. *State v. Sherman*, 115 N. Car. 773. And see other cases *supra*, this note.

**Payment of a Poll or Capitation Tax** is sometimes required. *Collins v. State*, 31 Fla. 574; *Smith v. State*, 29 Fla. 408; *Nail v. State*, 70 Miss. 32.

**Time of Disqualification.** — One is not disqualified by nonpayment of the capitation tax until after the time within which he may pay such tax without coercion. *Collins v. State*, 31 Fla. 574.

**2. Involuntary Nonpayment.** — *State v. Lowe*, 56 Kan. 594; *State v. Heaton*, 77 N. Car. 505.

**3. Name on Assessment Roll.** — *People v. Thompson*, 34 Cal. 671; *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322; *Schlacker v. Ashland Iron Min. Co.*, 89 Mich. 253; *People v. Thacker*, 108 Mich. 652; *Niles v. Steere*, 102 Mich. 328; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342.

The fact that the names of two persons who were not on the assessment roll appeared upon the panel is immaterial if they were excused before the jury was made up. *People v. Young*, 108 Cal. 8.

**Firm Property.** — A requirement that the juror shall have been assessed on the last assessment roll on property belonging to him was held to be satisfied by an assessment on firm property belonging to him and his partner. *People v. Owens*, 123 Cal. 482.

In a Federal Court it was held that the *California* Code provision just referred to was satisfied if the juror paid taxes on property belonging to him though assessed in the name of another, the purpose of such statute being

merely to obtain a substantial class of jurors. *U. S. v. Hackett*, 29 Fed. Rep. 848.

**4. State v. Doan**, 2 Root (Conn.) 451; *State v. Ching Ling*, 16 Oregon 419; *State v. Harding*, 16 Oregon 493.

**5. Electoral Qualifications** — *California.* — *Sampson v. Schaffer*, 3 Cal. 107; *People v. Peralta*, 4 Cal. 175.

*Iowa.* — *State v. Groome*, 10 Iowa 308.

*Michigan.* — *People v. Considine*, 105 Mich. 149; *People v. Wright*, 89 Mich. 70.

*Mississippi.* — *Nail v. State*, 70 Miss. 32; *Dixon v. State*, 74 Miss. 271.

*Nebraska.* — *Hart v. State*, 14 Neb. 572; *Omaha, etc., R. Co. v. Cook*, 37 Neb. 435.

*Wisconsin.* — *Lask v. U. S.*, 1 Pinn. (Wis.) 77.

See also *Anderson v. State*, 5 Ark. 444; *State v. Morgan*, 20 La. Ann. 442; *State v. Da Rocha*, 20 La. Ann. 356; *Compton v. Legras*, 24 La. Ann. 259; *State v. Courtney*, 28 La. Ann. 789; *State v. Fairlamb*, 121 Mo. 137, as to the duty of selecting qualified electors as jurors.

A statute providing that persons qualified to vote on the imposition of a tax or expenditure of money in a town should be liable to serve, was held to define the qualification of jurors as well as the liability to serve. *State v. Davis*, 12 R. I. 492.

**Necessity of Registration.** — Under a requirement that jurors must be registered voters, a juror was held not incompetent because he had not registered, if the time for registration had not expired. *State v. Salge*, 1 Nev. 455; *State v. Waterman*, 1 Nev. 543.

**Constitutionality of Statute.** — In *Gibbs v. State*, 3 Heisk. (Tenn.) 72, it was held that a *Tennessee* act requiring jurors to be qualified voters was unconstitutional, as depriving the defendant of an impartial jury, in view of previous legislation which had deprived a large portion of the population of the right to vote. See further as to this requirement during the period of reconstruction, *State v. Holmes*, 63 N. Car. 18.

**A State Constitutional Provision** that no one shall be a juror if not entitled to vote and hold office was held to apply only to disabilities imposed by the state constitution, and not to those imposed by the Fourteenth Amendment to the *United States* Constitution. *Sands v. Com.*, 21 Gratt. (Va.) 871.

**6. Jury Must Come from County of Commission of Crime.** — 4 Black. Com. 350; 2 Hawk. P. C.,



generally been considered in connection with the validity of a particular statute or practice in regard to the selection of jurymen, and it has been held that an act of the legislature authorizing the trial of the defendant outside of the county where the offense is charged to have been committed is invalid if the state constitution provides that the right of trial by jury shall remain inviolate.<sup>1</sup> This requirement does not, however, prevent choosing the jurors from a particular part of the county,<sup>2</sup> and in *Virginia* the statute requires that the jury be made up of persons residing remote from the place of commission of the crime.<sup>3</sup> It has likewise been held proper to require the taking of the jury from the district comprised within the jurisdictional limits of the court.<sup>4</sup> While a disregard of the statutory or constitutional requirement in summoning the jury as a whole is ground for a challenge to the array,<sup>5</sup> the objection that a particular juror is not a resident of the county or district is, it seems, merely a ground of challenge to him individually.<sup>6</sup>

**Citizenship and Residence in State.** — One may be a resident of the state within a requirement of the jury law though he is a citizen of another state;<sup>7</sup> and a person may be a citizen of the state within a statutory requirement though he has not acquired the right to vote there.<sup>8</sup> No particular length of residence is necessary<sup>9</sup> unless required by statute.<sup>10</sup> The question whether one who has left the state has lost his qualifications as a juror depends, as generally in questions of domicil and citizenship, upon his intention to remain away from the state.<sup>11</sup>

(14) *Occupancy of Public Office.* — Public officers, though frequently exempt

c. 40, § 1; 2 Hale P. C. 264; *People v. Powell*, 87 Cal. 348; *Swart v. Kimball*, 43 Mich. 448; *State v. Kemp*, 34 Minn. 61; *Goodson v. U. S.*, 7 Okla. 117.

1. **Constitutionality of Statute** — *Alabama.* — *Ex p. Rivers*, 40 Ala. 712.

*Arkansas.* — *Osborn v. State*, 24 Ark. 629.

*California.* — *People v. Powell*, 87 Cal. 348.

*Illinois.* — *Buckrice v. People*, 110 Ill. 29. See also *Watt v. People*, 126 Ill. 9.

*Kansas.* — *State v. Knapp*, 40 Kan. 148. See also *State v. Potter*, 16 Kan. 80; *State v. Price*, 55 Kan. 606.

*Michigan.* — *Swart v. Kimball*, 43 Mich. 448.

*Minnesota.* — *State v. Kemp*, 34 Minn. 61. See also *State v. Everett*, 14 Minn. 439.

*Missouri.* — *State v. McGraw*, 87 Mo. 161.

*Tennessee.* — *Kirk v. State*, 1 Coldw. (Tenn.) 344.

*Vermont.* — *State v. Howard*, 31 Vt. 414.

*Wisconsin.* — *Wheeler v. State*, 24 Wis. 52. See also *Shaffel v. State*, 97 Wis. 377.

See also *Com. v. Parker*, 2 Pick. (Mass.) 550; *State v. McCarty*, 52 Ohio St. 363. And see the title *VENUE*.

**Unorganized Territory** attached to an organized county for judicial purposes is to be considered a part of the county within this requirement. *Ex p. Crawford*, 12 Neb. 379; *Groom v. State*, 23 Tex. App. 82.

2. **Selection from Particular Part of County.** — *Colt v. Eves*, 12 Conn. 243; *State v. Kemp*, 34 Minn. 61; *Gardiner v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 193; *Ellis v. State*, 92 Tenn. 85; *Shaffel v. State*, 97 Tenn. 377. Compare *Zanone v. State*, 97 Tenn. 101.

In the United States Courts jurors need not be returned from the whole district, but may be taken from some division thereof. Rev. Stat. U. S., § 802; U. S. v. Stowell, 2 Curt. (U. S.) 153; U. S. v. Richardson, 28 Fed. Rep. 69; U. S. v. Chaires, 40 Fed. Rep. 820. And see U. S. v. Mays, 1 Idaho 763.

3. **Virginia Requirement.** — *Craft v. Com.*, 24 Gratt. (Va.) 602; *Lawrence v. Com.*, 81 Va. 484.

4. **Jurisdictional Limits of Court.** — *State v. Kemp*, 34 Minn. 61; *Opinion of Justices*, 41 N. H. 550; *Olive v. State*, 11 Neb. 1.

The Line Between Two Parishes Not Being Definitely Settled, it was held that a man living near it might properly serve as a juror in the parish in which he was registered as a voter and in which he claimed a residence. *State v. Gonsoulin*, 38 La. Ann. 459.

5. **Challenge to Array.** — *Beery v. U. S.*, 2 Colo. 186; *People v. Coughlin*, 67 Mich. 466; *Clark v. Saline County*, 9 Neb. 516.

6. **Challenge to Individual Juror.** — *Amos v. State*, 96 Ala. 120; *People v. Wallace*, 101 Cal. 281; *People v. Lange*, 56 Mich. 550; *Lawrence v. Com.*, 81 Va. 484.

7. **Residence in State.** — *U. S. v. Nardello*, 4 Mackey (D. C.) 503; *U. S. v. Cross*, 20 D. C. 365.

So it was held that the legislature could impose jury duty upon a citizen of another state, he having resided within the state for a certain part of the year. *People v. Plimley*, 8 N. Y. App. Div. 323, 17 Misc. (N. Y.) 457, affirmed 150 N. Y. 571.

8. **Citizen of State.** — *Anderson v. State*, 5 Ark. 444; *State v. France*, 76 Mo. 681; *State v. Fairlamb*, 121 Mo. 137.

9. **Length of Residence.** — *Thompson v. Paige*, 16 Cal. 77; *Thomas v. State*, 27 Ga. 287; *People v. Johnson*, 81 Mich. 573; *Byrd v. State*, 1 How. (Miss.) 163.

10. See *State v. Kennedy*, 8 Rob. (La.) 590.

11. **Persons Leaving State.** — *People v. Stonecipher*, 6 Cal. 405; *State v. Burke*, 107 Iowa 659; *Graham v. Trimmer*, 6 Kan. 230; *State v. Alexander*, 35 La. Ann. 1100; *State v. Taylor*, 134 Mo. 109; *Com. v. Stokes*, 4 York Leg. Rec. (Pa.) 187. And see the title *CITIZENSHIP*, vol. 6, p. 32; *DOMICIL*, vol. 10, p. 20



from the requirement of service as jurors,<sup>1</sup> are not disqualified<sup>2</sup> unless a statute so provides.<sup>3</sup> Accordingly, a coroner may serve<sup>4</sup> even though he held the inquest on the body of the person for whose killing the prosecution is instituted.<sup>5</sup> A deputy of the prosecuting attorney<sup>6</sup> or one employed by the sheriff to serve subpoenas for witnesses in the particular prosecution<sup>7</sup> is not competent.

**Officer of Municipality Party to Suit.** — A member of the city council has been considered disqualified in an action by or against the city, though the statute has removed his disqualification as an inhabitant of the city.<sup>8</sup> And a member of the council which had rejected a claim was excluded on the trial of an action on the claim though by statute the mere fact that he was a councilman did not exclude him.<sup>9</sup> A councilman before whom, as mayor *pro tempore*, one was convicted of violation of an ordinance, cannot sit on an appeal from such decision.<sup>10</sup> Officials whose duties are of such a nature as to require their personal presence may generally be excused in the discretion of the court.<sup>11</sup>

(15) **Previous Service as Juror.** — In a number of states the fact that one has performed jury service within a prescribed time is made a cause of challenge to him when summoned for further service, the object of these statutes being to exclude "professional" jurors.<sup>12</sup> The statutes are sometimes in terms applicable to tales jurors exclusively and not to members of the regular panel.<sup>13</sup> When the disqualification in terms applies to jurors generally, it has been held to apply to talesmen as well as members of the regular panel;<sup>14</sup> but a *Vermont* statute was differently construed.<sup>15</sup> A struck or special juror

1. **Public Officers.** — See *infra*, this section, *Exemptions from Jury Service*.

2. See *Page v. Lewis*, 26 Me. 360; *Hunter v. Hume*, 88 Va. 240.

3. **Statutory Disqualification.** — *Ladd v. State*, 17 Fla. 215.

4. **Coroners.** — *State v. Wright*, 53 Me. 328.

5. *O'Connor v. State*, 9 Fla. 215.

**Bailiff of Grand Jury.** — It was held that one could serve though he had been the bailiff of the grand jury which returned an indictment, he not being present at the deliberations of the grand jury. *Spittorff v. State*, 108 Ind. 171.

6. **Deputy of Prosecuting Attorney.** — *Block v. State*, 100 Ind. 357.

**A Constable Charged with the Enforcement of the Liquor Law** is not disqualified to sit in a liquor case in another precinct. *State v. Cosgrove*, 16 R. I. 411.

7. **Sheriff's Employee.** — *Zimmerman v. State*, 115 Ind. 129.

8. **Officer of Municipal Party.** — *Boston v. Baldwin*, 139 Mass. 315.

9. *Lancaster County v. Lancaster City*, 170 Pa. St. 108. Compare *Scranton v. Gore*, 124 Pa. St. 595.

10. *Anderson v. Fowler*, 48 S. Car. 8.

11. **Excusing Officers.** — *Pierson v. State*, 99 Ala. 149; *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431; *Aaronson v. State*, 56 N. J. L. 9; *Piper's Case*, 2 Browne (Pa.) 59; *Kennedy v. State*, 19 Tex. App. 618. See also *infra*, this section, *Exemptions from Jury Service*.

12. **Previous Service as Juror** — *Indiana*. — *Christie v. State*, 44 Ind. 408; *Barker v. Hine*, 54 Ind. 542; *Kassebaum v. State*, 45 Ind. 277; *Demaree v. State*, 45 Ind. 299; *Williams v. State*, 45 Ind. 299; *Goshen v. England*, 119 Ind. 368.

*Kansas*. — *Atchison, etc., R. Co. v. Smedeger*, 5 Kan. App. 700.

*Massachusetts*. — *Ex p. Brown*, 8 Pick. (Mass.) 504. See also *Provident Sav. Inst. v. Burnham*, 128 Mass. 458.

*Michigan*. — *People v. Thacker*, 108 Mich. 652.

*Nebraska*. — *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825.

*Tennessee*. — *Smith v. State*, 102 Tenn. 721.

*Texas*. — *Welsh v. State*, 3 Tex. App. 414. See also *Monk v. State*, 27 Tex. App. 450.

See also *Bellows v. Williams, Kirby* (Conn.) 166; *Irwin v. Irwin*, 3 Okla. 184; *Conkey v. Northern Bank*, 6 Wis. 447.

**In Federal Courts.** — Since the United States statutes expressly determine the time within which former service shall disqualify a juror, a state provision in that regard does not apply in the case of trials in the federal courts. *Walker v. Collins*, 50 Fed. Rep. 737, 4 U. S. App. 406. And see *U. S. v. Nardello*, 4 Mackey (D. C.) 503.

13. **Disqualification Not Applicable to Regular Panel** — *Colorado*. — *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254; *Brooke v. People*, 23 Colo. 375.

*Illinois*. — *Chicago, etc., R. Co. v. Eaton*, 136 Ill. 9.

*Indiana*. — *Goshen v. England*, 119 Ind. 368.

*Iowa*. — *Barnes v. Newton*, 46 Iowa 567; *State v. Standley*, 76 Iowa 215.

*Mississippi*. — *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738.

*North Carolina*. — *State v. Brittain*, 89 N. Car. 481.

*Ohio*. — *Bond v. State*, 23 Ohio St. 349; *Taylor v. State*, 36 Ohio St. 212.

14. **Statute Applicable to Talesmen.** — *Christie v. State*, 44 Ind. 408; *Kassebaum v. State*, 45 Ind. 277; *Demaree v. State*, 45 Ind. 299; *Kansas City v. Kirkham*, (Kan. App. 1900) 59 Pac. Rep. 675; *Wiseman v. Bruns*, 36 Neb. 467.

15. *Plattsburg First Nat. Bank v. Post*, 66 Vt. 237.



has been held not to be a petit juror within the meaning of such a disqualification,<sup>1</sup> and such a juror is clearly not included by a statute in terms applicable to tales jurors only.<sup>2</sup> Service as a grand juror within the time named in the statute has been held to be within such a statutory provision.<sup>3</sup>

**Place and Time of Previous Service.** — The statute sometimes requires that the previous service shall have been in the same court.<sup>4</sup> In some cases it has been decided that the previous disqualifying service must have been at a previous term, the mere fact that one has served already at the same term being insufficient.<sup>5</sup>

**Character of Previous Case.** — Previous service as talesman in a street-opening case in the same court has been held to disqualify;<sup>6</sup> but service on a sheriff's jury in a road case was held to be insufficient.<sup>7</sup>

**Actual Service** is, it seems, necessary.<sup>8</sup> So one who was merely summoned on a regular panel, but was discharged on the first day of his attendance, because there was no jury case to try, was not disqualified from subsequent service.<sup>9</sup> But the service is not rendered insufficient for purposes of future disqualification by the fact that, after the hearing of testimony for a whole day, the jury is discharged without a verdict and a judgment is rendered by consent.<sup>10</sup>

(16) *Party to Pending Suit.* — It is occasionally provided by statute that one shall be incompetent if he has a suit pending at the same term,<sup>11</sup> it being intended thereby to prevent combination between the jurors to render verdicts in favor of each other.<sup>12</sup> The fact that the other suit is not actually tried at that term is immaterial,<sup>13</sup> as is the fact that it has been decided before the suit in which the question of the juror's competency arises.<sup>14</sup>

In North Carolina the statute excludes persons who have a "suit pending and at issue,"<sup>15</sup> and the juror is not disqualified if the suit is not at issue.<sup>16</sup> The prosecutor in a pending criminal case is not within the provision,<sup>17</sup> nor is one who is interested merely as a creditor in a fund for which a receiver has sued included by the statute.<sup>18</sup>

(17) *Disloyalty.* — In an early case the failure to take an oath of loyalty as required by the statute was held to be a ground for a new trial,<sup>19</sup> and avowed

1. **Special Jurors.** — Moschell v. State, 53 N. J. L. 498.

2. State v. Whitfield, 92 N. Car. 831; State v. Starnes, 94 N. Car. 973.

3. **Service as Grand Juror.** — Bissell v. Ryan, 23 Ill. 566; Brooks v. Bruyn, 35 Ill. 392; Ex p. Brown, 8 Pick. (Mass.) 504.

4. **Service in Same Court.** — Courvoisier v. Raymond, 23 Colo. 113; State v. Outerbridge, 82 N. Car. 617; State v. Howard, 82 N. Car. 623; State v. Whitfield, 92 N. Car. 831.

5. **Previous Service at Same Term.** — Burden v. People, 26 Mich. 162; Houston Water Works Co. v. Harris, 3 Tex. Civ. App. 475; Garcia v. State, 5 Tex. App. 337; Tuttle v. State, 6 Tex. App. 556; Myers v. State, 7 Tex. App. 640. Compare Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

6. **A Calendar Year** has been held to be intended by a provision that one shall not serve more than four weeks in one year, and consequently one who has served that length of time in December was held to be capable of serving in the next January, though this was in the same term. Atlanta, etc., Air Line R. Co. v. Ray, 70 Ga. 674.

7. **Character of Previous Case.** — Williams v. Grand Rapids, 53 Mich. 271.

8. Brewer v. Tyngham, 14 Pick. (Mass.) 196. Here the court considered that the stat-

ute contemplated "service as a grand juror or traverse juror, in some court."

9. **Actual Service Necessary.** — State v. Thorne, 81 N. Car. 555; State v. Brittain, 89 N. Car. 481; State v. Whitfield, 92 N. Car. 831.

10. State v. Lowe, 56 Kan. 594.

11. Famulener v. Anderson, 15 Ohio St. 473.

12. **Suit Pending for Trial at Same Term.** — Claggett's Case, 2 Cranch (C. C.) 247; Plummer v. People, 74 Ill. 361. Compare State v. Ankrim. Tappan (Ohio) 112.

13. **One Tried and Acquitted of a Criminal Charge** at the same term is incompetent under such a statute. Murphy v. State, 9 Lea (Tenn.) 373.

14. Riley v. Bussell, 1 Heisk. (Tenn.) 295.

15. **Actual Trial Unnecessary.** — Plummer v. People, 74 Ill. 361; Riley v. Bussell, 1 Heisk. (Tenn.) 294; Hunt v. State, 2 Shannon Tenn. Cas. 395.

16. **Previous Decision.** — Murphy v. State, 9 Lea (Tenn.) 373.

17. **Party to a Suit "Pending and at Issue."** — State v. Liles, 77 N. Car. 496. See also State v. Oldham, 1 Hayw. (2 N. Car.) 450.

18. Hodges v. Lassiter, 96 N. Car. 351; State v. Smarr, 121 N. Car. 669.

19. State v. Brady, 107 N. Car. 822.

20. Vickers v. Leigh, 104 N. Car. 248.

21. **Disloyalty.** — Shane v. Clarke, 3 Har. & M.



present disloyalty to the government is a sufficient cause for the discharge of a juror, even if it does not absolutely require such a discharge.<sup>1</sup> By a statute passed during the civil war, a joinder in or giving aid to an insurrection against the United States was made an absolute disqualification for service in the United States courts.<sup>2</sup>

(18) *Want of Religious Belief.* — There is apparently no clear decision as to whether one is disqualified to serve by a want of religious belief.<sup>3</sup> But it has been held that even if this is a ground of disqualification, it is not available after trial.<sup>4</sup>

c. CAUSES PECULIAR TO PARTICULAR CASE — (1) *Prejudice as Regards Parties or Persons Interested in Case* — (a) *Relationship* — aa. GENERAL RULE OF EXCLUSION. — Relationship to a party, either by consanguinity or by affinity, has always been considered a ground of disqualification,<sup>5</sup> and this is now the rule either by the common law or by express statutory provision.<sup>6</sup> It was stated by Sir Edward Coke that relationship in any degree is sufficient for this purpose,<sup>7</sup> but later writers state that the relationship must be within the ninth degree, calculated according to the civil-law rules.<sup>8</sup> And this is apparently the law in the United States when not controlled by statute.<sup>9</sup> But the statute sometimes restricts the disqualification to a lower number of degrees.<sup>10</sup> In *South Carolina* it seems to be considered that since there is no statute fixing the degree of relationship the question whether the relationship is such as to require the rejection of the juror is purely within the discretion of the trial judge.<sup>11</sup> Relationship to an administrator who is a party to the record has the same effect as if it were to one acting in his own right.<sup>12</sup> A party cannot, it seems, object that a juror is related to him.<sup>13</sup>

Ignorance on the Part of the Juror during the trial of the existence of the relationship does not, it has been held, remove the disqualification.<sup>14</sup> But in other cases a different view is taken, on the ground that the relationship could not have been prejudicial if not known to the juror.<sup>15</sup>

bb. RELATIONSHIP BY MARRIAGE. — Affinity, or relationship by marriage, within the prohibited degrees is, as above stated, a ground of disqualification at the

(Md.) 101. *Contra*, *Gilbert v. Rider*, Kirby (Conn.) 184.

1. *Klinger v. Missouri*, 13 Wall. (U. S.) 257.

2. Rev. Stat. U. S., § 820; *U. S. v. Butler*, 1 Hughes (U. S.) 457, 25 Fed. Cas. No. 14,700; *U. S. v. Hammond*, 2 Woods (U. S.) 197.

3. *Want of Religious Belief.* — In *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308, it was held proper to exclude one who had grossly misbehaved himself as a juror in another case and who was destitute of any religious belief.

Where a statute required that jurors should be electors, and provided that electors must not belong to any organization teaching bigamy or polygamy, a member of the Mormon church was held not to be a competent juror. *Territory v. Evans*, 2 Idaho 627.

4. *McClure v. State*, 1 Verg. (Tenn.) 206.

5. *Relationship.* — *Co. Litt.* 157a.

6. *Rust v. Shackleford*, 47 Ga. 538; *State v. Hobgood*, 46 La. Ann. 855; *State v. Hill*, 46 La. Ann. 736; *Hasceig v. Tripp*, 20 Mich. 216; *State v. Walton*, 74 Mo. 270; *Veramendi v. Hutchins*, 56 Tex. 414. And see the other cases cited in this subsection.

7. *Degree of Relationship.* — *Co. Litt.* 157a.

8. *Finch's Law* 401; 3 Black. Com. 363; 1 Chitty's Crim. Law 541.

9. *State v. Williams*, 9 Houst. (Del.) 508; *O'Connor v. State*, 9 Fla. 215; *State v. Perry*,

*Busb. L.* (44 N. Car.) 330; *State v. Potts*, 100 N. Car. 457.

10. *Statutory Provision.* — See *Hudspeth v. Herston*, 64 Ind. 133; *Hardy v. Sprowle*, 32 Me. 310; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825; *People v. Clark*, 62 Hun (N. Y.) 84, 142 N. Y. 643; *Kahn v. Reedy*, 8 Ohio Cir. Ct. 345, 4 Ohio Cir. Dec. 284; *Hamilton v. State*, 101 Tenn. 417; *Churchill v. Churchill*, 12 Vt. 661.

11. *South Carolina Rule.* — *State v. Merriman*, 34 S. Car. 16. And see *Sims v. Jones*, 43 S. Car. 91.

12. *Relationship to Administrator.* — *Balsbaugh v. Frazer*, 19 Pa. St. 95.

13. *Objection by Related Party.* — *State v. Ketchey*, 70 N. Car. 621; *Wright v. Smith*, 104 Ga. 174. See also *Sikes v. State*, 105 Ga. 592.

14. *Ignorance of Juror* — *Delaware*. — *State v. Williams*, 9 Houst. (Del.) 508.

*Georgia.* — *Ledford v. State*, 75 Ga. 856; *McElhannon v. State*, 99 Ga. 672; *Moore v. Farmers' Mut. Ins. Assoc.*, 107 Ga. 199; *University Bank v. Tuck*, 107 Ga. 211.

*Indiana.* — *Tegarden v. Phillips*, 14 Ind. App. 27; *Hudspeth v. Herston*, 64 Ind. 133. But see *Hodges v. Bales*, 102 Ind. 494.

*Maine.* — *Jewell v. Jewell*, 84 Me. 304.

15. *Northcutt v. Juett*, (Ky. 1896) 36 S. W. Rep. 179; *Salisbury v. McClaskey*, 26 Hun (N. Y.) 262; *Travis v. Com.*, 106 Pa. St. 597.



common law.<sup>1</sup> And the statute generally names affinity as well as consanguinity as a ground of disqualification.<sup>2</sup> Such relationship by marriage or affinity does not exist, however, merely because one of the parties has a blood relation who is married to a blood relation of the juror. Either the party or the juror must be the consort of one related to the other by blood.<sup>3</sup> But the court may properly exclude one on account of such marriage of his blood relation to a blood relation of a party.<sup>4</sup> The disqualification of relationship has been held to exist when the wives of the juror and of a party to the suit are blood relations,<sup>5</sup> though the weight of authority is perhaps adverse to this view.<sup>6</sup>

**Termination of Disqualification.** — Although the disqualification arising from relationship by marriage has existed, it ceases upon the death of the consort through whom it arose, unless there is living issue of the marriage.<sup>7</sup> And it has been held that the burden is on the challenging party to show the existence of such issue.<sup>8</sup>

*cc.* **RELATIONSHIP TO PERSON INTERESTED BUT NOT PARTY.** — The consanguinity or affinity which disqualifies need not be to a party of record, provided it be to one who is substantially interested in the decision,<sup>9</sup> and relationship to a

**1. Affinity** — *England*. — Co. Litt. 157a; Marshall v. Eure, 1 Dyer 376; Mounson v. West, 1 Leon. 88.

*Colorado*. — Buddee v. Spangler, 12 Colo. 216.  
*Georgia*. — Miller v. State, 91 Ga. 186.

*Indiana*. — Trullinger v. Webb, 3 Ind. 198;  
Dearmond v. Dearmond, 10 Ind. 191.

*Kentucky*. — Dailey v. Gaines, 1 Dana (Ky.) 529.

*New Jersey*. — Patterson v. State, 48 N. J. L. 381; Den v. Clark, 1 N. J. L. 509; Vannoy v. Givens, 23 N. J. L. 201.

*New York*. — See Cain v. Ingham, 7 Cow. (N. Y.) 478.

*North Carolina*. — State v. Potts, 100 N. Car. 457.

*Pennsylvania*. — Wirebach v. Easton First Nat. Bank, 97 Pa. St. 543, 39 Am. Rep. 821.  
But see Todd v. Gray, 16 S. Car. 635.

In Missouri relationship by marriage is apparently not considered a disqualification unless a bias on the part of the juror in favor of his relative likewise appears. Mahaney v. St. Louis, etc., R. Co., 108 Mo. 191.

**2. Statutory Provisions.** — See Hardy v. Sprowle, 32 Me. 310; People v. Clark, 62 Hun (N. Y.) 84.

**3. Marriage of Kinsmen Insufficient** — *Alabama*. — Kirby v. State, 89 Ala. 63.

*Georgia*. — Oneal v. State, 47 Ga. 230; McKinney v. McKinney, 72 Ga. 80; Burns v. State, 89 Ga. 527; Central R., etc., Co. v. Roberts, 91 Ga. 513; Keener v. State, 97 Ga. 389; McDuffie v. State, 90 Ga. 786.

*Maine*. — Chase v. Jennings, 38 Me. 44.

*Massachusetts*. — Bigelow v. Sprague, 140 Mass. 425.

*New Jersey*. — Patterson v. State, 48 N. J. L. 381.

*New York*. — Higbe v. Leonard, 1 Den. (N. Y.) 186.

*Pennsylvania*. — Rank v. Shewey, 4 Watts (Pa.) 218.

*Tennessee*. — Waterhouse v. Martin, Peck (Tenn.) 390.

*Texas*. — Johnston v. Richardson, 52 Tex. 481.

See also AFFINITY, vol. I, p. 911.

**4. Discretion of Court.** — Williamson v. Mayer, 117 Ala. 253; Geiger v. Payne, 102 Iowa 581.

And see Hartford Bank v. Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274.

**5. Consanguinity of Wives.** — Paddock v. Wells, 2 Barb. Ch. (N. Y.) 333; Foot v. Morgan, 1 Hill (N. Y.) 654. And see Miley v. Lebanon Nat. Bank, 1 Pearson (Pa.) 541.

**6. Tegarden v. Phillips**, 14 Ind. App. 27; Poydras v. Livingston, 5 Mart. (La.) 293; Chinn v. State, 47 Ohio St. 575; Hume v. Commercial Bank, 10 Lea (Tenn.) 1, 43 Am. Rep. 290. See also AFFINITY, vol. I, p. 912.

**7. Death of Consort Without Issue** — *England*. — Mounson v. West, 1 Leon. 88; Stratford's Case, Year Book 10 Hen. VII., p. 7.

*Florida*. — Morrison v. McKinnon, 12 Fla. 552.

*Georgia*. — Miller v. State, 97 Ga. 653.

*Indiana*. — Dearmond v. Dearmond, 10 Ind. 191. And see Hodges v. Bales, 102 Ind. 494.

*Massachusetts*. — Bigelow v. Sprague, 140 Mass. 425.

*New Jersey*. — Vannoy v. Givens, 23 N. J. L. 201.

*New York*. — Cain v. Ingham, 7 Cow. (N. Y.) 479, note; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 333; Carman v. Newell, 1 Den. (N. Y.) 25; Foot v. Morgan, 1 Hill (N. Y.) 654.

*North Carolina*. — State v. Shaw, 3 Ired. L. (25 N. Car.) 532.

*Tennessee*. — Goodall v. Thurman, 1 Head (Tenn.) 209.

*Virginia*. — Jaques v. Com., 10 Gratt. (Va.) 690.

**8. Burden of Proof as to Issue.** — Miller v. State, 97 Ga. 653; State v. Shaw, 3 Ired. L. (25 N. Car.) 532. *Contra*, Jaques v. Com., 10 Gratt. (Va.) 690.

**9. Relationship to Party in Interest.** — Woodbridge v. Raymond, Kirby (Conn.) 280; Houston, etc., R. Co. v. Terrell, 69 Tex. 650; Davidson v. Wallingford, (Tex. Civ. App. 1895) 30 S. W. Rep. 286; Texas, etc., R. Co. v. Elliott, (Tex. Civ. App. 1899) 54 S. W. Rep. 410; Jaques v. Com., 10 Gratt. (Va.) 690.

For cases in which the person to whom the juror was related was held not to be interested



surety for the prosecution of the suit has been held to disqualify.<sup>1</sup>

**Relationship to Stockholders of Corporate Party.** — It has been held from an early date that relationship to members or stockholders in a corporation which is a party to the cause is ground of disqualification.<sup>2</sup> This applies to relationship to members of a mutual-insurance company who are liable for assessments;<sup>3</sup> and the fact that the juror is ignorant that his relative is a member is immaterial.<sup>4</sup>

**In Criminal Cases** a relative of the prosecutor is incompetent;<sup>5</sup> and this principle was extended to the case of a relative of a county commissioner who was active in the prosecution beyond the requirements of his official position.<sup>6</sup> Relationship to a person injured by the commission of the crime has also been considered a ground of disqualification.<sup>7</sup> In one case relationship to the person benefited by the commission of the crime was held to be ground for challenge.<sup>8</sup>

*dd.* **RELATIONSHIP TO COUNSEL.** — A juror has been generally held not to be disqualified by the fact that he is related to one of the counsel in the cause,<sup>9</sup>

in the litigation within the rule, see *Arkansas Southern R. Co. v. Loughridge*, 65 Ark. 300; *Faith v. Atlanta*, 78 Ga. 779; *Fulton v. Cummings*, 132 Ind. 453; *Seavy v. Dearborn*, 19 N. H. 351.

**Relationship to Witness.** — In *Beall v. Clark*, 71 Ga. 818, it was held that a half brother of an important witness for the plaintiff, to whom a salaried position was promised in case the plaintiff was successful, was incompetent.

But in *State v. Christian*, 30 La. Ann. 367, it was held that the refusal to exclude a juror who was a brother of a witness whom the defendant's counsel announced that he would seek to impeach was not ground for reversal, though in some cases it would be proper to exclude such a juror.

**1. Relationship to Plaintiff's Surety.** — *Sehorn v. Williams*, 6 Jones L. (51 N. Car.) 575.

**The Surety on a Claim Bond** filed in a suit having an interest therein which is conditional and contingent only, his relatives are not disqualified. *Larkin v. Baty*, 111 Ala. 307.

**Relative of Person Similarly Interested.** — The court may, it seems, set aside jurors related to another person indicted for the same offense, or interested in the same question. *Hartford Bank v. Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274; *Smith v. State*, 61 Miss. 754.

**2. Relationship to Members of Corporation.** — *Co. Litt.* 157a; *Bac. Abr.*, tit. *Juries*, E. 5; *Young v. Marine Ins. Co.*, 1 Cranch (C. C.) 452; *Quinebaug Bank v. Leavens*, 20 Conn. 87, 50 Am. Dec. 272; *Georgia R. Co. v. Hart*, 60 Ga. 550; *Georgia R. Co. v. Cole*, 73 Ga. 713; *University Bank v. Tuck*, 107 Ga. 211; *Irvine v. M., etc., Bank*, 1 Pittsb. (Pa.) 422.

**Exercise of Discretion.** — In *National Bank v. Ragland*, (Tex. Civ. App. 1899) 51 S. W. Rep. 661, where the statute defined a challenge for cause as an objection disqualifying the juror in the opinion of the court, it was held to be a proper exercise of discretion to sustain a challenge for relationship to a corporate party.

**Criminal Case.** — It has been held that on a prosecution for destroying corporate books, relatives of the stockholders are not competent though the corporation is not the actual prosecution. *McElhannon v. State*, 99 Ga. 672.

**3. Moore v. Farmers' Mut. Ins. Assoc.**, 107 Ga. 199; *Price v. Patrons'*, etc., *Home Protection Co.*, 77 Mo. App. 236.

**4. Ignorance of Juror.** — *Moore v. Farmer's Mut. Ins. Assoc.*, 107 Ga. 199; *University Bank v. Tuck*, 107 Ga. 211.

**5. Relative of Prosecutor.** — *Brown v. State*, 28 Ga. 439; *Ledford v. State*, 75 Ga. 856. Compare *Keener v. State*, 97 Ga. 388. And see the succeeding subdivision.

**6. Dumas v. State**, 62 Ga. 58.

**One Contributing to the Prosecution** is not a private prosecutor within a statute disqualifying persons related to such a prosecutor. *Moore v. State*, 36 Tex. Crim. 574, (Tex. Crim. 1896) 38 S. W. Rep. 356; *Heacock v. State*, 13 Tex. App. 97; *McGee v. State*, 37 Tex. Crim. 668.

**7. Relationship to Person Injured.** — *Jaques v. Com.*, 10 Gratt. (Va.) 690 (relationship to the owner of a house burned, in trial for arson); *State v. Williams*, 9 Houst. (Del.) 508; *State v. Boon*, 80 N. Car. 461; *Garner v. State*, 76 Miss. 515 (relationship to a person murdered).

**In Texas** it is provided by statute that persons related within the third degree to the person injured by the commission of the offense shall be disqualified. *Page v. State*, 22 Tex. App. 551; *Powers v. State*, 27 Tex. App. 700. And it was held that on the trial of an indictment for theft, one who was related within the prohibited degree to the owner of property for the theft of which, at the same time, another indictment was pending against the defendant was not competent. *Wright v. State*, 12 Tex. App. 163.

**In New York** relationship within the ninth degree to the person injured is cause for disqualification. *Code Crim. Pro. N. Y.*, § 377, subdiv. 1.

**8. Relationship to Person Benefited.** — *State v. Baldwin*, 80 N. Car. 390, in which case, on the trial of a jailer for allowing the escape of a prisoner, a relative of the prisoner so escaping was held to be subject to challenge.

**A Relative of the Owner of a Slave** was held to be incompetent to sit upon the trial of the slave for a capital offense. *State v. Anthony*, 7 Ired. L. (29 N. Car.) 234.

**9. Relationship to Counsel.** — *Bac. Abr.*, tit. *Juries*, E. 5; *Fait*, etc., *Co. v. Truxton*, 1 Penn. (Del.) 24; *Miller v. Louisville*, etc., *R. Co.*, 128 Ind. 97, 25 Am. St. Rep. 416; *Wood v. Wood*, 52 N. H. 422; *Pipher v. Lodge*, 16 S. & R. (Pa.) 214; *Funk v. Ely*, 45 Pa. St. 444. See the



even though it be to the prosecuting attorney.<sup>1</sup> In *Georgia*, however, relationship to counsel whose fee is contingent upon success is ground for disqualification.<sup>2</sup>

(b) *Business Relations in General.* — It has been held proper to exclude from service as a juror a partner of one of the parties,<sup>3</sup> and likewise a shipper over the railroad of a party who has received favors from such party and hopes to receive others.<sup>4</sup> But it has been held to be no ground of challenge that the juror is a client of the prisoner, who is an attorney.<sup>5</sup> In an early case in *Mississippi* it was decided that it was error not to exclude the surety of one of the parties for another debt, when the party was insolvent and the juror considered himself unfit to serve.<sup>6</sup> And in *Pennsylvania* it was held that in an ejectment suit by the heirs of an insolvent debtor the executor of a deceased creditor was not competent.<sup>7</sup> The court may also, it has been held, reject one connected with a corporation doing business with a company of which one of the parties is a prominent member.<sup>8</sup>

The *Indebtedness of a Juror to a Party*, however, is stated not to be ground for exclusion unless such juror is at the party's mercy or has been treated with particular indulgence by him;<sup>9</sup> and a tenant in common with indorsers of notes for the forgery of which the defendant is being tried is not subject to challenge on account of such relationship.<sup>10</sup>

(c) *Relation of Master and Servant.* — One who is in the employ of one of the parties was incompetent at common law and is generally so regarded at the present time.<sup>11</sup> Sometimes, however, this is apparently regarded as a matter for the discretion of the court.<sup>12</sup> Under a statute providing that one standing in the relation of master to the adverse party may be challenged, it was held in a murder trial that the master of the decedent was disqualified.<sup>13</sup> That one was formerly in the employ of a party does not, however, disqualify him;<sup>14</sup> nor is it ground for a new trial that one of the jurors was seeking to obtain employment from the adverse party, a municipality.<sup>15</sup> An employee of a stockholder of a corporation is not incompetent in a suit to which the corporation is a party.<sup>16</sup> But it was held proper to exclude a clerk of a firm which was intimately connected with one of the parties to an action of replevin

preceding subdivision, paragraph beginning in *Criminal Cases*.

1. *To Prosecuting Attorney.* — *People v. Waller*, 70 Mich. 237; *State v. Jones*, 64 Mo. 391; *State v. Cadotte*, 17 Mont. 315.

2. *Agreement for Contingent Fee.* — *Melson v. Dickson*, 63 Ga. 683, 36 Am. Rep. 128; *Crockett v. McLendon*, 73 Ga. 86. And see *Swift v. Mott*, 92 Ga. 448.

3. *Partner of Party.* — *Stumm v. Hummel*, 39 Iowa 478.

4. *Shipper Over Railroad of Party.* — *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243; *Omaha, etc. R. Co. v. Cook*, 37 Neb. 435.

5. *Juror Client of Party.* — *Reg. v. Geach*, 9 C. & P. 499, 38 E. C. L. 195.

6. *Surety of Party.* — *Ferriday v. Seiser*, 4 How. (Miss.) 506. And see *Mechanics, etc., Bank v. Smith*, 19 Johns. (N. Y.) 115.

7. *Executor of Creditor.* — *Smull v. Jones*, 6 W. & S. (Pa.) 122.

8. *Relations with Corporation in Which Party Interested.* — *Laidlaw v. Sage*, 2 N. Y. App. Div. 374.

9. *Juror Indebted to Party.* — *Richardson v. Planters Bank*, 94 Va. 130; *Thompson v. Douglass*, 35 W. Va. 337. Compare *Mechanics, etc., Bank v. Smith*, 19 Johns. (N. Y.) 115.

And see *Davis v. Panhandle Nat. Bank*, (Tex. Civ. App. 1895) 29 S. W. Rep. 926.

One Having a Claim against a party is not disqualified. *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

10. *Tenant in Common with Indorser.* — *Patterson v. State*, 48 N. J. L. 381.

11. *Employment by Party Disqualifies.* — *Co. Litt.* 157b; 3 Black. Com. 363; *Bac. Abr.*, tit. *Juries*, E 5; *Tidd's Pr.* (4th Am. ed.) 853; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Hubbard v. Rutledge*, 57 Miss. 7; *Louisville, etc., R. Co. v. Mask*, 64 Miss. 738; *Burnett v. Burlington, etc., R. Co.*, 16 Neb. 332; *Houston, etc., R. Co. v. Smith*, (Tex. Civ. App. 1899) 51 S. W. Rep. 506.

12. *Discretion of Court.* — *Goodrich v. Burdick*, 26 Mich. 39; *Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 581.

13. *Employer of Person Murdered.* — *State v. Coella*, 3 Wash. 99.

14. *Former Employment.* — *East Line, etc., R. Co. v. Brinker*, 68 Tex. 500. And see *Thompson v. Cleveland, etc., R. Co.*, 11 Cinc. L. Bul. 211, 9 Ohio Dec. (Reprint) 209.

15. *Juror Seeking Employment of Party.* — *Walton v. Augusta Canal Co.*, 54 Ga. 245.

16. *Employee of Stockholder of Party.* — *Fredrickson Boom Co. v. McPherson*, 13 N. Bruns. 8;



and was the latter's bondsman on the instrument securing such party in possession of the property in controversy.<sup>1</sup>

(d) *Relation of Landlord and Tenant.* — That the juror is a tenant of a party is in itself a ground of challenge,<sup>2</sup> and this disqualification is not affected by the fact that the right of distress has been abolished by statute.<sup>3</sup> But a tenant of one who is the plaintiff's bondsman for costs of prosecution is not disqualified.<sup>4</sup> The fact that a juror was the landlord of a party has been held to be ground for challenge to the favor only, and not an absolute disqualification.<sup>5</sup>

*One Boarding or Lodging at his own expense with a party to the suit is not thereby disqualified.*<sup>6</sup>

(e) *Friendship or Hostility to Party.* — One is not disqualified because he is a neighbor<sup>7</sup> or a friend<sup>8</sup> of the party, unless it appears that this will interfere with his impartiality of action.<sup>9</sup> General hostility between a juror and a party has been held to be a good cause of challenge.<sup>10</sup>

(f) *Sympathy with Party.* — The mere fact that a juror sympathizes with one of the parties in a civil case will not generally disqualify him;<sup>11</sup> but under a *Texas* statute excluding one having a bias or prejudice in favor of or against the defendant in a criminal case, sympathy with such defendant has been held to be ground for exclusion.<sup>12</sup>

(g) *Opinion as to Party's Character.* — One is not disqualified by the fact that he has an unfavorable opinion in regard to the character of the defendant in a criminal case, if it appears that he will give an impartial trial.<sup>13</sup>

*Benedict v. Pennsylvania Coal Co.*, 6 Kulp (Pa.) 221.

1. *Employee of Party's Bondsman.* — *Hill v. Corcoran*, 15 Colo. 270.

2. *Juror Tenant of Party.* — *Harrisburg Bank v. Forster*, 8 Watts (Pa.) 304; *Pipher v. Lodge*, 16 S. & R. (Pa.) 214; *Co. Litt.* 157*b*.

3. *Hathaway v. Helmer*, 25 Barb. (N. Y.) 29.

4. *Tenant of Plaintiff's Bondsman.* — *Brown v. Wheeler*, 18 Conn. 204.

*Tenant of Persons Interested in Criminal Prosecution.* — It was held in an action for bribery at an election that a juror was not disqualified because he was tenant of a nobleman whose interest was affected. *Marsh v. Coppock*, 9 C. & P. 480, 38 E. C. L. 193.

5. *Juror Landlord of Party.* — *Co. Litt.* 157*a*; *People v. Bodine*, 1 Den. (N. Y.) 281.

6. *Boarding with Party.* — *Statham v. State*, 84 Ga. 17; *Cummings v. Gann*, 52 Pa. St. 484.

7. *Neighbor of Party.* — *Jones v. Butterworth*, 3 N. J. L. 48.

8. *Friendship to Party.* — *Reg. v. Geach*, 9 C. & P. 499, 38 E. C. L. 195; *Lavender v. Hudgens*, 32 Ark. 764; *McFadden v. Wallace*, 38 Cal. 51; *Moore v. Cass*, 10 Kan. 288; *Van Skike v. Potter*, 53 Neb. 28. Compare *Com. v. Mosier*, 135 Pa. St. 221.

9. *Lavender v. Hudgens*, 32 Ark. 764; *Lombardi v. California St. R. Co.*, 124 Cal. 311; *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520; *Babcock v. People*, 13 Colo. 519.

In *Com. v. Mosier*, 135 Pa. St. 221, a juror was excluded because he had conversed with the defendant and exchanged cigars and drinks with him. And see *Com. v. House*, 3 Pa. Super. Ct. 309.

*Friendship of Families.* — It was held not cause for exclusion that the families of the defendant and the juror were very intimate, the prisoner and the juror not being acquainted, and there having been no conversation between the families in regard to the case. *Montague v. Com.*, 10 Gratt. (Va.) 767.

10. *Hostility to Party.* — *Brittain v. Allen*, 2 Dev. L. (13 N. Car.) 120.

But one is not necessarily disqualified because he has had business difficulties with the president and principal stockholder of the defendant company. *Hencke v. Milwaukee City R. Co.*, 69 Wis. 401.

*A Member of a Posse Comitatus* who spent three days searching for the defendant and heard all about the case from the coroner's jury was held to be incompetent. *State v. Defee*, 47 La. Ann. 193.

*Former Service of Process.* — One is not disqualified, if he testifies to the absence of any prejudice, merely because some years before the trial he served the defendant with legal processes, which fact he has forgotten. *Carthaus v. State*, 78 Wis. 560.

11. *Sympathy with Party.* — *Chicago, etc., R. Co. v. Bingenheimer*, 116 Ill. 226; *Laidlaw v. Sage*, 2 N. Y. App. Div. 374; *McKinney v. Long Island R. Co.*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 168. See also *infra*, this subsection, *Prejudice Against Corporations*.

*Member of Church Organization.* — One is not disqualified from sitting in an action against a church organization, by the fact that he belongs to another organization of the same denomination. *Barton v. Erickson*, 14 Neb. 164.

*Petitioner for Pardon.* — One who had signed a petition for the pardon of one convicted of a criminal offense, on the ground that he had been sufficiently punished, was held to be incompetent to sit in a civil action against the same person based upon the same charge. *Asbury L. Ins. Co. v. Warren*, 66 Me. 523, 22 Am. Rep. 590. And see *Com. v. Cleary*, 148 Pa. St. 26.

12. *Texas Statute.* — *Withers v. State*, 30 Tex. App. 383; *Giebel v. State*, 28 Tex. App. 151.

13. *Unfavorable Opinion of Defendant* — *Louisiana.* — *State v. Jones*, 38 La. Ann. 792.

*Mississippi.* — *Helm v. State*, 67 Miss. 562.

*Montana.* — *State v. Anderson*, 14 Mont. 541.



(h) **Prejudice as to Party's Business.** — It has generally been held that one is not disqualified to act by the mere fact that he is prejudiced against a business in which one of the parties is engaged, even though the case arose in connection with the exercise of such business, he having no prejudice against the party.<sup>1</sup> But it was held to be otherwise when the juror stated that he would do all in his power except raise mobs to break down places used for the business.<sup>2</sup> In *Michigan*, however, in prosecutions for the illegal sale of liquor to minors or on Sunday, it was held that a prejudice against the business of liquor selling was sufficient to disqualify;<sup>3</sup> but such prejudice was held not to disqualify when the business was necessarily illegal under the local option law.<sup>4</sup> And in *Indiana* such prejudice is sufficient to disqualify one from sitting on an application for a license to carry on the business.<sup>5</sup>

**Prejudice in Favor of Business.** — The fact that one considers the business of one of the parties a proper and moral vocation does not disqualify him.<sup>6</sup>

(i) **Prejudice Against Corporations.** — In an action against a corporation, one is disqualified if he is prejudiced against the corporation to such an extent as to be unable to act impartially.<sup>7</sup> But in *Virginia*, it seems, in an action against a corporation a juror cannot be asked on his *voir dire* whether he is prejudiced against corporations.<sup>8</sup>

*Nevada.* — *State v. Davis*, 14 Nev. 439, 33 Am. Rep. 563.

*New York.* — *People v. Allen*, 43 N. Y. 28; *People v. Lohman*, 2 Barb. (N. Y.) 216, 1 N. Y. 379, 49 Am. Dec. 340; *Fortune v. Trainor*, (Supm. Ct. Gen. T.) 47 N. Y. St. Rep. 58, affirmed 141 N. Y. 605; *People v. Flaherty*, 27 N. Y. App. Div. 535.

*Texas.* — *Monroe v. State*, 23 Tex. 210, 76 Am. Dec. 53; *Gaines v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 331.

But the expression of an opinion adverse to the defendant during the deliberations of the jury, based upon facts that had previously occurred, is ground for setting aside the verdict. *Martin v. State*, 25 Ga. 494. And see *infra*, this title, *Custody and Conduct of Jury — Misconduct of Jury — Receiving Evidence Out of Court*.

**1. Prejudice Against Particular Business.** — The question has generally arisen in connection with prosecutions for a violation of the liquor law or in civil-damage suits arising from liquor sales.

*Dakota.* — *Territory v. Pratt*, 6 Dak. 483; *State v. Tomlinson*, 7 N. Dak. 294.

*Illinois.* — *Albrecht v. Walker*, 73 Ill. 69; *Kroer v. People*, 78 Ill. 294; *Robinson v. Randall*, 82 Ill. 521; *Carrow v. People*, 113 Ill. 550.

*Indiana.* — *Swigart v. State*, 67 Ind. 287; *Elliott v. State*, 73 Ind. 10; *Butler v. State*, 97 Ind. 378; *Stoots v. State*, 108 Ind. 415; *Dolan v. State*, 122 Ind. 141.

*New York.* — *De Puy v. Quinn*, 61 Hun (N. Y.) 237; *Fortune v. Trainor*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 598.

And see *State v. Nelson*, 58 Iowa 208; *State v. Munch*, 57 Mo. App. 207. See also *infra*, this subsection, *Belief as to Credibility of Party or Witness*.

**Prosecution for Using United States Mail for Lottery Business.** — *U. S. v. Duff*, 6 Fed. Rep. 45; *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554. And see *U. S. v. Borger*, 7 Fed. Rep. 193.

**Ground for Challenge to Favor Only.** — See *Marezek v. Cauldwell*, 5 Robt. (N. Y.) 660.

**In Libel Suit Against Newspaper.** — One who stated that he thought newspapers published

improper articles and that his first impression would be against a newspaper in a libel suit was held not to be thereby rendered incompetent, he testifying that he would be impartial and would not assume negligence on the part of the newspapers. *Press Pub. Co. v. McDonald*, 38 U. S. App. 557, 73 Fed. Rep. 440.

**2. Prejudice of Excessive Violence.** — *Albrecht v. Walker*, 73 Ill. 69.

**3. Michigan Cases.** — *Theisen v. Johns*, 72 Mich. 285; *People v. Wheeler*, 96 Mich. 1.

**4. People v. Keefer**, 97 Mich. 15.

**5. License Proceedings.** — *Keiser v. Lines*, 57 Ind. 431; *Chandler v. Ruebels*, 83 Ind. 139; *Fletcher v. Crist*, 139 Ind. 121.

**6. Prejudice in Favor of Business.** — *Pemberton v. State*, 11 Ind. App. 297.

So it was held that a wholesale liquor dealer was not disqualified in an action under the civil damage act for the sale of liquor to the plaintiff's husband. *Owen v. Kamer*, (Ky. 1895) 29 S. W. Rep. 437.

**7. Prejudice Against Corporation.** — *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465.

In *Hughes v. Cairo*, 92 Ill. 339, a suit against a foreign insurance company to collect a special tax, one was held not disqualified as a juror because he had an opinion as to the right of foreign companies to do business in the state on the same terms as home companies.

**Views as to Burden of Proof.** — In an action against a corporation, the mere fact that the juror says that if the evidence were equally balanced he would find for the plaintiff does not disqualify him, provided he states that he will try the case fairly on the evidence. *Montgomery v. Wabash, etc., R. Co.*, 90 Mo. 446; *Hudson v. St. Louis, etc., R. Co.*, 53 Mo. 536.

In *Illinois* a contrary view was at one time taken. *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344.

But it has since been held that a juror cannot be asked which way he would decide in case the evidence were equally balanced. *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614.

**8. Virginia Decision.** — *Atlantic, etc., R. Co. v. Reiger*, 95 Va. 418.



(j) **Bias For or Against Counsel.** — One is not disqualified to serve because he is acquainted with the counsel of one of the parties,<sup>4</sup> or because he boards with<sup>2</sup> or occupies an office with<sup>3</sup> such counsel. Nor is a juror who is otherwise competent subject to challenge because he has an unfriendly feeling towards one of the counsel<sup>4</sup> or because the latter has been involved in litigation against him.<sup>5</sup>

**Relation of Attorney and Client.** — In *New York* a statute excludes from the jury one who is a client of one of the attorneys, but this does not apply when the relation is purely a thing of the past.<sup>6</sup> In the absence of such a statute the existence of the relation is, it seems, not a disqualification.<sup>7</sup>

(k) **Belief as to Credibility of Party or Witness.** — That one has such a prejudice against the business of a party that he would not give to the testimony of one engaged therein the same credit as if he were not so engaged, has been held a ground of disqualification.<sup>8</sup> But a different view has been taken in a case not arising out of the particular business,<sup>9</sup> and in *Massachusetts* even in a case arising out of the business.<sup>10</sup> It is stated to be a ground of challenge that the juror knows one of the parties and would believe him in preference to a witness whom he does not know.<sup>11</sup> And in *Massachusetts* it was held that one could not be asked his opinion as to the credibility of a particular witness.<sup>12</sup> So it was held proper to exclude one who stated that he would give more weight to a certain expert witness who was to testify than to another.<sup>13</sup> Where the case depends in part upon the testimony of an informer or accomplice, it is proper to exclude a juror who states that he would not give due weight to such testimony.<sup>14</sup>

**Questions as to Belief in Defendant's Credibility.** — It has been held that on a criminal prosecution, one may be asked whether, in view of the charge of crime, he would give the same credit to the testimony of the defendant as to that of others.<sup>15</sup>

**Opinion as to Credibility of Members of Particular Race.** — In *Florida* it has been held that it was not proper to interrogate a proposed juror as to the comparative

1. **Bias Towards Counsel.** — *Vojta v. Pelikan*, 15 Mo. App. 471; *Fairbanks v. Irwin*, 15 Colo. 366, in which latter case the counsel had at one time been employed by a juror.

2. *Statham v. State*, 84 Ga. 17.

3. *State v. Taylor*, 5 Ind. App. 29.

4. **Unfriendly Feeling Towards Counsel.** — *Hutchinson v. State*, 19 Neb. 262.

Where a statute provides that a challenge for actual bias must be based on bias against the party challenging, such a challenge cannot be based on a bias against such party's attorney. *State v. Gorden*, (Idaho 1897) 48 Pac. Rep. 1061.

5. *Goodall v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 359.

6. **Relation of Attorney and Client.** — *State v. McGrath*, (Idaho 1899) 59 Pac. Rep. 178; *People v. McQuade*, 110 N. Y. 284, 21 Abb. N. Cas. (N. Y.) 417; *Scott v. Rues*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 834. And see *Fealy v. Bull*, 11 N. Y. App. Div. 468.

One is not incompetent because his business partner is a friend of one of the attorneys in the case. *Santee v. Standard Pub. Co.*, 36 N. Y. App. Div. 555.

7. *Hill v. Corcoran*, 15 Colo. 270, in which case one of the counsel for the successful party was employed to defend a juror who during the trial was accused of a crime, and a new trial was refused.

In *Northern Pac. R. Co. v. Holmes*, 3 Wash. Ter. 202, it was decided that it was proper on

a challenge for actual bias to question jurors as to their relation towards the attorneys.

One is not disqualified to act by the fact that he is a resident of the city for which counsel in the case is a prosecuting officer. *O'Connor v. Bucklin*, 59 N. H. 589.

8. **Prejudice Against Business as Affecting Belief in Testimony.** — *Robinson v. Randall*, 82 Ill. 521; *Meaux v. Whitehall*, 8 Ill. App. 173; *Stoots v. State*, 108 Ind. 415; *Brockway v. Patterson*, 72 Mich. 122. And see *Shields v. State*, 95 Ind. 299. See also *supra*, this subsection, *Prejudice as to Party's Business*.

9. *Thiede v. Utah*, 159 U. S. 510, *affirming* 11 Utah 241. And see *U. S. v. Borger*, 7 Fed. Rep. 193.

10. *Com. v. Poisson*, 157 Mass. 510, which was a prosecution for an illegal liquor sale.

11. **Confidence in Witness's Credibility.** — *Stinson v. Sachs*, 8 Wash. 391.

12. **Question as to Particular Witness.** — *Com. v. Porter*, 4 Gray (Mass.) 423.

13. *Lewke v. Dry Dock, etc.*, R. Co., 46 Hun (N. Y.) 283.

14. **Distrust of Informer or Accomplice.** — *People v. O'Neil*, 109 N. Y. 251, *affirming* 48 Hun (N. Y.) 36; *People v. Mahoney*, 73 Hun (N. Y.) 601; *State v. Flint*, 60 Vt. 304.

15. **Questions as to Belief in Person's Credibility.** — *Basye v. State*, 45 Neb. 261. But see *Com. v. Poisson*, 157 Mass. 510; *State v. Everitt*, 14 Wash. 574.



credence which he would give to the testimony of persons belonging to different races,<sup>1</sup> but the contrary has been held in *California*.<sup>2</sup>

**Religious Belief.** — One cannot be asked his views as to the credibility of witnesses professing a particular religious belief,<sup>3</sup> nor whether he would believe a clergyman sooner than other persons.<sup>4</sup>

(1) **Race Prejudice.** — One should not be excluded from jury service merely because he does not like or think highly of the race to which the defendant belongs,<sup>5</sup> but it is cause for challenge that one believes that he cannot do impartial justice to a person of a particular race on a prosecution of such person.<sup>6</sup> On the prosecution of a white man for the murder of a negro, it was held proper to inquire of a juror whether he could return the same kind of a verdict against a white man for killing a negro as for killing another white man.<sup>7</sup> So on the prosecution of a negro it is proper to ask a juror whether he would give to a negro the same impartial trial which he would give to a white man.<sup>8</sup> He may not, however, be asked whether he has "the same neighborly regard" for a negro as for a white man.<sup>9</sup> Likewise on a prosecution of a foreigner, it has been held proper to ask a juror whether he belongs to a secret order involving an obligation creating prejudice against foreigners.<sup>10</sup>

(m) **Previous Service on Trial of Same Defendant.** — It is not ground for objection to a juror that he has previously served as a juror on the trial of the same defendant for another offense, though of a similar character.<sup>11</sup> A different view has obtained, however, where the two offenses were part of the same series of crime<sup>12</sup> or where the facts were in great part identical.<sup>13</sup>

(n) **Membership in Same Corporation or Association.** — It is no cause of challenge that a juror and one of the parties are members of the same corporation<sup>14</sup> or association, as when they are both Freemasons<sup>15</sup> or Odd Fellows.<sup>16</sup>

(2) **Interest and Prejudice as Regards Matters Involved** — (a) **Direct Pecuniary Interest.** — The smallest degree of pecuniary interest will, it is said, disqualify one to serve as a juror.<sup>17</sup> So one who has bet upon the result of the trial is

1. *Jenkins v. State*, 31 Fla. 196.

2. *People v. Car Soy*, 57 Cal. 102. See also *Watson v. Whitney*, 23 Cal. 375. See also *infra*, this subdivision, *Race Prejudice*.

3. **Disbelief on Religious Grounds.** — *Com. v. Buzzell*, 16 Pick. (Mass.) 153; *Horst v. Silverman*, 20 Wash. 233.

4. **Credibility of Clergyman.** — *State v. Holedger*, 15 Wash. 443.

5. **Prejudice Against Race.** — *State v. Casey*, 44 La. Ann. 969; *Balbo v. People*, 80 N. Y. 498, *affirming* 19 Hun (N. Y.) 424.

6. *State v. McAfee*, 64 N. Car. 339.

7. **Questions to Venireman.** — *Lester v. State*, 2 Tex. App. 433.

8. So in *Fendrick v. State*, 39 Tex. Crim. 147, it was held proper to ask the juror whether he would render the same verdict in a case where a negro killed a white man for insulting the former's wife, as where a white man killed a negro for insulting the white man's wife, the defendant claiming that these particular facts were involved in the prosecution.

9. *Pinder v. State*, 27 Fla. 370.

10. *Cavitt v. State*, 15 Tex. App. 190.

11. **As to Prejudice Against Foreigners.** — *People v. Reyes*, 5 Cal. 347.

**As to the Right of a Negro to Have Negroes on the Jury**, see the titles *CIVIL RIGHTS*, vol. 6, p. 81; *CONSTITUTIONAL LAW*, vol. 6, p. 971.

12. **Service on Trial of Same Defendant.** — *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *Howell v. State*, 4 Ind. App. 148; *State v. Maloney*, 118 Mo. 112; *Patterson v. State*, 48 N. J. L. 381; *Bowman v. State*, 41 Tex. 417; *West v. State*,

35 Tex. Crim. 48; *Arnold v. State*, 38 Tex. Crim. 1. And see *Com. v. Hill*, 4 Allen (Mass.) 591. See also *infra*, this section, *Knowledge or Opinion as to Case — Service as Juror in Case Involving Same Facts*.

13. **Connected Crimes.** — *Stephens v. State*, 53 N. J. L. 245.

14. *Curtis v. State*, 118 Ala. 125. But see *Howell v. State*, 4 Ind. App. 148.

**Civil and Criminal Case.** — In *Spear v. Spencer*, 1 Greene (Iowa) 534, it was held that jurors who had rendered a verdict of guilty in a criminal prosecution were not competent in a civil action of trespass against the same defendant involving the same questions in regard to the same subject-matter, even though they declared that they had not formed or expressed any opinion in the case.

15. **Membership in Same Corporation.** — *Brittain v. Allen*, 2 Dev. L. (13 N. Car.) 120.

16. **Membership in Same Association.** — See the title *FREEMASONS*, vol. 14, p. 543.

17. *Reed v. Peacock*, (Mich. 1900) 82 N. W. Rep. 53.

**Members of Club.** — One prosecuted for selling liquors without a license cannot object to jurors because they were members of a club formed in order to obtain liquor, with which the defendant was connected. *Boldt v. State*, (Wis. 1888) 35 N. W. Rep. 935, 72 Wis. 7.

**As to Membership in the Same Church Organization**, see *supra*, this subsection, *Sympathy with Party*.

17. **Pecuniary Interest.** — *Bassett v. Governor*, 11 Ga. 207; *Page v. Contoocook Valley R. Co.*,



incompetent.<sup>1</sup> That one has become interested in the suit during the trial, is stated to be sufficient ground for a new trial.<sup>2</sup>

One Especially Interested in a Public Improvement<sup>3</sup> or who is a petitioner therefor<sup>4</sup> has been held to be disqualified to act in a condemnation proceeding; but the contrary has likewise been decided.<sup>5</sup>

**Divestiture of Interest During Trial.** — Where a juror had a mere legal interest in the property in suit, by descent from his brother, to whom the defendant had conveyed it, and the plaintiff was ignorant of such interest when the juror was accepted, it was held proper for the court to permit the juror to convey the property to the defendant, and then to declare him competent.<sup>6</sup>

**Executors and Administrators.** — An administrator of the maker of a note has been held to be disqualified in a suit against an indorser thereon,<sup>7</sup> and likewise in ejectment by the heirs of an insolvent the executor of the insolvent was held to be incompetent.<sup>8</sup>

**Surety of Party.** — One who is surety for costs in the cause is disqualified,<sup>9</sup> and if he has once been such surety, it is immaterial that he has been discharged.<sup>10</sup> So one who is surety on the bail or appearance bond of the defendant is disqualified.<sup>11</sup>

(b) **Membership in Corporate Party or Association.** — A stockholder in a corporation is incompetent to act as a juror in a case to which the corporation is a party<sup>12</sup> or in which it is interested.<sup>13</sup> But a person merely named in the act of incorporation and in the list of subscribers without holding any stock is not disqualified.<sup>14</sup>

**Beneficial and Religious Associations.** — In *Delaware*, in an action against a subordinate lodge of a beneficial society, members of such lodge were excluded, but not members of other lodges.<sup>15</sup> It has been held that in a suit between the trustees of religious organizations, involving the right to certain property, members of such organizations were incompetent to act,<sup>16</sup> but a member of a

21 N. H. 438; *Peck v. Chosen Freeholders*, 21 N. J. L. 656; *Lynch v. Horry*, 1 Bay (S. C.) 229.

1. **Betting on Result.** — *Essex v. McPherson*, 64 Ill. 349; *Seaton v. Swem*, 58 Iowa 41; *Cluverius v. Com.*, 81 Va. 787.

In *Goodright v. McCausland*, 1 Yeates (Pa.) 378, it was said that a small bet not remembered by the juror might not disqualify him.

**Betting by Juror During Trial.** — See *infra*, this title, *Custody and Conduct of Jury* — *Misconduct of Jury* — *Expression or Intimation of Opinion*.

2. **Interest Accruing During Trial.** — *Turner v. Latorre*, 18 La. 74.

3. **Interest in Public Improvement.** — *Kundinger v. Saginaw*, 59 Mich. 355.

4. **Petitioners for Public Improvement.** — *Almand v. Rockdale County*, 78 Ga. 199.

5. *Buckley v. Drake*, 41 Hun (N. Y.) 384. And see *Somerville v. Wimbish*, 7 Gratt. (Va.) 205.

6. **Divestiture of Interest.** — *Isaac v. Clarke*, 2 Gill (Md.) 1.

7. **Executors and Administrators.** — *Meeker v. Potter*, 5 N. J. L. 677.

8. *Small v. Jones*, 6 W. & S. (Pa.) 122.

9. **Surety for Costs.** — *Bradshaw v. Hubbard*, 6 Ill. 390; *Chiapella v. Brown*, 14 La. Ann. 185.

10. *Phelps v. Hall*, 2 Tyler (Vt.) 401.

11. **Surety on Bail or Appearance Bond.** — *Brazleton v. State*, 66 Ala. 96; *Anderson v. State*, 63 Ga. 675; *People v. M'Collister*, 1 Wheel. Crim. (N. Y.) 391; *State v. Prater*, 26 S. Car. 198, 613.

12. **Membership in Corporation.** — *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Fleeson v.*

*Savage Silver Min. Co.*, 3 Nev. 157; *Page v. Contoocook Valley R. Co.*, 21 N. H. 438. And see *New Orleans v. Ripley*, 2 La. 345.

**Stockholder of Party's Lessee.** — Stockholders in a company which has leased the franchises and properties of another company are not disqualified in an action against the lessor company unless an interest in the trial is actually shown. *Augusta Southern R. Co. v. McDade*, 105 Ga. 134.

**Relation of Stockholder.** — See *supra*, this section, *Prejudice as Regards Parties or Persons Interested in Case* — *Relationship to Person Interested but Not Party*.

**Employee of Stockholder.** — See *supra*, this section, *Relation of Master and Servant*.

**Action Against Corporate Employee.** — A juror is not disqualified, in an action against the toll gatherer of a turnpike company for a penalty, because he is a stockholder in the company. *Williams v. Smith*, 6 Cow. (N. Y.) 166.

13. **Corporation Interested in Suit.** — *Silvis v. Ely*, 3 W. & S. (Pa.) 421.

So it was held that a stockholder in a corporation which owned stock in another corporation which was a party to the suit was disqualified. *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173.

14. **Incorporator Not Disqualified.** — *Portland, etc., Steam Ferry Co. v. Pratt*, 7 N. Bruns. 17.

15. *Delaware Lodge No. 1, etc., v. Allmon*, 1 Penn. (Del.) 160. As to masons, see the title FREEMASONS, vol. 14, p. 543.

16. **Member of Religious Association.** — *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73.



different organization of the same denomination has been held competent.<sup>1</sup>

(c) **Residence in Municipality Interested in Suit.**—The common-law authorities state as a ground of disqualification the fact that one is a member of a corporation of a municipal character which is interested in the suit.<sup>2</sup> In the *United States* it has been decided in a number of cases that one is disqualified if he is an inhabitant of a municipality which is a party, without referring to the question of payment of taxes by him.<sup>3</sup> Whether one who is not a taxpayer would be disqualified by residence does not appear to have been expressly decided; but generally the decision involves the competency of a resident who is a taxpayer, and it has been held in a very considerable number of cases that such a person is disqualified.<sup>4</sup> And it has been held that even a non-resident is disqualified if he is actually a taxpayer.<sup>5</sup> In some states, however, the interest of a resident taxpayer in a suit by or against the municipality is deemed to be too remote to be a valid ground of disqualification.<sup>6</sup> This disqualification has been held not to be a ground of objection by the municipality itself.<sup>7</sup>

**Cases Where Rule of Exclusion Inapplicable.**—Such interest as that of a resident or taxpayer will not generally disqualify where otherwise there would be a failure of justice through inability to obtain jurors.<sup>8</sup> Nor does the disqualification apply where the municipality is not in any way interested.<sup>9</sup> The fact that an

1. *Barton v. Erickson*, 14 Neb. 164.

**Juror Member of Same Association as party.**—See *supra*, this section, *Prejudice as Regards Parties or Persons Interested in Case—Membership in Same Corporation or Association*.

2. **Members or Citizens of Municipality.**—*Hesketh v. Braddock*, 3 Burr. 1847; *Reg. v. Wilts County*, 6 Mod. 307; *Day v. Savage*, Hob. 85.

3. *United States*.—*Alexandria v. Brockett*, 1 Cranch (C. C.) 505.

*Illinois*.—*Russell v. Hamilton*, 3 Ill. 56.

*Massachusetts*.—*Boston v. Baldwin*, 139 Mass. 315.

*Missouri*.—*Fine v. St. Louis Public Schools*, 30 Mo. 166; *Rose v. St. Charles*, 49 Mo. 509; *Fulweiler v. St. Louis*, 61 Mo. 479.

*New York*.—*Wood v. Stoddard*, 2 Johns. (N. Y.) 194.

4. **Resident Taxpayers**—*Delaware*.—*Robinson v. Wilmington*, 8 Houst. (Del.) 409.

*Georgia*.—*Columbus v. Goethius*, 7 Ga. 139; *Johnson v. Americus*, 46 Ga. 80. Since changed by statute, *Cartersville v. Lyon*, 69 Ga. 577.

*Indiana*.—*Hearn v. Greensburgh*, 51 Ind. 119; *Fountain County v. Loeb*, 68 Ind. 29; *Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; *Goshen v. England*, 119 Ind. 368.

*Iowa*.—*Cramer v. Burlington*, 42 Iowa 315; *McGinty v. Keokuk*, 66 Iowa 725; *Cason v. Ottumwa*, 102 Iowa 99. Compare *Davenport Gas Light, etc., Co. v. Davenport*, 13 Iowa 229; *Dively v. Cedar Falls*, 21 Iowa 565, where the question was treated as one for the discussion of the lower court.

*Kansas*.—*Gibson v. Wyandotte*, 20 Kan. 156; *Abilene v. Hendricks*, 36 Kan. 196; *Corlett v. Leavenworth*, 27 Kan. 673. *Kansas City v. Kirkham*, (Kan. App. 1900) 59 Pac. Rep. 675.

*New York*.—*Diveny v. Elmira*, 51 N. Y. 506.

*Oklahoma*.—*Guthrie v. Shaffer*, 7 Okla. 459. And see *Oklahoma City v. Meyers*, 4 Okla. 686.

*Oregon*.—*Garrison v. Portland*, 2 Oregon 123; *Portland v. Kamm*, 5 Oregon 362.

*Rhode Island*.—*Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420.

5. **Nonresident Taxpayer.**—*Kendall v. Albia*, 73 Iowa 241.

6. **Resident Taxpayer Competent**—*Kentucky*.—*Kemper v. Louisville*, 14 Bush (Ky.) 87.

*Nebraska*.—*Omaha v. Olmstead*, 5 Neb. 446. Compare *Omaha v. Cane*, 15 Neb. 657.

*North Carolina*.—*Eastman v. Burke County*, 119 N. Car. 505.

*Ohio*.—*Clermont County v. Lytle*, 3 Ohio 289.

*Tennessee*.—*Jackson v. Pool*, 91 Tenn. 448.

*Texas*.—*Marshall v. McAllister*, 18 Tex. Civ. App. 159; *Dallas v. Peacock*, 89 Tex. 58; *Missouri, etc., R. Co. v. Bishop*, (Tex. Civ. App. 1896) 34 S. W. Rep. 323; *Martin v. Somervell County*, (Tex. Civ. App. 1899) 52 S. W. Rep. 556.

*Washington*.—*Rathbun v. Thurston County*, 8 Wash. 238; *State v. Krug*, 12 Wash. 288.

**A Relative of an Inhabitant of a town which is a party is subject to challenge to the favor only, and not for principal cause.** *Carew v. Howard*, 1 Root (Conn.) 324.

**Officer of Municipal Party.**—See *supra*, this section, *Causes of General Character—Occupancy of Public Office*.

7. **Objection by Municipality.**—*Conklin v. Keokuk*, 73 Iowa 343. Compare *Hollenbeck v. Marshalltown*, 62 Iowa 21.

**A Contrary View** seems to have been taken in *Bailey v. Trumbull*, 31 Conn. 581, where it was held that the town must be presumed to have known of the juror's interest as a taxpayer, and hence must be regarded as having waived the objection by going to trial without making it.

8. **Necessity as Removing Disqualification.**—*Bassett v. Governor*, 11 Ga. 207; *State v. Intoxicating Liquors*, 54 Me. 564; *Com. v. Ryan*, 5 Mass. 90; *Hawes v. Gustin*, 2 Allen (Mass.) 402; *Com. v. Burding*, 12 Cush. (Mass.) 506; *Com. v. McLane*, 4 Gray (Mass.) 427; *Com. v. Brown*, 147 Mass. 591, 9 Am. St. Rep. 736; *Massachusetts Bay v. Paxton*, Quincy (Mass.) 548.

9. **Municipality Must Be Interested.**—*Phillips*



attorney was employed by a city on a murder trial was held not to disqualify residents as being liable to taxation to pay the attorney's fees.<sup>1</sup>

**Statute Removing Disqualification.** — In a number of states this disqualification has been removed by statute;<sup>2</sup> and such a statute is not invalid as depriving the opposite party of an impartial jury.<sup>3</sup>

**Prosecution for Violation of Ordinance.** — That one is a corporator or a resident of the municipality does not disqualify him from service on a prosecution for violation of an ordinance;<sup>4</sup> and even a municipal officer may serve on such a prosecution.<sup>5</sup> One is not disqualified to serve by the fact that he is a taxpayer of the municipality because on conviction a fine will be payable to such municipality.<sup>6</sup>

**Bastardy Proceedings.** — An inhabitant of the same town as one who has instituted bastardy proceedings has been held to be incompetent,<sup>7</sup> though a different decision has been rendered under a different statute.<sup>8</sup>

(d) **Prejudice Against Capital Punishment.** — Though no such ground of challenge is to be found stated in the *English* cases, in the *United States*, since the early part of the nineteenth century, the fact that one has conscientious scruples against the infliction of capital punishment has been regarded as a disqualification furnishing ground for challenge by the prosecution, on a trial for an offense which may be punished by death.<sup>9</sup> Opposition to capital punishment

*v. State*, 29 Ga. 105; *Phipps v. Mansfield*, 62 Ga. 210; *State v. McDonald*, 59 Kan. 241.

**On a Trial for Secreting Record Books of a Town,** it was held proper for the court to exclude from the jury an inhabitant of the town. *State v. Williams*, 30 Me. 484.

1. **Liability for Attorney's Fees.** — *Doyal v. State*, 70 Ga. 134.

2. **Disqualification Removed by Statute** — *Colorado*. — *Warner v. Gunnison*, 2 Colo. App. 430. *Connecticut*. — *Pettis v. Pomfret*, 28 Conn. 566.

*Georgia*. — *Cartersville v. Lyon*, 69 Ga. 577. *Massachusetts*. — *Hawes v. Gustin*, 2 Allen (Mass.) 402.

*Missouri*. — *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257.

*New York*. — *Diveny v. Elmira*, 51 N. Y. 506; *Hildreth v. Troy*, 101 N. Y. 234, 54 Am. Rep. 686, 3 How. Pr. N. S. (N. Y.) 483.

*Pennsylvania*. — *Scranton v. Gore*, 124 Pa. St. 595.

*Texas*. — *Watson v. De Witt County*, 19 Tex. Civ. App. 150.

*West Virginia*. — *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 17 W. Va. 812.

3. **Validity of Statute.** — *Com. v. Brown*, 150 Mass. 334, 147 Mass. 585, 9 Am. St. Rep. 736; *Com. v. Reed*, 1 Gray (Mass.) 472; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Smith v. German Ins. Co.*, 107 Mich. 270; *Minneapolis v. Wilkin*, 30 Minn. 142.

4. **Prosecution for Violation of Ordinance.** — *Williams v. Warsaw*, 60 Ind. 457; *State v. Wells*, 46 Iowa 662; *City Council v. Pepper*, 1 Rich. L. (S. Car.) 364.

5. *Anderson v. Fowler*, 48 S. Car. 8.

6. **Fine Payable to Municipality.** — *Dallas v. Peacock*, 89 Tex. 58; *Middletown v. Ames*, 7 Vt. 166.

7. **Bastardy Proceedings.** — *Hawes v. Gustin*, 2 Allen (Mass.) 402.

8. *Manion v. Flynn*, 39 Conn. 332.

9. **Prejudice Against Capital Punishment** — *United States*. — *Logan v. U. S.*, 144 U. S. 263; *U. S. v. Ware*, 2 Cranch (C. C.) 477; *U. S. v.*

*McMahon*, 4 Cranch (C. C.) 573; *U. S. v. Wilson*, Baldw. (U. S.) 78; *U. S. v. Cornell*, 2 Mason (U. S.) 91; *U. S. v. Hewson*, Brun. Col. Cas. (U. S.) 532.

*Alabama*. — *Harrison v. State*, 79 Ala. 29.

*Colorado*. — *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526.

*Delaware*. — *State v. Windsor*, 5 Harr. (Del.) 512.

*Georgia*. — *Williams v. State*, 3 Ga. 453; *Bell v. State*, 93 Ga. 557.

*Illinois*. — *Gates v. People*, 14 Ill. 433.

*Indiana*. — *Gross v. State*, 2 Ind. 329.

*Louisiana*. — *State v. Kennedy*, 8 Rob. (La.) 590; *State v. Baker*, 30 La. Ann. 1134; *State v. Alphonse*, 34 La. Ann. 9; *State v. Clark*, 32 La. Ann. 558; *State v. Vines*, 34 La. Ann. 1073; *State v. Stewart*, 45 La. Ann. 1164.

*Mississippi*. — *Lewis v. State*, 9 Smed. & M. (Miss.) 115; *Williams v. State*, 32 Miss. 389; 66 Am. Dec. 615; *Russell v. State*, 53 Miss. 367; *Fortenberry v. State*, 55 Miss. 403; *Smith v. State*, 58 Miss. 867.

*Nebraska*. — *St. Louis v. State*, 8 Neb. 405; *Bradshaw v. State*, 17 Neb. 147; *Johnson v. State*, 34 Neb. 257.

*Nevada*. — *State v. Vaughan*, 23 Nev. 103.

*New Hampshire*. — *Pierce v. State*, 13 N. H. 556; *State v. Howard*, 17 N. H. 171.

*New York*. — *People v. Jones*, 1 Edm. Sel. Cas. (N. Y.) 112; *O'Brien v. People*, 36 N. Y. 276; *Walter v. People*, 32 N. Y. 147, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 15; *Lowenberg v. People*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 414; *People v. Damon*, 13 Wend. (N. Y.) 355; *People v. Ryan*, (Oyer & T. Ct.) 2 Wheel. Crim. (N. Y.) 47.

*North Carolina*. — *State v. Bowman*, 80 N. Car. 432.

*Ohio*. — *Martin v. State*, 16 Ohio 364.

*Pennsylvania*. — *Com. v. Leshner*, 17 S. & R. (Pa.) 155; *Com. v. Valsalka*, 181 Pa. St. 17.

*Texas*. — *Clanton v. State*, 13 Tex. App. 139; *White v. State*, 16 Tex. 206; *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630; *Gonzales v. State*, 31 Tex. Crim. 508; *Burrell v. State*, 18 Tex.



is also quite frequently made by express provision of statute a ground of disqualification.<sup>1</sup> It has also been held ground for exclusion that one not opposed generally to the death penalty is conscientiously opposed to it in connection with the particular crime involved in the case.<sup>2</sup> The accused has no right to set up this ground of disqualification, it being available only to the prosecution.<sup>3</sup>

**Crimes Not Necessarily Punishable Capitally.**—It does not generally affect this ground of disqualification that the crime for which the defendant is prosecuted is not necessarily punishable with death, provided it may be so punished.<sup>4</sup> But in *Iowa* and *South Dakota* a different view is taken, and in those states apparently this ground of disqualification no longer exists, since no crime is necessarily punishable capitally.<sup>5</sup>

**Character of Prejudice.**—Conscientious scruples against the infliction of the death penalty, it has been held, do not disqualify if, notwithstanding his scruples, the juror will render a proper verdict;<sup>6</sup> but there are cases to the contrary.<sup>7</sup> Mere opposition to the policy of capital punishment, not involv-

713; *Caldwell v. State*, 41 Tex. 86; *Kennedy v. State*, 19 Tex. App. 618.

*Utah*.—*State v. Kessler*, 15 Utah 142.

*Vermont*.—*State v. Ward*, 39 Vt. 225.

*Virginia*.—*Clore's Case*, 8 Gratt. (Va.) 606; *Cluverius v. Com.*, 81 Va. 787.

*West Virginia*.—*State v. Greer*, 22 W. Va. 809.

See also *infra*, this subsection, *Prejudice Against Circumstantial Evidence*.

In *South Carolina* the question of excluding a juror on this ground seems to be a matter purely for the discretion of the trial court. *State v. McIntosh*, 39 S. Car. 97; *State v. James*, 34 S. Car. 49, 579, 13 S. E. Rep. 325.

**1. Statutory Provisions—Alabama.**—*Stalls v. State*, 28 Ala. 25.

*Arkansas*.—*Jones v. State*, 58 Ark. 390.

*California*.—*People v. Sanchez*, 24 Cal. 17; *People v. Goldenson*, 76 Cal. 328; *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295.

*Florida*.—*Metzger v. State*, 18 Fla. 481.

*Georgia*.—*Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314; *Jackson v. State*, 74 Ga. 841.

*Indiana*.—*Greenley v. State*, 60 Ind. 141; *Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216. But see *Davidson v. State*, 135 Ind. 255, where the exclusion of a juror for such a cause seems to have been regarded as a matter within the discretion of the trial court.

*Kentucky*.—*Smith v. Com.*, 98 Ky. 437.

*Missouri*.—*State v. David*, 131 Mo. 380.

*Nebraska*.—*Johnson v. State*, 34 Neb. 257.

*Nevada*.—*State v. Hing*, 16 Nev. 307.

*New York*.—*Walter v. People*, 32 N. Y. 147; *People v. Wood*, 131 N. Y. 617, *affirming* 123 N. Y. 632.

*Virginia*.—*Cluverius v. Com.*, 81 Va. 787; *Clore's Case*, 8 Gratt. (Va.) 606.

**Question to Juror.**—Where the statute provided that one whose opinions would preclude him from rendering a verdict of guilty of an offense punishable with death should not be allowed to serve, it was held proper to refuse to allow a venireman in a capital case to be asked simply whether he would find a man guilty on circumstantial evidence. *Lambright v. State*, 34 Fla. 564.

**2. Opposition to Death Penalty for Particular Crime.**—*People v. Tanner*, 2 Cal. 258; *Sawyer v. State*, 39 Tex. Crim. 557. And see *Twombly's Case*, 10 Pick. (Mass.) 480, note.

**3. Accused Not Entitled to Object.**—*Murphy v. State*, 37 Ala. 142; *Wesley v. State*, 61 Ala. 282; *Harrison v. State*, 79 Ala. 29; *State v. Togan*, 56 Kan. 61; *State v. Compagnet*, 48 La. Ann. 1470.

**4. Crime Not Necessarily Punishable with Death.**—*People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295; *Jones v. State*, 57 Miss. 684. So when the statute permits a jury to decide whether the punishment of death shall be inflicted. *Johnson v. State*, 48 Ga. 116; *Smith v. Com.*, 100 Ky. 133; *Spain v. State*, 59 Miss. 19; *Cooper v. State*, 59 Miss. 267; *Hill v. State*, 42 Neb. 503; *Thompson v. State*, 19 Tex. App. 593; *Caldwell v. State*, 41 Tex. 86.

**5. Iowa and South Dakota Decisions.**—*State v. Lee*, 91 Iowa 499; *State v. Garrington*, 11 S. Dak. 178, where, however, the statute authorized such a challenge "if the offense charged be punishable with death." In these cases, however, it was held that a juror may be questioned in this regard as a guide in exercising the right of peremptory challenge. See also *State v. Dooley*, 89 Iowa 584; *State v. Foster*, 91 Iowa 164.

**6. Sufficiency of Scruples to Affect Verdict.**—*Atkins v. State*, 16 Ark. 568; *Stratton v. People*, 5 Colo. 276; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. Compare *Clore's Case*, 8 Gratt. (Va.) 606.

**7. Waller v. State**, 40 Ala. 325; *Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216; *Russell v. State*, 53 Miss. 367; *Walter v. People*, 32 N. Y. 147, *affirming* (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 15; *Cluverius v. Com.*, 81 Va. 787. And see *State v. David*, 131 Mo. 380.

**Sufficiency of Statements by Juror.**—It has been held to be reversible error to exclude a juror merely because when questioned as to his conscientious scruples against capital punishment he replied that he "would not like for a man to be hung." *Smith v. State*, 55 Miss. 410.

Where one stated that his scruples were such as would render him "reluctant to find the defendant guilty of murder in the first degree," it was held that, though this statement was somewhat modified on further examination it was for the court to say from the whole examination, including the juror's appearance and demeanor, whether he was within the



ing any conscientious scruples or convictions, is not sufficient to disqualify.<sup>1</sup>

(e) **Prejudice Against Circumstantial Evidence.** — Persons who state that they will not convict for a capital offense on circumstantial evidence are likewise disqualified to act;<sup>2</sup> and such a condition of mind is held to be within the purview of a statute excluding one for conscientious scruples as to the death penalty.<sup>3</sup> It has been held that the fact that the case depends on direct testimony alone does not render competent one opposed to conviction on circumstantial evidence.<sup>4</sup> But elsewhere there are decisions and dicta to the contrary.<sup>5</sup>

Even in Cases Not Punishable with Death, the fact that one will not convict on circumstantial evidence has been decided to be ground of disqualification.<sup>6</sup>

(f) **Membership in Society to Suppress Crime.** — There is some conflict in the cases as to the effect of membership in an association for the suppression of certain classes of crime upon one's competency as a juror on a trial for such a crime. It is generally held that such membership alone will not necessarily render one incompetent,<sup>7</sup> it being sometimes apparently regarded as a matter for the exercise of the court's discretion.<sup>8</sup> In *Massachusetts* the disqualification exists apparently only when the association initiates or conducts the prosecution.<sup>9</sup> In *Pennsylvania* members of a society for the abolition of slavery were held incompetent to sit on a prosecution conducted by it for kidnapping an alleged slave.<sup>10</sup> In *Ohio* and *Rhode Island* one contributing for the general prosecution of persons charged with a violation of the liquor law was held competent on such a trial,<sup>11</sup> while in *Louisiana* a different view has been taken.<sup>12</sup> In *New York* one contributing for the particular prosecution was held to be disqualified;<sup>13</sup> but in *Texas* subscribers to a fund for such a purpose were

statutory disqualification. *People v. Carolin*, 115 N. Y. 658, 24 N. Y. St. Rep. 595.

1. **Opposition to Policy.** — *People v. Stewart*, 7 Cal. 140; *Savage v. State*, 18 Fla. 909; *People v. Donaldson*, 2 Edm. Sel. Cas. (N. Y.) 78.

2. **Objections to Circumstantial Evidence** — *Alabama*. — *Tatum v. State*, 82 Ala. 55; *Griffin v. State*, 90 Ala. 596.

*California*. — *People v. Ah Chung*, 54 Cal. 398.

*Florida*. — *Holland v. State*, 39 Fla. 178.

*Illinois*. — *Gates v. People*, 14 Ill. 433.

*Louisiana*. — *State v. Frier*, 45 La. Ann. 1434; *State v. Parker*, 46 La. Ann. 798.

*Mississippi*. — *Jones v. State*, 57 Miss. 684.

*Missouri*. — *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Young*, 119 Mo. 495; *State v. Leabo*, 89 Mo. 247; *State v. Punshon*, 133 Mo. 44. Compare *State v. Bauerle*, 145 Mo. 1, where the question was regarded as one for the trial court's exercise of discretion.

*Nevada*. — *State v. Pritchard*, 15 Nev. 74.

*Ohio*. — *Blair v. State*, 5 Ohio Cir. Ct. 496, 3 Ohio Cir. Dec. 242.

*Pennsylvania*. — *Com. v. Heist*, 14 Pa. Co. Ct. 239.

*Texas*. — *Clanton v. State*, 13 Tex. App. 139.

3. **Statutory Provision.** — *State v. Punshon*, 133 Mo. 44; *Shafer v. State*, 7 Tex. App. 239; *Cluverius v. Com.*, 81 Va. 787. See also *supra*, this subsection, *Prejudice Against Capital Punishment*.

Where a statute provides that a fixed opinion against capital punishment or a view that a conviction should not be based on circumstantial evidence shall be a ground of challenge by the state, a juror who is opposed to capital punishment on circumstantial evidence may be challenged though he is not opposed to a conviction on such evidence. *Jackson v. State*, 74 Ala. 26; *Garrett v. State*, 76 Ala. 18.

4. **Case Dependent Only on Direct Testimony.** — *Coleman v. State*, 59 Miss. 484.

5. *Olive v. State*, 34 Fla. 203; *Holland v. State*, 39 Fla. 178; *State v. Anderson*, 52 La. Ann. 101.

6. **Cases Not Capital.** — *State v. Frier*, 45 La. Ann. 1434; *State v. Young*, 119 Mo. 495; *People v. Fanshawe*, 137 N. Y. 68, *affirming* 65 Hun (N. Y.) 77. Compare *State v. Shields*, 33 La. Ann. 991.

In *Alabama* it is so provided by statute. *Smith v. State*, 55 Ala. 1.

7. **Membership in Society to Suppress Crime.** — *Musick v. People*, 40 Ill. 268; *State v. Wilson*, 8 Iowa 407; *State v. Flack*, 48 Kan. 146; *Scott v. Chope*, 33 Neb. 41.

A Member of a Temperance Society is not disqualified to serve on a prosecution for violation of the prohibition law, the society being formed merely to promote temperance among its members and not to enforce the law. *State v. Estlinbaum*, 47 Kan. 291.

8. **Discretion of Court.** — *Boyle v. People*, 44 Colo. 176, 34 Am. Rep. 76; *Com. v. O'Neil*, 6 Gray (Mass.) 343.

9. **Massachusetts Cases.** — *Com. v. Moore*, 143 Mass. 136, 58 Am. Rep. 128; *Com. v. Burroughs*, 145 Mass. 242. Compare *Com. v. Livermore*, 4 Gray (Mass.) 18; *Com. v. O'Neil*, 6 Gray (Mass.) 343.

10. *Respublica v. Richards*, 1 Yeates (Pa.) 480.

11. **Contributions for Prosecution.** — *Koch v. State*, 32 Ohio St. 353; *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838. And see *U. S. v. Borger*, 7 Fed. Rep. 193.

12. *State v. Moore*, 48 La. Ann. 380.

13. **Contributors for Particular Prosecution.** — *Jackson v. Sandman*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 894.



held not to be private prosecutors within a statute disqualifying such persons.<sup>1</sup> In an early case in *Iowa* it was decided not to be error to exclude a question to the juror as to his membership in such an association;<sup>2</sup> but a different view has more generally been taken.<sup>3</sup>

(g) **Abstract Moral and Legal Opinions** — *aa. PREJUDICE AGAINST CRIME.* — One is not disqualified by the fact that he has a general prejudice against crime<sup>4</sup> or a prejudice against the particular crime for which the prosecution is instituted;<sup>5</sup> and in an action for damages on account of personal injuries growing out of a violation of law, a prejudice against such violation does not disqualify.<sup>6</sup>

*bb. PREJUDICE AGAINST PARTICULAR CLASS OF ACTIONS.* — A prejudice against actions of the class to which the action belongs, if sufficient to affect one's decision, is, it seems, ground of disqualification.<sup>7</sup>

*cc. OPINION AS TO PROPRIETY OF LAW.* — It is not a ground of disqualification that one approves of the law under which the prosecution is brought.<sup>8</sup> And one's opinion of the morality of the particular transaction, as apart from its legality, is generally immaterial.<sup>9</sup> In a civil case the fact that a juror approves of the law under which the action is brought,<sup>10</sup> or disapproves of it,<sup>11</sup> does not disqualify, provided such views will not affect his verdict. One opposed to the enforcement of a criminal law is, however, not competent on a prosecution thereunder.<sup>12</sup>

*dd. LEGAL OPINION.* — An opinion upon a question of law will not, it seems,

1. *Heacock v. State*, 13 Tex. App. 97.

2. *Questions as to Membership.* — *State v. Wilson*, 8 Iowa 407.

3. *Lavin v. People*, 69 Ill. 303; *Pierson v. State*, 11 Ind. 341; *Fleming v. State*, 11 Ind. 234; *State v. Mann*, 83 Mo. 589. See also *Com. v. Thrasher*, 11 Gray (Mass.) 55; *Com. v. Burroughs*, 145 Mass. 242.

4. *Prejudice Against Crime.* — *Williams v. State*, 3 Ga. 453; *Koch v. State*, 32 Ohio St. 353; *Davis v. Hunter*, 7 Ala. 135. See also *Arnold v. State*, 38 Tex. Crim. 5.

In *People v. Reynolds*, 16 Cal. 128, it was held that the fact that a juror, having been formerly connected with the police department, had an unfavorable opinion generally of persons accused of crime, was not ground of disqualification.

In *People v. McGonegal*, 136 N. Y. 62, it was held that a juror's prejudice against a defendant because he was charged with the crime in question presented a question of fact merely on the issue of his qualification, and that the decision of the lower court was not subject to review.

**A Prejudice Against Socialists, Communists, and Anarchists** was held to be merely a prejudice against crime, and hence not a ground of disqualification on a prosecution for murder resulting from a conspiracy of an anarchistic character. *Spies v. People*, 122 Ill. 1, 123 U. S. 131.

**Prejudice Against the Carrying of Weapons** in violation of law does not necessarily disqualify a person from service on a murder trial. *People v. Hughson*, 154 N. Y. 153. Compare *People v. Larubia*, 69 Hun (N. Y.) 197.

5. **Prejudice Against Particular Offense.** — *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299; *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554; *Parker v. State*, 34 Ga. 262; *Williams v. State*, 3 Ga. 453; *State v. Burns*, 85 Mo. 47, affirming 16 Mo. App. 556; *People v. McGonegal*, 136 N. Y. 62, affirming (Supm. Ct.

Gen. T.) 42 N. Y. St. Rep. 307; *Leach v. State*, 99 Tenn. 584; *Higgins v. Minaghan*, 78 Wis. 602, 23 Am. St. Rep. 428. See also *Leach v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 581.

6. *Higgins v. Minaghan*, 78 Wis. 602, 23 Am. St. Rep. 428.

7. **Prejudice Against Particular Class of Actions.** — *McCarthy v. Cass Ave., etc., R. Co.*, 92 Mo. 536. But see *Young v. Bridges*, 34 La. Ann. 333.

8. **Approval of Law.** — *U. S. v. Noelke*, 17 Blatchf. (U. S.) 554; *People v. Keefer*, 97 Mich. 15.

**Interrogatory to Juror.** — But in *Com. v. Buzzell*, 16 Pick. (Mass.) 153, it was held that a juror could not be asked whether he thought the crime with which the defendant was charged should be punishable by law.

9. **Opinion of Morality of Transaction.** — *Elliott v. State*, 73 Ind. 10.

**As Affecting Ability to Act Impartially.** — On a prosecution for the murder of a woman by her husband, it was held proper to exclude a juror who said that he could not decide the case according to the law and the evidence where a white woman was married to a negro, as in the case in question. *People v. Decker*, 157 N. Y. 186.

It was likewise held ground for exclusion that the juror doubted his ability to act impartially where the defendant's wife was unduly intimate with the deceased. *Jones v. People*, 23 Colo. 276.

10. **Civil Cases.** — *McNall v. McClure*, 1 Lans. (N. Y.) 32.

11. *Judd v. Claremont*, 66 N. H. 418.

12. **Opposition to Enforcement of Law.** — *Theisen v. Johns*, 72 Mich. 285.

So on a prosecution for bigamy it was held that one who, as a Mormon, believed that polygamy was a direct command from God was incompetent. *Reynolds v. U. S.*, 98 U. S. 145; *U. S. v. Miles*, 2 Utah 19, affirmed 103 U. S. 304.



disqualify<sup>1</sup> except in a case where the jury has a right to pass on the law.<sup>2</sup> It has accordingly been held not allowable to question the juror in regard to matters of law and his knowledge thereof.<sup>3</sup>

*ee.* VIEWS AS TO BURDEN OF PROOF. — One stating that he would convict unless satisfied of the defendant's innocence<sup>4</sup> or if the proof were equally balanced<sup>5</sup> was held to be incompetent, as was one who stated that from the character of the crime he would presume the defendant to be insane until the contrary was proven.<sup>6</sup> But a statement by the juror that he will give to the defendant the benefit of a reasonable doubt if so instructed by the court is sufficient to remove any disqualification on this ground.<sup>7</sup>

**Hypothetical Questions as to Decision.** — At the present time, however, it is generally held that jurors cannot be asked upon their preliminary examination as to the way in which they would decide the case in a supposed state of the evidence, as, for instance, if it were equally balanced.<sup>8</sup> But in *Michigan* such questions may be asked.<sup>9</sup>

**Presumption of Insanity from Suicide.** — In an action on a life-insurance policy, where the defense is suicide, it is good cause of challenge to the juror that he considers the fact of suicide conclusive evidence of insanity;<sup>10</sup> but an opinion that it is "some" evidence of insanity is not ground of exclusion.<sup>11</sup>

*ff.* AVERSION TO PLEA OF INSANITY. — A juror is not incompetent merely because he believes that a feigned defense of insanity is frequently set up and is averse to the defense on that ground, if this aversion is not such as will prevent him from giving due consideration to the evidence in support of such defense.<sup>12</sup>

**1. Opinion of Question of Law.** — *Pearse v. Rogers*, 2 F. & F. 137; *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299; *Pettis v. Warren, Kirby* (Conn.) 426; *Wisch-over v. German Mut. F. Ins. Co.*, 71 Ill. 65; *Pemberton v. State*, 11 Ind. App. 297; *Com. v. Abbott*, 13 Met. (Mass.) 120; *McNall v. McClure*, 1 Lans. (N. Y.) 32; *Thrall v. Lincoln*, 28 Vt. 356; *Heath v. Com.*, 1 Rob. (Va.) 796.

On a murder trial, a juror who states that he thinks that one who kills another in self-defense should be imprisoned is not disqualified if he says that he will acquit in case self-defense is shown, provided he is instructed by the court to do so. *State v. Ford*, 42 La. Ann. 255.

But on a prosecution for the murder of the defendant's wife, one who stated that the fact of the wife's infidelity would induce him to accept a lighter sentence, no matter what the other proof might be, and that he could not conscientiously do otherwise, was held to be incompetent, upon a statement by the district attorney that he expected to introduce evidence showing that the husband suspected the wife's fidelity. *People v. Decker*, 157 N. Y. 186. See also *Jones v. People*, 23 Colo. 276.

**2. Jury Entitled to Pass on Law.** — *Com. v. Austin*, 7 Gray (Mass.) 51; *Crippen v. People*, 8 Mich. 117. See also *White v. Moses*, 11 Cal. 68; *Laverty v. Gray*, 3 Mart. (La.) 617; *Elbin v. Wilson*, 33 Md. 135; *Blake v. Millspaugh*, 1 Johns. (N. Y.) 316.

**3. Questions as to Law of Case.** — *Roberson v. State*, 40 Fla. 509; *Brown v. State*, 40 Fla. 459; *Chicago, etc., R. Co. v. Fisher*, 38 Ill. App. 33; *O'Rourke v. Yonkers R. Co.*, 32 N. Y. App. Div. 8; *State v. Everitt*, 14 Wash. 574. But see *Basque v. State*, 45 Neb. 261.

**4. Views as to Burden of Proof.** — *State v. Vogan*, 56 Kan. 61.

**5. People v. O'Neill, 107 Mich. 556.**

But it is otherwise where one states that he

can decide according to the evidence, though he states that if the evidence were evenly balanced he would be inclined to find for the plaintiff. *Richmond v. Roberts*, 98 Ill. 472.

**6. Of Insanity.** — *Com. v. Buccieri*, 153 Pa. St. 535, 32 W. N. C. (Pa.) 113.

**7. Intention to Abide by Instructions.** — *McFadden v. Wallace*, 38 Cal. 51; *State v. Ford*, 42 La. Ann. 255.

**8. Interrogatories to Juror.** — *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614 [affirming 38 Ill. App. 33, and overruling *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344; *Chicago, etc., R. Co. v. Buttolf*, 66 Ill. 347; *Galena, etc., R. Co. v. Haslam*, 73 Ill. 494]; *Fish v. Glass*, 54 Ill. App. 655; *Keegan v. Kavanaugh*, 62 Mo. 230; *Hudson v. St. Louis, etc., R. Co.*, 53 Mo. 537. See also *People v. Copsey*, 71 Cal. 548; *Woolen v. Wire*, 110 Ind. 251; *State v. Cleary*, 97 Iowa 413; *State v. Frelinghuysen*, 43 Minn. 265; *Com. v. Van Horn*, 188 Pa. St. 143, 4 Lack. Leg. N. (Pa.) 63; *State v. Bokien*, 14 Wash. 403.

**9. Monaghan v. Agricultural F. Ins. Co.**, 53 Mich. 238; *Otsego Lake Tp. v. Kirsten*, 72 Mich. 1, 16 Am. St. Rep. 524; *People v. Keefer*, 97 Mich. 16. And see *People v. Caldwell*, 107 Mich. 374.

**10. Opinion that Suicide Is Proof of Insanity.** — *Hiatt v. Mutual L. Ins. Co.*, 2 Dill. (U. S.) 572, note; *Texas Mut. L. Ins. Co. v. Brown*, 2 Tex. Unrep. Cas. 160.

**11. Hagadorn v. Connecticut Mut. L. Ins. Co.**, 22 Hun (N. Y.) 249. Compare *Com. v. Buccieri*, 153 Pa. St. 535.

**Questions as to Opinion.** — In *McComas v. Covenant Mut. L. Ins. Co.*, 56 Mo. 573, it was held that a question as to the juror's opinion whether one who commits suicide is necessarily insane was properly excluded, since it was not also asked whether such opinion would influence the juror's judgment.

**12. Aversion to Plea of Insanity.** — *Butler v.*



(h) **Pecuniary Interest in Same or Similar Question.** — It has been decided that one having a similar claim against the same defendant, involving the same facts, is incompetent.<sup>1</sup> But a mere surety on the prosecution bond of the plaintiff in a similar case against the same defendant is not disqualified.<sup>2</sup> The plaintiff in a former suit against the same defendant, involving the same issue, on which he has an opinion, is also incompetent.<sup>3</sup> One is not incompetent, however, merely because he has or has had claims or suits against the defendant company.<sup>4</sup> It was held that a new trial should not be granted because in an action for slander a juror expressed a wish to withdraw on the ground that he himself had a similar suit pending for a similar slander, the plaintiff's counsel not consenting to the withdrawal.<sup>5</sup>

**Person Defending Against Similar Claim.** — One who has united with others to resist suits on similar contracts made with the same party has been held to be incompetent.<sup>6</sup> But one is not incompetent merely because he has been sued in the past by the same plaintiff on a similar cause of action, the suit not being still pending.<sup>7</sup>

(i) **Political Affiliations.** — On an election contest a juror cannot be challenged for cause because he belongs to a particular political party, or voted against one of the contesting parties.<sup>8</sup> So on a prosecution for an election offense, questions as to the political affiliations of a juror are, it is said, properly excluded, and a question as to whether a juror's judgment would be biased by such affiliations cannot be allowed in the absence of special reason for its allowance.<sup>9</sup>

(3) **Knowledge or Opinion as to Case** — (a) **Opinion as to Merits of Case** — *aa.* **As Ground of Challenge and Exclusion in General.** — The formation and expression of an opinion relative to the merits of the case or to the guilt or innocence of one accused of crime constitute a well-recognized ground of challenge,<sup>10</sup> which,

State, 97 Ind. 378; State v. Baber, 74 Mo. 292, 41 Am. Rep. 314; State v. Pagels, 92 Mo. 300; State v. Welsor, 117 Mo. 570; People v. Carpenter, 102 N. Y. 238, 4 N. Y. Crim. 177, *affirming* 38 Hun (N. Y.) 490, 4 N. Y. Crim. 39; Hall v. Com., (Pa. 1888) 12 Atl. Rep. 163.

A prejudice against a defense of insanity will not disqualify where there is no intention of making such defense. People v. Collins, 105 Cal. 504.

1. **Interest in Similar Claim Against Same Defendant.** — Carr v. State, 104 Ala. 4; Talmadge v. Northrop, 1 Root (Conn.) 454; Jefferson County v. Lewis, 20 Fla. 980; Flagg v. Worcester, 8 Cush. (Mass.) 69; Davis v. Allen, 11 Pick. (Mass.) 466, 22 Am. Dec. 386; Gardner v. Lanning, 3 N. J. L. 231. See also Craig v. Fenn, C. & M. 43, 41 E. C. L. 29.

A stockholder in a corporation petitioning for damages for land taken by a railroad company was held not to be disqualified to sit as a juror in a case involving a similar petition for land belonging to another corporation and taken at the same time. Com. v. Boston, etc., R. Co., 3 Cush. (Mass.) 25. And see Miller v. Wild Cat Gravel Road Co., 52 Ind. 51.

2. **Surety on Prosecution Bond.** — Jenkins v. Wilmington, etc., R. Co., 110 N. Car. 438.

3. **Plaintiff in Previous Suit.** — Missouri Pac. R. Co. v. Smith, 60 Ark. 222; Little Rock, etc., R. Co. v. Wells, 61 Ark. 354.

4. **Dissimilar Claim Against Same Defendant.** — Missouri, etc., R. Co. v. Elliott, (Indian Ter. 1899) 51 S. W. Rep. 1067; Haugen v. Chicago, etc., R. Co., 3 S. Dak. 394.

5. **Similar Claim Against Different Defendant.** —

Shobe v. Bell, 1 Rand. (Va.) 39. As to a statute disqualifying in a certain class of actions a juror who is interested in similar questions, see Jeffries v. Randall, 14 Mass. 205.

6. **Person Defending Against Similar Claim.** — Courtwright v. Strickler, 37 Iowa 382.

A juror is not disqualified in an ejectment suit because he is interested in another tract held by the same plaintiff under the same title, the matter in dispute in regard to the other tract not affecting the land in suit. Gratz v. Benner, 13 S. & R. (Pa.) 110.

7. Austin v. Cox, 60 Ga. 520.

One who shows that he is prejudiced as a result of having been a defendant in a similar suit may properly be excused by the court. Doherty v. Lord, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 227, *affirming* (N. Y. City Ct. Gen. T.) 5 Misc. (N. Y.) 596. See also Palmer v. Bogan, Cheves L. (S. Car.) 52.

A servant of a defendant in a similar action by the same plaintiff is not subject to challenge for cause. Calhoun v. Hannan, 87 Ala. 277.

8. **Political Affiliations.** — Gray v. State, 19 Tex. Civ. App. 521.

9. Conners v. U. S., 158 U. S. 408.

10. **Opinion Ground for Exclusion.** — Chicago, etc., R. Co. v. Perkins, 125 Ill. 127; Trimble v. State, 2 Greene (Iowa) 404; Com. v. Knapp, 9 Pick. (Mass.) 499, 20 Am. Dec. 491; Com. v. Buzzell, 16 Pick. (Mass.) 153; Blake v. Mills-paugh, 1 Johns. (N. Y.) 316; Pringle v. Huse, 1 Cow. (N. Y.) 432; People v. Rathbun, 21 Wend. (N. Y.) 542; People v. Bodine, 1 Den. (N. Y.) 281; State v. Benton, 2 Dev. & B. L. (19 N. Car.) 196.



however, can be urged only by the party against whom the opinion was formed and expressed.<sup>1</sup>

**Challenge for Principal Cause or to Favor.** — Where a distinction is taken between challenges for principal cause and challenges to the favor, it has generally been held that an opinion of a fixed and decided character is ground for challenge for principal cause, while if of a mere hypothetical nature it is ground merely for challenge to the favor,<sup>2</sup> though in practice it seems to have been difficult to determine which of the two kinds of challenge a particular opinion would justify.<sup>3</sup> In *New Jersey* it is stated that an opinion is ground for principal challenge,<sup>4</sup> while in *Connecticut* and *New Hampshire*, as well as in *England*, it seems to have been regarded as in all cases a ground for challenge to the favor only.<sup>5</sup> The statutes providing that opinions shall not, in certain cases, be ground of challenge for principal cause do not affect their availability as grounds of challenge to the favor;<sup>6</sup> and under a statute providing that an opinion which does not affect the juror's ability to act impartially shall not disqualify, it is said that the opinion which was formerly ground of principal challenge is now ground for challenge to the favor.<sup>7</sup>

**Opinion Prima Facie Cause for Disqualification.** — The formation of an opinion is apparently a *prima facie* cause for exclusion, and this can be removed only by evidence that its source and nature are not such as to influence the juror's conduct;<sup>8</sup> and a like rule prevails under statutes in *New York* and *California*.<sup>9</sup>

*bb. NATURE OF OPINION* — (*aa. General Considerations.* — A very considerable number of terms have been used to describe the opinion which will disqualify one for jury service. So it is said that it must be decided,<sup>10</sup> deliberate and decided,<sup>11</sup> decided or substantial,<sup>12</sup> fixed,<sup>13</sup> fixed and deliberate,<sup>14</sup> or deliberate and settled.<sup>15</sup> In *Michigan* it is stated that the opinion which disqualifies one to serve in a criminal case must be of such a character as to repel the presumption of innocence.<sup>16</sup>

1. *State v. Bunker*, 14 La. Ann. 465; *State v. Bill*, 15 La. Ann. 114; *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 196.

**Expressions of Opinion During Trial.** — See *infra*, this title, *Custody and Conduct of Jury* — *Misconduct of Jury* — *Expression or Intimation of Opinion*.

2. **Challenge for Principal Cause or to Favor.** — *People v. Reynolds*, 16 Cal. 135; *Pringle v. Huse*, 1 Cow. (N. Y.) 432; *People v. Bodine*, 1 Den. (N. Y.) 307; *Freeman v. People*, 4 Den. (N. Y.) 10, 47 Am. Dec. 216; *Ex p. Vermilyea*, 6 Cow. (N. Y.) 555, 7 Cow. (N. Y.) 108; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *State v. Ellington*, 7 Ired. L. (29 N. Car.) 61; *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 196; *State v. Collins*, 70 N. Car. 241, 16 Am. Rep. 771; *State v. Jones*, 80 N. Car. 415; *Schoeffler v. State*, 3 Wis. 823.

3. *Schoeffler v. State*, 3 Wis. 823.

4. *State v. Spencer*, 21 N. J. L. 196; *State v. Fox*, 25 N. J. L. 566; *Moschell v. State*, 53 N. J. L. 498.

5. *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564; *State v. Potter*, 18 Conn. 166; *State v. Allen*, 46 Conn. 546; *Rollins v. Ames*, 2 N. H. 349, 9 Am. Dec. 79; *State v. Howard*, 17 N. H. 171; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Temple v. Sumner*, Smith (N. H.) 226. And see especially the elaborate and learned opinion of Carpenter, J., in *State v. Sawtelle*, 66 N. H. 488, reviewing all the early authorities.

6. **Effect of Statutory Provisions.** — *Stephens v. People*, 38 Mich. 739; *Thomas v. People*, 67 N. Y. 218; *Abbott v. People*, 86 N. Y. 466.

7. *Solander v. People*, 2 Colo. 48. And see *People v. Reynolds*, 16 Cal. 128; *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526.

8. **Opinion Prima Facie Disqualification.** — *Sneed v. State*, 47 Ark. 180, citing *Dolan v. State*, 40 Ark. 460; *Polk v. State*, 45 Ark. 170; *Zimmerman v. State*, 56 Md. 536.

9. *People v. Wells*, 100 Cal. 227; *People v. Miller*, 125 Cal. 44; *People v. McQuade*, 110 N. Y. 284.

10. **Particular Descriptions of Opinion.** — *Venum v. Harwood*, 6 Ill. 659; *Smith v. Eames*, 4 Ill. 80, 36 Am. Dec. 515; *Coughlin v. People*, 144 Ill. 140; *Lithgow v. Com.*, 2 Va. Cas. 297; *Osiander v. Com.*, 3 Leigh (Va.) 780, 24 Am. Dec. 693; *Armistead v. Com.*, 11 Leigh (Va.) 688, 37 Am. Dec. 633; *Hall v. Com.*, 89 Va. 171.

11. *Thompson v. Updegraff*, 3 W. Va. 629.

12. *Wormeley v. Com.*, 10 Gratt. (Va.) 658.

13. *Davis v. Walker*, 60 Ill. 452; *Neely v. People*, 13 Ill. 685 ("definite," "positive," "fixed"); *Mabry v. State*, 71 Miss. 716 ("fixed and definite"); *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 196; *Allison v. Com.*, 99 Pa. St. 17; *Traviss v. Com.*, 106 Pa. St. 597.

14. *Waters v. State*, 51 Md. 430; *Wright v. State*, 18 Ga. 383 ("fixed, settled, and abiding"); *State v. Dorsey*, 40 La. Ann. 739 ("fixed, deliberate, and determined," or "unyielding and determined"); *State v. Farrer*, 35 La. Ann. 315 ("fixed, deliberate, and determined").

15. *Staup v. Com.*, 74 Pa. St. 458; *Curley v. Com.*, 84 Pa. St. 151. And see *State v. Kingsbury*, 58 Me. 238.

16. **Presumption of Innocence.** — *Holt v. People*,



**Light and Transient Impressions** will not, it is said, disqualify.<sup>1</sup> So it is stated that the opinion to disqualify must be an abiding bias of the mind based on the substantial facts of the case in which the juror believes.<sup>2</sup>

**Suspicion of Bias.** — It has also been stated that the juror must be free "from the suspicion of bias,"<sup>3</sup> though this latter statement has been disapproved in another state.<sup>4</sup>

**Opinion or Impression.** — In some of the cases a distinction is made between an opinion and a mere impression, the former of which may, and the latter will not, disqualify.<sup>5</sup>

**Strength and Source of Opinion.** — It is sometimes said that the strength of the opinion rather than its source is to be considered,<sup>6</sup> but, as will hereafter appear, in cases of doubt the character of the source as regards authenticity is frequently considered in determining the strength of the opinion.<sup>7</sup>

**The Real Question** to be determined is whether the opinion or impression is such as to affect the juror's ability to render an impartial verdict on the law and the evidence;<sup>8</sup> and that this is so is recognized by statutes in a number

13 Mich. 224; *Stephens v. People*, 38 Mich. 739; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501; *People v. Shufelt*, 61 Mich. 237; *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854; *People v. Thacker*, 108 Mich. 652.

1. **Light and Transient Impressions** — *United States*. — U. S. v. Burr, 25 Fed. Cas. No. 14,692g.

*Illinois*. — *Smith v. Eames*, 4 Ill. 76, 36 Am. Dec. 515; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Coughlin v. People*, 144 Ill. 140.

*Louisiana*. — *State v. George*, 8 Rob. (La.) 535; *State v. Brown*, 4 La. Ann. 505.

*New York*. — *Stout v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 117; *Durrell v. Mosher*, 8 Johns. (N. Y.) 445.

*Oregon*. — *Kumli v. Southern Pac. Co.*, 21 Oregon 505.

*Texas*. — *Black v. State*, 42 Tex. 378.

*Washington*. — *State v. Carey*, 15 Wash. 549.

2. **Abiding Bias.** — *Huntley v. Territory*, 7 Okla. 60; *State v. Clark*, 42 Vt. 629; *State v. Meaker*, 54 Vt. 112; *State v. Meyer*, 53 Vt. 457.

3. **Freedom from "Suspicion of Bias."** — See *Coughlin v. People*, 144 Ill. 140.

4. *Baker v. State*, 88 Wis. 140.

5. **Opinion and Impression Distinguished** — *United States*. — *Reynolds v. U. S.*, 98 U. S. 145.

*Connecticut*. — *State v. Allen*, 46 Conn. 531.

*Delaware*. — *State v. Windsor*, 5 Harr. (Del.) 514.

*Georgia*. — *Myers v. State*, 97 Ga. 95.

*Kansas*. — *State v. Medlicott*, 9 Kan. 257.

*Missouri*. — *State v. Taylor*, 134 Mo. 109.

*Pennsylvania*. — *Traviss v. Com.*, 106 Pa. St. 597.

*South Dakota*. — *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

*Washington*. — *State v. Krug*, 12 Wash. 303.

6. **Strength and Not Source of Opinion Chiefly Considered** — *Florida*. — *Andrews v. State*, 21 Fla. 604.

*Georgia*. — *Boon v. State*, 1 Ga. 631.

*Illinois*. — *Coughlin v. People*, 144 Ill. 140.

*Oklahoma*. — *Huntley v. Territory*, 7 Okla. 60.

*Tennessee*. — *Moses v. State*, 10 Humph. (Tenn.) 456.

*Virginia*. — *Clore's Case*, 8 Gratt. (Va.) 606.

7. **Source May Affect Strength of Opinion.** — See *Alfred v. State*, 2 Swan (Tenn.) 581; *Wormeley*

*v. Com.*, 10 Gratt. (Va.) 658. See also *infra*, this subsection, *Source of Information on Which Based*.

8. **Ability to Act Impartially Is Real Question** — *United States*. — Anonymous, 1 Fed. Cas. No. 469; *U. S. v. Wilson, Baldw.* (U. S.) 78, 28 Fed. Cas. No. 16,730.

*Alabama*. — *Coghill v. Kennedy*, 119 Ala. 641; *Long v. State*, 86 Ala. 41.

*California*. — *People v. Wong Ark*, 96 Cal. 125.

*Connecticut*. — *State v. Smith*, 49 Conn. 378.

*Delaware*. — *State v. Anderson*, 5 Harr. (Del.) 493.

*Florida*. — *O'Connor v. State*, 9 Fla. 215.

*Georgia*. — *Monroe v. State*, 5 Ga. 140; *Blackman v. State*, 80 Ga. 785; *Justices v. Griffin, etc.*, Plank Road Co., 15 Ga. 39.

*Illinois*. — *Coughlin v. People*, 144 Ill. 140.

*Indiana*. — *Scranton v. Stewart*, 52 Ind. 68; *Hart v. State*, 57 Ind. 102; *Coryell v. Stone*, 62 Ind. 307; *Gueting v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Brown v. State*, 70 Ind. 576; *Elliott v. State*, 73 Ind. 14.

*Louisiana*. — *State v. Brette*, 6 La. Ann. 653; *State v. Ward*, 14 La. Ann. 684; *State v. LeDuff*, 46 La. Ann. 546; *State v. Johnson*, 33 La. Ann. 889; *State v. Revells*, 35 La. Ann. 302.

*Mississippi*. — *State v. Flower, Walk.* (Miss.) 318; *State v. Johnson, Walk.* (Miss.) 392; *Cody v. State*, 3 How. (Miss.) 27; *Noe v. State*, 4 How. (Miss.) 330; *King v. State*, 5 How. (Miss.) 730; *Lewis v. State*, 9 Smed. & M. (Miss.) 115; *Childress v. Ford*, 10 Smed. & M. (Miss.) 25; *Nelms v. State*, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94; *Sam v. State*, 31 Miss. 480; *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *Ogle v. State*, 33 Miss. 383; *Beason v. State*, 34 Miss. 602; *Alfred v. State*, 37 Miss. 296; *Williams v. State*, 37 Miss. 407; *George v. State*, 39 Miss. 570; *Josephine v. State*, 39 Miss. 613; *Brown v. State*, 57 Miss. 430.

*Missouri*. — *State v. Core*, 70 Mo. 491; *State v. Brown*, 71 Mo. 454; *State v. Walton*, 74 Mo. 270; *State v. Stein*, 79 Mo. 330; *Spangler v. Kite*, 47 Mo. App. 233; *McComas v. Covenant Mut. L. Ins. Co.*, 56 Mo. 573; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *McCarthy*



of states providing that an opinion shall not disqualify if not such as to affect the juror's action.<sup>1</sup>

"Unqualified" Opinion. — Some of the states have by statute expressly declared that one who has formed or expressed an "unqualified" opinion as to the guilt of the defendant shall be disqualified to serve as a juror. Such statutes appear from the decisions thereunder to have affected the grounds of disqualification but little, the opinion or belief being held to disqualify only when fixed and settled and not to include a mere casual impression or hypothetical opinion.<sup>2</sup>

Necessity of Malice. — In *England* and occasionally in the *United States* it has been determined that an opinion disqualifying a juror must be such as to imply malice or ill will against the prisoner;<sup>3</sup> and in *Connecticut* it is stated that it must be formed in such a way as to give rise to an inference of hostility or prejudice against the prisoner.<sup>4</sup> But these decisions seem not to be

*v. Cass Ave., etc., R. Co.*, 92 Mo. 536; *State v. Bronstine*, 147 Mo. 520.

*Nebraska*. — *Bolla v. State*, 51 Neb. 581.

*New Hampshire*. — *Dole v. Erskine*, 37 N. H. 316; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Sawtelle*, 66 N. H. 488.

*New Jersey*. — *State v. Labee*, 12 N. J. L. J. 215.

*New York*. — *People v. Honeyman*, 3 Den. (N. Y.) 121; *Ex p. Vermilyea*, 6 Cow. (N. Y.) 555, 7 Cow. (N. Y.) 108, *disapproving* *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564.

*North Carolina*. — *State v. Jones*, 80 N. Car. 415.

*Oregon*. — *Kumli v. Southern Pac. Co.*, 21 Oregon 505.

*Pennsylvania*. — *Nichols v. Nichols*, 1 Lack. Jur. (Pa.) 42; *Com. v. House*, 3 Pa. Super. Ct. 308; *Ex p. Spies*, 35 Pa. L. J. 215; *Allison v. Com.*, 99 Pa. St. 17; *Com. v. Crossmire* 156 Pa. St. 304.

*South Dakota*. — *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

*Texas*. — *Rothschild v. State*, 7 Tex. App. 519; *Ward v. State*, 19 Tex. App. 664; *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172.

*Utah*. — *People v. O'Loughlin*, 3 Utah 133.

*Vermont*. — *State v. Phair*, 48 Vt. 375; *State v. Meaker*, 54 Vt. 112.

*Virginia*. — *Wright v. Com.*, 32 Gratt. (Va.) 941; *Dejarnette v. Com.*, 75 Va. 867.

*West Virginia*. — *State v. Schnelle*, 24 W. Va. 780; *State v. Baker*, 33 W. Va. 329.

1. **Statutory Provisions** — *Alabama*. — *Coghill v. Kennedy*, 119 Ala. 641; *Carson v. State*, 50 Ala. 134; *Bales v. State*, 63 Ala. 30; *Beason v. State*, 72 Ala. 191; *Long v. State*, 86 Ala. 36; *Hamill v. State*, 90 Ala. 577.

*Arkansas*. — *Stewart v. State*, 13 Ark. 720; *Meyer v. State*, 19 Ark. 156; *Benton v. State*, 30 Ark. 328; *Casey v. State*, 37 Ark. 67.

*Colorado*. — *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526.

*Iowa*. — *State v. Sopher*, 70 Iowa 494; *State v. Bryan*, 40 Iowa 379; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *State v. Philpot*, 97 Iowa 365; *State v. Vatter*, 71 Iowa 557; *State v. Munchrath*, 78 Iowa 268; *State v. Smith*, 73 Iowa 32; *Sprague v. Atlee*, 81 Iowa 1; *State v. Field*, 89 Iowa 34; *State v. Foster*, 91 Iowa 164.

*Massachusetts*. — *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

*Mississippi*. — *Green v. State*, 72 Miss. 523.

*Texas*. — *Suit v. State*, 30 Tex. App. 319;

*Johnson v. State*, 21 Tex. App. 368; *Sawyer v. State*, 39 Tex. Crim. 557.

See also the statutes referred to in the cases cited *infra* in this subsection in regard to statutory provisions.

2. "Unqualified" Opinion — *California*. — *People v. Reynolds*, 16 Cal. 128; *People v. Mahoney*, 18 Cal. 180; *People v. Symonds*, 22 Cal. 348; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Weil*, 40 Cal. 268; *People v. Murphy*, 45 Cal. 137; *People v. Johnston*, 46 Cal. 78; *People v. Welch*, 49 Cal. 174. The statute making an "unqualified" opinion ground for exclusion as for implied bias was subsequently repealed. *People v. Brown*, 59 Cal. 345; *People v. Cochran*, 61 Cal. 548; *People v. Ah Lee Doon*, 97 Cal. 171.

*Colorado*. — *Collins v. Burns*, 16 Colo. 7.

*Iowa*. — *State v. Hinkle*, 6 Iowa 380; *State v. Sater*, 8 Iowa 420; *State v. Ostrander*, 18 Iowa 435, *questioning* *Trimble v. State*, 2 Greene (Iowa) 404; *State v. George*, 62 Iowa 682; *State v. Ormiston*, 66 Iowa 143; *Waukon-chaw-neekl-kaw v. U. S.*, 1 Morr. (Iowa) 332.

*Nevada*. — *State v. Millain*, 3 Nev. 409; *State v. Raymond*, 11 Nev. 98.

*South Dakota*. — *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

*Utah*. — *People v. O'Loughlin*, 3 Utah 141; *People v. Thiede*, 11 Utah 241.

Under such a statute it was held that an unqualified expression of an opinion was sufficient to disqualify, although the opinion itself was of a qualified character. *People v. Cottle*, 6 Cal. 227; *People v. Edwards*, 41 Cal. 640; *People v. Brotherton*, 43 Cal. 530.

3. **Malice or Ill Will**. — 2 Hawk. P. C., c. 43, § 28; *Reg. v. Hughes*, 2 Cr. & Dix. 396; *Tutchin's Case*, 14 How. St. Tr. 1095; *Rex v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564; *Temple v. Sumner*, Smith (N. H.) 226; *State v. Howard*, 17 N. H. 171; *State v. Spencer*, 21 N. J. L. 196; *State v. Fox*, 25 N. J. L. 566; *Moschell v. State*, 53 N. J. L. 498; *Wilson v. State*, 60 N. J. L. 171. See the authorities fully cited and discussed in *State v. Sawtelle*, 66 N. H. 488. See also *Waters v. State*, 51 Md. 430.

**Implied Malice**. — The existence of malice may be proven or may be implied from circumstances of the case. *State v. Fox*, 25 N. J. L. 594.

4. *State v. Potter*, 18 Conn. 166; *State v.*



in harmony with the usual trend of authority in the United States.

**Direction of Opinion.** — It has occasionally been held that a juror who states that he has an opinion cannot be asked whether it is for or against the prisoner.<sup>1</sup> In other cases, however, it is held that a party cannot challenge a juror on account of the formation of an opinion unless he first shows by questions to the juror that the opinion is adverse to him.<sup>2</sup>

(bb) *Conditional and Hypothetical Opinions.* — It is generally considered that opinions of a hypothetical character, so called, as being conditioned upon the truth of the statements on which they are based, are not such as will affect a juror's action and are consequently not ground of disqualification.<sup>3</sup> And conversely it is sometimes stated that a belief in the truth of the reports on which an opinion is based will tend to show disqualification.<sup>4</sup>

(cc) *Source of Information on Which Based* — **aaa. Rumor, Hearsay, and Newspaper Reports.** — As a general rule, the courts will not exclude a juror on account of opinions which he may possess, if they are founded on rumors or newspaper reports.<sup>5</sup>

Wilson, 38 Conn. 126; State v. Willis, 71 Conn. 315.

**1. Direction of Opinion Cannot Be Inquired Into.** — State v. Shelledy, 8 Iowa 477; Com. v. Hanlon, 3 Brews. (Pa.) 461; White v. Territory, 1 Wash. 279.

In State v. Brooks, 92 Mo. 542, it was held that a question asked of a juror as to whether he can give a fair and impartial trial to the accused is not objectionable as seeking to have the juror state which way his opinion inclines.

**2. Contrary Decisions.** — Coghill v. Kennedy, 119 Ala. 641; State v. Efler, 85 N. Car. 585; State v. Benton, 2 Dev. & B. L. (19 N. Car.) 196. And see Bell v. Howard, 4 Litt. (Ky.) 117.

That such questions may be asked, see People v. Brown, 72 Cal. 390; People v. Kunz, 73 Cal. 313.

**3. Hypothetical Opinion** — *Alabama.* — State v. Williams, 3 Stew. (Ala.) 454; Daughdrill v. State, 113 Ala. 7. See, however, Jackson v. State, 77 Ala. 18.

*California.* — People v. Reynolds, 16 Cal. 129.

*Connecticut.* — State v. Potter, 18 Conn. 167.

*Florida.* — Olive v. State, 34 Fla. 207.

*Georgia.* — Mitchum v. State, 11 Ga. 615; Mercer v. State, 17 Ga. 146; Cornwall v. State, 91 Ga. 277.

*Illinois.* — Gardner v. People, 4 Ill. 83; Smith v. Eames, 4 Ill. 76, 36 Am. Dec. 515; Leach v. People, 53 Ill. 311; Lycoming F. Ins. Co. v. Ward, 90 Ill. 545; Coughlin v. People, 144 Ill. 140. But see Gray v. People, 26 Ill. 344.

*Indiana.* — Burk v. State, 27 Ind. 430.

*Iowa.* — State v. Sater, 8 Iowa 420; State v. Ostrander, 18 Iowa 435.

*Kansas.* — State v. Medlicott, 9 Kan. 257.

*Maine.* — State v. Kingsbury, 58 Me. 238.

*Michigan.* — People v. Shufelt, 61 Mich. 237.

*Mississippi.* — State v. Flower, Walk. (Miss.) 318; State v. Johnson, Walk. (Miss.) 392; Lee v. State, 45 Miss. 114. But see Sam v. State, 31 Miss. 480.

*Missouri.* — State v. Farrow, 74 Mo. 531; State v. Hayes, 78 Mo. 307; State v. Schmidt, 136 Mo. 644.

*Montana.* — Territory v. Burgess, 8 Mont. 57.

*Nebraska.* — Curry v. State, 5 Neb. 412;

Murphy v. State, 15 Neb. 383; Bohanan v.

State, 18 Neb. 57, 53 Am. Rep. 791; Basye v. State, 45 Neb. 277.

*New Jersey.* — Mann v. Glover, 14 N. J. L. 195; Wilson v. State, 60 N. J. L. 171.

*New York.* — People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Durell v. Mosher, 8 Johns. (N. Y.) 445; Abbott v. People, 86 N. Y. 460.

*Ohio.* — Loeffner v. State, 10 Ohio St. 598.

*Pennsylvania.* — Irvine v. Lumbermen's Bank, 2 W. & S. (Pa.) 190; Com. v. Flanagan, 7 W. & S. (Pa.) 415.

*South Carolina.* — State v. Coleman, 20 S. Car. 441.

*Tennessee.* — Cartwright v. State, 12 Lea (Tenn.) 620; Leach v. State, 99 Tenn. 584.

*Vermont.* — State v. Meyer, 58 Vt. 457.

*Virginia.* — Spruce v. Com., 2 Va. Cas. 375; Com. v. Hughes, 5 Rand. (Va.) 655; Epes's Case, 5 Gratt. (Va.) 676; Osiander v. Com., 3 Leigh (Va.) 780, 24 Am. Dec. 693; Clore's Case, 8 Gratt. (Va.) 606.

*Washington.* — State v. Gile, 8 Wash. 12.

**4. Belief in Truth of Reports.** — Neely v. People, 13 Ill. 687; Gray v. People, 26 Ill. 344; Collins v. People, 48 Ill. 145; State v. Snodgrass, 52 Kan. 174; People v. Keefer, 97 Mich. 15; McGowan v. State, 9 Yerg. (Tenn.) 184; Dryer v. State, 40 Tex. Crim. 125. See, however, Alfred v. State, 2 Swan (Tenn.) 581; Major v. State, 4 Sneed (Tenn.) 598. Compare Conatser v. State, 12 Lea (Tenn.) 436.

**5. Rumors and Newspaper Reports** — *United States.* — Gallot v. U. S., 87 Fed. Rep. 446.

*Alabama.* — State v. Morea, 2 Ala. 275; State v. Williams, 3 Stew. (Ala.) 454.

*Arkansas.* — Dolan v. State, 40 Ark. 454; Sneed v. State, 47 Ark. 180; Hardin v. State, 66 Ark. 53.

*California.* — People v. Brown, 59 Cal. 345; People v. Irwin, 77 Cal. 494; People v. Owens, 123 Cal. 482.

*Connecticut.* — State v. Wilson, 38 Conn. 127; State v. Hoyt, 47 Conn. 530, 36 Am. Rep. 89.

*District of Columbia.* — U. S. v. Barber, 21 D. C. 456.

*Florida.* — O'Connor v. State, 9 Fla. 215; Montague v. State, 17 Fla. 662; Andrews v. State, 21 Fla. 598; Brown v. State, 40 Fla. 459.

*Georgia.* — West v. State, 79 Ga. 773; Blackman v. State, 80 Ga. 785; Thompson v. State,



The presumption is, it has been well said, that an opinion so formed is merely hypothetical, and it should be so treated unless the contrary appears.<sup>1</sup> The opinion so formed may, however, be so fixed, settled, or decided as to constitute in effect a prejudgment of the case; in which event it will necessitate the exclusion of the juror.<sup>2</sup>

24 Ga. 297; *Fogarty v. State*, 80 Ga. 451; *Myers v. State*, 97 Ga. 94.

*Illinois*.—*Leach v. People*, 53 Ill. 311; *Plummer v. People*, 74 Ill. 361; *Baxter v. People*, 8 Ill. 368; *Gardner v. People*, 4 Ill. 83.

*Indiana*.—*M'Gregg v. State*, 4 Blackf. (Ind.) 101; *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578; *Morgan v. Stevenson*, 6 Ind. 169; *Bradford v. State*, 15 Ind. 347; *Fahnestock v. State*, 23 Ind. 231; *Cluck v. State*, 40 Ind. 263; *Scranton v. Stewart*, 52 Ind. 68; *Hart v. State*, 57 Ind. 102; *Gueltig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Butler v. State*, 97 Ind. 378.

*Iowa*.—*State v. Bruce*, 48 Iowa 534, 30 Am. Rep. 403; *State v. Sopher*, 70 Iowa 496; *State v. Vatter*, 71 Iowa 558; *State v. Munchrath*, 78 Iowa 273; *State v. Yetzer*, 97 Iowa 423; *State v. Brady*, 100 Iowa 191; *State v. Young*, 104 Iowa 730.

*Kansas*.—*State v. Brannon*, 6 Kan. App. 765; *State v. Medlicott*, 9 Kan. 257; *State v. Spaulding*, 24 Kan. 1; *State v. Miller*, 29 Kan. 43; *State v. Snodgrass*, 52 Kan. 174; *State v. Treadwell*, 54 Kan. 507; *State v. Bussey*, 58 Kan. 679.

*Louisiana*.—*State v. Brette*, 6 La. Ann. 653; *State v. Desmouchet*, 32 La. Ann. 1241; *State v. Foster*, 36 La. Ann. 877; *State v. George*, 37 La. Ann. 786; *State v. Boyd*, 38 La. Ann. 374; *State v. Coleman*, 27 La. Ann. 691; *State v. De Rance*, 34 La. Ann. 186, 44 Am. Rep. 426; *State v. Ford*, 37 La. Ann. 443; *State v. Vogel*, 49 La. Ann. 1059; *State v. Dent*, 41 La. Ann. 1082.

*Maryland*.—*Waters v. State*, 51 Md. 430; *Garlitz v. State*, 71 Md. 295.

*Massachusetts*.—*Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

*Michigan*.—*Holt v. People*, 13 Mich. 224; *Ulrich v. People*, 39 Mich. 245; *People v. Shufelt*, 61 Mich. 237; *People v. Foglesong*, 116 Mich. 556.

*Mississippi*.—*Lee v. State*, 45 Miss. 114; *Logan v. State*, 50 Miss. 269; *White v. State*, 52 Miss. 216.

*Missouri*.—*State v. Walton*, 74 Mo. 270; *State v. Stein*, 79 Mo. 330; *State v. Hopkirk*, 84 Mo. 278; *State v. Wilson*, 85 Mo. 134; *State v. Reed*, 89 Mo. 168; *State v. Elkins*, 101 Mo. 344; *State v. Williamson*, 106 Mo. 162; *State v. Schmidt*, 136 Mo. 644; *State v. Reed*, 137 Mo. 125; *State v. Bronstine*, 147 Mo. 520.

*New York*.—*O'Brien v. People*, 36 N. Y. 276; *Abbott v. People*, 86 N. Y. 467; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *Durell v. Mosher*, 8 Johns. (N. Y.) 445.

*North Carolina*.—*State v. Ellington*, 7 Ired. L. (29 N. Car.) 61; *State v. Dove*, 10 Ired. L. (32 N. Car.) 469; *State v. Collins*, 70 N. Car. 241, 16 Am. Rep. 771; *State v. Kilgore*, 93 N. Car. 533; *State v. Green*, 95 N. Car. 611; *State v. De Graff*, 113 N. Car. 688.

*Ohio*.—*Jones v. State*, 14 Ohio Cir. Ct. 35, 7 Ohio Cir. Dec. 305.

*Oregon*.—*State v. Saunders*, 14 Oregon 300.

*Pennsylvania*.—*Staup v. Com.*, 74 Pa. St. 458; *O'Mara v. Com.*, 75 Pa. St. 424; *Curley v. Com.*, 84 Pa. St. 151; *Rizzolo v. Com.*, 126 Pa. St. 71; *Com. v. Eagan*, 190 Pa. St. 10.

*South Carolina*.—*State v. James*, 34 S. Car. 49, 579, 12 S. E. Rep. 657, 13 S. E. Rep. 325.

*South Dakota*.—*Haugen v. Chicago*, etc., R. Co., 3 S. Dak. 394.

*Tennessee*.—*Alfred v. State*, 2 Swan (Tenn.) 581; *Major v. State*, 4 Sneed (Tenn.) 598; *Wright v. State*, 4 Humph. (Tenn.) 194; *Spence v. State*, 15 Lea (Tenn.) 539; *Woods v. State*, 99 Tenn. 182.

*Texas*.—*Reed v. State*, 32 Tex. Crim. 25; *Adams v. State*, 35 Tex. Crim. 285; *Trotter v. State*, 37 Tex. Crim. 469; *Sawyer v. State*, 39 Tex. Crim. 557; *Morrison v. State*, 40 Tex. Crim. 473.

*Utah*.—*People v. O'Loughlin*, 3 Utah 133.

*Vermont*.—*State v. Hayden*, 51 Vt. 296; *State v. Meaker*, 54 Vt. 112; *State v. Meyer*, 58 Vt. 457.

*Virginia*.—*M'Cune v. Com.*, 2 Rob. (Va.) 771; *Epes's Case*, 5 Gratt. (Va.) 676; *Osiander v. Com.*, 3 Leigh (Va.) 780, 24 Am. Dec. 693; *Sprouce v. Com.*, 2 Va. Cas. 375; *Moran v. Com.*, 9 Leigh (Va.) 651; *Wright v. Com.*, 32 Gratt. (Va.) 941; *Jackson v. Com.*, 23 Gratt. (Va.) 919.

*Washington*.—*State v. Wilcox*, 11 Wash. 215; *State v. Carey*, 15 Wash. 549.

1. *Jackson v. Com.*, 23 Gratt. (Va.) 919; *Wright v. Com.*, 32 Gratt. (Va.) 941.

2. **Fixed or Settled Opinion**—*Florida*.—*Andrews v. State*, 21 Fla. 598.

*Georgia*.—*Boon v. State*, 1 Ga. 618; *Willis v. State*, 12 Ga. 444; *Nesbit v. State*, 43 Ga. 238.

*Illinois*.—*Coughlin v. People*, 144 Ill. 141.

*Kansas*.—*State v. Beatty*, 45 Kan. 492; *State v. Start*, 60 Kan. 256.

*Massachusetts*.—*Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

*Michigan*.—*People v. Barker*, 60 Mich. 288, 1 Am. St. Rep. 501; *People v. Evans*, 72 Mich. 367.

*Missouri*.—*State v. Brooks*, 92 Mo. 542; *State v. Punshon*, 133 Mo. 44.

*Nebraska*.—*Curry v. State*, 4 Neb. 548; *Olive v. State*, 11 Neb. 1; *Miller v. State*, 29 Neb. 437; *Cowan v. State*, 22 Neb. 519; *Owens v. State*, 32 Neb. 167.

*New York*.—*People v. Mallon*, 3 Lans. (N. Y.) 224.

*Pennsylvania*.—*Weston v. Com.*, 111 Pa. St. 251; *Clark v. Com.*, 123 Pa. St. 555.

*Tennessee*.—*Moses v. State*, 10 Humph. (Tenn.) 456, 11 Humph. (Tenn.) 232.

*Vermont*.—*State v. Clark*, 42 Vt. 629.

*Virginia*.—*Armistead v. Com.*, 11 Leigh (Va.) 688, 37 Am. Dec. 633; *Jackson v. Com.*, 23 Gratt. (Va.) 919; *Wright v. Com.*, 32 Gratt. (Va.) 941.

*Washington*.—*State v. Murphy*, 9 Wash. 204.



**Hearsay.** — The statutes and cases occasionally refer to opinions based upon hearsay, apparently regarding "hearsay" and "rumor" as synonymous terms for this purpose, and so it may be said that such opinions disqualify only when of a fixed and decided character.<sup>1</sup> A distinction has been made also between an opinion based on what purports to be a statement of the facts by another, and one based on such other's mere statement of opinion, the latter not being regarded as a ground of disqualification.<sup>2</sup>

**bbb. Juror's Direct Knowledge of Facts.** — One who has formed an opinion upon facts within his own knowledge and not learned from others is, it seems, incompetent.<sup>3</sup>

**ccc. Information from Person Having Direct Knowledge.** — There are to be found statements to the effect that one is disqualified by an opinion based on information obtained from persons having actual knowledge of the facts<sup>4</sup> or from persons professing to have personal knowledge thereof.<sup>5</sup>

An Opinion Based on a Statement by a Party to the case will, it seems, disqualify.<sup>6</sup>

An Opinion Based on Statements by Witnesses has been held to be ground of disqualification,<sup>7</sup> though in *Louisiana* apparently a different view is taken.<sup>8</sup> An opinion formed on the statement of a witness is occasionally made by statute a ground of exclusion,<sup>9</sup> and an opinion based on an affidavit of a witness is within a statute disqualifying one for opinions based on conversations or testimony of witnesses to the transaction.<sup>10</sup> Opinions so formed are not within a statute removing the disqualification of jurors on account of opinions based on rumor or hearsay.<sup>11</sup>

**1. Opinions on Hearsay — Georgia.** — *Reynolds v. State*, 1 Ga. 222; *Boon v. State*, 1 Ga. 618; *Hudgins v. State*, 2 Ga. 173; *Mercer v. State*, 17 Ga. 146; *Maddox v. State*, 32 Ga. 581, 79 Am. Dec. 307; *Westmoreland v. State*, 45 Ga. 225.

*Iowa.* — *State v. Ormiston*, 66 Iowa 143.

*Pennsylvania.* — *Irvine v. Lumbermen's Bank*, 2 W. & S. (Pa.) 190.

*Texas.* — *Bolding v. State*, 23 Tex. App. 172; *Adams v. State*, 35 Tex. Crim. 285; *Thomas v. State*, 36 Tex. 315; *Hamlin v. State*, 39 Tex. Crim. 579.

*Vermont.* — *State v. Hayden*, 51 Vt. 296.

So an opinion based on a statement by a juror on a former trial was held not to disqualify, it being based on hearsay merely. *State v. Williams*, 49 La. Ann. 1148. *Contra*, *Ned v. State*, 7 Port. (Ala.) 187.

**2. Form of Statement by Others.** — *Payne v. State*, 3 Humph. (Tenn.) 377; *Wormeley v. Com.*, 10 Gratt. (Va.) 658.

A fixed opinion based on newspaper reports containing all the evidence of the alleged crime and also an alleged confession by the defendant was held to disqualify. *Gallaher v. State*, 40 Tex. Crim. 296.

**3. Opinion Based on One's Own Knowledge Disqualifies — Arkansas.** — *Hardin v. State*, 66 Ark. 53.

*Illinois.* — *Smith v. Eames*, 4 Ill. 76, 36 Am. Dec. 515; *Leach v. People*, 53 Ill. 311.

*Missouri.* — *State v. Walton*, 74 Mo. 270; *State v. Hultz*, 106 Mo. 52; *State v. Foley*, 144 Mo. 600.

*New York.* — *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *Ex p. Vermilyea*, 6 Cow. (N. Y.) 555; *People v. Vermilyea*, 7 Cow. (N. Y.) 108.

*Contra.* — *State v. Spencer*, 21 N. J. L. 106.

**4. Knowledge of Informant.** — *Rice v. Rice*, 104 Mich. 371.

*5. Meyer v. State*, 19 Ark. 156; *Eason v. State*, 6 Baxt. (Tenn.) 474.

In *Woods v. State*, 99 Tenn. 182, it was said that an opinion based on newspaper accounts not "by those who professed to know the facts" did not disqualify.

In *State v. Jackson*, 37 La. Ann. 768, it was held that one was disqualified by an opinion based partly upon statements of the facts which he had heard in the neighborhood of the homicide and partly upon the fact that the deceased was his intimate friend.

**6. Conversation with Party.** — *Rice v. Rice*, 104 Mich. 371; *Ruff v. Rader*, 2 Mont. 211; *Rogers v. Rogers*, 14 Wend. (N. Y.) 131. And see *Salina v. Trospen*, 27 Kan. 544.

**7. Statements of Witnesses.** — *Quesenberry v. State*, 3 Stew. & P. (Ala.) 308; *Goodwin v. Blachley*, 4 Ind. 438; *Alfred v. State*, 2 Swan (Tenn.) 582; *Rice v. State*, 1 Yerg. (Tenn.) 432; *Woods v. State*, 99 Tenn. 182.

In *Ruff v. Rader*, 2 Mont. 211, it was held that one who has accepted as true a statement in regard to the case made to him by a witness has an "unqualified opinion" within the meaning of the statute.

*8. State v. Covington*, 45 La. Ann. 979.

**9. Statutory Provision.** — *Dugle v. State*, 100 Ind. 259; *Walker v. State*, 102 Ind. 502; *Siberry v. State*, 149 Ind. 684; *Frazier v. State*, 23 Ohio St. 551.

*10. State v. Woods*, 134 Ind. 35.

But an opinion based on a conversation with the father of the decedent is not based on a conversation with a witness so as to disqualify one in a murder case. *Goins v. State*, 46 Ohio St. 457.

*11. State v. Walton*, 74 Mo. 270; *State v. Hultz*, 106 Mo. 53; *State v. Foley*, 144 Mo. 600; *Keaton v. State*, 40 Tex. Crim. 139; *Trotter v. State*, 37 Tex. Crim. 468.

But in order to disqualify it must appear



ddd. Evidence on Former Trial or Proceeding — Previous Trial on Merits. — It has been held that one who has formed an opinion upon the evidence given on a previous trial is incompetent, the theory being that, having had all the facts of the case under consideration, his decision would remain the same upon a repetition of the proofs.<sup>1</sup> A distinction has been taken between an opinion formed by one who was actually present at the previous trial and an opinion by one who merely read or heard a report thereof,<sup>2</sup> but cases generally make no such distinction.<sup>3</sup> An opinion based on a merely fragmentary or incorrect report of the evidence in a former proceeding will not disqualify.<sup>4</sup>

Effect of Statute. — Where the statute expressly excludes one who has formed an opinion unless such opinion is founded on rumor or newspaper reports, an opinion based on testimony in a former trial is ground of disqualification.<sup>5</sup> Where, however, the statute makes no discrimination as to the source of the opinion, and merely requires that the court must be satisfied by the juror's statement that he will act impartially, one who has formed an opinion upon such previous testimony is not absolutely disqualified thereby.<sup>6</sup>

Preliminary and Incidental Proceedings. — In *Missouri* and *Kansas* an opinion based on the evidence given on the preliminary examination of the defendant has been held to disqualify;<sup>7</sup> but in *West Virginia* a different rule prevails.<sup>8</sup> An opinion based on evidence given in a previous habeas corpus proceeding<sup>9</sup> or on an application for bail<sup>10</sup> has been held to constitute no disqualification.

Proceedings Before Coroner. — In *Pennsylvania* the rule of exclusion does not apply when the opinion is based on testimony taken before the coroner in a case of homicide;<sup>11</sup> though in *Missouri* a different view has been taken.<sup>12</sup>

that the opinion was actually based on the statements made by the witness and that the witness was material. *Wade v. State*, 35 Tex. Crim. 170, 60 Am. St. Rep. 31.

1. Opinion Based on Evidence in Former Trial. — *State v. Webster*, 13 N. H. 491; *Laidlaw v. Sage*, 2 N. Y. App. Div. 374; *Rogers v. Rogers*, 14 Wend. (N. Y.) 131; *Irvine v. Kean*, 14 S. & R. (Pa.) 292; *Staup v. Com.*, 74 Pa. St. 461; *Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420; *Allison v. Com.*, 99 Pa. St. 17; *Eason v. State*, 6 Baxt. (Tenn.) 474; *Clore's Case*, 8 Gratt. (Va.) 619; *State v. Meaker*, 54 Vt. 124. And see *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172.

The Statute sometimes expressly excludes one who has formed an opinion from hearing evidence on a previous trial, *McGuffie v. State*, 17 Ga. 498; or on reports of the testimony of witnesses, *Howell v. State*, 4 Ind. App. 148; *Carroll v. State*, 5 Neb. 31; *Smith v. State*, 5 Neb. 181.

2. Presence at Trial. — *Jackson v. Com.*, 23 Gratt. (Va.) 928; *State v. Baker*, 33 W. Va. 326.

3. See *State v. Robinson*, 117 Mo. 659; *Erwin v. State*, 29 Ohio St. 186; *Allison v. Com.*, 99 Pa. St. 17; *State v. Meaker*, 54 Vt. 124.

4. Partial or Incorrect Report. — *State v. Taylor*, 134 Mo. 109; *State v. Shackelford*, 148 Mo. 493; *Allison v. Com.*, 99 Pa. St. 32; *Com. v. Taylor*, 129 Pa. St. 534. See *State v. Olberman*, 33 Oregon 556; *Com. v. Roddy*, 184 Pa. St. 286.

Jurors are not disqualified because they have read what "purported" to be evidence taken before a coroner. *State v. Robinson*, 117 Mo. 649.

5. Effect of Statute. — *Morton v. State*, 1 Kan. 468; *State v. Foley*, 144 Mo. 600; *State v. Hultz*, 106 Mo. 53; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825.

A report of evidence printed in a newspaper

is a "statement in a public journal" within the meaning of a statute providing that an opinion based on such a statement shall not necessarily disqualify. *Hopt v. Utah*, 120 U. S. 430.

6. *People v. McGonegal*, 136 N. Y. 70, explaining and distinguishing *Greenfield v. People*, 74 N. Y. 277, and *People v. McQuade*, 110 N. Y. 301; *State v. Ingram*, 23 Oregon 435. And see *State v. Olberman*, 33 Oregon 556.

In a Civil Case in *New York*, the statute as to qualifications of jurors not applying to such a case, it is proper to reject a juror who has formed and expressed an opinion based on reports of evidence in previous trials. *Laidlaw v. Sage*, 2 N. Y. App. Div. 374.

7. Preliminary Examination. — *Morton v. State*, 1 Kan. 468; *State v. Culler*, 82 Mo. 623; *State v. Hultz*, 106 Mo. 41.

8. *State v. Schnelle*, 24 W. Va. 767. See also *Monroe v. State*, 23 Tex. 210, 76 Am. Dec. 58.

9. Habeas Corpus Proceeding. — *Johnson v. State*, 21 Tex. App. 368.

10. Application for Bail. — *Grissom v. State*, 4 Tex. App. 374.

11. Evidence Before Coroner. — *Com. v. House*, 3 Pa. Super. Ct. 308; *Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420.

It Is Stated in *New York* that an opinion based upon evidence in proceedings before a coroner does not present the same obstacle to an impartial judgment as one based upon a previous trial where the defense has been fully heard, though under the local statute (see *infra*) the latter is not an absolute disqualification. *People v. McGonegal*, 136 N. Y. 62.

The exclusion of persons who had read evidence taken on the coroner's inquest is not ground of complaint by the defendant. *People v. Willson*, 109 N. Y. 345.

12. *State v. Culler*, 82 Mo. 623; *State v. Taylor*, 134 Mo. 109.



**Prosecution of Accomplice or Codefendant.** — It has likewise been held that an opinion based on the evidence given in a prosecution of an accomplice or codefendant disqualifies;<sup>1</sup> but elsewhere a different view has been taken,<sup>2</sup> especially when the evidence necessary for the conviction of the two defendants is not the same.<sup>3</sup>

**Previous Prosecution of Same Defendant.** — It has been decided that an opinion based on evidence given in a previous prosecution against the same defendant for a similar offense, the evidence in the two cases being the same, was sufficient to disqualify.<sup>4</sup>

(*dd*) **Opinions Removable Only by Evidence.** — The weight of authority is to the effect that an opinion is not necessarily such as to disqualify a juror merely because evidence will be necessary to remove it.<sup>5</sup> In support of this view it is said that any opinions or impressions, however slight, will necessarily require some evidence to efface them, but that this does not necessarily imply any partiality or prejudgment.<sup>6</sup> Where the statute provides that an opinion shall not disqualify if the court is satisfied by the statement of the juror that he will be able to act impartially, the fact that evidence will be necessary to remove the opinion will not render him incompetent.<sup>7</sup> In some states, however, it is held that the necessity of evidence to remove the opinion will render the juror incompetent.<sup>8</sup> This is apparently the rule in *New York* in civil cases, to

**1. Prosecution of Accomplice or Codefendant.** — *Brown v. State*, 70 Ind. 586; *Morton v. State*, 1 Kan. 468; *Shannon v. State*, 34 Tex. Crim. 5; *Black v. State*, 42 Tex. 378. And see *State v. Anderson*, 5 Harr. (Del.) 493; *Drye v. State*, 40 Tex. Crim. 125.

**2.** *Williams v. Com.*, 85 Va. 607.

**3.** *State v. Munchrath*, 78 Iowa 268; *Weston v. Com.*, 111 Pa. St. 251.

**4. Opinion on Evidence on Other Prosecution.** — *Ward v. State*, 102 Tenn. 724; *Gilmore v. State*, 37 Tex. Crim. 81.

**5. Necessity of Evidence to Remove Opinion Does Not Disqualify** — *United States*. — *Gallot v. U. S.*, 87 Fed. Rep. 446.

*Arkansas*. — *Benton v. State*, 30 Ark. 328; *Casey v. State*, 37 Ark. 67; *Sneed v. State*, 47 Ark. 180; *Hardin v. State*, 66 Ark. 53, *overruling* *Polk v. State*, 45 Ark. 165, and *Vance v. State*, 56 Ark. 402.

*California*. — *People v. Brown*, 48 Cal. 253. But see *People v. Gehr*, 8 Cal. 359; *People v. Fultz*, 109 Cal. 258.

*Connecticut*. — *State v. Willis*, 71 Conn. 315.

*Florida*. — *O'Connor v. State*, 9 Fla. 215.

*Indiana*. — *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Stout v. State*, 90 Ind. 1, *overruling* apparently *Fahnestock v. State*, 23 Ind. 231; *Morgan v. State*, 31 Ind. 193, and *Scranton v. Stewart*, 52 Ind. 77.

*Iowa*. — *State v. Lawrence*, 38 Iowa 51.

*Kentucky*. — *Smith v. Com.*, 100 Ky. 133.

*Louisiana*. — *State v. Frier*, 45 La. Ann. 1434.

*Maryland*. — *Garlitz v. State*, 71 Md. 301.

*Michigan*. — *Ulrich v. People*, 39 Mich. 245; *People v. Foglesong*, 116 Mich. 556; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501. But see to the contrary *People v. Shufelt*, 61 Mich. 237.

*Mississippi*. — *Sam v. State*, 13 Smed. & M. (Miss.) 189; *Ogle v. State*, 33 Miss. 383; *Green v. State*, 72 Miss. 525. To the contrary, see *Nelms v. State*, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94; *Cotton v. State*, 31 Miss. 504; *Alfred v. State*, 37 Miss. 296; *Logan v. State*, 50 Miss. 269.

*Missouri*. — *State v. Barton*, 8 Mo. App. 15; *State v. Davis*, 29 Mo. 392; *State v. Core*, 70 Mo. 491; *State v. Brown*, 71 Mo. 454; *State v. Walton*, 74 Mo. 270; *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314; *State v. Brooks*, 92 Mo. 542; *State v. Elkins*, 101 Mo. 344.

*Nevada*. — *Estes v. Richardson*, 6 Nev. 128.

*North Carolina*. — *State v. Green*, 95 N. Car. 611.

*Oregon*. — *State v. Morse*, 35 Oregon 462.

*Pennsylvania*. — *Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420; *Com. v. McMillan*, 144 Pa. St. 610, *affirming* 6 Kulp (Pa.) 281; *Com. v. Crossmire*, 156 Pa. St. 304, 33 W. N. C. (Pa.) 77.

*Tennessee*. — *Conatser v. State*, 12 Lea (Tenn.) 436; *Spence v. State*, 15 Lea (Tenn.) 539.

*Texas*. — *Thomas v. State*, 36 Tex. 315.

*Virginia*. — *Dejarnette v. Com.*, 75 Va. 867; *Hall v. Com.*, 89 Va. 171.

*Wyoming*. — *Bryant v. State*, 7 Wyo. 311.

**Statements by Jurors as to Evidence Necessary.**

— One who stated that it would take "conclusive" evidence to change his mind was held to be incompetent. *Andrews v. State*, 21 Fla. 598. So when "strong" evidence was required. *King v. State*, 89 Ala. 146. One who stated that he intended to act upon his opinion in case he heard nothing to change it was likewise held to be disqualified. *Rothschild v. State*, 7 Tex. App. 519.

**6. Reason of Rule.** — *State v. Willis*, 71 Conn. 315; *Garlitz v. State*, 71 Md. 301; *State v. Sawtelle*, 66 N. H. 537; *Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420.

**7. Effect of Statute.** — *Green v. State*, 72 Miss. 522; *People v. Oyer & T. Ct.*, 83 N. Y. 436; *People v. McGonegal*, 136 N. Y. 62. *Compare* *People v. Tyrrell*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 142.

**8. Necessity of Evidence to Remove Opinion Disqualifies** — *Kansas*. — *State v. Beatty*, 45 Kan. 492; *State v. Snodgrass*, 52 Kan. 174; *State v. Tomblin*, 57 Kan. 841; *State v. Beuerman*, 59 Kan. 586.



which the statute in regard to qualifications of jurors does not apply,<sup>1</sup> as it was in criminal cases before the adoption of such a statute.<sup>2</sup>

(ee) *Opinion as to Particular Elements of Case.* — One called as a juror is not disqualified by an opinion as to an immaterial matter<sup>3</sup> nor by an opinion as to an essential element of the case, if not such as to affect his ability to act impartially.<sup>4</sup> And so one has been held not to be disqualified by a belief that the crime for which the defendant is being prosecuted was actually committed by some one,<sup>5</sup> nor by an opinion that the deceased was poisoned;<sup>6</sup> and an opinion that the prisoner killed the deceased was held not to be ground for principal challenge, though this was one of the issues in the case.<sup>7</sup> But an opinion upon a point so essential as to go far towards a decision of the whole case and to have a real influence on the verdict will disqualify.<sup>8</sup>

Under an Iowa Statute disqualifying one on account of an opinion as to the guilt or innocence of the prisoner, an opinion on some of the matters involved,<sup>9</sup> as that the deceased was murdered<sup>10</sup> or as to whether the defendant did the killing,<sup>11</sup> was held to be insufficient to disqualify.

**Matters Not Controverted.** — An opinion as to matters involved in the case which are not controverted will not disqualify.<sup>12</sup>

(ff) *Opinions on Extraneous Matters.* — One is not disqualified by the fact that he has formed an opinion as to the guilt of one jointly indicted with the defendant;<sup>13</sup> nor does an opinion as to the guilt of another person, previously tried for the same crime, disqualify.<sup>14</sup> But on the trial of an accessory, an opinion as to the guilt of the principal will disqualify<sup>15</sup> unless the defendant's guilt can be determined without reference to that of the principal.<sup>16</sup> Under a statute making the question of qualification dependent on the guilt or innocence of the accused, it was held that an opinion as to the guilt of the principal did not disqualify a juror on the trial of an accessory.<sup>17</sup>

cc. **EXPRESSION OF OPINION** — (aa) *Necessity for Purpose of Disqualification.* — It has sometimes been held, especially in the earlier cases, that an opinion which is

*Nebraska.* — *Curry v. State*, 4 Neb. 548; *Olive v. State*, 11 Neb. 1; *Cowan v. State*, 22 Neb. 523; *Miller v. State*, 29 Neb. 437; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825; *Owens v. State*, 32 Neb. 167.

*Washington.* — *Rose v. State*, 2 Wash. 310; *State v. Coela*, 3 Wash. 99; *State v. Murphy*, 9 Wash. 204; *State v. Wilcox*, 11 Wash. 215; *State v. Rutten*, 13 Wash. 203; *State v. Moody*, 18 Wash. 165; *State v. Lattin*, 19 Wash. 57.

1. **New York Cases.** — *Matter of Klock*, 49 Hun (N. Y.) 459; *Halsted v. Manhattan R. Co.*, 58 N. Y. Super. Ct. 270.

2. *Cancemi v. People*, 16 N. Y. 501.

3. **Opinion as to Immaterial Matter.** — *U. S. v. Callender*, 25 Fed. Cas. No. 14,709; *Delaney v. Salina*, 34 Kan. 532; *Elbin v. Wilson*, 33 Md. 135; *Conatser v. State*, 12 Lea (Tenn.) 446; *State v. Krug*, 12 Wash. 288.

4. **Opinion as to Element of Case.** — *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299; *Loyd v. State*, 45 Ga. 58; *State v. Carrick*, 16 Nev. 120; *Dew v. McDivitt*, 31 Ohio St. 142.

5. **Belief that Crime Was Committed.** — *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78; *Cargen v. People*, 39 Mich. 549; *Friery v. People*, 2 Keyes (N. Y.) 424, 2 Abb. App. Dec. (N. Y.) 215; *Dew v. McDivitt*, 31 Ohio St. 142.

6. *People v. Foglesong*, 116 Mich. 556, *disapproving* *People v. Thacker*, 108 Mich. 652.

7. **Belief that Defendant Killed Deceased.** — *Lowenberg v. People*, 27 N. Y. 336. But see *State v. Brown*, 15 Kan. 400.

8. **Opinion on Essential Point.** — *U. S. v. Burr*, 25 Fed. Cas. No. 14,692g; *Davis v. Walker*, 60 Ill. 452, *State v. Otto*, (Kan. 1899) 58 Pac. Rep. 995; *State v. Tomblin*, 57 Kan. 841; *Brown v. State*, 57 Miss. 424; *Blake v. Millspaugh*, 1 Johns. (N. Y.) 316; *Lord v. Brown*, 5 Den. (N. Y.) 345; *Weeks v. Lyndon*, 54 Vt. 638.

The Burden of Proof is on the party challenged to show that the opinion was upon one of the main questions involved. *Weill v. Lucerne Min. Co.*, 11 Nev. 200.

9. **Iowa Statute.** — *State v. Bryan*, 40 Iowa 379.

10. *State v. Weems*, 96 Iowa 426.

11. *State v. Thompson*, 9 Iowa 190, 74 Am. Dec. 342.

12. **Matters Not Controverted.** — *State v. Wells*, 28 Kan. 321; *State v. Spaulding*, 24 Kan. 1; *State v. Gould*, 40 Kan. 258; *State v. Sorter*, 52 Kan. 531; *State v. O'Shea*, 60 Kan. 772; *State v. Martin*, 28 Mo. 530; *Conatser v. State*, 12 Lea (Tenn.) 437; *Spence v. State*, 15 Lea (Tenn.) 539.

13. **Opinion as to Other's Guilt.** — *Weston v. Com.*, 111 Pa. St. 251; *Pierson v. State*, 21 Tex. App. 14; *Thompson v. State*, 19 Tex. App. 593. And see *Williams v. Com.*, 85 Va. 607.

14. *Lambright v. State*, 34 Fla. 564.

15. **On Trial of Accessory.** — *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655; *Arnold v. State*, 9 Tex. App. 435.

16. *Peddy v. State*, 31 Tex. Crim. 547.

17. *Loyd v. State*, 45 Ga. 58.



merely formed and not expressed is not sufficient to disqualify.<sup>1</sup> It is now more generally held, however, that the mere formation of an opinion without expression is sufficient.<sup>2</sup>

(bb) *Particular Statements Indicating Bias.*—One has been held to be rendered incompetent by a statement made by him that the defendant was guilty and would be hung,<sup>3</sup> or that he ought to be hung,<sup>4</sup> or by a declaration that he would hang the prisoner.<sup>5</sup> So in a civil case one is disqualified by a statement to the effect that one of the parties ought to succeed.<sup>6</sup> But statements as to the penalty that should be imposed in case the defendant is guilty do not disqualify;<sup>7</sup> nor will a statement by one called as a juror, that he would not be in the prisoner's shoes, have such effect.<sup>8</sup> Statements made merely in jest or in the way of gossip have been held not to disqualify, though in themselves showing a decided prejudice.<sup>9</sup>

*Deliberate Expression in Writing.*—The expression of an opinion by signing a petition stating that in view of the testimony on a previous trial justice will be satisfied by the acceptance of a plea of murder in the second degree, and requesting that such plea be accepted, was held to be of such a deliberate character as to disqualify a signer of the petition;<sup>10</sup> and a similar view was taken when the juror had, in frequent editorials in the newspapers owned by him, expressed the opinion that the defendant was guilty.<sup>11</sup> And so one was

**1. Opinion Must Be Expressed.**—*United States.*—*U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

*Georgia.*—*Willis v. State*, 12 Ga. 444; *Baker v. State*, 15 Ga. 498; *Griffin v. State*, 15 Ga. 476.

*Illinois.*—*Noble v. People*, 1 Ill. 54.

*New Jersey.*—*State v. Fox*, 25 N. J. L. 595.

*New York.*—*People v. Rathbun*, 21 Wend. (N. Y.) 509.

*Vermont.*—*Boardman v. Wood*, 3 Vt. 570; *Atkinson v. Allen*, 12 Vt. 619, 35 Am. Dec. 361; *State v. Clark*, 42 Vt. 629; *State v. Phair*, 48 Vt. 366; *State v. Godfrey, Brayt.* (Vt.) 170; *State v. Tatro*, 50 Vt. 483.

*Virginia.*—*Wright v. Com.*, 32 Gratt. (Va.) 941.

**2. Expression of Opinion Unnecessary.**—*United States.*—*U. S. v. Wilson, Baldw.* (U. S.) 78; *Reynolds v. U. S.*, 98 U. S. 157; *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299.

*Connecticut.*—*State v. Potter*, 18 Conn. 172.

*Delaware.*—*State v. Anderson*, 5 Harr. (Del.) 494.

*Florida.*—*O'Connor v. State*, 9 Fla. 215.

*Massachusetts.*—*Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

*Mississippi.*—*State v. Johnson, Walk.* (Miss.) 392; *State v. Flower, Walk.* (Miss.) 318.

*New York.*—*Blake v. Millspaugh*, 1 Johns. (N. Y.) 316; *Ex p. Vermilyea*, 6 Cow. (N. Y.) 555; *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *People v. Mather*, 4 Wend. (N. Y.) 230, 21 Am. Dec. 122.

*Virginia.*—*Armistead v. Com.*, 11 Leigh (Va.) 688, 37 Am. Dec. 633.

*West Virginia.*—*State v. Baker*, 33 W. Va. 319.

**3. Particular Expressions Indicating Bias.**—*Moncrief v. State*, 59 Ga. 470; *Sellers v. People*, 4 Ill. 412; *Territory v. Kennedy*, 3 Mont. 520.

**4.** *People v. Plummer*, 9 Cal. 298; *Brakefield v. State*, 1 Sneed (Tenn.) 215; *Troxdale v. State*, 9 Humph. (Tenn.) 411; *Henrie v. State*, 41 Tex. 573. Compare *Wilson v. State*, 60 N. J. L. 171.

**5.** *Monroe v. State*, 5 Ga. 140; *Bishop v. State*, 9 Ga. 121; *Myers v. State*, 97 Ga. 94.

One was held to be disqualified who, when summoned as a juror, said of a class of cases, of which the particular case was one, that if he was on the jury he would "send up" the defendant. *U. S. v. Upham*, 2 Mont. 170.

But a statement by a juror that he wanted the defendant's case to come before him and that he would "remember" or "recollect" him was held not to be ground for a new trial. *Ash v. State*, 56 Ga. 583.

A statement that the prisoner was doomed to the penitentiary was held not to be a ground of disqualification, when it was merely a statement of what a jury would probably do in view of the circumstances of the crime. *Kennedy v. Com.*, 2 Va. Cas. 510.

**6. Civil Cases.**—*Vennum v. Harwood*, 6 Ill. 659; *Chicago, etc., R. Co. v. Perkins*, 125 Ill. 127.

**7. Statements as to Proper Penalty.**—*Mitchum v. State*, 11 Ga. 615; *Mercer v. State*, 17 Ga. 146; *West v. State*, 79 Ga. 773; *Cornwall v. State*, 91 Ga. 277; *State v. Coleman*, 20 S. Car. 441; *Com. v. Hughes*, 5 Rand. (Va.) 655.

**8. Disinclination to Be in Prisoner's Place.**—*Nash v. State*, 2 Tex. App. 362.

**A Statement to the Prosecuting Witness**, on a prosecution for assault, that the juror was well acquainted with his case and would do all that he could for him, was held to disqualify. *Hanks v. State*, 21 Tex. 526.

**9. Statement in Jest or by Way of Gossip.**—*State v. Cole*, (Del. 1899) 45 Atl. Rep. 391; *John v. State*, 16 Ga. 200; *Lovett v. State*, 60 Ga. 258; *State v. Diskin*, 35 La. Ann. 46; *State v. Birdwell*, 36 La. Ann. 859; *Com. v. Flanagan*, 7 W. & S. (Pa.) 415.

**10. Expression of Opinion by Petition to Court.**—*Com. v. Cleary*, 148 Pa. St. 26. And see *Asbury L. Ins. Co. v. Warren*, 66 Me. 523, 22 Am. Rep. 590.

**11. Expression of Opinion in Newspaper.**—*Com. v. House*, 3 Pa. Super. Ct. 304.



held to be disqualified in a civil case when he had expressed his opinion by a decision as arbitrator in the same cause.<sup>1</sup>

**Expression to Avoid Jury Duty.** — An expression of an opinion for the purpose of avoiding jury duty will not disqualify.<sup>2</sup>

*dd. STATEMENTS BY JUROR ON VOIR DIRE* — (aa) *Effect as Showing Opinion in General.* — It is impossible to specify the particular forms of statements by a venireman upon his examination on the *voir dire* which will show a disqualifying opinion or the reverse.<sup>3</sup> Such statements are infinite in variety, besides which not only his verbal statements, but also his appearance and manner, have weight with the court.<sup>4</sup> The juror's competency in this regard is to be determined upon his whole examination, and not upon a part thereof or by his use of particular expressions;<sup>5</sup> and it would seem that, generally, in order to render him competent, his statements of his ability to act impartially must be clear and direct.<sup>6</sup>

**Statutory Provisions.** — It is expressly declared by statute in a number of the states, generally with reference to criminal trials only, that an opinion based upon rumors, newspaper reports, or the like shall not disqualify, provided the court is satisfied by the statement of the juror that he will act impartially.<sup>7</sup>

**1. Expression of Opinion as Arbitrator.** — Lloyd v. Nourse, 2 Rawle (Pa.) 49.

**2. Opinion Expressed to Avoid Jury Duty.** — State v. Cole, (Del. 1899) 45 Atl. Rep. 391; John v. State, 16 Ga. 200; Moughon v. State, 59 Ga. 308; Lovett v. State, 60 Ga. 258; Hill v. State, 64 Ga. 453; Cornwall v. State, 91 Ga. 277; Simms v. State, 8 Tex. App. 230.

**3. Particular Statements on Voir Dire Indicative of Disqualifying Opinion.** — The following cases, among the large number on the point, are referred to as involving the effect of particular answers by the venireman:

*United States.* — Williams v. U. S., 93 Fed. Rep. 396.

*Georgia.* — McLaren v. Birdsong, 24 Ga. 265; Thomas v. State, 27 Ga. 287; Cato v. State, 72 Ga. 747.

*Mississippi.* — Mabry v. State, 71 Miss. 716.

*Missouri.* — State v. Wilson, 85 Mo. 134.

*Nebraska.* — Olive v. State, 11 Neb. 1; Hutchinson v. State, 19 Neb. 262.

*New York.* — Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340, 2 Barb. (N. Y.) 216.

*Pennsylvania.* — Traviss v. Com., 106 Pa. St. 597.

*Virginia.* — Clore's Case, 8 Gratt. (Va.) 606; Wormeley v. Com., 10 Gratt. (Va.) 658; Maile v. Com., 9 Leigh (Va.) 661; Wright v. Com., 32 Gratt. (Va.) 941; Dejanette v. Com., 75 Va. 867; Washington v. Com., 86 Va. 405; Hall v. Com., 89 Va. 171.

**4. Effect of Appearance and Manner.** — See Reynolds v. U. S., 98 U. S. 145. See also *infra*, this subsection, *Conclusiveness of Decision as to Acceptance or Exclusion of Juror.*

In U. S. v. Barber, 21 D. C. 456, it was held that the fact that two jurors gave the same answers on their *voir dire* did not necessarily render it error to accept one and reject the other, since a difference in their manner might justify such action.

**5. Whole Examination to Be Considered** — *Indiana.* — Butler v. State, 97 Ind. 378; Pemberton v. State, 11 Ind. App. 297.

*Kansas.* — Union Pac. R. Co. v. Motzner, 8 Kan. App. 431.

*Louisiana.* — State v. Bailey, 50 La. Ann. 533.

*Missouri.* — State v. Cunningham, 100 Mo. 382.

*Nebraska.* — Burlington, etc., R. Co. v. Beebe, 14 Neb. 463.

*Pennsylvania.* — Com. v. Moss, 6 Kulp (Pa.) 31; Ortwein v. Com., 76 Pa. St. 414, 18 Am. Rep. 420; Curley v. Com., 84 Pa. St. 151; Allison v. Com., 99 Pa. St. 17; Clark v. Com., 123 Pa. St. 555.

*Virginia.* — Hall v. Com., 89 Va. 171.

*Washington.* — State v. Lattin, 19 Wash. 57; State v. Harras, (Wash. 1900) 60 Pac. Rep. 58.

**Qualifying Answers under Duress.** — See State v. Fourchy, 51 La. Ann. 228.

**6. Statements to Be Clear and Direct.** — Coughlin v. People, 144 Ill. 140; State v. Ramsey, 50 La. Ann. 1339; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Curry v. State, 4 Neb. 545; Thurman v. State, 27 Neb. 628; State v. Schnelle, 24 W. Va. 780; State v. Baker, 33 W. Va. 329.

**7. Statutory Provisions as to Opinions on Rumor and Newspaper Reports** — *United States.* — Thiede v. Utah, 159 U. S. 510; Hopt v. Utah, 120 U. S. 430.

*California.* — People v. Miller, 125 Cal. 44; People v. Wells, 100 Cal. 227; People v. Collins, 105 Cal. 504.

*Colorado.* — Jones v. People, 2 Colo. 351. See also Thompson v. People, (Colo. 1899) 59 Pac. Rep. 51.

*Illinois.* — Coughlin v. People, 144 Ill. 140; Plummer v. People, 74 Ill. 361; Wilson v. People, 94 Ill. 209; Spies v. People, 122 Ill. 1, affirmed 123 U. S. 169.

*Indiana.* — Stout v. State, 90 Ind. 1; Noe v. State, 92 Ind. 92; Woods v. State, 134 Ind. 38; Hawk v. State, 148 Ind. 238; Siberry v. State, 149 Ind. 684; Shields v. State, 149 Ind. 395.

*Kentucky.* — Smith v. Com., 100 Ky. 133.

*Missouri.* — State v. Davis, 29 Mo. 391; State v. Rose, 32 Mo. 346; State v. Core, 70 Mo. 491; State v. Barton, 71 Mo. 288, 8 Mo. App. 15; State v. Greenwade, 72 Mo. 298; State v. Burgess, 78 Mo. 234; State v. Duffy, 124 Mo. 1; State v. Taylor, 134 Mo. 139; State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627.

*Montana.* — State v. Sheerin, 12 Mont. 539, 33 Am. St. Rep. 600; Territory v. Bryson, 9 Mont. 32.

*Nebraska.* — Palmer v. People, 4 Neb. 68; Thurman v. State, 27 Neb. 628; Basye v.



In some jurisdictions the statute provides in terms that the juror shall state under oath whether he believes that he can render a fair and impartial verdict, and that upon such statement and his other answers on his *voir dire* the court shall determine whether he can so act.<sup>1</sup> Such a statute has been decided not to be unconstitutional as impairing the right of the accused to a trial by an impartial jury.<sup>2</sup> Generally such a statute has been treated as valid without discussion of the question, and in only one state has it been declared unconstitutional,<sup>3</sup> and this decision has been questioned in a later decision of the same court.<sup>4</sup>

Under a New York Statute requiring the juror to declare his belief that his opinion will not influence his verdict and that he can render an impartial verdict according to the evidence, it is not sufficient to declare that he supposes that he will have to determine the case according to the evidence, and that his opinion ought not to influence his verdict,<sup>5</sup> or that he will decide the case upon the evidence.<sup>6</sup> But a statement that he "thinks" that he can so act is

State, 45 Neb. 261; Scott v. Chope, 33 Neb. 41; Bolln v. State, 51 Neb. 581.

North Dakota.—State v. Ekanger, 8 N. Dak. 559.

Ohio.—Blair v. State, 5 Ohio Cir. Ct. 496, 3 Ohio Cir. Dec. 242; McCarthy v. State, 5 Ohio Cir. Ct. 627, 3 Ohio Cir. Dec. 306; Doll v. State, 45 Ohio St. 445; Cooper v. State, 16 Ohio St. 328; Frazier v. State, 23 Ohio St. 551; McHugh v. State, 38 Ohio St. 153; Palmer v. State, 42 Ohio St. 596.

Oklahoma.—Bradford v. Territory, 2 Okla. 228; Huntley v. Territory, 7 Okla. 60.

Oregon.—Kumli v. Southern Pac. Co., 21 Oregon 505; State v. Ingram, 23 Oregon 434.

South Dakota.—State v. Church, 6 S. Dak. 89.

Tennessee.—Eason v. State, 6 Baxt. (Tenn.) 466; Conatser v. State, 12 Lea (Tenn.) 442. See also Woods v. State, 99 Tenn. 182.

Texas.—Ashton v. State, 31 Tex. Crim. 479. Utah.—People v. Thiede, 11 Utah 241.

See also *supra*, this subsection, *Nature of Opinion—Rumor, Hearsay, and Newspaper Reports*.

**1. Statutory Provisions as to Declaration by Juror**—Alabama.—Jones v. State, 120 Ala. 303.

Illinois.—Spies v. Illinois, 123 U. S. 131, *affirming* Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320.

Michigan.—Stephens v. People, 38 Mich. 739; Ulrich v. People, 39 Mich. 245.

Mississippi.—Green v. State, 72 Miss. 522.

Montana.—State v. Sheerin, 12 Mont. 539, 33 Am. St. Rep. 600; Territory v. Bryson, 9 Mont. 32.

Nebraska.—Palmer v. People, 4 Neb. 68; Murphy v. State, 15 Neb. 383; Cowan v. State, 22 Neb. 519; Thurman v. State, 27 Neb. 628; Scott v. Chope, 33 Neb. 41.

New York.—People v. Welch, (Supm. Ct. Gen. T.) 1 N. Y. Crim. 486; Phelps v. People, 6 Hun (N. Y.) 401, 72 N. Y. 344; People v. Mullin, 3 Alb. L. J. 150; Manke v. People, 17 Hun (N. Y.) 410; Pender v. People, 18 Hun (N. Y.) 560; People v. McLaughlin, 2 N. Y. App. Div. 419; Griffin v. Barton, (County Ct.) 22 Misc. (N. Y.) 228; People v. Flaherty, 27 N. Y. App. Div. 535; Thomas v. People, 67 N. Y. 218; Balbo v. People, 80 N. Y. 484; Cox v. People, 80 N. Y. 500; People v. Oyer & T. Ct., 83 N. Y. 436; People v. Cornetti, 92 N. Y. 85; People v. Casey, 96 N. Y. 118; People v. Otto, 101 N. Y. 690, (Supm. Ct. Gen. T.) 4 N.

Y. Crim. 155, *affirming* 38 Hun (N. Y.) 97; People v. Clark, 102 N. Y. 735, 2 N. Y. St. Rep. 540; People v. Buddenseick, 103 N. Y. 487, 57 Am. Rep. 766, 5 N. Y. Crim. 69, *affirming* (Supm. Ct. Gen. T.) 4 N. Y. Crim. 230; People v. McGonegal, 136 N. Y. 62; People v. Wilmarth, 156 N. Y. 566.

Ohio.—Cooper v. State, 16 Ohio St. 328; Frazier v. State, 23 Ohio St. 551; Erwin v. State, 29 Ohio St. 186; McHugh v. State, 38 Ohio St. 153, 42 Ohio St. 154; Doll v. State, 45 Ohio St. 445; Goins v. State, 46 Ohio St. 457.

Oklahoma.—Bradford v. Territory, 2 Okla. 228.

Texas.—Stagner v. State, 9 Tex. App. 440; Ashton v. State, 31 Tex. Crim. 479; Black v. State, 42 Tex. 377.

Utah.—Hopt v. Utah, 120 U. S. 430; Thiede v. Utah, 159 U. S. 510.

**2. Constitutionality of Statute**—United States.—Spies v. Illinois, 123 U. S. 169, *affirming* 122 Ill. 1.

Colorado.—Jones v. People, 2 Colo. 351.

Indiana.—Stout v. State, 90 Ind. 1.

Mississippi.—Green v. State, 72 Miss. 522.

Montana.—Territory v. Bryson, 9 Mont. 32.

New York.—Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

Ohio.—Cooper v. State, 16 Ohio St. 328; Palmer v. State, 42 Ohio St. 596.

Utah.—People v. Thiede, 11 Utah 241.

And see Kumli v. Southern Pac. Co., 21 Oregon 505.

**3. Decision that Statute Is Unconstitutional.**—Eason v. State, 6 Baxt. (Tenn.) 466.

**4. Conatser v. State, 12 Lea (Tenn.) 442.** See also Woods v. State, 99 Tenn. 182.

**Dicta.**—In State v. Church, 6 S. Dak. 89, it was said that such a statute comes close to the infringement of the defendant's constitutional rights. And in Huntley v. Territory, 7 Okla. 60, it was intimated that if the statute were to be construed as rendering one competent on his statement that he could act impartially, when as a matter of fact his opinion was of a fixed and definite nature, it would violate the right to a trial by an impartial jury.

**5. New York Statute.**—People v. Casey, 96 N. Y. 115.

**6. People v. Wilmarth, 156 N. Y. 566, affirming 29 N. Y. App. Div. 612.** Compare People v. Crowley, 102 N. Y. 234, *affirming* (Supm. Ct. Gen. T.) 4 N. Y. Crim. 26.



equivalent to "believes" as used in the statute.<sup>1</sup> By the terms of such statute the declaration by the juror is not conclusive, but the court must be satisfied of his competency.<sup>2</sup>

(bb) *Conclusiveness of Statement as to Impartiality.* — If the opinion is not based on such character of information as necessarily to involve disqualification, and is not such as necessarily to affect the impartiality of his action, a statement by the venireman upon his examination that he can do impartial justice according to the law and the evidence is considered sufficient to justify his acceptance as a juror.<sup>3</sup> But where the statements of the juror on his *voir dire* or else-

1. *People v. Martell*, 138 N. Y. 595.

2. *Young v. Johnson*, 123 N. Y. 226.

3. *Statement by Juror that He Can Act Impartially* — *United States*. — *Gallot v. U. S.*, 87 Fed. Rep. 446; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640; *Reynolds v. U. S.*, 98 U. S. 145; *Hopt v. Utah*, 120 U. S. 430.

*Arkansas*. — *Dolan v. State*, 40 Ark. 454.

*California*. — *People v. McCauley*, 1 Cal. 379; *People v. Collins*, 105 Cal. 504; *People v. Owens*, 123 Cal. 482.

*Colorado*. — *Collins v. Burns*, 16 Colo. 7.

*Connecticut*. — *State v. Willis*, 71 Conn. 293.

*Delaware*. — *State v. Windsor*, 5 Harr. (Del) 512.

*District of Columbia*. — *U. S. v. Schneider*, 21 D. C. 381.

*Florida*. — *O'Connor v. State*, 9 Fla. 215; *Montague v. State*, 17 Fla. 662; *Andrews v. State*, 21 Fla. 598; *Denham v. State*, 22 Fla. 664; *English v. State*, 31 Fla. 340; *Olive v. State*, 34 Fla. 203; *Brown v. State*, 40 Fla. 459.

*Georgia*. — *Ray v. State*, 15 Ga. 226; *Hinkle v. State*, 94 Ga. 595.

*Illinois*. — *Coughlin v. People*, 144 Ill. 140.

*Indiana*. — *Morgan v. Stevenson*, 6 Ind. 169; *Morgan v. State*, 31 Ind. 193; *Clem v. State*, 33 Ind. 418; *Hart v. State*, 57 Ind. 102; *Noe v. State*, 92 Ind. 92; *M'Gregg v. State*, 4 Blackf. (Ind.) 101; *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578.

*Iowa*. — *State v. Yetzer*, 97 Iowa 426; *State v. Brady*, 100 Iowa 191; *State v. Young*, 104 Iowa 730; *State v. Hudson*, (Iowa 1899) 80 N. W. Rep. 232.

*Louisiana*. — *State v. Brette*, 6 La. Ann. 653; *State v. Ford*, 42 La. Ann. 255; *State v. Covington*, 45 La. Ann. 979; *State v. Ward*, 14 La. Ann. 684; *State v. Bunger*, 14 La. Ann. 465; *State v. Schnapper*, 22 La. Ann. 43; *State v. Lartigue*, 29 La. Ann. 642; *State v. Ramsey*, 50 La. Ann. 1339; *State v. Johnson*, 33 La. Ann. 890; *State v. Hornsby*, 33 La. Ann. 1110; *State v. De Rance*, 34 La. Ann. 186, 44 Am. Rep. 426; *State v. Dugay*, 35 La. Ann. 327; *State v. Desmouchet*, 32 La. Ann. 1211; *State v. McGee*, 36 La. Ann. 206; *State v. Foster*, 36 La. Ann. 877; *State v. Melton*, 37 La. Ann. 77; *State v. Dent*, 41 La. Ann. 1082; *State v. Frier*, 45 La. Ann. 1434; *State v. Garig*, 43 La. Ann. 365; *State v. Vogel*, 49 La. Ann. 1057.

*Maryland*. — *Waters v. State*, 51 Md. 430; *Zimmerman v. State*, 56 Md. 536; *Garlitz v. State*, 71 Md. 299.

*Michigan*. — *Holt v. People*, 13 Mich. 224; *Ulrich v. People*, 39 Mich. 246; *Rice v. Rice*, 104 Mich. 371; *People v. O'Neill*, 107 Mich. 556.

*Missouri*. — *Eckert v. St. Louis Transfer Co.*

2 Mo. App. 36; *State v. Barton*, 71 Mo. 288; *Montgomery v. Wabash, etc., R. Co.*, 90 Mo. 446; *State v. Brooks*, 92 Mo. 542; *State v. Williamson*, 106 Mo. 162; *State v. Bryant*, 93 Mo. 273; *State v. Duffy*, 124 Mo. 1; *State v. Hunt*, 141 Mo. 626; *State v. Punshon*, 133 Mo. 44; *State v. Reed*, 137 Mo. 125.

*Nebraska*. — *Murphy v. State*, 15 Neb. 383; *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791.

*New York*. — *People v. Wah Lee Mon*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 767, 59 Hun (N. Y.) 626; *Griffin v. Barton*, (County Ct.) 22 Misc. (N. Y.) 228, affirmed 27 N. Y. App. Div. 632; *Phelps v. People*, 72 N. Y. 334; *Abbott v. People*, 86 N. Y. 460; *People v. Martell*, 138 N. Y. 595.

*North Carolina*. — *State v. Ellington*, 7 Ired. L. (29 N. Car.) 61; *State v. Dove*, 10 Ired. L. (32 N. Car.) 469; *State v. Bone*, 7 Jones L. (52 N. Car.) 121; *State v. Kilgore*, 93 N. Car. 533; *State v. Green*, 95 N. Car. 611; *State v. De Graff*, 113 N. Car. 688.

*Oklahoma*. — *Huntley v. Territory*, 7 Okla. 60.

*Oregon*. — *State v. Kelly*, 28 Oregon 225, 52 Am. St. Rep. 777; *State v. Morse*, 35 Oregon 462.

*Pennsylvania*. — *Com. v. Work*, 3 Pittsb. (Pa.) 493; *Com. v. Morrow*, 9 Phila. (Pa.) 583, 29 Leg. Int. (Pa.) 380; *Com. v. Beucher*, 10 Pa. Co. Ct. 3; *Hall v. Com.*, (Pa. 1888) 12 Atl. Rep. 163; *O'Mara v. Com.*, 75 Pa. St. 424; *Curley v. Com.*, 84 Pa. St. 151; *Clark v. Com.*, 123 Pa. St. 555, 23 W. N. C. (Pa.) 317; *Rizzolo v. Com.*, 126 Pa. St. 54, 24 W. N. C. (Pa.) 13; *Com. v. Taylor*, 129 Pa. St. 534; *Com. v. McMillan*, 144 Pa. St. 610; *Com. v. Van Horn*, 188 Pa. St. 143; *Com. v. Eagan*, 190 Pa. St. 10.

*South Carolina*. — *State v. James*, 34 S. Car. 49, 579, 13 S. E. Rep. 325; *State v. Summers*, 36 S. Car. 479; *Sims v. Jones*, 43 S. Car. 91.

*South Dakota*. — *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

*Tennessee*. — *Conatser v. State*, 12 Lea (Tenn.) 437; *Woods v. State*, 99 Tenn. 182.

*Texas*. — *Grissom v. State*, 4 Tex. App. 374; *Post v. State*, 10 Tex. App. 579; *Reed v. State*, 32 Tex. Crim. 25; *Livar v. State*, 26 Tex. App. 115; *Steagald v. State*, 22 Tex. App. 464; *Suit v. State*, 30 Tex. App. 319; *Shannon v. State*, 34 Tex. Crim. 5; *Adams v. State*, 35 Tex. Crim. 285; *Trotter v. State*, 37 Tex. Crim. 468; *Deon v. State*, 37 Tex. Crim. 506; *Bratt v. State*, (Tex. Crim. 1897) 41 S. W. Rep. 624.

*Vermont*. — *State v. Meyer*, 58 Vt. 457.

*Virginia*. — *Smith v. Com.*, 7 Gratt. (Va.) 593; *Clore's Case*, 8 Gratt. (Va.) 606; *Smith v. Com.*, 6 Gratt. (Va.) 606; *Wormeley v. Com.*, 10 Gratt. (Va.) 658; *Jackson v. Com.*, 23 Gratt.



where show that his opinion is of such a character as to disqualify him, it is immaterial that he states a belief that he can give a fair trial to the parties and render a verdict in accordance with the law and the facts.<sup>1</sup>

(b) **Member of Grand Jury Indicting Defendant.** — One who was a member of the grand jury which found the indictment is incompetent to act as a trial juror in the case.<sup>2</sup> But that one was a member of a grand jury which indicted the defendant for a similar offense is not ground for his exclusion from the jury.<sup>3</sup>

(c) **Witness in Case.** — It has been held in some cases that one is not disqualified because he has been summoned as a witness.<sup>4</sup> It has likewise been held

(Va.) 919; *Little v. Com.*, 25 Gratt. (Va.) 921; *Page v. Com.*, 26 Gratt. (Va.) 943, 27 Gratt. (Va.) 954; *Brown v. Com.*, 2 Leigh (Va.) 769; *Osiander v. Com.*, 3 Leigh (Va.) 780, 24 Am. Dec. 693; *Moran v. Com.*, 9 Leigh (Va.) 651; *Maile v. Com.*, 9 Leigh (Va.) 661; *Pollard v. Com.*, 5 Rand. (Va.) 659; *M'Cune v. Com.*, 2 Rob. (Va.) 771; *Lyles v. Com.*, 88 Va. 396.

*Washington.* — *Rose v. State*, 2 Wash. 310; *State v. Giles*, 8 Wash. 12.

*West Virginia.* — *State v. Schnelle*, 24 W. Va. 768; *State v. Baker*, 33 W. Va. 319.

*Wisconsin.* — *Baker v. State*, 88 Wis. 140.

*Wyoming.* — *Bryant v. State*, 7 Wyo. 311.

**1. Juror's Opinion as to Ability to Act Fairly Sometimes Immaterial** — *United States.* — *U. S. v. Burr*, 25 Fed. Cas. No. 14,692g.

*Arkansas.* — *Hardin v. State*, 66 Ark. 53; *Polk v. State*, 45 Ark. 165.

*California.* — *People v. Gehr*, 8 Cal. 359; *People v. Reynolds*, 16 Cal. 129; *People v. Weil*, 40 Cal. 268; *Monreal v. Bush*, 46 Cal. 80; *People v. Wells*, 100 Cal. 227; *People v. Miller*, 125 Cal. 44.

*Florida.* — *Andrews v. State*, 21 Fla. 598; *Olive v. State*, 34 Fla. 206.

*Georgia.* — *Jim v. State*, 15 Ga. 535; *McGuffie v. State*, 17 Ga. 497; *Maddox v. State*, 32 Ga. 581, 79 Am. Dec. 307; *Myers v. State*, 97 Ga. 95.

*Illinois.* — *Baxter v. People*, 8 Ill. 368; *Neely v. People*, 13 Ill. 685; *Gray v. People*, 26 Ill. 344; *Collins v. People*, 48 Ill. 145; *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344; *Coughlin v. People*, 144 Ill. 140.

*Indiana.* — *Brown v. State*, 70 Ind. 576.

*Kansas.* — *State v. Snodgrass*, 52 Kan. 174; *Morton v. State*, 1 Kan. 468; *State v. Brown*, 15 Kan. 400; *State v. Miller*, 29 Kan. 43; *State v. Beatty*, 45 Kan. 492; *State v. Vogan*, 56 Kan. 61; *State v. Beuerman*, 59 Kan. 586; *State v. Start*, 60 Kan. 256.

*Louisiana.* — *State v. Barnes*, 34 La. Ann. 395; *State v. Jackson*, 37 La. Ann. 768; *State v. Boyd*, 38 La. Ann. 374.

*Michigan.* — *Stephens v. People*, 38 Mich. 739; *People v. Shufelt*, 61 Mich. 237; *People v. Evans*, 72 Mich. 367.

*Missouri.* — *State v. Hultz*, 106 Mo. 41; *State v. Foley*, 144 Mo. 600.

*Montana.* — *Ruff v. Rader*, 2 Mont. 211.

*Nebraska.* — *Olive v. State*, 11 Neb. 1; *Miller v. State*, 29 Neb. 437.

*New Hampshire.* — *March v. Portsmouth, etc., R. Co.*, 19 N. H. 372.

*New York.* — *People v. Tyrrell*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 142; *Cancemi v. People*, 16 N. Y. 501; *Young v. Johnson*, 46 Hun (N. Y.) 164; *People v. Mallon*, 3 Lans. (N. Y.) 224.

*Ohio.* — *Fouts v. State*, 7 Ohio St. 471.

*Oregon.* — *State v. Brown*, 28 Oregon 147.

*Pennsylvania.* — *Allison v. Com.*, 99 Pa. St. 17; *Com. v. Cleary*, 148 Pa. St. 26.

*South Carolina.* — *State v. James*, 34 S. Car. 49; *Sims v. Jones*, 43 S. Car. 91.

*Tennessee.* — *Rice v. State*, 1 Yerg. (Tenn.) 432; *Moses v. State*, 10 Humph. (Tenn.) 456; *Conatser v. State*, 12 Lea (Tenn.) 445.

*Texas.* — *Shannon v. State*, 34 Tex. Crim. 5; *Gilmore v. State*, 37 Tex. Crim. 81; *Gallagher v. State*, 40 Tex. Crim. 296.

*Vermont.* — *State v. Clark*, 42 Vt. 629.

*Virginia.* — *Sprouce v. Com.*, 2 Va. Cas. 375; *Armistead v. Com.* 11 Leigh (Va.) 688, 37 Am. Dec. 633; *Dejarnette v. Com.*, 75 Va. 867; *Washington v. Com.*, 86 Va. 405.

*Washington.* — *Rose v. State*, 2 Wash. 310; *State v. Coella*, 3 Wash. 99; *State v. Murphy*, 9 Wash. 204; *State v. Wilcox*, 11 Wash. 215; *State v. Rutten*, 13 Wash. 203; *Piper v. Spokane*, (Wash. 1900) 60 Pac. Rep. 138.

**2. Member of Grand Jury Finding Indictment** — *England.* — 2 Hawk. P. C., c. 43, § 27; *Rex v. Oates*, 10 How. St. Tr. 1079; *Reg. v. Sullivan*, 1 Per. & Dav. 96, 8 Ad. & El. 831, 35 E. C. L. 539; *Young v. Slaughterford*, 11 Mod. 228.

*Alabama.* — *Birdsong v. State*, 47 Ala. 68; *Finch v. State*, 81 Ala. 41; *Williams v. State*, 109 Ala. 64.

*Arkansas.* — *Whitmore v. State*, 43 Ark. 271.

*Georgia.* — *Jackson v. State*, 51 Ga. 402; *Watkins v. State*, 60 Ga. 601; *Betts v. State*, 66 Ga. 508; *McLain v. State*, 71 Ga. 279.

*Indiana.* — *Barlow v. State*, 2 Blackf. (Ind.) 114; *Rogers v. Lamb*, 3 Blackf. (Ind.) 155.

*Massachusetts.* — *Com. v. Hussey*, 13 Mass. 221.

*South Carolina.* — *State v. O'Driscoll*, 2 Bay (S. Car.) 153; *State v. Cooler*, 30 S. Car. 105.

*Texas.* — *Greenwood v. State*, 34 Tex. 334; *Franklin v. State*, 2 Tex. App. 8.

*Virginia.* — *Dilworth v. Com.*, 12 Gratt. (Va.) 689, 65 Am. Dec. 264.

*Wisconsin.* — *Bennet v. State*, 24 Wis. 57.

See also *Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137.

The Penal Code of *California*, § 1074, subdiv. 4, contains a similar provision, but has no application when the prosecution is by information. *People v. Ebanks*, 117 Cal. 652.

**3. Grand Juror Indicting for Similar Offense.** — *Johnson v. State*, 34 Tex. Crim. 115. But see 2 Hawk. P. C., c. 43, § 27.

**Bailiff of Grand Jury Indicting Defendant.** — See *supra*, this section, *Causes of General Character* — *Occupancy of Public Office*.

**4. Witness Competent as Juror.** — *Rondeau v. New Orleans Imp., etc., Co.*, 15 La. 160; *Ran-kin v. Nelson*, (Supm. Ct. Gen. T.) 10 N. Y. St. Rep. 337. This seems to be involved in the decisions to the effect that a juror may always be a witness for either party and still



that one is not disqualified because he was a witness on a former trial of the same indictment<sup>1</sup> or on a trial of the same cause before arbitrators.<sup>2</sup> But other cases hold that one who is summoned as a witness is disqualified to serve as a juror,<sup>3</sup> and that it is immaterial that the witness will testify only as to the defendant's character<sup>4</sup> or that he is not actually examined.<sup>5</sup>

It is Sometimes Provided by Statute that a witness shall not be competent as a juror.<sup>6</sup> Under such a statute it has been decided that one summoned as a witness is not disqualified if he has no knowledge of material facts<sup>7</sup> or is not examined as a witness;<sup>8</sup> and the statute does not apply to one who has been a witness only on the question of venue.<sup>9</sup>

(d) Previous Jury Service in Same Case. — The fact that one served as a juror on a previous trial of the same case has long been regarded as ground for exclusion.<sup>10</sup> It has been held, however, that previous service on the trial of an entirely different issue in the same case will not disqualify.<sup>11</sup>

Termination of Previous Trial. — It has been held in some cases that such previous service does not disqualify if it was followed by a mistrial without a verdict, in the absence of a showing of actual bias on the part of the juror,<sup>12</sup> or where a verdict was directed by the court.<sup>13</sup> But elsewhere it has been held that former service, made by statute a ground of challenge, is sufficient for that purpose if the case was partially tried and a portion of the testimony was received.<sup>14</sup>

Necessity of Actual Service. — One summoned at a previous time is eligible if there was no trial at that time,<sup>15</sup> or if he was then excluded from service at the request of one of the parties.<sup>16</sup> Nor is one incompetent because he was included in a previous panel which was quashed.<sup>17</sup>

retain his seat as a juror. *Rex v. Rosser*, 7 C. & P. 648, 32 E. C. L. 670; *Manley v. Shaw*, C. & M. 361, 41 E. C. L. 200; *Fellows's Case*, 5 Me. 335; *Patterson v. Boston*, 20 Pick. (Mass.) 159; *Murdock v. Sumner*, 22 Pick. (Mass.) 156; *White v. State*, 73 Miss. 50; *State v. Spencer*, 21 N. J. L. 196; *Dunbar v. Parks*, 2 Tyler (Vt.) 217.

1. **Witness on Former Trial.** — *Fellows's Case*, 5 Me. 333.

2. *Harper v. Kean*, 11 S. & R. (Pa.) 280.

3. **Witness Incompetent as Juror.** — *Commander v. State*, 60 Ala. 1, *overruling* apparently *Bell v. State*, 44 Ala. 393; *Baldwin v. State*, 111 Ala. 11; *State v. Barber*, 113 N. Car. 711; *Com. v. Joliffe*, 7 Waits (Pa.) 585, *distinguishing* *Harper v. Kean*, 11 S. & R. (Pa.) 280; *State v. Underwood*, 2 Overt. (Tenn.) 92.

It was held a good cause of challenge that the juror had been subpoenaed for the purpose of impairing the credit of another important witness. *Chess v. Chess*, 1 P. & W. (Pa.) 32.

4. *State v. Barber*, 113 N. Car. 711. In this case the person held to be disqualified was not summoned as a witness, but was merely attending court in expectation of being called to testify.

5. *Atkins v. State*, 60 Ala. 45.

6. **Statutory Provision.** — *Brown v. State*, 10 Ark. 618; *Boyce v. Aubuchon*, 34 Mo. App. 315.

7. **Ignorance of Facts.** — *Seals v. State*, 35 Tex. Crim. 138.

8. **Person Not Examined.** — *East Line*, etc., R. Co. v. *Brinker*, 68 Tex. 500.

9. **Witness on Motion to Change Venue.** — *State v. Wisdom*, 84 Mo. 177; *Hardin v. State*, 40 Tex. Crim. 208.

10. **Previous Service in Same Case.** — *Co. Litt.* 157b; 3 Black. Com. 363; *Argent v. Darrell*, 2 Salk. 648; *Herndon v. Bradshaw*, 4 Bibb (Ky.)

45; *Hester v. Chambers*, 84 Mich. 562; *Barclay v. People*, 8 Alb. L. J. 104; *Freeman v. Wall*, 3 Luz. Leg. Reg. (Pa.) 33; *Hunter v. Matthews*, 12 Leigh (Va.) 228. For a statutory provision to the same effect see *Dunn v. State*, 7 Tex. App. 600; *Jacobs v. State*, 9 Tex. App. 278; *Willis v. State*, 9 Tex. App. 297.

11. **Different Issue.** — *Page v. Com.*, 27 Gratt. (Va.) 954, in which case jurors were held not to be disqualified on a trial on the plea of not guilty, though they had previously served on the plea of *autrefois acquit*.

12. **Previous Mistrial.** — *Whitner v. Hamlin*, 12 Fla. 18, *Cunneen v. State*, 96 Ga. 406.

In *Scott v. McDonald*, 83 Ga. 28, it was held, however, that a juror who, by disagreement with the other jurors, had caused a mistrial, was incompetent to sit on a new trial.

13. **Direction of Verdict.** — *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361.

14. **Partial Trial Sufficient.** — *Weeks v. Medler*, 20 Kan. 57.

15. **No Actual Trial.** — *Reid v. State*, 50 Ga. 556; *State v. Matthews*, 98 Mo. 119.

16. **Person Summoned but Not Serving.** — *Blackman v. State*, 80 Ga. 785; *Wilson v. State*, 3 Tex. App. 64; *Nalley v. State*, 28 Tex. App. 387; *Easterwood v. State*, 34 Tex. Crim. 400.

The fact that one was peremptorily challenged on the previous trial is not a ground of exclusion as having raised a prejudice on his part. See cases cited in the next preceding note. And this is likewise true when the previous peremptory challenge was at the trial of another party, though involving similar issues. *Cargen v. People*, 39 Mich. 549; *State v. Matthews*, 98 Mo. 119.

17. **Quashing of Previous Panel.** — *Arnold v. State*, 38 Tex. Crim. 5; *Caperton v. Nickel*, 4 W. Va. 173.



(e) **Service as Arbitrator in Case.** — That one has acted as arbitrator in a case is held to be a good ground of challenge.<sup>1</sup>

(f) **Service as Juror in Case Involving Same Facts** — *aa. IN GENERAL.* — One who has served on the trial of another person charged with the same crime, though not jointly indicted therefor, has been held to be incompetent.<sup>2</sup> And the fact that the juror, in a previous prosecution of another person, passed on similar issues arising in connection with the same acts or occurrences, has been regarded as a ground of disqualification.<sup>3</sup> But the mere similarity of issues involved arising out of different events, though of the same character, is not a ground of disqualification.<sup>4</sup> One is not disqualified to serve in a civil case by the fact that he has previously tried a case in which the plaintiff or defendant was the same and which depended on the same general considerations;<sup>5</sup> and this view has been taken even when the same act was involved in both cases.<sup>6</sup> But in other cases the identity of the issues and partial identity of the evidence have been considered to constitute disqualification.<sup>7</sup>

**Identity of Both Parties.** — It has been decided that when two actions between the same parties involve different issues, one can serve as juror in the trial of each of them, but that the rule is different if they involve the same questions and evidence.<sup>8</sup>

*bb. TRIAL OF CODEFENDANT.* — That one has previously served on the trial of one of two or more persons jointly indicted, does not disqualify him to act as a juror upon the trial of the others.<sup>9</sup> This doctrine has been disapproved in *Michigan*,<sup>10</sup> and the rule may of course be changed by statute.<sup>11</sup>

(g) **Knowledge Without Opinion.** — As a general rule, and in so far as such a rule is not excluded by the existence of the particular states of fact above referred to, knowledge alone in regard to the facts of the case, without any opinion thereon, will not disqualify.<sup>12</sup> This rule has been applied in the case of per-

1. *Lloyd v. Nourse*, 2 Rawle (Pa.) 49.

2. **Service on Trial of Person Charged with Same Offense.** — *Obenchain v. State*, 35 Tex. Crim. 490; *Sessions v. State*, 37 Tex. Crim. 58.

3. **Similar Issues on Same Facts.** — *Smith v. State*, 55 Ala. 1; *Wickard v. State*, 109 Ala. 45; *Brown v. State*, 104 Ga. 736; *People v. Troy*, 96 Mich. 530; *State v. James*, 34 S. Car. 49.

**Riot — Murder.** — That one served as a juror on a trial for riot does not disqualify him on a trial for murder committed during the riot. *Com. v. Toth*, 145 Pa. St. 308.

4. **Similar Issues on Similar Facts.** — *State v. Sheeley*, 15 Iowa 404; *State v. Leicht*, 17 Iowa 28. And see *People v. Williams*, 118 Mich. 692.

The fact that one was shown to be incompetent in a similar case is not ground of disqualification as tending to show incompetency in the case at bar. *State v. Fairlamb*, 121 Mo. 137. See also *supra*, this section, *Prejudice as Regards Parties or Persons Interested in Case — Previous Service on Trial of Same Defendant.*

5. **Identity of Party and Issues in Civil Cases.** — *Algier v. The Steamer Maria*, 14 Cal. 167; *Board of Levee Com'rs v. Dillard*, 76 Miss. 641; *Chariton Plow Co. v. Deusch*, 16 Neb. 384.

6. *Dew v. McDivitt*, 31 Ohio St. 143; *Central R., etc., Co. v. Ogletree*, 97 Ga. 325.

7. **Ground for Exclusion of Juror.** — *Garthwaite v. Tatum*, 21 Ark. 336, 76 Am. Dec. 402; *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221; *Swarnes v. Sitton*, 58 Ill. 155; *Apperson v. Logwood*, 12 Heisk. (Tenn.) 262.

8. **Identity of Both Parties.** — *Smith v. Wagenseller*, 21 Pa. St. 491. But see *Sheppard v.*

*Cook*, 2 Hayw. (3 N. Car.) 238. See also *Grady v. Early*, 18 Cal. 108.

9. **Service on Trial of One Jointly Indicted.** — *Regicides' Case*, 5 How. St. Tr. 975; *Cranburne's Case*, 13 How. St. Tr. 222; *Thistlewood's Case*, 33 How. St. Tr. 681, 956; *U. S. v. Wilson*, *Baldw.* (U. S.) 78; *Com. v. Hill*, 4 Allen (Mass.) 591; *State v. Sawtelle*, 66 N. H. 488; *Dew v. McDivitt*, 31 Ohio St. 143; *State v. Williams*, 31 S. Car. 238; *Thomas v. State*, 36 Tex. 315; *Bowman v. State*, 41 Tex. 417. See also *Humphries v. State*, 100 Ga. 260.

10. **Michigan Decisions.** — *People v. Troy*, 96 Mich. 530. Compare *People v. Betts*, 94 Mich. 642.

11. **Statutory Provision.** — See *State v. Sheeley*, 15 Iowa 404; *State v. Leicht*, 17 Iowa 28.

12. **Knowledge Without Opinion.** — *California.* — *Lawrence v. Collier*, 1 Cal. 37.

*Illinois.* — *Thompson v. People*, 24 Ill. 60, 76 Am. Dec. 733; *Chicago, etc., R. Co. v. Perkins*, 125 Ill. 127; *Gradle v. Hoffman*, 105 Ill. 147.

*Kansas.* — *State v. Bane*, 1 Kan. App. 537; *Roy v. State*, 2 Kan. 405.

*Massachusetts.* — *Com. v. Thrasher*, 11 Gray (Mass.) 57.

*Michigan.* — *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854; *People v. Summers*, 115 Mich. 537.

*Mississippi.* — *Penn v. State*, 62 Miss. 450.

*Missouri.* — *State v. Dusenberry*, 112 Mo. 277.

*New Hampshire.* — *State v. Howard*, 17 N. H. 171.

See also *Vance v. Com.*, 2 Va. Cas. 162.

So one who had acted as coroner was not



sons who have heard evidence on the previous trial, they not being disqualified if they have formed no opinion.<sup>1</sup>

*d. GENERAL POWER OF COURT TO EXCLUDE JUROR*—(1) *Action by Court of Its Own Motion*.—The court may, of its own motion, without any challenge or suggestion by either party, exclude an incompetent or disqualified juror.<sup>2</sup> There are, however, to be found decisions to the effect that a failure of the parties to exercise the right of challenge involves a waiver, and that the court cannot then exclude for such cause.<sup>3</sup> It is also stated that there is no positive obligation upon the court to discharge an incompetent juror not objected to by either party.<sup>4</sup>

(2) *Discretion as to Grounds*.—There are quite a number of decisions to the effect that the trial court has a wide discretion in excluding jurors for reasons which would not necessarily be grounds for sustaining a challenge for no cause, such action being merely the result of excessive caution in securing an impartial jury and not being calculated to injure either party.<sup>5</sup> This state-

disqualified to act as a juror on a prosecution for homicide. *O'Connor v. State*, 9 Fla. 215.

In an action for assault, however, it was held to be a proper exercise of discretion to reject one who believed a statement of the case which he had received from the plaintiff, though he said that he had no opinion as to whether the plaintiff was in the right. *May v. Elam*, 27 Iowa 365.

*On a Prosecution for Riot at a Public Meeting*, it was held to be ground for challenge that one had taken an active part as an inhabitant of the town in opposing the law which was to be considered at such meeting. *Reg. v. Swain*, 2 M. & Rob. 112, 2 Lewin C. C. 116.

*Previous Conversations with a Party* accordingly do not disqualify a juror if he has not formed any opinion therefrom. *Young v. Marine Ins. Co.*, 1 Cranch (C. C.) 452, 30 Fed. Cas. No. 18,163; *Will v. Mendon*, 108 Mich. 251. But see *Catasauqua Mfg. Co. v. Hopkins*, 141 Pa. St. 30.

**1. Evidence Heard at Previous Trial.**—*Robinson v. State*, 82 Ga. 535; *Leas v. Patterson*, 38 Ind. 465; *State v. Scott*, 1 Kan. App. 748; *Spangler v. Kite*, 47 Mo. App. 230; *State v. Duestrow*, 137 Mo. 44; *Parchman v. State*, 2 Tex. App. 228, 28 Am. Rep. 435; *Wade v. State*, 12 Tex. App. 358.

The same rule applies to those who have heard the evidence on a trial of a codefendant. *Weston v. Com.*, 111 Pa. St. 251; *Thompson v. State*, 19 Tex. App. 593.

**Officers Concerned in and Acquainted with Case.**—See *supra*, this section, *Causes of General Character—Occupancy of Public Office*.

**2. Exclusion Without Challenge—United States.**—*U. S. v. Morris*, 1 Curt. (U. S.) 23.

*Alabama.*—*Fields v. State*, 52 Ala. 348; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96; *U. S. Rolling Stock Co. v. Weir*, 96 Ala. 396.

*Georgia.*—*Doyal v. State*, 70 Ga. 134.

*Indiana.*—*Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1.

*Louisiana.*—*State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448.

*Michigan.*—*People v. Carrier*, 46 Mich. 442; *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 21 Am. St. Rep. 629; *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560.

*Mississippi.*—*Lewis v. State*, 9 Smed. & M.

(Miss.) 115; *Marsh v. State*, 30 Miss. 627; *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *McGuire v. State*, 37 Miss. 369; *Guice v. State*, 60 Miss. 714.

*Missouri.*—*State v. Taylor*, 134 Mo. 109.

*Nevada.*—*State v. Larkin*, 11 Nev. 314.

*New York.*—*People v. Decker*, 157 N. Y. 186.

*North Carolina.*—*State v. Jones*, 80 N. Car. 415; *State v. Barber*, 113 N. Car. 711.

*Texas.*—*Spear v. State*, 16 Tex. App. 98, apparently overruling *Greer v. State*, 14 Tex. App. 179; *Gonzales v. State*, 31 Tex. Crim. 508; *Mitchell v. State*, 43 Tex. 513.

*Virginia.*—*Montague v. Com.*, 10 Gratt. (Va.) 767.

See also *supra*, this section, *Causes of General Character—Physical Incapacity; Mental Defects*.

**3. Contrary Decisions.**—*Van Blaricum v. People*, 16 Ill. 364, 63 Am. Dec. 316; *Den. v. Pissant*, 1 N. J. L. 254. See also *Bell v. State*, 115 Ala. 25. But see *Sutton v. Petty*, 5 N. J. L. 581, where it was held that the parties cannot by consent waive the disqualification of age.

**4. Court Not Bound to Act in Absence of Challenge.**—*Murphy v. State*, 37 Ala. 142; *Waller v. State*, 40 Ala. 325; *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 196; *State v. Coleman*, 8 S. Car. 237; *Roberts v. State*, 30 Tex. App. 291.

**Refusal to Exclude Without Challenge.**—In *Jackson v. State*, 94 Ala. 85, the court declined to exclude a juror who, it appeared, was an unpardoned felon, unless he was challenged for that cause, and there was held to be no error in retiring him on a challenge for cause upon that ground, the challenge not having been charged to the defendant as peremptory.

**5. Discretion in Excluding Jurors—United States.**—*Queen v. Hepburn*, 7 Cranch (U. S.) 290; *U. S. v. Benson*, 31 Fed. Rep. 896.

*Alabama.*—*Tatum v. Young*, 1 Port. (Ala.) 298; *Quesenberry v. State*, 3 Stew. & P. (Ala.) 308; *State v. Marshall*, 8 Ala. 302.

*Arkansas.*—*Vaughan v. State*, 58 Ark. 353.

*California.*—*People v. Arceo*, 32 Cal. 40.

*Georgia.*—*Jesse v. State*, 20 Ga. 164.

*Iowa.*—*Dively v. Cedar Falls*, 21 Iowa 565.

*Kansas.*—*State v. Miller*, 29 Kan. 43; *State v. McKinney*, 31 Kan. 570; *State v. Sorter*, 52 Kan. 531.

*Maine.*—*Ware v. Ware*, 8 Me. 42.



ment has been most generally made in connection with the power of the court to exclude jurors on a suspicion of bias or previous formation of opinion.<sup>1</sup> But it is stated that the court cannot exclude a juror arbitrarily or at its mere will and caprice.<sup>2</sup> And in *Alabama* there are dicta to the effect that the court can exclude a juror only for statutory reasons or for reasons involving the personal convenience of the juror.<sup>3</sup>

**Depleting Regular Panel.** — While the court should not by excluding jurors unnecessarily reduce or deplete the panel so as to preclude a trial by the regular jurors,<sup>4</sup> the fact that this is the result of its action does not in itself show an abuse of discretion.<sup>5</sup>

(3) *For Reasons Personal to Juror.* — It is well recognized that the court has power to excuse a juror for reasons personal to the latter and at the latter's request.<sup>6</sup> The court may excuse those whose names appear on more than

*Massachusetts.* — *Com. v. Livermore*, 4 Gray (Mass.) 19.

*Michigan.* — *Atlas Min. Co. v. Johnston*, 23 Mich. 39; *Torrent v. Yager*, 52 Mich. 506; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501.

*Mississippi.* — *McGuire v. State*, 37 Miss. 369; *Hale v. State*, 72 Miss. 140.

*Nevada.* — *State v. Larkin*, 11 Nev. 314.

*New Hampshire.* — *State v. Bradford*, 57 N. H. 188.

*New York.* — *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47.

*South Dakota.* — *State v. La Croix*, 8 S. Dak. 369.

*Tennessee.* — *Lewis v. State*, 3 Head (Tenn.) 127; *Boyd v. State*, 14 Lea (Tenn.) 161.

*Texas.* — *Couts v. Neer*, 70 Tex. 468.

*Vermont.* — *Phelps v. Hall*, 2 Tyler (Vt.) 401; *Quinn v. Halbert*, 57 Vt. 178.

*Virginia.* — *Burch v. Hylton*, 89 Va. 441.

*Wisconsin.* — *Sutton v. Fox*, 55 Wis. 531, 42 Am. Rep. 744.

*Compare State v. Stephens*, 11 S. Car. 319.

See also *infra*, this section, *Conclusiveness of Decision as to Acceptance or Exclusion of Juror* — *Exclusion of Juror*.

**Statutory Grounds Not Exclusive.** — So it is stated that a juror may be disqualified by matters other than those expressly specified in the statute. *Stout v. State*, 90 Ind. 1; *Block v. State*, 100 Ind. 357; *Coppersmith v. Mound City R. Co.*, 51 Mo. App. 357; *Boyd v. State*, 14 Lea (Tenn.) 161; *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521.

1. **Discretion in Excluding for Bias** — *Alabama.* — *U. S. Rolling Stock Co. v. Weir*, 96 Ala. 396.

*Arkansas.* — *Hamilton v. State*, 62 Ark. 543.

*Iowa.* — *State v. Howard*, 10 Iowa 101; *Davenport Gas Light, etc., Co. v. Davenport*, 13 Iowa 229; *May v. Elam*, 27 Iowa 365; *Wisehart v. Dietz*, 67 Iowa 121; *Geiger v. Payne*, 102 Iowa 581.

*Louisiana.* — *State v. Shields*, 33 La. Ann. 1410.

*Maine.* — *Snow v. Weeks*, 75 Me. 105.

*Massachusetts.* — *Com. v. Livermore*, 4 Gray (Mass.) 18.

*Michigan.* — *Goodrich v. Burdick*, 26 Mich. 39.

*Mississippi.* — *Smith v. State*, 55 Miss. 513, 61 Miss. 754.

*Nebraska.* — *Richards v. State*, 36 Neb. 17.

*New York.* — *Doherty v. Lord*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 227; *Laidlaw v. Sage*, 2 N.

Y. App. Div. 374; *Lewke v. Dry Dock, etc., R. Co.*, 46 Hun (N. Y.) 283.

*Oklahoma.* — *Bradford v. Territory*, 2 Okla. 228; *Oklahoma City v. Meyers*, 4 Okla. 686.

In *Lawlor v. Linforth*, 72 Cal. 205, a juror who, upon being told that the action was for rent, stated that he was hostile to all landlords, was held to have been properly excluded.

2. **Exclusion Must Not Be Arbitrary.** — *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 21 Am. St. Rep. 629; *Aaronson v. State*, 56 N. J. L. 9; *People v. McQuade*, (Ct. App.) 21 Abb. N. Cas. (N. Y.) 417, 110 N. Y. 284, reversing (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 916; *Hildreth v. Troy*, 101 N. Y. 234, 54 Am. Rep. 686; *People v. Decker*, 157 N. Y. 186. See also *Montague v. Com.*, 10 Gratt. (Va.) 767; *State v. Williams*, 31 S. Car. 238.

**Court Cannot Disqualify Jurors.** — In *Bates v. State*, 19 Tex. 122, it was held that, while the court might discharge one for good cause, it should not by its own action, as by charging jurors summoned for one cause with the trial of another, disqualify such jurors from acting and so necessitate their exclusion.

3. **Alabama Decisions.** — *Boggs v. State*, 45 Ala. 30, 6 Am. Rep. 689; *Phillips v. State*, 68 Ala. 469; *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22; *Ezell v. State*, 102 Ala. 101. But see *Moseley v. State*, 107 Ala. 74.

4. **Depleting Regular Panel.** — *Stratton v. People*, 5 Colo. 276; *Mooney v. People*, 7 Colo. 218. And see *Doil v. Mundine*, 7 Tex. Civ. App. 96.

5. *People v. Hickman*, 113 Cal. 80.

Where the court excused so many jurors to allow them to spend Sunday at their homes that but ten could be procured for the trial, it was held proper to take two competent and impartial bystanders. *Cotton v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 347. See also *Smith v. Clayton*, 29 N. J. L. 357.

6. **Excusing for Reasons Personal to Juror** — *Alabama.* — *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22.

*Florida.* — *John v. State*, 16 Fla. 554.

*Georgia.* — *Kemp v. Williams*, 43 Ga. 211; *Sims v. State*, 51 Ga. 497.

*Iowa.* — *State v. Ostrander*, 18 Iowa 448.

*Louisiana.* — *State v. Hobgood*, 46 La. Ann. 855.

*Michigan.* — *People v. Carrier*, 46 Mich. 442; *People v. Thacker*, 108 Mich. 652.

*Mississippi.* — *Hale v. State*, 72 Miss. 140.



one panel of jurors summoned.<sup>1</sup> Excusing for such causes is a matter within the sound discretion of the court.<sup>2</sup> The court may exercise the power by excusing veniremen before the case is called for trial,<sup>3</sup> and it has been held that jurors may be excused without requiring their personal attendance in order to test the validity of the excuse.<sup>4</sup>

**Illness of Venireman.** — So the fact that a venireman is sick or in bad health is a ground for relieving him from service.<sup>5</sup> A physician's certificate is a proper basis on which to excuse the juror,<sup>6</sup> but is not necessary, and the court may act on its own observation or other satisfactory evidence.<sup>7</sup> Illness of a member of the juror's family, requiring his personal presence and attention, is also

*New Jersey.* — *Aaronson v. State*, 56 N. J. L. 9.

*North Carolina.* — *State v. Craton*, 6 Ired. L. (28 N. Car.) 164; *State v. Barber*, 113 N. Car. 711.

*Ohio.* — *Stewart v. State*, 1 Ohio St. 68.

*Pennsylvania.* — *Piper's Case*, 2 Browne (Pa.) 59.

*South Carolina.* — *Greer v. Norvill*, 3 Hill L. (S. Car.) 262; *State v. Whitman*, 14 Rich. L. (S. Car.) 113.

The Sheriff who summons the jury has no power to excuse any of the regular panel. *Ayers v. Metcalf*, 39 Ill. 307.

**Business Interests of Juror.** — See *U. S. v. Heath*, 20 D. C. 272. See also *People v. Thacker*, 108 Mich. 652.

**1. Jurors on More than One Panel.** — *Moseley v. State*, 107 Ala. 74. See also *Fariss v. State*, 85 Ala. 1; *Maxwell v. State*, 89 Ala. 150.

A special juror may be stricken from the panel of traverse jurors. *Cronan v. Roberts*, 65 Ga. 678; *Maddox v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500.

**For Service on Grand Jury.** — It was held proper for the court to discharge a venireman in order to place him on the grand jury, for service on which he was particularly fitted. *Sims v. State*, 51 Ga. 497.

**For Service at Later Time.** — It has been held to be proper to excuse jurors for the week for which they are drawn and stand them over to a later week. *Fulton County v. Amorous*, 89 Ga. 614.

**2. Discretion of Court.** — *State v. Ostrander*, 18 Iowa 435; *State v. Dickson*, 6 Kan. 209; *State v. Somnier*, 33 La. Ann. 237; *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431; *Cotton v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 48 N. Y. St. Rep. 89.

**3. Excusing Before Case Called for Trial.** — *Floyd v. State*, 55 Ala. 61; *Jackson v. State*, 77 Ala. 18; *Fariss v. State*, 85 Ala. 1; *Maxwell v. State*, 89 Ala. 150; *People v. Lee*, 17 Cal. 76; *Bond v. State*, 23 Ohio St. 349; *Anderson v. Wasatch, etc., R. Co.*, 2 Utah 518. See also *Phillips v. State*, 68 Ala. 469; *Shelton v. State*, 73 Ala. 5.

In Texas, however, in advance of the selection of a jury from a special venire, the court has no right to excuse any of the jurors so summoned, and they cannot be excused until they have appeared at the time and place specified in the venire, and until they are called and tested in the order in which their names appear on the venire facias. *Thuston v. State*, 18 Tex. App. 26; *Robles v. State*, 5 Tex. App. 346. And see *Hill v. State*, 10 Tex. App. 618; *Foster v. State*, 8 Tex. App. 249.

**4. Excusing in Absence of Juror.** — *People v.*

*Collins*, 105 Cal. 504; *Patterson v. State*, 48 N. J. L. 381; *Livar v. State*, 26 Tex. App. 115.

In *Thompson v. State*, 19 Tex. App. 593, and *Thuston v. State*, 18 Tex. App. 26, it is stated that this should be done over objection only upon the most satisfactory evidence of unavoidable necessity for the absence of the juror.

So it was held that it was proper to excuse a juror on receipt of a telegram from him stating that he was too ill to appear, no attempt being made to disprove his illness. *Houston City St. R. Co. v. Ross*, (Tex. Civ. App. 1894) 28 S. W. Rep. 254.

**Excusing Postmaster.** — Where an absent venireman is excused on information by the sheriff that he is a postmaster, complaint cannot be made in the absence of an application for an attachment to test the *bona fides* of the excuse. *Kennedy v. State*, 19 Tex. App. 618.

**Presentation of Excuse Outside of Courthouse.** — Since the judge alone is to receive excuses for not serving on the jury, there is no irregularity in excusing a juror who has made known his excuse to the judge outside the courthouse. *Vaughan v. State*, 58 Ark. 353.

**5. Illness of Juror — Alabama.** — *Webb v. State*, 100 Ala. 47; *Yarbrough v. State*, 105 Ala. 43.

*Arkansas.* — *Hamilton v. State*, 62 Ark. 543.

*Georgia.* — *Pannell v. State*, 29 Ga. 681.

*Iowa.* — *State v. Ostrander*, 18 Iowa 435.

*Louisiana.* — *State v. Moncla*, 39 La. Ann. 868; *State v. Madison*, 47 La. Ann. 30; *State v. Johnson*, 48 La. Ann. 437.

*Missouri.* — *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314.

*Pennsylvania.* — *Jewell v. Com.*, 22 Pa. St. 94.

*Tennessee.* — *Fletcher v. State*, 6 Humph. (Tenn.) 249.

*Texas.* — *Ray v. State*, 4 Tex. App. 450; *Doll v. Mundine*, 7 Tex. Civ. App. 96; *Ripley v. State*, 29 Tex. App. 37.

**6. Proof of Illness.** — *Hanvey v. State*, 68 Ga. 612; *Houston City St. R. Co. v. Ross*, (Tex. Civ. App. 1894) 28 S. W. Rep. 254.

*Ozburn v. State*, 87 Ga. 173; *Shawnee-town v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *State v. Baber*, 74 Mo. 293, 41 Am. Rep. 314.

In *Rulo v. State*, 19 Ind. 298, the court was held to be in error in discharging a juror on his own statement that he was suffering from neuralgia resulting from a broken tooth, without any sworn statements or evidence of a physician.

**Illness Occurring During Trial.** — See *infra*, this title, *Custody and Conduct of Jury — Illness of Juror*.



a good ground for excusing him.<sup>1</sup>

**Public Officers.** — Of an analogous character is the power of the court to excuse public officers the performance of whose duties would be interfered with by service on the jury.<sup>2</sup>

(4) *Time of Exercising Power.* — It has been held that the court may exercise this power to exclude or excuse for statutory or other causes after the acceptance of the juror,<sup>3</sup> before swearing,<sup>4</sup> or after acceptance and before the completion of the impaneling,<sup>5</sup> or after the swearing of the juror and before the completion of the impaneling.<sup>6</sup> And generally after the swearing of a juror the court has the power, in the exercise of its discretion, to exclude him if his retention on the jury would tend to defeat the ends of justice.<sup>7</sup>

**1. Illness of Member of Family.** — *Parsons v. State*, 22 Ala. 50; *State v. Ostrander*, 18 Iowa 435; *Coleman v. State*, 59 Miss. 484, *distinguishing* *Boles v. State*, 13 Smed. & M. (Miss.) 398; *Catron v. State*, 52 Neb. 389. And see *State v. Thornton*, 108 Mo. 640.

**2. Public Officers.** — *Sharpless v. Robinson*, 1 Cranch (C. C.) 147; *Ellis v. State*, 25 Fla. 702; *Com. v. Walton*, 17 Pick. (Mass.) 403; *Hale v. State*, 72 Miss. 140; *Stewart v. State*, 1 Ohio St. 66; *Piper's Case*, 2 Browne (Pa.) 59; *State v. Ward*, 39 Vt. 225.

**3. Excluding Juror After Acceptance** — *United States*. — *U. S. v. Dickinson*, Hempst. (U. S.) 1. *Arkansas*. — *Robinson v. State*, 33 Ark. 180. *California*. — *Grady v. Early*, 18 Cal. 109; *Lawlor v. Linforth*, 72 Cal. 205; *People v. Ward*, 105 Cal. 335.

*District of Columbia*. — *U. S. v. Heath*, 20 D. C. 272.

*Michigan*. — *People v. Carrier*, 46 Mich. 442. *Mississippi*. — *Lewis v. State*, 9 Smed. & M. (Miss.) 115.

*Missouri*. — *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314.

*North Carolina*. — *State v. Boon*, 80 N. Car. 461.

*Tennessee*. — *Lewis v. State*, 3 Head (Tenn.) 127; *Fletcher v. State*, 6 Humph. (Tenn.) 249; *Hines v. State*, 8 Humph. (Tenn.) 597; *Boyd v. State*, 14 Lea (Tenn.) 161; *Jenkins v. State*, 99 Tenn. 569.

*Texas*. — *Horbach v. State*, 43 Tex. 242. *Compare Drake v. State*, 5 Tex. App. 649.

**Re-examination** of a juror after his acceptance may be allowed by the court. *Vaughan v. State*, 58 Ark. 353.

**In Alabama** it is stated that the right to challenge for cause exists until acceptance is shown by some positive act. *Smith v. State*, 55 Ala. 1, *overruling* *Stalls v. State*, 28 Ala. 25. But the rule is different as to capital cases, in view of the requirement of special jurors in such cases. *State v. Williams*, 3 Stew. (Ala.) 454; *State v. Morea*, 2 Ala. 275; *Stalls v. State*, 28 Ala. 25.

**4. Before Swearing.** — *People v. Arceo*, 32 Cal. 44; *State v. Larkin*, 11 Nev. 314; *Pierce v. State*, 13 N. H. 554.

**5. After Acceptance and Before Completion of Impaneling.** — *Johnson v. State*, 58 Ga. 491; *Ochs v. People*, 124 Ill. 399; *State v. Hobgood*, 46 La. Ann. 855; *Smith v. State*, 55 Miss. 513. And see *Taylor v. State*, 11 Lea (Tenn.) 708.

**6. After Swearing of Juror and Before Completion of Impaneling.** — *Mathis v. State*, 31 Fla. 291; *Ochs v. People*, 124 Ill. 399; *State v. John-*

*son*, 48 La. Ann. 437; *Zimmerman v. State*, 56 Md. 536; *Ripley v. State*, 29 Tex. App. 37.

**In Texas** it has been held that in capital cases, in which each individual juror was sworn separately, the court had no power to excuse for illness one who had been sworn, though the jury had not all been impaneled. *Ellison v. State*, 12 Tex. App. 557. And see *Hill v. State*, 10 Tex. App. 618; *Sterling v. State*, 15 Tex. App. 249.

**In Massachusetts** it was decided that the impartiality of a juror could be inquired into after all the jurors were sworn but not after they were all impaneled. *Twombly's Case*, 10 Pick. (Mass.) 480, note. *Compare Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

**7. Exclusion After Swearing** — *United States*. — *U. S. v. Morris*, 1 Curt. (U. S.) 23; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364.

*Alabama*. — *Haynes v. Crutchfield*, 7 Ala. 189; *Henry v. State*, 77 Ala. 75; *Webb v. State*, 100 Ala. 47. *Compare State v. Williams*, 3 Stew. (Ala.) 454.

*Connecticut*. — *State v. Allen*, 46 Conn. 531.

*Florida*. — *Kelly v. State*, 39 Fla. 122.

*Georgia*. — *Jackson v. State*, 51 Ga. 408; *Wesley v. State*, 65 Ga. 731; *Lampkin v. State*, 87 Ga. 516.

*Illinois*. — *Stone v. People*, 3 Ill. 326; *Thomas v. Leonard*, 5 Ill. 556; *Ochs v. People*, 25 Ill. App. 379, *affirmed* 124 Ill. 399.

*Louisiana*. — *State v. Costello*, 11 La. Ann. 283; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448; *State v. Moncla*, 39 La. Ann. 868; *State v. Hobgood*, 46 La. Ann. 855; *State v. Nash*, 46 La. Ann. 194.

*Michigan*. — *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501.

*Mississippi*. — *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *McGuire v. State*, 37 Miss. 376; *Gilliam v. Brown*, 43 Miss. 641; *Mabry v. State*, 71 Miss. 716; *Roberts v. State*, 72 Miss. 728.

*Missouri*. — *State v. Thornton*, 108 Mo. 640; *State v. Wheeler*, 108 Mo. 658.

*Nevada*. — *State v. Kelly*, 1 Nev. 225; *State v. Pritchard*, 16 Nev. 101.

*New York*. — *People v. Damon*, 13 Wend. (N. Y.) 351.

*North Carolina*. — *State v. Adair*, 66 N. Car. 298; *State v. Cunningham*, 72 N. Car. 469; *State v. Bell*, 81 N. Car. 591.

*South Carolina*. — *Greer v. Norvill*, 3 Hill L. (S. Car.) 262.

*Texas*. — *Evans v. State*, 6 Tex. App. 513.

*Virginia*. — *Tooele v. Com.*, 11 Leigh (Va.) 749.



*e. WAIVER OF OBJECTION TO JUROR — (1) Failure to Challenge Before Acceptance of Juror.* — The objection to a juror, if known, should be interposed before the acceptance of the juror,<sup>1</sup> but it is stated to be allowable after acceptance,<sup>2</sup> or at least the court has discretion to permit the withdrawal of an inadvertent acceptance by the party and the interposition of a challenge.<sup>3</sup> If the disqualification was not previously known, it is, it appears, error to refuse to allow a challenge, though offered after acceptance, if before the juror is sworn.<sup>4</sup>

*(2) Failure to Challenge Before Swearing of Juror.* — The general rule is that a challenge for cause must be interposed before the juror has been sworn,<sup>5</sup> and sometimes the statute provides that the objection shall be made

**Excusing Before Impaneling.** — See *supra*, this subsection, *For Reasons Personal to Juror.*

**1. Effect of Acceptance of Juror.** — *State v. Potter*, 18 Conn. 176; *Mayers v. Smith*, 121 Ill. 442, *affirming* 25 Ill. App. 67; *Estep v. Waterous*, 45 Ind. 140; *State v. Pollard*, 14 Mo. App. 583; *Baker v. State*, 3 Tex. App. 525. 2, *Mann v. State*, 23 Fla. 610; *Scripps v. Reilly*, 38 Mich. 10; *State v. Green*, 95 N. Car. 611.

The juror may be challenged by the state after he has been passed to and accepted by the defendant. *State v. Vestal*, 82 N. Car. 563; *State v. Vann*, 82 N. Car. 631.

**3. Withdrawal of Acceptance.** — *Murray v. State*, 48 Ala. 675; *Adams v. Olive*, 48 Ala. 551; *Daniels v. State*, 88 Ala. 222; *State v. Green*, 95 N. Car. 611; *Mitchell v. State*, 43 Tex. 513. And see as to the effect of acceptance *Stalls v. State*, 28 Ala. 25; *State v. Hobgood*, 46 La. Ann. 855; *Garner v. State*, 76 Miss. 515; *State v. Pollard*, 14 Mo. App. 583; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *State v. Haines*, 36 S. Car. 504; *Murphy v. State*, 9 Lea (Tenn.) 373; *Baker v. State*, 3 Tex. App. 525; *Hubotter v. State*, 32 Tex. 479.

**4. Acceptance in Ignorance of Disqualification.** — *Sparks v. State*, 59 Ala. 82; *Spigener v. State*, 62 Ala. 383; *Roberts v. State*, 68 Ala. 515.

It has been held that merely passing a juror over to the opposite party is not a waiver of the right of challenge. *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308.

**5. Challenge to Be Interposed Before Swearing** — *England.* — *Hawk. P. C.*, c. 43, § 1; *Wharton's Case*, *Yelv.* 23; *Morris's Case*, 4 How. St. Tr. 1255; *Reg. v. Sullivan*, 8 Ad. & El. 831, 35 E. C. L. 539; *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; *Reg. v. Wardle*, 2 C. & M. 647, 41 E. C. L. 351; *Reg. v. Key*, 3 C. & K. 371, 15 Jur. 1065.

*United States.* — *U. S. v. Morris*, 1 Curt. (U. S.) 23; *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *Queen v. Hepburn*, 7 Cranch (U. S.) 290.

*Alabama.* — *State v. Williams*, 3 Stew. (Ala.) 454; *Ripley v. Coolidge*, Minor (Ala.) 11; *State v. Morea*, 2 Ala. 275; *McCauley v. State*, 26 Ala. 135; *Stalls v. State*, 28 Ala. 25; *Murray v. State*, 48 Ala. 675; *Drake v. State*, 51 Ala. 30; *Battle v. State*, 54 Ala. 93; *Smith v. State*, 55 Ala. 1; *Sparks v. State*, 59 Ala. 82; *Rash v. State*, 61 Ala. 89; *Roberts v. State*, 68 Ala. 515; *Henry v. State*, 77 Ala. 75.

*Arkansas.* — *Hurley v. State*, 29 Ark. 17; *Whitehead v. Wells*, 29 Ark. 99; *Williams v. State*, 63 Ark. 527.

*California.* — *People v. Kohle*, 4 Cal. 198; *People v. Rodriguez*, 10 Cal. 59; *People v.*

*Reynolds*, 16 Cal. 128; *People v. Jenks*, 24 Cal. 11; *People v. Ah You*, 47 Cal. 121; *Silcox v. Lang*, 78 Cal. 124; *People v. Goldenson*, 76 Cal. 328.

*Connecticut.* — *State v. Potter*, 18 Conn. 166. *District of Columbia.* — *U. S. v. Cross*, 20 D. C. 365.

*Florida.* — *O'Connor v. State*, 9 Fla. 216; *Whitner v. Hamlin*, 12 Fla. 18; *Mann v. State*, 23 Fla. 610; *Ellis v. State*, 25 Fla. 702.

*Georgia.* — *Costly v. State*, 19 Ga. 614; *Epps v. State*, 19 Ga. 102; *Statham v. State*, 84 Ga. 17; *Glover v. Woolsey*, *Dudley (Ga.)* 85.

*Illinois.* — *Sterling Bridge Co. v. Pearl*, 80 Ill. 251.

*Indiana.* — *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Morris v. State*, 7 Blackf. (Ind.) 607; *Jackson v. Pittsford*, 8 Blackf. (Ind.) 194.

*Iowa.* — *Spencer v. De France*, 3 Greene (Iowa) 216.

*Kentucky.* — *Bratton v. Bryan*, 1 A. K. Marsh. (Ky.) 212; *Rennick v. Walthal*, 2 A. K. Marsh. (Ky.) 23; *Finley v. Hayden*, 3 A. K. Marsh. (Ky.) 330; *Combs v. Com.*, 97 Ky. 24.

*Louisiana.* — *State v. Dubord*, 2 La. Ann. 732; *State v. Bunker*, 14 La. Ann. 465; *State v. Diskin*, 34 La. Ann. 920, 44 Am. Rep. 448.

*Maine.* — *State v. Bowden*, 71 Me. 89.

*Maryland.* — *Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479; *Young v. State*, (Md. 1900) 45 Atl. Rep. 531.

*Massachusetts.* — *Com. v. Gee*, 6 Cush. (Mass.) 174.

*Michigan.* — *Hunter v. Parsons*, 22 Mich. 96; *Jhons v. People*, 25 Mich. 499; *Scripps v. Reilly*, 38 Mich. 10; *Matter of Bennett*, 51 Mich. 71; *People v. Dolan*, 51 Mich. 610; *Thorp v. Deming*, 78 Mich. 124; *Ayres v. Hubbard*, 88 Mich. 155.

*Minnesota.* — *State v. Thomas*, 19 Minn. 484.

*Mississippi.* — *Watson v. Pipes*, 32 Miss. 453.

*Missouri.* — *Harding v. Brown*, 1 Mo. App. Rep. 13.

*New Jersey.* — *Boyles v. M'Eowen*, 3 N. J. L. 253.

*New York.* — *Lindsley v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 233; *People v. Carpenter*, 38 Hun (N. Y.) 490, *affirmed* 102 N. Y. 238.

*North Carolina.* — *State v. Adair*, 66 N. Car. 298; *State v. Perkins*, 66 N. Car. 126; *State v. Green*, 95 N. Car. 611; *State v. Boon*, 80 N. Car. 461; *State v. Cunningham*, 72 N. Car. 469; *State v. Jones*, 80 N. Car. 415.

*Pennsylvania.* — *Jordan v. Meredith*, 3 Yeates (Pa.) 318, 2 Am. Dec. 373; *Benedict v. Pennsylvania Coal Co.*, 6 Kulp (Pa.) 221; *Com. v. Leshner*, 17 S. & R. (Pa.) 164; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Hartzell*



by challenge before the swearing of the juror.<sup>1</sup> As the rule was formerly stated, the challenge must be interposed when the juror "comes to the book,"<sup>2</sup> and the right cannot generally be exercised after the administration of the oath has been begun.<sup>3</sup> It has been held in some cases that the court may, in its discretion, allow a challenge after the juror has been sworn.<sup>4</sup>

(3) *Failure to Challenge Before Verdict* — (a) *Previous Knowledge of Disqualification*. — Generally an objection to a juror for incompetency from any cause is waived if not made before verdict. The disqualification of a juror has, however, been frequently made the ground of an application for a new trial or other relief after verdict, and the courts have not been in unison in their action on such applications. It is agreed that one who knew of a ground of disqualification before or during the trial cannot present such objection for the first time after verdict, and he must actually show the want of such knowledge on his part.<sup>5</sup>

*v. Com.*, 40 Pa. St. 462; *Gearhart v. Jordan*, 11 Pa. St. 325.

*South Carolina*. — *State v. Haines*, 36 S. Car. 504; *State v. Quarrel*, 2 Bay (S. Car.) 150, 1 Am. Dec. 637; *State v. Williams*, 2 Hill L. (S. Car.) 381.

*Tennessee*. — *Ward v. State*, 1 Humph. (Tenn.) 253; *M'Clure v. State*, 1 Yerg. (Tenn.) 206; *Bloodworth v. State*, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546; *Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137.

*Texas*. — *Munson v. State*, 34 Tex. Crim. 498; *Cooley v. State*, 38 Tex. 636.

*Virginia*. — *Hendrick v. Com.*, 5 Leigh (Va.) 707; *Thompson v. Com.*, 8 Gratt. (Va.) 637; *Montague v. Com.*, 10 Gratt. (Va.) 767.

1. *Statutory Provision* — *United States*. — *Kohl v. Lehlback*, 160 U. S. 293.

*Arkansas*. — *Whitehead v. Wells*, 29 Ark. 99.

*Georgia*. — *Epps v. State*, 19 Ga. 103.

*Kentucky*. — *Combs v. Com.*, 97 Ky. 24.

*Missouri*. — *State v. Ross*, 29 Mo. 32; *State v. Waller*, 88 Mo. 402; *Pitt v. Bishop*, 53 Mo. App. 600.

*New York*. — *People v. Mack*, 35 N. Y. App. Div. 114; *Stedman v. Batchelor*, 49 Hun (N. Y.) 390.

*Virginia*. — *Hodges v. Com.*, 89 Va. 265; *Hite v. Com.*, 96 Va. 489.

Such a statute was held not to apply where, without any fault on the part of the challenging party, the disqualification was not discovered until after the jury was completed. *State v. Pritchard*, 16 Nev. 101. See also *State v. Hartley*, 22 Nev. 342. And see *infra*, this subsection, *Failure to Challenge Before Verdict*.

2. *Interposition When Jurors Come to the Book*. — *State v. Williams*, 2 Hill L. (S. Car.) 381. And see *Reg. v. Giorgetti*, 4 F. & F. 546; *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70.

This is the rule in *North Carolina*. *State v. Lamon*, 3 Hawks (10 N. Car.) 175; *State v. Patrick*, 3 Jones L. (48 N. Car.) 443; *State v. Seaborn*, 4 Dev. L. (15 N. Car.) 305; *State v. Perkins*, 66 N. Car. 126; *State v. Griffice*, 74 N. Car. 316; *State v. Davis*, 80 N. Car. 412.

3. *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Com. v. Marra*, 8 Phila. (Pa.) 440. Compare *Murphy v. State*, 9 Lea (Tenn.) 373, where the clerk had proceeded to swear the jury without the cognizance of the court.

4. *Allowing Challenge After Swearing of Juror* — *Alabama*. — *Haynes v. Crutchfield*, 7 Ala. 189; *Henry v. State*, 77 Ala. 75.

*Michigan*. — *People v. Evans*, 72 Mich. 367. *Nebraska*. — *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825.

*North Carolina*. — *State v. Adair*, 66 N. Car. 298; *State v. Byrd*, 93 N. Car. 624.

*Virginia*. — *Tooele v. Com.*, 11 Leigh (Va.) 749; *Dilworth v. Com.*, 12 Gratt. (Va.) 689, 65 Am. Dec. 264; *Bristow v. Com.*, 15 Gratt. (Va.) 646.

And see *State v. Wheeler*, 108 Mo. 658.

In *California* under the Penal Code, § 1068, providing that for cause the court may permit a challenge after a juror is sworn, a challenge after swearing is not a matter of right to either party, but may be permitted in the exercise of a sound discretion. *People v. Durrant*, 116 Cal. 179, citing *People v. Reynolds*, 16 Cal. 128; *People v. Montgomery*, 53 Cal. 576, and *People v. Bemmerly*, 87 Cal. 117.

5. *Disqualifications Known to Party Waived by Failure to Object* — *England*. — *Peermain v. Mackay*, 9 Jur. 491; *Herbert v. Shaw*, 11 Mod. 111.

*Canada*. — *Hart v. Pryor*, 10 Nova Scotia 53.

*Alabama*. — *Oliver v. Herron*, 106 Ala. 639; *Larkin v. Baty*, 111 Ala. 303; *Sowell v. Brewton Bank*, 119 Ala. 92.

*Arkansas*. — *Meyer v. State*, 19 Ark. 163.

*California*. — *People v. Coffman*, 24 Cal. 230; *People v. Sanford*, 43 Cal. 32.

*Connecticut*. — *Parmelee v. Guthery*, 2 Root (Conn.) 185, 1 Am. Dec. 65; *Selleck v. Sugar Hollow Turnpike Co.*, 13 Conn. 453; *Woodruff v. Richardson*, 20 Conn. 238; *Bellows v. Williams*, Kirby (Conn.) 166.

*Georgia*. — *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Cannon v. Bullock*, 26 Ga. 432; *Gibson v. Williams*, 39 Ga. 660; *Glover v. Woolsey*, Dudley (Ga.) 85; *Danielly v. Colbert*, 71 Ga. 218; *Brown v. Autrey*, 78 Ga. 753; *Statham v. State*, 84 Ga. 17; *Lampkin v. State*, 87 Ga. 516.

*Illinois*. — *Wickersham v. People*, 2 Ill. 128; *Mackin v. People*, 115 Ill. 312, 56 Am. Rep. 167; *Taylor v. Roby*, 37 Ill. App. 147.

*Indiana*. — *Barlow v. State*, 2 Blackf. (Ind.) 114; *Lafayette Plankroad Co. v. New Albany*, etc., R. Co., 13 Ind. 90, 74 Am. Dec. 246; *Rice v. State*, 16 Ind. 298; *Buck v. Hughes*, 127 Ind. 46; *Stevens v. Stevens*, 127 Ind. 560.

*Kansas*. — *Lane v. Scoville*, 16 Kan. 402; *State v. Ready*, 44 Kan. 700.

*Kentucky*. — *Pierce v. Bush*, 3 Bibb (Ky.)



**Applications of Rule.** — It has accordingly been held that one knowing of a disqualification arising from pecuniary interest <sup>1</sup> or from relationship <sup>2</sup> or from the fact that one was a taxpayer in a town which was a party <sup>3</sup> cannot raise such objection after verdict. A mental defect has been held not to be ground for a new trial if known when the juror was accepted, <sup>4</sup> though the rule was declared to be otherwise when the fact was not known. <sup>5</sup> Likewise the fact that a juror had formed or expressed an opinion is not ground for objection after verdict, if it is not shown that there was no previous knowledge thereof on the part of the moving party. <sup>6</sup>

347; *O'Brian v. Com.*, 9 Bush (Ky.) 333, 15 Am. Rep. 715.

*Louisiana.* — *State v. Shay*, 30 La. Ann. 114; *State v. Jackson*, 37 La. Ann. 897.

*Maine.* — *Hardy v. Sprowle*, 32 Me. 310; *Dolloff v. Stimpson*, 33 Me. 546; *Lane v. Goodwin*, 47 Me. 594; *Tilton v. Kimball*, 52 Me. 500; *State v. Bowden*, 71 Me. 89.

*Massachusetts.* — *Hallock v. Franklin County*, 2 Met. (Mass.) 558; *Fox v. Hazleton*, 10 Pick. (Mass.) 275; *Davis v. Allen*, 11 Pick. (Mass.) 466, 22 Am. Dec. 386; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 471, 32 Am. Dec. 271.

*Michigan.* — *Ship Milwaukie v. Hale*, 1 Dougl. (Mich.) 306; *People v. Scott*, 56 Mich. 151.

*Mississippi.* — *Seal v. State*, 13 Smed. & M. (Miss.) 286.

*Missouri.* — *Lisle v. State*, 6 Mo. 426; *State v. Howard*, 118 Mo. 127.

*Nevada.* — *State v. Hartley*, 22 Nev. 342.

*New Hampshire.* — *Rollins v. Ames*, 2 N. H. 349, 9 Am. Dec. 79.

*New Mexico.* — *Territory v. Abeita*, 1 N. Mex. 545; *Anderson v. Territory*, 4 N. Mex. 108; *U. S. v. Gomez*, 7 N. Mex. 554.

*New York.* — *People v. Morrissey*, Sheld. (N. Y.) 295.

*Ohio.* — *Williams v. True*, 1 Cinc. Super. Ct. 321.

*Pennsylvania.* — *M'Corkle v. Binns*, 5 Binn. (Pa.) 340, 6 Am. Dec. 420; *Spong v. Leshner*, 1 Yeates (Pa.) 326; *Eakman v. Sheaffer*, 48 Pa. St. 176; *Com. v. Stokes*, 4 York Leg. Rec. (Pa.) 187.

*South Carolina.* — *Jones v. Fitzpatrick*, 47 S. Car. 40.

*Tennessee.* — *Jarnagin v. State*, 10 Yerg. (Tenn.) 529.

*Texas.* — *McGehee v. Shafer*, 9 Tex. 20; *Blanton v. Mayes*, 72 Tex. 417.

*Virginia.* — *Reynolds v. Richmond*, etc., R. Co., 92 Va. 400.

Mistake in passing upon one of the jurors is not ground for a new trial. *Baker v. State*, 3 Tex. App. 525.

**A Judgment based on a verdict rendered by a jury two members of which were disqualified is not void so as to be disregarded as a nullity.** *Foreman v. Hunter*, 59 Iowa 550.

**1. Pecuniary Interest.** — *Glover v. Woolsey*, *Dudley* (Ga.) 85; *Bradshaw v. Hubbard*, 6 Ill. 390; *Jameson v. Androscoggin R. Co.*, 52 Me. 412; *Kent v. Charlestown*, 2 Gray (Mass.) 281; *Davis v. Allen*, 11 Pick. (Mass.) 466, 22 Am. Dec. 386.

**2. Relationship** — *Alabama.* — *Larkin v. Baty*, 111 Ala. 303.

*Arkansas.* — *Arkansas Southern R. Co. v. Loughridge*, 65 Ark. 300.

*Connecticut.* — *Parmelee v. Guthery*, 2 Root (Conn.) 185, 1 Am. Dec. 65; *Quinebaug Bank v. Leavens*, 20 Conn. 87, 50 Am. Dec. 272.

*Florida.* — *Morrison v. McKinnon*, 12 Fla. 552.

*Georgia.* — *Cannon v. Bullock*, 26 Ga. 431; *Gibson v. Williams*, 39 Ga. 660.

*Indiana.* — *Tegarden v. Phillips*, 14 Ind. App. 27; *Hodges v. Bales*, 102 Ind. 494.

*Maine.* — *Dolloff v. Stimpson*, 33 Me. 546; *Tilton v. Kimball*, 52 Me. 500.

*Massachusetts.* — *Woodward v. Dean*, 113 Mass. 297.

*Mississippi.* — *Solomon v. State*, 71 Miss. 567.

*New York.* — *Salisbury v. McCloskey*, 26 Hun (N. Y.) 262.

*South Carolina.* — *Jones v. Fitzpatrick*, 47 S. Car. 40.

*Canada.* — *Hart v. Pryor*, 10 Nova Scotia 53. And see *Le Blanc v. McRae*, 11 Nova Scotia 240.

**3. Taxpayer in Town.** — *Bailey v. Trumbull*, 31 Conn. 581; *Manion v. Flynn*, 39 Conn. 330.

**4. Mental Defect.** — *Mackin v. People*, 115 Ill. 312, 56 Am. Rep. 167.

**5. Hogshead v. State**, 6 Humph. (Tenn.) 59.

**6. Formation or Expression of Opinion** — *United States.* — *U. S. v. Smith*, 1 Sawy. (U. S.) 277.

*Connecticut.* — *State v. Tuller*, 34 Conn. 294; *State v. Allen*, 46 Conn. 546.

*Florida.* — *Kelly v. State*, 39 Fla. 122.

*Georgia.* — *Durham v. State*, 70 Ga. 265.

*Indiana.* — *Achey v. State*, 64 Ind. 56; *Ken-negar v. State*, 120 Ind. 176; *Stevens v. Stevens*, 127 Ind. 560.

*Kansas.* — *Florence*, etc., R. Co. v. Ward, 29 Kan. 354.

*Kentucky.* — *Bickel v. Kraus*, 100 Ky. 728.

*Louisiana.* — *Stachlin v. Destrehan*, 2 La. Ann. 1019.

*Michigan.* — *Bronson v. People*, 32 Mich. 34.

*Mississippi.* — *Parker v. State*, 55 Miss. 414; *Brown v. State*, 60 Miss. 447.

*Missouri.* — *State v. Burns*, 85 Mo. 47; *State v. Phillips*, 117 Mo. 389; *State v. Nocton*, 121 Mo. 537.

*Nebraska.* — *Tomer v. Densmore*, 8 Neb. 386; *Murphy v. State*, 43 Neb. 34.

*Nevada.* — *State v. Anderson*, 4 Nev. 265; *State v. Hartley*, 22 Nev. 342.

*New Hampshire.* — *State v. Daniels*, 44 N. H. 383.

*Ohio.* — *Parks v. State*, 4 Ohio St. 234.

*Tennessee.* — *Cantrell v. State*, 2 Shannon Tenn. Cas. 249; *Finkle v. Dunivant*, 16 Lea (Tenn.) 503; *Hamilton v. State*, 101 Tenn. 417.

*Texas.* — *Givens v. State*, 6 Tex. 343.

*Canada.* — *Brown v. Sheppard*, 13 U. C. Q. B. 178; *Ham v. Lasher*, 24 U. C. Q. B. 357.



(b) **Previous Ignorance of Disqualification** — *aa. NEW TRIAL NOT GRANTED.* — In many cases it has been expressly decided that the right to attack a verdict for the disqualification of a juror does not exist even when the moving party was previously ignorant of such disqualification, it being considered that it is the duty of a party to discover any such disqualification, and that to allow a subsequent attack on the verdict for that cause would give a wide opening for fraud.<sup>1</sup> In a still larger number of cases it is simply stated that there is no right to attack a verdict on this ground, without any reference to the question of previous ignorance or knowledge, and these may be considered also to support the proposition that ignorance is immaterial.<sup>2</sup>

**Applications of Rule.** — So it has been held that a party cannot object after verdict that one of the jury served as a grand juror in finding the indictment, though he was previously ignorant of that fact.<sup>3</sup> A like holding has been

**1. Ignorance of Disqualification Immaterial** — *England.* — *Rex v. Despard*, 2 M. & R. 406, 17 E. C. L. 309; *Case of Juryman*, 12 East 231, note.

*United States.* — *U. S. v. Baker*, 3 Ben. (U. S.) 68; *Hollingsworth v. Duane*, Wall. (C. C.) 147, 4 Dall. (U. S.) 353; *Kohl v. Lehlback*, 160 U. S. 293; *Brewer v. Jacobs*, 22 Fed. Rep. 217.

*Arkansas.* — *Meyer v. State*, 19 Ark. 163.  
*Georgia.* — *Meeks v. State*, 57 Ga. 329.  
*Illinois.* — *Chase v. People*, 40 Ill. 352, overruling *Guykowski v. People*, 2 Ill. 476.

*Kansas.* — *State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424.

*Kentucky.* — *Moody v. Pearce*, 7 J. J. Marsh. (Ky.) 221; *Presbury v. Com.*, 9 Dana (Ky.) 203.

*Massachusetts.* — *Woodward v. Dean*, 113 Mass. 297.

*Minnesota.* — *State v. Thomas*, 19 Minn. 484.

*Mississippi.* — *Frank v. State*, 39 Miss. 705.

*New York.* — *People v. Jewett*, 6 Wend. (N. Y.) 388; *Bennett v. Matthews*, (Supm. Ct. Spec. T.) 40 How. Pr. 428.

*North Carolina.* — *State v. Davis*, 80 N. Car. 412; *State v. Crawford*, 2 Hayw. (3 N. Car.) 298.

*Oregon.* — *State v. Powers*, 10 Oregon 145, 45 Am. Rep. 138.

*South Carolina.* — *State v. O'Driscoll*, 2 Bay (S. Car.) 153; *Billis v. State*, 2 McCord L. (S. Car.) 12; *State v. Fisher*, 2 Nott & M. (S. Car.) 261; *Josey v. Wilmington, etc.*, R. Co., 12 Rich. L. (S. Car. 134); *Boland v. Greenville, etc.*, R. Co., 12 Rich. L. (S. Car.) 368; *State v. Cooler*, 30 S. Car. 105.

*Tennessee.* — *M'Clure v. State*, 1 Yerg. (Tenn.) 206; *Draper v. State*, 4 Baxt. (Tenn.) 246.

*Texas.* — *Sutton v. State*, 31 Tex. Crim. 297.

*West Virginia.* — *Ohio River R. Co. v. Blake*, 38 W. Va. 718.

*Wisconsin.* — *Rockwell v. Elderkin*, 19 Wis. 367.

**2. Cases Not Referring to Question of Knowledge** — *England.* — *Rex v. Sutton*, 8 B. & C. 417, 15 E. C. L. 252; *In re Chelsea Waterworks Co.*, 10 Exch. 731, 3 C. L. R. 329, 24 L. J. Exch. 79, 1 Jur. N. S. 143, 3 W. R. 174; *Aylett v. Stellam*, Style 100; *Loveday's Case*, Style 129; *Wharton's Case*, Yelv. 23.

*United States.* — *U. S. v. Peaco*, 4 Cranch (C. C.) 601, 27 Fed. Cas. No. 16,018; *Queen v. Hepburn*, 7 Cranch (U. S.) 290; *Fisher v. Yoder*, 53 Fed. Rep. 565.

*Arkansas.* — *Collier v. State*, 20 Ark. 36;

*Daniel v. Guy*, 23 Ark. 50; *Fain v. Goodwin*, 35 Ark. 109; *Wright v. State*, 35 Ark. 640; *Shinn v. Tucker*, 37 Ark. 580; *Casat v. State*, 40 Ark. 511.

*Connecticut.* — *Gilbert v. Rider*, Kirby (Conn.) 184.

*District of Columbia.* — *U. S. v. Cross*, 20 D. C. 365.

*Florida.* — *State v. Madoil*, 12 Fla. 151.

*Georgia.* — *Gormley v. Laramore*, 40 Ga. 253; *Osgood v. State*, 63 Ga. 791; *Hill v. State*, 64 Ga. 453; *Pool v. Callahan*, 88 Ga. 468.

*Kentucky.* — *Finley v. Hayden*, 3 A. K. Marsh. (Ky.) 330.

*Louisiana.* — *Nugent v. Trepagnier*, 2 Mart. (La.) 205; *State v. Harris*, 30 La. Ann. 90; *State v. Robinson*, 37 La. Ann. 673; *State v. Williams*, 38 La. Ann. 361.

*Maryland.* — *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722.

*Massachusetts.* — *Amherst v. Hadley*, 1 Pick. (Mass.) 38; *Cook v. Castner*, 9 Cush. (Mass.) 266; *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258.

*Minnesota.* — *Steele v. Maloney*, 1 Minn. 347.

*Missouri.* — *State v. Ward*, 74 Mo. 253.

*New York.* — *Seacord v. Burling*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 175.

*North Carolina.* — *State v. Greenwood*, 1 Hayw. (2 N. Car.) 141; *State v. Crawford*, 2 Hayw. (3 N. Car.) 298; *Briggs v. Byrd*, 12 Ired. L. (34 N. Car.) 377; *State v. Patrick*, 3 Jones L. (48 N. Car.) 443; *State v. Lambert*, 93 N. Car. 618.

*Ohio.* — *Shoemaker v. State*, 12 Ohio 43.

*Oregon.* — *State v. Powers*, 10 Oregon 145, 45 Am. Rep. 138.

*Pennsylvania.* — *Pennsburg Alley*, 12 Pa. Co. Ct. 213, 2 Pa. Dist. 136.

*Rhode Island.* — *Ryan v. Riverside, etc.*, Mills, 15 R. I. 436; *State v. Cosgrove*, 16 R. I. 411.

*Tennessee.* — *Calhoun v. State*, 4 Humph. (Tenn.) 477; *Booby v. State*, 4 Yerg. (Tenn.) 111; *Bloodworth v. State*, 6 Baxt. (Tenn.) 615, 32 Am. Rep. 546.

*Texas.* — *Yanez v. State*, 6 Tex. App. 429, 32 Am. Rep. 591; *Boetge v. Landa*, 22 Tex. 105.

*Virginia.* — *Thompson v. Com.*, 8 Gratt. (Va.) 637; *Poindexter v. Com.*, 33 Gratt. (Va.) 766.

*Wisconsin.* — *Bonneville v. State*, 53 Wis. 680.

**3. Previous Service on Grand Jury** — *Arkansas.* — *Whitmore v. State*, 43 Ark. 271.



made as to one interested in the result of the trial,<sup>1</sup> as to one disqualified by being above or below the statutory age,<sup>2</sup> and, in some states, as to one disqualified by relationship to a party.<sup>3</sup> So deafness has been held not to be ground for a new trial, although unknown to the moving party,<sup>4</sup> though a different view was taken in a case involving defective eyesight.<sup>5</sup> It has been frequently decided that the objection of alienage is waived if not made before verdict, and is not ground for the grant of a new trial;<sup>6</sup> and a new trial will not generally be granted on account of the nonresidence of a juror, or because of his want of residence for the statutory time.<sup>7</sup> So the objection that one is not a householder or freeholder must be promptly made, and is generally not available after verdict.<sup>8</sup>

*Louisiana.*—*State v. Turner*, 6 La. Ann. 310; *State v. Thomas*, 35 La. Ann. 24; *State v. Smith*, 41 La. Ann. 688; *State v. McCarthy*, 44 La. Ann. 323.

*Ohio.*—*Beck v. State*, 20 Ohio St. 228.

*South Carolina.*—*State v. O'Driscoll*, 2 Bay (S. Car.) 153; *State v. Cooler*, 30 S. Car. 105.

*Tennessee.*—*Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137.

In *Bristow v. Com.*, 15 Gratt. (Va.) 634, it was held that a new trial should not be granted for this cause if the juror was not in fact biased. See also *Reg. v. Sullivan*, 8 Ad. & El. 831, 35 E. C. L. 539, where the defendant, having refused to permit the juror so disqualified to withdraw, was held not entitled to a new trial.

1. **Interest in Result.**—*Williams v. Great Western R. Co.*, 3 H. & N. 869, 28 L. J. Exch. 2, 7 W. R. 97; *Richardson v. Canada West Farmers' Ins. Co.*, 17 U. C. C. P. 341; *Pearson v. Wightman*, 1 Mill (S. Car.) 336, 12 Am. Dec. 636; *Magness v. Stewart*, 2 Coldw. (Tenn.) 309. But see *Bailey v. McCaulay*, 13 Q. B. 815, 66 E. C. L. 815.

2. **Disqualification as Regards Age.**—*Brewer v. Jacobs*, 22 Fed. Rep. 217; *Combs v. Com.*, 97 Ky. 24; *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Green v. State*, 59 Md. 123, 43 Am. Rep. 542; *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722.

3. **Disqualification by Relationship.**—*Onions v. Naish*, 7 Price 203; *Woodward v. Dean*, 113 Mass. 297; *Salisbury v. McClaskey*, 26 Hun (N. Y.) 262; *Hayes v. Thompson*, (Supm. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 220; *Cole v. Van Keuren*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 451; *People v. Mack*, 35 N. Y. App. Div. 114; *Traviss v. Com.*, 106 Pa. St. 597; *Todd v. Gray*, 16 S. Car. 635; *Hamilton v. State*, 101 Tenn. 417; *Cartwright v. State*, 12 Lea (Tenn.) 620.

4. **Physical Defects.**—*U. S. v. Baker*, 3 Ben. (U. S.) 68; *Drake v. State*, 5 Tex. App. 649.

5. *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429.

6. **Alienage Not Ground for New Trial**—*England.*—*Rex v. Despard*, 2 M. & R. 406, 17 E. C. L. 309; *Rex v. Sutton*, 8 B. & C. 417, 15 E. C. L. 252, 6 L. J. M. C. 102.

*United States.*—*Kohl v. Lehlback*, 160 U. S. 293; *Hollingsworth v. Duane*, Wall. (C. C.) 147, 4 Dall. (U. S.) 353.

*Arkansas.*—*Benton v. State*, 30 Ark. 340.

*California.*—*People v. Chung Lit*, 17 Cal. 320; *People v. McGungill*, 41 Cal. 430.

*Colorado.*—*Turner v. Hahn*, 1 Colo. 23; *Jones v. People*, 2 Colo. 351.

*Illinois.*—*Greenup v. Stoker*, 8 Ill. 202; *Chase v. People*, 40 Ill. 352.

*Iowa.*—*State v. Elliott*, 45 Iowa 487.

*Kentucky.*—*Moody v. Pearce*, 7 J. J. Marsh. (Ky.) 221; *Presbury v. Com.*, 9 Dana (Ky.) 203.

*Louisiana.*—*State v. Bower*, 26 La. Ann. 383; *State v. Bird*, 38 La. Ann. 497; *State v. Beeder*, 44 La. Ann. 1007; *State v. Sopher*, 35 La. Ann. 975.

*Montana.*—*Territory v. Harding*, 6 Mont. 326; *Territory v. Hart*, 7 Mont. 489.

*New Mexico.*—*Territory v. Baker*, 4 N. Mex. 117; *Anderson v. Territory*, 4 N. Mex. 108.

*New York.*—*Bennett v. Matthews*, (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 428.

*Ohio.*—*Erwin v. State*, 29 Ohio St. 190.

*Pennsylvania.*—*Com. v. Thompson*, 4 Phila. (Pa.) 215, 17 Leg. Int. (Pa.) 309.

*South Carolina.*—*State v. Quarrel*, 2 Bay (S. Car.) 150, 1 Am. Dec. 637.

*Texas.*—*Yanez v. State*, 6 Tex. App. 429, 32 Am. Rep. 591; *Leeper v. State*, 29 Tex. App. 63, *overruling Armendaras v. State*, 10 Tex. App. 44.

*Wisconsin.*—*Brown v. La Crosse, City Gas Light, etc.*, Co., 21 Wis. 51; *State v. Vogel*, 22 Wis. 471; *Bonneville v. State*, 53 Wis. 680.

7. **Nonresidence of Jurors Not Ground for New Trial**—*United States.*—*Queen v. Hepburn*, 7 Cranch (U. S.) 290; *Fisher v. Yoder*, 53 Fed. Rep. 565.

*California.*—*Thompson v. Paige*, 16 Cal. 77.

*Florida.*—*State v. Madoil*, 12 Fla. 151.

*Georgia.*—*Epps v. State*, 19 Ga. 103; *Costly v. State*, 19 Ga. 614; *Meeks v. State*, 57 Ga. 329; *Brown v. State*, 105 Ga. 640.

*Kentucky.*—*Major v. Pulliam*, 3 Dana (Ky.) 583.

*Maine.*—*Mt. Desert v. Cranberry Isles*, 46 Me. 411.

*Nebraska.*—*Hickey v. State*, 12 Neb. 490.

*North Carolina.*—*State v. White*, 68 N. Car. 158.

*Texas.*—*O'Mealy v. State*, 1 Tex. App. 180; *Sutton v. State*, 31 Tex. Crim. 297.

*Wisconsin.*—*Rockwell v. Elderkin*, 19 Wis. 367.

**Contra.**—In *Louisiana* a new trial may be granted to one previously ignorant of the juror's nonresidence. *State v. Labauve*, 46 La. Ann. 548.

8. **Person Not Freeholder or Householder**—*United States.*—*Brewer v. Jacobs*, 22 Fed. Rep. 217.

*Florida.*—*State v. Madoil*, 12 Fla. 151.

*Kentucky.*—*Bratton v. Bryan*, 1 A. K. Marsh. (Ky.) 212; *Rennick v. Walthal*, 2 A. K. Marsh.



**Exclusive Statutory Grounds for New Trial.** — Occasionally the refusal of a motion for a new trial on account of the juror's disqualification has been based on the fact that this is not one of the grounds for new trial enumerated in the statute.<sup>1</sup>

*bb. NEW TRIAL GRANTED.* — In other cases it is held that previous ignorance of the disqualification will excuse the failure to make the objection earlier, and that advantage of it may accordingly be taken after verdict.<sup>2</sup>

**Applications of Rule.** — This rule has been applied in favor of a party who was previously ignorant that a juror had sat on a former trial of the cause,<sup>3</sup> that he was one of the grand jury which found the indictment,<sup>4</sup> that he was not a freeholder,<sup>5</sup> that he was over the statutory age,<sup>6</sup> or that he was mentally or physically incapacitated.<sup>7</sup> In a number of cases it has been decided that the disqualification of relationship will be ground for a new trial if the moving party was ignorant thereof until after the trial;<sup>8</sup> and in some cases ignorance

(Ky.) 23; *Finley v. Hayden*, 3 A. K. Marsh. (Ky.) 330.

*Mississippi* — *Frank v. State*, 39 Miss. 703.

*North Carolina*. — *State v. Greenwood*, 1 Hayw. (2 N. Car.) 141; *State v. Crawford*, 2 Hayw. (3 N. Car.) 298; *State v. Davis*, 80 N. Car. 412, (N. Car. 1900) 35 S. E. Rep. 464.

*Ohio*. — *Shoemaker v. State*, 42 Ohio 43.

*Pennsylvania*. — *Pennsburg Alley*, 12 Pa. Co. Ct. 213.

*Tennessee*. — *Draper v. State*, 4 Baxt. (Tenn.) 246; *Calhoun v. State*, 4 Humph. (Tenn.) 477.

*Texas*. — *Lane v. State*, 29 Tex. App. 310; *Leeper v. State*, 29 Tex. App. 63; *Schuster v. La Londe*, 57 Tex. 28.

*West Virginia*. — *Ohio River R. Co. v. Blake*, 38 W. Va. 718.

But see *Briggs v. Georgia*, 15 Vt. 61, where a new trial was granted in view of the fact that the disqualification was not known during the trial. See also *State v. Babcock*, 1 Conn. 401. And compare *Orcutt v. Carpenter*, 1 Tyler (Vt.) 250.

**1. Disqualification of Juror Not Statutory Ground for New Trial.** — *People v. Fair*, 43 Cal. 137; *People v. Mortimer*, 46 Cal. 114; *People v. Samsels*, 66 Cal. 99; *State v. Marks*, 15 Nev. 33; *Leeper v. State*, 29 Tex. App. 63, *overruling Lester v. State*, 2 Tex. App. 432; *Armen-dares v. State*, 10 Tex. App. 44; *Boren v. State*, 23 Tex. App. 28; *Brackenridge v. State*, 27 Tex. App. 513. And see *Chartz v. Territory*, (Ariz. 1893) 32 Pac. Rep. 166; *Page v. State*, 22 Tex. App. 551.

Under a statute providing that where a party knowing of an objection to a juror in season to propose it before trial omits to do so he cannot afterwards do so unless by leave of court, it was held that an objection that the juror was disqualified because he had been convicted of larceny might be made after verdict if not discovered before, though another statute provided that no irregularity in drawing or impaneling juries should be ground for setting aside the verdict. *Garrett v. Weinberg*, 54 S. Car. 127. But see *State v. Robertson*, 54 S. Car. 147.

**2. Disqualification if Unknown May Be Taken Advantage of After Verdict** — *Connecticut*. — *State v. Babcock*, 1 Conn. 401.

*Delaware*. — *State v. Williams*, 9 Houst. (Del. 508.)

*Georgia*. — *Monroe v. State*, 5 Ga. 140; *Brown v. State*, 28 Ga. 439; *Burroughs v.*

*State*, 33 Ga. 403; *Hawkins v. Andrews*, 39 Ga. 118; *McElhannon v. State*, 99 Ga. 672; *Moore v. Farmers' Mut. Ins. Assoc.*, 107 Ga. 199.

*Illinois*. — *Essex v. McPherson*, 64 Ill. 349.

*Indiana*. — *Hudspeth v. Herston*, 64 Ind. 133; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429; *Block v. State*, 100 Ind. 357.

*Iowa*. — *State v. Groome*, 10 Iowa 308; *Seaton v. Swem*, 58 Iowa 41.

*Kentucky*. — *Herndon v. Bradshaw*, 4 Bibb (Ky.) 45.

*Louisiana*. — *State v. Nash*, 45 La. Ann. 1137; *State v. Labauve*, 46 La. Ann. 548.

*Maine*. — *McLellan v. Crofton*, 6 Me. 307; *Jewell v. Jewell*, 84 Me. 304.

*Maryland*. — *Busey v. State*, 85 Md. 115.

*Michigan*. — *Hester v. Chambers*, 84 Mich. 562.

*Minnesota*. — *Williams v. McGrade*, 18 Minn. 82.

*Mississippi*. — *Brown v. State*, 60 Miss. 447. *Missouri*. — *State v. Weeden*, 133 Mo. 70.

*Ohio*. — *Eastman v. Wight*, 4 Ohio St. 156.

*Tennessee*. — *Hogshead v. State*, 6 Humph. (Tenn.) 59.

*Utah*. — *U. S. v. Christensen*, 7 Utah 26.

*Vermont*. — *Briggs v. Georgia*, 15 Vt. 61; *Mann v. Fairlee*, 44 Vt. 672.

**3. Previous Service as Juror.** — *Herndon v. Bradshaw*, 4 Bibb (Ky.) 45; *Hester v. Chambers*, 84 Mich. 562; *Williams v. McGrade*, 18 Minn. 82.

**4. Member of Grand Jury.** — *Hawkins v. Andrews*, 39 Ga. 118; *Com. v. Hussey*, 13 Mass. 221; *U. S. v. Christensen*, 7 Utah 26. Compare *Jones v. State*, 95 Ga. 497.

**5. Juror Not Freeholder.** — *Briggs v. Georgia*, 15 Vt. 61.

**6. Juror Over Age.** — *Burroughs v. State*, 33 Ga. 403.

**7. Want of Mental or Physical Capacity.** — *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429; *Hogshead v. State*, 6 Humph. (Tenn.) 59.

**8. Relationship Unknown, Ground for New Trial** — *Delaware*. — *State v. Williams*, 9 Houst. (Del.) 508.

*Georgia*. — *Brown v. State*, 28 Ga. 439; *Georgia R. Co. v. Hart*, 60 Ga. 550; *Rust v. Shackelford*, 47 Ga. 538; *Bullard v. Trice*, 63 Ga. 165; *Beall v. Clark*, 71 Ga. 818; *Ledford v. State*, 75 Ga. 858; *Moore v. Farmers' Mut. Ins. Assoc.*, 107 Ga. 199.

*Indiana*. — *Hudspeth v. Herston*, 64 Ind. 133.



of the fact of alienage not resulting from negligence has been held to be sufficient excuse for failure to object to the juror before verdict.<sup>1</sup> So it has been held in a large number of cases that the previous formation or expression of an opinion by a juror, if unknown to a party, may be ground for a new trial upon his application.<sup>2</sup>

**Distinction as to Character of Disqualification.** — The tendency of the decisions is to the effect that the disqualification of a juror, if merely statutory, and not affecting his ability to act intelligently and impartially, as when he is an alien, a nonresident, or not a freeholder, will not be ground for a new trial, although such disqualification was previously unknown, since the verdict cannot have been affected thereby, while on the other hand a disqualification involving bias or partiality will be differently regarded. This distinction is clearly made in some cases;<sup>3</sup> and it is generally indicated in those states in which there are decisions both that a new trial will be authorized and that it will not be authorized by the previous ignorance of the party in regard to the disqualification.<sup>4</sup>

(c) **Constructive Knowledge** — *aa. IGNORANCE RESULTING FROM NEGLIGENCE.* — It is gen-

*Kentucky.* — *Gardner v. Arnett*, (Ky. 1899) 50 S. W. Rep. 840. Compare *Rhodes v. Crooke*, 11 Ky. L. Rep. 952.

*Maine.* — *Hardy v. Sprowle*, 32 Me. 310; *Lane v. Goodwin*, 47 Me. 593; *Jewell v. Jewell*, 84 Me. 304.

*Pennsylvania.* — *Caldwell v. Kumerant*, 20 Pa. Co. Ct. 608.

*Texas.* — *Powers v. State*, 27 Tex. App. 700; *Page v. State*, 22 Tex. App. 551; *Texas, etc., R. Co. v. Elliott*, (Tex. Civ. App. 1899) 54 S. W. Rep. 410.

*Canada.* — *Lynds v. Hoar*, 10 Nova Scotia 327.

1. **Ignorance of Juror's Alienage.** — *Hill v. People*, 16 Mich. 351 [*contra* in civil case, *Johr v. People*, 26 Mich. 427]; *Seal v. State*, 13 Smed. & M. (Miss.) 286; *People v. Reece*, 3 Utah 72; *Quinn v. Halbert*, 52 Vt. 353; *Richards v. Moore*, 60 Vt. 449.

2. **Unknown Opinions Ground for New Trial** — *England.* — *Dent v. Hundred of Hertford*, 2 Salik. 645; *Ramadge v. Ryan*, 9 Bing. 333, 23 E. C. L. 236.

*United States.* — *U. S. v. Fries*, 3 Dall. (U. S.) 515.

*Arizona.* — *Chartz v. Territory*, (Ariz. 1893) 32 Pac. Rep. 166.

*Colorado.* — *Fitzgerald v. People*, 1 Colo. 56. *Connecticut.* — *State v. Babcock*, 1 Conn. 401; *Smith v. Ward*, 2 Root (Conn.) 302; *State v. Tuller*, 34 Conn. 280; *Tweedy v. Brush, Kirby* (Conn.) 13.

*Georgia.* — *Monroe v. State*, 5 Ga. 85; *Wade v. State*, 12 Ga. 25; *Columbus v. Goetchius*, 7 Ga. 139; *Anderson v. State*, 14 Ga. 710; *Ray v. State*, 15 Ga. 223; *Martin v. State*, 25 Ga. 494; *Hudgins v. State*, 61 Ga. 182.

*Illinois.* — *Vennum v. Harwood*, 6 Ill. 659; *Sellers v. People*, 4 Ill. 412.

*Indiana.* — *Romaine v. State*, 7 Ind. 63; *Hudspeth v. Herston*, 64 Ind. 133.

*Iowa.* — *State v. Groome*, 10 Iowa 309; *State v. Shelledy*, 8 Iowa 477.

*Kentucky.* — *Cain v. Cain*, 1 B. Mon. (Ky.) 214; *Pierce v. Bush*, 3 Bibb (Ky.) 347; *McKinley v. Smith*, Hard. (Ky.) 174; *Vance v. Haslett*, 4 Bibb (Ky.) 191.

*Massachusetts.* — *Com. v. Hussey*, 13 Mass. 221; *Jeffries v. Randall*, 14 Mass. 205.

*Mississippi.* — *Cody v. State*, 3 How. (Miss.) 27; *Cannon v. State*, 57 Miss. 147; *Jeffries v. State*, 74 Miss. 675; *Childress v. Ford*, 10 Smed. & M. (Miss.) 25.

*Missouri.* — *State v. Wyatt*, 50 Mo. 309; *State v. Taylor*, 64 Mo. 358. See also *State v. Ross*, 29 Mo. 52.

*Montana.* — *Territory v. Kennedy*, 3 Mont. 520.

*New Hampshire.* — *Tenney v. Evans*, 13 N. H. 462.

*Ohio.* — *Eastman v. Wight*, 4 Ohio St. 156.

*Pennsylvania.* — *Com. v. Flanagan*, 7 W. & S. (Pa.) 415.

*South Carolina.* — *State v. Hopkins*, 1 Bay (S. Car.) 372. *Contra*, under present statute, *State v. Robertson*, 54 S. Car. 147. And see *Bridger v. Asheville, etc., R. Co.*, 27 S. Car. 456, 13 Am. St. Rep. 653.

*Tennessee.* — *Goodall v. Thurman*, 1 Head (Tenn.) 209; *Brakefield v. State*, 1 Sneed (Tenn.) 215 [*distinguishing* *Howerton v. State*, Meigs (Tenn.) 262]; *Riddle v. State*, 3 Heisk. (Tenn.) 401; *Draper v. State*, 4 Baxt. (Tenn.) 246; *Norfleet v. State*, 4 Sneed (Tenn.) 340; *Johnson v. State*, 11 Lea (Tenn.) 47; *Cartwright v. State*, 12 Lea (Tenn.) 620; *Parrish v. State*, 12 Lea (Tenn.) 655; *Hoard v. State*, 15 Lea (Tenn.) 318; *Spence v. State*, 15 Lea (Tenn.) 539; *Hamilton v. State*, 101 Tenn. 418.

*Texas.* — *Hanks v. State*, 21 Tex. 526; *Graham v. State*, 28 Tex. App. 582; *Washburn v. State*, 31 Tex. Crim. 352; *Henrie v. State*, 41 Tex. 573.

*Vermont.* — *Deming v. Hurlbut*, 2 D. Chip. (Vt.) 45; *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616.

*West Virginia.* — *State v. Greer*, 22 W. Va. 821.

*Wisconsin.* — *Bennet v. State*, 24 Wis. 57.

3. **Distinction as to Disqualifications as Ground for New Trial.** — *Brewer v. Jacobs*, 22 Fed. Rep. 234; *Moody v. Pearce*, 7 J. J. Marsh. (Ky.) 221; *Presbury v. Com.*, 9 Dana (Ky.) 203; *Williams v. McGrade*, 18 Minn. 82; *Hamilton v. State*, 101 Tenn. 417; *Cartwright v. State*, 12 Lea (Tenn.) 620.

4. See decisions *supra*, in this and the preceding subdivisions of this section.



erally held that ignorance of a disqualification which is the result of a failure to exercise due diligence to obtain knowledge in regard thereto is of no weight as enabling one to raise the objection after verdict;<sup>1</sup> and the failure to question the juror in regard to a disqualification has been frequently held to be a waiver of the right to object on that ground.<sup>2</sup>

**Applications of Rule.** — So one who has taken no measures to ascertain whether a juror is above or below the statutory age cannot raise such objection after verdict,<sup>3</sup> and the same holding has been made in regard to a juror who has

**1. Ignorance of Disqualification Arising from Negligence.**—*England.*—*In re* Chelsea Waterworks Co., 10 Exch. 731.

*Arkansas.*—*Whitehead v. Wells*, 29 Ark. 99; *Casat v. State*, 40 Ark. 511; *Arkansas Southern R. Co. v. Loughridge*, 65 Ark. 300.

*California.*—*People v. Sanford*, 43 Cal. 29.

*Colorado.*—*Turner v. Hahn*, 1 Colo. 24; *Jones v. People*, 2 Colo. 354.

*Connecticut.*—*Quinebaug Bank v. Leavens*, 20 Conn. 87, 50 Am. Dec. 272.

*Georgia.*—*John v. State*, 16 Ga. 200; *Eberhart v. State*, 47 Ga. 598; *Osgood v. State*, 63 Ga. 791; *Burns v. State*, 80 Ga. 544.

*Illinois.*—*Chase v. People*, 40 Ill. 352; *Essex v. McPherson*, 64 Ill. 349; *Bradshaw v. Hubbard*, 6 Ill. 390.

*Indiana.*—*Patterson v. State*, 70 Ind. 341; *Douthitt v. State*, 144 Ind. 397.

*Kansas.*—*State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424.

*Louisiana.*—*Chiapella v. Brown*, 14 La. Ann. 185; *State v. Magee*, 48 La. Ann. 901.

*Maine.*—*Mt. Desert v. Cranberry Isles*, 46 Me. 411; *Brown v. Reed*, 81 Me. 158.

*Maryland.*—*Tide Water Canal Co. v. Archer*, 9 Gill & J. (Md.) 479; *Busey v. State*, 85 Md. 115; *Young v. State*, (Md. 1900) 45 Atl. Rep. 531.

*Massachusetts.*—*Daniels v. Lowell*, 139 Mass. 56.

*Michigan.*—*Sleight v. Henning*, 12 Mich. 371.

*Minnesota.*—*State v. Madigan*, 57 Minn. 425.

*Mississippi.*—*George v. State*, 39 Miss. 570.

*Missouri.*—*Pitt v. Bishop*, 53 Mo. App. 604.

*Nebraska.*—*Wilcox v. Saunders*, 4 Neb. 569.

*New Hampshire.*—*State v. Hascall*, 6 N. H. 352; *Bodge v. Foss*, 39 N. H. 406; *Pittsfield v. Barnstead*, 40 N. H. 477; *Ready v. Manchester Gas Light Co.*, 67 N. H. 147; *Harrington v. Manchester, etc.*, R. Co., 62 N. H. 77; *Hersey v. Hutchins*, (N. H. 1900) 46 Atl. Rep. 33.

*New Mexico.*—*Territory v. Baker*, 4 N. Mex. 117; *Anderson v. Territory*, 4 N. Mex. 108.

*North Carolina.*—*State v. White*, 68 N. Car. 158.

*Ohio.*—*Hayward v. Calhoun*, 2 Ohio St. 164; *Hull v. Albro*, 2 Disney (Ohio) 147; *Eastman v. Wight*, 4 Ohio St. 156; *Kenrick v. Reppard*, 23 Ohio St. 333; *Watts v. Ruth*, 30 Ohio St. 32.

*Pennsylvania.*—*Irvine v. M.*, etc., Bank, 1 Pittsb. (Pa.) 422.

*Rhode Island.*—*Ryan v. Riverside, etc.*, Mills, 15 R. I. 436; *State v. Cosgrove*, 16 R. I. 411.

*Virginia.*—*Thompson v. Com.*, 8 Gratt. (Va.) 637.

*West Virginia.*—*Zickefoose v. Kuykendall*, 12 W. Va. 23.

**In a Capital Case** the defendant should not be held to the same degree of diligence as to inquiry with respect to the qualification of jurors as a party in a civil case. *State v. Williams*, 9 Houst. (Del.) 508.

**2. Failure to Question Juror.**—*England.*—*Wharton's Case*, Yelv. 23; *Rex v. Despard*, 2 M. & R. 406, 17 E. C. L. 309; *Rex v. Sutton*, 8 B. & C. 417, 15 E. C. L. 252.

*United States.*—*U. S. v. Baker*, 3 Ben. (U. S.) 68.

*California.*—*People v. Chung Lit*, 17 Cal. 320; *People v. Coffman*, 24 Cal. 230; *People v. Evans*, 124 Cal. 206.

*Colorado.*—*Jones v. People*, 2 Colo. 351; *Brown v. People*, 20 Colo. 161.

*Georgia.*—*Costly v. State*, 19 Ga. 614; *Meeks v. State*, 57 Ga. 329; *Jones v. State*, 95 Ga. 497.

*Illinois.*—*West Chicago St. R. Co. v. Huhnke*, 82 Ill. App. 404; *Vennum v. Harwood*, 6 Ill. 659.

*Indiana.*—*Alexander v. Dunn*, 5 Ind. 122; *Romaine v. State*, 7 Ind. 63.

*Iowa.*—*Faville v. Shehan*, 68 Iowa 241; *State v. Pickett*, 103 Iowa 714, *overruling* *State v. Groome*, 10 Iowa 308; *State v. Burke*, 107 Iowa 659.

*Kansas.*—*State v. Hinkle*, 27 Kan. 308.

*Kentucky.*—*Coleman v. Com.*, 8 Ky. L. Rep. 607.

*Louisiana.*—*State v. Kennedy*, 8 Rob. (La.) 590; *State v. Button*, 50 La. Ann. 1071.

*Massachusetts.*—*Daniels v. Lowell*, 139 Mass. 56.

*Mississippi.*—*George v. State*, 39 Miss. 570; *Wood v. State*, 62 Miss. 220; *Solomon v. State*, 71 Miss. 567.

*Nebraska.*—*Hickey v. State*, 12 Neb. 490; *Everton v. Esgate*, 24 Neb. 235.

*North Carolina.*—*State v. Davis*, 80 N. Car. 412.

*Ohio.*—*Watts v. Ruth*, 30 Ohio St. 32.

*Oregon.*—*State v. Powers*, 10 Oregon 145, 45 Am. Rep. 138.

*Pennsylvania.*—*Baird v. Otte*, 12 Pa. Co. Ct. 445.

*Rhode Island.*—*Ryan v. Riverside, etc.*, Mills, 15 R. I. 436; *State v. Cosgrove*, 16 R. I. 411; *Sprague v. Brown*, (R. I. 1899) 43 Atl. Rep. 637.

*South Carolina.*—*State v. Quarrel*, 2 Bay (S. Car.) 150, 1 Am. Dec. 637; *State v. Fisher*, 2 Nott & M. (S. Car.) 261.

*Tennessee.*—*M'Clure v. State*, 1 Yerg. (Tenn.) 208; *Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137.

*Texas.*—*Baker v. State*, 4 Tex. App. 223; *Aud v. State*, 36 Tex. Crim. 76, *disapproving* *Hanks v. State*, 21 Tex. 526.

*Wisconsin.*—*Bennet v. State*, 24 Wis. 57.

**3. Disqualification of Age.**—*Cohron v. State*, 20 Ga. 752; *State v. Garig*, 43 La. Ann. 365;



served on a former trial.<sup>1</sup> One who failed to examine a juror as to whether he was a freeholder or a householder was held to be unable to raise this objection after verdict;<sup>2</sup> and failure to discover that one was a member of the grand jury which found the indictment has been held to show negligence depriving one of the right to make such objection after verdict.<sup>3</sup> Ignorance of the language is not generally considered a ground for new trial, since the moving party has an opportunity to examine the juror before trial in this regard.<sup>4</sup> On the same principle it is decided that where knowledge of the formation or expression of an opinion could have been obtained by a proper examination of the juror on the *voir dire* examination, an objection because of opinion cannot be made after verdict.<sup>5</sup>

A Misstatement or Fraudulent Concealment of his disqualification by the juror may generally be made ground for a motion for a new trial;<sup>6</sup> but false answers of

*Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722; *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *U. S. v. Gomez*, 7 N. Mex. 554.

**Defective Eyesight.**—It was held that a party was not charged with notice that a juror's eyesight was defective by the fact that during the trial such juror stumbled while coming in late and told the court that his eyesight was bad. *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 421.

**Notice of Existing Records.**—In *State v. Magee*, 48 La. Ann. 901, it was held that a party was charged with notice that a member of the jury was under indictment by the fact that such indictment was on file with the clerk of the parish.

As to the duty to search registration books to learn whether a juror is a qualified elector, see *Mew v. Charleston*, etc., R. Co., 55 S. Car. 90.

**1. Juror on Previous Trial.**—*McDonald v. Beall*, 55 Ga. 288; *Craig v. Elliott*, 4 Bibb (Ky.) 272; *Fitzpatrick v. Harris*, 16 B. Mon. (Ky.) 561; *Hayward v. Calhoun*, 2 Ohio St. 164. But see *Herndon v. Bradshaw*, 4 Bibb (Ky.) 15.

**2. Freeholder or Householder.**—*Croy v. State*, 32 Ind. 384; *Estep v. Waterous*, 45 Ind. 140; *Kingin v. State*, 46 Ind. 132; *Gillooley v. State*, 58 Ind. 182.

**3. Member of Grand Jury.**—*Jones v. State*, 95 Ga. 497 (but see *Hawkins v. Andrews*, 39 Ga. 118); *Coleman v. Com.*, 8 Ky. L. Rep. 607; *State v. Smith*, 41 La. Ann. 688; *Beck v. State*, 20 Ohio St. 228; *Gillespie v. State*, 8 Yerg. (Tenn.) 507, 29 Am. Dec. 137; *Franklin v. State*, 2 Tex. App. 8. *Contra*, *Dilworth v. Com.*, 12 Gratt. (Va.) 689, 65 Am. Dec. 264; *Bennet v. State*, 24 Wis. 57.

But a party was held not to be negligent in failing to discover that the juror had been on the grand jury though he did not ask the direct question, the jury having stated that he had not formed or expressed an opinion in regard to the guilt or innocence of the accused. *Rice v. State*, 16 Ind. 298; *U. S. v. Christensen*, 7 Utah 26.

**4. Ignorance of Language.**—*State v. Pickett*, 103 Iowa 714; *State v. Madigan*, 57 Minn. 425; *Dokes v. Soards*, 9 Cinc. L. Bul. 76, 8 Ohio Dec. (Reprint) 621; *Boetge v. Landa*, 22 Tex. 105; *Drake v. State*, 5 Tex. App. 649. *Contra*, *Lafayette Plankroad Co. v. New Albany*, etc., R. Co., 13 Ind. 90, 74 Am. Dec.

246; *Com. v. Jones*, 12 Phila. (Pa.) 550, 34 Leg. Int. (Pa.) 148.

The determination of the question whether one who has some understanding of the language has sufficient understanding thereof is generally for the lower court. *People v. Davis*, (Cal. 1894) 36 Pac. Rep. 96; *State v. Tazwell*, 30 La. Ann. 884.

**5. Opinions that Might Have Been Discovered.**—*Arkansas*.—*Meyer v. State*, 19 Ark. 163; *Collier v. State*, 20 Ark. 36; *Casat v. State*, 40 Ark. 515; *Werner v. State*, 44 Ark. 122; *Brown v. St. Louis*, etc., R. Co., 52 Ark. 120; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20.

*Illinois*.—*Chicago*, etc., R. Co. *v. Kuster*, 22 Ill. App. 188; *Swarnes v. Siltton*, 58 Ill. 155; *Byars v. Mt. Vernon*, 77 Ill. 467.

*Iowa*.—*State v. Shelledy*, 8 Iowa 477.

*Kentucky*.—*Bell v. Howard*, 4 Litt. (Ky.) 117.

*Louisiana*.—*State v. Harper*, 51 La. Ann. 163.

*Michigan*.—*People v. Lange*, 56 Mich. 550.

*Mississippi*.—*Brown v. State*, 60 Miss. 447.

*Nebraska*.—*Clough v. State*, 7 Neb. 324; *Ogden v. State*, 13 Neb. 436; *Everton v. Esgate*, 24 Neb. 235.

*Ohio*.—*Schneider v. State*, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565; *Simpson v. Pitman*, 13 Ohio 365; *Wilder v. State*, 25 Ohio St. 555.

*South Carolina*.—*State v. Robertson*, 54 S. Car. 147. *Compare* *Garrett v. Weinberg*, 54 S. Car. 127.

*Texas*.—*Mills v. State*, 36 Tex. Crim. 71; *Aud v. State*, 36 Tex. Crim. 76 [disapproving *Hanks v. State*, 21 Tex. 527]; *Kirk v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 440; *Blanton v. Mayes*, 72 Tex. 417.

*Utah*.—*People v. Lewis*, 4 Utah 42.

**6. Active Concealment by Juror.**—*United States*.—*Hyman v. Eames*, 41 Fed. Rep. 676.

*Arkansas*.—*Meyer v. State*, 19 Ark. 164; *Casat v. State*, 40 Ark. 511.

*District of Columbia*.—*U. S. v. Angney*, 6 Mackey (D. C.) 66.

*Illinois*.—*Sellers v. People*, 4 Ill. 412; *West Chicago St. R. Co. v. Huhnke*, 82 Ill. App. 404.

*Indiana*.—*Johnson v. Tyler*, 1 Ind. App. 387; *Romaine v. State*, 7 Ind. 63; *Rice v. State*, 16 Ind. 298; *Lamphier v. State*, 70 Ind. 317; *Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59, 60 Am. Rep. 673.

*Iowa*.—*State v. Shelledy*, 8 Iowa 477.

*Kentucky*.—*Rash v. Cheatham*, 9 Ky. L. Rep. 403; *Rhodes v. Crooke*, 11 Ky. L. Rep. 952.



the juror are no excuse for failure to object if the party or his counsel is aware of their falsity.<sup>1</sup>

*bb. KNOWLEDGE OF COUNSEL.*—For the purpose of affecting a party with knowledge of the disqualification, knowledge on the part of his counsel is sufficient.<sup>2</sup>

*f. NEW TRIAL FOR DISQUALIFICATION OF JUROR*—(1) *Necessity of Prejudice.*—In order to justify a new trial on account of the disqualification of a juror, when this is permissible under the rules just stated, it must appear that the moving party suffered prejudice or injustice from the fact that the disqualified juror served on the trial.<sup>3</sup>

(2) *Quantum of Evidence Necessary.*—After a juror has been drawn and

*Louisiana.*—State *v. Kennedy*, 8 Rob. (La.) 590; State *v. Whitesides*, 49 La. Ann. 352; State *v. Harper*, 51 La. Ann. 163; State *v. Giron*, 52 La. Ann. 491.

*Maine.*—Studley *v. Hall*, 22 Me. 198.

*Massachusetts.*—Jeffries *v. Randall*, 14 Mass. 205.

*Mississippi.*—Cody *v. State*, 3 How. (Miss.) 27; Childress *v. Ford*, 10 Smed. & M. (Miss.) 25; Sam *v. State*, 31 Miss. 484; Cannon *v. State*, 57 Miss. 147; Jeffries *v. State*, 74 Miss. 675.

*Missouri.*—State *v. Ross*, 29 Mo. 32; State *v. Burnside*, 37 Mo. 343; State *v. Taylor*, 64 Mo. 358; State *v. Gonce*, 87 Mo. 627.

*Montana.*—Territory *v. Kennedy*, 3 Mont. 520.

*New York.*—Fealy *v. Bull*, 11 N. Y. App. Div. 468; McGarry *v. Buffalo*, (Supm. Ct. Gen. T.) 53 N. Y. St. Rep. 882, 70 Hun (N. Y.) 597.

*Ohio.*—Busick *v. State*, 19 Ohio 198.

*Rhode Island.*—Ryan *v. Riverside*, etc., Mills, 15 R. I. 436.

*Tennessee.*—Brakefield *v. State*, 1 Sneed (Tenn.) 215; Troxdale *v. State*, 9 Humph. (Tenn.) 411; Howerton *v. State*, Meigs (Tenn.) 262.

*Texas.*—Ray *v. State*, 4 Tex. App. 450; Gardenhire *v. State*, 6 Tex. App. 147; Armendaris *v. State*, 10 Tex. App. 44; Wade *v. State*, 12 Tex. App. 358; Read *v. State*, (Tex. App. 1889) 12 S. W. Rep. 413; Hanks *v. State*, 21 Tex. 526; Page *v. State*, 22 Tex. App. 551; Long *v. State*, 32 Tex. Crim. 140; Henrie *v. State*, 41 Tex. 574.

*Utah.*—People *v. Reece*, 3 Utah 72.

*Compare* Lawrence *v. Littell*, (Kan. App. 1899) 58 Pac. Rep. 495.

**Reliance on Juror's Statements.**—So it has been held that where the juror states on his *voir dire* examination that he has no knowledge or opinion in regard to the case, the party questioning him is not bound to inquire in this regard from other sources, as by searching the court records to see whether he has served in a previous trial, Lane *v. Scoville*, 16 Kan. 402; or to see whether he was one of the grand jurors who found the indictment, U. S. *v. Christensen*, 7 Utah 26.

**1. Knowledge of Falsity of Statements.**—Buck *v. Hughes*, 127 Ind. 46; State *v. Ready*, 44 Kan. 697; Parker *v. State*, 55 Miss. 414; Williamson *v. State*, 36 Tex. Crim. 225.

**2. Knowledge of Counsel**—*California.*—Townsend *v. Briggs*, 99 Cal. 481.

*Florida.*—Kelly *v. State*, 39 Fla. 122.

*Georgia.*—Anderson *v. State*, 14 Ga. 709; Cannon *v. Bullock*, 26 Ga. 431; Edmondson *v.*

Wallace, 20 Ga. 660; Gibson *v. Williams*, 39 Ga. 660.

*Illinois.*—Swarnes *v. Sitton*, 58 Ill. 155; Mackin *v. People*, 115 Ill. 312, 56 Am. Rep. 167.

*Indiana.*—Achey *v. State*, 64 Ind. 56.

*Louisiana.*—State *v. Labauve*, 46 La. Ann. 548; State *v. Whitesides*, 49 La. Ann. 352.

*Maine.*—Jameson *v. Androscoggin R. Co.*, 52 Me. 412; State *v. Bowden*, 71 Me. 89.

*Massachusetts.*—Kent *v. Charlestown*, 2 Gray (Mass.) 281.

*Michigan.*—Bourke *v. James*, 4 Mich. 336.

*Mississippi.*—Brown *v. State*, 60 Miss. 447.

*Ohio.*—Parks *v. State*, 4 Ohio St. 234.

*Pennsylvania.*—Com. *v. Stokes*, 4 York Leg. Rec. (Pa.) 187.

So in a statutory provision requiring a "party" knowing of any objection to a juror before trial to make such objection promptly, the word "party" was held to include the attorney of a party. Brown *v. Reed*, 81 Me. 158.

**3. Necessity of Showing of Prejudice**—*United States.*—Orme *v. Pratt*, 4 Cranch (C. C.) 124; Brewer *v. Jacobs*, 22 Fed. Rep. 217; Fisher *v. Yoder*, 53 Fed. Rep. 565.

*Georgia.*—Johnson *v. Americus*, 46 Ga. 80; Georgia R. Co. *v. Cole*, 73 Ga. 713.

*Indiana.*—Achey *v. State*, 64 Ind. 56.

*Kansas.*—Salina *v. Trosper*, 27 Kan. 544.

*Kentucky.*—Presbury *v. Com.*, 9 Dana (Ky.) 205.

*Massachusetts.*—Amherst *v. Hadley*, 1 Pick. (Mass.) 38.

*Missouri.*—Boteler *v. Roy*, 40 Mo. App. 234; State *v. Breen*, 59 Mo. 413.

*New Hampshire.*—State *v. Howard*, 17 N. H. 171.

*New Mexico.*—U. S. *v. Folsom*, 7 N. Mex. 532; Territory *v. Armijo*, 7 N. Mex. 571.

*New York.*—Stedman *v. Batchelor*, 49 Hun (N. Y.) 390; Salisbury *v. McClaskey*, 26 Hun (N. Y.) 262; Cole *v. Van Keuren*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 451.

*Pennsylvania.*—Traviss *v. Com.*, 106 Pa. St. 597.

*Rhode Island.*—State *v. Congdon*, 14 R. I. 458; Fiske *v. Paine*, 18 R. I. 632; Sprague *v. Brown*, (R. I. 1899) 43 Atl. Rep. 637.

*Texas.*—O'Mealy *v. State*, 1 Tex. App. 180; Leeper *v. State*, 29 Tex. App. 63; Lane *v. State*, 29 Tex. App. 310; Mays *v. State*, 36 Tex. Crim. 437; Williamson *v. State*, 36 Tex. Crim. 225; Murphy *v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 978.

*Virginia.*—Smith *v. Com.*, 2 Va. Cas. 6; Poore *v. Com.*, 2 Va. Cas. 474; Kennedy *v.*



has served on the jury, the presumption is that he was competent,<sup>1</sup> and in order to support a motion for a new trial on account of his disqualification evidence of a quite convincing character will generally be required, in view of the temptation to manufacture evidence for the purpose.<sup>2</sup>

**Single Witness as to Opinion Insufficient.**—Many courts have adopted the rule that evidence by a single witness of the formation or expression of an opinion by a juror against the defendant in a criminal trial will not be sufficient to impeach the verdict if such opinion was denied by the juror on oath before or after the trial.<sup>3</sup>

(3) **Discretion of Court.**—In a number of cases it is stated that the grant of a new trial on account of the disqualification of the juror is a matter entirely within the sound discretion of the trial court.<sup>4</sup>

*Com.*, 2 Va. Cas. 510; *Brown v. Com.*, 2 Va. Cas. 516; *Com. v. Hughes*, 5 Rand. (Va.) 655; *Com. v. Jones*, 1 Leigh (Va.) 598; *Heath v. Com.*, 1 Rob. (Va.) 796; *Com. v. Hailstock*, 2 Gratt. (Va.) 564; *Curran's Case*, 7 Gratt. (Va.) 619; *Puryear v. Com.*, 83 Va. 58; *Simmons v. McConnell*, 86 Va. 494; *Hodges v. Com.*, 89 Va. 265; *Reynolds v. Richmond, etc.*, R. Co., 92 Va. 400.

*West Virginia.*—*State v. McDonald*, 9 W. Va. 456; *Zickefoose v. Kuykendall*, 12 W. Va. 23; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *State v. Williams*, 14 W. Va. 851; *State v. Greer*, 22 W. Va. 800; *State v. Howes*, 26 W. Va. 110; *Flesher v. Hale*, 22 W. Va. 44; *Beck v. Thompson*, 31 W. Va. 459, 13 Am. St. Rep. 870.

**Prejudice Is Consideration.**—In other cases the court, in refusing to grant a new trial, incidentally refers to the fact that the moving party was not prejudiced or that the verdict was correct.

*United States.*—*Hyman v. Eames*, 41 Fed. Rep. 676.

*Delaware.*—*State v. Robinson*, 9 Houst. (Del.) 401.

*Georgia.*—*Edmondson v. Wallace*, 20 Ga. 660.

*Kansas.*—*State v. Ready*, 44 Kan. 700.

*Maine.*—*McLellan v. Crofton*, 6 Me. 307.

*Minnesota.*—*Steele v. Maloney*, 1 Minn. 347.

*Mississippi.*—*Solomon v. State*, 71 Miss. 567.

*Pennsylvania.*—*Baird v. Otte*, 12 Pa. Co. Ct. 445, 2 Pa. Dist. 449.

*Canada.*—*Hart v. Pryor*, 10 Nova Scotia 53.

**1. Presumption of Competency After Trial.**—*Alexander v. Dunn*, 5 Ind. 122; *Hart v. State*, 14 Neb. 572; *Mann v. State*, 3 Head (Tenn.) 377; *Cartwright v. State*, 12 Lea (Tenn.) 620; *King v. State*, 91 Tenn. 617; *Hammond v. Noble*, 57 Vt. 193; *Keenan v. State*, 8 Wis. 132.

**2. Degree of Proof on Motion for New Trial.**—*Georgia.*—*Griffin v. State*, 15 Ga. 476; *Lampkin v. State*, 87 Ga. 516; *Hinkle v. State*, 94 Ga. 595.

*Illinois.*—*Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Hughes v. People*, 116 Ill. 331.

*Indiana.*—*Pickens v. Hobbs*, 42 Ind. 270.

*Kansas.*—*State v. Peterson*, 38 Kan. 206.

*Maine.*—*Taylor v. Greely*, 3 Me. 204; *State v. Kingsbury*, 58 Me. 244.

*Missouri.*—*State v. Brooks*, 92 Mo. 542.

*Montana.*—*State v. Anderson*, 14 Mont. 541.

*New Jersey.*—*Conover v. Jones*, 5 N. J. L. J. 349.

*Tennessee.*—*Mann v. State*, 3 Head (Tenn.) 377; *King v. State*, 91 Tenn. 623; *Cartwright v. State*, 12 Lea (Tenn.) 620; *Ellis v. State*, 92 Tenn. 85.

*Texas.*—*Texas Cent. R. Co. v. Stuart*, 1 Tex. Civ. App. 642; *Drake v. State*, 5 Tex. App. 649; *Harris v. State*, 40 Tex. Crim. 8; *McGrew v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 226.

*Virginia.*—*Poore v. Com.*, 2 Va. Cas. 474; *Gray v. Com.*, 92 Va. 772.

**3. Single Witness as to Opinion Insufficient.**—*Georgia.*—*Columbus v. Goetchius*, 7 Ga. 139; *Epps v. State*, 19 Ga. 103; *Buchanan v. State*, 24 Ga. 282; *O'Shields v. State*, 55 Ga. 697; *Hudgins v. State*, 61 Ga. 182; *West v. State*, 79 Ga. 773; *Fogarty v. State*, 80 Ga. 464; *Henderson v. Fox*, 83 Ga. 233; *Myers v. State*, 97 Ga. 94; *Sumner v. State*, 109 Ga. 142.

*Massachusetts.*—*Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32.

*Missouri.*—*In re Bowman*, 7 Mo. App. 569.

*Montana.*—*Territory v. Burgess*, 8 Mont. 57.

*New Hampshire.*—*State v. Pike*, 20 N. H. 344; *State v. Ayer*, 23 N. H. 301.

*North Carolina.*—*State v. Scott*, 1 Hawks (8 N. Car.) 24.

*Texas.*—*Hawkins v. State*, 27 Tex. App. 273; *Driver v. State*, 37 Tex. Crim. 160; *Duke v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 43.

*Vermont.*—*Thrall v. Lincoln*, 28 Vt. 356.

**Single Witness as to Relationship.**—It has been held that the uncontradicted affidavit of a party that a juror was related to the other party is sufficient to sustain a motion for a new trial. *Dailey v. Gaines*, 1 Dana (Ky.) 529. But see *Shinn v. Tucker*, 37 Ark. 580.

**4. New Trial in Discretion of Court.**—*England.*—*Williams v. Great Western R. Co.*, 3 H. & N. 869.

*Canada.*—*Le Blanc v. McRae*, 11 Nova Scotia 240.

*Alabama.*—*Daniels v. State*, 88 Ala. 220.

*Arkansas.*—*Meyer v. State*, 19 Ark. 156.

*Florida.*—*State v. Madoil*, 12 Fla. 163.

*Georgia.*—*Hawkins v. Andrews*, 39 Ga. 118.

*Kentucky.*—*Presbury v. Com.*, 9 Dana (Ky.) 203.

*Maine.*—*Jewell v. Jewell*, 84 Me. 304.

*Massachusetts.*—*Woodward v. Dean*, 113 Mass. 297.

*North Carolina.*—*State v. Crawford*, 2 Hayw. (3 N. Car.) 298; *State v. Perkins*, 66 N. Car. 126; *Spicer v. Fulghum*, 67 N. Car. 18; *State v. Davis*, 80 N. Car. 412; *State v. Lambert*, 93 N. Car. 618; *State v. Davis*, 126 N. Car. 1007.



g. ARREST OF JUDGMENT FOR DISQUALIFICATION OF JUROR. — Generally, objection that a juror was disqualified cannot be made by a motion in arrest of judgment, since it is not a matter which appears or should appear on the record;<sup>1</sup> but in *Connecticut* such a motion has a wider application and may be based upon a juror's disqualification.<sup>2</sup>

h. CONCLUSIVENESS OF DECISION AS TO ACCEPTANCE OR EXCLUSION OF JUROR — (1) *Decision by Court* — (a) *In General*. — Where the disposal of a challenge for cause requires either the trial of a question of law or the trial of mixed questions of law and of fact, the determination of the legal questions involved is reviewable, unless otherwise provided by statute;<sup>3</sup> but as regards questions of fact, which are generally the sole or at least the main questions at issue, the decision of the trial court, if based upon evidence to sustain it, is usually regarded as conclusive or approximately so,<sup>4</sup> and at least it will not

*Rhode Island*. — *State v. Congdon*, 14 R. I. 458.

*Virginia*. — *Com. v. Jones*, 1 Leigh (Va.) 598; *Bristow v. Com.*, 15 Gratt. (Va.) 634.

*Wisconsin*. — *Bonneville v. State*, 53 Wis. 680.

See also *infra*, this subsection, *Conclusiveness of Decision as to Acceptance or Exclusion of Juror* — *Decision by Court* — *In General*.

1. *Motion in Arrest of Judgment Does Not Lie*

— *California*. — *People v. Samsels*, 66 Cal. 99.

*Florida*. — *Reynolds v. State*, 33 Fla. 301.

*Louisiana*. — *State v. Harris*, 30 La. Ann. 90; *State v. Wittington*, 33 La. Ann. 1403; *State v. McGee*, 36 La. Ann. 207; *State v. Griffin*, 38 La. Ann. 502; *State v. Miller*, 36 La. Ann. 158; *State v. Pete*, 39 La. Ann. 1095; *State v. Green*, 42 La. Ann. 644; *State v. Chevis*, 48 La. Ann. 576.

*Mississippi*. — *Frank v. State*, 39 Miss. 705.

*New Mexico*. — *Territory v. Romero*, 2 N. Mex. 474.

*Vermont*. — *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361.

*Virginia*. — *Gray v. Com.*, 92 Va. 772.

*Wisconsin*. — *Byrne v. State*, 12 Wis. 519; *Grubb v. State*, 14 Wis. 434.

2. *Connecticut Rule*. — *Woodbridge v. Raymond*, Kirby (Conn.) 279; *Tweedy v. Brush*, Kirby (Conn.) 13; *Smith v. Ward*, 2 Root (Conn.) 302; *State v. Tuller*, 34 Conn. 294; *State v. Allen*, 46 Conn. 531.

3. *Review of Legal Questions* — *Illinois*. — *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465; *Plummer v. People*, 74 Ill. 361; *Wilson v. People*, 94 Ill. 299; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

*Michigan*. — *Holt v. People*, 13 Mich. 224.

*New Jersey*. — *Patterson v. State*, 48 N. J. L. 381; *Moschell v. State*, 53 N. J. L. 498, 54 N. J. L. 390.

*New York*. — *People v. Mallon*, 3 Lans. (N. Y.) 224; *Stout v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 71.

*North Carolina*. — *Sehorn v. Williams*, 6 Jones L. (51 N. Car.) 575; *Baker v. Harris*, 1 Winst. L. (60 N. Car.) 277.

*Oregon*. — *Ford v. Umatilla County*, 15 Oregon 313.

*Tennessee*. — *Conatser v. State*, 12 Lea (Tenn.) 436.

4. *Conclusiveness of Decision of Trial Court on Questions of Fact* — *United States*. — *Hopt v. Utah*, 120 U. S. 430, *affirming* *People v. Hopt*, 4 Utah 247; *Spies v. Illinois*, 123 U. S. 131;

*Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 696, 7 U. S. App. 84; *U. S. v. McHenry*, 6 Blatchf. (U. S.) 503; *Press Pub. Co. v. McDonald*, 73 Fed. Rep. 440, 38 U. S. App. 557; *Reynolds v. U. S.*, 98 U. S. 145.

*Arkansas*. — *Milan v. State*, 24 Ark. 348; *Benton v. State*, 30 Ark. 328; *Lavender v. Hudgens*, 32 Ark. 763; *Maclin v. State*, 44 Ark. 115; *Vaughan v. State*, 58 Ark. 353; *Hardin v. State*, 66 Ark. 53.

*California*. — *People v. Henderson*, 28 Cal. 466; *People v. Fredericks*, 106 Cal. 554; *People v. Murphy*, 45 Cal. 143; *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, 49 Cal. 560; *People v. Atherton*, 51 Cal. 495; *People v. Taing*, 53 Cal. 602; *People v. Riley*, 65 Cal. 107; *People v. Fong Ah Sing*, 70 Cal. 11; *People v. Brown*, 72 Cal. 390; *People v. Ward*, 77 Cal. 113; *People v. Boling*, 83 Cal. 380; *People v. Bemmerly*, 87 Cal. 117.

*Colorado*. — *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Jones v. People*, 2 Colo. 355; *Denver, etc., R. Co. v. Moynahan*, 8 Colo. 56; *Denver, etc., R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243; *Babcock v. People*, 13 Colo. 515; *Salazar v. Taylor*, 18 Colo. 538.

*District of Columbia*. — *U. S. v. Schneider*, 21 D. C. 381.

*Georgia*. — *Costly v. State*, 19 Ga. 629; *Jordan v. State*, 22 Ga. 546; *Buchanan v. State*, 24 Ga. 282; *Galloway v. State*, 25 Ga. 596; *Westmoreland v. State*, 45 Ga. 279; *Eberhart v. State*, 47 Ga. 598; *Moon v. State*, 68 Ga. 687; *Williams v. State*, 69 Ga. 11; *Cato v. State*, 72 Ga. 747; *Simmons v. State*, 73 Ga. 609, 54 Am. Rep. 885; *Fogarty v. State*, 80 Ga. 450; *Vann v. State*, 83 Ga. 44.

*Indiana*. — *Miami Valley Furniture Co. v. Wesler*, 47 Ind. 65; *Hart v. State*, 57 Ind. 103; *Coryell v. Stone*, 62 Ind. 307; *Guetic v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Elliot v. State*, 73 Ind. 10; *Stout v. State*, 90 Ind. 1; *Butler v. State*, 97 Ind. 378; *Dugle v. State*, 100 Ind. 259; *Walker v. State*, 102 Ind. 502; *Epps v. State*, 102 Ind. 539; *Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216.

*Iowa*. — *Anson v. Dwight*, 18 Iowa 241; *Sprague v. Atlee*, 81 Iowa 1.

*Kansas*. — *State v. Bancroft*, 22 Kan. 170.

*Kentucky*. — *Rutherford v. Com.*, 13 Bush (Ky.) 608.

*Louisiana*. — *State v. Shay*, 30 La. Ann. 114; *State v. Tazwell*, 30 La. Ann. 884; *State v. Harris*, 30 La. Ann. 90; *State v. Shields*, 33 La.



be revised unless there has been an abuse of discretion to the injury of the party complaining, or unless there has been manifest error or some infringement of the law.<sup>1</sup>

Ann. 1410; State *v.* Farrer, 35 La. Ann. 317; State *v.* Ford, 37 La. Ann. 443; State *v.* Simmons, 33 La. Ann. 41; State *v.* Creech, 38 La. Ann. 480; State *v.* Redmond, 37 La. Ann. 774; State *v.* Waggoner, 39 La. Ann. 919; State *v.* Lewis, 41 La. Ann. 591; State *v.* Thomas, 41 La. Ann. 1088; State *v.* Ford, 42 La. Ann. 255.

*Maryland*. — Garlitz *v.* State, 71 Md. 293.

*Massachusetts*. — Borden *v.* Borden, 5 Mass. 79, 4 Am. Dec. 32; Kinnicutt *v.* Stockwell, 8 Cush. (Mass.) 73. And see Hubbard *v.* Gale, 105 Mass. 511.

*Minnesota*. — Morrison *v.* Lovejoy, 6 Minn. 319; State *v.* Mims, 26 Minn. 183; Hawkins *v.* Manston, 57 Minn. 323; Perry *v.* Miller, 61 Minn. 412; Bennett *v.* E. W. Backus Lumber Co., (Minn. 1899) 79 N. W. Rep. 682.

*Missouri*. — Eckert *v.* St. Louis Transfer Co., 2 Mo. App. 36; State *v.* Brooks, 92 Mo. 542; Baldwin *v.* State, 12 Mo. 223; State *v.* Bauerle, 145 Mo. 1; State *v.* Chatham Nat. Bank, 80 Mo. 626; State *v.* Gonce, 87 Mo. 627; McCarthy *v.* Cass Ave., etc., R. Co., 92 Mo. 536; State *v.* Cunningham, 100 Mo. 382.

*Nebraska*. — Republican Valley R. Co. *v.* Boyse, 14 Neb. 130; Hill *v.* State, 42 Neb. 503; Basye *v.* State, 45 Neb. 261.

*Nevada*. — State *v.* Larkin, 11 Nev. 325; State *v.* Hing, 16 Nev. 307; State *v.* Crutchley, 19 Nev. 368; State *v.* Vaughan, 22 Nev. 285.

*New Hampshire*. — March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; Watson *v.* Walker, 33 N. H. 131; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533; Walker *v.* Kennison, 34 N. H. 257; Rowell *v.* Boston, etc., R. Co., 58 N. H. 514; State *v.* Sawtelle, 66 N. H. 538.

*New Jersey*. — Johnson *v.* State, 59 N. J. L. 535, affirming 59 N. J. L. 271; Patterson *v.* State, 48 N. J. L. 381; Moschell *v.* State, 53 N. J. L. 511; Clawson *v.* State, 59 N. J. L. 434.

*New York*. — People *v.* McQuade, 110 N. Y. 284, affirming (Supm. Ct. Gen. T.) 1 N. Y. Supp. 155; Sanchez *v.* People, 22 N. Y. 150; Butler *v.* Glens Falls, etc., R. Co., 121 N. Y. 112; People *v.* Flaherty, 27 N. Y. App. Div. 539; People *v.* Mallon, 3 Lans. (N. Y.) 224; Stout *v.* People, (Supm. Ct.) 4 Park. Crim. (N. Y.) 132; People *v.* Willett, 36 Hun (N. Y.) 500; Magee *v.* Troy, 48 Hun (N. Y.) 383, 119 N. Y. 640; People *v.* Spiegel, 75 Hun (N. Y.) 161; Thomas *v.* People, 67 N. Y. 218; Balbo *v.* People, 80 N. Y. 484; People *v.* Carolin, 115 N. Y. 658, 24 N. Y. St. Rep. 595; Young *v.* Johnson, 123 N. Y. 226; People *v.* McGonegal, 136 N. Y. 62.

*North Carolina*. — State *v.* Ellington, 7 Ired. L. (29 N. Car.) 61; State *v.* Mercer, 67 N. Car. 266; State *v.* Collins, 70 N. Car. 241, 16 Am. Rep. 771; State *v.* Wincroft, 76 N. Car. 38; State *v.* Watson, 86 N. Car. 624; State *v.* Carland, 90 N. Car. 669; Branton *v.* O'Briant, 93 N. Car. 99; State *v.* Kilgore, 93 N. Car. 533; State *v.* Cole, 94 N. Car. 958; State *v.* Green, 95 N. Car. 611; Davenport *v.* McKee, 98 N. Car. 500; State *v.* Potts, 100 N. Car. 457; State *v.* Fuller, 114 N. Car. 885.

*Ohio*. — Serviss *v.* Stockstill, 30 Ohio St. 418; Dew *v.* McDivitt, 31 Ohio St. 139.

*Oklahoma*. — Huntley *v.* Territory, 7 Okla. 60.

*Oregon*. — State *v.* Olberman, 33 Oregon 556.

*Pennsylvania*. — Catasaqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 28 W. N. C. (Pa.) 146; Ortwein *v.* Com., 76 Pa. St. 426, 18 Am. Rep. 420; Wirebach *v.* Easton First Nat. Bank, 97 Pa. St. 543, 39 Am. Rep. 821; Com. *v.* Crossmire, 156 Pa. St. 304.

*South Carolina*. — State *v.* McIntosh, 39 S. Car. 97; Pinckney *v.* Western Union Tel. Co., 19 S. Car. 71, 45 Am. Rep. 765; State *v.* Summers, 36 S. Car. 479; State *v.* Coleman, 20 S. Car. 444; State *v.* Nance, 25 S. Car. 171; State *v.* Prater, 26 S. Car. 198; State *v.* Williams, 31 S. Car. 258; State *v.* Wyse, 32 S. Car. 45; State *v.* Haines, 36 S. Car. 504; State *v.* Merriman, 34 S. Car. 16.

*South Dakota*. — Haugen *v.* Chicago, etc., R. Co., 3 S. Dak. 394; State *v.* Chapman, 1 S. Dak. 414.

*Tennessee*. — State *v.* Collins, 15 Lea (Tenn.) 434.

*Texas*. — Mason *v.* State, 15 Tex. App. 534; Pierson *v.* State, 18 Tex. App. 524.

*Utah*. — People *v.* O'Loughlin, 3 Utah 133; People *v.* Hopt, 4 Utah 250.

*Vermont*. — State *v.* Ward, 39 Vt. 225; State *v.* Meaker, 54 Vt. 112.

*Virginia*. — Jackson *v.* Com., 23 Gratt. (Va.) 919.

*Washington*. — White *v.* Territory, 3 Wash. Ter. 397.

*West Virginia*. — State *v.* Baker, 33 W. Va. 330.

*Wisconsin*. — Baker *v.* State, 88 Wis. 140, quoting Reynolds *v.* U. S., 98 U. S. 156.

*Wyoming*. — Bryant *v.* State, 7 Wyo. 311.

In *Illinois* it is expressly decided that though at common law the decision of triers on challenges to the favor was final, this does not apply to the decision of the court, to which by statute the power to determine the competency of jurors is committed. *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465; *Plummer v. People*, 74 Ill. 361; *Wilson v. People*, 94 Ill. 299; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Coughlin v. People*, 144 Ill. 186.

In *New York* the finding of the trial court as to bias can be reviewed on appeal only when there is no legal evidence in support thereof or when the evidence shows a condition of mind which, as a matter of law, renders the juror incompetent, the former general statutory right of review having been withdrawn. *People v. McQuade*, 110 N. Y. 284; *People v. McGonegal*, 136 N. Y. 62.

**Statutes Precluding Appeal.** — State statutes have occasionally been construed as not allowing any right of appeal from decisions on challenges. *People v. Vasquez*, 49 Cal. 560; *People v. Cotta*, 49 Cal. 166; *People v. Taing*, 53 Cal. 602; *People v. Riley*, 65 Cal. 108; *People v. Fong Ah Sing*, 70 Cal. 8; *People v. Ward*, 77 Cal. 113; *People v. Boling*, 83 Cal. 380; *People v. Bemmerly*, 87 Cal. 117; *Territory v. Evans*, 2 Idaho 627; *People v. Hopt*, 4 Utah 247.

**1. Abuse of Discretion or Manifest Error Necessary for Reversal** — *United States*. — Southern Pac. R. Co. *v.* Rauh, 49 Fed. Rep. 696, 7 U.



**Error Not Prejudicial.** — An error in overruling or sustaining an objection to a juror is not ground for reversal if it appears that no prejudice resulted therefrom to the complaining party.<sup>1</sup> An error in excluding jurors may, it has been held, be corrected by restoring them to the panel.<sup>2</sup> And so the wrongful overruling of a challenge may be corrected by the exclusion of the juror.<sup>3</sup>

**Disqualification of Juror by Opinion.** — The rule that the decision of the lower court will be reversed only in extreme cases applies with regard to decisions on the question of the juror's opinion upon the merits of the case,<sup>4</sup> and also

S. App. 84; Press Pub. Co. v. McDonald, 73 Fed. Rep. 440, 38 U. S. App. 557.

*Arkansas.* — Benton v. State, 30 Ark. 343; Lavender v. Hudgens, 32 Ark. 763; Wright v. State, 35 Ark. 639; Casey v. State, 37 Ark. 67; Maclin v. State, 44 Ark. 115.

*California.* — People v. Brotherton, 47 Cal. 338.

*Colorado.* — Denver, etc., R. Co. v. Moynahan, 8 Colo. 56; Collins v. Burns, 16 Colo. 7.

*Florida.* — Jefferson County v. Lewis, 20 Fla. 980.

*Georgia.* — Stewart v. State, 58 Ga. 577; Powell v. Augusta, etc., R. Co., 77 Ga. 192; Hill v. State, 91 Ga. 154.

*Idaho.* — U. S. v. Alexander, 2 Idaho 354.

*Indiana.* — Howell v. State, 4 Ind. App. 148; Bradford v. State, 15 Ind. 347; Fahnestock v. State, 23 Ind. 231; Elliott v. State, 73 Ind. 10; Stout v. State, 90 Ind. 1; Noe v. State, 92 Ind. 92; Shields v. State, 95 Ind. 299; Butler v. State, 97 Ind. 378; Dugle v. State, 100 Ind. 259; Walker v. State, 102 Ind. 502; Stephenson v. State, 110 Ind. 358, 59 Am. Rep. 216; Dolan v. State, 122 Ind. 141; Davidson v. State, 135 Ind. 254; Shields v. State, 149 Ind. 395.

*Iowa.* — Davenport Gas Light, etc., Co. v. Davenport, 13 Iowa 229; Anson v. Dwight, 18 Iowa 241; May v. Elam, 27 Iowa 365; State v. Ostrander, 18 Iowa 435; State v. Munchrath, 78 Iowa 268; Sprague v. Atlee, 81 Iowa 1.

*Louisiana.* — State v. Welsh, 34 La. Ann. 991; State v. Elot, 34 La. Ann. 1195; State v. Barnes, 34 La. Ann. 395; State v. Creech, 38 La. Ann. 480; State v. Farrer, 35 La. Ann. 315.

*Michigan.* — Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431.

*Missouri.* — Baldwin v. State, 12 Mo. 223; Coppersmith v. Mound City R. Co., 51 Mo. App. 357; State v. Chatham Nat. Bank, 80 Mo. 626; Montgomery v. Wabash, etc., R. Co., 90 Mo. 446; McCarthy v. Cass Ave., etc., R. Co., 92 Mo. 536.

*Nebraska.* — Dodge v. People, 4 Neb. 20; Omaha Southern R. Co. v. Beeson, 36 Neb. 361; Omaha, etc., R. Co. v. Cook, 37 Neb. 435; Richards v. State, 36 Neb. 18; Basye v. State, 45 Neb. 261; Gran v. Houston, 45 Neb. 813.

*New Hampshire.* — March v. Portsmouth, etc., R. Co., 19 N. H. 373.

*New York.* — People v. Willett, 36 Hun (N. Y.) 500; People v. McLaughlin, 2 N. Y. App. Div. 419.

*North Dakota.* — State v. Ekanger, 8 N. Dak. 559.

*Ohio.* — Serviss v. Stockstill, 30 Ohio St. 418; Dew v. McDivitt, 31 Ohio St. 139.

*Oregon.* — State v. Tom, 8 Oregon 177; State v. Saunders, 14 Oregon 300; Kumli v. Southern Pac. Co., 21 Oregon 505.

*South Carolina.* — State v. Wyse, 32 S. Car. 45.

*South Dakota.* — State v. Church, 6 S. Dak. 89.

*Texas.* — Ray v. State, 4 Tex. App. 450; Gardenhire v. State, 6 Tex. App. 147; Heacock v. State, 13 Tex. App. 97.

*Vermont.* — State v. Tatro, 50 Vt. 483.

*Virginia.* — Cluverius v. Com., 81 Va. 787.

*Washington.* — White v. Territory, 3 Wash. Ter. 397.

*West Virginia.* — Thompson v. Douglass, 35 W. Va. 337.

*Wisconsin.* — Sutton v. Fox, 55 Wis. 531, 42 Am. Rep. 744; Olson v. Solveson, 71 Wis. 663; Grace v. Dempsey, 75 Wis. 313.

*Wyoming.* — Carter v. Territory, 3 Wyo. 193.

**1. Harmless Error** — *United States.* — Burt v. Panjaud, 99 U. S. 180.

*Arkansas.* — Missouri Pac. R. Co. v. Smith, 60 Ark. 221.

*Colorado.* — Salazar v. Taylor, 18 Colo. 538.

*Georgia.* — McKinney v. McKinney, 72 Ga. 80.

*Missouri.* — State v. Matthews, 88 Mo. 121.

*Nevada.* — State v. Larkin, 11 Nev. 314.

*Pennsylvania.* — Lancaster County v. Lancaster City, 170 Pa. St. 108.

*Texas.* — Holt v. State, 9 Tex. App. 571; Holland v. State, 31 Tex. Crim. 345; Bolding v. State, 23 Tex. App. 172; Goodson v. State, (Tex. Crim. 1893) 22 S. W. Rep. 20; Munson v. State, 34 Tex. Crim. 498.

*West Virginia.* — Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757.

*Wisconsin.* — Schoeffler v. State, 3 Wis. 823; Heucke v. Milwaukee City R. Co., 69 Wis. 401.

So where the evidence was not such as to justify a verdict for the complaining party, error in overruling his challenge is not ground for reversal. Reed v. De Laperiere, 99 Ga. 93; Morris v. State, 94 Ind. 565; Corlett v. Leavenworth, 27 Kan. 673.

**2. Restoring Jurors Improperly Excluded.** — Epps v. State, 19 Ga. 102. See also State v. Linebarger, 12 Mont. 292. But see State v. Allen, 46 Conn. 531; Anderson v. Wasatch, etc., R. Co., 2 Utah 518.

**3. Wrongful Overruling of Challenge Corrected.** — Amick v. Young, 69 Ill. 542; State v. Drake, 33 Kan. 151; People v. Wilson, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 199; Wormeley v. Com., 10 Gratt. (Va.) 658.

**4. Preconceived Opinions** — *United States.* — Reynolds v. U. S., 98 U. S. 156.

*California.* — People v. Wells, 100 Cal. 227.

*Colorado.* — Babcock v. People, 13 Colo. 515.

*Indiana.* — Lewis v. State, 137 Ind. 344; Elliott v. State, 73 Ind. 10.

*Iowa.* — State v. Munchrath, 78 Iowa 268.

*Michigan.* — Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431; Monaghan v. Agricultural F. Ins. Co., 53 Mich. 238.

*Mississippi.* — McGuire v. State, 76 Miss. 504.



where the statute expressly provides that the disqualifying opinion must be such as shall appear to the court to affect the juror's indifference or fitness to serve.<sup>1</sup>

**Decision on Motion for New Trial.** — The decision of the trial court upon the evidence adduced in support of a motion for a new trial for disqualification of a juror will not be disturbed unless error manifestly appears.<sup>2</sup>

(b) **Exclusion of Juror.** — Since a trial by an impartial jury is all that a party can demand, the erroneous allowance of a challenge for cause or the wrongful exclusion of a juror is stated in a number of cases to be no ground for complaint, unless it is shown that such action affected the character of the jury to the injury of the complaining party.<sup>3</sup> There are, however, decisions to

*Missouri.* — *State v. Greenwade*, 72 Mo. 298; *State v. Walton*, 74 Mo. 270; *State v. Brooks*, 92 Mo. 542; *State v. Bryant*, 93 Mo. 273; *State v. Cunningham*, 100 Mo. 382; *State v. Williamson*, 106 Mo. 169; *State v. Ihrig*, 106 Mo. 267.  
*New Hampshire.* — *March v. Portsmouth*, etc., R. Co., 19 N. H. 372.

*New York.* — *Doherty v. Lord*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 227, *affirming* (N. Y. City Ct. Gen. T.) 5 Misc. (N. Y.) 596.

*Oregon.* — *Kumli v. Southern Pac. Co.*, 21 Oregon 505.

*South Dakota.* — *Haugen v. Chicago*, etc., R. Co., 3 S. Dak. 394.

*Tennessee.* — *Conatser v. State*, 12 Lea (Tenn.) 436; *Spence v. State*, 15 Lea (Tenn.) 539.

*Texas.* — *Mason v. State*, 15 Tex. App. 534.

1. **Statute Vesting Discretion in Court** — *Colorado.* — *Thompson v. People*, (Colo. 1899) 59 Pac. Rep. 51.

*Oregon.* — *State v. Tom*, 8 Oregon 177; *State v. Saunders*, 14 Oregon 300; *Kumli v. Southern Pac. Co.*, 21 Oregon 505; *State v. Ingram*, 23 Oregon 434; *State v. Brown*, 28 Oregon 147.

*South Carolina.* — *State v. Dodson*, 16 S. Car. 453; *Gunter v. Graniteville Mfg. Co.*, 18 S. Car. 262, 44 Am. Rep. 573; *Sims v. Jones*, 43 S. Car. 91; *State v. Coleman*, 20 S. Car. 444; *State v. Murphy*, 48 S. Car. 1; *State v. Nance*, 25 S. Car. 171; *State v. Prather*, 26 S. Car. 198; *State v. Williams*, 31 S. Car. 238; *State v. Wyse*, 32 S. Car. 45; *State v. Merriman*, 34 S. Car. 16; *State v. James*, 34 S. Car. 49; *State v. Haines*, 36 S. Car. 504; *Sims v. Jones*, 43 S. Car. 91; *State v. Robertson*, 54 S. Car. 147.

*South Dakota.* — *State v. Church*, 6 S. Dak. 89.

*Texas.* — *Galveston*, etc., R. Co. v. *Thornberry*, (Tex. 1891) 17 S. W. Rep. 521; *National Bank v. Ragland*, (Tex. Civ. App. 1899) 51 S. W. Rep. 661; *Couts v. Neer*, 70 Tex. 468.

*Wyoming.* — *Carter v. Territory*, 3 Wyo. 193.

2. **Decision on Motion for New Trial** — *California.* — *Townsend v. Briggs*, 99 Cal. 481.

*Georgia.* — *Ray v. State*, 15 Ga. 223; *Costly v. State*, 19 Ga. 614; *Brinkley v. State*, 58 Ga. 296; *Hill v. State*, 91 Ga. 153; *Hinkle v. State*, 94 Ga. 595.

*Illinois.* — *Chicago*, etc., R. Co. v. *Kuster*, 22 Ill. App. 189.

*Indiana.* — *Clem v. State*, 33 Ind. 418.

*Kansas.* — *State v. Bancroft*, 22 Kan. 170.

*Massachusetts.* — *Borden v. Borden*, 5 Mass. 79, 4 Am. Dec. 32; *Norton v. Wilbur*, 5 Gray (Mass.) 7; *Kinnicutt v. Stockwell*, 8 Cush. (Mass.) 73.

*Minnesota.* — *Keegan v. Minneapolis*, etc., R. Co., 76 Minn. 90.

*New York.* — *People v. Benham*, 160 N. Y. 402.

*Ohio.* — *Alm v. Andrews Brothers Co.*, 9 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 514, 3 Ohio Dec. 247.

*Tennessee.* — *Mann v. State*, 3 Head (Tenn.) 373; *Rader v. State*, 5 Lea (Tenn.) 613; *Johnson v. State*, 11 Lea (Tenn.) 49; *Spence v. State*, 15 Lea (Tenn.) 547; *Ellis v. State*, 92 Tenn. 85.

See also *supra*, this subsection, *New Trial for Disqualification of Juror* — *Discretion of Court*.

But the decision of the lower court refusing a new trial was reversed where two witnesses testified to an expression by the juror before the trial of a deliberate purpose to hang the defendant. *Myers v. State*, 97 Ga. 76.

And for another case of reversal of an order denying a new trial on this ground, see *State v. Cleary*, 40 Kan. 287.

3. **Wrongful Exclusion of Juror Not Ground for Reversal** — *United States.* — U. S. v. Cornell, 2 Mason (U. S.) 91; *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 696, 7 U. S. App. 84; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; *Hayes v. Missouri*, 120 U. S. 71.

*Alabama.* — *Tatum v. Young*, 1 Port. (Ala.) 298; *State v. Marshall*, 8 Ala. 302.

*Arkansas.* — *Hurley v. State*, 29 Ark. 17; *Wright v. State*, 35 Ark. 639; *Maclin v. State*, 44 Ark. 115; *Vaughan v. State*, 58 Ark. 353; *Hamilton v. State*, 62 Ark. 543.

*California.* — *Grady v. Early*, 18 Cal. 109; *People v. Arceo*, 32 Cal. 40; *Asevado v. Orr*, 100 Cal. 293; *People v. Collins*, 105 Cal. 504. Compare *People v. Stewart*, 7 Cal. 140.

*Florida.* — *John v. State*, 16 Fla. 554.

*Illinois.* — *Kessel v. O'Sullivan*, 60 Ill. App. 548.

*Indiana.* — *Carpenter v. Dame*, 10 Ind. 125; *Heaston v. Cincinnati*, etc., R. Co., 16 Ind. 275, 79 Am. Dec. 430; *Pittsburgh*, etc., R. Co. v. *Montgomery*, 152 Ind. 1; *De Pew v. Robinson*, 95 Ind. 109; *Stephenson v. State*, 110 Ind. 358, 59 Am. Rep. 216.

*Iowa.* — *Geiger v. Payne*, 102 Iowa 581.

*Kansas.* — *Stewart v. Power*, 12 Kan. 598; *Atchison*, etc., R. Co. v. *Franklin*, 23 Kan. 74; *State v. Miller*, 29 Kan. 43; *State v. McKinney*, 31 Kan. 570; *Abilene v. Hendricks*, 36 Kan. 196.

*Louisiana.* — *State v. Shields*, 33 La. Ann. 1410; *State v. Barnes*, 34 La. Ann. 395; *State v. Hamilton*, 35 La. Ann. 1043; *State v. Farrer*,



the effect that the wrongful exclusion of a juror is ground of reversal.<sup>1</sup>

(2) *Decision by Triers.* — Triers being merely judges of fact, their finding as to the fact of competency is conclusive, unless they were improperly instructed.<sup>2</sup>

**3. Exemptions from Jury Service** — *α. IN GENERAL.* — The exemptions from jury service allowed by the different state statutes are extremely varied. Among the more important exemptions are those of persons over a certain age,<sup>3</sup> public officers of various sorts,<sup>4</sup> members of the

35 La. Ann. 315; *State v. Thomas*, 41 La. Ann. 1088; *State v. Lewis*, 41 La. Ann. 591; *State v. Claire*, 41 La. Ann. 1067.

*Maine.* — *Ware v. Ware*, 8 Me. 42; *State v. Williams*, 30 Me. 484; *Snow v. Weeks*, 75 Me. 105; *State v. Cady*, 80 Me. 413.

*Michigan.* — *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

*Minnesota.* — *State v. Kluseman*, 53 Minn. 541.

*Missouri.* — *O'Brien v. Vulcan Iron-Works*, 7 Mo. App. 257; *West v. Forrest*, 22 Mo. 344.

*Montana.* — *Territory v. Roberts*, 9 Mont. 12.

*Nebraska.* — *Omaha, etc., R. Co. v. Cook*, 37 Neb. 435.

*New Hampshire.* — *State v. Bradford*, 57 N. H. 188.

*New York.* — *Cotton v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 48 N. Y. St. Rep. 89, 65 Hun (N. Y.) 625.

*Ohio.* — *Loudenback v. Lowry*, 4 Ohio Cir. Ct. 65, 2 Ohio Cir. Dec. 422.

*Oregon.* — *State v. Ching Ling*, 16 Oregon 479.

*Pennsylvania.* — *Com. v. Mosier*, 135 Pa. St. 221.

*South Dakota.* — *State v. La Croix*, 8 S. Dak. 369.

*Tennessee.* — *Henry v. State*, 4 Humph. (Tenn.) 270.

*Virginia.* — *Thompson v. Douglass*, 35 W. Va. 337, *disapproving* *Montague v. Com.*, 10 Gratt. (Va.) 767.

*Wisconsin.* — *Sutton v. Fox*, 55 Wis. 531, 42 Am. Rep. 744.

In *Colorado* it is stated that the rule that the exclusion of a juror is not ground for reversal applies only when the court exercises its discretion on matters of excuse or exemption, and not where there are a challenge for cause and a judgment on the challenge. *Stratton v. People*, 5 Colo. 280; *Mooney v. People*, 7 Colo. 218. And see *Hill v. Corcoran*, 15 Colo. 270. But this distinction is not supported by the cases in other states.

**1. Wrongful Exclusion Ground for Reversal** — *Alabama.* — *Phillips v. State*, 68 Ala. 469; *Ezell v. State*, 102 Ala. 101; *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22.

*Georgia.* — *Cartersville v. Lyon*, 69 Ga. 579.

*Michigan.* — *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 21 Am. St. Rep. 629.

*Mississippi.* — *Boles v. State*, 13 Smed. & M. (Miss.) 398.

*New York.* — *People v. McQuade*, 110 N. Y. 284; *Hildreth v. Troy*, 101 N. Y. 234, 54 Am. Rep. 686.

*North Carolina.* — *State v. Shaw*, 3 Ired. L. (25 N. Car.) 533; *State v. Hensley*, 94 N. Car. 1021.

*Virginia.* — *Montague v. Com.*, 10 Gratt. (Va.) 767.

The Statute may give no right of review for the exclusion of a juror though it does give such right in case of the wrongful refusal of a challenge. *State v. Vaughan*, 22 Nev. 285; *State v. Larkin*, 11 Nev. 314; *State v. Pritchard*, 15 Nev. 74.

**2. Conclusiveness of Finding by Triers** — *United States.* — *Miles v. U. S.*, 103 U. S. 304, *affirming* 2 Utah 19.

*Arkansas.* — *Milan v. State*, 24 Ark. 346.

*California.* — *People v. Reynolds*, 16 Cal. 128.

*Colorado.* — *Solander v. People*, 2 Colo. 62.

*Illinois.* — *Coughlin v. People*, 144 Ill. 164.

*New York.* — *Ex p. Vermilyea*, 6 Cow. (N. Y.) 559; *Freeman v. People*, 4 Den. (N. Y.) 33, 47 Am. Dec. 216; *Cancemi v. People*, 16 N. Y. 501.

*North Carolina.* — *State v. Ellington*, 7 Ired. L. (29 N. Car.) 61; *State v. Dove*, 10 Ired. L. (32 N. Car.) 469.

*Wisconsin.* — *Schoeffler v. State*, 3 Wis. 828.

*Wyoming.* — *Carter v. Territory*, 3 Wyo. 193.

**3. Persons Over Certain Age** — *Alabama.* — *Williams v. State*, 67 Ala. 183.

*Georgia.* — *Carter v. State*, 75 Ga. 747; *Jackson v. State*, 76 Ga. 551; *Loeb v. State*, 75 Ga. 258.

*Illinois.* — *Davis v. People*, 19 Ill. 74; *Davison v. People*, 90 Ill. 221.

*Indiana.* — *State v. Miller*, 2 Blackf. (Ind.) 35.

*Iowa.* — *State v. Edgerton*, 100 Iowa 63.

*Kansas.* — *Moore v. Cass*, 10 Kan. 288.

*Maine.* — *State v. Day*, 79 Me. 126.

*Maryland.* — *Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

*Massachusetts.* — *Munroe v. Brigham*, 19 Pick. (Mass.) 368.

*Michigan.* — *People v. Rawn*, 90 Mich. 377.

*Texas.* — *Breeding v. State*, 11 Tex. 257.

*Virginia.* — *Booth v. Com.*, 16 Gratt. (Va.) 519.

**Construction of Statute.** — A *Virginia* statute providing that persons not over a certain age should be "liable" to service was held impliedly to exempt but not to disqualify persons over that age. *Booth v. Com.*, 16 Gratt. (Va.) 519.

But disqualification was held to result where the words of the statute were "qualified and liable" to serve. *Burroughs v. State*, 33 Ga. 403. See also *supra*, this section, *Challenges and Exclusion for Cause* — *Causes of General Character* — *Disqualification by Reason of Age*.

**4. Public Officers** — *England.* — *Ex p. Atkinson*, 10 Bing. 399, 25 E. C. L. 181, 4 Moo. & S. 160, 2 Dowl. 773, 3 L. J. C. Pl. 152.

*Georgia.* — *Lockett v. State*, 61 Ga. 44.

*Louisiana.* — *State v. Newton*, 28 La. Ann. 65.

*Maine.* — *State v. Quimby*, 51 Me. 395; *State v. Wright*, 53 Me. 328.



militia,<sup>1</sup> members of fire companies,<sup>2</sup> and occasionally officers and employees of private corporations.<sup>3</sup>

**Previous Service as Juror.** — Previous service as a juror within a certain time, while frequently a ground of challenge,<sup>4</sup> is also occasionally made a ground of exemption from service.<sup>5</sup> An exemption of "practicing attorneys" has been held not to extend to one who, though holding a license to practice law, follows the vocation of a real-estate agent, occasionally appearing in suits connected with his business;<sup>6</sup> but a general exemption of attorneys, without any qualification, applies, it seems, to those retired from practice.<sup>7</sup> A dentist has been held not to be a person exercising the functions of a practitioner of medicine within a statutory exemption.<sup>8</sup> A minister belonging to the "local connection," and who is therefore bound to preach when called upon, has been held to be within an exemption of "settled ministers of the gospel."<sup>9</sup>

**Statute Not Applicable to Bystanders.** — In *North Carolina* it has been held that the exemption of persons pursuing public vocations, being merely for the purpose of avoiding interference with such duties, does not apply when such persons are summoned as talesmen from the bystanders at the court, since their presence there shows that their public duties do not require their attention.<sup>10</sup>

**b. POWERS OF LEGISLATURE.** — Laws exempting certain classes of persons from liability to serve upon a jury have generally been held to be constitutional,<sup>11</sup> though in *Tennessee* a different view has been taken on the ground

*Massachusetts.* — *Moebs v. Wolffsohn*, 143 Mass. 130.

*Michigan.* — *People v. Lange*, 90 Mich. 454.

*Missouri.* — *Ex p. Goodin*, 67 Mo. 637.

*North Carolina.* — *State v. Miller*, 1 Dev. & B. L. (18 N. Car.) 500; *State v. Williams*, 1 Dev. & B. L. (18 N. Car.) 372.

*Ohio.* — *Glassinger v. State*, 24 Ohio St. 206.

*Texas.* — *Breeding v. State*, 11 Tex. 257; *Burns v. State*, 12 Tex. App. 269.

**1. Members of Militia.** — *Ex p. Will*, 61 Cal. 121; *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213; *Albert v. White*, 33 Md. 297; *Miller v. Com.*, 80 Va. 33.

But an honorary member of a military company has been held not to be within such an exemption. *Stewart v. State*, 23 Ga. 181.

As to proof of exemption, see *King v. State*, 90 Ala. 612; *Simon v. State*, 108 Ala. 27.

**2. Members of Fire Companies.** — *Alabama.* — *Phillips v. State*, 68 Ala. 469.

*Georgia.* — *Bloom v. State*, 20 Ga. 443; *Ex p. Rust*, 43 Ga. 209.

*Illinois.* — *Bragg v. People*, 78 Ill. 328.

*Missouri.* — *McGunnegle v. State*, 6 Mo. 367.

*North Carolina.* — *State v. Whitford*, 12 Ired. L. (34 N. Car.) 99.

*Tennessee.* — *Beamish v. State*, 6 Baxt. (Tenn.) 530.

*Texas.* — *Ex p. House*, 36 Tex. 83; *Ex p. Krupp*, (Tex. Crim. 1899) 54 S. W. Rep. 590.

*Vermont.* — *State v. Ward*, 39 Vt. 225.

**3. Employees of Private Corporations.** — *Zimmer v. State*, 30 Ark. 677; *People v. Holdridge*, 4 Lans. (N. Y.) 511.

**4. Previous Service as Juror.** — See *supra*, this section, *Challenges and Exclusion for Cause* — *Causes of General Character* — *Previous Service as Juror*.

**5. Colorado.** — *Courvoisier v. Raymond*, 23 Colo. 113.

*Florida.* — *Blount v. State*, 30 Fla. 287; *Lambright v. State*, 34 Fla. 564.

*Georgia.* — *Atlanta, etc., Air Line R. Co. v. Ray*, 70 Ga. 674.

*Massachusetts.* — *Reed's Case*, Quincy (Mass.) 331; *Swan's Case*, 16 Mass. 220; *Ex p. Brown*, 8 Pick. (Mass.) 504.

*Nebraska.* — *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825.

*Tennessee.* — *State v. Godwin*, 13 Lea (Tenn.) 268.

**Political Disabilities Arising from Service in the Confederate Army** were held not to give rise to a personal claim of exemption from jury service in a federal court. *In re Carnes*, 31 Fed. Rep. 397.

**6. Attorneys.** — *Wheatley v. State*, 11 Lea (Tenn.) 262.

**7. Matter of Swett**, 20 Pick. (Mass.) 1.

**8. Dentists.** — *State v. Fisher*, 119 Mo. 344, 21 S. W. Rep. 446.

**9. Ministers.** — *Com. v. Buzzell*, 16 Pick. (Mass.) 153. See also *State v. York*, 7 Kan. App. 291.

**10. Service as Talesmen.** — *State v. Hogg*, 2 Murph. (6 N. Car.) 319; *State v. Williams*, 1 Dev. & B. L. (18 N. Car.) 372; *State v. Willard*, 79 N. Car. 660.

**Persons Summoned under a Special Venire** are within the exemption. *State v. Whitford*, 12 Ired. L. (34 N. Car.) 99.

**11. Exemption Valid.** — *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213; *State v. Williams*, 1 Dev. & B. L. (18 N. Car.) 372. See also *Ex p. Conner*, 51 Ga. 571. And see cases cited *supra*, in this subsection.

The exemption of the members of a particular fire company has been held to be valid. *Bloom v. State*, 20 Ga. 443; *McGunnegle v. State*, 6 Mo. 367; *Ex p. House*, 36 Tex. 83.

**Payment for Exemption.** — In *Nevada* it was decided that a statute providing that the judges might prescribe limits for residents within which the payment of twenty-five dollars should exempt from jury service was



that such exemption amounts to class legislation.<sup>1</sup>

**Withdrawal of Exemption.** — It has generally been held that the right of exemption from jury service is not a vested right, but a mere gratuity which may be withdrawn at the pleasure of the legislature.<sup>2</sup> But in *Missouri* the legislative power of withdrawal has been denied.<sup>3</sup>

**c. EXEMPTION NOT CAUSE FOR CHALLENGE.** — It is generally agreed that a statutory exemption from jury service is a personal privilege, with which the parties to the cause have no concern and which furnishes to them no ground of challenge.<sup>4</sup> It has been held, however, that it is not error for the court, on a challenge for cause, to discharge persons entitled to exemption.<sup>5</sup> And elsewhere it is stated that ordinarily a court will decline, on a suggestion from any quarter, to hold a person so exempt to a duty to which he is not liable.<sup>6</sup>

**4. Service by Person Not on Panel.** — A party has the right to object to service by a person not included in the panel;<sup>7</sup> and it has been held that where a person not included in the panel, and not summoned, serves in place of one of the panel, without the knowledge of the complaining party, a new trial may properly be granted.<sup>8</sup> There are, however, decisions to the

not invalid as depriving the defendant of a trial by a common-law jury, though the exemption was pernicious, as tending to impose undue jury duty upon poor men and to encourage professional jurymen. *State v. Cohn*, 9 Nev. 179.

**1. Exemption Invalid.** — *Neely v. State*, 4 Lea (Tenn.) 316, *overruling* *Hawkins v. Small*, 7 Baxt. (Tenn.) 193; *Green v. State*, 15 Lea (Tenn.) 708. In the last-named case an act providing that fifteen per cent of the voters of a county might organize into militia and then be exempt from jury service was held unconstitutional as regards the exemption.

**2. Withdrawal of Exemption.** — *Dunlap v. State*, 76 Ala. 460; *Ex p. Rust*, 43 Ga. 209; *In re Scranton*, 74 Ill. 161; *Bragg v. People*, 78 Ill. 328; *Beamish v. State*, 6 Baxt. (Tenn.) 531. And see *Ex p. House*, 36 Tex. 83.

**3. Ex p. Goodin**, 67 Mo. 637, in which case it was held that one who had earned his right to the exemption by service as a fire warden for the city of St. Louis for seven years could not, after the expiration of that time, be deprived of the exemption. The decision of the lower court of appeal was to the contrary. *Matter of Powell*, 5 Mo. App. 220.

**4. Exemption Not Cause for Challenge** — *England*. — *Mulcahy v. Reg.*, L. R. 3 H. L. 306.

*Alabama.* — *Williams v. State*, 67 Ala. 183; *Jackson v. State*, 74 Ala. 26.

*District of Columbia.* — *U. S. v. Lee*, 4 Mackey (D. C.) 489, 54 Am. Rep. 293.

*Florida.* — *Brown v. State*, 40 Fla. 459.

*Illinois.* — *Davis v. People*, 19 Ill. 74; *Murphy v. People*, 37 Ill. 447; *Chase v. People*, 40 Ill. 352; *Davison v. People*, 90 Ill. 221.

*Indiana.* — *State v. Miller*, 2 Blackf. (Ind.) 35.

*Iowa.* — *State v. Adams*, 20 Iowa 486; *State v. Edgerton*, 100 Iowa 63.

*Kansas.* — *State v. York*, 7 Kan. App. 291; *Moore v. Cass*, 10 Kan. 288.

*Louisiana.* — *Edwards v. Farrar*, 2 La. Ann. 307; *State v. Jackson*, 42 La. Ann. 1170.

*Maine.* — *Fellows's Case*, 5 Me. 333; *State v. Quimby*, 51 Me. 395; *State v. Wright*, 53 Me. 328; *State v. Day*, 79 Me. 120.

*Maryland.* — *Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

*Massachusetts.* — *Moebs v. Wolffsohn*, 143 Mass. 130; *Munroe v. Brigham*, 19 Pick. (Mass.) 368.

*Michigan.* — *People v. Rawn*, 90 Mich. 377, correcting a dictum in *People v. Baumann*, 52 Mich. 584; *People v. Lange*, 90 Mich. 454.

*New Hampshire.* — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

*New Jersey.* — *Patterson v. State*, 48 N. J. L. 381.

*Ohio.* — *Glassinger v. State*, 24 Ohio St. 206; *Koch v. State*, 32 Ohio St. 353.

*Rhode Island.* — *State v. O'Brien*, 14 R. I. 266; *State v. Cosgrove*, 16 R. I. 411.

*South Carolina.* — *State v. Merriman*, 34 S. Car. 16; *State v. Toland*, 36 S. Car. 515.

*Texas.* — *Breeding v. State*, 11 Tex. 257; *Burns v. State*, 12 Tex. App. 269.

*Virginia.* — *Booth v. Com.*, 16 Gratt. (Va.) 519.

The California Penal Code, § 1075, expressly provides that the fact that one is exempt from jury duty shall not be a cause for challenge. *People v. Owens*, 123 Cal. 482.

**Aliens.** — See *supra*, this section, *Challenges and Exclusion for Cause* — *Causes of General Character* — *Alienage*.

**Statutory Provisions as to Age.** — The statute of Westm. 2, 13 Edw. I., c. 38, providing that men over seventy shall not be placed on a panel, was construed as giving no right to challenge such men. Com. Dig., tit. Challenge, A. 4; 3 Black. Com. 364; *Mulcahy v. Reg.*, L. R. 3 H. L. 306.

**5. Exemption May Be Allowed on Challenge.** — *McGrail v. Kalamazoo*, 94 Mich. 52.

*6. State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

**7. Service by Persons Not Included in Panel.** — *Goodwin v. State*, 102 Ala. 87; *Mingia v. People*, 54 Ill. 274.

**8. Grant of New Trial** — *England.* — *Rex v. Tremearne*, 5 B. & C. 254, 11 E. C. L. 218; *Dovey v. Hobson*, 6 Taunt. 460, 1 E. C. L. 452; *Wray v. Thorn*, Willes 488; *Norman v. Beaumont*, Willes 484. And see *Reg. v. Mellor*, 4 Jur. N. S. 214, 7 Cox C. C. 454.

*Georgia.* — *Stripling v. State*, 77 Ga. 108.

*New Jersey.* — *Robson v. Archer*, 2 N. J. L. 99.



contrary;<sup>1</sup> and likewise a new trial has been refused when, though the name of the person who served was not on the panel, he was summoned, either intentionally<sup>2</sup> or by mistake.<sup>3</sup>

Mistakes or Imperfections in the names on the panel or in the copy thereof served upon the accused will not invalidate the proceedings.<sup>4</sup> Such irregularities, however, are frequently treated as sufficient ground for rejecting the persons improperly designated.<sup>5</sup>

**5. Peremptory Challenges — a. DEFINITION AND NATURE.** — Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor.<sup>6</sup> The fact that a juror has been unsuccessfully challenged for cause does not preclude a subsequent peremptory challenge of the same juror.<sup>7</sup>

**Collateral Issues.** — Peremptory challenges are allowed only on the plea of not guilty, and never on the trial of a collateral issue.<sup>8</sup>

**Right Is to Reject, Not to Select.** — The right to challenge peremptorily is not a right to select, but a right to reject jurors. It excludes from the panel, until the prisoner has exhausted his challenges, those to whom he objects, and leaves the residue to be drawn for his trial according to the established order

*New York.* — *Dayton v. Church*, (Brooklyn City Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 367.  
*Ohio.* — *McGill v. State*, 34 Ohio St. 228.

*Pennsylvania.* — *Com. v. Spring*, 5 Pa. L. J. Rep. 238.

1. *Hill v. Yates*, 12 East 229; *Wells v. Cooper*, 30 L. T. N. S. 721.

Knowledge of the identity of the juror precludes a demand for a new trial. *Ham v. Lasher*, 24 U. C. Q. B. 357.

A Failure to Discover the Incompetency of one of the panel, owing to the failure to distinguish him from another member of the panel of a somewhat similar name, was held to be no ground for a new trial. *Burns v. State*, 80 Ga. 544.

2. **Person Summoned though Not on Panel.** — *Bennett v. Matthews*, (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 428.

3. *Tolbert v. State*, 71 Miss. 179; *Mann v. Fairlie*, 44 Vt. 672.

4. **Mistake as to Name on Panel — England.** — *Case of Jurymen*, 12 East 231, note; *Wray v. Thorn*, Willes 488.

*Alabama.* — *Bill v. State*, 29 Ala. 34; *Johnson v. State*, 47 Ala. 9; *Taylor v. State*, 48 Ala. 180; *Hall v. State*, 51 Ala. 9; *Floyd v. State*, 55 Ala. 61; *Rash v. State*, 61 Ala. 89; *Kimbrough v. State*, 62 Ala. 248; *Roberts v. State*, 68 Ala. 156; *Hubbard v. State*, 72 Ala. 164; *Jones v. State*, 104 Ala. 30; *Simon v. State*, 108 Ala. 27; *Bell v. State*, 115 Ala. 25.

*Arkansas.* — *Anderson v. State*, 5 Ark. 444.

*Florida.* — *Shaw v. Newman*, 14 Fla. 123.

*Georgia.* — *Moon v. State*, 68 Ga. 687.

*Illinois.* — *Goodhue v. People*, 94 Ill. 37.

*Michigan.* — *Smith v. School Dist. No. 2*, 40 Mich. 143.

But see *U. S. v. Wilson*, Baldw. (U. S.) 78.

5. **Rejection of Juror Improperly Named — Alabama.** — *Floyd v. State*, 55 Ala. 61; *Rash v. State*, 61 Ala. 89; *Hubbard v. State*, 72 Ala. 164; *Ezell v. State*, 102 Ala. 101.

*Illinois.* — *Mingia v. People*, 54 Ill. 274.

*New Jersey.* — *State v. Powell*, 7 N. J. L. 244.

*Texas.* — *Bowen v. State*, 3 Tex. App. 618; *Swofford v. State*, 3 Tex. App. 76; *Thompson*

*v. State*, 19 Tex. App. 594; *Hudson v. State*, 28 Tex. App. 323; *Mitchell v. State*, 36 Tex. Crim. 278.

Compare *Hurley v. State*, 29 Ark. 18; *Judge v. State*, 8 Ga. 173; *Ratteree v. State*, 53 Ga. 570.

6. **Peremptory Challenges — England.** — 4 Black. Com. 353; Co. Litt. 156b; 1 Chitty's Crim. Law 534.

*United States.* — *Lewis v. U. S.*, 146 U. S. 376.

*Illinois.* — *Donovan v. People*, 139 Ill. 412.

*Indiana.* — *Christie v. State*, 44 Ind. 408.

*Nebraska.* — *Thurman v. State*, 27 Neb. 628.

*Texas.* — *Cooley v. State*, 38 Tex. 636.

And see *State v. Skinner*, 34 Kan. 256; *Stone v. Segur*, 11 Allen (Mass.) 568; *Lamb v. State*, 36 Wis. 424.

**Right to Require Disclosure of Reason.** — The court cannot require the party making a peremptory challenge to disclose the reason for making it. *American Bridge Works v. Pereira*, 79 Ill. App. 90; *People v. Bodine*, 1 Den. (N. Y.) 281; *Dupree v. Virginia Home Ins. Co.*, 92 N. Car. 417; *Gulf, etc., R. Co. v. Keith*, 74 Tex. 287; *Cooley v. State*, 38 Tex. 636.

**Sufficiency of Challenge.** — The action of counsel in ordering a juror to stand aside without judicial action as to the ground of objection is in effect a peremptory challenge. *Crider v. Lifsey*, 10 Heisk. (Tenn.) 456.

7. **Peremptory Challenge of Juror Previously Challenged for Cause.** — *Barber v. State*, 13 Fla. 675; *Waterman v. State*, 13 Fla. 683; *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Cooley v. State*, 38 Tex. 636. And see *infra*, this subsection, *Right of Peremptory Challenge as Curing Erroneous Rulings*.

8. **Collateral Issues.** — 1 Chitty's Crim. Law 535; 2 Hale P. C., c. 35, p. 267; Bac. Abr., tit. Juries, E. 9; *Rex v. Radcliffe*, 1 W. Bl. 6; *Rex v. Okey*, 1 Lev. 61; *Brooks v. Com.*, 2 Rob. (Va.) 845.

So on a preliminary trial as to the question of present insanity of the accused it was held that he was not entitled to peremptory challenges. *Freeman v. People*, 4 Den. (N. Y.) 35, 47 Am. Dec. 216.



or usage of the court.<sup>1</sup>

**Struck Juries.** — The right to challenge peremptorily has been generally held not to exist in the case of struck juries.<sup>2</sup>

**b. GENERAL RULES** — (1) *In Criminal Cases* — (a) **Rights of Accused.** — The old common-law authorities generally describe the right of peremptory challenge as a right allowed *in favorem vitæ*,<sup>3</sup> and accordingly it was sometimes stated that the right at common law existed only in capital cases.<sup>4</sup> This view has quite frequently been adopted in the *United States*.<sup>5</sup> It was decided by the House of Lords, however, after a very full consideration of the question, that though tenderness for life may have been the origin of the practice of peremptory challenge, it was never restricted to prosecutions for crimes punishable by death, but extended to all felonies.<sup>6</sup>

(b) **Rights of State.** — While at common law the crown had the right to challenge any number of jurors peremptorily, this right was taken away by an early statute,<sup>7</sup> and thereafter the crown had merely the right to stand jurors aside without immediately stating any ground therefor.<sup>8</sup> In the *United States*

**1. Right Is to Reject and Not to Select** — *United States*. — *U. S. v. Marchant*, 12 Wheat. (U. S.) 480; *Hayes v. Missouri*, 120 U. S. 68; *Spies v. Illinois*, 123 U. S. 131; *Pointer v. U. S.*, 151 U. S. 396.

*Alabama*. — *State v. Marshall*, 8 Ala. 302.

*Arkansas*. — *Hurley v. State*, 29 Ark. 22; *Mabry v. State*, 50 Ark. 492; *Williams v. State*, 63 Ark. 527.

*Louisiana*. — *State v. Shields*, 33 La. Ann. 1410; *State v. Creech*, 38 La. Ann. 481; *State v. Carries*, 39 La. Ann. 931; *State v. McCarthy*, 44 La. Ann. 323.

*Maryland*. — *Turpin v. State*, 55 Md. 468; *Biddle v. State*, 67 Md. 304.

*Michigan*. — *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560.

*Minnesota*. — *State v. Smith*, 56 Minn. 78.

*Missouri*. — *State v. Hays*, 23 Mo. 287; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36; *O'Brien v. Vulcan Iron-Works*, 7 Mo. App. 257; *State v. Holme*, 54 Mo. 153; *Hegney v. Head*, 126 Mo. 619.

*Montana*. — *Territory v. Roberts*, 9 Mont. 12.

*Nevada*. — *State v. Vaughan*, 22 Nev. 285.

*New Hampshire*. — *State v. Doolittle*, 58 N. H. 92.

*New York*. — *Malloy v. Pelham* (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 828.

*North Carolina*. — *State v. Smith*, 2 Ired. L. (24 N. Car.) 402; *State v. Arthur*, 2 Dev. L. (13 N. Car.) 217; *State v. Cockman*, 2 Winst. L. (60 N. Car.) 95; *Capehart v. Stewart*, 80 N. Car. 101; *State v. Gooch*, 94 N. Car. 987; *State v. Hensley*, 94 N. Car. 1021; *State v. Jacobs*, 106 N. Car. 695.

*Ohio*. — *Bixbe v. State*, 6 Ohio 86.

*South Carolina*. — *State v. Wise*, 7 Rich. L. (S. Car.) 412; *State v. Coleman*, 8 S. Car. 237; *State v. Prater*, 26 S. Car. 198; *State v. Jacob*, 30 S. Car. 131, 14 Am. St. Rep. 897; *State v. Jackson*, 32 S. Car. 27.

*Texas*. — *State v. Ezell*, 41 Tex. 35; *Heskew v. State*, 17 Tex. App. 161.

*Vermont*. — *State v. Meaker*, 54 Vt. 112; *State v. Fournier*, 68 Vt. 262.

**2. Struck Juries** — *United States*. — *Blanchard v. Brown*, 1 Wall. Jr. (C. C.) 309.

*Indiana*. — *May v. Hoover*, 112 Ind. 455.

*Minnesota*. — *Branch v. Dawson*, 36 Minn. 193; *Watson v. St. Paul City R. Co.*, 42 Minn. 46.

*New Jersey*. — *Cook v. State*, 24 N. J. L. 843; *Moschell v. State*, 53 N. J. L. 498.

*Ohio*. — *Cleveland, etc., R. Co. v. Stanley*, 7 Ohio St. 155; *State v. Moore*, 28 Ohio St. 595.

*Contra*. — *Schwenk v. Umsted*, 6 S. & R. (Pa.) 351; *McDermott v. Hoffman*, 70 Pa. St. 31.

**Right to Challenge Special Venire.** — The right to challenge peremptorily conferred by the *Wisconsin* statute (Stat. Wis. 1898, § 2851), may be exercised as well to a special venire as to a regular panel. *Olson v. Solveson*, 71 Wis. 663.

**Talesmen.** — The question of the right peremptorily to challenge talesmen depends upon the construction of the local statute. In some cases it has been decided that there is no such right, *Burckhalter v. Coward*, 16 S. Car. 444; *Olson v. Solveson*, 71 Wis. 663; while in others a different view is taken, *Sackett v. Ruder*, 152 Mass. 397; *Mitchell v. Mitchell*, 80 Tex. 101.

**3. Common-law Rule** — *Cases Not Capital*. — *Co. Litt.* 156*b*; *Doctor and Student*, c. 8; 2 *Hale P. C.* 268; and other writers referred to in *Gray v. Reg.*, 11 Cl. & F. 427.

**4.** *Bac. Abr.*, tit. *Jury*, E. 9; 2 *Hawk. P. C.*, c. 43, § 5; *Reading's Case*, 7 *How. St. Tr.* 265.

**5.** *U. S. v. Carrigo*, 1 *Cranch* (C. C.) 49; *U. S. v. Krouse*, 2 *Cranch* (C. C.) 252; *U. S. v. White*, 5 *Cranch* (C. C.) 73; *U. S. v. Cottingham*, 2 *Blatchf.* (U. S.) 470; *U. S. v. Randall*, *Deady* (U. S.) 524; *U. S. v. Johns*, 4 *Dall.* (U. S.) 412; *Com. v. Hand*, 3 *Phila. (Pa.)* 403, 16 *Leg. Int.* (Pa.) 157; *State v. Sutton*, 10 *R. I.* 159. See also *U. S. v. Black*, 2 *Cranch* (C. C.) 195; *State v. Knight*, 43 *Me.* 11; *Dowling v. State*, 5 *Smed. & M. (Miss.)* 664.

**6.** *Gray v. Reg.*, 11 Cl. & F. 427. Before this decision the practice in *England* and *Ireland* in regard to peremptory challenges in felony cases not capital was entirely different, they being allowed in the former and not allowed in the latter.

**7. Challenge by State.** — 33 *Edw. I.*, stat. 4. See 1 *Chitty's Crim. Law* 534; *State v. Barontine*, 2 *Nott & M. (S. Car.)* 553; *U. S. v. Marchant*, 12 *Wheat.* (U. S.) 480; *Com. v. Marra*, 8 *Phila. (Pa.)* 440.

**8.** See *infra*, this section, *Standing Jurors Aside*.



likewise it is generally agreed that there is no right on the part of the state to challenge peremptorily in the absence of a statute giving the right.<sup>1</sup> Such a statute has, however, been quite generally adopted.<sup>2</sup>

(2) *In Civil Cases.* — In civil cases or proceedings no right of peremptory challenge exists unless conferred by statute.<sup>3</sup> It has been held that statutes authorizing such challenges in civil cases or proceedings do not authorize them in special proceedings growing out of the exercise of the right of eminent domain<sup>4</sup> or in summary proceedings for the recovery of land.<sup>5</sup> Bastardy proceedings have been decided to be civil in character within the meaning of such a statute.<sup>6</sup>

*c. POWER OF LEGISLATURE.* — The legislature has full power to regulate the right of peremptory challenge, and may confer the right upon the parties to civil actions and proceedings, or upon the state and the accused in criminal causes;<sup>7</sup> and it may likewise make changes in existing laws, increasing or decreasing the number of challenges to which either the state or the defendant may be entitled.<sup>8</sup> The legislature may also prescribe different numbers of challenges for different political divisions of the state.<sup>9</sup>

1. *New Hampshire.* — *Watson v. Walker*, 33 N. H. 131; *Walker v. Kennison*, 34 N. H. 259; *Corey v. Bath*, 35 N. H. 540; *State v. Drake*, 59 N. H. 21.

*New York.* — *People v. Aichinson*, (Oyer & T. Ct.) 7 How. Pr. (N. Y.) 241; *People v. Henries*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 579.

*Ohio.* — *State v. Carver*, 2 West. L. J. 426, 1 Ohio Dec. (Reprint) 135.

*South Carolina.* — *State v. Barrotine*, 2 Nott & M. (S. Car.) 553.

*Vermont.* — *State v. Noakes*, 70 Vt. 247.

*West Virginia.* — *State v. Miller*, 6 W. Va. 600.

2. *Statutes Giving Challenges to State.* — See *Wiley v. State*, 4 Blackf. (Ind.) 458; *Com. v. Dorsey*, 103 Mass. 412; *State v. Wilson*, 48 N. H. 398; *Walter v. People*, 32 N. Y. 147; *Warren v. Com.*, 37 Pa. St. 45; *State v. Ward*, 61 Vt. 153. See also *infra*, this subsection, *Power of Legislature*.

*Pennsylvania Practice and Statutes.* — It appears that in Pennsylvania, before the passage of any statute giving the right, it was the practice to allow the commonwealth to challenge peremptorily. *Com. v. Addis*, 1 Browne (Pa.) 285. See also *Com. v. Joliffe*, 7 Watts (Pa.) 585; *Com. v. Marra*, 8 Phila. (Pa.) 440.

3. *Civil Cases.* — *Creed v. Fisher*, 9 Exch. 472, 23 L. J. Exch. 143, 18 Jur. 228, 2 W. R. 196; *Brown v. Rome*, etc., R. Co., 86 Ala. 206; *Davis v. Bangor*, etc., R. Co., 60 Me. 303; *Convers's Appeal*, 18 Mich. 459; *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560.

*Appeal from Justice.* — In *Kerschner v. Cullen*, 27 Ind. 184, it was held that a provision respecting justices' courts which conferred on each party the right to challenge peremptorily one of the jury had no application on the trial of an appeal from the justice.

4. *Cases Involving Exercise of Eminent Domain.* — *Brown v. Rome*, etc., R. Co., 86 Ala. 206; *Barrett v. Bangor*, 70 Me. 335; *Convers's Appeal*, 18 Mich. 459; *Schuykill Nav. Co. v. Farr*, 4 W. & S. (Pa.) 362; *Schwenk v. Umsted*, 6 S. & R. (Pa.) 351. *Contra*, *Pettis v. Pomfret*, 28 Conn. 566.

5. *Summary Proceedings.* — *People v. Hamilton*, 39 N. Y. 107; *Roberts v. Cone*, (1871) 3

Alb. L. J. 151. *Contra*, *Miner v. Brown*, 20 Conn. 519.

*An Action of Forceful Entry and Detainer* is a civil action within the statute giving a right to a prescribed number of peremptory challenges in civil actions. *Quinebaug Bank v. Tarbox*, 20 Conn. 510.

6. *Bastardy Proceedings.* — *Dorgan v. State*, 72 Ala. 173; *Kremling v. Lallman*, 16 Neb. 280.

7. *Legislative Power to Confer Right of Challenge.* — *Georgia.* — *Boon v. State*, 1 Ga. 618; *Hudgins v. State*, 2 Ga. 174.

*Indiana.* — *Wiley v. State*, 4 Blackf. (Ind.) 458; *Beauchamp v. State*, 6 Blackf. (Ind.) 299.

*Massachusetts.* — *Com. v. Dorsey*, 103 Mass. 412.

*Mississippi.* — *Dowling v. State*, 5 Smed. & M. (Miss.) 664.

*Missouri.* — *Mallison v. State*, 6 Mo. 399.

*Nevada.* — *State v. McClear*, 11 Nev. 39.

*New Hampshire.* — *State v. Wilson*, 48 N. H. 398.

*New York.* — *Walter v. People*, 32 N. Y. 147.

*Ohio.* — *Fouts v. State*, 8 Ohio St. 98.

*Pennsylvania.* — *Warren v. Com.*, 37 Pa. St. 45; *Hartzell v. Com.*, 40 Pa. St. 462.

*South Carolina.* — *State v. Wyse*, 32 S. Car. 45; *Cregier v. Bunton*, 2 Strobb. L. (S. Car.) 487.

*Vermont.* — *State v. Ward*, 61 Vt. 153; *State v. Noakes*, 70 Vt. 247.

*West Virginia.* — *State v. Shores*, 31 W. Va. 491, 13 Am. St. Rep. 875.

8. *Increase or Decrease in Number.* — *Alabama.* — *South v. State*, 86 Ala. 617.

*Connecticut.* — *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

*Florida.* — *Mathis v. State*, 31 Fla. 291.

*Georgia.* — *Jones v. State*, 1 Ga. 610.

*Kentucky.* — *Walston v. Com.*, 16 B. Mon. (Ky.) 15.

*New Jersey.* — *Brown v. State*, 62 N. J. L. 666.

*Tennessee.* — *McLean v. State*, 1 Shannon Tenn. Cas. 478.

*Virginia.* — *Perry v. Com.*, 3 Gratt. (Va.) 602.

9. *Different Laws in Different Parts of State.* — *Hayes v. Missouri*, 120 U. S. 68. And see *Cable v. State*, 8 Blackf. (Ind.) 531.



**What Law Applicable.** — The law in force at the time of the trial of an offense, and not that in force at the time of its commission, will control the exercise of the right; and a statute, when thus applied to a previous offense, is not *ex post facto*.<sup>1</sup>

**d. NUMBER ALLOWED** — (1) *In General.* — At common law the number of peremptory challenges was limited to thirty-five, and this was subsequently reduced to twenty.<sup>2</sup> The question is now generally regulated in the different states by statutory provision, and there is no right to a number greater than that named in the statute.<sup>3</sup> And since the right of the state to challenge peremptorily exists only by force of statute, the number which may be interposed by it is necessarily prescribed in that manner.<sup>4</sup> The statutes generally allow to one accused of an offense which may be punished capitally a greater number of challenges than are allowed to one accused of an offense not so punished.<sup>5</sup> Occasionally a particular number of challenges is prescribed for offenses punishable by imprisonment for life.<sup>6</sup>

The **Maximum Punishment** which may be inflicted determines the number of challenges.<sup>7</sup>

**Nolle Prosequi as to Higher Offense.** — Where the crime which is the subject of the indictment is of various degrees or includes a lesser offense, the entry of

1. **What Law Applicable** — *Alabama.* — Lore v. State, 4 Ala. 173; *South v. State*, 86 Ala. 617. *Connecticut.* — State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

*Florida.* — Mathis v. State, 31 Fla. 291.

*Iowa.* — State v. Shreves, 81 Iowa 615.

*Minnesota.* — State v. Ryan, 13 Minn. 370.

*Tennessee.* — Burke v. State, 1 Shannon Tenn. Cas. 465.

*Texas.* — Edmonson v. State, (Tex. Crim. 1898) 44 S. W. Rep. 154.

2. **Number Allowed.** — Statute 22 Hen. VIII., c. 14, § 7. See generally 1 Chitty's Crim. Law 534; Com. Dig., tit. Challenge, C. 1; 4 Blackf. Com. 354; Gray v. Reg., 11 Cl. & F. 427; State v. Aaron, 4 N. J. L. 268; State v. Cadwell, 1 Jones L. (46 N. Car.) 289; Com. v. Hand, 3 Phila. (Pa.) 403, 16 Leg. Int. (Pa.) 157; Cooley v. State, 38 Tex. 636.

3. **State Statutory Provisions.** — In the following cases state statutes in this regard were construed and applied:

*California.* — People v. Clough, 59 Cal. 438; People v. O'Neil, 61 Cal. 435; People v. Riley, 65 Cal. 107; People v. Fultz, 109 Cal. 258; People v. Logan, 123 Cal. 414.

*Kansas.* — State v. Bartley, 48 Kan. 421.

*Louisiana.* — Burton v. Hicks, 27 La. Ann. 509; State v. Thompson, 28 La. Ann. 187; State v. Everage, 33 La. Ann. 120; State v. Demouchet, 40 La. Ann. 205.

*Maine.* — State v. Chadbourne, 74 Me. 506.

*Michigan.* — People v. Comstock, 55 Mich. 406.

*Missouri.* — State v. Ray, 53 Mo. 345; State v. Stevenson, 93 Mo. 91; State v. Talmage, 107 Mo. 543.

*Nebraska.* — Kremling v. Lallman, 16 Neb. 280.

*New York.* — People v. Keating, 61 Hun (N. Y.) 260; People v. Oyer & T. Ct., 83 N. Y. 436; Dull v. People, 4 Den. (N. Y.) 91.

*North Carolina.* — State v. Cadwell, 1 Jones L. (46 N. Car.) 289; State v. Powell, 94 N. Car. 965; State v. Hargrave, 100 N. Car. 484; State v. Patrick, 3 Jones L. (48 N. Car.) 443.

*Ohio.* — Martin v. State, 16 Ohio 364.

*Pennsylvania.* — Com. v. Hand, 3 Phila. (Pa.) 403, 16 Leg. Int. (Pa.) 157.

*South Carolina.* — State v. Pope, 9 S. Car. 273; State v. Workman, 15 S. Car. 540.

*Texas.* — Thompson v. State, 19 Tex. App. 593; Pierson v. State, 21 Tex. App. 14.

4. **Number of Challenges by State** — *Indiana.* — Wiley v. State, 4 Blackf. (Ind.) 458.

*Indian Territory.* — Watkins v. U. S., (Indian Ter. 1897) 41 S. W. Rep. 1044.

*Maine.* — State v. Chadbourne, 74 Me. 506.

*Massachusetts.* — Com. v. Certain Intoxicating Liquors, 107 Mass. 216.

*Missouri.* — Mallison v. State, 6 Mo. 399.

*New York.* — People v. McQuade, 110 N. Y. 293; Waterford, etc., Turnpike Co. v. People, 9 Barb. (N. Y.) 161; People v. Caniff, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 586; People v. Masters, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 517. *Contra*, People v. Henries, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 579; People v. Aichinson, (Oyer & T. Ct.) 7 How. Pr. (N. Y.) 241.

*Ohio.* — Fouts v. State, 8 Ohio St. 98.

*Pennsylvania.* — Com. v. Marra, 8 Phila. (Pa.) 440.

5. **Capital Offenses.** — Todd v. State, 85 Ala. 339; State v. Chadbourne, 74 Me. 506; State v. Aaron, 4 N. J. L. 268; State v. Gayner, Conf. Rep. (1 N. Car.) 305; State v. Patrick, 3 Jones L. (48 N. Car.) 443; State v. Davis, 80 N. Car. 384; Allen v. State, 7 Coldw. (Tenn.) 357.

6. **Crimes Punishable by Life Imprisonment.** — People v. Clough, 59 Cal. 438; People v. Harris, 61 Cal. 136; People v. Keating, 61 Hun (N. Y.) 260; Schoeffler v. State, 3 Wis. 823. And see Foutch v. State, 100 Tenn. 334.

7. **Maximum or Minimum Punishment.** — State v. Neuner, 49 Conn. 232; Dull v. People, 4 Den. (N. Y.) 91; People v. Keating, 61 Hun (N. Y.) 260; Fowler v. State, 8 Baxt. (Tenn.) 573.

That the statute names a minimum punishment only for the particular crime, does not entitle the defendant to the number of challenges allowed in the case of capital offenses. People v. Clough, 59 Cal. 438.



a *nolle prosequi* as to the higher degree or greater offense, or equivalent action by the prosecution, reduces the number of challenges allowable to the defendant to that prescribed for the lower degree or lesser offense.<sup>1</sup>

Where a Second Conviction of a particular offense subjects one to a punishment greater than that in the case of the first offense, the accused is, it has been held, entitled, on a prosecution for a first offense, to the number of challenges to which the punishment imposed for the second offense would entitle him.<sup>2</sup>

Where a Conviction of Murder in the Second Degree involves an acquittal of the charge of murder in the first degree, on another trial after such conviction, the defendant is entitled only to the number of challenges proper on a trial for murder in the second degree.<sup>3</sup>

(2) *Joint Parties* — (a) *In Civil Actions*. — The fact that there are several parties plaintiff or defendant is generally held to give no right to a number of challenges greater than that allowed to a single party, statutes giving a prescribed number of challenges to "parties," "each party," "either party," or the like, being construed to give such number of challenges only to each side, regardless of the number of persons on a side.<sup>4</sup> The fact that the parties plead separately has been held to be immaterial.<sup>5</sup> If, however, the interests of the parties are not identical, or are antagonistic, each litigant, it seems, should be deemed to be a party, and the full number of challenges should be allowed to him.<sup>6</sup>

*Consolidation of Actions*. — Where actions against several defendants are consolidated by order of the court, each defendant is entitled to the same number of peremptory challenges as, if the trial were separate.<sup>7</sup>

(b) *In Criminal Prosecutions* — *aa. RIGHTS OF DEFENDANTS*. — Unless the statute expressly or impliedly provides the contrary, a defendant who is tried jointly with others is entitled to the same number of peremptory challenges as if he

1. *Nolle Prosequi as to Higher Offense*. — *People v. Comstock*, 55 Mich. 405; *State v. Talmage*, 107 Mo. 543; *Goins v. State*, 46 Ohio St. 457.

2. *First and Second Offenses*. — *State v. Humphreys*, 1 Overt. (Tenn.) 306; *Hooper v. State*, 5 Yerg. (Tenn.) 422.

On a trial for the second offense the defendant is, of course, entitled to the number of challenges prescribed for cases in which the punishment is similar to that imposed for the second offense. *People v. Harris*, 61 Cal. 136; *People v. O'Neil*, 61 Cal. 435.

3. *Retrial After Conviction of Murder in Second Degree*. — *Foutch v. State*, 100 Tenn. 334; *Cheek v. State*, 4 Tex. App. 444.

4. *Joint Parties in Civil Actions* — *Alabama*. — *Bibb v. Reid*, 3 Ala. 88.

*Idaho*. — *U. S. v. Alexander*, 2 Idaho 354.  
*Illinois*. — *Schmidt v. Chicago, etc., R. Co.*, 83 Ill. 405.

*Indiana*. — *Snodgrass v. Hunt*, 15 Ind. 274.  
*Kentucky*. — *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *Kentucky Cent. R. Co. v. Gerriess*, 14 Ky. L. Rep. 397.

*Massachusetts*. — *Stone v. Segur*, 11 Allen (Mass.) 568.

*Michigan*. — *Fraser v. Jennison*, 42 Mich. 206.

*Nebraska*. — *McClay v. Worrall*, 18 Neb. 44.  
*North Carolina*. — *Bryan v. Harrison*, 76 N. Car. 360.

*Ohio*. — *Moore v. Bricklayers' Union*, 23 Cinc. L. Bul. 48, 10 Ohio Dec. (Reprint) 665.

*Tennessee*. — *Blackburn v. Hays*, 4 Coldw. (Tenn.) 227.

*Texas*. — *Wolf v. Perryman*, 82 Tex. 112; *Jones v. Ford*, 60 Tex. 127; *Hargrave v. Vaughn*, 82 Tex. 347.

*Utah*. — *People v. O'Loughlin*, 3 Utah 133.  
*Wisconsin*. — *Hundhausen v. Atkins*, 36 Wis. 518.

The Iowa Code provides that where there are several defendants and no separate trial is allowed, they must join in their challenges. *Cleveland v. Atkinson*, 94 Iowa 621.

For a Similar Idaho Statute see *U. S. v. Alexander*, 2 Idaho 354.

5. *Severance in Pleading*. — *Bibb v. Reid*, 3 Ala. 88; *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *Gram v. Sampson*, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666. But see *Stroh v. Hinchman*, 37 Mich. 490, in which case, however, the defenses were antagonistic.

6. *Antagonistic Defenses* — *Michigan*. — *Stroh v. Hinchman*, 37 Mich. 490.

*Texas*. — *Jones v. Ford*, 60 Tex. 127; *Hargrave v. Vaughn*, 82 Tex. 347; *Wolf v. Perryman*, 82 Tex. 112; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227; *Raby v. Frank*, 12 Tex. Civ. App. 125; *Allen v. Waddill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 273; *Rogers v. Armstrong Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 848; *Baum v. Sanger*, (Tex. Civ. App. 1898) 49 S. W. Rep. 650.

*Wisconsin*. — *Hundhausen v. Atkins*, 36 Wis. 518. See also *Gram v. Sampson*, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666.

7. *Consolidation of Actions*. — *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, *affirming Stone v. U. S.*, 29 U. S. App. 32, 64 Fed. Rep. 667. Compare *Stone v. U. S.*, 167 U. S. 178.



were tried alone;<sup>1</sup> and such has been the construction of statutes giving a certain number of challenges to "every person" indicted,<sup>2</sup> providing that the state and the defendant shall each be entitled to challenge a certain number,<sup>3</sup> or authorizing "the defendant" to challenge a certain number.<sup>4</sup> Sometimes, however, a statute is construed as giving to both defendants only the number of challenges to which each would be entitled if tried singly;<sup>5</sup> and such has been the construction of statutes giving the right to challenge a certain number to "each party,"<sup>6</sup> to "the respective parties,"<sup>7</sup> to "the respondent" or "the defendant,"<sup>8</sup> to "either party,"<sup>9</sup> and to "defendant or defendants."<sup>10</sup>

*bb. RIGHTS OF STATE.* — Generally, where the statute gives to the state the right peremptorily to challenge a certain number, the fact that there are more defendants than one does not entitle the state to an increase of that number;<sup>11</sup> but the state has been held to be entitled to such increase under statutes providing that it shall have the same number of challenges as the accused,<sup>12</sup> or allowing to it a certain proportion of the number allowed to the accused.<sup>13</sup>

**1. Each Defendant Entitled to Full Number of Challenges** — *England.* — *Salisbury's Case*, Plowd. 100; *Swan's Case*, Foster 104; **2** *Hale P. C.* 268; *Bac. Abr.*, tit. *Juries*, E. 9; **1** *Chitty's Crim. Law* 535.

*United States.* — *U. S. v. Haskell*, 4 Wash. (U. S.) 412, note; *U. S. v. Marchant*, 12 Wheat. (U. S.) 480, *affirming* 4 Mason (U. S.) 158.

*Alabama.* — *Hawkins v. State*, 9 Ala. 137, 44 Am. Dec. 431; *Brister v. State*, 26 Ala. 107.

*Florida.* — *Savage v. State*, 18 Fla. 909.

*Georgia.* — *Cruce v. State*, 59 Ga. 83; *Cumming v. State*, 99 Ga. 662.

*Illinois.* — *Maton v. People*, 15 Ill. 536; *Spies v. People*, 122 Ill. 265, 3 Am. St. Rep. 320.

*Kansas.* — *State v. Durein*, 29 Kan. 688; *State v. Hebrank*, 29 Kan. 693.

*Louisiana.* — *State v. McLean*, 21 La. Ann. 546.

*Michigan.* — *Stroh v. Hinchman*, 37 Mich. 490; *People v. Welmer*, 110 Mich. 248.

*Mississippi.* — *Smith v. State*, 57 Miss. 822.

*New Hampshire.* — *State v. Doolittle*, 58 N. H. 92.

*New York.* — *Astor Place Riot Case*, 11 Daly (N. Y.) 1; *People v. Vermilyea*, 7 Cow. (N. Y.) 383.

*Ohio.* — *Bixbee v. State*, 6 Ohio 86; *Mahan v. State*, 10 Ohio 233.

*Tennessee.* — *Hill v. State*, 2 Yerg. (Tenn.) 246; *Blackburn v. Hays*, 4 Coldw. (Tenn.) 228; *Wiggins v. State*, 1 Lea (Tenn.) 739.

*Vermont.* — *State v. Stoughton*, 51 Vt. 362; *State v. Noakes*, 70 Vt. 247.

*Wisconsin.* — *Schoeffler v. State*, 3 Wis. 823; *Washington v. State*, 17 Wis. 147.

**Right of State to Separate Trial.** — If defendants jointly indicted refuse to join in their challenges, and thereby create a possibility of exhausting the panel and consequent delay, the remedy of the state is to try them separately. *Charnock's Case*, 3 Salk. 81; *Salisbury's Case*, Plowd. 100; *Thymolby's Case*, 2 Dyer 152b; *U. S. v. Marchant*, 12 Wheat. (U. S.) 480; *Cruce v. State*, 59 Ga. 83.

**2. Construction of Statutes.** — *Washington v. State*, 17 Wis. 147. See also *State v. Reed*, 47 N. H. 466.

**3.** *Hill v. State*, 2 Yerg. (Tenn.) 246.

**4.** *People v. Welmer*, 110 Mich. 248. And see *Stroh v. Hinchman*, 37 Mich. 490.

**5. Both Defendants Restricted to Challenges of One.** — *State v. Warren Freeholders*, 2 N. J. L.

*J.* 102; *People v. Thayer*, (Oyer & T. Ct.) 1 Park, Crim. (N. Y.) 595.

**Dividing Challenges.** — Where the statute gave twenty-one challenges to a single defendant and provided that of two or more defendants tried jointly each should have one-half the number allowed by the act, it was held proper to give ten challenges to one and eleven to the other of two defendants jointly indicted and tried. *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96. And see *Gregg v. State*, 106 Ala. 44.

**Offenses Requiring Joint Action.** — It was held in *Georgia* that where two persons are tried together for an offense requiring their joint action, such as an affray, so that both or neither will be guilty, they are together entitled only to the statutory number of challenges. *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517. And see *Cruce v. State*, 59 Ga. 83.

**Charging Challenges Interposed Prior to Separate Trial.** — Under a statutory provision that on the trial of several defendants the challenge of one shall be deemed the challenge of all, one of several defendants is chargeable with all challenges interposed prior to his procurement of a separate trial. *Glass v. Com.*, (Ky. 1894) 26 S. W. Rep. 811.

**Federal Courts.** — By Rev. Stat. U. S., § 819, in all cases where there are several defendants or several plaintiffs, the parties on each side are to be deemed a single party for the purposes of all challenges. See *U. S. v. Hall*, 44 Fed. Rep. 883.

**6.** *State v. Cady*, 80 Me. 413; *People v. O'Loughlin*, 3 Utah 133.

**7.** *Hamlin v. State*, 67 Md. 333.

**8.** *State v. Reed*, 47 N. H. 466.

**9.** *State v. Sutton*, 10 R. I. 159. See also *State v. Ballou*, 20 R. I. 607.

**10.** *Moschell v. State*, 53 N. J. L. 498.

**11. Rights of State.** — *Savage v. State*, 18 Fla. 909; *Mahan v. State*, 10 Ohio 232; *Wiggins v. State*, 1 Lea (Tenn.) 738; *Schoeffler v. State*, 3 Wis. 823.

**12. Same Number as Accused.** — *Spies v. People*, 122 Ill. 265, 3 Am. St. Rep. 320; *State v. Noakes*, 70 Vt. 247; *State v. Marsh*, 70 Vt. 288.

**13. Proportion of Number Allowed to Accused.** — *Butler v. State*, 92 Ga. 601; *State v. Green*, 33 La. Ann. 1408; *State v. Waggoner*, 39 La. Ann. 919; *State v. Fournier*, 68 Vt. 262.



cc. RIGHTS OF DEFENDANTS INTER SE. — On a trial of defendants jointly, a challenge by one will exclude a juror as to the other defendant or defendants<sup>1</sup> although the latter desire that the juror sit in the case;<sup>2</sup> nor can one defendant complain of a challenge by another,<sup>3</sup> or in any way abridge the latter's right of challenge.<sup>4</sup> Occasionally, however, the statute provides that if several defendants are tried together they must join in their challenges, and in such case a challenge by one in which the other refused to join is insufficient;<sup>5</sup> and this is apparently the effect of a statute which limits the total number of challenges by all the defendants to the number allowed to one defendant when separately tried.<sup>6</sup>

(3) *Several Counts in Indictment.* — The fact that the indictment contains separate counts charging separate misdemeanors of a similar or kindred character does not entitle the defendant to a greater number of challenges than where but one offense is charged.<sup>7</sup>

(4) *Substitution of Jurors During Trial.* — Where a juror is incapacitated during trial and is accordingly discharged, it has in some cases, in view of the local statutes, been decided that upon the substitution of another juror in his place there is a right to the full legal number of challenges without regard to those that may have been made before such substitution.<sup>8</sup> In other cases, however, it is held that there is a right to exercise only such peremptory challenges as were not exhausted before the substitution.<sup>9</sup>

(5) *United States Courts.* — In the courts of the United States, under the Act of 1790,<sup>10</sup> the right to a peremptory challenge existed only in trials for treason and other crimes punishable by death.<sup>11</sup> The Act of 1840,<sup>12</sup> empowering the courts to make regulations conforming the impaneling of jurors to the state practice, was held to authorize the adoption by rule of court of the state statutes or practice acts on the subject of peremptory challenges.<sup>13</sup> In 1865 a provision fixing the number of challenges in cases of treason and capital offenses was adopted,<sup>14</sup> and this was amended in 1872. The statute as so

1. *Rights of Defendants Inter Se.* — *Maton v. People*, 15 Ill. 536; *Sodousky v. McGee*, 4 J. Marsh. (Ky.) 269; *Hill v. State*, 2 Yerg. (Tenn.) 249.

2. *Challenge of Juror Accepted by Other Defendant.* — *Salisbury's Case*, Plowd. 100; *State v. Doolittle*, 58 N. H. 92; *State v. Meaker*, 54 Vt. 112.

3. *No Right to Question Other's Challenge.* — *U. S. v. Marchant*, 4 Mason (U. S.) 158, *affirmed* 12 Wheat. (U. S.) 480; *Maton v. People*, 15 Ill. 536; *State v. Durr*, 39 La. Ann. 751; *State v. Cady*, 80 Me. 413; *State v. Jacobs*, 106 N. Car. 695; *State v. Smith*, 2 Ired. L. (24 N. Car.) 402; *Bixbee v. State*, 6 Ohio 86.

4. *Reynolds v. Rowley*, 2 La. Ann. 890; *State v. McLean*, 21 La. Ann. 546.

5. *Requirement that Defendants Join in Challenges.* — *People v. McCalla*, 8 Cal. 301. And see *Cleveland v. Atkinson*, 64 Iowa 621.

6. *State v. Cady*, 80 Me. 413; *People v. Thayer*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 595; *State v. Sutton*, 10 R. I. 159; *People v. O'Loughlin*, 3 Utah 133.

7. *Separate Offenses in Separate Counts.* — *State v. Skinner*, 34 Kan. 256; *Smith v. State*, 8 Lea (Tenn.) 386; *U. S. v. Groesbeck*, 4 Utah 487. But see *State v. McNeill*, 93 N. Car. 552. See also *People v. Sweeney*, 55 Mich. 586, in which latter case the syllabus, stating a contrary rule, appears not to be supported by the opinion.

As to a Massachusetts Statute authorizing each of two joint defendants to challenge two jurors peremptorily, irrespective of the number of

counts in the indictment, see *Com. v. Walsh*, 124 Mass. 32.

8. *Challenges on Substitution of Juror.* — *People v. Stewart*, 64 Cal. 60; *People v. Stewart*, 64 Cal. 60; *People v. Wong Ark*, 96 Cal. 125; *Garner v. State*, 5 Yerg. (Tenn.) 160; *Bruce v. Beall*, 100 Tenn. 573.

9. *Jackson v. State*, 78 Ala. 471; *State v. Hazledahl*, 2 N. Dak. 521.

In South Carolina it is now provided by statute that in civil cases the right of peremptory challenge shall extend to jurors drawn in the place of those previously challenged. *Curnow v. Phoenix Ins. Co.*, 46 S. Car. 79. Until the passage of the statute a different view prevailed. *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184; *Huff v. Watkins*, 15 S. Car. 82, 40 Am. Rep. 680.

10. *United States Courts.* — Crimes Act of 1790, § 30 (1 U. S. Stat. at L. 119, c. 9, § 30).

11. See *U. S. v. Dow*, Taney (U. S.) 34. See also *U. S. v. Hewson*, Brun. Col. Cas. (U. S.) 532; *U. S. v. Shackleford*, 18 How. (U. S.) 588; *U. S. v. Shive*, Baldw. (U. S.) 510; *U. S. v. Johns*, 4 Dall. (U. S.) 412.

12. Act July 20, 1840, 5 U. S. Stat. at L. 394, c. 47.

13. *Adoption of State Legislation Authorized.* — *U. S. v. Shackleford*, 18 How. (U. S.) 588; *U. S. v. Devlin*, 6 Blatchf. (U. S.) 71. Compare *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207; *Jones v. Vanzandt*, 2 McLean (U. S.) 611.

14. Act Cong. March 3, 1865, c. 86, 13 U. S. Stat. at L. 500.



amended allows, in cases of treason or capital offenses, twenty peremptory challenges to the defendants and five to the United States; on a trial for any other felony, ten to the defendant and three to the United States; and in all other cases, civil and criminal, three to each party.<sup>1</sup>

In the Territories, in the absence of other congressional legislation on the subject, the provisions of the Revised Statutes in this regard are applicable,<sup>2</sup> and they likewise control in the District of Columbia.<sup>3</sup>

*e.* IMPAIRMENT OF RIGHT. — The right of peremptory challenge is one of the safeguards against possible injustice, and its freest exercise within the limits fixed by the legislature should be permitted.<sup>4</sup> It is cause for reversal if a party is in any way deprived of his full number of challenges to his prejudice,<sup>5</sup> or if a mode of impaneling is adopted which so abridges or denies the right.<sup>6</sup> The action of the court, however, in refusing to allow the legal number of peremptory challenges is not ground for reversal if the challenges allowed are not exhausted,<sup>7</sup> or if it does not appear that after exhausting the challenges allowed any jurors were named whom it was desired to challenge.<sup>8</sup> On the other hand, the allowance of a peremptory challenge to which the party is not entitled is not ground for reversal if the cause is tried by an impartial jury.<sup>9</sup> But it has been decided to be reversible error for the court to rule at the outset of the trial that the defendant is entitled to but one-half

1. Existing Law. — Rev. Stat. U. S., § 819.

"Felony" within Statute. — It has been held that the word "felony," as used in the statute, does not cover the making or passing of counterfeit money, *U. S. v. Coppersmith*, 4 Fed. Rep. 198, 2 Flipp. (U. S.) 546; or presenting a false claim against the United States, *U. S. v. Daubner*, 17 Fed. Rep. 793; or receiving or concealing smuggled property, *Reagan v. U. S.*, 157 U. S. 301. But it does include robbing a mail carrier and putting the carrier in jeopardy of his life in doing so. *Harrison v. U. S.*, 163 U. S. 140.

Removal of Cause. — On the trial of a criminal cause removed from the state court to the federal court, the laws of the United States respecting peremptory challenges are applicable, and not the state law. *Georgia v. O'Grady*, 3 Woods (U. S.) 496.

2. Territorial Practice. — *U. S. v. Upham*, 2 Mont. 113.

In the Indian Territory, since by Act of Congress the provisions of the Arkansas law in regard to criminal procedure are made applicable, the provisions of that law control in regard to peremptory challenges. *Watkins v. U. S.*, (Indian Ter. 1897) 41 S. W. Rep. 1045.

3. District of Columbia. — *U. S. v. Dunn*, 3 Mackey (D. C.) 151.

Former Application of State Law. — While a part of Virginia was included in the District of Columbia, under the name of Alexandria county, the statute of Virginia in regard to the right of peremptory challenges controlled in cases arising in that part of the District. *U. S. v. Wood*, 2 Cranch (C. C.) 164; *U. S. v. McLaughlin*, 1 Cranch (C. C.) 444; *U. S. v. Craig*, 2 Cranch (C. C.) 36; *U. S. v. Browning*, 1 Cranch (C. C.) 330; *U. S. v. Peters*, 2 Cranch (C. C.) 98, 27 Fed. Cas. No. 16,034; *U. S. v. Lambert*, 2 Cranch (C. C.) 137; *U. S. v. Gee*, 2 Cranch (C. C.) 163.

4. Impairment of Right. — *People v. Edwards*, 101 Cal. 543; *Lamb v. State*, 36 Wis. 424.

By Standing Mute the defendant is not deprived of the right to challenge to the extent

authorized by law. *Link v. State*, 3 Heisk. (Tenn.) 252.

Statement by Court as to Number. — The court should, if so requested by the accused when the first juror is put upon the accused, determine the total number of challenges to which accused is entitled. *Cumming v. State*, 99 Ga. 662.

5. As Cause for Reversal. — *Allen v. State*, 7 Coldw. (Tenn.) 358; *Mitchell v. Mitchell*, 80 Tex. 101; *State v. Pearis*, 35 W. Va. 320.

6. *People v. Jenks*, 24 Cal. 11; *Donovan v. People*, 139 Ill. 412; *Thompson v. State*, 58 Miss. 62; *Schumaker v. State*, 5 Wis. 324; *Lamb v. State*, 36 Wis. 424. And see *Pointer v. U. S.*, 151 U. S. 396.

Compelling Four Challenges at Once. — In *Schumaker v. State*, 5 Wis. 324, it was held that in the absence of any statutory requirement to that effect, it was error to compel the defendant either to exercise at one time the right of four peremptory challenges, or to waive them.

Charging Challenges Made on Previous Attempt to Form Jury. — Where, because of inability to procure a jury, the trial is postponed to another term, the defendant is entitled to the full number of challenges to the jury for such subsequent term, and cannot be charged with the challenges made to the first jury. *State v. Briggs*, 27 S. Car. 81.

7. Exhaustion of Challenges Allowed. — *Allen v. Waddill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 273; *State v. Fournier*, 68 Vt. 262.

8. *Snow v. Starr*, 75 Tex. 411; *Wolf v. Perryman*, 82 Tex. 112.

9. *Bibb v. Reid*, 3 Ala. 88; *People v. Durrant*, 116 Cal. 179; *State v. Dalton*, 69 Miss. 611.

Erroneous Ruling Afterwards Corrected. — It is not ground for complaint by a party, if his legal number of challenges is allowed, that at first the court erroneously ruled that he was entitled to a greater number, and such ruling was not corrected until he had made some challenges. *State v. Jacob*, 30 S. Car. 131, 14 Am. St. Rep. 897.



his legal number of challenges, and this without reference to the question how many are actually made or allowed.<sup>1</sup>

*f. WAIVER OF RIGHT.* — The right of peremptory challenge may be waived by a failure to exercise it at the proper time.<sup>2</sup> The question what is the proper time for the exercise of the right is considered elsewhere.<sup>3</sup> But it may here be stated that a challenge should generally be interposed before the swearing of the juror,<sup>4</sup> though the court has, it seems, power in its discretion to allow such challenge after swearing.<sup>5</sup> In some cases it is decided that the failure to challenge before the acceptance of a juror constitutes a waiver of the right;<sup>6</sup> but a contrary view has also been taken.<sup>7</sup>

*g. WITHDRAWAL OF CHALLENGE.* — As a general rule a peremptory challenge cannot be withdrawn,<sup>8</sup> and a desire to challenge the juror for cause will not give an absolute right to such a withdrawal.<sup>9</sup> But the court is, it seems, vested with discretion to allow a withdrawal under exceptional circumstances;<sup>10</sup>

1. *Bruce v. State*, 59 Ga. 83. But see to the contrary *Miller v. State*, 36 Tex. Crim. 47.

2. *Waiver of Right* — *United States*. — U. S. v. Morris, 1 Curt. (U. S.) 23.

*California*. — *Vance v. Richardson*, 110 Cal. 414.

*Connecticut*. — *State v. Potter*, 18 Conn. 166.  
*Indiana*. — *Bradford v. State*, 15 Ind. 347;  
*Kurtz v. State*, 145 Ind. 119.

*Kentucky*. — *Wiggins v. Com.*, (Ky. 1898) 47 S. W. Rep. 1073.

*Massachusetts*. — *Cow v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458.

*Minnesota*. — *State v. Scott*, 41 Minn. 365.  
*North Carolina*. — *State v. Fuller*, 114 N. Car. 885.

*Pennsylvania*. — *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308.

*Texas*. — *Cooley v. State*, 38 Tex. 636; *Horbach v. State*, 43 Tex. 242.

*Washington*. — *Poncin v. Furth*, 15 Wash. 201.

*Wisconsin*. — *Gilchrist v. Brande*, 58 Wis. 184; *State v. Cameron*, 2 Pin. (Wis.) 490.

*Effect After Change in Jury.* — A waiver of peremptory challenges to the twelve jurors who were in the box does not debar the party from afterwards challenging any of such twelve after the constitution of the jury has been changed by a challenge of one or two individuals by the opposite party, and the substitution of others in their places. *Dorman v. Broadway R. Co.*, (Brooklyn City Ct. Gen. T.) 5 N. Y. Supp. 769; *Fountain v. West*, 23 Iowa 10, 92 Am. Dec. 405.

3. *Time of Interposition.* — See the title JURY, 12 ENCYC. OF PL. AND PR. 491 *et seq.*

4. *Challenge Before Swearing* — *California*. — *People v. Dolan*, 96 Cal. 315.

*Florida*. — *Ellis v. State*, 25 Fla. 702; *Bradham v. State*, (Fla. 1899) 26 So. Rep. 730.

*Illinois*. — *Peoria, etc., R. Co. v. Puckett*, 52 Ill. App. 222.

*Louisiana*. — *State v. Durr*, 39 La. Ann. 751.

*Maryland*. — *Rogers v. State*, 89 Md. 424.

*Michigan*. — *Ayres v. Hubbard*, 88 Mich. 155.

*New York*. — *People v. Carpenter*, 102 N. Y. 238, 4 N. Y. Crim. 177, *affirming* 38 Hun (N. Y.) 490, 4 N. Y. Crim. 39; *People v. McGonegal*, 136 N. Y. 62, *affirming* (Supm. Ct. Gen. T.) 42 N. Y. St. Rep. 307.

5. *Challenge After Swearing.* — *State v. Wren*, 48 La. Ann. 803; *Tweed's Case*, (Oyer & T. Ct.) 13 Abb. Pr. N. S. (N. Y.) 371, note; *People v. Hughes*, 137 N. Y. 29, *affirming* (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 413. But see *State v. Fuller*, 114 N. Car. 885.

In *California* the statute provides that the court may, for good cause, allow a peremptory challenge after swearing. *People v. Ward*, 105 Cal. 335; *People v. Durrant*, 116 Cal. 179.

6. *Effect of Acceptance of Juror* — *Arkansas*. — *Williams v. State*, 63 Ark. 527.

*Connecticut*. — *State v. Potter*, 18 Conn. 176.

*Illinois*. — *Mayers v. Smith*, 121 Ill. 442. See also *Peoria, etc., R. Co. v. Puckett*, 52 Ill. App. 222.

*New York*. — *People v. O'Neil*, 109 N. Y. 251, *affirming* 48 Hun (N. Y.) 36, 5 N. Y. Crim. 302.

*North Carolina*. — *State v. Lyon*, 89 N. Car. 568.

*Texas*. — *Drake v. State*, 5 Tex. App. 649; *McMillan v. State*, 7 Tex. App. 142; *Horbach v. State*, 43 Tex. 260.

*Washington*. — *Poncin v. Furth*, 15 Wash. 201.

7. *United States*. — *Jones v. Vanzandt*, 2 McLean (U. S.) 611; *U. S. v. Daubner*, 17 Fed. Rep. 793.

*Alabama*. — *Adams v. Olive*, 48 Ala. 551; *Murray v. State*, 48 Ala. 675.

*California*. — *People v. Dolan*, 96 Cal. 315.

*Florida*. — *O'Connor v. State*, 9 Fla. 216; *Mann v. State*, 23 Fla. 611.

*Michigan*. — *People v. Carrier*, 46 Mich. 442.

*Vermont*. — *State v. Spaulding*, 60 Vt. 228.

In *Pennsylvania* it has been decided that a party cannot, even with the permission of the court, resume a right of challenge which he has once waived. *Patton v. Ash*, 7 S. & R. (Pa.) 116; *Wenrick v. Hall*, 11 S. & R. (Pa.) 153.

8. *Withdrawal of Challenge.* — *Rex v. Parry*, 7 C. & P. 836, 32 E. C. L. 761; *State v. Wright*, 53 Me. 328; *Biddle v. State*, 67 Md. 304; *Furman v. Applegate*, 23 N. J. L. 28; *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

9. *In Order to Challenge for Cause.* — *Vojta v. Pelikan*, 15 Mo. App. 471; *State v. Coleman*, 8 S. Car. 237. But see *Savage v. State*, 18 Fla. 909.

10. *Discretion of Court.* — *Savage v. State*, 18 Fla. 909; *Morrison v. Lovejoy*, 6 Minn. 319; *Vojta v. Pelikan*, 15 Mo. App. 471.



and it has been held that it is proper to allow such withdrawal before the challenged juror has retired and another has been called.<sup>1</sup>

*h. RIGHT OF PEREMPTORY CHALLENGE AS CURING ERRONEOUS RULINGS* — (1) *Wrongful Acceptance of Juror*. — It is the general rule that error in overruling a challenge of a juror for cause is not available by the challenging party if his legal number of peremptory challenges was not exhausted during the impaneling of the jury, since he could exclude the obnoxious juror by a peremptory challenge without injury to himself, and whether he actually did so peremptorily challenge such juror is, it seems, immaterial.<sup>2</sup>

**1. Before Retirement of Juror.** — *Garrison v. Portland*, 2 Oregon 123. *Compare Rex v. Parry*, 7 C. & P. 836, 32 E. C. L. 761; *Savage v. State*, 18 Fla. 909.

**2. Peremptory Challenge Not Exhausted** — *United States*. — *Burt v. Panjaud*, 99 U. S. 180; *Hopt v. Utah*, 120 U. S. 430, *affirming* *People v. Hopt*, 4 Utah 250; *Spies v. Illinois*, 123 U. S. 131.

*Arizona*. — *Chartz v. Territory*, (Ariz. 1893) 32 Pac. Rep. 166.

*Arkansas*. — *Meyer v. State*, 19 Ark. 156; *Benton v. State*, 30 Ark. 328; *Wright v. State*, 35 Ark. 639; *Polk v. State*, 45 Ark. 165; *Mabry v. State*, 50 Ark. 492. See also *Stewart v. State*, 13 Ark. 720.

*California*. — *People v. Gatewood*, 20 Cal. 147; *People v. Gaunt*, 23 Cal. 156; *People v. Weil*, 40 Cal. 268; *People v. McGungill*, 41 Cal. 429; *People v. Freeman*, 92 Cal. 359; *People v. Durrant*, 116 Cal. 179; *People v. Winthrop*, 118 Cal. 85.

*Colorado*. — *Minich v. People*, 8 Colo. 440; *Babcock v. People*, 13 Colo. 518; *Union Pac. R. Co. v. Tracy*, 19 Colo. 331; *Prewitt v. Lambert*, 19 Colo. 7; *Van Houton v. People*, 22 Colo. 53.

*Connecticut*. — *State v. Hoyt*, 47 Conn. 530, 36 Am. Rep. 89; *State v. Smith*, 49 Conn. 376.

*District of Columbia*. — *U. S. v. Neverson*, 1 Mackey (D. C.) 152.

*Florida*. — *Andrews v. State*, 21 Fla. 598.

*Georgia*. — *Westmoreland v. State*, 45 Ga. 225. And see *Wilson v. State*, 69 Ga. 225.

*Idaho*. — *State v. Gorden*, (Idaho 1897) 48 Pac. Rep. 1061.

*Illinois*. — *St. Louis, etc., R. Co. v. Lux*, 63 Ill. 523; *Robinson v. Randall*, 82 Ill. 521; *Wilson v. People*, 94 Ill. 299; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

*Indiana*. — *Woods v. State*, 134 Ind. 35; *Fletcher v. Crist*, 139 Ind. 121; *Shields v. State*, 149 Ind. 395; *Voght v. State*, 145 Ind. 12; *Siberry v. State*, 149 Ind. 684, *overruling* *Brown v. State*, 70 Ind. 576.

*Iowa*. — *State v. Davis*, 41 Iowa 311; *State v. Elliott*, 45 Iowa 486; *Barnes v. Newton*, 46 Iowa 567; *State v. George*, 62 Iowa 682; *State v. Winter*, 72 Iowa 627; *State v. Brownlee*, 84 Iowa 473; *State v. Yetzer*, 97 Iowa 423.

*Kansas*. — *Morton v. State*, 1 Kan. 468; *Wiley v. Keokuk*, 6 Kan. 95; *Florence, etc., R. Co. v. Ward*, 29 Kan. 354; *State v. Stockman*, (Kan. App. 1899) 58 Pac. Rep. 1032.

*Kentucky*. — *Owen v. Kamer*, (Ky. 1895) 29 S. W. Rep. 437.

*Louisiana*. — *State v. Cazeau*, 8 La. Ann. 114; *State v. Lartigue*, 29 La. Ann. 642; *State v. Shields*, 33 La. Ann. 1410; *State v. Barnes*, 34 La. Ann. 396; *State v. Mangrum*, 35 La. Ann. 619; *State v. Ford*, 37 La. Ann. 443; *State v.*

*Redmond*, 37 La. Ann. 774; *State v. Melton*, 37 La. Ann. 77; *State v. Ford*, 42 La. Ann. 255; *State v. Jackson*, 42 La. Ann. 1170; *State v. Aarons*, 43 La. Ann. 406; *State v. Garig*, 43 La. Ann. 365; *State v. Green*, 43 La. Ann. 402; *State v. Nash*, 45 La. Ann. 1137; *State v. Le Duff*, 46 La. Ann. 546.

*Michigan*. — *Sullings v. Shakespeare*, 46 Mich. 408, 41 Am. Rep. 166; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501; *People v. Aplin*, 86 Mich. 393.

*Minnesota*. — *State v. Lawlor*, 28 Minn. 216.

*Mississippi*. — *Ogle v. State*, 33 Miss. 383; *Fletcher v. State*, 60 Miss. 675; *Ferriday v. Selser*, 4 How. (Miss.) 506. See *Shubert v. State*, 66 Miss. 446.

*Missouri*. — *Lisle v. State*, 6 Mo. 426; *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36.

*Montana*. — *Territory v. Hart*, 7 Mont. 42; *Territory v. Campbell*, 9 Mont. 19; *Davidson v. Bordeaux*, 15 Mont. 245.

*Nebraska*. — *Palmer v. People*, 4 Neb. 68; *Bohanan v. State*, 15 Neb. 209; *Kremling v. Lallman*, 16 Neb. 280; *Burnett v. Burlington, etc., R. Co.*, 16 Neb. 332; *Curran v. Percival*, 21 Neb. 434; *Nowotny v. Blair*, 32 Neb. 175; *Blenkiron v. State*, 40 Neb. 11; *Jenkins v. Mitchell*, 40 Neb. 664; *Brumback v. German Nat. Bank*, 46 Neb. 540; *Smith v. Meyers*, 52 Neb. 70; *Morgan v. State*, 51 Neb. 672.

*Nevada*. — *State v. McClear*, 11 Nev. 39; *State v. Hartley*, 22 Nev. 342.

*New Jersey*. — *Drake v. State*, 53 N. J. L. 23.

*New Mexico*. — *Territory v. Young*, 2 N. Mex. 93; *Anderson v. Territory*, 4 N. Mex. 108.

*North Carolina*. — *Capehart v. Stewart*, 80 N. Car. 101; *State v. Brittain*, 89 N. Car. 481; *State v. Gooch*, 94 N. Car. 987; *State v. Hensley*, 94 N. Car. 1021; *State v. Jones*, 97 N. Car. 469; *State v. Potts*, 100 N. Car. 457; *State v. Pritchett*, 106 N. Car. 667; *State v. Brady*, 107 N. Car. 822; *State v. Brogden*, 111 N. Car. 656; *State v. Arthur*, 2 Dev. L. (13 N. Car.) 217; *State v. Cockman*, 2 Winst. L. (60 N. Car.) 95; *Whitaker v. Carter*, 4 Ired. L. (26 N. Car.) 461.

*North Dakota*. — *Territory v. O'Hare*, 1 N. Dak. 36.

*Ohio*. — *Mimms v. State*, 16 Ohio St. 221; *Erwin v. State*, 29 Ohio St. 186; *Hartnett v. State*, 42 Ohio St. 568.

*Oklahoma*. — *Hyde v. Territory*, 8 Okla. 69. *Pennsylvania*. — *Com. v. Winnemore*, 2 Brewst. (Pa.) 380. And see *Sayres v. Com.*, 88 Pa. St. 291.

*South Carolina*. — *State v. McQuaige*, 5 S. Car. 429; *State v. Gill*, 14 S. Car. 412; *State v. Dodson*, 16 S. Car. 453; *State v. Anderson*, 26 S. Car. 599; *State v. Wise*, 7 Rich. L. (S. Car.) 413; *State v. Price*, 10 Rich. L. (S. Car.) 356.

*Tennessee*. — *Carroll v. State*, 3 Humph.



The *Converse Rule*, that such error in overruling a challenge for cause is available as ground for reversal if the objecting party does exhaust his peremptory challenges before the impaneling of the jury, is stated and applied in a number of cases.<sup>1</sup>

**Objectionable Juror Must Be Impaneled.**—In some cases, however, it is held that the mere exhaustion of his legal number of peremptory challenges will not give to the complaining party a right to a reversal, but that in addition he must show that an objectionable juror was impaneled owing to the want on his part of another peremptory challenge;<sup>2</sup> or, as it may be otherwise expressed, the complaining party must have made, or offered to make, a challenge to a juror subsequently called.<sup>3</sup>

(Tenn.) 315; *Preswood v. State*, 3 Heisk. (Tenn.) 468; *Henry v. State*, 4 Humph. (Tenn.) 270; *Moses v. State*, 10 Humph. (Tenn.) 456; *Griffae v. State*, 1 Lea (Tenn.) 43, 2 Leg. Rep. (Tenn.) 186; *Taylor v. State*, 11 Lea (Tenn.) 721; *Holcomb v. State*, 8 Lea (Tenn.) 420; *Alfred v. State*, 2 Swan (Tenn.) 581; *Cantrell v. State*, 2 Shannon Tenn. Cas. 249; *Hunt v. State*, 2 Shannon Tenn. Cas. 395; *Major v. State*, 4 Sneed (Tenn.) 600; *Eason v. State*, 6 Baxt. (Tenn.) 468; *Conatser v. State*, 12 Lea (Tenn.) 438; *McGowan v. State*, 9 Verg. (Tenn.) 184; *Hannum v. State*, 90 Tenn. 649; *Jenkins v. State*, 99 Tenn. 569; *Wooten v. State*, 99 Tenn. 189.

*Texas*.—*Burrell v. State*, 18 Tex. 713; *Johnson v. State*, 27 Tex. 758; *Bowman v. State*, 41 Tex. 417; *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650; *Bejarano v. State*, 6 Tex. App. 265; *Tuttle v. State*, 6 Tex. App. 556; *McKinney v. State*, 8 Tex. App. 626; *Lum v. State*, 11 Tex. App. 483; *Nalley v. State*, 28 Tex. App. 387; *Williams v. State*, 30 Tex. App. 354; *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044; *White v. State*, 30 Tex. App. 652; *Shaw v. State*, 32 Tex. Crim. 155; *Wilson v. State*, 32 Tex. Crim. 22; *Galveston, etc., R. Co. v. Wessendorf*, (Tex. Civ. App. 1896) 39 S. W. Rep. 132; *Allen v. Waddill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 273; *Kugadt v. State*, 38 Tex. Crim. 681; *Sharp v. State*, 6 Tex. App. 650.

*Utah*.—*Conway v. Clinton*, 1 Utah 224; *People v. Hopt*, 4 Utah 250.

*Vermont*.—*State v. Gaffney*, 56 Vt. 451.

*Washington*.—*State v. Moody*, 7 Wash. 395.

*Wisconsin*.—*Pool v. Milwaukee Mechanics' Ins. Co.*, 94 Wis. 447.

*Wyoming*.—*Carter v. Territory*, 3 Wyo. 193.

**Contra.**—*Birdsong v. State*, 47 Ala. 68; *Iverson v. State*, 52 Ala. 170; *Lithgow v. Com.*, 2 Va. Cas. 297.

**1. Exhaustion of Peremptory Challenges—***Arkansas*.—*Polk v. State*, 45 Ark. 165.

*California*.—*People v. Weil*, 40 Cal. 268.

*District of Columbia*.—*U. S. v. Schneider*, 21 D. C. 381.

*Illinois*.—*Meaux v. Whitehall*, 8 Ill. App. 173.

*Kansas*.—*State v. Brown*, 15 Kan. 400; *Salina v. Trosper*, 27 Kan. 544.

*Louisiana*.—*State v. Jackson*, 37 La. Ann. 768.

*Michigan*.—*Theisen v. Johns*, 72 Mich. 285.

*Mississippi*.—*Hubbard v. Rutledge*, 57 Miss. 7.

*Nebraska*.—*Curry v. State*, 4 Neb. 548; *Cowan v. State*, 22 Neb. 523; *Olive v. State*, 11

Neb. 1; *Miller v. State*, 29 Neb. 437; *Owens v. State*, 32 Neb. 167.

*New York*.—*People v. Tyrrell*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 142; *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. 194, *reversing* (Supm. Ct. Gen. T.) 2 N. Y. Crim. 187, 31 Hun (N. Y.) 158. See also *People v. Bodine*, 1 Den. (N. Y.) 281.

*Ohio*.—*Mimms v. State*, 16 Ohio St. 221; *Hartnett v. State*, 42 Ohio St. 568.

*Oklahoma*.—*Huntley v. Territory*, 7 Okla. 60.

*Tennessee*.—*Ward v. State*, 102 Tenn. 724.

**2. Objectionable Juror Must Be Forced on Party through Want of Peremptory Challenge—***Alabama*.—*Rash v. State*, 61 Ala. 89.

*Illinois*.—*Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

*Louisiana*.—*State v. Aarons*, 43 La. Ann. 406; *State v. Garig*, 43 La. Ann. 365; *State v. Tibbs*, 48 La. Ann. 1278.

*Nevada*.—*Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157; *State v. Raymond*, 11 Nev. 98.

*New York*.—*Finkelstein v. Barnett*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 564, *affirming* (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 488.

*Oregon*.—*Ford v. Umatilla County*, 15 Oregon 324.

*Tennessee*.—*Preswood v. State*, 3 Heisk. (Tenn.) 468; *Holcomb v. State*, 8 Lea (Tenn.) 419; *Wooten v. State*, 99 Tenn. 189.

*Texas*.—*Coiton v. State*, 32 Tex. 614; *Houston, etc., R. Co. v. Terrell*, 69 Tex. 650; *Snow v. Starr*, 75 Tex. 414; *Wolf v. Perryman*, 82 Tex. 112; *Sharp v. State*, 6 Tex. App. 650; *Rothschild v. State*, 7 Tex. App. 519; *Myers v. State*, 7 Tex. App. 641; *Hollis v. State*, 8 Tex. App. 620; *Grissom v. State*, 8 Tex. App. 386; *Holt v. State*, 9 Tex. App. 571; *Dreyer v. State*, 11 Tex. App. 631; *Loggins v. State*, 12 Tex. App. 65; *Wright v. State*, 12 Tex. App. 163; *Ward v. State*, 19 Tex. App. 664; *Thompson v. State*, 19 Tex. App. 593; *Bolding v. State*, 23 Tex. App. 172; *Blackwell v. State*, 29 Tex. App. 105; *Holland v. State*, 31 Tex. Crim. 345; *McKinney v. State*, 31 Tex. Crim. 583; *Powers v. State*, 23 Tex. App. 42; *Goodson v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 20; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227.

*Wisconsin*.—*Heucke v. Milwaukee City R. Co.*, 69 Wis. 401; *Carthaus v. State*, 78 Wis. 560; *Pool v. Milwaukee Mechanics Ins. Co.*, 94 Wis. 447.

**Contrary Decisions.**—This rule was expressly *disapproved* in *Thurman v. State*, 27 Neb. 628, *citing State v. Brown*, 15 Kan. 400.

**3. Necessity of Other Challenge.**—*Johns v. State*, 55 Md. 350; *Wooten v. State*, 99 Tenn. 189.



**Reversal though Challenges Not Exhausted.** — A few cases, mostly in *New York*, hold that even though the peremptory challenges are not exhausted, the challenging party is entitled to reversal provided he does not peremptorily challenge the objectionable juror, since he cannot be compelled to use his peremptory challenges to correct the mistakes of the court; but that if he does peremptorily challenge the juror, he is bound by such challenge and cannot thereafter complain of error in overruling the challenge for cause, if all his peremptory challenges are not exhausted.<sup>1</sup>

**Exhaustion of Challenges Not Considered.** — In a few cases it is simply stated, without reference to the question of exhaustion of peremptory challenges, that one cannot complain of the denial of a challenge for cause if he thereafter peremptorily challenges the juror. In these cases, failure to state that the challenges were not exhausted was probably a mere inadvertence.<sup>2</sup> In two or three cases it is stated, likewise without reference to the question of exhaustion of challenges, that the exclusion of the juror upon a peremptory challenge will not deprive one of the right to complain of the previous overruling of his challenge for cause.<sup>3</sup>

**Additional Challenges.** — The court may properly allow an additional challenge where one such challenge has been exhausted on a juror who should have been excluded for cause,<sup>4</sup> as where the court accepted the juror on the strength of false statements by him upon his *voir dire* examination;<sup>5</sup> and the allowance of such additional challenge will have the effect of curing the error in overruling the challenge for cause.<sup>6</sup>

(2) **Wrongful Exclusion of Juror.** — In some cases the fact that some of the complaining party's peremptory challenges were unexhausted is referred to as ground for refusing to reverse the action of the court in excluding a juror against such party's objection, since he was in a position by means of peremptory challenges to obtain an unobjectionable jury.<sup>7</sup> In *Texas*, how-

**A Peremptory Challenge by the State renders harmless the erroneous overruling of the defendant's challenge for cause.** *Griffin v. State*, 18 Ohio St. 438.

**1. New York Rule.** — *People v. Bodine*, 1 Den. (N. Y.) 281; *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *People v. Larubia*, 140 N. Y. 87; *People v. McQuade*, 110 N. Y. 284. See also *People v. Price*, 53 Hun (N. Y.) 185; *Malloy v. Pelham*, (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 828; *People v. Petmecky*, (Supm. Ct. Gen. T.) 2 N. Y. Crim. 450, *affirmed* 99 N. Y. 415; *People v. Knickerbocker*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 302; *Friery v. People*, 54 Barb. (N. Y.) 319, *affirmed* 2 Abb. App. Dec. (N. Y.) 215.

**Use of Peremptory Challenge Caused by Refusal to Allow Examination of Juror.** — Error in refusing to allow a defendant to examine a juror to determine his competency has been held to be cause for reversal, although the defendant excluded such juror on a peremptory challenge, and it was held to be immaterial whether his peremptory challenges were or were not exhausted. *State v. Bresland*, 59 Minn. 281. But see *State v. Furbeck*, 29 Kan. 532; *Shaw v. State*, 32 Tex. Crim. 155.

**2. Decision Not Referring to Exhaustion of Challenges.** — *State v. Ford*, 42 La. Ann. 255; *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *Finkelstein v. Barnett*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 564; *Conway v. Clinton*, 1 Utah 215; *People v. Thiede*, 11 Utah 241, *affirmed* 159 U. S. 510.

**3. Brown v. State**, 70 Ind. 576, *overruled* in *Siberry v. State*, 149 Ind. 684; *People v. Mc-*

*Gonegal*, 136 N. Y. 62; *Dowdy v. Com.*, 9 Gratt. (Va.) 727, 60 Am. Dec. 314. See also *Birdsong v. State*, 47 Ala. 68.

**4. Additional Peremptory Challenges.** — *State v. Kent*, 5 N. Dak. 516.

**5. Burke v. McDonald**, 2 Idaho 1022; *State v. Roland*, 38 La. Ann. 18.

**6. Cure of Error in Overruling Challenge for Cause.** — *Gardiner v. People*, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 155; *State v. Kent*, 5 N. Dak. 516; *Blackwell v. State*, 29 Tex. App. 194. And see *People v. Freeman*, 92 Cal. 359; *State v. La Croix*, 8 S. Dak. 369.

**Contra.** — *Iverson v. State*, 52 Ala. 170.

**7. Erroneous Exclusion of Juror — California.** — *Asevado v. Orr*, 100 Cal. 293.

**Dakota.** — *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38.

**Illinois.** — *Ochs v. People*, 124 Ill. 399.

**Iowa.** — *Wisehart v. Dietz*, 67 Iowa 121.

**Kansas.** — *Stout v. Hyatt*, 13 Kan. 232; *Atchison, etc., R. Co. v. Franklin*, 23 Kan. 74.

**Louisiana.** — *State v. Farrer*, 35 La. Ann. 317; *State v. Creech*, 38 La. Ann. 480.

**Michigan.** — *Luebe v. Thorpe*, 94 Mich. 268; *People v. Fowler*, 104 Mich. 449; *Brennan v. O'Brien*, (Mich. 1899) 80 N. W. Rep. 249.

**New York.** — *People v. Decker*, 157 N. Y. 186.

**Tennessee.** — *Jenkins v. State*, 99 Tenn. 569.

**Compare O'Neil v. Lake Superior Iron Co.**, 67 Mich. 560; *State v. Carries*, 39 La. Ann. 931, in which the fact that the peremptory challenges of the objecting party had been exhausted was apparently regarded as immaterial.



ever, it is held that error in excluding a juror is not rendered harmless by the fact that peremptory challenges remain to the complaining party.<sup>1</sup>

**6. Standing Jurors Aside** — *a. NATURE AND ORIGIN OF RIGHT.* — The privilege of the prosecution to stand members of the panel aside arose in connection with the early statute<sup>2</sup> taking away from the crown the right of peremptory challenge, this statute being construed as permitting the crown to put a member of the panel aside without stating a cause of challenge to him until the whole panel was gone through, so that it could be seen whether a full jury could be obtained without the persons so put aside.<sup>3</sup> The right belongs only to the prosecution.<sup>4</sup>

*b. PRACTICE IN UNITED STATES.* — In the United States the right has been recognized as existing, so far as shown by reported cases, only in *North Carolina*, *Pennsylvania*, and *South Carolina*.<sup>5</sup> Whether the right exists in the federal courts is doubtful, even though the state practice allows it.<sup>6</sup>

*c. EFFECT OF RIGHT OF PEREMPTORY CHALLENGE.* — It has been held that the right of the prosecution to stand jurors aside is not affected by the statutes conferring the right of peremptory challenge on the state;<sup>7</sup> and the jurors so stood aside may be thereafter peremptorily challenged by the prosecution.<sup>8</sup> In some cases, however, a contrary view has been taken, to the effect that the grant to the state of the right to challenge peremptorily must be regarded as abrogating the right to stand jurors aside.<sup>9</sup>

*d. IN WHAT CASES RIGHT EXISTS.* — That the right, where the practice is followed, exists in cases of felony, is conceded;<sup>10</sup> and though at times the existence of such right in prosecutions for misdemeanors has been questioned,

**1. Texas Decisions.** — *Hill v. State*, 10 Tex. App. 618; *Wade v. State*, 12 Tex. App. 358; *Monk v. State*, 27 Tex. App. 450.

**2. Nature and Origin of Right.** — 33 Edw. I., stat. 4 (1305). See *supra*, this section, *Peremptory Challenges* — *Rights of State*.

**3. England.** — Anonymous, 1 Vent. 309; Co. Litt. 156b; 2 Hale P. C. 271; 2 Hawk. P. C. 580; 4 Black. Com. 353; Bac. Abr., tit. Juries, E. 10.

*United States.* — *U. S. v. Shackleford*, 18 How. (U. S.) 588.

*Georgia.* — *Sealy v. State*, 1 Ga. 216, 44 Am. Dec. 641.

*New York.* — *Waterford, etc., Turnpike Co. v. People*, 9 Barb. (N. Y.) 161.

*North Carolina.* — *State v. Bone*, 7 Jones L. (52 N. Car.) 121.

*Pennsylvania.* — *Com. v. Marrow*, 3 Brews. (Pa.) 409.

**4. Right Limited to Prosecution.** — *State v. Bone*, 7 Jones L. (52 N. Car.) 121.

**5. Practice in United States** — *North Carolina.* — *State v. Craton*, 6 Ired. L. (28 N. Car.) 164; *State v. Jones*, 80 N. Car. 415, 88 N. Car. 671; *State v. Hensley*, 94 N. Car. 1021; *State v. Lytle*, 5 Ired. L. (27 N. Car.) 58; *State v. Cockman*, 2 Winst. L. (60 N. Car.) 95; *State v. Bone*, 7 Jones L. (52 N. Car.) 121.

*Pennsylvania.* — *Jewell v. Com.*, 22 Pa. St. 94; *Haines v. Com.*, 100 Pa. St. 317; *Smith v. Com.*, 100 Pa. St. 324; *Com. v. Maryland*, 29 Leg. Int. (Pa.) 150; *Com. v. Keenan*, 10 Phila. (Pa.) 194, 30 Leg. Int. (Pa.) 416; *Com. v. Noonan*, 15 Phila. (Pa.) 372, 38 Leg. Int. (Pa.) 184; *Com. v. Todd*, 1 Pa. Co. Ct. 416; *Com. v. Joliffe*, 7 Watts (Pa.) 585.

*South Carolina.* — *State v. Stephens*, 13 S. Car. 285; *State v. Barrontine*, 2 Nott & M. (S. Car.) 553; *State v. Wise*, 7 Rich. L. (S. Car.) 412.

See also *Stoner v. State*, 4 Mo. 368.

**6. United States Courts.** — The right was recognized in *U. S. v. Marchant*, 12 Wheat. (U. S.) 480, and *U. S. v. Wilson*, Baldw. (U. S.) 78. In *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207, the court divided upon the question; in *U. S. v. Shackleford*, 18 How. (U. S.) 588, it was stated to be dependent upon the state practice; but in *U. S. v. Butler*, 1 Hughes (U. S.) 457, it was decided by a court sitting in the District of South Carolina that such right no longer existed, in view of the right of peremptory challenge given to the state.

**7. Effect of Right of Peremptory Challenge.** — *Warren v. Com.*, 37 Pa. St. 45; *Haines v. Com.*, 100 Pa. St. 317; *Com. v. O'Brien*, 140 Pa. St. 555; *Com. v. Marra*, 8 Phila. (Pa.) 440; *State v. McNinch*, 12 S. Car. 95; *State v. Stephens*, 13 S. Car. 285.

**8. Zell v. Com.**, 94 Pa. St. 258.

And it was held that the right of peremptory challenge still remained to the prosecution even after the court had disallowed the challenge for cause shown by the prosecution at the end of the panel. *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 196.

**9. Mathis v. State**, 31 Fla. 291; *Reynolds v. State*, 1 Ga. 222; *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641.

**10. Prosecutions for Felony.** — *Zell v. Com.*, 94 Pa. St. 258; *Haines v. Com.*, 100 Pa. St. 317; *Com. v. Marra*, 8 Phila. (Pa.) 440; *Com. v. Noonan*, 15 Phila. (Pa.) 373, 38 Leg. Int. (Pa.) 184; *Com. v. Joliffe*, 7 Watts (Pa.) 585; *State v. McNinch*, 12 S. Car. 94; *State v. Wise*, 7 Rich. L. (S. Car.) 412; *State v. Barrontine*, 2 Nott & M. (S. Car.) 553.

In *North Carolina* the right to stand jurors aside exists in capital cases. *State v. Jones*, 88 N. Car. 671.



it seems to be settled that it exists in such cases as well as in prosecutions for felony.<sup>1</sup>

**Special Veniremen.** — Special veniremen as well as regular jurors may be required to stand aside.<sup>2</sup>

**e. LIMIT AS TO NUMBER.** — No restriction seems generally to have been exercised as to the number on the panel who may be required to stand aside.<sup>3</sup> In *North Carolina*, however, it is stated that the right is to be exercised under the supervision of the court, which may interfere if the practice is resorted to in the case of an unreasonable number.<sup>4</sup>

**f. ASSIGNMENT OF CAUSE OF CHALLENGE.** — The cause of challenge need not be assigned by the prosecution until the whole panel is gone through,<sup>5</sup> but after the panel has been gone through without forming a jury, the members thereof who have been stood aside by the prosecution should be recalled, in order that a cause of challenge may be assigned or that they may be tendered to the prisoner, before another venire can be resorted to.<sup>6</sup> The jurors may be recalled in the order in which they were required to stand aside.<sup>7</sup>

**7. Talesmen and Additional Jurors** — **a. IN GENERAL.** — Both at common law and under statutes, if a full jury does not appear, or is reduced by challenge or otherwise, the court, of its own motion, or on the application of either party, may command the service of as many efficient persons as will complete the jury, the persons thus procured being termed talesmen, additional jurors, special veniremen, etc.<sup>8</sup> A talesman, properly so called, cannot sit in any cause except the one for which he is returned;<sup>9</sup> but the term is

**1. Misdemeanors.** — *Haines v. Com.*, 100 Pa. St. 317; *Smith v. Com.*, 100 Pa. St. 329; *Com. v. O'Brien*, 140 Pa. St. 555; *Com. v. Fry*, 5 Lanc. L. Rev. 75; *Com. v. Keenan*, 10 Phila. (Pa.) 194, 30 Leg. Int. (Pa.) 416; *Com. v. Magee*, 10 Phila. (Pa.) 201, 31 Leg. Int. (Pa.) 36; *Com. v. Cunningham*, 8 W. N. C. (Pa.) 354; *Com. v. Noonan*, 15 Phila. (Pa.) 373, 38 Leg. Int. (Pa.) 184; *Reg. v. McGowen*, 11 Ir. C. L. 207; *Reg. v. Dougall*, 18 L. C. Jur. 85; *Reg. v. Benjamin*, 4 U. C. C. P. 179; *Reg. v. Felloses*, 19 U. C. Q. B. 48.

**2. Special Veniremen.** — *State v. Jones*, 97 N. Car. 469; *Rudy v. Com.*, 128 Pa. St. 500; *Com. v. O'Brien*, 140 Pa. St. 555. Compare *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

**3. Number Who May Be Stood Aside.** — See *Mansell v. Reg.*, 8 El. & Bl. 54, 92 E. C. L. 54; *Com. v. Marrow*, 3 Brews. (Pa.) 409.

**4. State v. Hensley**, 94 N. Car. 1021; *State v. Sloan*, 97 N. Car. 499; *State v. Arthur*, 2 Dev. L. (13 N. Car.) 217; *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 206. See also *State v. Jones*, 97 N. Car. 469.

**5. Assignment of Cause of Challenge.** — *Bac. Abr.*, tit. Juries, E. 10; 2 Hale P. C. 271; 4 Black. Com. 353; *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; *Com. v. Keenan*, 10 Phila. (Pa.) 194, 30 Leg. Int. (Pa.) 416.

It was, however, held not to be error to refrain from calling twelve of the panel, who were deliberating in another case, before recalling a juror who had been stood aside. *Com. v. Weber*, 167 Pa. St. 153.

**6. Recalling Jurors Stood Aside.** — *State v. Shaw*, 3 Ired. L. (25 N. Car.) 532; *State v. Washington*, 90 N. Car. 664; *State v. Benton*, 2 Dev. & B. L. (19 N. Car.) 196; *State v. Arthur*, 2 Dev. L. (13 N. Car.) 217.

**Failure to Recall Juror.** — The defendant cannot ask for a new trial on the ground that one

of the panel, who was stood aside, was not again called, he making no motion to that effect, and the juror being in fact one of his witnesses. *State v. Lytle*, 5 Ired. L. (27 N. Car.) 58.

**7. Order of Recall.** — *Reg. v. Geach*, 9 C. & P. 499, 38 E. C. L. 195; *State v. Boon*, 82 N. Car. 647; *Com. v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670.

**The Prosecution Cannot Stand Aside a Juror a Second Time.** — *Morin v. Reg.*, 18 Can. Sup. Ct. 407.

**After Challenge by the State for Cause Is Overruled**, and the juror has been accepted by the defendant, the state cannot require him to stand aside. *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

**8. Talesmen and Additional Jurors** — *England*. — 3 Black. Com. 364; *Bac. Abr.*, tit. Juries, C; 1 Chitty's Crim. Law 518; *Sweet's L. Dict. Florida*. — *O'Connor v. State*, 9 Fla. 225.

*Maryland*. — *Burk v. State*, 2 Har. & J. (Md.) 426.

*Michigan*. — *People v. Considine*, 105 Mich. 149.

*New Jersey*. — *State v. Aaron*, 4 N. J. L. 263.

*New York*. — *Shields v. Niagara Sav. Bank*, 3 Hun (N. Y.) 477.

*Pennsylvania*. — *Com. v. Eaton*, 8 Phila. (Pa.) 428.

*South Carolina*. — *State v. Williams*, 2 Hill L. (S. Car.) 381.

*West Virginia*. — *State v. Mills*, 33 W. Va. 455.

**9. Talesmen to Serve Only in Particular Case.** — *Wallace v. Columbia*, 48 Me. 436; *Howland v. Gifford*, 1 Pick. (Mass.) 43, note; *Amherst v. Hadley*, 1 Pick. (Mass.) 38; *Shields v. Niagara Sav. Bank*, 3 Hun (N. Y.) 477; *People v. Mallon*, 3 Lans. (N. Y.) 224.



stated to be broad enough to include those summoned to supply a deficiency in the regular panel.<sup>1</sup>

Special and Struck Juries. — The right to summon talesmen or additional jurors exists in the case of a special or struck jury as in other cases.<sup>2</sup>

*b. STATUTORY ENLARGEMENT OF POWERS OF COURT.* — Irrespective of the common-law mode of procuring additional jurors by summoning talesmen, it is generally provided by legislation in the several states that additional jurors may be procured by means of a special venire or similar process.<sup>3</sup> Formerly there was no right to tales jurors except to complete a jury from the original panel, and it was held to be necessary that at least one member of such panel be in attendance in order that talesmen might be resorted to.<sup>4</sup> This view, however, appears not to control generally at the present day in view of the statutory modifications of the common law, and the fact that no member of the regular panel is present no longer prevents the procurement of additional jurors.<sup>5</sup>

*c. CONDITIONS WHICH WILL AUTHORIZE* — (1) *No Regular Panel in Attendance.* — It has been held under the various statutes that when no regular panel has been drawn or summoned or is in attendance, the court may direct the procurement of sufficient jurors to transact its business.<sup>6</sup>

1. Nesbit *v. People*, 19 Colo. 441.

2. *Special and Struck Juries* — *England.* — Snook *v. Southwood*, R. & M. 429, 21 E. C. L. 482; Rex *v. Hill*, 1 C. & P. 667, 11 E. C. L. 521; Rex *v. Tipping*, 1 C. & P. 668, 11 E. C. L. 521; Rex *v. Hunt*, 4 B. & Ald. 430, 6 E. C. L. 547; Rex *v. Perry*, 5 T. R. 453; Buron *v. Denman*, 1 Exch. 769; Atty.-Gen. *v. Parsons*, 2 M. & W. 23; Sparrow *v. Turner*, 2 Wils. C. Pl. 366; Gailiff *v. Bourne*, 2 M. & Rob. 100; Marsh *v. Coppock*, 9 C. & P. 480, 38 E. C. L. 193. Compare *British Museum v. White*, 3 C. & P. 289, 14 E. C. L. 310.

*United States.* — Anonymous, 2 Dall. (U. S.) 382.

*Georgia.* — Winter *v. Muscogee R. Co.*, 11 Ga. 438.

*Louisiana.* — State *v. Cannon*, (La. 1894) 15 So. Rep. 626.

*Minnesota.* — Branch *v. Dawson*, 36 Minn. 193.

*Missouri.* — Barr *v. Kansas City*, 121 Mo. 22.

*New Jersey.* — Den *v. Evalul*, 1 N. J. L. 328.

*New York.* — People *v. Tweed*, (Supm. Ct.) 50 How. Pr. (N. Y.) 286.

*Ohio.* — Cleveland, etc., R. Co. *v. Stanley*, 7 Ohio St. 155; Hulse *v. State*, 35 Ohio St. 421.

*Pennsylvania.* — Carter *v. Ramsey*, 1 Del. Co. Rep. (Pa.) 423; Hubley *v. White*, 2 Yeates (Pa.) 133; Jordan *v. Meredith*, 3 Yeates (Pa.) 318, 2 Am. Dec. 373, 1 Binn. (Pa.) 27; Atlee *v. Shaw*, 4 Yeates (Pa.) 236.

3. *Statutory Enlargement of Powers of Court* — *Arizona.* — Territory *v. Clanton*, (Ariz. 1889) 20 Pac. Rep. 94.

*Florida.* — Gladden *v. State*, 13 Fla. 623.

*Georgia.* — Turner *v. State*, 70 Ga. 765.

*Illinois.* — Gropp *v. People*, 67 Ill. 154; Lincoln *v. Stowell*, 73 Ill. 246; Rockford Ins. Co. *v. Nelson*, 75 Ill. 548; Blemer *v. People*, 76 Ill. 265; People *v. Madison County*, 23 Ill. App. 386.

*Indiana.* — Merrick *v. State*, 63 Ind. 327; Pierce *v. State*, 67 Ind. 354; Wood *v. State*, 92 Ind. 269; Myers *v. Moore*, 3 Ind. App. 226. And see also Winsett *v. State*, 57 Ind. 26; Everts *v. State*, 48 Ind. 422.

*Kansas.* — Trembley *v. State*, 20 Kan. 116; State *v. Geary*, 58 Kan. 502.

*Louisiana.* — State *v. West*, 35 La. Ann. 28; State *v. Wright*, 41 La. Ann. 600; State *v. Foreman*, 45 La. Ann. 1047; State *v. Thibodaux*, 49 La. Ann. 15.

*Minnesota.* — Steele *v. Maloney*, 1 Minn. 347; State *v. Stokely*, 16 Minn. 282; State *v. McCartney*, 17 Minn. 76; State *v. Maben*, 45 Minn. 56.

*Mississippi.* — Russell *v. State*, 53 Miss. 367.

*Missouri.* — Barr *v. Kansas City*, 121 Mo. 22; State *v. Clark*, 121 Mo. 500.

*Montana.* — Dupont *v. McAdow*, 6 Mont. 226.

*New Mexico.* — Territory *v. Carmody*, 8 N. Mex. 376.

*New York.* — Gaffney *v. People*, 50 N. Y. 416.

*North Carolina.* — State *v. Boon*, 80 N. Car. 461; State *v. Cody*, 119 N. Car. 908, 56 Am. St. Rep. 692.

*Ohio.* — Bach *v. State*, 38 Ohio St. 664.

*Texas.* — White *v. State*, 16 Tex. 206; Gulf, etc., R. Co. *v. Greenlee*, 70 Tex. 553; Taylor *v. State*, 3 Tex. App. 170; Garza *v. State*, 3 Tex. App. 287; Wasson *v. State*, 3 Tex. App. 474; Drake *v. State*, 5 Tex. App. 649; Pocket *v. State*, 5 Tex. App. 552; Cordova *v. State*, 6 Tex. App. 207; Smith *v. State*, 21 Tex. App. 277; Rodriguez *v. State*, 23 Tex. App. 503.

*Wisconsin.* — Territory *v. Doty*, 1 Pin. (Wis.) 396.

4. *Necessity of Attendance of Member of Original Panel.* — 1 Chitty's Crim. Law 518; Bac. Abr., tit. Juries, C; Rogers *v. State*, 33 Ind. 543; Fuller *v. State*, 1 Blackf. (Ind.) 63; Barnes *v. State*, 60 Miss. 355; Williams *v. Com.*, 91 Pa. St. 493.

5. Everts *v. State*, 48 Ind. 422; Bennett *v. Tintic Iron Co.*, 9 Utah 291. See also Mackey *v. People*, 2 Colo. 13; Hunt *v. Scobie*, 6 B. Mon. (Ky.) 469; Vanderwerker *v. People*, 5 Wend. (N. Y.) 530; Reed *v. State*, 15 Ohio 217. And see *infra*, this subsection, *Conditions Which Will Authorize.*

6. *No Regular Panel in Attendance.* — People *v. Stuart*, 4 Cal. 218; People *v. Vance*, 21 Cal. 403; People *v. Williams*, 43 Cal. 344; Leahy *v. Southern Pac. R. Co.*, 65 Cal. 150; Blemer



**Discharge of Regular Panel.** — And it is generally held that additional jurors may be obtained even though the want of jurors is due to the action of the court in discharging the regular panel.<sup>1</sup>

(2) *Exhaustion of Panel.* — Where the panel in attendance has become exhausted so that a jury cannot be made up therefrom, a proper case is presented for bringing in talesmen, additional jurors, or the like.<sup>2</sup> So it is proper to order additional jurors in case of nonattendance of regular jurors,<sup>3</sup> or where exhaustion results because jurors are excluded for disqualification or incompetency,<sup>4</sup> or when some of the jurors are legally excused.<sup>5</sup>

**Exhaustion Generally Necessary.** — It has been held that the necessity for summoning talesmen should be avoided if possible;<sup>6</sup> and as a general rule each

*v. People*, 76 Ill. 265; *Shaw v. Wood*, 8 Ind. 518; *Heyl v. State*, 109 Ind. 589; *Chandler v. Colcord*, 1 Okla. 260. *Compare Hamlin v. Fletcher*, 64 Ga. 549; *Wilson v. State*, 42 Ind. 224; *v. Maben*, 45 Minn. 56; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389.

**Jury List Destroyed by Fire.** — See *State v. Arthur*, 39 Iowa 631.

**Although the First Venire Has Not Been Returned**, the justice may issue another. *Sebring v. Wheedon*, 8 Johns. (N. Y.) 460; *Blanchard v. Richly*, 7 Johns. (N. Y.) 198.

**A Second Jury** cannot be summoned in the absence of statutory authority. *Dean v. State*, 100 Ala. 102.

**1. Discharge of Regular Panel** — *United States*. — *St. Clair v. U. S.*, 154 U. S. 134.

*Colorado*. — *Mackey v. People*, 2 Colo. 13.

*Illinois*. — *Blemer v. People*, 76 Ill. 265. See also *Borelli v. People*, 164 Ill. 549.

*Indiana*. — *Shaw v. Wood*, 8 Ind. 518. *Compare Ohio*, etc., *R. Co. v. Trapp*, 4 Ind. App. 69.

*Kentucky*. — *Hunt v. Scobie*, 6 B. Mon. (Ky.) 469.

*Minnesota*. — *Steele v. Maloney*, 1 Minn. 347; *State v. McCartney*, 17 Minn. 76.

*Nebraska*. — *Barney v. State*, 49 Neb. 515.

*Ohio*. — *Reed v. State*, 15 Ohio 217; *Calkins v. State*, 18 Ohio St. 369.

*Utah*. — *Bennett v. Tintic Iron Co.*, 9 Utah 29.

*Washington*. — *Thompson v. Territory*, 1 Wash. Ter. 547.

See also *Simmons v. Cunningham*, (Idaho 1895) 39 Pac. Rep. 1109; *State v. Guidry*, 28 La. Ann. 630.

*Contra*. — *Judge v. State*, 8 Ga. 173; *Mosseau v. Veeder*, 2 Oregon 113.

**After the Discharge of a Trial Jury** for disagreement or a like reason, the court may, in a proper case, procure a jury for the transaction of its business. *Woolfolk v. State*, 85 Ga. 69; *Pierce v. State*, 67 Ind. 354; *Davis v. State*, 51 Neb. 301; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *Cole v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 573.

**2. Exhaustion of Regular Panel** — *United States*. — *Lovejoy v. U. S.*, 128 U. S. 171; *St. Clair v. U. S.*, 154 U. S. 134. See also *U. S. v. Cornell*, 2 Mason (U. S.) 91.

*Alabama*. — *Smith v. State*, 55 Ala. 1; *Kansas City*, etc., *R. Co. v. Smith*, 90 Ala. 25, 24 Am. St. Rep. 753.

*California*. — *People v. Coyodo*, 40 Cal. 586.

*Colorado*. — *Stratton v. People*, 5 Colo. 276.

*Connecticut*. — *Sumner v. Rhodes*, 14 Conn. 136.

*Illinois*. — *Stone v. People*, 3 Ill. 326; *Gropp v. People*, 67 Ill. 154.

*Indiana*. — *Bradley v. Bradley*, 45 Ind. 67.

*Kansas*. — *Trembley v. State*, 20 Kan. 116.

*Kentucky*. — *McClermand v. Com.*, (Ky. 1889) 12 S. W. Rep. 148.

*Louisiana*. — *State v. Caulfield*, 23 La. Ann. 148; *State v. Gallagher*, 26 La. Ann. 46; *State v. Ferray*, 22 La. Ann. 424; *State v. Desmouchet*, 32 La. Ann. 1241; *State v. Ross*, 30 La. Ann. 1154; *State v. Revells*, 35 La. Ann. 302.

*Minnesota*. — *State v. Brown*, 12 Minn. 538.

*Mississippi*. — *Fortenberry v. State*, 55 Miss. 403; *Story v. State*, 68 Miss. 609.

*Missouri*. — *State v. Buckner*, 25 Mo. 167; *Kirkwood v. Autenreith*, 11 Mo. App. 515.

*Nebraska*. — *Dodge v. People*, 4 Neb. 220.

*New Jersey*. — *Smith v. Clayton*, 29 N. J. L. 357.

*New York*. — *Gaffney v. People*, 50 N. Y. 416; *Ruloff's Case*, (Oyer & T. Ct.) 11 Abb. Pr. N. S. (N. Y.) 245; *People v. Mallon*, 3 Lans. (N. Y.) 224.

*North Carolina*. — *State v. Brogden*, 111 N. Car. 656; *State v. Stanton*, 118 N. Car. 1182.

*Pennsylvania*. — *Hartzell v. Com.*, 40 Pa. St. 462; *Brown v. Com.*, 76 Pa. St. 319.

*South Carolina*. — *State v. Anderson*, 26 S. Car. 599; *State v. Briggs*, 27 S. Car. 81.

*Texas*. — *Brotherton v. State*, 30 Tex. App. 369; *Weathersby v. State*, 29 Tex. App. 278; *Thompson v. State*, 33 Tex. Crim. 217.

*Virginia*. — *Curtis v. Com.*, 87 Va. 589.

*Washington*. — *State v. Cushing*, 17 Wash. 544; *Blanton v. State*, 1 Wash. 265; *State v. So Ho Ge*, 1 Wash. 275, 276.

*Wisconsin*. — *Olson v. Solveson*, 71 Wis. 663.

**3. Nonattendance of Jurors.** — *Gropp v. People*, 67 Ill. 154; *Emerick v. Sloan*, 18 Iowa 139; *State v. Geary*, 58 Kan. 502; *State v. Aaron*, 4 N. J. L. 263; *Patterson v. State*, 48 N. J. L. 381; *Curtis v. Com.*, 87 Va. 589. *Compare Mueller v. Rebhan*, 94 Ill. 142.

**4. Deficiency Caused by Exclusion of Jurors.** — *State v. Harris*, 64 Iowa 287; *Brentner v. Chicago*, etc., *R. Co.*, 68 Iowa 530; *Kirkwood v. Autenreith*, 11 Mo. App. 515; *Wykoff v. Loeber*, 5 Mont. 535; *Morehead v. State*, 34 Ohio St. 212. *Compare Atkins v. State*, 16 Ark. 568; *Stratton v. People*, 5 Colo. 276.

**5. Deficiency Caused by Excusing Jurors.** — *Deig v. Morehead*, 110 Ind. 451; *Logansport v. Dykeman*, 116 Ind. 15; *Emerick v. Sloan*, 18 Iowa 139; *State v. Laughlin*, 73 Iowa 351; *Trembley v. State*, 20 Kan. 117; *State v. Somnier*, 33 La. Ann. 237; *Smith v. Clayton*, 29 N. J. L. 357.

**6. Summoning Talesmen to Be Avoided.** — *Lambertson v. People*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 200.



venire should be perused and exhausted before recourse can be had to another venire or to talesmen,<sup>1</sup> though in various jurisdictions, under particular statutes, this is not regarded as necessary.<sup>2</sup> The exhaustion required involves the calling or presentation of all the jurors of the previous venire who are present in court and not otherwise engaged;<sup>3</sup> but the fact that an attachment is issued for absent jurors does not render it necessary to await the return of the attachment.<sup>4</sup>

(3) *Regular Panel Otherwise Engaged.* — The fact that the members of the regular panel are engaged in the consideration of another cause has likewise been held to authorize the procuring of additional jurors.<sup>5</sup>

(4) *Insufficient Number Summoned.* — If a sufficient number of jurors, although drawn, are not summoned, additional jurors may be obtained.<sup>6</sup>

(5) *Quashal of Venire.* — When, upon a challenge to the array, the panel is quashed, a new jury may be procured by the exercise of the statutory power to procure additional jurors.<sup>7</sup>

(6) *Presumption of Existence of Conditions.* — It will be presumed, in the absence of any showing to the contrary, that the summoning of talesmen or issuance of a special venire was justified by the existing conditions.<sup>8</sup>

d. ANTICIPATION OF REQUIREMENT. — Where, from the prominence of a case, or from newspaper reports or otherwise, there is reason to believe that there will be difficulty in procuring a jury from the regular panel, talesmen or additional jurors may be summoned in anticipation of probable exhaustion of

1. *Previous Venire to Be Exhausted* — *United States*. — U. S. v. Watkins, 3 Cranch (C. C.) 441.

*Alabama.* — *Barker v. Bell*, 49 Ala. 284.

*Colorado.* — *Stratton v. People*, 5 Colo. 276.

*Florida.* — *Collins v. State*, 31 Fla. 574.

*Idaho.* — *People v. Dunn*, 1 Idaho 74.

*Indiana.* — *Rogers v. State*, 33 Ind. 543; *Wilson v. State*, 42 Ind. 224.

*Louisiana.* — *Soniati v. Supple*, 48 La. Ann. 296. See also *State v. Red*, 32 La. Ann. 819.

*North Carolina.* — *State v. Washington*, 90 N. Car. 664.

*Texas.* — *Sharpe v. State*, 17 Tex. App. 487; *Hall v. State*, 28 Tex. App. 146.

See also *Blanton v. State*, 1 Wash. 265.

2. *Previous Venire Need Not Be Exhausted.* — *Levy v. Wilson*, 69 Cal. 111; *People v. Vincent*, 95 Cal. 425; *People v. Durrant*, 116 Cal. 179; *State v. Gleason*, 88 Mo. 582; *Foster's Case*, (Supm. Ct.) 13 Abb. Pr. N. S. (N. Y.) 372, note; *Deon v. State*, 37 Tex. Crim. 506; *Weathersby v. State*, 29 Tex. App. 278, *overruling Cahn v. State*, 27 Tex. App. 709, and *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389. And see *Thompson v. State*, 33 Tex. Crim. 217.

3. *What Constitutes Exhaustion.* — *Bradley v. Bradley*, 45 Ind. 67; *McClelland v. Com.*, (Ky. 1889) 12 S. W. Rep. 148; *State v. Atkinson*, 29 La. Ann. 543. And see *Ezell v. State*, 102 Ala. 101; *State v. Ross*, 30 La. Ann. 1154.

4. *Awaiting Return of Attachment.* — *Barthet v. Estebene*, 5 La. Ann. 315; *Fletcher v. Henley*, 13 La. Ann. 191; *State v. Brown*, 12 Minn. 538; *Hudson v. State*, 28 Tex. App. 323; *Habel v. State*, 28 Tex. App. 588; *Deon v. State*, 37 Tex. Crim. 506.

5. *Jurors Engaged in Other Cause* — *District of Columbia.* — U. S. v. Bowen, 3 MacArthur (D. C.) 64.

*Georgia.* — *Brown v. Autrey*, 78 Ga. 753.

*Indiana.* — *Bradley v. Bradley*, 45 Ind. 67; *Everts v. State*, 48 Ind. 422; *Winsett v. State*, 57 Ind. 26.

*Louisiana.* — *Rondeau v. New Orleans Imp., etc., Co.*, 15 La. 160.

*Michigan.* — *People v. Craig*, 48 Mich. 502.

*Mississippi.* — *Barnes v. State*, 60 Miss. 355.

*Missouri.* — *State v. Knight*, 61 Mo. 373; *State v. Jones*, 61 Mo. 232; *State v. Pitts*, 58 Mo. 556; *Evans v. Voght*, 8 Mo. App. 576.

*Montana.* — *O'Donnell v. Bennett*, 12 Mont. 242, *distinguishing Dupont v. McAdow*, 6 Mont. 227, decided under a former statute.

But see *Dean v. State*, 100 Ala. 102. See also *Brown v. Autrey*, 78 Ga. 753, as to waiver of objection.

*Return of Absentees Pending Formation of Jury.*

— It has been held that where a jury engaged on another case reports and is discharged pending the formation of the jury for which talesmen were summoned, the call under the regular venire must be resumed before continuing to form a jury from the talesmen. *State v. Creech*, 38 La. Ann. 480. But see *Myers v. Moore*, 3 Ind. App. 226; *Citizens' Nat. Bank v. Durrill*, 1 Mo. App. Rep. 429; *Prince v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 582.

6. *Insufficient Number Summoned.* — *People v. Devine*, 46 Cal. 46; *Territory v. Doty*, 1 Pin. (Wis.) 396.

7. *Quashal of Venire.* — *State v. Skinner*, 34 Kan. 258; *Dayton v. Warren*, 10 Minn. 233; *Purvis v. State*, 71 Miss. 706; *Boyer v. Teague*, 106 N. Car. 576, 19 Am. St. Rep. 547. See also *Russell v. State*, 53 Miss. 367.

*Effect of Statute.* — A statute empowering the court to summon jurors from the bystanders on sustaining a challenge to the array by the defendant does not authorize such action upon sustaining a challenge by the state. *Williams v. Com.* 91 Pa. St. 493.

8. *Presumption of Propriety of Court's Action.* — *Fanning v. People*, 10 Ill. App. 70; *People v. Madison County*, 23 Ill. App. 386; *Heyl v. State*, 109 Ind. 589; *State v. Laughlin*, 73 Iowa 351; *State v. Holmes*, 12 Wash. 169.



the panel;<sup>1</sup> and it seems that the sheriff has power of his own volition so to anticipate the requirement.<sup>2</sup>

*e.* NUMBER OF TALESMEN OR ADDITIONAL JURORS. — Unless the law names the number of talesmen who may be procured, there is generally a discretion to procure any number deemed necessary to complete the panel;<sup>3</sup> and statutory regulations have been construed as having this effect.<sup>4</sup> If the order does not state the number, the sheriff may exercise his discretion in regard thereto.<sup>5</sup>

*f.* QUALIFICATIONS. — The qualifications of a talesman are generally the same as those required in the case of regular jurors.<sup>6</sup> Grand jurors are competent as talesmen to try criminal cases,<sup>7</sup> and one is not disqualified to serve by the fact that he was on a previous panel which was quashed.<sup>8</sup> One previously summoned as a talesman and not put upon the defendant may likewise serve,<sup>9</sup> as may one who was included in the regular panel;<sup>10</sup> but one who has been excused should not be required to serve as a talesman.<sup>11</sup>

**IX. SPECIAL AND STRUCK JURIES — 1. In England.** — What were known as special juries were resorted to in the English courts at an early period,<sup>12</sup> the mode of obtaining such a jury being for the officer to prepare a list of forty-eight good and sufficient men, of whom twelve were struck out by the attor-

**1. Anticipation of Requirement — England.** — *Rex v. Dolby*, 3 Dowl. & R. 311, 2 B. & C. 104, 9 E. C. L. 43, 1 L. J. K. B. 241, 24 Rev. Rep. 647.

*Arkansas.* — *Mabry v. State*, 50 Ark. 492.

*Colorado.* — *Nesbit v. People*, 19 Colo. 441.

*Connecticut.* — *State v. Allen*, 47 Conn. 121.

*Florida.* — *O'Connor v. State*, 9 Fla. 215; *Lambright v. State*, 34 Fla. 564.

*Georgia.* — *Cruce v. State*, 59 Ga. 83; *Bird v. State*, 14 Ga. 43.

*Louisiana.* — *State v. Moncla*, 39 La. Ann. 868; *State v. Green*, 43 La. Ann. 402; *State v. West*, 35 La. Ann. 28.

*Nebraska.* — *Pflueger v. State*, 46 Neb. 493; *Davis v. State*, 51 Neb. 301.

*New Jersey.* — *Patterson v. State*, 48 N. J. L. 381.

*New York.* — *People v. Colt*, 3 Hill (N. Y.) 432.

**2. Power of Sheriff.** — *State v. Allen*, 47 Conn. 121.

**Actual Calling in Box.** — There is no prejudice in summoning talesmen in advance, provided they are not actually called into the box to the exclusion of the jurors composing the regular panel. *Nesbit v. People*, 19 Colo. 441.

**3. Number of Tales Jurors.** — *McGuffie v. State*, 17 Ga. 407; *State v. Somnier*, 33 La. Ann. 237; *State v. Buckner*, 25 Mo. 167.

**4. Statutory Regulations.** — *Linehan v. State*, 113 Ala. 70; *Com. v. Twitchell*, 1 Brews. (Pa.) 551; *Com. v. Eaton*, 8 Phila. (Pa.) 428.

**5. Discretion of Sheriff.** — *State v. Lamon*, 3 Hawks (10 N. Car.) 175.

**Sheriff's Mistake as to Number Immaterial.** — See *People v. Thurston*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 49.

**The Practice at Common Law** was to order the summoning of only so many talesmen as the jury lacked. *Burk v. State*, 2 Har. & J. (Md.) 426; *Chitty's Crim. Law* 519. And see *State v. Williams*, 2 Hill L. (S. Car.) 381.

**In Capital Cases**, at common law, the tales might be granted for a larger number than the original process. *Chitty's Crim. Law* 519; 2

*Hale P. C.* 266; *Burk v. State*, 2 Har. & J. (Md.) 426; *Com. v. Eaton*, 8 Phila. (Pa.) 428.

**6. Qualifications.** — See *supra*, this section, *Challenges and Exclusion for Cause.*

**Members of Police Jury.** — Under the *Louisiana* Act of 1873, members of the police jury may be drawn as talesmen in criminal trials. *State v. Daniel*, 31 La. Ann. 91.

**In North Carolina** (under *Battle's Rev. Stat.*, c. 17, § 229a, and p. 860, addenda to Code; Code N. Car. 1883, § 1733), talesmen, in addition to possessing the qualifications of regular jurors, were required to be freeholders. *Lee v. Lee*, 71 N. Car. 139; *State v. Ragland*, 75 N. Car. 12; *State v. Whitley*, 88 N. Car. 691; *State v. Hargrave*, 100 N. Car. 484. And see *State v. Wincroft*, 76 N. Car. 38.

And in the above state it is held that exemptions from jury service do not apply to talesmen. *State v. Hogg*, 2 Murph. (6 N. Car.) 319; *State v. Williams*, 1 Dev. & B. L. (18 N. Car.) 373; *State v. Whitford*, 12 Ired. L. (34 N. Car.) 99; *State v. Willard*, 79 N. Car. 660.

**7. Grand Juror Competent.** — *Rouse v. State*, 4 Ga. 136.

**8. Members of Quashed Panel.** — *Dumas v. State*, 65 Ga. 472; *Woolfolk v. State*, 85 Ga. 69; *State v. Degonia*, 69 Mo. 485; *Smith v. State*, 4 Neb. 277; *Caperton v. Nickel*, 4 W. Va. 173. See also *supra*, this title, *Challenges to the Array — Effect of Sustaining Challenge.*

**9. Person Previously Summoned as Talesman.** — *Woolfolk v. State*, 85 Ga. 69; *State v. Plum*, 49 Kan. 679, in which latter case the court named talesmen and included one who had been previously selected by the sheriff as a talesman. See also *Walker v. Collins*, 50 Fed. Rep. 737.

**10. Member of Regular Panel.** — *Campbell v. State*, 30 Tex. App. 645; *Brennan v. State*, 33 Tex. 266; *Adams v. State*, 35 Tex. Crim. 285.

**11. Juror Excused.** — *Golding v. Steamer C. Castro*, 20 La. Ann. 458.

**12. Special Juries in England.** — *Rex v. Edmonds*, 4 B. & Ald. 476, 6 E. C. L. 567. And see *Anonymous*, 1 Salk. 405, 3 Black. Com. 357.



neys on each side, the remaining twenty-four being returned to try the issue.<sup>1</sup> It was held that in making the list the officer should exercise his judgment so as to procure an intelligent class of men, which was generally done by taking merchants within the city of London and persons of the description of esquires in the counties.<sup>2</sup>

2. In the United States. — In the United States the term "struck jury" is generally applied to a jury which is obtained by striking names from a list as in the case of the English special jury, while the term "special jury" is used, with some lack of uniformity, with reference to any other jury or panel summoned for the trial of a particular case.<sup>3</sup> So what is termed a special jury is sometimes authorized in order to obtain persons acquainted with the particular class of matters involved in the case.<sup>4</sup> Sometimes the term "special jury," as used in a statute authorizing such a jury whenever the business of the court requires it, seems to refer merely to an ordinary jury called for a special emergency.<sup>5</sup>

**Special Jury and Special Venire.** — So far as the purpose of a special jury, so called, is merely to supply any deficiency in the number of regular jurors available, it seems to be practically the same as the special venire, the issuance of which is authorized in various states, sometimes when necessary to supply the want of a regular panel or a deficiency therein, and sometimes, in particular classes of cases, to avoid the possibility of the exhaustion of veniremen.<sup>6</sup> So in *Missouri* the terms "special jury" and "special venire" are apparently treated as interchangeable,<sup>7</sup> and in that state a special venire is regarded as proper in order to obtain a class of persons not interested in the question at issue.<sup>8</sup>

**Jury from Different County or Locality.** — Occasionally the statute provides that jurors may be procured from another county or locality than that in which the court is sitting, in order to avoid the influence of local prejudice.<sup>9</sup>

Under a New York Statute providing that a struck jury should be granted when

1. Tidd's Pr. (8th Am. ed.) 788.

2. See *Rex v. Edmonds*, 4 B. & Ald. 476, 6 E. C. L. 567; *Rex v. Wooler*, 1 B. & Ald. 193; *State v. Withrow*, 133 Mo. 500.

**Application for Purpose of Delay.** — Formerly under the English practice a party could, by having a jury struck, and then failing to summon it, have the trial delayed unless the other party summoned it. *Haldane v. Beauclerk*, 6 Dowl. & L. 642, 3 Exch. 658, 18 L. J. Exch. 227, 13 Jur. 326; *Hague v. Hall*, 5 M. & G. 693, 44 E. C. L. 363; *Holt v. Meddowcroft*, 4 M. & S. 467; *Montague v. Smith*, 17 Q. B. 688, 79 E. C. L. 688. This, however, was changed by statute. See *Cawley v. Knowles*, 16 C. B. N. S. 107, 111 E. C. L. 107. And see *Gray v. Knight*, 16 C. B. 143, 81 E. C. L. 143; *Stanbury v. Gillett*, 9 Bing. 319, 23 E. C. L. 290; *De Vere v. Wickers*, 11 Jur. 543; *White v. Eastern Union R. Co.*, 11 C. B. 875, 73 E. C. L. 875, 21 L. J. C. Pl. 112.

3. **Special and Struck Juries in United States.** — *Brown v. State*, 62 N. J. L. 666. And see *Hamlin v. State*, 67 Md. 333; *Riley v. Chicago*, etc., R. Co., 67 Minn. 165; *Cook v. State*, 24 N. J. L. 843; *Powell v. Whitaker*, (Pa. 1887) 7 Atl. Rep. 597; *McDermott v. Hoffman*, 70 Pa. St. 31; *Long v. Spencer*, 78 Pa. St. 303.

4. **To Obtain Persons Acquainted with Particular Class of Matters.** — *Golding v. Petit*, 27 La. Ann. 86; *Kellogg v. Clinton*, 28 La. Ann. 674; *Bruce v. Beall*, 100 Tenn. 573; *Nashville v. Sheperd*, 3 Baxt. (Tenn.) 373.

5. **Indiana Statute.** — *Wilson v. State*, 42 Ind.

224; *Evarts v. State*, 48 Ind. 422; *Winsett v. State*, 57 Ind. 26; *Pierce v. State*, 67 Ind. 354; *Merrick v. State*, 63 Ind. 327; *Heyl v. State*, 109 Ind. 589; *Myers v. Moore*, 3 Ind. App. 226; *Chandler v. Colcord*, 1 Okla. 260.

6. **Special Venire.** — See *supra*, this title, *Formation of Trial Jury — Talesmen and Additional Jurors*.

7. **Missouri Cases.** — *State v. Withrow*, 133 Mo. 500. And see *State v. Wisdom*, 84 Mo. 177; *State v. Leabo*, 89 Mo. 247.

8. *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Rose v. St. Charles*, 49 Mo. 509; *State v. Burns*, 54 Mo. 274.

**The Partiality of the Sheriff** is ground for ordering a "special jury" not selected by him, 3 Black. Com. 357; *Pacheco v. Hunsacker*, 14 Cal. 120; or, as stated in *Missouri*, for a "special venire," *State v. Leabo*, 89 Mo. 247.

9. **Jury from Other County or Locality — Kentucky.** — *Roberts v. Com.*, 94 Ky. 499; *Brafford v. Com.*, (Ky. 1891) 16 S. W. Rep. 710; *Massie v. Com.*, (Ky. 1896) 36 S. W. Rep. 550.

*New Jersey.* — *Deacon v. Shreve*, 23 N. J. L. 204; *Bell v. Vanriper*, 3 N. J. L. 103.

*New York.* — *Stryker v. Turnbull*, 3 Cai. (N. Y.) 103.

*Virginia.* — *Lawrence v. Com.*, 81 Va. 486; *Puryear v. Com.*, 83 Va. 51; *Waller v. Com.*, 84 Va. 492; *Wormeley v. Com.*, 10 Gratt. (Va.) 658; *Chahoon v. Com.*, 21 Gratt. (Va.) 822; *Sands v. Com.*, 21 Gratt. (Va.) 871; *Craft v. Com.*, 24 Gratt. (Va.) 602; *Page v. Com.*, 27 Gratt. (Va.) 954.



it appeared necessary in order to obtain a fair trial, or when it appeared to be required by the "importance or intricacy" of the case, it was held that a struck jury would be granted only in extreme cases,<sup>1</sup> and that such a jury would not generally be granted in New York city, since there it would not conduce to a fair trial.<sup>2</sup> The "importance" of the case, as coming within the statutory requirement, was held to be determined by the question whether the public interest was affected.<sup>3</sup> A case was held not to be of such "intricacy" as to require a struck jury because the jury had disagreed on a previous trial,<sup>4</sup> nor because the genuineness of a signature was involved,<sup>5</sup> nor because the case involved questions of the seaworthiness of a vessel and the seaman-ship of her master.<sup>6</sup>

**3. Powers of Legislature.** — It has been held that the legislature has full power to authorize a special or struck jury, and that such a jury is a legal one within the constitutional requirement of a trial by jury.<sup>7</sup> The legislature may likewise limit the number on the panel from which the jury is to be struck.<sup>8</sup>

**4. Application.** — For the court to order a special jury or panel upon its own motion, without any application therefor, has been held to be error.<sup>9</sup> The application for a special or struck jury should be at the time fixed by statute, if any time is so fixed,<sup>10</sup> and in any case it must be made in time to permit the summoning of the special jurors;<sup>11</sup> and it should be made before the organization of an ordinary jury has begun.<sup>12</sup> One who has demanded a

**1. Construction of New York Statute.** — *People v. McGuire*, (Supm. Ct.) 43 How. Pr. (N. Y.) 67; *Patchin v. Sands*, 10 Wend. (N. Y.) 570. See also *Hartshorne v. Gelston, Col. & C. Cas.* (N. Y.) 434, 3 Cai (N. Y.) 84; *Murphy v. Kipp*, 1 Duer (N. Y.) 659.

**2. Nesmith v. Atlantic Ins. Co.**, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 423.

**3. "Importance" of Case.** — *Stryker v. Turnbull, Col. & C. Cas.* (N. Y.) 457, 3 Cai. (N. Y.) 103; *People v. McGuire*, (Supm. Ct.) 43 How. Pr. (N. Y.) 67; *Adams v. Morgan*, (Supm. Ct. Gen. T.) 51 N. Y. St. Rep. 187, 67 Hun (N. Y.) 649, *appeal dismissed* 138 N. Y. 636.

So it was held that a struck jury should be granted in an action against a person for opening a highway near a turnpike gate in order to avoid it. *New Windsor Turnpike Co. v. Ellison*, 1 Johns. (N. Y.) 141.

**A Libel Against a Public Officer**, provided it was in reference to his conduct in office, was regarded as ground for granting a struck jury. *Spencer v. Sampson, Col. & C. Cas.* (N. Y.) 311; *Foot v. Croswell*, 1 Cai. (N. Y.) 498; *Van Vechten v. Hopkins*, 2 Johns. (N. Y.) 373; *Thomas v. Rumsey*, 4 Johns. (N. Y.) 483; *Thomas v. Croswell*, 4 Johns. (N. Y.) 491. *Compare Genet v. Mitchell*, 4 Johns. (N. Y.) 186, a case of a former foreign minister.

**The Amount of Money** involved in the case does not affect the question of ground for granting a struck jury. *Wright v. Columbian Ins. Co.*, 2 Johns. (N. Y.) 211. But see *Livingston v. Smith*, 1 Johns. (N. Y.) 141.

**4. "Intricacy" — Previous Disagreement of Jury.** — *Ives v. Ranger*, (Supm. Ct. Gen. T.) 47 N. Y. St. Rep. 390, 65 Hun (N. Y.) 622.

**5. Genuineness of Signature.** — *Poucher v. Livingston*, 2 Wend. (N. Y.) 296.

**6. Seaworthiness of Vessel.** — *Walsh v. Sun Mut. Ins. Co.*, (N. Y. Super. Ct. Spec. T.) 17 Abb. Pr. (N. Y.) 356. And see *Anonymous*, 1 Johns. (N. Y.) 314.

**7. Powers of Legislature.** — *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 60 Am.

St. Rep. 450; *Fowler v. State*, 59 N. J. L. 585, *affirming* 58 N. J. L. 423; *Brown v. State*, 62 N. J. L. 666.

**The Right to a Special Venire** may be abolished. *State v. Slover*, 134 Mo. 607.

**8. Conyers v. Graham**, 81 Ga. 615.

**9. Application.** — *McDaniel v. Nashville, etc.*, R. Co., 88 Tenn. 542. And see *State v. Miller*, 6 W. Va. 600.

**10. Time of Application.** — *State v. Carey*, 28 La. Ann. 49; *O'Brien v. Minneapolis*, 22 Minn. 378; *Mark v. St. Paul, etc.*, R. Co., 32 Minn. 208. See also, for various decisions as to local practice in regard to the time of the application, *Thorne v. Londonderry*, 8 Bing. 26, 21 E. C. L. 208, 1 Moo. & S. 62; *Franklin v. Nore, Col. & C. Cas.* (N. Y.) 52; *Walsh v. Sun Mut. Ins. Co.*, (N. Y. Super. Ct. Spec. T.) 17 Abb. Pr. (N. Y.) 356; *Tucker v. Berry*, 1 Browne (Pa.) 317; *Neff v. Neff*, 1 Binn. (Pa.) 350; *Binkley v. De Jardine*, Taylor (U. C.) 231; *Morvey v. Maynard*, 4 U. C. Q. B. O. S. 323.

**11. Delay Causing Inability to Procure Jurors.** — *Gunn v. Honeyman*, 2 B. & Ald. 400; *Johnson v. Blackwell*, 6 C. & P. 236, 25 E. C. L. 375; *Clandinan v. Dickson*, 8 U. C. Q. B. 281; *Sutton v. State*, 9 Ohio 133.

**12. McArthur v. Carrie**, 32 Ala. 75, 70 Am. Dec. 529; *Goodson v. Brothers* 111 Ala. 589. And see *Rose v. St. Charles*, 49 Mo. 509.

**Reliance on Demand by Adverse Party.** — By waiting until the day set for trial the accused waives his right to demand a special jury, and it is immaterial that a demand was made by the state if the record shows that he repudiated that demand from its inception. *Bond v. State*, 23 Ohio St. 349.

**Under the English Practice** a rule for a special jury could not be granted before joinder of issue. *Sayer v. Dufaur*, 9 Q. B. 800, 58 E. C. L. 800, 16 L. J. Q. B. 120; *Dresser v. Norman*, 6 C. B. N. S. 427, 95 E. C. L. 427, 5 Jur. N. S. 1083.

**Notice of Application.** — See *Gurney v. Gurney*, 3 Dowl. & L. 734; *Den v. Clark*, 1 N. J.



struck jury cannot, it has been held, withdraw his demand after examining the list of jurors.<sup>1</sup>

**5. Discretion in Granting.** — The allowance of a special jury has been generally regarded as a matter within the discretion of the lower court, and there must be an abuse of such discretion to authorize a reversal.<sup>2</sup> The court may, it has been held, recall its grant of a special jury upon learning that it is impossible to obtain such special jury as is desired.<sup>3</sup>

**6. Mode of Striking Jury.** — The number upon the list from which a struck jury is to be obtained by the striking of names by the parties is fixed by statute, and it is necessary that the statutory number of names, chosen in accordance with the statutory requirements, be on the list at the time of striking.<sup>4</sup> The person who shall prepare the list from which the jury is to be struck is fixed by statute,<sup>5</sup> and such officer is not disqualified by having formed or expressed an opinion as to the merits of the case.<sup>6</sup>

**Challenges.** — A statute providing for the striking of a jury from a list is generally construed as requiring the furnishing of a list of names which is subject to no exception, and it has been held in some cases that either party might, before the striking, challenge any such names as being those of persons disqualified.<sup>7</sup> It has also been decided that even after the jury is struck, members thereon may be challenged for bias or interest.<sup>8</sup>

**Joint Parties.** — In case there are joint parties on either side, they have, it seems, no right to strike a greater number of names than if there were but one on such side,<sup>9</sup> nor are they entitled to a greater number of names from which to strike.<sup>10</sup> They should join in striking,<sup>11</sup> and where they could not

L. 509; *Fuller v. Den*, 20 N. J. L. 61. As to waiver of notice see *Sutton v. State*, 9 Ohio 133.

**1. Withdrawal of Application.** — *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290.

So it was held that the accused was not entitled to a common jury after a rule was entered for a struck jury, the statute providing that such a rule should remain in force until the case was tried. *Brown v. State*, 62 N. J. L. 666.

**2. Discretion of Court.** — *Smith v. London*, etc., Dock Co., L. R. 2 C. P. 630; *Pierce v. State*, 67 Ind. 354; *Union Sav. Assoc. v. Edwards*, 47 Mo. 445; *Brown v. State*, 62 N. J. L. 666; *Clingan v. East Tennessee*, etc., R. Co., 2 Lea (Tenn.) 726; *Goodell v. Gibbons*, 91 Va. 608; *Atlantic*, etc., R. Co. v. *Peake*, 87 Va. 130. Compare *Jackson v. Pool*, 91 Tenn. 448. See also *Hall v. Perott*, *Baldw.* (U. S.) 123. But see *State v. Leabo*, 89 Mo. 247, where the statute gave an absolute right to the party.

**Unauthorized Discrimination.** — Though the judge has power, in directing the summoning of a special jury, to designate the persons to be summoned, his order to the sheriff to summon a certain class of persons and exclude another class, equally competent, is ground for reversal. *Jackson v. Pool*, 91 Tenn. 448.

**Jury of Particular Color.** — The statutory provision allowing a special jury has been held not to authorize a jury of a particular color, and it is reversible error to order such a jury. *Nashville v. Sheperd*, 3 Baxt. (Tenn.) 373.

**3. Recall of Grant.** — *Bruce v. Beall*, 100 Tenn. 573.

**4. List from Which Names to Be Stricken.** — *Adams v. Thornton*, 82 Ala. 263; *Kansas City*, etc., R. Co. v. *Smith*, 90 Ala. 25, 24 Am. St. Rep. 753; *Birmingham Union St. R. Co. v. Ralph*, 92 Ala. 273; *Smith v. Kaufman*, 100

Ala. 408; *People v. Tweed*, (Supm. Ct.) 50 How. Pr. (N. Y.) 262, 273, 280.

**Grand Jury List.** — In *Georgia* it was formerly provided that the struck jury should be obtained from the grand jury list. *Winter v. Muscogee*, R. Co., 11 Ga. 438; *Milledgeville Mfg. Co. v. Etheridge*, 63 Ga. 568. Compare *Hamlin v. Fletcher*, 64 Ga. 549.

**Waiver of Objections.** — Errors in the mode of selecting or striking the jury are waived by failure to object. *Ohio*, etc., R. Co. v. *Stein*, 140 Ind. 61; *Riley v. Chicago*, etc., R. Co., 67 Minn. 165. And see *Bassett v. Johnson*, 2 N. J. Eq. 154; *Koenig v. Bauer*, 1 Brews. (Pa.) 304.

**Mistake in Failing to Strike** a particular individual is not ground for allowing a retrial. *Central R.*, etc., Co. v. *Kent*, 87 Ga. 402.

**5. Officer to Prepare List.** — *Hulse v. State*, 35 Ohio St. 421.

**6. Webb v. State**, 29 Ohio St. 351.

**7. Challenge Before Striking.** — *Davis v. Hunter*, 7 Ala. 135; *Winter v. Muscogee R. Co.*, 11 Ga. 438; *London*, etc., F. Ins. Co. v. *Rufer*, 89 Ky. 525; *Hamlin v. State*, 67 Md. 333; *Lee v. Peter*, 6 Gill & J. (Md.) 447; *Ross v. Eason*, 2 Yeates (Pa.) 126.

**Necessity of Filling Panel.** — In *Odom v. Gill*, 59 Ga. 180, it was held that where some of the list had been set aside for cause, it was proper to have the striking done from the balance without filling it.

**8. Challenge After Striking.** — *Dothard v. Denison*, 72 Ala. 541.

**Excusing Struck Juror for Cause.** — See *Stewart v. State*, 1 Ohio St. 66, where it was held proper to excuse a postmaster.

**9. Joint Parties.** — *Hamlin v. State*, 67 Md. 333.

**10. Richmond, etc., R. Co. v. *Greenwood*, 99 Ala. 501; *Headman v. Rose*, 63 Ga. 458.**

**11. Pool v. Gramling**, 88 Ga. 653.



agree so to do, it has been held that each might strike a name in turn.<sup>1</sup>

**X. CUSTODY AND CONDUCT OF JURY — 1. Custody of Officer — a. NECESSITY.** — It is the rule in capital cases, and generally in prosecutions for any felony, that if the jurors leave the court during the trial they must be placed in the custody of an officer duly sworn to attend them;<sup>2</sup> and the statute sometimes contains a provision in this regard.<sup>3</sup> The record should show that the jury was placed in the officer's charge,<sup>4</sup> though it need not be shown that the jury returned into court in his charge.<sup>5</sup>

**Want of Custodian Not Prejudicial.** — It has been held that a failure to place the jurors in an officer's custody is not ground for a new trial if they do not improperly separate or communicate with other persons,<sup>6</sup> and a similar holding was made where the jury room was accessible only through the court room in which the court was still sitting.<sup>7</sup>

**Consent by the Parties to the retirement of the jury without an officer** was held to involve a waiver of the conduct of the jury in admitting strangers into the jury room.<sup>8</sup>

**Verdict Without Leaving Court Room.** — Where the jury renders its verdict without leaving the court room, there is no necessity that it should be placed in charge of a sworn officer.<sup>9</sup>

**b. WHO MAY BE CUSTODIAN.** — It is usual for a sheriff or constable to have charge of the jury, this being a matter dependent upon the local statutes.<sup>10</sup> If the regular officers are disqualified an elisor may be appointed for the purpose.<sup>11</sup> The judge may take charge of jurors in the temporary absence of the officer.<sup>12</sup> That a minor was placed in charge of the jury is not ground for a new trial, since if duly appointed and sworn he is an officer *de facto*.<sup>13</sup> A private person, however, cannot take charge of the jury, even for a short time.<sup>14</sup>

1. *Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

2. **Requirement of Custody of Officer — England.** — *Rex v. Stone*, 6 T. R. 527.

*Alabama.* — *Williams v. State*, 45 Ala. 57; *Robbins v. State*, 49 Ala. 394.

*Illinois.* — *McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65.

*New Jersey.* — *State v. Cucuel*, 31 N. J. L. 249.

*New York.* — *Douglass v. Blackman*, 14 Barb. (N. Y.) 381.

*Tennessee.* — *King v. State*, 91 Tenn. 617.

*Virginia.* — *Bennett v. Com.*, 8 Leigh (Va.) 745; *Philips v. Com.*, 19 Gratt. (Va.) 485; *Barnes v. Com.*, 92 Va. 794.

**Discretion of Court.** — In *People v. Considine*, 105 Mich. 149, it was stated that the court may in its discretion direct that the jury remain in the custody of an officer during the trial.

**Before Completion of Panel.** — It has been decided that where several days are required to complete the panel, jurors who have been accepted need not be placed in custody before the completion of the panel. *Epes's Case*, 5 Gratt. (Va.) 676; *Tooele v. Com.*, 11 Leigh (Va.) 749.

**Custody During View.** — A jury, while going to view the premises on which the crime was committed, should be kept in charge of an officer, so as not to be allowed to communicate with third persons. *People v. Hull*, 86 Mich. 449.

3. **Statutory Provision.** — *McIntyre v. People*, 38 Ill. 514; *Farley v. People*, 138 Ill. 97; *State v. Parrant*, 16 Minn. 178; *King v. State*, 87 Tenn. 304; *State v. Poindexter*, 23 W. Va. 805.

**Special Order Unnecessary.** — A statutory re-

quirement that an officer shall take charge of a jury in a felony case was held to render a special order to that effect unnecessary. *State v. Poindexter*, 23 W. Va. 805.

4. **Showing in Record.** — *Jones v. State*, 2 Blackf. (Ind.) 475; *Dias v. State*, 7 Blackf. (Ind.) 20; *Barnes v. Com.*, 92 Va. 794. But see *Morris v. Graves*, 2 Ind. 354.

5. *Robertson v. State*, 4 Lea (Tenn.) 425; *Scott v. State*, 7 Lea (Tenn.) 232. See also *State v. Ryan*, 13 Minn. 370.

6. **Want of Officer Not Necessarily Ground for New Trial.** — *Jarnagin v. State*, 10 Yerg. (Tenn.) 529.

7. *Smith v. State*, 63 Ga. 168.

8. **Consent of Parties.** — *Tower v. Hewett*, 11 Johns. (N. Y.) 134.

9. **Verdict Without Leaving Court Room.** — *State v. Parrant*, 16 Minn. 178; *Fink v. Hall*, 8 Johns. (N. Y.) 437; *Meyer v. Foster*, 16 Wis. 296.

10. **Sheriff or Constable.** — See *State v. Devall*, 51 La. Ann. 497; *Staley v. Barhite*, 2 Cai. (N. Y.) 221; *Bennett v. Com.*, 8 Leigh (Va.) 745.

**Irregularity in Appointment.** — A verdict will not be set aside because the jury was in charge of a deputy sheriff, notice of whose appointment had not been posted by the sheriff as required by law. *Woodson v. State*, 40 Tex. Crim. 685.

11. **Appointment of Elisor.** — *People v. Ebanks*, 117 Cal. 652.

12. **Judge in Charge of Jurors.** — *Philips v. Com.*, 19 Gratt. (Va.) 485.

13. **Minor in Charge of Jury.** — *McCann v. People*, 88 Ill. 103.

14. **Private Person in Charge.** — *Roberts v.*



**Prejudice of Officer.** — An officer who is a witness in the case may nevertheless act as custodian.<sup>1</sup> And an officer has been held not to be disqualified for this purpose by the fact that he made the complaint on which the defendant was arrested.<sup>2</sup> But it has been held improper to place in charge a sheriff who was so biased as to be disqualified from summoning the jurors.<sup>3</sup> And so a sheriff whose wife was a principal party to the cause and who was himself a necessary party was held to be disqualified.<sup>4</sup>

**c. OATH OF CUSTODIAN.** — In some cases the requirement that the officer be specially sworn at the time when the jury is placed in his charge is strictly enforced, and the omission to administer the oath is held to be ground for a new trial,<sup>5</sup> but the modern tendency seems to be to relax the strictness of the requirement, and not to set aside a verdict for failure to swear the officer if no prejudice has resulted therefrom by reason of misconduct of the officer or jury.<sup>6</sup> Sometimes the statute, though requiring the oath in criminal cases, does not require it in civil cases.<sup>7</sup> An oath has been held to be unnecessary on the retirement of the jury before all the evidence is in.<sup>8</sup>

**General Oath by Officer.** — In some cases it has been held that the oath of the officer to perform his duty, taken by him at the beginning of his term of office, or of the court term, is sufficient, and renders a special oath in each case unnecessary.<sup>9</sup> In any case, however, the administration of an oath at the beginning of the trial is sufficient, and an officer continuously in charge of

State, 72 Ga. 673; *Hare v. State*, 4 How. (Miss.) 157.

**1. Officer Who Is Witness in Case** — *Georgia*. — *Wade v. State*, 65 Ga. 756.

*Kansas*. — *State v. Snyder*, 20 Kan. 306.

*Michigan*. — *People v. Beverly*, 108 Mich. 509.

*Missouri*. — *State v. Rush*, 95 Mo. 199. See also *State v. Burns*, 148 Mo. 167.

*North Dakota*. — *State v. Rosencrans*, (N. Dak. 1900) 82 N. W. Rep. 422.

*Texas*. — *Washington v. State*, 19 Tex. App. 521, 53 Am. Rep. 387.

*Vermont*. — *State v. Lockwood*, 58 Vt. 378; *State v. Flint*, 60 Vt. 304.

*Washington*. — *Edwards v. Territory*, 1 Wash. Ter. 195.

*West Virginia*. — *State v. Shores*, 31 W. Va. 491, 13 Am. St. Rep. 875.

**Prosecuting Witness.** — An officer called upon to testify on behalf of the prosecution is not a prosecuting witness within the meaning of a law prohibiting a prosecuting witness from having charge of the jury. *Edwards v. Territory*, 1 Wash. Ter. 195.

**2. Officer Who Made Complaint.** — *People v. Coughlin*, 65 Mich. 704.

**3. Disqualification by Bias.** — *People v. Fel-lows*, 122 Cal. 233.

*State v. Judge*, 11 La. Ann. 79.

**5. Necessity of Oath** — *Georgia*. — *Roberts v. State*, 72 Ga. 673.

*Illinois*. — *McIntyre v. People*, 38 Ill. 514; *Lewis v. People*, 44 Ill. 452.

*Kansas*. — *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341.

*Kentucky*. — *Com. v. Shields*, 2 Bush (Ky.) 81.

*Mississippi*. — *McCann v. State*, 9 Smed. & M. (Miss.) 465.

*Tennessee*. — *Maynard v. State*, 9 Baxt. (Tenn.) 225.

*Wisconsin*. — *Brucker v. State*, 16 Wis. 333.

**6. Omission Not Fatal in Absence of Prejudice** — *United States*. — *U. S. v. Ball*, 163 U. S. 662.

*Arkansas*. — *Atterberry v. State*, 56 Ark. 515.

*Michigan*. — *People v. Beverly*, 108 Mich. 509.

*Mississippi*. — *McCann v. State*, 9 Smed. & M. (Miss.) 465.

*Missouri*. — *State v. Hays*, 78 Mo. 600; *State v. Hayes*, 78 Mo. 307; *State v. Frier*, 118 Mo. 648. See also *State v. Pollard*, 14 Mo. App. 583.

*New York*. — *People v. Johnson*, 46 Hun (N. Y.) 667.

*Tennessee*. — *Stone v. State*, 4 Humph. (Tenn.) 27.

*Texas*. — *Baker v. State*, 4 Tex. App. 223.

*Wisconsin*. — *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 295, 7 Am. Rep. 81.

**Not Statutory Ground for New Trial.** — In *State v. Crafton*, 89 Iowa 109, it was held that though the statute providing for the swearing of the bailiff is mandatory, it is not, in the absence of prejudice resulting from this neglect of duty, ground for a new trial, since the statute enumerates only certain grounds for a new trial and does not include this, though it authorizes a new trial when for any cause the defendant has not received a fair and impartial trial.

**7. Civil Cases.** — *Boreham v. Byrne*, 83 Cal. 23; *Deranlieu v. Jandt*, 37 Neb. 532.

**8. Retirement of Jury During Introduction of Evidence.** — *Wilhelm v. People*, 72 Ill. 468.

**9. General Oath Sufficient** — *United States*. — *U. S. v. Ball*, 163 U. S. 662.

*California*. — *Boreham v. Byrne*, 83 Cal. 23.

*Florida*. — *Cato v. State*, 9 Fla. 163; *O'Connor v. State*, 9 Fla. 215.

*Indiana*. — *Clayton v. State*, 100 Ind. 201.

*Louisiana*. — *State v. Kennedy*, 8 Rob. (La.) 590.

*Missouri*. — *State v. Frier*, 118 Mo. 648; *State v. Pollard*, 14 Mo. App. 583.

*Nebraska*. — *Deranlieu v. Jandt*, 37 Neb. 532.

*Ohio*. — *Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559.

*Virginia*. — *Bennett v. Com.*, 8 Leigh (Va.) 745.



the jury need not be sworn upon every recess or retirement of the jury pending the trial.<sup>1</sup>

**Waiver of Objection.** — An objection in this regard should be taken promptly at the time when it becomes available, or it will be deemed to be waived.<sup>2</sup>

**Showing of Oath in Record.** — In *Tennessee* the record in a felony case must show affirmatively that the oath was administered to the officer,<sup>3</sup> and this may be done by spreading the oath at large upon the minutes of the court<sup>4</sup> or by the recital that the officer was sworn as required by law.<sup>5</sup> If the record undertakes to set out the oath, it must be shown to conform to the statutory requirement.<sup>6</sup> In *New York* also it has been held that the record should show that the oath was administered.<sup>7</sup>

**d. CONDUCT OF CUSTODIAN — (1) In General.** — It has been held not to be misconduct on the part of the bailiff to procure for the jury such articles as apples,<sup>8</sup> cigars,<sup>9</sup> or changes of clothing.<sup>10</sup> While it is improper for him to procure liquor for the jury,<sup>11</sup> this is not ground for a new trial in the absence of a showing of prejudice.<sup>12</sup> The verdict will not be set aside because the sheriff made a bet as to the verdict while the jury was considering the case.<sup>13</sup> The conduct of the officer will be presumed to have been proper in the absence of evidence to the contrary.<sup>14</sup>

**Sleeping with Jury.** — The fact that the officer slept in the same room with the jury is not ground for a new trial if no influence was exerted by him upon the minds of the jurors.<sup>15</sup>

**Officer to Remain with Jury.** — The officer should remain with the jury, and if, by failing so to do, he should leave the jurors exposed to prejudicial influences, a new trial may be granted,<sup>16</sup> though this result will not follow if it is shown that the jurors had no communication with other persons.<sup>17</sup> The

*West Virginia.* — *State v. Poindexter*, 23 W. Va. 805.

The court should, however, satisfy itself that no harm has resulted from the omission of the special oath. *State v. Hayes*, 78 Mo. 307.

**1. Swearing Once During Trial Sufficient.** — *Sanders v. People*, 124 Ill. 218; *Com. v. Shields*, 2 Bush (Ky.) 81; *Johnson v. State*, 8 Baxt. (Tenn.) 450; *State v. Poindexter*, 23 W. Va. 805; *State v. Shores*, 31 W. Va. 491, 13 Am. St. Rep. 875; *State v. Ice*, 34 W. Va. 244.

**2. Waiver of Objection.** — *Deranlieu v. Jandt*, 37 Neb. 532; *Baker v. State*, 4 Tex. App. 223; *Chapman v. Chicago*, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 811.

**3. Showing in Record.** — *Lea v. State*, 94 Tenn. 495. But see *Clark v. State*, 8 Baxt. (Tenn.) 591, to the effect that the omission of the record as to the oath will be cured by the presumption that the jury was duly sworn.

**4.** *Lea v. State*, 94 Tenn. 495.

**5.** *Taylor v. State*, 6 Lea (Tenn.) 235; *Lancaster v. State*, 91 Tenn. 267; *Lea v. State*, 94 Tenn. 495; *Moore v. State*, 96 Tenn. 209; *Lemons v. State*, 97 Tenn. 560.

**6.** *Spain v. State*, 8 Baxt. (Tenn.) 514; *Buxton v. State*, 89 Tenn. 216; *Lancaster v. State*, 91 Tenn. 267.

**7. New York Cases.** — *Day v. Wilber*, 2 Cai. (N. Y.) 134; *Van Doren v. Walker*, 2 Cai. (N. Y.) 373; *Coughnet v. Eastenbrook*, 11 Johns. (N. Y.) 532. And see *Reynolds v. Bedford*, 3 Cai. (N. Y.) 140.

**8. Procuring Articles for Jury.** — *Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211.

**9.** *State v. Rush*, 95 Mo. 199.

**10.** *State v. Caulfield*, 23 La. Ann. 148.

**11. Procuring Liquors.** — *Kee v. State*, 28 Ark. 155; *Robinson v. State*, 33 Ark. 185; *Westmoreland v. State*, 45 Ga. 225; *Davis v. People*, 19 Ill. 74.

**12.** See *infra*, this section, *Misconduct of Jury—Refreshments for Jury—Intoxicating Liquors*.

**13. Betting on Verdict.** — *State v. Howes*, 26 W. Va. 110.

**14. Presumption Against Misconduct.** — *Thompson v. State*, 26 Ark. 323; *Kirk v. State*, 73 Ga. 620; *Morris v. Graves*, 2 Ind. 354.

**15. Sleeping with Jury.** — *Doyal v. State*, 70 Ga. 134; *Kirk v. State*, 73 Ga. 620; *Cornwall v. State*, 91 Ga. 277; *Webb v. State*, (Miss. 1897) 21 So. Rep. 133; *State v. Morris*, 84 N. Car. 756.

In *Jones v. State*, 68 Ga. 760, it was held that the fact that the officer occupied the same bed with one of the jurors while the case was under consideration was ground for setting aside the verdict, unless it was shown that no prejudice resulted therefrom.

**16. Officer to Remain with Jury.** — *State v. Harris*, 12 Nev. 414; *Love v. State*, 6 Baxt. (Tenn.) 154; *Com. v. Wormley*, 8 Gratt. (Va.) 712, 56 Am. Dec. 162. And see *infra*, this section, *Misconduct of Jury—Communications with Outsiders*.

**17.** *People v. Boggs*, 20 Cal. 432; *People v. Kelly*, 46 Cal. 355; *State v. Leunig*, 42 Ind. 541; *Hoover v. State*, 5 Baxt. (Tenn.) 672.

**Presumption.** — In *Butler v. State*, 72 Ala. 179, it is stated that the fact that the jurors were not under the eye of an officer during the whole of a murder trial raises a presumption that the jury was tampered with. But see *People v. Elly*, 46 Cal. 355.



officer in charge may, however, give them or any of their number into the custody of another sworn officer.<sup>1</sup>

**Taking Jury to Private Place.** — The officer is generally directed by the court or by statute to take the jury to a convenient private place, but a failure to comply with such direction is not ground for setting aside the verdict, if there is no resulting injury.<sup>2</sup>

**Punishment.** — The custodian may be punished by the court for improper conduct.<sup>3</sup>

(2) **Allowing Recreation to Jury.** — It is not improper for the officer in charge to take the jury for a walk, provided proper precautions are taken that no communication with outsiders take place;<sup>4</sup> nor is it ground for new trial that such walk extends beyond the limits of the county<sup>5</sup> or even of the state.<sup>6</sup> Nor will a visit to the scene of the crime be ground for a new trial, it appearing that the defendant was not prejudiced thereby.<sup>7</sup> Nor will the verdict be set aside because the officer took the jurors to a theatrical performance involving a burlesque representation of judicial proceedings,<sup>8</sup> or because they were taken to church and there heard a sermon applicable to the case on trial, such application not being intended.<sup>9</sup> The officer should not permit the jurors to go into a saloon while under his charge.<sup>10</sup> The verdict will not be set aside because the jury, under the officer's charge, visited the jail where the prisoner was confined, there being no evidence of any communications or

1. **Change of Officers.** — *People v. Hughes*, 29 Cal. 157; *Nicholson v. State*, 38 Fla. 99; *Com. v. Jenkins, Thach, Crim. Cas. (Mass.)* 118; *Tripp v. Bristol County*, 2 Allen (Mass.) 556; *State v. Crawford*, 99 Mo. 74.

**Where Two Bailiffs Are Appointed to Attend a Jury**, the absence of one for a short time, leaving the other in charge, is not improper. *State v. Harrigan*, 9 Houst. (Del.) 369.

**Presumption of Authority.** — That a juror, upon separating from his fellows, was in charge of a person other than the sheriff sworn to take charge of the jury, will furnish a presumption that such person was a subordinate of the sheriff, and as such qualified to take charge of the juror in question. *State v. Crawford*, 99 Mo. 74.

2. **Taking Jury to Private Place.** — *Newkirk v. State*, 27 Ind. 1; *State v. Hendricks*, 32 Kan. 559; *Caleb v. State*, 39 Miss. 721; *State v. Fairlamb*, 121 Mo. 137.

**Jury Taken to Public Inn.** — It is not a ground for setting aside a verdict that the jurors in a capital case, the court having ordered that they be taken to a convenient private place, were taken by the officer to a public inn and there kept in his charge, taking their meals at a separate table in the public dining room. *State v. Cucuel*, 31 N. J. L. 249.

**Agreement Before Leaving Room.** — It is not ground for a new trial that a jury was not kept in a private place until it rendered its verdict, if, in fact, the jurors had agreed upon the verdict before leaving their room. *People v. Francis*, 52 Mich. 575.

3. **Punishment for Improper Conduct — Interference in Deliberations.** — *Reins v. People*, 30 Ill. 256; *Brown v. State*, 69 Miss. 398; *Nelms v. State*, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94.

**Furnishing Liquor to Jury.** — *Kee v. State*, 28 Ark. 155; *Westmoreland v. State*, 45 Ga. 225; *Davis v. People*, 19 Ill. 74. And see *infra*, this section, *Misconduct of Jury — Refreshments for Jury — Intoxicating Liquors*.

4. **Recreation.** — *State v. Perry*, Busb. L. (44 N. Car.) 330; *State v. Hester*, 2 Jones L. (47 N. Car.) 83; *State v. Baker*, 63 N. Car. 276. See also *Spier v. State*, 89 Ga. 737.

5. **Walking Beyond County Limits.** — *Thompson v. Com.*, 8 Gratt. (Va.) 637.

6. **Beyond State Limits.** — *In re King*, 51 Fed. Rep. 434; *King v. State*, 91 Tenn. 617.

7. **Visit to Scene of Crime.** — *Luck v. State*, 96 Ind. 16. See also *Palmer v. State*, 65 N. H. 221. See also *infra*, this section, *Misconduct of Jury — Receiving Evidence Out of Court — Unauthorized View of Locus in Quo*.

**Misconduct During View.** — In an action for the death of a child on a railroad track, while the jurors were viewing the scene of the accident the sheriff placed the dress worn by the child at the point where the accident occurred and allowed the jury to proceed along the track in the same direction as the train had moved. It was held that this conduct did not require the discharge of the jury nor justify a new trial, the court having cautioned the jury to disregard it. *Bias v. Chesapeake, etc., R. Co.*, (W. Va. 1899) 33 S. E. Rep. 240.

8. **Visit to Theatre.** — *Moore v. People*, (Colo. 1899) 57 Pac. Rep. 857. And see *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526.

9. **Visit to Church.** — *State v. Kent*, 5 N. Dak. 516, where the sermon was on the subject of "Doubting Thomas," and was especially applicable to the case on trial because the evidence was circumstantial. See also *State v. Kinsaul*, (N. Car. 1900) 36 S. E. Rep. 31; *People v. Constantino*, 153 N. Y. 24.

In *Shaw v. State*, 83 Ga. 92, however, it was held ground for a new trial that the bailiff took the jurors to a prayer meeting where seats were assigned to them by the active prosecutor in the case, who likewise conducted the prayer meeting. See also *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13.

10. **Visit to Saloon.** — *Darter v. State*, 39 Tex. Crim. 40; *Wood v. State*, 34 Ark. 341; 36 Am. Rep. 13 (billiard saloon).



exercise of improper influences;<sup>1</sup> nor because the officer permitted the making of a photograph of the jury.<sup>2</sup>

(3) *Presence in Jury Room.* — While the presence of the officer in charge of the jury in the jury room is generally disapproved,<sup>3</sup> the weight of authority is to the effect that such presence is not ground for a new trial if it does not appear that the officer in any way participated in the proceedings or influenced the minds of the jurors.<sup>4</sup> Occasionally, however, it has been decided that the officer's presence will be presumed to be prejudicial and is of itself ground for a new trial;<sup>5</sup> and in other cases the fact that the officer so present gave testimony upon the material issues of the case has been regarded as necessitating a new trial.<sup>6</sup>

(4) *Communicating with Jury.* — The officer having the jury in charge should never speak to the jurors unless by order of the court, except to ask them whether they have agreed,<sup>7</sup> and communications by him to the jurors which are calculated to influence their verdict are good ground for a new trial.<sup>8</sup> This rule has been applied when the officer stated to the jurors that the defendant had been convicted of other crimes,<sup>9</sup> where the officer discussed the merits of the case or argued in favor of a particular verdict,<sup>10</sup> and where the

1. *Visit to Jail.* — *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314.

2. *Photograph of Jury.* — *State v. Taylor*, 134 Mo. 109.

3. *Officer in Jury Room Improper.* — *Rickard v. State*, 74 Ind. 275; *Waterman v. State*, 116 Ind. 51; *Houk v. Allen*, 126 Ind. 568; *State v. Thompson*, 87 Iowa 670; *McGuire v. State*, 10 Tex. App. 125. But see *State v. Caulfield*, 23 La. Ann. 148; *Crockett v. State*, 52 Wis. 211, 38 Am. Rep. 733.

4. *Not Ground for New Trial* — *Georgia*. — *Cornwall v. State*, 91 Ga. 277.

*Illinois.* — *Gainey v. People*, 97 Ill. 270.

*Indiana.* — *Fitzgerald v. Goff*, 99 Ind. 28, apparently overruling *Rickard v. State*, 74 Ind. 275; *McClary v. State*, 75 Ind. 260. Compare *Waterman v. State*, 116 Ind. 51; *Houk v. Allen*, 126 Ind. 568.

*Iowa.* — *State v. Thompson*, 87 Iowa 670; *State v. Beste*, 91 Iowa 565.

*Louisiana.* — *State v. Caulfield*, 23 La. Ann. 149.

*Missouri.* — *State v. Hopper*, 71 Mo. 425.

*Montana.* — *State v. Pepo*, 23 Mont. 473.

*New York.* — *People v. Hartung*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 132, 4 Park. Crim. (N. Y.) 319; *People v. Wilson*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 137, 4 Park. Crim. (N. Y.) 619; *In re Benson*, (County Ct.) 16 N. Y. Supp. 111.

*North Carolina.* — *State v. Harper*, 101 N. Car. 761, 9 Am. St. Rep. 46.

*South Carolina.* — *State v. Senn*, 32 S. Car. 392.

*South Dakota.* — *Williams v. Chicago*, etc., R. Co., 11 S. Dak. 463.

*Texas.* — *McGuire v. State*, 10 Tex. App. 125.

*Presumption of Absence of Injury.* — *Crockett v. State*, 52 Wis. 211, 38 Am. Rep. 733.

*Not Statutory Cause for New Trial.* — In *Slaughter v. State*, 24 Tex. 410, it was held that since this was not one of the statutory grounds of new trial, though such conduct by the officer was expressly forbidden by statute, a new trial would not be granted for this cause alone.

5. *New Trial Occasionally Granted.* — *State v. Snyder*, 20 Kan. 306; *People v. Knapp*, 42

Mich. 267, 36 Am. Rep. 438; *Gandy v. State*, 24 Neb. 716.

In *State v. Bailey*, 32 Kan. 84, it was said that the burden is on the state to show that no prejudice resulted.

6. *Officer Who Gave Testimony.* — *Gainey v. People*, 97 Ill. 270; *State v. Snyder*, 20 Kan. 306; *Tarkington v. State*, 72 Miss. 731; *McElrath v. State*, 2 Swan (Tenn.) 378. But see *State v. Flint*, 60 Vt. 304.

7. *Communications with Jury.* — *Reins v. People*, 30 Ill. 256; *Rickard v. State*, 74 Ind. 275; *Cole v. Swan*, 4 Greene (Iowa) 32. See also *Com. v. Heden*, 162 Mass. 521. Compare *Quinn v. State*, 130 Ind. 340.

8. *Presumption of Prejudice.* — In *Mattox v. U. S.*, 146 U. S. 140, Fuller, C. J., said: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." To the same effect as to the presumption of prejudice see *State v. La Grange*, 99 Iowa 10; *Thomas v. Chapman*, 45 Barb. (N. Y.) 98.

9. *Statements as to Defendant's Character.* — *Mattox v. U. S.*, 146 U. S. 140; *State v. Dallas*, 35 La. Ann. 899.

10. *Communications as to Merits of Case* — *Colorado*. — *Heller v. People*, 22 Colo. 11.

*Connecticut.* — *Bullock v. Hosford*, 2 Root (Conn.) 349.

*Iowa.* — *State v. La Grange*, 99 Iowa 10.

*Kentucky.* — *Lawless v. Reese*, 3 Bibb (Ky.) 486.

*Louisiana.* — *State v. Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277.

*Mississippi.* — *Nelms v. State*, 13 Smed. & M. (Miss.) 500, 53 Am. Dec. 94. See also *Barnett v. Eaton*, 62 Miss. 768.

*North Carolina.* — *State v. Wiseman*, 68 N. Car. 203.

*Texas.* — *Dansby v. State*, 34 Tex. 392; *Hogan v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 949.

See also *Heston v. Neathammer*, 180 Ill. 150. *Contra.* — *Baker v. Simmons*, 29 Barb. (N. Y.) 198.



officer intermeddled by pointing out particular instructions under which the jury might find a certain verdict.<sup>1</sup> A new trial has also been granted because the officer read to the jurors, by their request, portions of the instructions, though he read them correctly.<sup>2</sup> But the fact that the officer wrote out the verdict in accordance with directions from a juror was held not to be ground for a new trial.<sup>3</sup>

**Statements as to Effect of Disagreement.** — In several cases the fact that the officer told the jurors the length of the confinement which they might have to undergo in case of disagreement has been held to constitute ground for a new trial,<sup>4</sup> and a similar effect has been given to a statement that the judge was going to carry the jurors to another county.<sup>5</sup> But generally statements as to the length of possible confinement have not been regarded as ground for a new trial under the particular circumstances of the case.<sup>6</sup> A new trial was granted when the conduct of certain jurors in consulting with a partisan of the defendant was notorious, and the officer spoke to the jury of the disagreeable consequences which would follow if those jurors caused a disagreement.<sup>7</sup>

**Statements Not Affecting Verdict.** — A new trial will not be granted if the communications or statements to the jurors do not appear to have influenced the verdict.<sup>8</sup> So conversation on matters not relating to the trial has been held not to be ground for disturbing the verdict.<sup>9</sup> Mere statements by a juror to the officer as to the possibility of a verdict are not grounds for a new trial.<sup>10</sup> Nor is it ground for a new trial that jurors asked the officer for information or testimony which the officer refused, or to which request he made no reply.<sup>11</sup>

**2. Misconduct of Jury — a. GENERAL CONSIDERATIONS — (1) Remedies.** — The remedies for misconduct of the jury are discussed elsewhere, to which reference is made in the note below.<sup>12</sup>

**Equitable Relief.** — Equity may, in a proper case, enjoin the enforcement of a judgment entered on a verdict vitiated by the misconduct of a juror.<sup>13</sup>

**(2) Necessity of Prejudice.** — Misconduct or irregularity on the part of the jurors if not induced by the prevailing party, will not ordinarily be ground for setting aside the verdict, unless it was calculated to prejudice the unsuccessful party.<sup>14</sup> When, however, the misconduct is due directly to an improper

1. **Officious Intermeddling.** — *Brown v. State*, 69 Miss. 398.

2. **Reading Instructions.** — *State v. Brown*, 22 Kan. 222.

3. **Writing Out Verdict.** — *Territory v. Edie*, 7 N. Mex. 183.

4. **Communications as to Length of Confinement.** — *Obear v. Gray*, 68 Ga. 182; *Hogan v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 949. And see *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159.

5. **Possibility of Being Carried to Other County.** — *Gholston v. Gholston*, 31 Ga. 625.

6. **Statements as to Duration of Confinement Not Ground for New Trial — Georgia.** — *Collins v. State*, 78 Ga. 87; *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260.

*Louisiana.* — *State v. Cady*, 46 La. Ann. 1346. *Massachusetts.* — *Leach v. Wilbur*, 9 Allen (Mass.) 212.

*Mississippi.* — *Alexander v. State*, (Miss. 1898) 22 So. Rep. 871. See also *Pope v. State*, 36 Miss. 121.

*New York.* — *Wiggins v. Downer*, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 65.

*Texas.* — *McGuire v. State*, 10 Tex. App. 125.

*Washington.* — *State v. Zettler*, 15 Wash. 625.

*Wyoming.* — *Edwards v. Murray*, 5 Wyo. 153.

7. **Intimidation of Jurors under Suspicion.** — *People v. Mitchell*, 100 Cal. 328.

8. **Prejudice Necessary for New Trial.** — *State v. Cowan*, 74 Iowa 53; *State v. Wart*, 51 Iowa 587; *State v. Robertson*, 50 La. Ann. 455; *People v. Beverly*, 108 Mich. 509; *Pope v. State*, 36 Miss. 121; *State v. Pepo*, 23 Mont. 473. See also *People v. Wilson* (Supm. Ct.) 8 Abb. Pr. (N. Y.) 137; *People v. Hartung*, (Oyer & T. Ct.) 17 How. Pr. (N. Y.) 85.

**Misconduct Must Be Clearly Proved.** — *Clay v. Montgomery*, 102 Ala. 297.

9. **Communications on Immaterial Matters.** — *Daniel v. Frost*, 62 Ga. 697; *State v. Summers*, 4 La. Ann. 26.

10. **Statements by Juror as to Possibility of Verdict.** — *McFalls v. State*, 66 Ark. 16; *Cornwall v. State*, 91 Ga. 277.

11. **Unanswered Questions by Jurors.** — *State v. Griffin*, 71 Iowa 372; *State v. Barker*, 43 Kan. 262; *State v. Stark*, 72 Mo. 37.

12. See the title *JURY*, 12 ENCYC. OF PL. AND PR., p. 223, and the references there given.

13. **Equitable Relief.** — *Platt v. Threadgill*, 80 Fed. Rep. 192. See also *Cochran v. Street*, 1 Wash. (Va.) 79.

14. **Necessity of Prejudice — United States.** — *Henry v. Ricketts*, 1 Cranch (C. C.) 545; *Poole v. Chicago, etc., R. Co.*, 2 McCrary (U. S.) 251.



act by the prevailing party, the verdict will be set aside without reference to the question of resulting injury.<sup>1</sup>

**Misconduct After Agreement.** — Misconduct by the jurors after they have agreed upon their verdict has been held in some cases not to be ground for setting aside the verdict, as not being prejudicial, although it would have had that effect if occurring before agreement.<sup>2</sup>

*Arkansas.* — *McKenzie v. State*, 26 Ark. 334; *Thompson v. State*, 26 Ark. 323; *Kee v. State*, 28 Ark. 155.

*California.* — *People v. West*, 73 Cal. 345; *People v. Kramer*, 117 Cal. 647.

*Colorado.* — *May v. People*, 8 Colo. 210; *Outcalt v. Johnston*, 9 Colo. App. 519.

*Connecticut.* — *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712; *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88.

*Delaware.* — *State v. Harrigan*, 9 Houst. (Del.) 369.

*Florida.* — *State v. Madoil*, 12 Fla. 151.

*Georgia.* — *Collins v. State*, 73 Ga. 76.

*Illinois.* — *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474.

*Indiana.* — *Ball v. Carley*, 3 Ind. 577; *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; *Harrison v. Price*, 22 Ind. 165; *Whelchell v. State*, 23 Ind. 89; *Flatter v. McDermitt*, 25 Ind. 326; *Medler v. State*, 26 Ind. 171; *Holloway v. State*, 53 Ind. 554; *Achey v. State*, 64 Ind. 56; *De Priest v. State*, 68 Ind. 569; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Long v. State*, 95 Ind. 481; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Barlow v. State*, 2 Blackf. (Ind.) 114; *Creek v. State*, 24 Ind. 151; *De Hart v. Etnire*, 121 Ind. 242. See also *Hutchins v. State*, 140 Ind. 78.

*Iowa.* — *Langworthy v. Myers*, 4 Iowa 23; *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 881; *Walker v. Dailey*, 87 Iowa 375; *State v. Beste*, 91 Iowa 565; *Carbon v. Ottumwa*, 95 Iowa 524; *Bowman v. Western Fur Mfg. Co.*, 96 Iowa 188; *Hathaway v. Burlington, etc., R. Co.*, 97 Iowa 747; *Purcell v. Tibbles*, 101 Iowa 24.

*Kansas.* — *State v. Dickson*, 6 Kan. 209; *State v. Gould*, 40 Kan. 259.

*Kentucky.* — *Yancey v. Downer*, 5 Litt. (Ky.) 11; *Luttrell v. Maysville, etc., R. Co.*, 18 B. Mon. (Ky.) 291; *Crawford v. Com.*, (Ky. 1896) 35 S. W. Rep. 114.

*Maine.* — *Clark v. Lebanon*, 63 Me. 393.

*Minnesota.* — *Koehler v. Cleary*, 23 Minn. 325; *Woodbury v. Anoka*, 52 Minn. 329.

*Mississippi.* — *Green v. State*, 59 Miss. 501.

*Missouri.* — *State v. Upton*, 20 Mo. 397; *State v. Hart*, 66 Mo. 208; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Clifton*, 73 Mo. 430; *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314; *State v. Taylor*, 134 Mo. 109.

*Nebraska.* — *Vaughn v. Crites*, 44 Neb. 812; *Gran v. Houston*, 45 Neb. 813.

*Nevada.* — *Richardson v. Jones*, 1 Nev. 408.

*New Jersey.* — *Crane v. Sayre*, 6 N. J. L. 110; *State v. Cucuel*, 31 N. J. L. 249.

*New York.* — *People v. Menken*, 36 Hun (N. Y.) 90; *People v. Kennedy*, 57 Hun (N. Y.) 532; *People v. Gaffney*, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 36; *Hager v. Hager*, 38 Barb. (N. Y.) 94; *People v. Ransom*, 7 Wend. (N. Y.) 423; *Smith v. Thompson*, 1 Cow. (N. Y.) 221; *Horton v. Horton*, 2 Cow.

(N. Y.) 589; *Ex p. Hill*, 3 Cow. (N. Y.) 355; *Wilson v. Abrahams*, 1 Hill (N. Y.) 207.

*Ohio.* — *Armleder v. Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530.

*Oregon.* — *State v. Brown*, 7 Oregon 200.

*Rhode Island.* — *State v. Cottrell*, 19 R. I. 724.

*Tennessee.* — *King v. State*, 91 Tenn. 617.

*Texas.* — *McDonald v. State*, 15 Tex. App. 493; *Allen v. State*, 17 Tex. App. 637; *Testard v. State*, 26 Tex. App. 260.

*Vermont.* — *Dennison v. Powers*, 35 Vt. 39.

*West Virginia.* — *State v. Belknap*, 39 W. Va. 427.

*Wisconsin.* — *State v. Hartmann*, 46 Wis. 248.

See also *infra*, this subsection, *Communications with Outsiders — Necessity of Prejudice.*

**Prejudice in Favor of Complaining Party.** — A party cannot complain of misconduct which resulted to his benefit. *Portis v. State*, 27 Ark. 360.

**1. Misconduct of Prevailing Party — Prejudice Unnecessary.** — *Connecticut.* — *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88.

*Idaho.* — *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290; *Burke v. McDonald*, 2 Idaho 1022.

*Maine.* — *Cottle v. Cottle*, 6 Me. 140, 19 Am. Dec. 200; *Clark v. Lebanon*, 63 Me. 393.

*Massachusetts.* — *Knight v. Freeport*, 13 Mass. 218. See also *Harrington v. Worcester, etc., St. R. Co.*, 157 Mass. 582; *Johnson v. Witt*, 138 Mass. 79.

*Minnesota.* — *Koehler v. Cleary*, 23 Minn. 325; *Woodbury v. Anoka*, 52 Minn. 329.

*Mississippi.* — *Brookhaven Lumber, etc., Co. v. Illinois Cent. R. Co.*, 68 Miss. 432.

*New Hampshire.* — *Cilley v. Bartlett*, 19 N. H. 324.

*Tennessee.* — *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11.

*Vermont.* — *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408. See also *Clement v. Spear*, 56 Vt. 401.

*Wisconsin.* — *Jackson v. Smith*, 21 Wis. 26. See also *infra*, this subsection, *Communications with Outsiders — Communications by and with Prevailing Party.*

**Wilful Misconduct.** — In *Colorado* it is held that where the misconduct of the juror is wilful the verdict should be set aside, but when it is inadvertent the complaining party must show injury. *Chicago, etc., R. Co. v. McGraw*, 22 Colo. 363.

**2. Misconduct After Agreement.** — *Spier v. State*, 89 Ga. 737 (leaving jury room); *State v. Reilly*, 108 Iowa 735 (drinking liquor); *Lee v. McLeod*, 15 Nev. 158 (remarks importing bias).

**Receipt of Evidence Out of Court**, in the way of statements from individual jurors, has been held not to be ground for a new trial when such statements were not made until after the verdict was agreed on. *Wise v. Bosley*, 32 Iowa 34; *State v. Gay*, 18 Mont. 51; *Gonzales v. State*, 32 Tex. Crim. 611; *Angle v. State*, 35 Tex. Crim. 427.



(3) *Presumptions* — (a) *Against Misconduct*. — The presumption that the jurors performed their duty is strongly indulged, and can be overthrown only by some positive proof of misconduct, a mere suspicion of improper action being insufficient to justify the setting aside of the verdict.<sup>1</sup>

(b) *Of Prejudice*. — Where misconduct which might be prejudicial has been shown, it is held in many cases that a presumption of prejudice arises, which must be rebutted in order to prevent the setting aside of the verdict.<sup>2</sup>

(4) *Waiver of Objections*. — Failure to object to the misconduct of jurors as soon as knowledge thereof is obtained and opportunity to object is presented is a waiver of the right to object, and the objection cannot be thereafter presented, as by a motion for a new trial.<sup>3</sup> If the injured party signifies

**Hearing Reports and Rumors.** — To authorize reversal of the judgment upon the ground that the jurors were influenced by reports and rumors, it must appear that such reports and rumors were known to the jury at the time when the verdict was agreed on. *Rowland v. State*, 14 Ind. 575.

**1. Presumption Against Misconduct** — *United States*. — *Johnson v. Root*, 2 Cliff. (U. S.) 108; *Parshall v. Minneapolis, etc.*, R. Co., 35 Fed. Rep. 649.

*California*. — *People v. Williams*, 24 Cal. 31; *People v. Kramer*, 117 Cal. 647.

*Colorado*. — *Outcalt v. Johnston*, 9 Colo. App. 519.

*Connecticut*. — *Thomson v. Church, Kirby* (Conn.) 212.

*Illinois*. — *Roe v. Taylor*, 45 Ill. 485.

*Indiana*. — *Mergentheim v. State*, 107 Ind. 567.

*Iowa*. — *Fulliam v. Muscatine*, 70 Iowa 436.

*Kansas*. — *Gleason v. Strauss*, 5 Kan. App. 80.

*Minnesota*. — *State v. Dunphey*, 4 Minn. 438; *Eich v. Taylor*, 20 Minn. 378.

*Mississippi*. — *Lee v. State*, 45 Miss. 114.

*Nebraska*. — *Van Etten v. Butt*, 32 Neb. 288; *Cortelyou v. McCarthy*, 37 Neb. 742; *Tracey v. State*, 46 Neb. 361.

*Nevada*. — *State v. St. Clair*, 16 Nev. 207.

*Pennsylvania*. — *Coyle v. Gorman*, 1 Phila. (Pa.) 326, 9 Leg. Int. (Pa.) 46.

*Rhode Island*. — *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

*Tennessee*. — *Boyd v. State*, 14 Lea (Tenn.) 169; *Hannum v. State*, 90 Tenn. 647.

*Texas*. — *Kutch v. State*, 32 Tex. Crim. 184.

*Compare infra*, this subsection, *Communications with Outsiders* — *Presumptions*.

**Shifting of Burden of Proof.** — In *State v. Cucuel*, 31 N. J. L. 249, it was said that where one of the jury went to his house, and the bailiff did not accompany him into the house, the burden was shifted to the state to prove the good conduct of the juror while in the house.

**2. Presumption of Prejudice** — *United States*. — *Johnson v. Root*, 2 Cliff. (U. S.) 108.

*Arkansas*. — *Maclin v. State*, 44 Ark. 115.

*Georgia*. — *Westmoreland v. State*, 45 Ga. 225; *Shaw v. State*, 83 Ga. 92.

*Indiana*. — *Creek v. State*, 24 Ind. 151; *Short v. West*, 30 Ind. 367; *Hutchins v. State*, 140 Ind. 78.

*Kansas*. — *State v. Bailey*, 32 Kan. 84.

*Massachusetts*. — *Com. v. Roby*, 12 Pick. (Mass.) 496.

*Minnesota*. — *Koehler v. Cleary*, 23 Minn. 325; *Woodbury v. Anoka*, 52 Minn. 329.

*Mississippi*. — *Russell v. State*, 53 Miss. 367; *Green v. State*, 59 Miss. 501.

*Nebraska*. — *Edney v. Baum*, 44 Neb. 294.

*New Jersey*. — *State v. Cucuel*, 31 N. J. L. 249.

*New Mexico*. — *U. S. v. Spencer*, 8 N. Mex. 667.

*Ohio*. — *Alm v. Andrews Bros. Co.*, 9 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 514, 3 Ohio Dec. 247.

*Tennessee*. — *Nile v. State*, 11 Lea (Tenn.) 694.

*West Virginia*. — *State v. Cartright*, 20 W. Va. 32; *State v. Robinson*, 20 W. Va. 714, 43 Am. Rep. 799; *Flesher v. Hale*, 22 W. Va. 44.

**Statements to Follow Jurors** in regard to matters in the case have, however, in *Iowa*, been held to raise no presumption of prejudice. *State v. Woodson*, 41 Iowa 425; *State v. Cross*, 95 Iowa 629. See also *Paramore v. Lindsey*, 63 Mo. 63.

**3. Waiver of Objections** — *United States*. — *Berry v. De Witt*, 27 Fed. Rep. 723; *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep. 898; *Allen v. Blunt*, 2 Woodb. & M. (U. S.) 121, 1 Fed. Cas. No. 217; *Meyer v. Cadwalader*, 49 Fed. Rep. 32.

*Alabama*. — *Williams v. State*, 45 Ala. 57; *Robbins v. State*, 49 Ala. 394; *James v. State*, 53 Ala. 380.

*California*. — *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190; *Steward v. Hinkel*, 72 Cal. 187.

*Connecticut*. — *Woodruff v. Richardson*, 20 Conn. 240.

*Georgia*. — *Martin v. Tidwell*, 36 Ga. 332; *Salter v. Glenn*, 42 Ga. 64; *Lyman v. State*, 69 Ga. 404; *Kirk v. State*, 73 Ga. 620; *Wynn v. City, etc.*, R. Co., 91 Ga. 344; *Buchanan v. State*, 100 Ga. 76.

*Illinois*. — *Joseph Schlitz Brewing Co. v. Compton*, 46 Ill. App. 34; *Shelbyville v. Brant*, 61 Ill. App. 153; *Sanitary Dist. v. Cullerton*, 147 Ill. 385; *Stampofski v. Steffens*, 79 Ill. 303.

*Indiana*. — *Harrington v. State*, 76 Ind. 112; *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756; *Waterman v. State*, 116 Ind. 51; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61.

*Iowa*. — *Shields v. Guffey*, 9 Iowa 322; *State v. Delong*, 12 Iowa 453; *Hahn v. Miller*, 60 Iowa 96; *Foedisch v. Chicago, etc.*, R. Co., 100 Iowa 728; *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 885.

*Kentucky*. — *Hunt v. Com.*, (Ky. 1889) 12 S. W. Rep. 127; *Drake v. Drake*, (Ky. 1899) 52 S. W. Rep. 846.

*Louisiana*. — *State v. Dorsey*, 40 La. Ann. 739.

*Maine*. — *Fessenden v. Sager*, 53 Me. 531.



willingness to proceed with a juror who has been guilty of misconduct, although the court or the opposing counsel offers to dismiss him, objection cannot thereafter be made.<sup>1</sup> In a few cases, however, it has been held that the right to a new trial is not waived by failure promptly to present the objection;<sup>2</sup> and it has been held that failure to object does not constitute negligence if the

*Massachusetts.* — *Rowe v. Canney*, 139 Mass. 41; *Anthony v. Travis*, 148 Mass. 53; *Hill v. Greenwood*, 160 Mass. 256.

*Minnesota.* — *Young v. Otto*, 57 Minn. 307.

*Missouri.* — *State v. Robinson*, 117 Mo. 649.

*Montana.* — *Bradshaw v. Degenhart*, 15 Mont. 267, 48 Am. St. Rep. 677.

*Nebraska.* — *Scott v. Waldeck*, 12 Neb. 5; *Watson v. Roode*, 43 Neb. 348; *Nye, etc., Co. v. Snyder*, 56 Neb. 754.

*Nevada.* — *Lee v. McLeod*, 15 Nev. 158.

*New Hampshire.* — *State v. Rand*, 33 N. H. 216; *State v. Daniels*, 44 N. H. 383.

*New York.* — *Ahrhart v. Stark*, (Buffalo Super. Ct. Spec. T.) 10 Misc. (N. Y.) 448; *Gale v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 385; *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97; *Bruswitz v. Netherlands American Steam Nav. Co.*, 64 Hun (N. Y.) 262; *People v. Flack*, 57 Hun (N. Y.) 83, 8 N. Y. Crim. 43; *Lippus v. Columbus Watch Co.*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 319, 59 Hun (N. Y.) 623; *Valiente v. Bryan*, (N. Y. City Ct. Gen. T.) 66 How. Pr. (N. Y.) 302.

*North Carolina.* — *Posey v. Patton*, 109 N. Car. 455. And see *State v. Kinsauls*, (N. Car. 1900) 36 S. E. Rep. 31.

*North Dakota.* — *Kinneberg v. Kinneberg*, 8 N. Dak. 311.

*Ohio.* — *Gable v. Toledo*, 16 Ohio Cir. Ct. 515, 9 Ohio Cir. Dec. 63.

*Oregon.* — *Osmun v. Winters*, 30 Oregon 177.

*Pennsylvania.* — *Francis v. Philadelphia, etc., R. Co.*, 13 Montg. Co. Rep. (Pa.) 176; *Jejorek v. Nanticoke*, 9 Kulp (Pa.) 501; *Owen v. Schmidt*, 14 Phila. (Pa.) 183, 37 Leg. Int. (Pa.) 82; *Bentz v. South Bethlehem*, 7 Northam. Co. Rep. (Pa.) 107.

*Rhode Island.* — *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

*Tennessee.* — *Tinkle v. Dunivant*, 16 Lea (Tenn.) 503; *M'Donald v. Hodge*, 5 Hayw. (Tenn.) 85; *Booby v. State*, 4 Yerg. (Tenn.) 111.

*Virginia.* — *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130.

*West Virginia.* — *Dower v. Church*, 21 W. Va. 23; *Flesher v. Hale*, 22 W. Va. 44.

*Wisconsin.* — *Jackson v. Smith*, 21 Wis. 26; *Grottkau v. State*, 70 Wis. 462.

**Immediate Action upon Rumors in Regard to the Misconduct of the jury** must be taken by the injured party. *State v. Floyd*, 61 Minn. 467.

**Misconduct After Retirement.** — There is no waiver of misconduct alleged to have occurred on the night before the objection therefor, where on the next morning the verdict is immediately returned on the opening of court, and a motion to set the verdict aside is made as soon as it is announced. *Hanrahan v. Ayres*, (Buffalo Super. Ct. Spec. T.) 10 Misc. (N. Y.) 435.

**Excuse for Delay.** — The fact that the person on whose affidavit the motion was based was keeping out of the way, and it could not be

sooner procured, is a sufficient reason for not moving to set aside a conviction until after sentence. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

**Knowledge by the Court of the misconduct** does not excuse the party's failure to object. *Richardson v. Foster*, 73 Miss. 12, 55 Am. St. Rep. 483. *Compare State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782.

**The Improper Separation of the Jury** is governed by this rule, and, if known, must be promptly objected to.

*California.* — *Steward v. Hinkel*, 72 Cal. 187.

*Georgia.* — *Stix v. Pump*, 37 Ga. 332; *Eberhart v. State*, 47 Ga. 598; *Carter v. State*, 56 Ga. 463; *Kirk v. State*, 73 Ga. 620.

*Illinois.* — *Sanitary Dist. v. Cullerton*, 147 Ill. 385.

*Indiana.* — *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61.

*Iowa.* — *State v. Walton*, 92 Iowa 455.

*Maine.* — *Parsons v. Huff*, 38 Me. 141.

*Missouri.* — *State v. Blunt*, 110 Mo. 322.

*Nebraska.* — *Polin v. State*, 14 Neb. 540.

*Nevada.* — *State v. McMahon*, 17 Nev. 365.

See also *Williams v. State*, 45 Ala. 57; *Robbins v. State*, 49 Ala. 394; *James v. State*, 53 Ala. 380; *Loudy v. Clarke*, 45 Minn. 477.

And see *infra*, this subsection, *Separation of Jurors — Consent to Separation*.

But in *Texas* the constitutional provision that a defendant may waive any right secured to him by law except the right to trial by jury precludes him from waiving the mandatory provision of the statute that when the jurors separate each juror must be accompanied by an officer of the court. *McCampbell v. State*, 37 Tex. Crim. 607; *English v. State*, 28 Tex. App. 500, citing *Porter v. State*, 1 Tex. App. 394; *Grissom v. State*, 4 Tex. App. 374; *Defriend v. State*, 22 Tex. App. 570, and *distinguishing* the dictum in *Sterling v. State*, 15 Tex. App. 249.

**1. Express Consent After Knowledge.** — *Harrington v. State*, 76 Ind. 112; *Gale v. New York Cent., etc., R. Co.*, 13 Hun (N. Y.) 1, 76 N. Y. 594.

**2. Decisions that Objections Need Not Be Promptly Made.** — *People v. Tyrrell*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 142.

In *Rainy v. State*, 100 Ga. 82, it was held that the entertaining of a juror at dinner by the attorney for the state was cause for a new trial, though the counsel for the accused knew of it before verdict.

**Failure to Object But One Circumstance.** — In *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408, it was held that the failure to raise the objection promptly was merely a circumstance to be considered by the court in connection with others in determining, in its sound discretion, whether a new trial should be granted. See also *Whitcher v. Peacham*, 52 Vt. 242.



irregularity could not have been corrected.<sup>1</sup>

**Application of General Rule.**—The requirement that the objection must be promptly made has been applied in cases of the improper taking to the jury room of papers<sup>2</sup> or of articles other than papers;<sup>3</sup> of the wrongful inspection by jurors of articles,<sup>4</sup> or of the *locus in quo*;<sup>5</sup> of improper communications with outsiders;<sup>6</sup> of improper remarks in the presence of the jurors;<sup>7</sup> and of the wrongful acts of jurors in sleeping during the trial,<sup>8</sup> in reading newspapers,<sup>9</sup> in expressing bias,<sup>10</sup> and in becoming intoxicated.<sup>11</sup>

**Knowledge of Counsel.**—To excuse delay in making the objection it must be shown not only that the injured party was ignorant of the misconduct, but that his counsel was likewise ignorant.<sup>12</sup>

**After Motion for a New Trial** and disposal thereof, an objection on account of the misconduct of the jury cannot be raised for the first time.<sup>13</sup>

**On Appeal,** alleged misconduct cannot be considered if no objection was made below.<sup>14</sup>

**1. Inability to Correct Irregularity.**—*Oleson v. Meader*, 40 Iowa 662; *Moore v. New York El. R. Co.*, (C. Pl. Gen. T.) 18 Civ. Pro. (N. Y.) 146, 24 Abb. N. Cas. (N. Y.) 77; *Peterson v. Siglinger*, 3 S. Dak. 255.

**2. Prompt Objection Necessary**—*Taking Papers to Jury Room*—*Georgia*.—*Bass v. Winfry*, 20 Ga. 634.

*Iowa*.—*Shields v. Guffey*, 9 Iowa 322; *Turner v. Kelley*, 10 Iowa 574; *State v. Delong*, 12 Iowa 453; *Davenport v. Cummings*, 15 Iowa 219.

*Kansas*.—*State v. Taylor*, 36 Kan. 329.

*Louisiana*.—*Littlefield v. Beamis*, 5 Rob. (La.) 145.

*Michigan*.—*Chadwick v. Chadwick*, 52 Mich. 545.

*Minnesota*.—*State v. Nichols*, 29 Minn. 357.

*Missouri*.—*Lewis v. McDaniel*, 82 Mo. 577; *Zeibold v. Foster*, 118 Mo. 349.

*New York*.—*Lippus v. Columbus Watch Co.*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 629; *People v. Morrissey, Sheld.* (N. Y.) 295.

*Pennsylvania*.—*Boyer v. Shenandoah*, 16 Pa. Co. Ct. 75; *Garber v. Doersom*, 117 Pa. St. 162.

*South Carolina*.—*Groesbeck v. Marshall*, 44 S. Car. 538.

*Texas*.—*Davis v. McCabe*, (Tex. Civ. App. 1898) 46 S. W. Rep. 837.

*Virginia*.—*Forbes v. Com.*, 90 Va. 550.

See also *infra*, this subsection, *Papers in Jury Room*—*Notes by Jurors*.

**3. Taking Articles to Jury Room.**—*People v. Mahoney*, 77 Cal. 529; *Littlefield v. Beamis*, 5 Rob. (La.) 145; *People v. Wilson*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 137; *Whitcher v. Peacham*, 52 Vt. 242.

The New York Statute provides that the court may permit the jurors to take with them any paper or article received as evidence upon the consent of the defendant and the counsel for the people; and it is held that such consent is given if the court inquires whether the "exhibits" should be given to the jury, and no objection is made. *People v. Hughson*, 154 N. Y. 153.

**4. Inspection of Articles.**—*Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep. 898; *People v. McCurdy*, 68 Cal. 576; *Stampofski v. Steffens*, 79 Ill. 303; *Wilson v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 640; *Whitcher v. Peacham*, 52 Vt. 242.

But see *People v. Tyrrell*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 143.

**5. Inspection of Locus in Quo.**—See *infra*, this subsection, *Receiving Evidence Out of Court*—*Unauthorized View of Locus in Quo*.

**6. Wrongful Communications.**—*Lyman v. State*, 69 Ga. 404; *Wynn v. City, etc.*, R. Co., 91 Ga. 345; *Fessenden v. Sager*, 53 Me. 531; *Hussey v. Allen*, 59 Me. 269; *Rowe v. Canney*, 139 Mass. 41; *Hill v. Greenwood*, 160 Mass. 256. See *Hahn v. Miller*, 60 Iowa 96.

**7. Improper Remarks in Presence of Jurors.**—*Stevens v. State*, 93 Ga. 307; *Tucker v. Salem Flouring Mills Co.*, 13 Oregon 28; *Dower v. Church*, 21 W. Va. 24.

**8. Juror Sleeping.**—*Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 881; *Scott v. Waldeck*, 12 Neb. 5.

**9. Reading Newspaper.**—*Hunter v. State*, 43 Ga. 484.

**10. Expression of Bias.**—*State v. Burns*, 85 Mo. 47.

**11. Intoxication of Juror.**—See *infra*, this subsection, *Refreshments for Jury*—*Intoxicating Liquors*.

**12. Knowledge of Counsel**—*Georgia*.—*Martin v. Tidwell*, 36 Ga. 332; *Cogswell v. State*, 49 Ga. 103; *Wynn v. City, etc.*, R. Co., 91 Ga. 344. *Illinois*.—*McLaughlin v. Hinds*, 47 Ill. App. 598; *Shelbyville v. Brant*, 61 Ill. App. 153.

*Indiana*.—*Long v. State*, 95 Ind. 481.

*Minnesota*.—*State v. Nichols*, 29 Minn. 357.

*Mississippi*.—*Harris v. State*, 61 Miss. 304.

*Nebraska*.—*Watson v. Roode*, 43 Neb. 348; *Peterson v. Skjelver*, 43 Neb. 663.

*New York*.—*People v. Morrissey, Sheld.* (N. Y.) 295.

*Texas*.—*Davis v. McCabe*, (Tex. Civ. App. 1898) 46 S. W. Rep. 837.

*West Virginia*.—*Dower v. Church*, 21 W. Va. 24; *Flesher v. Hale*, 22 W. Va. 44.

*Wisconsin*.—*Brown v. La Crosse City Gas Light, etc., Co.*, 21 Wis. 56; *State v. Vogel*, 22 Wis. 471; *Bennett v. State*, 24 Wis. 57; *Grott-kau v. State*, 70 Wis. 462; *Bonneville v. State*, 53 Wis. 680.

**13. Objections After Motion for New Trial.**—*People v. McCoy*, 71 Cal. 397; *Hall v. Haun*, 5 Dana (Ky.) 58; *State v. Henry*, 15 La. Ann. 297; *Lybarger v. State*, 2 Wash. 552.

**14. Objection on Appeal.**—*People v. Tarm Poi*, 86 Cal. 225; *McQueen v. State*, 82 Ind. 72; *Robinson v. Walsh*, 54 Mich. 506; *Watson v.*



**Consent to Acts of Jury.** — If the party or his counsel consents to the action of the jury or individual jurors, such party cannot thereafter allege that such action constituted misconduct;<sup>1</sup> and so one cannot thereafter object if he himself or his counsel actually participates in the misconduct.<sup>2</sup>

(5) *Conclusiveness of Decision of Lower Court.* — The grant or denial of a new trial for misconduct on the part of the jury is quite frequently stated to be a matter within the sound discretion of the lower court,<sup>3</sup> the exercise of which will be interfered with only in case of palpable error.<sup>4</sup> The appellate court will also interfere, it seems, if the trial court refuses to consider the evidence by which its consideration of the motion should be guided or controlled.<sup>5</sup> The decision is, of course, not subject to review in jurisdictions where there is no right to review decisions on motion for new trial generally.<sup>6</sup>

**Conflicting Evidence.** — A finding by the lower court on conflicting evidence as to the misconduct of a juror will generally not be disturbed.<sup>7</sup>

Roode, 43 Neb. 348; Schappner v. Second Ave. R. Co., 55 Barb. (N. Y.) 497.

1. **Consent to Acts of Jury.** — People v. Hawley, 111 Cal. 78; State v. Allen, 23 Mont. 118; Hancock v. Salmon, 8 Barb. (N. Y.) 564.

2. **Participation in Misconduct.** — U. S. v. Salentine, 8 Biss. (U. S.) 404; McLaughlin v. Hinds, 151 Ill. 403; Bradshaw v. Degenhart, 15 Mont. 267, 48 Am. St. Rep. 677. See also *infra*, this subsection, *Refreshments for Jury — Refreshments Furnished by or in Behalf of Prevailing Party.*

**Misconduct Induced by Party.** — It was held that the fact that unauthorized experiments were made by the juror out of court, by the advice of counsel for the defendant given openly in court, did not preclude the latter from urging such misconduct as a ground for a new trial, since the court and the opposing attorney should not have allowed such advice to go uncondemned. State v. Sanders, 68 Mo. 202, 30 Am. Rep. 782.

3. **Discretion of Lower Court — Alabama.** — Brister v. State, 26 Ala. 107.

*Arkansas.* — Palmore v. State, 29 Ark. 248.

*Georgia.* — Smith v. Willingham, 44 Ga. 200.

*Iowa.* — State v. Allen, 89 Iowa 49.

*Kansas.* — State v. Dugan, 52 Kan. 23.

*Massachusetts.* — Com. v. White, 147 Mass. 76, 148 Mass. 429; Com. v. Poisson, 157 Mass. 510.

*Michigan.* — Wiest v. Luyendyk, 73 Mich. 661.

*Minnesota.* — Svenson v. Chicago Great Western R. Co., 68 Minn. 14.

*New Jersey.* — State v. Cucuel, 31 N. J. L. 249; Hutchinson v. Consumers Coal Co., 36 N. J. L. 24.

*North Carolina.* — State v. Gould, 90 N. Car. 658.

*Texas.* — Johnson v. State, 27 Tex. 758.

*Vermont.* — Peacham v. Carter, 21 Vt. 515; Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496.

**So in Case of Improper Separation,** the granting of a new trial is stated to be within the discretion of the court.

*Arkansas.* — Wright v. State, 35 Ark. 639.

*Florida.* — State v. Madoil, 12 Fla. 151.

*New York.* — People v. Buchanan, 145 N. Y. 1.

*North Carolina.* — State v. Barber, 89 N. Car. 523; State v. Brittain, 89 N. Car. 505.

*South Carolina.* — Pulaski v. Ward, 2 Rich. L. (S. Car.) 119.

*Vermont.* — Edgall v. Bennett, 7 Vt. 534; Downer v. Baxter, 30 Vt. 467; State v. Lawrence, 70 Vt. 524.

**In North Carolina** it is stated that it is within the discretion of the court to grant a new trial when there is a mere suspicion of undue influence exercised over the jury, though it is otherwise if there is actual evidence of such undue influence. State v. Perry, Busb. L. (44 N. Car.) 330; Moore v. Edmiston, 70 N. Car. 471; State v. Brittain, 89 N. Car. 481, *citing* State v. Tilghman, 11 Ired. L. (33 N. Car.) 513, *cited in* State v. Morris, 84 N. Car. 756.

**Under a Statute** authorizing the grant of a new trial by the lower court provided it can see that the substantial rights of the defendant have been prejudiced, the grant of a new trial is a matter of discretion. People v. Johnson, 110 N. Y. 134.

4. **Review for Palpable Error.** — Obear v. Gray, 68 Ga. 182; Shaw v. State, 83 Ga. 92; Perry v. Cottingham, 63 Iowa 41; Kennedy v. Holladay, 105 Mo. 24; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

**The Evidence of Misconduct** must be clear and convincing to authorize the reversal of a finding below in support of the verdict. Omaha Fair, etc., Assoc. v. Missouri Pac. R. Co., 42 Neb. 105.

5. **Refusal to Consider Evidence.** — Munde v. Lambie, 125 Mass. 367; Com. v. White, 147 Mass. 76. See also Mattox v. U. S., 146 U. S. 140; State v. Steifel, 106 Mo. 129. But see People v. Phelan, 123 Cal. 551.

6. **Decision on Motion for New Trial Not Reviewable.** — See State v. Brette, 6 La. Ann. 653; State v. Tucker, 10 La. Ann. 501; Gale v. New York Cent., etc., R. Co., 76 N. Y. 594; State v. Becker, 12 Oregon 318.

7. **Finding on Conflicting Evidence — California.** — People v. Deegan, 88 Cal. 602; People v. Kramer, 117 Cal. 647.

*Indiana.* — Holloway v. State, 53 Ind. 554; DePriest v. State, 68 Ind. 569; Catterlin v. Frankfort, 87 Ind. 45; Long v. State, 95 Ind. 481; Hamm v. Romine, 98 Ind. 77; Clayton v. State, 100 Ind. 201; Hodges v. Bales, 102 Ind. 494; De Hart v. Etnire, 121 Ind. 242; Hinshaw v. State, 147 Ind. 334; Stevens v. Stevens, 127 Ind. 560.

*Iowa.* — State v. Lee, 80 Iowa 75; Wightman v. Butler County, 83 Iowa 691; Walker v. Dailey, 87 Iowa 375.

*Kansas.* — State v. Dugan, 52 Kan. 23.



(6) *Punishment for Misconduct.* — Jurors guilty of conduct inconsistent with their duties should be brought before the court, and such punishment should be imposed on them as their offense may require,<sup>1</sup> as for a contempt of court.<sup>2</sup>

b. COMMUNICATIONS WITH OUTSIDERS — (1) *In General.* — Jurors should not be allowed to communicate with outsiders concerning the case,<sup>3</sup> and a juror in whose presence remarks bearing on the case are made should request a cessation thereof.<sup>4</sup>

*Punishment for Telling Communication.* — A juror is punishable as for contempt if he holds unauthorized communications with outsiders;<sup>5</sup> and likewise, persons communicating with a juror without leave of court may be punished.<sup>6</sup>

(2) *Necessity of Prejudice.* — The fact that verbal communications took

*Minnesota.* — State v. Floyd, 61 Minn. 467; Hull v. Minneapolis St. R. Co., 64 Minn. 402.

*Missouri.* — State v. Taylor, 134 Mo. 109.

*Nebraska.* — Republican Valley R. Co. v. P., 31 N. B. 130; Cortlyoad v. McCarthy, 37 Neb. 742; Carleton v. State, 43 Neb. 373; Everton v. Esgate, 24 Neb. 235.

*Nevada.* — State v. St. Clair, 16 Nev. 207.

*New Hampshire.* — Clark v. Manchester, 64 N. H. 471.

*North Carolina.* — State v. Bailey, 100 N. Car. 528; State v. Hester, 2 Jones L. (47 N. Car.) 83; State v. Best, 111 N. Car. 643; State v. Fuller, 114 N. Car. 885.

*Texas.* — Gilleland v. State, 44 Tex. 356.

*Wisconsin.* — Grottkau v. State, 70 Wis. 462.

1. *Punishment for Misconduct — England.* — Mounson v. West, Leon. 132.

*Arkansas.* — Portis v. State, 27 Ark. 360; Kee v. State, 28 Ark. 155; Binns v. State, 35 Ark. 118.

*Connecticut.* — State v. Andrews, 29 Conn. 100, 76 Am. Dec. 593.

*Florida.* — State v. Madoil, 12 Fla. 151; Ter-  
vin v. State, 37 Fla. 396.

*Georgia.* — State v. Helvenston, R. M. Charlt. (Ga.) 48.

*Illinois.* — Chicago, etc., R. Co. v. Holland, 122 Ill. 461.

*Indiana.* — Cheek v. State, 35 Ind. 492.

*Kentucky.* — Yancey v. Downer, 5 Litt. (Ky.) 11.

*Maine.* — Purinton v. Humphreys, 6 Me. 379.

*New York.* — People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332.

*Pennsylvania.* — Redmond v. Royal Ins. Co., 7 Phila. (Pa.) 167.

*South Carolina.* — Pulaski v. Ward, 2 Rich. L. (S. Car.) 122; Welch v. Welch, 9 Rich. L. (S. Car.) 133.

*Tennessee.* — Riley v. State, 9 Humph. (Tenn.) 646; Griffee v. State, 1 Lea (Tenn.) 41; Davidson v. Manlove, 2 Coldw. (Tenn.) 346.

*Texas.* — Cannon v. State, 3 Tex. 31; Edrington v. Kiger, 4 Tex. 89; Darter v. State, 39 Tex. Crim. 40.

*Wisconsin.* — Grottkau v. State, 70 Wis. 462.

See also *infra*, this subsection, *Communications with Outsiders — In General.*

2. *As for Contempt.* — U. S. v. Devaughan, 3 Cranch (C. C.) 84; State v. Helvenston, R. M. Charlt. (Ga.) 48; State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671. And see People v. Oyer & T. Ct., 101 N. Y. 245, 54 Am. Rep. 691.

A Juror Leaving His Fellow Jurors without permission is guilty of contempt. Murphy v.

Wilson, 46 Ind. 537; Crane v. Sayre, 6 N. J. L. 111; Fa p. Hill, 3 Cow. (N. Y.) 355.

Where the Misconduct Is a Violation of a Statute, and not of the mandate of the court, it is a misdemeanor and not a criminal contempt. People v. Oyer & T. Ct. (Supm. Ct. Gen. T.) 3 N. Y. Crim. 208.

3. *Communications with Outsiders.* — Blalock v. Phillips, 38 Ga. 216; Sanitary Dist. v. Culbertson, 147 Ill. 385; Short v. West, 30 Ind. 367; State v. Cucuel, 31 N. J. L. 249.

The Trustee of the Jury Fund has no right to tell the jurors, when they are being sent back by the court after reporting inability to agree, that they should agree, as they are getting good pay. Gardner v. Arnett, 7 N. Y. 1899) 50 S. W. Rep. 840.

On a View by the Jury, even the court has no power to allow a person to speak with members of the jury. People v. Green, 53 Cal. 60. And see Erwin v. Bulla, 29 Ind. 95, 92 Am. Dec. 341.

Complete Nonintercourse Not Required. — Complete nonintercourse with the rest of the world, under all circumstances, was never exacted of a jury during the progress of a trial in a capital case. State v. Cucuel, 31 N. J. L. 249.

4. *Juror's Duty to Prevent Remarks.* — State v. Andrews, 29 Conn. 100, 76 Am. Dec. 593.

5. *Punishment of Juror.* — *In re May*, 1 Fed. Rep. 737; Foster v. Brooks, 6 Ga. 287; State v. Brazil, Ga. Dec. (pt. ii.) 107; Blalock v. Phillips, 38 Ga. 216; Harrison v. Price, 22 Ind. 165; Lewis v. State, 9 Smed. & M. (Miss.) 115; Ruff v. Rader, 2 Mont. 211; Gulf, etc., R. Co. v. Schroeder, (Tex. Civ. App. 1894) 25 S. W. Rep. 306. See also the title CONTEMPT, vol. 7, p. 46.

In Clement v. Spear, 56 Vt. 401, wherein a juror was guilty of reprehensible conduct in making statements to strangers relative to the case, in disobedience to the admonition of the presiding judge, the court said: "If he alone were to suffer from it, this court would not hesitate to visit upon him the payment of the judgment and costs in the case."

6. *Punishment of Outsider.* — People v. Branigan, 21 Cal. 338; Baker v. State, 82 Ga. 776, 14 Am. St. Rep. 192; Younger v. Louks, 7 Ill. App. 280; State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671; Davidson v. Manlove, 2 Coldw. (Tenn.) 346; Ellis v. Ponton, 32 Tex. 434. See also Martin v. People, 54 Ill. 225; Bowler v. Washington, 62 Me. 302. And see the title CONTEMPT, vol. 7, p. 65.



place between a member of the jury and outsiders will not generally be ground for a new trial, unless it appears that such conversations were of a character to injure the unsuccessful party.<sup>1</sup> Accordingly, a conversation between a juror and a person not interested in the case, upon a matter entirely foreign thereto, will not be ground for setting aside the verdict.<sup>2</sup>

Oral Messages on Personal Matters, given by jurors to outsiders, to be conveyed to the jurors' homes, are not ground for setting aside the verdict;<sup>3</sup> and a like rule applies to such messages received by jurors through outsiders.<sup>4</sup>

(3) *Communications Concerning Case.*—The verdict will be set aside if it is shown that jurors received from outsiders unauthorized communications concerning the case which had, or probably had, an influence on their verdict,<sup>5</sup> and

1. **Absence of Prejudice**—*Arkansas.*—*Collier v. State*, 20 Ark. 36.

*California.*—*People v. Boggs*, 20 Cal. 432; *People v. Symonds*, 22 Cal. 348; *People v. Kelly*, 46 Cal. 355; *People v. McCurdy*, 68 Cal. 576.

*Georgia.*—*Epps v. State*, 19 Ga. 102; *Cohron v. State*, 20 Ga. 752.

*Iowa.*—*Stockwell v. Chicago*, etc., R. Co., 43 Iowa 470.

*Kentucky.*—*Fowler v. Com.*, 7 Ky. L. Rep. 528.

*Minnesota.*—*Chalmers v. Whittemore*, 22 Minn. 305.

*Missouri.*—*Stewart v. Small*, 5 Mo. 525; *State v. Igo*, 21 Mo. 459.

*New York.*—*People v. Carnal*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 256.

*Ohio.*—*Stites v. McKibben*, 2 Ohio St. 588; *Hutchins v. Wick*, 1 Cleve. L. Rep. 89, 4 Ohio Dec. (Reprint) 170.

*Texas.*—*Pickens v. State*, 31 Tex. Crim. 554; *Shaw v. State*, 32 Tex. Crim. 155; *Bailey v. State*, 26 Tex. App. 706.

*West Virginia.*—*State v. Belknap*, 39 W. Va. 429.

And see *infra*, the next subdivision, *Communications Concerning Case.*

2. **Communications upon Extraneous Matters**—*Arkansas.*—*Collier v. State*, 20 Ark. 36.

*California.*—*People v. Boggs*, 20 Cal. 432.

*Colorado.*—*Chesnut v. People*, 21 Colo. 512.

*Delaware.*—*State v. Harrigan*, 9 Houst. (Del.) 369.

*Georgia.*—*Burtine v. State*, 18 Ga. 534; *Allen v. State*, 61 Ga. 166; *Daniel v. Frost*, 62 Ga. 697; *Flanegan v. State*, 64 Ga. 52; *Hill v. State*, 64 Ga. 453.

*Illinois.*—*Taylor v. Roby*, 37 Ill. App. 147; *Martin v. People*, 54 Ill. 225; *Sanitary Dist. v. Cullerton*, 147 Ill. 385; *Bevelot v. Lestrade*, 153 Ill. 625.

*Indiana.*—*Masterson v. State*, 144 Ind. 240.

*Louisiana.*—*State v. Kennedy*, 8 Rob. (La.) 590.

*Massachusetts.*—*Com. v. Roby*, 12 Pick. (Mass.) 496.

*Mississippi.*—*Chase v. State*, 46 Miss. 683.

*Nebraska.*—*Caw v. People*, 3 Neb. 357.

*Nevada.*—*State v. Anderson*, 4 Nev. 265.

*South Dakota.*—*State v. Church*, 6 S. Dak. 89.

*Tennessee.*—*Hoover v. State*, 5 Baxt. (Tenn.) 672.

*Texas.*—*Webb v. State*, 5 Tex. App. 596.

*Utah.*—*Tiernan v. Trewick*, 2 Utah 396.

*West Virginia.*—*State v. Harrison*, 36 W. Va. 729.

A Statute prohibiting conversations with

jurors in regard to the case does not render a new trial necessary when the communication is merely about immaterial matters. *Johnson v. State*, 27 Tex. 758; *Shaw v. State*, 32 Tex. Crim. 155.

3. **Personal Messages.**—*Cornwall v. State*, 91 Ga. 277; *Ned v. State*, 33 Miss. 364; *State v. Howell*, 117 Mo. 307; *Rowe v. State*, 11 Humph. (Tenn.) 491; *Kennedy v. Com.*, 2 Va. Cas. 510.

**Letter Destroyed by Sheriff Before Delivery.**—In *Eich v. Taylor*, 20 Minn. 378, it was held to be no ground for a new trial that one of the jurors had attempted to send to his wife, by the hands of the prevailing party, a letter, of which letter, however, the prevailing party had no knowledge, and the letter was destroyed by the sheriff.

4. *Surles v. State*, 89 Ga. 167; *State v. Howell*, 117 Mo. 307; *Rowe v. State*, 11 Humph. (Tenn.) 491. And see *Taylor v. Everett*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 23.

5. **Prejudicial Communications Ground for New Trial**—*England.*—*Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 433.

*United States.*—*Poole v. Chicago*, etc., R. Co., 2 McCrary (U. S.) 251.

*California.*—*People v. Turner*, 39 Cal. 370; *People v. McCoy*, 71 Cal. 397; *People v. Mitchell*, 100 Cal. 328.

*Connecticut.*—*Bow v. Parsons*, 1 Root (Conn.) 430; *Dana v. Roberts*, 1 Root (Conn.) 134, 1 Am. Dec. 36; *Bennett v. Howard*, 3 Day (Conn.) 223; *Hamilton v. Pease*, 38 Conn. 115; *State v. Andrews*, 29 Conn. 100, 76 Am. Dec. 593; *Tomlinson v. Derby*, 41 Conn. 268.

*Georgia.*—*Blalock v. Phillips*, 38 Ga. 216; *Smith v. Willingham*, 44 Ga. 200.

*Illinois.*—*Martin v. Morelock*, 32 Ill. 487; *Dempsey v. People*, 47 Ill. 323.

*Iowa.*—*Perry v. Cottingham*, 63 Iowa 41; *State v. Walton*, 92 Iowa 455; *Welch v. Taverner*, 78 Iowa 207. See *State v. Allen*, 89 Iowa 49.

*Maine.*—*Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449.

*Michigan.*—*Churchill v. Emerick*, 56 Mich. 536.

*Minnesota.*—*Chalmers v. Whittemore*, 22 Minn. 307; *Hayward v. Knapp*, 22 Minn. 5; *Oswald v. Minneapolis*, etc., R. Co., 29 Minn. 6.

*Nevada.*—*Davis v. Cook*, 9 Nev. 134.

*New Hampshire.*—*State v. Hascall*, 6 N. H. 352. See *State v. Ayer*, 23 N. H. 301.

*New York.*—*Nesmith v. Clinton F. Ins. Co.*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 141.

*North Carolina.*—*State v. Wiseman*, 68 N.



it need not be shown that the prevailing party instigated the communication.<sup>1</sup> But even conversations or communications in regard to the case will not be ground for setting aside the verdict in the absence of a probability of prejudice therefrom.<sup>2</sup>

So Statements by Jurors to other persons in regard to matters connected with the trial do not necessarily afford ground for a new trial;<sup>3</sup> but a discussion by a juror with third persons on the merits of the case, or an expression of prejudice against one of the parties, will, it seems, be ground for a new trial.<sup>4</sup>

**Statements by Juror as to Verdict.** — It is not cause for a new trial that a juror stated to an outsider that a verdict had been agreed on,<sup>5</sup> nor even that he stated what the verdict was before it was actually delivered in court,<sup>6</sup> or that he stated his expectation as to what it would be.<sup>7</sup>

(4) *Presumptions.* — If the juror has been exposed to improper influences, which may have affected the verdict, the presumption is ordinarily against the purity of the verdict, and it will generally be set aside in the absence of evidence to rebut the presumption.<sup>8</sup> In some cases, however, such a presumption does not appear to have prevailed.<sup>9</sup> The presumption of prejudice may

Car. 205; *State v. Tilghman*, 11 Ired. L. (33 N. Car.) 513.

*Ohio.* — *Farrer v. State*, 2 Ohio St. 54.

*Texas.* — *Defriend v. State*, 22 Tex. App. 570.

1. **Source of Communication Immaterial.** — *Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 433; *Nesmith v. Clinton F. Ins. Co.*, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 141; *State v. Wiseman*, 68 N. Car. 205.

2. **Communications Concerning Case.** — *Wise v. Bosley*, 32 Iowa 34; *McCash v. Burlington*, 72 Iowa 26; *State v. Harper*, 101 N. Car. 761, 9 Am. St. Rep. 46; *March v. State*, 44 Tex. 64; *Nance v. State*, 21 Tex. App. 457; *Dennison v. Powers*, 35 Vt. 39; *Hall v. Com.*, 6 Leigh (Va.) 615, 29 Am. Dec. 236. See also *Cowles v. Merchants*, 140 Mass. 377. But see *Love v. State*, 6 Baxt. (Tenn.) 154.

3. **Statements by Juror.** — *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88; *Green v. State*, 71 Ga. 487; *Catterlin v. Frankfort*, 87 Ind. 45; *Stockwell v. Chicago, etc.*, R. Co., 43 Iowa 470; *Foedisch v. Chicago, etc.*, R. Co., 100 Iowa 728; *People v. Riley*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 374. Compare *Brant v. Lyons*, 60 Iowa 172. See also *infra*, this section, *Expression or Intimation of Opinion*.

That a Juror Showed a Memorandum Book containing the names of witnesses who had appeared on the trial, to a third person who had remarked upon the length of the trial, was held not to be ground for setting aside the verdict. *U. S. v. Daubner*, 17 Fed. Rep. 793.

In Connecticut, if a juror has a conversation with a person not belonging to the panel, in regard to the case on trial, the verdict will be set aside, unless it appears that the successful party has not benefited by the juror's misconduct or the losing party been injured. *Bennett v. Howard*, 3 Day (Conn.) 219; *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712; *Hamilton v. Pease*, 38 Conn. 115; *Tomlinson v. Derby*, 41 Conn. 268.

Informing the Jury that a Bet as to the verdict had been made by a person named is not a ground for setting aside the verdict. *Westmoreland v. State*, 45 Ga. 225.

4. **Prejudicial Remarks by Juror.** — *Poole v. Chicago, etc.*, R. Co., 2 McCrary (U. S.) 251; *Blalock v. Phillips*, 38 Ga. 216; *Jewsbury v.*

*Sperry*, 85 Ill. 56. But see *State v. Allen*, 89 Iowa 49; *Walker v. Dailey*, 87 Iowa 375. Compare *Brant v. Lyons*, 60 Iowa 172; *Ridenour v. Clarinda*, 65 Iowa 465; *Com. v. Sallager*, 3 Pa. L. J. Rep. 127, 4 Pa. L. J. 511.

5. **Statement by Juror as to Verdict.** — *Nichols v. Bronson*, 2 Day (Conn.) 211; *McCarthy v. Kitchen*, 59 Ind. 500.

6. *Ingersoll v. Truebody*, 40 Cal. 603; *Hyde v. Lookabill*, 66 Iowa 453; *Fowler v. Tuttle*, 24 N. H. 9; *Fash v. Byrnes*, (N. Y. Super. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 12; *State v. Bryant*, 21 Vt. 479; *Bushee v. Wright*, 1 Pin. (Wis.) 104. And see *Sanders v. State*, 2 Iowa 230.

7. **Expectation of Result.** — *Harrison v. Price*, 22 Ind. 165; *State v. Bird*, 1 Mo. 585; *King v. State*, 91 Tenn. 617; *Clement v. Spear*, 56 Vt. 401. And see *Stockwell v. Chicago, etc.*, R. Co., 43 Iowa 470.

8. **Presumption of Prejudice — England.** — *Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 433, 7 Moo. 87, 1 L. J. C. Pl. 2; *Coster v. Symons*, 1 C. & P. 148, 11 E. C. L. 349.

*Arkansas.* — *Thompson v. State*, 26 Ark. 323; *McKenzie v. State*, 26 Ark. 334; *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13.

*Georgia.* — *Robinson v. Donehoo*, 97 Ga. 702.

*Kansas.* — *Madden v. State*, 1 Kan. 340.

*Kentucky.* — *Com. v. Shields*, 2 Bush (Ky.) 81.

*Mississippi.* — *Riggs v. State*, 26 Miss. 51; *Pope v. State*, 36 Miss. 121; *Woods v. State*, 43 Miss. 364; *McCann v. State*, 9 Smed. & M. (Miss.) 469.

*Nebraska.* — *Edney v. Baum*, 44 Neb. 294.

*Ohio.* — *Farrer v. State*, 2 Ohio St. 54.

*South Carolina.* — *State v. Senn*, 32 S. Car. 392.

*Tennessee.* — *Love v. State*, 6 Baxt. (Tenn.) 154; *Odle v. State*, 6 Baxt. (Tenn.) 159; *Riley v. State*, 9 Humph. (Tenn.) 646; *Brown v. Pippin*, 12 Heisk. (Tenn.) 657; *Cartwright v. State*, 12 Lea (Tenn.) 620; *King v. State*, 91 Tenn. 617.

*Virginia.* — *Com. v. Wormley*, 8 Gratt. (Va.) 712, 56 Am. Dec. 162.

9. **Contrary Decisions.** — *People v. Dunne*, 80 Cal. 34; *McCash v. Burlington*, 72 Iowa 26; *State v. Allen*, 89 Iowa 49. And see *State v. Craig*, 78 Iowa 637. See also *supra*, this sub-



be rebutted by a showing that in fact no prejudice resulted.<sup>1</sup>

**From Possibility of Communications.** — The mere fact that the jurors have not been so closely confined and guarded as to make it absolutely impossible for any persons to communicate with them, does not raise a presumption of communication and is not ground for a new trial, if there is no reason to suppose that there was any communication.<sup>2</sup>

(5) *Communications by and with Prevailing Party* — (a) **In General.** — If a party makes remarks concerning the case to the jurors or in their presence, with the intention of influencing their verdict, the verdict should be set aside at the request of the other party,<sup>3</sup> and in such case the court will not inquire whether prejudice actually resulted, but will set aside the verdict as a punishment for the improper conduct.<sup>4</sup>

section, *General Considerations — Presumptions — Against Misconduct.*

**1. Rebuttal of Presumption.** — *Spencely v. De Willott*, 3 Smith 321; *Saltzman v. Sunset Telephone, etc., Co.*, 125 Cal. 501; *Pope v. State*, 36 Miss. 121; *Riley v. State*, 9 Humph. (Tenn.) 646; *Cartwright v. State*, 12 Lea (Tenn.) 620; *King v. State*, 91 Tenn. 617.

**2. No Presumption of Communication.** — *People v. Kelly*, 46 Cal. 355; *Chesnut v. People*, 21 Colo. 512; *Caleb v. State*, 39 Miss. 721; *Skates v. State*, 64 Miss. 645, 60 Am. Rep. 70; *State v. Baber*, 74 Mo. 293, 41 Am. Rep. 314; *State v. Fairlamb*, 121 Mo. 137; *State v. Perry*, Busb. L. (44 N. Car.) 330; *King v. State*, 91 Tenn. 617.

**Eating in Public.** — So the verdict will not be disturbed merely because the jury ate in a public dining room where there were other people. *People v. Kelly*, 46 Cal. 357; *Doyal v. State*, 70 Ga. 134; *Adams v. People*, 47 Ill. 376; *Browning v. State*, 33 Miss. 48; *Rowe v. State*, 11 Humph. (Tenn.) 401.

**3. Communications with Prevailing Party** — *California.* — *Wright v. Eastlick*, 125 Cal. 517. *Georgia.* — *Smith v. Lovejoy*, 62 Ga. 372. *Compare* *Southwestern R. Co. v. Mitchell*, 80 Ga. 438.

*Idaho.* — *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290.

*Illinois.* — *Lyons v. Lawrence*, 12 Ill. App. 531; *Vane v. Evanston*, 150 Ill. 616.

*Indiana.* — *Huston v. Vail*, 51 Ind. 299.

*Iowa.* — *Wise v. Bosley*, 32 Iowa 34.

*Kansas.* — *May v. Ham*, 10 Kan. 598; *Pond v. Barton*, 8 Kan. App. 601.

*Kentucky.* — *Campbell v. Bannister*, 79 Ky. 205, 2 Ky. L. Rep. 72.

*Maine.* — *Cottle v. Cottle*, 6 Me. 140, 19 Am. Dec. 200; *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253; *Heffron v. Gallupe*, 55 Me. 503; *McIntire v. Hussey*, 57 Me. 493.

*Minnesota.* — *Hayward v. Knapp*, 22 Minn. 5. See *Oswald v. Minneapolis, etc., R. Co.*, 29 Minn. 5.

*Missouri.* — *Kennedy v. Holladay*, 105 Mo. 24.

*New Hampshire.* — *Perkins v. Knight*, 2 N. H. 474; *State v. Hascall*, 6 N. H. 352.

*New York.* — *People v. Carnal*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 256; *Reynolds v. Champlain Transp. Co.*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 7; *Turner v. Beardsley*, 19 Wend. (N. Y.) 348.

*Ohio.* — *Pittsburgh, etc., R. Co. v. Porter*, 32 Ohio St. 328.

*Pennsylvania.* — *Chahoon v. Hackley*, 5 Kulp

(Pa.) 397; *Com. v. Martin*, 16 Pa. Co. Ct. 140; *Ritchie v. Holbrooke*, 7 S. & R. (Pa.) 458; *Snyder v. Haas*, 18 Pa. Co. Ct. 597.

*Rhode Island.* — *Tucker v. South Kingstown*, 5 R. I. 558.

*Tennessee.* — *Humphries v. Blevins*, 1 Overt. (Tenn.) 36; *Vaughn v. Dotson*, 2 Swan (Tenn.) 348; *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11; *Davidson v. Manlove*, 2 Coldw. (Tenn.) 346; *Brown v. Pippin*, 12 Heisk. (Tenn.) 657.

*Texas.* — *Gulf, etc., R. Co. v. Schroeder*, (Tex. Civ. App. 1894) 25 S. W. Rep. 306; *Burris v. State*, 37 Tex. Crim. 587.

*Washington.* — *Vollrath v. Crowe*, 9 Wash. 374.

**A Message by the Jurors to the Defendant**, sent by them before returning a verdict for the defendant, and requesting the defendant to give a situation to the plaintiff on account of his injuries, was held to be ground, in the discretion of the court, for the grant of a new trial. *Svenson v. Chicago Great Western R. Co.*, 68 Minn. 14.

**Jurors Not Known to Be Present.** — That a party in the hearing of the jurors declared positively that the testimony of a witness for his adversary was false, is ground for setting aside the verdict in his favor even if he did not know of the presence of jurors, since he must take the risk of the consequences. *Cilley v. Bartlett*, 19 N. H. 312.

**4. No Inquiry as to Prejudice** — *Indiana.* — *Huston v. Vail*, 51 Ind. 299.

*Maine.* — *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449.

*Massachusetts.* — *Harrington v. Worcester, etc., St. R. Co.*, 157 Mass. 579.

*New Hampshire.* — *State v. Hascall*, 6 N. H. 352.

*New York.* — *Gale v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 385.

*Ohio.* — *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328.

*Tennessee.* — *Vaughn v. Dotson*, 2 Swan (Tenn.) 348; *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11.

*Vermont.* — *McDaniels v. McDaniels*, 40 Vt. 364, 94 Am. Dec. 408.

See also *supra*, this subsection, *Necessity of Prejudice.*

In *May v. Ham*, 10 Kan. 598, it was held that it must appear beyond a reasonable doubt that the unsuccessful party was not prejudiced. *Compare* *Van Mere v. Farewell*, 12 Ont. 285.



**Mere Casual Communications** between the prevailing party and members of the jury, which were not intended to affect their decision and probably did not affect it, will not be cause for setting aside the verdict,<sup>1</sup> especially if there was no reference to the case.<sup>2</sup> So it has been held not ground for a new trial that a juror and the successful party rode to or from the place of trial in the same vehicle,<sup>3</sup> or that they walked together to their hotel.<sup>4</sup> And it has been held that neither the writing of a letter by a juror to the plaintiff upon an entirely different matter,<sup>5</sup> nor an attempt by a juror to communicate the verdict to the successful party before it was announced in court,<sup>6</sup> will constitute ground for setting aside the verdict.

(b) **By and with Counsel.** — Communications between the counsel for the prevailing party and members of the jury will justify the setting aside of the verdict if of a character calculated to prejudice the rights of the adverse party,<sup>7</sup> but mere temporary association or conversation between a juror and counsel will not require the setting aside of the verdict if it is shown to be of a non-prejudicial character,<sup>8</sup> as when there is no conversation in regard to the case on trial.<sup>9</sup>

(c) **By and with Partisans.** — Communications by an agent, friend, or relative

1. **Casual Conversations** — *Georgia*. — Central R., etc., Co. v. Wiggins, 91 Ga. 208.

*Illinois*. — Danville Democrat Pub. Co. v. McClure, 86 Ill. App. 432.

*Iowa*. — Wise v. Bosley, 32 Iowa 34.

*Massachusetts*. — Shea v. Lawrence, 1 Allen (Mass.) 167; White v. Wood, 8 Cush. (Mass.) 413.

*Minnesota*. — Oswald v. Minneapolis, etc., R. Co., 29 Minn. 5.

*Missouri*. — Kennedy v. Holladay, 105 Mo. 24.

*New York*. — Fleischmann v. Samuel, 18 N. Y. App. Div. 97.

*Pennsylvania*. — Clough v. Hoffman, 3 Del. Co. Rep. (Pa.) 213; Bentz v. South Bethlehem, 7 Northam. Co. Rep. (Pa.) 107.

*Virginia*. — Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

2. **Communications Not Referring to Case.** — *Hairgrove v. Curtiss*, 67 Ill. App. 448; *St. Paul F. & M. Ins. Co. v. Kelly*, 43 Kan. 741; *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97; *Kelley v. Downing*, 69 Vt. 266.

3. **Riding in Same Vehicle.** — *Ford v. Holmes*, 61 Ga. 419; *Bonnet v. Glattfeldt*, 120 Ill. 166; *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253; *Gale v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 385.

4. **Walking Together.** — *Beardstown v. Smith*, 150 Ill. 169, *affirming* 52 Ill. App. 46.

**Assistance to Party in Walking.** — In *Central R., etc., Co. v. Wiggins*, 91 Ga. 208, which was an action for injury to the plaintiff, which, as he contended, disabled him from walking without crutches or other assistance, it was held to be no cause for a new trial that one of the jurors took the plaintiff by the arm and assisted him down stairs in the courthouse, during a recess of the court after the commencement of the trial.

5. **Writing of Letter.** — *Eich v. Taylor*, 20 Minn. 378.

6. **Communication of Verdict.** — *Fash v. Byrnes*, (N. Y. Super. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 12.

7. **Communications by Counsel** — *England*. — *Hughes v. Budd*, 8 Dowl. P. C. 315.

*Illinois*. — *Martin v. Morelock*, 32 Ill. 487;

*McLaughlin v. Hinds*, 47 Ill. App. 598; *Mobile, etc., R. Co. v. Davis*, 130 Ill. 146.

*Indiana*. — *Hutchins v. State*, 140 Ind. 78.

*Iowa*. — *Oleson v. Meader*, 40 Iowa 663; *Stafford v. Oskaloosa*, 57 Iowa 748.

*Nebraska*. — *Ensign v. Harney*, 15 Neb. 330, 48 Am. Rep. 344; *Edney v. Baum*, 44 Neb. 294.

*North Carolina*. — *Love v. Moody*, 68 N. Car. 200.

So the verdict was set aside where, after the filing of a sealed verdict, the attorney for the successful party visited the jurors in order to obtain an affidavit as to the exact scope of the verdict. *Carlyle Canning Co. v. Baltimore, etc., R. Co.*, 77 Ill. App. 396.

**Communication Allowed by Court — Error.** — Where the statute provides that no person shall be permitted to converse with a juror impaneled in a felony cause except in the presence and by permission of the court, it is reversible error to allow a juror, against the objection of the defendant, to be brought from the jury room and to permit the district attorney to consult with him privately in relation to another case. *Defriemd v. State*, 22 Tex. App. 570.

8. **Nonprejudicial Association.** — *Ingersoll v. Truebody*, 40 Cal. 603; *Martin v. Mitchell*, 28 Ga. 382; *McDowell v. Sutlive*, 78 Ga. 149; *Jones v. Warner*, 81 Ill. 343, *Hyde v. Lookabill*, 66 Iowa 453; *State v. Fruge*, 28 La. Ann. 657; *Lee v. McLeod*, 15 Nev. 158; *Carnaghan v. Ward*, 8 Nev. 30; *Turner v. St. John*, 3 Coldw. (Tenn.) 376; *Delaney v. Hartwig*, 91 Wis. 412. See also *Armleder v. Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462.

Instructions that a discussion between counsel and certain jurors was immaterial may obviate the irregularity in carrying on such discussion. *Truman v. Bishop*, 83 Iowa 702.

9. **Communications Not About Case.** — *Collier v. State*, 20 Ark. 36; *Lindsay v. State*, 46 Neb. 177; *Hoover v. State*, 5 Baxt. (Tenn.) 672.

So it was held no ground for setting aside the verdict that a juror requested the attorney to send some one for a bottle of liniment, which request was acceded to. *Carnaghan v. Ward*, 8 Nev. 30.



of the prevailing party, if intended or calculated to affect the decision, will be ground for setting aside the verdict.<sup>1</sup> The fact that such action is without the consent or knowledge of the party is immaterial;<sup>2</sup> and it has been held to be unnecessary to show that the jury was actually influenced thereby.<sup>3</sup>

(6) *Communications by and with Witnesses.* — While in some cases communications between a witness and members of the jury have been considered as ground for a new trial,<sup>4</sup> such effect has not generally been given to them, no prejudicial influence appearing.<sup>5</sup> If the communication is shown to be about matters not connected with the case, no new trial will be granted;<sup>6</sup> and that it was of such a character will, it appears, be presumed in the absence of evidence to the contrary.<sup>7</sup>

(7) *Communications by Judge.* — The judge has no right to communicate privately with the jury after it has retired to consult,<sup>8</sup> and it is error for him, in the absence of the parties or counsel, to go before the jury while it is

**1. Communications by Partisans.** — *Hamilton v. Pease*, 38 Conn. 115; *Smith v. Willingham*, 44 Ga. 200; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Bowler v. Washington*, 62 Me. 302; *Knight v. Freeport*, 13 Mass. 218; *Veneman v. McCurtain*, 33 Neb. 643; *Cohen v. Robert*, 2 Strobh. L. (S. Car.) 410; *Brown v. Pippin*, 12 Heisk. (Tenn.) 657; *McDaniels v. McDaniels*, 40 Vt. 364, 94 Am. Dec. 408. Compare *Carlisle v. Sheldon*, 38 Vt. 440.

**2. Knowledge or Consent of Party.** — *Coster v. Merest*, 3 Brod. & B. 272, 7 E. C. L. 433; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Cohen v. Robert*, 2 Strobh. L. (S. Car.) 410; *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408. But see *Eakin v. Morris Canal, etc., Co.*, 24 N. J. L. 538.

**3. Actual Influence Need Not Be Shown.** — *Cohen v. Robert*, 2 Strobh. L. (S. Car.) 410; *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408. But see *Louisville, etc., R. Co. v. Berry*, 9 Ky. L. Rep. 683, 88 Ky. 222, 21 Am. St. Rep. 329; *Eakin v. Morris Canal, etc., Co.*, 24 N. J. L. 538; *Blaine v. Chambers*, 1 S. & R. (Pa.) 169.

**4. Communications Between Jurors and Witnesses.** — *State v. Brazil*, Ga. Dec. (pt. ii.) 107; *Woolsey v. White*, 7 Ill. App. 277; *Meuch v. Bolbach*, 4 Phila. (Pa.) 68, 17 Leg. Int. (Pa.) 140; *Simpson v. Kent*, 9 Phila. (Pa.) 30, 29 Leg. Int. (Pa.) 4; *Com. v. Stokes*, 3 York Leg. Rec. (Pa.) 220; *Hoard v. State*, 15 Lea (Tenn.) 318; *Odle v. State*, 6 Baxt. (Tenn.) 159.

**5. Communications Not Ground for New Trial.** — *Bevelot v. Lestrade*, 153 Ill. 625; *State v. Allen*, 89 Iowa 49; *State v. Crane*, 110 N. Car. 530; *State v. Martin*, Tappan (Ohio) 323; *Shomo v. Zeigler*, 10 Phila. (Pa.) 611, 31 Leg. Int. (Pa.) 205; *Kocher v. Miller*, 3 Luz. Leg. Reg. (Pa.) 44; *Hawley v. Acker*, 2 Woodb. (Pa.) 237; *State v. Way*, 38 S. Car. 333.

**Juror Riding with Witness.** — So it has been held that a verdict need not be set aside because a juror rode in a carriage from the courthouse with a witness. *U. S. v. Daubner*, 17 Fed. Rep. 793; *Hilton v. McDonald*, 173 Mass. 124.

**Misconduct of Adversary's Witness.** — A party should not be deprived of his verdict because one of his adversary's witnesses improperly approached the jury, and may thereby have prejudiced such adversary's case. *Johnson v. Witt*, 138 Mass. 79. And see *Owen v. Schmidt*, 14 Phila. (Pa.) 183, 37 Leg. Int. (Pa.) 82.

**Discretion of Lower Court.** — Where a witness for one of the parties improperly approached two of the jurors and made a remark to them as to what they should do, it was held that the question whether to grant a new trial was within the discretion of the trial court. *Johnson v. Witt*, 138 Mass. 79.

**6. Communications About Extraneous Matters.** — *Hairgrove v. Curtiss*, 67 Ill. App. 448; *Bevelot v. Lestrade*, 153 Ill. 625; *Omaha Fair, etc., Assoc. v. Missouri Pac. R. Co.*, 42 Neb. 105; *Francis v. Philadelphia, etc., R. Co.*, 13 Montg. Co. Rep. (Pa.) 176.

**7. Presumption as to Subject of Communication.** — *People v. Dunne*, 80 Cal. 34; *Bryan v. Com.*, (Ky. 1895) 33 S. W. Rep. 95; *Francis v. Philadelphia, etc., R. Co.*, 13 Montg. Co. Rep. (Pa.) 176; *Com. v. Martin*, 16 Pa. Co. Ct. 140; *State v. Way*, 38 S. Car. 333.

**8. Communications by Judge — Georgia.** — *Ruckersville Bank v. Hemphill*, 7 Ga. 397.

*Illinois.* — *Fisher v. People*, 23 Ill. 283; *Rafferty v. People*, 72 Ill. 37.

*Indiana.* — *Hall v. State*, 8 Ind. 439; *Fish v. Smith*, 12 Ind. 563.

*Maine.* — *Benson v. Fish*, 6 Me. 141.

*Massachusetts.* — *Sargent v. Roberts*, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Merrill v. Nary*, 10 Allen (Mass.) 416; *Read v. Cambridge*, 124 Mass. 567, 26 Am. Rep. 690; *Sargent v. Roberts*, 1 Pick. (Mass.) 337. Compare *Smith v. Holcomb*, 99 Mass. 552.

*Minnesota.* — *Hoberg v. State*, 3 Minn. 262; *Helmbrecht v. Helmbrecht*, 31 Minn. 504.

*Missouri.* — *State v. Alexander*, 66 Mo. 148.

*New York.* — *Taylor v. Betsford*, 13 Johns. (N. Y.) 487; *People v. Linzey*, 79 Hun (N. Y.) 23; *Seeley v. Bisgrove*, 83 Hun (N. Y.) 293; *Plunkett v. Appleton*, 41 N. Y. Super. Ct. 159; *Benson v. Clark*, 1 Cow. (N. Y.) 258; *Moody v. Pomeroy*, 4 Den. (N. Y.) 115; *Watertown Bank, etc., Co. v. Mix*, 51 N. Y. 558. Compare *People v. Carnal*, (Cyer & T. Ct.) 1 Park. Crim. (N. Y.) 256.

*Ohio.* — *Kirk v. State*, 14 Ohio 511.

*Rhode Island.* — *State v. Smith*, 6 R. I. 33.

*Texas.* — *Taylor v. State*, 42 Tex. 504.

*Vermont.* — *State v. Patterson*, 45 Vt. 308.

**Contra.** — *School Dist. No. 1 v. Bragdon*, 23 N. H. 517; *Bassett v. Salisbury Mfg. Co.*, 23 N. H. 438; *Allen v. Aldrich*, 29 N. H. 63; *Goldsmith v. Solomons*, 2 Strobh. L. (S. Car.) 296.



deliberating.<sup>1</sup> The fact that he does so for the purpose of further instructing the jury merely increases the impropriety, since it is a fundamental principle that, after submission of the cause to the jury, all further instructions must be delivered in open court.<sup>2</sup> In some cases, however, where no prejudice can possibly have resulted, it is held that the verdict is not vitiated by the fact that the judge entered the jury room during the deliberations.<sup>3</sup>

(8) *Delivery of Letters to Jurors.* — Letters sent to jurors while the trial is in progress should be inspected by the court before their delivery,<sup>4</sup> and it is stated that the officer in charge of the jury should not alone pass upon such communications.<sup>5</sup> But a new trial will not be granted if it is apparent that the letters contained no reference to the case on trial.<sup>6</sup> A possibility, however, that the letters contained prejudicial matter is sufficient for reversal.<sup>7</sup>

*c. SEPARATION OF JURORS* — (1) *Criminal Cases* — (a) *Separation Generally Allowed.* — In former times, when trials were much briefer than at present, it was held to be improper for the jurors to separate at any time during the trial.<sup>8</sup> It is the practice in the *United States*, at least in prosecutions for crimes other than felonies, for the court to permit the separation of jurors in criminal cases under proper instruction and admonition;<sup>9</sup> and this is a matter which is

1. *Judge Should Not Enter Jury Room* — *Georgia.* — *Green v. State*, 71 Ga. 487.

*Illinois.* — *Crabtree v. Hagenbaugh*, 23 Ill. 349.

*Indiana.* — *Fish v. Smith*, 12 Ind. 563; *Danes v. Pearson*, 6 Ind. App. 465.

*Kansas.* — *Stager v. Harrington*, 27 Kan. 414.

*Louisiana.* — *State v. Frisby*, 19 La. Ann. 143.

*Michigan.* — *Fox v. Peninsular White Lead, etc., Works*, 84 Mich. 676.

*Missouri.* — *State v. Alexander*, 66 Mo. 148.

*New York.* — *Benson v. Clark*, 1 Cow. (N. Y.) 258; *Valentine v. Kelley*, 54 Hun (N. Y.) 79; *People v. Linzey*, 79 Hun (N. Y.) 23; *High v. Chick*, 81 Hun (N. Y.) 100.

*Pennsylvania.* — *Sommer v. Huber*, 183 Pa. St. 162.

*Texas.* — *Lester v. Hays*, 14 Tex. Civ. App. 643.

*Washington.* — *State v. Wroth*, 15 Wash. 621.

2. *Instructions.* — See the title INSTRUCTIONS, 11 ENCYC. OF PL. AND PR. 275.

3. *Absence of Prejudice* — *Louisiana.* — *State v. George*, 8 Rob. (La.) 535.

*Michigan.* — *Hart v. Lindley*, 50 Mich. 20.

*Minnesota.* — *Helmbrecht v. Helmbrecht*, 31 Minn. 504, *modifying* *Hoberg v. State*, 3 Minn. 262.

*New York.* — *People v. Kelly*, 94 N. Y. 526; *Kerr v. Hammer*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 605; *People v. Pickert*, (County Ct.) 26 Misc. (N. Y.) 112; *Thayer v. Van Vleet*, 5 Johns. (N. Y.) 111. See, however, *Kehrley v. Shafer*, 92 Hun (N. Y.) 196; *Gibbons v. Van Alstyne*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 463.

*Ohio.* — *Gandolfo v. State*, 11 Ohio St. 114.

*Tennessee.* — *Cartwright v. State*, 12 Lea (Tenn.) 620.

*Texas.* — *Priest v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 611.

But see *State v. Wroth*, 15 Wash. 621.

So where the judge stated to the jurors that he could not communicate with them in the jury room, it was held that there was no cause for a new trial. *State v. Olds*, 106 Iowa 110; *State v. Robertson*, 51 La. Ann. 139. And see

*Com. v. Jenkins*, Thach. Crim. Cas. (Mass.) 118.

*Consent by Parties* to such action on the part of the judge is a waiver of the right to object thereto. *Smoke v. Jones*, 35 Mich. 409; *Hancock v. Salmon*, 8 Barb. (N. Y.) 564.

4. *Delivery of Letters to Jurors.* — *State v. Robinson*, 20 W. Va. 714, 43 Am. Rep. 799.

5. *King v. State*, 91 Tenn. 617.

6. *Letter Not Referring to Case.* — *State v. Magee*, 48 La. Ann. 901; *Scott v. State*, 7 Lea (Tenn.) 232; *King v. State*, 91 Tenn. 617.

7. *Possibility of Prejudicial Matter.* — *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. McCormick*, 20 Wash. 94.

8. *Separation* — *Former Rule.* — *Eastwood v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 25; *Com. v. M'Caul*, 1 Va. Cas. 271.

9. *England.* — *Rex v. Kinnear*, 2 B. & Ald. 462.

*Florida.* — *Frances v. State*, 6 Fla. 306.

*Illinois.* — *Sutton v. People*, 145 Ill. 279.

*Indiana.* — *Evans v. State*, 7 Ind. 271; *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756.

*Iowa.* — *State v. Rainsbarger*, 74 Iowa 196.

*Kansas.* — *State v. McKinney*, 31 Kan. 570; *State v. Palmer*, 40 Kan. 474.

*Louisiana.* — *State v. Magee*, 48 La. Ann. 901.

*Massachusetts.* — *Com. v. Costello*, 128 Mass. 88.

*Michigan.* — *People v. Considine*, 105 Mich. 149.

*Minnesota.* — *Bilansky v. State*, 3 Minn. 427; *State v. Ryan*, 13 Minn. 370.

*Missouri.* — *State v. Orrick*, 106 Mo. 111.

*Nebraska.* — *Kruget v. State*, 1 Neb. 365; *St. Louis v. State*, 8 Neb. 405.

*New York.* — *Beebe v. People*, 5 Hill (N. Y.) 32; *Stephens v. People*, (Supm. Ct. Gen. T.) 4 Park. Cr. (N. Y.) 396.

*Ohio.* — *Bergin v. State*, 31 Ohio St. 111.

*Pennsylvania.* — *McCreary v. Com.*, 29 Pa. St. 323; *Moss v. Com.*, 107 Pa. St. 267.

*South Carolina.* — *State v. Way*, 38 S. Car. 333; *State v. McElmurray*, 3 Sirobb. L. (S. Car.) 33.

*Utah.* — *People v. Callaghan*, 4 Utah 63.

*Virginia.* — *Jones v. Com.*, 79 Va. 213.



generally within the sound discretion of the trial court.<sup>1</sup>

**Capital Crimes and Other Felonies.** — In prosecutions for capital crimes, the jurors should not, it has been quite frequently stated, be allowed to separate,<sup>2</sup> even with the consent of the prisoner.<sup>3</sup> There are, however, other cases to the effect that separation is allowable even in prosecutions for capital crimes.<sup>4</sup> In some cases the right to permit a separation has been restricted to prose-

*Washington.* — *State v. Tommy*, 19 Wash. 270.

*Wisconsin.* — *Baker v. State*, 88 Wis. 140.

**1. Discretion of Court** — *England.* — *Rex v. Woolf*, 1 Chit. 401, 18 E. C. L. 115.

*Alabama.* — *Robbins v. State*, 49 Ala. 394.

*Arkansas.* — *Johnson v. State*, 32 Ark. 309.

*California.* — *People v. Ebanks*, 117 Cal. 652; *People v. Chaves*, 122 Cal. 134.

*Florida.* — *Frances v. State*, 6 Fla. 306.

*Georgia.* — *Berry v. State*, 10 Ga. 511.

*Illinois.* — *Sutton v. People*, 145 Ill. 279.

*Iowa.* — *State v. Gillick*, 10 Iowa 98; *State v. Rainsbarger*, 74 Iowa 196; *State v. Walton*, 92 Iowa 455.

*Kansas.* — *State v. Palmer*, 40 Kan. 474.

*Louisiana.* — *State v. Crosby*, 4 La. Ann. 434; *State v. Antoine*, 52 La. Ann. 488.

*Massachusetts.* — *Com. v. Gagle*, 147 Mass. 576.

*Michigan.* — *People v. Considine*, 105 Mich. 149.

*Mississippi.* — *Prewitt v. State*, 65 Miss. 437.

*Missouri.* — *State v. Smith*, 5 Mo. App. 427; *Compton v. Arnold*, 54 Mo. 147.

*Ohio.* — *Sargent v. State*, 11 Ohio 472; *State v. Engle*, 13 Ohio 490; *Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559; *Hottelling v. State*, 3 Ohio Cir. Ct. 630, 2 Ohio Cir. Dec. 366.

*Oregon.* — *State v. Shaffer*, 23 Oregon 555.

*South Dakota.* — *State v. Church*, 7 S. Dak. 289.

*Utah.* — *People v. Shafer*, 1 Utah 260.

*Wisconsin.* — *Baker v. State*, 88 Wis. 140.

**Effect of Permission of Judge.** — It has been held that the permission of the judge to separate does not affect the right to a new trial on account of such separation, but merely relieves the jurors from punishment therefor. *Rex v. Woolf*, 1 Chit. 401, 18 E. C. L. 115, *sub nom.* *Rex v. Kinnear*, 2 B. & Ald. 462.

**Adjournment of the Case** for a considerable number of days, involving a dispersal of the jurors and frequent communications by them with other persons, has been held to render it improper to resume the trial with the same jury. *State v. Williamson*, 42 Conn. 261. And see *People v. Dinsmore*, 102 Cal. 381.

**A Statute** requiring an officer to keep the jurors together does not apply to the absenting of individual jurors for necessary purposes. *State v. Fertig*, 84 Iowa 79, *citing State v. Bowman*, 45 Iowa 418, and *State v. Wart*, 51 Iowa 587.

**2. Crimes — Separation Not Allowed — Capital** — *United States.* — *U. S. v. Woods*, 4 Cranch (C. C.) 484.

*Alabama.* — *Morgan v. State*, 48 Ala. 65.

*Florida.* — *Frances v. State*, 6 Fla. 306.

*Illinois.* — *Sutton v. People*, 145 Ill. 279.

*Indiana.* — *Quinn v. State*, 14 Ind. 589.

*Louisiana.* — *State v. Crosby*, 4 La. Ann. 434; *State v. Desmond*, 5 La. Ann. 398; *State v. Evans*, 21 La. Ann. 321; *State v.*

*Frank*, 23 La. Ann. 213; *State v. Dubois*, 24 La. Ann. 310; *State v. Hornsby*, 32 La. Ann. 1268, 8 Rob. (La.) 554, 41 Am. Dec. 305; *State v. Dallas*, 35 La. Ann. 899; *State v. Pierre*, 38 La. Ann. 91; *State v. Foster*, 45 La. Ann. 1176; *State v. Warren*, 43 La. Ann. 828. *Massachusetts.* — *Com. v. Carrington*, 116 Mass. 37.

*Missouri.* — *McLean v. State*, 8 Mo. 153; *State v. Murray*, 91 Mo. 95; *State v. Gray*, 100 Mo. 523.

*New Jersey.* — *State v. Cucuel*, 31 N. J. L. 249.

*Pennsylvania.* — *Moss v. Com.*, 107 Pa. St. 267.

*Utah.* — *People v. Shafer*, 1 Utah 260. But see to the contrary *People v. Callaghan*, 4 Utah 49.

*Vermont.* — *State v. Godfrey*, *Brayt.* (Vt.) 170.

**3. Effect of Consent.** — *Woods v. State*, 43 Miss. 364; *Peiffer v. Com.*, 15 Pa. St. 468, 53 Am. Dec. 605; *Wesley v. State*, 11 Humph. (Tenn.) 502; *People v. Shafer*, 1 Utah 260. And see *infra*, this subsection, *Consent to Separation*.

**4. Capital Crimes — Separation Allowed** — *Connecticut.* — *State v. Babcock*, 1 Conn. 401.

*Kansas.* — *State v. McKinney*, 31 Kan. 570; *State v. Hendricks*, 37 Kan. 559.

*Minnesota.* — *State v. Ryan*, 13 Minn. 370.

*New Mexico.* — *Territory v. Chenowith*, 3 N. Mex. 225.

*New York.* — *Stephens v. People*, 19 N. Y. 549; *People v. Montgomery*, (Oyer & T. Ct.) 13 Abb. Pr. N. S. (N. Y.) 207.

*South Carolina.* — *State v. Stewart*, 26 S. Car. 125; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499; *State v. Anderson*, 2 Bailey L. (S. Car.) 565; *State v. McElmurray*, 3 Strobb. L. (S. Car.) 33.

*Washington.* — *State v. Voorhies*, 12 Wash. 53.

**Discretion of Court.** — So it is stated to be a matter within the discretion of the court whether to allow a separation on a prosecution for capital offense.

*Arkansas.* — *Hamilton v. State*, 62 Ark. 543.

*Iowa.* — *State v. Felter*, 25 Iowa 67.

*Nebraska.* — *Walrath v. State*, 8 Neb. 81; *St. Louis v. State*, 8 Neb. 405; *Langford v. State*, 32 Neb. 782.

*New Mexico.* — *Territory v. Chenowith*, 3 N. Mex. 225.

*New York.* — *Stephens v. People*, 19 N. Y. 549.

*Ohio.* — *Bergin v. State*, 31 Ohio St. 111; *Hottelling v. State*, 3 Ohio Cir. Ct. 630, 2 Ohio Cir. Dec. 366.

*Oregon.* — *State v. Shaffer*, 23 Oregon 555.

*South Carolina.* — *State v. Belcher*, 13 S. Car. 461; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499; *State v. Anderson*, 2 Bailey L. (S. Car.) 565.

See also *Quinn v. State*, 14 Ind. 589.



cutions for crimes less than felony.<sup>1</sup>

(b) *Separation Without Prejudice.* — A mere separation, even though it be unauthorized and improper, will not of itself justify a new trial unless prejudice actually resulted or may reasonably be inferred from the circumstances;<sup>2</sup> and

1. *Felonies — Separation Not Allowed.* — Quinn v. State, 14 Ind. 589; Anderson v. State, 26 Ind. 22; Grable v. State, 2 Greene (Iowa) 559; Nelson v. State, 47 Miss. 621; Prewitt v. State, 65 Miss. 437; Cantwell v. State, 18 Ohio St. 477; King v. State, 91 Tenn. 617. See also Williams v. State, 45 Ala. 57; Porter v. State, 1 Tex. App. 394.

In *Delaware* it is stated that the jurors should not be allowed to separate upon a prosecution for a felony of a grade as high as murder in the second degree. State v. Brown, 2 Marv. (Del.) 380.

2. *Necessity of Prejudice — Arkansas.* — Coker v. State, 20 Ark. 53; Cornelius v. State, 12 Ark. 782; Wilder v. State, 29 Ark. 294; Binns v. State, 35 Ark. 119; Wright v. State, 35 Ark. 639; Dobson v. State, (Ark. 1891) 17 S. W. Rep. 3; Payne v. State, 66 Ark. 545.

*California.* — People v. Mitchell, 100 Cal. 328.

*Colorado.* — Elkin v. People, 5 Colo. 508.

*Dakota.* — Territory v. King, 6 Dak. 131.

*Florida.* — Tervin v. State, 37 Fla. 396.

*Georgia.* — Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; State v. Fox, Ga. Dec. (pt. i.) 35; Robinson v. State, 109 Ga. 564.

*Illinois.* — McKinney v. People, 7 Ill. 540, 43 Am. Dec. 65; Jumpertz v. People, 21 Ill. 409.

*Indiana.* — Porter v. State, 2 Ind. 435; Riley v. State, 95 Ind. 446; Cooper v. State, 120 Ind. 371; Drew v. State, 124 Ind. 9; Jones v. State, 152 Ind. 318; Jarrell v. State, 58 Ind. 293; Barlow v. State, 2 Blackf. (Ind.) 114.

*Iowa.* — State v. Thompson, 87 Iowa 670; State v. Wright, 98 Iowa 702; State v. Wart, 51 Iowa 587. See also State v. Bowman, 45 Iowa 418; State v. Fertig, 70 Iowa 272, 84 Iowa 79; State v. Griffin, 71 Iowa 372.

*Kansas.* — State v. Bailey, 32 Kan. 83; State v. Hendricks, 32 Kan. 559.

*Kentucky.* — Blyew v. Com., 91 Ky. 200; Holly v. Com., (Ky. 1896) 36 S. W. Rep. 532.

*Louisiana.* — State v. Summers, 4 La. Ann. 26; State v. Brette, 6 La. Ann. 653; State v. Tucker, 10 La. Ann. 501; State v. Forney, 24 La. Ann. 191; State v. Turner, 25 La. Ann. 573; State v. Fruge, 28 La. Ann. 657; State v. Johnson, 30 La. Ann. 921; State v. Vines, 34 La. Ann. 1073; State v. Bellow, 42 La. Ann. 586; State v. White, 52 La. Ann. 206; State v. Richmond, 42 La. Ann. 299.

*Maine.* — Parsons v. Huff, 38 Me. 137.

*Massachusetts.* — Com. v. McCauley, 156 Mass. 49.

*Minnesota.* — Bilansky v. State, 3 Minn. 427; State v. Ryan, 13 Minn. 370; Eich v. Taylor, 20 Minn. 378.

*Mississippi.* — Organ v. State, 26 Miss. 78; Green v. State, 59 Miss. 501; Hare v. State, 4 How. (Miss.) 187.

*Missouri.* — Whitney v. State, 8 Mo. 165; State v. Igo, 21 Mo. 459; State v. Brannon, 45 Mo. 329; State v. Matrassey, 47 Mo. 295; State v. Bell, 70 Mo. 633; State v. Woodward, 95 Mo. 129; State v. Dougherty, 55 Mo. 69; State v. Carlisle, 57 Mo. 102; State v. Williams, 149 Mo. 496.

*Montana.* — State v. Gay, 18 Mont. 51.

*Nebraska.* — Caw v. People, 3 Neb. 367.

*Nevada.* — Menzies v. Kennedy, 9 Nev. 152; State v. Jones, 7 Nev. 408; State v. Ward, 19 Nev. 297.

*New Hampshire.* — State v. Prescott, 7 N. H. 287.

*New Jersey.* — State v. Cucuel, 31 N. J. L. 249. See also Titus v. State, 49 N. J. L. 36.

*New Mexico.* — Territory v. Chenowith, 3 N. Mex. 225.

*New York.* — Bebee v. People, 5 Hill (N. Y.) 32; Stephens v. People, 19 N. Y. 549; People v. Ransom, 7 Wend. (N. Y.) 417; People v. Buchanan, (N. Y. Gen. Sess.) 25 N. Y. Supp. 490. See also People v. Menken, 36 Hun (N. Y.) 91; People v. Douglass, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; People v. Draper, 28 Hun (N. Y.) 1; People v. Carnal, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 256; People v. Montgomery, (Oyer & T. Ct.) 13 Abb. Pr. N. S. (N. Y.) 207; People v. Gaffney, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 36.

*North Carolina.* — State v. Carstaphen, 2 Hayw. (3 N. Car.) 238; State v. Hester, 2 Jones L. (47 N. Car.) 83.

*Ohio.* — Bainbridge v. State, 30 Ohio St. 264.

*Pennsylvania.* — Com. v. Cressinger, 193 Pa. St. 326; Com. v. Morgan, 4 Kulp (Pa.) 193, 3 Pa. Co. Ct. 151; Com. v. Clemmer, 2 Pa. Co. Ct. 629; Com. v. Painton, 5 York Leg. Rec. (Pa.) 140.

*Rhode Island.* — State v. O'Brien, 7 R. I. 340.

*South Carolina.* — State v. Way, 38 S. Car. 333.

*Tennessee.* — Stone v. State, 4 Humph. (Tenn.) 37.

*Texas.* — Edrington v. Kiger, 4 Tex. 89; Goode v. State, 2 Tex. App. 520; Soria v. State, 2 Tex. App. 297; Davis v. State, 3 Tex. App. 92; Russell v. State, 11 Tex. App. 288; Ogle v. State, 16 Tex. App. 361; Wakefield v. State, 41 Tex. 556; Jack v. State, 26 Tex. 1.

*Vermont.* — Downer v. Baxter, 30 Vt. 467; State v. Lawrence, 70 Vt. 524.

*Virginia.* — Martin v. Com., 2 Leigh (Va.) 745; M'Carter v. Com., 11 Leigh (Va.) 663; Thompson v. Com., 8 Gratt. (Va.) 637; Philips v. Com., 19 Gratt. (Va.) 485; Overbee v. Com., 1 Rob. (Va.) 819. Compare Com. v. McCaul, 1 Va. Cas. 271.

*West Virginia.* — State v. Cartwright, 20 W. Va. 32; State v. Harrison, 36 W. Va. 729.

*Wisconsin.* — Crockett v. State, 52 Wis. 211, 38 Am. Rep. 733.

*Wyoming.* — Cook v. Territory, 3 Wyo. 110.

*Canada.* — Reg. v. Kennedy, 3 Nova Scotia

203. See also *infra*, this subsection, *Time of Separation — A After Submission of Case to Jury.*

A *Statutory Provision* forbidding the separation of jurors except on certain conditions will not generally render such separation ground for a new trial, if it affirmatively appears that no prejudice resulted therefrom. Riley v. State, 95 Ind. 446; State v. Wright, 98 Iowa 702; State v. Orrick, 106 Mo. 111; State v. Avery, 113 Mo. 475. And see Cantwell v.



this rule is applicable in capital cases as in others.<sup>1</sup> Accordingly, a merely momentary separation by one juror from the others, so as to render communication with other persons hardly possible, has been generally held not to be ground for a new trial.<sup>2</sup> So the separation of a juror from his fellows in the jury room, by going therefrom, is not a ground for new trial, if the juror was not subjected to improper influences while so absent.<sup>3</sup>

**Presumption of Prejudice.** — In many cases it is held that a presumption of injury arises from the fact of an improper separation during the trial, and that it is ground for a new trial unless this presumption is rebutted.<sup>4</sup> In other cases it

State, 18 Ohio St. 482; *Jones v. Com.*, 31 Gratt. (Va.) 830; *State v. Place*, 5 Wash. 773.

**As to the Effect of the Texas Statute**, as dispensing with the necessity of a showing of prejudice, see *infra*, this subsection, *Consent to Separation*.

**As to Statutes Prohibiting Separation After Submission of the case to the jury**, see *infra*, this subsection, *After Submission of Case to Jury*.

**1. Capital Cases — Florida.** — *Bird v. State*, 18 Fla. 493.

*Georgia.* — *Barrow v. State*, 80 Ga. 191.

*Illinois.* — *Reins v. People*, 30 Ill. 256.

*Indiana.* — *Drew v. State*, 124 Ind. 9.

*Louisiana.* — *State v. Evans*, 21 La. Ann. 321; *State v. Frank*, 23 La. Ann. 213; *State v. Moss*, 47 La. Ann. 1514.

*Minnesota.* — *Bilansky v. State*, 3 Minn. 427.

*Mississippi.* — *Green v. State*, 59 Miss. 501, apparently overruling *Woods v. State*, 43 Miss. 364.

*Missouri.* — *State v. Brannon*, 45 Mo. 329; *State v. Steifel*, 106 Mo. 129.

*New York.* — *Eastwood v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 25; *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332.

*Pennsylvania.* — *Peiffer v. Com.*, 15 Pa. St. 463, 53 Am. Dec. 605; *Com. v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670; *Alexander v. Com.*, 105 Pa. St. 1.

*Rhode Island.* — *State v. O'Brien*, 7 R. I. 336.

*Tennessee.* — *Stone v. State*, 4 Humph. (Tenn.) 27; *King v. State*, 91 Tenn. 617; *Cartwright v. State*, 12 Lea (Tenn.) 620.

*Texas.* — *Davis v. State*, 3 Tex. App. 92; *Cox v. State*, 7 Tex. App. 1; *Russell v. State*, 11 Tex. App. 288.

*Utah.* — *People v. Shafer*, 1 Utah 260.

*Virginia.* — *Philips v. Com.*, 19 Gratt. (Va.) 485.

*West Virginia.* — *State v. Robinson*, 20 W. Va. 714, 43 Am. Rep. 799.

*Wisconsin.* — *Keenan v. State*, 8 Wis. 132.

**2. Momentary Separation — California.** — *People v. Lee*, 17 Cal. 76; *People v. Wheatley*, 88 Cal. 114.

*Florida.* — *Coleman v. State*, 17 Fla. 206.

*Georgia.* — *Green v. State*, 71 Ga. 487.

*Indiana.* — *Jones v. State*, 152 Ind. 318.

*Kentucky.* — *Holly v. Com.*, (Ky. 1896) 36 S. W. Rep. 532.

*Louisiana.* — *State v. Forney*, 24 La. Ann. 191; *State v. Turner*, 25 La. Ann. 573.

*Missouri.* — *State v. Howell*, 117 Mo. 307.

*Tennessee.* — *Rowe v. State*, 11 Humph. (Tenn.) 491.

*Texas.* — *Nelson v. State*, 32 Tex. 71; *Jenkins v. State*, 41 Tex. 128; *Lamar v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 677.

*Virginia.* — *Martin v. Com.*, 2 Leigh (Va.) 745; *M'Carter v. Com.*, 11 Leigh (Va.) 663.

*West Virginia.* — *State v. Belknap*, 39 W. Va. 427.

**3. Absence from Jury Room — Arkansas.** — *Cornelius v. State*, 12 Ark. 810; *Stanton v. State*, 13 Ark. 317; *Binns v. State*, 35 Ark. 118.

*California.* — *People v. Bonney*, 19 Cal. 427; *People v. Moore*, 41 Cal. 238; *People v. Benimerly*, 98 Cal. 299.

*Colorado.* — *Chesnut v. People*, 21 Colo. 512.

*Delaware.* — *State v. Harrigan*, 9 Houst. (Del.) 369.

*Georgia.* — *Westmoreland v. State*, 45 Ga. 225.

*Indiana.* — *Alexander v. Dunn*, 5 Ind. 122; *Jarrell v. State*, 58 Ind. 293; *Barlow v. State*, 2 Blackf. (Ind.) 114; *New Albany v. McCulloch*, 127 Ind. 500.

*Kansas.* — *Perkins v. Ermel*, 2 Kan. 325; *State v. Bailey*, 32 Kan. 83.

*Missouri.* — *Whitney v. State*, 8 Mo. 165; *State v. Barton*, 19 Mo. 227; *State v. Dougherty*, 55 Mo. 69; *State v. Carlisle*, 57 Mo. 102; *State v. Bell*, 70 Mo. 633.

*Montana.* — *Territory v. Hart*, 7 Mont. 489.

*Nevada.* — *State v. Jones*, 7 Nev. 408; *State v. Ward*, 19 Nev. 297.

*New Jersey.* — *State v. Cucuel*, 31 N. J. L. 249.

*New Mexico.* — *Territory v. Nichols*, 3 N. Mex. 76.

*New York.* — *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332.

*North Carolina.* — *State v. Carstaphen*, 2 Hayw. (3 N. Car.) 238; *State v. Lytle*, 5 Ired. L. (27 N. Car.) 58.

*North Dakota.* — *State v. Kent*, 5 N. Dak. 516.

*Texas.* — *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

**The Absence of a Juror from the Jury Box** while the court is in session is not ground for a new trial when no prejudice results. *Porter v. State*, 2 Ind. 435; *State v. Bell*, 70 Mo. 633; *State v. Parsons*, 7 Nev. 57.

**4. Presumption of Prejudice — United States.** — *Mattox v. U. S.*, 146 U. S. 140.

*Alabama.* — *Butler v. State*, 72 Ala. 179.

*Arkansas.* — *Cornelius v. State*, 12 Ark. 782; *Coker v. State*, 20 Ark. 53; *Binns v. State*, 35 Ark. 118; *Maclin v. State*, 44 Ark. 115.

*California.* — *People v. Brannigan*, 21 Cal. 338; *People v. Symonds*, 22 Cal. 348.

*Georgia.* — *Monroe v. State*, 5 Ga. 85; *Westmoreland v. State*, 45 Ga. 225; *Daniel v. State*, 56 Ga. 653; *Silvey v. State*, 71 Ga. 553; *Kirk v. State*, 73 Ga. 620; *Roberts v. State*, 14 Ga. 16, 58 Am. Dec. 528.



is stated in effect that the verdict should be set aside if the separation was such as to furnish opportunity for the exercise of improper influence.<sup>1</sup> The presumption of improper influences arising from the fact of separation may be rebutted by an affirmative showing that no communications took place which could have injured the unsuccessful party.<sup>2</sup> In other cases it is apparently considered that the unsuccessful party has the burden of showing that the separation resulted in injury to him.<sup>3</sup>

**Distinction as to Character of Crime.** — In some jurisdictions a distinction is taken between capital cases and other cases, the presumption of prejudice being stated to exist in the former and not in the latter;<sup>4</sup> and a distinction has also

*Kansas.* — *Madden v. State*, 1 Kan. 341; *State v. Bailey*, 32 Kan. 83.

*Louisiana.* — *State v. Hornsby*, 32 La. Ann. 1268; *State v. Foster*, 45 La. Ann. 1176.

*Mississippi.* — *Russell v. State*, 53 Miss. 368; *Green v. State*, 59 Miss. 501; *Cartwright v. State*, 71 Miss. 82.

*Missouri.* — *State v. Orrick*, 106 Mo. 111; *State v. Steifel*, 106 Mo. 129; *State v. Avery*, 113 Mo. 475; *State v. Howland*, 119 Mo. 419.

*New Hampshire.* — *State v. Prescott*, 7 N. H. 288.

*New Jersey.* — *State v. Cucuel*, 31 N. J. L. 249.

*New York.* — *Eastwood v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 25.

*Tennessee.* — *King v. State*, 91 Tenn. 617; *Griffee v. State*, 1 Lea (Tenn.) 41; *Taylor v. State*, 11 Lea (Tenn.) 708; *Stone v. State*, 4 Humph. (Tenn.) 27; *M'Lain v. State*, 10 Yerg. (Tenn.) 241, 31 Am. Dec. 573; *Hines v. State*, 8 Humph. (Tenn.) 602; *Wesley v. State*, 11 Humph. (Tenn.) 502.

*Texas.* — *Burris v. State*, 37 Tex. Crim. 587.

*Virginia.* — *Com. v. M'Caul*, 1 Va. Cas. 271; *Phillips v. Com.*, 19 Gratt. (Va.) 485.

*West Virginia.* — *State v. Harrison*, 36 W. Va. 729.

*Wisconsin.* — *Keenan v. State*, 8 Wis. 132; *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559; *State v. Dolling*, 37 Wis. 396; *Crockett v. State*, 52 Wis. 211, 38 Am. Rep. 733.

**1. Opportunity for Exercise of Influence** — *California.* — *People v. Backus*, 5 Cal. 275; *People v. Thornton*, 74 Cal. 483.

*Georgia.* — *Monroe v. State*, 5 Ga. 85.

*Massachusetts.* — *Com. v. Roby*, 12 Pick. (Mass.) 519.

*Mississippi.* — *Organ v. State*, 26 Miss. 78; *Green v. State*, 59 Miss. 501; *Skates v. State*, 64 Miss. 644, 60 Am. Rep. 70.

*Missouri.* — *Whitney v. State*, 8 Mo. 165.

*New York.* — *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332.

*Rhode Island.* — *State v. O'Brien*, 7 R. I. 336.

*Tennessee.* — *Cartwright v. State*, 12 Lea (Tenn.) 620; *M'Lain v. State*, 10 Yerg. (Tenn.) 241, 31 Am. Dec. 573.

*Virginia.* — *Com. v. M'Caul*, 1 Va. Cas. 271.

In *Texas* it is stated that the verdict should be set aside if the circumstances of the separation were such as to render the exercise of improper influence probable. *Nelson v. State*, 32 Tex. 71; *Jenkins v. State*, 41 Tex. 128; *Wakefield v. State*, 41 Tex. 556; *Kelly v. State*, 28 Tex. App. 120.

**Presumption from Length of Separation.** — From the separation of jurors from their fellows for a considerable time it may be presumed that

they were tampered with. *State v. Fox*, Ga. Dec. (pt. 1.) 35.

**2. Rebuttal of Presumption** — *Arkansas.* — *Coker v. State*, 20 Ark. 53.

*California.* — *People v. Symonds*, 22 Cal. 349.

*Georgia.* — *Daniel v. State*, 56 Ga. 653.

*Missouri.* — *State v. Collins*, 86 Mo. 250; *State v. Payton*, 90 Mo. 220; *State v. Steifel*, 106 Mo. 129; *State v. Avery*, 113 Mo. 475; *State v. Orrick*, 106 Mo. 128; *State v. Sansone*, 116 Mo. 1.

*Nebraska.* — *Caw v. People*, 3 Neb. 357.

*Pennsylvania.* — *Moss v. Com.*, 107 Pa. St. 267; *Com. v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670.

*Tennessee.* — *King v. State*, 91 Tenn. 617; *Stone v. State*, 4 Humph. (Tenn.) 27; *Hines v. State*, 8 Humph. (Tenn.) 601; *Riley v. State*, 9 Humph. (Tenn.) 646; *Rowe v. State*, 11 Humph. (Tenn.) 492; *Greenlow v. State*, 4 Humph. (Tenn.) 25; *Cartwright v. State*, 12 Lea (Tenn.) 625.

**So in Capital Cases** the presumption of prejudice arising from separation may be rebutted. *Caw v. People*, 3 Neb. 357; *Com. v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670; *King v. State*, 91 Tenn. 617; *Thompson v. Com.*, 8 Gratt. (Va.) 637.

**3. Burden of Showing Prejudice** — *Arkansas.* — *Palmore v. State*, 29 Ark. 248.

*California.* — *People v. Bemmerly*, 98 Cal. 299.

*Florida.* — *Tervin v. State*, 37 Fla. 396.

*Indiana.* — See *Alexander v. Dunn*, 5 Ind. 122; *Stutsman v. Barringer*, 16 Ind. 363.

*Louisiana.* — *State v. Turner*, 25 La. Ann. 573.

*Missouri.* — *State v. Brannon*, 45 Mo. 329.

*South Carolina.* — *State v. Nance*, 25 S. Car. 168; *State v. Way*, 38 S. Car. 333.

*Texas.* — *Nelson v. State*, 32 Tex. 71; *Wakefield v. State*, 41 Tex. 556; *Ogle v. State*, 16 Tex. App. 361; *Stewart v. State*, 31 Tex. Crim. 153.

**4. Capital Cases.** — *Goerson v. Com.*, 106 Pa. St. 477, 51 Am. Rep. 534; *Moss v. Com.*, 107 Pa. St. 267; *Com. v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670; *Com. v. Johnson*, 5 Pa. Co. Ct. 236. And see *Jumpertz v. People*, 21 Ill. 375; *Green v. State*, 59 Miss. 501.

In *Louisiana* it is held that in a capital case misconduct and abuse will always be presumed, and a new trial will apparently be granted as a matter of course. *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *State v. Desmond*, 5 La. Ann. 398; *State v. Costello*, 11 La. Ann. 283; *State v. Populus*, 12 La. Ann. 710; *State v. Evans*, 21 La. Ann.



been taken between prosecutions for felonies and for other crimes.<sup>1</sup>

The Affidavit of a Juror who has been separated from his fellows that he was not tampered with during such separation has been held in a capital case to be insufficient evidence of that fact;<sup>2</sup> but in other cases the affidavit of the juror alone has been held sufficient to remove the presumption of prejudice.<sup>3</sup>

(c) **Manner and Purpose of Separation** — *aa. IN GENERAL.* — Though the separation of the jury has been defined to be "the departure of one or more jurors from their fellows, or the whole of the jurors departing from each other,"<sup>4</sup> not every withdrawal of a juror from the immediate presence of his fellows constitutes an improper separation.<sup>5</sup>

*bb. SEPARATION IN CHARGE OF OFFICER.* — The separation of one or more of the jurors from the rest is not objectionable, if it takes place in company with an officer, and if the officer remains in charge of such juror or jurors while the separation continues.<sup>6</sup> So it has been decided that a juror may be permitted to visit his home in the company of an officer;<sup>7</sup> and the fact that the juror while at his home is for a short time out of sight of the officer does not necessarily show an improper separation.<sup>8</sup> The fact that while the officer accompanies a portion of the jury the others are left in charge of another officer, or under lock and key, is immaterial.<sup>9</sup>

321; *State v. Frank*, 23 La. Ann. 213; *State v. Nockum*, 41 La. Ann. 689; *State v. Warren*, 43 La. Ann. 828; *State v. Foster*, 45 La. Ann. 1176; *State v. Moss*, 47 La. Ann. 1514; *State v. Antoine*, 52 La. Ann. 488.

1. **Felonies.** — In *Arkansas* it is held in case of felony that the separation of a juror from his fellows pending the trial casts upon the state the burden of showing that no improper influence was brought to bear upon him during his absence. *Maclin v. State*, 44 Ark. 119, citing *Cornelius v. State*, 12 Ark. 782, and stating that the rule was followed in *Stanton v. State*, 13 Ark. 317; *Collier v. State*, 20 Ark. 36; *Coker v. State*, 20 Ark. 53; *Thompson v. State*, 26 Ark. 323; *Kee v. State*, 28 Ark. 155; *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13, and *Binns v. State*, 35 Ark. 118.

2. **Sufficiency of Juror's Affidavit.** — *Hines v. State*, 8 Humph. (Tenn.) 597; *Hoover v. State*, 5 Baxt. (Tenn.) 672.

3. *Stanton v. State*, 13 Ark. 317; *Dobson v. State*, (Ark. 1891) 17 S. W. Rep. 3; *State v. Carstaphen*, 2 Hayw. (3 N. Car.) 238; *Thompson v. Com.*, 8 Gratt. (Va.) 637. And see *Barrow v. State*, 80 Ga. 191; *Com. v. McCauley*, 156 Mass. 49.

4. **Definition of Separation.** — *State v. Perry*, Busb. L. (44 N. Car.) 330.

A technical separation of the jurors is established by the fact that one of the jurymen was so situated that he could exchange a single word with a stranger without being overheard by the bailiff. *State v. Harris*, 12 Nev. 414.

5. **Separation of Jurors into Squads Within Jury Room.** — In *State v. Turner*, 6 Baxt. (Tenn.) 201, it was held that the fact that the jurors were not at all times in their deliberations gathered into one compact body, but gathered into small squads and talked about the case, always in view of the officer in charge, did not constitute misconduct.

6. **Separation in Charge of Officer** — *Alabama.* — *Nabors v. State*, 120 Ala. 323.

*Missouri.* — *State v. Crawford*, 99 Mo. 74; *State v. Schmidt*, 137 Mo. 266.

*Nevada.* — *State v. Jones*, 7 Nev. 408.

*New Jersey.* — *State v. Cucuel*, 31 N. J. L. 249.

*New York.* — *People v. Hoch*, 150 N. Y. 291. *Pennsylvania.* — *Moss v. Com.*, 107 Pa. St. 267; *Com. v. Britton*, 1 Leg. Gaz. (Pa.) 513.

*Texas.* — *Taylor v. State*, 38 Tex. Crim. 552. *Virginia.* — *Thomas v. Com.*, 2 Va. Cas. 479. *Washington.* — *State v. Burns*, 19 Wash. 52. *Wisconsin.* — *Crockett v. State*, 52 Wis. 211, 38 Am. Rep. 733.

**Officer Need Not Be Specially Sworn.** — *Wilhelm v. People*, 72 Ill. 468, *distinguishing McIntyre v. People*, 38 Ill. 514; *Lewis v. People*, 44 Ill. 433. But see *Jumpertz v. People*, 21 Ill. 375.

**Juror in Sight and Hearing of Officer.** — A separation of jurors conversing with outsiders on matters foreign to the cause, being all the time in the custody and within the sight and hearing of the officer and of each other, is not such a separation as will vitiate the verdict. *Jones v. State*, 152 Ind. 318; *State v. Howell*, 117 Mo. 307; *Jenkins v. State*, 41 Tex. 128; *Cook v. Territory*, 3 Wyo. 110. See also *Territory v. Hart*, 7 Mont. 489; *State v. Belknap*, 39 W. Va. 427.

So if the jurors remain in sight of the officer, and do not converse with other persons, a separation from their colleagues is not generally objectionable. *Coleman v. State*, 17 Fla. 206; *Holly v. Com.*, (Ky. 1866) 36 S. W. Rep. 532; *State v. Bellow*, 42 La. Ann. 586; *Rowe v. State*, 11 Humph. (Tenn.) 491. And see *Lamar v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 677.

7. **Visiting Home.** — *State v. Sansone*, 116 Mo. 1; *State v. Cucuel*, 31 N. J. L. 249; *Crockett v. State*, 52 Wis. 211, 38 Am. Rep. 733.

8. **Juror Out of Sight of Officer.** — *State v. Cucuel*, 31 N. J. L. 249.

Where the juror was in his room for a short time, out of sight of the officer, in order to change his clothes (*State v. O'Brien*, 7 R. I. 336), and likewise where the juror was allowed to remain with his sick wife about half an hour while the officer was outside, nothing being said about the case (*Boyett v. State*, 26 Tex. App. 689), it was held that no improper separation appeared.

9. **Part of Jury Left in Jury Room.** — *Territory v. King*, 6 Dak. 131; *Com. v. Gagle*, 147 Mass.



*cc. SLEEPING ACCOMMODATIONS.* — That the jurors occupy different rooms in a hotel has been held not to involve a wrongful separation, if they are all under the supervision of the officers of the court;<sup>1</sup> and the fact that the officer is not actually in a position to prevent communications with outsiders seems in some cases to be regarded as immaterial.<sup>2</sup>

*dd. GOING TO MEALS.* — There is no separation when jurors are permitted to go to a hotel or restaurant for their meals in charge of officers, no communication taking place with outsiders,<sup>3</sup> although there be an actual separation of the jurors in their positions at the dining tables, while remaining in view and under the supervision of the officer in charge.<sup>4</sup> And the fact that they take their meals in different rooms is immaterial, if the rooms adjoin, and they are all under the immediate charge of the officer.<sup>5</sup> An unauthorized separation may occur, however, on occasions of this kind, as where jurors withdraw themselves entirely from the sight or control of the officer in attendance.<sup>6</sup>

*ee. SEPARATION FOR NECESSARY PURPOSE.* — The temporary withdrawal from his fellows of a juror or jurors, for a necessary purpose, in the company or under the oversight of a bailiff, is not an illegal or irregular separation,<sup>7</sup>

576; *State v. Collins*, 86 Mo. 245; *Walker v. State*, 40 Tex. Crim. 544; *Trim v. Com.*, 18 Gratt. (Va.) 983, 98 Am. Dec. 765. And see *Cornwall v. State*, 91 Ga. 277; *Overbee v. Com.*, 1 Rob. (Va.) 819.

During a View by the Jury in the absence of the defendant, it was error to permit the jurors to separate so as to allow the possibility of communication with them. *People v. Hull*, 86 Mich. 449.

**1. Sleeping Accommodations.** — So when the jurors are in communicating rooms and the officer is in the same or an adjoining room. *Com. v. Shields*, 2 Bush (Ky.) 81; *State v. Devall*, 51 La. Ann. 497.

**Non-communicating Rooms.** — Where the jurors slept in two adjoining but non-communicating rooms, one-half of their number in each, and their custodians slept in a room connecting with one of the rooms, and the doors were locked, there was no improper separation. *Com. v. Manfredi*, 162 Pa. St. 144.

**Rooms Opening on a Common Passage or stairway,** which is locked or guarded, are in effect one room for this purpose. *People v. Bush*, 68 Cal. 623; *Kennedy v. Com.*, 2 Va. Cas. 510.

In *Thompson v. Com.*, 8 Gratt. (Va.) 637, it was held that there was no improper separation though the passage on which the rooms opened communicated with the street below by two flights of stairs, and the doors were left unlocked.

**2. Jurors Out of View of Officer.** — See *State v. Richmond*, 42 La. Ann. 299; *Thompson v. Com.*, 8 Gratt. (Va.) 637.

In *Wright v. State*, 35 Ark. 639, it was held to be no abuse of discretion to refuse a motion for a new trial on the ground that the jurors were permitted to sleep at night in separate rooms, unlocked and unguarded.

**3. Going to Meals.** — *State v. Nockum*, 41 La. Ann. 689; *State v. Riley*, 41 La. Ann. 693.

**4. Separation in Dining Room.** — *Coleman v. State*, 17 Fla. 206; *State v. Cucuel*, 31 N. J. L. 249; *State v. Baker*, 63 N. Car. 276. But see *Jumpertz v. People*, 21 Ill. 375.

**5. Jurors in Adjoining Rooms.** — Where the jurors were separated while at dinner, part being in one room and part in another, but all remained under the immediate charge of an

officer, it was held that this was not such separation as would authorize a new trial. *Kee v. State*, 28 Ark. 155; *Wright v. State*, 35 Ark. 639.

**6. Unauthorized Separation.** — *People v. Thornton*, 74 Cal. 482; *State v. Murray*, 91 Mo. 95; *State v. Gray*, 100 Me. 523; *People v. Schad*, 58 Hun (N. Y.) 571; *Odle v. State*, 6 Baxt. (Tenn.) 159.

**7. Separation for Necessary Purpose** — *Alabama*, — *Nabors v. State*, 120 Ala. 323.

*Arkansas*, — *Maclin v. State*, 44 Ark. 115.

*California*, — *People v. Bonney*, 19 Cal. 426; *People v. Moore*, 41 Cal. 238; *People v. Wheatley*, 88 Cal. 114.

*Georgia*, — *Neal v. State*, 64 Ga. 272.

*Illinois*, — *Wilhelm v. People*, 72 Ill. 468.

*Indiana*, — *Riley v. State*, 95 Ind. 446; *Cooper v. State*, 120 Ind. 377; *Masterson v. State*, 144 Ind. 240.

*Iowa*, — *State v. Bowman*, 45 Iowa 418.

*Kansas*, — *State v. Flack*, 48 Kan. 146.

*Louisiana*, — *State v. Johnson*, 30 La. Ann. 921; *State v. Nelson*, 32 La. Ann. 842; *State v. Riley*, 41 La. Ann. 693; *State v. Nockum*, 41 La. Ann. 689. And see *State v. Forney*, 24 La. Ann. 191.

*Mississippi*, — *Green v. State*, 59 Miss. 501.

*Missouri*, — *State v. Collins*, 86 Mo. 250; *State v. Payton*, 90 Mo. 220; *State v. Washburn*, 91 Mo. 571; *State v. Rush*, 95 Mo. 199; *State v. Woodward*, 95 Mo. 129; *State v. Crawford*, 99 Mo. 74; *State v. Dyer*, 139 Mo. 199.

*Montana*, — *Territory v. Clayton*, 8 Mont. 1.

*North Carolina*, — *State v. Miller*, 1 Dev. & B. L. (18 N. Car.) 500; *State v. Tilghman*, 11 Ired. L. (33 N. Car.) 513; *State v. Lytle*, 5 Ired. L. (27 N. Car.) 58.

*Tennessee*, — *Stone v. State*, 4 Humph. (Tenn.) 27; *Rowe v. State*, 11 Humph. (Tenn.) 492.

*Texas*, — *Soria v. State*, 2 Tex. App. 297; *Cox v. State*, 7 Tex. App. 1; *Jack v. State*, 26 Tex. 1.

*Washington* — *Edwards v. Territory*, 1 Wash. Ter. 195.

*West Virginia*, — *State v. Harrison*, 36 W. Va. 729.

The fact that the bailiff who was with the juror was called away by the judge for a



although the juror withdraws from the presence of the officer or is out of his sight for the short time required for the purpose.<sup>1</sup>

(d) **Time of Separation** — *aa. BEFORE COMPLETION OF JURY.* — The court may, it seems, while the jury is being completed, permit the separation of jurors who have already been selected,<sup>2</sup> and this rule applies even in capital cases.<sup>3</sup> The jurors may be sworn after separation without being again examined as to their qualifications.<sup>4</sup> In any case, separation under such circumstances is not ground for setting aside the verdict, if no resulting prejudice is shown.<sup>5</sup>

*bb. AFTER SUBMISSION OF CASE TO JURY.* — The general rule is that even though separation be permissible during the trial, the jurors should be kept together after the case is submitted to them for deliberation, until they are finally discharged from its consideration;<sup>6</sup> and the rule is most strongly applicable

moment is not ground for a new trial. *State v. Turner*, 25 La. Ann. 573.

**Jurors Left Without Bailiff.** — Temporary separation of jurors from their fellows, in a capital case, a part going out in charge of an officer for a necessary purpose and the rest remaining locked in the jury room, is not ground for a new trial. *State v. Collins*, 86 Mo. 250. See also *State v. Payton*, 90 Mo. 220.

Nor is the fact that a part of the jurors remained in the room unguarded, with the doors and windows closed but not locked, ground for a new trial, where it is shown that none of the jurors had any communication with an outsider. *Cornwall v. State*, 91 Ga. 277. Compare *Overbee v. Com.*, 1 Rob. (Va.) 819.

**1. Juror Out of Officer's Sight.** — *Masterson v. State*, 144 Ind. 240; *State v. Forney*, 24 La. Ann. 192; *Skates v. State*, 64 Miss. 644, 60 Am. Rep. 70; *State v. Rush*, 95 Mo. 199; *State v. Lytle*, 5 Ired. L. (27 N. Car.) 58; *Griffey v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 335.

**Attendant Suspicious Circumstances.** — That two jurymen went into a watercloset where a stranger was, and that another stranger went in afterwards, and that all four were in the closet for some time and out of the view of the officer, was held to constitute such a separation as required the setting aside of a conviction of murder in the first degree. *State v. Robinson*, 20 W. Va. 714, 43 Am. Rep. 799.

**2. Separation Before Completion of Jury.** — *James v. State*, 53 Ala. 380; *Frances v. State*, 6 Fla. 306; *Smith v. State*, 63 Ga. 168; *State v. Burns*, 33 Mo. 483; *Woodson v. State*, 40 Tex. Crim. 685; *Toel v. Com.*, 11 Leigh (Va.) 749; *Curtis v. Com.*, 87 Va. 589.

But see *McQuillen v. State*, 8 Smed. & M. (Miss.) 587; *Nomaque v. People*, 1 Ill. 145, 12 Am. Dec. 157.

In *State v. Voorhies*, 12 Wash. 53, it was held that a statutory provision that jurors in criminal cases shall not be allowed to separate except by consent of the defendant and the prosecuting attorney would not require reversal of a conviction because, against the objection of the defendant, jurors who had been passed for cause by both sides, but who had not been sworn as jurors, were allowed to separate during a recess.

**It Is a Matter of Discretion** with the trial court to permit the separation of jurors who have been selected. *Maclin v. State*, 44 Ark. 115. Compare *McKenzie v. State*, 26 Ark. 334.

**3. Capital Cases.** — *Frances v. State*, 6 Fla. 306; *Epes's Case*, 5 Gratt. (Va.) 676.

The rule in capital cases forbidding the jury to separate applies only when the jury has been duly impaneled, sworn, and charged with the case. *State v. Burns*, 33 Mo. 483; *State v. Todd*, 146 Mo. 295. But see *Grissom v. State*, 4 Tex. App. 374.

**4. No Further Examination Necessary.** — *Curtis v. Com.*, 87 Va. 589. Compare *Smith v. State*, 63 Ga. 168; *Toel v. Com.*, 11 Leigh (Va.) 749.

**5. Absence of Prejudice.** — *Roberts v. State*, 14 Ga. 8, 58 Am. Dec. 528; *Cohron v. State*, 20 Ga. 752; *Bailey v. State*, 26 Tex. App. 706; *State v. Clifford*, 58 Wis. 113.

**Presumption of Prejudice.** — See *Hines v. State*, 8 Humph. (Tenn.) 597. Compare *McKenzie v. State*, 26 Ark. 334.

**6. No Separation After Submission — England.** — *Reg. v. O'Connell*, 1 Cox C. C. 410.

*California.* — *People v. Hawley*, 111 Cal. 78. *Georgia.* — *Berry v. State*, 10 Ga. 511; *Daniel v. State*, 56 Ga. 653.

*Iowa.* — *State v. Fertig*, 84 Iowa 79.

*Kansas.* — *State v. Bailey*, 32 Kan. 83.

*Louisiana.* — *State v. Populus*, 12 La. Ann. 710.

*Minnesota.* — *Maher v. State*, 3 Minn. 444.

*Missouri.* — *State v. Flier*, 118 Mo. 648.

*Nebraska.* — *Walrath v. State*, 8 Neb. 80.

*New York.* — *People v. Schad*, 58 Hun (N. Y.) 571.

*Ohio.* — *Parker v. State*, 18 Ohio St. 88.

*Texas.* — *Darter v. State*, 39 Tex. Crim. 40.

*Washington.* — *Anderson v. State*, 2 Wash. 183; *State v. Rogan*, 18 Wash. 43.

**Leaving One Juror in the Jury Room** in charge of a bailiff, or under lock and key, while the others are taken to their meals, is not ground for a new trial. *Territory v. King*, 6 Dak. 131; *Com. v. Gagle*, 147 Mass. 576; *State v. Harper*, 101 N. Car. 761, 9 Am. St. Rep. 46.

**After Charge, but Before Retirement.** — It is held that the court may permit a separation of the jurors after the instructions, during the arguments of counsel, and at any time before they finally retire in charge of their bailiff for deliberation. *State v. McKinney*, 31 Kan. 570; *State v. Hendricks*, 32 Kan. 559. And see *Territory v. King*, 6 Dak. 131.

**Discretion of Court.** — In *Massachusetts* the court has some discretion in this regard. *Com. v. Gagle*, 147 Mass. 576.

**Under a Statute** authorizing a new trial when the jurors separate without leave of court after retiring, it was held a proper exercise of discretion not to grant a new trial, when one juror fainted and was removed to a separate room,



in capital cases.<sup>1</sup>

**Resulting Prejudice.**—Separation of the jurors during the deliberations, however, will not be cause for a new trial if it appears that there was no prejudice or probability thereof,<sup>2</sup> and it has been held to be proper to allow a temporary separation of one juror from his fellow jurors after submission of the case in order that he may testify in another case.<sup>3</sup> In some cases it is stated that there is a presumption of prejudice in case of separation after the submission of the case.<sup>4</sup>

**Effect of Statute.**—Where the statute requires that the jurors shall be kept together during their deliberations, allowing them to separate without an absolute necessity therefor is, it seems, ground for a new trial.<sup>5</sup> In some cases, however, violation of the statute in this regard is not considered to require a new trial unless injury was occasioned thereby.<sup>6</sup>

**cc. AFTER AGREEMENT ON VERDICT.**—The fact that the jurors, after finding and sealing their verdict, separate before returning the verdict into court, will not vitiate the verdict in the absence of a showing of resulting prejudice.<sup>7</sup>

where he was attended by a physician in the presence of an officer of the court. *People v. Buchanan*, 145 N. Y. 1, *affirming* (N. Y. Gen. Sess.) 25 N. Y. Supp. 481.

1. **Capital Cases.**—*State v. Hendricks*, 32 Kan. 559; *French v. Com.*, 100 Ky. 63; *Walrath v. State*, 8 Neb. 80; *U. S. v. Swan*, 7 N. Mex. 306; *People v. Reagle*, 60 Barb. (N. Y.) 527; *Bergin v. State*, 31 Ohio St. 111. But see *State v. Babcock*, 1 Conn. 402.

2. **Necessity of Prejudice—California.**—*People v. Symonds*, 22 Cal. 348.

*Colorado.*—*Chesnut v. People*, 21 Colo. 512.

*Dakota.*—*Territory v. King*, 6 Dak. 131.

*Georgia.*—*Green v. State*, 71 Ga. 487.

*Kansas.*—*State v. Flack*, 48 Kan. 146; *State v. Dugan*, 52 Kan. 23.

*Louisiana.*—*State v. Brette*, 6 La. Ann. 653.

*Minnesota.*—*State v. Conway*, 23 Minn. 291.

*Missouri.*—*State v. Barton*, 19 Mo. 227; *State v. Harlow*, 21 Mo. 446; *State v. Igo*, 21 Mo. 459; *State v. Pollard*, 14 Mo. App. 583.

*Nevada.*—*State v. Harris*, 12 Nev. 414.

*New Mexico.*—*Territory v. Nichols*, 3 N. Mex. 76.

*North Carolina.*—*State v. Miller*, 1 Dev. & B. L. (18 N. Car.) 500; *State v. Hester*, 2 Jones L. (47 N. Car.) 83.

*Ohio.*—*State v. Dougherty*, 1 Ohio Dec. (Reprint) 37, 1 West. L. J. 271.

*Pennsylvania.*—*Com. v. Clemmer* 2 Pa. Co. Ct. 629; *Com. v. Morgan*, 3 Pa. Co. Ct. 151.

*Texas.*—*Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409; *Davis v. State*, 3 Tex. App. 91; *Cox v. State*, 7 Tex. App. 1; *West v. State*, 7 Tex. App. 150; *Cannon v. State*, 3 Tex. 31.

*Virginia.*—*McCarter v. Com.*, 11 Leigh (Va.) 663.

In *State v. Tilghman*, 11 Ired. L. (33 N. Car.) 513, the reviewing court declined to interfere with the decision of the lower court refusing a new trial, though three different members of the jury several times separated themselves from their fellows after retirement for deliberation, notes were thrown from the windows of the jury room, persons were admitted thereto, refreshments were taken therein, and one juror conversed with a stranger outside the jury room.

3. **Separation to Testify.**—*State v. Fertig*, 70 Iowa 272; *State v. Adams*, 20 Kan. 311; *State*

*v. Durham*, 72 N. Car. 447. And see *People v. Kalkman*, 72 Cal. 212; *State v. Rodrigues*, 45 La. Ann. 1040; *State v. Washburn*, 91 Mo. 571.

4. **Presumption of Prejudice.**—*Cornelius v. State*, 12 Ark. 782; *People v. Brannigan*, 21 Cal. 337; *Daniel v. State*, 56 Ga. 653; *Creek v. State*, 24 Ind. 151; *Organ v. State*, 26 Miss. 78; *U. S. v. Swan*, 7 N. Mex. 306. And see *Murphy v. Hindman*, 37 Kan. 267. *Contra*, *State v. Wart*, 51 Iowa 587; *State v. Garig*, 43 La. Ann. 365.

**Jurors in Separate Rooms.**—In *Blyew v. Com.*, 97 Ky. 200, it was held that the fact that two jurors went to another room and remained away from the rest of the jury for half an hour was not cause for setting aside a conviction of murder.

But in *State v. Foster*, 45 La. Ann. 1176, two colored jurors were placed in another room, the doors of which were unlocked, and from which they could escape without the officer's knowledge, and it was held that misconduct would be presumed, and the verdict should be set aside.

**The Burden Is on the State** to show the absence of prejudice if the separation was such as to allow of the possibility of prejudice. *Madden v. State*, 1 Kan. 341; *State v. Church*, 7 S. Dak. 289, *reversing* 6 S. Dak. 89.

5. **Effect of Statute.**—*State v. Parrant*, 16 Minn. 178; *State v. Orrick*, 106 Mo. 111; *State v. Steifel*, 106 Mo. 129; *State v. Howland*, 119 Mo. 419; *Weis v. State*, 22 Ohio St. 486; *Wright v. State*, 17 Tex. App. 152. See also *People v. Thornton*, 74 Cal. 482; *People v. Brannigan*, 21 Cal. 337; *People v. Backus*, 5 Cal. 275.

6. **Absence of Prejudice.**—*Riley v. State*, 95 Ind. 446; *State v. Wright*, 98 Iowa 702.

**So Where the Verdict Appears to Be Right**, it is held that a separation in violation of the statute is not cause for a new trial. *Masterson v. State*, 144 Ind. 240; *Creek v. State*, 24 Ind. 151.

7. **Separation After Finding of Verdict.**—*Beyersline v. State*, 147 Ind. 125; *Com. v. Desmond*, 141 Mass. 200; *James v. State*, 55 Miss. 57, 30 Am. Rep. 496; *State v. Weber*, 22 Mo. 321; *Territory v. Hexter*, 3 Mont. 206; *Evans v. Foss*, 49 N. H. 490. And see *Com. v. Heller*, 5 Phila. (Pa.) 123, 19 Leg. Int. (Pa.) 133; *Com.*



A different view has, however, occasionally been taken.<sup>1</sup> Even though the verdict is not put in writing, a separation after an agreement in regard thereto has been held not prejudicial and hence not cause for a new trial.<sup>2</sup>

**Express Permission by Court.** — It is a quite frequent practice for the court to direct the jurors that, after sealing and signing their verdict, they may separate and return the verdict at the reconvening of the court.<sup>3</sup> Occasionally, however, the power of the court in this respect is dependent on the grade of the crime,<sup>4</sup> while in other cases the propriety of such action seems to be regarded as dependent upon the consent of the parties.<sup>5</sup>

**Effect of Statute.** — It has been held in some states that under statutes providing that the jurors shall be kept together, and that when they have agreed upon their verdict they shall be conducted into court by the officer in charge, the court has no power to allow them to separate after agreeing upon and sealing their verdict,<sup>6</sup> and that even the consent of the parties to the separation will not render the verdict valid.<sup>7</sup>

**Effect of Separation on Subsequent Power of Jury.** — It has been held in criminal cases that if the jurors separate after returning their verdict, and there is accordingly an opportunity for others to converse with them, they cannot thereafter be sent back to amend or complete their verdict,<sup>8</sup> though they may perhaps correct it in mere ambiguities.<sup>9</sup>

(e) **Consent to Separation.** — There are decisions to the effect that a consent to the separation of the jurors will justify the court in permitting it, as against

*v. Boyle*, 9 Phila. (Pa.) 592, 29 Leg. Int. (Pa.) 85, where it was stated that the principle is applicable only in cases other than capital.

1. *Silvey v. State*, 71 Ga. 553; *State v. Hornsby*, 32 La. Ann. 1268. And see *U. S. v. Vigol*, 2 Dall. (U. S.) 346; *State v. Callahan*, 55 Iowa 364.

2. **Separation After Agreement.** — *Clayton v. State*, 100 Ind. 201; *State v. Sprague*, 149 Mo. 409; *Territory v. Hexter*, 3 Mont. 206; *State v. Wallahan*, Tappan (Ohio) 80.

3. **Express Authority from Court for Separation.** — *U. S. v. Bennett*, 16 Blatchf. (U. S.) 338; *Jarrell v. State*, 58 Ind. 293; *Beyerline v. State*, 147 Ind. 125; *State v. Engle*, 13 Ohio 490; *Kennon v. Territory*, 5 Okla. 685; *McCreary v. Com.*, 29 Pa. St. 323.

4. **Grade of Crime.** — In *Massachusetts* such power exists in cases other than prosecutions for capital crimes. *Com. v. Carrington*, 116 Mass. 37; *Com. v. Costello*, 128 Mass. 88; *Com. v. Tobin*, 125 Mass. 203, 28 Am. Rep. 220; *Com. v. Desmond*, 141 Mass. 200; *Com. v. Heden*, 162 Mass. 521; *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468. And in *Maine* it exists in prosecutions for crimes other than those punishable by death or life imprisonment. *Anonymous*, 63 Me. 590; *State v. Fenlason*, 78 Me. 495; *State v. McCormick*, 84 Me. 566; *State v. Webber*, 90 Me. 108.

**Necessity for Sealing.** — If the verdict is written on the indictment and is sufficiently identified, it need not be sealed. *Com. v. Slaterry*, 147 Mass. 423. Compare *Com. v. Dorus*, 108 Mass. 488.

**In the Defendant's Absence**, the court has no right to make an order permitting the jurors to seal their verdict and separate. *Smith v. State*, 40 Fla. 203.

**Oral and Sealed Verdicts Must Accord.** — The oral verdict returned by the jury upon the reconvening of court must correspond with the paper signed and sealed by the jurors before

their separation. *Com. v. Durfee*, 100 Mass. 146. See also *Com. v. Tobin*, 125 Mass. 203, 28 Am. Rep. 220; *State v. Webber*, 90 Me. 108; *U. S. v. Swan*, 7 N. Mex. 306.

**Misrepresentation by Jury to Secure Separation by Pretending to Seal Verdict.** — See *infra*, this subsection, *Civil Cases — After Agreement on Verdict*.

5. **Consent of Parties** — *United States*. — *Doyle v. U. S.*, 10 Fed. Rep. 269; *U. S. v. Potter*, 6 McLean (U. S.) 186.

*California*. — *People v. Kelly*, 46 Cal. 355.

*Illinois*. — *Reins v. People*, 30 Ill. 256; *Farley v. People*, 138 Ill. 97.

*Iowa*. — *Sanders v. State*, 2 Iowa 230; *State v. Thompson*, 74 Iowa 119.

*Minnesota*. — *State v. Anderson*, 41 Minn. 104.

**Absence of Objection** is equivalent to consent. *State v. Hodges*, 45 Kan. 389; *State v. Emmons*, 45 Kan. 397, 26 Pac. Rep. 679.

6. **Statute Forbidding Separation.** — *State v. Callahan*, 55 Iowa 364; *State v. Fertig*, 84 Iowa 79; *State v. Anderson*, 41 Minn. 104; *State v. Rogan*, 18 Wash. 43; *State v. Barkuloo*, 18 Wash. 141.

7. **Effect of Consent.** — *Anderson v. State*, 2 Wash. 183; *State v. Mason*, 19 Wash. 94. See also *Sanders v. State*, 2 Iowa 230; *State v. Anderson*, 41 Minn. 104.

**Contrary Decisions.** — But in *Ohio* it was held that a statute requiring that jurors be kept together until agreement or discharge did not interfere with the discretion of the court to allow their separation after agreement. *Bainbridge v. State*, 30 Ohio St. 264. And see *State v. Engle*, 13 Ohio 490.

8. **Effect on Future Power of Jury.** — *Farley v. People*, 138 Ill. 97; *U. S. v. Swan*, 7 N. Mex. 306. See also the title VERDICT.

9. **Correction of Ambiguities and Informalities.** — *Jackson v. State*, 45 Ga. 198. And see *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.



the consenting party.<sup>1</sup> In other cases, however, it has been held that the consent of the injured party will not validate a separation which is not authorized by law;<sup>2</sup> and this view has been regarded as particularly applicable in capital cases,<sup>3</sup> though even in these the legislature may allow the separation of jurors with the consent of the prisoner.<sup>4</sup>

**Statutory Requirement of Consent.** — The statute sometimes requires consent of the parties as a condition precedent to separation, and a separation without compliance therewith is ground for a new trial.<sup>5</sup>

The Court Should Not Ask Counsel, in the presence of the jury, to consent that the jurors be allowed to separate, since a refusal of such consent is calculated to create prejudice;<sup>6</sup> but it has been held that unless prejudice is shown such asking of consent is not ground for a new trial.<sup>7</sup>

(f) **Remedy for Improper Separation.** — The improper separation of the jurors may be a ground for the discharge of the jury<sup>8</sup> or for a new trial,<sup>9</sup> but it is not ground for the discharge of the accused.<sup>10</sup>

**1. Separation Justified by Consent.** — *Bower v. Smith*, 8 Ga. 78; *Berry v. State*, 10 Ga. 512; *Reins v. People*, 30 Ill. 256; *Wade v. Com.*, (Ky. 1899) 50 S. W. Rep. 271; *State v. Mix*, 15 Mo. 153; *State v. McMahon*, 17 Nev. 365. And see *State v. Frier*, 118 Mo. 648; *Hilands v. Com.*, 111 Pa. St. 1, 56 Am. Rep. 235. See also *supra*, this section, *General Considerations — Waiver of Objections*.

**Prejudicial Effect.** — If the separation is with the defendant's consent, the burden of showing prejudice is upon him. *State v. McMahon*, 17 Nev. 365. See also *People v. Tarm Poi*, 86 Cal. 225; *People v. Backus*, 5 Cal. 275.

**2. Separation Not Justified by Consent.** — *People v. Hawley*, 111 Cal. 78; *State v. Populus*, 12 La. Ann. 710; *Cantwell v. State*, 18 Ohio St. 477; *Parker v. State*, 18 Ohio St. 88; *Wiley v. State*, 1 Swan (Tenn.) 256; *People v. Shafer*, 1 Utah 260. And see *Elkin v. People*, 5 Colo. 508; *State v. Parrant*, 16 Minn. 178.

In *Com. v. Costello*, 128 Mass. 88, it was said that if a court cannot lawfully allow jurors to separate without the consent of the defendant, it is at least doubtful whether such consent will cure the difficulty. *Citing Rex v. Woolf*, 1 Chit. 401, 18 E. C. L. 115; *Rex v. Kinnear*, 2 B. & Ald. 462; *Peiffer v. Com.*, 15 Pa. St. 468, 53 Am. Dec. 605.

**3. Capital Cases.** — *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *Woods v. State*, 43 Miss. 364; *Peiffer v. Com.*, 15 Pa. St. 468, 53 Am. Dec. 605; *Wesley v. State*, 11 Humph. (Tenn.) 502. Compare *Stephens v. People*, 19 N. Y. 549.

**4. Hartigan v. Territory**, 1 Wash. Ter. 447.

**5. Statutory Requirement of Consent.** — *State v. Garrity*, 98 Iowa 101 [overruling *State v. Rainsbarger*, 74 Iowa 200]; *State v. Smith*, 102 Iowa 656.

Under the Texas Statute forbidding separation in a felony case except with the consent of the prosecuting attorney and of the defendant, and then only in the custody of an officer, a separation without such consent is ground for a new trial, without regard to the question of resulting prejudice. *Porter v. State*, 1 Tex. App. 399; *Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409; *Grisson v. State*, 4 Tex. App. 374; *Hatch v. State*, 6 Tex. App. 384; *Cox v. State*, 7 Tex. App. 1; *Warren v. State*, 9 Tex. App. 620, 35 Am. Rep. 745; *Wright v. State*, 17 Tex.

App. 152; *Defriend v. State*, 22 Tex. App. 570; *English v. State*, 28 Tex. App. 500; *Robinson v. State*, 30 Tex. App. 459; *Walker v. State*, 37 Tex. 366; *Brown v. State*, 38 Tex. 482. Compare *Boyet v. State*, 26 Tex. App. 704; *Kelly v. State*, 28 Tex. App. 120; *Lamar v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 677; *Stewart v. State*, 31 Tex. Crim. 153, all of which latter cases were disapproved in *McCampbell v. State*, 37 Tex. Crim. 607.

**Who May Consent.** — Where the statute requires the consent of the defendant, his attorney has no power to give such consent. *Brown v. State*, 38 Tex. 482.

**Scope of Consent.** — Consent to a separation cannot be taken as a consent that a juror may absent himself, and so necessitate the discharge of the other jurors. *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213.

**The Failure to Object** to an order allowing separation has been held to constitute an implied consent. *Riggins v. Brown*, 12 Ga. 272; *Menzies v. Kennedy*, 9 Nev. 152.

**6. Asking Consent in Presence of Jury.** — *Berry v. State*, 10 Ga. 511; *Mitchell v. State*, 41 Ga. 527; *Lyman v. State*, 69 Ga. 404; *Peiffer v. Com.*, 15 Pa. St. 468, 53 Am. Dec. 605. And see *Parker v. State*, 18 Ohio St. 88; *People v. Shafer*, 1 Utah 260.

**7. State v. Holedger**, 15 Wash. 443. And see *State v. Walton*, 92, Iowa 455.

**8. Remedy.** — See *infra*, this title, *Discharge of Jury and Jurors — Grounds Authorizing Discharge — Misconduct of Jury*.

**9. Ground for New Trial — Georgia.** — *State v. Sherbourne*, Dudley (Ga.) 28; *State v. Fox*, Ga. Dec. (pt. i.) 35; *State v. Peter*, Ga. Dec. (pt. i.) 46.

*Illinois.* — *Russell v. People*, 44 Ill. 508.

*Mississippi.* — *Cartwright v. State*, 71 Miss. 82.

*Missouri.* — *State v. Witten*, 100 Mo. 525.

*Pennsylvania.* — *Com. v. Thompson*, 4 Phila. (Pa.) 215, 17 Leg. Int. (Pa.) 309.

*Tennessee.* — *M'Lain v. State*, 10 Yerg (Tenn.) 241, 31 Am. Dec. 573.

*Vermont.* — *State v. Shippy*, Brayt. (Vt.) 169.

*Virginia.* — *M'Carter v. Com.*, 11 Leigh (Va.) 663; *Toole v. Com.*, 11 Leigh (Va.) 749; *Overbee v. Com.*, 1 Rob. (Va.) 819.

And see other cases cited in this subsection.

**10. Not Ground for Discharge of Accused.** — *Williams v. State*, 45 Ala. 57; *People v. Hawley*,



(2) *Civil Cases* — (a) *In General*. — It is not the general practice in the *United States* to isolate jurors in civil cases during the incidental adjournments of the court, but they are permitted to separate after receiving due admonition from the court not to communicate with others in regard to the case.<sup>1</sup> It has been decided in a number of cases that a separation without the consent of the court is not ground for a new trial if no injury resulted therefrom.<sup>2</sup>

(b) *After Submission of Cause to Jury*. — It has been held that after the submission of the cause to the jury, the jurors should not be permitted to separate without the consent of the parties.<sup>3</sup> In some cases, however, it is considered proper to allow a separation during the deliberations;<sup>4</sup> and if counsel do not object to an order of court to that effect, consent to the order will be implied.<sup>5</sup> Though it is cause for a new trial if the separation is such as to furnish a ready opportunity for communication with other persons,<sup>6</sup> a new

III Cal. 78; *State v. Harras*, (Wash. 1900) 60 Pac. Rep. 58. And see *State v. Jenkins*, 84 N. Car. 812, 37 Am. Rep. 643.

1. *Civil Cases*. — *Dozenback v. Raymer*, 13 Colo. 451; *Stancell v. Kenan*, 33 Ga. 56; *Noel v. Denman*, 76 Tex. 306; *San Antonio, etc., R. Co. v. Bennett*, 76 Tex. 151. Compare *Meyer v. Cadwalader*, 49 Fed. Rep. 32. See also *infra*, this subsection, *Admonition on Separation*.

2. *Necessity of Prejudice* — *United States*. — *Burrill v. Phillips*, 1 Gall. (U. S.) 360.

*Connecticut*. — *Brandin v. Grannis*, 1 Conn. 402, note.

*Georgia*. — *Stancell v. Kenan*, 33 Ga. 56.

*Illinois*. — *Lake Erie, etc., R. Co. v. Helmerick*, 29 Ill. App. 270.

*Indiana*. — *Stutsman v. Barringer*, 16 Ind. 363; *Drummond v. Leslie*, 5 Blackf. (Ind.) 453.

*Iowa*. — *Boggs v. Chicago, etc., R. Co.*, 29 Iowa 577.

*Kentucky*. — *Bledsoe v. Bledsoe*, (Ky. 1886) 1 S. W. Rep. 10.

*Louisiana*. — *Vicksburg, etc., R. Co. v. Elmore*, 46 La. Ann. 1237.

*Maine*. — *Newell v. Ayer*, 32 Me. 334; *Parsons v. Huff*, 38 Me. 137; *Milo v. Gardiner*, 41 Me. 549.

*Massachusetts*. — *Nichols v. Nichols*, 136 Mass. 256; *Chemical Electric Light, etc., Co. v. Howard*, 150 Mass. 495.

*Minnesota*. — *Eich v. Taylor*, 20 Minn. 378.

*Mississippi*. — *Graves v. Monet*, 7 Smed. & M. (Miss.) 45.

*Missouri*. — *Compton v. Arnold*, 54 Mo. 149.

*Nevada*. — *Carnaghan v. Ward*, 8 Nev. 30.

*New Hampshire*. — *Evans v. Foss*, 49 N. H. 490.

*New Jersey*. — *Clarke v. Cole*, 2 N. J. L. 259; *Allen v. Smith*, 12 N. J. L. 199.

*New York*. — *Wilson v. Abrahams*, 1 Hill (N. Y.) 207; *Horton v. Horton*, 2 Cow. (N. Y.) 589; *Eastman v. Tuttle*, 1 Cow. (N. Y.) 248; *Ex p. Hill*, 3 Cow. (N. Y.) 355; *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; *Oliver v. First Presb. Church*, 5 Cow. (N. Y.) 283.

*Ohio*. — *Armleder v. Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530.

*South Carolina*. — *Pulaski v. Ward*, 2 Rich. L. (S. Car.) 119.

*South Dakota*. — *Edward Thompson Co. v. Gunderson*, 10 S. Dak. 42.

*Texas*. — *Cannon v. State*, 3 Tex. 31; *Edrington v. Kiger*, 4 Tex. 89; *Burns v. Paine*, 8 Tex. 159; *San Antonio, etc., R. Co. v. Bennett*, 76 Tex. 151; *Noel v. Denman*, 76 Tex. 306.

*Vermont*. — *Downer v. Baxter*, 30 Vt. 467.

See also *Ragland v. Wills*, 6 Leigh (Va.) 1; and *infra*, this subsection, *After Submission of Cause to Jury; After Agreement on Verdict*.

*Civil Cases and Misdemeanors* have been stated to stand upon similar grounds in this regard. *Prewitt v. State*, 65 Miss. 437; *Eastwood v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 25. See also *People v. Ransom*, 7 Wend. (N. Y.) 417; *Cannon v. State*, 3 Tex. 31; *Edrington v. Kiger*, 4 Tex. 89.

*Discretion of Court*. — A motion for a new trial upon the ground of a separation of the jury is addressed to the discretion of the court. *Downer v. Baxter*, 30 Vt. 467; *Edgell v. Bennett*, 7 Vt. 534.

*Separation on View*. — On a view of premises by consent, it was held not to constitute misconduct that one of the jurors, who by reason of lameness was unable to walk over the premises, remained in a carriage on a highway alongside and in view of the greater part of the premises. *Keller v. Bley*, 15 Oregon 429.

*Absence from the Jury Box* is not ground for a new trial without any showing of prejudice. *Crane v. Sayre*, 6 N. J. L. 110; *Eastman v. Tuttle*, 1 Cow. (N. Y.) 248. And see *Steward v. Hinkel*, 72 Cal. 187; *Ex p. Hill*, 3 Cow. (N. Y.) 355.

3. *After Submission of Case*. — *Lester v. Stanley*, Brun. Col. Cas. (U. S.) 58, 15 Fed. Cas. No. 8,277; *Stix v. Pump*, 37 Ga. 332; *Barfield v. Mullino*, 107 Ga. 730. And see *Spencer v. Williams*, 160 Mass. 17; *Shepherd v. Baylor*, 5 N. J. L. 954.

*Punishment*. — The separation of the jurors before agreement, when unauthorized, may be punished. *Murphy v. Wilson*, 46 Ind. 537; *Brown v. McConnel*, 1 Bibb (Ky.) 265.

4. *Separation Permissible*. — *Dozenback v. Raymer*, 13 Colo. 451; *Haynes v. Thomas*, 7 Ind. 38.

5. *Implied Consent*. — *Riggins v. Brown*, 12 Ga. 271; *Adkins v. Williams*, 23 Ga. 222.

6. *New Trial* — *Colorado*. — *Dozenback v. Raymer*, 13 Colo. 451.

*Connecticut*. — *Lester v. Stanley*, 3 Day (Conn.) 287.

*Georgia*. — *Obear v. Gray*, 68 Ga. 182.

*Mississippi*. — *Offit v. Vick*, Walk. (Miss.) 99.

*North Carolina*. — *Moore v. Edmiston*, 70 N. Car. 471.

*Ohio*. — *Sutliff v. Gilbert*, 8 Ohio 405.

*Virginia*. — *Howle v. Dunn*, 1 Leigh (Va.) 455.



trial will not be granted if it appears that there is no probability of prejudice.<sup>1</sup>

That the Statute Requires the Jurors to Be Kept Together by the officer until agreement or discharge, has been held not to necessitate a new trial in case of their separation unless there is a showing of prejudice.<sup>2</sup>

(c) After Agreement on Verdict. — It is generally held that in civil cases the court may allow the jurors to separate after agreeing upon and sealing up their verdict,<sup>3</sup> though in some cases the validity of such practice seems to be based upon the consent of the parties.<sup>4</sup> Even an unauthorized separation after agreement upon the verdict is not sufficient ground for a new trial in the absence of resulting prejudice.<sup>5</sup>

Effect on Subsequent Power of Jury. — In civil cases it is generally held that even after verdict and subsequent separation the jury may correct the verdict in

1. Absence of Prejudice — *Colorado*. — Dozenback v. Raymer, 13 Colo. 451.

*Georgia*. — Riggins v. Brown, 12 Ga. 271; Adkins v. Williams, 23 Ga. 222; Stix v. Pump, 37 Ga. 332.

*Illinois*. — Madison Coal Co. v. Beam, 63 Ill. App. 178; West Chicago St. R. Co. v. Lundahl, 82 Ill. App. 553.

*Indiana*. — Alexander v. Dunn, 5 Ind. 122; Carter v. Ford Plate Glass Co., 85 Ind. 180; New Albany v. McCulloch, 127 Ind. 500.

*Iowa*. — Boggs v. Chicago, etc., R. Co., 29 Iowa 577.

*Kansas*. — Perkins v. Ermel, 2 Kan. 325; Morrow v. Saline County, 21 Kan. 484.

*Kentucky*. — Bledsoe v. Bledsoe, (Ky. 1886) 1 S. W. Rep. 10.

*New Jersey*. — Oram v. Bishop, 12 N. J. L. 153.

*New York*. — Smith v. Thompson, 1 Cow. (N. Y.) 221; Anthony v. Smith, 4 Bosw. (N. Y.) 503.

*South Carolina*. — Pulaski v. Ward, 2 Rich. L. (S. Car.) 119.

*South Dakota*. — Edward Thompson Co. v. Gunderson, 10 S. Dak. 42.

*Vermont*. — Downer v. Baxter, 30 Vt. 467.

*Canada*. — O'Mullin v. Bishop, 20 U. C. Q. B. 275.

A Presumption of Prejudice arises where jurors separate and mingle with strangers for a considerable time. Robinson v. Donehoo, 97 Ga. 702. And see Ehrhard v. McKee, 44 Kan. 715.

2. Effect of Statute. — Armleder v. Lieberman, 33 Ohio St. 77, 31 Am. Rep. 530, where the separation was caused by an alarm of fire.

In Downer v. Baxter, 30 Vt. 467, it was held that such a statute was directory only, and that the lower court had discretion to refuse a new trial on account thereof in the absence of a clear showing of prejudice. But see Nicholson v. Smith, 15 Oregon 200.

3. Separation After Agreement in Civil Cases — *Colorado*. — Kohn v. Kennedy, 6 Colo. App. 388.

*Illinois*. — Mains v. Cosner, 62 Ill. 465; Chicago v. Langlass, 66 Ill. 361; Cleveland, etc., R. Co. v. Monaghan, 140 Ill. 474.

*Indiana*. — Lucas v. Marine, 40 Ind. 289; Leas v. Cool, 68 Ind. 166; Harter v. Seaman, 3 Blackf. (Ind.) 27; Crocker v. Hoffman, 48 Ind. 207.

*Iowa*. — Walker v. Dailey, 87 Iowa 375.

*Massachusetts*. — Winslow v. Draper, 8 Pick. (Mass.) 170; Lawrence v. Stearns, 11 Pick. (Mass.) 501; Pritchard v. Hennessey, 1 Gray (Mass.) 294; Chapman v. Coffin, 14 Gray (Mass.)

454; Com. v. Townsend, 5 Allen (Mass.) 216; Com. v. Heden, 162 Mass. 521.

*Nebraska*. — Scott v. Choate, 33 Neb. 41.

*New Hampshire*. — Evans v. Foss, 49 N. H. 496.

*New York*. — Green v. Bliss, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 428.

*South Carolina*. — Welch v. Welch, 9 Rich. L. (S. Car.) 133.

Misrepresentation to Secure Separation. — Where the jurors, in order to obtain permission to separate, seal what purports to be a verdict, but is merely an agreement to disagree, such misconduct by them is ground for a new trial. Tervin v. State, 37 Fla. 396; White v. Martin, 3 Ill. 69; Short v. West, 30 Ind. 367; Oliver v. First Presb. Church, 5 Cow. (N. Y.) 283. And see Aetna Ins. Co. v. Grube, 6 Minn. 82.

4. Consent of Parties. — Cothran v. Donaldson, 49 Ga. 458; Jones v. Smith, 64 Ga. 712; Sage v. Brown, 34 Ind. 464; Crocker v. Hoffman, 48 Ind. 207; Tyrrell v. Lockhart, 3 Blackf. (Ind.) 136; Bushee v. Wright, 1 Pin. (Wis.) 104; Burlingame v. Burlingame, 18 Wis. 285; Campbell v. Linton, 27 U. C. Q. B. 563.

A Failure to Object to the grant of such permission is equivalent to a consent thereto. Barnes v. Strohecker, 17 Ga. 340; Haynes v. Thomas, 7 Ind. 38; Parmlee v. Sloan, 37 Ind. 469; Bosley v. Farquar, 2 Blackf. (Ind.) 61.

5. Separation Without Permission — Absence of Prejudice — *Illinois*. — Cleveland, etc., R. Co. v. Monaghan, 140 Ill. 474.

*Indiana*. — Drummond v. Leslie, 5 Blackf. (Ind.) 453.

*Iowa*. — Cook v. Watters, 4 Iowa 73; Heiser v. Van Dyke, 27 Iowa 359; Walker v. Dailey, 87 Iowa 375.

*Kentucky*. — Brown v. McConnel, 1 Bibb (Ky.) 265; Smith v. Harrow, 3 Bibb (Ky.) 446.

*Maine*. — Blake v. Blossom, 15 Me. 394.

*Massachusetts*. — Winslow v. Draper, 8 Pick. (Mass.) 170.

*Minnesota*. — Nininger v. Knox, 8 Minn. 140.

*New Hampshire*. — Nims v. Bigelow, 44 N. H. 376; Evans v. Foss, 49 N. H. 490.

*New York*. — Horton v. Horton, 2 Cow. (N. Y.) 589.

*Ohio*. — Wright v. Burchfield, 3 Ohio 53; Sutliff v. Gilbert, 8 Ohio 405.

*South Carolina*. — Sartor v. McJunkin, 8 Rich. L. (S. Car.) 451.

*Virginia*. — Howle v. Dunn, 1 Leigh (Va.) 455; Ragland v. Wills, 6 Leigh (Va.) 1.

The Slightest Suspicion of Abuse has been held sufficient to vitiate a verdict upon such an unauthorized separation. Oliver v. First Presb.



immaterial matters, not going to the real questions in issue, or explain ambiguities in the findings;<sup>1</sup> while a different view is taken in regard to alterations of a radical character.<sup>2</sup> In some cases the question of the power of the jury after separation of its members is apparently determined by the question whether the separation was such as to afford an opportunity for the exercise of influence upon the jurors.<sup>3</sup>

(3) *Admonition on Separation.* — It is quite frequently required by statute that upon allowing the jurors to separate the court shall admonish them as to their duty to refrain from communications in regard to the case.<sup>4</sup> But such admonition is not necessary if the jurors are kept together throughout the trial in charge of a sworn officer.<sup>5</sup> It will be presumed on appeal, in the absence of a showing to the contrary, that the jurors were properly admonished.<sup>6</sup> Though failure to comply with the statute may be ground for a new trial,<sup>7</sup> such failure will not affect the verdict when it appears that no injury resulted therefrom.<sup>8</sup>

A Presumption of Injury has been held to arise in a criminal case from failure to give such admonition,<sup>9</sup> and likewise in a civil action, where the separation took place after the submission of the case to the jury;<sup>10</sup> but no such presumption appears to arise in a civil case when the separation is before sub-

Church, 5 Cow. (N. Y.) 283; *Horton v. Horton*, 2 Cow. (N. Y.) 589.

1. Effect on Subsequent Power of Jury — *Georgia.* — *Cothran v. Donaldson*, 49 Ga. 458; *Jones v. Smith*, 64 Ga. 712.

*Indiana.* — *Tyrrell v. Lockhart*, 3 Blackf. (Ind.) 136.

*Maine.* — *Blake v. Blossom*, 15 Me. 394.

*Massachusetts.* — *Spencer v. Williams*, 160 Mass. 17; *Winslow v. Draper*, 8 Pick. (Mass.) 170; *Chapman v. Coffin*, 14 Gray (Mass.) 454.

*Michigan.* — *Dailey v. Douglass*, 40 Mich. 557.

*Minnesota.* — *Nininger v. Knox*, 8 Minn. 140.

*Mississippi.* — *Maclin v. Bloom*, 54 Miss. 365.

*Nebraska.* — *Scott v. Chope*, 33 Neb. 41.

*New Hampshire.* — *Nims v. Bigelow*, 44 N. H. 376.

*North Carolina.* — *Luttrell v. Martin*, 112 N. Car. 593.

*Ohio.* — *Sutliff v. Gilbert*, 8 Ohio 405.

The Failure to State the Amount of the verdict may be rectified, it has been held, after a separation. *Bissell v. Ryan*, 23 Ill. 566; *Mason v. Massa*, 122 Mass. 477; *Chapman v. Coffin*, 14 Gray (Mass.) 454. And see *Warner v. New York Cent. R. Co.*, 52 N. Y. 437, 11 Am. Rep. 724. *Contra*, *Trout v. West*, 29 Ind. 51.

2. Radical Alterations Not Permissible. — *Cothran v. Donaldson*, 49 Ga. 458; *Sage v. Brown*, 34 Ind. 464; *Sutliff v. Gilbert*, 8 Ohio 405. See also *Nickelson v. Smith*, 15 Oregon 200.

3. Possibility of Prejudice. — *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393; *Martin v. Morelock*, 32 Ill. 485; *Luttrell v. Martin*, 112 N. Car. 593; *Russell v. State*, 11 Tex. App. 288; *Boyet v. State*, 26 Tex. App. 689; *Ragland v. Wills*, 6 Leigh (Va.) 1; *Mills v. Com.*, 7 Leigh (Va.) 751.

4. Admonition upon Separation. — *Stewart v. Randolph*, 2 Cinc. Super. Ct. 132; *People v. Ebanks*, 117 Cal. 652; *Crocker v. Hoffman*, 48 Ind. 207; *Lewis v. State*, 4 Kan. 297; *Kruget v. State*, 1 Neb. 365; *Walrath v. State*, 8 Neb. 80.

Sufficiency of Admonition. — An admonition not to converse "in regard to this case" is sufficient, though the statute says "on any

subject connected with the trial." *State v. McKinney*, 31 Kan. 570.

Disobedience of the Admonition is not shown by the fact that a juror stated to the court that there was a misunderstanding among the jurors as to the testimony of a witness. *People v. West*, 73 Cal. 345.

Without Any Statutory Provision, apparently, it is proper for the court to give such admonition. *McCreary v. Com.*, 29 Pa. St. 323; *Brandon v. Mullenix*, 11 Heisk. (Tenn.) 446; *Territory v. Doty*, 1 Pin. (Wis.) 396.

5. Not Necessary When Officer in Charge. — *Pritchett v. State*, 92 Ga. 65; *State v. Bussey*, 58 Kan. 679.

6. Presumption of Admonition. — *Dozenback v. Raymer*, 13 Colo. 451; *Evans v. State*, 7 Ind. 271; *Caw v. People*, 3 Neb. 357; *Langford v. State*, 32 Neb. 782; *St. Louis v. State*, 8 Neb. 405; *Hartigan v. Territory*, 1 Wash. Ter. 452.

7. New Trial. — *State v. Mulkins*, 18 Kan. 16.

8. Absence of Prejudice. — *People v. Colmere*, 23 Cal. 632; *People v. Coyne*, 116 Cal. 295; *State v. Gray*, 19 Nev. 212; *People v. Draper*, 28 Hua (N. Y.) 1; *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 105, 46 Am. St. Rep. 765.

Admonition During Short Recess. — It was held not to be ground for reversal that recesses of five minutes' duration were taken without any admonition, the admonition having been given at each adjournment and the trial having been apparently fair. *State v. Stackhouse*, 24 Kan. 455. See also, as to recesses of short duration, *People v. Colmere*, 23 Cal. 631; *Perkins v. Ermel*, 2 Kan. 325; *Stager v. Harrington*, 27 Kan. 414; *Gleason v. Strauss*, 5 Kan. App. 80.

9. Presumption of Injury. — *State v. Mulkins*, 18 Kan. 16.

In *People v. Coyne*, 116 Cal. 295, however, it was held that the failure to admonish the jurors upon their separation during adjournment, if before the introduction of evidence, was a technical error merely, and not ground for reversal.

10. Civil Cases. — *Ehrhard v. McKee*, 44 Kan. 715; *Pracht v. Whittridge*, 44 Kan. 710. And see *Murphy v. Hindman*, 37 Kan. 267.



mission to the jury and for a short time only.<sup>1</sup>

**Failure to Object.** — In a civil case the failure of the complaining party to object, if present when the court permits separation without admonition, has been held to involve a waiver of the objection;<sup>2</sup> while a different view has been taken in a criminal case.<sup>3</sup>

**d. BRIBERY AND CONFERRING OF FAVORS.** — Bribery of a juror by the successful party is ground for a new trial,<sup>4</sup> but not a mere attempt to bribe by one not shown to be acting for such party.<sup>5</sup> A new trial has also been granted on proof that a juror tried to obtain a bribe from one of the parties.<sup>6</sup>

**Conferring of Favor.** — A new trial will be granted if a favor or reward is conferred upon a juror by the successful party,<sup>7</sup> as where the attorney kept a juror's horse over night free of charge,<sup>8</sup> or loaned a vehicle to a juror,<sup>9</sup> or where a party liberally patronized a bar kept by the juror;<sup>10</sup> but the mere performance of an act of common courtesy will not have this effect.<sup>11</sup>

**e. REMARKS AND DISCUSSIONS IN HEARING OF JURY.** — Remarks made in the presence or hearing of the jury by strangers, expressive of their opinions or wishes in regard to the case, have been held insufficient to justify interference with the verdict when it was not shown that they influenced the jury,<sup>12</sup> especially when it was not intended that they should be heard by the jurors.<sup>13</sup> In some cases the overhearing of such remarks seems to be regarded as a possibility necessarily involved in a trial by jury, and so not cause for a new trial, without reference to their possible effect.<sup>14</sup> Accordingly, a new trial has been refused where persons in the presence of the jury and in audible tones expressed their opinions as to the proper verdict or punishment.<sup>15</sup> But, on the other hand, the presence of the jury during a prolonged discussion of

1. *Perkins v. Ermel*, 2 Kan. 325; *Stager v. Harrington*, 27 Kan. 414; *Gleason v. Strauss*, 5 Kan. App. 80.

2. **Waiver of Objection.** — *Musselman v. Pratt*, 44 Ind. 126; *Crocker v. Hoffman*, 48 Ind. 207; *Johnson v. Matthews*, 12 Cinc. L. Bul. 197, 9 Ohio Dec. (Reprint) 339.

3. *State v. Mulkins*, 18 Kan. 16.

4. **Bribery.** — *Hawkins v. New Orleans Printing, etc., Co.*, 29 La. Ann. 134.

5. *Clay v. Montgomery*, 102 Ala. 297.

**Juror Receiving Fees as Witness.** — It was held that a juror who was also summoned as a witness for the prevailing party could not receive fees as a witness; but that the fact that he did so would not be ground for setting aside the verdict if neither the juror nor the prevailing party knew that it was incorrect, and if there was no evidence of corrupt intention. *Handly v. Call*, 30 Me. 9.

6. **Solicitation of Bribe.** — *U. S. v. Chaffee*, 2 Bond (U. S.) 147, 25 Fed. Cas. No. 14,773. Compare *Portis v. State*, 27 Ark. 360.

7. **Conferring of Favor.** — *Veneman v. McCurtain*, 33 Neb. 643; *Baltimore, etc., R. Co. v. Phelps*, 5 Cinc. L. Bul. 28, 8 Ohio Dec. (Reprint) 11.

8. *Springer v. State*, 34 Ga. 379.

9. *Ensign v. Harney*, 15 Neb. 330, 48 Am. Rep. 344.

10. *Palmer v. Utah, etc., R. Co.*, 2 Idaho 290.

**Entertainment of Juror by Party.** — See *infra*, this subsection, *Refreshments for Jury—Refreshments Furnished by or in Behalf of Prevailing Party*.

11. **Act of Common Courtesy.** — *Bonnet v. Glattfeldt*, 120 Ill. 166; *Vane v. Evanston*, 150 Ill. 616; *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253; *Carnaghan v. Ward*, 8 Nev. 30.

12. **Remarks in Hearing of Jury** — *California*. — *People v. Brannigan*, 21 Cal. 337.

*Georgia*. — *Rockdale Paper Mills v. Stevens*, 65 Ga. 380.

*Iowa*. — *Ridenour v. Clarinda*, 65 Iowa 465.

*Kentucky*. — *Hilton v. Com.*, (Ky. 1891) 16 S. W. Rep. 826.

*Maine*. — *Caswell v. Pitcher*, (Me. 1887) 10 Atl. Rep. 453.

*Massachusetts*. — *Shea v. Lawrence*, 1 Allen (Mass.) 167.

*Missouri*. — *Fendler v. Dewald*, 14 Mo. App. 60; *Compton v. Arnold*, 54 Mo. 147.

*New Jersey*. — *State v. Cucuel*, 31 N. J. L. 249.

*New York*. — *Hager v. Hager*, 38 Barb. (N. Y.) 92.

13. *Jackson v. Jackson*, 32 Ga. 325; *Shea v. Lawrence*, 1 Allen (Mass.) 167; *State v. Ayer*, 23 N. H. 301; *Jones v. Vail*, 30 N. J. L. 135.

**Hearing Remarks in Sermon.** — See *People v. Constantino*, 153 N. Y. 24; *State v. Kinsauls*, 126 N. Car. 1095. And see *supra*, this section, *Custody of Officer—Conduct of Custodian—Allowing Recreation to Jury*.

14. **Decisions Ignoring Question of Effect.** — *Turner v. State*, 89 Tenn 548; *King v. State*, 91 Tenn. 617; *Turner v. St. John*, 3 Coldw. (Tenn.) 376; *State v. Miller*, 24 W. Va. 802.

In *State v. Jackson*, 112 N. Car. 851, it was stated that it must be presumed that jurors are sufficiently intelligent to know that their verdict must be based solely on the evidence introduced on the trial, and not on remarks overheard.

15. **Expressions of Opinion as to Verdict.** — *McTyier v. State*, 91 Ga. 254; *State v. Cucuel*, 31 N. J. L. 249; *Brake v. State*, 4 Baxt. (Tenn.) 361.



the case by other persons has been held to be ground for a new trial.<sup>1</sup> Remarks or discussions in the presence of the jury are not ground for a new trial if they were not actually heard,<sup>2</sup> or if they were not heard until after the jurors had agreed on the verdict.<sup>3</sup>

*f. OUTSIDER IN JURY ROOM.* — Outsiders have no right to be in the jury room or the place occupied by the jury; and such an intrusion as is calculated to influence the verdict is ground for a new trial.<sup>4</sup> In a number of instances, however, the temporary presence of outsiders has been held not ground for setting aside the verdict where the intrusion did not appear to have been for an improper purpose and no prejudice resulted, as when no communications took place between the intruder and the jurors,<sup>5</sup> or when no communications in regard to the cause on trial were had,<sup>6</sup> or even when the intruders conversed about the suit, if the jurors did not listen to their statements as evidence.<sup>7</sup>

*g. REFRESHMENTS FOR JURY* — (1) *Food* — (a) *Early Doctrine.* — In former times the practice was to administer to the officer taking charge of the jury an oath to keep the jury "without meat, drink, fire, or candle."<sup>8</sup> The fact, however, that the jury procured and partook of refreshments merely rendered the offending jurors liable to punishment, and was not ground for setting aside the verdict,<sup>9</sup> unless the refreshments were furnished by the prevailing

1. *Hearing of Prolonged Discussion.* — *Maclin v. State*, 44 Ark. 115; *Vaughan v. State*, 57 Ark. 1; *Campbell v. Chase Granite Co.*, 92 Me. 90. And see *Smith v. Willingham*, 44 Ga. 200; *State v. Dolling*, 37 Wis. 397.

Comments by a Party upon the testimony of a witness for his adversary, to the effect that it was false, were held to be ground for a new trial when made in the presence of jurors, though he did not know of their presence. *Cilley v. Bartlett*, 19 N. H. 312.

2. *Remarks Not Actually Heard.* — *Brown v. State*, 65 Ga. 332; *Ridenour v. Clarinda*, 65 Iowa 465; *State v. Yordi*, 30 Kan. 221; *Snodgrass v. State*, 36 Tex. Crim. 207; *State v. Smith*, 24 W. Va. 814. See also *State v. Robertson*, 50 La. Ann. 455.

3. *After Agreement on Verdict.* — *State v. Gay*, 18 Mont. 51; *Willing v. Swasey*, 1 Browne (Pa.) 123. And see *Rowland v. State*, 14 Ind. 575.

4. *Outsiders in Jury Room.* — *State v. Sherbourne*, *Dudley (Ga.)* 28; *Starling v. Thorne*, 87 Ga. 513; *Welch v. Taverner*, 78 Iowa 207; *Tarkington v. State*, 72 Miss. 731; *McElrath v. State*, 2 Swan (Tenn.) 382; *Clapp v. State*, 94 Tenn. 186; *Wright v. State*, 17 Tex. App. 152; *State v. Cartright*, 20 W. Va. 32.

*Officer Present to Typewrite Verdict.* — It is error to permit a deputy clerk to be present during the deliberations in order to typewrite the verdict. *Kilgore v. Moore*, 14 Tex. Civ. App. 20.

*Evidence of Intrusion.* — See *Hair v. State*, 16 Neb. 601.

5. *No Communication with Intruder.* — *Green v. State*, 59 Miss. 501; *State v. Gould*, 90 N. Car. 658; *State v. Nance*, 25 S. Car. 168; *Luster v. State*, 11 Humph. (Tenn.) 169.

6. *No Communication as to Cause.* — *Doyal v. State*, 70 Ga. 134; *Com. v. Roby*, 12 Pick. (Mass.) 496; *Green v. State*, 59 Miss. 501; *State v. Degonia*, 69 Mo. 485; *Com. v. Painton*, 5 York Leg. Rec. (Pa.) 140.

7. *Communications About Case.* — *Barbour v. Archer*, 3 Bibb (Ky.) 8.

That the County Clerk was called into the jury room to inform the jury how a computation of what was due should be made, was held not to be ground for a new trial. *Dennison v. Powers*, 35 Vt. 39.

As to the Presence of the Sheriff in the Jury Room in performance of his duties, see *Smith v. State*, 78 Ga. 71. Compare *Clapp v. State*, 94 Tenn. 186.

*Interpreter.* — Where some of the jurors spoke only English and some only Spanish, it was held proper to send to them an interpreter, specially sworn, so as to enable them to communicate with each other. *Thomason v. Territory*, 4 N. Mex. 154.

*Court Reporter Reading Testimony in Jury Room.* — It is error for the shorthand reporter to go to the jury room without the consent of the parties, and there read testimony to the jurors. *Fleming v. Shenandoah*, 67 Iowa 505, 56 Am. Rep. 354. But where the parties consent, there is no error. *Hahn v. Miller*, 60 Iowa 96.

That a Newspaper Reporter secreted himself in the jury room, and was there taking notes for a portion of the time during which the jury was deliberating, was held not to vitiate the verdict, it appearing that the jurors were unaware of his presence and that the verdict was not influenced thereby. *People v. Flack*, 57 Hun (N. Y.) 83, 8 N. Y. Crim. 43, *affirming* (*Oyer & T. Ct.*) 24 Abb. N. Cas. (N. Y.) 444, 8 N. Y. Crim. 31, *reversed* on another ground in 125 N. Y. 324.

As to the Presence of Physicians in the Jury Room to attend on a sick juror, see *infra*, this section, *Illness of Juror*.

8. *Food and Drink* — *Early Doctrine.* — 1 Chitty's Crim. Law 632; Co. Litt. 227b. See also *Monroe v. State*, 5 Ga. 85; *Murphy v. Wilson*, 46 Ind. 537; *Allegany County v. Howard County*, 57 Md. 393.

9. *Juror Punished, but No New Trial.* — Co. Litt. 227b; 2 Hale P. C. 306; 21 Vin. Abr., tit. Trial, G.g; Anonymous, 2 Dyer 218a; Anonymous, 1 Dyer 37b; Rex v. Burdett, 12 Mod.



party.<sup>1</sup>

(b) *Modern Doctrine.* — In modern times, owing to the increased duration of trials,<sup>2</sup> it has become necessary to relax the ancient common-law rule, and the jurors are now allowed to take refreshment whenever the occasion renders it proper.<sup>3</sup> Generally it is regarded as improper to furnish refreshments to the jury except by the express permission of the court,<sup>4</sup> but a new trial is not granted because of the giving of refreshments, whether with or without permission.<sup>5</sup>

*Jurors Cannot Be Starved into Agreement.* — It is improper to undertake to starve the jurors into an agreement,<sup>6</sup> and a verdict so obtained will be set aside.<sup>7</sup>

(2) *Intoxicating Liquors* — (a) *In General.* — While it is stated to be the better rule to exclude the jury from the use of liquors,<sup>8</sup> the court may, to a limited extent, authorize the officer to allow the use of such liquors.<sup>9</sup> It is generally held that the drinking of intoxicating liquor by jurors is not of itself a ground for disturbing their verdict if the liquor is not furnished by the prevailing party and no juror is thereby rendered less capable of discharging his duties.<sup>10</sup>

III, 2 Salk. 645; *Harebotle v. Placock*, Cro. Jac. 21; *Richmond v. Wise*, 1 Vent. 125; *Everett v. Youells*, 4 B. & Ad. 681, 24 E. C. L. 141, 1 N. & M. 530; *Mounson v. West*, Leon. 132. See also *Com. v. Roby*, 12 Pick. (Mass.) 496; *Ragland v. Wills*, 6 Leigh (Va.) 1.

1. See *infra*, this subsection, *Refreshments Furnished by or in Behalf of Prevailing Party.*

2. *Increased Length of Modern Trials.* — See *Rex v. Stone*, 6 T. R. 527, 530, note *a*.

3. *Old Rule as to Refreshment Superseded.* — *U. S. v. Fries*, 3 Dall. (U. S.) 515; *Territory v. Hart*, 7 Mont. 489; *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332 (see also *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168); *State v. Town*, Wright (Ohio) 75; *Stone v. State*, 4 Humph. (Tenn.) 27; *Hancock v. Elam*, 3 Baxt. (Tenn.) 34.

*Cider Furnished to Jury.* — In *Com. v. Roby*, 12 Pick. (Mass.) 496, it was held that the court might permit the furnishing of cider to the jury.

4. *Permission of Court* — *United States*. — *Harrison v. Rowan*, 4 Wash. (U. S.) 32; *O'Barr v. Alexander*, 37 Ga. 195; *State v. Baldy*, 17 Iowa 39; *State v. Bailey*, 32 Kan. 83; *Purinton v. Humphreys*, 6 Me. 379; *Allegany County v. Howard County*, 57 Md. 393; *State v. Town*, Wright (Ohio) 75.

A General Order of Court that the sheriff shall take jurors at meal times to their meals is sufficient authority without a special order for that purpose. *Cooper v. Robertson*, 87 Ind. 222.

*The Oath of the Officer in Kansas* is to keep the jury "without food except such as the court shall order." *State v. Eldred*, 8 Kan. App. 625; *Gen. Stat. Kan.* (1897), c. 102, § 237.

5. *Furnishing Food Not Cause for New Trial* — *United States*. — *Harrison v. Rowan*, 4 Wash. (U. S.) 32; *Johnson v. Hobart*, 45 Fed. Rep. 542.

*Georgia.* — *Spier v. State*, 89 Ga. 737.  
*Indiana.* — *Seavey v. Shurick*, 110 Ind. 494; *Morningsstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211.

*Iowa.* — *State v. Beste*, 91 Iowa 565.  
*Massachusetts.* — *Com. v. Roby*, 12 Pick. (Mass.) 496.

*North Carolina.* — *State v. Sparrow*, 3 Murph.

(7 N. Car.) 487; *State v. Miller*, 1 Dev. & B. L. (18 N. Car.) 500; *State v. Tilghman*, 11 Ired. L. (33 N. Car.) 513.

But see *Cooksey v. Haynes*, 27 L. J. Exch. 371.

6. *Jury Cannot Be Starved into Agreement.* — *Williford v. State*, 23 Ga. 3; *Com. v. Clue*, 3 Rawle (Pa.) 498; *State v. M'Kee*, 1 Bailey L. (S. Car.) 653, 21 Am. Dec. 499; *State v. Kelley*, 45 S. Car. 659. Compare *Pope v. State*, 36 Miss. 121.

7. It was held to be ground for a new trial that the jury were told that they would have no food except such as was obtained at their own expense. *Physioc v. Shea*, 75 Ga. 466; *Henderson v. Reynolds*, 84 Ga. 161.

*Cases Distinguished.* — It is not, however, a cause for a new trial that the jurors had no supper, and no breakfast until nine o'clock the next morning, the order to this effect not being objected to by the jurors, and it not appearing that they desired food in the meantime. *Templeton v. State*, 5 Tex. App. 398.

Nor will the keeping of a jury without food from eleven o'clock A. M. until three o'clock P. M. affect the verdict, the jurors having been told by the sheriff that they could have no food until they agreed upon a verdict or until the court should direct that they be taken to dinner. *Gaither v. Hascall*. *Richards Steam Generator Co.*, 121 N. Car. 384.

*That Cigars* were furnished to the jurors by the officer in charge is not ground for setting aside the verdict. *State v. Degonia*, 69 Mo. 485.

8. *Use of Liquors* — *Under Direction of Court.* — *State v. Brunetto*, 13 La. Ann. 45; *Tuttle v. State*, 6 Tex. App. 556.

9. *Robinson v. State*, 33 Ark. 185; *State v. Reed*, (Idaho 1894) 35 Pac. Rep. 706. And see *Palmore v. State*, 29 Ark. 254, where it was stated that it was not proper to leave to a bar-keeper the question of the proper quantity to be taken.

10. *Use of Intoxicating Liquor Not Ground for New Trial* — *England.* — *Richmond v. Wise*, 1 Vent. 124.

*United States.* — *Harrison v. Rowan*, 4 Wash. (U. S.) 32, 11 Fed. Cas. No. 6,142.

*Arizona.* — *Arizona Prince Copper Co. v.*



**Time of Drinking.** — In *Iowa* and *New York*, however, a distinction is made between the taking of intoxicating liquors as a beverage by the jurors during the progress of the trial, while the jurors are at liberty to separate and go where they please, and drinking after the case has been finally submitted to them for consideration, the latter being considered ground for a new trial, and not the former;<sup>1</sup> and this same distinction is suggested by the decisions in some other states.<sup>2</sup> So it has been decided that drinking by jurors during adjournments of court is not ground for a new trial if it does not affect their ability to perform their duties.<sup>3</sup>

*Copper Queen Min. Co.*, (Ariz. 1885) 7 Pac. Rep. 718.

*Arkansas*. — *Dolan v. State*, 40 Ark. 454. And see *Robinson v. State*, 33 Ark. 185; *Pelham v. Page*, 6 Ark. 535; *Kee v. State*, 28 Ark. 155; *McLendon v. State*, 66 Ark. 646, 51 S. W. Rep. 1062; *Payne v. State*, 66 Ark. 545.

*California*. — *People v. Deegan*, 88 Cal. 602; *People v. Bemmerly*, 98 Cal. 299; *People v. Sansome*, 98 Cal. 235; *People v. Leary*, 105 Cal. 486, *distinguishing* *People v. Lee Chuck*, 78 Cal. 317; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *People v. Van Horn*, 119 Cal. 323.

*Colorado*. — *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *May v. People*, 8 Colo. 210.

*Delaware*. — *State v. Harrigan*, 9 Houst. (Del.) 369.

*Georgia*. — *Westmoreland v. State*, 45 Ga. 225; *Jones v. State*, 68 Ga. 760.

*Idaho*. — *State v. Reed*, (Idaho 1894) 35 Pac. Rep. 706.

*Illinois*. — *Davis v. People*, 19 Ill. 74; *Graybeal v. Gardner*, 48 Ill. App. 305; *Sanitary Dist. v. Cullerton*, 147 Ill. 385.

*Indiana*. — *Creek v. State*, 24 Ind. 151; *Pratt v. State*, 56 Ind. 179; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180. *Compare* *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760.

*Kansas*. — *Perry v. Bailey*, 12 Kan. 539; *Larimer v. Kelly*, 13 Kan. 78; *State v. Tatlow*, 34 Kan. 80.

*Kentucky*. — *Gordon v. Louisville, etc., R. Co.*, (Ky. 1895) 29 S. W. Rep. 321.

*Maine*. — *Purinton v. Humphreys*, 6 Me. 379.

*Michigan*. — *In re Merriman*, 108 Mich. 454. *Compare* *People v. Hull*, 86 Mich. 449.

*Minnesota*. — *Young v. Otto*, 57 Minn. 307.

*Mississippi*. — *Russell v. State*, 53 Miss. 368; *Green v. State*, 59 Miss. 501. And see *Brookhaven Lumber, etc., Co. v. Illinois Cent. R. Co.*, 68 Miss. 432.

*Missouri*. — *State v. Baber*, 74 Mo. 293, 41 Am. Rep. 314; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Upton*, 20 Mo. 397; *State v. Taylor*, 134 Mo. 109; *State v. Washburn*, 91 Mo. 571.

*Montana*. — *Territory v. Burgess*, 8 Mont. 57; *Territory v. Hart*, 7 Mont. 489.

*Nebraska*. — *Cortelyou v. McCarthy*, 37 Neb. 742.

*Nevada*. — *Richardson v. Jones*, 1 Nev. 405; *State v. Jones*, 7 Nev. 408; *Davis v. Cook*, 9 Nev. 134.

*New Jersey*. — *State v. Cucuel*, 31 N. J. L. 249.

*North Carolina*. — *State v. Bailey*, 100 N. Car. 528; *State v. Miller*, 1 Dev. & B. L. (18 N. Car.) 500; *State v. Sparrow*, 3 Murph. (7 N. Car.) 487.

*Ohio*. — *Pittsburgh, etc., R. Co. v. Porter*, 32 Ohio St. 328.

*Pennsylvania*. — *Com. v. Cleary*, 148 Pa. St. 26; *Com. v. Salyards*, 158 Pa. St. 501, *affirming* 13 Pa. Co. Ct. 470; *Hawley v. Acker*, 2 Woodw. (Pa.) 237; *Haupt v. Hendler*, 2 Kulp (Pa.) 400.

*Tennessee*. — *Stone v. State*, 4 Humph. (Tenn.) 27; *Rowe v. State*, 11 Humph. (Tenn.) 492; *King v. State*, 91 Tenn. 618.

*Wisconsin*. — *Roman v. State*, 41 Wis. 312.

In *Texas*, after the decision in *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550, that partaking of liquor by a juror would invalidate the verdict, a statute was passed providing that this result should not ensue if the juror's ability to act was not impaired. *Jack v. State*, 26 Tex. 1; *March v. State*, 44 Tex. 64; *Webb v. State*, 5 Tex. App. 556; *Tuttle v. State*, 6 Tex. App. 556; *Allen v. State*, 17 Tex. App. 637; *Rider v. State*, 26 Tex. App. 334.

**Drinking at Scene of Crime.** — In *People v. Hull*, 86 Mich. 449, it was held that there was misconduct calling for a new trial when a juror at the scene of the crime, a hotel, upon a view of the premises, took a drink of liquor at the hotel bar, the hotel keeper being a principal witness for the prosecution.

**1. Distinction Between Drinking Before and After Submission.** — *Iowa*. — *Berry v. Berry*, 31 Iowa 415; *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122; *Van Buskirk v. Daugherty*, 44 Iowa 42 [*distinguishing* *Ryan v. Harrow*, 27 Iowa 494; *State v. Baldy*, 17 Iowa 39]; *O'Neill v. Keokuk, etc., R. Co.*, 45 Iowa 546; *Fairchild v. Snyder*, 43 Iowa 23; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *State v. Livingstone*, 64 Iowa 560; *Hemmi v. Chicago Great Western R. Co.*, 102 Iowa 25; *Hopkins v. Knapp, etc., Co.*, 92 Iowa 212. See also *State v. Kennedy*, 77 Iowa 209.

*New York*. — *People v. Pscherhofer*, 64 Hun (N. Y.) 483; *Hanrahan v. Ayres*, (Buffalo Super. Ct. Spec. T.) 10 Misc. (N. Y.) 435; *Patrick v. Victor Knitting Mills Co.*, 37 N. Y. App. Div. 7; *People v. Schad*, 58 Hun (N. Y.) 571. *Compare* the early cases of *Rose v. Smith*, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331; *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; *Brant v. Fowler*, 7 Cow. (N. Y.) 562; *Wilson v. Abrahams*, 1 Hill (N. Y.) 207, which are considered in the later cases above cited.

**2. Delaware.** — *Gregg v. McDaniel*, 4 Harr. (Del.) 367; *State v. Harrigan*, 9 Houst. (Del.) 369.

*New Hampshire*. — *State v. Bullard*, 16 N. H. 139; *Leighton v. Sargent*, 31 N. H. 120.

*Ohio*. — *Weis v. State*, 22 Ohio St. 486; *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328.

See also *People v. Lee Chuck*, 78 Cal. 317, *questioned* in *People v. Leary*, 105 Cal. 486.

**3. Drinking During Adjournment.** — *Indiana*. — *Pratt v. State*, 56 Ind. 179.

*Iowa*. — *Van Buskirk v. Daugherty*, 44 Iowa



**Punishment for Furnishing or Drinking Liquor.** — But even though no ground for a new trial is constituted, the officer or other person furnishing liquor to the jury without authority may be punished,<sup>1</sup> and the jurors themselves are liable to punishment as for contempt.<sup>2</sup>

(b) **Use for Medicinal Purposes.** — A verdict will not be set aside merely because a juror takes a limited quantity of liquor for medicinal purposes.<sup>3</sup>

(c) **Intoxication and Excessive Use.** — If during the progress of the trial or during their deliberations on the verdict jurors partake of intoxicating liquors to such an extent as to affect their ability clearly, impartially, and calmly to consider the evidence, the verdict will be set aside;<sup>4</sup> and the rule applies, it seems, where such an inordinate amount is drunk as to make a juror sick<sup>5</sup> or to render it probable that he was incapacitated.<sup>6</sup> It has been decided that the intoxication of a juror during a recess of the court was not ground for a new trial, it not appearing that he was under the influence of liquor while hearing the evidence and arguments.<sup>7</sup> But a contrary decision was made in *Indiana* in a capital case, on the ground that the juror's faculties were possibly affected by his previous debauch.<sup>8</sup>

**Presumptions.** — While there is no presumption that one drank liquor because he had an opportunity to do so,<sup>9</sup> in some cases it has been stated that such drinking raises a presumption of intoxication or injury which must be rebutted.<sup>10</sup>

**Waiver of Objections.** — If counsel consent to the giving of liquor they cannot thereafter object on the ground that it was given,<sup>11</sup> and by proceeding with

42; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *State v. Livingston*, 64 Iowa 560; *State v. Kennedy*, 77 Iowa 208.

*Kansas.* — *Larimer v. Kelly*, 13 Kan. 78.

*Mississippi.* — *Green v. State*, 59 Miss. 501.

*New York.* — *Wilson v. Abrahams*, 1 Hill (N. Y.) 207; *Dennison v. Collins*, 1 Cow. (N. Y.) 111.

*Ohio.* — *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328.

*Virginia.* — *Thompson v. Com.*, 8 Gratt. (Va.) 637.

**1. Punishment for Procuring Liquor.** — *Richmond v. Wise*, 1 Vent. 124; *State v. Harrigan*, 9 Houst. (Del.) 369; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *Webb v. State*, 5 Tex. App. 596; *Tuttle v. State*, 6 Tex. App. 556.

**2.** *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *State v. Harrigan*, 9 Houst. (Del.) 369.

**3. Use for Medicinal Purposes.** — *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122; *O'Neill v. Keokuk, etc., R. Co.*, 45 Iowa 546; *Pope v. State*, 36 Miss. 121; *Gilmanton v. Ham*, 38 N. H. 108; *State v. Cucuel*, 31 N. J. L. 249; *People v. Pscherhofer*, 64 Hun (N. Y.) 483.

**4. Intoxication Ground for Setting Aside Verdict.** — *Colorado.* — *Repath v. Walker*, 13 Colo. 109.

*Georgia.* — *Thomas v. State*, 27 Ga. 287.

*Indiana.* — *Brown v. State*, 137 Ind. 240, 45 Am. St. Rep. 180.

*Kansas.* — *Perry v. Bailey*, 12 Kan. 539.

*Kentucky.* — *Gordon v. Louisville, etc., R. Co.*, 16 Ky. L. Rep. 713, 29 S. W. Rep. 321.

*Louisiana.* — *State v. Brunetto*, 13 La. Ann. 45; *State v. Demarest*, 41 La. Ann. 413; *State v. Foster*, 45 La. Ann. 1176.

*Mississippi.* — *Green v. State*, 59 Miss. 501.

*Nevada.* — *State v. Jones*, 7 Nev. 408; *Davis v. Cook*, 9 Nev. 134.

*New Jersey.* — *State v. Cucuel*, 31 N. J. L. 249.

*New York.* — *Rose v. Smith*, 4 Cow. (N. Y.) 17, 15 Am. Dec. 331; *Hanrahan v. Ayres*, (Buffalo Super. Ct. Spec. T.) 10 Misc. (N. Y.) 435.

*North Carolina.* — *State v. Jenkins*, 116 N. Car. 972.

*Pennsylvania.* — *Com. v. Cleary*, 148 Pa. St. 26.

*Texas.* — *March v. State*, 44 Tex. 64; *Webb v. State*, 5 Tex. App. 596; *Tuttle v. State*, 6 Tex. App. 556.

*Washington.* — *Hedican v. Pennsylvania F. Ins. Co.*, 21 Wash. 488.

**5. Excessive Use.** — *State v. Broussard*, 41 La. Ann. 81, 17 Am. St. Rep. 396.

**Intoxication as Ground for Exclusion of Juror.** — See *supra*, this title, *Formation of Trial Jury* — *Challenges and Exclusion for Cause* — *Causes of General Character* — *Mental Defects*.

**6.** *Patrick v. Victor Knitting Mills Co.*, 37 N. Y. App. Div. 7.

**7. Intoxication During Recess.** — *State v. Livingston*, 64 Iowa 560.

In *State v. Tatlow*, 34 Kan. 80, it was held proper for the court, when informed that a juror had been drinking during the recess, to put off resumption of the trial for two hours in order to enable him to recover; and a new trial was refused.

**8.** *Brown v. State*, 137 Ind. 240, 45 Am. St. Rep. 180.

**9. No Presumption of Drinking.** — *Cortelyou v. McCarthy*, 37 Neb. 742; *Carleton v. State*, 43 Neb. 373. See also *Gilmer v. Cameron*, Ga. Dec. (pt. i.) 142; *Oram v. Bishop*, 12 N. J. L. 153.

**10. Presumption of Injury from Drinking.** — *Westmoreland v. State*, 45 Ga. 225; *Creek v. State*, 24 Ind. 151; *State v. Madigan*, 57 Minn. 425; *State v. Greer*, 22 W. Va. 800.

**11. Consent and Waiver of Objection.** — *U. S. v. Gibert*, 2 Sumn. (U. S.) 19.



the trial, knowing of the intoxication of a juror, any objection on that ground is waived.<sup>1</sup>

(3) *Refreshments Furnished by or in Behalf of Prevailing Party* — (a) *In General.* — It is the general rule that a new trial will be granted if jurors are entertained during the trial by the party in whose favor a verdict is rendered.<sup>2</sup> So it has been held ground for a new trial that the prevailing party furnished jurors with cigars<sup>3</sup> or intoxicating liquors.<sup>4</sup> In some cases, however, a less stringent rule has been applied, and it has been held that the verdict should not be disturbed if the furnishing of refreshments was a mere accident or inadvertence, without any improper design, and if it can be safely assumed that the minds of the jurors were not influenced.<sup>5</sup> And so in some cases it

1. *People v. Deegan*, 88 Cal. 602; *Ipswitch v. Fernandez*, 84 Cal. 639; *Richardson v. Foster*, 73 Miss. 12, 55 Am. St. Rep. 483; *Harris v. State*, 61 Miss. 304; *Bradshaw v. Degenhart*, 15 Mont. 267, 48 Am. St. Rep. 677; *Haupt v. Hendler*, 2 Kulp (Pa.) 400.

In *Jackson v. Jackson*, 40 Ga. 150, it was held that consent to a juror's remaining on the jury, although he was known to be intoxicated, was not a waiver of an objection based on his subsequent drinking of more liquor.

2. *Refreshments Furnished by Prevailing Party* — *England.* — *Richmond v. Wise*, 1 Vent. 124; *Everett v. Youells*, 1 N. & M. 530, 4 B. & Ad. 681, 24 E. C. L. 141.

*United States.* — *Johnson v. Hobard*, 45 Fed. Rep. 542; *Platt v. Threadgill*, 80 Fed. Rep. 192.

*Arkansas.* — *Pelham v. Page*, 6 Ark. 535.  
*Georgia.* — *Walker v. Walker*, 11 Ga. 203; *Walker v. Hunter*, 17 Ga. 364.  
*Illinois.* — *Martin v. Morelock*, 32 Ill. 485; *Doud v. Guthrie*, 13 Ill. App. 653; *Vane v. Evanston*, 150 Ill. 616; *Sanitary Dist. v. Culbertson*, 147 Ill. 385.

*Indiana.* — *Huston v. Vail*, 51 Ind. 299.  
*Kansas.* — *Madden v. State*, 1 Kan. 340; *Perry v. Bailey*, 12 Kan. 539.

*Maine.* — *Cottle v. Cottle*, 6 Me. 140, 19 Am. Dec. 200; *McIntire v. Hussey*, 57 Me. 493.  
*Nebraska.* — *Vose v. Muller*, 23 Neb. 171.

*Nevada.* — *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291.

*New Jersey.* — *Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193.

*Ohio.* — *Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507.

*Pennsylvania.* — *Redmond v. Royal Ins. Co.*, 7 Phila. (Pa.) 167; *Keegan v. McCandless*, 7 Phila. (Pa.) 248.

*Tennessee.* — *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11; *Mynatt v. Hubbs*, 6 Heisk. (Tenn.) 320.

*Texas.* — *Marshall v. Watson*, 16 Tex. Civ. App. 127.

*Vermont.* — *Shattuck v. Wrought Iron Range Co.*, 69 Vt. 468; *Baker v. Jacobs*, 64 Vt. 197.

*Offer of Refreshments.* — In *Lyons v. Lawrence*, 12 Ill. App. 531, it was held to be proper to set aside the verdict when the prevailing party produced refreshments in court and offered them to the jury.

*Entertainment After Verdict.* — The fact that a party entertained the jury after the verdict is misconduct on the part of the jury, where there is a suspicion that it has been tampered with. *Montgomery v. Township*, 26 Pittsb. Leg. J. (Pa.) 193. To the same effect see *Har-*

*vester Co. v. Hodge*, 6 Pa. Dist. 378, 27 Pittsb. Leg. J. (Pa.) 424. Compare *Grace v. Martin*, 83 Ga. 245.

*As to a Meal Paid for by Officer* when furnished by a party, see *supra*, this subsection, *Food — Modern Doctrine.*

3. *Cigars Furnished by Prevailing Party.* — *Platt v. Threadgill*, 80 Fed. Rep. 192; *Doud v. Guthrie*, 13 Ill. App. 653; *People v. Montague*, 71 Mich. 447; *Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507; *Baker v. Jacobs*, 64 Vt. 197; *Shattuck v. Wrought Iron Range Co.*, 69 Vt. 468.

4. *Intoxicating Liquors* — *Arkansas.* — *Pelham v. Page*, 6 Ark. 535.

*Maine.* — *Studley v. Hall*, 22 Me. 198.

*Michigan.* — *People v. Montague*, 71 Mich. 447.

*Nebraska.* — *Vose v. Muller*, 23 Neb. 171.

*Nevada.* — *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291.

*Ohio.* — *Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507.

*Tennessee.* — *Sexton v. Lelievre*, 4 Coldw. (Tenn.) 11; *Mynatt v. Hubbs*, 6 Heisk. (Tenn.) 320.

And see *Kellogg v. Wilder*, 15 Johns. (N. Y.) 455.

*Presumption.* — In *Vollrath v. Crowe*, 9 Wash. 374, it was stated to be cause for new trial that during the trial the plaintiff and a juror played cards, drank together in a saloon, and walked and conversed together, though it was testified that the case on trial was not discussed, and it did not appear who paid for the liquor, the plaintiff having presumably done so.

5. *Furnishing Refreshments Not Ground for New Trial* — *England.* — *Morris v. Vivian*, 10 M. & W. 137, 11 L. J. Exch. 367.

*Canada.* — *Gould v. Gould*, 3 Nova Scotia 87.  
*Iowa.* — *Koester v. Ottumwa*, 34 Iowa 41.

*Maine.* — *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253.

*Mississippi.* — *Brookhaven Lumber, etc., Co. v. Illinois Cent. R. Co.*, 68 Miss. 432.

*Missouri.* — *Kennedy v. Holladay*, 105 Mo. 24.

*New Jersey.* — *Eakin v. Morris Canal, etc., Co.*, 24 N. J. L. 538.

*Ohio.* — *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328.

*South Carolina.* — *McCarty v. McCarty*, 4 Rich. L. (S. Car.) 594.

*Tennessee.* — *Vaughn v. Dotson*, 2 Swan (Tenn.) 348.

And see *Goodright v. M'Causland*, 1 Yeates (Pa.) 372, 1 Am. Dec. 306.

*Contra.* — *Sacramento, etc., Min. Co. v. Showers*, 6 Nev. 291.



has been held to be improper to disturb the verdict when the jurors were ignorant that the refreshments were furnished by a party<sup>1</sup> or when the prevailing party was ignorant that they were being charged to him.<sup>2</sup>

**Right to Object.** — A new trial will not be granted on this ground on the motion of a party who consented to the furnishing of refreshments by the other party;<sup>3</sup> and there can be no complaint if the refreshments were furnished by both parties or with the consent of both.<sup>4</sup>

(b) **Entertainment by Counsel.** — Entertainment of jurors by counsel for the prevailing party has been held to be ground for a new trial,<sup>5</sup> and this rule has been applied in the case of entertainment by the prosecuting attorney.<sup>6</sup> But in case of entertainment by counsel, as in that of entertainment by a party, there are decisions to the effect that the verdict will not be disturbed if it appears that there was no wrongful intention and no prejudice has resulted.<sup>7</sup>

(c) **Entertainment by Partisans.** — It has been held in several cases that the furnishing of refreshments to jurors by the persons who might be supposed to be friendly to the prevailing party did not constitute ground for a new trial;<sup>8</sup> and the same holding has been made in the case of entertainment by witnesses for one of the parties.<sup>9</sup>

**Entertainment by Interested Officer.** — It was held that a new trial should be granted where a sheriff, in charge of the jury, who hoped to receive a reward offered for the conviction of the guilty person, took the jury to saloons and furnished liquors to them at his own expense.<sup>10</sup>

**Refusal of Jurors' Request.** — It was held proper not to declare a mistrial because certain jurors asked the prevailing party to entertain them for the night, which request he refused in view of the circumstances. *Southwestern R. Co. v. Mitchell*, 80 Ga. 438.

**Construction of Statute.** — A statute providing that the fact that a verdict was obtained by giving to a juror any food or drink "by way of treat" should be ground for setting aside the verdict, was construed not to apply to the giving of food or drink in the way of ordinary hospitality, as by furnishing lodging and regular meals, and it was held that this was not cause for setting aside the verdict if not done for an improper purpose and if it had no improper influence. *Carlisle v. Sheldon*, 38 Vt. 440.

1. **Ignorance of Jurors.** — *Vane v. Evanston*, 150 Ill. 616; *Eakin v. Morris Canal, etc., Co.*, 24 N. J. L. 538.

2. **Ignorance of Prevailing Party.** — *Harrison v. Rowan*, 4 Wash. (U. S.) 32; *Tripp v. Bristol County*, 2 Allen (Mass.) 556; *Gurney v. Minneapolis, etc., R. Co.*, 41 Minn. 223.

**Food Furnished for Pay by Interested Party.** — See *supra*, this subsection, *Food — Modern Doctrine*.

3. **Consent by Adverse Party.** — *Coleman v. Moody*, 4 Hen. & M. (Va.) 1. See also *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

4. **Arizona Prince Copper Co. v. Copper Queen Min. Co.** (Arizona 1885) 7 Pac. Rep. 718; *Dennison v. Collins*, 1 Cow. (N. Y.) 111. And see *McLaughlin v. Hinds*, 151 Ill. 403.

**Refreshments Furnished by Codefendant.** — One defendant cannot ask a new trial because refreshments were furnished to jurors by his codefendant. *Webster County v. Hutchinson*, 60 Iowa 721.

5. **Entertainment by Counsel.** — *Walker v. Hunter*, 17 Ga. 364; *Davis v. Atlanta Nat. Bank*, 66 Ga. 651; *Demund v. Gowen*, 5 N. J. L. 790.

6. **By Prosecuting Attorney.** — *Springer v. State*, 34 Ga. 381; *People v. Montague*, 71 Mich. 447.

In *Rainy v. State*, 100 Ga. 82, it was held that the entertainment of a juror at dinner by an attorney for the state was, on grounds of public policy, a proper cause for the grant of a new trial, without making any inquiry as to whether the defendant was prejudiced thereby.

7. **Not Cause for New Trial.** — *People v. Lyle*, (Cal. 1884) 4 Pac. Rep. 977; *Koester v. Ottumwa*, 34 Iowa 41; *Pittsburg, etc., R. Co. v. Porter*, 32 Ohio St. 328.

**That the Attorney Gave a Drink of Water to the jurors while in the box, at their request, is not ground for a new trial.** *Mitchell v. Corpening*, 124 N. Car. 472.

**If the Attorneys for Both Parties join the jurors in drinking, neither party can ask a new trial on account of such drinking.** *McLaughlin v. Hinds*, 151 Ill. 463.

8. **Refreshments Furnished by Other Persons.** — See *McCarty v. McCarty*, 4 Rich. L. (S. Car.) 594; *Schissler v. Cheshire*, 7 Nev. 427; *Dumas v. State*, 63 Ga. 601. But see *Armour v. Boswell*, 6 U. C. Q. B. O. S. 352.

**A Vermont Statute providing that a verdict obtained by a party who treated the jury should be set aside was held not to affect a verdict in favor of a town on the ground that some of the inhabitants thereof entertained the jury; but it was held that the entertainment, to be within the statute, should be by the town or by one of its authorized agents.** *Carlisle v. Sheldon*, 38 Vt. 440. Compare *Bowler v. Washington*, 62 Me. 302.

9. **Entertainment by Witnesses.** — *Harris v. Harris*, 11 R. 3 C. L. 294; *State v. Minor*, 106 Iowa 642, in which latter case, however, the court said that entertainment by witnesses might under some circumstances be ground for a new trial.

10. **Entertainment by Interested Officer.** — *People v. Myers*, 70 Cal. 582.



*h. RECEIVING EVIDENCE OUT OF COURT*—(1) *In General.*—It is a well-settled rule of law, declared by statute in some states, that the reception by the jury of evidence out of court will, if influential in determining the verdict, require the grant of a new trial;<sup>1</sup> but the verdict will not be disturbed if it was not affected by such improper evidence.<sup>2</sup>

(2) *Testimony of Jurors.*—The rule forbidding jurors to receive evidence out of court applies to communications by one juror to the others of facts within his knowledge which were not given in evidence;<sup>3</sup> and if material facts so communicated are considered by the jury in reaching a verdict, a new trial will be granted.<sup>4</sup> So verdicts have been set aside because members of the jury made statements to their fellow jurors as to the credibility of witnesses,<sup>5</sup> and likewise where a juror stated facts reflecting on the character of a party to the suit.<sup>6</sup>

**Necessity of Prejudice.**—Though it has occasionally been stated that prejudice will be presumed as the result of such communications,<sup>7</sup> the general rule is

1. **Reception of Evidence Out of Court**—*Indiana.*—*Erwin v. Bulla*, 29 Ind. 95, 92 Am. Dec. 341.

*Iowa.*—*Kruidenier v. Shields*, 70 Iowa 428; *Jones v. State*, 89 Iowa 182.

*Maine.*—*Winslow v. Morrill*, 68 Me. 362.

*New Jersey.*—*Perine v. Van Note*, 4 N. J. L. 165.

*New York.*—*People v. Gallo*, 149 N. Y. 106. *Pennsylvania.*—*Brunson v. Graham*, 2 Yeates (Pa.) 166.

*South Carolina.*—*Thompson v. Mallet*, 2 Bay (S. Car.) 94.

*Tennessee.*—*Hudson v. State*, 9 Yerg. (Tenn.) 408.

See also the cases cited under the specific heads following.

**In Mississippi**, however, it seems to be questionable whether this could ever be ground for a new trial. *Taylor v. State*, 52 Miss. 84.

2. **Absence of Prejudice.**—*Dutton v. Tracy*, 4 Conn. 79; *State v. Allen*, 89 Iowa 49; *Hathaway v. Burlington, etc., R. Co.*, 97 Iowa 747; *Cartwright v. State*, 12 Lea (Tenn.) 620.

So a new trial was refused where the same matter was brought out on the witness stand. *Thrift v. Redman*, 13 Iowa 25.

See also the specific heads following.

**Examining Hotel Register.**—In *State v. Beasley*, 84 Iowa 83, the court condemned the action of a juror in examining a hotel register to see if a name was contained therein, but declined to interfere with the action of the court below in denying a new trial, it appearing from the testimony of the juror himself and one of his fellows that no prejudice resulted.

3. **Communication of Facts by Juror**—*California.*—*Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190.

*Iowa.*—*Hall v. Robison*, 25 Iowa 91. *Compare Purcell v. Tibbles*, 101 Iowa 24.

*Kansas.*—*State v. Beam*, 1 Kan. App. 688.

*Maine.*—*Bowler v. Washington*, 62 Me. 302.

*Nebraska.*—*Wood River Bank v. Dodge*, 36 Neb. 708; *Richards v. State*, 36 Neb. 17; *Edney v. Baum*, 44 Neb. 294; *Ewing v. Hoffine*, 55 Neb. 131.

*New Jersey.*—*Anderson v. Barnes*, 1 N. J. L. 235.

4. **Ground for New Trial**—*Connecticut.*—*Talmadge v. Northrop*, 1 Root (Conn.) 522.

*Iowa.*—*Darrance v. Preston*, 18 Iowa 396;

*Griffin v. Harriman*, 74 Iowa 436; *Hathaway v. Burlington, etc., R. Co.*, 97 Iowa 747; *Bohn v. Chicago, etc., R. Co.*, (Iowa 1899) 78 N. W. Rep. 200.

*Kansas.*—*Murphy v. Hindman*, 37 Kan. 267; *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341; *Atchison, etc., R. Co. v. Bayes*, 42 Kan. 609; *State v. Woods*, 49 Kan. 237; *Salina v. Trosper*, 27 Kan. 544; *State v. Beam*, 1 Kan. App. 688.

*Nebraska.*—*Richards v. State*, 36 Neb. 17; *Wood River Bank v. Dodge*, 36 Neb. 708.

*Ohio.*—*Kent v. State*, 42 Ohio St. 426.

*Pennsylvania.*—*Com. v. Kulp*, 17 Pa. Co. Ct. 561, 5 Pa. Dist. 468.

*Tennessee.*—*Wade v. Ordway*, 1 Baxt. (Tenn.) 229; *Sam v. State*, 1 Swan (Tenn.) 61; *Booby v. State*, 4 Yerg. (Tenn.) 111; *Morton v. State*, 1 Lea (Tenn.) 498; *Ryan v. State*, 97 Tenn. 206.

*Texas.*—*Anschicks v. State*, 6 Tex. App. 524; *Mason v. State*, (Tex. App. 1891) 16 S. W. Rep. 766; *McWilliams v. State*, 32 Tex. Crim. 269; *Burlesan v. State*, (Tex. App. 1890) 15 S. W. Rep. 175; *Terry v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 986; *Hargrove v. State*, 33 Tex. Crim. 431.

5. **Statements as to Credibility of Witnesses.**—*Pumphrey v. Walker*, 71 Iowa 383; *Donston v. State*, 6 Humph. (Tenn.) 275; *Anschicks v. State*, 6 Tex. App. 524; *McKissick v. State*, 26 Tex. App. 673; *Lucas v. State*, 27 Tex. App. 322; *Tate v. State*, 38 Tex. Crim. 261.

6. **Statements as to Character**—*Connecticut.*—*State v. Andrews*, 29 Conn. 100, 76 Am. Dec. 593.

*Georgia.*—*Martin v. State*, 25 Ga. 494.

*Kansas.*—*State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341.

*Missouri.*—*State v. Sprague*, 149 Mo. 409.

*Tennessee.*—*Morton v. State*, 1 Lea (Tenn.) 498; *Nile v. State*, 11 Lea (Tenn.) 694; *Ryan v. State*, 97 Tenn. 206.

*Texas.*—*Hargrove v. State*, 33 Tex. Crim. 431; *Ellis v. State*, 33 Tex. Crim. 508; *Mitchell v. State*, 36 Tex. Crim. 278; *Holmes v. State*, 38 Tex. Crim. 370; *Burlesan v. State*, (Tex. App. 1890) 15 S. W. Rep. 175; *Hardiman v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 121.

7. **Presumption of Prejudice.**—*Sam v. State*, 1 Swan (Tenn.) 61; *McWilliams v. State*, 32 Tex. Crim. 269. *Contra*, *Austin v. State*, 42 Tex. 355. And see *State v. Olds*, 106 Iowa 110.



that communications with other jurors on matters outside the evidence are not necessarily prejudicial;<sup>1</sup> and remarks about the case are not cause for new trial if it appears that no injury resulted.<sup>2</sup> Accordingly, such statements have been held not to be ground for a new trial when made after the jury had actually agreed upon the verdict.<sup>3</sup> And in some cases, even statements in regard to the character of a party have been held not to warrant the setting aside of the verdict in the absence of a showing of prejudice.<sup>4</sup> So a new trial has been refused where it appeared from the affidavits of jurors or otherwise that they did not allow themselves to be influenced by the communications.<sup>5</sup>

**Statements as to Law.** — Statements by one juror to the others during their deliberations in regard to matters of law will not, it seems, though erroneous, be ground for a new trial.<sup>6</sup>

(3) *Private Examination of Witnesses.* — If the jurors, without the knowledge of the court, examine witnesses, a new trial should be granted,<sup>7</sup> and this rule is applicable if the jurors, while viewing the *locus in quo*, whether with or without leave of the court, obtain information from persons who happen to be there present.<sup>8</sup>

(4) *Unauthorized View of Locus in Quo.* — Where the gist of an action on trial is the condition of the *locus in quo*, or where a view of it will enable the jurors better to determine the credibility of the witnesses, or any other disputed fact, if the jurors, without the permission of the court or knowledge of the parties, examine the locality for the express purpose of acquiring such information, a new trial should be granted, unless it is clear that such misconduct could not have influenced their verdict.<sup>9</sup> If, however, there

1. **Absence of Prejudice.** — *Steward v. Hinkel*, 72 Cal. 187; *Borer v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 951.

2. *Cherry v. Sweeny*, 1 Cranch (C. C.) 530; *People v. Kramer*, 117 Cal. 647; *Davis v. Lowman*, 9 Ga. 504; *McTyler v. State*, 91 Ga. 256; *Bernstein v. Myers*, 99 Ga. 90; *Hall v. Robison*, 25 Iowa 91; *State v. Cowan*, 74 Iowa 53; *State v. Wright*, 98 Iowa 702; *Paramore v. Lindsey*, 63 Mo. 63; *Gallihar v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 329. Compare *McWilliams v. State*, 32 Tex. Crim. 269.

So statements of a self-evident fact which could not have influenced the verdict are not ground for a new trial. *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190.

**Remarks Favorable to Unsuccessful Party.** — Where the statements were of a character to induce sympathy for the successful party and to reduce the amount of the verdict against him, he was not entitled to a new trial. *Noble v. White*, 103 Iowa 352.

**Talks About the Case, after all the evidence is in**, by some of the jurors while the others are not present is not ground for a new trial. *Paramore v. Lindsey*, 63 Mo. 63. Compare *Edney v. Baum*, 44 Neb. 294.

3. **Communications After Agreement on Verdict.** — *Wise v. Bosley*, 32 Iowa 34; *State v. McKinney*, 31 Kan. 570; *Parker v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 553; *Gonzales v. State*, 32 Tex. Crim. 611.

4. **Statements as to Character Not Prejudicial.** — *State v. Woodson*, 41 Iowa 425; *State v. Cross*, 95 Iowa 629; *Taylor v. State*, 52 Miss. 84; *Austin v. State*, 42 Tex. 355; *Parker v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 553; *Cox v. State*, 28 Tex. App. 92.

So when the evidence shows the truth of the statements. *State v. Copeland*, 106 Iowa 102.

5. **Disregard of Communications by Jurors.** — *Moore v. People*, (Colo. 1899) 57 Pac. Rep. 857; *State v. Wright*, 98 Iowa 702; *Jack v. State*, 20 Tex. App. 656; *Testard v. State*, 26 Tex. App. 260; *Williams v. State*, 33 Tex. Crim. 128, 47 Am. St. Rep. 21.

6. **Statements as to Law.** — *Cutler v. Cutler*, 43 Vt. 660. See also *State v. Holmes*, 12 Wash. 170. See also *State v. Burks*, 132 Mo. 363; *Crawford v. State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467.

7. **Private Examination of Witnesses.** — *Metcalf v. Deane*, Cro. Eliz. 189; *Luttrell v. Maysville*, etc., R. Co., 18 B. Mon. (Ky.) 291; *Thompson v. Mallet*, 2 Bay (S. Car.) 94; *Smith v. Graves*, 1 Brev. (S. Car.) 16; *Vanmeter v. Kitzmiller*, 5 W. Va. 380. But see *State v. Martin*, Tappan (Ohio) 323, where a new trial was refused though the jury sent for the witness and had him repeat his testimony.

By the consent of the parties, a witness may be examined privately by the jury in its retirement. *Brown v. Cowell*, 12 Johns. (N. Y.) 384.

8. **While Viewing Premises.** — *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Bowler v. Washington*, 62 Me. 302; *Harrington v. Worcester*, etc., St. R. Co., 157 Mass. 579; *State v. Lopez*, 15 Nev. 407; *People v. Gallo*, 149 N. Y. 106; *State v. Perry*, 121 N. Car. 533, 61 Am. St. Rep. 683.

9. **Unauthorized View of Locus in Quo** — *Kansas*. — *Ortman v. Union Pac. R. Co.*, 32 Kan. 419.

*Maine*. — *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449; *Bowler v. Washington*, 62 Me. 302; *Winslow v. Morrill*, 68 Me. 362.

*Massachusetts*. — *Harrington v. Worcester*, etc., St. R. Co., 157 Mass. 579.

*Minnesota*. — *Rush v. St. Paul City R. Co.*, 70 Minn. 5; *Aldrich v. Wetmore*, 52 Minn. 164; *Woodbury v. Anoka*, 52 Minn. 329.



is no controversy as to the locality inspected, and no probability of prejudice, the verdict should not be disturbed.<sup>1</sup>

**Waiver of Objection.** — The objection to an unauthorized view may be waived, either expressly<sup>2</sup> or by failure properly to present it.<sup>3</sup>

(5) *Inspection of Articles.* — It is improper for a juror to inspect while out of court, during the trial, an article which is involved in the case;<sup>4</sup> but that he has done so is not ground for a new trial in the absence of a showing of prejudice.<sup>5</sup>

(6) *Making Experiments.* — The rule forbidding the jurors to receive evidence out of court renders it improper for them to make experiments in order to test the truth or weight of the evidence;<sup>6</sup> and the making of such experiments will generally be ground for a new trial.<sup>7</sup> But it is held that this is not ground for a new trial in the absence of anything to show that it influenced the verdict.<sup>8</sup>

*i.* PAPERS IN JURY ROOM — (1) *Papers in Evidence.* — In the early *English* cases the rule was laid down that the jurors, on retiring for deliberation, could, in the absence of consent of the parties, take with them no documentary

*New Jersey.* — *Deacon v. Shreve*, 22 N. J. L. 176; *State v. Vansciver*, 7 N. J. L. J. 268.

*New York.* — *Eastwood v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. 25, *affirmed* 14 N. Y. 562; *People v. Tyrrell*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 142.

*North Carolina.* — *State v. Perry*, 121 N. Car. 533, 61 Am. St. Rep. 683.

*Rhode Island.* — *Garside v. Ladd Watch Case Co.*, 17 R. I. 691.

*Wisconsin.* — *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818.

1. **Absence of Prejudice** — *California.* — *People v. Bonney*, 19 Cal. 426.

*Iowa.* — *Bowman v. Western Fur Mfg. Co.*, 96 Iowa 188.

*Kentucky.* — *Tudor v. Com.*, (Ky. 1897) 43 S. W. Rep. 187.

*Massachusetts.* — *Tully v. Fitchburg R. Co.*, 134 Mass. 499.

*Missouri.* — *State v. Brown*, 64 Mo. 367.

*Nebraska.* — *Edney v. Baum*, 44 Neb. 294.

*New Jersey.* — *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415.

*New York.* — *Haight v. Elmira*, 42 N. Y. App. Div. 391.

*Ohio.* — *Ohio Southern R. Co. v. Rawlens*, 29 Cinc. L. Bul. 260, 11 Ohio Dec. (Reprint) 785.

*Texas.* — *McDonald v. State*, 15 Tex. App. 493.

*Virginia.* — *Com. v. Brown*, 90 Va. 671.

See also *supra*, this section, *Custody of Officer* — *Conduct of Custodian.*

So in *Com. v. Desmond*, 141 Mass. 200, it was held that a new trial was not necessitated by the fact that a juror, after agreeing upon a verdict, which was sealed up, visited the scene of the crime.

**Measurements by Juror.** — The fact that during a trial a juror made measurements at a place where the alleged injury occurred is not ground for a new trial if the juror under oath says that he did not consider the measurements in arriving at his verdict, nor communicate them to any member of the jury, and if it is shown that the measurements made corresponded to those testified to by a witness. *Carbon v. Ottumwa*, 95 Iowa 524. And see *Hardin v. State*, 40 Tex. Crim. 208. *Compare*

*Ewers v. National Imp. Co.*, 63 Fed. Rep. 562.

2. **Waiver of Objection.** — *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236; *Sanderson v. Nashua*, 44 N. H. 492.

3. *Gilmore v. H. W. Baker Co.*, 12 Wash. 468, where it was held that objection was waived by failure to except to a remark of the court to the effect that the jurors could view the premises if they wished.

4. **Inspection of Articles.** — *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep. 898; *Stampofski v. Steffens*, 79 Ill. 303; *Wooldridge v. White*, (Ky. 1899) 48 S. W. Rep. 1081. On a murder trial, when the defendant's gun was taken to the jury room with the consent of counsel, it was held that the jurors had a right to take it apart in order to see whether the plunger had been tampered with so as to make a mark on the shells different from that which appeared on shells picked up on the scene of the crime. *Taylor v. Com.*, 90 Va. 109.

5. **Absence of Prejudice.** — *People v. Tipton*, 73 Cal. 405; *Trafton v. Pitts*, 73 Me. 408; *Kennon v. Territory*, 5 Okla. 685, in which cases jurors merely examined a second time articles which had already been examined by them when introduced in evidence. See also *Wilson v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 619; *Hendricks v. State*, 28 Tex. App. 416.

**Cure by Instructions.** — Even if it is improper for the jury in affiliation proceedings to inspect, while out of court, the countenance of a child, the irregularity is cured by an instruction to the jury not to consider the child's resemblance to the defendant. *La Mott v. State*, 128 Ind. 123.

6. **Making Experiments.** — *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 50 Am. Rep. 550. See also the title EXPERIMENTS (IN EVIDENCE), vol. 12, p. 412.

7. **Ground for New Trial.** — *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. Rep. 898; *People v. Conkling*, 111 Cal. 616; *Wooldridge v. White*, (Ky. 1899) 48 S. W. Rep. 1081; *Christy v. Keefer*, 2 Cleve. L. Rep. 164. But see *Taylor v. Com.*, 90 Va. 109.

8. **Absence of Prejudice.** — *Indianapolis v. Scott*, 72 Ind. 196.



evidence except that which was under seal.<sup>1</sup> This distinction between sealed and unsealed writings no longer exists; and in most jurisdictions, at the present day, the jurors may take out with them papers and documents given in evidence,<sup>2</sup> with the occasional exception of depositions.<sup>3</sup>

**Applications of Rule.** — Among papers in evidence which the jury has been allowed to take are included the claim on which the suit is based, constituting part of the complaint;<sup>4</sup> insurance policies,<sup>5</sup> and likewise the application and proof of loss;<sup>6</sup> wills;<sup>7</sup> account books;<sup>8</sup> ordinances for violation of which the action is brought;<sup>9</sup> photographs;<sup>10</sup> and maps and plats.<sup>11</sup> And a statute permitting jurors to take with them all papers in evidence, with certain specified exceptions, was held to apply to any article which was an exhibit in the case.<sup>12</sup>

**Contrary Decisions.** — In some cases, however, the propriety of allowing papers in evidence to go to the jury has been questioned, and a rule forbidding the taking out of such papers, except by consent of the parties, has been upheld.<sup>13</sup>

**1. Papers in Evidence — Old Rule.** — Co. Litt. 227*b*; 2 Roll. Abr. 676, 686; Vicary *v.* Farthing, Cro. Eliz. 411; Petre *v.* Heneage, 12 Mod. 520; Rex *v.* Burdett, 1 Ld. Raym. 148. See also Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Offit *v.* Vick, Walk. (Miss.) 99; Langworthy *v.* Connelly, 14 Neb. 340, 45 Am. Rep. 117.

**Failure to Observe This Rule,** however, did not vitiate the verdict. Co. Litt. 227*b*; Vicary *v.* Farthing, Cro. Eliz. 411; Petre *v.* Heneage, 12 Mod. 520; Rex *v.* Burdett, 1 Ld. Raym. 148.

**2. Modern Rule — Arkansas.** — Hurley *v.* State, 29 Ark. 17.

**District of Columbia.** — Brien *v.* Beck, 2 Mackey (D. C.) 82.

**Georgia.** — Hudspeth *v.* Mears, 92 Ga. 525; Davis *v.* State, 91 Ga. 167.

**Illinois.** — Hovey *v.* Thompson, 37 Ill. 538; O'Neill *v.* Calhoun, 67 Ill. 219; Carthage *v.* Buckner, 8 Ill. App. 152.

**Iowa.** — Miller *v.* Dickinson County, 68 Iowa 102.

**Massachusetts.** — Birghardt *v.* Van Deusen, 4 Allen (Mass.) 374.

**Mississippi.** — Taylor *v.* Sorsby, Walk. (Miss.) 97.

**Missouri.** — Cornelius *v.* Grant, 8 Mo. 59; Hanger *v.* Imboden, 12 Mo. 85; State *v.* Tompkins, 71 Mo. 613.

**New Hampshire.** — Moore *v.* Davis, 49 N. H. 45, 6 Am. Rep. 460.

**New Jersey.** — State *v.* Raymond, 53 N. J. L. 260.

**New York.** — Howland *v.* Willetts, 9 N. Y. 170; Porter *v.* Mount, 45 Barb. (N. Y.) 422; Schappner *v.* Second Ave. R. Co., 55 Barb. (N. Y.) 497; Hardy *v.* Norton, 66 Barb. (N. Y.) 527; Sanderson *v.* Bowen, 2 Hun (N. Y.) 153; Paige *v.* Chedsey, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 183, *affirming* (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 396.

**South Carolina.** — Gable *v.* Rauch, 50 S. Car. 95.

**Pennsylvania.** — Seibert *v.* Price, 5 W. & S (Pa.) 440; Alexander *v.* Jameson, 5 Binn. (Pa.) 238; Udderzook *v.* Com., 76 Pa. St. 340; Kline *v.* Huntingdon First Nat. Bank, (Pa. 1888) 15 Atl. Rep. 433; Hendel *v.* Berks, etc., Turnpike Road, 16 S. & R. (Pa.) 97; White *v.* Bisbing, 1 Yeates (Pa.) 400; Mullen *v.* Morris, 2 Pa. St. 85; Carson *v.* Watson, 4 Phila. (Pa.) 88; 17 Leg. Int. (Pa.) 221; Riddlesburg Iron, etc., Co. *v.* Rogers, 65 Pa. St. 416; Odd Fellows' Hall *v.* Masser, 24 Pa. St. 507; 64 Am. Dec. 675;

Shomo *v.* Zeigler, 10 Phila. (Pa.) 611, 31 Leg. Int. (Pa.) 205.

**Texas.** — San Antonio, etc., R. Co. *v.* Barnett, 12 Tex. Civ. App. 321; Grayson *v.* State, 40 Tex. Crim. 573.

**A Statute** allowing the taking of papers to the jury room has been held to apply to a copy of a daily commercial price-current, Peterson *v.* Haugen, 34 Iowa 395; and to a written receipt containing a memorandum relating to the transaction, Humphries *v.* McGraw, 5 Ark. 61.

**All Papers to Be Taken.** — It has been held that if the court allows a portion of the documentary evidence to be taken, it must, upon the request of a party, allow all of it to go. English *v.* State, 31 Fla. 340; Rainforth *v.* People, 61 Ill. 365. But see Phillips *v.* Runnells, 1 Morr. (Iowa) 391, 43 Am. Dec. 109.

**3. Exception — Depositions.** — See *infra*, this subsection, *Depositions*.

**4. Claim on Which Suit Is Based.** — McLean *v.* Crow, 88 Cal. 644. But see Hutchinson *v.* Decatur, 3 Cranch (C. C.) 291; Simms *v.* Templeman, 5 Cranch (C. C.) 163.

**5. Insurance Papers.** — People *v.* Formosa, 61 Hun (N. Y.) 272.

**6. Clark *v.* Phoenix Ins. Co., 36 Cal. 168; Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646.**

**7. Wills.** — Shelly *v.* Diller, 2 Rawle (Pa.) 177. But see Matter of Foster, 34 Mich. 21.

**8. Account Books.** — Mooney *v.* Hough, 84 Ala. 80; Territory *v.* Doyle, 7 Mont. 245.

**Memorandum Book of Car Inspector.** — Davis *v.* State, 91 Ga. 167.

**9. Ordinances.** — Carthage *v.* Buckner, 8 Ill. App. 152.

**10. Photographs.** — Barker *v.* Perry, 67 Iowa 146; Matter of Foster, 34 Mich. 21.

**11. Maps and Plats.** — Burton *v.* State, 115 Ala. 1; Western, etc., R. Co. *v.* Stafford, 99 Ga. 187.

**12. Articles Actually in Evidence.** — Jack *v.* Territory, 2 Wash. Ter. 101, in which case it was held that a hat and a bloodstained garment might be taken. To the same effect see State *v.* Webster, 21 Wash. 63. *Contra*, Hansing *v.* Territory, 4 Okla. 443.

**13. Cases Adverse to Sending Out Papers.** — Eden *v.* Lingenfelter, 39 Ind. 19; Lotz *v.* Briggs, 50 Ind. 346; Nichols *v.* State, 65 Ind. 512; State *v.* Colbert, 29 La. Ann. 715; Moore *v.* McDonald, 68 Md. 321; Farmers', etc., Bank *v.* Winfield, 24 Wend. (N. Y.) 419; Williams *v.* Thomas, 78 N. Car. 47. But see State *v.* Williams, 34



In any case the taking of papers in evidence is not ground for a new trial if no injury results to the unsuccessful party.<sup>1</sup>

**Discretion of Court.** — The question whether the jurors shall take with them papers in evidence is frequently stated to rest largely in the discretion of the court, the exercise of which will be disturbed only in case of abuse.<sup>2</sup> The ruling of the trial judge in this regard is, however, generally subject to review.<sup>3</sup>

**Comparison of Handwriting.** — In several cases it has been held that the jurors should not be allowed to take papers in evidence into the jury room in order to make a comparison of handwriting,<sup>4</sup> though there are cases to the contrary.<sup>5</sup>

(2) **Depositions.** — It is generally the rule that depositions read in evidence should not go to the jury;<sup>6</sup> and a dying declaration is within this rule,<sup>7</sup> as is a paper purporting to be the statement of what a party would have testified to had he been before the jury.<sup>8</sup> The reason of the rule is that the contents of the deposition would be more strongly impressed upon the jury than the oral evidence on the other side, and it has consequently been held that the rule of exclusion does not apply if all the evidence is reduced to writing.<sup>9</sup> In some cases, however, it is stated that whether depositions shall go to the

La. Ann. 959. Compare *Collins v. Frost*, 54 Ind. 242; *Snyder v. Braden*, 58 Ind. 143.

1. **Absence of Prejudice.** — See *infra*, this subsection, *Effect of Papers Improperly in Jury Room*.

2. **Discretion of Court** — *Alabama*. — *Campbell v. State*, 23 Ala. 44.

*California*. — *People v. Cochran*, 61 Cal. 548; *McLean v. Crow*, 88 Cal. 644.

*District of Columbia*. — *Brien v. Beck*, 2 Mackey (D. C.) 82.

*Kansas*. — *Hairgrove v. Millington*, 8 Kan. 480; *Wood v. Wood*, 47 Kan. 617.

*Massachusetts*. — *Burghardt v. Van Deuson*, 4 Allen (Mass.) 374.

*Michigan*. — *Canning v. Harlan*, 50 Mich. 323.

*Missouri*. — *State v. Tompkins*, 71 Mo. 613.

*Montana*. — *Territory v. Doyle*, 7 Mont. 245.

*Nebraska*. — *Langworthy v. Connelly*, 14 Neb. 340, 45 Am. Rep. 117. Compare *Mercer v. Harris*, 4 Neb. 77.

*New York*. — *Lycett v. Manhattan R. Co.*, (Supm. Ct. App. Div.) 62 N. Y. Supp. 848; *Sanderson v. Bowen*, 2 Hun (N. Y.) 153, 4 Thomp. & C. (N. Y.) 675; *Harnett v. Garvey*, 40 N. Y. Super. Ct. 96; *Porter v. Mount*, 45 Barb. (N. Y.) 422.

*Ohio*. — *Baltimore, etc., R. Co. v. McCamey*, 12 Ohio Cir. Ct. 543, 5 Ohio Cir. Dec. 631.

*Pennsylvania*. — *Ott v. Oyer*, 106 Pa. St. 19; *Kittanning Ins. Co. v. O'Neill*, 110 Pa. St. 548; *Cavanaugh v. Buehler*, 120 Pa. St. 441.

*Vermont*. — *Re Barney*, 71 Vt. 217.

*Wisconsin*. — *Starke v. Wolf*, 90 Wis. 434.

The Illinois Statute authorizing the jury to take papers in evidence was held not to apply to criminal cases, in which the rule is that of the common law, to the effect that the jury may take such books and papers as the court in its discretion directs. *Dunn v. People*, 172 Ill. 582.

In Michigan, though the practice of allowing the jury to take out papers has been quite frequently commented upon adversely, the rule seems to be that if their authenticity is not questioned, and there is no testimony to impeach their contents, it is within the discretion of the trial court to permit their being taken to the jury room, although objection is made.

*Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646. See also *Matter of Foster*, 34 Mich. 24; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327; *Canning v. Harlan*, 50 Mich. 323; *Chadwick v. Chadwick*, 52 Mich. 549; *Bulen v. Granger*, 63 Mich. 311.

3. **Review.** — *Wood v. Wood*, 47 Kan. 617; *Bulen v. Granger*, 63 Mich. 311; *Hendel v. Berks, etc.*, Turnpike Road, 16 S. & R. (Pa.) 92; *Starke v. Wolf*, 90 Wis. 434.

4. **Comparison of Handwriting.** — *Cox v. Straisser*, 62 Ill. 383; *Matter of Foster*, 34 Mich. 24; *Watson v. Davis*, 7 Jones L. (52 N. Car.) 178; *Chester v. State*, 23 Tex. App. 577. And see *Kruidenier v. Shields*, 70 Iowa 428, 77 Iowa 504.

5. *Hardy v. Norton*, 66 Barb. (N. Y.) 527; *State v. Wetherell*, 70 Vt. 274; *Bailey v. State*, (Tex. Crim. 1897) 38 S. W. Rep. 992 (no error in view of absence of objection).

**Examinations with a Magnifying Glass** by the jury in the jury room are permissible on a trial for forgery. *Hatch v. State*, 6 Tex. App. 384.

6. **Depositions** — *United States*. — U. S. v. Clarke, 2 Cranch (C. C.) 152.

*Illinois*. — *Rawson v. Curtiss*, 19 Ill. 485; *Fein v. Covenant Mut. Ben. Assoc.*, 60 Ill. App. 274; *Pittsburgh, etc., R. Co. v. Dahlin*, 67 Ill. App. 99.

*Maryland*. — *Jerry v. Townshend*, 9 Md. 159.

*Pennsylvania*. — *Hendel v. Berks, etc.*, Turnpike Road, 16 S. & R. (Pa.) 92; *Spence v. Spence*, 4 Watts (Pa.) 168; *White v. Bisbing*, 1 Yeates (Pa.) 400; *Alexander v. Jameson*, 5 Binn. (Pa.) 238.

*Texas*. — *Chamberlain v. Pybas*, 81 Tex. 511.

A Statute authorizing the taking to the jury of papers read in evidence does not apply to depositions. *State v. Cain*, 20 W. Va. 707; *Welch v. Franklin Ins. Co.*, 23 W. Va. 288; *State v. Lowry*, 42 W. Va. 205.

7. **Dying Declarations.** — *State v. Moody*, 18 Wash. 165. See also *Dunn v. People*, 172 Ill. 582. Compare *State v. Webster*, 21 Wash. 63.

8. **Statements of Possible Testimony.** — *Smith v. Wise*, 58 Ill. 141; *Green v. Gresham*, 21 Tex. Civ. App. 601.

9. **Entire Evidence Reduced to Writing.** — *Hairgrove v. Millington*, 8 Kan. 480; *Wakeman v. Marquand*, 5 Mart. N. S. (La.) 265.



jury room is a matter largely within the discretion of the trial court,<sup>1</sup> and in others it has been held that depositions may go to the jury.<sup>2</sup> Depositions not read in evidence, or partly excluded, fall under the general rule as to papers and documents not in evidence.<sup>3</sup>

**Prejudice Necessary for New Trial.** — If depositions calculated to influence the jury go to the jury room without the knowledge of the unsuccessful party, the verdict should be set aside;<sup>4</sup> but it is otherwise if no prejudice could have resulted.<sup>5</sup>

**Papers Attached to Deposition.** — Where a deposition cannot properly go out to the jury, the jury is not entitled to papers forming part of the deposition and attached thereto,<sup>6</sup> but such papers may go to the jury if they have been offered and admitted as independent evidence.<sup>7</sup>

(3) *Papers Not in Evidence or Record* — (a) **In General.** — As a general rule, the jurors are not entitled to have with them, on their retirement, papers bearing on the case which were not in evidence.<sup>8</sup>

(b) **Exceptions to Rule of Exclusion.** — It is, however, quite customary to allow the jury to have papers constituting merely a statement of the claim in suit.<sup>9</sup>

1. **Discretion of Court.** — *Whithead v. Keyes*, 3 Allen (Mass.) 495, 81 Am. Dec. 672; *Baker v. Com.*, (Ky. 1891) 17 S. W. Rep. 625. And see *Lafoon v. Shearin*, 95 N. Car. 397.

2. **Depositions May Go to Jury.** — *Newport News, etc., R. Co. v. Mendell*, (Ky. 1896) 34 S. W. Rep. 1081; *Howland v. Willetts*, 9 N. Y. 170; *Hansbrough v. Stinnett*, 25 Gratt. (Va.) 475.

In Ohio, unless special reasons exist for excluding depositions from the jury, it should be allowed to have them. *Sites v. McKibben*, 2 Ohio St. 588; *Greene v. Davis*, 4 Ohio Cir. Ct. 84, 2 Ohio Cir. Dec. 433. See also *Post v. Gazlay*, 1 Cinc. Super. Ct. 105.

**Immaterial Depositions.** — In *Shomo v. Zeigler*, 10 Phila. (Pa.) 611, 31 Leg. Int. (Pa.) 205, it was held that there was no error in allowing the jury to take a certified record of bankruptcy offered in evidence, although attached thereto were depositions relative to the bankruptcy, but immaterial to the controversy.

3. **Depositions Not in Evidence.** — See *infra*, this subsection, *Papers Not in Evidence or Record*.

4. **New Trial.** — *Coffin v. Gephart*, 18 Iowa 256; *Stewart v. Burlington, etc., R. Co.*, 11 Iowa 62; *Taylor v. Sorsby*, Walk. (Miss.) 97; *Bronson v. Metcalf*, 4 Wkly. L. Gaz. 115, 3 Ohio Dec. (Reprint) 169, 1 Disney (Ohio) 21.

5. *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Morris v. Howe*, 36 Iowa 493; *Foster v. McO'Brien*, 18 Mo. 88. And see *Shomo v. Zeigler*, 10 Phila. (Pa.) 611, 31 Leg. Int. (Pa.) 205.

**No Presumption of Prejudice.** — See *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424.

6. **Papers Attached to Deposition.** — *Toohy v. Sarvis*, 78 Ind. 474; *Snow v. Starr*, 75 Tex. 411; *Gulf, etc., R. Co. v. Hughes*, (Tex. Civ. App. 1895) 31 S. W. Rep. 411; *Chamberlain v. Pybas*, 81 Tex. 511. And see *Oskaloosa College v. Western Union Fuel Co.*, 90 Iowa 380.

7. **Papers Admitted as Independent Evidence.** — *Cockrill v. Hall*, 76 Cal. 192; *Sargent v. Lawrence*, 16 Tex. Civ. App. 540; *Davis v. Missouri, etc., R. Co.*, 17 Tex. Civ. App. 199.

8. **Papers Not in Evidence** — *Arkansas*. — *Palmore v. State*, 29 Ark. 248.

*Connecticut.* — *Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337.

*Georgia.* — *Ruckersville Bank v. Hemphill*,

7 Ga. 397; *Walker v. Hunter*, 17 Ga. 364; *Steadwell v. Morris*, 61 Ga. 97.

*Illinois.* — *Nolan v. Vosburg*, 3 Ill. App. 596; *Nelson v. Humes*, 12 Ill. App. 52; *Pittsburgh, etc., R. Co. v. Dahlin*, 67 Ill. App. 99.

*Indiana.* — *Eden v. Lingenfelter*, 39 Ind. 19.

*Iowa.* — *McLeod v. Humeston, etc., R. Co.*, 71 Iowa 138; *De Wulf v. Dix*, (Iowa 1900) 81 N. W. Rep. 779.

*Kansas.* — *State v. Clark*, 34 Kan. 289.

*Massachusetts.* — *Alger v. Thompson*, 1 Allen (Mass.) 453; *Whitney v. Whitman*, 5 Mass. 405; *Com. v. Edgerly*, 10 Allen (Mass.) 184.

*Montana.* — *Sweeney v. Darcy*, 21 Mont. 188.

*Nebraska.* — *La Bonty v. Lundgren*, 41 Neb. 312.

*New York.* — *Howland v. Willetts*, 9 N. Y. 170; *Hewitt v. Morris*, 37 N. Y. Super. Ct. 18; *Elliott v. Luengene*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 78.

*Oregon.* — *State v. Baker*, 23 Oregon 441.

*Pennsylvania.* — *Hamilton v. Glenn*, 1 Pa. St. 340; *Bellas v. Lloyd*, 2 Watts (Pa.) 401; *Kittanning Ins. Co. v. O'Neill*, 110 Pa. St. 548.

*Tennessee.* — *East Tennessee, etc., R. Co. v. Lee*, 95 Tenn. 388.

*Texas.* — *Goar v. Thompson*, 19 Tex. Civ. App. 330; *Faver v. Bowers*, (Tex. Civ. App. 1895) 33 S. W. Rep. 131.

*Vermont.* — *Re Barney*, 71 Vt. 217.

9. **Statement of Claim.** — *Rowand v. Clark*, 34 Leg. Int. (Pa.) 232; *Ege v. Kille*, 84 Pa. St. 333; *Ott v. Oyer*, 106 Pa. St. 19; *Allen v. Philadelphia*, 1 Pa. Dist. 216. But see *Burton v. Wilkes*, 66 N. Car. 604; *Whitehall Mfg. Co. v. Wise*, 119 Pa. St. 484.

**Not Cause for New Trial.** — *Avery v. Moore*, 133 Ill. 74; *Greff v. Blake*, 16 Iowa 222; *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.) 396. But see *Benson v. Fish*, 6 Me. 141.

**An Itemized Account** used by counsel and referred to during the trial, though not offered in evidence, may go to the jury if the items have been proved and the jurors are instructed to use the account only by way of aid to their memoranda. *Rorer v. Rorer*, 48 N. J. L. 51.

**A Statement of Injuries** filed in an action against a municipality for defects in a highway may go to the jury. *Felch v. Weare*, 66 N. H. 582.



So it has been held that calculations and estimates by a party as to the amount due to him were properly taken by the jury.<sup>1</sup> And a plat of land in dispute may go to the jury in the sound discretion of the court.<sup>2</sup>

(c) **Papers Partly in Evidence.** — Papers which have been admitted in part only should not go to the jury in their entirety unless proper precautions are taken to prevent inspection by the jury of the parts not in evidence.<sup>3</sup> In some jurisdictions instructions to the jury not to read such parts appear to be considered sufficient to prevent any prejudice,<sup>4</sup> while in other jurisdictions such instructions are regarded as insufficient for this purpose.<sup>5</sup>

(d) **Notes by Jurors.** — In *Indiana* it has been held that a new trial may be granted if jurors take notes of the evidence against objection and when directed by the court not to do so.<sup>6</sup> In other states the taking of notes of either arguments or evidence seems to be regarded as proper.<sup>7</sup> But counsel cannot request the jury to make notes of his claim.<sup>8</sup> In any case, however, in order to be available, objection must be made immediately on discovery of the action of the jurors;<sup>9</sup> and to authorize the setting aside of the verdict the notes must have been used.<sup>10</sup>

(e) **Judge's Minutes.** — The jurors have no right to take with them the judge's minutes of the trial;<sup>11</sup> but the verdict will not be disturbed for this cause if no injury appears to have resulted.<sup>12</sup>

(4) **Pleadings.** — In some jurisdictions it is regarded as improper for the jurors to take the pleadings to the jury room,<sup>13</sup> though the fact that they do

1. **Calculations and Estimates.** — *Tift v. Towns*, 63 Ga. 237; *Lilly v. Griffin*, 71 Ga. 535. And see *Robinson v. Allison*, 36 Ala. 525; *Alexander v. Dunn*, 5 Ind. 122; *Moore v. Beale*, (Ky. 1899) 50 S. W. Rep. 850.

**Calculations of Interest** may, it has been held, go with the note or claim sued on to the jury. *Allen v. Philadelphia*, 1 Pa. Dist. 216; *Nott v. Thomson*, 35 S. Car. 461. But see *Hatfield v. Cheaney*, 76 Ill. 488.

**Where the Amount of Recovery Was Entirely Indefinite**, as being the difference between the actual and the guaranteed values of certain property, it was held that a statement of a certain sum claimed should not be allowed to go to the jury. *Himes v. Kiehl*, 154 Pa. St. 190, 31 W. N. C. (Pa.) 487.

In *Michigan* it is held that memoranda of statements by counsel should not be given to the jury for use in the jury room unless by consent of the attorney of the opposite party, except when the case involves an investigation of long accounts where numerous items are to be passed upon, in which event the judge may, in his discretion, allow the jury to take lists of the items. *Harroun v. Chicago*, etc., R. Co., 68 Mich. 208, *overruling* *Millar v. Cuddy*, 43 Mich. 273, 38 Am. Rep. 181. See also *Wonderly v. Holmes Lumber Co.*, 56 Mich. 412.

2. **Plat of Land.** — *O'Hara v. Richardson*, 46 Pa. St. 385; *Hale v. Rich*, 48 Vt. 217. *Compare* *Way v. Arnold*, 18 Ga. 182.

3. **Papers Partly in Evidence.** — *People v. Thornton*, 74 Cal. 482; *Way v. Arnold*, 18 Ga. 182; *Sargent v. Lawrence*, 16 Tex. Civ. App. 540.

**Obscure Memoranda or Points for Argument** on the back of a paper which went into the jury room were held not to constitute ground for reversal, the trial court having refused to grant a new trial. *Cleveland*, etc., R. Co. v. *Schneider*, 45 Ohio St. 678.

4. **Instructions Not to Read Parts Not in Evidence.** — *Jackson v. State*, 76 Ga. 551; *Com. v. Wingate*, 6 Gray (Mass.) 485; *Com. v. Dow*, 11 Gray (Mass.) 316; *Boyer v. Shenandoah*, 16 Pa. Co. Ct. 75.

5. *Bates v. Preble*, 151 U. S. 149; *Atkins v. State*, 16 Ark. 568; *Rawson v. Curtiss*, 19 Ill. 456; *Dunn v. People*, 172 Ill. 582; *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327.

6. **Notes by Jurors.** — *Cheek v. State*, 35 Ind. 492. For other decisions to the effect that the taking of notes is improper, see *Batterson v. State*, 63 Ind. 531; *Long v. State*, 95 Ind. 481.

7. *Tift v. Towns*, 63 Ga. 237; *Lilly v. Griffin*, 71 Ga. 535; *Thomas v. State*, 90 Ga. 437; *Indianapolis*, etc., R. Co. v. *Miller*, 71 Ill. 463; *Cowles v. Hayes*, 71 N. Car. 230. See also *Omaha F. Ins. Co. v. Crighton*, 50 Neb. 314.

8. **Request of Counsel.** — *Indianapolis*, etc., R. Co. v. *Miller*, 71 Ill. 463; *Ettelsohn v. Kirkwood*, 33 Ill. App. 103.

9. **Time of Objection.** — *Cluck v. State*, 40 Ind. 263; *Long v. State*, 95 Ind. 481; *State v. Robinson*, 117 Mo. 649; *Watson v. Roode*, 43 Neb. 348.

10. **Use of Notes.** — *State v. Joseph*, 45 La. Ann. 903.

11. **Judge's Minutes.** — *Neil v. Abel*, 24 Wend. (N. Y.) 185; *Mitchell v. Carter*, 14 Hun (N. Y.) 448.

12. *Graves v. Gans*, 25 Wis. 41; *Chapman v. Chicago*, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81. And see *Ball v. Carley*, 3 Ind. 577 (minutes of counsel).

13. **Pleadings in Jury Room.** — *Good v. Martin*, 1 Colo. 166, 91 Am. Dec. 706; *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258.

**A Statute** authorizing the jury to take all papers received as evidence in the cause does not authorize the taking of pleadings. *Spaulding v. Satiel*, 18 Colo. 86; *McClintock v. Crick*, 4 Iowa 453; *Harding v. Norwich Union F. Ins. Soc.*, 10 S. Dak. 64; *Mt. Terry Min.*



so is not ground for a new trial, in the absence of a showing of prejudice,<sup>1</sup> and in some cases it is regarded as a matter within the discretion of the trial court.<sup>2</sup> The more general rule, however, is that the jurors may take the pleadings to their room.<sup>3</sup>

An Account or Statement Annexed to the petition or declaration may go as a part of the pleading,<sup>4</sup> as may papers attached to the indictment.<sup>5</sup>

(5) *Written Instructions.*—In the absence of any controlling statute or absolute rule of practice, it is usually regarded as a matter of discretion with the judge whether the jury shall take the written instructions on retirement.<sup>6</sup> The general practice is to allow the jury to have the instructions;<sup>7</sup> and even when this practice is disapproved, it appears to be regarded merely as an irregularity not vitiating the verdict.<sup>8</sup> It is stated that instructions which are refused should not go to the jury.<sup>9</sup>

A Statutory Requirement that the jury shall be allowed to take the instructions is found in some states.<sup>10</sup>

(6) *Records and Papers in Previous Proceedings.*—A new trial has been granted because the jurors were allowed to take out the original complaint and warrant for arrest and evidence given at the preliminary examination,<sup>11</sup> and likewise because they took out the evidence on the coroner's inquest.<sup>12</sup> It has been held, however, that a party is entitled as of right to a new trial because the jury obtained possession of a copy of the record of the lower court<sup>13</sup> or of a writ in an action in the lower court, with an indorsement thereon of the amount of the judgment.<sup>14</sup> But a new trial was granted when a bill of exceptions allowed on a previous trial was before the jurors during

Co. v. White, 10 S. Dak. 620. But see McLean v. Crow, 88 Cal. 644.

1. *Necessity of Prejudice.*—Bluedorn v. Missouri Pac. R. Co., 121 Mo. 258; Hall v. Rupley, 10 Pa. St. 231. And see Carroll v. Sweet, 57 N. Y. Super. Ct. 100.

2. *Discretion of Court.*—Hitchins v. Frostburg, 68 Md. 100, 6 Am. St. Rep. 422; Bluedorn v. Missouri Pac. R. Co., 121 Mo. 258. And see McLean v. Crow, 88 Cal. 644.

3. *Pleadings May Go to Jury Room—Illinois.*—East Dubuque v. Burhyte, 173 Ill. 553, affirming 74 Ill. App. 99.

Indiana.—Stout v. State, 90 Ind. 1; Shulse v. McWilliams, 104 Ind. 512; Masterson v. State, 144 Ind. 240.

Iowa.—McGinty v. Keokuk, 66 Iowa 725; Dorr v. Simerson, 73 Iowa 89; State Bank v. Brewer, 100 Iowa 576.

Kentucky.—Cargill v. Com., 93 Ky. 578.

Maryland.—Ingalls v. Crouch, 35 Md. 296.

Massachusetts.—Smith v. Holcomb, 99 Mass. 552; Com. v. Keenan, 140 Mass. 481.

Texas.—International, etc., R. Co. v. Leak, 64 Tex. 654.

Attested Copy of Complaint.—See Com. v. Crawford, 111 Mass. 422.

4. *Papers Annexed.*—McLean v. Crow, 88 Cal. 644; Wakeman v. Marquand, 5 Mart. N. S. (La.) 265. But see Ingalls v. Crouch, 35 Md. 296.

5. Stout v. State, 90 Ind. 1; State v. DeLong, 12 Iowa 453.

6. *Written Instructions—Discretion of Court.*—Hurley v. State, 29 Ark. 17; Benton v. State, 30 Ark. 328; State v. Tompkins, 71 Mo. 613; Scoville v. Salt Lake City, 11 Utah 60.

7. *Usually Allowed to Go Out.*—Dixon v. State, 13 Fla. 636; Coleman v. State, 17 Fla. 206; State

v. Tompkins, 71 Mo. 613; Foy v. Toledo Consol. St. R. Co., 3 Ohio Dec. 22; Mitchell v. Com., 89 Va. 826; Edwards v. Territory, 1 Wash. Ter. 195; Wood v. Aldrich, 25 Wis. 695. *Contra*, Hewitt v. Flint, etc., R. Co., 67 Mich. 61.

8. *Verdict Not Disturbed.*—Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50; Smith v. Lownsdale, 6 Oregon 79.

9. *Instructions Refused.*—People v. Cummings, 57 Cal. 88; State v. Kimball, 50 Me. 409; Goode v. Linecum, 1 How. (Miss.) 281; Irvine v. State, 18 Tex. App. 51. And see Collins v. State, 13 Fla. 651. But compare Langworthy v. Connelly, 14 Neb. 340, 45 Am. Rep. 117.

10. *Statutory Requirement.*—Miller v. Hampton, 37 Ala. 342; Duncan v. State, 7 Bayt. (Tenn.) 387; State v. Thompson, 83 Mo. 257, *overruling* State v. Phelps, 74 Mo. 128, and State v. Butterfield, 75 Mo. 297.

Charges Refused are within the Alabama statute. Beard v. Ryan, 78 Ala. 37.

In Ohio, since a request that the general charge be put in writing must be made before argument, special instructions given to the jury in writing after argument may be withheld from the jurors in their room if the principal charge was oral and there was no request that it be in writing. Griffin v. State, 34 Ohio St. 299.

11. *Preliminary Proceedings.*—People v. Dowdigan, 67 Mich. 92.

12. *Proceedings Before Coroner.*—U. S. v. Clarke, 2 Cranch (C. C.) 152; McLeod v. Humeston, etc., R. Co., 71 Iowa 138. *Compare* State v. Taylor, 36 Kan. 329; State v. Hartis, 34 La. Ann. 118.

13. *Proceedings in Lower Court.*—Com. v. Nash, 135 Mass. 11.

14. Clapp v. Clapp, 137 Mass. 183.



their deliberations,<sup>1</sup> and also when a copy of the evidence on a previous trial was read and considered by a juror.<sup>2</sup>

**A Former Verdict** in the same case should not be allowed to go to the jury;<sup>3</sup> but an objection in this regard must be promptly made.<sup>4</sup>

**The Record of a Previous Action** between the same parties should not, it has been held, be allowed to go to the jury, though it was admitted in evidence.<sup>5</sup>

(7) *Effect of Papers Improperly in Jury Room.* — Where a paper capable of influencing the jury in favor of the prevailing party has improperly passed into the possession of the jury on its retirement and has been read by the jurors, the verdict will be set aside.<sup>6</sup>

**Absence of Prejudice.** — The verdict will not generally be set aside if it does not appear that the paper was of a character to prejudice the unsuccessful party or if other circumstances rendered the reading of it harmless.<sup>7</sup> It has

**1. Bill of Exceptions on Previous Trial.** — *Munde v. Lambie*, 125 Mass. 367.

**2. Evidence on Previous Trial.** — *Heffron v. Gallupe*, 55 Mo. 593.

**The Opinion of the Appellate Court** is the law of the case, and the jurors, on a second trial, when they retire may take it with them, and refer to it as the law by which their verdict is to be found. *State v. Anderson*, 1 Hill L. (S. Car.) 327.

**3. Former Verdict in Same Case.** — *Green v. State*, 38 Ark. 304. But see *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550; *Fulton County v. Phillips*, 91 Ga. 65.

**Illegible Verdict.** — It is not ground for reversal that the jury obtained possession of an indictment on which a previous verdict was indorsed, if this indictment had been canceled and rendered illegible. *Harvey v. State*, 35 Tex. Crim. 545; *Lancaster v. State*, 36 Tex. Crim. 16.

**Verdict on Trial of Codefendant.** — It was held to be proper to refuse a motion to take out of the possession of the jury the indictment, on which was indorsed a verdict of guilty against a codefendant. *State v. Shores*, 31 W. Va. 491, 13 Am. St. Rep. 875.

**4. Objection to Be Promptly Made.** — *St. Louis, etc., R. Co. v. Higgins*, 53 Ark. 458; *Cargill v. Com.*, 93 Ky. 578; *Forbes v. Com.*, 90 Va. 550.

**5. Previous Action Between Same Parties.** — *Lotz v. Briggs*, 50 Ind. 346.

**6. Papers Improperly in Jury Room.** — *Connecticut.* — *Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337.

*Georgia.* — *Ruckersville Bank v. Hemphill*, 7 Ga. 397; *Killen v. Sistrunk*, 7 Ga. 294; *Walker v. Hunter*, 17 Ga. 364; *Steadwell v. Morris*, 61 Ga. 97. See also *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294.

*Illinois.* — *Nolan v. Vosburg*, 3 Ill. App. 596.

*Indiana.* — *Toohy v. Sarvis*, 78 Ind. 474; *Jones v. State*, 89 Ind. 82.

*Iowa.* — *McLeod v. Humeston, etc., R. Co.*, 71 Iowa 138.

*Kansas.* — *State v. Clark*, 34 Kan. 289.

*Massachusetts.* — *Alger v. Thompson*, 1 Allen (Mass.) 453; *Com. v. Edgerly*, 10 Allen (Mass.) 184; *Hix v. Drury*, 5 Pick. (Mass.) 296; *Whitney v. Whitman*, 5 Mass. 405; *Munde v. Lambie*, 125 Mass. 367.

*Montana.* — *Sweeney v. Darcy*, 21 Mont. 188.

*Nebraska.* — *La Bonté v. Lundgren*, 41 Neb. 312.

*New York.* — *Farmers', etc., Bank v. Whinfield*, 24 Wend. (N. Y.) 419; *Elliott v. Luengene*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 78; *Durfee v. Eveland*, 8 Barb. (N. Y.) 46; *Neil v. Abel*, 24 Wend. (N. Y.) 185; *Mitchell v. Carter*, 14 Hun (N. Y.) 448.

*Tennessee.* — *East Tennessee, etc., R. Co. v. Lee*, 95 Tenn. 388.

*Texas.* — *Faver v. Bowers*, (Tex. Civ. App. 1895) 33 S. W. Rep. 131; *Goar v. Thompson*, 19 Tex. Civ. App. 330.

*Vermont.* — *Re Barney*, 71 Vt. 217.

**In New Hampshire** the verdict will not be set aside merely because papers are taken to the jury room through accident or inadvertence. *Glidden v. Towle*, 31 N. H. 147; *Gardner v. Kimball*, 58 N. H. 202. Nor, it appears, even when they are wrongfully sent to the jury. *Maynard v. Fellows*, 43 N. H. 255. But see *Page v. Wheeler*, 5 N. H. 91.

**7. Necessity of Prejudice.** — *United States.* — *Simms v. Templeman*, 5 Cranch (C. C.) 163; *Fuller v. Fletcher*, 44 Fed. Rep. 34; *U. S. v. Wilson*, 69 Fed. Rep. 584; *Lonsdale v. Brown*, 4 Wash. (U. S.) 148.

*Arkansas.* — *Palmore v. State*, 29 Ark. 249.

*Illinois.* — *Avery v. Moore*, 133 Ill. 74.

*Indiana.* — *Ball v. Carley*, 3 Ind. 577; *Alexander v. Dunn*, 5 Ind. 122; *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263.

*Iowa.* — *Turner v. Kelley*, 10 Iowa 573; *State v. Accola*, 11 Iowa 246; *Greff v. Blake*, 16 Iowa 222.

*Kansas.* — *State v. Taylor*, 20 Kan. 643.

*Louisiana.* — *State v. Bradley*, 6 La. Ann. 556; *Flower v. Jones*, 7 Mart. N. S. (La.) 148.

*Michigan.* — *Bulen v. Granger*, 63 Mich. 311.

*Minnesota.* — *Denny v. Marrett*, 29 Minn. 361. And see *State v. Nichols*, 29 Minn. 357.

*Missouri.* — *Foster v. McO'Brien*, 18 Mo. 88.

*Nebraska.* — *Langworthy v. Connelly*, 14 Neb. 340, 45 Am. Rep. 117.

*New Hampshire.* — *Page v. Wheeler*, 5 N. H. 91.

*New York.* — *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497; *Dolan v. Etna Ins. Co.*, 22 Hun (N. Y.) 396; *People v. Wilson*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 137; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 323, 8 Am. Dec. 404. And see *Durfee v. Eveland*, 8 Barb. (N. Y.) 46.

*Ohio.* — *Tracy v. Card*, 2 Ohio St. 431; *Cleveland, etc., R. Co. v. Schneider*, 45 Ohio St. 678; *Jaspers v. Mallon*, 11 Cinc. L. Bul. 166, 9 Ohio Dec. (Reprint) 184; *Thompson v. C.*,



been held that if the paper is not read until after the jury has decided on a verdict, the reading will not vitiate the verdict;<sup>1</sup> and such reading has been considered harmless when the facts stated in the paper were proven by other evidence.<sup>2</sup> So the action of the jury may be rendered harmless by the giving of particular instructions,<sup>3</sup> and the withdrawal of the paper from the jury room before it is read by the jury will prevent any prejudice from its presence.<sup>4</sup>

**Papers Not Read.** — The verdict will not be set aside if it appears that the paper was not read or considered by the jury,<sup>5</sup> but it will be presumed, it appears, that a paper improperly in the jury room was read by the jurors.<sup>6</sup>

**Papers Furnished by Prevailing Party.** — If, however, the paper was improperly handed to the jury by the prevailing party or his counsel, without the authority of the court, the verdict will be set aside though the paper was immaterial and was not read by the jury.<sup>7</sup>

etc., R. Co., 11 Cinc. L. Bul. 211, 9 Ohio Dec. (Reprint) 209.

*Pennsylvania.* — *Alexander v. Jameson*, 5 Binn. (Pa.) 238; *Sholly v. Diller*, 2 Rawle (Pa.) 177; *McCully v. Barr*, 17 S. & R. (Pa.) 445.

*South Carolina.* — *State v. Tindall*, 10 Rich. L. (S. Car.) 212; *Lott v. Macon*, 2 Strobb. L. (S. Car.) 178.

*Texas.* — *Beeks v. Odom*, 70 Tex. 183; *Fields v. Haley*, (Tex. Civ. App. 1899) 52 S. W. Rep. 115.

*Vermont.* — *Peacham v. Carter*, 21 Vt. 515; *Winslow v. Campbell*, 46 Vt. 746.

*Wisconsin.* — *Graves v. Gans*, 25 Wis. 41; *Chapman v. Chicago*, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81.

**Presumption of Prejudice.** — It appears that if the paper is of a character calculated to prejudice the party if read by the jury, such prejudice will be presumed. *Pound v. State*, 43 Ga. 88; *Madden v. State*, 1 Kan. 341; *State v. Hartmann*, 46 Wis. 248. *Compare State v. Harris*, 34 La. Ann. 119; *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717.

**1. Reading After Agreement.** — *Graves v. State*, 63 Ga. 740; *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294; *State v. Wilson*, 40 La. Ann. 751. But see *Cooper v. State*, 103 Ga. 63.

That the particular juror who read the paper had previously made up his mind as to the verdict, was held to render the reading harmless. *Abel v. Kennedy*, 3 Greene (Iowa) 47; *Morris v. Howe*, 36 Iowa 490.

**2. Facts Otherwise Proven.** — *Steinheimer v. Coleman*, 39 Ga. 119; *Bryant v. Booze*, 55 Ga. 438; *Texas*, etc., R. Co. v. *Robertson*, (Tex. Civ. App. 1896) 35 S. W. Rep. 505.

The fact that the jury takes a paper not in evidence is harmless, if a copy thereof is set out in the pleadings, which the jury may properly take. *State Bank v. Brewer*, 100 Iowa 576.

**3. Error Cured by Instructions.** — *U. S. v. Wilson*, 69 Fed. Rep. 584; *People v. Wilson*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 137. See also *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497. But see *Atkins v. State*, 16 Ark. 568.

**4. Withdrawal of Paper.** — *Simms v. Templeman*, 5 Cranch (C. C.) 163; *Phillips v. State*, 62 Ark. 119; *U. S. v. Wilson*, 69 Fed. Rep. 584. See also *State v. Bradley*, 6 La. Ann. 556.

One cannot, after consenting to certain papers going in with the jury, ask for their withdrawal. *National Bank v. Ragland*, (Tex. Civ. App. 1899) 51 S. W. Rep. 661.

**5. Papers Not Read or Considered** — *United States*. — *U. S. v. Wilson*, 69 Fed. Rep. 584.

*Georgia.* — *Killen v. Sistrunk*, 7 Ga. 294; *Riggins v. Brown*, 12 Ga. 271; *Wilkins v. Mad-drey*, 67 Ga. 766; *Schmertz v. Johnson*, 72 Ga. 472; *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294; *Falvey v. Richmond*, 87 Ga. 99; *Kaplan v. Glover*, 108 Ga. 301.

*Indiana.* — *Ohio*, etc., R. Co. v. *Hill*, 7 Ind. App. 255; *Wilds v. Bogan*, 57 Ind. 453.

*Iowa.* — *Morris v. Howe*, 36 Iowa 493.

*Kansas.* — *State v. Miller*, 35 Kan. 328.

*Louisiana.* — *State v. Harris*, 34 La. Ann. 119.

*Massachusetts.* — *Hix v. Drury*, 5 Pick. (Mass.) 296.

*Mississippi.* — *Goode v. Linecum*, 1 How. (Miss.) 281.

*Nebraska.* — *Langworthy v. Connelly*, 14 Neb. 340, 45 Am. Rep. 117.

*New Hampshire.* — *Page v. Wheeler*, 5 N. H. 91.

*New York.* — *New York*, etc., *Ice Lines v. Howell*, 19 N. Y. App. Div. 341; *Schappner v. Second Ave. R. Co.*, 55 Barb. (N. Y.) 497; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482; *Hackley v. Hastie*, 3 Johns. (N. Y.) 252; *Elliott v. Luengene*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 78.

*North Carolina.* — *State v. Bailey*, 100 N. Car. 528; *Posey v. Patton*, 109 N. Car. 455.

*South Carolina.* — *State v. Tindall*, 10 Rich. L. (S. Car.) 212.

*Texas.* — *Harvey v. State*, 35 Tex. Crim. 545; *Lancaster v. State*, 36 Tex. Crim. 16.

**6. Presumption of Reading.** — *Jones v. State*, 89 Ind. 82; *La Bonty v. Lundgren*, 41 Neb. 312; *Durfee v. Eveland*, 8 Barb. (N. Y.) 46. But see *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263; *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424.

**7. Papers Given by Prevailing Party** — *England.* — *Co. Litt.* 227*b*; *Heylor v. Hall*, *Palmer* 325; *Webb v. Taylor*, 2 Roll. Abr. 714, *Style* 383; *Richmond v. Wise*, 1 Vent. 125; *Pratt's Case*, cited in *Vin. Abr.*, tit. *Trial*, G. g. 19. And see 2 *Hale P. C.* 308.

*United States.* — *Lonsdale v. Brown*, 4 Wash. (U. S.) 148.

*Connecticut.* — *Hamilton v. Pease*, 38 Conn. 115.

*Georgia.* — *Killen v. Sistrunk*, 7 Ga. 283.

*Indiana.* — *Ball v. Carley*, 3 Ind. 577.

*Massachusetts.* — *Alger v. Thompson*, 1 Allen (Mass.) 453; *Hix v. Drury*, 5 Pick. (Mass.) 296.



**Papers Introduced by Complaining Party.** — One cannot complain because the jury had with it evidence or instructions which he himself offered.<sup>1</sup>

*j. BOOKS IN JURY ROOM* — (1) *Legal Works.* — Information to the jurors in regard to the law of a case should be furnished in open court, and it is generally improper to allow them to have law books for the purpose of independent research.<sup>2</sup> In some cases, however, it is regarded as proper to allow the jury to examine statutes in regard to the crime involved,<sup>3</sup> though in other cases it is held that the jury should not be allowed to have a copy of the statutes.<sup>4</sup> But the fact that law books were in the room in which the jury deliberated will not warrant a new trial if it does not appear that the jurors consulted such books;<sup>5</sup> and even if the jury actually consulted law books, a new trial will not be granted if it does not appear that any prejudice resulted therefrom.<sup>6</sup>

(2) *Other Books.* — It is generally improper for the jury to examine books of a non-legal character in order to obtain information bearing on the case, and it has accordingly been held ground for a new trial that the jurors, after retiring, obtained possession of an atlas<sup>7</sup> or a county map.<sup>8</sup> And the same rule applies to scientific books.<sup>9</sup> But a new trial will not be granted if no prejudice appears to have resulted.<sup>10</sup>

*k. OBJECTS AND ARTICLES IN JURY ROOM.* — It is generally regarded as proper to allow the jurors to take with them to the jury room articles which were introduced in evidence,<sup>11</sup> and likewise models used on the trial by wit-

*Mississippi.* — *Offit v. Vick*, Walk. (Miss.) 99.  
*New Hampshire.* — *Page v. Wheeler*, 5 N. H. 91; *Flanders v. Davis*, 19 N. H. 139.

*New York.* — *Sanderson v. Bowen*, 2 Hun (N. Y.) 153; *O'Brien v. Merchants' F. Ins. Co.*, 38 N. Y. Super. Ct. 482.

1. **Papers Introduced by Complaining Party.** — *People v. Cummings*, 57 Cal. 88; *Hickman v. Layne*, 47 Neb. 177; *Shomo v. Zeigler*, 10 Phila. (Pa.) 611, 31 Leg. Int. (Pa.) 205.

2. **Legal Works.** — *Johnson v. State*, 27 Fla. 245; *Heard v. Sill*, 26 Ga. 302; *Jones v. State*, 89 Ind. 82; *Newkirk v. State*, 27 Ind. 1; *State v. Nelson*, 32 La. Ann. 842; *Merrill v. Nary*, 10 Allen (Mass.) 416; *Barker v. Pool*, 6 Mo. 260; *Hardy v. State*, 7 Mo. 607; *Harrison v. Hance*, 37 Mo. 185. See also *Burrows v. Unwin*, 3 C. & P. 310, 14 E. C. L. 322. But see *U. S. v. Vigol*, 2 Dall. (U. S.) 347; *Fuller v. Fletcher*, 44 Fed. Rep. 34.

3. **Copies of Statute Involved in Case** — *May Go to Jury.* — *Mulreed v. State*, 107 Ind. 62; *Com. v. Jenkins*, Thach. Crim. Cas. (Mass.) 118; *Findley v. People*, 1 Mich. 234; *Gardolfo v. State*, 11 Ohio St. 114; *Edwards v. Territory*, 1 Wash. Ter. 195; *Loew v. State*, 60 Wis. 559. See also *Fisher v. State*, 73 Ga. 595; *People v. Gaffney*, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 36.

4. **May Not Go to Jury.** — *Cooper v. State*, 103 Ga. 63; *State v. Kimball*, 50 Me. 409; *Merrill v. Nary*, 10 Allen (Mass.) 416; *Harris v. State*, 24 Neb. 803; *Wilson v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 619; *People v. Hartung*, (Oyer & T. Ct.) 17 How. Pr. (N. Y.) 85, 4 Park. Crim. (N. Y.) 256; *State v. Smith*, 6 R. I. 33.

**Waiver of Objection.** — Counsel cannot object that a juror had read the code where such counsel, knowing that the book was in the room where the jury were to be confined, had stated that he did not care if the jury did have access to it. *Durham v. State*, 70 Ga. 264.

5. **Books in Jury Room Not Consulted.** — *Love*

*ett v. State*, 60 Ga. 257; *Allen v. State*, 61 Ga. 166; *State v. Harris*, 34 La. Ann. 118; *State v. Tanner*, 38 La. Ann. 307; *State v. Hopper*, 71 Mo. 425. But see *Jones v. State*, 89 Ind. 82.

6. **Absence of Prejudice.** — *People v. Gaffney*, Sheld. (N. Y.) 304, 14 Abb. Pr. N. S. (N. Y.) 36; *People v. Draper*, 28 Hun (N. Y.) 1; *People v. Hartung*, (Oyer & T. Ct.) 17 How. Pr. (N. Y.) 85, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 319; *Munos v. State*, 34 Tex. Crim. (N. Y.) 472.

**After Agreeing on Verdict.** — It is not a ground for reversal that after agreeing upon their verdict the jurors procured a copy of the code, for the purpose of enabling them properly to formulate their verdict. *Graves v. State*, 63 Ga. 740. See also *State v. Wilson*, 40 La. Ann. 751. But see to the contrary *Cooper v. State*, 103 Ga. 63.

7. **Atlas.** — *State v. Lantz*, 23 Kan. 728, 33 Am. Rep. 215.

8. **County Map.** — *State v. Hartmann*, 46 Wis. 248, in which case the question was whether a public highway existed in a certain place.

As to a map of the United States, see *De Wulf v. Dix*, (Iowa 1900) 81 N. W. Rep. 779.

9. **Scientific Books.** — *State v. Gillick*, 10 Iowa 98, in which case it was held that it was proper to refuse to allow the jurors to take with them scientific works from which passages were read as evidence, but which were not marked. See also *Force v. Scholl*, 22 Pa. Co. Ct. 107.

10. **Absence of Prejudice.** — *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496, in which case the jurors consulted a dictionary and obtained therefrom the word "wanton," which they used in writing their special verdict; *U. S. v. Horn*, 5 Blatchf. (U. S.) 102, wherein it was held that the verdict would not be set aside because the jurors obtained possession of several city directories, they being instructed to disregard any information obtained therefrom.

11. **Articles Introduced in Evidence.** — *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State*



nesses to explain their testimony;<sup>1</sup> and a statute authorizing the jury to take papers received in evidence has been held to include articles introduced in evidence.<sup>2</sup> Even when it is improper to take such articles, a new trial will not be granted in the absence of prejudice.<sup>3</sup>

**4. READING OF NEWSPAPERS.** — A new trial will not be granted because the jurors during the trial read newspapers which contained no reference to the particular case.<sup>4</sup> And even if a newspaper so read contained accounts of or comments upon the case a new trial will not be granted if these were not calculated to mislead the jurors or to prejudice their verdict.<sup>5</sup> But if the jurors read newspaper statements bearing on the case which were calculated to affect them in arriving at a verdict, a new trial will be granted.<sup>6</sup> It has even been held that the verdict should be set aside where the jury, without the knowledge of the court or the defendant, obtained a newspaper report of the court's oral charge, even though the report was correct.<sup>7</sup> The mere publication or introduction into the jury room of a newspaper containing comments on the trial is generally not regarded as prejudicial if such comments were not read by any of the jurors,<sup>8</sup> and occasionally it has been held that the reading of improper comments was cured by explicit instructions to disregard them.<sup>9</sup> An objection to the actions of jurors in this regard should be made promptly.<sup>10</sup>

**Statement as to Former Verdict.** — It is no ground for discharging the jury or for

*v. McCafferty*, 63 Me. 223; *Powell v. State*, 61 Miss. 319; *Gresser v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 595. But see *Forehand v. State*, 51 Ark. 553; *McCoy v. State*, 78 Ga. 490.

Clothing introduced in evidence may accordingly be taken by the jury. *Adams v. State*, 93 Ga. 166; *Hendricks v. State*, 28 Tex. App. 416; *Spehcer v. State*, 34 Tex. Crim. 238; *Bell v. State*, 32 Tex. Crim. 436. And see *People v. Mahoney*, 77 Cal. 529.

**1. Models Used by Witnesses.** — *Louisville, etc., R. Co. v. Berry*, 96 Ky. 604; *Illinois Silver Min., etc., Co. v. Raff*, 7 N. Mex. 336; *Blazinski v. Perkins*, 77 Wis. 9.

**2. Effect of Statute.** — *Jack v. Territory*, 2 Wash. Ter. 101; *State v. Webster*, 21 Wash. 63. But see *Hansing v. Territory*, 4 Okla. 443.

**Magnifying Glass.** — It has been held that a magnifying glass may be taken by the jury in order to examine particular papers. *Barker v. Perry*, 67 Iowa 146; *Hatch v. State*, 6 Tex. App. 384.

In a **Liquor Proceeding**, it was held proper to allow the jury to take with it to its room a bottle containing a liquid which, though not part of the liquor seized, was manufactured and sold by the same person, under the same name, the jurors being instructed not to consider the qualities of such liquid unless they were satisfied from the evidence that it was the same as the liquor seized. *State v. McCafferty*, 63 Me. 223.

**3. Absence of Prejudice.** — *People v. Page*, 1 Idaho 102; *Titus v. State*, 49 N. J. L. 36; *People v. Wilson*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 137; *Bell v. State*, 32 Tex. Crim. 436; *Spencer v. State*, 34 Tex. Crim. 238.

**4. Reading of Newspapers.** — *U. S. v. Gibert*, 2 Sumn. (U. S.) 19; *Flanagan v. State*, 64 Ga. 53; *Fogarty v. State*, 80 Ga. 450; *State v. Wilson*, 121 Mo. 434; *State v. Brown*, 7 Oregon 200; *Scott v. State*, 7 Lea (Tenn.) 232.

**5. References to Case** — *United States*. — *U. S. v. Reid*, 12 How. (U. S.) 361.

*California*. — *People v. Leary*, 105 Cal. 486.

*Georgia*. — *Fogarty v. State*, 80 Ga. 450.

*Montana*. — *State v. Jackson*, 9 Mont. 508.

*New Jersey*. — *State v. Cutuel*, 31 N. J. L. 249.

*New York*. — *People v. Gaffney*, Sheld. (N. Y.) 304, 14 Abb. Pr. N. S. (N. Y.) 36.

*Oregon*. — *State v. Brown*, 7 Oregon 186.

*Texas*. — *Williams v. State*, 33 Tex. Crim. 128, 47 Am. St. Rep. 21; *Moore v. State*, 36 Tex. Crim. 88.

*West Virginia*. — *State v. Robinson*, 20 W. Va. 716, 43 Am. Rep. 799.

**6. Statements Calculated to Influence Verdict.** — *Mattox v. U. S.*, 146 U. S. 140; *Meyer v. Cadwalader*, 49 Fed. Rep. 32; *People v. Stokes*, 103 Cal. 193, 42 Am. St. Rep. 102; *State v. Walton*, 92 Iowa 455; *Cartwright v. State*, 71 Miss. 82; *Com. v. Landis*, 12 Phila. (Pa.) 576, 34 Leg. Int. (Pa.) 204; *Com. v. Johnson*, 5 Pa. Co. Ct. 236; *Carter v. State*, 9 Lea (Tenn.) 440; *Walker v. State*, 37 Tex. 366. See also *People v. McCoy*, 71 Cal. 397. *Compare Com. v. Chauncey*, 2 Ashm. (Pa.) 90.

**7. Report of Charge.** — *Farrer v. State*, 2 Ohio St. 54. But see *Com. v. Haines*, 15 Phila. (Pa.) 363, 38 Leg. Int. (Pa.) 94.

**8. Comments Must Have Been Read.** — *Chicago v. Dermody*, 61 Ill. 431; *State v. Jackson*, 9 Mont. 508; *Brown v. State*, 85 Tenn. 439.

**Presumption of Reading.** — In *Meyer v. Cadwalader*, 49 Fed. Rep. 32, however, it was held that it must be presumed that the jurors, who were allowed to separate each evening of the trial, read newspaper statements bearing on that particular trial which were published in the leading newspapers of the city. But see *Illinois Cent. R. Co. v. Souders*, 178 Ill. 585.

**9. Instructions to Disregard Comments.** — *Thrall v. Simley*, 9 Cal. 529; *State v. Jackson*, 9 Mont. 508.

**No Presumption Against Violation of Instructions.** — See *U. S. v. McKee*, 3 Cent. L. J. 258, 26 Fed. Cas. No. 15,683.

**10. Objection to Be Made Promptly.** — *Hunter v. State*, 43 Ga. 483; *Bulliner v. People*, 95 Ill. 394.



a new trial that the jurors read newspaper statements of the amount of the verdict on a former trial.<sup>1</sup>

**Accounts of Other Case.** — It has been held that while the reading by jurors on a murder trial, of a newspaper account of another trial for murder, was not ground for setting aside the verdict, a new trial should be granted where the offense was insanity produced by the use of liquors, and the jurors read newspaper accounts of another trial then in progress, reciting expert testimony to the effect that no such thing as "moral insanity" exists and that dipsomania is mere drunkenness.<sup>2</sup>

**Effect of Statute.** — A statute forbidding the jurors to take with them to the jury room notes of testimony taken by a person other than themselves was held to prohibit them from taking newspapers purporting to state the evidence;<sup>3</sup> but a statute providing for a new trial if the jury "receive any evidence, papers, or documents not authorized by the court," was held not to refer to newspapers.<sup>4</sup>

**m. SLEEPING DURING TRIAL.** — The fact that a juror falls asleep during the trial is not ground for disturbing the verdict if it does not appear that his sleep was for such a length of time or at such a stage in the trial as to affect his ability fairly to consider the case;<sup>5</sup> nor is the mere appearance of being asleep sufficient for this purpose.<sup>6</sup> And a motion for a new trial on this account will not be granted if the conduct of the juror was known during the trial and no objection was then made.<sup>7</sup>

**n. EXPRESSION OR INTIMATION OF OPINION.** — The fact that during the trial a juror made remarks indicating his opinion in regard to the merits of the case or his expectations as to the result is not ground for a new trial, if there is reason to suppose that such expressions were founded on the proceedings and evidence in the cause;<sup>8</sup> but statements showing prejudice against either party, not based on the evidence, will generally be ground for a new trial.<sup>9</sup> A statement by a juror during the trial that he has made up his mind, without stating in favor of which party, has been held not to be ground for a new trial;<sup>10</sup> but remarks indicating a careless and indifferent state of mind

1. **Statement as to Previous Verdict.** — *Illinois Cent. R. Co. v. Souders*, 178 Ill. 585; *Sherwood v. Chicago, etc., R. Co.*, 88 Mich. 108. But see *Hasson v. Railroad Co.*, 21 W. N. C. (Pa.) 96.

2. **Accounts of Other Case.** — *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

3. **Effect of Statute.** — *State v. Walton*, 92 Iowa 455.

4. *State v. Jackson*, 9 Mont. 508.

5. **Sleeping During Trial.** — *Dolan v. State*, 40 Ark. 454; *Stroud v. Mulcahy*, 47 Ill. App. 176; *McClary v. State*, 75 Ind. 260; *Com. v. Jongrass*, 181 Pa. St. 172; *Stone v. State*, 4 Humph. (Tenn.) 37.

6. **Appearance of Being Asleep.** — *Pelham v. Page*, 6 Ark. 535; *McClary v. State* 75 Ind. 260.

7. **Waiver of Objection.** — *U. S. v. Boyden*, 1 Lowell (U. S.) 266; *Cogswell v. State*, 49 Ga. 103; *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 881; *Scott v. Waldeck*, 12 Neb. 5; *People v. Morrissey*, Sheld. (N. Y.) 295.

8. **Expressions of Opinion During Trial** — *United States*. — *Berry v. Dewitt*, 27 Fed. Rep. 723, 23 Blatchf. (U. S.) 544; *U. S. v. Swett*, 2 Hask. (U. S.) 310, 28 Fed. Cas. No. 16,427.

*Connecticut*. — *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88.

*Florida*. — *Jordan v. State*, 22 Fla. 528.

*Indiana*. — *Harrison v. Price*, 22 Ind. 165.

*Iowa*. — *State v. Allen*, 89 Iowa 49.

*Kansas*. — *Gleason v. Strauss*, 5 Kan. App. 80.  
*Louisiana*. — *State v. Cook*, 52 La. Ann. 114.  
*Minnesota*. — *Chalmers v. Whittemore*, 22 Minn. 305.

*Pennsylvania*. — *Com. v. Sallager*, 3 Pa. L. J. Rep. 127, 4 Pa. L. J. 511; *Scott v. Reyer*, 5 Leg. Gaz. (Pa.) 73, 1 Leg. Chron. (Pa.) 84.

*Rhode Island*. — *Kaul v. Brown*, 17 R. I. 14.

*Texas*. — *Ray v. State*, 35 Tex. Crim. 354; *Griffin v. State*, (Tex. Crim. 1899) 53 S. W. Rep. 848.

*Wisconsin*. — *Jackson v. Smith*, 21 Wis. 26.  
See also *supra*, this section, *Misconduct of Jury* — *Communications with Outsiders* — *Communications Concerning Case*.

9. **Statements Indicating Prejudice.** — *Allum v. Boulton*, 9 Exch. 738, 2 C. L. R. 1072, 23 L. J. Exch. 208, 18 Jur. 406, 2 W. R. 459; *Jackson v. Jackson*, 40 Ga. 150; *Perry v. Cottingham*, 63 Iowa 41; *State v. Hopkins*, 1 Bay (S. Car.) 372. See also *Ewers v. National Imp. Co.* 63 Fed. Rep. 562; *Blalock v. Phillips*, 38 Ga. 216; *Jewsbury v. Sperry*, 85 Ill. 56; *State v. Cook*, 52 La. Ann. 114; *McIlvaine v. Wilkins*, 12 N. H. 474.

10. **Statement that Juror Has Made Up His Mind.** — *McAllister v. Sibley*, 25 Me. 474; *Marsh v. Clark County*, 27 Cinc. L. Bul. 56, 11 Ohio Dec. (Reprint) 442; *Strauss v. Dashney*, 12 Cinc. L. Bul. 182, 9 Ohio Dec. (Reprint) 329; *Darby v. Calhoun*, 1 Mill (S. Car.) 398.

An Expression of Opinion After Verdict has been



have been held to be sufficient ground.<sup>1</sup>

An Offer to Bet by a juror as to the result of the trial has been held to be ground for a new trial;<sup>2</sup> but, on the other hand, the wager of a cigar by a juror as to the verdict was held not to authorize a new trial when the case was not a close one, and there was no reason to believe that any prejudice resulted.<sup>3</sup>

Remarks Adverse to Counsel. — Remarks adverse to counsel for the losing party have generally not been regarded as ground for a new trial.<sup>4</sup>

Remarks to or in Reference to Witnesses. — A remark that some of the witnesses had poor memories is not misconduct authorizing a new trial;<sup>5</sup> but a different view was taken as to a statement to a witness that he had knowingly testified to an untruth.<sup>6</sup> It has been held that a juror may properly question witnesses during the trial in order to understand the facts;<sup>7</sup> and the fact that he cross-examines witnesses of a party does not necessarily show prejudice against that party authorizing a new trial.<sup>8</sup>

*o. MISCELLANEOUS QUESTIONS AS TO MISCONDUCT.* — It has been held that no ground for a new trial was constituted by the following facts: That the jurors were inattentive to the instructions or misapprehended them;<sup>9</sup> that they questioned the correctness of instructions after retirement;<sup>10</sup> that they called for additional evidence;<sup>11</sup> that they played cards before the cause was delivered to them for determination;<sup>12</sup> that a juror in good faith made a false answer on his *voir dire*;<sup>13</sup> that there was great noise and confusion in the jury room;<sup>14</sup> that a juror reported evidence for a newspaper;<sup>15</sup> or that the foreman concealed from the other jurors the fact that the court had given permission to them to separate.<sup>16</sup> Nor is conversation between jurors in the jury box of itself ground for a new trial.<sup>17</sup> It has been held, on the other hand, that a

held to constitute no ground for a new trial. *State v. Anderson*, 14 Mont. 541; *Lee v. McLeod*, 15 Nev. 158; *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 998.

1. Indifferent State of Mind. — *State v. White*, 48 La. Ann. 1444, where a juror, just before retiring, said to a bystander that he would "wind it up" in a short time, and that either way would suit him. But see *Taylor v. California Stage Co.*, 6 Cal. 228.

2. Betting by Juror. — *Smith v. Suydam*, 16 N. J. L. 171.

3. Butts v. Union R. Co., (R. I. 1899) 44 Atl. Rep. 993.

As to Disqualification of a Juror by having a bet on the case, see *supra*, this title, *Formation of Trial Jury—Challenges and Exclusion for Cause—Interest and Prejudice as Regards Matters Involved—Direct Pecuniary Interest.*

4. Remarks Adverse to Counsel. — Chicago, etc., R. Co. v. Holland, 122 Ill. 461; *State v. Allen*, 89 Iowa 49; *Truman v. Bishop*, 83 Iowa 697. See also *People v. Cullen*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 886. But see *Perry v. Cottingham*, 63 Iowa 47.

5. Remarks to or in Reference to Witnesses. — *Carthaus v. State*, 78 Wis. 560.

6. *Small v. State*, 102 Ga. 31. Compare *Mayer v. Liebmann*, 16 N. Y. App. Div. 54.

Under a Statute providing that a juror knowing anything in reference to a fact in issue shall disclose it in open court, it was held not to be ground for a new trial that the juror said, upon the plaintiff testifying to certain matters: "Yes, sir, I know all about it. That's so." *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130.

7. Putting Questions to Witnesses. — *Schaefer v. St. Louis, etc., R. Co.*, 128 Mo. 64.

8. Examination of Witnesses. — Chicago, etc., R. Co. v. Krueger, 124 Ill. 459, affirming 23 Ill. App. 639; Chicago, etc., R. Co. v. Harper, 128 Ill. 384.

9. Conduct Without Regard to Instructions. — *State v. Dickson*, 6 Kan. 209.

10. *State v. Peterson*, 38 Kan. 204.

11. Calling for Evidence. — *Nolen v. Heard*, 87 Ga. 293. And see *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712.

12. Playing Cards. — *State v. Taylor*, 134 Mo. 109.

13. False Answers on Voir Dire. — *Fitzpatrick v. People*, 98 Ill. 269.

But it is ground for new trial if the answer is wilfully false. *Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59, 60 Am. Rep. 673; *Johnson v. Tyler*, 1 Ind. App. 387; *McGarry v. Buffalo*, (Supm. Ct. Gen. T.) 24 N. Y. Supp. 16.

Effect of Party's Knowledge of Falsity. — See *Buck v. Hughes*, 127 Ind. 46. And see also *supra*, this title, *Formation of Trial Jury—Waiver of Objection to Juror—Constructive Knowledge—Ignorance Resulting from Negligence.*

14. Noise in Jury Room. — *Oram v. Bishop*, 12 N. J. L. 153.

15. Juror Reporting Evidence. — *State v. Cottrell*, 19 R. I. 724, where it appeared that the report was correct and that the taking of notes was by consent.

16. Action of Foreman. — *Spinney v. Bowman*, (Me. 1887) 10 Atl. Rep. 252.

The foreman has no right to require the jurors, during their deliberations, to rise and address him as chairman. *Hutchins v. State*, 140 Ind. 78.

17. Conversations Between Jurors. — *People v. Kramer*, 117 Cal. 647.



new trial should be granted when some of the jurors broke out of the jury room against the will of the officer,<sup>1</sup> when the jury refused to return a direct answer to a special interrogatory,<sup>2</sup> or when jurors attempted to dissuade a witness from giving evidence.<sup>3</sup>

**3. Illness of Juror.** — While the illness of a juror may be ground for his discharge,<sup>4</sup> if it is of a merely temporary character it is proper to wait a reasonable time for his recovery;<sup>5</sup> and if he recovers so far as to permit the trial to proceed, and he is not mentally incapacitated by his sickness, the verdict will not be disturbed.<sup>6</sup>

**Care and Medical Attendance.** — The court may, in its discretion, allow proper medicine and medical attendance to be furnished to the juror.<sup>7</sup> That the sick juror is separated from the others does not affect the validity of the proceedings if he is not tampered with;<sup>8</sup> and that a physician was with the juror was held to be immaterial where the other jurors were in an adjoining room with the door open.<sup>9</sup> It is proper for the court to put a juror in charge of a sworn officer to enable him to consult a physician;<sup>10</sup> and the court may provide for the comfort of the sick juror by allowing him to lie down during the remainder of the proceedings.<sup>11</sup>

**XI. DISCHARGE OF JURY AND JURORS** — **1. Power to Discharge** — *a.* IN GENERAL. — It was laid down by Lord Coke that a jury once sworn and charged in a case affecting life or member could not be discharged without giving a verdict;<sup>12</sup> and if the jurors could not agree before the judge's departure, they could be carried about to other courts in the circuit.<sup>13</sup> The dictum of Lord Coke was questioned at an early day;<sup>14</sup> and it is now the general rule in both

**1. Breaking Out of Jury Room.** — *Shepherd v. Baylor*, 5 N. J. L. 954; *Morrow v. M'Lennen*, 3 N. J. L. 477.

**2. Refusing to Answer Interrogatory.** — *Chicago, etc., R. Co. v. McGraw*, 22 Colo. 363.

**3. Dissuading Witness.** — *Laughlin v. Harvey*, 24 Ont. App. 438.

**4. Illness of Juror.** — See *infra*, this title, *Discharge of Jury and Jurors* — *Grounds Authorizing Discharge* — *Illness or Death* — *Of Juror*.

**5.** *Nichols v. Nichols*, 136 Mass. 256.

**6. Not Ground for New Trial.** — *People v. Brown*, 76 Cal. 573; *Hughes v. People*, 116 Ill. 330; *People v. Buchanan*, 145 N. Y. 1, *affirming* (N. Y. Gen. Sess.) 25 N. Y. Supp. 481.

**7. Medical Attention.** — *Matter of Newton*, 3 C. & K. 85, 13 Q. B. 716, 66 E. C. L. 716, 13 Jur. 606, 3 Cox. C. C. 489; *O'Shields v. State*, 55 Ga. 696; *Nichols v. Nichols*, 136 Mass. 256; *People v. Buchanan*, 145 N. Y. 1, *affirming* (N. Y. Gen. Sess.) 25 N. Y. Supp. 481; *State v. Town*, *Wright* (Ohio) 75; *Goersen v. Com.*, 106 Pa. St. 477, 51 Am. Rep. 534.

As to the right to administer intoxicating liquors as medicine, see *supra*, this section, *Refreshments for Jury* — *Intoxicating Liquors* — *Use for Medicinal Purposes*.

The attending physician should be cautioned not to speak upon matters not connected with his duties. *Nichols v. Nichols*, 136 Mass. 256.

**Physician Called After Agreement.** — A new trial will not be granted on the ground that a juror was ill when deliberating and was treated by a physician, where it is shown that the physician was not called until after agreement on the verdict, and that he prescribed for the juror by consent of the appellant. *Wesley v. Chicago, etc., R. Co.*, 84 Iowa 441.

**8. Isolation of Sick Juror.** — *Stout v. State*, 76 Md. 317.

**9.** *Goersen v. Com.*, 106 Pa. St. 477, 51 Am. Rep. 534.

**10. Placing Sick Juror in Charge of Officer.** — *People v. Hoch*, 150 N. Y. 291.

**11. Allowing Sick Juror to Lie Down.** — *Surles v. State*, 89 Ga. 167; *Baxter v. People*, 8 Ill. 368.

**12. Early Doctrine.** — *Co. Litt.* 227*b*; 4 Black. Com. 360; 2 Hawk. P. C., c. 47, § 1. And see *Ned v. State*, 7 Port. (Ala.) 187; *Nelson v. State*, 47 Miss. 621; *Monroe v. State*, 5 Ga. 85; *State v. Garrigues*, 1 Hayw. (2 N. Car.) 241; *Stocks v. State*, 91 Ga. 831.

**13.** *Rex v. Ledgingham*, 1 Vent. 97; *Morris v. Davies*, 3 C. & P. 427, 14 E. C. L. 378. And see *Berry v. Wallin*, 1 Overt. (Tenn.) 241.

**14. Lord Coke's Rule Denied.** — The rule laid down by Lord Coke that a jury once sworn and charged cannot be discharged without giving a verdict has been questioned in many cases and its authority has been denied.

*England.* — *Kinloch's Case*, *Foster* 16; *Winsor v. Reg.*, L. R. 1 Q. B. 289, 390, 6 B. & S. 143, 118 E. C. L. 143, 7 B. & S. 490; *Rex v. Stevenson*, 2 Leach C. C. 546; *Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Edwards*, 4 Taunt. 309. And see 2 Hale P. C. 297.

*United States.* — *U. S. v. Perez*, 9 Wheat. (U. S.) 579.

*District of Columbia.* — *U. S. v. Bigelow*, 3 Mackey (D. C.) 393.

*Massachusetts.* — *Com. v. Bowden*, 9 Mass. 494; *Com. v. Sholes*, 13 Allen (Mass.) 554.

*New York.* — *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203.

*Ohio.* — *Hurley v. State*, 6 Ohio 399.

*Pennsylvania.* — *Com. v. Cook*, 6 S. & R. (Pa.) 579, 9 Am. Dec. 465.

*Virginia.* — *Com. v. Fells*, 9 Leigh (Va.) 613. See also *Hawes v. State*, 88 Ala. 37.



*England* and the *United States* that the court may discharge the jury when this is necessary to attain the ends of justice.<sup>1</sup> And the right to discharge the jury exists even in capital cases;<sup>2</sup> though occasionally the power in these cases is subject to greater limitations than in other cases.<sup>3</sup>

**1. Jury May Be Discharged — *England*.** — *Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143, 7 B. & S. 490, L. R. 1 Q. B. 289, 390; *Powell v. Sonnett*, 1 Dowl. N. S. 56, 1 Bligh N. S. 545, 3 Bing. 381, 11 Moo. 330.

***United States*.** — *Simmons v. U. S.*, 142 U. S. 148; *Thompson v. U. S.*, 155 U. S. 271; *U. S. v. Watson*, 3 Ben. (U. S.) 1; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; *U. S. v. Haskell*, 4 Wash. (U. S.) 402; *U. S. v. Morris*, 1 Curt. (U. S.) 23.

***Alabama*.** — *Powell v. State*, 19 Ala. 580; *McCauley v. State*, 26 Ala. 135; *Ned v. State*, 7 Port. (Ala.) 187; *Scott v. State*, 110 Ala. 48.

***Arkansas*.** — *Atkins v. State*, 16 Ark. 579; *Ball v. State*, 48 Ark. 94.

***Connecticut*.** — *State v. Woodruff*, 2 Day (Conn.) 504, 2 Am. Dec. 122.

***District of Columbia*.** — *U. S. v. Bigelow*, 3 Mackey (D. C.) 393.

***Florida*.** — *Tervin v. State*, 37 Fla. 396; *Ellis v. State*, 25 Fla. 702.

***Illinois*.** — *Thomas v. Leonard*, 5 Ill. 556; *Logg v. People*, 8 Ill. App. 99; *Miller v. Metzger*, 16 Ill. 390; *Ochs v. People*, 25 Ill. App. 379.

***Indiana*.** — *Miller v. State*, 8 Ind. 325; *Leas v. Patterson*, 38 Ind. 465; *Welsh v. State*, 126 Ind. 71.

***Iowa*.** — *State v. Pierce*, 77 Iowa 245.

***Kentucky*.** — *Com. v. Olds*, 5 Litt. (Ky.) 137.

***Louisiana*.** — *State v. Costello*, 11 La. Ann. 283; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448.

***Massachusetts*.** — *Com. v. Townsend*, 5 Allen (Mass.) 216; *Com. v. McCormick*, 130 Mass. 61, 39 Am. Rep. 423; *Com. v. Bowden*, 9 Mass. 494; *Com. v. Roby*, 12 Pick. (Mass.) 496.

***Mississippi*.** — *State v. Moor, Walk.* (Miss.) 134, 12 Am. Dec. 541; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Josephine v. State*, 39 Miss. 613. See also *Whitten v. State*, 61 Miss. 717.

***Missouri*.** — *State v. Arthur*, 32 Mo. App. 24.

***Nevada*.** — *State v. Pritchard*, 16 Nev. 101.

***New Jersey*.** — *State v. Hall*, 9 N. J. L. 256.

***New York*.** — *People v. Denton*, 2 Johns. Cas. (N. Y.) 275; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; *People v. Reagle*, 60 Barb. (N. Y.) 527; *Canter v. People*, (Ct. App.) 38 How. Pr. (N. Y.) 91.

***North Carolina*.** — *State v. Morrison*, 3 Dev. & B. L. (20 N. Car.) 115; *State v. Weaver*, 13 Ired. L. (35 N. Car.) 203; *State v. Tilletson*, 7 Jones L. (52 N. Car.) 114, 75 Am. Dec. 456; *State v. Jefferson*, 66 N. Car. 309; *State v. Bass*, 82 N. Car. 570; *State v. Johnson*, 75 N. Car. 123, 22 Am. Rep. 666.

***Pennsylvania*.** — *Com. v. Cook*, 6 S. & R. (Pa.) 577, 9 Am. Dec. 465.

***Tennessee*.** — *State v. Brooks*, 3 Humph. (Tenn.) 70. Compare *Ward v. State*, 1 Humph. (Tenn.) 253.

***Virginia*.** — *Com. v. Fells*, 9 Leigh (Va.) 613; *Wright v. Com.*, 75 Va. 914.

**Jury Cannot Be "Carted About."** — The judge cannot have the jurors conveyed from circuit to circuit until they agree on a verdict. *Winsor v. Reg.*, L. R. 1 Q. B. 289; *Spearman v. Wilson*, 44 Ga. 473; *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 309, 1 Am. Dec. 168; *State v. M'Kee*, 1 Bailey L. (S. Car.) 653, 21 Am. Dec. 499; *State v. Kelley*, 45 S. Car. 659. But see *State v. Bullock*, 63 N. Car. 570.

**That the Statute** requires the court to discharge the jury under certain circumstances, does not affect the general discretion of the court to order a discharge in other proper cases. *Tervin v. State*, 37 Fla. 396; *Smith v. State*, 40 Fla. 203.

**2. Capital Cases — *England*.** — *Rex v. Edwards*, 4 Taunt. 309; *Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143.

***United States*.** — *U. S. v. Shoemaker*, 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364; *U. S. v. Perez*, 9 Wheat. (U. S.) 579.

***Louisiana*.** — *State v. Costello*, 11 La. Ann. 283.

***Mississippi*.** — *State v. Moor, Walk.* (Miss.) 134, 12 Am. Dec. 541.

***North Carolina*.** — *State v. Jefferson*, 66 N. Car. 309; *State v. Alman*, 64 N. Car. 364; *State v. Honeycutt*, 74 N. Car. 391; *State v. McGimsey*, 80 N. Car. 377, 30 Am. Rep. 90; *State v. Bass*, 82 N. Car. 571; *State v. Ephraim*, 2 Dev. & B. L. (19 N. Car.) 162; *State v. Whitson*, 111 N. Car. 695; *State v. Scruggs*, 115 N. Car. 805; *State v. Chase*, 82 N. Car. 575.

**3. *Pennsylvania*.** — In this state it is said that the discharge of the jury in a capital case is justified only in a case of absolute necessity. *Com. v. Cook*, 6 S. & R. (Pa.) 578, 9 Am. Dec. 465; *Com. v. Clue*, 3 Rawle (Pa.) 498; *McFadden v. Com.*, 23 Pa. St. 12, 62 Am. Dec. 308; *Peiffer v. Com.*, 15 Pa. St. 468, 53 Am. Dec. 605; *Hilands v. Com.*, 111 Pa. St. 1, 56 Am. Rep. 235; *Com. v. Fitzpatrick*, 121 Pa. St. 109, 6 Am. St. Rep. 757. And failure of the jury to agree is not such a case. *Com. v. Fitzpatrick*, 121 Pa. St. 109. Compare *McCreary v. Com.*, 29 Pa. St. 323.

***South Carolina*.** — *State v. Ray*, Rice L. (S. Car.) 1, 33 Am. Dec. 90.

***Tennessee*.** — *State v. Brooks*, 3 Humph. (Tenn.) 70.

***Virginia*.** — *Com. v. Fells*, 9 Leigh (Va.) 613.

**Felonies and Misdemeanors.** — In some of the cases it has been suggested or stated that a right of discharge exists generally in the case of misdemeanors which did not exist in the case of felonies. *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *State v. Smith*, 44 Kan. 75, 21 Am. St. Rep. 266; *People v. Denton*, 2 Johns. Cas. (N. Y.) 275; *People v. Ward*, (Ct. Sess.) 1 Wheel. Crim. (N. Y.) 469; *People v. Ellis*, 15 Wend. (N. Y.) 371; *State v. Morrison*, 3 Dev. & B. L. (20 N. Car.) 115; *Williams v. Com.*, 2 Gratt. (Va.) 567, 44 Am. Dec. 403; *Dye v. Com.*, 7 Gratt. (Va.) 662. But see *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec.



*b. IN WHOM POWER VESTED.* — The power to discharge the jury before verdict is vested in the court,<sup>1</sup> and it has been held that it is not the subject of delegation by the court to the clerk or other officer.<sup>2</sup> But in some cases the discharge of the jury by an officer, acting under instructions from the judge, seems to be regarded as proper, without any direct adjudication on the question.<sup>3</sup>

*c. PRESENCE OF ACCUSED.* — The person on trial for a criminal offense has a right to be present when the jury is discharged, and a discharge of the jury in his absence is unauthorized and will relieve him from liability to further prosecution.<sup>4</sup>

**2. Grounds Authorizing Discharge** — *a. IN GENERAL.* — The power of discharging a jury before it has arrived at a verdict is a delicate and highly important trust, and can be exercised only, as the decisions variously state it, in cases of extreme, manifest, urgent, or imperious necessity.<sup>5</sup> While there are certain fairly well defined grounds which are considered sufficient to authorize the discharge of the jury,<sup>6</sup> the question of its propriety depends to a large extent upon the circumstances of the particular case.<sup>7</sup>

**Showing in Record.** — In some jurisdictions it is held that the judge, upon discharging the jury before verdict, must set out in the record the facts showing the necessity of the discharge and his finding thereon.<sup>8</sup>

203, and the remarks in *State v. Bass*, 82 N. Car. 570, in regard to the previous cases of *State v. Wiseman*, 68 N. Car. 203, and *State v. Davis*, 80 N. Car. 384.

**1. Who Empowered to Discharge.** — *People v. Reagle*, 60 Barb. (N. Y.) 527, where it was held that the presiding judge alone could not discharge a jury.

**2. Right of Delegation.** — *State v. Jefferson*, 66 N. Car. 309; *Ingersoll v. Lansing*, 51 Hun (N. Y.) 101; *Hines v. State*, 24 Ohio St. 134. But see *McCorkle v. State*, 14 Ind. 39.

**3. People v. Shotwell**, 27 Cal. 394; *Com. v. Townsend*, 5 Allen (Mass.) 216; *Hansen v. Ludlow Mfg. Co.*, 167 Mass. 112; *State v. Cottrell*, 19 R. I. 724.

**4. Presence of Accused.** — *State v. Nelson*, 26 Ind. 366; *State v. Wilson*, 50 Ind. 487, 19 Am. Rep. 719; *State v. Sommers*, 60 Minn. 90; *State v. Shuchardt*, 18 Neb. 454; *State v. Alman*, 64 N. Car. 364. See also *State v. Smith*, 44 Kan. 75, 21 Am. St. Rep. 266, *distinguishing State v. White*, 19 Kan. 445, 27 Am. Rep. 137. But see *State v. Vaughan*, 29 Iowa 286, in which case it was held that in the absence of the defendant at the discharge of the jury for disagreement could not be prejudicial.

**Felonies and Misdemeanors.** — In *Texas* the presence of the defendant is necessary upon the discharge of the jury on a prosecution for a felony, but not in a misdemeanor case. *Rudder v. State*, 29 Tex. App. 262; *Selman v. State*, 33 Tex. Crim. 631.

**Waiver of Right by Defendant's Counsel.** — Where the presence of the defendant is waived by his counsel, his absence cannot affect the action of the court in discharging the jury. *People v. Smalling*, 94 Cal. 112.

**5. Discharge Only in Cases of Extreme Necessity** — *United States*. — *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; *U. S. v. Coolidge*, 2 Gall. (U. S.) 364.

*Alabama.* — *Powell v. State*, 19 Ala. 581.

*Arkansas.* — *Atkins v. State*, 16 Ark. 568.

*Georgia.* — *Judge v. State*, 8 Ga. 173; *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281.

*Indiana.* — *McCorkle v. State*, 14 Ind. 39; *Miller v. State*, 8 Ind. 325; *State v. Wamire*, 16 Ind. 357.

*Iowa.* — *State v. Calendine*, 8 Iowa 288.

*Mississippi.* — *Boles v. State*, 24 Miss. 445; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195.

*Nevada.* — *Ex p. Maxwell*, 11 Nev. 436.

*New York.* — *People v. Denton*, 2 Johns. Cas. (N. Y.) 275; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; *People v. Barrett*, 2 Cai. (N. Y.) 305, 2 Am. Dec. 239; *Grant v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 527.

*North Carolina.* — *State v. Ephraim*, 2 Dev. & B. L. (19 N. Car.) 162; *Matter of Spier*, 1 Dev. L. (12 N. Car.) 491; *State v. Alman*, 64 N. Car. 364; *State v. Bailey*, 65 N. Car. 426; *State v. Jefferson*, 66 N. Car. 309; *State v. Wiseman*, 68 N. Car. 203; *State v. McGimsey*, 80 N. Car. 377, 30 Am. Rep. 90; *State v. Davis*, 80 N. Car. 384.

*Ohio.* — *Dobbins v. State*, 14 Ohio St. 499.

*Pennsylvania.* — *Hilands v. Com.*, 111 Pa. St. 1, 56 Am. Rep. 235; *Com. v. Cook*, 6 S. & R. (Pa.) 577, 9 Am. Dec. 465; *Com. v. Hetrick*, 1 Woodw. (Pa.) 288.

*South Carolina.* — *State v. Edwards*, 2 Nott & M. (S. Car.) 17.

*Tennessee.* — *Mahala v. State*, 10 Yerg. (Tenn.) 532, 31 Am. Dec. 591; *State v. Connor*, 5 Coldw. (Tenn.) 311; *State v. Brooks*, 3 Humph. (Tenn.) 70.

*Texas.* — *Taylor v. State*, 35 Tex. 97; *Pizano v. State*, 20 Tex. App. 139, 54 Am. Rep. 511.

*Virginia.* — *Williams v. Com.*, 2 Gratt. (Va.) 567, 44 Am. Dec. 403.

*West Virginia.* — *Gruber v. State*, 3 W. Va. 699.

**6.** See the following paragraphs.

**7.** See *Stocks v. State*, 91 Ga. 831.

**The Insufficiency of the Accommodations furnished to the jury is not a ground for discharging it before the completion of its duties.** *Conklin v. State*, 25 Neb. 784.

**8. Showing in Record** — *Kansas.* — *State v. Allen*, 59 Kan. 758.



*b. DEFECTIVE INDICTMENT.* — If the indictment is defective, it is proper to discharge the jury, and such discharge will not affect the defendant's liability to further prosecution.<sup>1</sup>

*c. ABSENCE OF EVIDENCE.* — The absence of a witness, or want of preparation of the evidence, has been generally held insufficient as a ground for the discharge of the jury.<sup>2</sup>

*d. ABSENCE OF DEFENDANT.* — The escape of the prisoner from custody while on trial has been held to be cause for the discharge of the jury, on the ground that a verdict received in his absence would be void;<sup>3</sup> but it has also been held that the court is not bound to discharge the jury because the defendant is voluntarily absent, he having been present at the commencement of the trial.<sup>4</sup> The question apparently depends on whether the trial may proceed in case of the voluntary absence of the defendant, a matter which is considered elsewhere.<sup>5</sup>

*e. ABSENCE OF JUROR.* — The failure of a juror to appear in order to perform his duties is ground for discharge of the jury.<sup>6</sup>

*f. MISCONDUCT OF JURY.* — If misconduct on the part of the jury or members thereof is discovered before verdict, it is proper to discharge the jury on that account;<sup>7</sup> and this principle applies in cases of improper separation of the jury.<sup>8</sup>

*g. INABILITY TO AGREE* — (1) *In General.* — The court has power to dis-

*Nebraska.* — *State v. Shuchardt*, 18 Neb. 454; *Conklin v. State*, 25 Neb. 784.

*Nevada.* — *Ex p. Maxwell*, 11 Nev. 436.

*North Carolina.* — *State v. Prince*, 63 N. Car. 529; *State v. Jefferson*, 66 N. Car. 309; *State v. Ephraim*, 2 Dev. & B. L. (19 N. Car.) 162; *State v. Bass*, 82 N. Car. 571.

*Ohio.* — *Hines v. State*, 24 Ohio St. 139.

*Tennessee.* — *State v. Pool*, 4 Lea (Tenn.) 363; *State v. Waterhouse*, Mart. & Y. (Tenn.) 278.

See also the cases cited *infra*, this subsection, *Inability to Agree*.

**Order Taken as True.** — An order setting forth the reasons for the discharge of the jury, entered in the mode prescribed by statute, must be taken as stating the true reasons of the discharge. *Conklin v. State*, 25 Neb. 784.

**The Record of a Cause May Be Amended** at the next term so as to show the true facts as to the reason for the discharge of the jury. *State v. Davis*, 80 N. Car. 384.

**A Mere Entry by the Clerk** in the ordinary routine of duty is not sufficient, under a statute requiring the court to order that the reason for the discharge be entered on the journal. *Conklin v. State*, 25 Neb. 784.

**A Mere Finding** by the court that the ends of justice required the discharge is not sufficient. *State v. Leunig*, 42 Ind. 541.

**1. Defective Indictment** — *Alabama.* — *Scott v. State*, 110 Ala. 48.

*Arkansas.* — *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213.

*California.* — *People v. Larson*, 68 Cal. 18.

*Iowa.* — *State v. Smith*, 88 Iowa 178.

*Nebraska.* — *State v. Priebe*, 16 Neb. 131.

*New York.* — *Johnson's Case*, 5 City Hall Rec. (N. Y.) 103.

*North Carolina.* — *State v. England*, 78 N. Car. 552.

*Tennessee.* — *Walton v. State*, 3 Sneed (Tenn.) 687.

**2. Absence of Evidence.** — *State v. Calendine*, 8 Iowa 288; *People v. Barrett*, 2 Cai. (N. Y.) 304, 2 Am. Dec. 239; *People v. Green*, 13

Wend. (N. Y.) 55; *Klock v. People*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 676, *questioning* *People v. Ellis*, 15 Wend. (N. Y.) 371. See to the contrary *State v. Nelson*, 7 Ala. 610; *People v. Judges*, 8 Cow. (N. Y.) 127. See also *Reg. v. Charlesworth*, 1 B. & S. 460, 101 E. C. L. 460; *Jones v. Reg.*, (Can. 1880) 1 Crim. L. Mag. 766.

The refusal of a witness to be sworn at the request of the prosecution was held ground for discharge of the jury. *U. S. v. Coolidge*, 2 Gall. (U. S.) 364.

**3. Absence of Defendant.** — *State ex rel. Battle*, 7 Ala. 259; *Andrews v. State*, 2 Sneed (Tenn.) 551.

**4. State v. Wamire**, 16 Ind. 357; *Fight v. State*, 7 Ohio (pt. i.) 181.

**5.** See the title CONSTITUTIONAL LAW, vol. 6, p. 993 *et seq.* See also ENCYC. OF PL. AND PR., title TRIAL.

**6. Absence of Juror** — *England.* — *Reg. v. Ward*, 10 Cox C. C. 573.

*Indiana.* — *Maynard v. Black*, 41 Ind. 310; *Harris v. Doe*, 4 Blackf. (Ind.) 369.

*Kentucky.* — *Orr v. Bobb*, Sneed (Ky.) 244.

*New Jersey.* — *State v. Hall*, 9 N. J. L. 256.

*Pennsylvania.* — *Pennell v. Percival*, 13 Pa. St. 197.

*South Carolina.* — *State v. Scarborough*, 2 S. Car. 439; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499.

But see *Standley v. State*, 10 Ga. 82.

**7. Misconduct of Jury.** — *Simmons v. U. S.*, 142 U. S. 148; *Tervin v. State*, 37 Fla. 396; *State v. Leunig*, 42 Ind. 541; *Grable v. State*, 2 Greene (Iowa) 559; *State v. Jefferson*, 66 N. Car. 309; *State v. Wiseman*, 68 N. Car. 203.

**8. Improper Separation of Jury.** — *Reg. v. Ward*, 17 L. T. N. S. 220, 16 W. R. 281, 10 Cox C. C. 573; *Wyatt v. State*, 1 Blackf. (Ind.) 257; *State v. Costello*, 11 La. Ann. 283; *State v. Hall*, 9 N. J. L. 256; *People v. Reagle*, 60 Barb. (N. Y.) 527; *Griffie v. State*, 1 Lea (Tenn.) 43. But see *Hilands v. Com.*, 111 Pa. St. 1, 56 Am. Rep. 235.



charge a jury when, after a reasonable time for deliberation, it appears that an agreement cannot be reached;<sup>1</sup> and in some states there is a statutory provision to that effect.<sup>2</sup> There have been some adjudications that no right of discharge for this reason exists in capital cases,<sup>3</sup> and in one or two early cases a distinction was taken in this respect between felonies and misdemeanors.<sup>4</sup> In order to authorize a discharge for this reason, ample time and every reasonable opportunity should have been given to the jurors for deliberation, and the court should be clearly satisfied that they will not be able to agree.<sup>5</sup>

**1. Discharge on Nonagreement of Jury** — *England*. — *Conway v. Reg.*, 7 Ir. L. Rep. 149; *Matter of Newton*, 13 Q. B. 716, 66 E. C. L. 716; *Reg. v. Davison*, 2 F. & F. 250; *Powell v. Sonnett*, 1 Dowl. N. S. 56, 1 Bligh N. S. 545; *Winsor v. Reg.*, L. R. 1 Q. B. 289, 7 B. & S. 490; *Dewar v. Purday*, 4 N. & M. 633, 30 E. C. L. 57, 3 Ad. & El. 166.

*United States*. — *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *U. S. v. Workman*, 28 Fed. Cas. No. 16,764; *Kelly v. U. S.*, 27 Fed. Rep. 616; *Ex p. Lange*, 18 Wall. (U. S.) 163; *Logan v. U. S.*, 144 U. S. 263, reversing 45 Fed. Rep. 872; *U. S. v. Watkins*, 3 Cranch (C. C.) 441.

*Alabama*. — *Barrett v. State*, 35 Ala. 406.

*Arkansas*. — *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611; *Potter v. State*, 42 Ark. 29.

*California*. — *Ex p. McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

*Connecticut*. — *State v. Woodruff*, 2 Day (Conn.) 504, 2 Am. Dec. 122; *Dutton v. Tracy*, 4 Conn. 79.

*Delaware*. — *State v. Gamble*, (Del. 1899) 45 Atl. Rep. 716.

*Georgia*. — *Williford v. State*, 23 Ga. 1; *Lester v. State*, 33 Ga. 329; *Lovett v. State*, 80 Ga. 255.

*Idaho*. — *State v. Jorgenson*, (Idaho 1893) 32 Pac. Rep. 1129.

*Indiana*. — *State v. Walker*, 26 Ind. 346; *State v. Nelson*, 26 Ind. 366; *Shaffer v. State*, 27 Ind. 131; *State v. Leach*, 120 Ind. 124. *Compare Miller v. State*, 8 Ind. 325; *Reese v. State*, 8 Ind. 416.

*Iowa*. — *State v. Vaughan*, 29 Iowa 286.

*Kansas*. — *State v. White*, 19 Kan. 445, 27 Am. Rep. 137.

*Kentucky*. — *Com. v. Olds*, 5 Litt. (Ky.) 137; *Thompson v. Com.*, (Ky. 1894) 25 S. W. Rep. 1059.

*Louisiana*. — *State v. Ferguson*, 8 Rob. (La.) 613; *State v. Blackman*, 35 La. Ann. 483.

*Maine*. — *Richards v. Page*, 81 Me. 563.

*Maryland*. — *Deford v. State*, 30 Md. 179.

*Massachusetts*. — *Com. v. Bowden*, 9 Mass. 494; *Com. v. Cody*, 165 Mass. 133; *Com. v. Purchase*, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; *Com. v. Roby*, 12 Pick. (Mass.) 496.

*Michigan*. — *People v. Schoeneth*, 44 Mich. 489; *People v. Harding*, 53 Mich. 481.

*Mississippi*. — *Helm v. State*, 67 Miss. 562; *State v. Moor*, Walk. (Miss.) 134, 12 Am. Dec. 541.

*Missouri*. — *State v. Matrassey*, 47 Mo. 295; *State v. Copeland*, 65 Mo. 497.

*Nevada*. — *Ex p. Maxwell*, 11 Nev. 428.

*New York*. — *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; *Hauxhurst's Case*, 2 City Hall Rec. (N. Y.) 33; *Vanderwerker v. People*, 5 Wend. (N. Y.)

530; *People v. Green*, 13 Wend. (N. Y.) 55.

*North Carolina*. — *State v. Prince*, 63 N. Car. 529; *State v. Bullock*, 63 N. Car. 570; *State v. Jefferson*, 66 N. Car. 309; *State v. Honeycutt*, 74 N. Car. 391; *Hannon v. Grizzard*, 89 N. Car. 115; *State v. Twiggs*, 90 N. Car. 685; *State v. Carland*, 90 N. Car. 668; *Osborne v. Wilkes*, 108 N. Car. 651; *State v. Whitson*, 111 N. Car. 695.

*Ohio*. — *Hurley v. State*, 6 Ohio 400; *Poage v. State*, 3 Ohio St. 229; *Dobbins v. State*, 14 Ohio St. 493.

*Pennsylvania*. — *McCreary v. Com.*, 29 Pa. St. 323.

*South Carolina*. — *State v. Kelley*, 45 S. Car. 619; *State v. Stephenson*, 54 S. Car. 234.

*Tennessee*. — *State v. Waterhouse*, Mart. & Y. (Tenn.) 278; *State v. Pool*, 4 Lea (Tenn.) 363, criticizing *Mahala v. State*, 10 Verg. (Tenn.) 532, 31 Am. Dec. 591.

*Texas*. — *Powell v. State*, 17 Tex. App. 345; *Branch v. State*, 20 Tex. App. 599; *Brady v. State*, 21 Tex. App. 659; *Smith v. State*, 22 Tex. App. 196; *Moseley v. State*, 33 Tex. 671; *Wright v. State*, 35 Tex. Crim. 158; *Penn v. State*, 36 Tex. Crim. 140.

*Virginia*. — *Com. v. Fells*, 1 Leigh (Va.) 613.

*West Virginia*. — *Crookham v. State*, 5 W. Va. 510.

*Wisconsin*. — *State v. Crane*, 4 Wis. 400.

**2. Statutory Provision** — *California*. — *People v. James*, 97 Cal. 400.

*Colorado*. — *In re Allison*, 13 Colo. 525, 16 Am. St. Rep. 224.

*Florida*. — *Lambright v. State*, 34 Fla. 564; *Adams v. State*, 34 Fla. 185.

*Kansas*. — *State v. Rudy*, (Kan. App. 1899) 57 Pac. Rep. 263.

*Minnesota*. — *Rollins v. Nolting*, 53 Minn. 232.

*Nebraska*. — *State v. Shuchardt*, 18 Neb. 454; *Conklin v. State*, 25 Neb. 784.

*Ohio*. — *Ladd v. State*, 5 Ohio Cir. Ct. 276, 3 Ohio Cir. Dec. 137.

*Texas*. — *Varnes v. State*, 20 Tex. App. 107; *Moseley v. State*, 33 Tex. 671; *Wright v. State*, 35 Tex. Crim. 158.

*Virginia*. — *Wright v. Com.*, 75 Va. 914; *Jones v. Com.*, 86 Va. 740.

*West Virginia*. — *Crookham v. State*, 5 W. Va. 510.

**3. Capital Cases**. — *Ned v. State*, 7 Port. (Ala.) 187; *McCreary v. Com.*, 29 Pa. St. 323; *Com. v. Fitzpatrick*, 121 Pa. St. 109, 6 Am. St. Rep. 757; *Com. v. Clue*, 3 Rawle (Pa.) 498; *Mahala v. State*, 10 Verg. (Tenn.) 532, 31 Am. Dec. 591.

**4. Felonies and Misdemeanors**. — *Williams v. Com.*, 2 Gratt. (Va.) 568, 44 Am. Dec. 403; *Dye v. Com.*, 7 Gratt. (Va.) 662.

**5. Power to Be Cautiously Exercised**. — *State v.*



**Proof of Inability to Agree.** — The statements of the jurors as to their inability to agree are not binding upon the court, and may be disregarded,<sup>1</sup> and the court has no right to discharge the jury upon the mere statement of the sheriff that the jurors are unable to agree.<sup>2</sup>

**Showing the Record.** — That the jurors are unable to agree and that there is no reasonable probability of their doing so are essential facts, which must be stated in the order of the discharge and established by the record, in order to justify the further prosecution of the defendant.<sup>3</sup>

**Discretion of Court.** — The determination of the question whether the circumstances justify a discharge of the jury on account of the inability of its members to agree generally rests in the discretion of the trial court.<sup>4</sup> In some cases the exercise of such discretion is held to be not subject to review,<sup>5</sup> and others state that it is subject to review in case of abuse of discretion.<sup>6</sup>

(2) *Time for Deliberations of Jury.* — What will constitute a reasonable time for deliberation is not capable of exact determination, but depends upon the character of the case, the length of the trial, the forum, and other circumstances.<sup>7</sup> Owing to this fact, and to the discretion vested in the trial court,

Walker, 26 Ind. 346; State v. Shuchardt, 18 Neb. 454; *Ex p.* Maxwell, 11 Nev. 436. And see People v. Ward, (Ct. Sess.) 1 Wheel. Crim. (N. Y.) 469.

1. **Statements of Jury.** — People v. Harding, 53 Mich. 481; *Ex p.* Maxwell, 11 Nev. 428; State v. Reinhart, 26 Oregon 466. And see Josephine v. State, 39 Miss. 613; Poage v. State, 3 Ohio St. 229.

Where the statute provided that the jurors should be kept together for such time as to render it altogether improbable that they could agree, it was error to discharge them merely on statements as to their inability to agree, without reference to the time of their deliberations. Powell v. State, 17 Tex. App. 345; Wright v. State, 35 Tex. Crim. 158.

2. **Statement of Officer.** — People v. Cage, 48 Cal. 323, 17 Am. Rep. 436.

3. **Showing in Record** — Florida. — Adams v. State, 34 Fla. 185.

Kansas. — State v. Smith, 44 Kan. 75, 21 Am. St. Rep. 266; State v. Allen, 59 Kan. 718. Nebraska. — Conklin v. State, 25 Neb. 784.

North Carolina. — State v. McGimsey, 80 N. Car. 377, 30 Am. Rep. 90.

Ohio. — Dobbins v. State, 14 Ohio St. 493; Hines v. State, 24 Ohio St. 134; Ladd v. State, 5 Ohio Cir. Ct. 276, 3 Ohio Cir. Dec. 137.

Tennessee. — State v. Pool, 4 Lea (Tenn.) 363. Texas. — Wright v. State, 35 Tex. Crim. 158; Pool v. State, 35 Tex. Crim. 159.

As to the sufficiency of the showing in the record, see People v. Smalling, 94 Cal. 112; State v. Reinhart, 26 Oregon 466.

4. **Discretion of Court** — United States. — U. S. v. Perez, 9 Wheat. (U. S.) 579.

California. — People v. Greene, 100 Cal. 140.

Colorado. — *In re* Allison, 13 Colo. 525, 16 Am. St. Rep. 224.

Idaho. — State v. Jorgenson, (Idaho 1893) 32 Pac. Rep. 1129.

Maine. — Richards v. Page, 81 Me. 563.

Missouri. — State v. Matrassey, 47 Mo. 295.

Nevada. — *Ex p.* Maxwell, 11 Nev. 428.

North Carolina. — State v. Bullock, 63 N. Car. 570.

South Carolina. — State v. Stephenson, 54 S. Car. 234.

5. **Right of Review.** — Winsor v. Reg., 7 B.

& S. 490, L. R. 1 Q. B. 390, 12 Jur. N. S. 561; People v. Harding, 53 Mich. 481; Hamilton v. Moody, 21 Mo. 79; People v. Green, 13 Wend. (N. Y.) 55; State v. Reinhart, 26 Oregon 474.

6. Grace v. McKissack, 49 Ala. 163; School Dist. No. 1 v. Bragdon, 23 N. H. 507; Powell v. State, 17 Tex. App. 345; Schindler v. State, 17 Tex. App. 408; Varnes v. State, 20 Tex. App. 109; Brady v. State, 21 Tex. App. 659; Wright v. Com., 75 Va. 914.

**Detention of Jury.** — So the question how long the jurors shall be detained at their deliberations is for the discretion of the trial court, and the fact that they are detained for a considerable length of time is not a ground for setting aside the verdict rendered at the end of such time.

Idaho. — People v. Stock, 1 Idaho 218.

Illinois. — Jeffery v. Robbins, 73 Ill. App. 353.

Kentucky. — Chesapeake, etc., R. Co. v. Cowherd, 96 Ky. 113; Gilbert v. Com., (Ky. 1899) 51 S. W. Rep. 590; Monroe v. Brann, 14 Ky. L. Rep. 764; Avery v. Meek, 14 Ky. L. Rep. 814.

Louisiana. — State v. Fuselier, 51 La. Ann. 1317.

Missouri. — Steinkamper v. McManus, 26 Mo. App. 51; State v. Rose, 142 Mo. 418.

New Hampshire. — School Dist. No. 1 v. Bragdon, 23 N. H. 507.

New York. — Green v. Telfair, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 260; Wilson v. Manhattan R. Co., (C. Pl. Gen. T.) 2 Misc. (N. Y.) 127; Erwin v. Hamilton, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 32. See Huntton v. Russell, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 154; Erwin v. Hamilton, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 32.

South Carolina. — State v. Kelley, 45 S. Car. 659.

The Statute occasionally provides that jurors, after stating their inability to agree, shall not be sent out a third time without their consent. Lambright v. State, 34 Fla. 564; State v. Stephenson, 54 S. Car. 234; State v. Kelley, 45 S. Car. 659.

7. **Time for Deliberation.** — Fowler v. State, 85 Ind. 538, where it was held proper to dis-



a period which in one case is regarded as sufficient to authorize a discharge is treated in another case as insufficient for the purpose, and *vice versa*.<sup>1</sup>

*h. END OF TERM.* — If the jurors have not come to an agreement by the end of the term of court, it is proper to discharge them, and such a discharge does not affect a further prosecution for the same offense.<sup>2</sup> A discharge is not justified, however, if the court has power to continue the term for the purpose of concluding the case,<sup>3</sup> nor is a discharge justified by the fact that all the business of the term except the case on trial is finished, if a portion of the term yet remains.<sup>4</sup>

*i. ILLNESS OR DEATH* — (1) *Of Juror.* — Where, owing to the illness or death of a juror, it is impossible to proceed with the case, it is proper for the

charge the jury after three hours deliberation, in view of the fact that the prosecution was in a justice's court and the punishment could not extend beyond a fine of a few dollars.

**1. Decisions as to Length of Time — Sufficient Time.** — The following periods of time have been held sufficient to authorize the discharge of the jury:

Thirty minutes. *People v. Green*, 13 Wend. (N. Y.) 55.

One and one-half hours. *Lovett v. State*, 80 Ga. 255.

Three hours. *State v. Leach*, 120 Ind. 124 (crime punishable by five dollars fine).

Four hours. *Jones v. Com.*, 86 Va. 740 (trial for robbery).

One night. *In re Allison*, 13 Colo. 525, 16 Am. St. Rep. 224; *Williford v. State*, 23 Ga. 1; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137.

Fourteen hours. *Rollins v. Nolting*, 53 Minn. 232.

Seventeen hours. *Barrett v. State*, 35 Ala. 406.

Eighteen hours. *Shaffer v. State*, 27 Ind. 131; *Com. v. Purchase*, 2 Pick. (Mass.) 521, 13 Am. Dec. 452 (capital case).

Nineteen hours. *State v. Walker*, 26 Ind. 346.

Twenty hours. *Varnes v. State*, 20 Tex. App. 107.

Twenty-one hours. *Penn v. State*, 36 Tex. Crim. 140.

Forty-six hours. *Brady v. State*, 21 Tex. App. 659 (embezzlement).

Two days. *Smith v. State*, 22 Tex. App. 196.

Two and one-half days. *People v. Stock*, 1 Idaho 218.

Three days. *Wright v. Com.*, 75 Va. 914.

Six days. *State v. Honeycutt*, 74 N. Car. 391.

Ten days. *State v. Carland*, 90 N. Car. 668.

*Insufficient Time.* — The following periods have been held to be insufficient:

Three hours. *Gulick v. Van Tilburgh*, 16 N. J. L. 417 (trial before justice of the peace).

Three and one-half hours. *Whitten v. State*, 61 Miss. 717.

Eight hours. *Hines v. State*, 24 Ohio St. 134 (murder trial).

One night. *State v. Shuchardt*, 18 Neb. 454.

Nineteen hours. *Mahala v. State*, 10 Yerg. (Tenn.) 532, 31 Am. Dec. 591.

Twenty hours. *Conklin v. State*, 25 Neb. 784.

Forty-six hours. *State v. Alman*, 64 N. Car. 364 (capital case); *Rudder v. State*, 29 Tex. App. 262.

**2. Discharge at End of Term — England.** — *Reg. v. Davison*, 2 F. & F. 250, 8 Cox C. C. 360.

*Alabama.* — *State ex rel. Battle*, 7 Ala. 259; *Powell v. State*, 19 Ala. 577; *Barrett v. State*, 35 Ala. 406.

*California.* — *Johnson v. Pacific Cement Co.*, 50 Cal. 648.

*Indiana.* — *Ashbaugh v. Edgecomb*, 13 Ind. 466.

*Kentucky.* — *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; *Com. v. Olds*, 5 Litt. (Ky.) 137; *Shearer v. Clay*, 1 Litt. (Ky.) 261.

*Mississippi.* — *State v. Moor*, Walk. (Miss.) 134, 12 Am. Dec. 541; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Josephine v. State*, 39 Miss. 613.

*Missouri.* — *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413.

*New York.* — *People v. Goodwin*, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203.

*North Carolina.* — *State v. Tilletson*, 7 Jones L. (52 N. Car.) 114, 75 Am. Dec. 456. But see *Matter of Spier*, 1 Dev. L. (12 N. Car.) 491.

*South Carolina.* — *State v. M'Lemore*, 2 Hill L. (S. Car.) 680.

*Tennessee.* — *State v. Brooks*, 3 Humph. (Tenn.) 70; *Berry v. Wallin*, 1 Overt. (Tenn.) 241; *State v. Brooks*, 3 Humph. (Tenn.) 72.

*Virginia.* — *Williams v. Com.*, 2 Gratt. (Va.) 567, 44 Am. Dec. 403.

**An Order of Discharge** is not necessary, but the jury stands charged at the end of the term by operation of law.

*Alabama.* — *Lore v. State*, 4 Ala. 173; *Walker v. State*, 117 Ala. 42.

*Indiana.* — *Ashbaugh v. Edgecomb*, 13 Ind. 466.

*Kansas.* — *In re Scrafford*, 21 Kan. 735.

*Kentucky.* — *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 546.

*Missouri.* — *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413; *State v. Jeffors*, 64 Mo. 376.

*North Carolina.* — *State v. Tilletson*, 7 Jones L. (52 N. Car.) 114, 75 Am. Dec. 456.

*Tennessee.* — *Berry v. Wallin*, 1 Overt. (Tenn.) 241.

*Virginia.* — *Com. v. Thompson*, 1 Va. Cas. 319; *Williams v. Com.*, 2 Gratt. (Va.) 567, 44 Am. Dec. 403.

**3. Power to Continue Term.** — *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Whitten v. State*, 61 Miss. 717; *State v. McGimsey*, 80 N. Car. 377, 30 Am. Rep. 90; *Com. v. Fitzpatrick*, 121 Pa. St. 109, 6 Am. St. Rep. 757.

**4. Completion of Business.** — *Ex p. Vincent*, 43 Ala. 402.



court to discharge the jury;<sup>1</sup> and this may be done though the statute authorizes the substitution of another juror for the one incapacitated to serve.<sup>2</sup> In some jurisdictions the practice is to discharge only the juror incapacitated and to substitute another in his place.<sup>3</sup> Whether the single juror or the jury as a whole shall be discharged, is apparently a matter within the discretion of the court.<sup>4</sup>

**Character of Illness.** — In order to authorize a discharge for the illness of a juror, such illness must be so serious as practically to incapacitate him from properly performing his duties;<sup>5</sup> and this, it has been decided, is a question purely for the trial court.<sup>6</sup> The determination of the question of the juror's illness should be by judicial methods.<sup>7</sup>

(2) *In Juror's Family.* — The death or serious illness of a member of a juror's family, affecting the juror's ability to act properly, is ground for discharging the juror.<sup>8</sup>

(3) *Of Accused.* — The illness of the accused, necessitating his absence from the court room, is ground for discharging the jury.<sup>9</sup>

**1. Illness or Death of Juror — England.** — *Rex v. Stevenson*, 2 Leach C. C. 546; *Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Edwards*, 4 Taunt. 309.

*Alabama.* — *Nugent v. State*, 4 Stew. & P. (Ala.) 79, 24 Am. Dec. 746; *Ned v. State*, 7 Port. (Ala.) 213; *Jackson v. State*, 78 Ala. 471; *Hawes v. State*, 88 Ala. 37; *Webb v. State*, 100 Ala. 47.

*Arkansas.* — *Atkins v. State*, 16 Ark. 568; *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611.

*California.* — *People v. Ross*, 85 Cal. 383.

*Florida.* — *Ellis v. State*, 25 Fla. 702.

*Illinois.* — *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

*Indiana.* — *Doles v. State*, 97 Ind. 555.

*Kansas.* — *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322.

*Louisiana.* — *State v. Moncla*, 39 La. Ann. 868.

*Maryland.* — *Deford v. State*, 30 Md. 179.

*Massachusetts.* — *Com. v. Roby*, 12 Pick. (Mass.) 496; *Com. v. Merrill*, Thach. Crim. Cas. (Mass.) 1.

*Missouri.* — *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454; *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413.

*North Carolina.* — *State v. Scruggs*, 115 N. Car. 805.

*Tennessee.* — *Fletcher v. State*, 6 Humph. (Tenn.) 249; *State v. Curtis*, 5 Humph. (Tenn.) 601.

*Texas.* — *Ellison v. State*, 12 Tex. App. 557; *Bates v. State*, 19 Tex. 122.

*Vermont.* — *State v. Emery*, 59 Vt. 84.

See also *supra*, this title, *Custody and Conduct of Jury — Illness of Juror.*

**2. Statute Authorizing Substitution of Juror.** — *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695; *State v. Curtis*, 5 Humph. (Tenn.) 601; *Snowden v. State*, 7 Baxt. (Tenn.) 482; *De Berry v. State*, 99 Tenn. 207.

That the Statute authorizes the substitution of another juror in case of sickness, does not prohibit an adjournment of the court in order that the sick juror may have time in which to get well. *State v. Garrity*, 98 Iowa 101.

**3. Substitution of Jurors — England.** — *Reg. v. Beere*, 2 M. & Rob. 472; *Rex v. Scalbert*, 2 Leach C. C. 620; *Reg. v. Ashe*, 1 Cox C. C. 150; *Rex v. Edwards*, R. & R. 234, 2 Leach C. C. 621, note, 3 Campb. 207, 4 Taunt. 309, 13 Rev. Rep. 601.

*United States.* — *Young v. Marine Ins. Co.*, 1 Cranch (C. C.) 566.

*Alabama.* — *Yarbrough v. State*, 105 Ala. 43.

*California.* — *People v. Stewart*, 64 Cal. 60; *People v. Brady*, 72 Cal. 490; *People v. Wong Ark*, 96 Cal. 125.

*Georgia.* — *Pannell v. State*, 29 Ga. 681; *Ozburn v. State*, 87 Ga. 175.

*Illinois.* — *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

*Louisiana.* — *State v. Moncla*, 39 La. Ann. 868.

*Missouri.* — *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314.

*New York.* — *Silby v. Foote*, 14 How (U. S.) 218, and *Foote v. Silby*, 1 Blatchf. (U. S.) 445, determining New York practice.

*Tennessee.* — *De Berry v. State*, 99 Tenn. 207.

**4. Substitution or Discharge of Whole Jury.** — *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695; *State v. Scruggs*, 115 N. Car. 805; *State v. Hazledahl*, 2 N. Dak. 524; *Snowden v. State*, 7 Baxt. (Tenn.) 483; *State v. Curtis*, 5 Humph. (Tenn.) 601. But see *Noble v. Billings*, 8 N. Bruns. 85, and cases cited *infra*, this section, *Discharge and Substitution of Individual Jurors.*

**5. Character of Illness.** — *Johnson v. State*, 60 Ark. 45; *Conklin v. State*, 25 Neb. 784; *People v. Buchanan*, (N. Y. Gen. Sess.) 25 N. Y. Supp. 492; *Com. v. Clue*, 3 Rawle (Pa.) 498.

**6. Hubbard v. Gale**, 105 Mass. 511.

**7. Method of Determination.** — *Rulo v. State*, 19 Ind. 298; *State v. Smith*, 44 Kan. 75, 21 Am. St. Rep. 266. And see *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322.

So in *State v. Nelson*, 19 R. I. 467, 61 Am. St. Rep. 780, it was held to be improper to discharge the jury upon a statement made by telephone in regard to a juror's illness.

**Expert Evidence Unnecessary.** — *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

**8. Illness or Death in Juror's Family.** — *Hawes v. State*, 88 Ala. 37; *Stocks v. State*, 91 Ga. 831; *Bates v. State*, 19 Tex. 122 [*compare Hill v. State*, 10 Tex. App. 618]; *Com. v. Fells*, 9 Leigh (Va.) 613; *State v. Davis*, 31 W. Va. 390.

**9. Illness of Accused — England.** — *Meadow's Case*, Foster 76; *Rex v. Streek*, 2 C. & P. 413, 12 E. C. L. 195; *Rex v. Stevenson*, 2 Leach C. C. 546.

*Alabama.* — *Ned v. State*, 7 Port. (Ala.) 187.



(4) *Of Court or Counsel.* — The illness of the presiding judge is ground for discharging the jury,<sup>1</sup> as is illness in his family, rendering it impossible for him to proceed with the trial;<sup>2</sup> and it would seem that the sudden illness of counsel might be ground for discharge if there were no associate counsel capable of proceeding with the case.<sup>3</sup>

*J. CONCLUSIVENESS OF DECISION OF TRIAL COURT.* — The question whether it is proper to discharge the jury before verdict rests to a great extent in the sound discretion of the trial court.<sup>4</sup> In the English and federal courts, and the courts of some of the states, it has been held that the exercise of the court's discretion in this respect is not subject to review.<sup>5</sup> In other jurisdictions it is held that the exercise of discretion by the lower court is always open to review on appeal or writ of error.<sup>6</sup> In some cases it is stated that the action of the trial court in discharging the jury is subject to revision

*Arkansas.* — *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611.

*Florida.* — *Ellis v. State*, 25 Fla. 702.

*Massachusetts.* — *Com. v. Roby*, 12 Pick. (Mass.) 496.

*North Carolina.* — *State v. Wiseman*, 68 N. Car. 203.

*Tennessee.* — *Mahala v. State*, 10 Yerg. (Tenn.) 532, 31 Am. Dec. 591.

*Texas.* — *Brown v. State*, 38 Tex. 482.

1. *Illness of Judge.* — *Nugent v. State*, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; *State v. Ulrich*, 110 Mo. 350. But see *Ex p. Ulrich*, 42 Fed. Rep. 587, 43 Fed. Rep. 661.

2. *Illness in Judge's Family.* — *State v. Tatman*, 59 Iowa 471.

3. *Illness of Counsel.* — *U. S. v. Watson*, 3 Ben. (U. S.) 1.

4. *Discretion of Trial Court* — *England.* — *Reg. v. Newton*, 3 Cox C. C. 489; *Reg. v. Davison*, 8 Cox C. C. 360; *Winsor v. Reg.*, 6 B. & S. 143, 118 E. C. L. 143.

*United States.* — *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *Logan v. U. S.*, 144 U. S. 264; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; *U. S. v. Haskell*, 4 Wash. (U. S.) 402; *U. S. v. Watson*, 3 Ben. (U. S.) 1; *U. S. v. Morris*, 1 Curt. (U. S.) 24.

*Alabama.* — *Barrett v. State*, 35 Ala. 406.

*Arkansas.* — *Atkins v. State*, 16 Ark. 570.

*California.* — *Grady v. Early*, 18 Cal. 109.

*Idaho.* — *People v. Stock*, 1 Idaho 218.

*Indiana.* — *Murphy v. Wilson*, 46 Ind. 537.

*Louisiana.* — *State v. Fuselier*, 51 La. Ann. 1317.

*Maryland.* — *Deford v. State*, 30 Md. 179.

*Massachusetts.* — *Com. v. Purchase*, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; *Com. v. Roby*, 12 Pick. (Mass.) 503; *Hubbard v. Gale*, 105 Mass. 511; *Com. v. Townsend*, 5 Allen (Mass.) 216.

*Michigan.* — *People v. Harding*, 53 Mich. 487.

*New Hampshire.* — *School Dist. No. 1 v. Bragdon*, 23 N. H. 507.

*New York.* — *People v. Denton*, 2 Johns. Cas. (N. Y.) 275; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *People v. Goodwin*, 18 Johns. (N. Y.) 200, 9 Am. Dec. 203; *People v. Green*, 13 Wend. (N. Y.) 57; *Erwin v. Hamilton*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 32; *People v. Reagle*, 60 Barb. (N. Y.) 527; *White v. Calder*, 35 N. Y. 183.

*North Carolina.* — *State v. Prince*, 63 N. Car. 529; *State v. Bullock*, 63 N. Car. 570; *State v.*

*Alman*, 64 N. Car. 364; *State v. Jefferson*, 66 N. Car. 309; *State v. Bass*, 82 N. Car. 570; *State v. Chase*, 82 N. Car. 575; *State v. Morrison*, 3 Dev. & B. L. (20 N. Car.) 115.

*Ohio.* — *Dobbins v. State*, 14 Ohio St. 493.

*South Carolina.* — *State v. Whitman*, 14 Rich. L. (S. Car.) 113.

*Texas.* — *Ray v. State*, 4 Tex. App. 450; *Schindler v. State*, 17 Tex. App. 408; *Taylor v. State*, 35 Tex. 97; *Clark v. State*, 28 Tex. App. 189, 19 Am. St. Rep. 817.

*Vermont.* — *Kelley v. Downing*, 69 Vt. 266.

*Virginia.* — *Com. v. Fells*, 9 Leigh (Va.) 613. See also *supra*, this section, *Inability to Agree*.

5. *No Right of Review* — *England.* — *Winsor v. Reg.*, L. R. 1 Q. B. 390.

*United States.* — *U. S. v. Perez*, 9 Wheat. (U. S.) 579; *U. S. v. Shoemaker*, 2 McLean (U. S.) 114; *U. S. v. Morris*, 1 Curt. (U. S.) 36.

*Maryland.* — *Hoffman v. State*, 20 Md. 430. *Massachusetts.* — *Com. v. Purchase*, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; *Hubbard v. Gale*, 105 Mass. 511.

*Michigan.* — *People v. Harding*, 53 Mich. 487.

*New Hampshire.* — *Morrill v. Warner*, 66 N. H. 572.

*New York.* — *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

*Oregon.* — *State v. Reinhart*, 26 Oregon 474.

In *North Carolina* it is stated that in all cases not capital the action of the judge in discharging a jury is not subject to review. *State v. Bass*, 82 N. Car. 570; *State v. Chase*, 82 N. Car. 575. See also *State v. Prince*, 63 N. Car. 529; *State v. Bullock*, 63 N. Car. 570; *State v. Bailey*, 65 N. Car. 426; *State v. Wiseman*, 68 N. Car. 203; *State v. Davis*, 80 N. Car. 384; *State v. McGimsey*, 80 N. Car. 377, 30 Am. Rep. 90; *State v. Washington*, 89 N. Car. 535, 45 Am. Rep. 700; *State v. Twiggs*, 90 N. Car. 685.

6. *Decisions Subject to Review.* — *Hawes v. State*, 88 Ala. 37; *Ned v. State*, 7 Port. (Ala.) 189; *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611; *State v. Ephraim*, 2 Dev. & B. L. (19 N. Car.) 162; *State v. Prince*, 63 N. Car. 529; *Com. v. Cook*, 6 S. & R. (Pa.) 577, 9 Am. Dec. 465; *Mahala v. State*, 10 Yerg. (Tenn.) 533, 31 Am. Dec. 591.

*Must Be Facts upon Which Discretion Exercised.* — It is in the sound discretion of the court to judge of the necessity and propriety of a dis-



only in case of abuse of discretion;<sup>1</sup> and in the absence of a showing in the record that there was such abuse of discretion, it will be presumed that the action of the lower court was right.<sup>2</sup>

**3. Discharge and Substitution of Individual Jurors.** — It is generally held that the court may exercise the power of discharge on the discovery of matters affecting the qualifications or impartiality of particular jurors.<sup>3</sup> In some jurisdictions the court has power to substitute another juror for the juror so found to be disqualified,<sup>4</sup> and in others it is stated that such substitution of a juror is not allowable, but that the whole jury is to be discharged.<sup>5</sup> In still

charge, though there must be facts upon which the discretion may be exercised. *People v. Reagle*, 60 Barb. (N. Y.) 527.

**Must Be Exercised in Accordance with Established Rules.** — The power to discharge a jury without the consent of the prisoner is not an absolute, uncontrolled discretionary power, but it must be exercised in accordance with established legal rules, and sound legal discretion in the application of such rules to the facts and circumstances of each particular case. *Ex p. McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *State v. Shuchardt*, 18 Neb. 454; *Ex p. Maxwell*, 11 Nev. 436; *State v. Pritchard*, 16 Nev. 101; *Dobbins v. State*, 14 Ohio St. 499; *State v. M'Kee*, 1 Bailey L. (S. Car.) 651, 21 Am. Dec. 499.

**1. Discretion Must Be Abused.** — *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *Ray v. State*, 4 Tex. App. 450; *Schindler v. State*, 17 Tex. App. 408; *Varnes v. State*, 20 Tex. App. 107; *Brady v. State*, 21 Tex. App. 659; *Clark v. State*, 28 Tex. App. 189, 19 Am. St. Rep. 817; *O'Connor v. State*, 28 Tex. App. 288; *Rudder v. State*, 29 Tex. App. 262; *Wright v. Com.*, 75 Va. 914.

**2. Presumption in Favor of Action of Lower Court** — *Arkansas*. — *Atkins v. State*, 16 Ark. 568.

*Idaho*. — *State v. Jorgenson*, (Idaho 1893) 32 Pac. Rep. 1129.

*Indiana*. — *Vanderkarr v. State*, 51 Ind. 91; *Fowler v. State*, 85 Ind. 538.

*Kansas*. — *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322.

*Mississippi*. — *Helm v. State*, 66 Miss. 537.

*Tennessee*. — *State v. Waterhouse*, Mart. & Y. (Tenn.) 278; *State v. Brooks*, 3 Humph. (Tenn.) 70.

*Texas*. — *O'Connor v. State*, 28 Tex. App. 288.

**3. Matters Affecting Individual Jurors.** — It has been held proper to exercise the power of discharge where a juror has served on a former trial of the same case, *Taylor v. Combs*, (Ky. 1899) 50 S. W. Rep. 64; where he was related to a party, *State v. Hill*, 46 La. Ann. 736; *State v. Hobgood*, 46 La. Ann. 855; where he was an alien, *Keech v. State*, 15 Fla. 591; *Stone v. People*, 3 Ill. 326; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501; *Norfleet v. State*, 4 Sneed (Tenn.) 340; and where he was prejudiced against capital punishment, *State v. Vaughan*, 23 Nev. 103; or against conviction on circumstantial evidence, *State v. Pritchard*, 16 Nev. 101.

**Illness of Juror.** — See *supra*, this section, *Illness or Death — Of Juror*.

**4. Substitution of Juror** — *Alabama*. — *Bell v. State*, 44 Ala. 393; *Hawes v. State*, 88 Ala. 37; *Yarbrough v. State*, 105 Ala. 43. Compare *State v. Williams*, 3 Stew. (Ala.) 454.

*California*. — *Grady v. Early*, 18 Cal. 111; *People v. Brady*, 72 Cal. 490.

*Georgia*. — *Hook v. Stovall*, 26 Ga. 711; *Jackson v. State*, 51 Ga. 402; *Watkins v. State*, 60 Ga. 601, before introduction of evidence.

*Illinois*. — *Stone v. People*, 3 Ill. 328; *Thomas v. Leonard*, 5 Ill. 556; *Ochs v. People*, 124 Ill. 399, affirming 25 Ill. App. 379.

*Kentucky*. — *Taylor v. Combs*, (Ky. 1899) 50 S. W. Rep. 64. Compare *Shelby v. Com.*, 91 Ky. 563; *O'Brien v. Com.*, 9 Bush (Ky.) 333, 15 Am. Rep. 715.

*Louisiana*. — *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448; *State v. Nash*, 46 La. Ann. 194; *State v. Hobgood*, 46 La. Ann. 855.

*Mississippi*. — *McGuire v. State*, 37 Miss. 369; *Jefferson v. State*, 52 Miss. 767; *Robertis v. State*, 72 Miss. 728.

*Nevada*. — *State v. Pritchard*, 16 Nev. 101.

*North Carolina*. — *State v. Scruggs*, 115 N. Car. 805.

*North Dakota*. — *State v. Hazledahl*, 2 N. Dak. 524.

*Tennessee*. — *De Berry v. State*, 99 Tenn. 207; *Garner v. State*, 5 Yerg. (Tenn.) 160; *Mahala v. State*, 10 Yerg. (Tenn.) 537, 31 Am. Dec. 591; *State v. Curtis*, 5 Humph. (Tenn.) 601; *Lewis v. State*, 3 Head (Tenn.) 143; *Snowden v. State*, 7 Baxt. (Tenn.) 482; *Boyd v. State*, 14 Lea (Tenn.) 161.

*West Virginia*. — *State v. Davis*, 31 W. Va. 390.

See also *Douthitt v. State*, 144 Ind. 400, and *supra*, this section, *Illness or Death — Of Juror*.

**New York.** — By Code Crim. Pro. N. Y., § 371, the discharge of a juror after he is accepted and sworn is discretionary with the trial judge. *People v. Beckwith*, 103 N. Y. 360; *People v. Hughes*, 137 N. Y. 29.

**Effect of Association with Prejudiced Juror.** — That a juror is found to have an opinion after having been accepted and having associated with the other jurors, does not render it necessary to discharge the other jurors as having been affected by association with such juror, they being re-examined and found to be competent. *Ellis v. State*, 92 Tenn. 85; *Taylor v. State*, 11 Lea (Tenn.) 708.

**5. Juror Not to Be Substituted.** — *Grable v. State*, 2 Greene (Iowa) 559; *Gearhart v. Jordan*, 11 Pa. St. 325; *State v. Stephens*, 11 S. Car. 322; *State v. Cason*, 41 S. Car. 531. See also *U. S. v. Watkins*, 3 Cranch (C. C.) 441.

In *Nevada* it is stated that after some of the evidence is given there should be no substitu-



other cases, without considering the question of the substitution of individual jurors, it has been held proper to discharge the whole jury for matters affecting the competency of one member thereof.<sup>1</sup> In some jurisdictions it is held to be discretionary whether to substitute another juror or to discharge the jury.<sup>2</sup>

**4. Effect of Consent.** — Consent to the action of the court in discharging a jury renders such action valid, even though there does not exist such imperious necessity as would otherwise justify it.<sup>3</sup> Consent to the discharge may, it seems, be shown by failure to object thereto<sup>4</sup> or by other circumstances.<sup>5</sup> The consent of the defendant's counsel alone has been held to be insufficient.<sup>6</sup>

**5. Effect of Discharge.** — After the discharge of the jury the court has no longer any right to recall it, nor has it any further power over the case.<sup>7</sup>

**Effect of Unauthorized Discharge.** — It is generally agreed that the discharge of the jury in a criminal case, in the absence of circumstances rendering it proper for the court to exercise a discretion in that behalf, will operate as an acquittal of the defendant.<sup>8</sup>

tion, but the whole jury should be discharged. *State v. Vaughan*, 23 Nev. 103.

In *Georgia*, under a statute providing that newly discovered evidence as to competency can be given before evidence on the main issue is submitted, it was held that a substitution of one juror for another after the evidence was in was improper, and that a mistrial should have been declared. *Simmons v. State*, 88 Ga. 272.

In *Texas* it is stated that in felony cases the juror should not be substituted, but that the jury should be discharged. *Ellison v. State*, 12 Tex. App. 557.

**1. Discharge of Jury.** — *U. S. v. Morris*, 1 Curt. (U. S.) 23; *Simmons v. U. S.*, 142 U. S. 149; *State v. Allen*, 46 Conn. 531; *Com. v. McCormick*, 130 Mass. 61, 39 Am. Rep. 423; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; *People v. Damon*, 13 Wend. (N. Y.) 351; *State v. Bell*, 81 N. Car. 591; *State v. Washington*, 89 N. Car. 335, 90 N. Car. 664; *State v. Cason*, 41 S. Car. 531. See also *Reg. v. Wardle*, C. & M. 647, 41 E. C. L. 351; *Whitmore v. State*, 43 Ark. 271; *Adams v. State*, 99 Ind. 244.

**2. Matter of Discretion.** — *Henry v. Cuvillier*, 3 Mart. N. S. (La.) 524; *State v. Scruggs*, 115 N. Car. 805; *Snowden v. State*, 7 Baxt. (Tenn.) 482; *Garner v. State*, 5 Yerg. (Tenn.) 160; *Taylor v. State*, 11 Lea (Tenn.) 703. And see *Silsby v. Foote*, 14 How. (U. S.) 218.

**3. Effect of Consent — England.** — *Kinloch's Case*, *Foster* 22; *Rex v. Stokes*, 6 C. & P. 151, 25 E. C. L. 327; *Everett v. Youells*, 3 B. & Ad. 23 E. C. L. 91; *Reg. v. Deane*, 5 Cox C. C. 501.

*Alabama.* — *Hughes v. State*, 35 Ala. 351.

*Georgia.* — *Lancon v. State*, 14 Ga. 426; *Spencer v. State*, 15 Ga. 562.

*Indiana.* — *McCorkle v. State*, 14 Ind. 39; *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756; *State v. Wamire*, 16 Ind. 357.

*Michigan.* — *People v. Gardner*, 62 Mich. 307; *People v. White*, 68 Mich. 648.

*Missouri.* — *State v. Baber*, 74 Mo. 293, 41 Am. Rep. 314.

*New York.* — *McFall v. People*, 18 Hun (N. Y.) 382.

*North Carolina.* — *State v. Davis*, 80 N. Car. 384; *State v. Ephraim*, 2 Dev. & B. L. (19 N. Car.) 162; *Matter of Spier*, 1 Dev. L. (12 N. Car.) 491.

*Pennsylvania.* — *Com. v. Fitzpatrick*, 121 Pa. St. 109, 6 Am. St. Rep. 757.

*Tennessee.* — *Elijah v. State*, 1 Humph. (Tenn.) 102.

*Texas.* — *Arcia v. State*, 28 Tex. App. 198.

*Utah.* — *People v. Kerm*, 8 Utah 269.

*Virginia.* — *Williams v. Com.*, 2 Gratt. (Va.) 567, 44 Am. Dec. 403.

See also *U. S. v. Randall*, 2 Cranch (C. C.) 412.

**4. Assent by Implication.** — *Kingen v. State*, 46 Ind. 132; *Long v. State*, 46 Ind. 582.

**5.** In *Stewart v. State*, 15 Ohio St. 155, consent to a discharge on the part of the defendant was implied from his having made an objection to proceeding with a disqualified juror, the effect of which was to render a discharge necessary. See to the same effect *Henning v. State*, 160 Ind. 386.

It was, however, held that consent to the continuance of a case did not involve a consent to the discharge of the jury. *Swink v. Bohn*, 6 Colo. App. 517.

**6. Consent of Counsel.** — *U. S. v. Shaw*, 59 Fed. Rep. 110; *State v. Wamire*, 16 Ind. 357.

**Entry of Consent on Minutes.** — See *Lancon v. State*, 14 Ga. 426; *Moore v. State*, 3 Heisk. (Tenn.) 493.

**Where the Record Does Not Show** a discharge of the jury without the consent of the defendant it will be presumed that the discharge was with his consent. *People v. Curtis*, 76 Cal. 57; *Morgan v. State*, 3 Sneed (Tenn.) 475.

**Asking Party to Consent to Discharge.** — Where the court stated to the jurors that he would discharge them if the defendant would consent, and then asked the defendant's attorney in the presence of the jury whether he would consent to the discharge, judgment on a verdict rendered thereafter, on the refusal of the defendant to consent to the discharge, was reversed. *Thomas v. State*, (Ala. 1900) 27 So. Rep. 315.

**7. Effect of Discharge.** — *Bond v. Wood*, 69 Ill. 282; *Richards v. Page*, 81 Me. 563; *West v. West*, etc., R. Co., 61 Miss. 536; *State v. Dawkins*, 32 S. Car. 177; *Mills v. Com.*, 7 Leigh (Va.) 751. For a further discussion of this matter, see the title VERDICT.

**8. Effect of Improper Discharge — Alabama.** — *Cobia v. State*, 16 Ala. 781; *McCauley v. State*, 26 Ala. 135; *Grogan v. State*, 44 Ala. 9; *Bell*



**XII. GRAND JURIES -- 1. Power of Court to Summon or Impanel Grand Jury** — **Inherent Power of Court.** — In the absence of any statute upon the subject, a court which has all the common-law powers incident to a court of criminal jurisdiction has inherent power to procure the attendance of a grand jury.<sup>1</sup>

**Power Conferred by Statute.** — In some states the power of the court to summon a grand jury is expressly conferred by statute.<sup>2</sup>

**Limitations upon Power.** — It is to be observed that a court has no jurisdiction to impanel a grand jury except in accordance with the provisions of law, and that accordingly, when a court undertakes to impanel a grand jury without observing the requirements of law it is acting in excess of its jurisdiction, and the body so impaneled is not a grand jury.<sup>3</sup>

**2. Qualifications, Grounds of Challenge, and Exemptions** — *a. IN GENERAL.* — According to the common law it was required that grand jurors should be lawful liege freemen, and the English statutes require several additional qualifications.<sup>4</sup>

**General and Special Grounds of Disqualification and Exception.** — In the statutes and in the opinions of the courts there is no well-defined distinction between grounds

*v. State*, 44 Ala. 393; *Ex p. Clements*, 50 Ala. 459; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *Ned v. State*, 7 Port. (Ala.) 187.

*Arkansas.* — *Atkins v. State*, 16 Ark. 568; *Whitmore v. State*, 43 Ark. 271; *State v. Ward*, 48 Ark. 36, 3 Am. St. Rep. 213.

*California.* — *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *People v. Hunckeler*, 48 Cal. 331; *People v. Webb*, 38 Cal. 467; *People v. Curtis*, 76 Cal. 57.

*Connecticut.* — *State v. Allen*, 46 Conn. 531.

*Indiana.* — *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Weinzorpfli v. State*, 7 Blackf. (Ind.) 186; *Miller v. State*, 8 Ind. 325; *McCorkle v. State*, 14 Ind. 39; *State v. Wamire*, 16 Ind. 357; *State v. Leunig*, 42 Ind. 541; *Adams v. State*, 99 Ind. 244.

*Iowa.* — *State v. Calendine*, 8 Iowa 288.

*Kentucky.* — *O'Brian v. Com.*, 9 Bush (Ky.) 333, 15 Am. Rep. 715, reversing 6 Bush (Ky.) 568; *Robinson v. Com.*, 88 Ky. 386.

*Michigan.* — *People v. Jones*, 48 Mich. 554.

*Mississippi.* — *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Helm v. State*, 66 Miss. 537; *Whitten v. State*, 61 Miss. 717.

*Nebraska.* — *State v. Shuchardt*, 18 Neb. 454.

*New York.* — *Ah King v. People*, 5 Hun (N. Y.) 297; *Grant v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 527.

*North Carolina.* — *State v. Garrigues*, 1 Hayw. (2 N. Car.) 241; *State v. Prince*, 63 N. Car. 529, Matter of Spier, 1 Dev. L. (12 N. Car.) 491.

*Ohio.* — *Hines v. State*, 24 Ohio St. 134; *Mitchell v. State*, 42 Ohio St. 383.

*Pennsylvania.* — *Com. v. Hetrick*, 1 Woodw. (Pa.) 288.

*Tennessee.* — *State v. Connor*, 5 Coldw. (Tenn.) 311; *Hines v. State*, 8 Humph. (Tenn.) 17.

*Texas.* — *Powell v. State*, 17 Tex. App. 346; *Pizano v. State*, 20 Tex. App. 139, 54 Am. Rep. 511.

See, however, *U. S. v. Bigelow*, 3 Mackey (D. C.) 393. And see *Reg. v. Charlesworth*, 1 B. & S. 460, 101 E. C. L. 460, 8 Jur. N. S. 1091, 9 Cox C. C. 44. See also the title JEOPARDY, ante, p. 580.

**Waiver.** — An improper discharge of a juror is not waived by consenting to proceed with

eleven jurors. *Mahoney v. San Francisco*, etc., R. Co., 110 Cal. 471.

1. *Miller v. People*, 183 Ill. 423; *Com. v. Burton*, 4 Leigh (Va.) 645, 26 Am. Dec. 337.

**United States Court of Inferior Jurisdiction.** — A court created by a statute of the United States and not by the constitution, and whose criminal jurisdiction is limited to offenses below the grade of felony, has no power to impanel a grand jury where no such power is conferred by the act creating the court. *Ex p. Farley*, 40 Fed. Rep. 66, which case was decided under Act Cong. March. 1, 1889, creating a court at Muskogee in the Indian Territory.

**2. Statutory Power to Summon Grand Jury.** — See the statutes of the various states, and *Gardner v. People*, 4 Ill. 83.

**Statute Conferring Discretion upon Court.** — See *Jones v. State*, 18 Neb. 401.

3. *Bruner v. San Francisco*, 92 Cal. 239.

**A Statute Which Takes Away from a Court Its Criminal Jurisdiction** by implication deprives the court of its authority to impanel a grand jury. *State v. Doherty*, 60 Me. 504.

**4. Qualifications at Common Law in General.** — *Bac. Abr.*, tit. Indictment, C; *Jones v. State*, 2 Blackf. (Ind.) 475; *Webb v. State*, 1 Shannon Tenn. Cas. 427.

**Conscientious Scruples Against Death Penalty Disqualification.** — *Jones v. State*, 2 Blackf. (Ind.) 475. See also *Gross v. State*, 2 Ind. 329.

**Convicts.** — At the common law one convicted of crime was disqualified. *Musick v. People*, 40 Ill. 268, per Walker, C. J. And in *Louisiana*, by a statute, a grand juror shall not be a person who is "charged with any crime or offense." *State v. Thibodeaux*, 48 La. Ann. 600.

**"Good and Lawful Men"** are men free from objection such as bias, prejudice, or other objection affecting their fairness or impartiality. In other words, grand jurors must be indifferent between the parties. *Patrick v. State*, 16 Neb. 330. See also *Webb v. State*, 1 Shannon Tenn. Cas. 427.

**Inability to Read and Write English** is a disqualification. *State v. Furco*, 51 La. Ann. 1082.

**Insane Persons.** — Idiots, lunatics, and other insane persons are not qualified. *Betts v.*



of disqualification and grounds of challenge, and though technically there may be such distinction it has not always been adhered to. A grand juror may be disqualified because of his age, citizenship, etc., and also because of special reasons which, at the instance of a party accused, may amount to a disqualification to sit in such party's case. Such special reasons do not amount to a general disqualification and do not exclude the juror from the panel, but only render him subject to challenge by a particular person and preclude him from acting in a particular case.<sup>1</sup>

**Disregard of Society, Sect, or Denomination.** — A grand jury should be selected with a single eye to the qualifications pointed out by the statute, without inquiry whether the individuals selected do or do not belong to any particular society, sect, or denomination, social, benevolent, political, or religious.<sup>2</sup>

**Qualification as of What Time.** — The law is well settled that the juror must be qualified at the time he performs service as such, and any inquiry into his qualifications for jury duty anterior to that time becomes entirely irrelevant in any issue questioning his qualifications at the time he acts.<sup>3</sup>

**Powers of Foreman After Challenge Sustained.** — Where a foreman possesses the requisite general qualifications, but has been challenged because of his incompetency to sit in a particular case, he may nevertheless, as foreman, sign an indictment found in such a case by the proper number of grand jurors, whether he concurs in such indictment or not; and where it does not appear that he concurred in the indictment, or that he took any part in the proceedings which resulted in its finding, and in the absence of any showing to the contrary, it will be presumed that he merely performed the statutory duty of signing the indictment and that he did not take any part in its finding.<sup>4</sup>

**b. STATUTORY PROVISIONS.** — In many states statutes have been enacted providing who shall be qualified to serve as grand jurors and enumerating the classes of persons who shall be disqualified to serve as such, and also providing the grounds upon which the grand jurors shall be subject to challenge;<sup>5</sup> and

State, 66 Ga. 515; *Territory v. Hart*, 7 Mont. 42.

**Male Persons.** — In jurisdictions where the common-law rule prevails, grand jurors must be male citizens. *State v. Brown*, 10 Ark. 78; *Betts v. State*, 66 Ga. 515.

**Washington Statute.** — In *Rosencrantz v. Territory*, 2 Wash. Ter. 267, it was held, under a statute providing that electors and householders should be competent as grand jurors, that married women living with their husbands were qualified.

**Polygamist.** — In *U. S. v. Reynolds*, 1 Utah 226, it was held that where a grand jury is being drawn which is to investigate violations of the law against polygamy, persons who have conscientious scruples against indicting polygamists may be excluded upon the broad ground that they would not make good jurymen to enforce the law. And subsequently in *Clawson v. U. S.*, 114 U. S. 477, polygamists were excluded under Act Cong. March 22, 1882, § 5, providing that "in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States," polygamists may be challenged.

**Quakers** may serve as grand jurors where, by statute, it is permissible to administer an affirmation to them. *Com. v. Smith*, 9 Mass. 107.

**Villein.** — At the common law a villein was disqualified. *Musick v. People*, 40 Ill. 268, *per Walker, C. J.*

1. *U. S. v. White*, 5 Cranch (C. C.) 457, 28 Fed. Cas. No. 16,679; *U. S. v. Williams*, 1 Dill. (U. S.) 485, 28 Fed. Cas. No. 16,716.

2. *People v. Jewett*, 3 Wend. (N. Y.) 314.

3. **Qualifications as of What Time.** — *Collins v. State*, 31 Fla. 574; *State v. Wilcox*, 104 N. Car. 847; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Armsby v. People*, 2 Thomp. & C. (N. Y.) 157; *State v. Williams*, 2 Hill L. (S. Car.) 381. *Compare State v. Middleton*, 5 Port. (Ala.) 484; *State v. Ligon*, 7 Port. (Ala.) 167, in which cases it was held that where a grand juror is a freeholder or householder when his name is returned to the clerk by the sheriff, he need not continue to be a freeholder or householder until the time of the finding of the indictment.

4. *State v. Lightfoot*, 107 Iowa 344.

5. **Statutory Qualifications and Grounds of Challenge.** — See the statutes of the various states and territories and of the United States, and also the following cases:

*United States.* — *U. S. v. Hammond*, 2 Woods (U. S.) 197.

*Alabama.* — *Fowler v. State*, 100 Ala. 96.

*Arkansas.* — *State v. Brown*, 10 Ark. 78.

*Florida.* — *Kitrol v. State*, 9 Fla. 9; *Collins v. State*, 31 Fla. 574.

*Georgia.* — *Betts v. State*, 66 Ga. 515.

*Indiana.* — *Hardin v. State*, 22 Ind. 347.

*Kansas.* — *State v. Stunkle*, 41 Kan. 456.

*Kentucky.* — *Com. v. Pritchett*, 11 Bush (Ky.) 277; *Com. v. Smith*, 10 Bush (Ky.) 476.

*Louisiana.* — *State v. Thibodeaux*, 48 La. Ann. 600; *State v. Jones*, 8 Rob. (La.) 616.

*Michigan.* — *People v. Smith*, 118 Mich. 73.

*Missouri.* — *State v. Holcomb*, 86 Mo. 371.



it has been very generally held that where the qualifications and disqualifications of grand jurors are enumerated in a statute there can be no grounds of disqualification except such as are named in the statute,<sup>1</sup> and that statutory grounds of challenge are the only ones upon which an accused person can insist.<sup>2</sup> Nevertheless the qualifications of grand jurors are in many respects fixed by the common law,<sup>3</sup> and the excusal of one called as a grand juror is largely in the discretion of the court. An accused person cannot complain that the excusal was without sufficient reason, if the individuals selected and sworn are in all respects unobjectionable.<sup>4</sup>

**Grand Juror Must Be Qualified in All Respects.** — Where a statute provides several qualifications, each grand juror must possess all of such qualifications, and if one is disqualified in any respect he is not a competent juror.<sup>5</sup>

**Technical Objections.** — Where the statute is substantially complied with and a grand jury is composed of upright and intelligent men, mere technical objections to them will not be favored.<sup>6</sup>

**c. INFANTS.** — A rule of the common law which has been embodied in the statutes of most states is that a grand juror must be over the age of twenty-one years;<sup>7</sup> but it is immaterial that a grand juror was disqualified by reason of his infancy when the jury list was prepared if it appears that he was qualified when he subsequently sat as a grand juror.<sup>8</sup>

**d. ALIENS.** — By the common law, and in most if not all states by statute, an alien is disqualified to serve as a grand juror.<sup>9</sup>

*Montana.* — Territory v. Harding, 6 Mont. 323.

*Nevada.* — State v. Millain, 3 Nev. 409.

*Ohio.* — Doyle v. State, 17 Ohio 222; State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478.

*Tennessee.* — State v. Duncan, 7 Yerg. (Tenn.) 271; State v. Bryant, 10 Yerg. (Tenn.) 527; State v. Chairs, 9 Baxt. (Tenn.) 196.

*Texas.* — Martin v. State, 22 Tex. 214; Rainey v. State, 19 Tex. App. 479; Owens v. State, 25 Tex. App. 552; Reed v. State, 1 Tex. App. 1.

*Virginia.* — Chahoon v. Com., 20 Gratt. (Va.) 733; Moran v. Com., 9 Leigh (Va.) 651; Com. v. Willson, 2 Leigh (Va.) 739.

**Person Competent to Serve as Traverse Juror.** — In *Maine* a person competent to serve as a traverse juror is competent to serve as a grand juror. State v. Quimby, 51 Me. 395.

**Disloyalty to the United States** is a cause of disqualification and challenge in the courts of the United States. U. S. v. Hammond, 2 Woods (U. S.) 197; U. S. v. Gale, 109 U. S. 65.

In *West Virginia* likewise, loyalty is prescribed as a qualification of grand jurors. Bradford v. State, 4 W. Va. 763.

**Keeper of an Ordinary.** — In *Virginia* the keeper of an ordinary is disqualified to serve as a grand juror. Com. v. Willson, 2 Leigh (Va.) 739.

**Owner or Occupier of Mill.** — In *Virginia* the owner or occupier of a grist mill is disqualified to serve as a grand juror. Com. v. Long, 2 Va. Cas. 318; Moran v. Com., 9 Leigh (Va.) 651.

**1. None but Statutory Grounds of Disqualification.** — Fowles v. State, 100 Ala. 96; Betts v. State, 66 Ga. 515; Com. v. Smith, 9 Mass. 107; People v. Jewett, 3 Wend. (N. Y.) 314; State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478; State v. Chairs, 9 Baxt. (Tenn.) 196; Owens v. State, 25 Tex. App. 552.

**2. None but Statutory Grounds of Challenge.** —

People v. Southwell, 46 Cal. 142; State v. Gut, 13 Minn. 341; State v. Holcomb, 86 Mo. 371.

3. Com. v. Smith, 9 Mass. 107.

**4. Defendant Cannot Object to Excusal of Grand Jurors.** — State v. Kelly, 1 Nev. 224; State v. Larkin, 11 Nev. 326. See also U. S. v. Gale, 109 U. S. 65; U. S. v. Jones, 69 Fed. Rep. 973; People v. Colson, 49 Cal. 679; People v. Ather-ton, 51 Cal. 495; People v. Murphy, 45 Cal. 143; People v. Bradford, 57 N. H. 198; State v. Easter, 30 Ohio St. 543, 27 Am. Rep. 478.

5. Kitrol v. State, 9 Fla. 9.

6. Roby v. State, 74 Ga. 812.

**7. Infants.** — See the statutes of the various states, and the following cases: State v. Brown, 10 Ark. 78; Betts v. State, 66 Ga. 515; Com. v. Smith, 10 Bush (Ky.) 476; Territory v. Hart, 7 Mont. 42; State v. Perry, 122 N. Car. 1018; Clifford v. State, 3 Shannon Tenn. Cas. 501.

8. State v. Perry, 122 N. Car. 1018.

**9. Disqualification of Aliens.** — See the statutes of the various states, and the following cases:

*Arkansas.* — State v. Brown, 10 Ark. 78.

*California.* — People v. Roberts, 6 Cal. 214.

*Georgia.* — Betts v. State, 66 Ga. 515; Reich v. State, 53 Ga. 73, 21 Am. Rep. 265.

*Illinois.* — Musick v. People, 40 Ill. 268.

*Indiana.* — State v. Taylor, 8 Blackf. (Ind.) 178.

*Louisiana.* — State v. Causey, 43 La. Ann. 897; State v. Griffin, 38 La. Ann. 502; State v. McGee, 36 La. Ann. 206; State v. Parks, 21 La. Ann. 252; State v. Guillois, 44 La. Ann. 317.

*Montana.* — Territory v. Hart, 7 Mont. 42. See also Territory v. Clayton, 8 Mont. 1; Territory v. Harding, 6 Mont. 323.

*Virginia.* — Com. v. Cherry, 2 Va. Cas. 20.

*Wisconsin.* — State v. Cole, 17 Wis. 674.

**Grand Juror Need Not Be Native.** — A naturalized citizen of the United States or native citi-



**Evidence of Naturalization.** — The declaration of a juror that he is a naturalized citizen should be received by the court as *prima facie* true, so as to dispense with proof by the actual production of his papers.<sup>1</sup>

**e. RESIDENTS OF STATE.** — In some states it is required by statute that a grand juror shall have lived within the state for a certain length of time immediately preceding the finding and return of the indictment.<sup>2</sup>

**f. RESIDENTS OF COUNTY.** — Grand jurors must be residents of the county, this being a requisite at common law and in many states by statute.<sup>3</sup>

**g. QUALIFIED ELECTORS.** — In some states it is a statutory requirement that grand jurors shall be qualified electors or voters.<sup>4</sup>

**h. TAXPAYERS.** — A grand juror need not be a taxpayer, or, if one, need not have paid his taxes, unless it is so required by statute.<sup>5</sup>

**i. FREEHOLDERS OR HOUSEHOLDERS.** — A grand juror need not be a freeholder or householder in the absence of any statute requiring it;<sup>6</sup> but in many

zen of any other state is qualified to serve as a grand juror in a state in which he resides. *Com. v. Towles*, 5 Leigh (Va.) 743.

1. *People v. Roberts*, 6 Cal. 214. See also *People v. Freeland*, 6 Cal. 96, 65 Am. Dec. 489; *State v. Guillory*, 44 La. Ann. 317.

2. *Doyle v. State*, 17 Ohio 222. See also *Davidson v. People*, 90 Ill. 221; *Harless v. U. S.*, 1 Morr. (Iowa) 169.

**Mere Temporary Absence from the State** on business, without any intention to change his domicile, does not render a grand juror incompetent. *State v. Alexander*, 35 La. Ann. 1100.

3. **Residents of County.** — 2 Hawk. P. C., c. 25, § 16. See also the statutes of the various states, and the following cases:

*Arkansas.* — *State v. Brown*, 10 Ark. 78.

*Georgia.* — *Betts v. State*, 66 Ga. 515.

*Indiana.* — *Hudson v. State*, 1 Blackf. (Ind.) 317.

*Iowa.* — *State v. Edgerton*, 100 Iowa 63; *State v. Russell*, 90 Iowa 569; *State v. Pierce*, 90 Iowa 506.

*Louisiana.* — *State v. Rowland*, 36 La. Ann. 193.

*Mississippi.* — *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Byrd v. State*, 1 How. (Miss.) 163.

*Montana.* — *Territory v. Harding*, 6 Mont. 323.

*North Carolina.* — *State v. Wilcox*, 104 N. Car. 847.

*Oklahoma.* — *Peters v. U. S.*, 2 Okla. 138; *Keith v. Territory*, 8 Okla. 307.

*Pennsylvania.* — *White v. Com.*, 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

*Texas.* — *Spito v. State*, (Tex. Crim. 1893) 24 S. W. Rep. 97.

*Utah.* — *Territory v. Woolsey*, 3 Utah 470.

*Virginia.* — *Moran v. Com.*, 9 Leigh (Va.) 651.

**Time of Residence.** — In *Georgia* grand jurors must have resided in the county for six months. *Betts v. State*, 66 Ga. 515.

In *Louisiana* they must have resided within the parish for the twelve months next preceding their service as grand jurors. *State v. Rowland*, 36 La. Ann. 193.

**The Removal of a Grand Juror from the County** after his name has been drawn, but before his service as a grand juror, disqualifies him. *State v. Wilcox*, 104 N. Car. 847.

**The Record.** — It must appear of record that the grand jurors were drawn from the body of

the county. *White v. Com.*, 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

It is sufficient if the record shows that they were householders of the county. *Hudson v. State*, 1 Blackf. (Ind.) 317.

In *Keith v. Territory*, 8 Okla. 307, it was held that a recital in the indictment that the grand jurors were duly summoned, impaneled, and sworn in and for the body of the county, is sufficient.

4. **Qualified Electors.** — See the statutes of the various states, and the following cases:

*Florida.* — *Adams v. State*, 28 Fla. 511.

*Louisiana.* — *State v. Parks*, 21 La. Ann. 252.

*Maryland.* — *Downs v. State*, 78 Md. 128.

*Nebraska.* — *Jones v. State*, 18 Neb. 401; *Polin v. State*, 14 Neb. 501.

*Ohio.* — *Doyle v. State*, 17 Ohio 222; *State v. Elson*, 45 Ohio St. 648; *Shoemaker v. State*, 12 Ohio 43.

*Wisconsin.* — *State v. Cole*, 17 Wis. 674.

5. **At Common Law Need Not Be Taxpayers.** — *State v. Williams*, 35 S. Car. 344; *U. S. v. Benson*, 31 Fed. Rep. 896. See also *State v. Rife*, 18 R. I. 596.

**Statutory Provisions.** — In some states, by statute, grand jurors must be taxpayers. *State v. Donaldson*, 43 Kan. 431; *Territory v. Harding*, 6 Mont. 323. And in others they must have paid their taxes. *State v. Durham Fertilizer Co.*, 111 N. Car. 658; *State v. Perry*, 122 N. Car. 1018.

In *Florida*, by statute, grand jurors must have paid their last assessed poll tax. *Collins v. State*, 31 Fla. 574.

6. **Need Not Be Freeholder unless Required by Statute.** — *Palmore v. State*, 29 Ark. 248; *People v. Jewett*, 6 Wend. (N. Y.) 387; *State v. Williams*, 35 S. Car. 344.

**Uncertainty as to Common-law Rule.** — The authorities leave it somewhat doubtful whether it was necessary at common law for grand jurors to be freeholders. In 2 Hale's P. C. 155, it is declared that they ought to be freeholders, but it is admitted that the amount of the freehold required is altogether uncertain. See also 4 Black. Com. 302, wherein it is said that grand jurors "ought to be freeholders, but to what amount is uncertain, which seems to be *casus omissus*." In 1 Chitty's Crim. Law 308, it is declared on the authority of Hale and Blackstone that "it has been frequently taken for granted that none but freeholders can be returned on the panel." In 2 Hawk. P. C.,



states statutes have been enacted requiring grand jurors to be freeholders or householders.<sup>1</sup>

*j. PRIOR JURY SERVICE.* — In some states statutes have been enacted forbidding the name of a person once drawn as a juror to be again put into the jury box within a prescribed time, but it has been held that such provisions do not so far disqualify a person whose name is drawn within that time as to render invalid an indictment found by a grand jury of which a person so drawn is a member.<sup>2</sup>

*k. IMPARTIALITY — PRIOR KNOWLEDGE OR OPINION — (1) In General.* — It is a rule founded upon familiar principles of justice that no one should be permitted to serve as a grand juror unless he is a good and lawful man, who will impartially and faithfully perform his duties as a grand juror,<sup>3</sup> and it is a general rule that grand jurors should not be interested in the matters which they are called upon to investigate,<sup>4</sup> but the true rule is that a grand juror is not disqualified to act in any particular case where he is not interested beyond that common interest which every member of society feels in the prosecution of lawbreakers.<sup>5</sup>

(2) *Prosecutor or Complainant — Victim of Crime.* — As a general proposition, the victim of a crime should not be permitted to act as a grand juror in investigating such crime,<sup>6</sup> but it has been generally held that a relative of

c. 25, § 19 *et seq.* it is said that it is doubtful whether there is any necessity by the common law or by statute that a grand juror should be a freeholder. See further, for a review of ancient writings upon this subject, *People v. Jewett*, 6 Wend. (N. Y.) 388.

1. *Statutes Requiring Grand Jurors to Be Household-ers or Freeholders.* — See the statutes of the various states, and the following cases:

*Alabama.* — *Fowler v. State*, 100 Ala. 96; *State v. Middleton*, 5 Port. (Ala.) 484.

*Arkansas.* — *State v. Brown*, 10 Ark. 78.

*Indiana.* — *State v. Herndon*, 5 Blackf. (Ind.) 75; *Wills v. State*, 69 Ind. 86; *Hardin v. State*, 22 Ind. 347; *State v. McGinley*, 4 Ind. 7.

*Mississippi.* — *Barney v. State*, 12 Smed. & M. (Miss.) 68.

*New Jersey.* — *State v. Rockafellow*, 6 N. J. L. 332.

*Ohio.* — *Shoemaker v. State*, 12 Ohio 43.

*Tennessee.* — *State v. Byrant*, 10 Yerg. (Tenn.) 527; *State v. Duncan*, 7 Yerg. (Tenn.) 271.

*Texas.* — *Martin v. State*, 22 Tex. 214; *Stanley v. State*, 16 Tex. 557; *Jackson v. State*, 11 Tex. 261.

*Virginia.* — *Com. v. Carter*, 2 Va. Cas. 319; *Wysor v. Com.*, 6 Gratt. (Va.) 711; *Com. v. Cunningham*, 6 Gratt. (Va.) 695; *Com. v. Helmondollar*, 4 Gratt. (Va.) 536; *Moore v. Com.*, 9 Leigh (Va.) 639; *Kerby v. Com.*, 7 Leigh (Va.) 747; *Com. v. Burton*, 4 Leigh (Va.) 645, 26 Am. Dec. 337; *Com. v. Reynolds*, 4 Leigh (Va.) 663; *Com. v. Burcher*, 2 Rob. (Va.) 826.

*Washington.* — *Harland v. Territory*, 3 Wash. Ter. 131.

*West Virginia.* — *State v. Henderson*, 29 W. Va. 147.

Both *Householder or Freeholder.* — Where it is required that a grand juror shall be a householder or a freeholder, he need not be both. *Fowler v. State*, 100 Ala. 96. But *contra* in *Indiana* under Act Ind. 1875. *Wills v. State*, 69 Ind. 286.

2. *Prior Jury Service.* — *Owen v. State*, 31 Ala. 387; *State v. Elson*, 45 Ohio St. 648;

*Bloodworth v. State*, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546; *State v. Cox*, 52 Vt. 471. See also *Barger v. State*, 6 Blackf. (Ind.) 188; *State v. Ward*, 60 Vt. 142.

*Computation of Time.* — *State v. Ward*, 60 Vt. 142. See also *U. S. v. Reeves*, 3 Woods (U. S.) 199.

*Statute Inapplicable to Grand Jurors.* — *State v. Brown*, 28 Oregon 147. See also *U. S. v. Clark*, 46 Fed. Rep. 633; *U. S. v. Reeves*, 3 Woods (U. S.) 199. See farther, to the effect that a statute rendering petit jurors incompetent for this cause does not apply to grand jurors, *Loeb v. State*, 75 Ga. 258.

3. *Grand Jurors Must Be Impartial.* — *Jones v. State*, 2 Blackf. (Ind.) 475; *State v. Billings*, 77 Iowa 417; *Com. v. Brown*, 147 Mass. 585, 9 Am. St. Rep. 736; *Plymouth Borough*, 167 Pa. St. 612.

4. *Com. v. Brown*, 147 Mass. 585, 9 Am. St. Rep. 736; *Plymouth Borough*, 167 Pa. St. 612.

5. *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818.

*Taxable Inhabitant of Town Receiving Fine Not Disqualified.* — *Com. v. Ryan*, 5 Mass. 90.

*Subscriber to Funds for Prosecution of Crime Not Disqualified.* — *Koch v. State*, 32 Ohio St. 353.

*Prosecution for Violation of Election Laws — Political Partisan Not Disqualified.* — *U. S. v. Eagan*, 30 Fed. Rep. 608.

*Grand Juror in Favor of Lynching Defendant.* — A grand juror is not disqualified because he has heard talk of lynching the defendant, but it would be otherwise if he had actually favored such lynching. *State v. Billings*, 77 Iowa 417.

*Prosecuting Attorneys.* — Neither the prosecuting attorney of a county nor a special prosecuting attorney is qualified. *People v. Lauder*, 82 Mich. 109.

3. *Victim of Crime.* — *Com. v. Brown*, 147 Mass. 585, 9 Am. St. Rep. 736; *People v. Smith*, 118 Mich. 73; *Territory v. Hart*, 7 Mont. 42. See also *Johnson v. State*, 62 Ga. 179.



such victim is not disqualified.<sup>1</sup>

(3) *Interest in Defendant's Favor.* — It is not a good objection to an indictment that it was found by a grand jury one of whose members was interested in the defendant's favor by reason of his relationship to the defendant or otherwise.<sup>2</sup>

(4) *Prior Knowledge or Opinion of Guilt.* — The rule at common law was that a grand juror was not disqualified or subject to challenge because of knowledge which he possessed of the commission of a crime, or because of opinions which he had expressed as to the guilt of a person accused of crime, where it appeared that his knowledge or opinions were not of such a character as to prevent an impartial and fair consideration of the charges which he was called upon to investigate. This rule, which prevails in most states, is based upon the fact that grand jurors, in finding indictments, may act upon their own knowledge or upon the knowledge of one or more of their number.<sup>3</sup> But in some cases this objection to grand jurors has been allowed,<sup>4</sup> and in some states statutes have been enacted permitting the objection to be made.<sup>5</sup>

**L. EXEMPTIONS** — (1) *Statutory Provisions.* — In the various states statutes have been generally enacted exempting persons who pursue certain vocations or persons of a certain age from serving as grand jurors.<sup>6</sup>

**Stockholder of Burglarized Bank Not Disqualified.** — *Rowland v. Com.*, 82 Pa. St. 306, 22 Am. Rep. 754.

**1. Relative of Victim of Crime.** — *State v. Russell*, 90 Iowa 569; *State v. Sharp*, 110 N. Car. 604; *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478; *State v. Maddox*, 1 Lea (Tenn.) 671; *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818. See also *Lascalles v. State*, 90 Ga. 347, 35 Am. St. Rep. 216; *Middletown v. Ames*, 7 Vt. 166.

**Objections Waived.** — The objection that the prosecutor was a member of the grand jury is waived unless it is taken seasonably. *Johnson v. State*, 62 Ga. 179, holding that such objection is not good in arrest of judgment.

**2. Grand Juror Interested in Defendant's Favor.** — *Com. v. Ryan*, 5 Mass. 90; *State v. Maddox*, 1 Lea (Tenn.) 671; *State v. Newfane*, 12 Vt. 424. See also *State v. Russell*, 90 Iowa 569.

**3. Prior Knowledge or Opinion Immaterial.** — *United States*, — *U. S. v. Clune*, 62 Fed. Rep. 798; *U. S. v. Williams*, 1 Dill. (U. S.) 485; *U. S. v. White*, 5 Cranch. (C. C.) 457, 28 Fed. Cas. No. 16,679; *U. S. v. Belvin*, 46 Fed. Rep. 381. *Alabama*. — *State v. Hughes*, 1 Ala. 658.

*Connecticut*. — *State v. Hamlin*, 47 Conn. 95, 36 Am. Rep. 54.

*Georgia*. — *Williams v. State*, 69 Ga. 12; *Lee v. State*, 69 Ga. 705, *Betts v. State*, 66 Ga. 515.

*Illinois*. — *Musick v. People*, 40 Ill. 268.

*Indiana*. — See *Jones v. State*, 2 Blackf. (Ind.) 475.

*Massachusetts*. — *Com. v. Woodward*, 157 Mass. 516, 34 Am. St. Rep. 302; *Tucker's Case*, 8 Mass. 286.

*Nevada*. — *State v. Millain*, 3 Nev. 409.

*Ohio*. — *State v. Easter*, 30 Ohio St. 549, 27 Am. Rep. 478; *Koch v. State*, 32 Ohio St. 353, *Tennessee*. — *State v. Chairs*, 9 Baxt. (Tenn.) 196.

*Wisconsin*. — *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678.

**Former Member of Petit Jury.** — Where a person is indicted for perjury, the fact that a member of the grand jury that found the indictment had previously been one of the petit

jury that tried the action in which the alleged perjury was committed is not a good ground for a plea in abatement. *State v. Wilcox*, 104 N. Car. 847.

**Member of Jury on Former Trial of Defendant.** — Where it is made to appear by plea in abatement that one of the grand jurors who returned the indictment had served on a jury which rendered a verdict of guilty against the prisoner for the same offense on a former trial, the plea will be sustained and the indictment dismissed. *U. S. v. Jones*, 31 Fed. Rep. 725. But see *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678.

**Justice of the Peace.** — A justice of the peace before whom a preliminary examination has been held and who has committed an accused person to answer the charge is not disqualified. *State v. Chairs*, 9 Baxt. (Tenn.) 196. But see *contra*, *State v. Lightfoot*, 107 Iowa 344.

**4. U. S. v. Burr**, 1 Burr's Trial 38; *People v. Jewett*, 3 Wend. (N. Y.) 314; *Com. v. Clark*, 2 Browne (Pa.) 323. See also *State v. Gillick*, 7 Iowa 287, wherein the court cited *Co. Litt. 155b*, 2 Hawk. P. C., c. 43, § 28, and *Ex p. Vermilyea*, 6 Cow. (N. Y.) 555. See further *People v. Manahan*, 32 Cal. 68.

**5. People v. Northey**, 77 Cal. 618; *People v. Manahan*, 32 Cal. 68; *State v. Shelton*, 64 Iowa 335; *State v. Osborne*, 61 Iowa 330; *State v. Billings*, 77 Iowa 417; *State v. Gillick*, 7 Iowa 287; *State v. Lightfoot*, 107 Iowa 344. See also *Territory v. Hart*, 7 Mont. 42.

**Prosecutor.** — A witness for the prosecution is not a "prosecutor" within the *Nevada* statute providing that a challenge to a grand juror may be interposed on the ground that he "is the prosecutor upon a charge or charges against the defendant." *State v. Millain*, 3 Nev. 409.

In *Montana* "a witness on the part of the prosecution" who has been served with process, or is bound by a recognizance as such, is expressly subject to challenge. *Territory v. Hart*, 7 Mont. 42.

**6. Statutory Exemption from Grand Jury Service.** — See the statutes of the various states.



**None but Statutory Exemptions.** — Where a person is otherwise qualified to act as a grand juror he is not exempt from grand-jury service unless he belongs to one of the classes of persons who are exempted by statute.<sup>1</sup>

(2) *Exemption Not Disqualification.* — It has been universally held that where persons who belong to certain classes of individuals are exempted by statute from serving as grand jurors, such exemption is a personal privilege which may be waived, and that although such persons are not compellable to serve they are not disqualified.<sup>2</sup> Thus, where it is provided by statute that persons over a certain age shall be exempt from grand-jury service, they may nevertheless waive the exemption and are not disqualified.<sup>3</sup>

### m. EFFECT OF DISQUALIFICATION OF ONE OR MORE GRAND JURORS —

(1) *In General.* — It is well settled that the incompetency or want of the requisite qualifications of one or more grand jurors may be set up as an objection to an indictment found by a grand jury of which such grand jurors were members, however many unexceptionable persons may have concurred in finding such indictment.<sup>4</sup>

**Illustrations—Civil Officers.**—*Com. v. Pritchett*, 11 Bush (Ky.) 277, wherein it was held that a school trustee is a civil officer.

**Constables.**—*State v. Quimby*, 51 Me. 395.

**County Supervisors.**—*State v. Adams*, 20 Iowa 486.

**Justices of the Peace.**—*State v. Adams*, 20 Iowa 486; *Glassinger v. State*, 24 Ohio St. 206.

**Ministers of the Gospel.**—*State v. Adams*, 20 Iowa 486.

**United States Officers.**—*State v. Wright*, 53 Me. 328; *State v. Quimby*, 51 Me. 395; *Com. v. Strother*, 1 Va. Cas. 186.

1. *Stewart v. State*, 23 Ga. 181, holding that an honorary member of a military company is not exempt.

2. **Exemption Not Disqualification.**—*Bac. Abr.*, tit. Juries, E. 6. See also the following cases:

*Iowa.*—*State v. Adams*, 20 Iowa 486; *State v. Reid*, 20 Iowa 413.

*Kansas.*—*State v. Stunkle*, 41 Kan. 456.

*Kentucky.*—*Com. v. Smith*, 10 Bush (Ky.) 277; *Com. v. Pritchett*, 11 Bush (Ky.) 277.

*Maine.*—*State v. Quimby*, 51 Me. 395; *State v. Wright*, 53 Me. 328; *Fellows's Case*, 5 Me. 333.

*Massachusetts.*—*Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468.

*New Hampshire.*—*State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

*Ohio.*—*Glassinger v. State*, 24 Ohio St. 206.

*Texas.*—*Owens v. State*, 25 Tex. App. 552.

3. **Persons Over Age Not Disqualified.**—3 Black. Com. 364; *Bac. Abr.*, tit. Juries, E. 6. See also the following cases:

*Alabama.*—*Spigener v. State*, 62 Ala. 383.

*Georgia.*—*Jackson v. State*, 76 Ga. 551; *Carter v. State*, 75 Ga. 747; *Loeb v. State*, 75 Ga. 258.

*Illinois.*—*Davidson v. People*, 90 Ill. 221.

*Indiana.*—*State v. Miller*, 2 Blackf. (Ind.) 35.

*Iowa.*—*State v. Edgerton*, 100 Iowa 63.

*Maryland.*—*Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

*Virginia.*—*Booth v. Com.*, 16 Gratt. (Va.) 119.

But see *Kitrol v. State*, 9 Fla. 9.

4. **Effect of Disqualification of One or More Grand Jurors.**—2 Hawk. P. C., c. 25, § 28; 1 Chitty's Crim. Law 309. See also the following cases:

*United States.*—*U. S. v. Hammond*, 2 Woods (U. S.) 197; *U. S. v. Collins*, 1 Woods (U. S.) 521; *U. S. v. Wilson*, 6 McLean (U. S.) 604; *U. S. v. Williams*, 1 Dill. (U. S.) 485.

*Alabama.*—*State v. Clarissa*, 11 Ala. 57; *State v. Brooks*, 9 Ala. 10; *State v. Ligon*, 7 Port. (Ala.) 167; *State v. Middleton*, 5 Port. (Ala.) 484.

*Arkansas.*—*Wilburn v. State*, 21 Ark. 198; *State v. Brown*, 10 Ark. 78.

*Dakota.*—*People v. Wintermute*, 1 Dak. 60.

*Florida.*—*Kitrol v. State*, 9 Fla. 9.

*Georgia.*—*U. S. v. Blodgett*, 35 Ga. 336; *Betts v. State*, 66 Ga. 515.

*Indiana.*—*Hardin v. State*, 22 Ind. 347; *Vattier v. State*, 4 Blackf. (Ind.) 73.

*Kentucky.*—*Com. v. Smith*, 10 Bush (Ky.) 476.

*Louisiana.*—*State v. Thibodeaux*, 48 La. Ann. 600; *State v. Causey*, 43 La. Ann. 897; *State v. Griffin*, 38 La. Ann. 502; *State v. Rowland*, 36 La. Ann. 193; *State v. Parks*, 21 La. Ann. 251; *State v. Jones*, 8 Rob. (La.) 616; *State v. Nolan*, 8 Rob. (La.) 513.

*Maine.*—*State v. Lightbody*, 38 Me. 200; *State v. Symonds*, 36 Me. 128.

*Massachusetts.*—*Com. v. Parker*, 2 Pick. (Mass.) 559.

*Mississippi.*—*Miller v. State*, 33 Miss. 356. 69 Am. Dec. 351; *Stokes v. State*, 24 Miss. 621; *Portis v. State*, 23 Miss. 578; *Barney v. State*, 12 Smed. & M. (Miss.) 68; *McQuillen v. State*, 8 Smed. & M. (Miss.) 587.

*New Jersey.*—*State v. Rockafellow*, 6 N. J. L. 332.

*North Carolina.*—*State v. Martin*, 2 Ired. L. (24 N. Car.) 101; *State v. Duncan*, 6 Ired. L. (28 N. Car.) 98.

*Ohio.*—*Doyle v. State*, 17 Ohio 222; *Huling v. State*, 17 Ohio St. 583.

*Tennessee.*—*State v. Bryant*, 10 Verg. (Tenn.) 527; *State v. Duncan*, 7 Verg. (Tenn.) 271; *State v. Chairs*, 9 Baxt. (Tenn.) 196; *Bennett v. State*, Mart. & Y. (Tenn.) 135.

*Texas.*—*Martin v. State*, 22 Tex. 214; *Stanley v. State*, 16 Tex. 557; *Vanhook v. State*, 12 Tex. 252; *Jackson v. State*, 11 Tex. 261; *State v. Foster*, 9 Tex. 65.

*Virginia.*—*Com. v. Long*, 2 Va. Cas. 318; *Com. v. Cherry*, 2 Va. Cas. 20; *Com. v. St. Clair*, 1 Gratt. (Va.) 568.

*Wisconsin.*—*State v. Cole*, 17 Wis. 674.



(2) *Objections Waived.* — Although it is well settled that an accused person is entitled to be indicted by a grand jury composed of members who possess the requisite qualifications and are not subject to challenge, the right of objection to a grand juror depends in a great measure upon the time at which it is made,<sup>1</sup> and it is also well settled that where the objection to a grand juror is that he is disqualified as a member of the panel or is subject to challenge as a grand juror in the investigation of a particular case, the objection will be deemed to have been waived unless it is made seasonably and in the proper manner.<sup>2</sup>

*n.* PRESUMPTION AS TO QUALIFICATION — BURDEN OF PROOF. — Unless the record shows that the grand jury was composed of disqualified persons, it will be presumed that they were qualified;<sup>3</sup> and the burden of proving the incompetency of a grand juror whose disqualification does not appear on the face of the record rests upon the defendant.<sup>4</sup>

3. **Number of Grand Jurors Impaneled** — *a.* AT COMMON LAW. — At common law it was necessary that the grand jury should consist of twelve at least, and it might consist of any greater number not exceeding twenty-three. Not less than twelve, because without the concurrence of that number a true bill could not be found and the defendant be put on his trial; and not more than twenty-three, because otherwise there might be an equal division, or two full juries, who might differ in opinion.<sup>5</sup>

1. *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478.

2. **Disqualification and Grounds of Challenge Waived** — *United States.* — *U. S. v. Gale*, 109 U. S. 65; *U. S. v. White*, 5 Cranch (C. C.) 457; *U. S. v. Butler*, 1 Hughes (U. S.) 457, 25 Fed. Cas. No. 14,700.

*Alabama.* — *Boyington v. State*, 2 Port. (Ala.) 100.

*Arkansas.* — *Baker v. State*, 58 Ark. 513; *Hudspeth v. State*, 50 Ark. 534; *Fenalty v. State*, 12 Ark. 630.

*California.* — *People v. McGungill*, 41 Cal. 430; *People v. Hadden*, 32 Cal. 445; *People v. Henderson*, 28 Cal. 465; *People v. Moice*, 15 Cal. 329; *People v. Roberts*, 6 Cal. 214.

*Connecticut.* — *State v. Hamlin*, 47 Conn. 114.

*Florida.* — *Reynolds v. State*, 33 Fla. 301; *Potsdamer v. State*, 17 Fla. 895.

*Georgia.* — *Shope v. State*, 106 Ga. 226; *Fisher v. State*, 93 Ga. 309; *Turner v. State*, 78 Ga. 174.

*Illinois.* — *Musick v. People*, 40 Ill. 268.

*Indiana.* — *Cooper v. State*, 120 Ind. 377; *Meiers v. State*, 56 Ind. 336; *Mershon v. State*, 51 Ind. 14; *Hardin v. State*, 22 Ind. 347.

*Iowa.* — *State v. Kouhns*, 103 Iowa 720; *State v. Elliott*, 45 Iowa 487; *State v. Gibbs*, 39 Iowa 318.

*Kentucky.* — *Presbury v. Com.*, 9 Dana (Ky.) 203; *Com. v. Smith*, 10 Bush (Ky.) 476.

*Louisiana.* — *State v. Causey*, 43 La. Ann. 897; *State v. Griffin*, 38 La. Ann. 502; *State v. Menge*, 36 La. Ann. 200; *State v. Jones*, 8 Rob. (La.) 616.

*Maine.* — *State v. Carver*, 49 Me. 588, 77 Am. Dec. 275.

*Maryland.* — *Cooper v. State*, 64 Md. 40.

*Massachusetts.* — *Com. v. Smith*, 9 Mass. 107.

*Minnesota.* — *State v. Thomas*, 19 Minn. 484; *State v. Arbes*, 70 Minn. 462.

*Mississippi.* — *Head v. State*, 44 Miss. 731; *Barney v. State*, 12 Smed. & M. (Miss.) 68.

*Montana.* — *Territory v. Clayton*, 8 Mont. 1; *Territory v. Harding*, 6 Mont. 326; *Territory v. Hart*, 7 Mont. 42.

*Nebraska.* — *Patrick v. State*, 16 Neb. 330.

*New Mexico.* — *Territory v. Leyba*, (N. Mex. 1897) 47 Pac. Rep. 718; *Territory v. Barrett*, 8 N. Mex. 70; *Territory v. Armijo*, 7 N. Mex. 571.

*Ohio.* — *State v. Easter*, 30 Ohio St. 542, 27 Am. Rep. 478; *Erwin v. State*, 29 Ohio St. 190, 23 Am. Rep. 733.

*South Carolina.* — *State v. Motley*, 7 Rich. L. (S. Car.) 327.

*Tennessee.* — *Ellis v. State*, 92 Tenn. 85; *Dyer v. State*, 11 Lea (Tenn.) 509; *State v. Deason*, 6 Baxt. (Tenn.) 511.

*Texas.* — *Doss v. State*, 28 Tex. App. 506; *Lum v. State*, 11 Tex. App. 483; *Lacy v. State*, (Tex. App. 1892) 19 S. W. Rep. 896.

*Virginia.* — *Com. v. Cherry*, 2 Va. Cas. 20.

*Wisconsin.* — *Grubb v. State*, 14 Wis. 434.

3. **Presumption as to Qualifications.** — *Territory v. Harding*, 6 Mont. 323; *Webb v. State*, 1 Shannon Tenn. Cas. 427; *Bennett v. State*, Mart. & V. (Tenn.) 133.

4. **Burden of Proving Disqualification.** — *Minor v. State*, 63 Ga. 318; *State v. Haynes*, 54 Iowa 109; *Territory v. Harding*, 6 Mont. 323; *State v. Perry*, 122 N. Car. 1018; *State v. Seaborn*, 4 Dev. L. (15 N. Car.) 305, 42 Am. Dec. 140.

5. **Number of Grand Jurors at Common Law.** — 1 Chitty's Crim. Law 306; 2 Hawk. P. C., c. 25, § 16; 2 Hale's P. C. 161; Forsyth Jury Tr. 178; 4 Black. Com. 302. See also the following cases in which the rule of the common law is stated:

*England.* — *Rex v. Marsh*, 6 Ad. & El. 236, 33. E. C. L. 66; *Clyncard's Case*, Cro. Eliz. 654; *Robinson v. Bland*, 2 Burr. 1088, note.

*Arkansas.* — *Harding v. State*, 22 Ark. 210.

*California.* — *People v. Hunter*, 54 Cal. 65.

*Florida.* — *Donald v. State*, 31 Fla. 255.

*Indiana.* — *Hudson v. State*, 1 Blackf. (Ind.) 317.



*b. IN UNITED STATES.* — The rule as to the number of persons that shall be impaneled on a grand jury has been changed in many states by statutory and constitutional provisions, though in some states the number remains the same as at common law.<sup>1</sup>

*Discretion of Court as to Number.* — Where a statute provides that the number of grand jurors shall be not less than thirteen nor more than eighteen, it does not change the common law except so far as it invests the court with a discretion, within the limits specified, as to the number to be sworn.<sup>2</sup>

*c. EXCESSIVE NUMBER OF GRAND JURORS.* — It has been held uniformly, it would seem, that where a grand jury is composed of more than the lawful number of members it is not a legal body, and that an indictment found by such body is not valid as against an objection seasonably made.<sup>3</sup>

*Iowa.* — *State v. Salts*, 77 Iowa 193; *State v. Ostrander*, 18 Iowa 453.

*Maine.* — *State v. Symonds*, 36 Me. 128; *Low's Case* 4 Me. 439, 16 Am. Rep. 271.

*Massachusetts.* — *Com. v. Wood*, 2 Cush. (Mass.) 149.

*Nevada.* — *State v. Hartley*, 22 Nev. 342.

*North Carolina.* — *State v. Davis*, 2 Ired. L. (24 N. Car.) 153.

*South Carolina.* — *State v. Clayton*, 11 Rich. L. (S. Car.) 581.

*Texas.* — *Rainey v. State*, 19 Tex. App. 479; *McNeese v. State*, 19 Tex. App. 48.

*Utah.* — *Brannigan v. People*, 3 Utah 488.

*Vermont.* — *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818.

*Wisconsin.* — *Brucker v. State*, 16 Wis. 333.

**1. Number of Grand Jurors in United States.** — See the statutes of the various states and territories and of the United States, and also the following cases:

*United States.* — *Reynolds v. U. S.*, 98 U. S. 145.

*Alabama.* — *Peters v. State*, 98 Ala. 38.

*Arkansas.* — *Harding v. State*, 22 Ark. 210; *Bates v. State*, 60 Ark. 450; *Shropshire v. State*, 12 Ark. 190; *State v. Hawkins*, 10 Ark. 71.

*California.* — *People v. Thurston*, 5 Cal. 69; *People v. Roberts*, 6 Cal. 214; *People v. Hunter*, 54 Cal. 65; *People v. Simmons*, 119 Cal. 1.

*Colorado.* — *Parker v. People*, 13 Colo. 155.

*Florida.* — *Gladden v. State*, 12 Fla. 562; *Keech v. State*, 15 Fla. 591; *Donald v. State*, 31 Fla. 255.

*Georgia.* — *Stevenson v. State*, 69 Ga. 68; *Turner v. State*, 78 Ga. 174.

*Illinois.* — *Barron v. People*, 73 Ill. 256; *Beasley v. People*, 89 Ill. 371; *Gitcheil v. People*, 146 Ill. 175, 37 Am. St. Rep. 147.

*Indiana.* — *State v. May*, 50 Ind. 170; *Meiers v. State*, 56 Ind. 336; *State v. Myers*, 51 Ind. 145.

*Iowa.* — *State v. Salts*, 77 Iowa 193; *State v. Billings*, 77 Iowa 417; *State v. Standley*, 76 Iowa 215; *State v. Belvel*, 89 Iowa 405.

*Kansas.* — *State v. Copp*, 34 Kan. 522.

*Kentucky.* — *Downs v. Com.*, 92 Ky. 605; *Sanders v. Com.*, (Ky. 1892) 18 S. W. Rep. 528.

*Louisiana.* — *State v. Causey*, 43 La. Ann. 897.

*Maine.* — *State v. Symonds*, 36 Me. 128.

*Massachusetts.* — *Com. v. Wood*, 2 Cush. (Mass.) 149; *Crimm v. Com.*, 119 Mass. 326.

*Michigan.* — *People v. Lauder*, 82 Mich. 109;

*People v. Thompson*, (Mich. 1899) 81 N. W. Rep. 344.

*Minnesota.* — *State v. Cooley*, 72 Minn. 476.

*Mississippi.* — *Miller v. State*, 33 Miss. 356, 69 Am. Dec. 351.

*Missouri.* — *State v. Green*, 66 Mo. 631; *State v. Pate*, 67 Mo. 488.

*Montana.* — *State v. Ah Jim*, 9 Mont. 167; *State v. King*, 9 Mont. 445.

*Nevada.* — *State v. Hartley*, 22 Nev. 342.

*New York.* — *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

*North Carolina.* — *State v. Perry*, 122 N. Car. 1018.

*Ohio.* — *Doyle v. State*, 17 Ohio 222.

*Pennsylvania.* — *Com. v. Salter*, 2 Pearson (Pa.) 461.

*South Carolina.* — *State v. Starling*, 15 Rich. L. (S. Car.) 120; *State v. Williams*, 35 S. Car. 344.

*Tennessee.* — *Turner v. State*, 89 Tenn. 547; *Fitzhugh v. State*, 13 Lea (Tenn.) 258; *Pybos v. State*, 3 Humph. (Tenn.) 49.

*Texas.* — *Drake v. State*, 25 Tex. App. 293; *Ex p. Reynolds*, 35 Tex. Crim. 437, 6 Am. St. Rep. 54; *McNeese v. State*, 19 Tex. App. 48; *Smith v. State*, 19 Tex. App. 95; *Williams v. State*, 19 Tex. App. 265; *Ex p. Swain*, 19 Tex. App. 323; *Rainey v. State*, 19 Tex. App. 479; *Harrell v. State*, 22 Tex. App. 692; *Watts v. State*, 22 Tex. App. 572.

*Utah.* — *People v. Green*, 1 Utah 11; *U. S. v. Reynolds*, 1 Utah 226; *Brannigan v. People*, 3 Utah 488.

*Vermont.* — *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818.

*Virginia.* — *Com. v. Sayers*, 8 Leigh (Va.) 722; *Price v. Com.*, 21 Gratt. (Va.) 846; *Hausenfluck v. Com.*, 85 Va. 702.

*Wisconsin.* — *Brucker v. State*, 16 Wis. 333; *State v. Fee*, 19 Wis. 562.

*Wyoming.* — *In re Wright*, 3 Wyo. 478, 31 Am. St. Rep. 94.

**2. State v. Miller**, 3 Ala. 343.

**3. Too Many Grand Jurors** — *Alabama.* — *Peters v. State*, 98 Ala. 38.

*Arkansas.* — *Harding v. State*, 22 Ark. 210; *Shropshire v. State*, 12 Ark. 190.

*California.* — *People v. Thurston*, 5 Cal. 69.

*Florida.* — *Keech v. State*, 15 Fla. 591.

*Kentucky.* — *Downs v. Com.*, 92 Ky. 605.

*Mississippi.* — *Miller v. State*, 33 Miss. 356, 69 Am. Dec. 351.

*New York.* — *Conkey v. People*, (Ct. App.) 5 Park. Crim. (N. Y.) 31.



*d.* NUMBER OF GRAND JURORS INSUFFICIENT. — According to some authorities, where fewer grand jurors are impaneled than the minimum number allowed by statute the grand jury is not a lawful body, and the error reaches all subsequent proceedings,<sup>1</sup> and it is a fatal objection that the number of grand jurors is less than the number that is required to concur in finding an indictment,<sup>2</sup> but in some cases it has been held that where a grand jury is required to be composed of a definite number and a less number is impaneled, the action of such grand jury in finding an indictment is valid if a sufficient number concur in the finding.<sup>3</sup>

**Waiver of Objection to Insufficiency of Number.** — Where an indictment has been concurred in by a sufficient number of grand jurors, an objection that there was not a sufficient number of grand jurors on the panel may be waived by not making it seasonably.<sup>4</sup>

**4. Foreman of Grand Jury** — *a.* NECESSITY FOR APPOINTMENT OF FOREMAN. — In order to give system and certainty to the proceedings of the grand jury one of the grand jurors must be appointed foreman, and in many states the appointment of a foreman is required by statute.<sup>5</sup> In some states the appointment of a foreman is necessary because the law requires or permits witnesses to be sworn by the foreman.<sup>6</sup>

*b.* BY WHOM FOREMAN APPOINTED. — The practice in this regard is not uniform in the various states, in some the foreman being appointed by the court,<sup>7</sup> in others by the grand jurors themselves from their own number.<sup>8</sup>

*c.* QUALIFICATIONS OF FOREMAN. — The foreman must be one of the grand jurors and need have no qualifications other than those of ordinary grand jurors.<sup>9</sup>

*d.* TEMPORARY FOREMAN. — Where it happens that the foreman regularly appointed is absent at the time action is being taken upon an indictment, o

*Pennsylvania.* — *Com. v. Salter*, 2 Pearson (Pa.) 461.

*Texas.* — *Harrell v. State*, 22 Tex. App. 692; *Rainey v. State*, 19 Tex. App. 479; *Williams v. State*, 19 Tex. App. 265; *Ex p. Swain*, 19 Tex. App. 323; *McNeese v. State*, 19 Tex. App. 48; *Lott v. State*, 18 Tex. App. 627; *Ex p. Reynolds*, 35 Tex. Crim. 437, 60 Am. St. Rep. 54; *Smith v. State*, 19 Tex. App. 95; *Wells v. State*, 21 Tex. App. 594.

1. *State v. Hawkins*, 10 Ark. 71; *Gladden v. State*, 12 Fla. 562; *State v. Symonds*, 36 Me. 128; *Doyle v. State*, 17 Ohio 222; *Brannigan v. People*, 3 Utah 488.

**Indictment Concurred in by Sufficient Number.** — Where there is less than the minimum number of grand jurors objection may be taken to the indictment, even though it was concurred in by a sufficient number of grand jurors. *State v. Hawkins*, 10 Ark. 71; *Doyle v. State*, 17 Ohio 222.

2. *State v. Symonds*, 36 Me. 128.

3. *State v. Davis*, 2 Ired. L. (24 N. Car.) 157. See also *People v. Hunter*, 54 Cal. 65; *State v. Garhart*, 35 Iowa 316. But see *contra*, *Norris House v. State*, 3 Greene (Iowa) 513, which case was *disapproved* in the later Iowa cases.

4. *State v. Belvel*, 89 Iowa 405; *State v. Pate*, 67 Mo. 488. See also *State v. Welsh*, 33 Mo. 33; *State v. Bleekley*, 18 Mo. 428.

5. **Necessity for Appointment of Foreman** — *Arkansas.* — *Blackmore v. State*, (Ark. 1888) 8 S. W. Rep. 940.

*California.* — *People v. Roberts*, 6 Cal. 214. *Iowa.* — *State v. Brandt*, 41 Iowa 593.

*Kentucky.* — *Com. v. Pullan*, 3 Bush (Ky.) 47.

*Louisiana.* — *State v. Texada*, 19 La. Ann. 436.

*Mississippi.* — *Cody v. State*, 3 How. (Miss.) 27. *New York.* — *People v. Rose*, 52 Hun (N. Y.) 33.

*Tennessee.* — *State v. Collins*, 6 Baxt. (Tenn.) 151; *State v. Gouge*, 12 Lea (Tenn.) 132.

*Vermont.* — *State v. Brown*, 31 Vt. 603.

6. *People v. Roberts*, 6 Cal. 214.

7. **Appointment of Foreman by Court.** — *Blackmore v. State*, (Ark. 1888) 8 S. W. Rep. 940; *Com. v. Pullan*, 3 Bush (Ky.) 47; *Cody v. State*, 3 How. (Miss.) 27; *People v. Rose*, 52 Hun (N. Y.) 33; *State v. Collins*, 6 Baxt. (Tenn.) 151; *State v. Gouge*, 12 Lea (Tenn.) 132. And see the statutes of the various states.

**Appointment by Court of Foreman Selected by Grand Jurors.** — Where it is the duty of the court to appoint the foreman, the court may allow the grand jury to retire and select its foreman and report its action to the court, and may thereupon direct the grand juror so selected to be sworn as such foreman. *Blackmore v. State*, (Ark. 1888) 8 S. W. Rep. 940.

In Iowa the court may appoint a talesman properly selected from the bystanders for the foreman of the grand jury. *State v. Brandt*, 41 Iowa 593.

8. **Appointment of Foreman by Grand Jurors.** — *Lung's Case*, 1 Conn. 428; *Bird v. State*, 53 Ga. 602; *Woodward v. State*, 33 Fla. 520.

9. *Keitler v. State*, 4 Greene (Iowa) 291, *per* Greene, J.

"The Oath of the Foreman is not a special oath administered to him alone, but it is precisely the same oath which is administered to the



that through incompetency or other cause he declines to act, the court has authority to appoint a foreman *pro hac vice*.<sup>1</sup>

*e.* **POWERS AND DUTIES OF FOREMAN.** — The foreman is, in the absence of the court, the presiding officer of the inquest. He is the organ through which its inquisitions and proceedings are reported to the court, and particular duties devolve upon him distinct from those of the other members of the grand jury. The most important of his duties is to report all bills which are submitted to the grand jury and to indorse on such bills, as foreman, whether they are true or not.<sup>2</sup>

**5. Attendance upon Grand Jury.** — The sheriff is the person upon whom the duty of waiting upon the grand jury devolves, and he need take no oath before attending the grand jury other than his oath of office, but it is not necessary to the legal constitution of a grand jury that it should have an officer in attendance upon it.<sup>3</sup>

**6. Charge of Court to Grand Jury—In General.** — After the grand jury has been impaneled it is proper and usual for the court to instruct that body as to its duties and the method of performing them,<sup>4</sup> but grand jurors who are duly sworn as such are legally charged with the performance of their duties, and no charge on the part of the court is essential to give validity to their acts,<sup>5</sup> neither is it necessary that all the grand jurors should hear the full charge.<sup>6</sup>

**Discretion of Court** — In charging a grand jury the court has a wide discretion.<sup>7</sup>

**Substance of Charge to Grand Jury.** — The court may call the attention of the grand jury to and direct the investigation of matters of general public import, such as great riots, public nuisances, and the like, but as a general rule the court does not call the attention of the grand jury to ordinary crimes committed against the person or property of private individuals.<sup>8</sup> It is not

other twelve." *State v. Collins*, 6 Baxt. (Tenn.) 151, *per* Sneed, J.

1. *State v. Collins*, 6 Baxt. (Tenn.) 151. See also *White v. State*, 93 Ga. 47.

**Supplying Place of Excused Foreman.** — After a grand jury has been impaneled and a foreman appointed, if the foreman is excused from the grand jury another foreman may be appointed. *U. S. v. Belvin*, 46 Fed. Rep. 383.

**In the United States Courts** the court selects the foreman. *Rev. Stat. U. S.*, § 809. See also *U. S. v. Belvin*, 46 Fed. Rep. 383.

2. *Cody v. State*, 3 How. (Miss.) 27; *State v. Collins*, 6 Baxt. (Tenn.) 151.

**Return of Indictment by Foreman Without Other Grand Jurors Improper.** — *State v. Bordeau*, 93 N. Car. 560. See also *State v. Cox*, 6 Ired. L. (28 N. Car.) 440.

3. **Attendants upon Grand Jury.** — *State v. Perry*, Busb. L. (44 N. Car.) 330, in which case it was held that although a statute provided that a constable, upon taking a prescribed oath, might attend a grand jury, it was not necessary to have such officer in attendance upon the grand jury.

**Clerk as Stenographer.** — See *infra*, this section. *Secrecy as to Proceedings of Grand Juries* — *Presence and Advice of Persons Not Members of Grand Jury* — *Stenographers*.

4. **Propriety of Charge to Grand Jury.** — 4 Black. Com. 303; *Denning v. State*, 22 Ark. 131; *Stewart v. State*, 24 Ind. 145; *Com. v. Sanborn*, 116 Mass. 61; *McQuillen v. State*, 8 Smed. & M. (Miss.) 594; *Turk v. State*, 7 Ohio (pt. ii.) 240; *Com. v. Dietrich*, 7 Pa. Super. Ct. 515.

**Charge Not of Record.** — See *McQuillen v. State*, 8 Smed. & M. (Miss.) 587.

**5. Failure of Court to Charge Grand Jury Immaterial.** — Charge to Grand Jury, *Taney (U. S.)* 615, 30 Fed. Cas. No. 18,257; *Stewart v. State*, 24 Ind. 142; *Com. v. Sanborn*, 116 Mass. 61; *State v. Brett*, 16 Mont. 360; *Porterfield v. Com.* 91 Va. 801.

**Statutes Requiring Court to Charge Grand Jury.** — See *Ex p. Job*, 17 Nev. 184.

**As to Violations of Specific Laws.** — See the statutes of the various states, and see *State v. Will*, 97 Iowa 58; *French v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 114; *People v. Page*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 600.

6. **All Grand Jurors Need Not Hear Charge.** — *Com. v. Sanborn*, 116 Mass. 61; *State v. Froiseth*, 16 Minn. 313. See also *Wadlin's Case*, 11 Mass. 142; *Findley v. People*, 1 Mich. 235; *People v. Lauder*, 82 Mich. 109.

7. **Discretion of Court in Charging Grand Jury.** — *Com. v. Sanborn*, 116 Mass. 61; *Clair v. State*, 40 Neb. 534; *Grand Jury v. Public Press*, 4 Brews. (Pa.) 313.

8. **Scope of Court's Charge.** — *Grand Jury v. Public Press*, 4 Brews. (Pa.) 313; *Com. v. Kulp*, 17 Pa. Co. Ct. 561. See also *Com. v. Green*, 126 Pa. St. 536, 12 Am. St. Rep. 894.

**In the United States Courts** specific cases may be submitted to the grand jury by the express instructions of the court. *U. S. v. McAvoy*, 26 Fed. Cas. No. 15,654, 4 Blatchf. (U. S.) 418, 18 How. Pr. (N. Y.) 380.

**Instruction to Preserve Secrecy.** — See *State v. Brewster*, 70 Vt. 341.

**Mistakes in a Charge** will not affect an indictment which the jury is authorized to find. *State v. White*, 37 La. Ann. 172. See also



necessary in a charge to the grand jury to enumerate and define with legal precision the various offenses which are punishable by indictment.<sup>1</sup>

**Invasion of Province of Grand Jury.** — The court, in charging the grand jury, should not undertake to tell that body that there is evidence warranting it in indicting parties for violations of particular laws, nor otherwise invade the province of the grand jury.<sup>2</sup>

**Charge Must Be Given in Open Court.** — The judge of the court should not go into the grand-jury room to charge the grand jury, but should charge that body from the bench.<sup>3</sup>

**Additional Charges.** — The court, after having once charged the grand jury, may in its discretion call the grand jury before it at any time and give it further instructions.<sup>4</sup>

**Charges Requested by Grand Jury.** — The court is always willing to advise the grand jury and to respond to any inquiries as to matters of law which that body may see fit to make, and the court sometimes so informs the grand jury in its charge,<sup>5</sup> but it has been declared that the grand jury should not ask the court to give an additional charge, although if such a request is made the court perhaps may be bound to give it if it is such an instruction as can be given without committing the court upon points which are within the province of the grand jury to decide.<sup>6</sup>

**7. General Control of Court over Grand Jury** — While the grand jury in its deliberations acts to some extent independently of the court and is a co-ordinate authority therewith, it is a branch over which the court has general supervision and authority.<sup>7</sup>

**Assistance and Protection of Grand Jury.** — The grand jury may, if it sees fit, invoke the powers of the court to assist or protect it in the performance of its duties.<sup>8</sup>

**Power of Court to Inspect and Revise Indictments.** — The grand jury being under the

*Com v. Sanborn*, 116 Mass. 63; *State v. Turlington*, 102 Mo. 645.

**1. Enumeration of Various Offenses Unnecessary.** — Charge to Grand Jury, Taney (U. S.) 615, 30 Fed. Cas. No. 18,257.

**2. Invasion of Province of Grand Jury Improper.** — *U. S. v. Watkins*, 3 Cranch (C. C.) 441; *State v. Will*, 97 Iowa 58; *Com. v. Knapp*, 9 Pick. (Mass.) 495; *State v. Turlington*, 102 Mo. 642; *Clair v. State*, 40 Neb. 534; *Cobb v. State*, 40 Neb. 545.

**Calling Attention to Jail Breaking.** — A charge which, without naming any person, calls the attention of the grand jury to a recent jail breaking in which a citizen has lost his life, is unobjectionable. *Parker v. Territory*, (Ariz. 1898) 52 Pac. Rep. 361.

**3. Charge Must Be Given in Open Court.** — *State v. Will*, 97 Iowa 58. See also *U. S. v. Kilpatrick*, 16 Fed. Rep. 765, *per Dick, J.*

**4. Court May Give Further Instructions.** — *U. S. v. Watkins*, 3 Cranch (C. C.) 505; Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *State v. Will*, 97 Iowa 58; *Com. v. Sanborn*, 116 Mass. 61; *Clair v. State*, 40 Neb. 534. See also *Cherry v. State*, 6 Fla. 685; *Wadlin's Case*, 11 Mass. 142.

**5. Grand Jury May Apply to Court for Advice.** — Charge to Grand Jury, Chase (U. S.) 263, 30 Fed. Cas. No. 18,248. See also *U. S. v. Kilpatrick*, 16 Fed. Rep. 765, and *U. S. v. Hunter*, 15 Fed. Rep. 712.

**6. U. S. v. Watkins**, 3 Cranch (C. C.) 505. **Suggestion by Grand Jury as to Preparation of Indictment Not Improper.** — *Com. v. Dietrich*, 7 Pa. Super. Ct. 515.

**Discretion of Court to Give Requested Charges.** — *U. S. v. Watkins*, 3 Cranch (C. C.) 505.

**Iowa Statute.** — Code Iowa (1873), § 4281 (Code 1897, § 5264), provides that the grand jury may at all reasonable times ask the advice of the court, although it would seem that where members of the grand jury desire the advice of the court the grand jury as a whole should be present when the advice is given. Yet the fact that the court expounded the law to a few members of the grand jury in the absence of others is not such an irregularity as will vitiate an indictment found by such grand jury. *State v. Edgerton*, 100 Iowa 63.

**7. Control of Court over Grand Jury** — *United States*. — Matter of Ellis, Hempst. (U. S.) 10.

*Arkansas*. — Denning *v. State*, 22 Ark. 131.

*Colorado*. — Wyatt *v. People*, 17 Colo. 252.

*Maryland*. — Byers *v. State*, 3 Md. 207.

*Massachusetts*. — *Com. v. Bannon*, 97 Mass. 214.

*New York*. — Matter of Gardiner, (Ct. Gen. Sess.) 31 Misc. (N. Y.) 364.

*Ohio*. — Turk *v. State*, 7 Ohio (pt. ii.) 240.

*Tennessee*. — *State v. Cowan*, 1 Head (Tenn.) 280.

See also 1 Archbold's Crim. Pr. and Pl. (8th ed.) 98, 99.

**Punishment of Grand Juror for Contempt.** — See *infra*, this section, *Misconduct of Grand Jurors*.

**8. Power of Court to Assist and Protect Grand Jury.** — *Com. v. Bannon*, 97 Mass. 214, citing *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757.



control of the court, it is the province and duty of the court to see that the grand jury's finding is proper in point of law; therefore the court may commit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty on the part of the grand jury.<sup>1</sup>

**Coercion of Grand Jury by Court.** — The court has no power to coerce a grand jury to find a true bill, and whatever may be the return of the grand jury the court is bound to receive it.<sup>2</sup>

**8. Interference of Executive with Grand Jury.** — Even though the executive may have the power to pardon one accused of crime before he has been indicted, the executive has no power, through the prosecuting attorney, to interfere with the action of the grand jury, and to instruct that body not to find an indictment.<sup>3</sup>

**9. Excusal of Grand Jurors** — *a. EXCUSAL BY GRAND JURY.* — The court alone can excuse a grand juror,<sup>4</sup> and although the grand jury may excuse temporarily one or more of its members, provided the body be not reduced below the number requisite to constitute a quorum,<sup>5</sup> it has no power to excuse one of its members for the term.<sup>6</sup>

*b. POWER OF COURT TO EXCUSE GRAND JURORS* — (1) *In General.* — According to the weight of authority, there is no rule of the common law that forbids the excusal of a grand juror by the court either before or after the grand jury has been sworn and impaneled;<sup>7</sup> but according to some authorities courts, by virtue of their common-law powers, do not possess a discretionary right to discharge a grand juror after the grand jury has been impaneled and sworn.<sup>8</sup>

(2) *Statutory Provisions.* — In some states statutes have been enacted authorizing the court to excuse or discharge grand jurors from attendance for certain specified reasons, and it has been held that when a member is so discharged the grand jury is not thereby dissolved, and that the court may substitute another in his place without organizing a new grand jury.<sup>9</sup>

**1. Power of Court to Inspect and Revise Indictments.** — *State v. Cowan*, 1 Head (Tenn.) 280, citing 1 Archbold's Crim. Pr. and Pl. (Waterman ed.) 98-104, note 5. See also *Byers v. State*, 63 Md. 207.

**2. Court Has No Power to Coerce Grand Jury.** — *State v. Branch*, 68 N. Car. 186, 12 Am. Rep. 633.

**Court May Not Discharge Grand Jury for Disobedience of Instructions.** — *U. S. v. Watkins*, 3 Cranch (C. C.) 507.

**3. Interference of Executive with Grand Jury.** — *In re Miller*, 3 Cinc. L. Bul. 967, 17 Fed. Cas. No. 9,552.

**4. Denning v. State**, 22 Ark. 131.

**5. Temporary Excusal by Grand Jury.** — *Smith v. State*, 19 Tex. App. 95.

**6. Excusal by Grand Jury for Term.** — *Watts v. State*, 22 Tex. App. 572.

**7. Power of Court to Excuse Grand Jurors** — *United States*. — *U. S. v. Jones*, 69 Fed. Rep. 973; *U. S. v. Belvin*, 46 Fed. Rep. 383.

*Alabama*. — *Compton v. State*, 117 Ala. 56; *Peters v. State*, 98 Ala. 38.

*Arkansas*. — *Denning v. State*, 22 Ark. 131.

*California*. — *People v. Leonard*, 106 Cal. 302; *People v. Hidden*, 32 Cal. 445.

*Florida*. — *Jones v. State*, 18 Fla. 889.

*Georgia*. — *Williams v. State*, 69 Ga. 12; *Thompson v. State*, 9 Ga. 210.

*Idaho*. — *State v. Schieler*, (Idaho 1894) 37 Pac. Rep. 272.

*Louisiana*. — *State v. Brooks*, 48 La. Ann. 1519; *State v. Reiz*, 48 La. Ann. 1446; *State v. Causey*, 43 La. Ann. 897; *State v. Hunter*, 43 La. Ann. 157; *State v. Woodson*, 43 La. Ann. 905; *State v. Jenkins*, 43 La. Ann. 917.

*Maryland*. — *Mills v. State*, 76 Md. 274.

*Minnesota*. — *State v. Brown*, 12 Minn. 545.

*Missouri*. — *State v. Wilson*, 85 Mo. 139.

*New Hampshire*. — *State v. Bradford*, 57 N. H. 188.

*Vermont*. — *State v. Ward*, 60 Vt. 142.

*Wisconsin*. — *State v. Fee*, 19 Wis. 562.

**8. Power of Court to Discharge Grand Juror After Impanelment Denied.** — *Keitler v. State*, 4 Greene (Iowa) 291; *Portis v. State*, 23 Miss. 578; *Smith v. State*, 19 Tex. App. 95; *Baldwin's Case*, 2 Tyler (Vt.) 475.

**Texas Court Must Discharge Grand Jury as Body.** — *Smith v. State*, 19 Tex. App. 95.

**Where Offense Committed by Grand Jury Is under Investigation.** — In *Iowa* and *Vermont* it has been held that the court has no power to require a grand juror to withdraw himself from the panel in any particular case, not even where a crime alleged to have been committed by him is under investigation, there being a sufficient number of other grand jurors to constitute a quorum and to find an indictment. *Keitler v. State*, 4 Greene (Iowa) 291; *Baldwin's Case*, 2 Tyler (Vt.) 475.

**9. Statutory Authority to Discharge Grand Jurors.** — *State v. Thomas*, 61 Ohio St. 444. See also *Burrell v. State*, 129 Ind. 290.



*c.* DISCRETION OF COURT. — The excusal of a grand juror rests in the sound discretion of the court.<sup>1</sup>

*d.* GROUNDS OF EXCUSAL. — The excusal of grand jurors being a matter which rests in the discretion of the court, it would seem that the court may excuse a grand juror for any reason which to it seems sufficient. Thus a grand juror may be excused for illness,<sup>2</sup> or because he is disqualified,<sup>3</sup> or because he failed to attend,<sup>4</sup> or because he was impaneled and sworn after the proper number of grand jurors had been impaneled and sworn,<sup>5</sup> and the court may even excuse a grand juror to enable him to attend to his private business.<sup>6</sup>

*e.* PRESUMPTIONS AS TO EXCUSAL. — In the absence of any showing in the record upon the subject the court will, when it is necessary to do so, presume that a grand juror was excused;<sup>7</sup> and under similar circumstances the court may presume that a grand juror, although he was discharged, did not avail himself of the privilege.<sup>8</sup>

**Presumption as to Sufficiency of Cause for Excusal.** — When a grand juror is excused or discharged by the court, in the absence of any showing in the record to the contrary, it will be presumed that he was not excused or discharged without sufficient cause.<sup>9</sup>

*f.* RECALLING GRAND JUROR EXCUSED BY MISTAKE. — Where the court inadvertently and by mistake excuses a grand juror, it may, before the entry of the order excusing him, recall him.<sup>10</sup>

**10. Power of Court to Fill Vacancies.** — Whenever vacancies occur in the panel because of the excusal or discharge of a grand juror, or for any other reason, the court has power to fill such vacancies by calling other grand jurors.<sup>11</sup>

**1. Discretion of Court as to Excusal of Grand Juror.** — *Denning v. State*, 22 Ark. 131; *Jones v. State*, 18 Fla. 889; *Williams v. State*, 69 Ga. 12; *Meiers v. State*, 56 Ind. 336; *Mills v. State*, 76 Md. 274; *State v. Brown*, 12 Minn. 545; *State v. Bradford*, 57 N. H. 188.

**Inquiry into Excuse Offered by Grand Juror — Evidence.** — Where a person called as a grand juror asks the court to excuse him, his reasons for being excused should be supported by evidence in some accredited form, for example, by an oath made by him in open court, but in the absence of any statute requiring such a showing the court may excuse him without requiring him to make his excuse under oath. *People v. Hidden*, 32 Cal. 445.

**2. Grand Juror May Be Excused for Illness.** — *Peters v. State*, 98 Ala. 38; *Denning v. State*, 22 Ark. 131.

**Ohio Statute.** — In *Ohio* sickness is made by statute a ground for discharging a grand juror. *State v. Thomas*, 61 Ohio St. 444.

**3. Excusal or Discharge of Disqualified Grand Juror** — *Arizona*. — *Territory v. Barth*, (Ariz. 1887) 15 Pac. Rep. 673.

*Idaho*. — *State v. Schieler*, (Idaho 1894) 37 Pac. Rep. 272.

*Louisiana*. — *State v. Furco*, 51 La. Ann. 1082; *State v. Reig*, 48 La. Ann. 1446; *State v. Brooks*, 48 La. Ann. 1519; *State v. Hunter*, 43 La. Ann. 157; *State v. Woodson*, 43 La. Ann. 995; *State v. Jenkins*, 43 La. Ann. 917; *State v. Causey*, 43 La. Ann. 897.

*Tennessee*. — *Jetton v. State*, *Meigs* (Tenn.) 192.

*Texas*. — *State v. Jacobs*, 6 Tex. 99; *Vanhook v. State*, 12 Tex. 252.

*Virginia*. — *Com. v. Burton*, 4 Leigh (Va.) 645, 26 Am. Dec. 337.

**4. Nonattending Grand Juror May Be Excused.** — *State v. Wilson*, 85 Mo. 134.

**5. Excusal of Superfluous Grand Juror.** — *Compton v. State*, 117 Ala. 56; *State v. Fee*, 19 Wis. 562.

**6. Excusal of Grand Juror to Attend to Private Business.** — *Denning v. State*, 22 Ark. 131.

**7. Presumption as to Excusal of Grand Juror.** — *Wallis v. State*, 54 Ark. 611, in which case the excusal of a grand juror was presumed because otherwise there would have been too many grand jurors. See also *Blevins v. State*, 68 Ala. 92.

**8. Presumption that Grand Juror Acted though Excused.** — *Thompson v. State*, 9 Ga. 210, in which case it was necessary to presume that the grand juror did not avail himself of the privilege, because otherwise it could have been objected that a sufficient number of grand jurors did not concur in the finding of the indictment.

**9. Presumption as to Sufficiency of Cause for Excusal** — *Arizona*. — *Territory v. Barth*, (Ariz. 1887) 15 Pac. Rep. 673.

*Arkansas*. — *Wallis v. State*, 54 Ark. 611.

*California*. — *People v. Millsaps*, 35 Cal. 47; *People v. Hidden*, 32 Cal. 445.

*Georgia*. — *Williams v. State*, 69 Ga. 12.

*Indiana*. — *Burrell v. State*, 129 Ind. 290.

*Kansas*. — *State v. Copp*, 34 Kan. 522.

*Minnesota*. — *State v. Brown*, 12 Minn. 538.

*Mississippi*. — *Cotton v. State*, 31 Miss. 504.

*Tennessee*. — *Epperson v. State*, 5 Lea (Tenn.) 293.

**10. Recalling Grand Juror Excused by Mistake.** — *State v. Cohn*, 9 Nev. 179.

**11. Power of Court to Fill Vacancies** — *United States*. — *U. S. v. Jones*, 69 Fed. Rep. 973.

*Arkansas*. — *Denning v. State*, 22 Ark. 131.

*Indiana*. — *Burrell v. State*, 129 Ind. 290.

*Iowa*. — *State v. Garhart*, 35 Iowa 315; *State v. Gurlagh*, 76 Iowa 141; *State v. Silvers*, 82



11. **Terms of Court and Sessions of Grand Jury** — *a. IN GENERAL.* — The grand jury is impaneled for a certain term of court to which it is returned,<sup>1</sup> but in many states the rules as to the time for summoning the grand jury and as to the duration of the grand jury are fixed by statute.<sup>2</sup>

*b. AT WHAT TIME DURING TERM GRAND JURY MAY BE ORGANIZED.* — Where the matter is not controlled by statute the court has authority to organize a grand jury at any time during the term.<sup>3</sup>

*c. POWER OF COURT TO POSTPONE ATTENDANCE OF GRAND JURY.* — Where a grand jury has been regularly drawn and summoned for the term, the court may in its discretion, at the beginning of the term, postpone the attendance of the jury until the second week of the term.<sup>4</sup>

*d. ADJOURNMENTS* — (1) *Effect of Temporary Adjournment of Court.* — The court need not be in actual session during the entire time that the grand jury is engaged in the transaction of business, and a recess or temporary adjournment of court does not affect the right and power of the grand jury to remain in session and transact business.<sup>5</sup>

*Where Court Adjourns and Orders Grand Jury to Adjourn.* — Where the court adjourns to a future date and also, without discharging the grand jury for the term, directs it to adjourn to such future date, that body retains all its powers and functions and upon reassembling has power to take cognizance of all business properly cognizable by a grand jury.<sup>6</sup>

(2) *Power of Grand Jury to Adjourn.* — The grand jury, when properly organized, meets and adjourns upon its own motion without reference to the temporary adjournment of the court.<sup>7</sup>

(3) *Expiration of Term of Court.* — The existence of the grand jury does not cease before the expiration of the term for which it has been called, unless a statute in terms so declares, or unless the court discharges the grand jury before the termination of the term;<sup>8</sup> but the grand jury's powers cease upon the expiration of the term or after the adjournment of the court for the term.<sup>9</sup>

*Grand Jury Sitting at Subsequent Term — De Facto Grand Jury.* — Where a grand jury is summoned, selected, impaneled, and sworn for a term of court, and holds its session and does business during that term, and continues its sittings over and into the next succeeding term of the court, and during that term is recognized by the court as a lawful grand jury, during such succeeding term it is at

Iowa 714; *State v. Mooney*, 10 Iowa 506; *State v. Smith*, 88 Iowa 178.

*Louisiana.* — *State v. Reiz*, 48 La. Ann. 1446

*Maryland.* — *Mills v. State*, 76 Md. 274.

*Massachusetts.* — *Crimm v. Com.*, 119 Mass. 326.

*Missouri.* — *State v. Wilson*, 85 Mo. 139.

*Tennessee.* — *Epperson v. State*, 5 Lea (Tenn.) 293; *Jetton v. State*, Meigs (Tenn.) 192.

*Texas.* — *State v. Jacobs*, 6 Tex. 99.

*Vermont.* — *State v. Ward*, 60 Vt. 142.

See further the title **INDICTMENTS, INFORMATION, AND COMPLAINTS**, 10 ENCYC. OF PL. AND PR. 375.

1. *Com. v. Bannon*, 97 Mass. 214.

2. **Statutory Provisions.** — See the statutes of the various states.

In California a grand jury is impaneled to serve for one year and until another grand jury shall be chosen as its successor. *People v. Leonard*, 106 Cal. 302; *Matter of Gannon*, 69 Cal. 541.

3. **Grand Jury May Be Organized at Any Time.** — *Jackson v. State*, 102 Ala. 167.

4. **Court May Postpone Attendance of Grand Jury.** — *Traviss v. Com.*, 106 Pa. St. 597.

5. **Grand Jury May Do Business Pending Temporary Adjournment.** — *Nealon v. People*, 39 Ill.

App. 481; *Com. v. Bannon*, 97 Mass. 214; *People v. Chautauqua County*, (County Ct.) 11 Civ. Pro. (N. Y.) 172. See also *State v. Pate*, 67 Mo. 489.

6. **Effect of Adjournment of Court and Grand Jury.** — *State v. Davis*, 22 Minn. 423.

**Failure of Grand Jury to Assemble After Adjournment.** — Where, during the term, the grand jury is discharged by the court until a certain future date, and that body does not appear on that day but upon the day thereafter, it is not thereby dissolved and may proceed to find indictments without being reassembled. *Clem v. State*, 33 Ind. 418.

7. **Grand Jury May Adjourn on Its Own Motion.** — *Nealon v. People*, 39 Ill. App. 481.

8. **Existence of Grand Jury Coextensive with Term.** — *State v. Winebrenner*, 67 Iowa 231; *Com. v. Colton*, 11 Gray (Mass.) 1. See also *State v. Davis*, 22 Minn. 425; *State v. Pate*, 67 Mo. 489.

**The Grand Jury Cannot Dissolve Itself.** — *Matter of Gannon*, 69 Cal. 541; *Clem v. State*, 33 Ind. 418; *State v. Will*, 97 Iowa 58.

9. **Power of Grand Jury Limited to Term of Court.** — *Nealon v. People*, 39 Ill. App. 481; *Com. v. Bannon*, 97 Mass. 214. See also *State v. Noyes*, 87 Wis. 340, 41 Am. St. Rep. 45.



least a *de facto* grand jury and its doings cannot be inquired into collaterally on habeas corpus.<sup>1</sup>

*e. SPECIAL TERMS OF COURT.* — Indictments may be found at a special term of court,<sup>2</sup> and it has been held that the court may impanel a grand jury at an adjourned term,<sup>3</sup> and that the court, when it adjourns the regular term to a special adjourned term, may in its discretion require the attendance of the grand jurors at the adjourned term, such continuance not operating as a discharge of the grand jury.<sup>4</sup>

*f. TERM OF COURT TO WHICH DEFENDANT HAS BEEN BOUND OVER* — *Indictment of Defendant at Prior Term.* — It has been held that where an accused person has been bound over to appear at a certain term of court, a grand jury called for a prior term of court has no jurisdiction to inquire into his offense by virtue of the proceedings previously instituted against him, but only by virtue of its general statutory authority to inquire into all violations of the criminal laws.<sup>5</sup>

*Discharge of Defendant for Failure of Grand Jury to Indict.* — Statutes sometimes fix the time within which an indictment shall be found and provide that unless an indictment is found within such time the defendant shall be discharged,<sup>6</sup> and it has been held that when a party is held to answer at a particular term and no indictment is found at that term, he should be discharged.<sup>7</sup>

**12. Duties of Grand Juries.** — The Oath Administered to the Grand Jury contains a concise statement of its duties. It is diligently to inquire and true presentment make as well of all such matters and things as shall be given it in charge as of those things which it shall know to be presentable; and it is to present no one from envy, hatred, or ill will, and to leave no one unrepresented from fear, favor, or affection.<sup>8</sup>

*Duty to Make Report.* — It is the duty of the grand jury to report its action on such cases as are submitted to it, and it is incumbent upon the court and the prosecuting attorney to see that this duty is performed.<sup>9</sup>

*Duty to Supervise Doings of County Officers.* — In many states it is made by statute the duty of the grand jury to inspect the county jail and poorhouse, to inquire into the wilful and corrupt misconduct of public officers within the county,

1. *De Facto Grand Jury.* — *State v. Noyes*, 87 Wis. 340, 41 Am. St. Rep. 45.

2. *Special Terms of Court.* — *Aaron v. State*, 39 Ala. 689; *Harrington v. State*, 36 Ala. 241; *People v. Carabin*, 14 Cal. 438; *Gardner v. People*, 4 Ill. 83; *Young v. State*, 2 How. (Miss.) 865; *People v. McKane*, 80 Hun (N. Y.) 322; *Oshoga v. State*, 3 Pin. (Wis.) 56. See also 2 Hale's P. C. 34, 35; 2 Hawk. P. C., c. 6, § 2; and 1 Chitty's Crim. Law 145, 146.

In *Indiana* it has been held under a statute authorizing special sessions of the Circuit Court that a grand jury is not warranted in finding an indictment at such term against any person other than the one for whose trial the court was convened. *Wilson v. State*, 1 Blackf. (Ind.) 428.

3. *Impanelment of Grand Jury at Adjourned Term.* — *Sims v. State*, 51 Ga. 497; *Holman v. State*, 79 Ga. 155; *Ulmer v. State*, 14 Ind. 52; *State v. Peterson*, 61 Minn. 73; *State v. Sweeney*, 68 Mo. 97; *State v. Barnes*, 20 Mo. 413.

4. *Attendance of Grand Jury at Special Adjourned Term.* — *State v. Pate*, 67 Mo. 488.

*Minnesota Statute.* — Stat. Minn. (1894), § 4850, provides for the holding of adjourned terms and provides that the judge "may direct grand and petit jurors to be drawn and summoned for any adjourned or special term,

in the manner prescribed by law." *State v. Peterson*, 61 Minn. 73.

5. *Indictment Before Term to Which Defendant Has Been Bound Over.* — *Stark v. Bindley*, 152 Ind. 182.

6. *Failure of Grand Jury to Indict Within Statutory Time.* — *State v. Lambert*, 9 Nev. 323; *Jones v. Com.*, 19 Gratt. (Va.) 481; *Glover v. Com.*, 86 Va. 382; *Waller v. Com.*, 84 Va. 492.

7. *Failure to Indict at Term to Which Defendant Is Held.* — *Ex p. Two Calf*, 11 Neb. 221.

*Where Grand Jury Does Not Investigate Offense.* — In *Illinois* it has been held that the failure of the grand jury to indict at the term to which the defendant has been held does not entitle him to a discharge where the record fails to show that any evidence was heard by the grand jury. *People v. Hessing*, 28 Ill. 410.

*Waiver of Privilege by Defendant.* — The failure of a grand jury to indict a defendant within the time prescribed by statute may be waived if the motion is not brought to the attention of the court seasonably and in a proper manner. *Sutton v. Com.*, 97 Ky. 308.

8. *Com. v. Dietrich*, 7 Pa. Super. Ct. 515; *In re Grand Jury*, 62 Fed. Rep. 840; *Charge to Grand Jury*, Chase (U. S.) 263, 30 Fed. Cas. No. 18,248.

9. *Rion v. Com.*, 1 Duv. (Ky.) 235.



and to examine the county treasurer's books, the tax collector's books and accounts, and the dockets of justices of the peace. For these purposes they are generally granted free access to public prisons and to all public records of the county.<sup>1</sup>

**13. Powers of Grand Juries — a. IN GENERAL. — Power to Accuse or Try Offenders.** — For a long period the powers of a grand jury were not clearly defined, and it would seem from the accounts of commentators on the laws of England that it was at first a body which not only accused but also tried public offenders,<sup>2</sup> but at the present day a grand jury is an informing and accusing tribunal only.<sup>3</sup>

**Criminal Jurisdiction Only.** — The powers of the grand jury extend only to questions of crime. Its functions are not executive, but judicial. It is, in fact, a preliminary tribunal, and it is furnished with inquisitorial powers only for the purpose of examining into crimes.<sup>4</sup>

**b. WHAT CRIMES THEY MAY INVESTIGATE — Jurisdiction Coextensive with Jurisdiction of Court.** — As to the offenses which a grand jury has power to investigate, it has the same jurisdiction as the court upon which it is in attendance,<sup>5</sup> and it must derive its powers and exercise its functions under the authority of a legally constituted court.<sup>6</sup> A grand jury is impaneled to inquire of and present all offenses committed within the county;<sup>7</sup> being organized for the term, and with reference to no particular case, it has power to inquire into all crimes.<sup>8</sup>

**Crimes over Which Court Has No Jurisdiction.** — The powers of a grand jury do not transcend the jurisdiction of the court, and a grand jury has no power to make a presentment for an offense over which the court has no jurisdiction.<sup>9</sup> Where it transcends its powers its proceedings are null.<sup>10</sup>

**Territorial Jurisdiction of Grand Jury.** — A grand jury has the same territorial jurisdiction as the court upon which it is in attendance,<sup>11</sup> and it has such jurisdiction only; it cannot inquire into offenses committed outside of the court's territorial jurisdiction.<sup>12</sup>

**Time of Commission of Offense.** — The powers of the grand jury extend to all offenses which have been committed, without regard to the time of their commission, the only qualification being that contained in the statute of limitations.<sup>13</sup>

1. See the statutes of the different states.

2. *Per* Field, J., in Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255.

3. **Grand Jury Accusing Tribunal Only.** — *State v. Branch*, 68 N. Car. 186, 12 Am. Rep. 633; *Charge to Grand Jury*, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255.

4. *Pankey v. People*, 2 Ill. 80; *Matter of Gardiner*, (N. Y. Gen. Sess.) 31 Misc. (N. Y.) 364.

**Where There Is No Prosecuting Attorney.** — The powers and duties of the grand jury do not cease because there may happen to be no prosecuting attorney. *State v. Gonzales*, 26 Tex. 197.

**Necessity for Petit Jury in Attendance.** — There need be no petit jury in attendance upon a court to give validity to the action of a grand jury. *State v. Davis*, 22 Minn. 423.

**5. Jurisdiction Coextensive with Jurisdiction of Court.** — *People v. Northey*, 77 Cal. 618; *Cook v. State*, 7 Blackf. (Ind.) 165; *State v. Henning*, 33 Ind. 189; *Keitler v. State*, 4 Greene (Iowa) 291; *Com. v. Bannon*, 97 Mass. 214; *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; *Territory v. Corbett*, 3 Mont. 50; *People v. Horton*, (Buffalo Super. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 222; *U. S. v. Hill*, 1 Brock. (U. S.) 156, 26 Fed. Cas. No. 15,364.

6. *Cook v. State*, 7 Blackf. (Ind.) 165; *Jackson v. Com.*, 13 Gratt. (Va.) 795.

7. *People v. Horton*, (Buffalo Super. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 222.

**Unorganized Counties.** — Sometimes unorganized counties are attached to organized counties for judicial purposes, such cases being exceptions to the general rule. *Waukon-chaw-neek-kaw v. U. S.*, 1 Morr. (Iowa) 332; *State v. Stokely*, 16 Minn. 282; *Dodge v. People*, 4 Neb. 222.

8. *State v. Watson*, 31 La. Ann. 379.

**Crimes Committed by Corporations.** — The power of a grand jury to inquire into crimes exists as well in the case of a corporation as of an individual charged with a criminal offense. *People v. Equitable Gas Light Co.*, (Ct. Gen. Sess.) 6 N. Y. Crim. 189, which case was decided under a statute.

9. *U. S. v. Hill*, 1 Brock. (U. S.) 156, 26 Fed. Cas. No. 15,364.

10. *Beal v. State*, 15 Ind. 378; *U. S. v. Hill*, 1 Brock. (U. S.) 156, 26 Fed. Cas. No. 15,364.

11. *Keitler v. State*, 4 Greene (Iowa) 291.

12. *Beal v. State*, 15 Ind. 378.

13. **Time of Commission of Offense.** — *People v. Beatty*, 14 Cal. 566, in which case it was held that a grand jury may investigate crimes com-



c. **INQUISITORIAL POWERS** — (1) *In General*. — Although it has been sometimes asserted that at common law a grand jury was charged especially with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offenses,<sup>1</sup> according to the weight of authority the power of the grand jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body is ordinarily limited to cases in which individuals have been charged with specific crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the court or the prosecuting attorney, and it has no power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender.<sup>2</sup>

(2) *Statutory Provisions*. — In many states the powers of grand jurors are prescribed by statute,<sup>3</sup> and in some states grand juries have by statute inquisitorial powers as to the investigation of gaming, illegal voting, tippling, disturbing public worship, and other minor offenses, and are empowered to send for witnesses to testify as to such offenses.<sup>4</sup>

mitted after the grand jury has been impaneled.

1. *Per Avery, J.*, in *State v. Wilcox*, 104 N. Car. 847. See also to the effect that a grand jury has inquisitorial powers, *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, and a dictum by *Church, C. J.*, in *State v. Wolcott*, 21 Conn. 271.

In Maryland grand jurors have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders though no preliminary proceedings have been had before a magistrate, and though neither the court nor the state's attorney has laid the matter before them. *Blaney v. State*, 74 Md. 153. See also *Cahen v. Jarrett*, 42 Md. 580.

2. **Grand Jury Has No Inquisitorial Powers** — *Pennsylvania*. — *Grand Jury v. Public Press*, 4 Brews. (Pa.) 313; *Com. v. Dietrich*, 7 Pa. Super. Ct. 515; *Com. v. Kulp*, 17 Pa. Co. Ct. 561; *Com. v. McComb*, 157 Pa. St. 611; *Com. v. Green*, 126 Pa. St. 531, 12 Am. St. Rep. 894; *Rowand v. Com.*, 82 Pa. St. 405; *McCullough v. Com.*, 67 Pa. St. 30.

*Tennessee*. — *Glenn v. State*, 1 Swan (Tenn.) 19; *State v. Smith, Meigs* (Tenn.) 99, 33 Am. Dec. 132; *Robeson v. State*, 3 Heisk. (Tenn.) 266; *Ayrs v. State*, 5 Coldw. (Tenn.) 26; *State v. Adams*, 2 Lea (Tenn.) 647; *Wallace v. State*, an unreported case which is cited in *McGrew v. City Produce Exch.*, 85 Tenn. 578, 4 Am. St. Rep. 771; *State v. Lee*, 87 Tenn. 114; *State v. Lewis*, 87 Tenn. 119; *Harrison v. State*, 4 Coldw. (Tenn.) 195.

See also to the effect that a grand jury has no inquisitorial powers, *In re Lester*, 77 Ga. 143, *per Hall, J.*; *O'Hair v. People*, 32 Ill. App. 277; *Lewis v. Wake County*, 74 N. Car. 194.

In the United States Courts the investigations of grand juries are subject to the following limitations: First, such matters as may be called to their attention by the court; second, such matters as may be submitted to them by the district attorney; third, such matters as may come to their knowledge in the course of

investigations into matters brought before them or from their own observations; and, fourth, such matters as may come to their knowledge from the disclosures of their associates. They have no inquisitorial powers. *Charge to Grand Jury*, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255. See also to the same effect, *U. S. v. McAvoy*, 4 Blatchf. (U. S.) 418, 18 How. Pr. (N. Y.) 380, 26 Fed. Cas. No. 15,654; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765.

**Duties of Prosecuting Attorney** — *With Respect to Preparing Indictments, Etc.* — At common law it was the duty of the prosecuting attorney to prepare indictments and submit them, together with the witnesses, to the grand jury. *O'Hair v. People*, 32 Ill. App. 277.

*With Respect to Calling Witnesses*. — A prosecuting officer has no right to send witnesses to the grand jury room merely to be interrogated whether there has been any violation of law within their knowledge. *Lewis v. Wake County*, 74 N. Car. 194. See also *U. S. v. Kilpatrick*, 16 Fed. Rep. 765.

**Where Witness Properly Called Testifies Improperly**. — Where a witness is summoned before the grand jury to testify as to offenses as to which that body has inquisitorial powers, and upon the examination of such witness he testifies in relation to an offense as to which it has no inquisitorial power, an indictment found by the grand jury upon such testimony is bad upon a plea in abatement. *State v. Robinson*, 2 Lea (Tenn.) 114.

3. **Statutory Powers of Grand Juries**. — See the statutes of the various states, and *Fields v. State*, 121 Ala. 16.

4. **Statutes Conferring Inquisitorial Powers**. — See the statutes of the various states.

In Tennessee grand juries have by statute inquisitorial powers such as are mentioned in the text. *Robeson v. State*, 3 Heisk. (Tenn.) 266; *State v. Parish*, 8 Humph. (Tenn. 80; *Ayrs v. State*, 5 Coldw. (Tenn.) 26; *Warner v. State*, 13 Lea (Tenn.) 52; *Doebler v. State*, 1 Swan (Tenn.) 473; *Glenn v. State*, 1 Swan (Tenn.) 19; *Hirsch v. State*, 8 Baxt. (Tenn.) 89; *State v. Barnes*, 5 Lea (Tenn.) 398; *State v.*



**Construction of Statutes.** — Statutes conferring upon the grand jury inquisitorial powers and power to send for witnesses are in derogation of the common law, and must be strictly construed and not extended beyond their express provisions.<sup>1</sup>

**d. HEARING VOLUNTEER WITNESSES.** — It is not allowable for private individuals to go before the grand jury with their witnesses and prefer charges; they should make a complaint before a magistrate or communicate their knowledge to the prosecuting attorney to enable him to prepare an indictment,<sup>2</sup> but the record need not show that a witness who appeared before the grand jury was sent by the prosecuting attorney.<sup>3</sup>

**e. MAKING PRESENTMENTS — ACTING ON ITS OWN KNOWLEDGE.** — A grand jury may, on its own knowledge or that of any of its members, make a presentment without there being any prosecutor or indictment previously presented to it.<sup>4</sup>

**Presentment Ignored by Prosecuting Attorney.** — In the *United States* it has been the usage for the court to pass over presentments which the prosecuting attorney ignores and upon which he does not see proper to prepare an indictment.<sup>5</sup>

**f. PENDING PRELIMINARY EXAMINATION OR OTHER PROCEEDINGS — Before or Pending Preliminary Examination.** — A grand jury has the power to investigate a criminal offense and find an indictment without any previous preliminary examination of the accused,<sup>6</sup> and when a preliminary examination of an accused person is pending the grand jury has full power to make inquiry and find an indictment against such person notwithstanding such preliminary examination,<sup>7</sup> although, as a general rule, it is better not to indict while such examination is pending.<sup>8</sup>

Estes, 3 Lea (Tenn.) 168; *Harrison v. State*, 4 Coldw. (Tenn.) 197; *State v. Staley*, 3 Lea (Tenn.) 565; *State v. Smith, Meigs* (Tenn.) 99, 33 Am. Dec. 132.

**1. Strict Construction of Statutes.** — *Harrison v. State*, 4 Coldw. (Tenn.) 197; *Glenn v. State*, 1 Swan (Tenn.) 19; *Warner v. State*, 13 Lea (Tenn.) 52.

**Power of Prosecuting Attorney to Send for Witnesses.** — Where a grand jury is given inquisitorial powers with reference to certain offenses, and is empowered to send for witnesses to testify as to such offenses, witnesses should not be summoned at the instance of the prosecuting attorney but solely at the request of the grand jury. *Warner v. State*, 13 Lea (Tenn.) 52.

**Where Grand Jury May Send for Witnesses No Order of Court Necessary.** — *State v. Barnes*, 5 Lea (Tenn.) 398.

**2. Grand Jury Should Not Hear Volunteer Witnesses.** — *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *Lewis v. Wake County*, 74 N. Car. 194; *Com. v. Dietrich*, 7 Pa. Super. Ct. 515. *Contra*, *State v. Stewart*, 45 La. Ann. 1164.

**3. State v. Frizell**, 111 N. Car. 722.

**4. Power to Make Presentments.** — 2 Coke's Inst. 739; 1 Chitty's Crim. Law 162; *Lewis v. Wake County*, 74 N. Car. 194; *Grand Jury v. Public Press*, 4 Brews. (Pa.) 313; *State v. Lee*, 87 Tenn. 114; *State v. Darna*, 1 Humph. (Tenn.) 290.

In New York a presentment as a means or as a link in the chain to hold a person to answer for a crime is unknown. Although the court sanctions presentments which call attention to public evils in general, yet the grand jury should never, under cover of a presentment, present an individual in this manner. *Matter*

of Gardiner, (N. Y. Gen. Sess.) 31 Misc. (N. Y.) 364.

**Distinction Between Presentments and Indictments Abolished.** — *Groves v. State*, 73 Ga. 205.

**5. U. S. v. Hill**, 1 Brock. (U. S.) 156, 26 Fed. Cas. No. 15,364.

**Indictment Framed upon Presentment — Necessity to Submit Indictment to Grand Jury.** — See *Nunn v. State*, 1 Ga. 243, citing 1 Chitty's Crim. Law 163.

**Variance Between Indictment and Presentment.** — A variance between the presentment and the indictment is immaterial, as the grand jury has the right in finding an indictment to correct, change, or modify the presentment. *Laird v. State*, 61 Md. 309.

**6. Necessity for Preliminary Examination.** — *People v. Page*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 600. See also, for a full discussion of this subject, the title PRELIMINARY EXAMINATION, 16 ENCYC. OF PL. AND PR. 818.

**7. Pendency of Preliminary Examination Immaterial.** — *People v. Heffernan*, (N. Y. Gen. Sess.) 5 Park. Crim. (N. Y.) 393; *People v. Horton*, (Buffalo Super. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 222; *People v. Hyler*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 566.

**Pending Preliminary Examination by Recorder.** — In *New York* it has been held by a recorder that he may advise the grand jury not to examine a charge against a person who has been arrested for a criminal offense on a warrant of the recorder, pending an examination before such recorder. *People v. Freund*, (N. Y. Gen. Sess.) 33 N. Y. Supp. 612.

**After Complaint Made to Magistrate — New York Statute.** — See *People v. Andrews*, (Ct. App.) 7 N. Y. Crim. 314.

**8. Advisability of Prior Preliminary Examination.**



**Pending Investigation by Coroner.** — A grand jury may in some jurisdictions take action pending an investigation by the coroner.<sup>1</sup>

**g. AS TO FINDING INDICTMENT IN WHOLE OR IN PART.** — All the authorities concur that the grand jury cannot find part of an entire count true, and another part false, as in some instances a petit jury may, but must either maintain or reject the entire count. Where there are separate and distinct counts in the indictment the rule is otherwise, and the grand jury may find a "true bill" as to one count, and "not a true bill" as to another. So an indictment against several persons may be found against one or more, and rejected as to the rest, and this although there be but a single count.<sup>2</sup>

**h. OUSTER OF JURISDICTION OF OTHER TRIBUNALS.** — The grand jury may at any time inquire into a crime which has been committed in the county, and if definite action be taken by indictment, every inferior tribunal is immediately ousted of jurisdiction, and it makes no difference whether the inferior tribunal has acquired jurisdiction of the case or not.<sup>3</sup>

**i. TERMINATION OF POWERS.** — The functions and powers of the grand jury are ended after a true bill found by it has been received by the court. Thereafter the grand jury has no power to reconsider the matter and withdraw the indictment, and on the prosecution of the person indicted such withdrawal of the indictment cannot be shown by the testimony of the foreman of the jury.<sup>4</sup>

**j. SPECIAL STATUTORY POWERS.** — In some states extraordinary powers are conferred by statute upon grand juries. Thus in one state it has been provided that a certain statute shall not go into effect in any county until it has been recommended by the grand jury of said county,<sup>5</sup> and in another it has been provided that no license for the sale of intoxicating liquor shall be issued except upon the recommendation of the grand jury.<sup>6</sup>

**14. Number of Grand Jurors Necessary to Constitute a Quorum.** — Under the common law twelve grand jurors constitute a quorum,<sup>7</sup> and it has been held, uniformly it would seem, that one accused of crime is not entitled as a matter of right to a full panel in his particular case, and that if a sufficient number of grand jurors has been impaneled the absence, death, excusal, or discharge of one or more jurors does not affect the organization of the grand jury or disable it from investigating criminal charges and finding indictments, providing the minimum number which is required to concur in the finding of an indictment remains and does so concur.<sup>8</sup>

**tion.** — *People v. Hefferman*, (N. Y. Gen. Sess.) 5 Park. Crim. (N. Y.) 393.

**1.** *People v. Molineux*, (N. Y. Gen. Sess.) 26 Misc. (N. Y.) 589, 13 N. Y. Crim. 544, which case was decided under Code Crim. Pro. N. Y., §§ 252, 260, empowering the grand jury to inquire into all crimes committed or triable in the county, and making it imperative upon the grand jury to inquire into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted.

**2.** *State v. Wilhite*, 11 Humph. (Tenn.) 602. See also to the same effect, *State v. Cowan*, 1 Head (Tenn.) 280, in which case the court cited 1 Chitty's Crim. Law 322; 1 Russ. on Crimes (9th ed.) 430; and 1 Arch. Crim. Prac. (Waterman ed.) 98, 104.

**3.** *People v. Molineux*, (N. Y. Gen. Sess.) 26 Misc. (N. Y.) 589, 13 N. Y. Crim. 544.

**4.** *Fields v. State*, 121 Ala. 16.

**5. Statute Inoperative until Approved by Grand Jury.** — In *Haney v. Bartow County*, 91 Ga. 770, it was held that such a statute is constitutional and is not open to the objection that it confers upon grand jurors the power of

legislation, nor is it open to the objection that it violates a constitutional requirement that statutes shall have uniform operation throughout the state.

**6. Power to Recommend Liquor License.** — In *Cahen v. Jarrett*, 42 Md. 571, it was held that a statute conferring such power is constitutional and is a proper exercise of police power.

**7.** *McNeese v. State*, 19 Tex. App. 48.

**8. Number that May Constitute Quorum** — *Alabama*. — *State v. Miller*, 3 Ala. 343.

*California*. — *People v. Roberts*, 6 Cal. 214; *People v. Butler*, 8 Cal. 435; *People v. Gatewood*, 20 Cal. 146, *People v. Hunter*, 54 Cal. 65; *People v. Simmons*, 119 Cal. 1.

*Florida*. — *Gladden v. State*, 12 Fla. 562.

*Iowa*. — *State v. Ostrander*, 18 Iowa 435; *State v. Billings*, 77 Iowa 417.

*Kansas*. — *State v. Copp*, 34 Kan. 522.

*Louisiana*. — *State v. Causey*, 43 La. Ann. 897.

*Minnesota*. — *State v. Cooley*, 72 Minn. 476.

*Mississippi*. — *Johnston v. State*, 7 Smed. & M. (Miss.) 58; *Portis v. State*, 23 Miss. 583.

*New York*. — *Dolan v. People*, 64 N. Y. 485.



**15. Notice to Accused — Presence Before Grand Jury — Notice of Proceedings of Grand Jury.** — A person accused of crime is not entitled to notice that the grand jury is investigating the charge against him.<sup>1</sup>

**Right of Accused to Appear Before Grand Jury.** — The accused is never allowed as of right to appear before the grand jury, his right to confront his accuser not arising until his trial.<sup>2</sup>

**Right to Representation by Counsel Before Grand Jury.** — An accused person is not entitled to be represented by counsel before the grand jury.<sup>3</sup>

**16. Evidence Before Grand Juries — a. ADMISSIBILITY OR COMPETENCY OF EVIDENCE — (1) In General — Application of Ordinary Rules of Evidence.** — Investigations before grand juries must be made in accordance with the well-established rules of evidence. They must have the best legal proof of which the case admits. In this respect grand juries are judicial tribunals.<sup>4</sup> Nevertheless the grand jury is not controlled by technical rules of evidence.<sup>5</sup>

**The Grand Jury Should Receive None but Legal Evidence,** to the exclusion of mere reports, suspicions, and hearsay evidence;<sup>6</sup> nor should it hear irrelevant evidence.<sup>7</sup>

**In Requiring the Production of Evidence** before a grand jury the court will be guided by ordinary rules.<sup>8</sup>

**(2) Statutory Provisions.** — In some states statutes have been enacted expressly providing that grand juries shall receive none but legal evidence.<sup>9</sup>

*South Carolina.* — *State v. Williams*, 35 S. Car. 344.

*Texas.* — *Drake v. State*, 25 Tex. App. 293; *Jackson v. State*, 25 Tex. App. 314; *Watts v. State*, 22 Tex. App. 572; *Smith v. State*, 19 Tex. App. 95.

*Vermont.* — *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818.

1. *People v. Goldenson*, 76 Cal. 328. See also *State v. Wolcott*, 21 Conn. 272.

**Bringing Accused into Court to Challenge Grand Jurors.** — In *Texas* it is provided by statute that any person confined in jail shall, upon his request, be brought into court to enable him to challenge grand jurors. *Barkman v. State*, (Tex. Crim. 1899) 52 S. W. Rep. 69, in which case, however, it was held that it was not ground for quashing an indictment that the defendant was not present when the grand jury was impaneled. See also *Barkman v. State*, (Tex. Crim. 1899) 52 S. W. Rep. 73, holding that where a person confined in jail desires to be present when the grand jury is impaneled he or his counsel must make that wish known to the district judge.

2. *People v. Stuart*, 4 Cal. 218; *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757, *per Fletcher, J.* See also *State v. Hamlin*, 47 Conn. 95, 36 Am. Dec. 54; *Lung's Case*, 1 Conn. 428.

**Presence of Accused Handcuffed Before Grand Jury.** — The fact that a person accused of murder is brought into the courtroom in the presence of the grand jury while he is handcuffed is not an available error, and does not warrant the inference that the grand jury saw him thus handcuffed and was therefore prejudiced against him in finding the indictment. *Com. v. Weber*, 167 Pa. St. 153.

3. *Matter of Gardiner*, (N. Y. Gen. Sess.) 31 Misc. (N. Y.) 364, *per Foster, J.* See also to the same effect *Com. v. Salter*, 2 Pearson (Pa.) 466.

4. **Admissibility of Evidence.** — *U. S. v. Kil-*

*patrick*, 16 Fed. Rep. 765; *Charge to Grand Jury*, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *In re Grand Jury*, 62 Fed. Rep. 840; *U. S. v. Reed*, 2 Blatchf. (U. S.) 435, 27 Fed. Cas. No. 16,134; *Com. v. Knapp*, 9 Pick. (Mass.) 495; *State v. Frizell*, 111 N. Car. 722; *Dockery v. State*, 35 Tex. Crim. 487.

5. **May Disregard Technical Rules of Evidence.** — *Turk v. State*, 7 Ohio 240 (pt. ii.) 240.

6. **Hearsay Evidence Inadmissible.** — *Charge to Grand Jury*, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *In re Grand Jury*, 62 Fed. Rep. 840.

7. **Irrelevant Evidence.** — *U. S. v. Hunter*, 15 Fed. Rep. 712.

**Evidence Admissible Before Petit Jury.** — Any evidence which is admissible before a petit jury is admissible before a grand jury. *State v. Frizell*, 111 N. Car. 722.

**Competency of Witnesses.** — As to the competency of witnesses before a grand jury see *infra*, this section, *Witnesses Before Grand Juries*.

8. **Compelling Production of Evidence — Ballots.** — Since ballots are not subject to inspection except in an election contest, the court has no power to compel the production of ballot boxes before a grand jury which is investigating election frauds. *Keenan v. People*, 58 Ill. App. 241; *Ex p. Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557.

**Paper Intrusted by Client to Attorney.** — Where an attorney at law is intrusted by a client with a paper the court will not require the production of such paper before the grand jury. *Anonymous*, 8 Mass. 370.

9. **Statutory Provisions as to Admissibility of Evidence.** — See the statutes of the various states, and see the following cases: *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77; *Com. v. Minor*, 89 Ky. 555; *State v. Beebe*, 17 Minn. 241; *People v. Edwards*, (Oyer & T. Ct.) 25 N. Y. Supp. 480; *People v. Lindenborn*, (Supm. Ct. Crim. T.) 23 Misc. (N. Y.) 426; *People v.*



(3) *Depositions of Witnesses Examined by Committing Magistrates.* — In some states, by statute, the grand jury need not take the oral testimony of witnesses, but may find an indictment upon the depositions of witnesses taken upon the preliminary examination of the accused, or upon the minutes of their testimony taken upon the preliminary examination of the accused, or upon the minutes of their testimony taken by the committing magistrate.<sup>1</sup>

(4) *Evidence in Behalf of Accused Persons.* — As a general rule it is the duty of the grand jury to inquire into the nature and probable grounds of criminal accusations, but it is the exclusive province of the petit jury to hear and determine whether the defendant is or is not guilty, and therefore the grand jury should not, ordinarily, examine witnesses in behalf of the defendant.<sup>2</sup>

**Right of Defendant to Be Heard.** — It is well settled that the submission to the grand jury of evidence in behalf of an accused person is not a right upon which he can insist.<sup>3</sup>

**Exceptions to General Rule.** — However, the grand jury may receive all the evidence presented to it by the prosecuting attorney, whether it tends to establish the innocence or the guilt of the accused,<sup>4</sup> but it would seem to be an open question whether or not the grand jurors may send for witnesses in behalf of the accused against the wishes of the prosecuting attorney.<sup>5</sup>

(5) *Submission of Doubtful Questions to Court.* — If there should be any doubts as to the admissibility of evidence, the grand jury should submit the question to the court for its instructions and directions. Such inquiries should be made in writing, and the judge must determine whether the instructions should be by written communication or from the bench.<sup>6</sup>

(6) *Effect of Reception of Inadmissible or Incompetent Evidence.* — The court will not look behind the return of the grand jury and set aside an indictment because that body received improper evidence or the testimony of witnesses who were not competent to testify.<sup>7</sup>

Brickner, (Oyer & T. Ct.) 8 N. Y. Crim. 217; *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361.

**1. Depositions or Minutes of Witnesses.** — See the statutes of the various states, and see also *People v. Stuart*, 4 Cal. 218; *State v. Marshall*, 105 Iowa 38; *State v. Beal*, 94 Iowa 39; *State v. Cook*, 92 Iowa 483; *State v. Wise*, 83 Iowa 596; *State v. Rodman*, 62 Iowa 456.

**Duty of Court to Submit Papers to Grand Jury.** — In *Iowa*, by statute, it is the duty of the court to submit to the grand jury all papers relating to the arrest and preliminary examination of persons who have been held to await the action of the grand jury. *State v. Collis*, 73 Iowa 542.

**2. Evidence for Defendant Not Ordinarily Heard.** — *Respublica v. Shaffer*, 1 Dall. (U. S.) 236; *U. S. v. Lawrence*, 4 Cranch (C. C.) 514; *U. S. v. White*, 2 Wash. (U. S.) 29; *U. S. v. Palmer*, 2 Cranch (C. C.) 11.

**3. Defendant Has No Right to Be Heard.** — 2 Hale's P. C. 157; *U. S. v. Terry*, 39 Fed. Rep. 355; *Respublica v. Shaffer*, 1 Dall. (U. S.) 236; *U. S. v. Palmer*, 2 Cranch (C. C.) 11; *U. S. v. White*, 2 Wash. (U. S.) 29; *People v. Golden-son*, 76 Cal. 328; *Lung's Case*, 1 Conn. 428; *State v. Wolcott*, 21 Conn. 272; *U. S. v. Blodgett*, 35 Ga. 336, 30 Fed. Cas. No. 18,312.

**4. Evidence for Defendant Presented by Prosecuting Attorney.** — Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *U. S. v. White*, 2 Wash. (U. S.) 29; *U. S. v. Palmer*, 2 Cranch (C. C.) 11.

**5. Discretion of Grand Jury to Send for Witnesses for Defense.** — In *U. S. v. Terry*, 39 Fed. Rep. 355, the court refused to set aside an indictment because the grand jury requested the district attorney to subpoena certain witnesses in behalf of the defense, and he refused to do so, and instructed the grand jury that no witnesses for the defense should be subpoenaed. See also *U. S. v. White*, 2 Wash. (U. S.) 29, and Justice Field's Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; 1 Chitty's Crim. Law 318.

**6. Determination by Court of Admissibility of Evidence.** — *Per Dick, J.*, in *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *Per Hill, J.*, in *U. S. v. Hunter*, 15 Fed. Rep. 712.

**7. Reception of Incompetent or Illegal Evidence Immaterial—England.** — *Reg. v. Russell, C. & M.* 247, 41 E. C. L. 139.

*United States.* — *U. S. v. Reed*, 2 Blatchf. (U. S.) 466.

*Alabama.* — *Washington v. State*, 63 Ala. 189.

*Connecticut.* — *State v. Fasset*, 16 Conn. 472.

*Indiana.* — *Stewart v. State*, 24 Ind. 142;

*Creek v. State*, 24 Ind. 151.

*Iowa.* — *State v. Tucker*, 20 Iowa 508; *State v. Fowler*, 52 Iowa 103.

*Massachusetts.* — *Com. v. Woodward*, 157 Mass. 516, 34 Am. St. Rep. 302; *Com. v. Knapp*, 9 Pick (Mass.) 495.

*Michigan.* — *People v. Lauder*, 82 Mich. 109.

*Mississippi.* — *Hammond v. State*, 74 Miss. 214.

*Missouri.* — *State v. Shreve*, 137 Mo. 1.



*b. WEIGHT AND SUFFICIENCY OF EVIDENCE* — (1) *Requisite Evidence upon Which to Base Indictment* — **Ancient Rule.** — Formerly an indictment was regarded as a mere accusation which the grand jury ought to make if probable evidence was adduced in its support.<sup>1</sup>

The Rule Now Prevailing is that to justify the finding of an indictment the grand jury must be convinced that the accused is guilty, or, in other words, an indictment should not be found unless the evidence before the grand jury, unexplained and uncontradicted, would warrant a conviction by a petit jury.<sup>2</sup>

**Statutory Provisions.** — In some states, notably *California* and *New York*, statutes have been enacted as to the amount of evidence that a grand jury shall have before it in order to find an indictment.<sup>3</sup>

(2) *Indictment on Knowledge of Grand Jury.* — If a grand juror is personally possessed of knowledge that an indictable offense has been committed, he should disclose such knowledge to his associates, and upon the information thus communicated an indictment may be found as if it had been brought out by the testimony of witnesses, no superadded evidence being necessary to support an indictment.<sup>4</sup> Anciently the grand jury did not examine any wit-

*Nevada.* — *State v. Logan*, 1 Nev. 509.

*New Jersey.* — *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270.

*New York.* — *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *People v. Hulbut*, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

*Pennsylvania.* — *Com. v. Crans*, 3 Pa. L. J. 442, 2 Pa. L. J. Rep. 172.

*South Carolina.* — *State v. Boyd*, 2 Hill L. (S. Car.) 288, 27 Am. Dec. 376.

*Tennessee.* — *Bloomer v. State*, 3 Sneed (Tenn.) 66.

*Texas.* — *Dockery v. State*, 35 Tex. Crim. 487.

**Under New York Statute.** — Code Crim. Pro. N. Y., § 256, provides that the grand jury shall receive none but legal evidence, and it has been held that where there is sufficient legal evidence to authorize the finding of an indictment, the fact that the grand jury received any improper evidence will not necessarily vitiate the indictment; yet if illegal evidence was received and was of such a nature as to influence in any degree the result of the deliberations of the grand jury, the indictment should be set aside. *People v. Metropolitan Traction Co.*, 12 N. Y. Crim. 405; *People v. Lindenborn*, (Supm. Ct. Crim. T.) 23 Misc. (N. Y.) 426; *People v. Briggs*, (Oyer & T. Ct.) 60 How. Pr. (N. Y.) 17, wherein an indictment was quashed for the reason that the defendant's wife was permitted to testify against him before the grand jury, contrary to law; *People v. Haines*, (N. Y. Gen. Sess.) 6 N. Y. Crim. 100; *People v. Moore*, (Oyer & T. Ct.) 65 How. Pr. (N. Y.) 177. See also *People v. Strong*, (N. Y. Gen. Sess.) 1 Abb. Pr. N. S. (N. Y.) 244; *People v. Clark*, (Oyer & T. Ct.) 8 N. Y. Crim. 169, 179; *People v. Vaughan*, (County Ct.) 19 Misc. (N. Y.) 298; *People v. Restenblatt*, (N. Y. Gen. Sess.) 268; *People v. Price*, (Ct. Sess.) 6 N. Y. Crim. 141.

**Reception of Illegal Evidence Immaterial.** — It has been held, however, that the reception of illegal evidence by the grand jury will not vitiate the indictment if, apart from such evidence, there is enough to sustain the indictment and it is not manifest that the illegal evidence influenced the minds of the grand jurors and brought about an indictment in-

sufficiently supported by other and admissible evidence. *People v. Farrell*, (N. Y. Gen. Sess.) 20 Misc. (N. Y.) 213; *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361.

1. **Evidence of Probable Guilt Formerly Sufficient.** — Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255. See also *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77, *per* Field, C. J.

2. **Grand Jury Must Have Evidence of Guilt** — *United States.* — Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765.

*California.* — *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77.

*Massachusetts.* — See *Com. v. Knapp*, 9 Pick. (Mass.) 496.

*Michigan.* — *People v. Lauder*, 82 Mich. 109.

*Nevada.* — *State v. Logan*, 1 Nev. 509.

*New York.* — *People v. Lindenborn*, (Supm. Ct. Crim. T.) 23 Misc. (N. Y.) 426; *Matter of Gardiner*, (N. Y. Gen. Sess.) 31 Misc. (N. Y.) 364; *People v. Briggs*, (Oyer & T. Ct.) 60 How. Pr. (N. Y.) 29; *People v. Hyler*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 570, 10 How. Pr. (N. Y.) 567; *People v. Restenblatt*, (N. Y. Gen. Sess.) 1 Abb. Pr. (N. Y.) 268; *People v. Hulbut*, 4 Den. (N. Y.) 133, 47 Am. Dec. 244; *People v. Price*, (Ct. Sess.) 6 N. Y. Crim. 141.

*Ohio.* — *Turk v. State*, 7 Ohio (pt. ii.) 240.

*Oklahoma.* — *Royce v. Territory*, 5 Okla. 61.

**Evidence Procured by Grand Jury in Investigation of Another Offense.** — *State v. Beebe*, 17 Minn. 241.

**Indictment of Witness Before Grand Jury for Perjury.** — *State v. Terry*, 30 Mo. 371.

**Prosecutor Not Necessary Witness.** — *State v. Dingee*, 17 Iowa 232.

3. **Statutory Provisions as to Requisite Evidence.** — See the statutes of the various states particularly of *California* and *New York*, and see *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77; *People v. Edwards*, (Oyer & T. Ct.) 25 N. Y. Supp. 480.

4. **Indictment on Knowledge of Grand Jury** — *England.* — *Reg. v. Russell*, C. & M. 247, 41 E. C. L. 139.

*United States.* — Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255.

*Georgia.* — *Groves v. State*, 73 Ga. 205.



nesses, presentments being made alone upon the knowledge of the members of that body.<sup>1</sup>

**Oath of Grand Juror Who Divulges Knowledge.** — In view of the fact that a grand juror is under oath to make only true presentments, there is no necessity that he should take an oath as a witness before communicating to his fellows his personal knowledge of the commission of a crime.<sup>2</sup>

**Impeachment of Knowledge of Grand Jurors.** — A defendant cannot impeach the knowledge of the members of the grand jury who gave the information upon which a presentment against him was based.<sup>3</sup>

(3) *On Resubmission of Case to Same Grand Jury.* — If, after an indictment has been found by a grand jury upon sufficient evidence, it becomes necessary or advisable, by reason of the quashal of such indictment or for any other reason, for the same grand jury to find another indictment for the same offense against the same defendant, such subsequent indictment may be found upon the evidence previously heard without hearing additional evidence or re-examining the witnesses previously examined.<sup>4</sup> It is immaterial that some of the grand jurors who found the original indictment are absent when the second indictment is found, and that others are present when the second indictment is found who were absent on the former occasion.<sup>5</sup>

(4) *Review of Sufficiency of Evidence.* — Where it appears that witnesses were examined by the grand jury, or that that body had before it legal documentary evidence, according to the weight of authority no inquiry into the sufficiency of the evidence upon which an indictment is based will be made, and the court will not set aside an indictment because of the insufficiency of the evidence upon which it is based.<sup>6</sup> In some of the cases the decisions have been influenced by statutes which enumerated the grounds for quashing an indictment without naming the insufficiency of the evidence as one.<sup>7</sup> However, according to some authorities, an indictment may be set aside if there

*Kansas.* — *State v. Skinner*, 34 Kan. 256.

*Louisiana.* — *State v. Richard*, 50 La. Ann. 210.

*Massachusetts.* — *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468; *Com. v. Woodward*, 157 Mass. 516, 34 Am. St. Rep. 222.

*Ohio.* — *Turk v. State*, 7 Ohio (pt. ii.) 240.

*Tennessee.* — *State v. Darnal*, 1 Humph. (Tenn.) 290; *State v. McManus*, 4 Humph. (Tenn.) 258.

1. *Per Horton, C. J.*, in *State v. Skinner*, 34 Kan. 256; *per Turley, J.*, in *State v. Darnal*, 1 Humph. (Tenn.) 290.

2. *State v. Richard*, 50 La. Ann. 210; *Com. v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468.

3. **Impeachment of Knowledge of Grand Jurors.** — *State v. McManus*, 4 Humph. (Tenn.) 258, citing *State v. Darnal*, 1 Humph. (Tenn.) 290, and *distinguishing State v. Smith, Meigs* (Tenn.) 99, 33 Am. Dec. 132.

4. **Finding New Indictment upon Evidence Previously Heard** — *Indiana.* — *Creek v. State*, 24 Ind. 151.

*Kentucky.* — *McIntire v. Com.*, (Ky. 1887) 4 S. W. Rep. 1.

*Louisiana.* — *State v. Richard*, 50 La. Ann. 210.

*Massachusetts.* — *Com. v. Clune*, 162 Mass. 206; *Com. v. Woodward*, 157 Mass. 516, 34 Am. St. Rep. 302; *Com. v. Woods*, 10 Gray (Mass.) 477.

*Minnesota.* — *State v. Peterson*, 61 Minn. 73.

*Ohio.* — *Whiting v. State*, 48 Ohio St. 220.

*Texas.* — *Terry v. State*, 15 Tex. App. 66.

5. *Com. v. Clune*, 162 Mass. 206.

6. **No Inquiry into Sufficiency of Evidence Permissible** — *United States.* — *U. S. v. Reed*, 2 Blatchf. (U. S.) 435.

*Alabama.* — *Jones v. State*, 81 Ala. 80; *Agee v. State*, 117 Ala. 169; *Washington v. State*, 63 Ala. 192; *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Dec. 643.

*Connecticut.* — *State v. Fasset*, 16 Conn. 457.

*Indiana.* — *Stewart v. State*, 24 Ind. 142; *Creek v. State*, 24 Ind. 151.

*Iowa.* — *State v. Fowler*, 52 Iowa 103; *State v. Harris*, 36 Iowa 268; *State v. Tucker*, 20 Iowa 508; *State v. Smith*, 74 Iowa 580.

*Kentucky.* — *Com. v. Minor*, 89 Ky. 555;

*McIntire v. Com.*, (Ky. 1887) 4 S. W. Rep. 1.

*Michigan.* — *People v. Lauder*, 82 Mich. 115.

*Mississippi.* — *Smith v. State*, 61 Miss. 759;

*Hammond v. State*, 74 Miss. 214.

*Montana.* — *Territory v. Pendry*, 9 Mont. 67.

*New Jersey.* — *State v. Dayton*, 23 N. J. L.

49, 53 Am. Dec. 270.

*Ohio.* — *Turk v. State*, 7 Ohio (pt. ii.) 240.

*South Carolina.* — *State v. Boyd*, 2 Hill L.

(S. Car.) 288, 27 Am. Dec. 376.

*Texas.* — *Terry v. State*, 15 Tex. App. 66;

*Kingsbury v. State*, 37 Tex. Crim. 259; *Jacobs*

*v. State*, 35 Tex. Crim. 410; *Dockery v. State*,

35 Tex. Crim. 487.

*Utah* — *U. S. v. Cutler*, 5 Utah 608.

7. **Statutory Grounds for Quashal of Indictment.**

— *Com. v. Minor*, 89 Ky. 555; *U. S. v. Cutler*,

5 Utah 608. See also *People v. Colby*, 54 Cal.

37; *State v. Logan*, 1 Nev. 509.



was no competent evidence before the grand jury to support it.<sup>1</sup>

(5) *Disregard by Grand Jury of Sufficient Evidence.* — It has been declared that a statute making it the duty of the grand jury to find an indictment when there is sufficient evidence to support one does not make it the duty of the court or empower the court to review or criticise the action of the grand jury when it fails to find an indictment.<sup>2</sup>

c. *MINUTES OF EVIDENCE.* — In the early days no record was kept of the testimony taken before the grand jury,<sup>3</sup> but in some states it is required by statute that one of the grand jurors must act as clerk, or that a stenographer shall be appointed, and that such clerk or stenographer shall take the minutes of the proceedings of the grand jury and of the evidence given before that body.<sup>4</sup>

*Requisites of Minutes.* — Where a statute requires the grand jury to take minutes of the evidence, it is not necessary that the evidence should be written down in full, nor need such minutes be signed by the witnesses who testify.<sup>5</sup>

*Minutes of Evidence No Part of Record.* — It has been held that the minutes of the testimony of witnesses before the grand jury form no part of the record of the court.<sup>6</sup>

*Right of Accused to Inspect or Copy Minutes.* — Where the grand jury makes minutes of the evidence, such minutes are to be delivered to the prosecuting attorney and by him kept among the records of the court,<sup>7</sup> and it has been held that the defendant is not entitled as of right to inspect the minutes or to take a copy thereof for the purpose of informing himself of the nature of the testimony before the grand jury,<sup>8</sup> and that the accused is not entitled to the production of the minutes on his trial.<sup>9</sup> In late cases in *New York*, however, it has been held that it is within the power of the court to entertain a motion

1. *Dodd's Case*, 1 Leach C. C. 155; *State v. Logan*, 1 Nev. 509; *U. S. v. Kuhl*, 85 Fed. Rep. 624. See also *People v. Lauder*, 82 Mich. 109; *U. S. v. Terry*, 39 Fed. Rep. 355, *per Hoffman*, J.; *U. S. v. Farrington*, 5 Fed. Rep. 343.

In *New York* it has been held that courts have inherent common-law power to set aside indictments which are found without evidence to support them, or which are contrary to the evidence introduced before the grand jury, but that as a general proposition the sufficiency of the evidence is a question for the grand jury, and on a motion to dismiss the court will not carefully weigh the evidence. *People v. Price*, (Ct. Sess.) 6 N. Y. Crim. 141; *People v. Molineux*, (N. Y. Gen. Sess.) 27 Misc. (N. Y.) 60; *People v. Lindenborn*, (Supm. Ct. Crim. T.) 23 Misc. (N. Y.) 426; *People v. Brickner*, (Oyer & T. Ct.) 8 N. Y. Crim. 217; *People v. Metropolitan Traction Co.*, 12 N. Y. Crim. 405; *People v. Winant*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 361; *People v. Briggs*, (Oyer & T. Ct.) 60 How. Pr. (N. Y.) 17; *People v. Restenblatt*, (N. Y. Gen. Sess.) 1 Abb. Pr. (N. Y.) 268; *People v. Clark*, (Oyer & T. Ct.) 8 N. Y. Crim. 169; *People v. Eckford*, 7 Cow. (N. Y.) 535. Compare *People v. Willis*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 568, decided under *Laws N. Y. 1897, c. 427*, which amended previous statutes providing that the court should set aside indictments upon certain statutory grounds, of which the insufficiency of the evidence was not one, by adding to the phrase "in either of the following cases," etc., the words "but in no other."

2. *Per McMahon, J.*, in *People v. Farrell*, (N. Y. Gen. Sess.) 20 Misc. (N. Y.) 213.

*Duty of Grand Jury to Examine Witnesses.* —

Before ignoring a bill it is the duty of the grand jury to examine all witnesses marked on the indictment. *Com. v. Ditzler*, 1 Lanc. Bar (Pa.) 493.

3. *Per Foster, J.*, in *Matter of Gardiner*, (Gen. Sess.) 31 Misc. (N. Y.) 364, *citing Mohun's Case*, 1 Salk. 104.

4. *Statutes Require Minutes of Evidence.* — See the statutes of the various states, and particularly of *Indiana* and *New York*. See also *Hinshaw v. State*, 147 Ind. 334; *State v. Bates*, 148 Ind. 610; *Matter of Gardiner*, (N. Y. Gen. Sess.) 31 Misc. (N. Y.) 364; *People v. Molineux*, (N. Y. Gen. Sess.) 27 Misc. (N. Y.) 61.

*Right of Prosecuting Attorney to Take Minutes of Evidence.* — Where the prosecuting attorney is authorized by statute to appear before the grand jury and interrogate witnesses, he has the right to take minutes of the evidence for his future use. *Per Monks, J.*, in *State v. Bates*, 148 Ind. 610.

5. *Requisites of Minutes.* — *Hinshaw v. State*, 147 Ind. 334.

6. *Minutes of Evidence No Part of Record.* — *State v. Lewis*, 96 Iowa 286.

7. *Prosecuting Attorney Custodian of Minutes.* — *In re District Attorney*, 7 Fed. Cas. No. 3,925.

8. *Accused Has No Right to Copy or Inspect Minutes.* — *Hosler v. State*, 16 Ark. 534; *People v. Richmond*, (N. Y. Gen. Sess.) 5 N. Y. Crim. 97; *People v. Jaehne*, (N. Y. Gen. Sess.) 4 N. Y. Crim. 161. In the last two cases *People v. Naughton*, (Oyer & T. Ct.) 38 How. Pr. (N. Y.) 430, was distinguished.

9. *Minutes Need Not Be Produced on Trial.* — *Franklin v. Com.*, (Ky. 1899) 48 S. W. Rep. 950.



to inspect the minutes of the grand jury, and that such motion is addressed to the discretion of the court.<sup>1</sup>

**17. Witnesses Before Grand Juries — a. COMPETENCY.** — As in ordinary judicial proceedings, the witnesses called before the grand jury must be competent to give the testimony required of them.<sup>2</sup>

**b. HOW AND BY WHOM SUMMONED.** — **Witnesses Are Not Bound to Attend** before a grand jury for the purpose of giving evidence without a subpoena, but if they do so attend a person indicted cannot object thereto.<sup>3</sup>

**The Proper Process for Witnesses** whose attendance is required before the grand jury is a subpoena issued by the clerk.<sup>4</sup>

**Witnesses May Be Summoned in Vacation.** — The prosecuting attorney may have subpoenas for witnesses issued in vacation and prior to the convening of the grand jury.<sup>5</sup>

**c. OATH OF WITNESSES — Necessity to Swear Witnesses.** — Witnesses before a grand jury must be sworn.<sup>6</sup>

**Form of Witnesses' Oath.** — In most jurisdictions it would seem that a general oath to give evidence touching criminal charges to be laid before the grand jury, without reference to any particular person or place, is proper.<sup>7</sup>

**By Whom Oath Administered.** — At common law the witness was sworn in open court and sent to the grand jury.<sup>8</sup> The presiding judge need not necessarily, however, be present when the witnesses are sworn.<sup>9</sup>

**1. Discretionary Power of Court to Allow Inspection of Minutes.** — *People v. Molineux*, (N. Y. Gen. Sess.) 27 Misc. (N. Y.) 60; *Matter of Gardiner*, (N. Y. Gen. Sess.) 31 Misc. (N. Y.) 364. See also *Eighmy v. People*, 79 N. Y. 546; *People v. Naughton*, (Oyer & T. Ct.) 38 How. Pr. (N. Y.) 430; *People v. Bellows*, (Oyer & T. Ct.) 1 How. Pr. N. S. (N. Y.) 149.

**Necessity to Attach Minutes of Evidence to Indictment.** — In *Iowa* it is not necessary that the minutes of the evidence of the witnesses examined before the grand jury be attached to the indictment, but only that they be presented with it and filed by the clerk. *State v. Cross*, 95 Iowa 629. See also *State v. Craig*, 78 Iowa 638; *State v. Briggs*, 68 Iowa 420; *State v. Hamilton*, 42 Iowa 655; *State v. Postlewait*, 14 Iowa 447.

**2. Witnesses Must Be Competent.** — *Dockery v. State*, 35 Tex. Crim. 487.

**Presumption as to Competency of Witness.** — Where, by statute, a wife, on the prosecution of her husband for adultery, is authorized to testify as to the marriage, and on an indictment for adultery the name of the wife is indorsed as a witness, in the absence of any information as to what she testified to it will be presumed that she was examined only as to matters as to which she was a competent witness. *Com. v. Mosier*, 135 Pa. St. 221.

**3. Witnesses May Appear Without Subpoena.** — *State v. Parrish*, 8 Humph. (Tenn.) 80. See also *State v. Stewart*, 45 La. Ann. 1164; *State v. Frizell*, 111 N. Car. 722.

**4. Power of Clerk to Issue Subpoena.** — *Baldwin v. State*, 126 Ind. 24, in which case it was held that the clerk may issue subpoenas for witnesses to appear before the grand jury without any statute expressly conferring such authority.

**The Grand Jury has no power to summon witnesses in the absence of statutory authority.** *State v. Lee*, 87 Tenn. 114. See also *supra*,

this section, *Powers of Grand Juries — Inquisitorial Powers.*

**The Attorney-general cannot issue a subpoena to witnesses to attend the grand jury, and one so subpoenaed cannot be forced to testify.** *Warner v. State*, 13 Lea (Tenn.) 52.

**Form of Subpoena.** — Witnesses should be summoned to appear before the court to testify before the grand jury, and not to appear before the grand jury. *State v. Butler*, 8 Yerg. (Tenn.) 83.

**5. Witnesses May Be Summoned in Vacation.** — *O'Hair v. People*, 32 Ill. App. 277, *citing* *Rex v. King*, 8 T. R. 585.

**A Subpoena Duces Tecum**, requiring a druggist to produce before a grand jury prescriptions compounded by him or by those in his employ, must specify with some particularity the prescriptions to be produced. *State v. Bragg*, 51 Mo. App. 334. See also to the same effect *State v. Davis*, 117 Mo. 614.

**6. Witnesses Before Grand Jury Must Be Sworn.** — *In re Lester*, 77 Ga. 143.

**7. Form of Witnesses' Oath.** — *U. S. v. Reed*, 2 Blatchf. (U. S.) 435, 27 Fed. Cas. No. 16,134.

In *Georgia* a grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case. *In re Lester*, 77 Ga. 143, *citing* *Ashburn v. State*, 15 Ga. 246.

**8. Witness Must Be Sworn in Open Court.** — *1 Chitty's Crim. Law* 322; *Boone v. People*, 148 Ill. 440; *State v. Cain*, 1 Hawks (8 N. Car.) 353; *State v. Barnes*, 7 Jones L. (52 N. Car.) 20; *Duke v. State*, 20 Ohio St. 225; *State v. Kilcrease*, 6 S. Car. 444; *Gilman v. State*, 1 Humph. (Tenn.) 59; *Ayrs v. State*, 5 Coldw. (Tenn.) 26.

In *Connecticut* witnesses may be sworn by a magistrate in the grand-jury room. *State v. Fasset*, 16 Conn. 471.

**9. Judge Need Not Be Present When Witnesses Are Sworn.** — *Boone v. People*, 148 Ill. 440; *Jetton v. State*, Meigs (Tenn.) 192.



The Foreman of the Grand Jury has no authority, in the absence of statute, to administer oaths to witnesses, but in some states statutes have been enacted conferring such power.<sup>1</sup> But even where the foreman may administer oaths the common-law practice is not abrogated.<sup>2</sup>

**Record as to Witnesses Being Sworn.** — The record need not affirmatively show that the witnesses before the grand jury were sworn.<sup>3</sup>

**d. EXAMINATION OF WITNESSES — Discretion of Grand Jury.** — The witnesses before the grand jury are examined according to the discretion of that body, and the court has no control over such discretion.<sup>4</sup>

**Witnesses Must Not Be Examined in Open Court.** — The power of the court to require a grand jury to come into open court and have the witnesses for the state there examined is not only opposed to immemorial usage, but is not sustained either by principle or by authority.<sup>5</sup>

**e. SELF-CRIMINATION — (1) In General.** — In accordance with the dictates of natural justice and the constitutional guaranty that no one shall be called upon to testify against himself, a witness before a grand jury cannot be required to incriminate himself,<sup>6</sup> and it has been held in some cases that the person whose offense is to be investigated by the grand jury should not be brought before that body,<sup>7</sup> and that it is fatal to an indictment that the person accused was called to testify without being informed, or knowing, that his own conduct was the subject under investigation.<sup>8</sup> According to the weight of authority, however, an indictment will not be set aside or quashed because it is found on self-criminating testimony.<sup>9</sup>

**Right of Witness to Counsel.** — A witness before a grand jury has no right to the assistance of counsel to advise him against incriminating himself.<sup>10</sup>

**(2) Voluntary Self-crimination.** — There is no rule of law which forbids a person accused of crime to testify before the grand jury which is investigating his offense, if he sees fit to do so and testifies voluntarily, and any witness

**1. Statutory Power of Foreman to Administer Oaths.** — See the statutes of the various states, and the following cases: *State v. Green*, 24 Ark. 591; *State v. Allen*, 83 N. Car. 680; *State v. White*, 88 N. Car. 698; *State v. Brewster*, 70 Vt. 341.

**2. Witnesses May Be Sworn by Foreman or in Open Court.** — *State v. Allen*, 83 N. Car. 680; *State v. White*, 88 N. Car. 698.

**3. Record Need Not Show that Witnesses Were Sworn.** — *King v. State*, 5 How. (Miss.) 730; *Duke v. State*, 20 Ohio St. 228; *Gilman v. State*, 1 Humph. (Tenn.) 59. See also *State v. Sheppard*, 97 N. Car. 401.

**The Oath of a Grand Juror** will not be taken to show that a witness was not sworn. *Simms v. State*, 60 Ga. 146.

**Waiver of Objection.** — The objection that witnesses before the grand jury were not sworn may be waived by not taking it in proper time. *State v. Barnes*, 7 Jones L. (52 N. Car.) 21; *State v. Roberts*, 2 Dev. & B. L. (19 N. Car.) 540.

**4. Discretion of Grand Jury in Examining Witnesses.** — *U. S. v. Reed*, 2 Blatchf. (U. S.) 435, 27 Fed. Cas. No. 16,134.

**Examination of Witnesses Before Preparation of Indictment.** — It is no objection to an indictment that the witnesses were examined before it was prepared. *State v. Parrish*, 8 Humph. (Tenn.) 80.

**5. Examination of Witnesses in Open Court Improper.** — *State v. Branch*, 68 N. Car. 186, 12 Am. Rep. 633.

**6. Witness Cannot Be Required to Incriminate**

**Himself — United States.** — *Counselman v. Hitchcock*, 142 U. S. 547; *Sanderson's Case*, 3 Cranch (C. C.) 638; *U. S. v. Edgerton*, 80 Fed. Rep. 374.

**Florida.** — *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267.

**Illinois.** — *Boone v. People*, 148 Ill. 440.

**Iowa.** — *State v. Trauger*, (Iowa 1898) 77 N. W. Rep. 336; *State v. Lewis*, 96 Iowa 286.

**Michigan.** — *People v. Lauder*, 82 Mich. 109.

**Minnesota.** — *State v. Froiseth*, 16 Minn. 296.

**Missouri.** — *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449.

**New York.** — *People v. Kelly*, 24 N. Y. 74; *People v. Haines*, (N. Y. Gen. Sess.) 6 N. Y. Crim. 100; *People v. Lewis*, (Supm. Ct.) 14 Misc. (N. Y.) 264; *People v. Singer*, (Oyer & T. Ct.) 5 N. Y. Crim. 1; *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159.

**North Carolina.** — *State v. Frizell*, 111 N. Car. 722.

**Texas.** — *Spearman v. State*, 34 Tex. Crim. 279.

**7. Accused Person Incompetent as Witness.** — *State v. Trauger*, (Iowa) 1898 77 N. W. Rep. 336; *People v. Lauder*, 82 Mich. 109.

**8. U. S. v. Edgerton**, 80 Fed. Rep. 374.

**9. Spearman v. State**, 34 Tex. Crim. 279; *Mencheca v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 203; *U. S. v. Jones*, 69 Fed. Rep. 978. See also *Jenkins v. State*, 55 Fla. 737, and see the next succeeding section of the text.

**10. Witness Has No Right to Counsel.** — *People v. Lauder*, 82 Mich. 109.



before a grand jury may incriminate himself if he chooses to waive his rights.<sup>1</sup>

(3) *Statutory Immunity of Witnesses.* — In some jurisdictions it is provided by statute that no witness shall be indicted for any offense in relation to which he has testified before the grand jury, and where the statute affords the witness complete protection from prosecution he is compellable to testify.<sup>2</sup>

(4) *Use of Self-incriminating Testimony on Trial.* — Where a person who is charged with an offense, and who is not in custody, voluntarily incriminates himself in testifying before a grand jury and is indicted, a member of the grand jury or the prosecuting attorney may on the trial testify as to the statements made by such person.<sup>3</sup>

*f. CONTROL OF COURT OVER WITNESSES* — (1) *In General.* — Witnesses before the grand jury are under the control of the court in the same manner and to the same extent as are witnesses before a trial jury.<sup>4</sup>

(2) *Power of Court to Recognize Witnesses.* — A court has power to require a witness who has been subpoenaed to testify before the grand jury, to enter into a recognizance to appear either at the present or a future term.<sup>5</sup>

(3) *Punishment of Contempt* — *Power of Court to Punish Witnesses for Contempt.* — Where a witness before a grand jury refuses to answer competent and material questions asked by that body, the court has inherent power summarily to punish him for contempt;<sup>6</sup> but it has been declared that the usual mode of procedure where witnesses refuse to testify, or where the legitimate action of the body is obstructed, is, unless otherwise provided by statute, to report the matter to the court and obtain an order in the premises, and that it is the disobedience of this order that constitutes the contempt.<sup>7</sup>

*Power of Grand Jury to Punish Witness for Contempt.* — A grand jury has no power to adjudge or to punish contempts.<sup>8</sup>

*De Facto Grand Jury* — *Collateral Attack upon Organization of Grand Jury.* — Where a witness before a grand jury denies its authority, it is sufficient that it is a *de facto* grand jury, and no collateral attack can be made upon the validity of its organization.<sup>9</sup>

1. *Witness May Voluntarily Incriminate Himself.* — *People v. Northey*, 77 Cal. 618; *People v. King*, 28 Cal. 265; *State v. Trauger*, (Iowa 1898) 77 N. W. Rep. 336; *State v. Donelon*, 45 La. Ann. 744. See also *People v. Lauder*, 82 Mich. 109.

*Voluntary Testimony After Compulsory Attendance.* — In *New York* it has been held that a defendant cannot be compelled to attend a grand jury even to give voluntary testimony, and that an indictment found upon such testimony should be quashed. *People v. Singer*, (Oyer & T. Ct.) 18 Abb. N. Cas. (N. Y.) 96. But see *contra*, *State v. Donelon*, 45 La. Ann. 744.

2. *Statutes Exempting Witnesses from Prosecution.* — *State v. Hatfield*, 3 Head (Tenn.) 231; *In re Peasley*, 44 Fed. Rep. 272; *In re Counselman*, 44 Fed. Rep. 270. And see particularly as to the extent of the protection that must be given the witness, *Counselman v. Hitchcock*, 142 U. S. 547. See further the title WITNESSES.

3. *People v. Lauder*, 82 Mich. 109.

*Indictment of Grand Juror upon Disclosures Made by Him.* — See *State v. Hatfield*, 3 Head (Tenn.) 231.

4. *Control of Court over Witnesses.* — *Matter of Gannon*, 69 Cal. 541; *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 440.

5. *Court May Recognize Witnesses.* — *Gwynn v. State*, 64 Miss. 324.

6. *Power of Court to Punish Witnesses for Contempt* — *United States*. — *U. S. v. Caton*, 1 Cranch (C. C.) 150; *In re Peasley*, 44 Fed. Rep. 271; *In re Counselman*, 44 Fed. Rep. 268. *California*. — *Ex p. Haymond*, 91 Cal. 545; *Matter of Gannon*, 69 Cal. 541.

*Colorado*. — *Wyatt v. People*, 17 Colo. 252.

*Connecticut*. — *Matter of Clark*, 65 Conn. 17.

*Indiana*. — *Baldwin v. State*, 126 Ind. 24.

*Missouri*. — *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 440.

*New York*. — *Matter of Taylor*, (Supm. Ct.) 8 Misc. (N. Y.) 159; *People v. Kelly*, 24 N. Y. 74.

*Tennessee*. — *Warner v. State*, 13 Lea (Tenn.) 52; *Hirsch v. State*, 8 Baxt. (Tenn.) 89.

*Utah*. — *In re Harris*, 4 Utah 5.

*Statutory Authority to Punish Contempt.* — *State v. Lewis*, 96 Iowa 286.

7. *Report by Grand Jury to Court.* — *Wyatt v. People*, 17 Colo. 252. See also to the same effect, *In re Harris*, 4 Utah 5.

*Arrest of Disobedient Witness.* — Where a witness appears before the grand jury and refuses to answer questions, and treats it with disrespect, that body can require the officer in attendance upon it to take the witness into custody and take him to the court for the purpose of obtaining its aid and direction. *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757.

8. *Grand Jury Has No Power to Punish Witness.* — *Wyatt v. People*, 17 Colo. 252.

9. *Grand Jury Not Subject to Collateral Attack.*



g. FEES OF WITNESSES. — Witnesses summoned before a grand jury are not entitled to pay, except such as may be given to them by statute.<sup>1</sup>

18. View by Grand Jury. — It would seem that the grand jury has no more right to visit premises for the purpose of official inspection, upon its own motion, than has a petit jury, but the court may in its discretion make an order permitting the grand jury to view property where such view will aid that body in its investigation.<sup>2</sup>

19. Number of Grand Jurors That Must Concur in Finding Indictment. — The Rule at Common Law was that every indictment and presentment by the grand jury should be found or concurred in by twelve at least of the grand jurors, but where there were more than twelve grand jurors it was sufficient that twelve should concur in such indictment or presentment.<sup>3</sup>

In United States. — In the various states and territories statutory and constitutional provisions have generally been made as to the number of grand jurors that must concur in finding an indictment or making a presentment.<sup>4</sup>

Application of Common Law Where Statute Is Silent. — Where a statute provides that twenty-four grand jurors or any sixteen of them shall be a grand jury, and is silent as to the number who must concur in finding an indictment, the common-law rule is applicable, and twelve of the members may concur in finding

— *Exp. Haymond*, 91 Cal. 545; *Matter of Gannon*, 69 Cal. 541.

Improper Exercise of Inquisitorial Powers — Witness May Refuse to Testify. — *Wallace v. State*, an unreported case cited with approval in *McGrew v. City Produce Exch.*, 85 Tenn. 578, 4 Am. St. Rep. 771.

1. Witnesses' Fees. — *Lewis v. Wake County*, 74 N. Car. 194.

2. View by Grand Jury. — *Wyatt v. People*, 17 Colo. 252.

3. Number That Must Concur at Common Law. — 2 Hawk. P. C., c. 25, § 16; 2 Hale's P. C. 161; Bac. Abr., tit. Indictment, C; 4 Black. Com. 302; Co. Litt. 156 b; 1 Chitty's Crim. Law 306. See also the following cases in which the common-law rule is stated:

*England*. — *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66; *Clyncard's Case*, Cro. Eliz. 654; *Rex v. St. Michael*, 2 Bl. 718; *Robinson v. Bland*, 2 Burr. 1088, note.

*Alabama*. — *State v. Miller*, 3 Ala. 343.

*Arkansas*. — *Harding v. State*, 22 Ark. 210.

*California*. — *People v. Hunter*, 54 Cal. 65.

*Florida*. — *Gladden v. State*, 12 Fla. 562; *Donald v. State*, 31 Fla. 255; *English v. State*, 31 Fla. 340.

*Indiana*. — *Hudson v. State*, 1 Blackf. (Ind.) 317.

*Iowa*. — *State v. Ostrander*, 18 Iowa 453; *State v. Salts*, 77 Iowa 193.

*Maine*. — *Low's Case*, 4 Me. 439, 16 Am. Rep. 271; *State v. Symonds*, 36 Me. 128.

*Massachusetts*. — *Com. v. Wood*, 2 Cush. (Mass.) 149; *Com. v. Smith*, 9 Mass. 107.

*Mississippi*. — *Barney v. State*, 12 Smed. & M. (Miss.) 68.

*Nevada*. — *State v. Hartley*, 22 Nev. 342.

*New York*. — *Conkey v. People*, (Ct. App.) 5 Park. Crim. (N. Y.) 31.

*North Carolina*. — *State v. Davis*, 2 Ired. L. (24 N. Car.) 153; *State v. Barker*, 107 N. Car. 913.

*South Carolina*. — *State v. Clayton*, 11 Rich. L. (S. Car.) 581.

*Wisconsin*. — *Brucker v. State*, 16 Wis. 333.

4. Number of Grand Jurors That Must Concur in

United States. — See the statutes and constitutions of the various states and territories, and see also the following cases:

*Arkansas*. — *Harding v. State*, 22 Ark. 210.

*California*. — *People v. Roberts*, 6 Cal. 214.

*Florida*. — *Donald v. State*, 31 Fla. 255.

*Illinois*. — *Gitchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147.

*Indiana*. — *State v. May*, 50 Ind. 170.

*Iowa*. — *State v. Billings*, 77 Iowa 417.

*Kansas*. — *State v. Copp*, 34 Kan. 522.

*Kentucky*. — *Downs v. Com.*, 92 Ky. 605; *Sanders v. Com.*, (Ky. 1892) 18 S. W. Rep. 528.

*Louisiana*. — *State v. Causey*, 43 La. Ann. 897.

*Maine*. — *State v. Symonds*, 36 Me. 128; *Low's Case*, 4 Me. 439, 16 Am. Rep. 271.

*Michigan*. — *People v. Lauder*, 82 Mich. 109.

*Minnesota*. — *State v. Cooley*, 72 Minn. 476.

*Mississippi*. — *Barney v. State*, 12 Smed. & M. (Miss.) 68.

*Missouri*. — *State v. Green*, 66 Mo. 631; *State v. Dearing*, 65 Mo. 530.

*Montana*. — *Territory v. Hart*, 7 Mont. 42; *State v. Ah Jim*, 9 Mont. 167; *State v. King*, 9 Mont. 445.

*Nevada*. — *State v. Hartley*, 22 Nev. 342.

*New York*. — *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418; *People v. Shattuck*, (Buffalo Super. Ct. Crim. T.) 6 Abb. N. Cas. (N. Y.) 33.

*North Carolina*. — *State v. Perry*, 122 N. Car. 1018.

*Ohio*. — *Doyle v. State*, 17 Ohio 222.

*South Carolina*. — *State v. Williams*, 35 S. Car. 344; *State v. Clayton*, 11 Rich. L. (S. Car.) 581.

*Tennessee*. — *Epperson v. State*, 5 Lea (Tenn.) 291; *Pybos v. State*, 3 Humph. (Tenn.) 49.

*Texas*. — *Drake v. State*, 25 Tex. App. 293; *Smith v. State*, 19 Tex. App. 95.

*Vermont*. — *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818.

*Washington*. — *McAllister v. Territory*, 1 Wash. Ter. 360; *Watts v. Territory*, 1 Wash. Ter. 409.



an indictment, regardless of the total number of grand jurors.<sup>1</sup>

**Insufficient Number Concurring.** — It has been uniformly held that an indictment concurred in by fewer grand jurors than the lawful number is not a legal indictment.<sup>2</sup>

**20. Secrecy as to Proceedings of Grand Juries** — *a. PENDING PROCEEDINGS IN JURY ROOM* — (1) *In General.* — By a rule of the common law, and in some states by statute, grand jurors are required to take an oath of secrecy, and it is well settled that the proceedings before the grand jury must be kept strictly secret, and that no information must be given pending their deliberation concerning the matters brought before them.<sup>3</sup>

**Criminal Liability of Grand Jurors Who Violate Rule of Secrecy.** — Anciently, if a grand juror disclosed to a person accused the evidence before the grand jury in his case, such grand juror became accessory to the crime if it was felony, and a principal if it was treason, and later such disclosure was considered a high misdemeanor.<sup>4</sup>

**Liability for Communicating and Interfering with Grand Jury.** — It is a criminal misdemeanor and a high contempt for an individual to communicate with the grand jury in reference to a matter before it.<sup>5</sup>

**To Whom Rule Applies.** — The rule applies to all persons authorized by law to be present in the grand-jury room.<sup>6</sup>

1. *Com. v. Sayers*, 8 Leigh (Va.) 722. See also *State v. Miller*, 3 Ala. 344; *State v. Brainerd*, 56 Vt. 532, 48 Am. Rep. 818.

2. *Territory v. Hart*, 7 Mont. 42; *Com. v. Sayers*, 8 Leigh (Va.) 722. See also 2 Hale's P. C. 161.

**Objection Waived.** — The objection must be made seasonably and in the proper manner, otherwise it will be waived. *Hamilton v. State*, 97 Ga. 216.

3. **Proceedings of Grand Jury Secret** — *England.* — *Freeman v. Arkell*, 1 C. & P. 135; *Greenleaf on Evidence* (16th ed.), § 252.

*United States.* — Charge to Grand Jury, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *Fotheringham v. Adams Express Co.*, 34 Fed. Rep. 648.

*Florida.* — *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267.

*Illinois.* — *Gitchell v. State*, 45 Ill. App. 116; *Gitchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147.

*Indiana.* — *Shattuck v. State*, 11 Ind. 473; *Hinshaw v. State*, 147 Ind. 334.

*Maryland.* — *Elbin v. Wilson*, 33 Md. 135; *Izer v. State*, 77 Md. 110.

*Massachusetts.* — *Com. v. Hill*, 11 Cush. (Mass.) 137.

*Mississippi.* — *Sands v. Robison*, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132.

*Missouri.* — *State v. Grady*, 12 Mo. App. 361; *State v. Johnson*, 115 Mo. 480; *Kennedy v. Holladay*, 105 Mo. 24; *State v. Thomas*, 99 Mo. 235; *Beam v. Link*, 27 Mo. 261; *Tindle v. Nichols*, 20 Mo. 326.

*North Carolina.* — *State v. Broughton*, 7 Ired. L. (29 N. Car.) 96, 45 Am. Dec. 507.

*Oregon.* — *State v. Moran*, 15 Oregon 262.

*Pennsylvania.* — *Doan's Case*, 17 Pa. Co. Ct. 518; *Com. v. Twitcheil*, 1 Brews. (Pa.) 551.

*Tennessee.* — *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *Crocker v. State*, Meigs (Tenn.) 127.

*Texas.* — *Sims v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 705; *Hines v. State*, 37 Tex. Crim. 339; *Rothschild v. State*, 7 Tex. App. 519.

4. **Criminal Liability of Grand Jurors Who Violate Rule of Secrecy.** — 4 Black. Com. 126; 1 Chitty's Crim. Law 317. See also *State v. Fasset*, 16 Conn. 457; *Sands v. Robison*, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132; *State v. Brewster*, 70 Vt. 341.

**Grand Juror May Be Fined for Contempt.** — A grand juror may be fined for contempt where he violates his oath and discloses what takes place before the grand jury. *Per Turley, J.*, in *Crocker v. State*, Meigs (Tenn.) 127. See also *In re Summerhayes*, 70 Fed. Rep. 769.

5. **Liability for Communicating and Interfering with Grand Jury.** — *Com. v. Crans*, 3 Pa. L. J. 442, 2 Pa. L. J. Rep. 172. See also *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *Bergh's Case*, (N. Y. Gen. Sess.) 16 Abb. Pr. N. S. (N. Y.) 266.

**A Mere Inquiry of the Grand Jury** as to what is being done in the jury room in relation to a particular case does not constitute a contempt of court. *Harwell v. State*, 10 Lea (Tenn.) 544.

**The Delivery of an Aspersive Letter to a Grand Juror** is a contempt of court. *Bergh's Case*, (N. Y. Gen. Sess.) 16 Abb. Pr. N. S. (N. Y.) 267. See also *Matter of Tyler*, 64 Cal. 434.

**Offer to Advise Grand Jury.** — It has been held that an indictment should not be dismissed merely because to each grand juror was given a circular letter reminding him of the importance of his duties, stating his powers under the statute, and offering further advice if he would call at the headquarters of a certain committee. *People v. Shea*, 147 N. Y. 78.

6. *Gitchell v. State*, 45 Ill. App. 116; *People v. Thompson*, (Mich. 1899) 81 N. W. Rep. 344; *People v. Lauder*, 82 Mich. 132; *State v. Johnson*, 115 Mo. 480; *Clark v. Field*, 12 Vt. 485.

**Burden of Proof.** — Where an attack is made upon the indictment by the defendant upon the ground that the proceedings of the grand jury were not secret, the burden is upon the defendant to show that they were not secret. *State v. Fertig*, 98 Iowa 139.

**Presumptions.** — It will be presumed that no



(2) *Presence and Advice of Persons Not Members of Grand Jury* — (a) *Outsiders in General.* — It has been held that although the presence of a stranger in the jury room is improper, it does not invalidate an indictment found by the grand jury if he does not act as a grand juror, or if the person indicted is not thereby injured in his substantial rights;<sup>1</sup> but if an unauthorized person participates in the proceedings of the grand jury and instructs the grand jury concerning the law of the case, the indictment will be quashed.<sup>2</sup>

(b) *Judge of Court.* — The judge of the court should not go into the grand-jury room while the grand jury is deliberating and direct it to find an indictment, and an indictment found under such directions will be quashed.<sup>3</sup>

(c) *Prosecuting and Other Attorneys.* — The Attorney-general has under some circumstances the right to appear before a grand jury and personally assist the prosecuting attorney in conducting the examination of witnesses before that body.<sup>4</sup>

The Prosecuting Attorney may be present in the grand-jury room during the sittings of the grand jury and may examine witnesses,<sup>5</sup> and he may advise in matters of procedure and read statutes to the jury,<sup>6</sup> but he should not give

improper communication is had with the grand jury in the absence of proof to the contrary. *Shattuck v. State*, 11 Ind. 473.

*Control of Court over Proceedings.* — The court may in its discretion question the grand jury as to whether or not the proper secrecy is being observed, and may take such proceedings as are necessary to secure the preservation of secrecy. *Doan's Case*, 17 Pa. Co. Ct. 513.

1. *Presence of Strangers.* — *Bennett v. State*, 62 Ark. 516; *State v. Bates*, 148 Ind. 610; *State v. Kimball*, 29 Iowa 267; *State v. Clough*, 49 Me. 573; *State v. Bacon*, (Miss. 1900) 27 So. Rep. 593; *Sims v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 705. See also *Shattuck v. State*, 11 Ind. 473; *Courtney v. State*, 5 Ind. App. 356. *Compare State v. Brewster*, 70 Vt. 341; *State v. Bowman*, 90 Me. 363, 60 Am. St. Rep. 266.

*Advice of Witness to Grand Jury.* — One who appears before the grand jury as an ostensible witness should confine himself to testifying, and should not give the grand jury advice, even at the request of that body, as to how it should proceed. *Matter of Gardiner*, (Ct. Gen. Sess.) 31 Misc. (N. Y.) 364. See also *Lewis v. Wake County*, 74 N. Car. 194; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765.

*Final Report of Grand Jury Drawn Up by Third Person.* — Where the grand jury in its final report expresses its thanks to the several officers of the court for attention shown and services rendered, the fact that such report is drawn up by another attorney than the prosecuting attorney will not vitiate indictments found by such grand jury, it not appearing that the person who drafted the report was present or assisted at its deliberations. *State v. Harris*, 39 La. Ann. 228.

2. *Quashal of Indictment.* — *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *State v. Clough*, 49 Me. 573; *Com. v. Salter*, 2 Pearson (Pa.) 461.

*Objections Waived.* — See *State v. Justus*, 11 Oregon 178, 50 Am. Rep. 470.

3. *State v. Will*, 97 Iowa 58.

4. *Right of Attorney-General to Appear Before Grand Jury.* — See *State v. District Ct.*, 22 Mont. 25.

5. *Presence of Prosecuting Attorney* — *United States*. — *U. S. v. Reed*, 2 Blatchf. (U. S.) 435, 27 Fed. Cas. No. 16,134; *Ex p. Crittenden*,

*Hempst.* (U. S.) 176, 6 Fed. Cas. No. 3,393 *a*; *In re District Attorney*, 7 Fed. Cas. No. 3,925; *Charge to Grand Jury*, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765.

*Illinois.* — *Shoop v. State*, 45 Ill. App. 110; *Gitchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147.

*Indiana.* — *Shattuck v. State*, 11 Ind. 473.

*Kansas.* — *State v. Skinner*, 34 Kan. 256.

*Louisiana.* — *State v. Aleck*, 41 La. Ann. 83.

*Missouri.* — *Tindle v. Nichols*, 20 Mo. 326.

*Montana.* — *State v. District Ct.*, 22 Mont. 25.

*Pennsylvania.* — *Com. v. Twitchell*, 1 Brews. (Pa.) 551; *Com. v. Frey*, 11 Pa. Co. Ct. 523; *Com. v. Bradney*, 24 W. N. C. (Pa.) 101, 126 Pa. St. 199; *Com. v. Salter*, 2 Pearson (Pa.) 461; *In re Bridge*, 9 Kulp (Pa.) 427.

*Tennessee.* — *Foute v. State*, 3 Hayw. (Tenn.) 98.

6. *U. S. v. Kilpatrick*, 16 Fed. Rep. 765; *Shattuck v. State*, 11 Ind. 473; *Com. v. Bradney*, 126 Pa. St. 190.

*Advice of Prosecuting Attorney Must Be Confined to Questions of Law.* — *Shattuck v. State*, 11 Ind. 473.

In *North Carolina* the prosecuting attorney cannot instruct the grand jury in the law. If the grand jurors desire to be informed of the law or of their duties they must go into court and ask instructions from the court. *Lewis v. Wake County*, 74 N. Car. 194.

In *United States Courts* the district attorney informs the grand jury of the nature of the charge, and calls its attention to the provisions of the statutes supposed to have been violated. The witnesses are then produced and examined, and it is only when the jury is satisfied that the offense has been committed by the accused that the district attorney is directed to prepare the formal indictment. *Per Hoffman, J.*, in *U. S. v. Terry*, 39 Fed. Rep. 355.

*Florida Statute.* — Rev. Stat. Fla. (1892), § 2807, provides that the state attorney shall, when required by the grand jury, attend that body for the purpose of examining witnesses in its presence and to give it advice upon legal matters. *Jenkins v. State*, 35 Fla. 811.

*Missouri Statute.* — Rev. Stat. Mo. (1889), § 4077 (Rev. Stat. 1899, § 2497), provides that the prosecuting attorney shall be allowed at



the grand jury advice as to the sufficiency of the evidence to authorize the finding of an indictment, nor take part in its deliberations.<sup>1</sup>

**Oath of Prosecuting Attorney Who Attends Grand Jury.**—No oath is taken of the prosecuting attorney before his going into the jury room except his oath of office and oath of attorney, which last binds him to be faithful and true to the interests of his client, the state.<sup>2</sup>

The Assistant Prosecuting Attorney may appear before the grand jury and do all that is proper for his superior to do, but no more.<sup>3</sup>

A Private Prosecutor may, it has been held, at the request of the prosecuting attorney, appear before the grand jury and examine witnesses,<sup>4</sup> but it is improper for an attorney who is employed to assist the prosecutor to appear before the grand jury and take part in its deliberations, and urge it to find an indictment.<sup>5</sup>

(d) Stenographers. — According to the weight of authority it is immaterial that a stenographer went into a grand-jury room and took down the testimony of the witnesses, unless it appears that the person indicted was prejudiced by the actions or influence of such stenographer.<sup>6</sup>

all times to appear before the grand jury on his request, for the purpose of giving information, but that he shall not be permitted to be present "during the expression of their opinions or the giving their votes on any matter before them." *State v. Johnson*, 115 Mo. 480.

1. **Prosecuting Attorney Must Not Invade Province of Grand Jury**—*United States*.—U. S. v. Kilpatrick, 16 Fed. Rep. 765; *In re* District Attorney, 7 Fed. Cas. No. 3,925; *Ex p.* Crittenden, Hempst. (U. S.) 176, 6 Fed. Cas. No. 3,393 a; *Charge to Grand Jury*, 2 Sawy. (U. S.) 667, 30 Fed. Cas. No. 18,255.

*Illinois*.—*Giuchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147.

*Indiana*.—*Shattuck v. State*, 11 Ind. 473.

*Louisiana*.—*State v. Aleck*, 41 La. Ann. 83.

*Pennsylvania*.—*Com. v. Bradney*, 126 Pa. St. 199, 24 W. N. C. (Pa.) 101; *Com. v. Frey*, 11 Pa. Co. Ct. 525.

*Texas*.—*Rothschild v. State*, 7 Tex. App. 519.

*West Virginia*.—*State v. Baker*, 33 W. Va. 379.

**Instruction Not to Find Indictment.**—Pending an investigation by a grand jury, a United States district attorney has no power to instruct that body not to find an indictment. *In re Miller*, 3 Cinc. L. Bul. 967, 17 Fed. Cas. No. 9,552.

**Presence of Prosecuting Attorney During Voting Mere Irregularity.**—*Com. v. Bradney*, 126 Pa. St. 199; *U. S. v. Terry*, 39 Fed. Rep. 355. See also *Shattuck v. State*, 11 Ind. 473, in which case, however, the practice is condemned.

**Presence of Prosecuting Attorney After Grand Jury Has Agreed Is Harmless.**—*State v. Mc Ninch*, 12 S. Car. 89.

**Instruction as to Degree of Crime.**—Where the prosecuting attorney instructs the jury that it should find an indictment for murder in the first degree instead of an indictment for murder in the second degree, and the jury, against its wish, complies with his instructions, the indictment will not be set aside. *Johnson v. State*, 22 Tex. App. 206, in which case it appeared that the judge participated in so instructing the jury.

2. **Oath of Prosecuting Attorney Who Attends**

**Grand Jury.**—*State v. Brewster*, 70 Vt. 341, *per* Ross, C. J.

3. **Presence of Assistant Prosecuting Attorney in Jury Room.**—*Bennett v. State*, 62 Ark. 516; *State v. Van Buskirk*, 59 Ind. 384; *State v. Fertig*, 98 Iowa 139, *Franklin v. Com.*, (Ky. 1899) 48 S. W. Rep. 986; *State v. Whitney*, 7 Oregon 386. Compare *State v. Addison*, 2 S. Car. 499.

4. **Private Prosecutor May Attend Grand Jury.**—*Bennett v. State*, 62 Ark. 516; *Wilson v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 916. But see *State v. Heaton*, 21 Wash. 59, wherein it was held that the appearance of special counsel before the grand jury was an irregularity, because there did not exist the grounds for appointing special counsels which a statute prescribed.

5. **Private Prosecutor Must Not Take Part in Deliberations.**—*Wilson v. State*, 70 Miss. 595, 35 Am. St. Rep. 664; *Welch v. State*, 68 Miss. 341; *Brown v. State*, 57 Miss. 425; *People v. Sellick*, (Ct. Sess.) 4 N. Y. Crim. 329.

**Delivery to Grand Jury of Memorandum Made by Private Counsel.**—It has been held that an indictment should be quashed where it appears that an attorney was employed as private counsel, was interested in procuring an indictment, and drew up a memorandum of directions for the examination of witnesses which he sent by the district attorney to the grand jury. *Com. v. Frey*, 11 Pa. Co. Ct. 523.

6. **Stenographer.**—*U. S. v. Simmons*, 46 Fed. Rep. 65; *State v. Bates*, 148 Ind. 610; *Courtney v. State*, 5 Ind. App. 356; *State v. Brewster*, 70 Vt. 341. But see *contra*, *State v. Bowman*, 90 Me. 363, 60 Am. St. Rep. 266; *People v. Lauder*, 82 Mich. 109.

**Juror Acting as Stenographer.**—One of the grand jurors may act as stenographer. *People v. Lauder*, 82 Mich. 109.

**Appointment of Stranger as Clerk.**—The appointment by the court, of one who is not a member of the grand jury as clerk of that body, is unauthorized by law, and can be made the ground of a motion in arrest of judgment. *State v. Watson*, 34 La. Ann. 669.

**Interrogation of Witnesses by Clerk.**—It has been held that where a clerk of the grand jury,



(e) **Sheriff or Bailiff.** — It has been held that the presence in the grand-jury room, during the deliberations of the grand jury and the examination of witnesses, of the sheriff, or his deputy, or a bailiff in whose custody the grand jury has been confided, is not ground for quashing the indictment.<sup>1</sup>

(f) **Presence of One Witness During Examination of Another.** — A grand jury should not permit one witness to be present at the examination of another, and the violation of this rule will subject an indictment based upon evidence thus irregularly taken to be quashed.<sup>2</sup>

**b. EVIDENCE AS TO WHAT OCCURRED IN GRAND-JURY ROOM — (1) In General.** — Neither the rule of secrecy, nor the oath of secrecy which grand jurors are required to take, prevents the public or an individual from proving by one or more of the grand jurors, in a court of justice, what passed before the grand jury, where, after the purpose of secrecy has been effected, it becomes necessary to the attainment of justice and the vindication of truth and right in a judicial tribunal that the conduct and testimony of prosecutors and witnesses shall be inquired into.<sup>3</sup>

**Discretion of Court.** — Whether or not a grand juror shall be examined as a witness is to a large extent discretionary with the court in which he is called as a witness.<sup>4</sup>

**Secrecy Not for Benefit of Witnesses.** — Witnesses before the grand jury cannot invoke the rule of secrecy after the hearing before that body has been terminated, nor can witnesses rely upon such rule in a criminal proceeding against them, or where it is sought subsequently to impeach their credibility as witnesses, or to take advantage of admissions made by them.<sup>5</sup>

**Rule as to Prosecuting Attorneys, Clerks, and Witnesses.** — Whenever it would be proper for a grand jury to testify as to the statements of witnesses before it, the prosecuting attorney who was in attendance upon it can likewise testify as to such matters. It may be said in general that there is no difference in principle between the prosecuting attorney and a member of the grand jury, and that the prosecuting attorney cannot testify where a grand juror cannot.<sup>6</sup> The same is true of the clerk of the grand jury and of witnesses before the grand jury.<sup>7</sup>

(2) **Statutory Provisions Permitting Grand Jurors to Testify — Exclusiveness of Statute.** — In some states statutes have been enacted prescribing the instances

appointed pursuant to the *Iowa* statute, interrogates witnesses, the irregularity is immaterial where it appears that the questions were asked at the request of the foreman. *State v. Miller*, 95 *Iowa* 368.

1. **Presence of Sheriff or Bailiff.** — *State v. Bacon*, (Miss. 1900) 27 So. Rep. 563; *Richardson v. Com.*, 76 *Va.* 1007.

2. *Com. v. Dorwart*, 7 *Lanc. Bar* (Pa.) 121; *U. S. v. Edgerton*, 80 *Fed. Rep.* 374.

3. **Grand Jurors May Testify in Furtherance of Justice.** — *Florida.* — *Jenkins v. State*, 35 *Fla.* 737, 48 *Am. St. Rep.* 267.

*Indiana.* — *Hinshaw v. State*, 147 *Ind.* 334; *State v. Van Buskirk*, 59 *Ind.* 384; *Burdick v. Hunt*, 43 *Ind.* 381; *Shattuck v. State*, 11 *Ind.* 473; *Burnham v. Hatfield*, 5 *Blackf. (Ind.)* 21.

*Maine.* — *Hunter v. Randall*, 69 *Me.* 183; *State v. Benner*, 64 *Me.* 267.

*Mississippi.* — *Sands v. Robison*, 12 *Smed. & M. (Miss.)* 704, 51 *Am. Dec.* 132.

*North Carolina.* — *State v. Broughton*, 7 *Ired. L. (29 N. Car.)* 96, 45 *Am. Dec.* 507.

*Oregon.* — *State v. Moran*, 15 *Oregon* 262.

*Tennessee.* — *Jones v. Turpin*, 6 *Heisk. (Tenn.)* 181.

*Utah.* — *U. S. v. Kirkwood*, 5 *Utah* 123.

**Refusal of Grand Juror to Testify Is Contempt.** — *Ex p. Schmidt*, 71 *Cal.* 212. But a grand juror cannot be required to testify whether he voted to find an indictment, and if he refuses to answer such a question the court has no power to punish him for contempt. *Ex p. Sontag*, 64 *Cal.* 525.

4. **Discretion of Court as to Examination of Grand Juror.** — *Jenkins v. State*, 35 *Fla.* 737, 48 *Am. St. Rep.* 267; *Sands v. Robison*, 12 *Smed. & M. (Miss.)* 704, 51 *Am. Dec.* 132.

5. **Secrecy Not for Benefit of Witnesses.** — *People v. Northey*, 77 *Cal.* 618; *People v. Kelley*, 47 *Cal.* 126; *People v. Young*, 31 *Cal.* 564; *State v. Broughton*, 7 *Ired. L. (29 N. Car.)* 101, 45 *Am. Dec.* 507; *U. S. v. Kirkwood*, 5 *Utah* 123; *People v. Reggel*, 8 *Utah* 21.

6. **Prosecuting Attorney Governed by Same Rule as Grand Jurors.** — *Jenkins v. State*, 35 *Fla.* 737, 48 *Am. St. Rep.* 267; *State v. Van Buskirk*, 59 *Ind.* 384; *McLellan v. Richardson*, 13 *Me.* 82; *Knott v. Sargent*, 125 *Mass.* 95; *State v. Johnson*, 115 *Mo.* 480; *Com. v. Twitchell*, 1 *Brews. (Pa.)* 551.

7. **Clerk and Witnesses May Not Testify Where Grand Juror May Not.** — *People v. Thompson*, (Mich. 1899) 81 *N. W. Rep.* 344; *People v. Lauder*, 82 *Mich.* 132.



in which grand jurors may testify as to what occurred before them, and it has been held that such statutes are exclusive and that grand jurors may testify in no other than the prescribed cases.<sup>1</sup>

(3) *In Support of Indictment.* — Grand jurors may be summoned and examined as witnesses in support of an indictment found by them.<sup>2</sup>

(4) *Impeachment of Indictment.* — The testimony of a member of the grand jury by which an indictment was found is not admissible for the purpose of impeaching the indictment.<sup>3</sup>

(5) *As to How Grand Jurors Voted.* — A rule from which, it would seem, no departure is ever allowed is that grand jurors cannot testify how they or any of their fellows voted, or what induced them to find or not to find an indictment, nor can they disclose the opinions expressed by their fellows or themselves upon any question before them.<sup>4</sup>

1. *Statutory Provisions Exclusive.* — *People v. Thompson*, (Mich. 1899) 81 N. W. Rep. 344, quoting 9 AM. AND ENG. ENCYC. OF LAW (1st ed.) 17, 18. See also *People v. Lauder*, 82 Mich. 132, wherein that authority was cited. See further *Burdick v. Hunt*, 43 Ind. 381; *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21; *Way v. Butterworth*, 106 Mass. 75; *Sands v. Robinson*, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132; *Tindle v. Nichols*, 20 Mo. 326; *State v. Hamilton*, 13 Nev. 386; *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181. But see *contra*, *Hinshaw v. State*, 147 Ind. 334.

2. *Grand Juror May Testify in Support of Indictment.* — *Ex p. Schmidt*, 71 Cal. 212; *Simms v. State*, 60 Ga. 145.

*Proof of Ignorance of Grand Jury as Alleged in Indictment.* — See *Com. v. Hill*, 11 Cush. (Mass.) 137.

*Grand Juror May Testify that Witness Testified Before Grand Jury.* — *People v. Northey*, 77 Cal. 618.

*Testimony of Grand Juror to Identify Case on Trial.* — A grand juror may not be called to give evidence as to the character of the testimony taken before the grand jury for the purpose of identifying, or disproving the identity of, the case on trial with that on which the grand jury has acted. *Newman v. State*, 72 Miss. 124, which was a prosecution for the illegal sale of intoxicating liquor. See also *State v. Fowler*, 52 Iowa 103; *Rocco v. State*, 37 Miss. 357; *Smith v. State*, 61 Miss. 754; *King v. State*, 66 Miss. 502; *Bailey v. State*, 67 Miss. 333; *Naul v. McComb City*, 70 Miss. 699; *Spratt v. State*, 8 Mo. 247 and *State v. Boyd*, 2 Hill L. (S. Car.) 288, 27 Am. Dec. 376.

3. *Grand Jurors Cannot Impeach Indictment.* — *England.* — *Rex v. Marsh*, 6 Ad. & El. 238, 33 E. C. L. 67.

*Connecticut.* — *State v. Fasset*, 16 Conn. 457.

*Georgia.* — *Simms v. State*, 60 Ga. 145; *Turner v. State*, 57 Ga. 107.

*Illinois.* — *Shoop v. People*, 45 Ill. App. 110.

*Iowa.* — *State v. Davis*, 41 Iowa 311.

*Louisiana.* — *State v. Lewis*, 38 La. Ann. 680.

*Minnesota.* — *State v. Beebe*, 17 Minn. 241.

*Missouri.* — *State v. Baker*, 20 Mo. 338.

*Nevada.* — *State v. Logan*, 1 Nev. 516; *State v. Hamilton*, 13 Nev. 386.

*New York.* — *People v. Hulbut*, 4 Den. (N. Y.) 135, 47 Am. Dec. 244.

*North Carolina.* — *State v. M'Leod*, 1 Hawks (8 N. Car.) 344.

*Pennsylvania.* — *Zeigler v. Com.*, (Pa. 1888) 14 Atl. Rep. 237.

*Texas.* — *State v. Oxford*, 30 Tex. 428.

*Testimony of Prosecuting Attorney Held Admissible.* — *State v. Grady*, 84 Mo. 224.

*Conclusiveness of Indorsement of Names of Witnesses.* — *State v. Miller*, 95 Iowa 368; *State v. Little*, 42 Iowa 51.

*Testimony of Grand Jurors Received to Show Presence of Strangers During Their Deliberations.* — *State v. Will*, 97 Iowa 58; *State v. Miller*, 95 Iowa 368.

In *Missouri* an indictment cannot be impeached by the testimony of members of the grand jury that the prosecuting attorney was present during their investigations and while they were expressing their opinions in finding the indictment. *State v. Johnson*, 115 Mo. 480.

*Impeachment of Indictment Based upon Presentment by Grand Jury.* — *Com. v. Greene*, 126 Pa. St. 531, 12 Am. St. Rep. 894, following *Gordon v. Com.*, 92 Pa. St. 216, 37 Am. Rep. 672. See also to the same effect *Com. v. McComb*, 157 Pa. St. 611.

4. *Grand Jurors Will Not Be Heard to Say How They Voted.* — *California.* — *Ex p. Sontag*, 64 Cal. 525.

*Florida.* — *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267.

*Maryland.* — *Elbin v. Wilson*, 33 Md. 135.

*Massachusetts.* — *Com. v. Hill*, 11 Cush. (Mass.) 137.

*Michigan.* — *People v. Thompson*, (Mich. 1899) 81 N. W. Rep. 344; *People v. Lauder*, 82 Mich. 132.

*Missouri.* — *State v. Johnson*, 115 Mo. 480.

*North Carolina.* — *State v. Broughton*, 7 Ired. L. (29 N. Car.) 96, 45 Am. Dec. 507.

*Texas.* — *State v. Oxford*, 30 Tex. 428.

*May Not Explain Why Indictment Was Not Found.* — *Owens v. Owens*, 81 Md. 518.

*Grand Juror Not Punishable for Contempt for Refusal to Testify as to How He Voted.* — *Ex p. Sontag*, 64 Cal. 525.

In a Subsequent Civil Action it is error to permit or require a grand juror to testify whether he did not endeavor to have the plaintiff indicted for perjury, or whether he did not furnish to the foreman names of witnesses to be summoned for that purpose. *Elbin v. Wilson*, 33 Md. 135.

*Statutory Provisions.* — In some states it is expressly provided by statute that grand jurors shall not be permitted or required to disclose how they or any of their fellows voted



(6) *As to Number of Grand Jurors Concurring.* — According to some authorities grand jurors may be called as witnesses to testify as to whether the requisite number of grand jurors concurred in finding an indictment, the certificate of the foreman not being conclusive,<sup>1</sup> but according to other authorities no such inquiry can be made of a grand juror.<sup>2</sup>

(7) *Admissions and Confessions Made Before Grand Jury.* — On the trial of a person indicted for a crime, a confession voluntarily made by him before the grand jury may be proven by one or more of the members of that body,<sup>3</sup> and it has been held that in civil actions a grand juror may be called to testify as to admissions made by a party, against his interest, before a grand jury.<sup>4</sup>

(8) *On Prosecution for Perjury of Witness Before Grand Jury.* — Where a witness before a grand jury commits perjury, a member of such grand jury is a competent witness before a subsequent grand jury which is investigating such perjury,<sup>5</sup> and on the trial of an indictment for perjury against a witness before a grand jury, members of the grand jury before which such witness testified are competent witnesses.<sup>6</sup> In some states it is expressly so provided by statute.<sup>7</sup>

(9) *Testimony of Grand Jurors to Impeach Witnesses — In General.* — Whenever it is necessary to the due administration of justice the credibility of a

on any question before them. See the statutes of the various states, and see *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *People v. Thompson*, (Mich. 1899) 81 N. W. Rep. 344; *People v. Lauder*, 82 Mich. 132.

1. *Number of Grand Jurors Concurring May Be Inquired Into.* — *Alabama.* — *Spurrenberger v. State*, 53 Ala. 481, 25 Am. Dec. 643.

*Florida.* — *Cherry v. State*, 6 Fla. 679.

*Indiana.* — *Shattuck v. State*, 11 Ind. 473.

*Maine.* — *Low's Case*, 4 Me. 439, 16 Am. Rep. 271; *State v. Symonds*, 36 Me. 128. See also *McLellan v. Richardson*, 13 Me. 82.

*Massachusetts.* — *Com. v. Smith*, 9 Mass. 107.

*Montana.* — *Territory v. Hart*, 7 Mont. 42.

*New York.* — *People v. Shattuck*, (Buffalo Super. Ct. Crim. T.) 6 Abb. N. Cas. (N. Y.) 33.

*North Carolina.* — *State v. Horton*, 63 N. Car. 595.

*Pennsylvania.* — *Com. v. Twitchell*, 1 Brews. (Pa.) 551.

See also 1 Greenleaf on Evidence, § 252; 4 Greenleaf on Evidence 439, 448; 2 Hawk. P. C., c. 25, § 16, which authorities were cited in *Gitchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147, and in *Shattuck v. State*, 11 Ind. 473.

2. *No Inquiry as to Number of Grand Jurors Concurring Permitted — England.* — *Rex v. Marsh*, 6 Ad. & El. 236, 33 E. C. L. 66.

*Connecticut.* — *State v. Hamlin*, 47 Conn. 114; *State v. Fasset*, 16 Conn. 457.

*Georgia.* — *Simms v. State*, 60 Ga. 145.

*Illinois.* — *Gitchell v. People*, 146 Ill. 175, 37 Am. St. Rep. 147, wherein nearly all of the cases in this note were cited with approval.

*Indiana.* — *Creek v. State*, 24 Ind. 151.

*Iowa.* — *State v. Davis*, 41 Iowa 311; *State v. Mewherter*, 46 Iowa 88; *State v. Gibbs*, 39 Iowa 318.

*Minnesota.* — *State v. Beebe*, 17 Minn. 241.

*Missouri.* — *State v. Wammack*, 70 Mo. 410; *State v. Baker*, 20 Mo. 338.

*Texas.* — *State v. Oxford*, 30 Tex. 428.

*Washington.* — *Watts v. Territory*, 1 Wash. Ter. 409.

*West Virginia.* — *State v. Baltimore, etc.*, R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

3. *Grand Juror May Testify as to Defendant's Confessions — England.* — *Sykes v. Dunbar*, 2 Selw. N. P. (13th ed.) 1015, a case decided by Lord Kenyon which was cited in *State v. Broughton*, 7 Ired. L. (29 N. Car. 96, 45 Am. Dec. 507).

*United States.* — *U. S. v. Porter*, 2 Cranch (C. C.) 60, 27 Fed. Cas. No. 16,072; *U. S. v. Charles*, 2 Cranch (C. C.) 76.

*Indiana.* — *Hinshaw v. State*, 147 Ind. 334.

*North Carolina.* — *State v. Broughton*, 7 Ired. L. (29 N. Car.) 96, 45 A. Dec. 507.

*Utah.* — *People v. Reggel*, 8 Utah 21; *U. S. v. Kirkwood*, 5 Utah 123.

4. *Use in Civil Actions of Admissions Made Before Grand Jury.* — *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21; *Kirk v. Garrett*, 84 Md. 383. And see further as to the testimony of grand jurors in civil actions *infra*, this subdivision, *In Civil Actions*.

5. *Testimony of Grand Juror Before Subsequent Grand Jury as to Perjury.* — *People v. Young*, 31 Cal. 563.

6. *Grand Jurors May Testify on Trial of Witness for Perjury — England.* — Charge to Grand Jury of Park, J., in Car. & P. 90, cited in *Izer v. State*, 77 Md. 110.

*United States.* — *U. S. v. Reed*, 2 Blatchf. (U. S.) 435.

*California.* — *People v. Young*, 31 Cal. 563.

*Connecticut.* — *State v. Fasset*, 16 Conn. 468.

*Maryland.* — *Izer v. State*, 77 Md. 110.

*Nevada.* — *State v. Logan*, 1 Nev. 509.

*New York.* — *People v. Hulbut*, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

*North Carolina.* — *State v. Broughton*, 7 Ired. L. (29 N. Car.) 96, 45 Am. Dec. 507.

*Tennessee.* — *Crocker v. State*, Meigs (Tenn.) 127; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181.

7. *Statutory Provisions.* — See the statutes of the various states, and see *People v. Thompson*, (Mich. 1899) 81 N. W. Rep. 344; *People v. Lauder*, 82 Mich. 132; *Tindle v. Nichols*, 20 Mo. 326; *Fotheringham v. Adams Express Co.*, 34 Fed. Rep. 646, in which last case the court cited a statute of *Missouri*.



witness may be attacked by showing by the testimony of grand jurors that he made statements before the grand jury of which such jurors were members different from the statements subsequently made by him as a witness, and such a course is frequently pursued where, on the trial of a criminal case, it is sought to impeach a witness who had previously testified before the grand jury.<sup>1</sup>

**Statutory Provisions.** — In many states it is provided by statute that a member of a grand jury may be required by any court to disclose the testimony of a witness examined before such grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court.<sup>2</sup>

(10) *In Civil Actions.* — It has been very generally held that in civil actions members of a grand jury may, in the furtherance of justice, be called as witnesses and be permitted to give evidence, the only limitations being that the testimony of such grand jurors shall be relevant and that they shall not be required or permitted to disclose how the grand jurors voted or what opinions they expressed, and that they shall not impeach their findings.<sup>3</sup>

**21. Misconduct of Grand Jurors.** — It would seem that grand jurors may be indicted or punished for contempt where they have been guilty of wilful misconduct or neglect of duty.<sup>4</sup>

**1. Testimony of Grand Juror to Impeach Witness** — *United States*. — U. S. v. Reed, 2 Blatchf. (U. S.) 435.

*Connecticut*. — State v. Fasset, 16 Conn. 468.

*Indiana*. — Burnham v. Hatfield, 5 Blackf. (Ind.) 21.

*Maine* — State v. Benner, 64 Me. 278.

*Maryland*. — Izer v. State, 77 Md. 110; Kirk v. Garrett, 84 Md. 383.

*Massachusetts*. — Com v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741; Com v. Hill, 11 Cush. (Mass.) 137.

*Mississippi*. — Sands v. Robison, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132.

*New Hampshire*. — State v. Wood, 53 N. H. 484.

*New York*. — People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

*North Carolina*. — State v. Broughton, 7 Ired. L. (23 N. Car.) 96, 45 Am. Dec. 507.

*Tennessee*. — Crocker v. State, Meigs (Tenn.) 127; Jones v. Turpin, 6 Heisk. (Tenn.) 181.

*Texas*. — Clanton v. State, 13 Tex. App. 139. See also Hines v. State, 37 Tex. Crim. 339.

*Utah*. — U. S. v. Kirkwood, 5 Utah 123.

*Virginia*. — Little v. Com., 25 Gratt. (Va.) 921.

See also 1 Chitty's Crim. Law 317; 3 Russell on Crimes (9th Am. ed.) 529.

**Prosecuting Attorney May Be Called to Impeach Witness.** — State v. Van Buskirk, 59 Ind. 384.

**Defendant May Show What Witness Testified to Before Grand Jury.** — State v. Van Buskirk, 59 Ind. 384.

**Refreshing Memory of Witness.** — It is not a regular mode of assisting the recollection of a witness to recur to his recollection of his testimony before the grand jury. Com v. Phelps, 11 Gray (Mass.) 73. See also Putnam v. U. S., 162 U. S. 687.

**Grand Juror May Testify to Confirm Witness.** — Perkins v. State, 4 Ind. 222; People v. Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244.

In Minnesota it has been held that when the right to examine grand jurors is restricted by statute they cannot, in civil cases, be examined for the purpose of impeaching a witness.

Loveland v. Cooley, 59 Minn. 259; Matter of Pinney, 27 Minn. 283.

**Impeachment of Grand Juror.** — Where a grand juror was himself a witness before the grand jury proof of his statements may be used to impeach his testimony on the trial. U. S. v. Kirkwood, 5 Utah 125.

**2. Statutory Provisions.** — See the statutes of the various states, and see also People v. Thompson, (Mich. 1899) 81 N. W. Rep. 344; People v. Lauder, 82 Mich. 132; State v. Ragsdale, 59 Mo. App. 590; State v. Parker, 96 Mo. 382; Tindle v. Nichols, 20 Mo. 326; State v. Moran, 15 Oregon 262. See further Fotheringham v. Adams Express Co., 34 Fed. Rep. 646, in which case the court cited the Missouri statute.

**3. Testimony of Grand Jurors in Civil Actions.** — Burnham v. Hatfield, 5 Blackf. (Ind.) 21; Burdick v. Hunt, 43 Ind. 381; Kirk v. Garrett, 84 Md. 383; Sands v. Robison, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132.

**Prosecuting Attorney Competent as Witness.** — Hunter v. Randall, 69 Me. 183.

**Statutory Provisions.** — In some states, by statute, grand jurors are not competent to testify in civil actions as to matters which came to their knowledge as members of the grand jury. See the statutes of the various states and see also the following cases: Loveland v. Cooley, 59 Minn. 259; Matter of Pinney, 27 Minn. 283; Tindle v. Nichols, 20 Mo. 326.

**4. Punishment of Grand Juror for Contempt — Neglect of Duty.** — U. S. v. Kilpatrick, 16 Fed. Rep. 765, per Dick, J.

**Intoxication of Grand Juror — Not Fatal to Indictment.** — Allen v. State, 61 Miss. 627.

**Discharge and Punishment of Grand Juror.** — In Matter of Ellis, Hempst. (U. S.) 10, the foreman of the grand jury was fined and discharged from the jury for "intemperance" — presumably intoxication.

**Liability of Grand Jurors for Disclosing Secrets of Grand-jury Room.** — As to the criminal liability of grand jurors for revealing the secrets of the grand-jury room, and their



**22. Discharge of Grand Juries — Power of Court to Discharge Grand Jury.** — Where a grand jury has been illegally impaneled, or has finished its business, it is competent for the court to discharge it at any time during the term, and, should another grand jury be necessary, the court may impanel another.<sup>1</sup>

**Power of Court to Reassemble Discharged Grand Jury.** — Where a grand jury, having finished its business, has been discharged before the end of the term, the court may, at any time during the term, revoke and set aside its order discharging the grand jurors and reassemble them for the purpose of finding indictments, especially where an offense has been committed subsequently to the discharge of the grand jury.<sup>2</sup>

**23. Effect of Investigation of Offense by Grand Jury — a. RESUBMISSION OF CHARGE TO GRAND JURY — (1) After Return of Ignoramus.** — When a bill is returned *ignoramus*, or not found, if the party accused is in custody he is discharged without further answer, but a fresh bill may afterwards be referred to a subsequent grand jury.<sup>3</sup>

**(2) After Quashal of Indictment.** — Where an indictment is found by a grand jury, but is set aside as being informal or of doubtful validity, the same or another grand jury may bring in another indictment for the same offense, and it is proper and the better practice, if the circumstances will permit, to send the second bill to the grand jury immediately upon the quashal of the first.<sup>4</sup>

**b. POWER OF GRAND JURY TO BRING IN INDICTMENT PENDING ANOTHER.** — The pendency of an indictment does not affect the right of the prosecution to present another indictment for the same offense, and where two indictments for the same offense are pending one cannot be pleaded in abatement of the other.<sup>5</sup>

**c. LEAVE TO FILE INFORMATION WHERE GRAND JURY DOES NOT INDICT.** — Where a grand jury, after investigating a charge, refuses to bring in an indictment, the court should not grant leave to file an information for the identical offense into which the grand jury inquired except upon good cause shown, and where such leave is granted without sufficient cause the court may revoke the leave and set aside the information.<sup>6</sup>

**24. Record as to Grand Juries and Their Proceedings — a. IN GENERAL.** — Properly speaking, the record of a criminal case, where the offense is an indictable one, except when the accused is bound over to wait the action of

liability to be punished for contempt for such offense, see *supra*, this section, *Secrecy as to Proceedings of Grand Juries*.

**1. Power of Court to Discharge Grand Jury During Term.** — *Meiers v. State*, 56 Ind. 336; *Smith v. State*, 19 Tex. App. 95.

**Power of Court to Impanel Special Grand Jury.** — See *infra*, this section, *Special Grand Juries*.

**2. Power of Court to Reassemble Discharged Grand Jury.** — *Findley v. People*, 1 Mich. 234; *Newman v. State*, 43 Tex. 525.

**3. Effect of Return of Ignoramus — Submission of New Bill.** — 4 Black. Com. 305; *U. S. v. Watkins*, 3 Cranch (C. C.) 506. See also *Com. v. Allen*, 14 Pa. Co. Ct. 546; *Rion v. Com.*, 1 Duv. (Ky.) 235; *Com. v. Roberts*, 4 Met. (Ky.) 220.

**Termination of Proceedings Against Defendant — Malicious Prosecution.** — *Stark v. Bindley*, 152 Ind. 182.

**Statutory Provisions — Discharge of Defendant and Exoneration of Bail.** — *State v. Collis*, 73 Iowa 542.

**4. Second Indictment upon Quashal of First.** — *State v. Lee*, 114 N. Car. 844. See also *State v. Skidmore*, 109 N. Car. 797; *State v. Flowers*,

109 N. Car. 841; *State v. Harris*, 91 N. Car. 656.

**Nolle Prosequi as to First Indictment.** — The defendant has no right to except to the entry of a *nolle prosequi* on the first bill of indictment unless it is entered without his consent after the case has been submitted to the jury. *Jackson v. State*, 76 Ga. 551, citing *Doyal v. State*, 70 Ga. 134.

**5. One Indictment Not a Bar to Another.** — 2 Hawk. P. C., c. 25, § 15; *Foster's Crim. Law* 105; 1 Chitty's Crim. Law 446; *Reg. v. Goddard*, 2 Ld. Raym. 920; *Rex v. Stratton*, 1 Dougl. 239; *Withipole's Case*, Cro. Car. 134; *U. S. v. Herbert*, 5 Cranch (C. C.) 87; *Dutton v. State*, 5 Ind. 534; *Com. v. Murphy*, 11 Cush. (Mass.) 472; *Com. v. Drew*, 3 Cush. (Mass.) 279; *Miazza v. State*, 36 Miss. 616.

**Former Indictment Insufficient or Defective — Duty of Grand Jury to Find New Indictment.** — *State v. Reinhart*, 26 Oregon 466, citing *Perkins v. State*, 66 Ala. 457; *State v. Collis*, 73 Iowa 542, and *Stuart v. Com.*, 28 Gratt. (Va.) 950. See also *Com. v. Drew*, 3 Cush. (Mass.) 279.

**6. Leave to File Information Where Grand Jury**



the grand jury, commences with the return of the indictment.<sup>1</sup>

*b. AS TO IMPANELMENT OF GRAND JURY* — (1) *Necessity to Show Impanelment.* — The record must show the impaneling of the grand jury.<sup>2</sup>

(2) *How Impanelment Shown* — In General. — It is not necessary that the record should affirm every part of the form or mode of proceeding in obtaining and impaneling a grand jury.<sup>3</sup>

*Showing as to Impanelment in Each Case.* — It is not necessary that the record of the formation of the grand jury should be repeated in each case. No good purpose would be accomplished by such unnecessary repetition. It is sufficient if such record be made once as a part of the permanent record of the term.<sup>4</sup>

*Harmless Informalities.* — The record as to the preliminary steps in the formation of the grand jury should not be tested by over-refined technicalities. Defects and imperfections which do not tend to the prejudice of the substantial rights of the defendant are to be disregarded, and where the record discloses enough to authorize the inference that the grand jury was lawfully organized, it is immaterial that the facts are informally expressed.<sup>5</sup>

*As to Court for Which Grand Jury Was Impaneled.* — The record must set forth with sufficient certainty the court in which the grand jurors were impaneled, in order that it may appear that the court had jurisdiction of the offense.<sup>6</sup>

*Sufficiency of Recitals in Indictment.* — Where the record shows that the grand jury came into court and presented an indictment, and such indictment recites that the grand jurors were good and lawful men, duly and legally impaneled, etc., enough is disclosed to show that the grand jury was impaneled and that the impanelment was regular.<sup>7</sup>

*Does Not Indict.* — *State v. Cain*, 16 Mont. 561. See also *State v. Brett*, 16 Mont. 360.

1. *State v. Thomas*, 61 Ohio St. 444.

*The Caption of a Bill of Indictment* is no part of the presentment of the grand jury. It is merely the record of the court, and may be wholly omitted, because the clerk's minute of the time when the bill was found and the record of the court would supply the defect. *State v. Gilbert*, 13 Vt. 647. To the same effect is *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 145.

2. *Record Must Show Impaneling of Grand Jury.* — *Parmer v. State*, 41 Ala. 416; *Milan v. State*, 24 Ark. 346; *Ford v. State*, 34 Ark. 649; *Miller v. State*, 40 Ark. 488; *Green v. State*, 19 Ark. 178.

*In England* it is the uniform practice for the caption of the indictment to show the impanelment of the grand jury. *Per Buskirk, C. J.*, in *Bailey v. State*, 39 Ind. 438.

*Record on Appeal.* — In *Arkansas* an entry showing the impanelment of the grand jury is part of the record in every criminal case prosecuted upon an indictment found by such grand jury, and on appeal or writ of error such entry should be copied into the transcript. *Miller v. State*, 40 Ark. 488; *Ford v. State*, 34 Ark. 649; *Green v. State*, 19 Ark. 178.

*In Georgia and Indiana* it has been held that it will be presumed on appeal that the grand jury was properly and legally impaneled where neither the transcript of the record nor the bills of exceptions show the contrary. *Grinad v. State*, 34 Ga. 270; *Holloway v. State*, 53 Ind. 554; *Long v. State*, 46 Ind. 582; *Lovell v. State*, 45 Ind. 550; *Bell v. State*, 42 Ind. 335; *Bailey v. State*, 39 Ind. 438; *Alley v. State*, 32 Ind. 476. In the latter case the court

*overruled Sawyer v. State*, 17 Ind. 435, and the following cases based on that decision: *Conner v. State*, 18 Ind. 428; *Jackson v. State*, 21 Ind. 171; *Hall v. State*, 21 Ind. 268.

3. *Requisite Particulars in General.* — *State v. Seaborn*, 4 Dev. L. (15 N. Car.) 305, 42 Am. Dec. 140; *State v. Thomas*, 61 Ohio St. 444.

*Record on Appeal.* — Where the record certified by the clerk shows a due impaneling of the grand jury, it is sufficient without a specified statement of that fact in the clerk's certificate. *App v. State*, 90 Ind. 73.

4. *Repetition of Record in Each Case Unnecessary.* — *Parker v. People*, 13 Colo. 155.

5. *Disregard of Technical Objections.* — *Epps v. State*, 102 Ind. 539; *State v. Thomas*, 61 Ohio St. 444.

*Order in Which Various Steps Are Set Forth Immaterial.* — *Lambert v. People*, 34 Ill. App. 637.

*Approved Form.* — A recital in the record that on a certain day, etc., "the regular grand jury for said term of said court, having been duly impaneled and sworn, according to law," returned the indictment, sufficiently shows that the indictment was found by a legal grand jury. *Beavers v. State*, 58 Ind. 530, citing *Bailey v. State*, 39 Ind. 438; *Bowe v. State*, 25 Ind. 415, and *Wall v. State*, 23 Ind. 150.

6. *As to Court for Which Grand Jury Was Impaneled.* — *State v. Williams*, 2 McCord L. (S. Car.) 301. But see *State v. Freeman*, 21 Mo. 481.

7. *Record as to Finding of Indictment and Recitals in Indictment Sufficient.* — *Walter v. State*, 105 Ind. 589; *Henning v. State*, 106 Ind. 386, 55 Am. Dec. 756; *Powers v. State*, 87 Ind. 144; *Weinzorpflin v. State*, 7 Blackf. (Ind.) 186; *Padgett v. State*, 103 Ind. 550; *Stout v. State*,



c. NUMBER OF GRAND JURORS. — The record need not in terms show the number of grand jurors, and where it appears of record that the indictment was found by a grand jury duly impaneled, etc., it will be presumed, in the absence of a contrary showing, that the grand jury was composed of the proper number of persons.<sup>1</sup>

d. NAMES OF GRAND JURORS. — It has been held that it is essential that the names of the grand jurors shall appear in at least some part of the record,<sup>2</sup> but it is neither usual nor necessary to insert their names in the record of each case.<sup>3</sup>

e. QUALIFICATIONS OF GRAND JURORS — Specification of Qualifications Unnecessary. — The record need not specify the qualifications of the grand jurors, and a recital in the record that the grand jury was duly elected, impaneled, sworn, and charged, or some equivalent recital, is sufficient to show that the grand jurors were good and lawful men and possessed the requisite qualifications.<sup>4</sup>

As to County from Which Grand Jury Was Drawn. — It should appear with reasonable certainty, in the caption of the indictment, that the grand jurors impaneled and sworn to inquire, and presentment make, of the guilt or innocence of the party charged, were of the proper county, and if it does not so appear this will be a fatal defect.<sup>5</sup>

f. AS TO GRAND JURORS BEING SWORN — (1) *Necessity to Show that Grand Jurors Were Sworn.* — According to some authorities it is a fatal objection that the record does not show that the grand jurors took the oath required by law, and a mere showing that a foreman was appointed and sworn is not sufficient.<sup>6</sup>

(2) *How Swearing of Grand Jurors Shown.* — It has been held that the fact that the grand jurors were sworn may be shown by a recital to that effect in the indictment, and it would seem that ordinarily no other record of the fact is made.<sup>7</sup>

g. APPOINTMENT OF FOREMAN — Necessity for Record to Show Appointment. — It is not usual in all cases to enter the appointment of a foreman upon the minutes of the court, although undoubtedly the better practice would require it,<sup>8</sup> but it must appear from the record, either expressly or by necessary implication, that a foreman was designated by the court and sworn to act as such,

<sup>9</sup> 3 Ind. 150; Bell v. State, 42 Ind. 335; Epps v. State, 102 Ind. 539; Alley v. State, 32 Ind. 476; Bailey v. State, 39 Ind. 438; Holloway v. State, 53 Ind. 554; State v. England, 19 Mo. 386.

Indorsement on Indictment Insufficient. — Parmer v. State, 41 Ala. 416.

Sufficiency of Recital in Venire. — See Collier v. State, 2 Stew. (Ala.) 388. See also State v. Williams, 3 Stew. (Ala.) 454.

Waiver of Objections to Sufficiency of Record. — Young v. State, 23 Ohio St. 577.

1. Presumption as to Proper Number of Grand Jurors. — Easterling v. State, 35 Miss. 210; Williams v. State, Wright (Ohio) 42.

Presumption that Vacancies Were Filled. — Sater v. State, 56 Ind. 378.

2. Names of Grand Jurors Must Appear of Record. — Parks v. State, 4 Ohio St. 234; Mahan v. State 10 Ohio 232.

3. Turns v. Com., 6 Met. (Mass.) 224.

Initials of Christian Name Sufficient. — Cotton v. State, 31 Miss. 504.

4. Specification of Qualifications Unnecessary — Indiana. — Mathis v. State, 94 Ind. 562; Wein-zorphlin v. State, 7 Blackf. (Ind.) 186; Willey v. State, 46 Ind. 363; Stone v. State, 30 Ind. 115. See also Holloway v. State, 53 Ind. 554; Bell v. State, 42 Ind. 335; Bailey v.

State, 39 Ind. 438; Powers v. State, 87 Ind. 144.

Mississippi. — Easterling v. State, 35 Miss. 210.

Montana. — Territory v. Harding, 6 Mont. 323.

Ohio. — Parks v. State, 4 Ohio St. 234; Williams v. State, Wright (Ohio) 42.

Tennessee. — Galvin v. State, 6 Coldw. (Tenn.) 283; Webb v. State, 1 Shannon Tenn. Cas. 427; M'Clure v. State, 1 Yerg. (Tenn.) 215; Bennett v. State, Mart. & Y. (Tenn.) 133.

5. Must Appear that Grand Jurors Were of Proper County. — Clark v. State, 1 Ind. 253; Byrd v. State, 1 How. (Miss.) 163.

Recital in Caption Sufficient. — Com. v. Edwards, 4 Gray (Mass.) 1.

6. Record Must Show that Grand Jurors Were Sworn. — Baker v. State, 39 Ark. 180; Cody v. State, 3 How. (Miss.) 27. But see Holloway v. State, 53 Ind. 559; Com. v. Pullan, 3 Bush (Ky.) 47.

7. Sufficiency of Recital in Indictment. — State v. Watson, 31 La. Ann. 379; McBean v. State, 3 Heisk. (Tenn.) 20; M'Clure v. State, 1 Yerg. (Tenn.) 226; State v. Long, 1 Humph. (Tenn.) 386.

8. Entry of Appointment in Minutes Unnecessary. — People v. Roberts, 6 Cal. 214.



and the want of such a showing is a fatal defect.<sup>1</sup>

**Requisites and Sufficiency of Record.** — It has been held in numerous cases that the appointment of the foreman need not appear of record in terms, and that it is sufficient if the record shows that the grand jury was impaneled and sworn, and that one of the grand jurors was sworn,<sup>2</sup> or that the indictment was indorsed by the foreman and duly returned and properly filed,<sup>3</sup> or even that the grand jury was duly impaneled, sworn, and charged.<sup>4</sup>

**h. FINDING, RETURN, AND FILING OF INDICTMENT** — (1) *Necessity to Show Finding of Indictment.* — The record must show that the indictment was found. It cannot be intended that the defendant was indicted.<sup>5</sup>

(2) *Necessity to Show Return of Indictment.* — The record must show that the indictment was returned into court by the grand jury.<sup>6</sup>

**i. AMENDMENTS.** — The court has the power to amend the record so as to make it speak the truth, by the insertion of anything which may have been inadvertently or otherwise omitted.<sup>7</sup>

**j. CONCLUSIVENESS OF RECORD.** — The record of a court as to the impaneling and proceedings of a grand jury, and the finding of an indictment, like other records, proves itself, and is of such validity that, as a general rule, no fact can be averred against it.<sup>8</sup>

**1. Appointment of Foreman Must Appear of Record.** — *Cody v. State*, 3 How. (Miss.) 27.

**2. Woodside v. State**, 2 How. (Miss.) 655; *Byrd v. State*, 1 How. (Miss.) 247.

**3. People v. Roberts**, 6 Cal. 214; *Yates v. People*, 38 Ill. 527; *Com. v. Pullan*, 3 Bush (Ky.) 47; *Easterling v. State*, 35 Miss. 212; *State v. Gouge*, 12 Lea (Tenn.) 132.

**Presumption as to Appointment of Foreman.** — *Grinad v. State*, 34 Ga. 270; *White v. State*, 93 Ga. 47; *Com. v. Pullan*, 3 Bush (Ky.) 47; *Easterling v. State*, 35 Miss. 212.

**4. Com. v. Pullan**, 3 Bush (Ky.) 47; *State v. Gouge*, 12 Lea (Tenn.) 132.

**Showing in Record as to Necessity for Foreman Pro Tem.** — *State v. Collins*, 6 Baxt. (Tenn.) 151.

**A Variance Between the Name on the Indictment and That in the Record Has Not Been Regarded as Material**, the presumption being that the persons are the same. *State v. Orrick*, 106 Mo. 111. See also *State v. Stedman*, 7 Port. (Ala.) 496; *Mohler v. People*, 24 Ill. 26; *Deitz v. State*, 123 Ind. 86; *State v. Granville*, 34 La. Ann. 1088; *State v. Calhoun*, 1 Dev. & B. L. (18 N. Car.) 374.

**5. Record Must Show that Indictment Was Found.** — *State v. Beebe*, 17 Minn. 241.

**6. Record Must Show Return of Indictment** — *Arkansas*. — *Miller v. State*, 40 Ark. 488; *Milan v. State*, 24 Ark. 346; *Green v. State*, 19 Ark. 178; *Ford v. State*, 34 Ark. 649.

*Colorado*. — *Thornell v. People*, 11 Colo. 307.

*Florida*. — *Goodson v. State*, 29 Fla. 511, 30 Am. St. Rep. 135; *Johnson v. State*, 24 Fla. 162.

*Georgia*. — *Bowen v. State*, 81 Ga. 482.

*Illinois*. — *Yundt v. People*, 65 Ill. 372; *Sattler v. People*, 59 Ill. 68; *Kelly v. People*, 39 Ill. 157; *Gardner v. People*, 20 Ill. 430; *Aylesworth v. People*, 65 Ill. 301; *Gardner v. People*, 4 Ill. 83; *Rainey v. People*, 8 Ill. 71; *McKinney v. People*, 7 Ill. 540, 43 Am. Dec. 65.

*Indiana*. — *Waterman v. State*, 116 Ind. 51; *Jackson v. State*, 21 Ind. 79; *Conner v. State*, 19 Ind. 98.

*Louisiana*. — *State v. Pitts*, 39 La. Ann. 914;

*State v. Sandoz*, 37 La. Ann. 376; *State v. Shields*, 33 La. Ann. 991.

*Mississippi*. — *Jenkins v. State*, 30 Miss. 408; *Laura v. State*, 26 Miss. 174; *Hague v. State*, 34 Miss. 616; *Cachute v. State*, 50 Miss. 169; *Friar v. State*, 3 How. (Miss.) 422; *Goodwyn v. State*, 4 Smed. & M. (Miss.) 535.

*Tennessee*. — *Blevins v. State*, Meigs (Tenn.) 82; *Hite v. State*, 9 Yerg. (Tenn.) 198; *Chappel v. State*, 8 Yerg. (Tenn.) 166; *Brown v. State*, 7 Humph. (Tenn.) 155.

*Virginia*. — *Com. v. Cawood*, 2 Va. Cas. 527.

See also the title INDICTMENTS, INFORMATION, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 410-417.

**7. Power of Court to Amend Record** — *United States*. — *U. S. v. Terry*, 39 Fed. Rep. 355.

*Alabama*. — *Aaron v. State*, 37 Ala. 106; *Franklin v. State*, 28 Ala. 12.

*Arkansas*. — *Baker v. State*, 39 Ark. 180.

*Florida*. — *Johnson v. State*, 24 Fla. 162.

*Georgia*. — *Bowen v. State*, 81 Ga. 482; *Jackson v. State*, 76 Ga. 551. See also *McLean's Case*, 71 Ga. 283; *Mikell v. State*, 62 Ga. 368; *Carter v. State*, 56 Ga. 463.

*Indiana*. — *Waterman v. State*, 116 Ind. 51; *Bodkin v. State*, 20 Ind. 281. See also *Long v. State*, 56 Ind. 133; *State v. Pearce*, 14 Ind. 426.

*Louisiana*. — *State v. Mason*, 32 La. Ann. 1018.

*North Carolina*. — *State v. Bordeaux*, 93 N. Car. 560.

*Tennessee*. — *State v. Willis*, 3 Head (Tenn.) 157.

*Texas*. — *Rhodes v. State*, 29 Tex. 190.

*Virginia*. — *Com. v. Cawood*, 2 Va. Cas. 527.

**8. Conclusiveness of Record** — *England*. — *Rutland's Case*, 6 Coke 53, 3 Black. Com. 331.

*United States*. — *U. S. v. Terry*, 39 Fed. Rep. 355.

*Alabama*. — *State v. Allen*, 1 Ala. 442.

*Arkansas*. — *Bates v. State*, 60 Ark. 450.

*Connecticut*. — *State v. Hamlin*, 47 Conn. 116.

*Georgia*. — *Terrell v. State*, 9 Ga. 58.

*Iowa*. — *State v. Will*, 97 Iowa 58; *State v. Davis*, 41 Iowa 315; *State v. Smith*, 74 Iowa



An Exception to the General Rule of law which forbids a record to be contradicted, or a grand juror to disclose the proceedings of the jury or to impeach its findings, will only be allowed in rare and extraordinary cases, as where the falsity of the record works a manifest and substantial injury to the defendant which the court, in the interest of justice, is bound to redress; and the facts contradicting the record must be made out to the entire satisfaction of the court, so as to leave no doubt on the subject.<sup>1</sup>

*k.* SUPPLYING LOST RECORD. — Where, along with other records of the court, the record as to the impaneling of the grand jury and the return of the indictment, and also the indictment and other entries pertaining thereto, are destroyed, such record and indictment may be restored and supplied by copies thereof made upon secondary evidence of their contents.<sup>2</sup>

25. Special Grand Juries — *a.* POWER OF COURT TO IMPANEL SPECIAL GRAND JURY. — Upon the discharge of the regular grand jury it is competent for the court, if the public interests require it, to impanel a special grand jury, such power being usually conferred by statute,<sup>3</sup> but even at common law the court has such power.<sup>4</sup>

Discretion of Court. — The impaneling of a special grand jury rests in the discretion of the court.<sup>5</sup>

*b.* POWERS OF SPECIAL GRAND JURY. — A special grand jury is qualified to transact any business which may properly come before it, and in general has the same powers as a regular grand jury.<sup>6</sup>

26. Fees and Compensation of Grand Jurors. — The amount that grand jurors shall be paid for their services is usually provided by statute, as is also the fund out of which such payment shall be made.<sup>7</sup>

27. Liability of Grand Jurors. — However recklessly and maliciously a grand jury may have acted in returning an indictment against another without evidence or probable cause, the jurors are not liable to the injured person in an action for malicious prosecution.<sup>8</sup>

584; *State v. Fowler*, 52 Iowa 104; *State v. Little*, 42 Iowa 52; *State v. Gibbs*, 39 Iowa 321.

*Maine.* — *Low's Case*, 4 Me. 453, 16 Am. Rep. 271.

*Massachusetts.* — *Com. v. Smith*, 9 Mass. 110. *North Carolina.* — *State v. Bordeaux*, 93 N. Car. 560.

*Ohio.* — *Turk v. State*, 7 Ohio (pt. ii.) 240.

1. Exceptions to General Rule. — *U. S. v. Terry*, 39 Fed. Rep. 355, citing *Low's Case*, 4 Me. 453, 16 Am. Rep. 271. See also *Com. v. Kulp*, 17 Pa. Co. Ct 561.

2. Supplying Lost Record. — *Miller v. State*, 40 Ark. 488, which case was decided under a statute authorizing lost or destroyed indictments to be supplied. See also the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 417.

3. Statutory Power of Court to Order Special Grand Jury. — See the statutes of the various states, and see *People v. McDonell*, 47 Cal. 134; *State v. Harris*, 73 Mo. 287; *State v. Overstreet*, 128 Mo. 470; *Snodgrass v. Com.*, 89 Va. 679; *Robinson v. Com.*, 88 Va. 903.

4. Common-law Power of Court to Summon Special Grand Jury. — 2 Hale's P. C. 156; 1 Chitty's Crim. Law 314; *Findley v. People*, 1 Mich. 234; *Shinn v. Com.*, 32 Gratt. (Va.) 899.

5. Discretion of Court to Impanel Special Grand Jury. — *State v. Overstreet*, 128 Mo. 470.

6. Powers of Special Grand Jury. — *People v. McDonell*, 47 Cal. 134; *State v. Cunningham*, 130 Mo. 507; *Lyles v. Com.*, 88 Va. 396.

May Investigate Offense Committed Before Impanelment of Regular Grand Jury. — *State v. Overstreet*, 128 Mo. 470.

7. *People v. Stookey*, 98 Ill. 537, in which case it was held under the statutes of *Illinois* that the fees of grand jurors who served in city courts are not payable out of the county treasury.

Power of Grand Jurors to Fix Compensation — *Georgia Statute.* — Code Ga. (1882), § 3940 (3 Code Ga. 1895, §§ 872, 873), empowers the grand jury impaneled at the fall term of the Superior Court to fix the compensation of jurors for the next succeeding year, and it has been held that when that grand jury continues to serve until the succeeding calendar year has in part expired it may still fix such compensation. *Tanner v. Rosser*, 89 Ga. 811.

Compensation of Juror Acting as Stenographer. — Where one of the grand jurors acts as a stenographer, there is no impropriety in his being paid for such services. *People v. Lauder*, 82 Mich. 109.

8. *England.* — 1 Hawk. P. C., c. 72, § 5; 1 Chitty's Crim. Law 323.

*California.* — *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48.

*Georgia.* — *Thornton v. Marshall*, 92 Ga. 548.

*Illinois.* — *Sidener v. Russell*, 34 Ill. App. 446.

*Indiana.* — *Hunter v. Mathis*, 40 Ind. 356. See also *Griffith v. Slinkard*, 146 Ind. 117.

*Kentucky.* — *Ullman v. Abrams*, 9 Bush (Ky.) 738; *Black v. Sugg*, Hard. (Ky.) 566.



28. Constitutional Law as Affecting Grand Juries — (a) Necessity for Indictment or Presentment by Grand Jury — (1) *In General*. — The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.<sup>1</sup>

(2) *Provisions of Magna Charta*. — The thirty-ninth section of *Magna Charta* provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, \* \* \* unless by the lawful judgment of his peers or by the law of the land," and courts and commentators upon this provision have declared that it entitles a person who is accused of a capital felony or infamous crime to an indictment by a grand jury;<sup>2</sup> but *Magna Charta* did not forbid the legislature from authorizing prosecutions for misdemeanors to be on information.<sup>3</sup>

(3) *In United States Courts*. — The fifth amendment to the Constitution of the United States provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury, except in cases arising in the land and naval forces, etc.<sup>4</sup>

(4) *In State Courts* — (a) *Provisions Modeled after Magna Charta*. — In many if not most of the states, constitutional provisions have been adopted declaring in effect that no one shall be held to answer for any capital or otherwise infamous offense until he shall have been first charged therewith by a grand jury;<sup>5</sup> and a statute purporting, in violation of such constitutional guaranty, to give a court jurisdiction to punish, without presentment by a grand jury, one who has committed a capital or otherwise infamous offense, is unconstitutional and void.<sup>6</sup>

(b) *Provisions Dispensing with Grand Jury*. — In numerous states power to provide

*Missouri*. — *Engelke v. Chouteau*, 98 Mo. 629.

*Writ of Attaint*. — A writ of attaint does not lie against a grand jury. *Black v. Sugg*, Hard. (Ky.) 566, *per* Trimble, J.

*Georgia Statute Exempting Members of Grand Jury from Liability*. — *Thornton v. Marshall*, 92 Ga. 548.

*Liability of Grand Jurors for Disclosing Secrets of Grand-jury Room*. — As to the criminal liability of grand jurors for revealing the secrets of the grand-jury room and their liability to be punished for contempt for such offense, see *supra*, this section, *Secrecy as to Proceedings of Grand Juries*.

1. *Grand Jury Bulwark of Personal Liberty*. — *Jones v. Robbins*, 8 Gray (Mass.) 329, *per* Shaw, C. J.; *State v. Kingsly*, 10 Mont. 537.

2. *Magna Charta Entitles Accused to Indictment by Grand Jury*. — 4 Black. Com. 310; 2 Coke Inst. 46, 50; 2 Kent's Com. 12, 13; 3 Story on Const., § 1783; *Ex p. Wilson*, 114 U. S. 423; *Saco v. Wentworth*, 37 Me. 167, 58 Am. Dec. 786; *Jones v. Robbins*, 8 Gray (Mass.) 329; *State v. Kingsly*, 10 Mont. 537; *State v. Ah Jim*, 9 Mont. 167; *State v. King*, 9 Mont. 445; *State v. Barker*, 107 N. Car. 913.

3. *Misdemeanors Not Provided for by Magna Charta*. — *State v. Starling*, 15 Rich. L. (S. Car.) 120. See also 4 Black. Com. 309, 310.

4. *Fifth Amendment to United States Constitution*. — *Parkinson v. U. S.*, 121 U. S. 281; *Ex p. Bain*, 121 U. S. 1; *Mackin v. U. S.*, 117 U. S. 348; *Ex p. Wilson*, 114 U. S. 417; *U. S. v. Cobb*, 43 Fed. Rep. 570; *U. S. v. Ebert*, 1 Cent.

L. J. 205, 25 Fed. Cas. No. 15,019; *U. S. v. Maxwell*, 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750; *U. S. v. Shepard*, 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273; *U. S. v. Brady*, 1 Mackey (D. C.) 588.

5. *Constitutional Provisions Requiring Indictment by Grand Jury*. — See the constitutions of the various states, and the following cases decided in states in which a capital or otherwise infamous offense cannot be prosecuted except upon indictment:

*Arkansas*. — *Haskins v. State*, 47 Ark. 243; *Palmore v. State*, 29 Ark. 248; *Mott v. State*, 29 Ark. 147; *State v. Cadle*, 19 Ark. 613; *Eason v. State*, 11 Ark. 481.

*Massachusetts*. — *Com. v. Horregan*, 127 Mass. 450; *Nolan's Case*, 122 Mass. 330; *Jones v. Robbins*, 8 Gray (Mass.) 329.

*Mississippi*. — *Cody v. State*, 3 How. (Miss.) 27.

*Nevada*. — *State v. O'Flaherty*, 7 Nev. 153.

*New York*. — *People v. Petrea*, 92 N. Y. 128, 65 How. Pr. (N. Y.) 59; *People v. Freileweh*, 11 N. Y. App. Div. 409; *People v. Barry*, 16 N. Y. App. Div. 462.

*North Carolina*. — *State v. Barker*, 107 N. Car. 913.

*Ohio*. — *Markle v. Akron*, 14 Ohio 586.

*Tennessee*. — *State v. Gouge*, 12 Lea (Tenn.) 132.

*Texas*. — *Pitner v. State*, 23 Tex. App. 366.

6. *Unconstitutional Statutes*. — *Eason v. State*, 11 Ark. 481; *Jones v. Robbins*, 8 Gray (Mass.) 329. See also *Com. v. Horregan*, 127 Mass. 450; *Nolan's Case*, 122 Mass. 330.



for the prosecution of felonies by information has been conferred upon the legislatures by the constitutions, but the power is sometimes restricted in felony cases to offenses of designated degrees or is subject to other conditions.<sup>1</sup>

(c) **Applicability of United States Constitution to States** — *aa. FIFTH AMENDMENT.* — The fifth amendment to the United States Constitution does not apply to the states, and does not prohibit the states from proceeding in felony cases by information when that mode of procedure is authorized by the state constitution.<sup>2</sup>

*bb. FOURTEENTH AMENDMENT.* — Neither the provision of the fourteenth amendment that no state shall deprive any person of life, liberty, or property without due process of law, nor any other provision of that amendment, forbids the states from proceeding in felony cases by information when that mode of procedure is authorized by the state constitution.<sup>3</sup> The provision of that amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" does not curtail the powers of the states in this respect.<sup>4</sup>

(5) *In Territorial Courts.* — In territories the courts are governed by the provision of the fifth amendment to the United States Constitution that no one shall be held to answer for any capital or otherwise infamous crime except on a presentment or indictment of a grand jury, etc.;<sup>5</sup> and of course a statute of the territory which authorizes the prosecution of infamous offenses by information is unconstitutional.<sup>6</sup>

**A State Constitution Does Not Operate Ex Post Facto, and consequently one who has**

**1. Constitutions Dispensing with Grand Juries.** — For constitutional provisions permitting all criminal prosecutions to be by information, or dispensing with grand juries in certain cases or under certain circumstances, see the constitutions of the various states, and the following cases decided in states in which modifications of the common-law rule have been made:

*United States.* — *Hurtado v. People*, 110 U. S. 516; *McNulty v. California*, 149 U. S. 645; *Vincent v. California*, 149 U. S. 648.

*California.* — *Kalloch v. Superior Ct.*, 56 Cal. 229, *People v. Giancoli*, 74 Cal. 642; *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 357.

*Colorado.* — *In re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558.

*Connecticut.* — *Romero v. State*, 60 Conn. 92; *State v. Keena*, 64 Conn. 215.

*Indiana.* — *State v. Boswell*, 104 Ind. 541; *Kennegar v. State*, 120 Ind. 176.

*Kansas.* — *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471.

*Louisiana.* — *State v. Woods*, 31 La. Ann. 267; *State v. Cole*, 38 La. Ann. 843; *State v. Newton*, 30 La. Ann. 1253.

*Montana.* — *State v. Brett*, 16 Mont. 360; *State v. Cain*, 16 Mont. 561.

*Nebraska.* — *Miller v. State*, 29 Neb. 437; *State v. Miller*, 43 Neb. 860.

*South Dakota.* — *State v. Ayers*, 8 S. Dak. 517.

*Utah.* — *Matter of Maxwell*, 19 Utah 495.

*Vermont.* — *State v. Dyer*, 67 Vt. 690.

*Wisconsin.* — *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559; *Bird v. State*, 77 Wis. 276.

*Wyoming.* — *State v. Boulter*, 5 Wyo. 236; *In re Wright*, 3 Wyo. 478, 31 Am. St. Rep. 94.

**Constitution Not Self-executing.** — See *In re Durbon*, 10 Mont. 147, following *State v. Ah Jim*, 9 Mont. 167. See also *State v. Kingsly*, 10 Mont. 537.

**2. Fifth Amendment Inapplicable to States — United States.** — *Hurtado v. People*, 110 U. S. 516.

*Idaho.* — *People v. Waters*, 1 Idaho 560, *per Whitson*, J.

*Indiana.* — *State v. Boswell*, 104 Ind. 541.

*Kansas.* — *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471.

*Texas.* — *Pitner v. State*, 23 Tex. App. 366.

*Utah.* — *Matter of Maxwell*, 19 Utah 495.

*Washington.* — *State v. Nordstrom*, 7 Wash. 506. See also *Lybarger v. State*, 2 Wash. 552.

**3. United States.** — *Hurtado v. People*, 110 U. S. 516; *McNulty v. California*, 149 U. S. 645.

*California.* — *Kalloch v. Superior Ct.*, 56 Cal. 229.

*Colorado.* — *In re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558.

*Indiana.* — *State v. Boswell*, 104 Ind. 541.

*Montana.* — *State v. Brett*, 16 Mont. 360.

*Utah.* — *Matter of Maxwell*, 19 Utah 495.

*Compare State v. Doherty*, 60 Me. 504.

**4. Abridgment of Privileges.** — *Matter of Maxwell*, 19 Utah 495.

**5. Fifth Amendment Applicable to Territories.**

— *Territory v. Blomberg*, (Ariz. 1886) 11 Pac. Rep. 671; *State v. Kingsly*, 10 Mont. 537; *State v. Rock*, (Utah 1899) 57 Pac. Rep. 532. See also *Thompson v. Utah*, 170 U. S. 343, wherein it was held that a party who committed a felony before Utah was admitted into the Union was entitled to be tried by a jury of twelve although the state constitution authorized a jury of eight persons.

**6. Territorial Statute Dispensing with Grand Jury Unconstitutional.** — *Territory v. Blomberg*, (Ariz. 1886) 11 Pac. Rep. 671; *State v. Rock*, (Utah 1899) 57 Pac. Rep. 532.



committed an infamous offense prior to the admission of a territory to statehood is entitled to a presentment or indictment by a grand jury, notwithstanding the provisions of the state constitution.<sup>1</sup>

(6) *Offenses to Which Constitutions Apply* — (a) *In General* — Classification of Offenses After Adoption of Constitution. — A constitutional provision that no one shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury, etc., does not have special reference to the particular crimes which theretofore had been known at common law as capital and infamous, and is not intended to limit its safeguards to those offenses. It applies to all offenses which may thereafter be made capital or infamous by legislation.<sup>2</sup>

(b) *Capital or Otherwise Infamous Offenses*. — A Capital Offense is any offense, no matter what, to which the death penalty is attached.<sup>3</sup>

The Words "or Otherwise Infamous Crime," used in the fifth amendment to the United States Constitution, include any crime subject to an infamous punishment, even if they should be held to include also crimes infamous in their nature independently of the punishment affixed to them,<sup>4</sup> and it has been held that an offense is infamous whenever the court can order that the offender shall be punished by imprisonment in the penitentiary.<sup>5</sup>

(c) *Misdemeanors*. — The guaranty in a state constitution of the right to a presentment or indictment by a grand jury does not apply where the offense is a mere misdemeanor;<sup>6</sup> and it has been held in numerous cases that the fifth amendment to the United States Constitution by a fair implication leaves offenses other than "capital or otherwise infamous crimes" to be prosecuted upon indictment or information, or in either mode, in the discretion of Congress.<sup>7</sup>

(d) *Quasi-criminal Offenses*. — There are many offenses created by statute which are but quasi-criminal, and they may be constitutionally punished without the intervention of a grand jury.<sup>8</sup>

(e) *Contempts*. — A prosecution for contempt need not be instituted by an indictment or presentment.<sup>9</sup>

1. *State Constitution Does Not Operate Ex Post Facto*. — *State v. Kingsly*, 10 Mont. 537; *State v. Rock*, (Utah 1899) 57 Pac. Rep. 532.

2. *To What Offenses Constitution Applicable — Penal Legislation After Adoption of Constitution*. — *U. S. v. Brady*, 1 Mackey (D. C.) 588, *per Cox, J.*

3. *Capital Offense Defined*. — *U. S. v. Brady*, 1 Mackey (D. C.) 588, *per Cox, J.*

4. *Crimes Infamous in Their Nature or Subjecting Offender to Infamous Punishment*. — *Mackin v. U. S.*, 117 U. S. 348.

5. *Crime Punishable by Imprisonment in Penitentiary Is Infamous*. — *Parkinson v. U. S.*, 121 U. S. 281; *Ex p. Wilson*, 114 U. S. 417; *Mackin v. U. S.*, 117 U. S. 348; *U. S. v. De Walt*, 128 U. S. 393; *Territory v. Blomberg*, (Ariz 1886) 11 Pac. Rep. 671; *Jones v. Robbins*, 8 Gray (Mass.) 329. See also *U. S. v. Cobb*, 43 Fed. Rep. 570. *Contra*, *U. S. v. Shepard*, 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273; *U. S. v. Maxwell*, 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750, in which latter case the court cited *Rex v. Hickman*, 1 Moody 34, and *People v. Whipple*, 9 Cow (N. Y.) 707. See also *U. S. v. Brady*, 1 Mackey (D. C.) 588.

"Any Criminal Charge" — *Arkansas Constitution*. — The constitution of Arkansas declares that no man shall be put to answer "any criminal charge" but by presentment, indictment, or impeachment, and under this pro-

vision it has been held that an assault and battery is a criminal offense which cannot be prosecuted except by indictment. *Rector v. State*, 6 Ark. 187; *State v. Cox*, 8 Ark. 436.

6. *State Constitution Inapplicable to Misdemeanors*. — *Thurman v. State*, 25 Ga. 220. See also *Dillingham v. State*, 5 Ohio St. 280.

7. *In United States Courts offenses not infamous may be prosecuted on information*. *U. S. v. Waller*, 1 Sawy. (U. S.) 701, 28 Fed. Cas. No. 16,634; *U. S. v. Shepard*, 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273; *U. S. v. Maxwell*, 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750; *U. S. v. Ebert*, 1 Cent. L. J. 205, 25 Fed. Cas. No. 15,019; *U. S. v. Mann*, 1 Gall. (U. S.) 3, 26 Fed. Cas. No. 15,717; *The Bolina*, 1 Gall. (U. S.) 75, 3 Fed. Cas. No. 1,608; *Walsh v. U. S.*, 8 Woodb. & M. (U. S.) 341, 29 Fed. Cas. No. 17,116; *U. S. v. Joe*, 4 Chicago Leg. W. 105, 26 Fed. Cas. No. 15,478; *U. S. v. Isham*, 17 Wall. (U. S.) 496; *U. S. v. Buzzo*, 18 Wall. (U. S.) 125; *Nebraska v. Lockwood*, 3 Wall. (U. S.) 236; *Stockwell v. U. S.*, 13 Wall. (U. S.) 542. See also *U. S. v. Brady*, 1 Mackey (D. C.) 588.

8. *Quasi-criminal Offense — Grand Jury Unnecessary*. — *Markle v. Akron*, 14 Ohio 586. See also *Haskins v. State*, 47 Ark. 243.

9. *Prosecution for Contempt — Grand Jury Unnecessary*. — *Wyatt v. People*, 17 Colo. 252.



(7) *Jurisdiction to Try Offender Without Indictment.* — The right of an accused person under the constitution to have his case investigated by a grand jury is a substantial one, and does not rest in the discretion of the court;<sup>1</sup> and where a person is tried, convicted, and sentenced upon an information in violation of the constitution he is entitled to his discharge on habeas corpus.<sup>2</sup>

*b. REQUISITES OF GRAND JURY — NUMBER, QUALIFICATIONS OF GRAND JURORS, ETC. — (1) In General.* — An indictment, to be valid within the purview of the constitution, must have been found by a grand jury legally selected and competent to act at the time the indictment is found;<sup>3</sup> but it has been declared that a substantial compliance with the provisions of the constitution is sufficient, and that a literal compliance therewith, which might sometime defeat the spirit and intention of the constitution, should not be required.<sup>4</sup>

*Method of Selecting Grand Jury.* — Where the constitution provides that the grand jury shall be selected from the "jurors in attendance at the court," that mode must be pursued, and the grand jury cannot be drawn by the sheriff and clerk before the commencement of the term of the court.<sup>5</sup>

*Continuance of Grand Jury to Subsequent Term.* — A statute providing that the court may retain and continue over the grand jury to a special term subsequent to the term for which it was drawn and sworn is constitutional.<sup>6</sup>

(2) *Number of Grand Jurors — Limitations Imposed by State Constitutions.* — Where a state constitution fixes the number of grand jurors at twelve, the legislature has no power to change the number.<sup>7</sup> But it has been held that where a constitution contains merely the ordinary provision that no person shall be held to answer for a capital or otherwise infamous offense, unless on the presentment or indictment of a grand jury, it is not necessary that the grand jury shall consist of twenty-three members, the maximum number at the common law, and the legislature may provide that the grand jury shall consist of not more than seventeen nor less than fifteen persons,<sup>8</sup> or of twelve persons only,<sup>9</sup> or ten,<sup>10</sup> or even seven members.<sup>11</sup>

*Constitution Expressly Authorizing Legislature to Fix Number.* — A constitutional provision that the legislature shall have power to determine the number of persons confers a discretion upon the legislature as to the number of grand jurors, and empowers it to fix the number at less than twelve.<sup>12</sup>

*State Constitution Retroactive.* — It has been held that a provision of a state con-

1. *Indictment Not Discretionary with Court.* — *People v. Freileweh*, 11 N. Y. App. Div. 409.

2. *Jurisdictional Defect — Discharge on Habeas Corpus.* — *Ex p. Wilson*, 114 U. S. 417.

3. *Grand Jury Must Have Been Legally Selected and Competent.* — *State v. Flemming*, 66 Me. 142, 22 Am. Rep. 552; *State v. Symonds*, 36 Me. 128.

4. *Substantial Compliance with Constitution Sufficient.* — *Rogers v. State*, 15 Ark. 71.

5. *Constitutional Provision as to Method of Selecting Grand Jurors.* — See *State v. Lawrence*, 12 Oregon 297.

6. *Court May Continue Grand Jury to Subsequent Term.* — *State v. Davis*, 126 N. Car. 1007; *State v. Battle*, 126 N. Car. 1036.

7. *Number of Grand Jurors Fixed by State Constitution.* — *Rainey v. State*, 19 Tex. App. 479.

*Constitutional Provision Self-executing.* — A constitutional provision as to the number of grand jurors is self-operative, and no legislation is necessary to put it in force. *Downs v. Com.*, 92 Ky. 605; *Sanders v. Com.*, (Ky. 1892) 18 S. W. Rep. 528; *Wells v. Com.*, (Ky. 1893) 22 S. W. Rep. 552; *State v. Ah Jim* 9 Mont. 167; *State v. King*, 9 Mont. 445.

8. *Grand Jury Need Not Consist of Twenty-three*

*Members.* — *Brucker v. State*, 16 Wis. 333.

*Number Fixed According to Population of County.* — Where a state constitution provides that the grand jury may consist of any number of members not less than five nor more than fifteen, as the General Assembly may by law provide, the General Assembly may provide that in counties having a population of sixteen thousand inhabitants or less the grand jury shall be composed of five members, and that in counties having a population of more than sixteen thousand inhabitants it shall consist of seven members. *State v. Salts*, 77 Iowa 193; *State v. Standley*, 76 Iowa 215.

9. *Legislature May Change Number of Grand Jurors to Twelve.* — *English v. State*, 31 Fla. 340.

10. *Legislature May Change Number of Grand Jurors to Ten.* — *State v. Hartley*, 22 Nev. 342.

11. *Legislature May Change Number of Grand Jurors to Seven.* — *Hausenfluck v. Com.*, 85 Va. 702, in which case, however, the court did not consider the validity of the statute as respects the state constitution.

12. *Discretionary Power of Legislature to Fix Number.* — *State v. Starling*, 15 Rich. L. (S. Car.) 120.



stitution reducing the number of grand jurors applies to offenses committed before the adoption of such constitution, and is not open to the objection that it is an *ex post facto* law.<sup>1</sup>

**Limitations Imposed by United States Constitution.** — The United States Constitution does not contain any limitations upon the power of a state to fix the number of grand jurors.<sup>2</sup>

(3) *Qualifications of Grand Jurors.* — There have been conflicting dicta upon the question whether a state constitution requiring a grand jury inhibits the legislature from changing the common-law qualifications of grand jurors, it being asserted on one side that the legislature may from time to time change the qualifications,<sup>3</sup> and on the other that the constitution requires grand jurors to possess the qualifications which were required at common law.<sup>4</sup>

**Residence of Grand Jurors.** — In the United States courts all that the defendant can claim as a constitutional right is to have a jury of the district to try his case; that is, a jury every member of which resides within the district. He has no right to insist that every part of the district shall be represented in the make-up of the jury by residents of each place or locality.<sup>5</sup>

**c. NUMBER OF GRAND JURORS THAT MUST CONCUR IN FINDING INDICTMENT** — **Limitations Imposed by State Constitutions.** — It has been held that a constitutional provision that no person shall be tried for a capital crime or other felony unless on presentment or indictment by a grand jury inhibits the legislature from providing that the concurrence of less than twelve grand jurors in the finding of an indictment shall be sufficient.<sup>6</sup>

**State Constitution Retroactive.** — A state constitution reducing the number of grand jurors that need to concur in the finding of an indictment is applicable to offenses committed before the adoption of such constitution, and is not open to the objection that it is *ex post facto*.<sup>7</sup>

**Limitations Imposed by United States Constitution.** — The United States Constitution contains no provisions which inhibit states from providing that an indictment may be found upon the concurrence of a less number of grand jurors than was required at the common law.<sup>8</sup>

**d. RESTRICTION UPON RIGHT OF CHALLENGE AND APPEAL.** — A statute restricting the grounds of challenge to the panel of the grand jury is constitutional;<sup>9</sup> but it has been held that a statute which prohibits all exceptions to the rulings of inferior courts in refusing to set aside an indictment on the

1. **State Constitution Retroactive.** — *State v. Ah Jim*, 9 Mont. 167; *State v. King*, 9 Mont. 445.

2. **United States Constitution Does Not Fix Number in State Courts.** — *Parker v. People*, 13 Colo. 155; *State v. Carrington*, 15 Utah 480; *Matter of Maxwell*, 19 Utah 495; *Hausenfluck v. Com.*, 85 Va. 702.

3. *Per* Shepherd, J., *obiter*, in *State v. Barker*, 107 N. Car. 913.

4. *Per* Johnson, C. J., *obiter*, in *State v. Brown*, 10 Ark. 78.

5. **Residence of Grand Jury.** — *U. S. v. Wan Lee*, 44 Fed. Rep. 707.

**Grand Jury Drawn from Division of County.** — An act incorporating a city and establishing a mayor's court does not infringe the constitution by providing that the grand jury for such court shall be drawn from the body of such corporation, but the utmost limit of the duty of a grand juror so summoned is to inquire of offenses committed within such corporation. *Rogers v. State*, 15 Ark. 71.

6. **Statute Diminishing Number That Need Concur Unconstitutional.** — *Donald v. State*, 31 Fla. 255, wherein the statute provided that the

assent of eight grand jurors should be sufficient; *State v. Barker*, 107 N. Car. 913, whereof in the statute provided that the concurrence of nine grand jurors should be sufficient. *But see contra*, *State v. Hartley*, 22 Nev. 342, holding that a statute providing that ten persons shall constitute the grand jury, and that eight of that number shall find an indictment, is constitutional.

**Constitutional Provision Self-executing.** — A constitutional provision as to the number of grand jurors who may find an indictment is self-operative and no legislation is necessary to put it in force. *Sanders v. Com.*, (Ky. 1892) 18 S. W. Rep. 528; *State v. Ah Jim*, 9 Mont. 167; *State v. King*, 9 Mont. 445.

7. **State Constitution Retroactive.** — *State v. Ah Jim*, 9 Mont. 167; *State v. King*, 9 Mont. 445.

8. **United States Constitution Does Not Control States in Fixing Number That Need Concur.** — *State v. Carrington*, 15 Utah 480; *Matter of Maxwell*, 19 Utah 495.

9. **Legislature May Restrict Grounds of Challenge.** — *People v. Southwell*, 46 Cal. 142. See also *Head v. State*, 44 Miss. 731.



ground that members of the grand jury were disqualified is unconstitutional in that it violates the constitutional provision requiring a presentment or indictment by a grand jury.<sup>1</sup>

*e.* LOCAL STATUTES AS TO GRAND JURIES. — Under the constitutions of some states a statute abolishing the grand-jury system must be of uniform operation;<sup>2</sup> and the constitution of *New York* expressly forbids the passage of any local or private bill for "selecting, drawing, summoning, or impaneling" grand jurors.<sup>3</sup>

*f.* CURATIVE STATUTES. — It is not within the constitutional authority of the legislature to enact that indictments already pending shall be valid notwithstanding they have been found by a grand jury which was not legally drawn.<sup>4</sup>

*g.* REQUISITES OF INDICTMENT UNDER CONSTITUTION. — Where a constitution provides that no person shall be held to answer for certain offenses unless on the presentment or indictment of a grand jury, the courts have necessarily to look to the common law to ascertain what an indictment is within the meaning of the constitution. While the power of the legislature to mould and fashion the form of an indictment is plenary, and the legislature may dispense with mere matters of form, the substance of a good common-law indictment must be preserved.<sup>5</sup>

*h.* POWER OF COURT TO AMEND INDICTMENT WITHOUT CONCURRENCE OF GRAND JURY. — A constitutional provision requiring an indictment or presentment by a grand jury forbids the amendment of an indictment in a matter of substance after it has been returned by the grand jury.<sup>6</sup>

1. Statute Prohibiting Exceptions Unconstitutional — Right of Appeal. — *Palmore v. State*, 34 Ark. 248, *distinguishing* *Whitehead v. Wells*, 29 Ark. 248, wherein it was held that the legislature may prescribe the time and manner of determining the objection for the want of qualification of jurors.

2. Statute Abolishing Grand Jury Must Be of Uniform Operation. — *In re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558.

3. New York Constitution. — *People v. Petrea*, 92 N. Y. 128, 65 How. Pr. (N. Y.) 59.

4. Curative Statutes Unconstitutional. — *State v. Flemming*, 66 Me. 142, 22 Am. Rep. 552, *following* *State v. Doherty*, 60 Me. 504.

In Massachusetts it has been held that a curative statute enacted with reference to a certain grand jury is constitutional as to indictments found by such grand jury after the passage of the act. *Com. v. Brown*, 121 Mass. 69.

5. Legislature Cannot Dispense with Substantial

Requirements of Indictment. — *Mott v. State*, 29 Ark. 147; *Rhodus v. Com.*, 2 Duv. (Ky.) 159; *State v. O'Flaherty*, 7 Nev. 153. See also *McCann v. U. S.*, 2 Wyo. 274, wherein Peck, J., declared *obiter* that a statute dispensing with the necessity of setting forth the fiduciary relation and its breach in an indictment for embezzlement would be unconstitutional.

6. Court Cannot Amend Indictment in Matter of Substance. — *Ex p. Bain*, 121 U. S. 1; *Com. v. Mahar*, 16 Pick. (Mass.) 120. See also *Com. v. Drew*, 3 Cush. (Mass.) 279.

See further in support of the proposition that even at common law the court cannot amend an indictment without the concurrence of the grand jury, 2 Hawk. P. C., c. 25, §§ 97, 98; *Rex v. Wilkes*, 4 Burr. 2527; *Com. v. Child*, 13 Pick. (Mass.) 198; *People v. Campbell*, (N. Y. Gen. Sess.) 4 Park. Crim. (N. Y.) 386; *State v. Sexton*, 3 Hawks (10 N. Car.) 184, 14 Am. Dec. 584.



# INDEX.

**ABATEMENT OF NUISANCE**, see **INTOXICATING LIQUORS**.

**ABOUT:**

Intoxicating liquors, 366

**ACCRETIONS:**

Islands, 536

**ADJOURNMENT:**

Intoxicating liquors:

Hearing of application for license and remonstrance, 252

Judge, 723

Authority of judge over jury after adjournment of court, 724

**ADMISSIONS:**

Interpreters, 32

**ADULTERATION** (see **INTOXICATING LIQUORS**):

Interstate commerce, 84

**ADVERSE POSSESSION:**

Irrigation, 518

Islands, 535

**AFFIDAVITS:**

Application for liquor license, 244

**AGENCY** (see **INTOXICATING LIQUORS**):

Interstate commerce:

Sale by agents, 66

**AIDERS AND ABETTORS**, see **INTOXICATING LIQUORS**.

**ALCOHOL:**

Intoxicating liquors, 198

**ALE**, see **INTOXICATING LIQUORS**.

**ALIENS:**

Irrigation, 497

**AMENDMENTS** (see **JUDGMENTS AND DECREES**):

Intoxicating liquors:

Recommendation of petition or application for license, 248

Remonstrances or counterpetitions, 251

**AND:**

And and or, 20

**APPEALS:**

*Intoxicating Liquors*, see **INTOXICATING LIQUORS**.

**ARREST OF JUDGMENT**, 850

Abolition, 858

Clerical errors, 856

Defect in pleadings, 851

Defect in verdict, 855

Defective count where declaration contains a good count, 853

Defects and process, 856

**ARREST OF JUDGMENT**, *conf'd.*

Defects cured by verdict, 856

Defects waived by going to trial, 856

Effect of arrest, 858

Errors apparent on face of record, 850

Errors of committing magistrate, 855

Error which would be fatal on demurrer, 851

Evidence objections to, 856

Formal defect in pleadings, 852

Grounds of arrest, 850

Indictment under repealed statute, 854

Informalities in returning indictment, 857

In general, 850

Irregularities at trial, 857

Jury, 854, 1171

Irregularities in summoning and impanelling jury, 854

Jury and jury trial, 854

Misconduct of jury, 855

Objections to qualification or competency of jurors, 854, 1171

Objections to the jury, 854

Limitation of actions, 855

Matters of form, 855

Misjoinder of causes of action, 853

Objections previously raised by demurrer, 851

Objections to jurisdiction, 854

Objections to the jury, 854

Record not showing matters which should appear, 851

Record showing that defendant should be released, 855

Statutory grounds, 850

Time for moving in arrest, 858

Variance between allegations and proof not sufficient, 853

Various defects and irregularities as to parties, 855

Verdict, 855

Defects cured by verdict, 856

Who may move in arrest, 857

**ASSAULT** (see **JEOPARDY**):

Intoxication, 411

**ASSIGNMENTS** (see **JUDGMENTS AND DECREES**):

Intoxicating liquors:

Assignment or transfer of license, 232

Assigned license no protection to assignee in selling, 232

Connecticut, 234

Consent of licensee to transfer unnecessary, 233

License a personal trust, 232

Licensee entitled to payment for unexpired portion of term, 233

License not assignable without statutory authority therefor, 232

New York, 234



**ASSIGNMENTS, *cont'd.*****Intoxicating liquors, *cont'd.*****Assignment or transfer of license, *cont'd.***

Pennsylvania, 233, 235

Right of transfer to other premises under Pennsylvania statute, 235

Transfer allowed in proper case, 233

Transfer of license to other place or building, 235

Transfer of license to personal representatives, 233

Under statutes authorizing assignment, 233

**Judgments and decrees:**

Whether operative as assignment or conveyance, 764

**ATTACHMENTS:**

Intoxicating liquors, 315

**ATTORNEY AND CLIENT:**

Interpreters, 32

**BARTER:***Intoxicating liquors*, see **INTOXICATING LIQUORS.****BAWDY HOUSES:****Intoxicating liquors:**

Constitutionality of statutes prohibiting sales in bawdy houses, 218

*BEER*, see **INTOXICATING LIQUORS.***BILL OF EXCEPTIONS*, see **JUDGE.****BILLS OF EXCHANGE AND PROMISSORY NOTES (see JUDGMENT NOTES.***Intoxicating liquors*, see **INTOXICATING LIQUORS.****BONDS:****Intoxicating liquors:**

License bonds:

Bond of village or county, 274

**BRANDY:**

Intoxicating liquors, 198

**BRIBERY:**

Intoxication, 413

**BRIDGES:**

Interstate commerce, 49, 88

**BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS:**

Intoxicating liquors, 316

**BURGLARY:**

Intoxication, 412

**CARRIERS OF GOODS (see INTERSTATE COMMERCE):****Intoxicating liquors (see INTOXICATING LIQUORS):**

Illegal transportation, 380

*CARRIERS OF LIVE STOCK*, see **INTERSTATE COMMERCE.***CARRIERS OF PASSENGERS*, see **INTERSTATE COMMERCE.****CERTIORARI:****Intoxicating liquors:**

Granting or refusal of license, 258

In general, 258

Persons not parties to record, 259

Question of fact not reviewable on certiorari, 258

Questions of law reviewable, 259

Who may apply for writ, 259

Revocation of license, 269

**CHAMBERS:****Judge, 723**

Authority of judge over jury after adjournment of court, 724

Definition, 723

Jurisdiction incidental to jurisdiction of court, 723

Jurisdiction limited by that of court to which judge belongs, 724

Powers regulated by statute, 724

**CHATTEL MORTGAGES:**

Intoxicating liquors, 314

*CHILDREN*, see **ISSUE (DESCENDANTS).****CHINESE:**

Interstate commerce, 94

*CHURCHES*, see **INTOXICATING LIQUORS.***CIDER*, see **INTOXICATING LIQUORS.****CIGARETTES:**

Interstate commerce, 68

**CITIZENSHIP:****Intoxicating liquors:**

Eligibility of applicant for license, 239

Recommendation of petition or application for license, 247

Joint-stock companies, 639

**CIVIL DAMAGE ACTS:**

Liability of owner or lessor for violations of law on leased premises, 395

Liability of leased premises, 395

Liability of premises for fines assessed against occupant, 396

Personal liability of owner or lessor, 395

*CLUBS*, see **INTOXICATING LIQUORS.***C. O. D.:**Intoxicating liquors*, see **INTOXICATING LIQUORS.***COLLATERAL ATTACK*, see **JUDGMENTS AND DECREES.***COMMERCE*, see **INTERSTATE COMMERCE.***COMMON CARRIER*, see **INTERSTATE COMMERCE.***COMPANIES*, see **JOINT STOCK COMPANIES.***CONFESSION OF JUDGMENTS*, see **JUDGMENT NOTES; JUDGMENTS.****CONFLICT OF LAWS:****Intoxicating liquors:**

Extraterritorial effect of ordinances, 289

Status of contracts of sale made in another state, 312

Contracts valid in states where made, 312

Effect of knowledge of purpose to resell illegally and assistance therein, 312

In general, 312

Participation in unlawful act of purchaser, 313

Purchaser to use illegally in another state, 313

Reasonable cause to believe liquors would be resold illegally, 312

Repeal of statutes, 314

Sale with view to illegal resale, 313

Seller's knowledge of illegal purpose, 312

Special statutory provisions, 313



**CONNECTING CARRIERS:**

Interstate commerce, 64

**CONSTITUTIONAL LAW** (see JEOPARDY):*Commerce*, see INTERSTATE COMMERCE.*Interstate commerce*, see INTERSTATE COMMERCE.**Intoxicating liquors**, 206

Civil damage acts, 221

Construction of statutes unconstitutional in part, 217

Immunities and privileges of citizens, 216

Interstate commerce, 216, 221, 291, 293

Keeping liquors, 218

License fees must be uniform, 223

License fees not taxes, 223

**License laws**, 208

Citizens, 210

Druggists, 210

Exercise of police power, 209

In general, 208

Male persons, 210

Persons of good moral character, 210

Physicians, 210

Regulating conditions upon which licenses granted, 209

Residents, 210

Screen laws, 213

Statutes authorizing revocation of license, 215

Statutes prohibiting employment of women and children in saloons, 213

Statutes prohibiting obstructions during business hours, 214

Statutes prohibiting sales and requiring closing of saloons at certain times, 212

Statutes prohibiting sales in certain localities, 214

Statutes prohibiting sales or gifts to certain classes of persons, 212

Statutes requiring applicant to give bond, 211

Statutes requiring consent of persons living in vicinity of proposed saloon, 211

Statutes restricting certain classes of persons the right to sell, 210

Local option laws, 221

**Municipal control of liquor traffic**, 283

Constitutional limitations on delegative power of legislature, 283

Constitutional limitations on power to pass ordinances, 283

Ordinances inconsistent with constitution, 283

Prohibition laws, 221

Statutes authorizing attorney's fees, 222

Statutes authorizing license fees, 222

Statutes authorizing taxes, 222

Statutes declaring places for manufacture and sale nuisances, 220

Statutes declaring what liquors shall be deemed intoxicating, 216

Statutes delegating legislative power, 224

Statutes discriminating against liquors of other states and countries, 216

Statutes forbidding gifts of liquors, 217

Statutes forbidding recovery for liquors illegally sold and authorizing recovery back of money paid therefor, 220

Statutes imposing fine and imprisonment for violation of liquor laws, 218

Statutes making it an offense to keep liquors with intent to sell unlawfully, 218

**CONSTITUTIONAL LAW**, *cont'd.***Intoxicating liquors**, *cont'd.*

Statutes making it an offense to keep place for unlawful sale, 218

Statutes making judgments for fines and taxes liens on leased property, 219

Statutes prescribing rules of evidence, 225

Statutes prescribing rules of pleading, 226

**Statutes prohibiting manufacture and sale of intoxicating liquors**, 206

Appropriation of private property for public benefit, 207

*Ex post facto* laws, 207

Impairment of obligation of contract, 208

Power to prohibit manufacture and sale of intoxicating liquor, 206

Specific objections, 207

Taking of property without due process of law, 207

Whether an abridgment of immunities, privileges, etc., 207

Statutes prohibiting manufacture or keeping for sale in another state, 296

Statutes prohibiting sales in bawdy houses, 218

Statutes providing for forfeiture of licensee's bond, 219

Statutes providing for forfeiture of liquors illegally kept, 219

Statutes providing for treatment and cure of inebriates, 221

Statutes providing that certain acts shall make place of sale a nuisance, 319

Statutes regulating liquor traffic in Alaska, 221

Statutes regulating sale of intoxicating liquors, 208

Taxation, 216

Taxation of liquor traffic not license to sell, 224

Title and subject-matter of statutes, 227

**Title and subject-matter of Statutes** (see *infra*, TITLE AND SUBJECT-MATTER OF STATEUTES):

Application of constitutional provisions, 227

Incorporation, 229

Miscellaneous examples, 228

Nature and object of constitutional provisions, 227

Regulating elections, 229

Sale, 209

Statutes held invalid, 227

Title of act to regulate or restrain, 227

What enactments valid under title to prohibit, 228

Who may question validity of statutes, 230

Town agent system of license and sales, 221

Who may question validity of statutes, 230

Wilson act, 293

**CONSTRUCTION**, see INTERPRETATION AND CONSTRUCTION.**CONTEMPT:****Intoxicating liquors:**

Proceedings for contempt in violating injunction, 324

**CONTRACTS** (see INTOXICATING LIQUORS; INTOXICATION):

Interpreters, 32



**CONTRACTS, *cont'd.***

Interstate commerce, 52

**Judgments and Decrees:**

Whether a judgment is a contract, 763

**CORPORATIONS (see IRRIGATION; JOINT STOCK COMPANIES):****Intoxicating liquors:**

Licenses, 240

**COTENANCY, see JOINT TENANTS AND TENANTS IN COMMON.****COUNTERCLAIM. see SET-OFF, RECOUPMENT AND COUNTERCLAIM.****COUNTERFEITING:**

Interstate commerce, 53

Intoxication, 412

**COURTS (see INTERPRETERS; INVESTMENTS; JUDGE; JUDICIAL SALES):****COVENANTS (see INTERPRETATION AND CONSTRUCTION):**

Intoxicating liquors, 317

**CRIMINAL LAW (see INTOXICATING LIQUORS; INTOXICATION; JEOPARDY):**

Interstate commerce:

Punishment of crime, 52

**DAMS:**

Interstate commerce, 88

**DECREES, see JUDGMENTS AND DECREES.****DEEDS (see INTERPRETATION AND CONSTRUCTION):****Intoxicating liquors:**

Conditions in deeds prohibiting sales on premises conveyed, 316

Issue (descendants), 548

**DISORDERLY HOUSES:****Intoxicating liquors:**

Constitutionality of statutes forbidding sale in bawdy houses, 218

**DITCHES, see IRRIGATION.****DRAINS, see IRRIGATION.****DRUGGISTS (see INTOXICATING LIQUORS):****DRUNKARDS, see INTOXICATING LIQUORS.****DRUNKENNESS, see INTOXICATION.****DUE PROCESS OF LAW:****Intoxicating liquors:**

Statutes declaring nuisance, 320

Statutes prohibiting manufacture and sale of intoxicating liquors, 207

**DYING WITHOUT ISSUE, see ISSUE (DESCENDANTS).****ELECTIONS, see INTOXICATING LIQUORS.****ELEVATORS:**

Interstate commerce, 65

**EVIDENCE (see INTOXICATING LIQUORS.)***Interpreters, see INTERPRETERS.***EXAMPLES, 888, 891****EXCHANGE:***Intoxicating liquors, see INTOXICATING LIQUORS.***EXECUTIONS:**

Intoxicating liquors, 315

**EXECUTORS AND ADMINISTRATORS**

(see INVESTMENTS; JOINT EXECUTORS):

**Intoxicating liquors:**

License does not pass to personal representatives, 232

**EXEMPLARY DAMAGES:**

Jeopardy, 583

**EX POST FACTO LAWS:****Intoxicating liquors:**

Statutes prohibiting manufacture and sale of intoxicating liquors, 207

**EXPRESS COMPANIES:**

Interstate commerce:

Interstate commerce act, 130

**EXPRESSIO UNUS EST EXCLUSIO ALTERIUS:**

Interpretation and construction, 25

**FERRIES (see INTERSTATE COMMERCE):**

Interstate commerce, 64

**FIDUCIARY, see INVESTMENTS.****FIRE INSURANCE:**

Intoxicating liquors, 315

**FOREIGN CORPORATIONS:**

Interstate commerce (see INTERSTATE COMMERCE), 65

**FORFEITURE (see INTOXICATING LIQUORS):**

Interpretation and construction:

Avoidance of forfeiture, 18

Jeopardy, 583

**FORGERY:**

Intoxication, 413

**FORMER JEOPARDY, see JEOPARDY.****FRAUD, see INTOXICATION; JEOPARDY.****GAMBLING:**

Interstate commerce, 94

**GAME:**

Interstate commerce, 69

**GAME AND GAME LAWS:**

Interstate commerce, 87

**GENERAL AVERAGE, see JETTISON.****GIFTS (see INTOXICATING LIQUORS):****GRAMMAR:**

Interpretation and construction, 20

**GRAND JURIES, see JURY AND JURY TRIAL.****GUARANTY:**

Interpretation and construction:

Language construed most strongly against user thereof, 16

**GUARDIAN AD LITEM:**

Investments, 426

**GUARDIANS, see INTOXICATING LIQUORS; INVESTMENTS.****HABITUAL DRUNKARDS, see INTOXICATING LIQUORS.****HEARING, see INTOXICATING LIQUORS.****HEIRS, see ISSUE (DESCENDANTS).****HIGHWAYS:**

Interstate commerce, 48, 88

**HOLIDAYS, see INTOXICATING LIQUORS.**



**HOMICIDE**, see INTOXICATION.

**HOUSES OF ILL FAME:**

Intoxicating liquors, 364

**HUSBAND AND WIFE**, see INTOXICATING LIQUORS.

**ILLEGAL CONTRACTS**, see INTOXICATING LIQUORS.

**ILLEGAL SALES**, see INTOXICATING LIQUORS.

**IMMIGRATION:**

Interstate commerce, 116

**IMPAIRMENT OF OBLIGATION OF CONTRACTS:**

Intoxicating liquors:

Statutes prohibiting manufacture and sale of intoxicating liquors, 208

**IMPLIED CONTRACTS:**

Intoxication, 403

**INDIANS** (see INTOXICATING LIQUORS):

Irrigation, 497

**INDICTMENT**, see JEOPARDY.

**INFANTS**, see INTOXICATING LIQUORS.

**INFORMATION**, see JEOPARDY.

**INFORMERS:**

Intoxicating liquors:

Sales to informers, 346

**INJUNCTIONS**, see INTOXICATING LIQUORS.

**INNKEEPERS:**

Intoxicating liquors:

Illegal sales by tavern keeper, hotel keeper and innkeeper, 354

**INSANITY**, see INTOXICATION.

**INSPECTION LAWS**, see INTERSTATE COMMERCE.

**INSTRUMENTS**, see INTERPRETATION AND CONSTRUCTION.

**INSURANCE:**

Interpretation and construction:

Avoidance of forfeiture, 18

Language construed most strongly against user thereof, 16

Interstate commerce, 64, 87

Intoxicating liquors, 315

**INTENT:**

Intoxication, 406, 413

**INTENTION**, see INTERPRETATION AND CONSTRUCTION.

**INTERNATIONAL LAW:**

Judicial notice, 933

**INTERPRETATION AND CONSTRUCTION, I**

Absolute deed and defeasance, 10

Ambiguity, necessity of, 23

Ambiguity, necessity for, 4

"And" and "or," 20

**Bills of exchange and promissory notes:**

Language construed most strongly against user thereof, 16

17 C. of L.—83

**INTERPRETATION AND CONSTRUCTION, cont'd.**

*Clerical mistakes*, see *infra*, VERBAL AND CLERICAL MISTAKES.

**Consideration of different parts of instrument, 4**

Absolute deed and defeasance, 10

Covenants in deed, 5

Deed as contract, 5

Description in deed, 6

*Ejusdem generis*, 6

Every part to be given effect, 7

General words preceding particular words, 7

Grant cannot be restricted or diminished by subsequent clause, 8

Instrument to be considered as a whole, 4

Negotiable instrument, 10

Operative parts must be doubtful, 6

Purchase-money mortgage, 10

Repugnant clauses in deed, 8

Rule as to wills, 8

Separate writing expressly referred to, 10

Transaction incorporated in several writings, 9

Writing must be between same parties, 10

**Construction by parties, 23**

Construction by parties ineffective in absence of ambiguity, 25

In general, 23

Previous contracts, 25

**Construction in favor of instrument:**

Avoidance of forfeiture, 18

Effectiveness of instrument, 18

Legality of instrument, 18

Validity of instrument, 17

**Contracts:**

Deed as contract, 5

Language construed most strongly against user thereof, 15

Covenants, 5

Deed as contract, 5

**Deeds:**

Absolute deed and defeasance, 10

Language construed most strongly against user thereof, 14

Repugnant clauses, 8

Definition, 2

Equitable construction preferred, 18

Every part to be given effect, 7

**Exceptions:**

Language construed most strongly against user thereof, 16

Existing law part of contract, 26

*Expressio unius est exclusio alterius*, 25

**Forfeiture:**

Avoidance of forfeiture, 18

Grammar, 20

**Guaranty:**

Language construed most strongly against user thereof, 16

Implied terms, 26

**Insurance:**

Avoidance of forfeiture, 18

Language construed most strongly against user thereof, 16

**Intention of parties, 2**

In general, 2

Intention of parties to deeds, 3

Intention sought is that expressed, 3

Interpretation only when ambiguity exists, 4

To contracts generally, 2



**INTERPRETATION AND CONSTRUCTION, *cont'd.***

Language construed most strongly against user thereof, 14

Bill or note, 16

Contracts, 15

Exceptions in carrier's contract, 16

General rule, 14

Guaranty contracts, 16

Indentures, 14

Insurance contract, 16

Leases, 14

Mortgages, 14

Promisee's understanding of contract, 17

Public grants, 15

Rule one of last resort, 16

**Leases :**

Language construed most strongly against user thereof, 14

Legality of instrument, 18

Legal terms, 13

Meaning of words used, 4

Misspelling, 20

*Mistakes*, see *infra*, **VERBAL AND CLERICAL MISTAKES**.

**Mortgages :**

Language construed most strongly against user thereof, 14

Note and a mortgage, 11

Nature and situation of subject matter, 22

**Negotiable instruments :**

Transaction incorporated in several writings, 10

Object of interpretation, 2

Ordinary meaning of words, 11

*Parties*, see *infra*, **CONSTRUCTION OF PARTIES**.

Preliminary negotiations, 23

**Public Grants :**

Language construed most strongly against user thereof, 15

Punctuation, 20

Purpose of instrument or contract, 22

Reasonable and equitable construction preferred, 18

Relation of parties, 22

Repugnant clauses in deed, 8

Scope of title, 2

Spelling, 20

Subject-matter, 22

**Surrounding circumstances, 21**

Circumstances construed only in case of ambiguity, 23

Court stand in place of parties, 23

In general, 21

Nature and situation of subject-matter, 22

Preliminary negotiations, 23

Purpose of instrument, 22

Relation of parties, 22

Technical terms and expressions, 13

Transaction incorporated in several writings, 9

**Usages and customs :**

Meaning of words, 12

In general, 12

Local usage, 12

Trade usage as to meaning of terms, 12

Words of quantity or number, 12

Validity of instrument, 17

Construction in favor of, 17

**Verbal and clerical mistakes, 19**

Description in deed, 19

False grammar, 20

Incorrect spelling, 20

**INTERPRETATION AND CONSTRUCTION, *cont'd.***

Verbal and clerical mistakes, *cont'd.*

In general, 19

Repugnant words may be rejected, 19

Substitution of words, 20

Words supplied to effectuate intention, 19

**Words :**

Meaning of words and phrases, 11

Arbitrary meaning given by parties, 12

Legal terms, 13

Local usage, 12

Ordinary meaning generally to be given, 11

Peculiar meaning to be given by usage, 12

Technical terms and expressions, 13

Trade usage, 12

Words of quantity or number, 12

Meaning of words used, 4

Words of measure, 26

Written and printed matter, 21

Written matter controls printed, 21

**INTERPRETERS, 27**

Admissions, 32

Attorney and client, 32

Common law, 27

Compensation, 31

**Competency, 30**

Ability of person to interpret, 31

As relating to bias of person appointed, 30

Discretion of trial court, 30

Discretion should not be exercised so as to deprive party of evidence, 30

Impeachment of interpreter's testimony, 31

Parties' acquiescence in interpretation of unbiased commissioner, 31

Relation of interpreter to party, 31

Witness as interpreter, 30

Contracts, 32

Contracts, admissions, and other communication through interpreter, 32

Definition, 27

Impeachment of interpreter's testimony, 31

Number of interpreters, 28

Oath, 30

**Questions of law and fact :**

Necessity of appointment, 29

**Right and duty of court to appoint, 27**

At common law, 27

Common law not changed by statute, 28

Foreigners, 28

In general, 27

Mutes, 29

Necessity of appointment question for court, 29

Number of interpreters, 28

Persons with defective power of speech, 29

Under statutes, 28

What witnesses may testify through interpreters, 28

Swearing interpreters as witnesses, 30

What witnesses may testify through interpreters, 28

Foreigners, 28

Mutes, 29

Persons with defective power of speech, 29

**Witnesses :**

Interpreter must be sworn as witness, 30

Witness as interpreter, 30

**INTERRUPT, 32**



**INTERSECT, 32**

Mines and mining claims, 33

**INTERSTATE COMMERCE, 34**

Adulteration, 84

**Agency:**

Sale by agents, 66

Bridges, 49, 88

Interstate commerce act, 131

Carriers of goods (see *infra*, RAILROADS AND OTHER CARRIERS), 63

Taxation, see *infra*, STATE TAXATION.

Carriers of passengers (see *infra*, RAILROADS AND OTHER CARRIERS) 63

Taxation, see *infra*, STATE TAXATION.

Carriers subject to interstate commerce act, 128

Bridges, 131

Carriers by water, 130

Common control or management, 129

Express companies, 130

Ferries, 131

In general, 128

Necessity of common control or management, 129

Northern Pacific Railway Company, 130

Participation in through rates and through bills of lading, 129

Stock yards companies, 131

Switching companies, 130

Transfer companies, 130

Transportation wholly within one state, 128

Charges, see *infra*, JUST AND REASONABLE CHARGES.

Chinese immigration, 94

Cigarettes, 68, 87

Coal oil, 93

Colored passengers, 100

Commerce, see *infra*, WHAT CONSTITUTES INTERSTATE COMMERCE.

Commission, see *infra*, ORGANIZATION, POWERS AND DUTIES OF COMMISSION.

Congress, see *infra*, POWER OF CONGRESS.

Connecting carriers, 64

Connecting carriers (see *infra*, FACILITIES FOR INTERCHANGE OF TRAFFIC):

Continuous carriage, 163

Construction of interstate commerce act, 123

Application to existing contracts, 124

Construction of English traffic acts adopted, 124

In general, 123

Interests to be considered, 124

Strict or liberal construction, 123

Terms railroad and transportation, 124

Construction of statutes, see *infra*, STATE STATUTES AFFECTING INTERSTATE COMMERCE.

Contagious and infectious disease, 84

Continuous carriage, 163

Contracts (see *infra*, SALES), 52

State statutes affecting interstate commerce, 86

Convicts, exclusion of, 86

**Corporations:**

Employment of corporation by Congress, 54

Counterfeiting, 53

County printing, 93

**Criminal law:**

Punishment of crime, 52

Criminal proceedings, 178

Criminals, exclusion of, 86

**INTERSTATE COMMERCE, *cont'd.***

Dams, 88

Dead bodies, 94

Death by wrongful act, 94

Discrimination (see *infra*, FACILITIES FOR INTERCHANGE OF TRAFFIC; INSPECTION LAWS; STATE STATUTES AFFECTING INTERSTATE COMMERCE; STATE TAXATION; UNDUE PREFERENCE OR ADVANTAGE):

Interstate commerce act, 134

Allowance for leakage, 142

Burden of proof, 136

Carload rates, 139

Circumstances to be considered, 137

Classification of freights, 138

Commission to ticket brokers, 141

Common law and statutes contrasted, 135

Competition, 137

Compressing cotton in transit, 142

Consideration for discrimination, 136

Device unnecessary, 135

Difference caused by carrier, 137

Difference in cost, 137

Discounts for large shipments, 139

Discrimination not unlawful unless circumstances and conditions are similar, 136

Free cartage, 142

Inequality of conditions justifies inequality of rates, 136

In general, 134

Like kind of traffic, 137

Limited to discrimination in rates, 134

Local and through rates, 140

Manufacturer's rates, 139

Mileage for use of shipper's cars, 139

Particular instances, 139

Party rate tickets, 141

Passes, 141

Rebates, 141

Round trip tickets, 141

Similarity of circumstances and conditions, 136

Special rates for carrying immigrants, 140

Statutory provision, 134

Underbilling, 142

What constitutes, 135

Whether all discriminations illegal, 135  
*Long and short hauls*, see *infra*, LONG AND SHORT HAULS.

Railroads and other carriers, 96

Disinterment of dead bodies, 94

Elevators, 65

Embargo, 53

Enforcement of act, 164

Appeal, 177

Appeal as supersedeas, 178

Burden of proof, 166

Complaint, 164

Costs and expenses, 172

Criminal proceedings, 178

Decision upon application, 176

Duty of commission as to abstract, collateral and ex parte questions, 165

Duty to dispose of issues of fact, 169

Duty to remand case to commission, 176

Effect of answer promising compliance with the law, 170

Election of tribunal, 164

Enforcement of order, 167, 177

Equitable and legal proceedings, 174

Volume XVII,



**INTERSTATE COMMERCE, *cont'd.*****Enforcement of act, *cont'd.***

- Estoppel, 166
- Evidence, 166, 174
- Extent of jurisdiction, 165
- Findings, 175
- Findings of fact, 168
- Function of commission, 165
- Injunction, 172
- Jurisdiction as to receivers, 165
- Jurisdiction in penal actions and prosecutions, 165
- Jurisdiction of commission, 164
- Jurisdiction of state courts, 164
- Jurisdiction over foreign carriers, 165
- Mandamus, 172
- Nature and effect of order, 170
- Nature of proceeding, 166
- Order of commission, 169
- Original proceedings, 174
- Parties, 166, 173
- Proceedings before commission, 164
- Proceedings in federal courts, 171
- Proceedings to enforce orders of commission, 172
- Recommendation as to reparation, 169
- Refunding of excessive rates, 171
- Rehearing, 171
- Remand, 177
- Reparation, 171
- Report, 169
- Reversal, 177
- Review in supreme court, 178
- Right to invoke aid of United States court, 167
- Right to require attendance of witnesses, 167
- Right to take proofs where defendant fails to answer, 167
- Suits for relief from illegal discrimination, 172
- When enforcement properly refused, 176
- Exclusion of imports, 84**
  - Adulterated, unsound, or infectious articles, 84
  - Fraudulent articles, 85
  - Lawful subjects of commerce, 84
  - Regulations to secure purity, 85
- Exports, see infra, STATE TAXATION.*
- Express companies :**
  - Interstate commerce act, 130
- Facilities for interchange of traffic, 149**
  - Cars of private company, 152
  - Discrimination between connecting lines, 151
  - Duty to advance charges or give credit, 152
  - Duty to afford equal facilities, 149
  - Duty to arrange for joint through transportation, 151
  - Duty to draw cars of other lines, 152
  - Rates and charges, 150
  - Reasonable and proper facilities, 149
  - Sale of through tickets, 150
  - Similar and dissimilar circumstances and conditions, 150
  - Terminal points, 150
  - Three carriers involved, 149
  - Undue preferences, 150
  - Use of tracks and terminal facilities, 151
- Ferries, 64, 92**
  - Interstate commerce act, 131

**INTERSTATE COMMERCE, *cont'd.*****Filing and publishing schedules, 160**

- Advances, 162
- Change of schedules, 162
- Connivance of shipper with carrier, 162
- Contents of schedule, 161
- Contracts presumed to be with reference to schedule, 161
- Duty of carriers to devise methods of framing tariff, 160
- Duty to establish and publish, 150
- Duty to file schedule, 161
- Effect of variance from schedule rates, 162
- Joint schedules, 161
- Reduction, 163
- Unlawful to charge more or less than schedule rates, 162
- Foreign corporations, 65, 105**
  - Consolidation, 108
  - Corporations protected equally with individuals, 105
  - Exclusion, 105
  - Insurance, 108
  - Known place of business and authorized agent, 106
  - License, 106
  - Office license, 107
  - Power of state in general, 105
  - Right to buy and sell, 107
  - Right to contract, 107
  - Right to sue, 107
  - Sales by agents and correspondence, 107
  - Taxation, 106
  - What constitutes doing business in state, 106
- Fraudulent goods, 85
- Freights, see infra, DISCRIMINATION.*
- Gambling, 94
- Game, 69
- Game and game laws, 87
- Hauls, see infra, LONG AND SHORT HAULS.*
- Health, see infra, QUARANTINE AND SANITARY LAWS.*
- Highways, 48, 88
- Immigration, 116
- Import or export duties, 60
- Imports, see infra, EXCLUSION OF IMPORTS; STATE TAXATION.*
- Injunction, 55
- Inspection laws, 78**
  - Application to exports and imports, 80
  - Application to persons, 80
  - Coal, 81
  - Coke, 81
  - Discrimination, 79
  - Discrimination as to charges, 82
  - Hides, 81
  - Inspection charges, 81
  - Inspection in transit, 79
  - Intoxicating liquors, 81
  - Legitimate subjects of commerce cannot be excluded, 80
  - Object of inspection laws, 79
  - Paramount power of congress, 78
  - Power recognized in constitution, 78
  - Prohibitory statutes invalid, 80
  - Survey of damaged goods on vessels, 81
  - Tobacco, 81
  - Validity in general, 78
  - What are inspection laws, 79
- Insurance, 64, 87
- Interstate commerce act (see *infra*, FILING AND PUBLISHING SCHEDULES):**



**INTERSTATE COMMERCE, *cont'd.*****Interstate commerce act, *cont'd.***

*Carriers subject to act, see infra, CARRIERS*  
 SUBJECT TO INTERSTATE COMMERCE ACT.

Constitutionality, 122

Continuous carriage, 163

*Discrimination, see infra, DISCRIMINATION.*

*Enforcement of act, see infra, ENFORCEMENT OF ACT.*

*Facilities for interchange of traffic, see infra, FACILITIES FOR INTERCHANGE OF TRAFFIC.*

*Filing and publishing schedules, see infra, FILING AND PUBLISHING SCHEDULES.*

*Just and reasonable charges, see infra, JUST AND REASONABLE CHARGES.*

*Long and short hauls, see infra, LONG AND SHORT HAULS.*

Mileage, excursion, commutation tickets, 163

Nature, 122

*Organization, powers, and duties of commission, see infra, ORGANIZATION, POWERS, AND DUTIES OF COMMISSION.*

Pooling contracts, 163

Purpose, 122

*Rules of construction, see infra, CONSTRUCTION OF INTERSTATE COMMERCE ACT.*

*Undue discrimination, see infra, DISCRIMINATION.*

*Undue preference and advantage, see infra, UNDUE PREFERENCE AND ADVANTAGE.*

*Undue preference or advantage, see infra, UNDUE PREFERENCE OR ADVANTAGE.*

**Intoxicating liquors, 68, 291**

Constitutionality of statutes, 216

Constitutionality of statutes as affected by interstate commerce clause, 221

Constitutionality of Wilson act, 293

Doctrine of license cases, 291

Inspection laws, 81

Necessity of additional state legislation to render act operative, 293

Object of statute, 293

Operation and effect of Wilson act, 294

Original packages, 291

Rule in original package cases, 292

State statutes affecting interstate commerce, 87

Statutes prohibiting manufacture or keeping for sale in another state, 296

Statutes violating interstate commerce clause, 216

**What is original package, 294**

Bottle packed singly, 295

Box or cask in which several bottles placed as original package, 295

In general, 294

Opening and selling contents of bottles, 295

Size immaterial, 295

Size to be determined by importer, 295

Wilson act, 293

**Just and reasonable charges, 131**

Circumstances to be considered, 132

Classification of freights, 132

Comparison of rates, 133

Competition as affecting reasonableness, 133

Considerations affecting reasonableness of rates, 132

*Discrimination, see infra, DISCRIMINATION.*

Effect of advance in rates, 133

**INTERSTATE COMMERCE, *cont'd.*****Just and reasonable charges, *cont'd.***

Higher rates for special services, 133

In general, 131

Length of carriage, 132

Summer and winter rates, 134

What constitutes, 131

License, occupation and privilege taxes, 94

**Licenses:**

Foreign corporations, 106

Liens, 92, 104

**Live stock:**

Contagious and infectious disease, 84

Logs and logging, 93

**Long and short hauls, 153**

Burden of proof, 155

Carrier may act without prior application to commission, 159

Circumstances to be considered, 156

Commission may authorize lower charge for longer haul, 159

Competition between rival lines, 156

Dissimilar circumstances and conditions takes case out of statute, 154

Dissimilarity of circumstances and conditions, 154

Equal charge for longer and shorter hauls, 153

Fast freight lines, 153

Free cartage, 153

Group rates, 154

In general, 153

Just and reasonable charges, 134

Local and through rates, 158

Meaning of the word line, 158

Nature and sufficiency of competition, 157

Necessity of application to commission, 159

Preference, 148

Presumption, 155

Proviso, 154

Rate proportionately less for long hauls, 153

Relation of joint through rates to independent local rates, 158

Similarity of conditions a question of fact, 155

Substantial dissimilarity eliminates fourth section, 154

When carriers are competitors, 157

When circumstances and conditions of carriage are substantially different, 155

When commission should act, 159

Manufacture, 53, 65, 94

Monopolies, 52

Municipal taxation, 112

National corporation, 54

Natural gas, 69, 93

Navigable waters, 92

Navigation, 46, 50, 92

Oleomargarine 68, 87

Act of Congress, 87

Coloring in imitation of butter, 88

State may prevent fraudulent imitation of butter, 88

State statutes prohibiting importation and sale, 68

**Organization, powers and duties of commission, 124**

Administrative board, 125

Administrative, judicial and legislative powers, 125

Commission not a court, 125



**INTERSTATE COMMERCE, *cont'd.*****Organization, powers, etc., of commission, *cont'd.***

Enforcement of contracts, 127  
Establishment of general rules of conduct, 125

Establishment of rates of carriage, 126

Establishment of through routes, 127

In general, 124

Rates, 126

Regulations limited to existing facilities, 127

**Original packages, 71**

Definition, 73

Examples, 73, 74

In general, 71

Necessity of sale, 71

Original package in hands of importer protected from state interference, 72

Outside receptacle constitutes original package, 73

Right to sell in original packages, 72

Separate wrapping and labeling of small packages, 73

Taxation, 122

What constitutes breaking, 74

What constitutes original package, 73

Wilson law, 74

Passes, 141, 147

**Paupers:**

Carriers, 105

Exclusion of paupers, 86

Petroleum, 93

Pilots, 51, 92

**Police-power (see *infra*, POWER OF STATES; RAILROADS AND OTHER CARRIERS):**

Control of congress, 47

*Exclusion of imports*, see *infra*, EXCLUSION OF IMPORTS.

Telegraphs and telephones, 89

Pooling contracts, 163

**Power of congress (see *infra*, INSPECTION LAWS; POWER OF STATES), 41**

Bridge tolls, 50

Commerce wholly within the state, 46

Consent of state, 49

Constitutional limitations, 46

Corporations, 54

Counterfeiting, 53

Delegation of power, 54

Embargo, 53

Employment of state corporation, 54

Exclusiveness of power, 42

Exclusive power of congress in matters national in character, 44

Extent of power, 46

Failure of Congress to act equivalent to declaration that commerce shall be free 44

Freight rates, 48

Highways, 48

Indian tribes, 47

In general, 41

Injunction, 55

Interstate or foreign commerce is national in its character, 45

Legitimate objects of exercise, 46

Line between power of Congress and of states as each case arises, 41

Manufacture, 53

Means employed, 54

Means of communication by land and water, 47

Monopolies, 52

**INTERSTATE COMMERCE, *cont'd.*****Power of congress, *cont'd.***

National subjects requiring uniformity of regulation, 44

Navigation on the high seas, 46

Operation of state laws extended by act of congress, 45

Operation of trains, 48

Persons, 52

Pilots, 51

Police powers, 47

Power of state concurrent but subordinate, 43

Preferences in ports of one state, 54

Private contracts, 52

Punishment of crime, 52

Railroads, 48

Shipping and navigation, 50

State power not concurrent, 43

Subjects of interstate commerce, 69

Subjects of regulation, 47

Subordinate concurrent power of state, 49

Telegraph companies, 48

Trademarks, 53

Trusts, 52

Uniformity of regulation object of common clause, 42

Wharves, piers, bridges, 49

**Power of states (see *infra*, FOREIGN CORPORATIONS; POWER OF CONGRESS; RAILROADS AND OTHER CARRIERS; STATE STATUTES AFFECTING INTERSTATE COMMERCE), 55**

Conflicting state and federal regulations, 59

Effect of action by Congress, 58

Effect of nonaction by Congress, 57

Evasion of power of Congress, 57

Import or export duties, 60

Imposition of license tax by Congress, 60  
Legislation which is a mere aid to commerce, 55

Local police regulations, 55

Mere grant of commercial power not prohibition of state action, 58

Nature and source of power, 56

Regulation by Congress precludes state regulation, 58

State law suspended but not repealed, 59

*Taxation*, see *infra*, STATE TAXATION.

Tonnage duties, 60

Unnecessary regulation, 57

When invalid, 56

**Preferences, see *infra*, UNDUE PREFERENCE OR ADVANTAGE.****Production, 65*****Publishing schedules*, see *infra*, FILING AND PUBLISHING SCHEDULES.****Quarantine and sanitary laws, 82**

Effect of congressional regulation, 83

Limit of power, 83

Making importer liable for damages, 83

Power of state, 83

Quarantine charges, 83

Validity in general, 82

**Railroads:**

Construction across states and territories, 48

Freight rates, 48

Operation of trains, 48

**Railroads and other carriers, 94**

Absence of congressional regulation, 102

Burdens on transportation void, 95

*Carriers subject to interstate commerce act*, see *infra*, CARRIERS SUBJECT TO INTERSTATE COMMERCE ACT.



**INTERSTATE COMMERCE, *cont'd.*****Railroads and other carriers, *cont'd.***

- Colored passengers, 100
- Connecting carriers, 104
- Consolidation, 96
- Contracts of carriage, 97
- Delaying shipments, 103
- Delivery to consignee, 103
- Depot and terminal facilities, 104
- Discrimination, 96
- Effect of congressional regulation, 95
- Equal accommodations, 100
- Examining and licensing employees, 98
- Exemption from liability of common carrier, 97
- Failure of Congress to make regulations as to rates, 102
- Free carriage of shippers, 103
- Garnishment, 104
- Heating passenger cars, 100
- In general, 94
- Interstate commerce act, 105
- Interstate commerce act affected as to rates, 102
- Leases, 104
- Liability for injuries happening within state, 104
- Lighting road in city limits, 99
- Limiting liability of carrier to its own lines, 97
- Limiting time for bringing action, 98
- Mileage books, 100
- Paupers, 105
- Police regulations, 95
- Posting schedule of rates, 102
- Power in absence of legislation by Congress, 95
- Rates of carriage, 101
- Redemption of unused tickets, 101
- Requiring notice as condition precedent to right to sue, 98
- Requiring trains to stop at stations, 98
- Running of trains, 98
- Separate accommodations for colored passengers, 100
- Sparks, 104
- Speed of trains, 99
- State regulation of interstate commerce, 94
- State regulation of rates for interstate transportation void, 101
- Stations, 104
- Statutes entering into contract, 98
- Stop-over privileges, 100
- Sunday laws, 97
- Switching, 104
- Taxation, see infra, STATE TAXATION.*
- Tickets, 100
- Transportation of live stock, 103
- Rates** (see *infra, DISCRIMINATION; FILING AND PUBLISHING SCHEDULES; JUST AND REASONABLE CHARGES; UNDUE PREFERENCE OR ADVANTAGE*):
  - Interstate commerce commission, 126
  - Rates of carriage, 101
- Regulation of interstate commerce, 41**
  - Power of Congress, see infra, POWER OF CONGRESS.*
  - Power of states, see infra, POWER OF STATES.*
  - What constitutes regulation, 60
- Sales, 65**
  - Action for price of goods sold, 66
  - Agents, 66

**INTERSTATE COMMERCE, *cont'd.*****Sales, *cont'd.***

- Contracts for sale and transportation to another state, 65
- In general, 65
- Right to sell any article imported, 66
- State Statutes affecting interstate commerce, 85**
  - Bankrupt and fire sales, 86
  - Delivery of goods, 85
  - Fraudulent goods, 85
  - In general, 85
  - Requiring label on goods, 86
  - Sale of perishable food at railway depots, 86
  - Taxation, 85
- Satisfaction of mortgages, 94
- Schedules, see infra, FILING AND PUBLISHING SCHEDULES.*
- Seeds, 92
- Service of process on traveler, 93
- Shipping, 50
- Ships and shipping, 92
- Short hauls, see infra, LONG AND SHORT HAULS.*
- Sleeping cars, 64
- States** (see *infra, POWER OF STATES*):
  - Commerce wholly within the state, 46
  - Preferences to ports of one state, 54
  - State statutes affecting interstate commerce** (see *infra, FOREIGN CORPORATIONS; RAILROADS AND OTHER CARRIERS; STATE TAXATION*), 74
  - Bridges, 88
  - Chinese immigration, 94
  - Cigarettes, 87
  - Coal oil, 93
  - Construction of state statutes, 75**
    - Construction to sustain statute, 75
    - Following construction of state court, 76
    - General rule, 75
    - Partial invalidity, 76
    - Statutes held applicable only to internal commerce, 76
  - Contracts, 86
  - County printing, 93
  - Dams, 88
  - Dead bodies, 94
  - Death by wrongful act, 94
  - Discrimination against products and citizens of other states, 77**
    - Discrimination after incorporation with mass of property of state, 77
    - Equality in markets of state, 77
    - Validity of statute, 77
    - View that only discriminating statutes are void, 78
  - Disinterment of dead bodies, 94
  - Docks, 88
  - Elevators, 88
  - Exclusion of imports, see infra, EXCLUSION OF IMPORTS.*
  - Exclusion of paupers, criminals, and the like, 86
  - Ferries, 92
  - Fish laws, 87
  - Fraudulent goods, 85
  - Gambling, 94
  - Game laws, 87
  - General rule, 75
  - Highways, 88
  - In general, 74
  - Inspection laws, see infra, INSPECTION LAWS.*



**INTERSTATE COMMERCE, *cont'd.*****States, *cont'd.***

- Insurance, 87
- Intoxicating liquors, 87
- License, occupation and privilege taxes, 94
- Liens, 92
- Logs and logging, 93
- Manufacture, 94
- Natural gas, 93
- Navigable waters, 92
- Navigation, 92
- Oleomargarine, 87
- Petroleum, 93
- Piers, 88
- Pilots, 92
- Presumption that it was enacted in good faith, 75
- Preventing exports, 85
- Purpose of law immaterial, 75
- Quarantine and sanitary laws, see infra,*
- QUARANTINE AND SANITARY LAWS.
- Railroads and other carriers, see infra,*
- RAILROADS AND OTHER CARRIERS.
- Sale of goods, 85
- Satisfaction of mortgages, 94
- Scope of section, 74
- Seeds, 92
- Service of process on traveler, 93
- Ships and shipping, 92
- Statutes imposing direct burdens on commerce, 75
- Stock yards, 92
- Suppression of gambling, 94
- Telegraphs and telephones, see infra,* TELE-  
GRAPHS AND TELEPHONES.
- Warehouses, 88
- Wharves, 88
- State taxation, 108**
  - Bridges, 113
  - Building and loan association, 120
  - Business transacted in state, 110
  - Carriers, 116**
    - Alien passengers, 117
    - Contract in charter, 117
    - Franchise and property tax, 119
    - Freight, 116
    - Gross receipts, 118
    - Income tax, 119
    - Office tax, 120
    - Passengers, 116
    - Receipts from internal transportation, 119
    - Receipts from interstate and foreign transportation, 118
    - Receipts mingled with mass of property of state, 119
    - Rolling stock, 117
    - Sleeping cars, 117
    - Taxation by unit rule, 120
  - Compensation for facilities furnished, 109
  - Dealing in futures, 122
  - Discrimination, 111, 114
  - Exports, 114
  - Foreign corporations, 106
  - Franchise tax, 119
  - Franchise tax on corporations, 120
  - Immigrants, 116
  - Imports, 113
  - Incorporation charges, 121
  - Inheritance tax, 122
  - Instrumentalities of commerce, 111
  - Insurance premiums, 122
  - Live stock grazed in state, 122

**INTERSTATE COMMERCE, *cont'd.*****State taxation, *cont'd.***

- Original package, 122
- Property tax, 111
  - Bonds, 115
  - Bridges, 113
  - Choses in action, 115
  - Credits, 115
  - Discrimination, 114
  - Exports, 114
  - Goods in transit, 115
  - Imports and interstate and foreign, 113
  - Instrumentalities of commerce, 111
  - Municipal taxation at home port, 112
  - Tax on property because used in interstate or foreign commerce, 112
  - Tonnage, 112
  - Vessels, 112
- Sales within state, 122
- Separation of interstate from intrastate commerce, 110
- Stamp tax, 122
- Succession tax, 122
- Tax on incidents of commerce, 110
- Tonnage, 112
- Travelers, 116
- Validity in general, 108
- Vessels, 112
- What constitutes tax on commerce, 109
- Stations, 104
- Statutes, see infra,* STATES.
- Stock exchanges, 65
- Stock yards, 65, 92
- Stock-yards companies, 131
- Subjects of interstate commerce, 67**
  - Articles inherently unfit for commerce, 69
  - Cigarettes, 68
  - Game, 69
  - Intoxicating liquors, 68
  - Lawful subjects of barter and sale, 67
  - Natural gas, 69
  - Oleomargarine, 68
  - Particular articles, 68
  - Powers of Congress, 69
  - Power to determine, 69
  - When protection of commerce clause attaches, 70
- Succession tax, 122
- Sunday:**
  - Railroads and other carriers, 97
- Suppression of gambling, 94
- Switching, 104
- Switching companies, 130
- Taxation (see *infra,* STATE TAXATION):**
  - Telegraphs and telephones, 90
- Telegraphs and telephones, 48, 89**
  - Charge for poles in street, 90
  - Contracts limiting or qualifying liability, 91
  - Delivery by messenger, 91
  - Delivery in other states, 91
  - Delivery in state, 91
  - Effect of congressional legislation, 91
  - Granting one company a monopoly, 91
  - In general, 89
  - Poles and wires, 89
  - Police powers, 89
  - Regulation of buildings, 89
  - Regulation of rates, 91
  - State statutes affecting interstate commerce, 89
  - Taxation, 90
  - Transmission and delivery of messages, 90



**INTERSTATE COMMERCE, *cont'd.***

- Tickets (see *infra*, DISCRIMINATION), 109
- Mileage, excursion, commutation tickets, 163
- Party-rate tickets, 147
- Tonnage, 112
- Tonnage duties, 60
- Trademarks, 53
- Transfer companies, 130
- Trusts, 52
- Undue preference or advantage (see *infra*, DISCRIMINATION), 142
  - Burden of proof, 144
  - Carrier may prefer itself, 146
  - Choice of cars, 148
  - Circumstances to be considered, 144
  - Competition between rival lines, 146
  - Conditions for benefit of carrier, 146
  - Definition of preference, 143
  - Discrimination in rates, 147
  - Discrimination under third section defined, 143
  - Free cartage, 147
  - Furnishing cars to shippers, 148
  - Group rates, 145
  - Guaranty of arrival on time, 147
  - In general, 142
  - Interruption of transit, 149
  - Joint through traffic, 145
  - Local and through rates, 147
  - Long and short hauls, 148
  - Municipal subscription to road does not justify discrimination, 145
  - Overcoming disadvantage, 146
  - Particular instances, 146
  - Party-rate tickets, 147
  - Passes, 147
  - Preference or advantage not necessarily unlawful, 143
  - Question of fact, 144
  - Relative fairness and impartiality required, 143
  - Requiring prepayment of charges, 149
  - Use of shippers' cars, 148
  - What constitutes, 143
- United States*, see *infra*, POWER OF CONGRESS.
- Unjust discrimination*, see *infra*, DISCRIMINATION.
- Wharves, 49
- What constitutes interstate commerce, 61
  - Carriage of freight and passengers, 63
  - Commerce wholly confined to one state, 63
  - Connecting carriers, 64
  - Continuous voyage, 62
  - Crossing state line not necessary, 64
  - Definition of commerce, 61
  - Definition of interstate commerce, 61
  - Ferries, 64
  - Foreign corporations, 65
  - Grain elevators, 65
  - Insurance, 64
  - Mining, 65
  - Original packages, 71
    - Definition, 73
    - Examples, 73, 74
    - In general, 71
    - Necessity of sale, 71
    - Original package in hands of importer protected from state interference, 72
    - Outside receptacle constitutes original package, 73
    - Right to sell in original package, 72

**INTERSTATE COMMERCE, *cont'd.***

- What constitutes interstate commerce, *cont'd.*
- Original packages, *cont'd.*
  - Separate wrapping and labeling of small packages, 73
  - What constitutes breaking, 74
  - What constitutes original package, 73
  - Wilson law, 74
- Packing houses, 65
- Particular transactions constituting interstate commerce, 63
- Preparation for shipment, 70
- Production and manufacture, 65
- Sale of goods, 65
- Sale of goods by agents, 66
- Sleeping cars, 64
- Stock exchanges, 65
- Stock yards, 65
- Subjects of interstate commerce*, see *infra*, SUBJECTS OF INTERSTATE COMMERCE.
- Telegraphs and telephones, 64
- Temporary interruption of voyage, 63
- Transportation, 62
- Transportation across state line, 62
- When protection of commerce clause ceases, 70
  - Incorporation with mass of property of state, 70
  - Original packages, 71
  - When incorporation takes place, 71
- When protection ceases, see *infra*, WHAT CONSTITUTES INTERSTATE COMMERCE.
- When protection of commerce clause commences, see *infra*, WHAT CONSTITUTES INTERSTATE COMMERCE.
- Wilson law, see *infra*, ORIGINAL PACKAGES.

**INTERVAL, 179****INTERVALE, 179****INTERVENE, 179****INTERVENING, 179****INTERVENING CLAUSE, 179****INTERVENING DAMAGES, 179****INTERVENTION, 180**

Definition, 180

Judgment:

Effect of judgment on intervener's rights, 186

Jury and jury trial, 185

Rights, duties and liabilities of intervener, 185

Limits of intervener's rights, 185

Right to have claim adjudicated, 185

Right to trial by jury, 185

Right to intervene, 180

*Cestuis que trust*, 184

Exercise of right optional, 185

Existence of another remedy does not affect the right, 185

In equity, 183

In general, 180

Interest in the matter in litigation, 181

Louisiana statute, 181

New York statute, 182

Persons interested in fund under control of court, 184

Right may be waived, 185

Statutes confining intervention to actions for the recovery of property, 182

Unauthorized interference, 183

Under statutes, 180

**INTER VIVOS, 186**



INTESTATE, 186

INTESTATE LAWS, 186

INTIMATE, 186

INTIMIDATION, 187

INTIMIDATION OF VOTERS, 187

INTO, 187

INTOXICATE, 187

INTOXICATING LIQUORS, 189

Abatement of nuisance, 323

Evidence in proceedings for abatement, 326

In general, 323

Who may maintain proceedings for abatement, 324

About, 366

Actions:

Civil actions based on refusal to issue or on revocation of license, 261

Destruction of liquors by private persons, 305

For wrongful taking of intoxicating liquors, 303

Remedies of owner of liquors taken under search and seizure acts, 304

Special damages to business by conversion, 303

Statutes providing that no action shall be brought on claims or demands contracted or given for intoxicating liquors, 303

Where liquors are kept for unlawful purpose, 303

Where liquors are lawfully acquired or kept, 303

*Illegal Sales*, see *infra*, ILLEGAL SALES.

Recovery back of fees on refusal or revocation of license, 272

Refusal to approve bond, 276

Refusal to sell liquors, 315

*Right to recover back money paid for liquors illegally sold*, see *infra*, ILLEGAL SALES.*Right to recover price of liquors illegally sold*, see *infra*, ILLEGAL SALES.

Adjacent, 366

Adjournment:

Hearing of application for license and remonstrance, 252

Adulteration, 296

Burden of proof, 297

Druggists, 296

In general, 296

Laws against adulteration of intoxicating liquors, 296

Affidavits:

Application for license, 244

Agency (see *infra*, TOWN AGENT SYSTEM OF LICENSE AND SALES):

Agency as a defense to recovery back of money paid for liquors illegally sold, 311

Burden of proof, 388

Civil liability, 384

Criminal liability, 385

Criminal liability for authorized violations of law, 385

Criminal liability for unauthorized violations of law, 386

Criminal liability of purchaser, 391

Evidence, 388

Husband and wife, 394

INTOXICATING LIQUORS, *cont'd.*Agency, *cont'd.*

Licenses, 231

Absence of licensee on military service, 232

Partner not on same footing as agent, 231

Removal of licensee, 232

Right of licensee to sell by agent, 231

Sales must be within scope of license, 231

Whether license protects the agent, 231

Minors, 337

Personal liability of servant or agent for violation of liquor laws, 389

Keeping with intent to sell unlawfully, 391

Maintaining liquor nuisances, 391

Selling liquors of another on one's own license, 389

Selling without license for one who has no license, 389

To what extent protected by employer's license, 389

Violation of local option laws, 390

Place of sale where goods are delivered by seller in person or his agent, 301

Purchasing as agent for minor, 338

Several liability of employer and servant or agent, 391

Violations of law against instructions, 386

What constitutes agent, 391

Aiders and abettors:

Infants, 338

Alaska, 221, 382

Alcohol, 198

Ale, 202

Malt liquor, 202

Spirituuous liquor, 202

Strong liquor, 202

Whether intoxicating, 202

Amendments:

Recommendation of petition or application for license, 248

Remonstrance or counterpetitions, 251

Appeals:

Licenses, see *infra*, LICENSES.Application for license, see *infra*, LICENSES.Approval of bond, see *infra*, BONDS.

Assignments:

Assignment or transfer of license, 232

Assigned license no protection to assignee in selling, 232

Connecticut, 234

Consent of licensee to transfer unnecessary, 233

License a personal trust, 232

Licensee entitled to payment for unexpired portion of term, 233

License not assignable without statutory authority therefor, 232

New York, 234

Pennsylvania, 233, 235

Right of transfer to other premises under Pennsylvania statute, 235

Transfer allowed in proper case, 233

Transfer of license to other place or building, 235

Transfer of license to personal representative, 233

Under statutes authorizing assignment, 233

Attachments, 315



**INTOXICATING LIQUORS, *cont'd.*****Attorneys' fees:**

Constitutionality of statutes authorizing, 222

**Barter:**

Whether a sale, 298

**Bawdy houses:**

Constitutionality of statutes prohibiting sales in bawdy houses, 218

**Beer, 200**

Ale, 202

Burden on defendant to show that beer sold is not intoxicating, 201

Judicial knowledge, 200, 201

Lager beer, 200

Strong beer, 200

Use of the word "beer" by witnesses, 201

View that the word "beer" does not import intoxicating liquor, 201

Whether intoxicating question for jury, 200

Whether vinous or spirituous liquors, 200

**Bills of exchange and promissory notes:**

Status of notes given for price of liquors illegally sold, 307

Evidence in actions on notes, 309

Evidence must show illegality, 309

Holder should purchase after maturity, 309

Liquors sold without license, 308

Liquors sole consideration for note, 307

Note acquired after or before maturity, 308

Repeal of statutes, 308

Rights of innocent purchaser, 308

Rights of payee, 307

Where part of consideration is intoxicating liquors, 308

Whether illegal consideration taints whole note, 308

*Board*, see *infra*, LICENSES.

**Bonds:**

Constitutionality of statutes providing for forfeiture of licensee's bond, 219

**License bonds, 273**

Action for refusal to approve bond, 276

Action on bond, 278

Alterations, 275

Approval of bond in general, 276

Approval of licensing authorities, 275

Arbitrary exercise of discretion, 276

Clerical errors, 275

Discretion as to approval of bond, 276

Effect of various omissions, irregularities and errors, 275

Estoppel to deny validity of license, 278

Extent of liability, 279

Failure of board to approve bond, 275

Form and requirements of bond, 274

Imposing additional conditions, 274

Jurisdiction of action on bond, 278

Necessity and object of bond, 273

Original bond refused, 276

Provision for payment of damages, 275

Retrial of original suit against principal, 279

Second bond granted, 276

To whom bond should run, 274

Validity of contract to pay surety for acting as such, 278

What constitutes breach, 277

What operates as discharge of sureties 277

**INTOXICATING LIQUORS, *cont'd.*****Bonds, *cont'd.*****License bonds, *cont'd.***

Whether conviction is condition precedent to suit on bond, 278

Who may be sureties, 276

Who may maintain action on bond, 278

Ordinances requiring bond, 289

Sales without giving bond, 366

Statutes requiring applicant to give bond, 211

Town agent system of license and sales, 279

Brandy, 198

*Building*, see *infra*, PLACE.

Building restrictions and restrictive agreements, 316

*Burden of proof*, see *infra*, EVIDENCE.

**Carriers of Goods:**

Illegal transportation, 380

Place of sale, 300

Delivery to carrier on order of purchaser as affecting criminal liability, 300

Delivery to carrier on order of purchaser as affecting validity of contract, 300

Where goods are shipped C. O. D., 300

**Certiorari:**

Granting or refusal of license, 258

In general, 258

Persons not parties to record, 259

Question of fact not reviewable on certiorari, 258

Questions of law reviewable, 259

Who may apply for writ, 259

Revocation of license, 269

Chattel mortgages, 314

**Children** (see *infra*, INFANTS):

Statutes prohibiting employment of women and children in saloons, constitutionality, 213

*Churches*, see *infra*, SALES WITHIN PROHIBITED DISTANCE OF CHURCHES, SCHOOLS, ETC.

**Cider, 203**

Construction of statutes containing the word "cider," 203

When considered a spirituous or intoxicating liquor, 203

Cider not a vinous liquor, 199

**Citizenship:**

Eligibility of applicant for license, 239

Recommendation of petition or application for license, 247

**Civil damage acts:**

Liability of owner or lessor for violations of law on leased premises, 395

Liability of leased premises, 395

Liability of premises for fines assessed against occupant, 396

Personal liability of owner or lessor, 395

**C. O. D.:**

Place of sale where goods are shipped C. O. D., 300

Collection of fees, 271

*Commerce*, see INTERSTATE COMMERCE, 290

**Common seller, 376**

Competency of evidence, 377

Competency of witnesses, 378

Effect of acquittal or conviction of other offenses involving same sale, 379

Jurisdiction, 377

License as innkeeper or victualler, 377

Number of sales, 376



**INTOXICATING LIQUORS, *cont'd.***

- Common seller, *cont'd.*
  - Second offense, 379
  - Sufficiency of evidence, 378
  - Travelling seller, 377
  - What constitutes offense, 376
- Complaint:
  - Revocation of license, 267
- Conditional sale:
  - Place of sale, 302
- Conditions:
  - Bond imposing additional conditions, 274
- Conditions in deeds prohibiting sales on premises conveyed, 316
- Conflict of laws:
  - Extraterritorial effect of ordinances, 289
  - Status of contracts of sale made in another state, 312
    - Contracts valid in state where made, 312
    - Effect of knowledge of purpose to resell illegally and assistance therein, 312
    - In general, 312
    - Participation in unlawful act of purchaser, 313
    - Purchase to use illegally in another state, 313
    - Reasonable cause to believe liquors would be resold illegally, 312
    - Repeal of statutes, 314
    - Sale with view to illegal resale, 313
    - Seller's knowledge of illegal purpose, 312
    - Special statutory provisions, 313
- Connecting carriers, 104
- Consent:
  - Of parent or guardian, see infra, INFANTS.*
  - Ordinances requiring consent of adjacent property owners, 289
- Consent of persons living in vicinity:
  - Constitutionality of statute, 211
- Consent of residents, property owners, or freeholders living in vicinity to license, 249
- Constables, 367
- Constitutional law (*see infra, JEOPARDY*), 206
  - Civil damage acts, 221
  - Construction of statutes unconstitutional in part, 217
  - Immunities and privileges of citizens, 216
  - Interstate commerce, 216, 221, 291, 293
  - Keeping liquors, 218
  - License fees must be uniform, 223
  - License fees not taxes, 223
- License laws, 208
  - Citizens, 210
  - Druggists, 210
  - Exercise of police power, 209
  - In general, 208
  - Male persons, 210
  - Persons of good moral character, 210
  - Physicians, 210
  - Regulating conditions upon which licenses granted, 209
  - Residents, 210
  - Screen laws, 213
  - Statutes authorizing revocation of license, 215
  - Statutes prohibiting employment of women and children in saloons, 213
  - Statutes prohibiting obstructions during business hours, 214
  - Statutes prohibiting sales and requiring closing of saloons at certain times, 212

**INTOXICATING LIQUORS, *cont'd.***

- Constitutional law, *cont'd.*
  - License laws, *cont'd.*
    - Statutes prohibiting sales in certain localities, 214
    - Statutes prohibiting sales or gifts to certain classes of persons, 212
    - Statutes requiring applicant to give bond, 211
    - Statutes requiring consent of persons living in vicinity of proposed saloon, 211
    - Statutes restricting certain classes of persons, 210
  - Local option laws, 221
  - Municipal control of liquor traffic, 283
    - Constitutional limitations on delegative power of legislature, 283
    - Constitutional limitations on power to pass ordinances, 283
    - Ordinances inconsistent with constitution, 283
  - Prohibition laws, 221
    - Statutes authorizing attorney's fees, 222
    - Statutes authorizing license fees, 222
    - Statutes authorizing taxes, 222
    - Statutes declaring places for manufacture and sale nuisances, 220
    - Statutes declaring what liquors shall be deemed intoxicating, 216
    - Statutes delegating legislative power, 224
    - Statutes discriminating against liquors of other states and countries, 216
    - Statutes forbidding gifts of liquors, 217
    - Statutes forbidding recovery for liquors illegally sold and authorizing recovery back of money paid therefor, 220
    - Statutes imposing fine and imprisonment for violation of liquor laws, 218
    - Statutes making it an offense to keep liquors with intent to sell unlawfully, 218
    - Statutes making it an offense to keep place for unlawful sale, 218
    - Statutes making judgments for fines and taxes liens on leased property, 219
    - Statutes prescribing rules of evidence, 225
    - Statutes prescribing rules of pleading, 226
- Statutes prohibiting manufacture and sale of intoxicating liquors, 206
  - Appropriation of private property for public benefit, 207
  - Ex post facto* laws, 207
  - Impairment of obligation of contracts, 208
  - Power to prohibit manufacture and sale of intoxicating liquors, 206
  - Specific objections, 207
  - Taking of property without due process of law, 207
  - Whether an abridgment of immunities, privileges, etc., 207
- Statutes prohibiting manufacture or keeping for sale in another state, 296
- Statutes prohibiting sales in bawdy houses, 218
- Statutes providing for forfeiture of licensee's bond, 219
- Statutes providing for forfeiture of liquors illegally kept, 219
- Statutes providing for treatment and cure of inebriates, 221
- Statutes providing that certain acts shall make place of sale a nuisance, 319



**INTOXICATING LIQUORS, *cont'd.*****Constitutional law, *cont'd.***

Statutes regulating liquor traffic in Alaska, 221

Statutes regulating sale of intoxicating liquors, 208

Taxation, 216

Taxation of liquor traffic not license to sell, 224

*Title and subject-matter of statutes*, see *infra*, TITLE AND SUBJECT-MATTER OF STATUTES.

Town agent system of license and sales, 221

Who may question validity of statutes, 230

Wilson act, 293

**Contempt:**

Proceedings for contempt in violating injunctions, 324

**Contracts (see *infra*, ILLEGAL SALES; PROPERTY):**

Actions for refusal to sell liquors, 315

Conditions in deeds prohibiting sales on premises conveyed, 316

Contracts in general as affected by liquor laws, 317

Contracts of services, 317

Covenants and agreements respecting licensed houses, 317

Divisible contracts, 311

Entire contracts, 311

Executory contracts, 314

Insurance of liquors, 315

*Leases of premises on which intoxicating liquors are sold*, see *infra*, LEASES.

Liability of liquors to attachment and execution, 315

Mortgages of liquors, 314

Mortgage to secure price of liquors, 309

Status of award for price of liquors, 314

*Status of contracts of sale made in another state*, see *infra*, CONFLICT OF LAWS.

Status of entire and divisible contracts of sale of liquors, 311

Status of executory contracts of sale of liquors, 314

Status of judgment for price of liquors, 314

*Status of notes given for price of liquors illegally sold*, see *infra*, BILLS OF EXCHANGE AND PROMISSORY NOTES:

**Corporations:**

Licenses, 240

*Counterclaim*, see *infra*, SET-OFF, RECOUPMENT AND COUNTERCLAIM.

**County license:**

Municipal and state licenses, 238

*Courts*, see *infra*, LICENSES.

Covenants, 317

*Clubs*, see *infra*, SOCIETIES AND CLUBS.

**Criminal law (see *infra*, OFFENSES AGAINST LIQUOR LAWS AND PROSECUTIONS THEREUNDER):**

Liability of purchaser, 391

Nuisances, 320

Effect of former conviction or acquittal, 321

Parties responsible for maintaining nuisances, 320

Date of license, 262

**Deeds:**

Conditions in deeds prohibiting sales on premises conveyed, 316

**INTOXICATING LIQUORS: *cont'd.*****Definitions, 197**

Alcohol, 198

Ale, 202

Beer, 200

Brandy, 198

Cider, 203

Constitutionality of statutes declaring what liquors shall be deemed intoxicating, 216

Decisions under certain statutes, 206

Evidence, 204

Gin, 199

Intoxicating and spirituous distinguished, 197

Intoxicating liquors, 197

Liquor or liquors, 197

Liquors used for preserving fruits and in culinary preparations, 203

Medicinal and toilet preparations containing alcohol, 204

Porter, 202

Questions of law and fact, 204

Rum, 199

Spirituous liquors, 197

Test to determine whether preparation within prohibition of statute, 205

What liquors and compounds thereof are within prohibitions of statutes, 198

Whiskey, 198

Wine, 199

**Delegation of power:**

Constitutional limitations, 283

**Delegation of legislative power, 224**

Legislature, 281

Municipal corporations, 281, 290

Municipality requiring and granting licenses, 283

Power to license, 242

*Delivery*, see *infra*, PLACE.

*Discretion in granting and refusing licenses*, see *infra*, LICENSES.

**Disorderly houses:**

Constitutionality of statutes forbidding sale in bawdy houses, 218

Revocation of license, 264, 265

**Distances:**

Measurement of distances, 250

**Druggists, 355**

Adulteration, 296

Drug clerk, 358

Gifts, 357

Illegal sales in general, 355

Laws against adulteration of intoxicating liquors, 296

Legality of sales as affected by element of intent, 356

Necessity for license or permit and strict compliance therewith, 355

Necessity for physician's prescription, 355

Requisites and sufficiency of prescription, 356

Sale of what liquors prohibited, 358

Sales by persons who are both physicians and druggists, 359

Sales for medicinal purposes, 359

Sales to minors, 357

Statutes restricting right to sell to druggists, 210

Sundays, 357

*Drunkards*, see HABITUAL DRUNKARDS.

*Drunkenness*, see *infra*, HABITUAL DRUNKARDS.



**INTOXICATING LIQUORS, *cont'd.***

Drunkenness, permitting drunkenness, 371

Due process of law :

Statutes declaring nuisance, 320

Statutes prohibiting manufacture and sale of intoxicating liquors, 207

Election day :

Adjoining or disconnected rooms, 350

Keeping open on election day, 348

Ordinances prohibiting sales on Sundays and election days, 287

Sales or gifts on election day, 347

Same room used for drinking and for other purposes, 350

What constitutes keeping open on prohibited days, 349

What rooms are within prohibition, 350

Enjoining or prohibiting grant of license, 260

**Evidence** (see *infra*, COMMON SELLER; KEEPING INTOXICATING LIQUORS FOR UNLAWFUL SALE):

Burden on defendant to show illegality of sale, 306

Constitutionality of statutes prescribing rules of evidence, 225

Defendant must show illegality of sale in action on notes, 309

Hearing of application for license and remonstrance, 252

Husband and wife, 393

Illegal transportation, 381

Infants, 338

Appearance of minor, 339

Burden of proof, 338

Consent of parent, 340

Minority of purchaser, 340

Necessity of showing that defendant was a liquor dealer, 341

Other evidence to show guilty knowledge or want of it, 339

Proof of sales 340

Question for jury, 339

Seller's ignorance or knowledge of purchaser's minority, 338

Maintaining place, building, tenement, etc., for unlawful keeping or sale of intoxicating liquors, 369

Master and servant, 388

Medicinal and toilet preparations containing alcohol, 204

Sunday, 352

What are intoxicating liquors, 204

**Evidence in criminal prosecutions for maintaining nuisances and in proceedings for injunction and abatement, 326**

Competency, 326

In general, 326

Sufficiency, 327

**Exchange :**

Whether a sale, 298

Executions, 315

**Executors and administrators .**

License does not pass to personal representatives, 232

**Ex post facto laws :**

Statutes prohibiting manufacture and sale of intoxicating liquors, 207

*Fees*, see *infra*, LICENSES.

**Felony :**

Conviction of felony as bar to license, 240

Filing application or petition for license, 245

**Findings :**

Revocation of license, 269

**INTOXICATING LIQUORS, *cont'd.***

**Fines :**

Constitutionality of statutes imposing fine and imprisonment for violation of liquor laws, 218

Fire insurance, 315

*Foreign countries*, see *infra*, COMMERCE.

**Forfeiture :**

Constitutionality of statutes providing for forfeiture of licensee's bond, 219

Constitutionality of statutes providing for forfeiture of liquors illegally kept, 219

*Former acquittal or conviction*, see *infra*, JEOPARDY.

**Freeholders :**

Consent of residents, property owners, or freeholders living in vicinity to license, 249

**Gifts, 367**

Constitutionality of statute forbidding gifts of liquors, 217

Druggists 357

Whether a sale, 298

*Guardians*, see *infra*, INFANTS.

**Habitual drunkards, 341**

Evidence, 342, 343

Knowledge or ignorance, 341

Knowledge or ignorance of purchaser's habits as affecting liability of seller, 342

Notice to seller of purchaser's intemperate habits, 343

Ordinances prohibiting sales to drunkards, 289

Sales to, 341

Sales to habitual drunkards, 342

Sales to intoxicated persons, 341

Treating intoxicated persons, 341

Who are drunkards, persons of intemperate habits, etc., 343

**Hearing :**

Appeal from granting or refusal of license, 258

Revocation of license, 269

*Hearing of application for license and remonstrance*, see *infra*, LICENSES.

**Holidays** (see *infra*, ELECTION DAY; SUNDAYS):

Adjoining or disconnected rooms, 350

Same room used for drinking and for other purposes, 350

Selling or keeping open on legal holiday, 349

What constitutes keeping open on prohibited days, 349

What rooms are within prohibition, 350

**Hours :**

Selling or keeping open for sale during prohibited hours, 352

Houses of ill fame, 364

**Husband and wife, 392**

Evidence, 393

Joint and several liability of husband and wife, 394

Liability of husband acting as agent for wife, 394

Liability of husband for acts of wife, 393

**Liability of wife for her own acts, 392**

Acts done in husband's presence, 392

Wife doing business as sole trader, 393

Wife living apart from her husband, 393

*Ignorance*, see *infra*, INFANTS.

*Illegal contracts*, see *infra*, CONTRACTS.

*Illegality*, see *infra*, PROPERTY.



**INTOXICATING LIQUORS, *cont'd.*****Illegal sales (see *infra*, NUISANCES):**

Actions for refusal to sell liquors, 315  
 Conditions in deeds prohibiting sales on premises conveyed, 316

Contracts in general as affected by liquor laws, 317

Contracts of services, 317

Covenants and agreements respecting licensed houses, 317

Executory contracts, 314

Insurance of liquors, 315

*Leases of premises on which intoxicating liquors are sold, see infra, LEASES.*

Liability of liquors to attachment and execution, 315

Mortgages of liquors, 314

Mortgage to secure price of liquors, 309

Right to recover price of liquors illegally sold, 305, 309

Agency as defense, 311

Amendment or repeal of statutes as affecting recovery, 311

Assignability and survivorship of claim, 311

Contracts in violation of statute void, 305

Evidence, 306

Exchange of property for liquors, 310

Limit of recovery, 310

Money paid not recoverable at common law, 310

Nature of action, 310

No recovery when indictment would lie, 306

Recovery back of moneys paid for liquors illegally sold under statute, 310

Recovery by direct action, 309

Recovery by way of set-off or counter claim, 311

Repeal of statute declaring contracts of sale invalid, 306

Sales by agent, 306

Sales not authorized by license, 305

Sales without license, 305

Statement and application of rule, 305

Status of award for price of liquors, 314

*Status of contracts of sale made in another state, see infra, CONFLICT OF LAWS.*

Status of entire and divisible contracts of sale of liquors, 311

Status of executory contracts of sale of liquors, 314

Status of judgment for price of liquors, 314

*Status of note given for price of liquors illegally sold, see infra, BILLS OF EXCHANGE AND PROMISSORY NOTES.*

**Impairment of obligation of contracts:**

Statutes prohibiting manufacture and sale of intoxicating liquors, 208

**Importation of intoxicating liquors from foreign countries (see *infra*, COMMERCE), 290**

Effect of Wilson law on importations from foreign countries, 291

Knowledge of intent to resell unlawfully, 291

Right of importer to sell in original packages, 290

Sales in original packages only permissible, 291

Who may sell in original packages, 290

**INTOXICATING LIQUORS, *cont'd.*****Imprisonment:**

Constitutionality of statutes imposing fine and imprisonment for violation of liquor laws, 218

**Indians:**

Sales to Indians and introducing intoxicating liquors into Indian country, 344

Constitutionality of statutes, 345

In general, 344

**Inebriates:**

Constitutionality of statutes providing for treatment and cure of inebriates, 221

**Infants, 333**

Aiding and abetting in sale, 338

Allowing minor to enter and remain on premises, 341

Consent in writing, 334

Consent of parent:

Evidence, 340

Consent of parent or guardian, 334

Nature of order required to protect seller, 334

When consent authorized by statute, 334

When consent not authorized by statute, 335

Writing, 334

Conviction as affecting liability for other offenses, 338

Each sale separate offense, 334

**Evidence, 338**

Appearance of minor, 339

Burden of proof, 338

Consent of parent, 340

Minority of purchaser, 340

Necessity of showing that defendant was a liquor dealer, 341

Other evidence to show guilty knowledge or want of it, 339

Proof of sales, 340

Question for jury, 339

Seller's ignorance or knowledge of purchaser's minority, 338

General scope of prohibitory statutes, 333

Knowledge of intoxicating properties, 334

Knowledge or ignorance of minority as affecting responsibility, 335

Appearance by minor, 339

Burden of proof, 338

Diligence required in ascertaining age of minor, 336

Evidence, 338

Of parents, 336

Purchase for minor by adult, 336

Question for jury, 339

Statutes containing word knowingly, 336

Statutes omitting knowingly, 336

View that ignorance of minority is immaterial, 335

View that knowledge of minority is element of offense, 335

What constitutes due diligence, 336

Minor carrying on business for himself, 333

Ownership of the liquors, 334

Persons prohibited from making sales, 334

Premises, 341

Purchase for minor by adult, 336

Liability of purchaser, 337

Liability of seller, 336

Purchasing as agent for minor, 337

Treating minor, 336



**INTOXICATING LIQUORS, *cont'd.*****Infants, *cont'd.***

- Purchase for Others by Minor, 337
  - Minor purchasing for another minor, 338
  - Purchase for disclosed principal, 337
  - Purchase for undisclosed principal, 337
  - Sale to minor treating adult, 338
  - Revocation of license where sales to minors, 265
- Selling, giving, or furnishing to minors, 333
- Treating, 336, 338
- What minors within purview of statute, 333
- Written consent, 334

**Informers :**

- Sales to informers, 346

**Injunctions, 321**

- Against whom injunction is operative, 322
- Enjoining or prohibiting grant of license, 260
- Evidence in proceedings for injunction, 326
- Extent of closing required, 322
- In general, 321
- Mere selling, 322
- Permanent and temporary injunction 322
- Proceedings in contempt in violating injunction, 324
- Right of private person to enjoin, 325
- When bar to further proceedings, 322
- When illegal use must exist, 322
- Who may maintain proceedings for injunction, 324

**Innkeepers :**

- Illegal sales by tavern keeper, hotel keeper and innkeeper, 354

**Inns and innkeepers :**

- Sunday, 351

**Insurance, 315*****Intent, see infra, INFANTS; KNOWLEDGE.*****Interstate commerce, 69, 291**

- Constitutionality of statutes, 216
- Constitutionality of statutes as affected by interstate commerce clause, 221
- Constitutionality of Wilson act, 293
- Doctrine of license cases, 291
- Inspection laws, 81
- Necessity of additional state legislation to render act operative, 293
- Object of statute, 293
- Operation and effect of Wilson act, 294
- Original packages, 291
- Rule in original package cases, 292
- State statutes affecting interstate commerce, 87
- Statutes prohibiting manufacture or keeping for sale in another state, 296
- Statutes violating interstate commerce clause, 216

**What is original package, 294**

- Bottle packed singly, 295
- Box or cask in which several bottles placed original package, 295
- In general, 294
- Opening and selling contents of bottles, 295
- Size immaterial, 295
- Size of package determined by importer, 295

**Wilson Act, 293****Intoxicated persons, sales to, 341****INTOXICATING LIQUORS, *cont'd.******Intoxicating liquors as property, see infra, PROPERTY.*****Intoxication, permitting, 371****Jeopardy :**

- Conviction for selling liquor to minor as affecting liability for other offenses, 338
- Effect of prior conviction or acquittal of same or similar offense, 384
- Legislature authorizing municipality to impose additional penalties, 282
- Nuisances, 321
- Prior conviction of contempt, 325
- Sunday, 352

**Judgments :**

- Revocation of license, 269
- Status of judgment for price of liquors, 314

**Judicial knowledge :**

- Beer, 200, 201

**Judicial notice, 909****Jurisdiction, 383****Jury and jury trial :**

- Revocation of license :
  - Right to trial by jury, 269
  - Right to trial by jury, 320
- Justices the of peace, 383

**Keeping intoxicating liquors for unlawful sale, 372**

- Competency of evidence, 374
- Evidence in behalf of defendant, 375
- Evidence in behalf of prosecution, 374
- In general, 372
- Nature of offense, 372
- Place of keeping for unlawful sale, 373
- Probative force and sufficiency of evidence, 375

**What constitutes offense, 373*****Knowledge, see infra, HABITUAL DRUNKARDS; INFANTS.******Lager Beer, see infra, BEER.*****Landlord and tenant :**

- Liability of owner or lessor for violations of law on leased premises, 394
- Civil damage acts, 395
- Criminal liability, 394
- Liability of premises for fines assessed against occupant, 396

**Larceny, 303****Leases, 315**

- Premises on which intoxicating liquors are sold, 315
- Right of lessor to recover possession, 316
- Right of lessor to recover rent, 315
- Statute imposing penalty on lessor, 315
- Validity of lease, 315

***Legislature, see infra, MUNICIPAL CONTROL OF LIQUOR TRAFFIC.******License fees, see infra, LICENSES.******License Laws (see infra, BOND):***

- Constitutionality of statutes authorizing taxes or license fees, 222
- Equality, 223
- In general, 222
- License fees not taxes, 223
- Taxation of liquor traffic not license to sell, 224
- Uniformity, 223

**Town agent system of license and sales :**

- Constitutionality, 221

**Licenses, 230**

- Actions based on refusal to issue or on revocation of license, 261



**INTOXICATING LIQUORS, *cont'd.*****Licenses, *cont'd.***

- Agency, 231**
  - Absence of licensee on military service, 232
  - Partner not on same footing as agent, 231
  - Removal of licensee, 232
  - Right of licensee to sell by agent, 231
  - Sales must be within scope of license, 231
  - Whether license protects the agent, 231
- Appeal, 257**
  - Effect of appeal, 258
  - Hearing, 258
  - How authorized, 257
  - Notice of appeal, 258
  - Presumptions on appeal, 258
  - Who is entitled to appeal, 257
- Assignment or transfer of license, 232**
  - Assigned license no protection to assignee in selling, 232
  - Connecticut, 234
  - Consent of licensee to transfer unnecessary, 233
  - License a personal trust, 232
  - Licensee entitled to payment for unexpired portion of term, 233
  - License not assignable without statutory authority therefor, 232
  - New York, 234
  - Pennsylvania, 233, 235
  - Right to transfer to other premises under Pennsylvania statute, 235
  - Transfer of license to other place or building, 235
  - Transfer of license to personal representative, 233
  - Transfers allowed in proper case, 233
  - Under statutes authorizing assignment, 233
- Bonds, 273**
  - Action for refusal to approve bond, 276
  - Actions on bond, 278
  - Alterations, 275
  - Approval of bond in general, 276
  - Approval of licensing authorities, 275
  - Arbitrary exercise of discretion, 276
  - Bond to village or county, 274
  - Clerical errors, 275
  - Discretion as to approval of bond, 276
  - Effect of various omissions, irregularities and errors, 275
  - Estoppel to deny validity of license, 278
  - Extent of liability, 279
  - Failure of board to approve bond, 275
  - Form and requirements of bond, 274
  - Imposing additional conditions, 274
  - Jurisdiction of action on bond, 278
  - Necessity and object of bond, 273
  - Original bond refused, 276
  - Provision for payment of damages, 275
  - Retrial of original suit against principal, 279
  - Second bond granted, 276
  - To whom bond should run, 274
  - Validity of contract to pay surety for acting as such, 278
  - What constitutes breach, 277
  - What operates as discharge of sureties, 277
  - Whether conviction is conviction precedent to suit on bond, 278
  - Who may be sureties, 276
  - Who may maintain action on bond, 278

**INTOXICATING LIQUORS, *cont'd.*****Licenses, *cont'd.***

- Certification of license not equivalent to license, 262
- Certiorari, 258**
  - In general, 258
  - Persons not parties to record, 259
  - Question of fact not reviewable on certiorari, 258
  - Question of law reviewable, 259
  - Who may apply for writ, 259
- Consent of residents, property owners or freeholders living in vicinity to license, 249
- Constitutionality of license laws, 208**
  - Citizens, 210
  - Druggists, 210
  - Exercise of police power, 209
  - In general, 208
  - Male persons, 210
  - Persons of good moral character, 210
  - Physicians, 210
  - Regulating conditions upon which licenses granted, 209
  - Residents, 210
  - Screen laws, 213
  - Statutes authorizing revocation of license, 215
  - Statutes prohibiting employment of women and children in saloons, 213
  - Statutes prohibiting obstructions during business hours, 214
  - Statutes prohibiting sales and requiring closing of saloons at certain times, 212
  - Statutes prohibiting sales in certain localities, 214
  - Statutes prohibiting sales or gifts to certain classes or persons, 212
  - Statutes requiring applicant to give bond, 211
  - Statutes requiring consent of persons living in vicinity of proposed saloon, 211
  - Statutes restricting certain classes of persons the right to sell, 210
- Counterpetitions, 250
- Created by implication, 231
- Date, 262
- Definition of license, 230
- Discretion in granting and refusing licenses, 254**
  - Arbitrary refusal not an exercise of discretion, 255
  - Board acts in a judicial capacity, 254
  - Facts and circumstances of particular case to be considered, 255
  - In general, 254
  - Interests of community to be considered, 255
  - Nature and extent of discretion, 255
  - Refusal to license because elected for that purpose, 256
  - Refusing license to one applicant and granting to another, 256
  - Right to exercise discretion exists, 254
  - Unfitness of applicant, 256
  - Unsuitableness of place, 256
  - View that discretion cannot be exercised arbitrarily, 255
  - View that discretion is absolute, 255
  - What is not an abuse of discretion, 256



**INTOXICATING LIQUORS, *cont'd.*****Licenses, *cont'd.***

Disqualification of members of licensing board, 242

View that members signing petition are not disqualified, 242

Duration of term of license, 235

Effect of license, 230

**Eligibility of applicant for license, 239**

Abuse of discretion, 256

Citizenship, 239

Corporations, 240

**Fitness and moral qualifications of applicant, 240**

Conviction of felony, 240

Disorderly neighborhood, 241

Indulgence in liquors, 240

In general, 240

Other immorality than habit of becoming intoxicated, 240

Violation of liquor laws, 241

Partnerships, 240

Qualifications as to sex, 240

Residence, 239

Engaging in or pursuing business of selling intoxicating liquors without license, 279

Enjoining or prohibiting grant of license, 260

Executors and administrators, 232

Federal license, 238

Federal license no protection for sales without state license, 333

**Fees, 270**

Action to recover fees, 272

Collection of fees, 271

Disposition of fees, 272

Fixing amount of fees, 270

License fees not taxation, 270

Municipal corporations, 272

Payment of fees, 271

**Power of municipality to impose and fix amount of license fees, 285**

Discrimination in fees imposed, 286

Imposition of fees amounting to prohibition not permissible, 285

License fees held not prohibitory, 285

Presumption as to reasonableness of fee, 285

Reasonableness of fees, 285, 286

Under statutes fixing minimum and maximum fee, 285

Under statutes merely conferring power to license, 285

Reasonableness of amount, 270

Recovery back of fees or revocation of license, 272

Recovery back of illegal or excessive fees, 273

Revocation of license, 272

Filing of application or petition, 245

**Form and requisites of license, 261**

Date, 262

Description of premises, 262

In general, 261

License signed before meeting of the board valid, 262

Writing, 262

**Hearing of application and remonstrance, 252**

Adjournment, 252

Depositions, 253

Evidence, 252

Fitness of applicant, 252

**INTOXICATING LIQUORS, *cont'd.*****Licenses, *cont'd.***

**Hearing of application and remonstrance, *con.***

Necessity for license, 253

Personal attendance, 252

Proof of new matter, 253

Time of hearing, 252

Unsuitableness of location, 253

*Illegal sales, see infra, ILLEGAL SALES.*

Implication, 231

Injunction, 260

**Licenses subject to laws in force when granted, 236**

Repeal of statute, 236

Statutes changing conditions under which right exercised, 236

Mandamus, 260, 330

Mortgage, 35

*Municipal control of liquor traffic, see infra, MUNICIPAL CONTROL OF LIQUOR TRAFFIC.*

Municipal license, 238

Nature of license, 230

**Necessity of license, 230**

Evidence, 253

**Number of licenses required, 237**

Different kinds of business, 237

Different places of business, 237

Federal license no protection in violating state laws, 238

Licenses required by different jurisdictions, 237

Municipal licenses necessity of county laws, 238

State or county licenses necessity of municipal license, 238

United States laws, 238

Parol, 262

**Partnership, 231**

Licenses may be granted to firm, 231

License to one member no protection to other members, 231

Partner not on same footing as agent, 231

Rights of partners under license, 231

Personal representatives, 232

**Petition or application for license, 243**

Affidavit, 244

Alleging recommendation of applicant, 244

Character of sales, 244

Description of premises, 243

Filing of application or petition, 245

Hearing of application and remonstrance, 252

Location of premises, 243

Necessary allegations, 243

Necessity for application or petition, 243

*Notice of application or petition for license, see infra, NOTICE OF APPLICATION OR PETITION FOR LICENSE.*

Qualification of applicant, 244

Recommendation of petition or application, 244, 247

Remonstrances or counterpetitions, 250

**Power to grant licenses, 241**

Delegation of power, 242

In general, 241

Necessity of obeying statutory requirements, 241

Prosecution of licensing authorities for wrongfully granting or refusing license, 261



**INTOXICATING LIQUORS, *cont'd.*****Licenses, *cont'd.***

- Qualifications of applicant, 239, 240
  - Petition, 244
- Recommendation of petition or application for license, 247
  - Amendments, 248
  - Citizens residing outside of the city, 248
  - Minors, 248
  - Necessity of recommendation, 247
  - Right to withdraw signature, 248
  - What signing is sufficient, 248
  - Who is qualified to sign recommendation, 247
  - Women, 248
- Remonstrances or counterpetitions, 250
  - Amendment of remonstrance, 251
  - Before whom remonstrance filed, 250
  - Filing of remonstrance, 250
  - Form and allegations of remonstrance, 251
  - Hearing of application of remonstrance, 252
  - Right to remonstrate, 250
  - Time of filing remonstrance, 250
  - Withdrawal of remonstrance, 251
- Repeal of statute, 263
- Retroactive effect, 329
- Review of action of licensing authorities, 257
  - Appeal, 257
    - Effect of appeal, 258
    - Hearing, 258
    - How authorized, 257
    - Notice of appeal, 258
    - Presumptions on appeal, 258
    - Who is entitled to appeal, 257
- Certiorari, 258
  - In general, 258
  - Persons not parties to record, 259
  - Question of fact not reviewable on certiorari, 258
  - Questions of law reviewable, 259
  - Who may apply for writ, 259
- Effect of appeal, 258
- Hearing, 258
- How authorized, 257
- Mandamus, 260
- Notice of appeal, 258
- Presumptions on appeal, 258
- Who is entitled to appeal, 257
- Revocation of license, *see infra*, REVOCATION OF LICENSE.
- Right to license not absolute right, 236
- Sales not protected by license, 332
  - Federal license no protection for sales without state license, 333
  - Restaurant or tavern license, 333
  - Sales at places not authorized by license, 332
  - Sales for unauthorized purpose, 332
  - Sales in quantities not authorized by license, 332
- Sales under void licenses, 331
  - License granted before giving bond, 331
  - Licenses issued on credit, 331
  - Licenses issued without recommendation of commissioners, 332
  - Sales for unauthorized purpose, 332
  - Sales in quantities not authorized by license, 332
- Sales without license, 328
  - Burden of proving license or no license, 330

**INTOXICATING LIQUORS, *cont'd.*****Licenses, *cont'd.*****Sales without license, *cont'd.***

- Compelling issuance of mandamus, 330
- Effect of impossibility of obtaining license, 329
- Effect of wrongful refusal of license, 330
- Impossibility of obtaining license, 329
- In general, 328
- Mandamus, 330
- Motive immaterial, 330
- Performance of all requisite steps by applicant, 329
- Retroactive effect of license, 329
- Sales after expiration or revocation of license, 329
- Sales before issuance of license, 329
- Sales exempted from operation of license laws, 328
- Single sale constitutes offense, 328
- State license, 238
- Subject to laws in force when granted, 236
- Town agent system of license and sales, *see infra*, TOWN AGENT SYSTEM OF LICENSE AND SALES.
- Void licenses, sales under, 331
- What places may be licensed, 239
- Writing, 262
- Liens :**
  - Constitutionality of statutes making judgments for fines and taxes liens on leased property, 219
- Mandamus :**
  - Review of action of licensing authorities, 260
  - Revocation of licenses, 267
  - Sales without license, 330
- Manufacture :**
  - Violation of statute requiring keeping of statement and making report of manufacture and sale, 366
- Manufacturers :**
  - Illegal manufacture and sale, 353
- Master and servant, 384**
  - Burden of proof, 388
  - Civil liability, 384
  - Contracts for services rendered in furtherance of illegal liquor traffic, 317
  - Criminal liability, 385
  - Criminal liability for authorized violations of law, 385
  - Criminal liability for unauthorized violations of law, 386
  - Evidence, 388
  - Personal liability of servant or agent for violations of liquor laws, 389
    - Keeping with intent to sell unlawfully, 391
  - Maintaining liquor nuisances, 391
  - Selling liquors of another on one's own license, 389
  - Selling without license for one who has no license, 389
  - To what extent protected by employer's license, 389
  - Violation of local option laws, 390
- Several liability of employer and servant or agent, 391
- Violations of law against instructions, 386
- What constitutes servant, 391
- Measurement of distances, 250
- Medicinal purposes, 359



**INTOXICATING LIQUORS, *cont'd.*****Military law :**

- Business carried on by agent in absence of licensee on military service, 232

**Minors, see *infra*, INFANTS.****Mortgages :**

- Mortgagees of liquors, 314
- Right to mortgage license, 235
- Status of mortgage to secure price of liquors, 309

**Municipal control of liquor traffic, 380**

- Concurrent powers of control by state and municipality, 282

**In general, 282**

- Legislature may authorize municipality to impose additional penalties, 282

- Municipal license no protection for selling without state license, 282

- Power of state and municipality to require separate licenses, 282

- Sales punishable under general law may be made punishable under ordinance, 282

- State license no protection for selling without municipal license, 282

**Constitutional law, 283**

- Constitutional limitations on delegative power of legislature, 283

- Constitutional limitations on power to pass ordinances, 283

- Ordinances inconsistent with constitution, 283

- Delegation of power by municipal corporation, 290

- Discrimination in fees imposed, 286

- Election days, ordinances prohibiting sale on, 287

- Exclusive control, 281

- Exclusive power to license, 281

- Extraterritorial effect of ordinances, 289

- Grant to municipality of exclusive power of control, 281

- In general, 280

- Legislative intent must be clearly apparent, 281

- Legislative power to delegate exclusive control to municipality, 281

- Licenses, power to revoke, 287

- Ordinances good in part and bad in part, 290

- Ordinances prohibiting employment of women in saloons, 289

- Ordinances prohibiting sales in particular localities, 289

- Ordinances prohibiting sales to drunkards, 289

- Ordinances requiring bond, 289

- Ordinances requiring closing of saloons on certain days and during certain hours, 288

**In general, 288**

- Laws held to delegate power to require closing on Sundays, 288

- Ordinances held reasonable, 288

- Ordinances held unreasonable, 288

- Ordinances must be reasonable, 288

- Ordinances requiring consent of adjacent property owners, 289

- Power of legislature to delegate power, 281

- Power to prohibit keeping liquors for unlawful sale, 287

**Power to require and grant licenses, 283**

- Delegation of power by legislature proper, 283

**INTOXICATING LIQUORS, *cont'd.*****Municipal control of liquor traffic, *cont'd.*****Power to require and grant licenses, *cont'd.*****Examples, 283****Extent of power delegated, 284****Grant of exclusive power to license, 284****In general, 283****Power to impose and fix amount of license fees, 285****Power to license, regulate and prohibit, 284****Power to regulate, 284****What statutes give power, 283, 284****Power to revoke licenses, 287****Prohibition :****Power to prohibit traffic in intoxicating liquors, 286****Authority of legislature to delegate power, 286****Power to prohibit keeping liquors for unlawful sale, 287****Power to prohibit not included in power to license, 286****Power to prohibit not included in power to regulate, 286****Prosecution under general law for keeping open on Sunday, 282****Repeal of ordinances, 290****Statutory authority for exercise of power, 281****Sundays, ordinances prohibiting sales on, 287****Municipal corporations :****Disposition of fees, 272****Licenses, 238****Municipal license necessity of county license, 238****State or county license necessity of municipal license, 238****Power to make purchase of liquor punishable, 287****Notes, see *infra*, BILLS OF EXCHANGE AND PROMISSORY NOTES.****Notice :****Proceedings to revoke licenses, 268****Notice to seller of purchaser's intemperate habits, 343****Notice of appeal :****Granting or refusing to license, 258****Notice of application or petition for license, 245****Description of place, 245****Necessity of notice, 245****Notices held insufficient, 246****Notices held sufficient, 246****Object of notice, 245****Publication of notice, 246****Requirement of notice, 245****Time of giving notice, 246****Nuisances, 318****Competency of evidence, 326****Constitutionality of statutes, 319****Constitutionality of statutes declaring places of manufacture and sale nuisances, 220****Criminal responsibility for maintaining liquor nuisance, 320****Criminal responsibility of parties responsible for maintaining liquor nuisances, 320****Due process of law, 320****Effect of former conviction or acquittal of similar offense, 321**



**INTOXICATING LIQUORS, *cont'd.*****Nuisances, *cont'd.***

Evidence in criminal prosecutions and in proceedings for injunction and abatement, 326

*Injunctions*, see *infra*, **INJUNCTIONS**.

Keeping for unlawful sale, 319

Keeping open on Sunday, 319

Keeping place in disorderly manner, 319

Manufacturing without license, 319

Master and servant, 391

Proceedings for contempt in violating injunction, 324

Rights of private parties to recover damages for or to enjoin nuisance, 325

Right to trial by jury, 320

Selling in violation of law, 318

Sufficiency of evidence, 327

What constitutes nuisance at common law, 318

What constitutes nuisance under statutes, 318

Who may maintain proceedings for injunction and abatement, 324

*Number of licenses*, see *infra*, **LICENSES**.

**Offenses against liquor laws and prosecutions thereunder** (see *infra*, **CRIMINAL LAW**; **ELECTION DAY**; **HABITUAL DRUNKARDS**; **INDIANS**; **MASTER AND SERVANT**; **PLACE**; **SALES WITHIN PROHIBITED DISTANCE OF CHURCHES, SCHOOLS, ETC.**; **SUNDAYS**), 328

*Adulteration*, see *infra*, **ADULTERATION**.

Alaska, 382

*Being common seller*, see *infra*, **COMMON SELLER**

Criminal liability of purchaser, 391

*Druggists* (see *infra*, **DRUGGISTS**), 355

Evidence of maintaining place, building or tenement for unlawful keeping or sale of intoxicating liquors, 369

Furnishing intoxicating liquors to constables, 367

*Furnishing of intoxicating liquors by social clubs*, see *infra*, **SOCIETIES AND CLUBS**.

Giving away intoxicating liquors, 367

House of ill fame, 364

*Husband and wife*, see **HUSBAND AND WIFE**.

Ignorance of intoxicating properties, 383

Illegal manufacture and sales by manufacturer, 353

Illegal sales by wholesale dealers, 353

Illegal transportation, 380

*Innkeepers*, see *infra*, **INNKEEPERS**.

Jeopardy, 384

Jurisdiction, 383

*Keeping intoxicating liquors for unlawful sale*, see *infra*, **KEEPING INTOXICATING LIQUORS FOR UNLAWFUL SALE**.

Liability of owner or lessor for violations of law on leased premises, 394

**Licenses**, (see *infra*, **LICENSES**):

Prosecution of licensing authorities for wrongful granting or refusing license, 261

Revocation of license for violation of liquor laws, 264

Violation of liquor laws as bar to application for license, 241

Maintaining place or building for unlawful keeping or sale, 368

Maintaining tenement for unlawful keeping or sale, 369

**INTOXICATING LIQUORS, *cont'd.***

**Offenses against liquor laws and prosecutions thereunder, *cont'd.***

Medicinal purposes, 359

*Municipal control of liquor traffic*, see *infra*, **MUNICIPAL CONTROL OF LIQUOR TRAFFIC**.

Permitting drunkenness, 371

Physicians, 358

Sales by persons who are both physicians and druggists, 359

Sales for medicinal purposes, 359

Sales under void licenses, 331

Sales without giving bond, 366

*Sales without license*, see *infra*, **LICENSES**.

Screen laws, 381

*Selling intoxicating liquors to be drunk on premises*, see *infra*, **SELLING INTOXICATING LIQUORS TO BE DRUNK ON PREMISES**.

Selling without having paid occupation tax or posted receipt, 366

Theatres, 365

Tippling houses, 371

Unlawful assemblies, 371

Violation of statute requiring keeping of statement and making report of manufacture and sale, 366

Women in saloons, 382

On, 366

*Ordinances*, see *infra*, **MUNICIPAL CONTROL OF LIQUOR TRAFFIC**.

*Original Packages*, see *infra*, **COMMERCE**; **INTERSTATE COMMERCE**.

**Owner:**

Consent of residents, property owners, or freeholders living in vicinity to license, 249

Liability of owner or lessor for violations of law on leased premises, 394

*Ownership*, see *infra*, **PROPERTY**.

*Parents*, see *infra*, **INFANTS**.

**Partnership, 394**

**Licenses**, 231, 240

License may be granted to firm, 231

License to one member no protection to other members, 231

Partner not on same footing as agent, 231

Rights of partners under license, 231

Patent medicines, 204, 205

**Payment:**

Constitutionality of statutes forbidding recovery for liquors illegally sold and authorizing recovery back of money paid therefor, 220

Payment of fees, 271

*Petition for license*, see *infra*, **LICENSES**.

**Physicians:**

Illegal sales, 358

Restricting to physicians the right to prescribe intoxicating liquors, 210

Sales by persons who are both physicians and druggists, 359

Sales for medicinal purposes, 359

**Place** (see *infra*, **SALES WITHIN PROHIBITED DISTANCE OF CHURCHES, SCHOOLS, ETC.**; **SELLING INTOXICATING LIQUORS TO BE DRUNK ON PREMISES**):

Constitutionality of statutes declaring places for manufacture and sale nuisances, 220

Constitutionality of statutes making it an offense to keep place for unlawful sale, 218



**INTOXICATING LIQUORS, *cont'd.*****Place, *cont'd.***

- House of ill fame, 364
- Keeping intoxicating liquors for unlawful sale, 373

**Licenses :**

- Abuse of discretion in refusing licenses, 256
- Description of place in notice of application or petition for license, 245
- Description of premises, 262
- Description of premises in petition or application for license, 243
- Discretion of licensing board, 256
- What places may be licensed, 239
- Maintaining place, building, tenements, etc., for unlawful keeping or sale of intoxicating liquors, 368
- Ordinances prohibiting sales in particular localities, 289

- Separate license required for each place of business, 237

**Theatres, 365**

- Transfer of license to other place or building, 235

**What is place of sale, 300**

- Delivery to carrier on order of purchaser as affecting criminal liability, 300
- Delivery to carrier on order of purchaser as affecting validity of contract, 300
- Sale of ascertained goods, 300
- Where goods are delivered by seller in person or by agent, 301
- Where goods are shipped C. O. D. 300
- Where goods are sold on order of agent subject to principal's approval, 301
- Where sale is conditional, 302

**Pleadings :**

- Constitutionality of statutes prescribing rules of pleading, 227

**Police, 367****Porter, 202****Premises, see *infra*, PLACE; SELLING INTOXICATING LIQUORS TO BE DRUNK ON PREMISES.****Prescription, see *infra*, DRUGGIST.****Private international law :**

- Extraterritorial effect of ordinances, 289
- Status of contracts of sale made in another state, 312
- Contracts valid in state where made, 312
- Effect of knowledge of purchase to resell illegally and assistance therein, 312
- In general, 312
- Participation in unlawful act of purchaser, 313
- Purchase to use illegally in another state, 313
- Reasonable cause to believe liquors would be resold illegally, 312
- Repeal of statute, 314
- Sale with view to illegal resale, 313
- Seller's knowledge of illegal purpose, 312
- Special statutory provisions, 313

**Prohibition (see *infra*, CONSTITUTIONAL LAWS):**

- Power of municipality to prohibit traffic in intoxicating liquors, 286
- Authority of legislature to delegate power, 286
- Power to prohibit keeping liquors for unlawful sale, 287

**INTOXICATING LIQUORS, *cont'd.*****Prohibition, *cont'd.***

- Power of municipality to prohibit traffic, *con.*
- Power to prohibit not included in power to license, 286
- Power to prohibit not included in power to regulate, 286

**Property, 302**

- Action for destruction of liquors by private persons, 305
- Action for wrongful taking of intoxicating liquors, 303

***Custodia legis*, 304**

- In liquors lawfully acquired and kept, 302

- In liquors unlawfully acquired or kept, 302
- Remedies of owner of liquors taken under search and seizure acts, 304

- Statute providing that no action shall be brought on claims or demands contracted or given for intoxicating liquors, 303

- Subject of larceny, 303

**Publication of notice :**

- Petition or application for license, 246

**Public officers, see *infra*, TOWN AGENT SYSTEM OF LICENSE AND SALES.****Punishment :**

- Constitutionality of statutes imposing fine and imprisonment for violation of liquor laws, 218

**Purchaser, criminal liability of, 391****Qualifications of liquor dealer, see *infra*, LICENSES.****Questions of law and fact :**

- Medicinal and toilet preparations containing alcohol, 204
- Whether beer is intoxicating, 200

**Quo warranto :**

- Revocation of license, 267

**Recommendation of petition or application for license, see *infra*, LICENSES.****Report, 366****Residence :**

- Consent of residents, property owners, or freeholders living in vicinity to license, 249
- Eligibility of applicant for license, 239

**Review :**

- Licenses*, see *infra*, LICENSES.

- Revocation of license, 267

**Revocation of license, 262**

- Action based on revocation of license, 261
- Certiorari, 269
- Conditions, 263
- Contracts, 263
- Deception, 266
- Fraudulently obtaining license, 266
- Grounds for revoking licenses, 264
- Jurisdiction to revoke licenses, 263
- Keeping disorderly place, 264
- License improvidently granted, 266
- License issued in violation of statute, 266
- License secured improvidently or not in conformity with law, 265

**Municipal corporations :**

- Power to revoke, 287
- Permitting disorderly assemblages, 265
- Power to revoke, 262
- Proceedings to revoke licenses, 266
- Complaint, 267
- Findings, 269
- Formal proceeding necessary, 267
- Hearing, 269



**INTOXICATING LIQUORS, *cont'd.***Revocation of license, *cont'd.*Proceedings to revoke licenses, *cont'd.*

Judgment, 269

Mandamus, 267

Nature of proceedings, 266

Notice to licensee of proceedings, 268

Quo Warranto, 267

Right to trial by jury, 269

Statutes under which court declares  
license void on conviction, 266

Verification of complaint, 268

What notice must contain, 268

Who may institute, 267

Recovery back of fees, 272

Repeal by implication, 263

Repeal of statute, 263

Review, 269

Revocability in general, 262

Sales after expiration or revocation of  
license, 329

Sales by agent or servant, 265

Sales by women, 265

Sales to minors, 265

Statutes providing for revocation not im-  
pairment of obligation of contract, 263

Stay of proceedings, 269

Violations of liquor law, 264

Rum, 199

**Sale or gift to certain classes of persons :**

Constitutionality of statute prohibiting, 212

**Sales** (see *infra*, COMMON SELLER; DRUGGIST;  
KEEPING INTOXICATING LIQUORS FOR  
UNLAWFUL SALE; LICENSES; NUISANCES;  
OFFENSES AGAINST LIQUOR LAWS AND  
PROSECUTIONS THEREUNDER; TIME OF  
SALE):*Churches*, see *infra*, SALES WITHIN PRO-  
HIBITED DISTANCE OF CHURCHES,  
SCHOOLS, ETC.Constitutionality of statutes forbidding re-  
covery for liquors illegally sold and au-  
thorizing recovery back of money paid  
therefor, 220

Druggists, 355

*Election day*, see *infra*, ELECTION DAY.*Furnishing of intoxicating liquors by social  
clubs*, see *infra*, SOCIETIES AND CLUBS.*Habitual drunkards*, see *infra*, HABITUAL  
DRUNKARDS.*Holidays*, see *infra*, HOLIDAYS.*Illegal sales*, see *infra*, ILLEGAL SALES.*Indians*, see *infra*, INDIANS.

Informers, 346

Manufacturer, 353

Medicinal purposes, 359

*Minors*, see *infra*, INFANTS.*Municipal control of liquor traffic*, see *infra*,  
MUNICIPAL CONTROL OF LIQUOR TRAFFIC.

Physicians, 358

*Place*, see *infra*, PLACE.Power to prohibit manufacture and sale  
of intoxicating liquors, 206Sales by persons who are both physicians  
and druggists, 359

Sales for medicinal purposes, 359

*Schools*, see *infra*, SALES WITHIN PRO-  
HIBITED DISTANCE OF CHURCHES,  
SCHOOLS, ETC.Status of entire and divisible contracts of  
sales of liquors, 311*Sundays*, see *infra*, SUNDAYS.

Test case, 346

**INTOXICATING LIQUORS, *cont'd.*****Sales, *cont'd.****Town agent system of license and sales*, see  
*infra*, TOWN AGENT SYSTEM OF LICENSE  
AND SALES.*What constitutes sale*, see *infra*, WHAT CON-  
STITUTES SALE.

Wholesale dealers, 353

*Sales to minors*, see *infra*, INFANTS.

Sales to slaves and free negroes, 344

Sales under void licenses, 331

**Sales within prohibited distance of churches,  
schools, etc., 362**Carrying intoxicating liquors to church,  
364

Churches, 362

How distance estimated, 363

In general, 362

Public buildings and institutions, 364

Schools, 363

Selling or giving away intoxicating liquors  
in house of ill fame, 364*Sales without license*, see *infra*, LICENSES.*Schools*, see *infra*, SALES WITHIN PROHIBITED  
DISTANCE OF CHURCHES, SCHOOLS, ETC.

Screen laws, 381

Screen laws, constitutionality, 213

**Searches and seizures :**Remedies of owner of liquors taken under  
search and seizure acts, 304*Seizures*, see *infra*, SEARCHES AND SEIZURES.**Selling intoxicating liquors to be drunk on  
premises, 365**Construction of terms on, on and about,  
adjacent, 366Drinking on premises not element of  
offense, 365Necessity of intent that liquors be drunk  
on premises, 365

Sale in what quantity violation of law, 365

**Set-off, recoupment and counterclaim :**Right to recover back of money paid for  
liquors illegally sold, 311**Signature :**Recommendation of petition or application  
for license, 248**Societies and clubs, 360**Furnishing of liquors by *bona fide* social  
club to members, 361No legislation especially mentioning clubs,  
361

Sales by clubs organized to evade law, 360

Sales by clubs to persons not members, 360

Statutes containing provisions specially  
mentioning clubs, 362

State license, 238

*States*, see LEGISLATURE; MUNICIPAL CORPO-  
RATIONS.**Statutes** (see *infra*, CONSTITUTIONAL LAW;  
INTERSTATE COMMERCE; LICENSES; TITLE  
AND SUBJECT MATTER OF STATUTES):Licenses subject to laws in force when  
granted, 236

Statutes delegating legislative power, 224

**Stay of proceedings :**

Revocation of license, 269

**Sundays :**

Adjoining or disconnected rooms, 350

Druggists, 357

Evidence in prosecutions for keeping open  
on Sunday, 352Evidence in prosecutions for Sunday sales  
or gifts, 352



**INTOXICATING LIQUORS, *cont'd.*****Sundays, *cont'd.***

Former acquittal or conviction of similar offense as bar, 352

Innkeepers, 351

Keeping open on Sunday, 348

**Municipal corporations:**

Prosecution under general law for keeping open on Sunday, 282

Ordinances prohibiting sales on Sundays and election days, 287

Prosecution under general law for keeping open on Sunday, 282

Sales or gifts on Sunday, 346

Same room used for drinking and for other purposes, 350

Selling or keeping open on Sundays by publicans, 351

What constitutes keeping open on prohibited days, 349

What rooms are within prohibition, 350

**Suretyship (see *infra*, BONDS):**

Validity of contract to pay surety for acting as such, 278

What operates as discharge of sureties, 277

Who may be sureties, 276

**Taxation:**

Constitutionality of statute, 216

Constitutionality of statutes authorizing taxes or license fees, 222

Equality, 223

In general, 222

License fees not taxes, 223

Taxation of liquor traffic not license to sell, 224

Uniformity, 223

Constitutionality of statutes making judgments for fines and taxes liens on leased property, 219

License fees not taxation, 270

**Tenements:**

Maintaining tenements for unlawful keeping or sale, 369

Test case, 346

Theatres, 365

**Time, computation of:**

Duration of license, 235, 236

**Time of sale:**

*Election days*, see *infra*, ELECTION DAYS.

Ordinances requiring closing of saloons on certain days and during certain hours, 288

Selling or keeping open for sale during prohibited hours, 352

Statutes prohibiting sales and requiring closing of saloons at certain times, constitutionality, 212

*Sundays*, see *infra*, SUNDAYS.

Tippling house, 371

*Title*, see *infra*, PROPERTY.

**Title and subject-matter of statutes, 227**

Application of constitutional provisions, 227

Incorporation, 229

Miscellaneous examples, 228

Nature and object of constitutional provisions, 227

Regulating elections, 229

Sale, 229

Statutes held invalid, 227

Statutes held valid, 227

Title of act to regulate or restrain, 227

What enactments valid under title to prohibit, 228

Who may question validity of statutes, 230

**INTOXICATING LIQUORS, *cont'd.***

Town agent system of license and sales, 221, 279

Consequences of failure to give bond, 279

Duties of agent, 280

Evidence, 280

In general, 279

Nature of appointment, 279

Necessity of appointment, 279

Necessity of giving bond, 279

Noncompliance with statute designating persons from whom liquor shall be purchased, 280

Powers of agent, 280

Sales must be authorized by law, 280

Sales to agent or unauthorized person, 280

Town agent for selectmen, 280

*Transfer*, see *infra*, ASSIGNMENTS.

**Treating:**

Infants, 336, 338

**United States, (see *infra*, INTERSTATE COMMERCE):**

Federal license no protection for sales without state license, 333

Federal license no protection in violating state laws, 238

*Importation of intoxicating liquors from foreign countries*, see *infra*, COMMERCE.

Unlawful assemblies, 371

**Voters:**

Recommendation of petition or application for license, 247

**What Constitutes sale, 297**

Agreement to pay necessary, 297

Agreement to sell, 297

Barter, 298

Delivery *prima facie* evidence of sale, 297

Devices or subterfuges to evade liquor laws, 299

Drinking of liquor unnecessary, 298

Exchange, 298

Giving or furnishing as act of hospitality, 298

Illustration of unsuccessful device, 299

In general, 297

Loan, 298

Nominal payment, 297

Property must pass, 297

Sales on credit, 297

*What liquors and compounds thereof are within prohibitions of statutes*, see *infra*, DEFINITION.

Whiskey, 198

**Wholesale dealers:**

Illegal sales 353

**Wine, 199**

Not an intoxicating liquor, 199

When considered a spirituous liquor, 199

Wine a vinous or alcoholic liquor, 199

**Women:**

Employment of women in saloons, 382

Keeping winerom for women, 382

Licenses, 240

Ordinances prohibiting employment of women in saloons, 289

Recommendation of petition or application for license, 248

Revocation of license where sales by women, 265

Statutes prohibiting employment of women and children in saloons, constitutionality, 213



**INTOXICATION, 398**

Assault, 411

Bribery, 413

Burglary, 412

Contracts, 399

Effect of intoxication in absence of fraud of other contracting party, 399

Degree of intoxication necessary, 401

Drunkenness acquired for purpose of fraud, 400

In general, 399

Intoxication question for jury, 401

Near relatives, 400

Rights of innocent third persons, 400

Whether contract void or merely voidable, 401

Who may avoid contract, 402

Implied contracts, 403

Status of contracts of intoxicated persons in case of fraud of other party, 402

Impairment of contracting mind, 402

Lesser degree of intoxication sufficient in case of fraud, 402

Counterfeiting, 412

**Criminal law :**

Cases in which specific intent is not element of crime, 413

Crimes in which specific intent is necessary element, 406

Applications of rule in prosecutions for particular offenses, 408

Assaults, 411

Capacity to form intent, 407

Cases in which specific intent is not element of crime, 413

Competency and sufficiency of evidence to prove intoxication, 408

Homicide, 408

Intoxicated person may be capable of forming intent, 408

Intoxication as affecting intent, 406

Necessity for caution in applying rule, 407

Specific offenses, 412

Statement of rule, 406

What degree of intoxication will merit consideration, 407

Effect of involuntary intoxication on responsibility for crime, 414

Under what circumstances and for what purposes evidence of voluntary intoxication admissible, 406

**Voluntary intoxication no excuse for crime, 403**

Constitutional infirmity rendering person unusually susceptible to influence of liquor, 405

Drunkenness not aggravation of crime, 404

In general, 403

Temporary insanity caused by voluntary intoxication, 405

Unreasonable belief of danger generated by drunkenness, 405

Voluntary intoxication for purpose of committing crime, 404

Voluntary intoxication rendering party unconscious of his acts, 405

Defined, 399

Forgery, 413

*Fraud*, see *infra*, **CONTRACTS**.**Homicide, 408**

Antecedent threats and menaces, 410

**INTOXICATION, *cont'd.*****Homicide, *cont'd.***

Evidence of intoxication competent to show absence of premeditation, 409

Evidence of intoxication to be cautiously considered, 410

Intoxicated man may commit murder in first degree, 411

Intoxication may reduce to murder in second degree, 409

Provocation, 410

Reduction of offense to manslaughter, 409

What degree of intoxication may be considered, 410

Implied contracts, 403

**Insanity, 414****Criminal law :**

Responsibility of insane person drunk at time of committing act, 416

Dipsomaniacs, 415

Persons afflicted with delirium tremens, 414

Persons afflicted with fixed insanity from use of intoxicants, 414

Temporary insanity caused by voluntary intoxication, 405

Intent (see *infra*, **CRIMINAL LAW**), 406, 413

Larceny, 412

*Murder*, see *infra*, **HOMICIDE**.

Perjury, 413

**Rape, 413**

Assault with intent to commit rape, 411

Suicide, 412

**IN TRANSIT, 416****IN TRANSITU, 416****INTRINSIC, 416****INTRODUCE, 416****INTROMISSION, 416****INTRUDE, 416****INTRUDER, 417****INTRUSION, 417****INTRUSTED, 417****INURE, 417****INVALID, 417****INVALIDATED, 418****INVASION, 418****INVEIGLE, 418****INVENTED WORD, 419****INVENTION, 419****INVENTORY, 419****IN VENTRE SA MERE, 420****INVEST, 420****INVESTIGATION, 421****INVESTITURE, 422****INVESTMENT, 420****INVESTMENTS, 423****Agents :**

Misconduct of agents, 472

**Bank :**

Deposits in bank, 452



**INVESTMENTS, *cont'd.***

- Bonds, 452
- Bonds at a premium, 459
- Business, 450
- Business** (see *infra*, **LIABILITIES OF FIDUCIARIES FOR USING TRUST FUNDS IN BUSINESS OR SPECULATION**):
  - Continuing established business, 441
- Business employment of funds in business or speculation, 450
- Change of investments**, 459
  - Change to advantage of beneficiary, 460
  - Express statutory power to vary investments, 460
  - General rule, 459
  - Implied power to change investments, 461
  - Insecure investments, 459
  - Provisions of trust instrument, 460
  - Rule as to investments made by creator of trust, 461
  - When investments may be changed, 459
  - Where specific securities are given in trust, 461
- Co-fiduciaries**:
  - Misconduct of, 472
- Commingling trust funds, 468
- Commingling trust funds with individual funds, 468
- Consent of beneficiary, 430, 476
- Construction*, see *infra*, **CONSTRUCTION OF PARTICULAR DIRECTIONS OR POWERS**.
- Construction of particular directions or powers**, 438
  - To continue established business, 441
  - To invest a specified amount in a particular way, 441
  - To invest in corporate stock or securities, 440
  - To invest in government or public securities, 438
  - To invest in names of fiduciaries, 441
  - To invest in real estate, 438
  - To invest in real securities, 439
  - To make loans on personal security, 440
- Continuation of established business, 441
- Corporate bonds, 452
- Courts*, see *infra*, **DETERMINATION AS TO NATURE OF INVESTMENT**.
- Definition, 425
- Deposits in bank, 452
- Designation of fiduciary capacity in which investments are held**, 456
  - Extent of liability for investments or deposits in individual name, 457
  - Proper form for investments, 457
  - Rule applies though fiduciary acted in good faith, 456
  - Rule stated, 456
- Determination as to nature of investments** (see *infra*, **CONSTRUCTION OF PARTICULAR DIRECTIONS OR POWERS**), 428
- Authority to make certain investments, 429
- Consent of beneficiary, 430
- Directions to fiduciary, 434
- Express directions**, 428
  - Investments expressly forbidden, 429
  - Rule stated, 428
  - When directions may be departed from, 429
- Statutes usually permissive merely, 431
- Statutory provisions, 430

**INVESTMENTS, *cont'd.***

- Determination as to nature of investments, *con.***
- Supervision of courts**, 431
  - Duty to obtain directions from the courts, 432
  - In general, 431
  - Order obtained by fraud, 433
  - Protection afforded by order of court, 433
  - Right of fiduciaries to apply for directions, 432
  - Specific instructions in particular cases, 432
  - Whether fiduciaries must apply for directions, 432
- Diligence required, 437
- Directions*, see **DETERMINATION AS TO NATURE OF INVESTMENTS**.
- Discretion of fiduciary, 434
- Duty to invest** (see *infra*, **LIABILITIES OF FIDUCIARIES**), 426
  - Exceptional circumstances, 427
  - Express direction to invest, 426
  - Guardian *ad litem*, 426
  - In general, 426
  - Time allowed within which to invest, 427
  - What is a reasonable time, 427
- Effect of beneficiary's consent to or acquiescence in improper investment**, 476
  - Assent of one of several beneficiaries, 477
  - Beneficiary must be competent to act, 476
  - Beneficiary must be fully informed, 477
  - Burden of proof, 477
  - Rule stated, 476
- Failure to invest*, see *infra*, **LIABILITIES OF FIDUCIARIES**.
- Good faith (see *infra*, **LIABILITIES FOR LOSSES ON INVESTMENTS**), 435
- Government or public securities**, 438, 442
  - Annuities, 443
  - A proper investment, 442
  - Bonds of confederate states, 443
  - Bonds of quasi-public corporations, 438
  - Distinction between investment of United States and of Confederate money, 444
  - In general, 438
  - Municipal debentures, 438
- Guardian *ad litem*, 426
- Income to beneficiaries**, 457
  - Circumstances of *cestuis que trustent*, 458
  - Duty of fiduciary to secure, 457
  - Rate of interest on investments, 457
  - Rights as between life tenants and remaindermen, 458
  - Usurious loans, 458
  - When compound interest should be obtained, 458
- Interest**:
  - Liabilities of fiduciaries for failure to invest, 462
- Liability of fiduciaries for interest**, 472
  - In general, 472
  - Rate, 472
  - Simple or compound interest, 474
  - When compound interest should be obtained, 458
- Liabilities of fiduciaries**:
  - Effect of beneficiary's consent to or acquiescence in improper investment, 476
  - Effect of provision in trust exonerating fiduciary from liability for losses, 477
- For failure to invest**, 462
  - Existence of liability, 462
  - Extent of liability, 462



**INVESTMENTS, *cont'd.*****Liabilities of fiduciaries, *cont'd.*****For failure to invest, *cont'd.***

For failure to invest—generally, 462

For failure to make investments directed by trust instrument, 463

Interest, 462

Losses to principal, 462

Where trustee has option to invest in government or real securities, 463

Liability of fiduciaries for commingling trust funds with individual funds, 468

Liabilities of fiduciaries for improperly disposing of investments, 471

**Liabilities of fiduciaries for losses on investments, 464**

Creator of trust having made similar investments, 467

Extent of liability for loss of confederate money, 468

Failure to invest, 462

General rule as to when fiduciaries are not responsible for losses, 465

Investment must be proper and authorized, 465

Investment of individual funds in the same enterprise, 467

Loss caused by wrong of *cestui que trust*, 468

Losses not attributable to bad faith, unsound judgment or negligence, 465

Losses on unauthorized investments, 466

Manner of enforcing liability, 467

Responsibility for losses resulting from bad faith, unsound judgment or negligence, 464

Liability of fiduciaries for misconduct of agents, 472

Liability of fiduciaries for misconduct of co-fiduciaries, 472

**Liability of fiduciary for using trust funds in business or speculation, 469**

Election by beneficiary, 471

Liability to replace amounts used, 469

Limitations, 470

Right of beneficiary to profits realized by fiduciary, 470

Limitation of actions, 478

**Loans on personal security, 440, 448**

Construction of direction to make loans on personal security, 440

Loans on personal security not necessarily improper, 449

Necessity for sureties, 450

Prevailing doctrine as to impropriety, 448

View that such loans may be made, 449

Loans to co-fiduciaries, 454

Misconduct of co-fiduciaries, 472

*Mortgages*, see *infra*, REAL SECURITIES.Name of fiduciary (see *infra*, DESIGNATION OF FIDUCIARY CAPACITY IN WHICH INVESTMENTS ARE HELD), 441**Option of beneficiary as to adopting improper investments, 475**

Beneficiary bound by acceptance of investment, 475

Effect of beneficiary's consent to or acquiescence in improper investment, 476

Right to adopt some investments and reject others, 475

Rule stated, 475

Partnership property, 439

**INVESTMENTS: *cont'd.*****Propriety of particular investments, 441**

Corporate bonds, 452

Deposits in bank, 452

Employment in business or speculation, 450

*Government or public securities*, see *infra*, GOVERNMENT OR PUBLIC SECURITIES.

Introductory, 441

*Loans on personal securities*, see *infra*, LOANS ON PERSONAL SECURITIES.

Loans to co-fiduciaries improper, 454

Purchase of real estate, 453

*Real securities*, see *infra*, REAL SECURITIES.

Rule as to investments made by creator of trust, 454

Scope of section, 441

Stock, 450

*Public securities*, see *infra*, GOVERNMENT OR PUBLIC SECURITIES.**Real property, 438**

Direction to invest in real property, 438

Freehold ground rents, 439

New buildings—repairs—improvements, 439

Purchase of real property, 453

**Real securities, 445**

Care in selecting security, 446

Construction of a direction to invest in real securities, 439

Depreciation of property after loan is made thereon, 447

English "two-thirds rule" as to margin, 447

Fiduciaries must use their own judgment, 446

Fiduciary must see that security is sufficient, 446

Margin of security, 447

Margin of two-thirds, 447

Necessity for margin, 447

Proper investment, 445

Rule as to junior mortgages, 448

When excessive loan may be sustained as to part, 448

**Remaindermen:**

Rights as between life tenants and remaindermen, 458

**Removal of fiduciaries, 478****Requirements of good faith and sound judgment, 435**

Loans without security, 436

Measure of diligence required, 437

Requirement of sound business judgment and proper care, 435

Rule stated, 435

Scope of article, 425

*Securities*, see *infra*, GOVERNMENT OR PUBLIC SECURITIES.

Separate investment of funds held on different trusts, 455

*Situs* of investments, 454

Sound judgment, 435

*Speculation*, see *infra*, LIABILITIES OF FIDUCIARIES FOR USING TRUST FUNDS IN BUSINESS OR SPECULATION.*Statutes*, see *infra*, DETERMINATION AS TO NATURE OF INVESTMENT.**Stock, 440, 450**

Construction of direction to invest in corporate stock or securities, 440

View that investment therein is improper, 450



**INVESTMENTS, *cont'd.*****Stock, *cont'd.***

View that such investment is not necessarily improper, 451  
*Unsound judgment*, see *infra*, LIABILITIES OF FIDUCIARIES FOR LOSSES ON INVESTMENTS.  
 Usury, 458

**INVIOLEATE**, 478**INVITATION**, 478**INVOICE**, 478**INVOLUNTARY**, 479**INVOLUNTARY MANSLAUGHTER**, 479**INVOLUNTARY PAYMENT**, 479**INVOLUNTARY SERVITUDE**, 479**INVOLVE**, 480**INVOLVED**, 480**I. O. U.** 480**IPSO FACTO**, 481**IRON**, 481**IRREGULAR**, 481**IRREGULAR HEIR**, 482**IRREGULARITY**, 481**IRRELEVANT**, 483**IRREPARABLE**, 483**IRREPARABLE INJURY**, 483**IRRESISTIBLE**, 484**IRRESISTIBLE IMPULSE**, 484**IRRESISTIBLE SUPERHUMAN CAUSE**, 484**IRRESISTIBLE VIOLENCE**, 484**IRRESPECTIVE OF BENEFITS**, 484**IRREVOCABLE**, 484**IRRIGATION**, 485**Abandonment and nonuser**, 516

Abandonment and nonuser distinguished, 518

Abandonment of ditch without abandonment of water right, 517

Clear proof required, 517

Intention, 517

Water right may be lost by abandonment, 516

What constitutes abandonment, 517

**Action for interference with water rights**, 520

In general, 520

Proof of damages, 521

When and by whom action may be maintained, 520

Adverse possession, 518

Aliens, 497

**Application of water to beneficial use**, 500

Increased area of cultivation, 501

In general, 500

Place of application, 501

Use on wrong land by mistake, 501

Water must be used within reasonable time, 500

**IRRIGATION, *cont'd.*****Appropriation of water** (see *infra*, ABANDONMENT AND NON-USER; APPLICATION OF WATER TO BENEFICIAL USE; DIVERSION OF WATER; PRIORITY), 494

Aliens, 497

Application of entire flow of stream, 503

Enlargement of original use, 504

**Extent of right**, 502

Appropriation of entire flow of stream, 503

Enlargement of original use, 504

In general, 502

Right to bed and banks of stream, 505

Right to flow of tributaries, 505

Surplus water, 504

Use of water at certain periods, 504

Water must be used reasonably, 503

Filing map and statement of ditch, 502

Indians, 497

No right of appropriation against riparian owner, 496

Origin of doctrine of appropriation, 494

Ownership of land not essential, 497

Percolating waters, 496

Reasonable use, 503

Relation, 502

Right of appropriation, 494

Right to bed and banks of stream, 505

Right to flow of tributaries, 505

Riparian rights not affected by appropriation statutes, 496

State lands, 495

Subsurface streams, 496

Surplus waters, 504

To what lands applicable, 495

Use of same ditch by several appropriators, 513

Use of water at certain periods, 504

**What constitutes appropriation**, 497*Application of water to beneficial use*, see *infra*, APPLICATION OF WATER TO BENEFICIAL USE.

Construction of notice, 498

*Diversion of water*, see *infra*, DIVERSION OF WATER.

Doctrine of relation, 502

Filing map and statement of ditch, 502

In general, 497

Notice of appropriation, 497

Rights acquired by actual diversion without posting notice, 498

What water may be appropriated, 496

Who may make appropriation, 496

Arid land grants, 528

Arid states, 489

Artificial want, 489

*Beneficial use*, see *infra*, APPLICATION OF WATER TO BENEFICIAL USE.**Common law**, 487

Right to use water of natural stream, 487

Use must be reasonable, 487

Use of water for irrigation as natural or artificial want, 489

What constitutes reasonable use, 488

**Constitutional law**:

Taxation, 520

**Contracts**:

Contracts affecting water rights, 516

*Corporations*, see *infra*, IRRIGATION COMPANIES.

Deeds, 515

Definition, 487



**IRRIGATION, *cont'd.***

- Different systems of irrigation law, 490
- Districts, 527
- Ditches, see infra, IRRIGATING DITCHES.*
- Diversion of water, 498**
  - Diversion must be with intent to apply to beneficial use, 498
  - Must be diverted within reasonable time, 498
- Filing map and statement of ditch, 502
- Indians, 497
- Instrument, 528
- Irrigating ditches, 509**
  - Condemnation of right of way, 509
    - Assessment of damages, 511
    - Ditches on public domain, 511
    - Enlargement of ditch already constructed, 510
    - In general, 509
    - Right of condemnation limited, 510
    - Right of entry for construction or maintenance of ditch, 511
  - Damages from construction and maintenance, 512
    - Contributory negligence, 513
    - In general, 512
    - Lawful maintaining of ditch, 512
    - Negligence, 512
  - Ditches as property, 513
  - Property, 513
  - Right to construct ditches, 509
  - Use of same ditch by several appropriators, 513
- Diversion of water :**
  - Change of point or means of diversion, 500
  - Change of use, 499
  - Ditch constructed on public land, 500
  - Gradual application, 501
  - Mode of diversion immaterial, 499
  - Use of ditch constructed by another, 499
  - Use of natural ravine or channel, 499
- Irrigation companies, 521**
  - Acquisition of water rights, 523
  - By-laws, 523
  - Contracts for water, 524
  - Delay in making application for water, 524
  - Duty to furnish water to consumers, 523
  - In general, 521
  - Insufficiency of water supply as defense to action to compel delivery, 524
  - Irrigation districts, 527
  - Private irrigation companies, 522
  - Rates for use of water, 525
  - Regulations, 523
  - Transfer of stock, 526
- Judicial notice, 490
- Maintaining and condemnation, see infra, APPROPRIATION OF WATER; IRRIGATING DITCHES.*
- Natural want, 489
- Percolating waters, 496
- Priority, 505**
  - Adjudication of priorities and water rights, 508
  - Appropriation of water on public lands, 506
  - Elements to be considered, 509
  - Priorities under Acts of Congress, 506
  - Priority as between persons using water for different purposes, 506
  - Priority of right acquired by priority of appropriation, 505

**IRRIGATION, *cont'd.***

- Property (see *infra*, WATER RIGHTS CONSIDERED AS PROPERTY):**
  - Ditches as property, 513
- Property in water, 490
- Public use, 490
- Real property :**
  - Water rights, 514
- Reasonable time :**
  - Application of water to beneficial use, 500
  - Diversion of water, 498
- Reasonable use, 488, 503**
  - Reasonableness of use as determined by quantity of water consumed, 488
  - Total consumption unreasonable, 488
  - What constitutes at common law, 488
  - What is reasonable use dependent upon circumstances, 488
- Relation, 502
- Riparian rights, 491**
  - Appropriation statutes, 496
  - Diversion of water to nonriparian lands, 493
  - Grant of water right by riparian owner, 494
  - Measure of right, 492
  - Nature and extent, 492
  - Ownership in corpus of water of stream, 492
  - Priority right to bed and banks of stream, 505
  - Return of surplus water to channel, 493
  - Right annexed to soil, 493
  - Right limited to natural flow of stream, 493
  - To what extent doctrine in force, 491
- State control of irrigation, 490**
  - Water as public property, 490
    - Use of water for irrigation as public use, 490
    - Use of water subject to state control, 491
  - State control of natural flow, see infra, APPROPRIATION OF WATER.*
- Storage of water for irrigation purposes, 514
- Taxation, 520
- Water right, 487
- Water rights considered as property, 514**
  - Abandonment and nonuser, see infra, ABANDONMENT AND NON-USER.*
  - Action for interference with water rights, 520
  - Adverse user, 518
  - Contracts, 516
  - Conveyance of water rights, 515
  - Deeds, 515
  - Estoppel, 519
  - In general, 514
  - Loss of water right by estoppel, 519
  - Mode of conveyance, 515
  - Proof of damages, 521
  - Real estate, 514
  - Taxation, 520
- Water as public property, 490

**ISLANDS, 530**

- Accretions, 536
- Adverse possession, 535
- Definition, 530
- Grant, 533**
  - Construction of grant, 533
  - Grant of lands bounding on a river not navigable, 533
  - Grant of lands bounding on navigable waters, 534



**ISLANDS, *cont'd.*****Grant, *cont'd.***

- Grants by federal government, 534
- Grants by state, 534
- In general, 533
- Meander lines, 535
- Surveying and platting, 535
- Title acquired by grant, 533

**Guano islands, how title acquired to, 533****How title is acquired, 532**

- Adverse possession, 535
- By discovery, 533
- By grant, 533
- Grants by state, 534
- Meander lines, 535
- Title acquired by temporary occupancy for hunting or fishing, 535

**Meander lines, 535****Navigable waters, 530**

- Actual navigability test in some states, 531
- Common-law rule as to navigability, 531
- How title to islands determined in federal courts, 532
- Islands arising on soil owned by individual, 531
- Islands in large lakes, 53
- Property in islands, 530

**Platting, 535****Rights pertaining to ownership of island, 536****Riparian rights, 536**

- Pertaining to islands in great lakes, 536
- Pertaining to islands in navigable rivers, 536

**States:**

- Grants by state, 534

**Surveying, 535****Title to islands (see *infra*, How TITLE IS**

- ACQUIRED), 530
- Islands in large lakes, 532
- Navigable waters, 530
- Unnavigable waters, 532
- What waters are navigable, 531

**United States:**

- Grants by federal government, 534
- Unnavigable waters, 532

**ISSUABLE, 537****ISSUE, 537**

- At issue, 538
- Bank bills, 539
- In the sense of send out, 539
- Joinder of issue, 538
- Municipal bonds, 540
- Process, 539
- Questions arising on motion, 538

**ISSUE (DESCENDANTS), 542****Adopted children, 544****After, 565****At, 565****Bastards, 544*****Cy pres* doctrine, 554****Deeds, 548****Definite and indefinite failure of issue, 558****"After," 565****"At," 565****Before he has any issue, 561****Behind him, 564****Bequest of perishable goods, 571****Children, 562****Definite failure favored, 560****Devise to A. and her children, 563****Die under twenty-one and without issue, 566****ISSUE (DESCENDANTS), *cont'd.*****Definite and indefinite failure of issue, *cont'd.***

- Die unmarried or before marriage and without issue, 566
- Direction to pay money, 570
- Dying without issue in lifetime of person living at testator's decease or before possession or period of distribution, 568
- Effect of alternative limitations, 572
- Effect of power of appointment, 571
- Effect of word "then," 565
- Failure of issue confined to period of distribution or possession, 572
- Failure of testator's own issue, 571
- General rule, 558
- Gift over expressly limited to take effect on, at, or after decease of first taker, 565
- Gift over for life, 571
- Gift over if A. survives B. and dies without issue, or in case the issue die under age, 568
- Gift over to person named, 570
- Gift over to the survivors of persons then living, 568
- Indefinite failure of issue, 558
- Intention prevails, 560
- Issue alive, 561
- Issue surviving, 561
- Issue who shall attain twenty-one, 561
- Leaving no issue, 563
- "On," 565
- "Or" construed "And" 567
- Personal property, 561
- Personal trust, 570
- Statutes abolishing estates tail, 560
- Statutory changes, 572
- Supplying word "leaving," 564
- Without children, 561
- Without having issue, 561
- Without leaving issue, 563
- Without leaving issue behind him, 563
- Without leaving issue living at time of death, 564
- Words applied to both personalty and realty in same will, 564

**Definition, 543****Dying without issue (see *infra*, DEFINITE AND INDEFINITE FAILURE OF ISSUE; EFFECT OF LIMITATION OVER UPON PRECEDING LIMITATION):****When referred to prior objects, 555****In default of issue, 556****As to personalty, 556****As to realty, 556****Contingency, 557****Contingent gift, 556****Devise of reversion, 558****Devise to children in fee or in tail, 557****Devise to eldest son in tail, 557****Failure of issue of male, 557****In default of such issue, 555****In general, 555****Personalty, 555****Real property, 555****Dying without issue referred to death in lifetime of testator, 573****English cases, 574****General rule, 573****Not referred to death in lifetime of testator, 574****Survivorship, 573**



**ISSUE (DESCENDANTS), *cont'd.***

Effect of limitation over upon preceding limitation, 574

Devise to A. and his heirs, 575

Devise to A. for life, 576

Gift to issue by way of remainder, 576

Personalty, 576

Where failure of issue is definite, 577

Where failure of issue is indefinite, 574

**Issue construed children, 545**

Different meanings in same instrument, 546

In general, 545

Issue correlative with parent, 547

Issue explained by children, 545-546

Issue male and female, 547

*Limitation*, see *infra*, WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION.

On, 565

*Per capita* and *per stirpes*, 544

*Purchase*, see *infra*, WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION.

Statutes, 572

Stepchildren, 544

Then, 565

Unmarried, 567

**Whether Issue Is a Word of Purchase or Limitation, 548**

*Cy pres* doctrine, 554

Deeds, 548

Gift over upon indefinite failure of issue, 551

Issue compared with heirs of the body, 548

Issue *in esse*, 550

Limitation to A. and his issue, 548

Limitation to A. and his issue of personality, 550

Limitation to A. and his issue — when no gift over, 549

Limitation to A. for his life and after his death to his issue — when no gift over, 551

Marriage articles, 548

*Prima facie* a word of limitation, 548

When a word of purchase, 549

Wills, 548

Words of distribution alone, 553

Words of distribution and limitation, 551, 552

Words of limitation alone, 553

Words of limitation and definition, 543

Words of purchase, 543

*Words of purchase or limitation*, see *infra*, WHETHER ISSUE IS A WORD OF PURCHASE OR LIMITATION.

**IT**, 577

**ITEM**, 577

**ITEMIZED ACCOUNT**, 578

**ITINERANT**, 578

**JACTITATION OF MARRIAGE**, 578

**JAIL**, 578

**JAIL LIBERTIES**, 579

**JANITOR**, 579

**JAPANESE**, 579

**JAS.** 579

**JEALOUS EYE**, 579

**JEOFAILS**, 579

**JEOPARDY** (see FRAUD), 580

Accessory, 600

Arrest of judgment, 607

Defect in indictment, 591

**Assault:**

Assault and higher crimes comprehending it, 600

Assault and murder, 599

Conviction for assault, death supervening, no bar to prosecution for murder or manslaughter, 600

Assault and contempt, 602

Codefendant, 604

Collateral questions, 593

Concurrent jurisdiction, 588

Conflict of laws, 604

**Constitutional law:**

Federal provision not binding on states, 582

Statute authorizing resentence after reversal for error subsequent to verdict, 594

Statute providing for the enforcement of an existing judgment, 595

Continuing offenses, 603

Court, 586

Cumulative punishment, 583

Definition, 581

Desertion, 604

Disorderly house, 603

**Effect of jeopardy attaching, 583**

Acquittal before justice as bar to new trial on appeal, 584

In general, 583

State cannot secure a new trial after jeopardy has attached, 584

**Essential elements, 586**

Court of competent jurisdiction, 586

Courts of concurrent jurisdiction, 588

General rule, 584

Indictment, 588

Information, 588

Issue joined, 591

Judge incompetent by reason of relationship to defendant, 587

Justice of the peace, 587

Legally constituted jury impaneled and sworn, 592

Police court, 587

Statute creating or conferring jurisdiction upon court unconstitutional, 587

United States court, 587

Valid indictment or information, 588

Valid verdict, 585

Venue, 588

Exemplary damages, 583

Forfeiture, 583

Forged instrument, 598

**Fraud:**

Fraudulent procurement or discharge on insufficient bail, 594

Gambling and keeping a gambling house distinct crimes, 597

Gaming house, 603

History of doctrine of former jeopardy, 581

**Identity of offenses, 596**

Acquittal as principal no bar to prosecution as accessory, 600

Acts closely connected in point of time, 603

Aggravated assault, 600

Assault and contempt, 602

Assault and higher offenses comprehending it, 600



**JEOPARDY, *cont'd.*****Identity of offenses, *cont'd.***

- Conviction for manslaughter on an indictment for murder, 601
- Conviction of lower crime on prosecution for higher, 601
- Conviction of murder in the second degree on an indictment for murder in the first degree, 601
- Criminating evidence at trial for another offense, 598
- Forging and uttering forged instruments, 598
- Gambling and keeping a gambling house distinct crimes, 597
- Higher crime in felony and lower in misdemeanor, 601
- Indictments similar, but facts different, 598
- In general, 596
- Jeopardy of a codefendant, 604
- Manslaughter and murder, 600
- Murder and assault, 599
- Murder and manslaughter, 599
- One act constituting distinct crimes against different sovereignties, 604
- One act violating both a military and a general law, 605
- One act violating both a state law and a municipal ordinance, 605
- Prosecution for higher crime as bar to prosecution for lower, 598
- Prosecution for lower crime as bar to prosecution for higher, 599
- Prosecution for murder or manslaughter after conviction for assault and death of injured person, 600
- Riot and other offenses, 602
- Several prosecutions for single crime prohibited, 603
  - Continuing offenses, 603
  - Desertion, 604
  - Disorderly house, 603
  - Gaming house, 603
  - Indictment charging commission of offenses between specified dates, 604
  - Rule stated, 603
  - Sunday sales, 604
- Test of identity, 597
- Variance in facts alleged in the two indictments, 598
- Where one act includes several crimes, 602
- Where one crime includes another, 598

**Indictment or information, 588**

- Acquittal or verdict a bar regardless of validity of indictment, 591
- Acquittal under erroneous decision that indictment is defective, 591
- Arrest of judgment for defect in indictment, 591
- Conviction or acquittal on defective indictment, 590
- Defective indictment, 590-591
- Defective information or indictment, 588
- Demurrer sustained, 590
- Grand jury illegally organized, 588
- Indictment describing no offense known to the law, 589
- Judgment upon a verdict of guilty, 591
- Necessity of valid indictment or information, 588
- Nolle prosequi*, 590
- Partial endurance of punishment, 591
- Penalty indicted in full, 591

**JEOPARDY, *cont'd.*****Indictment or information, *cont'd.***

- Quashal or dismissal of indictment, 589
- Variance, 589
- Information, see *infra*, INDICTMENT OR INFORMATION.
- Intoxicating liquors :**
  - Conviction for selling liquor to minor as affecting liability for other offenses, 338
  - Effect of prior conviction or acquittal of same or similar offense, 384
  - Legislature authorizing municipality to impose additional penalties, 282
- Nuisances, 321
- Prior conviction of contempt, 325
- Sunday, 352
- Issue joined, 591**
  - Examples, 592
  - Necessity, 591
- Judge, incompetency of, 587
- Jurisdiction of court, 586
- Jury, 592**
  - Conviction or acquittal before a justice of the peace, 592
  - Necessity of a legally constituted jury, 592
  - Plea of guilty, 592
  - Submission to jury of question of capacity to commit crime, 593
- Justice of the peace, 584, 586, 587, 592
- Limitation of action, 594
- Murder, 599**
  - Conviction for manslaughter on conviction for murder, 601
  - Conviction of murder in the second degree on an indictment for murder in the first degree, 601
  - Manslaughter and murder, 600
  - Murder and assault, 599
  - Murder and manslaughter, 599
- New trial, 584
- Nolle prosequi, 590, 595**
  - Discontinuance resulting from a continuance *nisi*, 596
  - Effect of *nolle prosequi*, 595
  - Entry of *nolle prosequi* after jeopardy attaches, 595
  - Entry of *nolle prosequi* because of insufficient evidence, 595
  - Nolle prosequi* after disagreement and discharge of jury, 596
  - Penalties, 582
  - Police court, 587
  - Preliminary examination, 586
  - Preliminary questions, 593
  - Private and international law, 604
- Public officers :**
  - Removal of public officers, 583
- Punishment :**
  - Partial endurance of punishment, 591
- Sunday sales, 604
- To what classes of offenses the doctrine is applied, 582**
  - Applicability to actions for the recovery of statutory penalties, 582
  - Cumulative damages, 583
  - Cumulative punishment, 583
  - Forfeiture, 583
  - In general, 582
  - Proceedings for surety of the peace, 583
  - Proceedings *in rem*, 583
  - Removal of public officers, 583
  - United States court, 587
  - Variance, see *infra*, INDICTMENT:



**JEOPARDY, *cont'd.***

- Verdict, 585
  - Unforeseen occurrence making impossible the rendition of a valid verdict, 593
- Waiver of objection to a second jeopardy, 605
  - Acquittal directed at defendant's request for defect in indictment, 605
  - Arrest of judgment in jurisdiction where the judgment cannot be reversed, 608
  - Arrest of judgment in jurisdictions where the judgment of arrest may be reversed, 607
  - Conviction on some counts and acquittal on others, 608
  - Discharge of jury with defendant's consent, 605
  - Effect of arrest of judgment, 607
  - Failure to have defective verdict perfected, 605
  - Guilty of some offenses and silent as to residue, 608
  - In general, 605
  - Limitations of the waiver, 608
  - Motion to quash indictment, 605
  - Waiver after verdict, 606
  - Waiver not affected by partial service of sentence, 607
  - When a waiver will be implied after verdict, 606
  - Where verdict acquits in part and convicts in part, 608
  - Where verdict is silent as to part of offenses charged, 608
  - Withdrawal of plea of guilty, 605
- What constitutes a jeopardy, 584
  - Acquittal or conviction fraudulently procured, 593
  - Determination of preliminary or collateral questions, 593
  - Discharge under statute limiting the time within which the accused may be tried, 594
  - Effect of a *nolle prosequi*, 595
  - Explanations and qualifications of the rule, 593
  - Fraudulent procurement of discharge on insufficient bail, 594
  - General rule stated, 584
  - One preliminary examination no bar to another, 586
  - Preliminary examination before committing magistrate, 586
  - Rendition of valid verdict, 585
  - Statute authorizing resentence after reversal for error subsequent to verdict, 594
  - Statutes not unconstitutional as putting twice in jeopardy, 594
  - Statutes providing for the enforcement of an existing judgment, 595
  - Unforeseen occurrence making impossible the rendition of a valid verdict, 593
- Void warrant of arrest, 586
- When jeopardy attaches, 584
- Where magistrate may either try or commit, 586

**JET, 609**

**JETSAM, 609**

**JETTISON, 610**

- Deck cargo, 611, 612
- Definition, 610
- General-average adjustment, 611
  - Contribution for deck cargo, 611
  - In general, 611

**JETTISON, *cont'd.***

- Insurer's liability for goods jettisoned, 613
- Negligence of master, 613
- Title to property not lost by jettison, 613
- When justifiable, 611
  - For benefit of ship and cargo, 611
  - To save life, 611
  - Where the property is valueless or doomed to destruction from its own condition, 611
- Who may jettison, 610
  - Master, 610
  - Necessity for consultation, 610
  - Passenger, 611

**JEWEL, 613**

**JEWELRY, 613**

**JOB, 614**

**JOBBER, 614**

**JOCKEY, 614**

**JOIN, 614**

**JOINDER, 615**

**JOINT (see JOINT EXECUTORS AND ADMINISTRATORS), 615**

**JOINT ADVENTURES, 615**

**JOINT AND SEVERAL, 615**

**JOINT CREDITORS AND DEBTORS, 615**

**JOINT DEBTORS' ACT, 615**

**JOINT EXECUTORS AND ADMINISTRATORS, 616**

- Accounting, 634
  - Joint accounts, 634
  - Right to call each other to account, 635
  - Separate accounts, 634
- Actions, 630
  - Actions by and against third persons, 630
    - At law, 630
    - In equity, 631
    - In whose name brought, 631
    - Joinder, 631
    - Where action is against executors or administrators, 631
  - Actions *inter se*, 632
- Admissions, 625
- Arbitration, 622
- Bonds, 619
  - Joint bonds, 619
    - Effect of joint bond, 619
    - Relationship to surety, 619
    - When allowable, 619
    - Whether death of one party held not to discharge suretyship, 619
  - Separate bonds, 620
- Collection of assets, 621
- Compensation, 633
  - Division of commissions, 633
  - In general, 633
  - Special compensation for extra services, 633
- Compositions, 621
- Confession of judgments, 623
- Joinder of action, 630
- Joint administrators, 617
- Joint executors, 617
- Liabilities, 625
- Liability of, 620



**JOINT EXECUTORS, ETC., *cont'd.***

- Liability of one for Acts of others, 625**
  - Acquiescence or negligence contributing to breach of trust, 629
  - Acts done under authority of law, 628
  - Circumstances authorizing employment of agents, 628
  - Contributing to devastavits, 626
  - Effect of giving joint bond, 630
  - Effect of giving joint receipt, 629
  - Effect of making joint inventory, 630
  - Exceptions to general rule, 626
  - Executors who are also trustees, 626
  - General rule, 625
  - Joint acts, 630
  - Joint liability for joint acts, 630
  - Liability dependent on circumstances, 629
  - One not ordinarily liable for acts of others, 625
  - Passive conduct, 628
  - Payment of debt due from executor to estate, 627
  - Putting corepresentative in possession of assets, 626
  - Release of one where all are liable, 630
  - Representative not assuming to act, 628
  - Unnecessarily enabling corepresentative to obtain possession of assets, 627
- Limitation of action :**
  - Waiver of statute of Limitations, 624**
    - Acknowledgment of or promise to pay debts, 624
    - Admissions, 625
    - In general, 624
    - Payment of barred debts, 624
- Marriage of administratrix, 617
- Marriage of executrix, 617
- Mortgage, 621**
  - Discharge of mortgage, 621
- Necessity of contemporaneous appointment, 617
- Pledge, 621
- Powers, 620**
  - Admissions, 625
  - Collection of assets, 621
  - Compositions, 621
  - Confession of judgment, 623
  - Discharge of mortgages, 621
  - Distinction between acts done as executor and those done as trustee, 623
  - Distinction between assets derived from decedent and assets converted by representatives, 622
  - Distinction between executors and administrators, 622
  - Execution of powers under will, 624
  - Mortgage, 621
  - Pledge, 621
  - Presentation of claims against estate, 623
  - Promises, 625
  - Release of debts, 621
  - Sale of real estate under order of court, 623
  - Statutory provisions, 620
  - Waiver of statute of limitations, see infra,*
- LIMITATION OF ACTION:**
- Promises, 625
- Real property :**
  - Sale of real property under order of court, 623
  - Release, 621
  - Removal, 633

**JOINT EXECUTORS, ETC., *cont'd.***

- Sale of real property :**
  - Order of court, 623
  - Special proceedings, 632
  - Statutory provisions, 620
  - Survivorship, 618
  - Unity of estate, 618
- JOINT JUDGMENT, 635**
- JOINTLY, 615**
- JOINT NEGLIGENCE, 635**
- JOINT PARTIES, 635**
- JOINT RESOLUTIONS, 635**
- JOINT STOCK COMPANIES, 636**
  - Actions by and against joint stock companies, 643**
    - Actions in local jurisdictions, 643
    - In foreign jurisdictions, 644
    - Personal judgment against members, 644
    - Service of process, 644
    - Statutes, 643
    - Citizenship, 639
  - Corporations :**
    - Distinguished from corporations :**
      - Articles of association and charter, 639
      - Citizenship, 639
      - For purposes of taxation, 639
      - In general, 638
      - Jurisdiction of federal courts, 639
    - Definition, 636
  - Dissolution, 645**
    - By equitable proceedings, 645
    - By mutual consent, 645
    - By single ownership of all shares, 645
    - By terms of articles of association, 645
  - Dividends, 640
  - General nature, 636
  - Partnership, 637**
    - Distinguished from partnership, 637
  - Powers, rights and liabilities of members, 641**
    - As between themselves, 642
    - As to the public, 641
  - Power to take and convey real estate, 642
  - Real property, 642
  - Service of process, 644
  - Statutory regulation, 640**
    - England, 640
    - United States, 641
  - Taxation, 639
  - United States courts, 639

**JOINT TENANTS AND TENANTS IN COMMON, 646**

- Actions between cotenants, 699**
  - Action on case, 703
  - Assumpsit, 704
  - Ejectment, 700
  - Forcible entry and detainer, 700
  - In general, 699
  - Replevin, 700
  - Suits in equity, 704
  - Trespass *quare clausum*, 700
  - Trespass to try title, 704
  - Trover, 700
- Assumpsit, 704
- Attachment, 707
- Care, see infra,* EXPENSES FOR CARE AND MANAGEMENT.
- Champerly and maintenance, 682
- Confusion of goods, 664



**JOINT TENANTS, ETC., *cont'd.***

- Contracts, 672
  - Good faith required, 672
  - Leasing common property, 673
  - Liability of cotenants to strangers, 700
  - Licensing acts on common property, 674
  - Whether acts of one tenant in common are binding on cotenant, 672
  - With each other, 672
  - With third persons, 672
- Contribution, 679
  - Taxes, 686
- Conversion, 700
  - Action for negligent loss or destruction of common property, 703
  - Conversion of divisible property, 703
  - Cotenant liable for conversion of property, 701
  - Enjoyment of common property rendered impossible, 701
  - Exclusive appropriation of property, 700
  - Particular acts considered, 701
  - Sale of property as conversion, 702
- Conveyance, see *infra*, SALE OR CONVEYANCE OF COMMON PROPERTY.
- Corporations, 667
- Creation, 655
  - By destruction of joint estates, 656
  - Common law, 655
  - Deed, 655
  - Deeds of conveyance, 656
  - Devise to several persons to be divided between them, 656
  - In general, 655
  - Intention, 655
  - Will, 655
- Creation of estates in cotenancy (see *infra*, JOINT TENANCY; TENANCY IN COMMON), 653
  - At common law, 653
  - Favored by early common law, 653
  - General rule of construction, 653
  - Intention, 653
- Lapse of devise or legacy, 666
  - Where beneficiaries are joint tenants, 666
  - Where beneficiaries are tenants in common, 667
- Statutes, 654
- Under modern practice and statutes, 657
  - Constitutionality of statutes, 657
  - In general, 657
  - Joint tenancy, 658
  - Tenancy in common, 660
- Definitions, 648
- Destruction of property, see *infra*, LOSS, INJURY OR DESTRUCTION OF PROPERTY.
- Duties and liabilities, 685
  - As to rents and profits, see *infra*, RENTS AND PROFITS.
  - Expense for care and management, see *infra*, EXPENSES FOR CARE AND MANAGEMENT.
- Improvements, 687
- Liens and incumbrances, see *infra*, LIENS AND INCUMBRANCES.
- Losses, injury or destruction of property, see *infra*, LOSS, INJURY OR DESTRUCTION OF PROPERTY.
- Repairs, 687
- Taxes, 687
- Easements, 684
- Ejectment, 700
- Entireties, 652

**JOINT TENANTS, ETC., *cont'd.***

- Entry and possession of one for benefit of all, 669
- Equity, 704
- Estates in cotenancy distinguished from each other and from similar estates, 652
  - From each other, 652
  - From estates in parcenary, 652
  - From partnerships, 652
  - From tenancies by entireties, 652
- Execution, 707
- Expenses for care and management, 686
  - Expenses of litigation, 687
  - Improvements, 687
  - In general, 686
  - Personal services, 688
  - Repairs, 687
  - Taxes, 686
  - Taxes must have been paid in interest of other cotenants, 687
- Forcible entry and detainer, 700
- Good faith, 672
- Improvements, 687
- Incidents, 668
- Incumbrance, see *infra*, LIENS AND INCUMBRANCES; PURCHASE OF OUTSTANDING TITLE OR INCUMBRANCE.
- Injunction, 705
- Joint tenancy (see *infra*, ESTATES IN COTENANCY DISTINGUISHED FROM EACH OTHER AND FROM SIMILAR ESTATES):
  - Creation (see *infra*, CREATION OF ESTATES IN COTENANCY, 654)
    - Conveyance to cotrustees, 659
    - Deed, 654
    - Disseizin, 655
    - Express terms, 658
    - Gift to one and his children, 654
    - Gift with remainder over, 654
    - Illustrations, 658
    - In general, 654
    - Intention must be clearly shown, 658
    - Life insurance policy, 659
    - Personal property, 659
    - Where there is no intention to sever, 654
    - Will, 654
  - Definition, 648
  - Nature and incidents, 649
  - Right of survivorship, see *infra*, SURVIVORSHIP.
- Severance, 708
  - Agreement of cotenants, 709
  - Alienation of interest, 708
  - By act of joint tenant, 708
  - Course of dealing between cotenants, 709
  - Judicial alienation of share of cotenant, 710
  - Marriage, 709
  - Mortgage, 709
  - Partial severance, 710
  - Tenancy in common created by severance of joint tenancy, 710
  - Will, 709
  - Unity of interest, 649
  - Unity of possession, 649
  - Unity of time, 649
  - Unity of title, 649
- Judgment liens, 784
- Jus accrescendi*, see *infra*, SURVIVORSHIP.
- Lapse of devise or legacy, 666
  - Where beneficiaries are joint tenants, 666
  - Where beneficiaries are tenants in common, 667



**JOINT TENANTS, ETC., *cont'd.***

- Leases, 673
- Legacies and devises*, see *infra*, LAPSE OF DEVISE OR LEGACY,
- Liabilities*, see *infra*, DUTIES AND LIABILITIES.
- Liabilities of cotenants to strangers, 706**
  - Attachment, 707
  - Contract, 706
  - Execution, 707
  - In general, 706
  - Levy and sale, 708
  - Sale of entire property by sheriff as conversion, 708
  - Tort, 707
- Licenses, 674
- Liens and incumbrances, 685**
  - Cotenants surety for each other, 685
  - In general, 685
- Lien for rents and profits, 697
  - On account of purchase money, 685
- Limitation of action, 696
- Loss, injury or destruction of property, 697**
  - In general, 697
  - Removal of ore or other mineral, 699
  - Waste, 698
- Mortgage made by two or more persons, 666
- Nature and incidents of estates in cotenacy, 649**
  - Joint tenancy, 649
  - Tenants in common, 651
- Parcenary, 652
- Partition, 706
- Partnership, 652**
  - Tenants in common, 664
- Powers**, see *infra*, RIGHTS AND POWERS.
- Profits**, see *infra*, RENTS AND PROFITS.
- Purchase of outstanding title or incumbrance, 674**
  - Contribution, 679
  - General rule, 674
  - Purchase after expiration of period of redemption, 677
  - Purchase at judicial sale, 676
  - Purchase before cotenancy began, 679
  - Purchase by cotenant holding adversely, 678
  - Purchase by husband or widow of cotenant, 678
  - Purchase by one inures to benefit of all, 674
  - Purchase in name of third person, 676
  - Purchase of interest of cotenant, 678
  - Purchase of outstanding title after termination of cotenancy, 678
  - Purchase of tax title, 677
  - Rule qualified as to tenants in common, 675
- Receiver, 706
- Rents and profits, 688**
  - Accounting in equity, 695
  - Common law, 688
  - General rule applicable to lessee of cotenant, 692
  - In general, 688
  - Lien, 697
  - Limitation of action, 696
  - Measure of accountability, 695
  - Occupation under claim of exclusive ownership, 695
  - Occupying tenant accountable for use and occupation, 691
  - Occupying tenant not liable for profits arising solely from his own expenditure, 692

**JOINT TENANTS, ETC., *cont'd.***

- Rents and profits, *cont'd.***
  - Property unoccupied, 690
  - Set-off and counterclaim, 696
  - Statutory liability between cotenants, 688
  - Where cotenant has been ousted, 694
  - Where occupying tenant sustains relation of trust towards cotenant, 692
  - Where premises are leased to stranger, 693
  - Where premises are occupied by one cotenant and there is no agreement to pay rent, 690, 693
- Repairs, 687
- Replevin, 700
- Rights and powers, 669
- Rights and powers** (see *infra*, CONTRACTS; PURCHASE OF OUTSTANDING TITLE OR INCUMBRANCE; SALE OR CONVEYANCE OF COMMON PROPERTY):
  - Assailing common title, 680
  - As to use and enjoyment of common property, 669
  - Care of common property, 671
  - Good faith, 672
  - Insurance of separate interest, 671
  - Lawful use and enjoyment, 671
  - Management of common property, 671
  - Use and enjoyment of personal property, 670
  - Use and enjoyment of stranger claiming under cotenant, 671
- Rights of cotenants against strangers, 706
- Sale or conveyance of common property, 680**
  - Devise of joint tenant's share, 682
  - Grant of specific right or easement, 684
  - Levy of execution, 683
  - Meies and bounds, 682
  - Of one's own interest, 681
  - Of whole property, 680
  - Reservation of specific interest, 685
  - Tenant not in possession, 682
  - Undivided share, 681
- Set-off and counterclaim, 696
- Severance of cotenancy** (see *infra*, JOINT TENANCY):
  - Partition, 712
  - Tenancy in common, 711
- Shipowners, 665
- Survivorship, 649**
  - Choses in action, 650
  - Doctrine abolished by statute, 650
  - In general, 649
  - Joint tenancy, 649
- Taxes, 686
- Tenancy in common** (see *infra*, ESTATES IN COTENANCY DISTINGUISHED FROM EACH OTHER AND FROM SIMILAR ESTATES), 651
  - Created by severance of joint tenancy, 710
  - Creation** (see *infra*, CREATION OF ESTATES IN COTENANCY), 660
    - Confusion of goods, 664
    - Conveyance of interest in land to be selected by grantee, 663
    - Conveyance of several interests, 660
    - Conveyance of undivided interest by acreage, 663
    - Descent, 661
    - Execution by two creditors, 665
    - Grant or conveyance of same property to several persons, 666
    - In general, 660
    - Joint owners of patent rights, 660



**JOINT TENANTS, ETC., *cont'd.*****Tenancy in common, *cont'd.*****Creation, *cont'd.***

Land patented to two or more persons, 665

Mortgage made to two or more persons, 666

Partnership, 664

Purchase of undivided interest in property, 661

Purchaser of undivided share succeeds to rights of vendor, 662

Raising crops on shares, 663

Redemption of land, 665

Shopowners, 665

Widow and heirs at law, 665

Definition, 649

Equality of interest, 651

In general, 651

Recovery of property by stranger, 712

Severance, 711

Severance by agreement, 711

Severance by one cotenant, 712

**Title (see *infra*, PURCHASE OF OUTSTANDING****TITLE OR INCUMBRANCE):**

Assailing common title, 680

Trespass *quare clausum*, 700

Trespass to try title, 704

Trover, 700

Unity of possession, 668, 649

Waste, 698

**What property may be held in cotenancy, 668**

Equitable estate, 668

Mining and water rights, 668

**Who may be cotenants, 667**

Corporations, 667

Husband and wife, 668

In general, 667

Partners, 668

**JOINT TORTFEASORS, 712****JOINT TRESPASS, 712****JOINTURE, 712****JOURNAL, 713****JOURNEY, 713****JOURNEYS ACCOUNT, 713****J. P., 713****JR., 713****JUBILEE, 713****JUDEX, 713****JUDG., 713****JUDGE (see JUDGMENTS AND DECREES), 714****Adjournment, 723**

Authority of judge over jury after adjournment of court, 724

**Attendance on trials, 719**

Absent without consent is ground for new trial, 720

Change of judges during trial, 721

Duty of presiding judge to be present, 719

Effect of absence in civil trials, 720

Effect of absence in criminal trial, 720

Effect of absence in trials for misdemeanor, 720

Judges essential to constitute court, 719

New trial granted notwithstanding consent of aggrieved party, 721

Present during argument, 719

Right to change seat in court room, 719

**JUDGE, *cont'd.*****Bill of exceptions, 722**

Duty with regard to, 722

Settlement, 722

Signature, 722

**Chambers, 723**

Authority of judge over jury after adjournment of court, 724

Definition, 723

Jurisdiction incidental to jurisdiction of court, 723

Jurisdiction limited by that of court to which judge belongs, 724

Powers regulated by statute, 724

**Change of judges during trial, 721****Constitutional law:**

Legislative authority over powers and duties, 000

**Coroner, 727****Court, 717***Decision*, see *infra*, OPINIONS.**Definition, 716****Delegation of power, 717****Disqualification of Judges, 732**

Attorney, 733, 739

Constitutional or statutory grounds exclusive, 740

**Counsel, 733, 739**

Application of the rule, 740

Disqualification by reason of relationship of attorney and client, 739

Extent of disqualification, 740

General rule, 739

Reason for the rule, 739

**Degree and nature of disqualifying interest, 740**

Degree of interest immaterial, 740

Interest affecting individual rights of judge, 741

Nature of disqualifying interest, 741

Pecuniary or property interest, 741

**Effect of judgment, 742**

Collateral attack on such judgment, 743

Effect of judgment of disqualified judge at common law, 742

Judgment voidable merely, 742

Statutes, 742

Void or voidable, 742-43

Waiver of objection, 743

Whether judgment may be validated by consent or waiver, 742

**Exhibition of partisan feeling, 738****General principle, 732**

Grounds of disqualification, 733

**Interest, 734**

In general, 734

Interest in decedent's estates, 735

Interest must be present, 735

Judge may not act in cause in which he is interested, 734

Party, 737-736

Relationship, 736

Relationship degree, 737

Relationship to stockholder, 735

Resident, 735

Stockholders, 734

Taxpayer, 735

Where judge is a party, 736

**Interest as ground for disqualification, 732-33**

Judge in court below, 740

Legislature cannot confer power to act as judge in one's own cause, 733



**JUDGE, *cont'd.*****Disqualification of judges, *cont'd.***

- Mandamus to compel transfer of cause, 745
- Mandamus to judge improperly refused, 745
- No man may act as judge in his own cause, 732
- Party, 736-737
- Powers of disqualified judge, 744.**
  - Necessity authorizing judge to act, 744
  - Power to make formal orders, 744
- Prejudice, 738
- Relationship, 733, 736**
  - Affinity removed by death, 738
  - Construction of term "party," 737
  - Degree of relationship, 737
  - In general, 736
- Right of disqualified judge to retire of his own motion, 745
- Statutory grounds, 733
- Unnecessary expression of opinion, 738
- Fraud, 726
- Instruction, 721

**Judicial acts and opinions, 725**

- Acts and opinions not within jurisdiction, 728**
  - Acts in absence of jurisdiction, 729
  - Acts in excess of jurisdiction, 728
  - Attachment cases, 731
  - Good faith as a test, 731
  - Intendment in favor of jurisdiction, 729
  - Judge acting without jurisdiction liable as trespasser, 730
  - Judges of courts of superior or general jurisdiction, 728
  - Judges of inferior courts, 729
  - Liability for acting upon insufficient affidavits or complaints, 730
  - Liability for actions under statutes subsequently declared unconstitutional, 730
  - Liability for want of jurisdiction over person, process or subject matter, 730
  - Mistake of fact, 731
  - No presumption in favor of jurisdiction of inferior courts, 729
  - View that judges are not liable for acts in excess of jurisdiction, 731
- Exemption applies to all judges acting within jurisdiction, 727
- Liability for fraud and corruption, 726
- Liability for judicial acts and opinions within jurisdiction, 725
- Liability for slanderous words, 727
- No liability for error of judgment in acting or failing to act, 726
- Reason for exemption, 727
- To what judges is the rule applicable, 727
- What are judicial acts, 728

**Jurisdiction (see *infra*, JUDICIAL ACTS AND OPINIONS; JURISDICTION):**

- Chambers, 723
- Disqualification of, 1066
- Power to review decisions of other judges of coordinate jurisdiction, 718

**Jury and jury trial:**

- Authority of judge over jury after adjournment of court, 724

Justice, 716, 727

**Legislative authority over, 717**

- Authority to confer upon a party to a controversy power to act as judge in his own cause, 733

**JUDGE, *cont'd.*****Legislative authority over, *cont'd.***

- Imposition of ministerial duties, 717
- Power to grant judicial functions to other than regular judges, 718
- Power to impose nonjudicial functions, 717
- Right to require opinions of judges, 718
- Liability for slander, 727
- Liability of judges for acts and opinions, see infra, JUDICIAL ACTS AND OPINIONS; MINISTERIAL ACTS.*

**Ministerial acts, 731**

- Liability in general, 731
- What are ministerial acts within meaning of rule, 732
- Misrepresentations of counsel, 721

**New Trial:**

- Absence, 720-721
- Duty to hear motion for new trial, 723

**Official acts and opinions:**

- Coroners, 727
- Justices of the peace, 727

**Opinions, 721**

- Duty to syllabize opinions, 721
- Necessity for written opinions, 721

Personal nature of judge's duty, 717

Powers and duties during trial, 718

Powers and duties in general, 717

**Review:**

- Power to review decisions of other judges of co-ordinate jurisdiction, 718

Slander, liability for, 727

**Special or substitute judges, 745**

- Constitutional provisions, 746
- Definition, 745
- Oath of special judge, 748
- Powers of special judge, 748
- Proof of authority, 750
- When special judges *cin act*, 747
- When special judges cannot act, 747

Statement, appeal, 723

**Witnesses:****Judges as witnesses, 724**

- Cases in which judge may be a witness, 725
- To prove testimony of witnesses, 725
- When essential members of court, 724
- When not essential to composition of court, 725
- Whether court loses jurisdiction, 725

Witnesses, right to question, 721

Written opinion, 721

**JUDGMENT LIENS, 768****Amount of Lien, 788**

- Costs, 788
- In general, 788
- Interest on judgment, 788

Choses in action, 788

**Commencement and precedence of Lien (see *infra*, EXPIRATION OR EXTINGUISHMENT OF LIEN), 790**

- After-acquired property, 797
- Contest between judgment creditor, 797
- Contest between judgment creditor and purchaser, 797
- Doctrine of relation, 793
- Effect of release or waiver of lien on one parcel, 792
- Equitable interests, 797
- Execution, 795
- Fraudulent conveyances, 797
- Future advances, 798
- In general, 790



**JUDGMENT LIENS, *cont'd.*****Commencement and precedence of lien, *cont'd.***

- Issuance of execution, 795
- Judgment and conveyance on same day, 794
- Judgment lien not defeated by subsequent mortgage, 791
- Judgment lien not divested by subsequent conveyance, 791
- Lands alienated in parcels to be subjected to lien in inverse order of alienation, 792
- Lands sold contemporaneously, 793
- Mortgage and judgment, 795
- Order of subjection of lands conveyed in parcels, 792
- Priority as affected by issuance of execution, 795
- Priority by fractional part of a day, 794
- Priority of lien in some specific instances, 797
- Purchase money, 798
- Superior rights of third persons, 798
  - In general, 798
  - Judgment debtor as mere conduit to pass title, 799
  - Lands instantaneously seized, 799
  - Nunc pro tunc* entry, 800
  - Purchase money mortgage, 800
  - Recording acts, 799
- Confession of judgment, 771
- Conflict of lease, 788
- Default judgment, 771
- Deficiency judgment or decree, 772

**Docketing or recording judgment, 772**

- Decrees, 772
- Effect of actual notice of undocketed judgment, 773
- In general, 772

**Irregularities in docketing or indexing, 775**

- Abbreviation of Christian name, 776
- Error as to amount of judgment, 777
- In general, 775
- Misspelling of surname, 776
- Mistake in Christian name, 776
- Omission as to name of party to judgment, 775
- Omission of Christian name, 775
- Omission of middle initial, 776

**Judgments of federal courts, 774****Justice's judgments, 774**

- Necessity of docketing as against subsequent purchaser, 773
- Necessity of docketing as between judgment creditors, 773
- Statutes requiring judgments to be docketed, 772

**Equity of redemption, 779****Expiration or extinguishment of lien, 800**

- Appeal, 806
- Bankruptcy, 808
- Effect of division of old county into new, 808
- Entry of satisfaction, 805
- Expiration of statutory period, 800
  - As between debtor and creditor, 801
  - In general, 800

**Extension of lien, 802**

- Agreement, 804
- Appeal, 803
- Death of judgment debtor, 804
- Execution within specified time required for continuance of lien, 802
- Injunction, 803

**JUDGMENT LIENS, *cont'd.*****Expiration or extinguishment of lien, *cont'd.*****Extension of lien, *cont'd.***

- Issuance of execution, 802
- Judgment entered with stay of execution, 803
- Proceedings operating to stay execution, 802
- Revivor of judgment, 804
- Statute of limitations suspended, 803
- War, 804
- Writ of error, 803
- Imprisonment on *capias ad satisfaciendum*, 806
- In general, 800
- Injunction, 807
- Levy on personalty, 806
- Mortgage, 808
- Payment, 808
- Release, 805
- Reversal or cancellation of judgment, 807
- Sale of lands under execution, 806
- Stay of execution, 807
- Writ of error, 806

**Extension of Lien, see *infra*, EXPIRATION OR EXTINGUISHMENT OF LIENS.****Extinguishment of lien, see *infra*, EXPIRATION OR EXTINGUISHMENT OF LIEN.****Fraudulent conveyances, 797****Fraudulent sales, 784****Indexing:****Irregularities in docketing or indexing, 775**

- Abbreviation of Christian name, 776
- Error as to amount of judgment, 777
- In general, 775
- Misspelling of surname, 776
- Mistake in Christian name, 776
- Omission as to name of party to judgment, 775
- Omission of Christian name, 775
- Omission of middle initial, 776

**Indexing judgment, 774**

- Actual notice as substitute for indexing, 775
- Date of index, 774
- In general, 774
- Jurisdiction requiring judgments to be indexed, 774

**Interest subject to lien, 777****Joint tenants and tenants in common, 784****Leases, 783****Oil or mining license, 788****Legislative control over lien, 770****License:**

- Oil or mining license, 788
- Life estate, 782
- Mining license, 788

**Municipal corporations, 786****Naked legal title, 778****Name:**

- Omission or mistake as to name of party to judgment, 775
- Nature of the lien, 770
- Nunc pro tunc* entry, 800
- Origin and history, 768
  - In general, 768
  - United States courts, 769
- Writ of *elegit* and statutory judgment lien, 769

**Personal estate, 787**

- Choses in action, 788
- Judgment not a lien on personalty, 787
- Oil or mining license, 788



**JUDGMENT LIENS, *cont'd.***

Power of appointment, 780

**Prerequisites as to judgment or decree (see *infra*, DOCKETING OR RECORDING), 771**

Decree, 771

Decree of foreclosure of mortgage, 772

Deficiency judgment or decree, 772

Finality of judgment, 771

Indexing, 774, 775

In general, 771

Judgment at law, 771

Judgment must be for definite sum of money, 771

*Priority*, see *infra*, COMMENCEMENT AND PRECEDENCE OF LIEN.

Private international law, 788

**Real estate, 777**

Contingent remainders, 783

Devises, 784

Effect of judgment against vendor after payment of another purchase price, 781

Equitable interests, 778

Equitable interests in chancery, 779

Equitable liens are equitable interests, 779

Equity of redemption 779

Estates of decedents, 785

Executors and administrators, 785

Fraudulent sales, 784

Homesteads, 786

In general, 777

Interest of *cestui que trust*, 779

Interest of grantor in deed of trust, 779

Interest of vendee, 782

Interest of vendor, 780

Lands belonging to municipality, 786

Lands held by tenancy in common, 784

Lands in hands of fraudulent grantee, 784  
Lands subject to power of appointment, 780

Leaseholds, 783

Life estates, 782

Naked legal title, 778

Partnership realty, 786

Remainders, 783

Rents and profits, 787

Reversionary interests, 783

Right of redemption from sheriff's sale, 786

Subsequently acquired realty, 787

Vendor and purchaser, 780, 782

*Recording*, see *infra*, DOCKETING OR RECORDING JUDGMENTS.

Relation, 793

Remainders, 783

Retroactive statutes, 770

*Termination*, see *infra*, EXPIRATION OR EXTINGUISHMENT OF LIEN.**Territorial extent, 788**

Judgments in federal courts, 790

Judgments in state courts, 788

Trustees and *cestui que trusts*, 779

United States courts, 790

Territorial extent, 790

Vendor and purchaser, 780, 782

**JUDGMENT NOTES, 752**

Definition, 752

In whose favor judgment may be confessed, 753

Negotiable, 753

No confession where debt outlawed, 755

Whether note must mature, 753

Whether warrant must be distinct from notes, 752

**JUDGMENTS (see JUDGMENTS AND DECREES; JUDGMENT NOTES):****Disqualification of judges, 742**

Collateral attack on such judgment, 743

Effect of judgment of disqualified judge at common law, 742

Judgment voidable merely, 742

Statutes, 742

Void or voidable, 742-743

Waiver of objection, 743

Whether judgment may be validated by consent or waiver, 742

**Intervention:**

Effect of judgment on intervener's rights, 186

**Intoxicating liquors:**

Status of judgment for price of liquors, 314

**Protection afforded by judgment or decree of sale:**

Reversal or vacation of judgment does not invalidate sale nor divest title of purchaser, 1017

*Vacation*, see JUDGMENTS AND DECREES.**Amendment after term at which rendered, 816****JUDGMENTS AND DECREES (see JUDGMENTS; JUDGMENT LIENS):**

Amendment as to method of payment, 822

As to matters of form, 818

As to matters of substance, 816

Correction of clerical errors or misprisions, 820

Effect of amendment as to third persons, 823

Entry may be amended or corrected so as to conform to judgment actually rendered, 818

Erroneous or omitted description of land, 821

Error in description of parties or attorney, 821

Evidence to procure amendment, 822

Mistake as to parties, 821

Mistake in amount, 820

Mistake in calculation, 821

Mistake in date, 820

Order allowing amendment should provide for protection of intervening rights, 824  
Rights of third persons protected without express reservation, 824

Rule applies only to final judgments, 817

Strained application in the interest of justice, 822

Striking out erroneous entries, 820

Supplying omissions, 820

Control of court over judgments during term at which rendered, 813

*Appeals*, see *infra*, DIRECT ATTACK BY APPEAL OR WRIT OF ERROR.*Arrest of judgment*, see ARREST OF JUDGMENT.**Assignment of judgments, 872**

Assignability at common law, 872

In equity, 873

Right to use assignor's name, 873

Whether assignee can proceed in his own name, 872

Whether legal title passes, 872

Assignability under statute, 873

**Assignee taking subject to equities:**

Assignee charged with inspection of record, 885

Effect of assignment on right of set-off, 885



**JUDGMENTS AND DECREES, *cont'd.*****Assignment of judgments, *cont'd.***

Assignee taking subject to equities, *cont'd.*  
Equities arising from other transactions, 885

Estoppel of debtor to set up equity, 885  
General rule, 884

Secret equities of third persons, 885

What equities not within the rule, 885

Attorney, 876

**Effect of assignment, 881**

Assignee's title no better than assignor's, 883

Assignee taking subject to equities, 884

Assignor loses control of judgment, 882

Debt, 882

Effect of reversal or vacation after assignment, 885

Foreign states, 881

Good faith in assignment, 884

Implied warranty, 881

In general, 881

Purchase for less than face value, 884

Statutes, 881

What rights do not pass, 883

What rights pass with assignment, 882

**Equitable assignments, 877**

Common law, 873

Executory agreement to assign, 878

Intent of parties, 877

Irregularities or informalities, 877

Necessity for proof of assignment, 878

No particular form necessary, 877

Order to creditor's attorney, 878

Parol assignment, 878

Parol evidence to show intent, 879

Partial assignment, 875

Proof of assignment, 878

Recording, 878

Sale under execution, 879

Statutes not exclusive of equitable assignments, 877

Form of assignment, 876

**Future judgment, 874**

Where cause assignable, 874

Where cause not assignable, 874

**Implied warranty, 881**

Assignment without recourse, 881

No warranty of payment, 882

That judgment subsisting and unpaid, 881

**Judgment for tort, 874**

Method and form of assignment, 876

**Notice of assignment, 879**

Duty of sheriff after notice of assignment, 881

Effect of assignment on record, 880

Effect of notice to judgment debtor, 880

Necessity for, 879

Payment to third persons, 880

Rights of judgment debtor before notice, 879

What constitutes notice to judgment debtor, 880

**Partial assignment, 874**

Change of legal title, 874

Equitable assignment, 875

Necessity for judgment debtor's consent, 874

Process must follow judgment, 875

Power of attorney, 876

Set-off, 885

Statutes, 873

**JUDGMENTS AND DECREES, *cont'd.*****Assignment of judgments, *cont'd.***

Statutes not exclusive of equitable assignments, 877

Statutory assignments, 876

What judgments assignable, 872

Whether operative as assignment or conveyance, 764

**Who may assign, 875**

Attorney, 876

Bank, 876

In general, 875

Person having beneficial interest, 875

**Codes :**

Definition, 762

**Collateral attack (see *infra*, DIRECT ATTACK BY APPEAL OR WRIT OF ERROR), 848**

Definition, 848

Fraud, 848

Grounds of attack, 848

Parties or privies, 848

Stranger, 849

**Confession of judgments, 765**

Affidavit, 767

Agent or attorney, 766

At common law, 765

By whom confession may be made, 766

Confession must be for debt due or to become due, 765

Confession must be for sum certain, 765

Contingent liabilities, 766

Corporation or partnership, 766

For what claims confession may be made, 765

Future advances, 765

Joint debtor, 766

Lien, 771

Married women, 766

Necessity of assent of creditor, 767

Statement, 767

Statutory confession of judgment without action, 765

Time and place of making confession, 767

Torts, 766

Under statutes, 765

**Contracts :**

Whether a judgment is a contract, 763

**Control of court over judgments during term at which rendered, 813**

Duration of term, 815

In general, 813

Power to amend, open, or vacate, 813

Proceedings commenced during term but continued to subsequent term, 815

Setting aside judgment after appeal perfected or bill of exceptions taken, 815

To what cases the power extends, 815

To what errors, 815

To what power may be exercised, 815

**Courts, see *infra*, CONTROL OF COURT OVER JUDGMENTS DURING TERM AT WHICH RENDERED.****Decrees :**

Definition, 762

**Default :**

Judgment lien, 771

Default judgments, 767

Definition, 762

**Direct attack by appeal or writ of error, 808**

Awarding damages against unsuccessful party, 811

Costs, 812



**JUDGMENTS AND DECREES, *cont'd.***Direct attack by appeal or writ of error, *cont'd.*

Costs usually adjudged prevailing party, 813

Discretion of appellate court in regard to costs, 812

Effect of affirmance or dismissal of appeal or writ of error, 811

Effect of modification, 811

Effect of reversal, 808

Direction by appellate court as to proceedings to be had or judgment to be rendered in trial court, 809

In general, 808

Purchase by judgment creditor, 810

Rendition of final judgment by appellate court, 809

Rights of third persons, 810

Vacation or annulment of judgment, 809

Voluntary purchase from party, 810

Where property has been taken under judgment, 810

In general, 808

*Discharge*, see *infra*, SATISFACTION AND DISCHARGE.

Entry of judgments, 768

*Equitable assignments*, see *infra*, ASSIGNMENT OF JUDGMENTS.

Equitable relief against judgments, 850

**Estoppel**, 768

Conclusiveness as memorial of legal proceedings, 768

*Res judicata*, 768*Executions*, see *infra*, SATISFACTION AND DISCHARGE.**Fraud:**

Collateral attack, 849

*Implied warranty*, see *infra*, ASSIGNMENT OF JUDGMENTS.*In rem* and *in personam*, 763*Judgments by confession*, see *infra*, CONFESION OF JUDGMENTS.**Jurisdiction:**

Opening and vacating judgments, 840

Jurisdiction to open or vacate judgments, 842

**Kinds of judgments and decrees**, 763Distinctions between judgments *in rem* and judgments *in personam*, 763

Domestic and foreign judgments distinguished, 763

Final and interlocutory judgments distinguished, 763

In general, 763

Orders, 763

*Lien*, see JUDGMENT LIEN.**Limitations:**

Opening and vacating judgment, 843

Opening and vacating judgments, 840

*Medium of payment*, see *infra*, PAYMENT.

Modification, 811

*Notice of assignment*, see *infra*, ASSIGNMENT OF JUDGMENTS.**Opening and vacation** (see *infra*, CONTROL OF COURT OVER JUDGMENTS DURING TERM AT WHICH RENDERED):

Effect of reversal or vacation after assignment, 885

**Opening and vacation of judgment after term at which rendered**, 824

Absence of defendant, 836

Appeal, 845, 848

Attorney appearing without authority, 836

**JUDGMENTS AND DECREES, *cont'd.*****Opening and vacation of judgments after term at which rendered, *cont'd.***

Attorney's mistake or neglect, 833

Burden of proof, 843

Casualty, 834

Chambers, 843

Collusion, 827

Consent judgment, 826

Corporation's right to relief, 834

Costs, 830

Counterclaim, 838

Defenses available at trial, 838

Disabilities of defendant, 837

Discretion of court, 844

Distinction between opening and vacation, 825

Error, 838

Excusable neglect, 831

Exercise of discretion not disturbed unless abuse clearly appears, 845

Fraud, 827

Fraud or collusion must be clearly shown, 828

General rule against opening or vacation, 824

Grounds upon which judgments may be opened or vacated, 825

Imposition of terms, 847

Improper conduct, 828

Inadvertence, 831

Instances of excusable neglect, 832

Invalidity not apparent on face of record, 826

Irregularities, 828

Judgment against party dead at time of rendition, 837

Judgment against several defendants may be vacated as to those not served, 835

Judgment contrary to agreement, 835

Judgment entered without authority, 837

Judgment for *bona fide* debt, 837

Judgment on verdict, 834

Judgment rendered without jurisdiction, 825

Jurisdiction to open or vacate, 842

Meritorious defense, 846

Misfortune, 834

Mistake, 830

Mistake of law, 831

Mistake or neglect of attorney, 833

Necessity of showing a meritorious defense, 846

Newly discovered evidence, 835

Notice, 843

Opening and vacating judgment, 842

Party represented by counsel, 832

Perjury, 828

Pleadings not warranting judgment, 838

Presumption of regularity, 830

Reversal of foreign judgment on which judgment is based, 837

Sickness of party or attorney, 835

Striking void judgment from records, 842

Submission of parties to jurisdiction, 838

Surprise, 831

Technical defense not sufficient, 846

**Time for applying**, 840

Application for relief must be made within the time limited, 841

Delay sufficient to bar relief, 841

Diligence, 841

In the absence of statute, 841



**JUDGMENTS AND DECREES, *cont'd.***

Opening and vacation of judgments after term at which rendered, *cont'd.*

Time of applying, *cont'd.*

Limitation running from adjournment of term, 841

Limitation running from notice of judgment, 841

Limitation running from rendition of judgment, 841

Limitations not applicable to applications based on grounds not statutory, 840

Requirement of diligence, 841

Rule as to void judgments, 842

Statutes limiting time for application on grounds not statutory, 841

Under statutes, 840

When statutory period begins to run, 841

Where party had no notice of judgment, 842

Unauthorized appearance by attorney, 836

Unauthorized entry, 837

Unavoidable casualty or misfortune, 834

Void judgment may be vacated, 825

Want of notice, 835

Where the judgment is void, 847

Who may apply for opening or vacation, 839

Assignee of interest, 840

General rule, 839

Judgment creditors, 839

Legal representatives of party, 840

Limitations of the general rule, 839

Party in whose favor judgment rendered, 840

Person not a party may apply for opening at vacation of judgment injuriously affecting his rights, 839

Stranger to record, 839

Subsequent purchaser or mortgagee, 839

Orders, 763

Part payment, see *infra*, PAYMENT.

Payment:

Effect of part payment, 864

Additional consideration, 865

Common-law rule, 864

Costs, 864

Failure of consideration, 865

Release under seal, 865

When rule not applicable, 864

Effect of payment, 862

Absolute satisfaction, 862

Cumulative judgment, 863

Cumulative judgment against different persons for same cause, 863

Cumulative judgment against same person for same cause, 863

Judgment cannot be kept alive, 863

Payment by one of joint debtors, 863

Release of one debtor allowed by statute, 863

Release of one joint debtor releases all, 863

Subrogation 864

When made by one primarily liable, 862

Where several joint debtors, 863

Evidence of payment, 865

Burden of proof, 866

Parol evidence, 866

Receipt, 866

Record entry, 865

**JUDGMENTS AND DECREES, *cont'd.***

Payment, *cont'd.*

Medium of payment, 861

Acceptance under express agreement, 861

Banknotes, 862

Negotiable instrument, 861

Where payment is to attorney or officers, 862

Where payment to judgment creditor, 861

Part payment:

Rebuttal of presumption of payment, 867

Presumptions, fee *infra*, SATISFACTION AND DISCHARGE.

Satisfaction and discharge, 862

Subrogation, 864

Tender, 862

To whom payment must be made, 858

After assignment, 860

Attorney of judgment creditor, 859

Clerk of court, 860

In general, 858

Next friend of infant, 859

Officers authorized by law to receive payment, 860

One of joint judgment creditors, 858

Real party in interest, 859

*Presumption of satisfaction and discharge*, see *infra*, SATISFACTION AND DISCHARGE.

Requisites of Valid Judgments (see *infra*, CONFESSIO OF JUDGMENT), 764

In general, 764

Judgments by default, 767

Reversal (see *infra*, DIRECT ATTACK BY APPEAL OR WRIT OF ERROR), 808

Satisfaction and discharge (see *infra*, PAYMENT):

Compelling entry of satisfaction, 869

Awarding issue and staying execution, 870

Grounds antedating rendition of judgment, 870

Grounds for compelling, 870

Payment not in full, 870

Power of court to compel, 869

Where there is dispute, 870

Executions against property, 869

Effect of forthcoming or delivery bond, 869

Personal property, 869

Real property, 869

Sale under execution, 869

Executions against the body, 869

Grounds for vacating, 871

Operation and effect, 871

Power to vacate, 870

Presumption of satisfaction from lapse of time, 866

Admissions as evidence in rebuttal, 868

Arises after twenty years, 866

Clear recognition of debt, 867

Evidence in rebuttal, 867

Lapse of time in connection with other circumstances, 868

Merely lapse of time, 868

Partial payment as evidence of rebuttal, 867

Poverty or insolvency of debtor, 868

Presumption not conclusive, 867

Question for court or jury, 868

Volume XVII.



**JUDGMENTS AND DECREES, *cont'd.***Satisfaction and Discharge, *cont'd.*Presumption of satisfaction from lapse of time, *cont'd.*

Statutes declaratory of common law, 867

Where less than twenty years have elapsed, 868

Proceedings after satisfaction in fact, 869

Proceedings under final process, 859

Set-off, 868

Vacating, 871

Where satisfaction obtained on execution, 872

**Set-off:**

Assignment of judgments, 885

Set-off satisfaction, 868

Tender, 862

*Terms*, see *infra*, CONTROL OF COURT OVER JUDGMENTS DURING TERM AT WHICH RENDERED.**Vacation and opening:***Vacating entry of satisfaction*, see *infra*, SATISFACTION AND DISCHARGE.*Writ of error*, see *infra*, DIRECT ATTACK BY APPEAL OR WRIT OF ERROR.**JUDICATORY, 886****JUDICIAL, 886****JUDICIAL (see JUDGE):**

Judicial acts, 728

Ministerial acts, 732

**JUDICIAL ACT, 887****JUDICIAL AND LEGISLATIVE, 888****JUDICIAL AND MINISTERIAL, 887****JUDICIALLY, 891****JUDICIAL NOTICE, 892**

Abbreviations, 897

Almanacs, 901

**Animals:**

Nature and characteristic of domestic animals, 900

Appellate court, 896

Art, matters of, 909

Attorneys, 924

Beer, 200, 201

Benzine, 910

**Boundaries, 911**

County boundaries, 912

Municipal corporations, 938

State boundaries, 911

Census, 898

Cities, 940, 941

**Conclusiveness, 902**

Reception of evidence not error, 902

Current abbreviations, 896

Current phrases, 896

Current terms, 896

Corporate existence, 912

**Corporations (see *infra*, RAILROADS), 934**

Bank charters, 935

Foreign corporations, 935

General incorporation laws, 935

Rule as to private corporations, 934

**Counties, 911**

Corporate existence, 912

County boundaries, 912

Date of organization, 912

Division of states into counties, 911

Places within county, 912

**JUDICIAL NOTICE, *cont'd.***

Course of heavenly bodies, 904

Course of nature, 903

Courts, court officers, seals, records and proceedings, 919

Attorneys, 924

Court officers, 923

Courts of sister states, 920

Date of institution of suit, 926

Distinction between beginning and ending of terms, 922

Federal courts, 920

In general, 919

Judges of lower courts, 922

Jurisdiction, 921

Jurisdiction of county judges, 920

Officers of other courts, 924

Practice of courts in sister states, 920

Proceedings in other causes, 926

Proceedings in same case, 925

Records, 925

Rule in garnishment case, 926

Rules of lower courts, 923

Seals of court, 924

State courts, 920

Statutory proceeding for execution against stockholder of corporation, 925

Tender and payment into court, 926

Terms of court, 921

Terms of justices, 922

**Currency, 899**

Depreciation, 899, 900

In general, 899

Value of United States currency, 899

**Definition, 894****Demurrers:**

Facts admitted on demurrer, 901

*Department of government*, see *infra*, PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT.**Deputies, 919****Distances, 905**

Division of counties into townships or towns, 913

Division of states into counties, 911

**Elections, 898**

General elections, 898

Local elections, 898

Local option election, 898

**Evidence:**

Reception of evidence not error, 902

Examples of things judicially noticed, 946, 947

Facts of usual or uniform occurrence, 902

Fluctuations of language, 896

Foreign nations, 910

Foreign officers, 919

Function exercised with caution, 895

Gas, 910

General rule, 895

**Geographical facts (see *infra*, BOUNDARIES), 904**

Bodies of water, 905

Distances, 905

Foreign and domestic towns and cities, 906

In general, 904

Location, nature, and navigability of waters and watercourses, 905

Time consumed in travel, 906

*Government*, see *infra*, PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT.



**JUDICIAL NOTICE, *cont'd.***

- Historical events, 907
  - Facts relating to land titles, 907
  - General rule, 907
  - Matters of private nature, 907
  - Military occupation, orders, and army lines, 908
  - War, 907
  - War between foreign countries, 908
- Hours of the day, 904
- Husbandry, course of, 903
- Inquiries of the foreign office, 901
- International law, 933
- Intoxicating liquors, 909
- Irrigation, 490
- Journals, 915
- Journals of legislature, 930
- Judges, see *infra*, COURTS, COURT OFFICERS, SEALS, RECORDS AND PROCEEDINGS.
- Jurisdiction, 921
- Justices of the peace, 917
- Laws (see *infra*, STATUTES), 928
  - Common course of the banking business, 933
  - Common law, 932
  - International law, 933
  - Law merchant, 933
- Law merchant, 933
- Legislative acts, 915
- Market values, 900
- Matters of art and science, 909
  - Disputed theories, 910
  - General rule, 909
  - Intoxicating properties of liquor, 909
  - Medium of payment, 899
- Mercantile law, 933
- Mortality tables, 900
- Municipal corporations, 936
  - Cities in other states, 941
  - In general, 936
  - Limits and subdivisions, 938
  - Location, 940
  - Municipal powers, 937
  - Officers, 938
  - Ordinances, 937
  - Organization under general law, 941
  - Streets, 939
  - Where declared to be public law, 936.
- Names, 912
  - Abbreviations, 897
  - Names in foreign language, 897
- Natural phenomena, 903
- Navigable waters, 905
- Necessity for actual knowledge, 901
  - Almanacs, 901
  - Court's personal knowledge, 902
  - Encyclopædias, 901
  - In general, 901
  - Official reports and correspondence of public officers, 901
  - Resort to sources of information, 901
- Notaries public, 917
- Officers, see *infra*, PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT.
- Official reports, 901
- Ordinances, 937
- Population, 898
- Preliminary observation, 894
- Public functionaries, officers, departments of government, 914
  - Compensation and terms of office, 918
  - Courts, 917

**JUDICIAL NOTICE, *cont'd.***

- Public functionaries, officers, etc., *cont'd.*
  - Departmental regulations, proceedings, records, 915
  - Deputy officers, 919
  - Executive, 914
  - Foreign officers, 919
  - In general, 914
  - Justices of the peace, 917
  - Legislative acts, journals, sessions, etc., 915
  - Notaries public, 917
  - Powers of judges or public officers, 918
  - Public institutions, commissions, administrative boards, 916
  - Public officers in general, 916
  - Seals, 918
  - Sheriffs, 917
  - Signatures, 918
- Public lands, 907
- Public officers (see *infra*, COURTS, COURT OFFICERS, SEALS, RECORDS, AND PROCEEDINGS; PUBLIC FUNCTIONARIES, OFFICERS, DEPARTMENTS OF GOVERNMENT):
  - Municipal corporations, 938
- Public policy, 900
- Railroads, 941
  - Common carriers, 941
    - Construction, 943
    - General features of railroad business, 942
    - Incorporation and corporate existence, 942
    - In general, 941
    - Location, 944
    - Officers and agents, 945
    - Operation, 944
    - Speed, 944
- Record, see *infra*, COURTS, COURT OFFICERS, SEALS, RECORDS, AND PROCEEDINGS.
- Science, matters of, 909
- Seals:
  - Public officers, 918
- Signatures:
  - Officers, 924
  - Public officers, 918
- Sister states, 910
- Sources of information, 901
- Sovereignty, 910
- State boundaries, 911
- States:
  - Division of states into counties, 911
  - State boundaries, 911
- Statutes, 928
  - Judicial notice by statute, 945
  - Private statutes, 931
  - Public Statutes, 928
    - Execution of public statutes, 931
    - In general, 928
    - Joint resolutions of state legislature, 930
    - Legislative journals, 930
    - Public statutes of local application, 931
    - Repeal, 929
    - Statutes declared to be public, 930
    - Time when public statute takes effect, 929
    - What are public statutes, 930
- Streets, 939
- Succession of seasons, 904
- Surveys, 913
  - Direction from principal meridian, 914
  - Private surveys, 914
  - Public surveys, 913



**JUDICIAL NOTICE, *cont'd.***

- Symbols of sovereignty, 910
- Taxes, 895
- Terms of court, 921
- Time:
  - Coincidence of days of week and month, 903
  - Time, course of time, 903
  - Towns, 913
  - Towns and cities, 906
  - Treaties, 923
  - Usage and custom, 945
  - Usual meaning of words, 896
  - War, 907
  - Weights and measures, 900
  - Words, 896

**JUDICIAL RECORD, 947****JUDICIAL SALES, 948**

- Abatement of price* (see *infra*, PURCHASE MONEY), 988
- Accident, 998
- Adjournment, 972
  - Notice, 970
- Advance price*, see *infra*, OBJECTIONS AND SETTING ASIDE OFFER OF ADVANCE PRICE AS GROUND FOR OPENING BIDDINGS.
- Adverse possession, 1023
- Advertisement or notice, 966
  - Designation by counsel, 967
  - Directions of court must be followed, 966
  - How method and time of advertisement or notice determined, 966
- Methods of advertising, 967
  - Discretion of paper, 967
  - Posting notice, 967
  - Publication in newspaper, 967
  - The usual methods, 967
  - What the notice or advertisement should contain, 968
- Necessity for, 966
- Notice of postponed sale or resale, 970
  - Adjournment of sale, 970
  - Effect of failure to give proper notice, 971
  - Evidence of notice, 970
  - Presumption that proper notice was given, 970
- Notice regulated by order of court, 966
- Notice regulated by statute, 966
- Terms of sale, 933
- Time of advertising, 969
  - In general, 969
  - Number of insertions, 969
  - Publication for a specified number of weeks, 969
  - Restrictions on time of sale as affecting time of advertising, 970
  - Whether publication must be continued up to day of sale, 969
- What the notice or advertisement should contain, 968
  - Amount of decree, 969
  - Description of property, 968
  - Hour of sale, 968
  - Incumbrances, 969
  - Names of parties, 969
  - Place of sale, 968
  - Signature, 969
  - Terms of sale, 968
  - Time of sale, 968
- Agent, 962, 966
  - Bid through agent, 977
- Auction*, see *infra*, BIDS.

**JUDICIAL SALES, *cont'd.***

- Auctioneer, 962, 965
- Bids (see *infra*, OBJECTIONS AND SETTING ASIDE; OFFER OF ADVANCE PRICE AS A GROUND FOR OPENING BIDDINGS), 977
  - Announcement of name of bidder, 978
  - Bidder released from liability by acceptance of higher bid, 979
  - Bidding by private signal, 978
  - Bid received by letter, 978
  - Bid through agent, 977
  - Chilling bidding, 980
  - Conditional bids, 978
  - Course pursued where same bid claimed by two persons, 979
- Enforcement of bid, 1025
  - Attachment for contempt, 1028
  - Independent action to recover amount of bid, 1028
  - Resale at bidder's risk, 1026
  - Summary proceedings in general, 1025
- Liability on bid, 1016
- Limitation of time for bidding, 978
- Puffing, 980
- Rejection of bid, 978
- Resale at bidder's risk, 1026
  - In general, 1026
  - Motion for resale, 1026
  - Report and confirmation of first sale, 1028
  - Rule to show cause against resale at bidder's risk, 1027
  - Staying resale, 1028
  - Surplus on resale, 1027
  - Terms of resale, 1027
- Resale upon failure of successful bidder to comply with bid, 979
- Reserved price, 979
- Right of bidder to withdraw bid, 979
- Suppression of competition or chilling bidding, 980
- Bond, 962
- Bond*, see *infra*, PURCHASE MONEY.
- Cash, 983
- Caveat emptor, 1010
  - Examples, 1011, 1012
  - In general, 1011
  - No warranty in judicial sales, 1011
  - Remedy against debtor, 1012
- Chilling bidding, 980
- Collateral impeachment, 1033
- Competition, suppression of, 980
- Confederate money, 985
- Confirmation:
  - Advance offer made after confirmation of sale, 1010
  - Appreciation or depreciation in value of property between time of sale and confirmation, 1020
  - Arbitrary exercise of discretion, 992
  - Confirmation *in pais*, 991
  - Discretion of court, 992
- Effect of confirmation, 993
  - Completing sale, 993
  - Irregularities, 993
  - Retroaction, 993
- Form of confirmation, 991
- Imposition of terms or conditions, 993
- Inadequacy of price, 1004
- Irregularities, 999
- Judge in chambers, 991
- Judge interested, 991
- Necessity for, 989



**JUDICIAL SALES, *cont'd.*****Confirmation, *cont'd.***

- Reversal of decree of confirmation, 1018
- Review in appellate court, 993
- Sale becomes absolute only upon confirmation by the court, 953
- Time for confirmation, 991
- Who may confirm sale, 991
- Who may proceed for confirmation, 991

**Contempt :**

- Enforcement of bid, 1028

**Courts, see *infra*, CONFIRMATION; OBJECTION AND SETTING ASIDE.****Court the real vendor, 953****Credit, 983, 987****Crops, 1015****Deed, 1029**

- Acknowledgment, 1033
- By whom executed, 1029
- Death of purchaser, 1031
- Deputies, 1030
- Description of property, 1032
- Informalities, 1033
- Necessity for, 1029
- Recitals required, 1032
- Requisites and validity of deed, 1032
- Revenue stamp, 1033
- Time for making deed, 1031
- To whom executed, 1030

**Definition, 953****Easements, 1023*****En masse*, see *infra*, EN MASSE OR IN PARCELS.****Execution sales distinguished from, 956****Fraud, 996, 1018****Fraud, statute of, 954****Implied warranty, 1010****Improvements, 1024****Inadequacy of price, 1000**

- Distinction depending upon whether objection raised before or after confirmation, 1004

**Evidence, 1004****General rule, 1000****Inadequacy of price in connection with other circumstances, 1003****Inadequacy so gross as to shock conscience, 1002****Sale not set aside for mere inadequacy of price, 1001****Abatement of price, 989****Personal liability of purchaser, 1013****Purchaser's rights as to, 1012****Purchaser takes subject to prior liens and incumbrances, 1013****Setting aside sale, 1000*****In rem* or *in personam*, 957****Interest, 987****Interest on purchase money, 1024****In what action or proceeding sale may be ordered, 957****Jurisdiction, 956****Letter, bid received by, 978****Lien for purchase money, 987****Liens, 957****Personal liability of purchaser, 1013****Prior incumbrances not destroyed, 1013****Purchaser takes subject to prior liens and incumbrances, 1013****Rules concerning, 1012****JUDICIAL SALES, *cont'd.*****Limitation of Action, 973****Time of sale :****Place of sale, 973****Court house door, 974****How determined, 973****Presumption that sale was made at proper place, 974****Sale of land on the premises, 974****Misconduct of officer, 999****Mistake, 998****Mode of sale, 974****In general, 974****Public or private, 975****Sale *en masse* or in parcels, 975****Sales of personalty, 977*****Notice*, see *infra*, ADVERTISEMENT OR NOTICE.****Oath, 962****Objections and setting aside, 994****Effect of claiming proceeds of sale, 966****Grounds of Objection, 996****Accident, 998****Confirmation may be refused for irregularities, 999****Defect of title, 1000****Fraud, 996*****Inadequacy of price*, see *infra*, INADEQUACY OF PRICE.****Incumbrances, 1000****In general, 996****Irregularities, 999****Judgment directing sale superseded, 1005****Misconduct of officer, 999****Mistake, 998****Nonpayment by purchaser, 1000****Objections to judgment or proceedings leading up to order of sale, 1005****Sale in violation of order staying same, 1004****Scarcity of bidders, 1000****Surprise, 997****Inadequacy of price, 1000****Distinction depending upon whether objection raised before or after confirmation, 1004****Evidence, 1004****General rule, 1000****Inadequacy so gross as to shock conscience, 1002****Inadequacy of price in connection with other circumstances, 1003****Sale not set aside for mere inadequacy of price, 1001****Judicial sales not disturbed for slight causes, 994*****Offer of advance price as a ground for opening bids*, see *infra*, OFFER OF ADVANCE PRICE AS A GROUND FOR OPENING BIDDINGS.****Policy of upholding judicial sales, 994****Power of court to set aside sale, 995****Presumption indulged in favor of sustaining sales, 994****Purchaser's right to be heard, 996*****Purchaser's rights upon setting aside of sale*, see *infra*, PURCHASER.****Setting aside where injustice would result, 995****Time for objecting, 1005****Waiver of objections, 1006****Whether offer of advance price is necessary, 1006**



**JUDICIAL SALES, *cont'd.*****Objections and setting aside, *cont'd.*****Who may object, 995**

Effect of failure to object to confirmation, 996

In general, 995

Person not interested or prejudiced, 995

Successful bidder, 995

**Offer of advance price as a ground for opening biddings, 1006**

Advance bid cannot be withdrawn, 1008

Advance must be secured, 1008

Advance offer made after confirmation of sale, 1010

Advance offer made through malice or prejudice, 1009

Biddings opened to all, 1009

Conditional application, 1010

Extent to which practice prevails, 1007

In Canada, 1006

In England, 1006

Original purchaser entitled to return of purchase money when biddings opened, 1009

States which have adopted the practice, 1007

Terms of payment on resale, 1009

What advance will cause biddings to be opened, 1007

When biddings will not be opened, 1009

When person offering advance bid becomes purchaser, 1009

Whether biddings may be opened more than once, 1008

Whether notice of opening biddings is necessary, 1008

Who may make advance offer, 1007

*Opening biddings, see infra, OBJECTIONS AND SETTING ASIDE; OFFER OF ADVANCE PRICE AS A GROUND FOR OPENING BIDDINGS.**Parcels, see infra, SALE EN MASSE OR IN PARCELS.**Payment, see infra, PURCHASE MONEY.***Place of sale:**

Advertising, 968

*Possession, see infra, RIGHT TO POSSESSION.*

Private sales, 975

**Protection afforded by judgment or decree of sale, 1016**

Defect of parties, 1018

Fraud on part of purchaser, 1018

General rule, 1016

Property sold not that of defendant, 1018

Purchase by party procuring sale or by his attorney, 1019

Reversal of decree of confirmation, 1018

Title of purchaser not affected by errors or irregularities in judgment or decree, 1017

When the rule does not apply, 1018

*Publication of notice, see infra, ADVERTISE-  
MENT OR NOTICE.*

Public or private sale, 975

Puffing, 980

**Purchase money:****Abatement of price, 988**

Deficiency in quantity in land sold, 988

Outstanding taxes or other liens, 989

Taxes and interest on incumbrances becoming due after confirmation, 989

**Bond or security for purchase money, 985**

Effect of failure of commissioner to return bonds into court, 986

**JUDICIAL SALES, *cont'd.*****Purchase money, *cont'd.*****Bond or security, *cont'd.***

Enforcement of bond, 986

In general, 985

Penalty of bond, 986

Requiring new security, 986

Taking one bond for aggregate amount realized by sale in parcels, 986

Discounting credit payments, 987

Effect of failure to make payment at proper time, 988

Interest, 987

Lien for purchase money, 987

**Method of payment, 984**

In general, 984

Payment in confederate money, 985

Payment in confederate money, 985

Purchaser acquires no title or right to deed until compliance with terms of sale, 988

**To whom payment should be made, 983**

Commissioner liable to purchaser, 984

Officer making sale, 983

Payment of purchase money into court, 984

Payment to person not authorized to receive it, 984

**Purchaser (see *infra*, PROTECTION AFFORDED BY JUDGMENT OR DECREE OF SALE; WHO MAY PURCHASE):**

Application of proceeds of sale, 1020

**Circumstances entitling purchaser to be relieved from purchase, 1020**

Decree inadequate to transfer title, 1021

Defect in title or incumbrances, 1021

Deficiency in quantity of land sold, 1021

Delay in completion of sale, 1023

Easements, 1023

Irregularities, 1023

Lack of jurisdiction, 1021

Land not subject to sale, 1021

Purchaser must make out a plain case, 1023

Purchaser unable to obtain possession by virtue of decree, 1021

Sale or proceeds leading up thereto void, 1020

Title by adverse possession, 1023

Liabilities upon setting aside of sale, 1025

Purchase by party procuring sale or by his attorney, 1019

Rights to growing crops, 1015

**Right upon setting aside of sale, 1024**

Compensation for improvements, 1024

Interest on purchase money, 1024

Liabilities upon setting aside of sale, 1025

Reimbursement, 1024

Right to a conveyance, 1013

*Right to possession, see infra, RIGHT TO POSSESSION.*

Right to rents and profits, 1015

**Redemption, 1034**

Against whom redemption may be made, 1035

Court may allow redemption in absence of statute, 1035

Courts cannot bar statutory right of redemption, 1034

Effect of redemption, 1036

Right may be based on contract, 1035

Right of redemption based on statute, 1034



**JUDICIAL SALES, *cont'd.*****Redemption, *cont'd.***

Time and manner of redeeming, 1036

Who may redeem, 1035

Rents and profits, 1015

**Resale (see *infra*, OFFER OF ADVANCE PRICE AS A GROUND FOR OPENING BIDDINGS):**

Failure of successful bidder to comply with bid, 979

Notice, 970

**Resale at bidder's risk, 1026**

In general, 1026

Motion for resale, 1027

Report and confirmation of first sale, 1028

Rule to show cause against resale at bidder's risk, 1027

Staying resale, 1028

Surplus on resale, 1028

Terms of resale, 1027

Rights and liabilities of purchasers, 1010

**Right to possession:**

Compensation for being kept out of possession, 1015

Effect of appeal from order of confirmation, 1014

Effect of right of redemption, 1015

English rule, 1015

In general, 1014

Where person in possession not a party to proceeding, 1014

Sales *en masse*, 975**Sales *en masse* or in parcels, 975**

Discretion of court, 976

Discretion of officer making sale, 976

In general, 975

Offering in both methods and sale at highest bid, 977

Order of selling different lots, 976

Sale must be pursuant to notice, 977

When sale *en masse* is proper, 977

Scope of article, 956

Setting aside, see *infra*, OBJECTIONS AND SETTING ASIDE.

Sheriff's sales distinguished from, 956

Sundays, 973

Surprise, 997

**Taxes:**

Abatement of price, 989

**Terms of sale, 981**

Adjudications as to property or cash or credit sales, 983

Confirmation, 993

Conformity to advertisement, 983

Debt or contract under which property sold as affecting terms, 982

Effect of provision for allowance out of purchase money of taxes or assessments due, 982

How prescribed, 981

Officer must sell on terms prescribed, 982

Purchaser acquires no title or right to deed until compliance with terms of sale, 988

Requiring deposit, 982

Time, see *infra*, ADVERTISEMENT OR NOTICE.

Time for making deed, 1031

Time for objecting, 1005

**Time of sale, 971, 973**

Adjournment or postponement, 972

Advertisement, 968

Election day, 972

Hour of sale, 973

How determined, 971

**JUDICIAL SALES, *cont'd.*****Time of sale, *cont'd.***

Presumption that sale was made at proper time, 973

Sale during financial depression, 973

Sale should be on day named in notice, 972

Statute of limitations, 973

Sundays and holidays, 973

**Title:**

Decree inadequate to transfer title, 1021

Defect in title, 1021

Reversal or vacation of judgment does not invalidate sale nor divest title of purchaser, 1017

Right to a conveyance, 1013

Title by adverse possession, 1023

Title of purchaser not affected by errors or irregularities in judgment or decree, 1017

**Title acquired, 1010**

As against parties, 1010

As against third persons, 1010

**Under what circumstances sale may be ordered, 957**

Ascertainment of liens and priorities, 957

Debt must exceed five years' rents and profits of land, 958

Removal of cloud upon title or other impediment to fair sale, 958

Sale before final decree, 959

Scope of article, 957

**What may be sold, 959**

In general, 959

Only so much necessary to satisfy decree should be sold, 960

Patent right, 959

Property other than decree of sale authorized, 960

Property the sale of which is forbidden by will, 959

**What sales are judicial, 954**

Examples, 954-956

Execution or sheriff's sales, 956

Foreclosure sale, 954

Partition sale, 954

Receiver's sale, 954

Sale by executor or administrator, 954

Sale by guardian, 955

Sale by order of probate court, 955

Sale in attachment proceedings, 955

**Who may make sale, 960**

Bonds, 962

In general, 960

Oath, 962

Person interested in proceeding, 961

Removal of commissioners appointed to sell, 962

Sale by auctioneer or agent, 962

Sale by less than whole number of persons appointed to sell, 961

**Who may purchase, 963**

Agent, 966

Appraiser, 965

Attorneys, 963

Auctioneer employed to conduct sale, 965

Fiduciary, 965

Judge ordering sale, 964

Parties, 963

Person appointed to sell, 964

Residuary legatee, 966

Reversioner, 966

Stockholder, 966



**JUDICIAL SALES, *cont'd.***Who may purchase, *cont'd.*

Tenant, 905

Tenant for life, 965

Witnesses, 963

Withdrawal of property from sale, 979

**JUDICIOUSLY**, 1036**JUDICIUM**, 1036**JUGGLER**, 1036**JUN.**, 1036**JUNCTION**, 1036**JUNIOR**, 1036**JUNK SHOP**, 1038**JURAT**, 1038**JURISDICTION**, 1089**JURISDICTION** (see **JUDGMENTS AND DECREES**):

Adjournment, irregular, 1070

Arrest of judgment, 854

Change of venue, 1063

Consent:

Effect of consent to give jurisdiction, 1050

Contracts to deprive courts of jurisdiction, 1063

Death, 1070

*Defects*, see *infra*, **ERRORS, IRREGULARITIES AND JURISDICTIONAL DEFECTS**.**Defects in the pleadings, form and manner of procedure**, 1069

Coverture of party, 1071

Death of party, 1070

Defects in the pleadings, 1069

Improper form of action, 1070

Infancy of party, 1071

In general, 1069

Insanity of party, 1070

Irregular adjournment, 1070

Definition, 1041

**Effect of possession and want of jurisdiction**, 1042

Adoption proceedings, 1057

Applications of the rule in general, 1049

As affecting the liability for contempt, 1059

As affecting the liability of a party prosecuting an action, 1058

As affecting the liability of judges and judicial officers, 1058

As affecting the liability of officers levying executions, 1059

As affecting the right to a writ of habeas corpus, 1059

As affecting the right to enjoin the collection of a judgment, 1058

Awards of arbitrators, 1055

Bankruptcy and insolvency proceedings, 1052

Courts of general and of special jurisdiction, 1055

Decrees in equity, 1049

Distinction between void and voidable judgments, 1047

Divorce proceedings, 1057

Effect of possession of jurisdiction, 1042

Effect of want of jurisdiction, 1046

Eminent domain proceedings, 1052

**JURISDICTION, *cont'd.*****Effect of possession and want of jurisdiction, *con.***

Foreclosure proceedings, 1052

Foreign judgments, 1050

Garnishment proceedings, 1050

General rules, 1042

Guardian's sales, 1055

Justice's courts, 1055

Land officer's rulings, 1056

Orders and decrees of probate courts, 1053

Orders and decrees of probate courts with jurisdiction, 1053

Orders and decrees of probate courts without jurisdiction, 1054

Partition proceedings, 1057

Proceedings by attachment, 1050

Proceedings in execution, 1051

Proceedings of court martial, 1056

Proceedings under poor debtor's law, 1052

Reasons for the rule, 1043

*Res judicata*, 1057

Revival of judgment, 1057

Special tribunals, 1056

Statutory proceedings, 1056

Tax proceedings, 1053

Writ of prohibition, 1058

**Errors, irregularities and jurisdictional defects** (see *infra*, **DEFECTS IN THE PLEADINGS, FORM AND MANNER OF PROCEDURE; SERVICE OF PROCESS**), 1065**Defects in jurisdiction over the particular case**, 1066

Disqualification of judge, 1066

Entry otherwise than in open court, 1073

Entry outside of term, 1073

Erroneous judgment, 1071

Errors and irregularities in taxation of costs, 1073

Errors or irregularities in execution process, 1073

In general, 1065

Irregular entry of judgment, 1072

Irregularities in setting aside or vacating judgments, 1073

Irregularity in form of judgment, 1073

Premature entry of judgment, 1072

**Essential constituents of jurisdiction**, 1059

In general, 1059

Jurisdiction of the person, 1060

Jurisdiction of the subject matter, 1060

Jurisdiction over the *res* or property, 1060

Infants, 1071

Insanity, 1070

Intoxicating liquors, 383

*Irregularities*, see *infra*, **ERRORS, IRREGULARITIES AND JURISDICTIONAL DEFECTS**.**Judges:**

Disqualification of, 1066

Judicial notice, 921

Judicial sales, 956

Jurisdiction and exercise of jurisdiction distinguished, 1042

**Jurisdiction of the person**, 1063

In general, 1063

Jurisdiction by consent and waiver of objections to jurisdiction, 1064

Marriage, 1071

*Pleadings*, see *infra*, **DEFECTS IN THE PLEADINGS, FORM AND MANNER OF PROCEDURE**.*Possession*, see *infra*, **EFFECT OF POSSESSION AND WANT OF JURISDICTION**.



**JURISDICTION, *cont'd.*****Presumption of Jurisdiction, 1073**

Cases involving exercise of general powers, 1073

Justices' courts, 1077

Persons not within territorial limits, 1078

Presumption as to authority of attorney to enter appearance, 1076

Presumption as to findings of jurisdictional fact generally, 1075

Presumption as to service of process or appearance, 1075

Presumption in favor of courts of general jurisdiction, 1074

Presumption of jurisdiction applicable to United States courts, 1076

Probate courts, 1076

Publication, 1078

Record recitals as to jurisdictional facts, 1077

Rule stated, 1073

Special proceedings in probate court, 1077

Cases involving exercise of special statutory powers, 1079

Conclusiveness of presumption, 1080

Jurisdiction appearing of record, 1081

Presumption of jurisdiction generally, 1079

Proceedings according to course of common law, 1079

Proceedings not according to course of common law, 1079

Courts of special or inferior jurisdiction, 1082

Jurisdiction involving gist of proceeding, 1085

No presumption, 1082

Recitals of jurisdictional facts, 1084

What are courts of special or inferior jurisdiction, 1084

Domestic courts, 1073

Foreign courts, 1085

Service of process, 1067

In general, 1067

Irregularities in return, 1069

Irregular process, 1069

Irregular service, 1068

Service by publication, 1068

Want of service, 1067

Sources and modes of acquiring jurisdiction, 1060

Change of venue, 1063

Consent in appellate courts, 1061

Contracts to deprive courts of jurisdiction, 1053

Effect of consent to give jurisdiction, 1060

Jurisdiction of the person, 1063

Jurisdiction of the *res*, 1065

Jurisdiction over the subject matter, 1060

Waiver of defects of jurisdiction, 1062

Waiver of defects of jurisdiction, 1062  
*Want of jurisdiction*, see *infra*, EFFECT OF POSSESSION AND WANT OF JURISDICTION.

**JURY AND JURY TRIAL, 1086**

Abstract moral and legal opinions, 1137

Aversion to plea of insanity, 1138

Legal opinions, 1137

Opinions as to propriety of law, 1137

Prejudice against crime 1137

Prejudice against particular class of actions, 1137

View as to burden of proof, 1138

**JURY AND JURY TRIAL, *cont'd.***

*Additional jurors*, see *infra*, TALESMEN AND ADDITIONAL JURORS.

Affinity, qualification, 1125

Age, 1175

Age, disqualification, 1116

Alienage, disqualification, 1118

Aliens, 1164

*Array*, see *infra*, CHALLENGES TO THE ARRAY.

Arrest of judgment :

Disqualification of juror, 1171

Attorney and client :

Bias for or against counsel as disqualification 1130

Relationship to counsel, 1126

*Bias*, see *infra*, CHALLENGES AND EXCLUSION FOR CAUSE.

Books in jury room, 1247

Burden of proof, views as to, 1138

Capital punishment, prejudice against, 1134

*Cause*, see *infra*, CHALLENGES AND EXCLUSION FOR CAUSE.

Challenges (see *infra*, PEREMPTORY CHALLENGES; STANDING JURORS ASIDE):

Struck juries, 1198

Challenges and exclusion for cause, 1115, 1127-1129.

Affinity, 1125

Age, 1116

Alienage, 1118

Arrest of juror, 1171

Aversion to plea of insanity, 1138

Belief as to credibility of party or witness, 1130

Beneficial and religious associations, 1132

Bias for or against counsel, 1130

Burden of proof, 1116

Business relations, 1127

Capital punishment, prejudice against, 1134

Causes of general character, 1116

Circumstantial evidence, prejudice against, 1136

Citizenship, 1121

Competency as of time of trial, 115

Conclusiveness of decision as to acceptance or exclusion of juror, 1171

Decision by triers, 1175

Decision on motion for new trial, 1174

Disqualification of juror, 1171

Error not prejudicial, 1173

Exclusion of juror, 1174

In general, 1171

Crimes not necessarily punished capitally, 1135

Criminality, 1118

Direct pecuniary interest, 1131

Disloyalty, 1123

Disqualification by reason of age, 1116

Disqualification by reason of sex, 1116

Drunkenness, 1117

Electoral qualification, 1120

Executors and administrators, 1132

*Exemption*, see *infra*, EXEMPTION.

Favor, 1115

Freehold qualification, 1119

Friendship to party, 1128

General power of court to exclude juror, 1156

Action by court of its own motion, 1156

Depleting regular panel, 1157

Discretion as to grounds, 1156

Discretion in excluding for bias, 1157

Volume XVII.



**JURY AND JURY TRIAL, *cont'd.***Challenges and exclusion for cause, *cont'd.*General power of court to exclude juror, *con.*

Excusing for reasons personal to juror,

1157

Illness of venireman, 1158

Public officers, 1159

Time of exercising power, 1159

Hostility to party, 1128

Household qualification, 1119

Ignorance of the English language, 1117

Illness, 1158

Immorality, 1118

Indebtedness of a juror to a party, 1127

Interest and prejudice as regards matters involved, 1131

Knowledge or opinion as to case, *see infra*,

KNOWLEDGE OR OPINION AS TO CASE.

Lack of education, 1117

Landlord and tenant, 1128

Master and servant, 1127

Membership in corporate party or association, 1132

Membership in same corporation or association, 1131

Membership in society to suppress crime, 1136

Mental defects, 1117

Mode of trial of challenges, 115

Municipal officer, 1122

New trial for disqualification of juror, 1169

Alienage, 1164

Arrest of judgment for disqualification of juror, 1171

Necessity of prejudice, 1169

New trial — discretion of court, 1170

Previous ignorance of disqualification, 1165

Quantum of evidence necessary, 1169

Single witness as to opinion insufficient, 1170

Nonpayment of taxes, 1120

Nonresidence, 1120

Occupancy of public office, 1121

Opinion as to case, *see infra*, KNOWLEDGE OR OPINIONS AS TO CASE.

Opinion as to party's character, 1128

Party to pending suit, 1123

Party to suit, 1122

Pecuniary interest, 1131

Pecuniary interest in same or similar question, 1139

Physical incapacity, 1117

Political affiliations, 1139

Prejudice against capital punishment, 1134

Prejudice against circumstantial evidence, 1136

Prejudice against corporations, 1129

Prejudice as regards parties or persons interested in case, 1124

Prejudice to party's business, 1129

Presumptions, 1116

Previous service as juror, 1122

Previous service on trial of same defendant, 1131

Principal challenges and challenges to favor, 1115

Property qualification, 1118

Public officer, 1121

Race prejudice, 1130, 1131

Reasons personal to juror, 1157

Relation of attorney and client, 1130

Relation of master and servant, 1127

**JURY AND JURY TRIAL, *cont'd.***Challenges and exclusion for cause, *cont'd.*

Relationship, 1124

Relationship by marriage, 1124

Relationship to counsel, 1126

Relationship to person interested but not a party, 1125

Religious belief, 1131

Residence in municipality interested in suit, 1133

Right and power in general, 1115

Sex, 1116

Sickness, 1157, 1158

Surety of party, 1132

Sympathy with party, 1128

Waiver of objection to juror, *see infra*,

WAIVER OF OBJECTION TO JUROR.

Want of religious belief, 1124

**Challenges to the array, 1111**

Abolition or limitation of right, 1111

Bias or misconduct of summoning officer, 1112

Causes affecting part of panel, 1113

Challenge before swearing, 1114

Effect of sustaining challenge, 1114

Exclusive statutory grounds, 1112

Excusing jurors, 1113

General considerations, 1111

Grounds at common law, 1111

Irregularities in selecting list or drawing panel, 1111

Misconduct of parties, 1112

Objection after verdict, 1114

Waiver of right of challenge, 1113

Withdrawal of challenge, 1114

Circumstantial evidence, prejudice against, 1136

Citizenship, 1121

Classes of juries, 1096

Communications, *see infra*, CUSTODY AND CONDUCT OF JURY.Conduct of jury, *see infra*, CUSTODY AND CONDUCT OF JURY.

Corporations, prejudice against, 1129

Counsel, *see infra*, ATTORNEY AND CLIENT.Courts, *see infra*, CHALLENGES AND EXCLUSION FOR CAUSE.

Criminality, disqualification on account of, 1118

Criminal proceedings, *see infra*, WAIVER AND LOSS OF RIGHT TO JURY TRIAL.**Custody and conduct of jury:**

Allowing recreation to jury, 1202

Books in jury room, 1247

Bribery and conferring of favors, 1230

Communicating with jury, 1203

Conduct of custodian, 1201

Custody of jury, 1199

Custody of officer, 1199

Examples of misconduct, 1250

**Misconduct of jury, 1204**

Appeal, 1208

Communications by and with counsel, 1214

Communications by and with partisans, 1214

Communications by and with prevailing party, 1213

Communications by and with witnesses, 1215

Communications by judge, 1215

Communications concerning case, 1211

Communications with outsiders, 1210



**JURY AND JURY TRIAL, *cont'd.***Custody and conduct of jury, *cont'd.*Misconduct of jury, *cont'd.*

Conclusiveness of decision of lower court, 1209

Delivery of letters to jurors, 1216

General considerations, 1204

Improper separation of jury, 1207

Knowledge of counsel, 1208

Misconduct after agreement, 1205

Necessity of prejudice, 1204, 1210

Prejudice, 1204

Presumption against misconduct, 1206

Presumption as to communications concerning case, 1212

Presumption of prejudice, 1206

Prompt objection necessary, 1208

Punishment for misconduct, 1210

Waiver of objections, 1206

Necessity of custody of officer, 1199

Oath of custodian, 1200

Objects and articles in jury room, 1247

Opinion, expression or intimation, 1249

Outsider in jury room, 1231

*Papers in jury room*, see *infra*, PAPERS IN JURY ROOM.

Prejudice of officer, 1200

Presence in jury room, 1203

Punishment of custodian, 1202

Reading of newspapers, 1248

*Receiving evidence out of court*, see *infra*, RECEIVING EVIDENCE OUT OF COURT.

Remarks and discussions in hearing of jury, 1230

*Separation*, see *infra*, SEPARATION OF JURORS.

Sleeping during trial, 1249

Sleeping with jury, 1201

Statements as to effect of disagreement, 1204

Who may be custodian, 1199

Death, 1257

Definition of juries, 1095

*De Medietate Linguae*, 1096*De ventre inspiciendo*, 1096**Discharge of jury and jurors, 1251**

Absence of defendant, 1254

Absence of evidence, 1254

Absence of juror, 1254

Conclusiveness of decision of trial court, 1259

Death, 1257

Defective indictment, 1254

Discharge and substitution of individual jurors, 1260

Effect of consent, 1261

Effect of discharge, 1261

End of Term, 1257

Grounds authorizing discharge, 1253

Illness, 1257

Illness of accused, 1257

Illness of court or counsel, 1259

Illness of juror, 1257

Inability to agree, 1254

Misconduct of jury, 1254

Power to discharge, 1251

Presence of accused, 1253

Time for deliberation of jury, 1256

*Disqualification of jury trial*, see *infra*, CHALLENGE.

Drunkenness, disqualification, 1117

**Education:**

Disqualification for lack of, 1117

**JURY AND JURY TRIAL, *cont'd.***

Electoral qualification, 1120

*Evidence*, see *infra*, RECEIVING EVIDENCE OUT OF COURT.

Examples of misconduct, 1250

*Exclusion*, see *infra*, CHALLENGES AND EXCLUSION FOR CAUSE.

Executors and administrators, 1132

**Exemptions from jury service, 1175**

Age, 1175

Bystanders, 1176

Exemption not cause for challenge, 1177

In general, 1175

Powers of legislature, 1176

Previous service as juror, 1176

*Failure to demand jury*, see *infra*, WAIVER AND LOSS OF RIGHT TO JURY TRIAL.*Favor*, see *infra*, CHALLENGES AND EXCLUSION FOR CAUSE.**Fees:**

Nonpayment of fees as waiver of right to jury trial, 1107

*Food*, see *infra*, REFRESHMENTS FOR JURY.**Formation of trial jury** (see *infra*, EXEMPTION FROM JURY SERVICE; PEREMPTORY CHALLENGES; SERVICE BY PERSON NOT ON PANEL; STANDING JURORS ASIDE; TALESMEN AND ADDITIONAL JURORS), 1115*Challenges and exclusions for Cause*, see *infra*, CHALLENGES AND EXCLUSION FOR CAUSE.

General considerations, 1115

Freehold qualification, 1119

**Grand juries:****Adjournments, 1276**

Effect of temporary adjournment of court, 1276

Expiration of term of court, 1276

Power of grand jury to adjourn, 1276

Attendance upon grand jury, 1272

*Challenge*, see *infra*, QUALIFICATIONS, GROUNDS OF CHALLENGE, AND EXEMPTIONS.**Charge of court to grand jury, 1272**

Charge must be given in open court, 1273

Charges requested by grand jury, 1273

Discretion of court, 1272

Invasion of province of grand jury, 1273

Substance of charge to grand jury, 1272

**Constitutional law, 1303**

Applicability of United States Constitution to states, 1304

Capital or other infamous offenses, 1305

Contempts, 1305

Curative statutes, 1308

Fifth amendment, 1304

Fourteenth amendment, 1304

Jurisdiction to try offender without indictment, 1306

Local statutes as to grand juries

Magna Charta, 1303

Misdemeanors, 1305

Necessity for indictment or presentment by grand jury, 1303

Number of grand jurors, 1306

Number of grand jurors that must concur in finding indictment, 1307

Offenses to which constitutions apply, 1305

Power of court to amend indictment without concurrence of grand jury, 1308



**JURY AND JURY TRIAL, *cont'd.*****Grand juries, *cont'd.*****Constitutional law, *cont'd.***

Provisions dispensing with grand jury, 1303

Qualifications of grand jurors, 1307

Quasi-criminal offenses, 1305

Requisites of grand jury, 1306

Requisites of indictment under constitution, 1308

Restriction upon right of challenge and appeal, 1307

Contempt, 1289

**Courts:**

Power of court to summon or impanel grand jury, 1262

Court's control over, 1273

Court's power to fill vacancies, 1275

Discharge of grand juries, 1293

Duties of grand juries, 1277

**Effect of investigation of offenses by grand jury, 1298**

After quashal of indictment, 1298

After return of ignoramus, 1298

Leave to file information when grand jury does not indict, 1298

Power of grand jury to bring in indictment pending another, 1298

Resubmission of charge to grand jury, 1298

**Evidence before grand juries (see *infra*, SECRECY AS TO PROCEEDINGS OF GRAND JURIES; WITNESSES BEFORE GRAND JURIES), 1282****Admissibility or competency of evidence, 1282**

Depositions of witnesses examined by committing magistrates, 1283

Effect of reception of inadmissible or incompetent evidence, 1283

Evidence in behalf of accused persons, 1283

In general, 1282

Statutory provisions, 1282

Submission of doubtful questions to court, 1283

**Minutes of evidence, 1286**

In general, 1286

Right of accused to inspect, 1286

**Weight and sufficiency of evidence, 1284**

Disregard by grand jury of sufficient evidence, 1286

Indictment on knowledge of grand jury, 1284

Requisite evidence upon which to base indictment, 1284

Resubmission of case to same grand jury, 1285

Review of sufficiency of evidence, 1285

**Excusal of grand jurors, 1274**

Discretion of court, 1275

Excusal by grand jury, 1274

Grounds of excusal, 1275

Power of court to excuse grand jurors, 1274

Presumptions as to excusal, 1275

Recalling grand juror excused by mistake, 1275

Statutory provisions, 1274

**Executive's interference with grand jury, 1274****Exemptions, see *infra*, QUALIFICATIONS, GROUNDS OF CHALLENGE, AND EXEMPTIONS.****JURY AND JURY TRIAL, *cont'd.*****Grand juries, *cont'd.***

Fees of grand jurors, 1302

**Foreman of grand jury, 1271**

By whom foreman appointed, 1271

Necessity for appointment of foreman, 1271

Powers and duties of foreman, 1272

Temporary foreman, 1271

Inquisitorial powers, 1279

Liability of grand jurors, 1302

Misconduct of grand jurors, 1297

Notice to accused, 1282

**Number of grand jurors impaneled, 1269**

At common law, 1269

Excessive number of grand jurors, 1270

In United States, 1270

Number of grand jurors insufficient, 1271

Number of grand jurors necessary to constitute a quorum, 1281

**Number of grand jurors that must concur in finding indictment, 1290**

Common-law rule, 1290

In general, 290

Insufficient number concurring, 1291

Statutory rule, 1290

Power of court to fill vacancies, 1275

Power of court to summon or impanel grand jury, 1262

**Powers of grand juries, 1278**

Acting on its own knowledge, 1280

Finding indictment in whole or in part, 1281

Hearing voluntary witnesses, 1280

In general, 1278

Inquisitorial powers, 1279

Jurisdiction coextensive with jurisdiction of court, 1278

Making presentments, 1280

Ouster of jurisdiction of other tribunals, 1281

Pending preliminary examination or other proceedings, 1280

Special statutory powers, 1281

Termination of powers, 1281

What crimes they may investigate, 1278

**Qualifications, grounds of challenge, and exemptions:**

Aliens, 1264

Complaint, 1266

Disregard of society, sect, or denomination, 1263

Effect of disqualification of one or more grand jurors, 1268

Exemption not disqualification, 1268

Freeholders, 1265

Householders, 1265

Impartiality, 1266

Infants, 1264

In general, 1262

Interest in defendant's favor, 1267

Powers of foreman after challenge sustained, 1263

Presumption as to qualification, 1269

Prior jury service, 1266

Prior knowledge or opinion of guilt, 1267

Prosecutor, 1266

Qualified electors, 1265

Residents of county, 1265

Residents of state, 1265

Statutory provisions, 1263

Statutory provisions as to exemptions, 1267

Victim of crime, 1266



**JURY AND JURY TRIAL, *cont'd.*****Grand juries, *cont'd.***

Quorum, 1281

**Record as to grand juries and their proceedings, 1295**

Amendments, 1301

Appointment of foreman, 1300

Conclusiveness, 1301

Finding, filing and return of indictment, 1301

Grand jurors being sworn, 1300

How impanelment shown, 1299

Impanelment, 1299

In general, 1298

Names of grand jurors, 1300

Necessity to show impanelment, 1299

Number of grand jurors, 1300

Qualifications of grand jurors, 1300

Supplying lost record, 1302

**Secrecy as to proceedings of grand juries, 1291****Evidence as to what occurred in grand jury room, 1294**

Admissions and confessions made before grand jury, 1296

As to how grand jurors voted, 1295

As to number of grand jurors concurring, 1296

Civil actions, 1297

Discretion of court, 1294

Impeachment of indictment, 1295

In general, 1294

In support of indictment, 1295

On prosecution for perjury of witness before grand jury, 1296

Statutory provisions permitting grand jurors to testify, 1294

Testimony of grand jurors to impeach witnesses, 1296

Judge of court, 1292

Outsiders in general, 1292

Pending proceedings in jury room, 1291

Presence and advice of persons not members of grand juries, 1292

Presence of one during examination of another, 1294

Prosecuting and other attorneys, 1292

Sheriff, 1294

Stenographers, 1293

**Self-incrimination, 1288****Sessions of grand jury, see *infra*, TERMS OF COURT AND SESSIONS OF GRAND JURY.****Special grand juries, 1302**

Power of court to impanel, 1302

Powers of special grand jury, 1302

**Terms of court and sessions of grand jury, 1276***Adjournments, see infra, ADJOURNMENTS.*

At what time during term grand jury may be organized, 1276

In general, 1276

Power of court to postpone attendance of grand jury, 1276

Special term of court, 1277

Term of court to which defendant has been bound over, 1277

**Vacancies, 1275****View by grand jury, 1290****Witnesses before grand juries, 1287**

Competency, 1287

Control of court over witnesses, 1289

Examination of witnesses, 1288

How and by whom summoned, 1287

**JURY AND JURY TRIAL, *cont'd.*****Grand juries, *cont'd.*****Witnesses before grand juries, *cont'd.***

Oath of witnesses, 1287

Power of court to recognize witnesses, 1289

Punishment of contempt, 1289

Self-incrimination, 1288

Statutory immunity of witnesses, 1289

Use of self-incriminating testimony on trial, 1289

**Hearsay, 1145****Household qualification, 1119****Hypothetical opinion, 1143****Illness, 1158**

In juror's family, 1258

Of accused, 1258

Of court or counsel, 1249

Of juror, 1251, 1257

**Immorality:**

Disqualification, 1118

*Impression, see infra, KNOWLEDGE OR OPINION AS TO CASE.***Insanity, aversion to plea of, 1138****Insanity, disqualification, 1117****Intervention, 185****Intoxicating liquors, see *infra*, REFRESHMENTS FOR JURY.****Revocation of license:**

Right to trial by jury, 269

Right to trial by jury, 269, 320

*Jeopardy, see JEOPARDY.***Judge:**

Authority of judge over jury after adjournment of court, 724

**Knowledge or opinion as to case, 1139**

Expression of opinion, 1148

Knowledge without opinion, 1155

Member of grand jury indicting defendant, 1153

**Merits of case, 1139**

Ability to act impartially, 1141

Another's opinion, 1145

As ground of challenge and exclusion in general, 1139

Based on statement made by party, 1145

Based on statements by witnesses, 1145

Challenge for principal cause or to favor, 1140

Conditional and hypothetical opinions, 1143

Coroner's proceedings, 1146

Deliberate expression in writing, 1149

Evidence on former trial or proceeding, 1146

Expression of opinion, 1148

Hearsay, 1145

Impressions, 1141

Information from person having direct knowledge, 1145

Juror's direct knowledge of facts, 1145

Light and transient impressions, 1141

Malice, necessity of, 1142

Nature of opinion, 1140

Necessity of evidence to remove opinion, 1147

Opinion and impression distinguished, 1141

Opinion as to extraneous matters, 1148

Opinion as to particular elements of case, 1148



**JURY AND JURY TRIAL, *cont'd.***Knowledge or opinion as to case, *cont'd.*Merits of case, *cont'd.*Opinion *prima facie* cause for disqualification, 1140

Particular descriptions of opinion, 1140

Particular expressions indicating bias, 1149

Preliminary and incidental proceedings, 1146

Presumption of innocence, 1140

Previous prosecution of same defendant, 1147

Rumors, 1143

Settled opinion, 1144

Source of information on which based, 1143

Statutes, 1146

Statutory provisions, 1140

Unqualified opinion, 1142

Whether opinion must be expressed, 1149

Newspapers, 1150

Previous jury service in same case, 1154

Service as arbitrator in case, 1155

Service as juror in case involving same facts, 1155

Service as juror on trial of codefendant, 1155

Statutory provisions as to declaration by juror, 1151

Statutory provisions as to opinions on rumor and newspaper reports, 1150

**Voir dire**, 1150

Conclusiveness of statement as to impartiality, 1152

Constitutionality of statutes, 1151

Effect as showing opinion in general, 1150

Statements by jurors, 1150

Statutory provisions as to declaration by juror, 1151

Statutory provisions on rumor and newspaper reports, 1150

Whole examination to be considered, 1150

Witness in case, 1153

Verdict, 1162

Landlord and tenant, disqualification, 1128

*Legal opinions*, see *infra*, ABSTRACT MORAL AND LEGAL OPINIONS.*Loss of right to jury trial*, see *infra*, WAIVER AND LOSS OF RIGHT TO JURY TRIAL.

Malice, 1142

Master and servant, disqualification, 1127

Matrons, 1096

*Misconduct of jurors*, see *infra*, CUSTODY AND CONDUCT OF JURY.

Nature of juries, 1095

Newspaper reports, 1143

*Newspapers*, see *infra*, KNOWLEDGE OR OPINION AS TO CASE.

Newspapers, reading of, 1248

Nonresidence, 1120

Number of jurors:

Power to waive legal number of jurors, 1098

Civil cases, 1098

Criminal proceedings, 1098

*Objections to jurors*, see *infra*, CHALLENGES AND EXCLUSION FOR CAUSE.

Objects and articles in jury room, 1247

Opinion, expression or intimation, 1249

*Opinions*, see *infra*, ABSTRACT MORAL AND LEGAL OPINIONS; CHALLENGES AND EXCLU-**JURY AND JURY TRIAL, *cont'd.***

SION FOR CAUSE; KNOWLEDGE OR OPINION AS TO CASE.

**Panel**, see *infra*, CHALLENGE TO THE ARRAY; TALESMAN AND ADDITIONAL JURORS.

Drawing of panel, 1110

Procuring attendance of members of panel, 1110

Service by person on, 1176

**Papers in jury room**, 1239

Books in jury room, 1247

Comparison of handwriting, 1241

Depositions, 1241

Discretion of court, 1241

Effect of papers improperly in jury room, 1245

Exceptions to rule excluding papers not in evidence, 1242

Judge's minutes, 1243

Notes by jurors, 1243

Papers furnished by prevailing party, 1246

Papers in evidence, 1239

Papers not in evidence, 1242

Papers partly in evidence, 1243

Pleadings, 1243

Records and papers in previous proceedings, 1244

Written instructions, 1244

**Parties:**

Qualification as jurors, 1123

**Peremptory challenges**, 1178

Civil cases, 1180

Collateral issue, 1178

Criminal cases, 1179

Definition, 1178

General rules, 1179

Impairment of right, 1185

Nature, 1178

**Number allowed**, 1181

Each defendant entitled to full number of challenges, 1183

In general, 1181

Joint parties in civil actions, 1182

Joint parties in criminal prosecutions, 1182

*Nolle prosequi* as to higher offense, 1181

Rights of state in criminal actions, 1183

Several counts in indictment, 1184

Substitution of jurors before trial, 1184

The maximum punishment, 1181

United States courts, 1184

Power of legislature, 1180

**Right of peremptory challenge as curing erroneous rulings**, 1187

Additional challenges, 1189

Exclusion for cause, 1187

Exhaustion of challenges not considered, 1189

Necessity of other challenge, 1188

Objectionable juror must be forced on party through want of peremptory challenge, 1188

Reversal though challenges not exhausted, 1189

Wrongful acceptance of juror, 1187

Wrongful exclusion of juror, 1189

Rights of accused, 1179

Rights of state, 1179

Standing jurors aside, 1190

Struck juries, 1179

Waiver of right, 1186

What law applicable, 1181

Withdrawal of challenges, 1186

Wrongful acceptance of jurors, 1187

Volume XVII.



**JURY AND JURY TRIAL, *cont'd.*****Presumptions :**

- Against misconduct, 1206
- Incompetence of juror, 1116
- Innocence, 1140
- Of prejudice, 1206
- Waiver on appeal, 1109

**Public officers, 1121, 1175**

- Excusing from service, 1159

**Qualification of juror, see *infra*, CHALLENGE.****Race prejudice, 1131****Reading of newspapers, 1248****Receiving evidence out of court, 1237**

- In general, 1237
- Inspection of articles, 1239
- Making experiments, 1239
- Private examination of witnesses, 1238
- Testimony of jurors, 1237
- Unauthorized view of *locus in quo*, 1238

**Refreshments for jury, 1231**

- Distinction between drinking before and after submission, 1233
- Entertainment by counsel, 1236
- Entertainment by interested officer, 1236
- Entertainment by partisans, 1236
- Food, 1231
- Intoxicating liquors, 1232
- Intoxication and excessive use, 1234
- Presumption as to intoxicating liquors, 1234
- Refreshments furnished by or in behalf of prevailing party, 1235
- Use of intoxicating liquors for medicinal purposes, 1234

**Relationship, 1164****Relationship, qualification, 1124****Relationship to counsel, 1126****Religious belief, qualification, 1124****Residence, 1120****Right to jury trial, see *infra*, WAIVER AND LOSS OF RIGHT TO JURY TRIAL, 1097****Rumors, 1143****Selection of jury list, 1110****Separation of jurors, 1216****Capital cases, 1217****Civil cases, 1227**

- Admonition on separation, 1229
- After agreement on verdict, 1228
- After submission of cause to jury, 1227
- In general, 1227

**Consent to separation, 1225****Criminal cases, 1216****Distinction as to character of crime, 1220****Express permission by court, 1225****Felonies, 1217****Manner and purpose of separation, 1221****Meals, 1222****Presumption of prejudice, 1219****Remedy for improper separation, 1226****Resulting prejudice, 1224****Separation after agreement on verdict, 1224****Separation after submission of case to jury, 1223****Separation for necessary purposes, 1222****Separation generally allowed, 1216****Separation in charge of officer, 1221****Separation without prejudice, 1218****Sleeping accommodations, 1222****Time of separation, 1223****Service by person not on panel, 1177****Sickness, 1158**

- In juror's family, 1258

**JURY AND JURY TRIAL, *cont'd.*****Sickness, *cont'd.***

- Of accused, 1258
- Of court or counsel, 1249
- Of juror, 1251, 1257
- Sleeping during trial, 1249

**Special juries, see *infra*, STRUCK JURIES.****Standing jurors aside, 1190**

- Assignment of cause of challenge, 1191
- Effect of right of peremptory challenge, 1190
- In what cases right exists, 1190
- Limit as to number, 1191
- Nature and origin of right, 1190
- Practice in United States, 1190

**Struck juries, 1195**

- Application, 1197
- Application for purpose of delay, 1196
- Challenges, 1198
- Discretion in granting, 1198
- In England, 1195
- In United States, 1196
- Jury from different county or locality, 1196
- Mode of striking jury, 1198
- Peremptory challenges, 1199
- Powers of legislature, 1197
- Special jury and special venire, 1196
- Time of application, 1197

**Talesmen and additional jurors, 1191**

- Anticipation of requirement, 1194
- Conditions which will authorize, 1192
- Discharge of regular panel, 1193
- Exhaustion of panel, 1193
- In general, 1191
- Insufficient number summoned, 1194
- No regular panel in attendance, 1192
- Number of talesmen or additional jurors, 1195
- Presumption of existence of conditions, 1194
- Qualifications, 1195
- Regular panel otherwise engaged, 1194
- Statutory enlargement of powers of court, 1192
- Talesmen to serve only in particular case, 1191
- Venire, 1194

**Taxes, disqualification for nonpayment, 1120**  
***Voir dire*, see *infra*, KNOWLEDGE OR OPINION AS TO CASE.****Waiver and loss of right to jury trial, 1097****Delay in payment of jury fees, 1107****Effect of waiver, 1108**

- Change of issues, 1108
- Disregard of waiver by court, 1108
- Subsequent term or trial, 1108

**Failure to demand jury, 1104**

- Cases involving different classes of issues, 1105
- Demand at or near beginning of term, 1106
- Demand in pleading, 1105
- In general, 1104
- Repetition of demand, 1105
- Sufficiency of demand, 1105
- Time of demand, 1106

**Misconduct of jury, 1206****Withdrawal of demand, 1107****Mode of waiver, 1099**

- Consent in civil cases, 1100
- Constitutional provisions, 1099
- Contract previous to litigation, 1100



**JURY AND JURY TRIAL, *cont'd.*****Waiver and Loss of Right to Jury Trial, *cont'd.*****Mode of waiver, *cont'd.***

- Delay in payment of jury fees, 1107
- Failure to demand a jury, 1104
- In general, 1099
- Knowledge that jury cannot be procured, 1103
- Legal and equitable issues and proceedings, 1102
- Nonappearance at trial, 1100
- Nonpayment of jury fees, 1107
- Preventing procurement of jurors, 1108
- Reference of cause, 1102
- Requesting direction of verdict, 1103
- Statutory provisions, 1099
- Subsequent trial, 1107
- Nonpayment of jury fees, 1107

**Power to waive legal number of jurors, 1098**

- Civil cases, 1098
- Criminal proceedings, 1098

**Power to waive trial by jury, 1097**

- Civil cases, 1097
- Criminal proceedings, 1097
- Different degrees of crime, 1097

**Presumption of waiver on appeal, 1109**

- Preventing procurement of jurors, 1108
- Subsequent trial, 1107

**Sufficiency of record, 1110****Withdrawal of waiver, 1109****Waiver of objection to juror, 1160**

- Alien, 1164
- Constructive knowledge, 1166
- Failure to challenge before acceptance of juror, 1160

**Failure to challenge before swearing of juror, 1160****Failure to challenge before verdict, 1161**

- Alienage, 1164
- Allowing challenge before swearing, 1161

**Application of the rule, 1162****Constructive knowledge, 1166****Disqualification of age, 1167****Distinction as to character of disqualification, 1166****Formation of expression of opinion, 1162****Ignorance of disqualification immaterial, 1163****Ignorance resulting from negligence, 1166****Knowledge of counsel, 1169****New trial granted, 1165****Pecuniary interest, 1162****Previous knowledge of disqualification, 1161****Previous service on grand jury, 1163****Relationship, 1162, 1164****Ignorance resulting from negligence, 1166****Knowledge of counsel, 1169****New trial granted, 1165****Non-resident, 1164****Previous knowledge of disqualification, 1161****Witness as juror, 1153****JUS ACCRESCENDI, see JOINT TENANTS AND TENANTS IN COMMON.****JUSTICE:****Judge, 716****JUSTICES OF THE PEACE:****Intoxicating liquors, 383****LANDLORD AND TENANT:****Intoxicating liquors:**

- Liability of owner or lessor for violations of law on leased premises, 394
- Civil damage acts, 395
- Criminal liability, 394
- Liability of premises for hnes assessed against occupant, 396

**LARCENY:****Intoxicating liquors, 303****Intoxication, 412****LEASES:****Interpretation and construction:**

- Language construed most strongly against user thereof, 14

**Intoxicating liquors, 315**

- Premises on which intoxicating liquors are sold, 315

**Right of lessor to recover possession, 316****Right of lessor to recover rent, 315****Statute imposing penalty on lessor, 315****Validity of lease, 315****LEGACIES AND DEVISEES, see ISSUE (DESCENDANTS); JOINT TENANTS AND TENANTS IN COMMON.****LEGISLATURE, see JUDGE.****LICENSES:****Intoxicating liquors, see INTOXICATING LIQUORS.****LIENS (see JUDGMENT LIENS):****Interstate commerce, 92****LIMITATION OF ACTIONS:****Investments, 478****LOGS AND LOGGING:****Interstate commerce, 93****MANDAMUS:****Intoxicating liquors:**

- Review of action of licensing authorities, 260

**Revocation of license, 267****MARINE INSURANCE, see JETTISON.****MASTER AND SERVANT (see INTOXICATING LIQUORS):****Intoxicating liquors:**

- Contracts for services rendered in furtherance of illegal liquor traffic, 317

**MASTER OF VESSEL, see JETTISON.****MILITARY LAW:****Intoxicating liquors:**

- Business carried on by agent in absence of licensee on military service, 232

**MINES AND MINING CLAIMS:****Intersect, 33****MISTAKES, see INTERPRETATION AND CONSTRUCTION.****MORTGAGES (see INVESTMENTS):****Interpretation and construction:****Note and a mortgage, 11****Mortgages of liquors, 314****Right to mortgage license, 235****Status of mortgage to secure price of liquors, 209**



**MUNICIPAL CORPORATIONS** (see INTOXICATING LIQUORS):**Intoxicating liquors** (see INTOXICATING LIQUORS):

Licenses, 238

Municipal licenses necessity of county license, 238

State or county license necessity of municipal license, 238

**MURDER**, see INTOXICATION; JEOPARDY.**NATURAL GAS:**

Interstate commerce, 69, 93

**NAVIGABLE WATERS**, see ISLANDS.**NAVIGATION** (see INTERSTATE COMMERCE; JETTISON):

Interstate commerce, 46, 50

**NEW TRIAL**, see JUDGE.**NOLLE PROSEQUI**, see JEOPARDY.**NOTES**, see JUDGMENT NOTES.**NOTICE:***Intoxicating liquors*, see INTOXICATING LIQUORS.**NUISANCES:****Intoxicating liquors** (see INTOXICATING LIQUORS):

Abatement, 323

Constitutionality of statute declaring places of manufacture and sale nuisances, 220

**OATH:**

Interpreters, 30

**OLEOMARGARINE:**

Interstate commerce, 68, 78

Act of Congress, 87

Coloring in imitation of butter, 88

State may prevent fraudulent imitation of butter, 88

State statutes prohibiting importation and sale, 87

**ON:**

Intoxicating liquors, 366

**OPINIONS**, see JUDGE.**OR:**

And and or, 20

**ORDINANCES:***Intoxicating liquors*, see INTOXICATING LIQUORS.**ORIGINAL PACKAGES**, see INTERSTATE COMMERCE; INTOXICATING LIQUORS.**PARENT AND CHILD**, see INTOXICATING LIQUORS.**PARTNERSHIP:****Intoxicating liquors**, 394

Licenses, 231, 240

License may be granted to firm, 231

License to one member no protection to other members, 231

Partner not on same footing as agent, 231

Rights of partners under license, 231

**Joint-stock companies:**

Distinguished from partnership, 637

Joint tenants and tenants in common, 652

**PENALTIES:**

Jeopardy, 582

**PERJURY:**

Intoxication, 413

**PHYSICIANS AND SURGEONS:****Intoxicating liquors:**

Illegal sales, 358

**PILOTS**, see INTERSTATE COMMERCE.**POLICE POWER** (see INTERSTATE COMMERCE):

Interstate commerce:

Control of Congress, 47

**PORTER:**

Intoxicating liquors, 202

**PRESUMPTION**, see JURISDICTION.**PRIVATE INTERNATIONAL LAW:****Intoxicating liquors:**

Extra-territorial effect of ordinances, 289

Status of contracts of sale made in another state, 312

Contracts valid in state where made, 312

Effect of knowledge of purpose to resell illegally and assistance therein, 312

In general, 312

Participation in unlawful act of purchaser, 313

Purchase to use illegally in another state, 313

Reasonable cause to believe liquors would be resold illegally, 312

Repeal of statutes, 314

Sale with view to illegal resale, 313

Seller's knowledge of illegal purpose, 312

Special statutory provisions 313

**PROBATE**, see JOINT EXECUTORS AND ADMINISTRATORS.**PROHIBITION LAWS**, see INTOXICATING LIQUORS.**PROPERTY**, see INTOXICATING LIQUORS.**PUBLIC OFFICERS:****Jeopardy:**

Removal of public officers, 583

**PUNCTUATION:**

Interpretation and construction, 20

**PUNISHMENT**, see JEOPARDY.**QUARANTINE**, see INTERSTATE COMMERCE**QUESTIONS OF LAW AND FACT:****Interpreters:**

Necessity of appointment, 29

**Intoxicating liquors:**

Medicinal and toilet preparations containing alcohol, 204

Whether beer is intoxicating, 200

**QUO WARRANTO:****Intoxicating liquors:**

Revocation of license, 267

**RAILROADS**, see INTERSTATE COMMERCE.**RAPE:****Intoxication**, 413

Assault with intent to commit rape, 411

**REAL PROPERTY**, see ISLANDS; ISSUE (DESCENDANTS); JOINT TENANTS AND TENANTS IN COMMON.



- REMAINDERS AND EXECUTORY INTERESTS*, see *ISSUE (DESCENDANTS)*.
- RIPARIAN RIGHTS*, see *ISLANDS*.
- RIVERS*, see *IRRIGATION*; *ISLANDS*.
- SALES** (see *INTOXICATING LIQUORS*; *JUDICIAL SALES*):  
*Interstate commerce*, see *INTERSTATE COMMERCE*.
- SCHOOLS*, see *INTOXICATING LIQUORS*.
- SCREEN LAWS*, see *INTOXICATING LIQUORS*, 351
- SEARCHES AND SEIZURES*, see *INTOXICATING LIQUORS*.
- SET-OFF, RECOUPMENT AND COUNTERCLAIM:**  
*Intoxicating liquors*:  
 Right to recover back of money paid for liquors illegally sold, 311
- SHIPPING:**  
*Interstate commerce*, 50
- SHIPS AND SHIPPING*, see *INTERSTATE COMMERCE*; *JETTISON*.
- SOCIETIES AND CLUBS*, see *INTOXICATING LIQUORS*.
- SPELLING:**  
*Interpretation and construction*, 20
- STATES*, see *INTERSTATE COMMERCE*.
- STATUTES*, see *INTOXICATING LIQUORS*.
- STAY OF PROCEEDINGS:**  
*Intoxicating liquors*:  
 Revocation of license, 269
- STOCK EXCHANGES:**  
*Interstate commerce*, 65
- STREAMS*, see *IRRIGATION*.
- SUCCESSION TAX:**  
*Interstate commerce*, 122
- SUICIDE:**  
*Intoxication*, 412
- SUNDAY** (see *INTERSTATE COMMERCE*; *INTOXICATING LIQUORS*):  
*Intoxicating liquors*, see *INTOXICATING LIQUORS*.
- SURETYSHIP*, see *INTOXICATING LIQUORS*.
- SURVIVORSHIP*, see *JOINT TENANTS AND TENANTS IN COMMON*.
- TAXATION** (see *INTERSTATE COMMERCE*; *INTOXICATING LIQUORS*):  
*Intoxicating liquors*:  
 Constitutionality of statutes, 216  
 License fees not taxation, 270  
 Irrigation, 520  
 Joint-stock companies, 639
- TELEGRAPHS AND TELEPHONES:**  
*Interstate commerce*, see *INTERSTATE COMMERCE*.
- TENANCY IN COMMON*, see *JOINT TENANTS AND TENANTS IN COMMON*.
- TENANTS*, see *JOINT TENANTS AND TENANTS IN COMMON*.
- THEATRES:**  
*Intoxicating liquors*, 365
- TICKETS AND FARES*, see *INTERSTATE COMMERCE*.
- TIME, COMPUTATION OF:**  
*Intoxicating liquors*:  
 Duration of license, 235, 236
- TIPPLING HOUSE:**  
*Intoxicating liquors*, 371
- TITLE*, see *INTOXICATING LIQUORS*; *JOINT TENANTS AND TENANTS IN COMMON*.
- TOWNS:**  
*Intoxicating liquors*, see *INTOXICATING LIQUORS*.
- TRIAL*, see *JURY AND JURY TRIAL*.
- TRUSTS:**  
*Interstate commerce*, 52
- TRUSTS AND TRUSTEES*, see *INVESTMENTS*.
- UNITED STATES** (see *INTERSTATE COMMERCE*):  
*Intoxicating liquors*:  
 Federal license no protection in violating state laws, 238
- UNITED STATES COURTS:**  
 Joint-stock companies, 639
- UNLAWFUL ASSEMBLIES:**  
*Intoxicating liquors*, 371
- USAGES AND CUSTOMS:**  
*Interpretation and construction*:  
 Meaning of words, 12  
 In general, 12  
 Local usage, 12  
 Trade usage as to meaning of terms, 12  
 Words of quantity or number, 12
- VERDICT**, see *JEOPARDY*.  
 Arrest of judgment, 855  
 Defects cured by verdict, 856
- WARRANTS*, see *JUDGMENT NOTES*.
- WATER AND WATER COURSES* see *IRRIGATION*.
- WATERS*, see *ISLANDS*.
- WHARVES:**  
*Interstate commerce*, 49
- WHISKEY:**  
*Intoxicating liquors*, 198
- WILLS*, see *ISSUE (DESCENDANTS)*.
- WINE:**  
*Intoxicating liquors*, 199
- WITNESSES*, see *INTERPRETERS*; *JUDGE*.
- WOMEN*, see *INTOXICATING LIQUORS*.
- WORDS AND PHRASES*, see *INTERPRETATION AND CONSTRUCTION*.







